



Quarterly India Tax Updates Confidence to lead through uncertainty

10 October 2018

Presenters

Subject matter experts



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We will discuss...

1 Permanent Establishment

2 Digital Economy

3 Secondment

4 GST

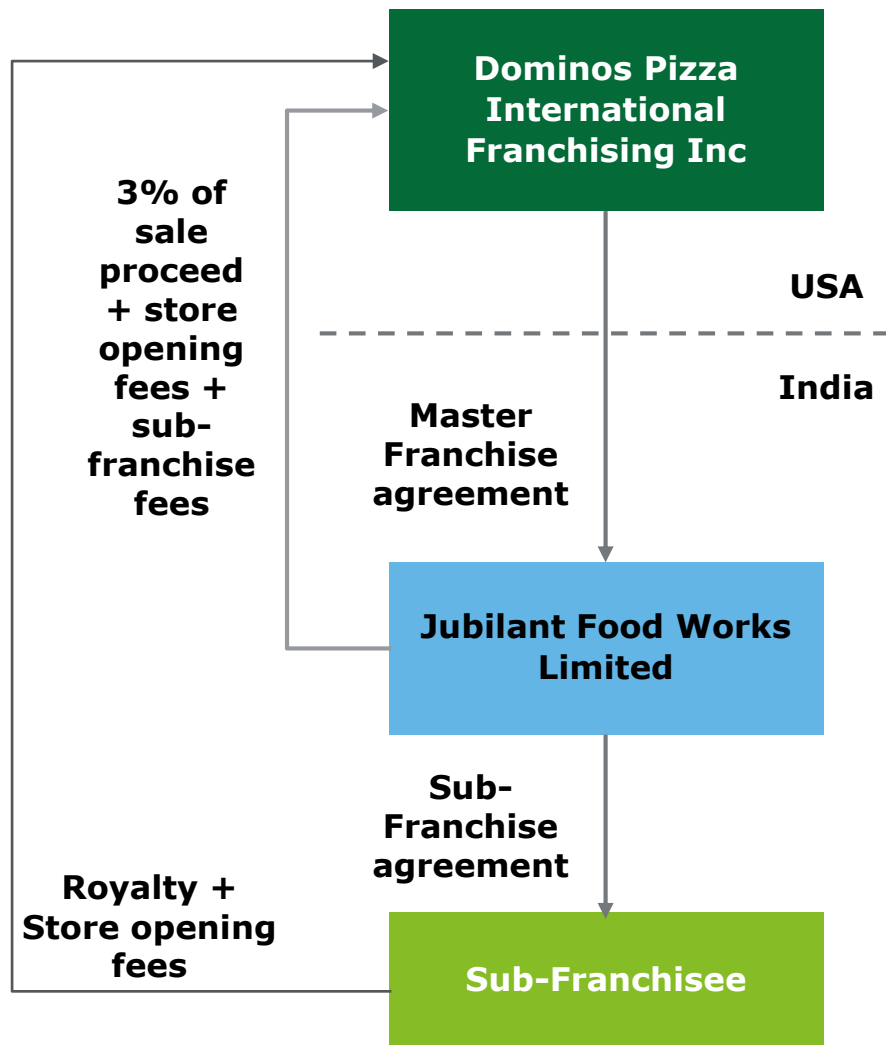
5 Other notifications

Permanent Establishment

- Dominos Pizza International Franchising Inc. - [2018] 94 taxmann.com 296 (Mumbai - Trib.)
- Nokia Networks OY v. JCIT [2018] 94 taxmann.com 111 (Delhi - Trib.) (SB)

Dominos Pizza International Franchising Inc.

Franchisee in India



Facts

- Taxpayer, a tax resident of USA, entered into Master Franchise Agreement with Indian company, Jubilant Food Works Limited ('Jubilant'), for franchise of Dominos Pizza Store.
- Taxpayer provided certain store/consultancy services to Jubilant.
- As per the Master Franchise Agreement (MFA) between taxpayer and Jubilant, taxpayer was entitled to charge 3 per cent of sales proceeds and further to store opening fees and sub-franchise fees.
- From the sub-franchise, the taxpayer is entitled only royalty and store opening fees.
- Income from franchise fee and consultancy services provided to Jubilant for opening of store was offered to tax as Royalty taxable @ 10% as per India-USA.

