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Consideration for live feed, live transmission is not royalty

The Delhi Bench of the Income-tax Appellate Tribunal held that consideration received for live feed / transmission does not constitute royalty.

Background:

- The taxpayer[1] is a company incorporated under the laws of Singapore and is a tax resident of Singapore.
- During the Financial Year (FY) 2014-15, corresponding to Assessment Year (AY 2015-16), the taxpayer had received (amongst others) consideration from sub-licensing of sports broadcasting rights in relation to 'Live' as well as 'Non-Live' feeds from an Indian company (I Co), under a Master Rights Agreement (MRA). The taxpayer offered only income arising from sub-licensing of 'Non-live feeds' to tax as royalty in its return of income for the FY 2014-15, corresponding to AY 2015-16. The income (i.e. remaining consideration) from 'Live' feed was not offered to tax by the taxpayer on the following grounds:
  - 'Live' feed neither fell within the ambit of 'royalty' as defined under the Income-tax Act, 1961 (ITA) as well as under the India-Singapore tax treaty.
  - 'Live' feed of the events was also not covered under the definition of 'copyright' as per the Indian Copyright Act, 1957 (ICA) as it could not be regarded as literary, musical, dramatic, musical or artistic work.
  - In earlier cases[2] (including that of the jurisdictional High Court), it was held that payment made for 'live' telecast / broadcast was not royalty.

  Explanation 2 to Section 9(1)(vi) of the ITA defines the term royalty to mean consideration for, inter alia, for the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films.
- The Assessing Officer (AO) did not agree with the contentions raised by the taxpayer and observed that entire income was taxable in India as per the provisions of ITA as well as the India-Singapore tax treaty on the following basis:

[1] Fox Network Group Singapore (P.) Ltd. v. ACIT [2020] 121 taxmann.com 330 (Delhi ITAT)

[2] CIT v. Delhi Race Club (1940) ltd [2015] 228 Taxman 185 (Delhi HC); DDIT v. Nimbus Communications Ltd [2013] 32 taxmann.com 53 (Mumbai ITAT); and ADIT v. Neo Sports Broadcast (P.) Ltd. [2011] 15 taxmann.com 175 (Mumbai ITAT)

- License fees received through the MRA consisted of integrated bundle of rights licensed by third party including, several national and international governing bodies for various sporting events.
- As per the agreements, the rights which were transferred formed the entire bouquet of rights, ranging from right of broadcasting, reproduction, public screening, interactive gaming, sponsorship, promoting to merchandise and others. Thus, these rights by no means were only for broadcasting.
- In none of the contracts was a license fee bifurcated in the fee of 'live' and 'non-live' transmission.

Accordingly, the AO taxed 10% of the gross receipt as royalty.

- In appeal proceedings, the matter reached the Delhi Bench of the Income-tax Appellate Tribunal (ITAT).

Decision of the ITAT:

- The ITAT noted that the only issue which required its consideration was whether the consideration received in relation to 'live' feeds constituted royalty under the ITA or under the India-Singapore tax treaty.
- On perusal of agreements, definition of royalty under the ITA and the India-Singapore tax treaty and relevant sections of the ICA, the ITAT noted as under:
  - As per various agreements with various sporting and governing bodies of sports and in all the agreements, there was a specific clause, whereby 95% of the license fees / commercial right fee was via 'live transmission' and remaining 5% was for 'non-live transmission'.
  - There was no transfer of any patent, invention, model, design, secret formula or process or trademark or similar property, or imparting of any information or use of any patent invention, etc.
  - Section 14 of the ICA defined copyright as the exclusive right to do or authorise doing of specified acts and section 13 of the ICA provided that copyright shall subsist in work. Further, the term 'work' had been defined in section 2(y) of the ICA to mean:
    - A literary dramatic, musical or artistic work;
    - A cinematographic film;
    - Or a sound recording.
  - The right granted by the taxpayer to the I Co was of mere transfer of live feed through satellite; the entire transmission was done by the I Co.
  - There was neither recording by way of cinematography nor by way of sound recording involved in live broadcast.
  - No artistic work was created when the events were captured on cameras for live transmission because the right granted by the taxpayer was only to broadcast the event.

- No film or tape / CDs / or any right therein had been given by the taxpayer to the I Co for live broadcast of events.
- The Delhi HC in an earlier case[3] had held that there was clear distinction between a copyright and a broadcasting right, broadcast or live coverage which did not have a copyright. Therefore, payment for live telecast was neither payment for transfer of any copyright nor of any scientific work, so as to fall within the ambit of royalty under section 9(1)(vi) of the ITA.
- The Mumbai ITAT in earlier cases[4] had held that there was no copyright on live events, and therefore, it was not taxable as royalty.

- Taking note of the above, the ITAT held as under:
  - When the parties to the agreement agreed that there were two streams of fees i.e. live transmission and non-live transmission and even payments were made separately under the distinctive heads, then it was not correct to hold that both constituted one and the same thing.
  - Live feed did not have any lasting time as it was not a film which could constitute a 'work' in which a copyright could be given. There could not be copyright on broadcast covering live events of sports.
  - A 'work' as defined under the ICA did not come into existence in a live feed or event, as live broadcasting of sporting events did not emanate from any pre-rerecording of images or sound. Hence, no right to use could be transferred.
  - Recording for re-telecast or replays was not part of the live transmission fees nor any such event of commentary, etc. as the taxpayer had not granted any such licence to conduct such activity.
  - There was a clear distinction between a copyright and a broadcasting right, broadcast or live coverage which did not have a copyright. Therefore, payment for live telecast was neither payment for transfer of any copyright nor of any scientific work. Thus, the same did not qualify as royalty under section 9(1)(vi) of the ITA.

  In view of the above, the ITAT answered the substantial question of law in favour of the taxpayer and allowed the taxpayer's appeal.

[3] CIT v. Delhi Race Club (1940) Ltd [2015] 228 Taxman 185 (Delhi HC)

[4] DDIT v. Nimbus Communications Ltd [2013] 32 taxmann.com 53 (Mumbai - ITAT) and ADIT v. Neo Sports Broadcast (P.) Ltd. [2011] 15 taxmann.com 175 (Mumbai ITAT)

Comment:

This ruling affirms the following principles:

- There is a distinction between a copyright and a broadcasting right, broadcast or live coverage which does not have a copyright;
- Payment for live telecast is neither payment for transfer of any copyright nor of any scientific work and hence, does not qualify as royalty under section 9(1)(vi) of the ITA.

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