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Global Tax Insights

Editorial

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The United Nations has released the 2017 update of the Model Double Taxation Convention between Developed and Developing Countries; this introduces Article 12A on 'fees for technical services', which is absent from the OECD convention. The 2017 update incorporates key aspects of the BEPS project and also includes a new general anti-abuse rule in Article 29(9). The UN Committee stated that '[the new rule], together with the specific anti-abuse rules included in tax treaties, is intended to prevent transactions and arrangements from being granted treaty benefits in circumstances where granting such benefits would be contrary to the object and purpose of the Model Convention'. Furthermore, Article 4 has been modified to include a new tie-breaker rule for determining the treaty residence of dual-resident persons other than individuals, and Article 5 has been modified to prevent the avoidance of permanent establishment status.

The OECD recently released additional guidance on the attribution of profits to a PE under BEPS Action 7, taking account of stakeholder comments received on the discussion drafts issued in 2016 and 2017. The additional guidance sets out high-level general principles for the attribution of profits to PEs arising under Article 5(5) and includes examples of a commissionaire structure for the sale of goods, an online advertising sales structure, and a procurement structure. The Report also includes additional guidance related to PEs created as a result of the changes to Article 5(4), and provides an example on the attribution of profits to PEs arising from the anti-fragmentation rule included in Article 5(4.1).

With all these changes happening at the international tax front, the questions that arise are: Is the avenue for tax planning finished? Will every structure that has been planned to mitigate tax be viewed microscopically to examine whether it is tax avoidance? My sense is that structures will continue to evolve, and litigation will keep increasing; this debate of tax planning and tax avoidance is eternal!

I express my gratitude to all the member firms that have contributed to this edition of the newsletter. I sincerely hope that the contents are useful to members and their clients. Feedback and suggestions are always welcome. You may email your suggestions at sachin.vasudeva@scvindia.com

Sachin Vasudeva

Country Focus

ISRAEL

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Real Estate Taxation: Exemption from tax on the sale of a single residential apartment to a foreign resident

According to the Real Estate Tax Law, with effect from 1 January 2018 a person who sells their only residential apartment is exempt from tax (subject to a maximum of NIS 4.5 million). Also, if a person had more than one apartment on 1 January 2014 and today has only one (e.g. sold all their other apartments in the linear tax exemption period between 1 January 2014 and 31 December 2017), they may request a full exemption from tax on the sale of the remaining one (up to NIS 4.5 million).

This exemption applies to Israeli residents and foreign residents who own no residential apartment in their country of origin. The law assumes that a foreign resident owns a residential apartment in the country they come from, unless they supply an authorisation from the tax authorities of their country that they do not own a property there.

It is not easy for non-residents to produce such a permit from the tax authorities in their country of residence: currently, only a few tax authorities (e.g. Russia and Belgium in certain cases) provide approval for 'single apartment ownership'. The foreign resident from countries that do issue such permits must present this, and an affidavit or other documents will not suffice.

In other cases, the Israeli tax authorities will accept other objective proofs from the foreign resident who claims not to own a residential apartment in their residence country, or alternatively tax reports from their country of origin, indicating that they have no rental income and with an affidavit verified by an attorney that they do not own a residential apartment in that country.

"The law assumes that a foreign resident owns a residential apartment in the country they come from, unless they supply an authorisation from the tax authorities of their country that they do not own a property there"

Country Focus

INDIA

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Levy of GST on duty-free shops at international airports

The Delhi Bench of the Authority for Advance Ruling under GST, on an application by Rod Retail (P.) Ltd, vide Advance Ruling No. 01/DAAR/2018, has held that the applicant is required to pay GST on supply of goods from their retail outlet situated in the security hold area (duty-free shops) of Terminal 3 of Indira Gandhi International (IGI) Airport, New Delhi, to international passengers going abroad.

