



Media & entertainment industry

Direct tax issues

Prashant Bhojwani | 11 November 2017

Key segments

Broadcast

Print

Films

Sports

Music

Radio

Digital Advertising

Out of home
advertising

Animation and VFX

Gaming

Live events

New media

Live broadcast rights

Issue for consideration: Taxability of income of a foreign company from live broadcast rights

- Whether such right constitutes a “copyright”

Live coverage should not have a copyright* and accordingly, should not be taxable as royalty

- Delhi Race Club (Delhi High Court)
- Nimbus Communications Limited (Mumbai Tribunal)
- Neo Sports Broadcast Private Limited (Mumbai Tribunal)
- Taj TV Limited (Mumbai Tribunal)

*As per Copyright Act, 1957, copyright means exclusive right to reproduce, issue copies, translate, adapt, etc. of a work which is already existing

Sponsorship rights

- Sponsorship rights typically include following:
 - Title sponsor
 - Venue advertising
- **Issue for consideration:** Taxability of income of a foreign company from sponsorship rights

Sponsorship revenue not for use of trademark, brandname and accordingly, should not be taxable as royalty

- Payment for sponsorship rights is in essence for advertising and publicity*
 - Sahara India Financial Corporation Limited (Delhi High Court)
 - Hero Motocorp Limited (Delhi Tribunal)
 - Golf In Dubai** (AAR)

* Circular Number 715 dated 8 August 1995

** Revenue authorities initially argued that sponsorship revenue should be taxable as royalty but finally withdrew this argument

Permanent establishment

- Supreme Court's decision in Formula One World Championship Limited's (FOWC) case
 - Budh International Circuit is a Permanent Establishment (PE) of FOWC in India
- **Key observations of the Supreme Court:**
 - Event has taken place by conduct of race physically in India
 - Entire income is generated from conduct of event in India
 - Budh International Circuit is a fixed place from where Grand Prix was conducted which is an economic / business activity
 - Commercial rights are with FOWC, which are exploited with actual conduct of race in India
 - During duration of the event (though for limited days), FOWC had full access to / complete control of the circuit (at the disposal of FOWC)

Way forward for events in India

Tax exemption for international sporting events in India

- Tax exemption under Section 10(39) of the Income tax Act, 1961 (Act)
 - Approval to be obtained for income to be exempted
 - Income should arise from sporting event held in India
 - Person earning income to be notified by Central Government
 - Event to be approved by International body
 - Participation of more than 2 countries
 - Event to be notified by Central Government

Approval granted for following events:

- ICC Champions Trophy 2006
- Commonwealth Games 2010
- ICC Cricket World Cup 2011
- FIFA under-17 Football World Cup