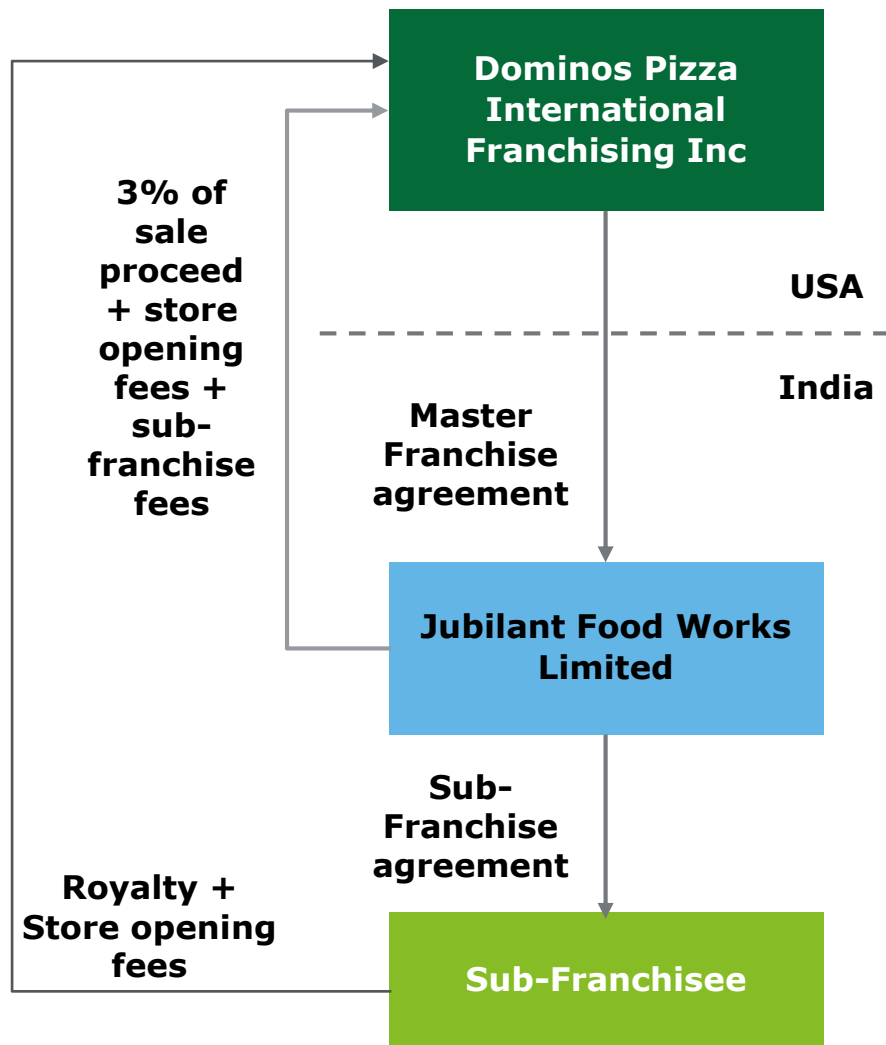


Issue

- Can Jubilant be treated as Dependent Agent Permanent Establishment ('DAPE') of taxpayer in India?

Dominos Pizza International Franchising Inc.

Franchisee in India

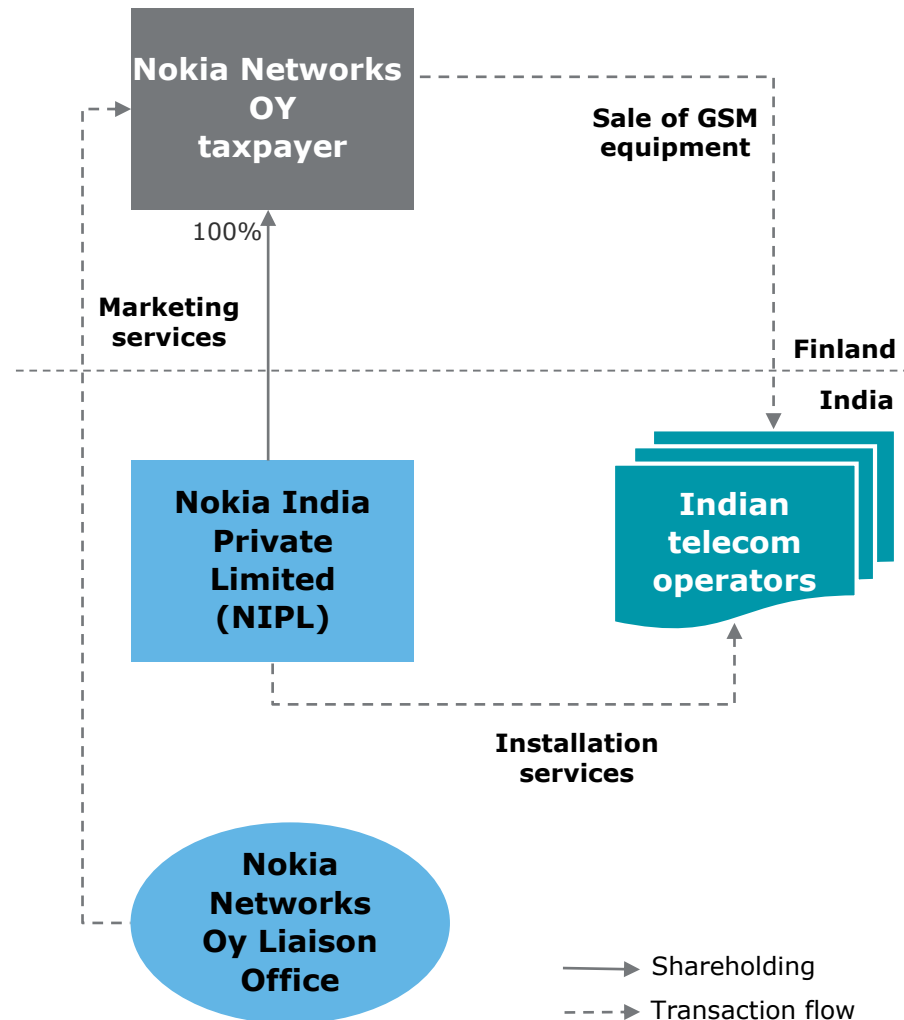


Findings

- The profit and loss from the business belongs to Jubilant or sub-franchisee.
- No stock of goods or merchandise are maintained by Jubilant or sub-franchisee out of which goods are being regularly delivered on behalf of the taxpayer.
- The restrictions in the MFA and Sub-franchise agreement (viz. entitlement of the taxpayer to examine accounts, approve suppliers and allow control over advertisement) are only to safeguard brand value and to correctly compute correctly the receipt of royalty.
- Supreme Court ruling in case of Formula One World Championship distinguished on the grounds that there is no physical control on the business of franchise and sub-franchise by the taxpayer.
- Accordingly ITAT held that Jubilant does not constitute a dependent agent permanent establishment in India.