Facts of the case

- The applicant, M/s Rod Retail (P.) Ltd, was a private limited company engaged in the business of retail sale of sunglasses. The applicant had several retail outlets in Delhi, one of which is at Terminal 3 (International Departures), IGI Airport.
- As a standard rule, every international airport has a 'land side' and an 'air side'. The land-side area comprises check-in counters and baggage drops; the air-side area has aircrafts for boarding. A passenger crosses over from land side to air side by passing through the Customs and Immigration area, then through security to the boarding gates for departure. It is in this security hold area that the applicant's retail outlet is situated.
- The applicant supplied goods only to passengers with a valid international boarding pass and denied supply of goods to domestic passengers travelling to a domestic destination on a transit international flight.

Issue before the Authority

Whether the supply of sunglasses from the retail outlet of the applicant at Terminal 3, IGI Airport (International Departures), New Delhi, to outbound international passengers against the international boarding pass is liable to SGST under the DGST Act, 2017 and CGST under the CGST Act, 2017 or is a zero-rated 'export' supply within the meaning of Section 2(23) read with Section 2(5) of the IGST Act, 2017.

Applicant's contention

The retail outlet, although geographically within India, is located beyond the customs border and therefore falls outside the territory of India.

The definition of 'export of goods' under Section 2(5) of the IGST Act reveals that it has two limbs: (i) taking goods out of India (ii) to a place outside India. In the present transaction, when the goods are brought into its retail outlet, they do so by crossing the customs frontiers of India (from the land side to the air side of the airport, by going through Customs and Immigration and into the security hold area where the outlet is located); this satisfies the first limb of the definition of the 'export of goods' – taking goods out of India. When the goods are supplied to international passengers from the retail outlet against the international boarding pass, the second limb of the definition of 'export of goods' is also satisfied, as the boarding pass indicates that the passengers are travelling to a destination outside India.

In view of the above, the supply of goods to international passengers is a zero-rated transaction, being 'export sale' within the meaning of exports under Section 2(5) of the IGST Act 2017 and accordingly, GST cannot be levied.

Authority's ruling

The Authority observed that 'export of goods' has been defined under Section 2(5) of the IGST Act, 2017 as taking goods out of India to a place outside India. 'India' is defined under Section 2(56) of the CGST Act as 'India means the territory of India as referred to in Article 1 of the Constitution, its territorial waters, seabed and sub-soil underlying such waters, continental shelf, exclusive economic zone or any other maritime zone as referred to in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, and the air space above its territory and territorial waters'. Hence, when goods are exported by air, the export will be completed only when goods leave the airspace limits or territorial waters of India. The goods cannot be called 'exported' merely for having passed through the customs frontiers.

The Authority also observed that the Supreme Court of India, in the case of *Collector of Customs, Calcutta v. Sun Industries* (1988), held that under Section 2(18) of the Customs Act, 1962, the export of goods out of India was completed when the ship had passed beyond the territorial waters of India. Since the definition of 'export' under Section 2(18) of the Customs Act, 1962 and the definition under Section 2(5) of the IGST Act, 2017 are identical, the rationale of judgment of the Supreme Court of India in the above-mentioned case clearly also applies in the present. Accordingly, the supply of goods beyond the customs frontiers of India would not constitute export of goods.

In view of the above, the Authority held that the supply of goods to international passengers going abroad by the applicant from their retail outlet situated in the security hold area of Terminal 3 of IGI Airport, New Delhi may be taking place beyond the customs frontiers of India as defined under Section 2(4) of the IGST Act, 2017; however, the said outlet is not outside India, as claimed by the applicant, but within the territory of India as defined under Section 2(56) of the CGST Act, 2017 and Section 2(27) of the Customs Act, 1962. Hence, the applicant is not taking goods out of India and their supply cannot be called 'export' under Section 2(5) of the IGST Act, 2017 or 'zero-rated supply' under Section 2(23) and Section 16(1) of the IGST Act, 2017. Accordingly, the applicant is required to pay GST at the applicable rates.

