



Media and entertainment industry

India tax landscape

June 2016

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Overview

The Indian Media and entertainment industry is a sunrise sector with a rapid growth curve. In 2015, the industry grew at 11.76% with a market size of USD 19 billion (INR 1,281 billion¹). Overall, the industry is expected to grow at CAGR of 13.98% till 2018. By 2025, the industry is expected to attain a market size of USD 100 billion (INR 6,743 billion). India is globally the fifth largest Media and entertainment market.

The global Media and entertainment industry is expected to touch a market size of USD 2.14 trillion in 2020. The United States of America's Media and entertainment industry is the world's largest and is expected to be valued at USD 723 billion by 2018.

Media and entertainment is one of the sectors identified by the Indian Government under "Make in India" initiative.

The key sub-sectors of the Media and entertainment industry are outlined below:



- Television
- Films
- Music
- Digital advertising
- Animation and VFX
- Print
- Sports
- Radio
- Out of home advertising
- Gaming

Television, print, and films are the three largest sub-sectors in India. Key demographics of the Indian Media and entertainment industry are outlined below:

- India is the world's second largest television market with 168 million television households and 890 television channels approximately (including 400 news and current affairs channels approximately).
- India has the world's largest film industry in terms of tickets sold and number of films produced (more than 1,250 films are produced yearly in more than 20 languages).
- Globally, India has the biggest newspaper market with more than 100 million copies sold daily and more than 100,000 registered newspapers.

The Ministry of Information and Broadcasting is the apex body for formulation and administration of the rules, regulations and laws relating to information, broadcasting, press, and films in India.

Note: Data for this section has been sourced from related news clippings and articles




1.Amounts reflected are based on exchange rate of 1 USD = INR 67.43 as on 1 June 2016

Foreign direct investment

The foreign direct investment (FDI) inflows in the information and broadcasting sector for the period April 2000 to December 2015 stands at USD 4.55 billion. In India, FDI can be made under two routes — the automatic route (i.e. no approval of Government is required) and under the Government route (i.e. approval of the Government is

required). Under the Government route, it is necessary to obtain a prior approval of the Foreign Investment Promotion Board. Recently, the Indian Government has further liberalized the FDI policy for the Media and entertainment industry. The current FDI sectoral limits for the Media and entertainment industry are tabulated as follows:



Sr. No	Sub-sector	Current sectoral cap
1	 Broadcasting	
1.1	<ul style="list-style-type: none"> • Teleports • Direct-to-home • Cable networks • Mobile TV • Headend-in-the sky broadcasting services 	100% Automatic route up to 49% Government route beyond 49%
1.2	<ul style="list-style-type: none"> • Up-linking of 'news and current affairs' television channels 	49% Government route
1.3	<ul style="list-style-type: none"> • Up-linking of non-'news and current affairs' television channels • Downlinking of television channels 	100% Automatic route
2	 Radio	
2.1	<ul style="list-style-type: none"> • Terrestrial broadcasting FM radio 	49% Government route
3	 Print media	
3.1	<ul style="list-style-type: none"> • Publishing newspaper and periodicals (news and current affairs) • Publication Indian editions of foreign magazines (news and current affairs) 	26% Government route
3.2	<ul style="list-style-type: none"> • Publishing/ printing of scientific and technical magazines/ specialty journals/ periodicals • Publication of facsimile edition of foreign newspapers 	100% Government route

FDI in above sectors is also subject to compliance with the policy, guidelines, regulations of the Ministry of Information and Broadcasting. With respect to the sub-sectors not listed above, FDI is permissible up to 100% under the automatic route, e.g. films. The Government has, on 20 June 2016, announced several amendments in the FDI Policy including changes in broadcasting sector. It is proposed to

permit 100% FDI under automatic route in broadcasting carriage services (for activities mentioned in point 1.1 above) as against present limit of 49% under automatic route and beyond 49% under Government route. Formal amendments to the FDI Policy and Regulations under Foreign Exchange Management Act giving effect to the said announcement is awaited.



Tax

The key direct tax and indirect tax issues in respect of the Indian Media and entertainment industry have been outlined as follows:

Broadcast

Advertising on television channels

- Typically, three parties are involved for advertising arrangements on television channels, namely – broadcaster, advertising agency, and advertiser. Payments are made by the advertiser to the advertising agency and by the advertising agency to the broadcaster.
- The Central Board of Direct Taxes (CBDT) has clarified that withholding tax as contractual payments (i.e. 2%) would be applicable for the first payment (i.e. by advertiser) and there would be no withholding tax on the second payment (i.e. by advertising agency).
- Recently, the CBDT has clarified regarding the withholding tax applicability on “the fees/charges taken or retained by the advertising agency” i.e. whether the same is in the nature of discount or commission. If this amounts to commission, withholding tax at 10% is applicable. It has been clarified that withholding tax would

not be attracted on above payments made by the broadcaster to the advertising agency or on amounts retained by the advertising agency for booking, procuring, and canvassing advertisements.

