



A study on taxation of transponder charges

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Abstract

There are several television channels in India and many of them avail services of foreign satellite service providers for transmitting or uplinking the signals for the television programs. The unfixed nature of these services makes it even hard to determine the appropriate measures for taxation. To provide an example, international telecasting channels that operate in India, as well as related corporations that are tax residents of other states, generate money in India through ad income and distribution revenue. Telecasting enterprises that employ satellite communication and related technologies are strongly linked to the problem of telecasting taxation, specifically the taxability of transponder capacity costs. In growing technology, transponder plays a prominent role in receiving and transmitting of audio-video signals. The use of transponder is found in satellite or broadcast communication, aviation, marine communication etc. Payment of this transponder charges with reference to satellite communication is an important taxation issue. Because most of these satellites are owned by foreign firms without a stable basis in India, this problem is crucial in international taxes. Also, determining the exact location of the satellites is even more difficult for tax authorities, i.e., their unfixed nature makes it hard to determine the taxability.

Keywords: taxation of transponder charges, taxability under domestic act, model convention, classification-royalty or FTS

Introduction

The channels of a communications satellite are referred to as transponders since each is treated as a separate receiver or repeater. Several video and audio channels flow through one transponder on one wideband carrier thanks to digital video data compression and multiplexing. Non-multiplexed broadcasters can travel in single channel per carrier mode, with multiple carriers such as analogue or digital per transponder, and analog signals video has one channel per transponder, with subcarriers for audio and automated transmission identification service. As a result, instead of paying for a complete transponder or utilising landlines to deliver it to an earth station, each station may broadcast directly to the satellite, multiplexing with other stations. A communications satellite's path is believed to be the ground area covered by its transponders, as well as the satellite dish diameter necessary to receive each transponder's output. Every transponder or collection of transponders normally has its own map since they may be focused towards various parts of the globe. Concerns have been raised in India over the taxation of connection charges paid to telecommunications carriers. As a result, the taxability of revenue derived from the use of a satellite or transponder is a topic on which various adjudications have reached differing conclusions.

Scope and Methods

The research aims to study the taxation of Intangible assets, to understand the basics of royalties and taxing cross-border transactions. Also to examine the issue with respect to taxability of payment for data transmission services through a transponder, whether such payments can be considered as royalty or business income. Primary data is the first hand information of practices in the income tax department through various case laws and practical day to day problems. This research adopted analytical method, comparative method and case study method. The research has adopted analytical method to analyse the royalty provisions and taxability of royalty payments under Income tax act, 1961 and under model conventions. Comparative method to compare the DTAAs that India with different countries like U.K, U.S.A, etc., Also the case study method to study and understand various judicial rulings.

Discussion

Under Income Tax Act: The issue to be considered whether payment that made towards interconnectivity charges will qualify as use of process and thus, be classified as royalty. The Explanation-6 to section-9(1)(vi) of the act, clarifies that 'royalty' includes consideration in respect of any right, property or information whether or not the possession or control of such right, property or information is with the payer or whether the same is used directly by the payer or whether the location of such right, property or information is in India. Furthermore, the term 'process' now includes and shall be deemed to have always included satellite transmission, which includes

up-linking, amplification, and transition for down-linking of any transmission, cable, fibre optics, or other identical technology, whether or not it is private.

Income from several sources including income from royalties and fees for technical services that paid to non-residents are subject to tax deduction at source. It is to be noted that section-194J is the provision for withholding of taxes on "royalty" and section-194C is the provision that applies to withholding in case of broadcasting and telecasting based on established norms of interpretation, that the specific provision would over-rule the general provision, it should follow that tax on such payments must be withheld pursuant to section-194C. Suppose where the distribution rights that is granted by foreign broadcasters are in fact termed as 'royalty', the same would be taxed in case of foreign companies under section-115A.

Under Model Convention

Customers and satellite operators commonly enter into "transponder leasing" arrangements, in which the satellite operator permits the client to use the capacity of a satellite transponder to broadcast over vast global locations. Customers' payments under these agreements are for the use of transponder transmitting capacity and will not be considered royalties. These payments are not made in consideration for the utilisation, or right to use, property, or for information, that is mentioned in the definition.

Whether Connectivity charges constitutes FTS or royalty?

Payments paid to foreign telecommunications operators for connection costs are the topic of discussion as to whether they are payments for technical services, so constituting fees for technical services (FTS), or payments for the use of a secret procedure or formula, thereby raising royalty. Additionally, if the money paid by users for telephone or other charges would be considered fees for technical services and therefore susceptible to withholding under the act's section-194J.