Nokia Networks OY

Indian Contracting Subsidiary



Facts

- Relates to AY 1997-98 and 1998-99
- Nokia Networks OY (taxpayer), tax resident of Finland, is engaged in manufacture of advanced telecommunication systems and equipment (GSM equipment) used in fixed and mobile phone networks.
- In 1993, the taxpayer established a liaison office (LO) in India to carry out advertising activity.
- The taxpayer sold equipment manufactured in Finland to Indian telecom operators, on a principal-to-principal basis and also entered into installation contracts.
- 100% subsidiary Nokia India Pvt. Ltd. was established in 1995. Thereafter, installation activities (including existing contracts) were carried out by the subsidiary.
- Guarantee was given by the taxpayer to the customers on the performance of the subsidiary and that ownership in the subsidiary will not fall below 51% without the consent of the customers in the event of non-performance by the subsidiary.

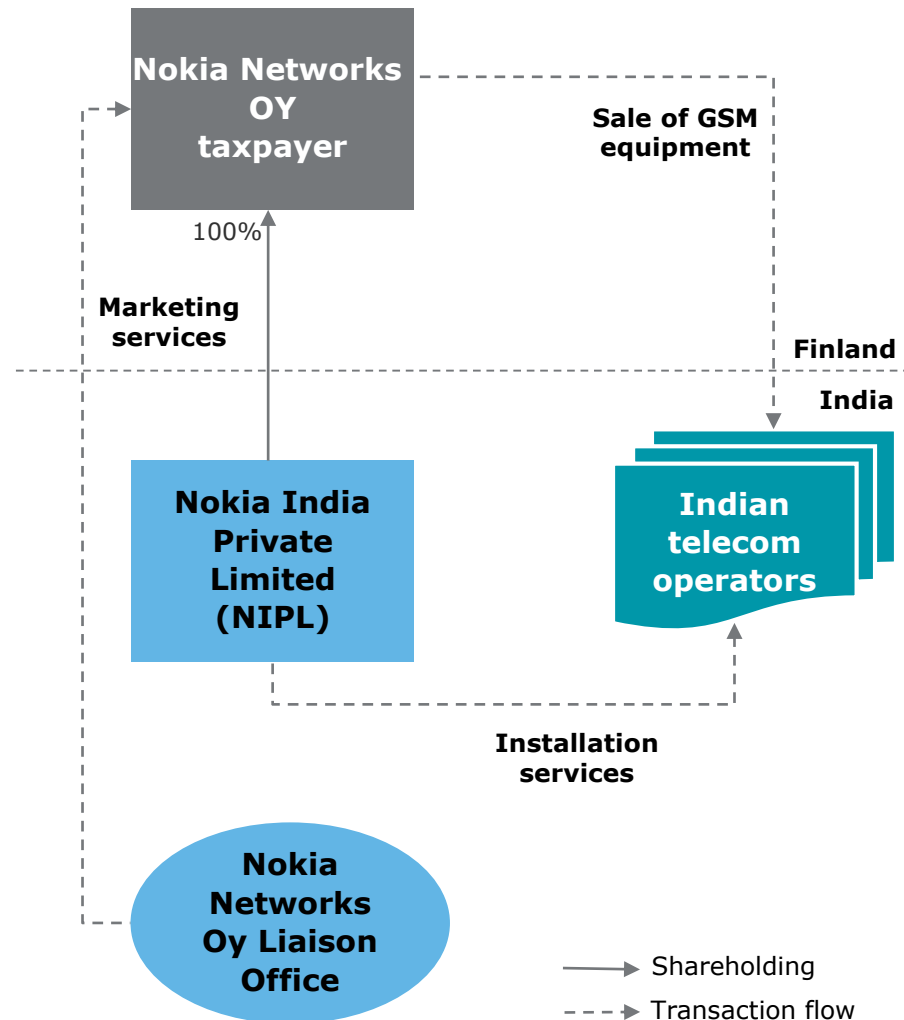


Issues

- Whether the subsidiary of taxpayer would constitute business connection or PE in India.
- If yes, can there be any attribution of profits on account of signing, network planning and negotiation of offshore supply contracts in India.

Nokia Networks OY

Indian Contracting Subsidiary



Findings – Majority view

On fixed place PE

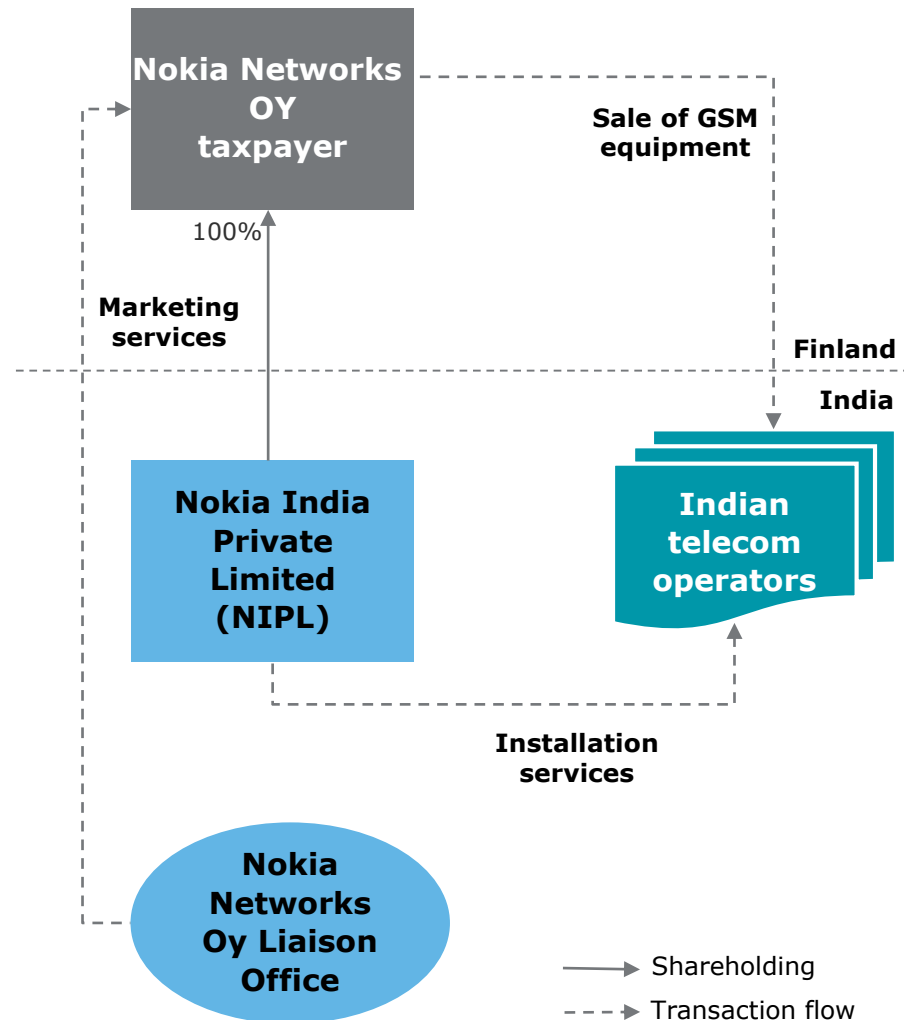
- No categorical findings by lower authorities that Fixed Place PE exists qua the subsidiary.
- Disposal test is paramount – Formula One (SC).
- Fixed place PE does not get established by provision of telephone, fax and car facility to visiting employees.
- After incorporation of the subsidiary, the taxpayer has not carried out any activity other than offshore supply. Any activity performed by the subsidiary under independent contract cannot constitute a PE.
- Activities carried out by employees of the taxpayer travelling to India i.e. network planning, negotiation and signing of contracts are preparatory and auxiliary in nature.