- The above clarifications are also applicable for the print segment advertisement arrangements.

Withholding tax on band placement fees

- Broadcasters pay channel/band placement fees to multi-system operators/cable operators for placing their channels on a preferred frequency/band to enhance viewership of the channel.
- The Revenue authorities have adopted a position that band placement fees are in the nature of royalty. Accordingly, it is necessary to deduct withholding tax at 10%.

- The Tribunal has upheld the taxpayer’s contention of withholding tax at 2% as contractual payments but still this issue continues to be subject matter of litigation.

Service tax on band placement fees

- Services provided by cable operators or multi-system operators to broadcasters for placing their channels on a preferred frequency or exemption notifications and are accordingly subject to service tax.

Production of content

- Broadcasters make payments to production houses for production of content which is telecast on their channels.
- Recently, the CBDT has clarified that in case such content is produced as per specifications of the broadcaster, the same is considered as works contract and withholding tax at 2% would be applicable.
- In case the broadcaster acquires only the broadcasting rights for the content already produced by the production house, the same is not considered as works contract and other provisions of withholding tax would have to be evaluated such as royalty, fees for technical services (withholding tax rate for royalty and fees for technical services is 10%).

Content cost

- A major cost for the broadcasters is in respect of content (commissioned or licensed). The taxpayers claim such cost as a revenue expenditure deductible in the first year or over the license period. In a few cases, however, the Revenue authorities treated such content cost as an intangible asset

entitled to depreciation at 25%.

- The taxpayer’s method of accounting and tax treatment adopted has been upheld by the Tribunals and the Revenue authorities’ position for grant of depreciation instead has been rejected in the said cases.

Dual taxation on copyright transactions

- The declared list of services, inter alia, includes ‘temporary transfer or permitting the use or enjoyment of any intellectual property right’ (IPR), thus being liable to service tax.
- Almost all State Governments across India have classified “copyright” as goods and levied value added tax (VAT) on such transfer or licensing of copyright.
- Levy of dual tax being service tax and VAT on the IPR transaction unduly increases the cost of doing business, especially if they are not available as credit to the buyer.
- One could argue that the definition of ‘declared service’ under the service tax law is amply clear, but there is protracted litigation on what could be construed as ‘transfer of right to use’. This could result in accelerating the dispute on dual taxation; the industry would end up paying both the taxes on conservative basis to mitigate interest and penal consequences. Goods and Services Tax (GST) could amicably address this issue of dual taxation.

Withholding tax on transponder fees

- Broadcasters make payments for transponder fees to satellite companies for transmission of television signals.
- The royalty definition under the domestic tax laws was amended in the year 2012 retrospectively to include

transmission by satellite. Subsequently, the High Court held that payments for transponder fees are royalty under the domestic tax laws in view of the above retrospective amendment.

- In case such payments are made to non-residents, the Revenue authorities are adopting a position that the amended definition of royalty is applicable even to the tax treaty and, accordingly, transponder fees received by non-residents are taxable in India under the tax treaty.
- The Tribunal held that the payments for transponder fees are taxable as royalty even under the tax treaty while recently another High Court has ruled in favour of the taxpayer holding that the Parliament cannot amend international treaty unilaterally. The High Court has further ruled that payment for digital broadcasting services through a transponder should not be considered as royalty. Accordingly, one needs to wait and watch the developments in this space.

Indirect tax on transponder fees

- Satellite companies located in India pay service tax on transponder fees received from broadcasting companies. However, in cases where such satellite companies are situated outside India, the taxability of the transaction needs to be analyzed from the perspective of Place of Provision of Services Rules, 2012 (POPS Rules).
- Interestingly, a question was raised before the Court as regards VAT applicability on such transponder fees. The High Court held that since the agreement was entered into within Karnataka, there was a 'transfer of right to use goods', namely 'space segment capacity of the transponder' in a satellite, thereby, qualifying as 'deemed sale' and

liable to VAT. Thus, the issue again boils down to applicability of VAT vis-à-vis service tax on transponder fees.

