

# Fees for wearing sponsor's logo – Indian Perspective

FIT ✦ WU ✦ WIRC Workshop

**Harshal Bhuta**

M.Com., F.C.A., A.D.I.T., LL.M. (Hons.) in  
International Tax Law [WU (Vienna)]



# Fees for wearing sponsor's logo – Indian Perspective

## Structure of Presentation

1. Facts of the case study
2. Question from Indian Perspective
3. Analysis
4. Reference provisions

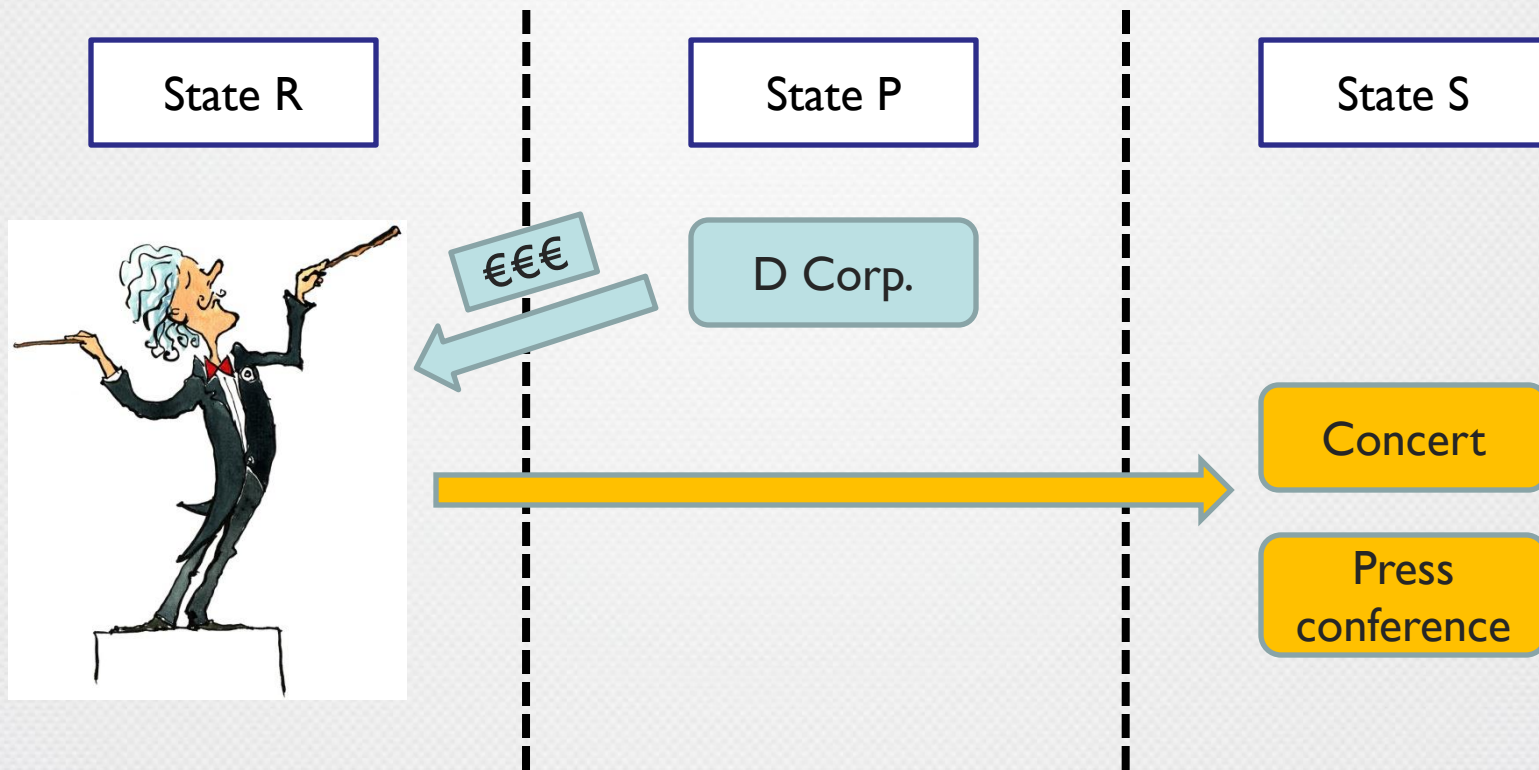


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## I. Facts of the case study

