

TAXATION OF ENTERTAINERS AND SPORTSPERSONS

SEMINAR ON MEDIA AND ENTERTAINMENT INDUSTRY WITH GST

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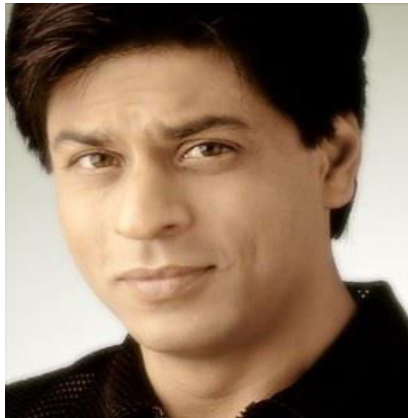
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Road Map...

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- Domestic Tax - Entertainers and Sportsmen
- Cross-border taxation
 - ▣ Article 17 – OECD Commentary
 - ▣ Taxation of Resident Entertainers and Sportspersons outside India
 - ▣ Taxation of Non-Resident Entertainers and Sportspersons in India



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Introduction

Taxation of Entertainers and Sportsmen

Who is an Artist, Actor, Entertainer?

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- Common parlance, “Entertainer” means:
 - ▣ One who amuses people, such as a singer, dancer, comedian, magician, especially as a profession
 - ▣ One who entertains; a host
 - ▣ Entertain - To engage the attention of agreeably; to amuse with that which makes the time pass pleasantly; to divert; as, to entertain friends with conversation
- Definition by Courts in context of erstwhile Section 80RR:
 - ▣ *“The various meanings assigned to the term ‘artist’ by different standard dictionaries clearly show that the term “artist” is a term which has a wide meaning not merely restricted to the meaning of fine arts but encompasses within its scope, a skilled performer.”*
 - ▣ Mr. Sachin Tendulkar’s argument upheld that he was **an “Actor”** while appearing in commercials (2011-TIOL-327-ITAT-MUM)
 - ▣ CIT vs Tarun R Tahiliani (2010-TIOL-446-HC-MUM-IT) : A Designer was held to be **an “Artist”**
 - ▣ Harsha Bhogle vs ITO (2003-TIOL-46-ITAT-MUM) : A presenter, commentator and programme compere of sports on television was held to be **not an “artist”**

Who is an Artist, Actor, Entertainer?

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- Canadian Case Law - Cheek vs the Queen: Court's reasoning on why **a radio broadcaster cannot be considered as a 'radio artiste'** as per 1980 US-Canada Tax Treaty:
*"...It is **obvious** that **athletes and sportsmen "perform"** in their chosen athletic avocation; and their performance is **inherently entertaining**. The fans who turn on the radio to hear a particular Baseball game want to know how the team is performing on the field. While he may be able to hold the attention and interest of the fans with his "down time" commentary but he is not the reason why the fan turns on the radio."*
- Pilcom vs Income-tax Officer (2001) 77 ITD 218 (Calcutta) : **Players of cricket associations of the participating countries in the World Cup Cricket Tournament, 1996, should be considered as Entertainers**
- Issue : Whether the IPL can be considered has having more entertainment value than actually being a sport? Artificially crafted teams and not all the players of Mumbai Indians are actually from Mumbai?
- Article 17 of OECD Model Convention, various tax treaties and Section 115BBA apply in equal measure to both Sportspersons and Entertainers

Artist – Meaning for the purpose of Section 194J Difference between an "artist/entertainer" and a "film artist"

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- Section 44AA(3) Explanation (c) of Rule 6F - Film artist means any person engaged in his professional capacity in the production of a cinematograph film whether produced by him or by any other person as **actor**, cameraman, director, music director, art director, dance director, editor, singer, lyricist, story writer, screen play writer, dialogue writer and dress designer
- Should be engaged in professional activity in production of cinematography would only be called a film artist
- An artist not associated with production of any film would not be called a "film artist"
- An artist/entertainer can be called a film artist, if services pursuant to film production
- Not a film artist if entertains people not involved in production of film
- Artists performing in social functions/events cannot be considered 'film artists' and payment made to them does not fall in the ken of section 194J
- *Jasminder Singh vs ACIT* [2017] 83 taxmann.com 239 (Lucknow - Trib.)

