

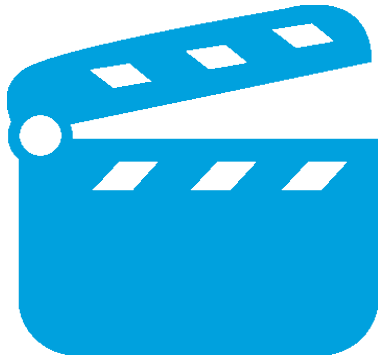
Media &
entertainment industry
– direct tax issues

Prashant Bhojwani
| 26 November
2016



Key segments

Broad overview



- **India has the world's largest film industry in terms of number of films produced**
- **1,500 to 2,000 films produced every year in more than 20 languages**

Films - revenue streams



Film production – business models



Film incentives

Government of various countries offer film incentives to attract overseas film producers to shoot in their countries

- Prevalent in some countries for a long time (example: Canada since 1974)

Objective of granting film incentives – promote shooting in host country

Advantages for producer

- Reduction in film production cost
- Opportunity to showcase new locations to audiences
- Access to overseas expertise/ latest technology

Examples:

- **Germany – 20% of qualifying expenditure**
- **Mauritius – 30% of qualifying expenditure**
- **United Kingdom – 25% of qualifying expenditure**



Hollywood films - India story

Indian Government focusing on promoting India as a filming destination

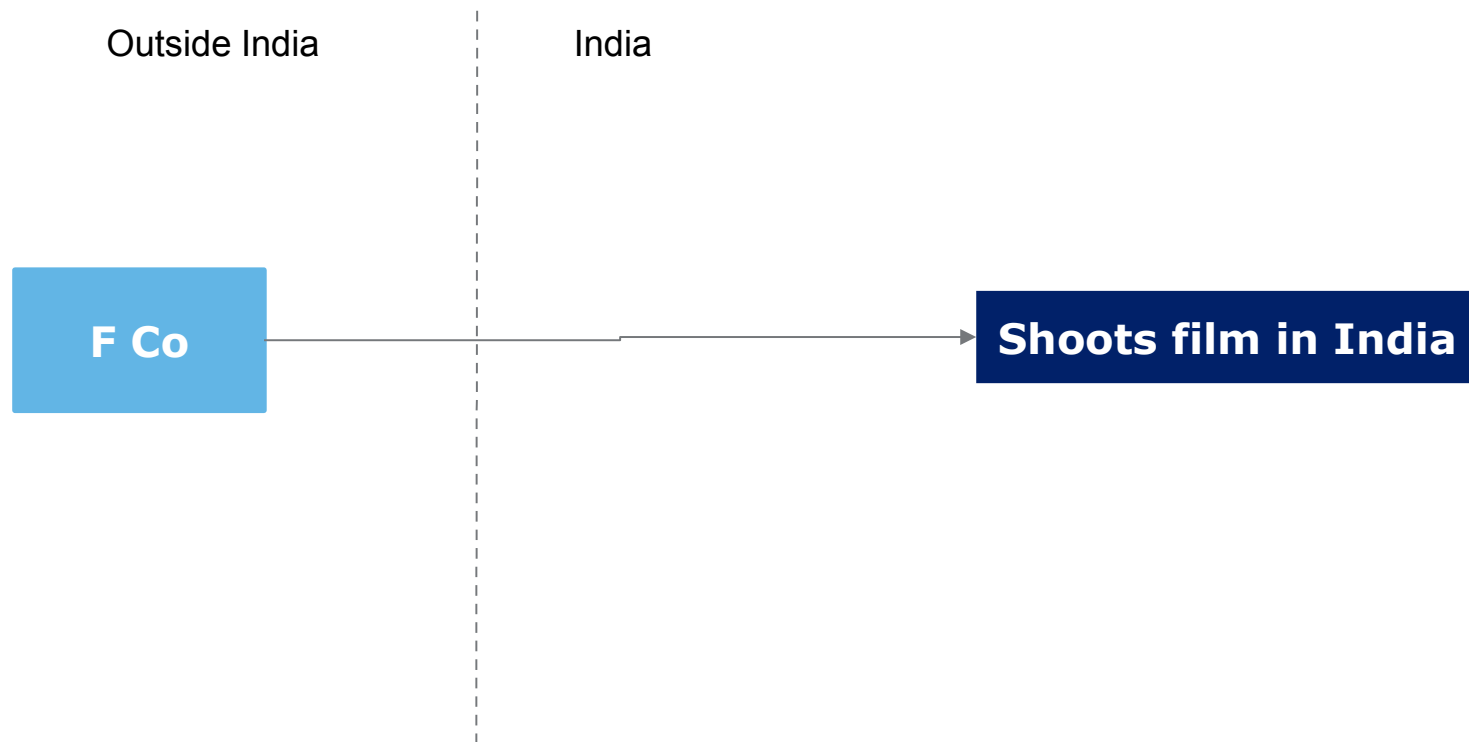


In recent past, several Hollywood films have been shot in India

- Kung Fu Yoga
- Point Break
- Second Best exotic Marigold Hotel
- Million Dollar Arm
- The Hundred-Foot Journey



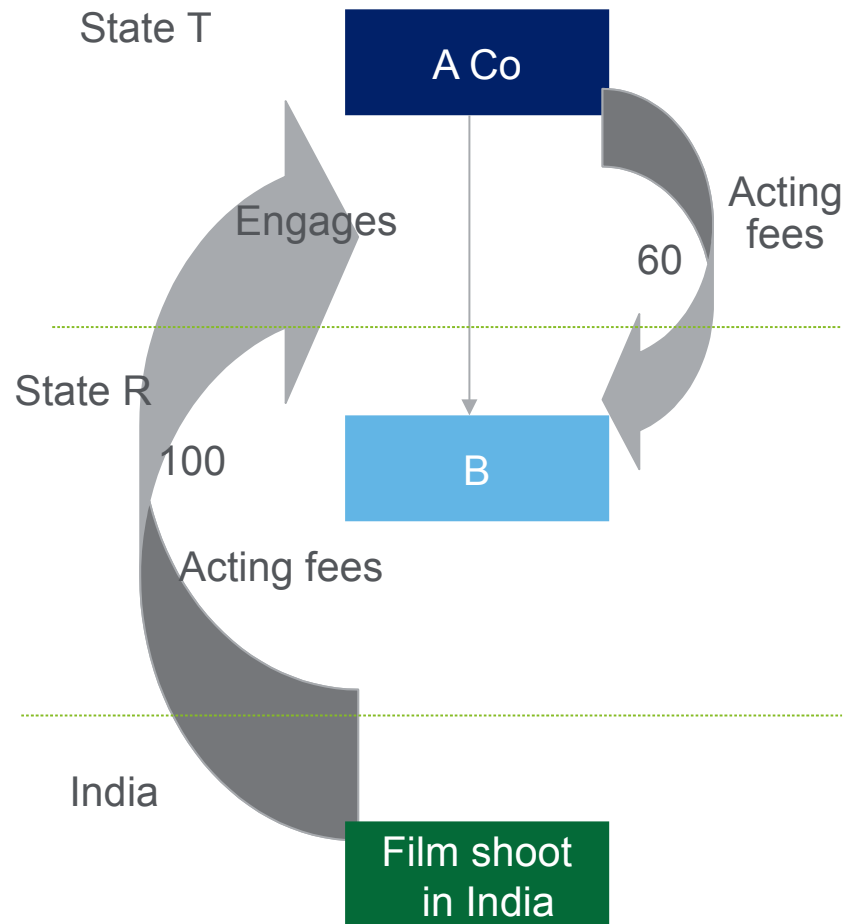
Case study 1



- F Co produces a Hollywood film
- Film shooting undertaken partly in India

Issues for consideration

Case study 2



- Actor (B) is a resident of State R
- B is engaged by a Company (A Co) situated in State T
- Entire shareholding of A Co is held by B
- A Co provides B's services for a film shoot in India
- Film shoot undertaken partly in India
- Tax implications in India?
- Article 17(1) and 17(2)
- Section 115BBA