Foreign telecasting companies

- A foreign broadcaster telecasting its channel in India is mandatorily required to appoint an Indian company as its representative in view of the guidelines issued by the Ministry of Information and Broadcasting.
- Such foreign broadcasters earn advertisement and subscription revenues from India. The Tribunal held the broadcaster (USA company) to have a dependent agent permanent establishment in India and, accordingly, considered its advertisement revenues taxable in India. Additionally, the matter was sent back to the Revenue authorities to examine whether subscription revenues are taxable as royalty.
- Taxability of foreign broadcasters has been a matter of litigation between the Revenue authorities and taxpayers in several cases. The decision mentioned above is the most recent development on this front.
- In such cases, another issue arises regarding the profits attributable to India in case the foreign broadcaster has a permanent establishment in India. Earlier based on a Circular issued by the CBDT, 10% of advertisement revenues of the foreign broadcaster (after reducing commission payments) were considered as taxable income in case such foreign broadcaster did not have a permanent establishment in India. This Circular was subsequently withdrawn in the year 2001.

Direct-to-home service

- Direct-to-home (DTH) service has two aspects – service aspect and entertainment aspect. There are two separate and distinct taxable events in respect of each of the two aspects.
- Service tax is payable on service aspect. Since DTH provides performances, films or programmes to viewers, the State Government also levies entertainment tax on such service. Thus, DTH service provider is also subject to dual taxation being service tax and entertainment tax leading to a dual tax burden upon the industry.

Set-top boxes

- Sale of set-top boxes has been a litigative matter as to whether consideration should be included in the service portion of DTH service or only VAT should be applicable as sale of goods.
- In some of the judicial decisions, the High Courts held that sale of set-top boxes should attract VAT and not service tax. There are also disputes

with regard to inclusion of set-top box value for the purpose of entertainment tax levy.

- In the recent Union Budget 2016-17, customs duty on digital head-ends and set-top boxes is reduced to 10%. This is a positive development for DTH and cable operators and could lead to reduction in prices of set-top boxes.

Entertainment tax

- In most of the States in India, cable operators are liable to pay entertainment tax and questions were raised as to whether such tax paid is to be included in the value of taxable service for the purpose of discharging service tax liability.
- The Central Board of Excise and Customs (CBEC) has clarified that entertainment tax collected and paid to the Government would not be included in the value of taxable service, provided the cable operator indicates the entertainment tax element on the bill raised upon the customer.



Foreign news agencies/newspapers

- Foreign news agency or newspaper/magazine/journal houses typically have a presence in India to facilitate collection of news from India.
- Income of such foreign news agency or newspaper/magazine/journal houses should not be taxable in India

with respect to activities confined to collection of news and views in India for transmission out of India based on an exemption under the domestic tax laws.

- From a tax risk management perspective, it is of utmost importance that the activities in India of such foreign news agency or





Films

Indian films shot overseas

- It is common for Indian films to be shot in overseas jurisdictions (partly or fully). Typically, in such cases the Indian producer contracts with a line producer in the respective jurisdiction to assist with the shooting and the film producer pays line producer fees.
- The Revenue authorities have taken a position that such line producer fees amount to fees for technical services and taxes should be withheld by the Indian producer on such payments.
- The Tribunal and the Authority for Advance Rulings have held that line producer fees are not in the nature of fees for technical services and, accordingly, taxes are not required to be withheld on such payments.
- It may be noted that the taxability/withholding tax applicability on line producer fees should be evaluated based on the contractual terms (i.e. role/responsibilities) agreed and documented between the parties.
- Payment of line producer fees would also need to be examined from a service tax perspective (implications under reverse charge mechanism for the film producer) depending upon the nature of service and POPS Rules.

Foreign films shot in India

In recent times, the Indian Government is making efforts to promote India as a filming destination. Films such as 'Million Dollar Arm', 'Zero Dark 30', and 'A Mighty Heart' have been shot in India. In

connection with film shooting in India, tax implications should be evaluated for film producers/studios, actors (in front of the camera) and crew (behind the camera).

- Foreign film producers/studios²: Income of foreign producers should not be taxable in India in respect of operations confined to shooting of a film in India for transmission out of India based on an exemption under the domestic tax laws.
- Foreign actors: Taxability of foreign actors are covered under Article 17 of tax treaties (Taxation of entertainers and sportsperson). Income from personal activities, as such, performed in India (i.e. performance in India) should be taxable in India irrespective of whether or not such actor is an employee. In case performance income of such actor accrues not to the actor but to another person/entity, such income should still be taxable in India [Article 17(2)]. This is an anti-avoidance measure included in tax treaties.
- Foreign crew would include behind the scene technicians. Taxability of their income should be evaluated based on criteria such as nature of services, legal form of entity, presence/period of stay in India, relevant tax treaty provisions.