The fees which is paid by broadcasters for appropriate channel placement in addition to channel distribution fees is typically referred to as channel placement fees. As per royalty definition, it includes consideration for use of any process. Since, channel placement fee is a form of service fee and does not signify any consideration towards a usage of a process. Whereas the court held that, channel placement fee is being the work of broadcasting or telecasting of programs and it is in the nature of FTS or royalty. Therefore it was subjected to tax deduction at source under section-194C. In another case, the assessee was sending SMS and using the services of a telecommunications operator to do so. The payment made for availing the said services, even if for standard connectivity charges, could not be considered as "royalty". The deductor neither has any access or control over the equipment nor is there any usage of any process or equipment, which could be made available to the deductor.

Air costs paid to telecommunications operators do not include administrative, consulting, or technical services, and hence cannot be considered fees for technical services. Services like roaming, long distance calls, and data transmission will not be taxable as FTS, Whereas Voice charges are in nature of service charges and not managerial, consultancy or technical services and in absence of permanent establishment, thus income shall not be taxable in India. Payments paid for broadband services provided by foreign telecommunications firms outside India, such as downlink data over customer-based circuits, may not be considered fees for technical services or royalties under the act or the India-US tax treaty. Payments for downlinking frequency band are comparable to payments made for telephony in that they are neither in the managerial function, advisory, or professional support, nor are they for the right to use commercial, economic, or experimental equipment. Furthermore, under the legislation and the applicable tax treaties, payments for interconnection usage costs are neither FTS nor royalty. It is a typical facility and doesn't involve any technical services. The process to run such facility is a general one available on public domain and not an exclusive one and it cannot constitute be characterised as royalty.

Whether roaming charges constitutes royalty?

The process and working of international roaming facility that includes transmitting signals from home network to international network, which will enable transmission of voice, messages, and data from one country to another. This entire act of transmitting signals is normally a process for facilitating communication. Therefore, consideration paid by the Indian telecommunications operator towards such process or use of transmission equipment to the international telecommunications operator can be classified as 'royalty' under section-9(1) (vi) of the act especially in light of the amendment by Finance Act 2012 through insertion of Explanation-6, wherein it is no longer necessary to determine whether the process is secret or not. However, according to AAR's judgement, there is no real use of equipment by the assessee while using a facility offered by a foreign corporation through its network or circuits. Because the foreign corporation is using its own network to provide a service that allows the assessee to send voice and data across telecommunications capacity, payment cannot be taxed as "royalty" under the statute or treaty. However, In the light of the amendment, the consideration paid towards roaming charges, transponder charges, etc. could be classified as 'royalty' under the act. However, the taxpayer can rely on this ruling with respect to the taxability of use of equipment for transmitting voice or data. In another instance, the question was whether national roaming costs may be considered rent for "use of equipment" under section-194I, and so be subject to withholding tax. In this case, the taxpayer entered into an arrangement with IDEA Cellular Ltd. that allows a cellular network user to use the services of any other network

and can also gain access to the services of any other network operators in their respective licensed area for a selected charge called as national roaming charge. The Tribunal determined that paying roaming charges for usage of the linked network is not the same as paying for devices, and so is not subject to withholding tax.

Conclusion

Owing to the satellite transponder leases being treated as royalty, which is not being held admissible for advantage of DTAA in several jurisdictions, the Indian industry is being forced to gross up the withholding tax levied in India, as the benefit of the same is not available to the foreign satellite provider in its country, despite having a DTAA with India. This means that Indian business will have to pay a profit of \$20 to \$22 million in addition to the transponder costs as the foreign satellite operators got to be paid on a net basis the worth of the transponder use. This is putting an undue burden on the industry with no benefit to the Indian entity or the foreign satellite provider. The suggestions on Direct tax submitted for pre-budget memorandum 2021-22 is that the 2012 amendments could be interpreted to bring within its ambit, the payments made by Telcos to other domestic operators for services like interconnect, roaming, etc. Tax withholding on such payments would result in significant cash flow issues for Telcos. Also their suggestion is that, the highly competitive Telecom Industry, the Government should clarify that explanations-5 and 6 should not be interpreted in a way to bring payments, whether it is made to domestic operators or international operators, for standardized telecom services including basic or mobile telephony, internet, roaming, interconnect, etc. under the ambit of definition of 'Royalty'.

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