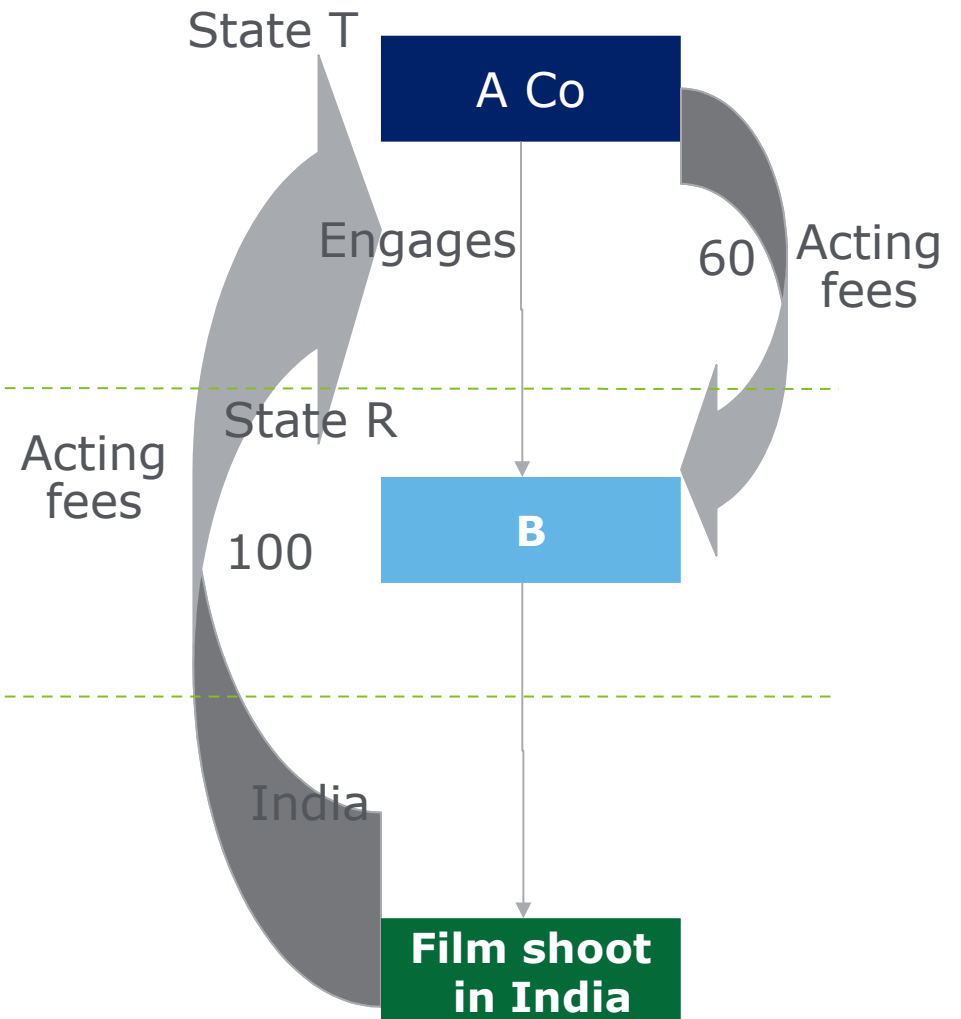
Case study 2

Tax implications for A Co in India

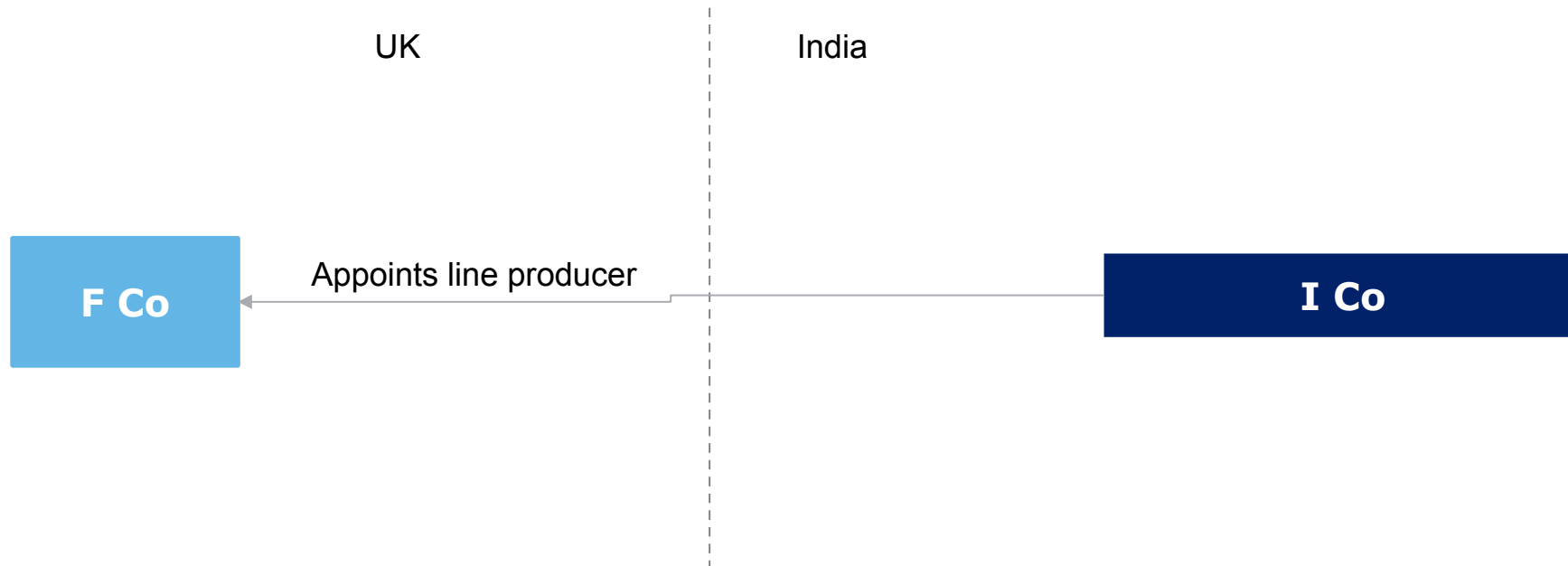
- A Co taxable under Article 17(2) of T-India tax treaty
- A Co's income = 100 less 60 = 40

Tax implications for B in India

- B taxable under Article 17(1) of R-India tax treaty
- B's income as per Section 115BBA = 60



Case study 3



- I Co produces a Bollywood film
- I Co appoints F Co as line producer for UK shoot
- Film shooting undertaken in UK and India
- F Co receives UK film incentives

Issues for consideration



Abandoned films

Deductibility of cost of production for abandoned films:

- Circular No. 16/2015 [F. No. 279/Misc/140/ 2015-ITJ] dated 6 October 2016

Decisions:

- B. Naggi Reddy (199 ITR 451) (Madras High Court)
- Abdul G. Nadiadwala (151 ITD 657) (Mumbai Tribunal)
- A.K.Films Private Limited (152 ITD 538) (Mumbai Tribunal)
- Mukta Arts Private Limited (105 ITD 533) (Mumbai Tribunal)

Taxability of film rights

Business models:

- Outright sale
 - Licensing
-
- S.P.Alaguvel (52 taxmann.com 231) (Madras High court)
 - Mrs. K. Bhagyalakshmi (40 taxmann.com 350) (Madras High court)
 - B4U International Holding Ltd. (21 taxmann.com 529) (Mumbai Tribunal)
 - Manish Dutt (12 taxmann.com 50) (Mumbai Tribunal)
 - Asiavision Home Entertainment (P.) Ltd. (37 SOT 111) (Mumbai Tribunal)
 - Warner Brother Pictures Inc. (17 taxmann.com 171) (Mumbai Tribunal)
 - Warner Bros. Distributing Inc (28 taxmann.com 22) (Mumbai Tribunal)
 - Warner Bros. Distributing Inc (44 taxmann.com 237) (Mumbai Tribunal)
 - Shri Balaji Communications (30 taxmann.com 100) (Chennai Tribunal)

Rule 9A

Deduction in respect of expenditure on production of films governed by Rule 9A

Milestone

Deductibility

Release 90 days before end of financial year

Entire cost of production allowable

Release less than 90 days before end of financial year

Deduction of cost of production allowable to the extent of amount realized by **exhibiting film on a commercial basis**