Based on the above, the foreign film producers/studios are required to undertake Indian tax compliances (such as withholding tax on payments) and contractual arrangements should be structured appropriately to avoid/mitigate tax risks.

Customs duty on filming equipment

- The Admission Temporaire/Temporary Admission (ATA) Carnet permits duty-free temporary admission of goods into a member country. The list of exempted products includes filming equipment. However, there is no corresponding customs notification granting exemption on import of filming equipment on lines of ATA Carnet.
- Film production equipment is very expensive and is not easily available in all countries, thereby compelling the film producers to import them on temporary basis on lease for the purpose of producing the film. Customs duty cost significantly increases burden of tax on film producers.

Film co-productions

At times, a film is co-produced by two or more parties. In such a situation, one should evaluate the issue of association of persons (AOP). The implication of being treated as an AOP is that this is considered a separate entity for tax purposes. The term "AOP" has not been defined under the tax laws. The CBDT has recently clarified³ in the context of engineering, procurement and construction contracts/turnkey contracts that an arrangement with the following attributes would 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 profits/incurs losses based on performance within its scope of work⁴
- 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.

Though the above Circular is issued in the context of turnkey contracts, the guidance should be considered while structuring film co-productions. There may be additional factors/aspects that should be considered for this issue based on the factual matrix of each case.

Film distribution rights

- Film distribution typically involves grant of license i.e. film distribution rights. The film intellectual property continues to be owned by the film producer under this model.
- The definition of royalty under the domestic tax laws includes consideration for transfer of all or any rights (including grant of license) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films.
- On a reading of the above definition, one would observe that consideration for "sale, distribution or exhibition" of "cinematographic films" is excluded from the royalty definition.
- The key issues are as follows: first, what constitutes a "cinematographic film", and second, whether license of distribution rights amounts to "sale, distribution or exhibition" for the purpose of the above exclusion. There are decisions of the High Court and the Tribunals on this issue – most of these decisions are in favour of the taxpayer, dealing with the exclusion to royalty definition (i.e. sale, distribution or exhibition).

2. Individual not citizen of India, firm which does not have any partner citizen/resident of India, company which does not have any shareholder citizen/resident of India

3. Circular does not apply to related parties

4. Members may contract price at gross-level only to facilitate billing convenience



- At times, a comprehensive agreement is entered into covering various modes of film distribution for a lump sum consideration. It may be advisable for taxpayers to bifurcate the consideration for various distribution rights from a tax risk management perspective.

Indirect tax on film distribution rights

- Temporary transfer or permitting use or enjoyment of any IPR is liable to service tax. Grant of license for theatrical release of film is exempted from service tax, whereas grant of license of non-theatrical right being television right, internet right, etc. by producers attracts service tax.
- IPR such as trademarks, copyrights are typically treated as 'goods' under the State VAT legislations and therefore their transfer/license of distribution rights attracts VAT.
- The above results in dual taxation and further exempt income may entail significant reversals of cenvat credit adding cost to the business.
- Also, typically VAT paid on licensing of IPR is not available as credit to the licensee under the State VAT laws, making it more expensive for business.

Exhibition of films

- Producers, distributors, sub-distributors, exhibitors of films enter into different kinds of arrangements in relation to exhibition of movies. These arrangements are either entered into on a principal-to-principal basis (where films are exhibited by the exhibitor on his/her own account) or on behalf of the distributor/sub-distributor/producer, or on a revenue sharing basis.
- CBEC has clarified that levy of service tax would not depend on the nature of

such arrangements, but on the nature of transaction involved. As a result, it has been clarified that service tax would be applicable on exhibition of films by the exhibitor, whether on a principal-to-principal basis or on behalf of the distributor/sub-distributor/producer or on revenue sharing basis.

Film incentives

- Governments of certain countries offer grants/subsidies (film incentives) for shooting of films in that country. The issue which arises is regarding the tax treatment of such grants/subsidies i.e. whether grants/subsidies should be considered as income or reduced from cost of production of the film.
- The cost of production has to be reduced by subsidy received by the film producer under any scheme from the Government as per the Rules. One needs to consider whether the term "Government" in the Rules includes foreign governments also.
- If this is not the case, considering the specific nature of rebate (which would be based on evaluation of such film incentive scheme), an issue arises that whether one may still reduce this from the cost of production.
- For the purpose of service tax, any subsidy or grant disbursed by the Government cannot form part of the value of taxable service, unless such subsidy or grant directly influences the value of such service.

Deduction for cost of production of films

- Rules 9A and 9B deal with deduction of expenditure for production of films. Said Rules refer to exhibition of films on a commercial basis and are silent on the modes of such exhibition.



