

# TAX FLASH NEWS

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## Payments made to Facebook towards banner advertisement are not taxable in India

### Background

Recently, the Mumbai Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Play Games 24X7 Private Limited<sup>1</sup> (the taxpayer) dealt with the taxability of payments made to Facebook towards online banner advertisement. The Tribunal held that payments made to Facebook towards banner advertisement were not taxable in India since equipment/installations are owned by Facebook and the taxpayer does not have any role to play in either maintaining or involving into any managerial activities with Facebook. No dedicated equipment or installation was earmarked by Facebook to the taxpayer. Further, the taxpayer does not have any economic or possessory right on the server of Facebook and the server was not at the disposal of the taxpayer.

### Facts of the case

The taxpayer is engaged in the business of providing a platform for online gaming, more particularly the Rummy platform. The taxpayer incurred advertisement expenses for banner advertisement on Facebook. The taxpayer made payment to Facebook but did not deduct tax at source. The Assessing Officer (AO) made disallowance on account of the non-deduction of tax under Section 40(a)(ia).

### Tribunal decision

For the purpose of uploading the banner advertisement on Facebook, the advertisement related information is put up at the interface provided by Facebook, Ireland in the required format. Facebook, Ireland, after due verification of the advertisements, uploaded the advertisement on its server. While uploading the advertisement on Facebook, the taxpayer does not have any control over the functioning of the interface provided by Facebook, Ireland. The entire operation

and maintenance of the server while providing the advertisement platform is under the control of Facebook, Ireland.

The taxpayer made use of the standard facility which was provided for displaying an advertisement on the website of Facebook, Ireland which was also provided to its other global customers in the like manner. Equipment/installations are all owned by Facebook, Ireland and the taxpayer did not have any role to play in either maintaining or involving into any managerial activities with Facebook, Ireland. There was no dedicated equipment/installation/any portion of equipment/installation was earmarked/provided by Facebook, Ireland to the taxpayer.

As per the agreement between the taxpayer and Facebook, Ireland, the taxpayer did not have any economic or possessory right with regard to the server of the Facebook and the server was not at the disposal of the taxpayer. The taxpayer did not get any right to modify/deal with the server in any manner. The server through which the advertisement was uploaded was not at all located in India.

Further, there was no role played by Facebook India Online Pvt. Ltd. in the taxpayer's case and thus there was no element of Permanent Establishment (PE) of Facebook, Ireland in India.

In the present case, the relevant Section 195(2) specifically provides that if a person responsible for deducting tax at source considers that the whole sum would not be income chargeable in the case of the recipient, the said person may make an application to the AO.

Though the said application was not made by the taxpayer, it cannot be treated as a mandate because Section 195 clearly states that a person 'may make an application' as may be prescribed. In the present case, the taxpayer was very well aware that Facebook,

<sup>1</sup> Play Games 24X7 Private Limited v. DCIT (ITA No. 1533/MUM/2019) – Taxsutra.com

Ireland is a non-resident and the advertisement payment made to Facebook, Ireland would not come under the purview of TDS provisions and, therefore, had chosen not to deduct tax at source.

The decisions<sup>2</sup> relied on by the taxpayer were applicable to the taxpayer's case. Further, the taxpayer had given the specific task of advertisement banner to Facebook Ireland.

In the present case, the taxpayer demonstrated before us that the taxpayer is taking the privilege of the platform of Facebook, Ireland which was not either in the nature of royalty or technical services. The payment terms were specifically defined in the agreement with Facebook Ireland which clearly indicates that Facebook Ireland will provide a platform banner for an advertisement to the taxpayer. Thus, there was no element of fees for technical services or royalty. The AO as well as the CIT(A) ignored the actual fact of the present case without demonstrating that the services are coming under the purview of FTS or royalty.

### Our comments

Sharing of data on the internet has become an important advertising and marketing tool for present-day business. The taxability of such online businesses has been a subject matter of debate before the Courts/Tribunal.

The Mumbai Tribunal in the case of Pinstorm Technologies Pvt. Ltd.<sup>3</sup> held that the payment made to a foreign company for the services rendered for uploading and display of the banner advertisement on its portal was not in the nature of FTS or royalty. Further, the payment was in the nature of business income and in the absence of a PE in India, it is not chargeable to tax in India.

The Kolkata Tribunal in the case of Right Florists Ltd.<sup>4</sup> held that the payment made for online advertisement on search engines of Google and Yahoo was not taxable in India. The Tribunal observed that the search engine which has only its presence through its website cannot be held as a PE unless its web servers are also located in the same jurisdiction

However, the ratio laid down in the above cases was not followed in the case of Google India Private Ltd.<sup>5</sup>, since the Tribunal felt that the facts relating to the working of the AdWords program stood on a different footing. The Tribunal observed that it was not a case of merely displaying or exhibiting of advertisement by the advertiser on the website, but it was a case of use

of patented technology, secret process and use of trademark by the taxpayer. Google India was provided access to the IPR, Google Brand features, secret process embedded in the Adwords Programme as a tool of the trade for the generation of income. Therefore, the payment was taxable as royalty.

The Mumbai Tribunal, in the present case, has held that payments made to Facebook towards banner advertisement were not taxable in India. The taxpayer does not have any economic or possessory right with regard to the server of Facebook and the server was not at the disposal of the taxpayer.

It is important to note that India has introduced various measures to tax digital and remote operations. Such measures include expanding the scope of a business connection by introducing Significant Economic Presence (SEP) provisions. Further, in 2016, the government introduced Equalisation Levy (@ 6 per cent) on online advertisement, digital advertising space or any other such facility or service. In 2020, a new set of Equalisation Levy (@ 2 per cent) has also been introduced on the amount of consideration received or receivable by an e-commerce operator from e-commerce supply or services. It is interesting to analyse the applicability and interplay of the Income-tax Act, 1961 and the provisions of the Equalisation Levy vis-à-vis such payments.



<sup>2</sup> Urban Ladder Home Decor Solutions Pvt. Ltd. (ITA No.615 to 620/Bang/2020, dated 17 August 2021), Google India (P.) Ltd. v. CIT [2021] 435 ITR 284 (Kar), Inception Business Services (ITA No.2674/Chny/2016, dated 18 February 2019), Carat Lane Trading (P) Ltd., 89 Taxmann.com 434 [2018] 89 taxmann.com 434 (Chen), ITO v. Right Florists (P.) Ltd 25 ITR (T) 639 (Kol)

<sup>3</sup> Pinstorm Technologies (P.) Ltd. v. ITO [2012] 24 taxmann.com 345 (Mum)

<sup>4</sup> ITO v. Right Florists Ltd. [2013] 25 ITR 639 (Kol)

<sup>5</sup> Google India Private Ltd. v. ACIT [2017] 190 TTJ 409 (Bang)

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