Editorial Comments:

The ruling given by the Authority is based on the premise that goods can be said to be exported only when goods are taken out of India to a place outside India; they cannot be called 'exported' as soon as they cross the customs frontiers.

In the context of high sea sales, the Board (in Circular 33/2017-Cus of 1 August 2017) has clarified that for imported goods, IGST would be levied and collected only once, at the time of customs clearance by the last buyer in the chain of high sea sales; accordingly, no GST shall be levied on intermittent high sea sales (whether one or multiple) of imported goods. Therefore, there seems to be a different yardstick for characterising export versus import sales beyond the customs frontiers of India.

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Country Focus

NEW ZEALAND

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Online shopping about to cost consumers more: GST will apply to most low-value imported goods from 1 October 2019

Currently, goods purchased from overseas are generally not subject to GST unless the total GST and duty payable on those goods is at least NZ$60. Where no duty is payable, this roughly translates to GST applying to goods costing a total of NZ$400 or more.

The days of being able to buy these low-value goods from overseas websites free of GST may, however, be coming to an end.

The government has released a discussion document, 'GST on Low-Value Imported Goods: An Offshore Supplier Registration System', which proposes requiring offshore suppliers to register and account for New Zealand GST on low-value goods that are sold to New Zealand consumers when the offshore supplier makes total supplies to New Zealand consumers in excess of NZ$60,000 in a 12-month period.

Referred to as the 'Amazon tax', it is very similar to the 'Netflix tax' that came into effect in October 2016 and compels suppliers of remote services to charge New Zealand GST if they make supplies to New Zealand consumers in excess of the NZ$60,000 GST registration threshold.

If the Amazon tax comes into effect:

- Offshore suppliers will be required to register, collect, and return GST on supplies of goods to New Zealand consumers if the value of the goods is NZ$400 or less.
- Goods valued at or below NZ$400 no longer be subject to tariffs and cost recovery charges.
- Imports of tobacco and alcohol will not be subject to the new rules. Instead, the current excise rules will apply.
- Special rules are proposed for a consignment of low-value goods that exceeds NZ$400 in total but arises under a 'single transaction'.
- GST on goods that cost more than NZ$400 will continue to be collected at the border by New Zealand Customs.
- Goods supplied to GST-registered businesses will be excluded unless the offshore supplier decides to zero-rate the supply. This allows offshore suppliers to claim costs associated with making business-to-business supplies.
- Offshore suppliers will be required to charge GST, unless the recipient has identified themselves as a GST-registered business or has provided their GST registration number or New Zealand business number.
- GST-registered recipients that purchase goods for non-taxable purposes may be required to account for GST on the goods (i.e. to be subject to a reverse charge of GST).
- Online marketplaces and re-deliverers of offshore goods into New Zealand may also be required to register and account for GST on low-value goods if the NZ$60,000 registration threshold is exceeded.
- Currently, a simplified 'pay only' registration (similar to the current registration for offshore suppliers subject to the 'Netflix tax') is proposed to reduce compliance costs for offshore suppliers.
- It is proposed that offshore suppliers of low-value goods file quarterly GST returns.

As the tax is being imposed on offshore suppliers, encouraging registration and voluntary

"The extension of GST to low-value items is conservatively estimated to raise an additional NZ$87 million in GST for the government"

compliance is crucial. However, if enforcement is required, then Inland Revenue have noted that:

- The penalties and use-of-money interest rules that currently apply to taxpayers are also applicable to offshore suppliers. The existing penalties regime can also be applied to consumers that falsely represent themselves as a business to avoid paying GST.
- To collect any unpaid tax or penalties, New Zealand has international agreements with a number of jurisdictions (including with major trading partners) that allow New Zealand to seek the assistance of the tax authority of the foreign jurisdiction in which the non-complying offshore supplier is resident, to collect GST and any penalties and use-of-money interest imposed.
- It is proposed that the rules will also provide Inland Revenue with discretion to require a consumer to register and pay the GST that should have been returned.
- Finally, further measures to bolster compliance will be explored, including a joint registration system with other countries such as Australia, or data-matching programmes with other tax jurisdictions or government agencies; this is likely to require information sharing with other tax jurisdictions such as Australia, as well as with government entities such as New Zealand Customs.