- The Tribunals have held that modes of exhibition should not be limited to theatrical but include other modes such as television.
- With the growth of digital business and advent of new revenue streams, this is an important issue which the film industry is grappling with.

Abandoned films

- Deduction of cost of production of films certified for release by the Board of Film Censors is available as per Rule 9A. In case of films abandoned, a certificate for release from the Board of Film Censors is not received.
- The CBDT has clarified that cost of production of abandoned films should be treated as a revenue expenditure and deduction allowed under Section 37 of the Income-tax Act, 1961 (Act) i.e. general business expenditure

Post-production fees

- At times, post-production work including VFX is outsourced to a foreign company and the Indian film producer pays post-production fees to such foreign company.
- The issue which arises in such cases is whether such post-production fees amounts to fees for technical services under the relevant tax treaty/domestic tax laws and accordingly triggering withholding tax applicability.
- This would depend upon the specific services provided, documentation of the same in the contract, and the relevant tax treaty provisions as regards the provisions of fees for technical services.

Post-production in India

- India is increasingly becoming the outsourced post-production service provider to many foreign film producers.

Generally, the content is temporarily imported into India for carrying out post-production activity. On completion of such activity, the processed content is re-exported for its use outside India.

- On import of the content in tangible media, customs duty becomes payable and service tax is applicable on the value of post-production services rendered. This is contrary to other back-office service activities carried out in India where export benefit is provided, thereby making Indian post-production sector less competitive.

Tax clearance certificate

- Individuals (e.g., foreign film actors), not domiciled in India, who visit India for purposes of business/profession and earn income from a source in India, are required to obtain a tax clearance certificate from the Revenue authorities before departing India.

Film producer filings

- A film producer is required to furnish a prescribed statement (Form No 52A) outlining the details of expenses incurred. Such statement is required to be submitted per film per year within 30 days from the end of the financial year or completion of film, whichever is earlier.
- It may be noted that the term “film producer” has not been defined under the tax laws and this issue is aggravated by the new business models. Considering this, a clarification from the Government is required.

Indirect tax challenges faced by film industry

- The film industry is subjected to multiple taxes at various points in its supply chain, without availability of credit in most cases.

- Various transactions/activities attract different types of indirect taxes. In most cases, taxes paid on procurements are not available as credit while paying taxes on the revenues. For instance, service tax (levied by Central Government) charged by technicians to the producer is not available as credit while making payment of VAT (levied by State Government) on grant of distribution rights by the producer.

- Similarly, VAT/service tax charged to the distributors on their costs is not available as credit against entertainment tax liability of the distributor/exhibitor. Without adequate service tax liability, producers are not able to utilize the service tax credit charged by such artists, resulting in tax cascading and increase in cost of film production.

Advertising

Equalisation levy

- An equalisation levy of 6% is introduced in respect of online advertisement and digital advertising space (or any other facility or service for the purpose of online advertisement) payments to non-residents, who do not have a permanent establishment in India. This levy is to be deposited by resident payers and non-residents payers having a permanent establishment in India.
- Equalisation levy is applicable if the aggregate amount payable to the non-resident exceeds INR 100,000 in a year. The corresponding income would be exempt from income-tax in the hands of such non-resident in India.
- Equalisation levy is applicable for services provided from 1 June 2016 onwards. There may be transitioning issues to be dealt with (e.g. advance received before 1 June) and the non-residents may have a challenge claiming tax credit for such equalisation

levy in the home country.

- There is also a question with regard to inclusion of value of equalisation levy paid for the purpose of discharging service tax liability since service tax is payable on the gross amount charged for the purpose of rendering services.

Depreciation on hoardings

- Out of home (OOH) players earn revenues from providing hoarding sites to advertisers. The issue in this context is whether such hoardings should be considered as buildings (depreciation rate is 10%) or considered as plant and machinery (depreciation rate is 15%) for purposes of depreciation.
- The Tribunal held that hoarding structures are permanent structures embedded in the building and it cannot be said that hoarding structures are tools or apparatus with which the taxpayer is carrying on business; rather, these hoarding structures are building.





- It is recommended that the Government clarifies the above characterization issue for depreciation purposes considering this is only a timing difference.

Valuation of advertising services

- It is an accepted practice in advertising agency business to pay the bills of advertisers such as television channels, cinema house for those released in the respective media and subsequently recover the same from the customers while raising the bill.
- The amount included in the bill raised by the advertising agency on the customer which is in addition to the service fees charged is towards the reimbursement of expenses actually paid by the advertising agency to the media house.