On subsidiary constituting PE

- Subsidiary cannot constitute PE merely because it is controlled by the taxpayer.
- Guarantee does not yield income to the taxpayer.

Nokia Networks OY

Indian Contracting Subsidiary



Findings – Majority view

On Agency PE

- There is no material fact on record that the subsidiary has negotiated or concluded any contract of supply of equipment on behalf of the taxpayer.
- The subsidiary neither has any authority to conclude contracts for supply nor any of the orders has been booked by the subsidiary which can be said to be binding upon the assessee.
- The marketing support agreement is an independent agreement for which the subsidiary is remunerated at arm's length.



Findings - Dissenting view

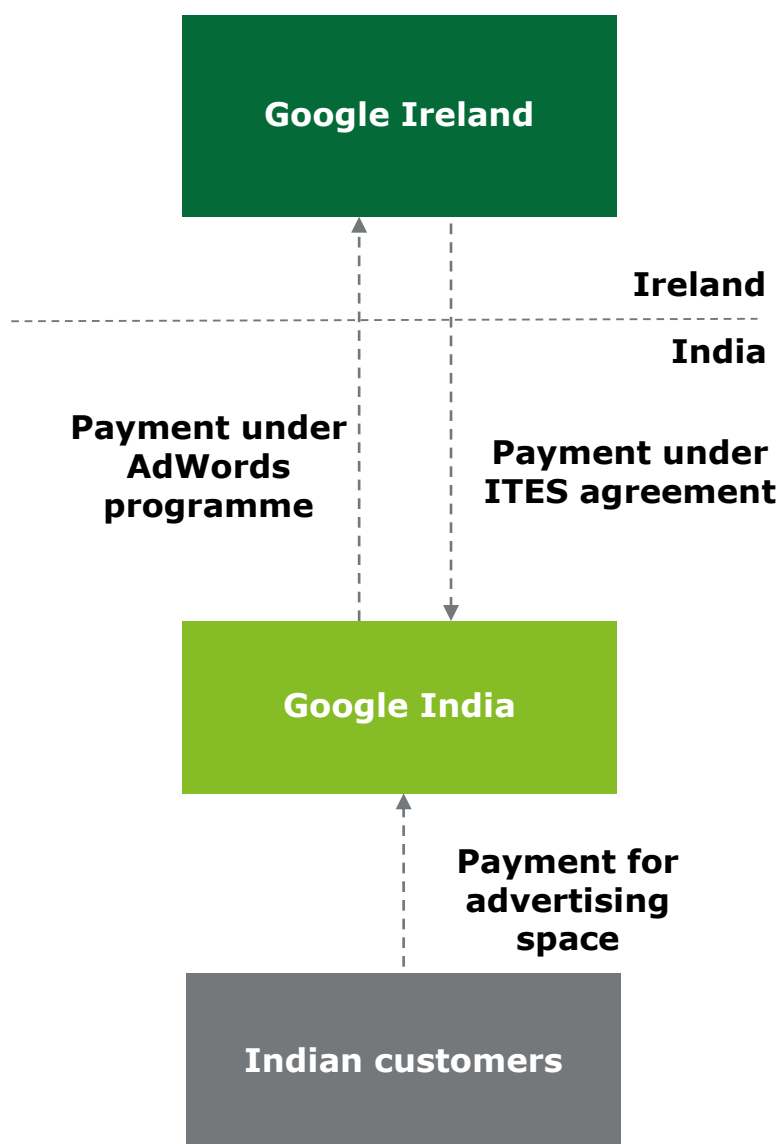
- When a subsidiary company is merely an alter ego or virtual projection of its parent company, it must be treated as a PE of the parent company in India.

Digital Economy

- Google India (P.) Ltd. v. JDIT (IT) (2018) 93 taxmann.com 183 (Bangalore Tribunal)
- Akamai Technologies Inc., In Re (2018) 404 ITR 495 (AAR)

Google India (P.) Ltd. v JDIT

Taxability of payment for purchase of advertisement space



Facts

- Google India appointed by Google Ireland Ltd. as a non-exclusive authorised distributor of 'AdWords programme' pursuant to a Distribution Agreement for sale of advertisement space in India.
- Google India paid distribution fees to Google Ireland without withholding tax.
- Separately, Google India had also entered into a Service Agreement for ITES Services with Google Ireland, for which fees are paid to Google India.