If the proposals proceed, it is likely that offshore sellers of low-value goods will pass on the additional GST cost to consumers. This will make buying goods from offshore retailers more expensive, in line with the intention to level the playing field for local retailers who have long campaigned for equal tax treatment with offshore retailers.

The extension of GST to low-value items is conservatively estimated to raise an additional NZ$87 million in GST for the government. In reality, this is likely to be much more, given that the Netflix tax was proposed to bring in an additional NZ$40 million annually and has in fact brought in NZ$162 million since coming into effect on 1 October 2016.

The extension will also bring New Zealand in line with other countries: Australia and Switzerland are introducing similar rules from 1 July 2018 and 1 January 2019, respectively, and the EU has announced plans to implement a similar system for the collection of VAT by 2021.

Submissions on the discussion document close on 29 June 2018, with draft legislation expected to be introduced by November 2018. **If enacted, the new rules will apply from 1 October 2019, giving affected parties about 10 months to make any necessary business systems and contract changes.**

Country Focus

UK

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Employment status

Determining whether an individual should be treated as employed or self-employed for UK tax purposes is not always straightforward.

There are, of course, many clear-cut cases. But there are individuals whose status is not immediately apparent. With increasing numbers of individuals adopting new types of working arrangements (e.g. through online platforms), more and more businesses are having to consider cases where the answer is not obvious.

The UK legislation relating to employment status is extremely limited. But over the years a substantial body of case law has built up, as the courts have looked at and given judgment on various types of working arrangements. This body of case law contains the various principles that need to be considered and applied in the more difficult employment status decisions.

One principle that has evolved from case law is that the following three characteristics must be present for an individual to be treated as an employee:

- There must be 'mutuality of obligation' (i.e. the employee must agree to provide work in consideration for the engaging business providing payment).
- The engaging business must have control over the individual.
- The individual must be required to provide personal service.

A range of other factors may need to be considered, such as the extent to which the individual takes financial risk, and whether they provide their own equipment.

In marginal cases, it can be difficult to arrive at a definitive conclusion about whether an individual is employed or self-employed. Indeed, in some cases, a business may never be completely satisfied that they have reached the right answer, or that their decision will go unchallenged in the future.

Where a business takes on an employee in the UK, the business must pay the employee's salary, plus employer's social security contributions (at 13.8%), and potentially pension contributions (of at least 2%) and the apprenticeship levy (at 0.5%). The business will have to process payments through a payroll scheme, withhold tax and social security contributions and pay these directly to HMRC, and ensure the employee benefits from certain statutory employment rights.

None of these issues arise when a business takes on a self-employed individual. Therefore, employment status decisions do have real and significant consequences.

Businesses clearly want to avoid wrongly treating an employee as if they were self-employed. To prevent this, some businesses simply refuse to engage with individuals on a self-employed basis; they either treat all individuals as employees, or else insist that individuals engage through their own personal service company (which puts the obligation to determine the nature of the relationship on the personal service company).

In 2016, the UK government commissioned the Taylor Review to look into 'modern working practices'. The resulting report was published in July 2017, and following on from this the government has recently published consultation documents into four aspects of the UK working environment, one of which is employment status.

"Greater certainty in the area of employment status would be warmly welcomed by all those who do business in the UK, and encouragingly this is now something that is firmly on the radar"

The government recognises some of the challenges that businesses face as a result of the current employment status rules. To increase clarity and certainty, they have suggested various possible new approaches, including:

- **Setting the current rules in legislation.** This approach would involve preparing a definitive list of all the current principles, setting these out in primary legislation, and then using secondary legislation (which could be updated regularly to take account of changes in work patterns as they emerge) to provide greater detail as to what the various principles mean in practice.
- **Creating a new 'precise test' to determine employment status.** This test would be based as far as possible on objective criteria, which could include things such as the length of the engagement, and the percentage of the individual's income that is expected to derive from the engager.
- **Creating a 'simpler test'.** This would determine employment status on the basis of a small number of factors, and could be similar to the 'ABC test' used in the USA.