- The advertising agencies have been discharging service tax on the service fees and claim a deduction of the reimbursement amount being the amount actually recovered (without any markup) from their clients.
- The Revenue authorities have argued that the advertising agency does not satisfy the conditions of pure agent and hence, the entire amount received from the client (including the reimbursement amount) should also attract service tax.
- The Tribunal has upheld Revenue's contention above, levying service tax on the entire amount and, thus, this aspect is prone to litigation.

Advertising on television channels/ print

- As discussed earlier under broadcast and print section.

Sports

Sports events in India

In the recent past, several prestigious global sports events have been held in India, e.g, Formula One racing, ICC Cricket World Cup. In connection with sports events held in India, tax implications should be evaluated for the following⁵:

- Foreign commercial rights holder
- Foreign teams⁶
- Foreign sportspersons
- Foreign crew

Taxability of sportspersons is covered under Article 17 of tax treaties (Taxation of entertainers and sportsperson). The income from personal activities of sportsperson, as such, performed in India (i.e. performance in India) should be taxable in India irrespective of whether or not such sportsperson is an employee [Article 17(1)]. In case performance income of such sportsperson accrues not to such sportsperson but to another person/entity, such income should still be taxable in India [Article 17(2)]. This is an anti-avoidance provision part of tax treaties.

There are several complexities/issues in the context of taxability of revenue streams of players (e.g. whether training fees should be taxable and in which situations should training fees be taxable, taxability of image rights), attribution of income (e.g. if sports event is held in more than one jurisdiction) in case of sportsperson.

Taxability of crew should be evaluated based on criteria such as nature of

services/contractual relationship, legal form of entity or individual, presence/ period of stay in India, relevant tax treaty provisions.

Based on such evaluation, the Indian tax compliances such as withholding tax on payments have to be undertaken and contractual arrangements structured appropriately to avoid/mitigate tax risks in India.

Another issue which should be evaluated in case of sports events held in India is whether an event, as such, could constitute a permanent establishment/ business connection in India leading to tax implications for foreign companies. This issue has been examined by the Authority for Advance Rulings and the key conclusions have been outlined below:

- The sports field can be regarded as a place of business.
- The sports field was at the disposal of the organizer of such sports event.
- Having regard to the special nature of business activity, duration of business operations need not be for a long period and no hard and fast rule can be laid down as to the number of days which impart a degree of permanence to place of business.
- On the basis of a solitary and isolated activity, the organizer should not have a permanent establishment in India. However, the course of events in the future may lead to a different view.

Essentially whether an event in India should constitute a permanent

⁵. An Indian resident is taxable on its global income; accordingly only non-resident taxation considered in this point

⁶. The High Court had held that amounts paid to a foreign team for participation in a match in India as prize money should be taxable in India

establishment requires an evaluation of the fact pattern along with application of international tax principles.

To sum-up, tax analysis in respect of sports events is extremely complex and internationally very limited guidance/ precedents are available.

Taxability of sponsorship fees

- Sponsorship fees is one of the key revenue streams for sports bodies/teams/players. Sponsorship arrangements include title/event sponsorship, team sponsorship, personal sponsorship of players, venue advertising etc.
- In case of overseas sponsorship fee payments, the Revenue authorities have taken a position that the same is in the nature of royalty (which is subject to withholding tax) while the taxpayers contend that sponsorship fees are business income and not subject to withholding tax in the absence of a permanent establishment in India.
- On this issue, there are decisions upholding the taxpayers' contention that sponsorships are essentially in the nature of advertising contracts (as clarified by the CBDT in the context of withholding tax on domestic payments) and do not fall within the purview of royalty as per the domestic tax laws or tax treaty.
- With the increased prominence on sports events/sports leagues in India, it is recommended that the CBDT issues a clarification outlining the withholding tax position in respect of overseas sponsorship fee payments including if the sports event is held in India.

Indirect tax impact on sponsorship fees

- Normally, service provider is liable to pay service tax to the Government, however, where sponsorship service is provided to body corporate or partnership firm located in taxable territory, liability to pay service tax arises on such service recipient under reverse charge mechanism.
- Sponsorship services, except when provided to sporting events organized by specified organizations, are covered under levy of service tax.
- Clarification is required on definition of sponsorship service in order to determine service tax liability under reverse charge on such services.
- Brand promotion service provided under a contract for promotion or marketing of a brand of goods, service, event or endorsement of name, including a tradename, logo or housemark of a business entity by appearing in advertisement and promotional event or carrying out any promotion activity for such goods is liable to service tax.
- Exemption is granted to an individual providing services as player, referee, umpire, coach or manager for participation in tournament or championship only when the event is organized by recognized sports body (defined under law). Thus, organizers of sports events are burdened with additional service tax cost on various other services availed, given their output revenue stream is outside the purview of service tax.

