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## INDIA: Adjudicating “Situs” for Taxation of IP Intangibles

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In July 2016, the High Court of Delhi ruled on in the case of *Cub Pty Limited (Formerly Known as Foster’s Australia Ltd.) v. UOI & Ors.*, regarding the “situs” (location) of intellectual property (IP), holding that income accruing from transfer of intangible assets such as IP is not taxable in India if its ownership is foreign. The ruling overturned the dictum by the Authority for Advance Rulings (AAR (Income Tax)), which held otherwise.

Foster’s Australia Ltd., an Australian company, had an indirect subsidiary in India, Foster’s India Ltd. To assume its brewery business in India, Foster’s Australia Ltd. entered into a brand license agreement (BLA) with Foster’s India Ltd., wherein the latter was licensed to use four of the trademarks owned by Foster’s Australia Ltd. Later, there was transfer of ownership at the step-down subsidiary level and SABMiller became the owner of Foster’s India Ltd. by virtue of the “India Sale Purchase Agreement.” The transaction included, among other items, assignment of 16 trademarks which were owned by Foster’s Australia Ltd. (four of which were licensed to Foster’s India Ltd.). Due to the change in ownership, the BLA was terminated and the license to use the marks was canceled.

Assignment of the marks to SABMiller led the petitioner to seek an advance ruling from the AAR as to whether income emanating to the applicants by virtue of transfer of their IP was taxable in India under provisions of the Income Tax Act, 1961, and the double Taxation Avoidance Agreement between India and Australia. The AAR held that the income had “accrued” to applicants from the said transfer and that the income was taxable in India as per the provisions of the Income Tax Act. The reasons given included use of the trademarks, which were licensed to Fosters India Ltd., as well as registration of Foster’s Australia Ltd.’s trademarks. AAR was of the view that the IP belonging to Foster’s Australia had its “tangible presence” in India at the time of its transfer, since it generated goodwill in the Indian market by use for over a decade. AAR also supported that the goodwill of the IP was only increased by virtue of its operation in the Indian market, which entailed substantial income to be accrued.

Aggrieved by the AAR’s ruling, Foster’s Australia Ltd. approached the Delhi High Court contending that the situs of intangible capital assets, such as IP, must be determined by the situs of its owner, as per the common law principle of “mobilia sequuntur personam.” Foster’s Australia Ltd. argued that registration of a trademark in India did not imply migration of IP, but merely a recognition of a pre-existing right. The company also said that use of the licensed trademarks only generated royalty, and there was no change in proprietorship, which continued to vest with Foster’s Australia Ltd. Hence, the situs of the IP continued to be in Australia. Foster’s Australia Ltd. further contended that the situs of IP, being a business intangible, must be decided based on where the business is carried out.

The Delhi High Court, assessing the intent of the legislation, which was deliberately silent on the aspect of taxation of income accruing from transfer of IP owned by a foreign company, accepted Foster's Australia Ltd.'s argument, ruling that the situs of the owner of an intangible asset is the closest proximation of the situs of an intangible asset. Hence, transaction of IP owned by foreign entities would not be taxable in India.

The ruling brings clarity and harmony to the provisions of the Income Tax Act that are applicable to IP transactions.

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