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## Facts of the case study





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## Facts of the case study (Contd)

- Conductor is a resident of State R
- Enters into contract with D Corp. (resident of State P) to wear its logo during concerts and press conferences worldwide
- Consideration under contract – lumpsum amount of ₹1,000,000/- per year
- Conducts a concert in State S and wears jacket with logo of D Corp.
- Goes to press conference after the concert wearing jacket with logo of D Corp.

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## 2. Question from Indian Perspective



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## Question from Indian perspective

Would India enjoy the right to tax the remuneration which the Conductor receives for wearing the sponsor's logo if -

- *Scenario 1* : State S is India ?
- *Scenario 2* : State P is India ?
- *Scenario 3* : State R is India ?

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## 3. Analysis under three scenarios



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## Scenario 1 : State S is India

### A. Income Tax Act, 1961



- The concert as well as the press conference take place in India. Therefore, income may accrue / arise in India u/s 5.
- Does this income of conductor qualify under Sec. 115BBA?
- Cumulative conditions under Sec. 115BBA:
  - Should be an entertainer;
  - Entertainer should be a foreign citizen and a non-resident;
  - Performance should take place in India;
  - Income should be from his performance (i.e. performance fees).



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## Scenario 1 : State S is India

### A. Income Tax Act, 1961 (Contd)

- Since endorsement income cannot be considered as performance fee, it should not be covered within scope of Sec. 115BBA. Consequently, not covered under Sec 194E.
- Chargeable to tax u/s 5 (also CBDT Circular 787 / 2000);  therefore TDS required u/s 195 (FA 2012 – NR to NR).
  - Application to AO ?
  - Rates in force – 30%.
  - PAN and TAN application ?
  - Filing return of income ?
  - Tax clearance certificate u/s 230 (Ntf No. SRO 961, dt. 25-5-1953) ? 



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## Scenario 1 : State S is India

### A. Income Tax Act, 1961 (Contd)

- Basis of apportionment of endorsement fee for taxability in India ?
  - Based on ratio of (number of concerts & press conferences held in India / Total number of concerts & press conferences held worldwide).
  - Weightage to be given to the number of people attending the concert / press conference ?
  - How to estimate the ratio mid-way through the year ?

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## Scenario I : State S is India

### B. Indian DTAA's

- Article on Entertainers under almost all Indian DTAA's (viz. Artists and Sportsmen) modeled on UN MC. Thereby, India has been given the right to tax income arising from “personal activities as such” exercised in India:
  - Para 9 of Commentary to Art 17 UN MC / OECD MC: Sponsorship & advertising fees
  - Para 9.1 of Commentary to Art 17 OECD MC (2014 OECD MC Commentary update): Specific case
  - CBDT Circular 787 / 2000 also mentions coverage under Article 17



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## Scenario 1 : State S is India


### B. Indian DTAA's (Contd.)

- Exceptions to the above:
  - *India - Egypt DTAA*: Time threshold test is present and therefore, unlikely to be met under facts of the case.
  - *India - USA DTAA*: Specific example in Technical Explanation to India - USA DTAA which explains that income not predominantly attributable to performance itself would be outside the purview of Article 18 of the treaty. Therefore, endorsement fee for wearing logo during concert would be classified under Article on Entertainers whereas endorsement fee for wearing logo during press conference would be classified under Article on Independent Personal Services.