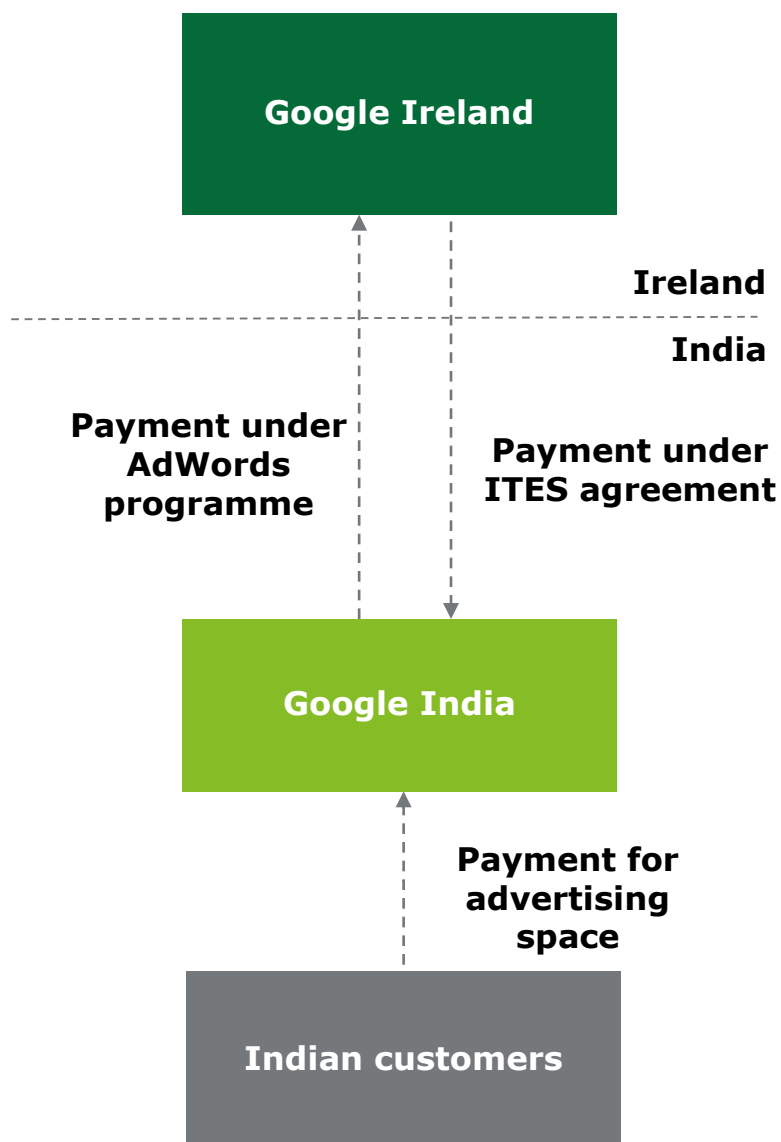


Issues

- Taxability of payment for purchase of advertisement space under the AdWords programme.
- Transfer pricing methodology.

Google India (P.) Ltd. v JDIT

Taxability of payment for purchase of advertisement space



Findings

Taxability of payment for purchase of advertisement space

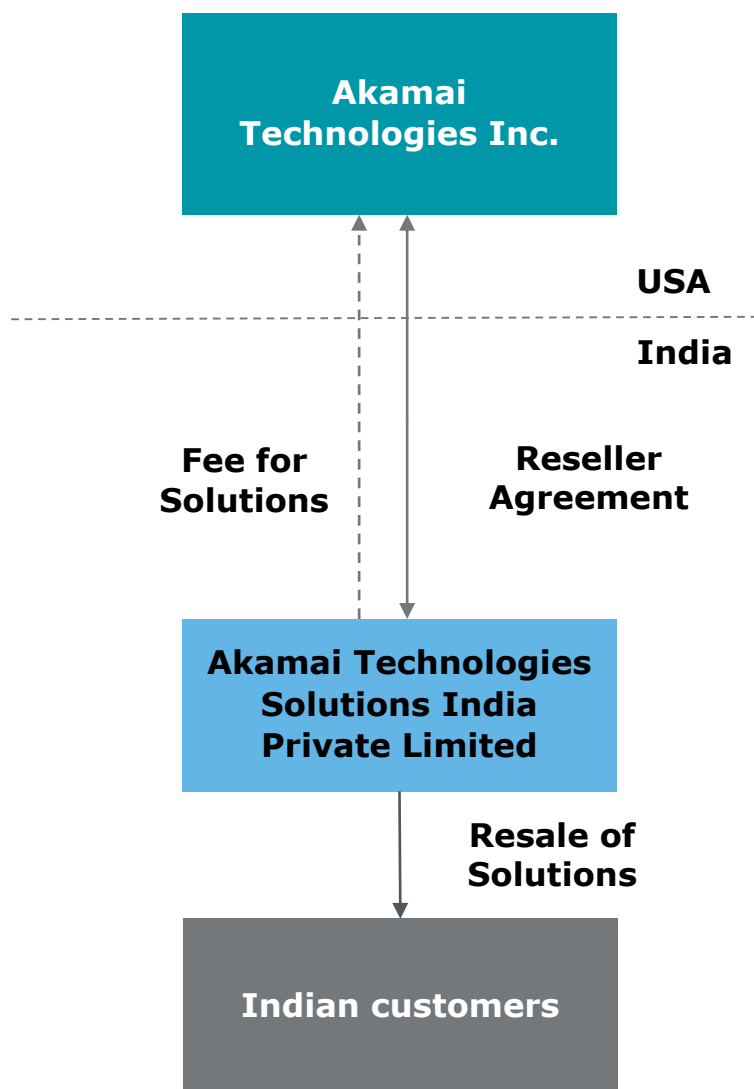
- Google Ireland was under obligation to provide pre-sale and past-sale services under ITES Agreement.
- Distribution Agreement and Service Agreement were interconnected and inseparable.
- Under AdWords Distributor Agreement and Service Agreement, Google India was licensed to use trademarks, IPRs, brand features, derivative works and other intangibles of Google Ireland.
- Payment for buying AdWords space was also for usage of intangibles – was in the nature of royalty.

