

# TAX FLASH NEWS

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## A Mauritian company does not constitute an Agency PE in India on account of distribution of a sports channel by its subsidiary in India

Recently, the Bombay High Court in case of Taj TV Limited<sup>1</sup> (the taxpayer) dealt with the issue of taxability of distribution income earned by a non-resident channel company through the distribution of channels in India. The High Court held that the Mauritian company does not constitute an agency Permanent Establishment (PE) in India under the India-Mauritius tax treaty on account of distribution of its sports channel by the Indian subsidiary. Thus, distribution income earned by such Mauritian company is not taxable in India.

### Facts of the case

The taxpayer is a Mauritius based company engaged in telecasting a sports channel. The taxpayer appointed Indian subsidiary as its distributor to distribute sports channel to cable operators for exhibition to subscribers in India. The Assessing Officer (AO) observed that the Indian entity had the exclusive right to represent the taxpayer before the distribution systems or cable operators and to negotiate and procure cable distribution license agreement for the service authorised by the taxpayer. The distribution revenue collected by Indian entity was shared in the ratio of 60:40 by the taxpayer and Indian entity. Therefore, the taxpayer had a Permanent Establishment (PE) in India<sup>2</sup> and consequently, the subscription revenue was taxable as business income. However, the Commissioner of Income-tax (Appeals) [CIT(A)] held that the taxpayer had given distribution rights to Indian entity for promoting and distributing TV channels in India on principal to principal basis. Thus, Indian entity did not constitute an Agency PE. The Income-tax Appellate Tribunal (the Tribunal) upheld the order of the CIT(A).

### High Court's decision

The High Court upheld the Tribunal's finding that the Indian subsidiary was not acting as an agent of the taxpayer, but it had obtained the right of distribution of the channel for itself. Subsequently, it had entered into contracts with other parties in its own name in which the taxpayer was not a party.

The distribution of the revenue between the taxpayer and Indian entity was in the ratio of 60:40 and the entire relationship was on principal to principal basis.

Therefore, the distribution income earned by the taxpayer cannot be taxed in absence of an agency PE in India.

### Our comments

Whether foreign channel company has a PE/business connection in India in terms of operations undertaken to distribute channels in India has been a matter of debate before the Courts/Tribunal.

The Mumbai Tribunal in case of NGC Network Asia LLC<sup>3</sup> dealt with such issue and held that Indian entity was a dependent agent of the taxpayer. The Tribunal examined the agreement to conclude that Indian subsidiary had been given authority to conclude contracts on behalf of the taxpayer and thus, being resident in India, it should be considered a dependent agent PE under the India-US tax treaty.

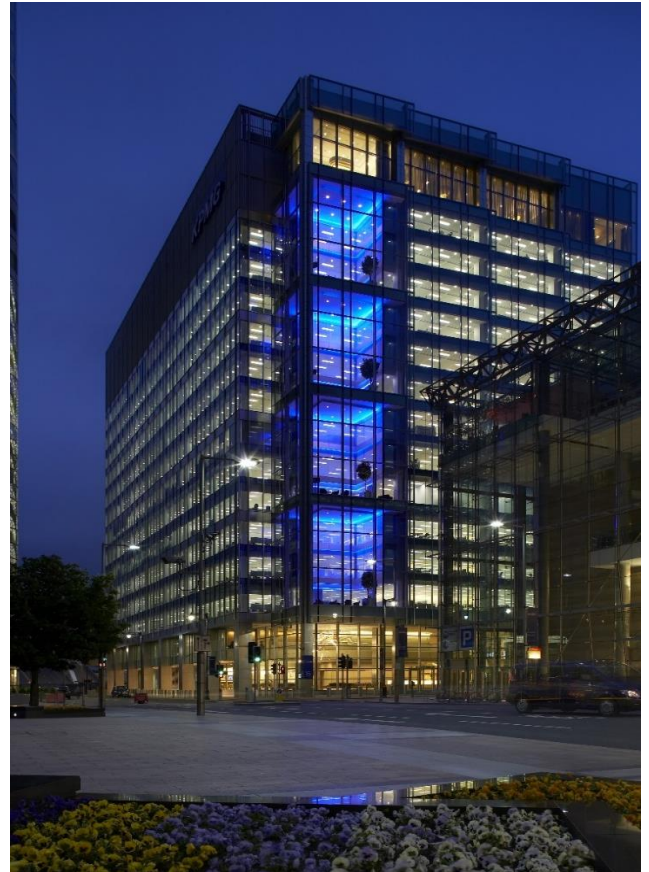
<sup>1</sup> CIT v. Taj TV Limited (ITA No. 1984/Bom/2017) – Taxsutra.com

<sup>2</sup> Within the meaning of Article 5(4)(i) of the treaty

<sup>3</sup> NGC Network Asia LLC v. Jt. DIT [2015] 64 taxmann.com 289 (Mum)

However, the Tribunal in the case of Reuters Limited<sup>4</sup> 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 High Court in the present case observed that the Indian entity was not acting as agent of the taxpayer, but it had obtained the right of distribution of the channel for itself and subsequently, it had entered into contracts with other parties in its own name in which the taxpayer was not a party. Accordingly, it was held that the Mauritian company does not constitute a dependent agent PE in India.



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<sup>4</sup> Reuters Limited v. DCIT (ITA No. 7895/Mum/2011) (Mum)

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