



# PRESENTATION



# ON 'DIRECT TAX ISSUES OF MEDIA AND ENTERTAINMENT SECTOR'



# ROAD MAP

- Part I - Importance of the Sector & Key Happenings
- Part II - Domestic tax Issues
- Part III - Cross Border Taxation



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# PART - I

## ■ IMPORTANCE OF THE SECTOR & KEY HAPPENINGS

- Various Key Segments of the Sector
- 'Media & Entertainment' sector's performance in India
- Recent Significant changes in the 'Operation model'



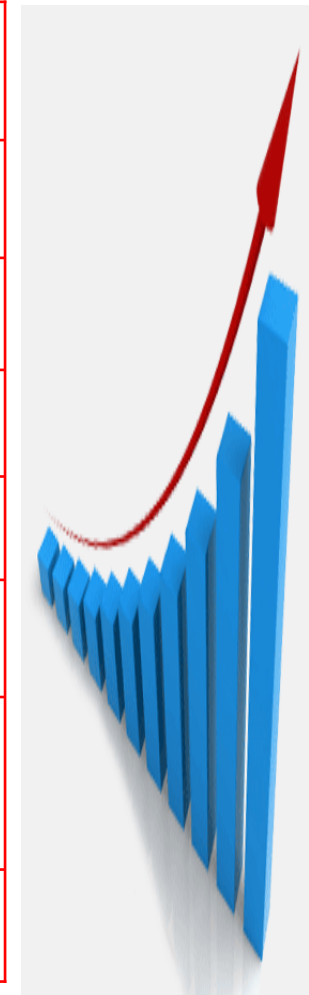
# Various Key Segments...

- The Indian Entertainment and Media Industry can be categorized as follows:
  - Television
  - Filmed Entertainment (*Movies*)
  - Print (*Primarily Newspaper and Magazines*)
  - Radio
  - Music
  - Animation
  - Gaming
  - Outdoor Advertisement such as Concerts etc



# Sector Performance in India...

Rs. Billion Change %	2004	2005	2006	2007	CAGR (04-07)
Television	128.7	158.5 23%	191.2 21%	225.9 18%	19%
Filmed Entertainment	59.9	68.1 14%	84.5 24%	96.0 14%	14%
Print Media	97.8	109.5 12%	128.0 17%	149.0 16%	15%
Radio	2.4	3.2 33%	5.0 56%	6.2 24%	37%
Music	6.7	7.0 4%	7.2 3%	7.3 1%	3%
Animation , Gaming & VFX, Out-of-home advertising & Online Advertising	9.1	10.0 10%	11.6 16%	15.2 31%	19%
<b>Total M &amp; E Industry</b>	<b>304.6</b>	<b>356.3</b> <b>17%</b>	<b>438.0</b> <b>23%</b>	<b>512.6</b> <b>17%</b>	<b>19%</b>



Source :- Report on Indian M & E Sector\_March 2008 by FICCI-PWC

# Recent Key Changes ...

- Indian M & E Industry has grown at a rate of 17% during 2007 as against a projected rate of 15% and with an estimated size of Rs. 513 billion
  - The segments with highest rates of growth were online advertising, out-of-home advertising and the radio industry
  - followed by Animation, Gaming & VFX, and Television Industry
- In 2007, record high FDI investment of **USD 211 million** which is about 8.5 billion INR. The future inflows in the form of investments are
  - Temasek Holding investing INR 11 billion in INX Media which is in television broadcasting
  - South Asia Entertainment investing INR 7 billion in Sun Direct TV which is in DTH
  - George Soros investing INR 4 billion in Reliance Entertainment Ltd which is in Internet, film & television broadcasting
  - Goldman Sach investing INR 2 billion in Innovative Media Ltd which is Out of home media



# *Recent Key Changes ...*

- Indian Film Industry declared as 'Industry' in 2000 under IDBI Act
- Corportisation of the Film Industry lead to more organized & transparent business model
- Availability of finance from banks compare to old source of financing from private lenders, C.Y. EXIM bank financed INR 300 Cr to the Industry compare to INR 100 Cr L.Y.
- Insurance companies providing Insurance to the film against the loss caused during the shooting which started from 'Taal'
- Indo-foreign collaborations for film ventures and other activities in addition to foreign countries such as Switzerland, UK, Germany, Italy, Brazil entered into co-production bilateral agreements with India offering incentive to the Indian Media Companies



# PART - II

## ■ INDIAN DOMESTIC TAXATION

- Special Provisions for the Sector
- Burning Issues
- Some general provisions - Important for the Sector !