Live coverage

- Broadcasters acquire the broadcasting rights (including for live coverage) in respect of sports events from sports bodies/commercial rights holders. In such cases, the Revenue authorities have taken a position that payments for live coverage are for a copyright and are accordingly subject to withholding tax as royalty.
- There are decisions upholding the taxpayer's position that live rights do not amount to copyright and, hence, are not in the nature of royalty under the domestic tax laws/tax treaty. It is recommended that the CBDT issues a clarification outlining that live rights do not constitute royalty as the same is not a copyright, to avoid further litigation.
- Recently, the Supreme Court held the activity of producing audio-visual coverage of matches held in India by

non-resident service providers would be liable for service tax and sporting bodies are required to discharge service tax liability under reverse charge mechanism on the same.

Sports leagues

- The advent of sports leagues in India has thrown-up newer aspects to be considered such as tax treatment for franchise fee payments. With the growing interest in this sub-sector, one should closely focus on tax issues and structuring related aspects

Tax clearance certificate

- Individuals (e.g. sportsperson), not domiciled in India, who visit India for purposes of business/profession and earn income from a source in India, are required to obtain a tax clearance certificate from the Revenue authorities before departing India.

New media

The growth of digital economy has given rise to emergence of new business models e.g., app stores, cloud computing. In such cases, the link or connection between revenue generating activities and geographical location is more obscured as compared to the past wherein a geographical connection with economic activity entailed taxation in the said jurisdiction. Digital economy poses challenges for the application of the existing international tax laws/framework. In this connection, some of the key issues to be examined are as follows:

- Existence of business presence/nexus with a jurisdiction
- Accrual/source of income
- Characterization of income

In India, there has been tax litigation on account of taxability of overseas payments for digital transactions such as web hosting, data processing, data access/subscription, software maintenance, online advertisements, online shopping.

Online content

- Service provided by any person in relation to development and supply of content for use in telecommunication service, advertising agency service, online information service, broadcasting service etc. is liable to service tax.
- Applicability of indirect tax on delivery of content online has been a subject matter of litigation. The question of 'transfer of right to use' comes into picture leading to the continuing dispute of dual taxation and

unwarranted litigation.

- Taxability of software/solutions/cloud has been a litigative area because of difficulty in classification as goods or services, due to inherent nature of intangibility, transfer of use, license, etc. Export benefits are not available on providing access or enabling download of any data/information, if user is abroad. While few States have provisions for taxing digital content, in other States, there continues to be ambiguity on applicability of entertainment tax.

Live events

In respect of events held in India by overseas entertainers (e.g. musicians), the tax implications should be examined, inter alia, for the foreign entertainers and the foreign crew.

- Foreign entertainers: Taxability of entertainers is covered under Article 17 of tax treaties (Taxation of entertainers and sportsperson). The income from personal activities, as such, of entertainers who have performed in India should be taxable irrespective of whether or not such entertainer is an employee. In case performance income accrues not to such entertainer but to another person/entity, such income should still be taxable in India [Article 17(2)]. This is an anti-avoidance provision part of tax treaties.

- Foreign crew would include behind the scene technicians. Taxability of their income should be evaluated based on criteria such as nature of services, legal form of entity or individual, presence/period of stay in India, relevant tax treaty provisions.

Based on the above evaluation, the Indian tax compliances (such as withholding tax on payments) should be undertaken and contractual arrangements structured appropriately to avoid/mitigate tax risks.

Admission to entertainment events

- Service by way of admission, *inter alia*, to exhibition of cinematographic film, circus, dance or theatrical performance

including drama or ballet is exempt from service tax.

- Service tax is payable when the consideration for admission to entertainment events such as award function, concert, pageant, musical performance or any sporting event other than recognised sporting event is more than INR 500 per person.
- However, the said payment for admission to any event is already liable to a high rate of State entertainment tax and an additional levy of service tax thereon imposes a significant burden on business.

Tax clearance certificate

- Individuals (e.g. entertainers), not domiciled in India, who visit India for purposes of business/profession and earn income from a source in India, are required to obtain a tax clearance certificate from the Revenue authorities before departing India.

Music

Music rights

- Deductibility of acquisition/license cost of music rights has been an issue in litigation. The taxpayers claim such cost as a revenue expenditure deductible in the first year or over the license period, while the Revenue authorities typically adopt a position that such acquisition/license costs are an intangible asset entitled to depreciation at 25%.
- The High Court and Tribunal decisions have upheld the taxpayer's claim of deductibility of music rights as a revenue expenditure. In this



connection, it is recommended that the Government issues a clarification regarding the tax treatment of music rights to reduce litigation.