Overall, a new 'precise test' is likely to be the most attractive option for reform. This would stand the best chance of creating certainty for businesses and individuals and could be designed to ensure that counterintuitive results (e.g. individuals who look like employees but are treated as being self-employed) are kept to a minimum. Since 2013 the UK has had a 'statutory residence test', and while this can require a large amount of information to determine whether someone is UK tax resident, it is valued for its ability to arrive at a definitive result; some kind of 'statutory employment test' is likely to be welcomed for the same reason.

None of the suggested approaches would be easy to get right, and the second and third of these in particular could result in individuals being treated as employees for the first time. However, the government appears to be taking things slowly and carefully, and has promised that if they do decide to make significant changes to the current rules they will ensure that businesses and individuals have plenty of time to adjust and prepare.

Greater certainty in the area of employment status would be warmly welcomed by all those who do business in the UK, and encouragingly this is now something that is firmly on the radar.

International Tax Cases

GERMANY

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Where to pay taxes when being a referee at the world championship

Many soccer fans are looking forward to Russia and the world championship this summer. Of course, the main focuses are the (hopefully!) exciting games and who will finally become the world champion in soccer.

But, as in many other cases, it is not only fun: you also have to consider tax issues for the parties involved. And not only the soccer players, but also the referees, should check where they have to pay taxes.

Facts

Let us consider a German referee who was also appointed for a FIFA world championship as well as for Champions League games and other international competitions. He received payment either from FIFA or from UEFA, both located in Switzerland. The games took place in various countries.

The referee and the German tax authorities argued about the category of income, as well as the question of whether the income can be taxed in Germany or in a foreign country. After an appeal and the judgment of the fiscal court (first instance), the German Fiscal Court (Bundesfinanzhof) had to deal with this issue.

Domestic law

By judgment of 20 December 2017 (reference number I R 98/15), the German Fiscal Court outlined the current German view of the referee's taxation. The basic question with regard to the domestic tax law was whether the referee is seen as employee or if he receives business income. This is one decisive issue in Germany, since you only have to pay the additional trade tax on business income. The German Fiscal Court dealt with the German definitions and preconditions in great detail, and came to the conclusion that a referee is not an employee since – at least during each game – he is not subject to any directives and participates in the 'referee market'. Furthermore, the German Fiscal Court stated that every referee has a permanent establishment for management purposes (and the German Fiscal Court maintains the view that there does not exist any floating income).

Double tax treaty

The German Fiscal Court also had to check which double tax treaty is applicable, and rejected the applicability of the double tax treaty between Germany and Switzerland. Independently from the fact that FIFA or UEFA are paying out the agreed amount, you have to check the DTT between Germany and the country where the soccer stadium is located.

When assuming that the state where the soccer games take place will also tax the referee's income, you must take into account the DTT regulations. The German Fiscal Court therefore examined which type of income under the relevant DTT must be checked. Even though a referee might run several kilometres during a soccer game, he is not a sportsman. Also, for DTT purposes the referee receives business income. As a consequence, the country where the soccer game takes place is only allowed to tax any income if the referee has a permanent establishment in that country. But the right to use the referee cabin for the duration of the game is not sufficient to constitute a permanent establishment. According to the German Fiscal Court, the referee must tax the worldwide income in Germany, since the only (managerial) permanent establishment is situated in his home country.

It is crucial to check the taxation regulations in all countries involved, since it cannot be ruled out that the other countries might arrive at a controversial assessment.

To paraphrase Gary Lineker: 'Football is a simple game: 22 men chase a ball for 90 minutes and at the end, the German tax authorities win'.

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International Tax Cases

INDIA

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Domain registration services – are the charges royalty?