Hollywood films

Government focusing on promoting India as a filming destination



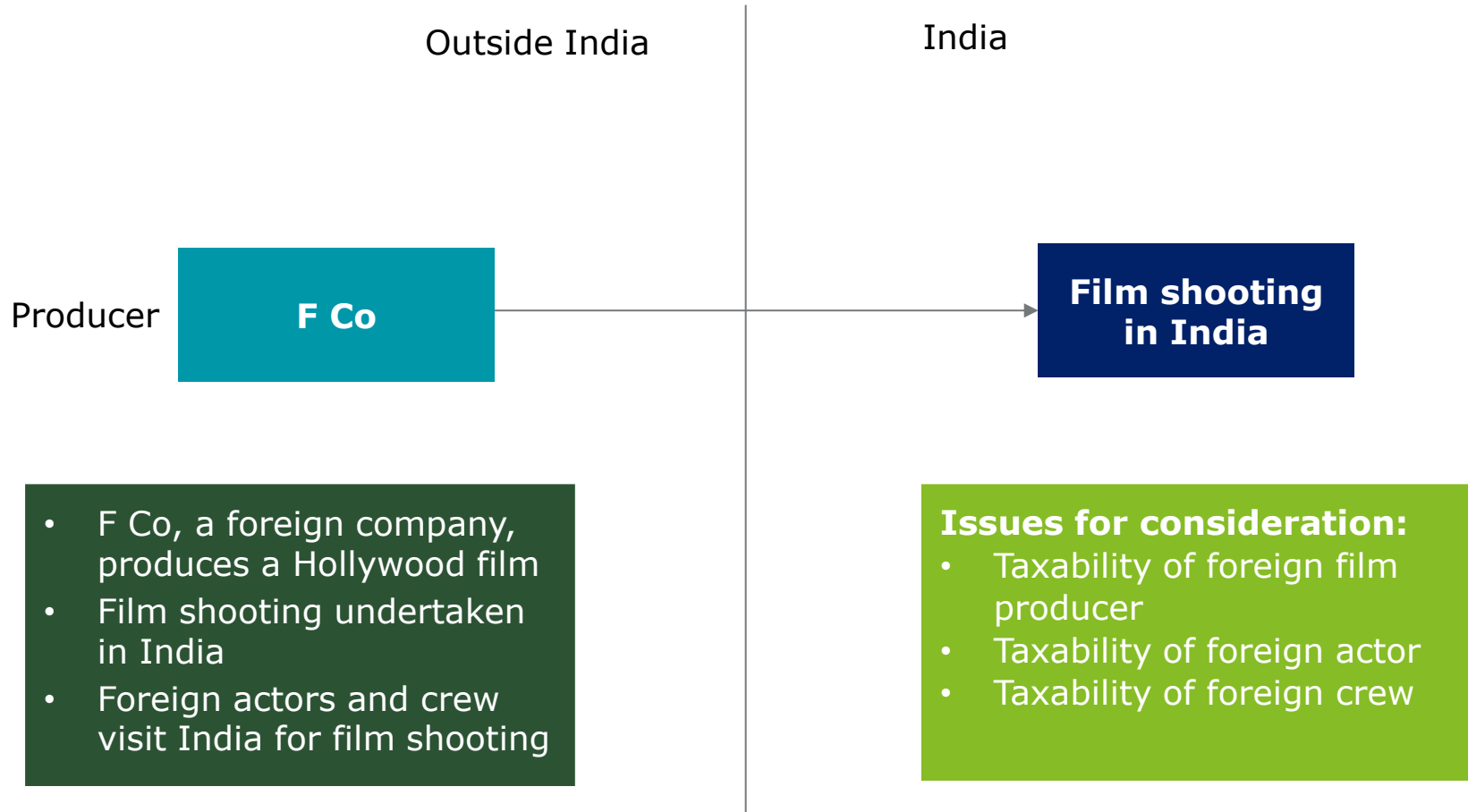
In recent past, several Hollywood films have been shot in India

- Kung-Fu Yoga
- The Second Best Exotic Marigold Hotel
- The Hundred-Foot Journey

Approvals granted for shooting 41 foreign films in India in 2016



Case study 1 – Hollywood film



Foreign film producer

- Income of non-resident through or from operations confined to shooting a cinematograph film in India not taxable in India*
- Above exemption not available if:
 - Non-resident being individual is a citizen of India
 - Non-resident being a firm has any partner who is citizen of India or resident of India
 - Non-resident being a company has any shareholder who is citizen of India or resident of India



