GSLTR

Global Sports Law and Taxation Reports

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India:

Taxation of sportspersons and artistes

by Vispi T. Patel, Rajiv Shah and Ketan Maru[1]

Many international events involving the participation of sportspersons and entertainers are taking place around the globe. Such events have resulted in increased mobility of professional actors, entertainers, sportspersons, artistes etc. either independently or as part of a team. They perform live concerts in different countries or are part of sports teams like tennis, golf, cricket, football, hockey etc. With increased mobility, it results into earning of income by organisers, sponsors and individual performers in a very short span of time spent in a particular country.

From an Indian perspective, the taxability of income earned by such sportspersons or artistes is governed by the Income-tax Act, 1961 ("the Act") and the Tax Convention between the country of residence of such persons and the country of performance of the activities ("Treaty").

Provisions of Treaty

Art. 17 of the Organisation for Economic Co-operation and Development (OECD) Model Tax Convention ("MTC") deals with taxation of sportspersons and entertainers. The title of the art. 17 of MTC 2014 was changed to "Entertainers and Sportspersons" from "Artistes and Sportsmen" from MTC 2010. It provides that apart from the country of residence of such persons, the country in which activities of the sportsperson or artiste are performed (source country) is entitled to tax the income derived from these activities.

The scope of taxation of an entertainer and sportsperson entails determination of the following questions such as:

- who can be covered within the term sportsperson or entertainer/artiste?
- what are the personal activities of a sportsperson or entertainer/artiste which can be brought within the purview of art. 17?
- what are the source and allocation rules for activities performed in different countries?
- what is the interplay between the domestic tax law and the respective treaty?

Paragraph 1 of the MTC (2014) reads as:

"Notwithstanding the provisions of Article 15, income derived by a resident of Contracting state as an entertainer, such as theatre, motion picture, radio or television artiste, or a musician, or as a sportsperson, from that resident's personal activities as such exercised in the other Contracting State, may be taxed in that other state."

The term "entertainer" and "sportsperson" have not been defined in the MTC. Hence, the same has to be understood in the context in which the term is understood in the source country. The examples given in the paragraph are merely illustrative and not exhaustive. Important is whether an entertainment character is present in the activities that the individual performs. The word "*entertainer*" has a wider meaning and includes anyone who entertains, *i.e.* a dancer, singer, comedian, etc. The essence of "entertainment" is the provision of amusement or enjoyment, relaxation, etc.; the staging of performance, spectacle, etc.; giving delight, etc. In today's world, the entertainment business landscape is wide enough to cover cinema, music, internet, gaming, sports, educational, cultural, spiritual, health, etc.

When the person performs more than one activity in the source country, it may be necessary to review and find out the predominant activity which leads to income generation. At times it may be advisable to allocate the income among various activities when the person is not paid for each activity separately. The MTC provides that anyone who performs as such even for a single event would be covered within the purview of art. 17.

The paragraph provides that income earned by a non-resident sportsperson or entertainer shall be taxed in the source country. The predominant factor to tax such income is to determine where such activities are performed. The provision makes it possible to avoid the practical difficulties which often arise in determining the taxability of a sportsperson or entertainer performing abroad.

The paragraph is applicable irrespective of who the payer of the income is, *i.e.* the place of performance is important. There can also be other income, *i.e.* advertising, sponsorship, royalty, etc. earned by such persons where the earning of the income may not have a connection with the professional performance. In such cases provision of art. 17 will not be applicable. The test would be whether income could have been earned by the person, had there been no performance. The commentary to MTC provides the guiding principles with examples as to whether the activity has a close connection with the performance of the entertainer or sportsperson. However, it needs to be noted that these are mere guiding principles and each case has to be examined and decided on the facts of the same.

When payment is made to a football, cricket or tennis player for wearing sponsor's logo, trade mark or trade name, etc. on his/her shirt during the match, the

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country in which one or more such events take place may tax a proportion of the relevant advertising or sponsorship income. Another example will be when the payment is made for the right to use the name, signature, personal images, etc. If such uses of image rights are connected to their performances in a given country, then the relevant payment will be taxable in the hands of the entertainer or sportsperson. Any payment made for the simultaneous broadcast of the performance would fall within the purview of art. 17 and would be taxed in the source country.