## *Specific Provisions – Section 285B ...*

- Currently, The E & M industry is not covered under any specific provisions of the Indian Income Tax Act, 1961 except **Film Production & Multiplex**
- As per **Section 285B**, producers of a cinematography film are required to
  - Furnish a statement in form 52A to assessing officer **per film per year**
  - **Within 30 days** from end of the financial year or completion of the film whichever is earlier
  - Stating the details of persons to whom the **aggregate payments** exceeding Rs.50,000 made in a year
  - Section 272A provides for penalty of **Rs. 100 per day** if the above statement is not furnished
  - Vide CBDT's circular No. 204 , 1976 it has been clarified that **object of** this provision is to
    - **check inflation of expenditure** by film producers and
    - enable the tax authorities to get **information about the recipients for necessary action** in their cases



# Specific Provisions - Rule 9A...

- As per Rule 9 A - Computation of 'Cost of Production' for film producer
  - Outcome of exercise of power given to CBDT u/s 295 (1)
  - Recognizes the special characteristics of the film and provides guidelines for deduction of expenses because production expenses may be spread over a period beyond a year
  - **Deduction Criteria**

Censor Board Certification	Exhibition/ Sale of rights	Release 90 days before end of the F.Y.	Deduction of 'Cost of production'
✓	✓	✓	Full Deduction
✓	✓	✗	To the extent of amount realized
✓	✗	✗	No Deduction



# *Specific Provisions – Rule 9A...*

- **'Cost of Production' means**
  - **All the expenditure** incurred on PRODUCTION of the film, except
    - Expenditure incurred on preparation of positive films
    - Expenditure incurred on advertisement of the film after Censor Certificate
  - Subsidy received from the government will have to be reduced from the cost
  
- **Whether expenses not allowed under Rule 9A will be allowed under Section 37 of the Act?**
  
- **Yes, because**
  - Rule 9A doesn't override any provisions of the Act
  - Cost of making positive film is allowed under section 37 – *Prasad Production (Madras High Court) 179 ITR 147*
  - Any loss arising due to feature film being abandoned midway without completing is also allowed as deduction as a business loss – *B Nagi Reddy (Madras High Court) 199 ITR 451*
  - Also refer, *Mukta Arts Pvt Ltd Vs ACIT (Mumbai Tribunal) ITA 5501/Mum/1996*



# *Specific Provisions – Rule 9A...*

- **Whether Subsidy Received by the Producer from the government towards regional films is a taxable as 'Revenue Receipt'?**
  
- **No, as per**
  - Circular 541 dated 25/7/1989 as amended by 15/9/1989
  - Sadichaa Chitra Vs CIT (1991) 189 ITR 774 (Mumbai HC)
  
- **Yes, as per**
  - Sahney Steel & Press Work Ltd (SC) 228 ITR 253 – *which states that subsidy received as assistance towards carrying on trade or business is revenue in nature hence taxable as revenue*
  - Read with CCE Vs Ratan Melting (SC – 5 Bench) (yet to report) – *which states that the circulars are not binding on the court, hence the SC / HC rulings should be given preference over the circulars issued by the Board*



# *Specific Provisions – Rule 9A...*

- **What will construe ‘exhibition on a commercial basis’? Whether following things will deemed to be exhibited on a commercial basis**
  - **Paid preview**
  - **Direct online release**
  - **Direct exhibition on Television**
  
- **Yes**, as per *Vieshesh Films Pvt Ltd Vs Dy CIT (Mumbai ITAT) ITA No 5569 & 5570/Mum/2004 dated 27-08-2008*
  - *The requirement of Rule 9A is exhibition of film and the mode has not been prescribed*
  - *Hence exhibition film on Television on commercial basis clearly falls within the ambit of Rule 9A*
  