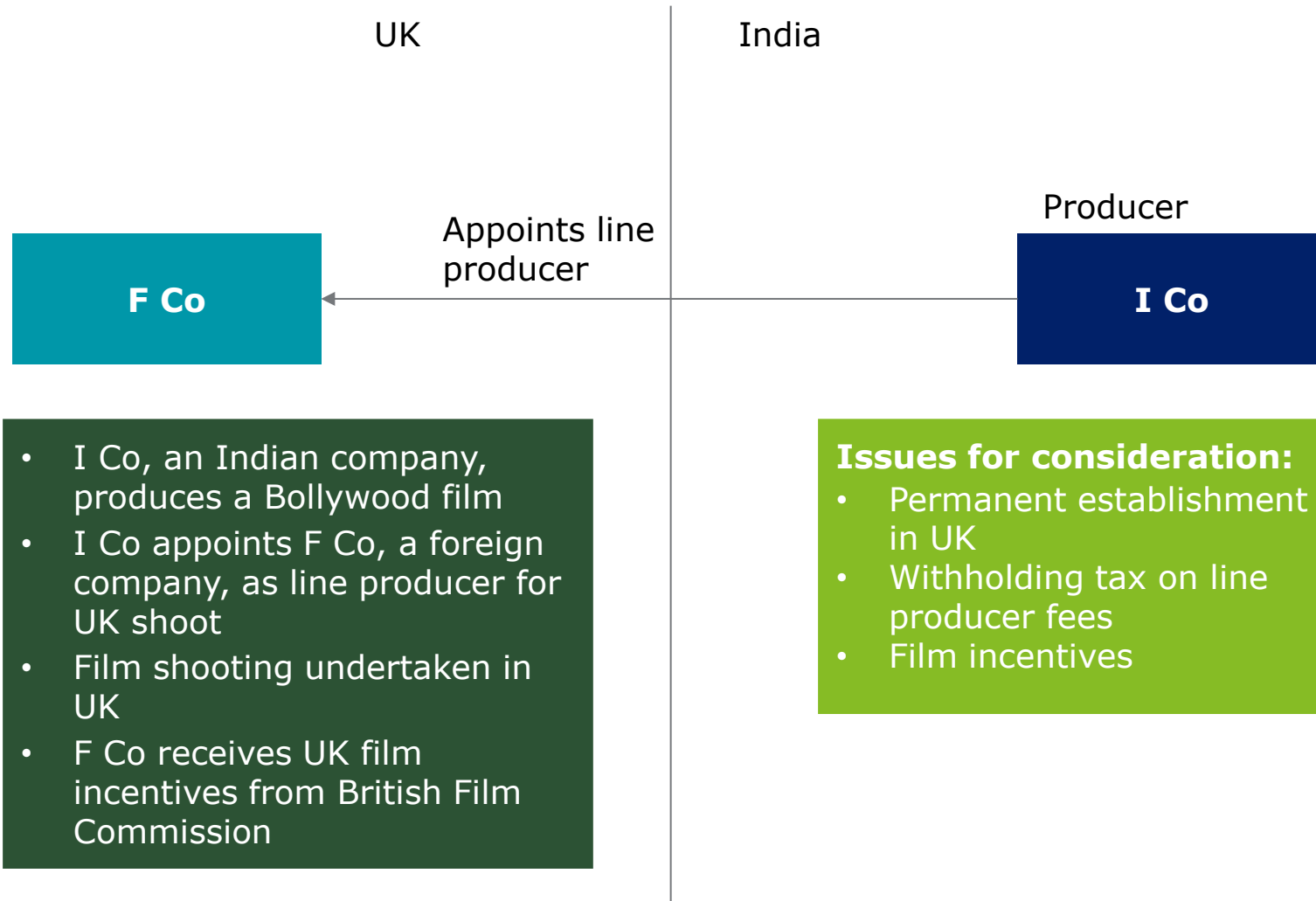
* Section 9(1)(i)(d) of the Act

Foreign crew

- Crew includes behind the scene personnel
- Relevant Articles of tax treaties to be considered:
 - Article 12 / 13 on “Royalties and Fees For Technical Services”
 - Article 15 on “Independent Personal Services” in case payment made to crew (individual, etc) not being an employee
 - Article 16 on “Dependent Personal Services” in case payment made to individual being an employee



Case study 2 – Bollywood film



Line producer fees

Decisions:

- Yash Raj Films (Private) Limited (Mumbai Tribunal)
- Nitin M. Panchamiya (Mumbai Tribunal)
- Endemol India (Private) Limited (AAR)



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)

Film incentives serve as a mechanism to support production of film

Advantages for producer

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

Examples:

- Mauritius: 30-40% of qualifying expenditure
- United Kingdom: 25% of qualifying expenditure