In other cases where the income is not directly received by the sportsperson or artiste, *e.g.* it may be paid to an orchestra or team, *e.g.* a football team. The individual team member may be paid a salary instead of receiving payment for his/her separate performance. In such instances, the country where the performance takes place is entitled to tax the proportion of the member's salary which corresponds to such performance.

It was found that sportspersons and entertainers were avoiding tax liability in the source country by incorporating a company in a tax friendly country and working for such companies. Accordingly, paragraph 2 to art. 17 was introduced to cover such tax avoidance.

Paragraph 2 of art. 17 of the MTC (2014) reads as:

> *"Where in respect of personal activities exercised by an entertainer or a sportsperson acting as such accrues not to the entertainer or sportsperson but to another person, that income may, notwithstanding the provisions of Article 15, be taxed in the Contracting State in which the activities of the entertainer or sportsperson are exercised."*

Paragraph 2 deals with situations where the income from the activities performed by the entertainer or sportsperson accrues to another person, e.g. a company and not to that entertainer or sportsperson. In such a scenario, the source country acquires the right to tax the income in the hands of the other person to whom the income accrues. The right is restricted only to the income that is attributed to the performance of the individual, i.e. the other person may derive income from sale of tickets or for allocation of advertising space. Paragraph 2 cannot be invoked for taxing such income in the source country.

The paragraph is not restricted to cases where both the entertainer or sportsperson and the other person are resident of the same country. The paragraph is applicable to even cases where the entertainer or sportsperson and the other person are tax resident of different countries. It allows the country in which the activities of an entertainer or sportsperson are exercised, to tax the income derived from these activities and accruing to another person regardless of other provisions of the Treaty.

Art. 17 of the MTC neither provides any mechanisms for computation of income nor would the rate of tax at which the income may be taxed, hence such income will be taxed in accordance with the domestic laws of the respective countries.

Some of the Indian Treaties provide that if the consideration payable to the performer for its performance in India is below a stipulated minimum threshold amount, the same need not be taxed in the source country, i.e. USA, etc. Some of the Treaties also provide that if the performance is supported the by government or it involves public funds, the same may not be taxed in India, i.e. Colombia, Macedonia, Croatia, Thailand, Japan, Malta, etc.

Sometimes there is only one contract under which payment is received by the performer, but the performance is in more than one country. In such case, each country is entitled to tax the income which is attributable to performance in that country. Such an allocation would obviously depend on the facts of each case. The commentary to the MTC provides guidance for allocation of such income among various countries with examples.

Provisions of Income-tax Act, 1961 ("the Act")

Section 4 of the Act is the charging section and it provides for the charge on every person in respect of his "total income" earned in the relevant financial year. Section 5(2) of the Act lays down the scope of total income chargeable to tax in India. The total income of any previous year of a person who is resident includes all income from whatever source derived which is:

1 received or deemed to be received in India; or
2 accrues or arises or deemed to be accrued or arise in India; or
3 accrues or arises outside India during such previous year.

As far as a non-resident is concerned, the total income includes all income from whatever source derived which is received or deemed to be received by or on behalf of the non-resident; or accrues or arises or is deemed to accrue or arise to him in India during such year.

Section 9 of the Act provides the deeming fiction as regards deemed accrual of income in India. It deems certain income to accrue or arise in India even if the income in fact does not accrue or arise in India. It deems all income to accrue or arise in India, whether directly or indirectly if the same is through or from:

1 any business connection in India; or
2 any property in India; or
3 any asset or source of income in India; or
4 transfer of a capital asset situated in India.

Section 6 of the Act provides test for determining the residential status of the taxpayer. Under the said section an individual is regarded as resident in India:

1 if he is physically present in India for more than 181 days in a financial year; or
2 if he is physically present in India for more than 364 days in the preceding four financial years and also present in India for 60 days or more in that financial year.