Recently, the Delhi Tribunal in the case of *M/s GoDaddy.com LLC v. Assistant Commissioner of Income Tax*, [2018] 92 taxmann.com 241, has examined the services for domain name registration and after examining the issue, has held that rendering of services for domain name registration is rendering of services in connection with use of an intangible property. Therefore, charges received for the said services is royalty within the meaning of clause (iii) of Explanation 2 to Section 9(1)(vi) of the Income Tax Act 1961 ('the Act').

Facts of the case

M/s GoDaddy.com LLC ('GoDaddy') is located in the USA. It is engaged in business as an accredited domain name registrar authorised by the Internet Corporation for Assigned Names and Numbers (ICANN). ICANN is a US body that performs a variety of functions related to the internet's unique identifiers and includes operational functions, collaboration, coordination and engagement. In other words, ICANN is responsible for coordinating the maintenance and procedures of several databases related to the namespaces of the internet, to ensure the stable and secure operation of networks.

All domain name registrations by GoDaddy are subject to availability with ICANN and the terms and conditions imposed by ICANN (see Figure 1).

The following services are thus rendered by GoDaddy and ICANN under domain name registration:

- Checking availability of the desired domain name
- Facilitating registration of domain name of the users
- Assigning unique IP address for the domain name
- Maintaining record of all the domain names and their IP address.

Apart from domain name registration services, GoDaddy also provides web-hosting services to the customers and had income from web-hosting services that it offered for tax as royalty income. GoDaddy also received domain registration fees (Figure 2), which it claimed to

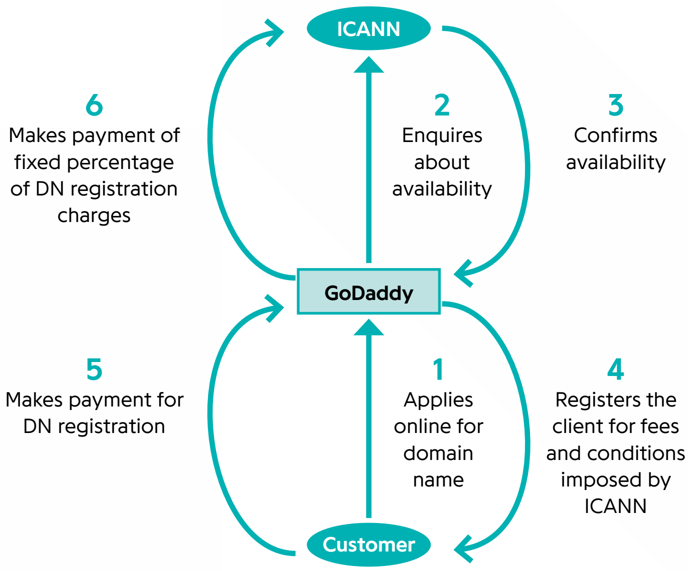
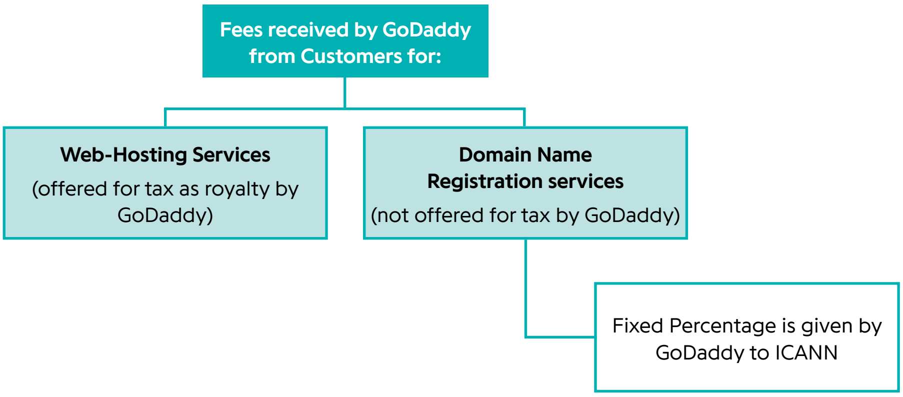


Figure 1. How the domain name registration service operates

Figure 2. Fees received by GoDaddy



be not taxable in India. However, the Assessing Officer determined that the fees should be taxed as royalty; this decision was also upheld by the Dispute Resolution Panel.