- **Tax Planning Avenue**
  - Friday 2<sup>nd</sup> Jan 2009 – 89<sup>th</sup> day before end of the financial year
  - Friday 1<sup>st</sup> Jan 2010 – 90<sup>th</sup> day before end of the financial year

**Hence, either the entire release can be pre-pone by 1 or 2 days or significant Paid Previews should be arranged on those days to meet the ‘90 days before’ deadline and claiming of full cost of production in the concerned financial year**



# Specific Provisions – Rule 9A...

- **Pre-Caution while computing the ‘Cost of production’**
  - As the rule doesn’t override the other provisions of the Act, the other sections of the Act should be considered and preferred over Rule 9A, such as
    - Section 43 B – Statutory Payments,
    - Section 40(A)(2) – Related Party Payments
    - Section 40(A)(3) – Disallowance of expenses paid otherwise than by a/c payee crossed cheque
    - Section 40(a)(ia) – Disallowance of expenses due to non-deduction of Tax
  - **‘Recovery income’** should be properly accounted and reduced from Cost of production as this can be questioned in the assessment, the income such as
    - Income from dismantle of Set
    - Sale of Scrap
    - Sale of costumes etc.
  - **‘Remuneration to actors etc paid in Kind’** should be properly accounted at its fair market value and should be added to the Cost of production also the TDS should be deducted and paid accordingly, the remuneration such as
    - Car - *Mr. Amitabh Bachhan Vs DCIT (Mumbai Tribunal) ITA No 1584 & 2509 /Mum/2006 dated 29<sup>th</sup> November 2006*
    - Distribution rights
    - Other benefits except cash, in consideration to the services provided



## *Specific Provisions – Rule 9B ...*

- As per Rule 9 B – Computation of ‘Cost of acquisition of distribution rights’ for film distributor
  - ❑ Outcome of exercise of power given to CBDT u/s 295 (1)
  - ❑ Recognizes the special characteristics of the film and provides guidelines for deduction of expenses because distribution expenses may be spread over a period beyond a year
  - ❑ **Deduction Criteria**

Exhibition/ Sale of rights	Release 90 days before end of the F.Y.	Deduction of ‘Cost of acquisition’
✓	✓	Full Deduction
✓	✗	To the extent of amount realized
✗	✗	No Deduction



# *Specific Provisions – Sec 9...*

- **Section 9(d) – No income accrued on shooting of films in India, if**
  - ❑ An Individual who is not a Citizen of India
  - ❑ A firm or company not having any partner/shareholder who are citizen or resident of India
  - ❑ Producer's operations are confined only to 'Shooting of films' in India
  - ❑ *Example: 'The Mighty Heart' which were shot in India but never released in India*
  
- **Section 80IB (7A) r.w. Rule 18DB - Deduction on profits of multiplexes theatre, if**
  - ❑ The multiplex should be constructed between 1st April, 2002 and 31st March, 2005, in a place except Chennai, Delhi, Mumbai & Kolkata
  - ❑ 50% of the profits from building, owning and operating of multiplex theatres is allowed as a deduction for a period of initial 5 years
  - ❑ Definition of 'Multiplex is given in Rule 18DB





# General Provisions – Useful ...

- **TDS on hiring of equipments – Whether 194C, 194 J or 194I ?**
  - Hiring of equipment only – 194 I
  - Hiring of general equipments with operating staff – 194 C
  - Hiring of technical equipments with professionals – 194 J
  
- **FBT on ‘Premier of the movie’ – Whether liable to FBT ?**
  - No, it is exempt under 115WB(2)(D)(v) as the expenses are on ‘display of product’ w.e.f. 01<sup>st</sup> April 2008
  - Is ‘Film’ a product and ‘Film making’ manufacturing activity – Yes, CIT Vs D. K. Kondke (1991) 192 ITR 128 (Mumbai HC)
  
- **License fees paid by Radio Channel – Whether Revenue or Capital expenditure ?**
  - Lumpsum fees for more than 2 years – ‘Intangible Assets’, depreciation @25% of WDV
  - **Planning Avenue** - Agreement stating fees for each year – Revenue Expenditure
  