The period of 60 days in the test (2) above is substituted with the period of 182 days, when:

1 a person who is citizen of India leaves India for the purpose of employment outside India; or
2 a person is of Indian origin and citizen of India and is outside India and comes on a visit to India.

There is no special provision in the Act for an individual emigrating from a foreign country to India or for an individual emigrating from India to a foreign country. The tax liability of an individual is strictly governed by the residential status of the individual and the scope of total income chargeable in his hands in accordance with section 5 of the Act.

Tax liability of resident individual entertainer/artistes or sportspersons performing outside India

Any income, which accrues or arises in any part of the world, to any resident sportsperson or artiste is taxable in India irrespective of whether it is received in India or not. The income earned in respect of the performance outside India and taxed outside India may also be taxed in India or be exempt from tax depending on the Treaty between the two countries. If the income is taxed outside India, credit for the tax would generally be available against the tax liability in respect of the said income in India.

A sportsman who carries on his activities in his individual name would be taxed on his total income under the head "*profits and gains of business or profession*". All income which may arise from the activities of the sports directly or indirectly would be taxed as arising from the exercise of the profession. The sportsman would be entitled to deduction of expenses which he incurs for the purpose of business. The other income that may arise not from the exercise of the profession will be taxed as "*income from other sources*". The resident is free to operate in his individual capacity or may operate through a corporation. When the operation is through a corporate body, he will be taxed on his income which he may derive from that company and the company will be taxed on net income after deducting the remuneration paid to the individual. Under the Act, there is no special provision for taxation of the resident entertainers and sportspersons.

Tax liability of non-resident individual entertainers/artistes or sportspersons performing in India

In respect of a non-resident entertainer/artiste or sportsperson, as stated above in section 5 all income accruing or arising or deemed to be accruing or arising, received or deemed to be received in India is taxable in India. Section 115BBA and section 194E of the Act deal with the liability of the non-resident sportsperson, artiste and sports association/institution. The text of the said provision is reproduced hereunder for ready reference.

"Tax on non-resident sportsmen or sports associations.

Section 115BBA. (1) Where the total income of an assessee,–

(a) being a sportsman (including an athlete), who is not a citizen of India and is a non-resident, includes any income received or receivable by way of–

(i) participation in India in any game (other than a game the winnings wherefrom are taxable under section 115BB) or sport; or
(ii) advertisement; or
(iii) contribution of Articles relating to any game or sport in India in newspapers, magazines or journals; or

(b) being a non-resident sports association or institution, includes any amount guaranteed to be paid or payable to such association or institution in relation to any game (other than a game the winnings wherefrom are taxable under section 115BB) or sport played in India or

(c) being an entertainer, who is not a citizen of India and is a non-resident, includes any income received or receivable from his performance in India, the income-tax payable by the assessee shall be the aggregate of—

(i) the amount of income-tax calculated on income referred to in clause (a) or clause (b) or clause (c) at the rate of twenty per cent; and
(ii) the amount of income-tax with which the assessee would have been chargeable had the total income of the assessee been reduced by the amount of income referred to in clause (a) or clause (b) or clause (c):

Provided *that no deduction in respect of any expenditure or allowance shall be allowed under any provision of this Act in computing the income referred to in clause (a) or clause (b) or clause (c).*

(2) *It shall not be necessary for the assessee to furnish under sub-section (1) of section 139 a return of his income if–*

(a) his total income in respect of which he is assessable under this Act during the previous year consisted only of income referred to in clause (a) or clause (b) or clause (c) of sub-section (1); and
(b) the tax deductible at source under the provisions of Chapter XVII-B has been deducted from such income."

"Payments to non-resident sportsmen or sports associations.

194E. *Where any income referred to in section 115BBA is payable to a non-resident sportsman (including an athlete) or an entertainer, who is not a citizen of India or a non-resident sports association or institution, the person responsible for making the payment shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rate of twenty per cent."*

Section 115BBA of the Act provides taxability of non-resident sportspersons or sports associations or institutions or entertainers. The rate of tax is 20% and applicable surcharge and education cess. The said section is confined to only specified income, specified institutions and to individuals who are non-citizens. The section stipulates the following income:

1 income from participation in any game or sports; or
2 income by way of advertisement; or
3 income from contribution of articles relating to any games or sports in India in any newspapers, magazines or journals; or
4 income derived by a non-resident entertainer from his performance in India;
5 it is specifically provided that income of sports associations or institutions would include any amount payable to them as minimum guarantee amount.