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 (Mumbai Tribunal)
- Suneel Darshan (Mumbai Tribunal)

Abandoned films

Issue for consideration: Deductibility of cost of production for abandoned films

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

Decisions

- B. Naggi Reddy (Madras High Court)
- Venus Records and Tapes Private Limited (Bombay High Court)
- Abdul G. Nadiadwala (Mumbai Tribunal)
- A.K.Films Private Limited (Mumbai Tribunal)
- Mukta Arts Private Limited (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

Taxability of film rights

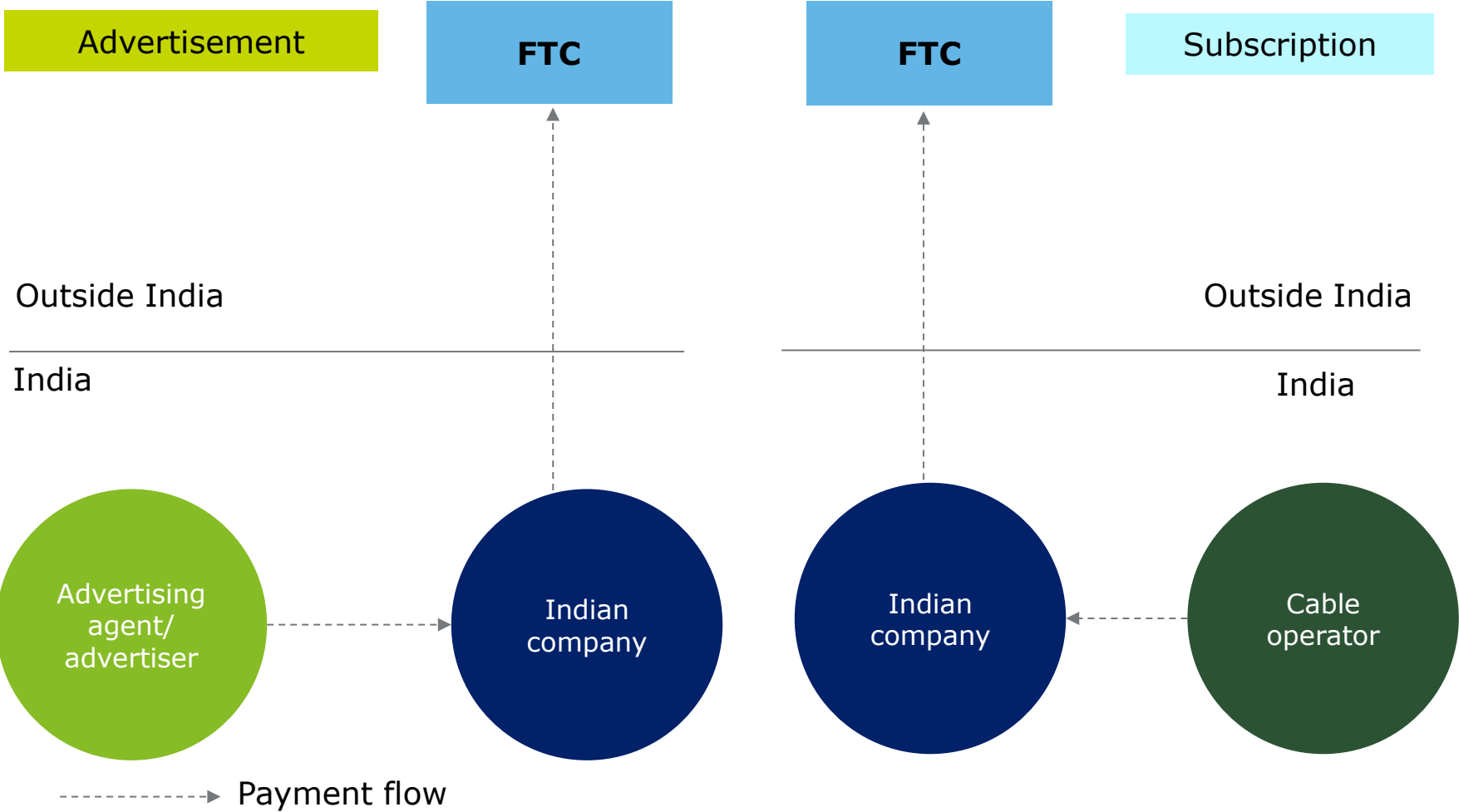
Business models:

- Sale
 - License
-

- S.P.Alaguvel (Madras High Court)
- Mrs. K. Bhagyalakshmi (Madras High Court)
- B4U International Holding Limited (Mumbai Tribunal)
- Manish Dutt (Mumbai Tribunal)
- Asiavision Home Entertainment (Private) Limited (Mumbai Tribunal)

- Warner Brother Pictures Inc. (Mumbai Tribunal)
- Warner Bros. Distributing Inc (Mumbai Tribunal)
- Shri Balaji Communications (Chennai Tribunal)
- Indo Overseas Films (Chennai Tribunal)

Foreign telecasting company (FTC)



Issues for consideration



Taxability of advertisement revenue

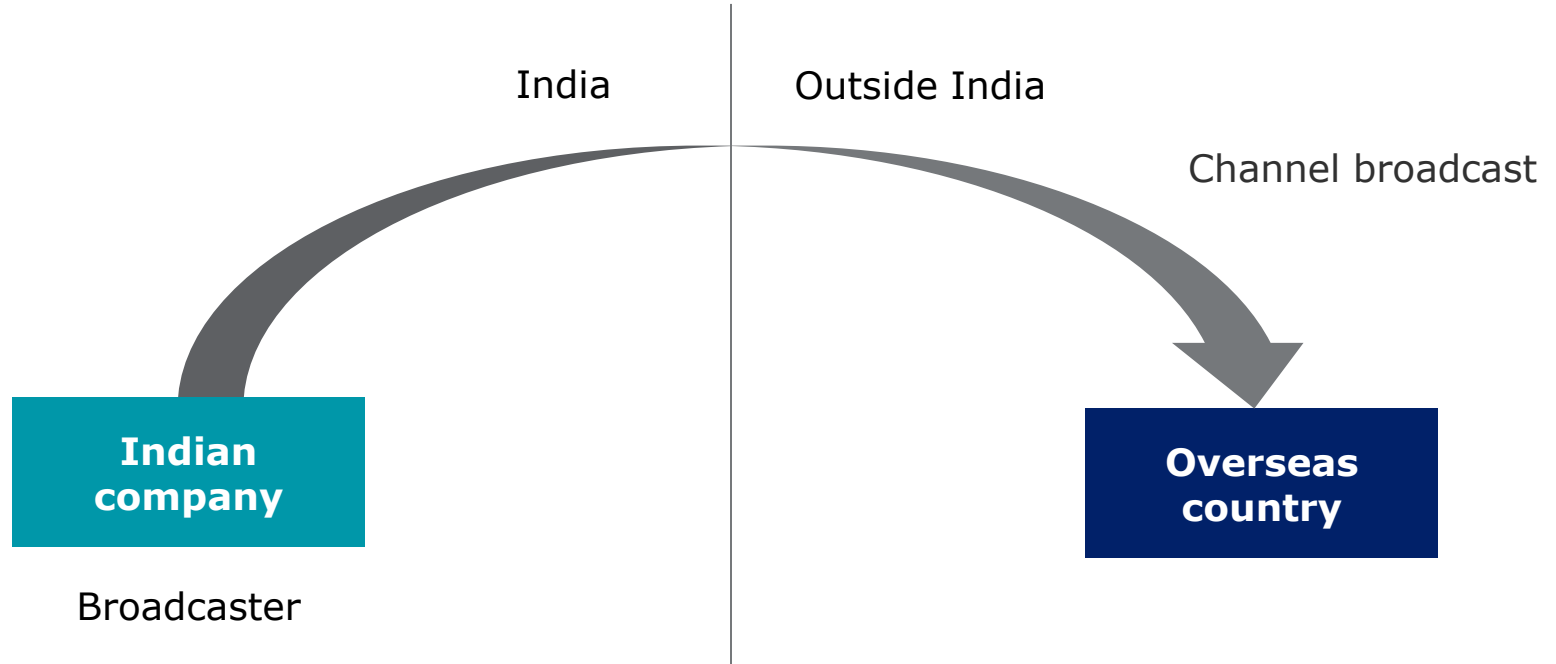


Taxability of subscription revenue

Recent decisions:

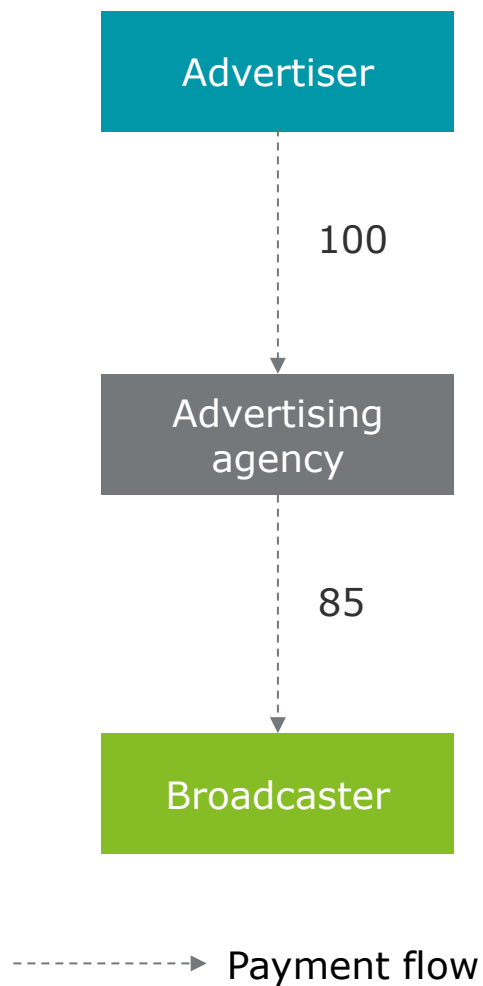
- Taj TV Limited (Mumbai Tribunal)
- NGC Network Asia LLC (Mumbai Tribunal)

Channel broadcast overseas



Issue for consideration: Withholding tax on payments to non-residents in respect of overseas broadcast of channels

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)]
- Key decisions:
 - Moving Picture Company India Limited (Delhi High Court)
 - Jagran Prakashan Limited (Allahabad High Court)
 - Living Media Limited (Delhi High Court)
 - Prasar Bharti (Kerala High Court)

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 consultation paper of Telecom Regulatory Authority of India
 - Carriage fee
 - Placement fee
- Mumbai Tribunal decision



Production of content

Issue for consideration: Withholding tax on payments to production house 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)]
- Contract for producing content as per specifications provided by broadcaster, covered by definition of 'work' in Section 194C of the Act