- **Lumpsum fees received towards telecast rights for more than 1 year – Taxability?**
  - The amount received will be taxable equally in each of the year under consideration – As per *Molly Boban Vs ITO (ITAT Cochin Bench) dated 11<sup>th</sup> March 2008*



# PART - III

- **CROSS-BORDER TAXATION**
  - Withholding Tax Issues
  - Transfer Pricing Issues



# Withholding Tax Provision ...

- **Whether payment of 'Transponder Hiring Charges' - Royalty or Business Income ?**
- **No**, as per
  - If the possession and control is not with the Indian party then can not be treated as leasing of equipment, hence no Royalty - *ISRO Satellite Center (AAR) 765 of 2007 dated 22<sup>nd</sup> October 2008*
  - Also refer, *Dell International Service (Pvt.) Limited (AAR) 735 of 2007*
- **Yes**, as per
  - Though it will not be termed as 'leasing of equipment' but it will be 'service fees for digital broadcast' hence 'Royalty' under the Indian Income Tax Act - *ACIT Vs Sanskar Info Tv Pvt Ltd (Mumbai ITAT) dated 10<sup>th</sup> June 2008*
  - Read with *Asia Satellite Telecommunication Co. Ltd Vs DCIT (2003) 84 ITD 478 (Delhi Tribunal)*
- **Our View**, depends on the term of the agreement even if there is no possession or control, it can deemed to be 'Service fee for digital broadcast', however if DTAA prescribes 'Make Available' then it will not be liable to tax under 'Royalty & FTS'



# Withholding Tax Provision ...

- **When foreign company carries out its activities solely through an Dependent Agent in India and the Indian agent has been remunerated at arms length then is the Foreign Principal Taxable in India ?**
- **No, as per**
  - *DIT (International Taxation) Mumbai Vs M/s Morgan Stanley & Co. Inc. (2007) 292 ITR 416 (SC)*
  - *Set Satellite (Singapore) Pte. Ltd. (Mumbai High Court) dated 22<sup>nd</sup> August 2008*
  - *Galileo International Inc. Vs. DCIT, Non- Resident Circle, New Delhi , (ITAT Delhi)*
  - *Amadeus Global Travel Vs. DCIT (ITAT Delhi)*
  - *CBDT Circular No. 23 of 1969*
  - *CBDT Circular No. 5 of 2004*
- **Indian Distribution Rights transferred from One Non Resident to Another - whether liable to tax in India?**
- **Yes, as per recent ruling by Income Tax Department in case of TIFC, Cyprus (of Network 18) and UTV Mauritius where UTV Mauritius transferred the Indian Territory rights of 'Welcome' to TIFC, Cyprus and Cyprus company has been asked to withheld the tax as Royalty while making payment to Mauritius company. No recourse has been given to India-Mauritius DTAA and Income Tax Act has been preferred.**



# *Withholding Tax Provision ...*

- **Taxation of foreign artists, technicians working in India for Indian Films - whether liable to tax in India?**
- **Yes, as per the DTAA**
  - **Artists** will be covered under a separate article of 'Artist & athletes' which generally also gives the right of taxation to Source State
  - **Other Technicians** will be covered under article 'Independent Personal Services' in which generally the taxation is subject to number of days of stay & fixed base in the source state



# *Transfer Pricing Aspects ...*

- **Cross-border transactions – Most Appropriate Method?**
  
- **Case Study – Overseas Film Distribution**
  - Which Method is Most Appropriate Method?
    - Comparable Uncontrolled Method (CUP)
    - Resale Price Method (RPM)
    - Cost Plus Method (CPM)
    - Profit Split Method (PSM)
    - Transaction Net Margin Method (TNMM)
  
  - How to factor/ discount different business model?
    - Outright Purchase,
    - Minimum Guarantee Amount, &
    - Commission Model
  
  - Due to lack of data in public database, CUP seems the appropriate method, hence Study of the documents and arrangement assumes prime importance



*Queries ...*



*YOUR  
QUESTIONS*

*PLEASE !!!*



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