Entertainers – Method of Accounting

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- Method of accounting
 - ▣ Cash vs Mercantile
 - ▣ Cash - Outstanding fees may not be receivable
 - ▣ Cash system of accounting – Advance received but no actual work has been started?
 - Taxable in the year when the work starts
 - *R.S.Suriya v. Asstt. CIT* [2015] 43 ITR (Trib.) 309 (Chennai) & *ACIT vs J. Harris Jayaraj* [2017] 82 taxmann.com 56 (Chennai - Trib.
 - ▣ Dual – Artist and Producer
 - Can follow cash system for income as an Artist and mercantile method as Producer – not considered as hybrid system of accounting
 - Section 145
 - *Vishwanath Acharya vs ACIT* [2016] 67 taxmann.com 269 (Mumbai - Trib.) / *ACIT vs Mehul J. Somaiya* ITA No. 7118/Mum/2006 dated 10.12.2008
 - ▣ TDS can be claimed in the year income is offered to tax

Entertainers – Tax on Income

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- No specific provisions
- Income from endorsements – Business or Profession?
 - Profession – If photo shoots, ad films, promotional events
 - Business – If involved in designing, testing, naming the product being endorsed
- Income received in kind
 - Chargeable to tax u/s 28
 - Amitabh Bachan vs DCIT (2007) 106 TTJ (Mumbai) 925
- Gifts received in cash / kind
 - Taxable u/s 56(2)(x) if amount / FMV over Rs. 50,000/-
- TDS on gifts in kind – Section 194J not applicable Red Chillies Entertainment Pvt. Ltd. v. ACIT ITA no.1577/Mum./2013

Entertainers – Tax on Income

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- Remuneration in cash and distribution rights
 - When are the distribution rights taxed?
 - At the Completion of the film?
 - At the time of actual realisation from the sale of rights whether by way of advance against sale of rights before the completion of the movie or receipt post completion of movie.
 - Receives right to exploit
 - Value should be defined in the Agreement
 - Income from Distribution rights is a business, separate from profession, taxed as per the provisions of Rule 9B
- Remuneration as overflow
 - As per method of accounting followed for professional income
- If Artists family accompanies the Artist for shooting at a location, can it be considered as income of the Artist u/s 28(iv)?
 - Cannot be considered a 'benefit' or 'perquisite'
 - David Dhawan vs DCIT [2005] 2 SOT 311 (Mum.)

Resident Entertainers – Allowability of Expenses

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- Claim of expenses
 - Artist has to pay an amount to opt out of a contract
 - Yes, if for professional reasons. Debatable if for personal reasons
 - Compensation to modify shooting dates
 - Yes if in the course of business and not breach of Law
 - Make-up, clothes, fitness
 - Reasonable amount can be claimed – generally 30%-50% is disallowed for personal expenses
 - Entertainment, including expenditure on parties
 - Can be claimed – Income-tax Authorities may disallow a portion of the expenses as personal
 - Travelling expenses
 - Can be claimed subject to justification for profession (business development, contracts)
 - Documentation is key to claiming the expenses

Resident Sportsmen

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- Accrual of Income
 - Players contracted on period basis - may be accounted on pro rata over contract period.
 - If for particular number of matches – on completion of each match
 - Fees of stand by player – Completion of each match, even if not played or contract basis
- TDS u/s 194J - Sports activities by following persons:
- Notification No. 88/2008
 - Sports persons;
 - Umpires and Referees
 - Coaches and Trainers
 - Team Physicians and Physiotherapists;
 - Event Managers;
 - Commentators;
 - Anchors; and
 - Sports Columnists
- Professional expenses allowed

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Cross Border Taxation – Article 17

Taxation of Entertainers and Sportsmen

Article 17 – OECD Model tax Convention

□ Taxation of Entertainers and Sportspersons

“1. Notwithstanding the provisions of Articles 7 and 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.

2. Where income in respect of personal activities exercised by an entertainer or a sportsperson acting as such accrues not to the entertainer or sportsperson but to another person, that income may, notwithstanding the provisions of Articles 7 and 15, be taxed in the Contracting State in which the activities of the entertainer or sportsperson are exercised.”

Preliminary Conditions

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- Income derived from professional (Article uses the term ‘personal’) activities would be taxable in Country of Performance (‘Country P’) irrespective of number of days stay in Country P. Conditions for applicability:
 - Resident of one of the contracting states (‘Country R’);
 - From Performance of Personal Activities in Country P.
 - Must be a performance;
 - Performance should be in public, i.e. directly before an audience or recorded and later reproduced for an audience;
 - Predominant element of the performance must be artistic and entertaining (level is irrelevant);
 - Performer should be the reason why the audience is listening to or watching the performance
- Dual Role – predominant nature of activity
- Applicable regardless of the Payer
- Computation method not specified in the Tax treaties – As per Domestic Law of each country