Transponder fees

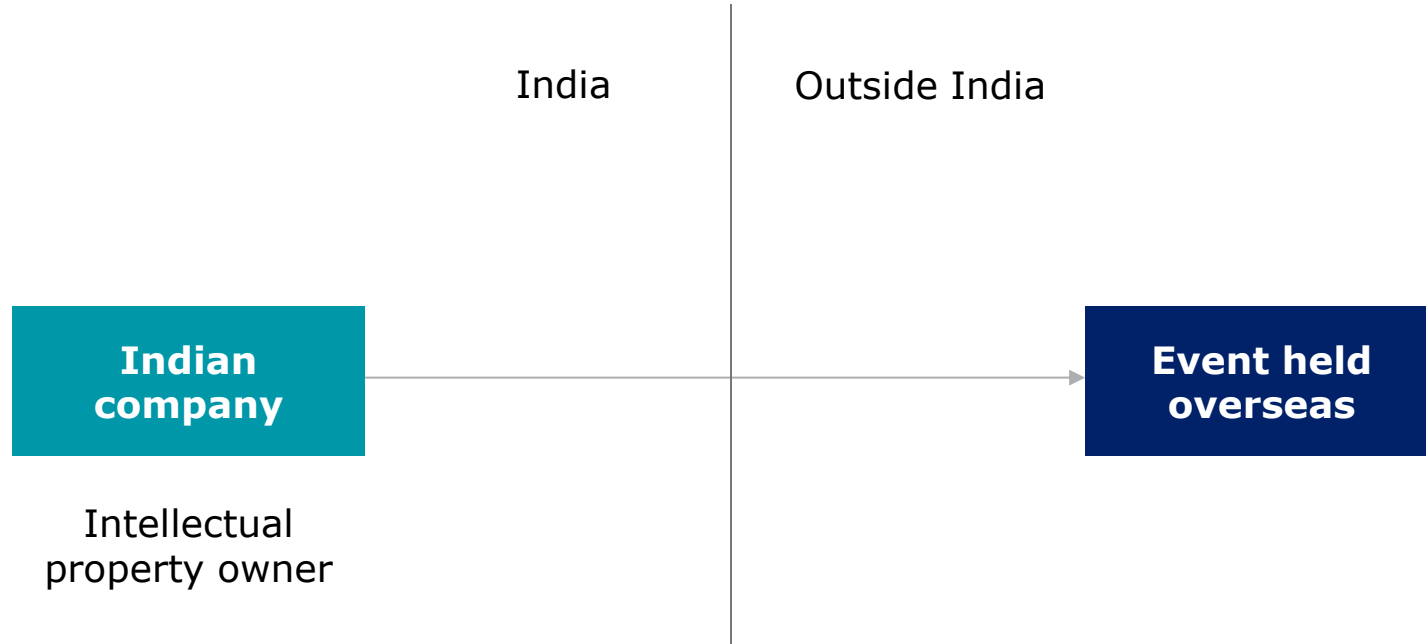
Issue for consideration: Withholding tax on transponder fees

Recent decisions

- New Skies Satellite BV (Delhi High Court)
- New Delhi Television Limited (Delhi Tribunal)
- Taj TV Limited (Mumbai Tribunal)
- Mumbai Tribunal decision



Event outside India



Issue for consideration: Withholding tax on payments to non-residents for event held outside India

Transfer pricing - update

Base erosion and profit shifting – Action Plan 13 (guidance on implementation of transfer pricing documentation and Country-by-Country reporting)

Documentation	Threshold
Country-by-Country report	Total consolidated revenue of international group exceeds INR 5,500 crores
Master file (Part B)	Consolidated revenue of international group exceeds INR 500 crores and <ul style="list-style-type: none">• value of international transactions exceeds INR 50 crores or• value of intangible property related international transactions exceeds INR 10 crores

- Impact
 - Transparency: availability of information with tax authorities
 - Additional compliances

In the limelight...

Cross-border transactions

Foreign film shooting in India

International sports events in India

Overseas expansion eg. broadcasting, events overseas

[Income Computation and Disclosure Standards](#)

Digitisation

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Foreign crew

Fees for technical services (FTS) means consideration for managerial, technical or consultancy services

If consideration paid to professional (not employee): Fees for professional services not taxable in India, if following conditions satisfied*:

- if the person does not have a fixed base regularly available to him in India
- his stay in India does not exceed 90 days in a year

If consideration paid to employee: Remuneration not taxable in India, if following conditions satisfied**:

- recipient is in India for less than 183 days in a tax year
- remuneration is paid by / on behalf of a non-resident employer
- remuneration is not borne by employer's PE in India

*Article 15 of India-USA tax treaty

**Article 16 of India-USA tax treaty



Income Computation and Disclosure Standards

ICDS	Particulars
I	Accounting policies
II	Valuation of inventories
III	Construction contracts
IV	Revenue recognition
V	Tangible fixed assets
VI	Changes in foreign exchange rates
VII	Government grants
VIII	Securities
IX	Borrowing costs
X	Provisions, contingent liabilities and contingent assets