The payer of the above income is under an obligation to deduct tax at source at 20% on the gross amount under section 194E of the Act. Section 194E of the Act casts responsibility on the person making payment to deduct tax at source. It provides that any person responsible for making payment to a non-resident sportsperson, sports association or entertainer, in respect of income referred to in section 115BBA of the Act, shall be responsible for deducting tax at the rate of 20% before making such payment.

The recipient of the income is not required

to furnish any return of income if he is in receipt of only aforesaid income and tax has been withheld.

There is no provision under the Indian Income-tax Act which is parallel to paragraph 2 of the MTC. Further, there is no provision under the Act to "look through" such payments made to other persons and tax the same in the hands of entertainer or sportspersons.

The Central Board of Direct Taxes (CDBT) has issued a circular[2] which provides guidelines for taxation of income earned by entertainers/artistes and sportspersons, etc. The circular provides clarification with few illustrations in connection with the taxability of income of the non-resident artists or performer in India which is as under.

1 When an artiste performs in India gratuitously without any consideration, there is no question of any income and consequently there will be no tax in India.

2 When the artiste performs in India to promote sale of his records and no consideration is paid for his performance by the record company or anyone else, then there will be no tax as the artiste does not receive any income from such performance in India.

3 Any consideration received by the artiste or performer for the live performance or simultaneous live telecast or broadcast (on radio, television, internet, etc.) in India would be considered as income and will be taxable India.

4 The consideration paid to the artistes to acquire the copyright of performance in India for subsequent sale of records or CDs, etc. outside India or the consideration paid to the artistes for acquiring the license for broadcast or telecast overseas shall not be taxable in India.

5 The consideration paid to the artistes to acquire the copyright of performance in India for subsequent sale of records or CDs, etc. in India or the consideration paid to the artistes for acquiring the license for broadcast or telecast in India is taxable in India as per section 9(1)(vi) of the Act as royalties. Further, such consideration will also fall under the royalties article of the Treaty.

6 The portion of endorsement fees (e.g. launch or promotion of products, etc.) which relates to performance of the artiste in India shall be taxable in India in accordance with Section 5 of the Act and also under the Treaty.

7 The payment of guarantee money to sports association/institution would be covered by "other income" Article of the treaty and taxed accordingly.

The CBDT has also recognised the need to examine the contract of the performer in order to ascertain the true character of the payment, its connection with the performance in India and the consequent tax liability in India.

Further, the circular also provides that non-resident entertainers/artistes and sportspersons may be required to obtain a tax clearance certificate (TCC) under section 230 of the Act when they are not domiciled in India. However, if the non-resident performer stays in India for less than 120 days, they are not required to obtain TCC.

Social security

There are separate laws which govern the payment of social security payments. Such laws cast an obligation on the employer to deduct certain specified percentage of the remuneration payable to its employees and pay the same either to the government authority or to invest the fund under trust for the benefit of the employees. They are also required to make payment towards their own contribution. However, such laws are applicable to employer subject to certain terms and conditions as prescribed therein, *i.e.* minimum number of employees.

An individual who is an independent professional is not subject to payment of any social security contribution. He may voluntarily opt for payment of such contribution by purchasing an insurance policy or by contributing to a fund. Hence, a sportsperson or entertainer performing independently has no liability to contribute towards any social security schemes.

Concluding remarks

Income of the non-resident sportsperson or entertainer from their performance in India will be liable to tax under the Act read with the Treaty. Under section 90 of the Act, a taxpayer is entitled to opt for provisions of the Act or the Treaty whichever is beneficial to him.

Section 115BBA of the Act deals with the specified income of the individuals and sports association. The income other than specified income will be governed by section 5 and section 9 of the Act. There is no provision in the Act which is similar to paragraph 2 of art. 17 of MTC.

[2] Circular No. 787, dated 10 February 2000.