Meaning - Entertainer and Sportsperson

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- No precise definition of “Entertainer” - Theatre, motion picture, radio or television artiste, or musician, stage performer, film actor, former sportsman in TV commercial
- Who acts as such even for a single event
 - ▣ One time appearance in a movie or a Amateur winning a Sports Prize
- Does not include - Visiting conference speaker : *former politician as a Speaker, a model presenting clothes during a fashion show, support staff*
- Cameramen, producers, film directors, choreographers, technical staff, road crew
- No precise definition of “sportsmen”
 - ▣ Not restricted to traditional athletic events (e.g. runners, jumpers, swimmers)
 - ▣ Also covers, golfers, jockeys, footballers, cricketers, tennis players, racing drivers
 - ▣ Billiards and snooker, chess and bridge tournaments
- Merely reporting is not covered

Income covered by Article 17

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Income covered by Article 17	Income covered by other Articles
Directly or indirectly related to performance, irrespective of the payer	No direct link between the income and the performance of activities (Bryan Adams in a coke commercial / Ricky Ponting in the De Ghumke Pepsi commercial)
Having Entertainment character, even if activities are of political, religious or charitable nature	Royalties for intellectual property rights - Article 12
Income of agent received on behalf of Individual	Income of agent arranging appearance
<i>Sponsorship and Advertising fees, if related to performance (Wearing Logo during Match)</i>	<i>Sponsorship and Advertising fees, if not related to performance</i>
<i>Income from image rights ie name, signature or personal image, if related to performance</i>	<i>Income from image rights ie name, signature or personal image, if not related to performance</i>
<i>Income from Merchandising, if related to performance</i>	<i>Merchandising income derived from sales not related to performances- Article 12 or Article 7</i>
<i>Income from preparation and training, regardless of whether or not related to performance</i>	Payments received in the event of the cancellation of a performance - Articles 7 or 15
Payments for simultaneous broadcast of performance, benefiting Entertainer / Sportsman	Income from restrictive covenants, (an agreement, a legal obligation imposed) to do or not to do something - Article 7

Article 17 – Paragraph 2 Income accruing to other persons

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- Three situations:
 - Management company receives income for appearance of a group (not constituted as a legal entity)
 - Team, team, troupe, orchestra, etc., constituted as a legal entity
 - Income for performances may be paid to entity
 - Individual members liable to tax under Paragraph 1
 - Profit element of legal entity under Paragraph 2
 - Star Company
 - Taxable under Paragraph 2
 - If Country P Looks Through, taxable under Paragraph 1

Paragraph 2

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- Not applicable to:
 - Prize money of owner of horse or race car since not related to personal activities of the jockey or race car driver
 - *Income of enterprises involved in production of entertainment or sports events.*
 - *Income of independent promoter of concert from sale of tickets and allocation of advertising space*
- *Same income should not be taxed twice through application of these two paragraphs.*
 - *Paragraph 2 : Star-company on payment with respect to activities performed by the Individual; and*
 - *Paragraph 1 : Part of remuneration paid by Company to the Individual, attributed to activities.*
 - *Depending on domestic law of Country P, tax only the company or Individual on the whole income attributable to activities or tax each of them on part of the income, e.g. by taxing the income received by the company but allowing a deduction for the relevant part of the remuneration paid to the Individual and taxing that part in the hands of the Individual*
- Individual and star-company need not be residents of same Contracting State



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Cross Border Taxation – Resident Entertainers and Sportsmen perform outside India

Taxation of Entertainers and Sportsmen

Taxability outside India

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- If Treaty with Country P, and taxing rights with Country P, computation as per Domestic Law of Country P
- May require to pay taxes and file Income-tax Return outside India
- Credit for foreign taxes should be available in India



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Cross Border Taxation –Entertainers and Sportsmen perform in India

Taxation of Entertainers and Sportsmen

Taxation of Non-Resident Entertainers and Sportsmen in India

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Residential status - Period of stay in India (not only shooting, including promotion and practice sessions)

Rate of tax not provided in the treaty - taxable at rates under the Act

Rates of withholding taxes



Section 115BBA r.w. Section 194E,
Section 195

Taxation in India - Income

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- Sportsman, Non-Resident and not a Citizen of India, receives income:
 - Participation in India in any game (other than lotteries, puzzles, gambling) or sport;
 - Advertisement;
 - Contribution to Articles relating to any game or sport in India
- Non-Resident Sports Association or Institution, income from Game or sport played in India
- An Entertainer, NR not a Citizen of India, income from performance in India
- Income-tax payable at the rate of 20% (plus surcharge and cess)
- No deduction of expenses
- Not necessary to file return of income in India, if:
 - No other income in India other than Section 115BBA; and
 - Appropriate taxes withheld at source u/s 194E
- Does not cover cases of when income accrues to a person other than the Entertainer / Sportsman
- Continue to be taxed as per normal income tax provisions