Transfer pricing methodology

- Business of AdWords programme required deployment of assets and functions of different entities located in different geographical locations in order to ultimately deliver services.
- Revenues were generated with combined efforts.
- Transaction to be benchmarked by adopting profit split method.

Akamai Technologies Inc., In Re

Taxability of payment received under Reseller Agreement



Facts

- Taxpayer has built its Akamai EdgePlatform® for accelerating content and business processes online [Solutions].
- The taxpayer has entered into Services Reseller Agreement with Akamai Technologies Solutions India Pvt. Ltd. [Akamai India] to appoint it as non-exclusive reseller to resell Solutions to Indian customers.
- Key terms of Reseller Agreement:
 - Akamai India would enter into contracts with Indian customers.
 - Akamai India would not have any rights, title and interest in any intellectual property and software of the taxpayer.

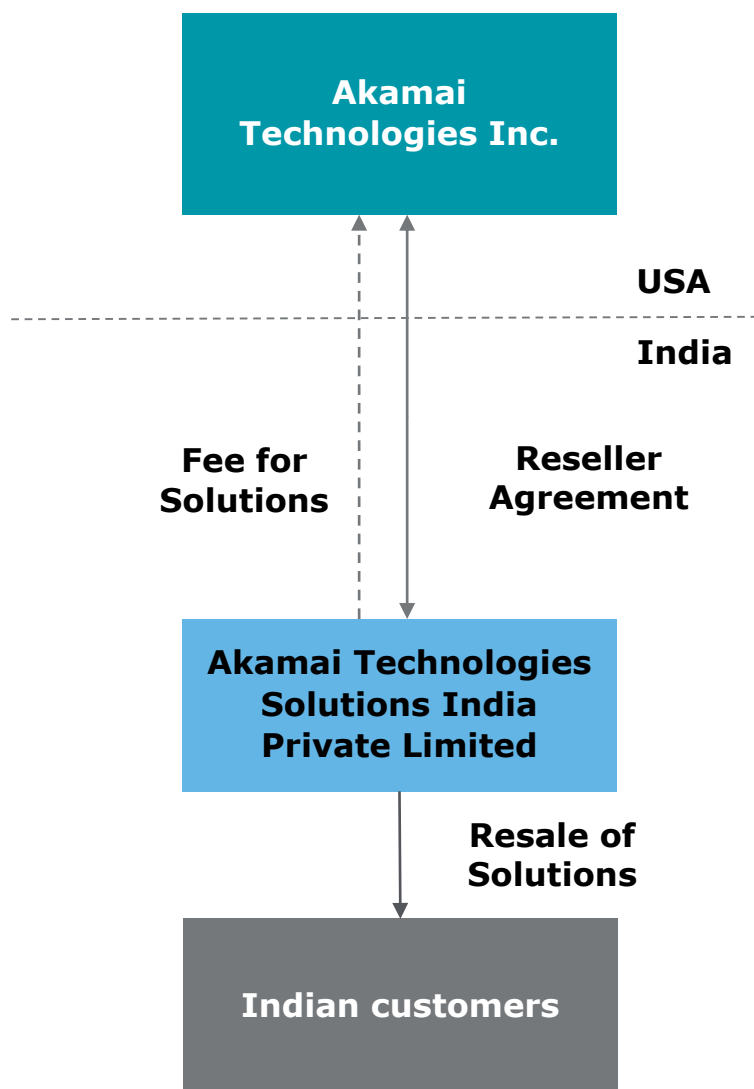


Issue

- Taxability of payment received under Reseller Agreement.

Akamai Technologies Inc., In Re

Taxability of payment received under Reseller Agreement



Findings

Receipt not fees for technical / included services

- The taxpayer is providing a standard facility to all who are willing to pay for it; human involvement is only in relation to development of Solutions and for marketing / after-sales services.
- The 'make available' condition laid down in the India-US tax treaty is not satisfied.

Receipt not royalty

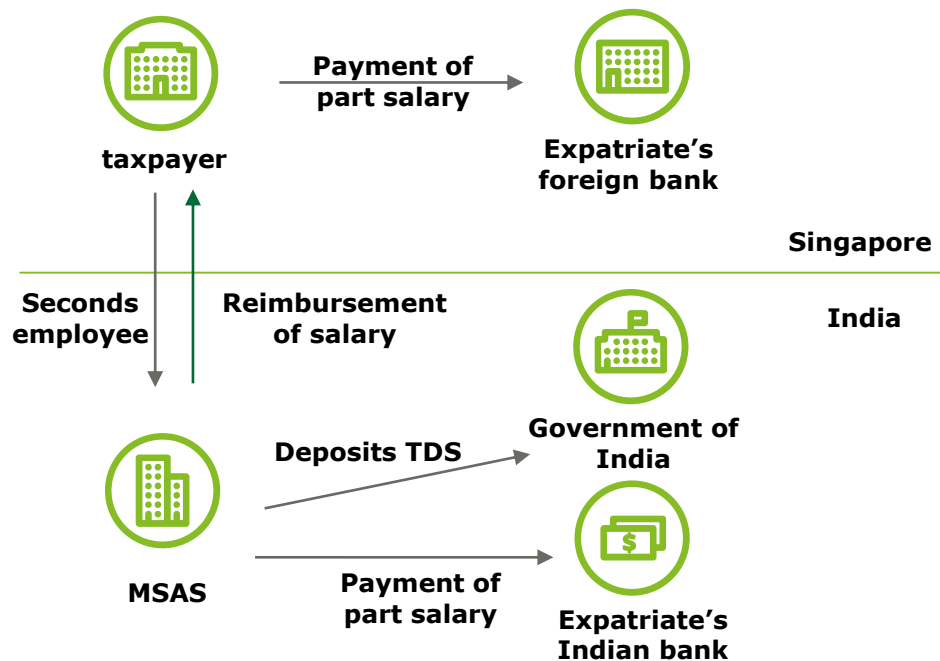
- Akamai India / Indian customers are not granted any right to use, nor do they have possession and control over the taxpayer's tangible or intangible property used in provision of Solutions.
- Reseller Agreement does not entail providing any software (either in original or a copy) or grant / transfer of right in the 'process'.