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## Scenario 1 : State S is India

### B. Indian DTAA's (Contd.)

- India's position on Para 9 of Commentary to Art 17 OECD MC (2014 OECD MC Commentary update) 
  - Therefore, even if only press conference would have taken place in India (whereas concert would have been conducted outside India), India still considers that part income from endorsement is covered u/a 17
  - Such income may otherwise have been classified under Article 14 since concert takes place outside India and press conference by itself is unlikely to be considered as an “entertainment performance” of the conductor. Consequently, it should not have been taxed in India in absence of fixed base of the conductor in India and / or failure to satisfy threshold presence test in India which is existing in almost all Indian DTAA's



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## Scenario 2 : State P is India

### A. Indian Tax Act, 1961

- Since D Corp could claim the endorsement fees as business expenditure, it is necessary to examine TDS applicability under ITA (based on economic theory of base erosion):
  - Neither concert nor press conference takes place in India, hence endorsement income of conductor should not accrue / arise in India.
  - There is no transfer of any intangible property right from the conductor to the D Corp. Also, conductor does not render any managerial, technical or consultancy services. Therefore, payment should not fall within meaning of Sec. 9(1)(vi) / (vii).
  - No business connection, hence Sec. 9(1)(i) should be inapplicable too.

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## **Scenario 3 : State R is India**

- Conductor is R & OR under ITA. Consequently, worldwide income is taxable in India.
- Issues arising in Foreign Tax Credit – WHT in foreign country on gross income vis-à-vis taxability of net income in India under ITA.



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## 4. Reference provisions

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## Tax on non-resident sportsmen or sports associations.

**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*





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**Circular: No. 787, dated 10-2-2000.**

**227. Guidelines regarding taxation of income of artists, entertainers, sportsmen, etc., from international/national/ local events**

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**5. In connection with the taxability of income of the non-resident artists or performer in India, the facts and circumstances of each event need to be considered.**

*A few situations are illustrated below :*

.....

.....

*(vi) The portion of endorsement fees (for launch or promotion of products, etc.) which relates to artist's performance in India shall be taxable in India in accordance with the provisions of section 5 of the Income-tax Act. Under the DTAA, this would fall under the Article on "Artists and Sportsmen".*



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**Notification : No. SRO 961, dated 25-5-1953.**

**Persons exempted from obtaining tax clearance certificate under section 46A(1) of the 1922 Act**

*In exercise of the powers conferred by sub-section (1) of section 46A of the Indian Income-tax Act, 1922 (11 of 1922), the **Central Government hereby directs that the provisions of the said section shall not apply to the following persons, namely :***

.....  
*(2) Persons who are not domiciled in India, provided that the total period spent in India does not exceed one hundred and twenty days;*

.....  
*Provided that subject to such general or special directions as the Central Government may issue, a competent authority may, at his discretion, require any of the aforesaid persons to obtain from him a tax clearance or an exemption certificate.*





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## THE 2014 UPDATE TO THE OECD MODEL TAX CONVENTION

*Para 205. Add the following new paragraph 8 to the Positions on Article 17:*

**8. India does not agree with the interpretation given in paragraph 9 restricting the scope of Article 17 only to personal activities that have a close connection with performance. India considers that any consideration received by an entertainer or a sportsperson for any personal activity, including appearance is covered by Article 17.**



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**Thank you**



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## Contact Information

### Harshal Bhuta

M.Com., F.C.A., A.D.I.T., LL.M. (Hons.) in International Tax Law [WU (Vienna)]

### M/s. P. R. Bhuta & Co. Chartered Accountants,

**Address** 2-I, Jeevan Sahakar, 2nd Floor, Sir P. M. Road, Fort, Mumbai – 400001, India.  
**Telephone** +91 22 22660010/3427 ; 66333699  
**Mobile** +91 9930114418  
**Fax** +91 22 22662793  
**E-mail** [harshal.bhuta@bhutaco.com](mailto:harshal.bhuta@bhutaco.com)  
**Website** [www.bhutaco.com](http://www.bhutaco.com)