

Indian agent procuring ad air time for National Geographic & Fox Channel held as agency PE of foreign Co.

Summary – The Mumbai ITAT in a recent case of NGC Network Asia LLC., (the Assessee) held that Agent of US based company procuring advertisement airtime for National Geographic Channel and Fox International Channel held as its agency PE in India. Thus, profits attributable to PE of foreign company on sale of advertisement airtime were taxable in India.

Facts

- (a) NGC Network Asia LLC ('NGC Asia'), a US based company, was engaged in broadcasting of National Geographic channel and Fox International Channel.
- (b) It had sold the entire 'advertisement air time' of its channels for a lump sum consideration to its associated enterprise in India, namely, NGC Network (India) Private Limited ('NGC India').
- (c) Assessee was of the view that income received by it from sale of 'advertisement air time' was not taxable in India as 'advertisement air time' would amount to 'goods' which was transferred to NGC India on principal to principal basis. Therefore, NGC India could not be treated as its PE in India and, accordingly, business income from selling of 'advertisement air time' could not be taxed in India.
- (d) However, Assessing officer ('AO') considered NGC India as the 'dependent agent PE' of assessee. Further, he was of the view that "advertisement air time" could not be considered to be "goods".

The Tribunal held in favour of revenue as under:

- (1) One of the main characteristics of "goods" is that it should be capable of being "consumed" or "used" independently by the buyer thereof. In the instant case, what was transferred was the "right to procure advertisements" for particular "airtime". Hence, though the 'advertisement air time' might be capable of being transferred, but the same could not be consumed/used by the buyer without the assistance from the assessee by way of telecasting the same in the television channels.
- (2) Thus, the concept of purchase and sale of goods, could not be applied to the facts of the instant case. Accordingly, NGC India was only enabling the assessee to procure the advertisements for telecasting them and, hence, the NGC India could not be considered as selling advertisement airtime independent of the assessee. Hence, NGC India could not be considered to be "an independent principal/agent" of assessee.

- (3) Further, NGC India habitually exercises in India an authority to conclude contracts on behalf of the assessee and the same would be binding on the assessee, since it had agreed to broadcast the advertisements procured by NGC India.
- (4) Thus, NGC India should be classified as "dependent agent" of the assessee in terms of Article 5(4)(a) of the India-US DTAA and, accordingly, business income from selling of 'advertisement air time' had to be attributed to assessee's PE in India.