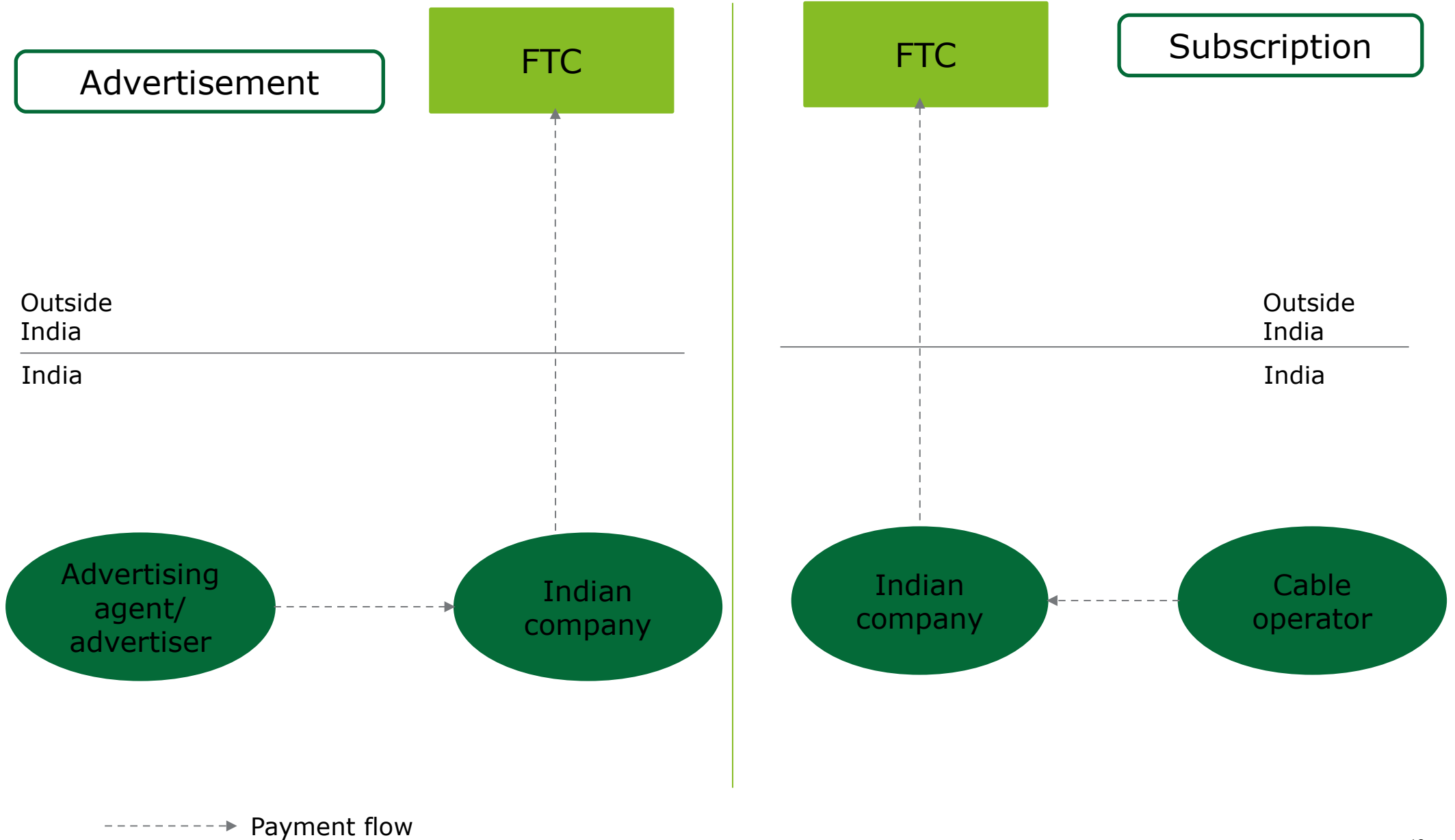
Decisions:

- Vishesh Films Private Limited (26 SOT 64) (Mumbai Tribunal)
- Suneel Darshan (2 SOT 753) (Mumbai Tribunal)

Association of persons (AOP)

- Where two or more persons voluntarily join in a common purpose or common action the object of which is to produce income, profits or gains.
- Circular No.7/2016 dated 7 March 2016 - following attributes should not constitute an AOP:
 - Each member is individually responsible for executing its part of work through its own resources and bears the risk for its scope of work
 - Each member earns profit/ incurs losses based on performance within its scope of work
 - Men/ materials used for an area of work are under the risk and control of the respective members
 - Control and management is not unified and common management is only for inter-se co-ordination for administrative convenience
- Additional factors / aspects also to be considered based on facts and circumstances of the case
- Above guidance may be considered relevant for film co-productions though circular issued in the context of turnkey contracts