Circular 787 dated 10.02.2000

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Scenario	Taxability
i. If the artist performs in India gratuitously, without any consideration, or performs in India to promote sale of his records but no consideration is paid for the performances by anyone.	No Tax
ii. Consideration received by artist for live performance and/or simultaneous live telecast or broadcast in India.	Taxable in India / Article 17
iii. Consideration received to acquire copyrights of performance in India for subsequent sale abroad (of records, CDs etc) or consideration to acquire license for broadcast or telecast overseas.	Not taxable in India u/s. 9(1)(vi)
iv. Consideration to acquire copyright of performance in India for subsequent sale in India or consideration to acquire license for broadcast or telecast in India.	Taxable in India u/s. 9(1)(vi) / Article 12 - Royalties
v. Endorsement fees which relates to artist's performance in India.	Taxable in India u/s. 5 / Article 17

Sportsmen

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- Foreign players who become residents during the year?
 - If two series are played in India, possibility that players may become tax residents of India
 - Section 115BBA not applicable since only for non-resident sportsmen / sports association
 - Section 194J applicable (Notification No. 88 dated 21.08.2008)
 - Required to file return of income
 - Taxable at normal slab rates
 - Can claim deduction for expenses
 - What happens to payments already made under Section 115BBA for part of the year?
 - In case the Deductor is aware that the Sportsman would become resident during the year, should taxes be withheld under Section 194J?

Case Study - 1

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- Akon, an American singer visited India for live stage performances, hosted in 3 cities in a span of 15 days, by a Foreign Management Company ('F Co') and in India by Indian Event management Company ('I Co')
 - Remuneration - Rs. 4 crores
- I Co released a compilation of audio and video CDs / DVDs the Concert, released globally by an XYZ Music Company, an Indian Company and remuneration paid was Rs 1 crore on acquiring rights by XYZ Music
- Guest Appearance on Indian Idol, remuneration of Rs 50 lakhs
- Dinner hosted in his Honour and a car gifted to him by Bollywood
- Payment of Commission to F Co - Rs 20 lakhs

Case Study - 1

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- Remuneration for performance - Section 115BBA
- Acquiring rights by XYZ Music
 - Circular 787 - Subsequent Sale abroad not taxable and subsequent Sale in India taxable
 - XYZ Music Company to release it globally
 - Rs 1 crore to be apportioned between India and other than India
- Guest Appearance on Indian Idol, remuneration of Rs 50 lakhs - Section 115BBA
- F Co' s income not taxable in India (Wizcraft decision)

Case Study - 2

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- Mr. A (Brazil Resident), contracted to by USA Club to play in IPL in India, Sri Lanka and China
- Play-off matches in India, Sri Lanka and China (to be played over 3 weeks) and final match in India
 - ▣ Two matches a week
- Income of the Club - Prize money for winning IPL- Rs. 50 million (50% to be distributed among players)
- Income of Mr. A
 - ▣ Monthly compensation - Rs.2 lakhs (including time spent in training)
 - ▣ Player of the Series - Rs.10 lakhs
 - ▣ Share of Prize money for winning IPL
 - ▣ Sport brand promotion fees for wearing gear:
 - Rs. 2 lakhs: during matches
 - ▣ Rs. 25 lakhs for guest appearance in a Bollywood movie

Case Study - 2

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- Income of Mr. A
 - Monthly compensation - Rs.2 lakhs
 - Attributable to India activity taxable u/s 115BBA at the rate of 20% on gross basis
 - Player of the Series - Rs.10 lakhs
 - Since player of the Series, Portion of the Player of the Year award attributable to India, taxable u/s 115BBA at the rate of 20% on gross basis
 - Share of Prize money for winning IPL
 - Whether merely because Final match played in India is won by the Club, entire amount can be taxable in India?
 - Whether amount attributable to India fits within “income earned by way of participation in any game” u/s 115BBA? Better view: Yes

Case Study - 2

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- Income of Mr. A
 - Sport brand promotion fees for wearing gear:
 - Rs. 2 lakhs: during matches
 - Directly related to performance and hence taxable under Section 115BBA
 - Rs. 25 lakhs for guest appearance in a Bollywood movie
 - Taxable under Section 115BBA as an Entertainer
- Income of Club
 - Prize money would be taxable under Article 17(2)
 - Even if the Club is a Sports Association / Institution, prize money not covered u/s 115BBA, since not a guaranteed payment for participation
 - Taxable in India on net basis under normal provisions

Source

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Income Tax Department

Department of Revenue, Ministry of Finance, Government of India



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Queries

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**YOUR
QUESTIONS
PLEASE !!!**



Thank you!!!

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