Secondment

Morgan Stanley Asia (Singapore) Pte. (2018) (95 taxmann.com 165)
(Mumbai Tribunal)

Morgan Stanley Asia (Singapore) Pte. Ltd.

Taxability of reimbursement of salary for seconded employee



Facts

- Taxpayer, a Singapore entity, deputed its employee to India to set up an Indian entity [MSAS].
- As per the contract, taxpayer agreed to pay salary of the employee in Singapore; the same was reimbursed by MSAS to the taxpayer.



Issue

- Taxability of reimbursement of salary for seconded employee.



Findings

- Amount received by the taxpayer is in the nature of reimbursement of cost incurred on behalf of MSAS.
- Definition of 'fees for technical services' excludes from its purview any consideration which would be income of the recipient in the nature of salary.
- The payment by MSAS, being a pure reimbursement of salary cost incurred by the taxpayer, is in the nature of payment of salary which is covered under exception.
- There is no profit element and the entire amount of salary received by employee has been subjected to tax in India.
- Amount not taxable in the hands of the taxpayer.

Different position taken by Chennai Tribunal in Panasonic Corporation's case

Indirect Tax

- GST Amendments
- GST Annual Return and Mandatory GST Audit
- GST Advance Rulings - Evolving Jurisprudence
- Proposals on Simplified Returns

GST Amendments

Significant Amendments in provisions for levy, registration, transition and place of supply

- High seas sale, drop shipments, sale from bonded warehouses excluded from the definition of supply (**Schedule III of CGST Act**).
- Import of services by a person, whether or not taxable in terms of GST law, from its related person or from any other establishment outside India shall be treated as supply, even if the transaction is without a consideration (**Schedule I of CGST Act**).
- Provision regarding reverse charge on procurements from unregistered suppliers rationalized- to be applicable only to specified class of registered persons and for supplies of specified goods or services (**Section 9(4) of CGST Act**).
- Registration provisions amended to:
 - Facilitate availing separate registration for multiple place of business in a State, concept of business vertical wise registration deleted from legislation.
 - Mandatory registration for E-Commerce Operators liable to collect Tax at Source (TCS).
- Retrospective amendment made in Transition provisions to exclude education cess, secondary education cess, Krishi Kalyan Cess (KKC) and Swachh Bharat Cess (SBC) from eligible duties for the purpose of transition.
- Place of supply in case of transportation of goods to a place outside India shall be destination of the goods.

GST Amendments

Important Amendments in Input Tax Credit (ITC) provisions

- The restriction of ITC on motor vehicles is now only on those vehicles having approved seating capacity up to 13 persons (including driver).
- ITC in respect of general insurance, servicing, repair and maintenance of motor vehicles shall not be available unless used for specified purposes.
- ITC on food, beverages, health care, insurance, renting of motor vehicle, etc., shall be available if mandated by any law in force for an employer or if such services are used for making outward supplies of same category or as part of composite or mixed supply.
- ITC on services shall be available to a registered person even if the services are provided by the supplier to any other person on the direction of the registered person.
- Value of exempt supply for the purpose of reversal of ITC not to include transactions excluded from Schedule III of definition of supply.

Tax Deducted at Source (TDS) and Tax Collected at Source (TCS)

- TDS and TCS provisions applicable from 1 October 2018.
- Specified persons (Government departments, PSUs, etc.) to deduct tax at source @2% at the time of payment / credit to the supplier, when total value of supply under a contract exceeds INR 2.5 lakhs.

GST Annual Return and Mandatory GST Audit



GST Annual Return

- Form GSTR-9 for filing GST Annual Return notified.
- Annual return is to be filed by every registered person other than input service distributors, person paying tax under Section 51/52 (TDS/TCS), non-resident taxable persons and casual taxable person.
- Some salient features of the format include:
 - Requirement to report the reconciliation between the credit claimed in GSTR-3B and GSTR-2A available on GST portal.
 - Requirement to distinctively report details of transactions reported between April'18 to September'18, which pertain to FY 2017-18.



Mandatory GST Audit

- Every registered person with an aggregate turnover of more INR 2 crores during a financial year is required to submit a GST audit report by December 31st of the subsequent financial year.
- Form GSTR-9C for filing GST Audit Report notified.
- Key reconciliations to be accomplished for GST audit Form include:
 - Reconciliation of turnover declared in audited Financial Statement vis-à-vis Annual Return.
 - Reconciliation of tax paid.
 - Reconciliation of ITC declared in Annual Return (GSTR-9) with ITC availed as per audited Financial Statements.
- Review of tax positions and additional liability, if any, a key requirement for completion of audit.

