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Google India Tax Ruling May Trigger Litigation 'Boom'

By Siri Bulusu

A ruling upholding a royalty tax on Google India represents a “change in judicial thinking,” India’s chief income tax commissioner said.

“The ruling shows that judicial forums—tribunals and courts—are willing to look more at the substance of transactions to see what exactly is happening and then interpret the law in light of that understanding,” Akhilesh Ranjan told Bloomberg Tax May 14.

The [May 11 ruling](#) is the latest in a six-year dispute over the tax treatment of payments made from Google India to Google Ireland for the use of its copyrighted AdWords software. The judgment upheld a \$38.4 million for assessment year 2013-14.

Ranjan said revenue authorities are set to scrutinize similar cross-border transactions.

“Of course we will be looking at similar companies in a similar fashion and hoping that the high courts and supreme court will appreciate these points we’re trying to make,” Ranjan said.

OECD Solution Needed

Litigation for multinationals will “boom” in light of the Indian revenue authority’s stance on taxing digital transactions, practitioners said, stressing that it would be best for multinational companies if the OECD quickly reaches consensus on how to tax such transactions.

"I don't see this judgment as a move in the right direction because there is no legal benchmark to compare it against—it should be laws that draw the lines around value creation, not court judgments," Meyyappan Nagappan, leader of taxation of digital economy at Nishith Desai Associates, told Bloomberg Tax May 14.

The OECD's Base Erosion and Profit Shifting initiative includes a chapter on the challenges facing the taxation of digital economy, with questions on how to measure where value is created and how countries should allocate profits based on that value creation.

However, the lack of consensus on how to address such issues has forced the Indian government to move ahead unilaterally and impose certain digital taxes, practitioners said, such as the equalization levy aimed at taxing digital advertisements. India's Chief Commissioner of Income Tax said late last month the country would go ahead with other measures if no international agreement emerges first.

"Generally there is difficulty in reaching consensus on taxing digital transactions, as it requires rewriting of the entire rules of business presence, permanent establishment and attribution," Rakesh Nangia, managing partner at Nangia & Co. LLP, told Bloomberg Tax in a May 15 email.

Unless a precedent is set in a high court or by the OECD through its BEPS project, all companies undertaking transactions similar to Google will "fall under India's tax net," Nangia said.

More Unilateral Action Ahead?

Resistance to taxing digital companies is emerging mostly from developed countries who wish to retain taxing rights over resident companies that derive revenue from emerging and fast developing economics like India, Nangia said.

The May 11 judgment, pertaining to assessment year 2013-14, is identical to a previous Bangalore ITAT order relating to assessment years 2006-2012. However, practitioners consider the judgment to be unique since a high court requested the tax tribunal to reach a conclusion without taking the previous order into consideration.

Google India was granted the marketing and distribution rights of the copyrighted Adwords program in India through two separate contracts with Google Ireland, according to court documents.

Google India had raised a number of points in its defense for the assessment years 2006-07 to 2012-13, in which it argued that Google is merely a reseller of advertisement space wherein advertisers select keywords and place a bid on the online auction.

“The government looked at the contracts together, saying that one transaction could not exist without the terms of the other contract,” Nagappan said, adding that the method created a slippery litigation slope because most transactions involve multiple contracts.

The judgment stated that it was “beyond doubt” that Google India had been provided a license to use intellectual property for which it was making payments to Google Ireland—and that the India-Ireland tax treaty also classified the transaction as a royalty.

“If the OECD does not bring any guidelines on this and tax treaties are not amended, then source countries are more likely to make necessary amendments in their domestic tax laws and find ways to tax such digital transactions in their own country,” Nangia said.