Contention of GoDaddy

According to GoDaddy, domain registration charges were not taxable as royalty because GoDaddy merely facilitates getting the domain name registered in the name of the customer, who pays a price for such services.

It was contended by GoDaddy that web-hosting services and domain name registration services have independent existence. They referred to a sample web-hosting agreement between GoDaddy and the customer and submitted that domain name registration is the process of registering a domain name that identifies one or more IP addresses with a name that is easier to remember and use in URLs to identify a particular web page. The domain name allows others to access the user's website directly with an easily memorised address instead of using a numeric IP address.

It was further contented that GoDaddy is not involved in the actual purchase and sale of domain names.

It was also contended that for providing domain registration service, none of the employees of the appellant visited India and all services are provided from outside India. GoDaddy has no fixed business presence in India in the form of any branch or liaison office, and the business operations are undertaken from outside India.

Contention of the revenue authorities

The revenue authorities assessed the receipts towards domain name registration as royalty on the grounds that GoDaddy customers use the GoDaddy server, because the domain name registration is a tool that equips the customers with the right to use that server.

Domain name registration is interlinked to the web-hosting charges since without domain name registration, web-hosting is not possible. Thus, these two services are inextricably linked; besides, domain name is an intangible asset having similar characteristics as a trademark, and hence is taxable as royalty. For this, the revenue authorities relied on various judicial precedents, including the decision of the Supreme Court of India in the case of *Satyam Infoway Ltd. v. Siffynet Solutions (P.) Ltd*, AIR 2004 SC 3540, wherein the Court held that the domain name is a valuable commercial right having all the characteristics of a trademark, so domain names are subject to the same legal norms that apply to trademarks.

It was further contended that:

- As per the agreement between GoDaddy and ICANN, GoDaddy has the right to register, assign, transfer and manage specific domain names.
- GoDaddy enjoys absolute and exclusive rights to assign domain names under specific domain extensions.
- ICANN owns domain extensions but has granted the registrar, GoDaddy, all the rights and risks relating to the assignment, allocation, transfer and management of specific domain names within specific extensions.
- GoDaddy thus has the right to own, allocate, register, transfer, cancel/deactivate, renew, suspend, auction and exploit domain names under its accreditation agreement with ICANN.
- The domain name registration charges were paid to GoDaddy in India, and hence are taxable as royalty income.

Grounds of appeal raised by the GoDaddy before the Tribunal

The only grounds of appeal before the Tribunal was whether the fees received by GoDaddy for rendering services for domain name registration can be taxable as royalty in India.

Decision of the Tribunal

The Tribunal observed that the rendering of services for domain name registration is in connection with the use of an intangible asset, which is similar to a trademark; therefore, relying on the decision of the Apex Court in the case of Satyam Infoway Ltd, held that payments received by GoDaddy for services rendered in respect of domain name registration were in the nature of royalty and taxable under clause (iii)[1] of Explanation 2 of Section 9(1)(vi) of the Act.

Editorial Comments:

A domain name is an identification string defining administrative autonomy, authority or control within the internet and can be thought of as a location where certain information or activities can be found. In this decision, the Delhi Tribunal has compared domain names to trademarks and therefore held that fees charged for domain name registration are taxable as royalty.

With the increase in digital transactions, it is very important to understand the fact pattern of the transactions and wherever there is an involvement of intellectual property; IP law could also be referred to and analysed, with caution, to assess whether rights and characteristics are analogous with IP.

1. Royalty means consideration for the use of any patent, invention, model, design, secret formula or process or trademark or similar property.

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The Next Step

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