Foreign telecasting company (FTC)

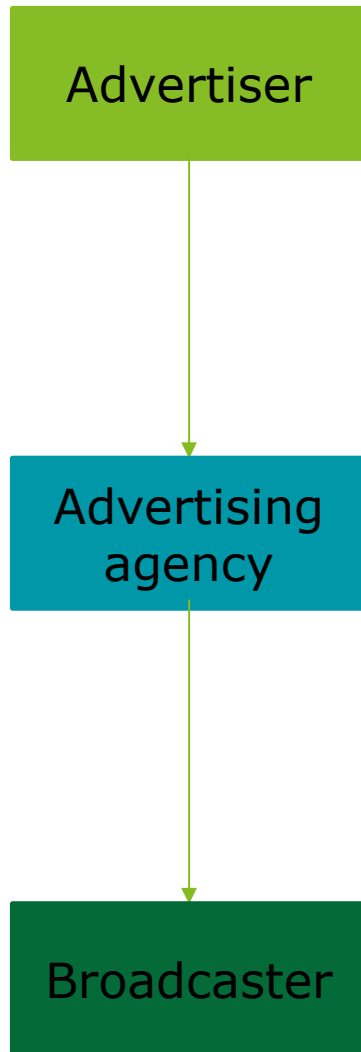


Issues for consideration

Recent decisions:

- Taj TV Limited (72 taxmann.com 143) (Mumbai Tribunal)
- NGC Network (India) Private Limited (13 taxmann.com 160) (Mumbai Tribunal)

Agency commission



- Issue for consideration: Withholding tax on agency commission
 - Whether in the nature of commission or discount?
- Circular No 5/2016 dated 29 February 2016 [F.No. 275/06/2016-IT(B)]

Channel placement fees

- Channel placement fees is for placing a channel at a preferred frequency/ band
- Issue for consideration: Withholding tax on channel placement fees
- Definition as per Telecom Regulatory Authority of India consultation paper
 - Carriage fee
 - Placement fee
- Mumbai Tribunal decision



Production of content

- Issue for consideration: Withholding tax on payments to production houses for content
- Business models:
 - Payment for production of content as per specification of broadcaster
 - Payment for acquisition of broadcasting rights of content
- Circular No. 4/2016 dated 29 February 2016 [F.No.275/07/2016/IT(B)]
- It is clarified that contract for production of content covered by definition of 'work' in Section 194C of the Income-tax Act, 1961



Transponder fees

- Issue for consideration: Withholding tax on transponder fees

Recent decisions:

- Shin Satellite Public Company Limited ITA No. 500/2012 (Delhi)
- New Skies Satellite BV (382 ITR 114) (Delhi)
- Asia Satellite Telecommunications Co. Ltd (197 Taxman 263) (Delhi)
- Intelsat Global Sales and Marketing Limited (ITA No. 1070 to 1074 & 1621/Mds/2010, 1562/Mds/2011, 2246/Mds/2012, 470/Mds/2014, 432/Mds/2015, 516Mds/2016) (Chennai Tribunal)



Live broadcast rights

- Issue for consideration: Withholding tax on payment for live broadcast rights

Decisions:

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Article 17(1) and 17(2) of OECD Model

Article 17(1):

"Notwithstanding the provisions of Article 15, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste, or a musician, or as a sportsperson, from that resident's personal activities as such exercised in the other Contracting State, may be taxed in that other State."

Article 17(2):

"Where income in respect of personal activities exercised by an entertainer or a sportsman in his capacity as such accrues not to the entertainer or sportsman himself but to another person, that income may, notwithstanding the provisions of Articles 15, be taxed in the Contracting State in which the activities of the entertainer or sportsman are exercised."



Line producer - rulings

- Yash Raj Films Private Limited (28 taxmann.com 247) (Mumbai Tribunal)
- Nitin M. Panchamiya (50 SOT 468) (Mumbai Tribunal)
- Endemol India Private Limited (42 taxmann.com 395) (A.A.R. Nos. 1081 & 1082 of 2011)
- Endemol India Private Limited (40 taxmann.com 340) (A.A.R. No. 1083 of 2011)
- Endemol India Private Limited (43 taxmann.com 186) (A.A.R. No. 1076 of 2011)

