KPMG

#KPMG josh

TAX FLASH NEWS

5 April 2022

Indian distributor of a Mauritian sports channel company does not constitute a dependent agent PE in India

Recently, the Mumbai Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Taj TV Limited[1] (the taxpayer) dealt with the issue of the constitution of Permanent Establishment (PE) in India under the India-Mauritius tax treaty (tax treaty) with respect to channel distribution transactions. The Tribunal held that the Indian entity of the taxpayer (Mauritian channel company) does not constitute a dependent agent PE (DAPE) in India under Article 5(4) of the tax treaty with respect to the distribution revenue. The Indian entity did not habitually exercise the authority to conclude the contract on behalf of the taxpayer.

Further, with respect to advertisement revenue, the Tribunal observed that the Indian entity was remunerated at an arm's length price and hence no further profit needs to be attributed in India.

Facts of the case

The taxpayer, a Mauritius based entity, is engaged in the business of telecasting its sports channel 'Ten Sports'. The taxpayer had appointed an Indian entity as an advertising sales agent to sell commercial advertisement time to prospective advertisers and other parties in India in connection with the business of programming and telecasting on different channels. The Indian company was appointed as its distributor to distribute sports channel to cable operators for exhibition to subscribers in India and to collect advertisement charges from Indian advertisers on behalf of the taxpayer.

As per the agreement, the Indian entity was entitled to a commission at 10 per cent to 12.5 per cent of the advertisement revenue collected for the taxpayer. The taxpayer did not have any branch or office in India and all the telecasting was from outside India. The taxpayer received revenue in the form of 'Advertisement Spot Sales' and 'Distribution Income'.

The Assessing Officer (AO) held that as the Indian entity had authority to conclude contracts in the name of the taxpayer and also had exercised this authority habitually and repeatedly in India. Thus, the taxpayer had an Agency PE in India within the meaning of Article 5(4)(i) of the tax treaty. The AO disagreed with the taxpayer that if the payment to the agent was made on arm's length basis, then no further profit needs to be attributed. Accordingly, attributed 75 per cent of the assessable profits arising from Indian operations to the functions performed by a DAPE for the purpose of taxation in India.

The Commissioner of Income-tax (Appeals) [CIT(A)] held that the taxpayer did not have any PE in India with respect to the distribution function.

Tribunal's decision

DAPE in respect of distribution revenue

With respect to distribution, all the agreements entered into by the Indian entity with third parties were on its own behalf and in its own name. As per the provisions of Article 5(4)(i) of the tax treaty, it is only when the person in a Contracting State has and habitually exercises the authority to conclude contracts in the name of the other enterprise, such person shall be deemed to be the PE of the other enterprise. The tax department had failed to establish that the Indian entity had habitually exercised the authority to conclude the contract on behalf of the taxpayer.

[1] Taj TV Limited v. DCIT (ITA No. 6588/Mum/2019) – Taxsutra.com

The Special Bench of the Delhi Tribunal in the case of Motorola Inc.[2] held that the tax treaty is only an alternative tax regime and not an exemption regime and therefore, the burden is first on the tax department to show that the taxpayer had a taxable income under the tax treaty, and then the burden is on the taxpayer to show that its income is exempt under the tax treaty. However, in the present case, the tax department had neither established nor brought anything on record, either at the assessment stage or before the Tribunal, that the Indian entity had habitually exercised the authority to conclude the contract on behalf of the taxpayer. Therefore, the Indian entity cannot be held to be a DAPE of the taxpayer in India under Article 5(4)(i) of the tax treaty with respect to the distribution revenue.

Indian entity was remunerated at an arm's length price

The tax department did not deny that Indian entity was remunerated at an arm's length price with respect to advertisement revenue and transfer pricing analysis was also accepted by the Transfer Pricing Officer under Section 92CA(3). It was observed that on a similar issue, the Tribunal in the taxpayer's own case had passed[3] an order holding that if the arm's length price of the transaction was accepted, then nothing further should be attributable to the taxpayer.

The legal principle followed by the Tribunal was equally applicable to the facts of the present case. Thus, following its earlier decision rendered in the taxpayer's own case, the Tribunal accepted the alternative plea of the taxpayer and held that since the Indian entity was remunerated at arm's length price in respect of the advertisement revenue, no further profit needs to be attributed. Further, as regards the issue of existence of a PE with respect to advertisement revenue, same is left open.

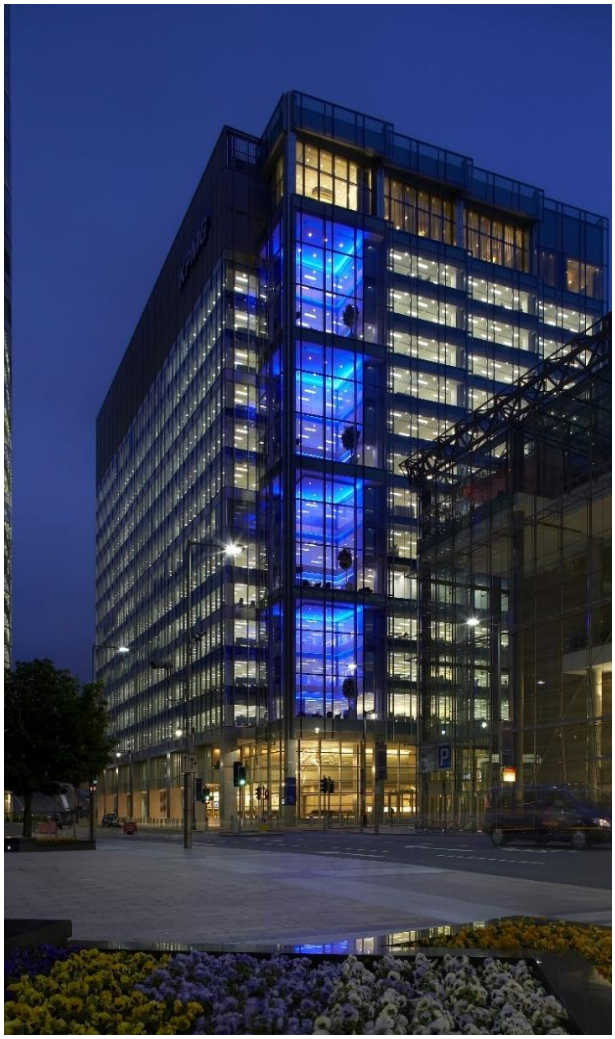
Our comments

The issue with respect to foreign channel companies having a PE/business connection in India has been a matter of debate before the Courts/Tribunal.