GST Advance Rulings - Evolving Jurisprudence

Taxability of activities of Corporate Office vis-à-vis branches

Branch offices being distinct persons, employees in the corporate office have no Employer-Employee relationship with branch offices. Activities performed by such employees for various functions with respect to other units to be treated as supply liable to GST even if made without consideration. **Columbia Asia Hospitals Pvt Ltd [2018-VIL-126-AAR]**

Classification of supply as composite supply or mixed supply

Even when two products are supplied together as integral part of contract, they cannot be said to be naturally bundled and thereby composite supply if the contract is divisible. If the recipient chooses to split it into two separate contracts, it will be considered as mixed supply. **Switching Avo Electro Power Ltd [2018-VIL-01-AAR]**

Inclusion of Post Supply Discount in Supply Value

Requirement of prefixed criteria in the contract for post supply trade discount essential. The discount that remains undetermined to be arrived at after the supply cannot be allowed for arriving at transaction value. **Ultratech Cement Limited [2018-VIL-112-AAR]**

Taxability of sub-contractor's services

Supply of works contract services by a sub-contractor to main contractor entitled to reduced rate of GST provided works contract services provided by sub-contractor is same as or part of the main contract entered into by main contractor. **Shree Construction [2018-VIL-150-AAR]**

Taxability of EPC Contracts

Construction of plant resulting in immovable property to be treated as works contract services. Merely because product involved is covered in schedule does not result in supply being composite supply involving principal supply as that of primary product. **Giriraj Renewables Pvt. Ltd. [2018-VIL-11-AAR]**

Proposals on Simplified Returns



Monthly Returns

- Input credit shall be availed based on invoices uploaded by supplier.
- Invoices can be uploaded continuously at any time during a month and shall be visible to the recipient.
- Facility for amendment of return twice for each tax period introduced.
 - Higher late fee for change in liability of more than 10% between original and amended return.
 - Invoices once locked by recipient cannot be amended by supplier.
- Shipping bill details for exports can be updated after filing of return, same shall not be counted as amendment of return.



Quarterly Returns

- Option to file quarterly GST returns in a simplified format for small taxpayers with turnover limit of less than INR 5 crores.
- Quarterly returns filers would be provided facility of reduced compliance with respect to missing & pending invoices, non-GST supplies, exempt supplies and details of input tax credit on capital goods.



Amendment Returns

- To address the problem of clerical errors i.e. wrong entries being made in the return, there would be a facility for filing of amendment return.
- Amendment return shall be different than a regular return. There would be a facility to file two amendment returns for each tax period within the specified time period.

Other notifications

- Place of Effective Management ('PoEM') – CBDT Notification dated 22 June 2018
- Significant Economic Presence ('SEP')- CBDT communication dated 13 July 2018
- Companies (Significant Beneficial Owners) Rules, 2018 –MCA Notification dated 13 June 2018

Place of Effective Management ('PoEM')

CBDT Notification dated 22 June 2018

Transition provision	Exceptions, modifications and adaptations shall apply only to the income of foreign company which has become taxable in India on account of change in tax residency.
FTC	<ul style="list-style-type: none">• Benefit of Foreign tax credit (FTC) in terms of Rule 128 shall be available.• FTC allowed in same proportion in which income is offered to tax.
Treatment under other provisions of ITA	Provisions applicable to a foreign company as also provisions specifically applicable to residents shall apply. Provisions applicable to non-residents would not apply.
WHT / TDS	If more than one provision relating to TDS are applicable to foreign company (as a non-resident and resident in India), the provision applicable to the foreign company shall prevail.
Computation of Tax Depreciation	As per tax records / Books of accounts.
Brought forward loss (b/f loss) and unabsorbed depreciation	As per tax records / Books of accounts.
Rate of Exchange	Rule 115
In case of Conflict	Provisions applicable to a foreign company shall prevail – applicable tax rate shall be 40% plus applicable surcharge and cess.
Transaction not altered	Any transaction of the foreign company with any other person or entity under the ITA shall not be altered only on the ground that the foreign company has become Indian resident.
Provisions of section 195(2)	Provisions under section 195(2) of ITA shall continue to apply in such manner so as to include payment to foreign company.
Financial Statements requirement	In case the Accounting Year does not end on 31 March.

Significant Economic Presence ('SEP')

Communication dated 13 July 2018

- Finance Act 2018 inserted a new Explanation [Explanation 2A] to section 9(1)(i) of the Act to clarify that the significant economic presence of a non-resident shall constitute "business connection" in India.
- "Significant economic presence" defined to mean –
 - transaction in respect of any goods, services or property carried out by a non-resident in India including provision of download of data or software in India provided the revenue therefrom exceeds monetary threshold as may be prescribed; or
 - systematic and continuous soliciting of business activities or engaging in interaction with users (exceeding the number as may be prescribed) in India through digital means.
- Whether or not the non-resident has a residence or place of business in India or renders services in India not relevant.
- Only so much of income as is attributable to the specified transactions or activities to be deemed to accrue or arise in India.
- The proposed amendment in line with recommendations under BEPS Action Plan 1 on addressing tax challenges of the digital economy.

CBDT issued a Press Release dated 13 July 2018 inviting suggestions/comments of stakeholders and general public (by 10 August 2018- extended upto 30 September 2018) with regard to the threshold of "revenue" and "users".

Companies (Significant Beneficial Owners) Rules, 2018

Notification dated 13 June 2018

- Significant Beneficial Owner [SBO] has been defined as an **individual** acting either alone or together, or through one or more persons or trust, including a trust and persons resident outside India, holding beneficial interest of at least:
 - **10%, or such other percentage as may be prescribed, in shares of a company; or**
 - **The right to exercise or the actual exercising of 'significant influence'; or**
 - **'Control' as defined in section 2(27) of the Companies Act, 2013****but whose name is not entered** in the register of members of a company as the holder of the shares.
- Rules have been framed for determining SBO; where no natural person is identified, SBO is the relevant natural person who holds the person of senior managing official.
- Compliances by SBO and company, and penalties for non-compliance.

Income-tax return form aligned to the new rules – require disclosure of SBO

Stay updated

Navigate change with confidence

Register for the upcoming quarterly tax updates webcast

The quarterly tax updates series will be back in **January 2019**, with insights on tax developments for the quarter – October 2018 to December 2018.

More details to follow, shortly.



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