- Acquisition of temporary music rights attracts service tax (except for temporary transfer of a copyright relating to original music, being exempt from service tax).
- Acquisition of permanent right attracts VAT under the State VAT legislations, since various State laws have notified IPRs as goods and liable to VAT.



Radio

License fees

- Radio operators are required to pay license fees – one time entry license fee and annual recurring license fee to the Government. The issue under debate is regarding allowability of such license fees whether deductible in the year it is incurred (or over the license period in case of one time entry fee) or such license fees should be considered as an intangible asset on which depreciation is allowable.
- It is recommended that the Government issues a clarification regarding the tax treatment of music rights to reduce litigation and bring clarity.

Radio frequency spectrum

- Service tax is levied on value of all services, other than those specified in the negative list, to be provided in taxable territory by one person to another. Services provided by radio operators are not covered under

the negative list or the exemption notification and are liable to service tax.

- In the Union Budget 2016-17, the right to use radio-frequency spectrum and subsequent transfers are being made taxable as declared services.

Additional depreciation

- Additional depreciation of 20% is allowed to taxpayers engaged, inter alia, in the business of manufacture or production of an article or thing. The issue which arises is whether additional depreciation is allowable to radio operators producing programmes.
- The High Court has upheld the allowance of additional depreciation to the taxpayer on the premise that the radio programme made is a thing (i.e. intangible asset).

Advertising on radio

- As discussed earlier under broadcast section.



Indirect tax cess

Swachh Bharat Cess

- Government notified levy of Swachh Bharat Cess (SBC) at 0.5% on all taxable services last year to be effective from 15 November 2015. Hence, service tax rate including Swachh Bharat cess became 14.5%.

- However, CENVAT Credit Rules, 2004 have not been amended to provide for credit of SBC. This accentuates the tax burden of doing business.

Krishi Kalyan Cess

- The Union Budget 2016-17 has introduced Krishi Kalyan cess (KKC) applicable at 0.5% on value of taxable

services (effective 1 June 2016), which has made the effective service tax rate at 15%.



Transfer pricing

- Royalty paid to associated enterprises (AE) for licensing distribution rights, use of brand name etc. is aggressively scrutinized by the Revenue authorities. The onus is on the taxpayer to substantiate that the licensing rights obtained benefits the payer and ultimately, meets the arm's length principle.
- Transfer pricing considerations are also relevant in cases where a media group is providing services not only pertaining to advertising agency but also content development. It is not unusual for these activities to be housed under different companies within the same group. To the extent any inter-company payments are involved, such transactions would need to meet the arm's length principle.
- In case any content is being developed or localised for a third-party in India where the AE of the Indian content developer is also involved, the nature and degree of involvement of the AE vis-à-vis the third party needs to be examined to ascertain whether such transaction with the third-party is a 'deemed international transaction' as

these transactions would then have to meet the Indian transfer pricing compliance requirements.

- The advertising agency recovers payments from its clients on a cost-to-cost basis and typically treats these payments as pass-through in nature. While the advertising agency records its revenue only on a net basis (i.e. gross billing less pass-through payments for advertisements), the Revenue authorities may still consider these payments in computing the margin of the advertising agency. This approach lowers the margin figure computed for the advertising agency which may lead to adverse transfer pricing adjustments.
- There is some guidance available on the above issue under the Organisation for Economic Co-operation and Development Transfer Pricing Guidelines as per which the advertising agency should be remunerated appropriately for its agency function rather than for the performance of services themselves. This view has also been upheld at the Tribunal level.



Concluding thoughts

The Media and entertainment industry in India is poised for growth at a fast pace. Penetration of smartphones and the 'Digital India' initiative have led to a spurt of activities in the digital sector. While the growth track is impressive, a number of challenges are posed before the industry.

Key challenges faced by the Media and entertainment industry from a tax perspective include the following aspects:

- Improving the effective tax rate
- Managing tax risks
- Implications for cross-border transactions
- Cash-blockage on account of high withholding tax rate
- Benchmarking of intellectual property/ content transactions
- Multiplicity of indirect taxes.

The biggest ask of the industry is the introduction of GST regime in India, which now seems is not far from reality, with the introduction of Model GST law, being made available to public by the Ministry of Finance in June 2016. There are many transactions where the input taxes paid are not available as credit and are regarded as tax cost. Likewise, many transactions attract dual tax levies, because of the peculiar federal structure of indirect taxes in India. GST, to be implemented possibly, may address this issue of cascading and dual taxation impact.

In addition to the above, base erosion and profit shifting, place of effective management and income computation and disclosure standards pose new challenges for players in the Media and entertainment industry.



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