The Mumbai Tribunal in case of NGC Network Asia LLC[4] held that an Indian entity was a dependent agent of the taxpayer. The Tribunal examined the agreement and concluded that the Indian subsidiary was given authority to conclude contracts on behalf of the taxpayer and thus, it had constituted a DAPE under the India-US tax treaty.

However, the Tribunal in the case of Reuters Limited[5] observed that the taxpayer's distributor in India i.e., an Indian subsidiary was not a dependent agent of the taxpayer. The qualified character of the agency is the authorisation to act on behalf of somebody else so much as to conclude the contracts. The Indian subsidiary was not acting on behalf of the taxpayer. It was an independent entity and the relationship between the taxpayer and the Indian subsidiary was on a principal-to-principal basis.

The Mumbai Tribunal in the present case has held that the Indian entity of a foreign company does not constitute a DAPE in India under Article 5(4) of the India-US tax treaty with respect to distribution revenue. The Indian entity had not habitually exercised the authority to conclude the contract on behalf of the taxpayer. Further, with respect to advertisement revenue, the Tribunal observed that Indian entity was remunerated at an arm's length price and hence no further profit needs to be attributed.



[2] Motorola Inc. v. DCIT [2005] 95 ITD 269 (Del) (SB)
[3] Taj TV Ltd. v. ADIT [2017] 162 ITD 674 (Mum)
[4] NGC Network Asia LLC v. JDIT [2015] 64 taxmann.com 289 (Mum)
[5] Ruters Limited v. DCIT [2015] 115 ITD 844 (Mum)

KPMG in India addresses:

Ahmedabad
Commerce House V, 9th Floor,
902, Near Vodafone House, Corporate Road,
Prahlad Nagar,
Ahmedabad – 380 051.
Tel: +91 79 4040 2200

Bengaluru
Embassy Golf Links Business Park,
Pebble Beach, 'B' Block,
1st & 2nd Floor,
Off Intermediate Ring Road, Bengaluru – 560071
Tel: +91 80 6833 5000

Chandigarh
SCO 22-23 (1st Floor),
Sector 8C, Madhya Marg,
Chandigarh – 160 009.
Tel: +91 172 664 4000

Chennai
KRM Towers, Ground Floor,
1, 2 & 3 Floor, Harrington Road,
Chetpet, Chennai – 600 031.
Tel: +91 44 3914 5000

Gurugram
Building No.10, 8th Floor,
DLF Cyber City, Phase II,
Gurugram, Haryana – 122 002.
Tel: +91 124 307 4000

Hyderabad
Salarpuria Knowledge City,
6th Floor, Unit 3, Phase III,
Sy No. 83/1, Plot No 2, Serilingampally Mandal,
Ranga Reddy District,
Hyderabad – 500 081.
Tel: +91 40 6111 6000

Jaipur
Regus Radiant Centre Pvt Ltd.,
Level 6, Jaipur Centre Mall,
B2 By pass Tonk Road,
Jaipur – 302 018.
Tel: +91 141 - 7103224

Kochi
Syama Business Centre,
3rd Floor, NH By Pass Road,
Vytilla, Kochi – 682 019.
Tel: +91 484 302 5600

Kolkata
Unit No. 604,
6th Floor, Tower – 1,
Godrej Waterside,
Sector – V, Salt Lake,
Kolkata – 700 091.
Tel: +91 33 4403 4000

Mumbai
2nd Floor, Block T2 (B Wing),
Lodha Excellus, Apollo Mills Compound, N M Joshi Marg,
Mahalaxmi, Mumbai- 400011
Tel: +91 22 3989 6000

Noida
Unit No. 501, 5th Floor,
Advant Navis Business Park,
Tower-A, Plot# 7, Sector 142,
Expressway Noida,
Gautam Budh Nagar,
Noida – 201 305.
Tel: +91 0120 386 8000

Pune
9th floor, Business Plaza,
Westin Hotel Campus, 36/3-B,
Koregaon Park Annex,
Mundhwa Road, Ghorpadi,
Pune – 411 001.
Tel: +91 20 6747 7000

Vadodara
Ocean Building, 303, 3rd Floor,
Beside Center Square Mall,
Opp. Vadodara Central Mall,
Dr. Vikram Sarabhai Marg,
Vadodara – 390 023.
Tel: +91 265 619 4200

Vijayawada
Door No. 54-15-18E,
Sai Odyssey,
Gurunanak Nagar Road, NH 5,
Opp. Executive Club, Vijayawada,
Krishna District,
Andhra Pradesh – 520 008.
Tel: +91 0866 669 1000

---

home.kpmg/in

#KPMG josh

home.kpmg/in/socialmedia

KPMG Assurance and Consulting Services LLP, Lodha Excelus, Apollo Mills Compound, NM Joshi Marg, Mahalaxmi, Mumbai - 400 011
Phone: +91 22 3989 6000, Fax: +91 22 3983 6000