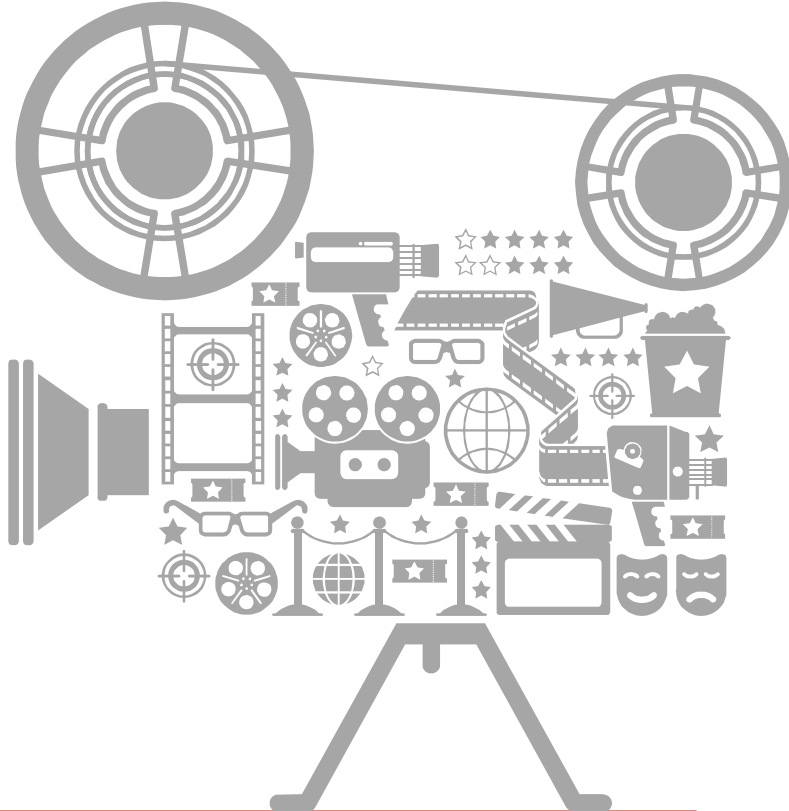
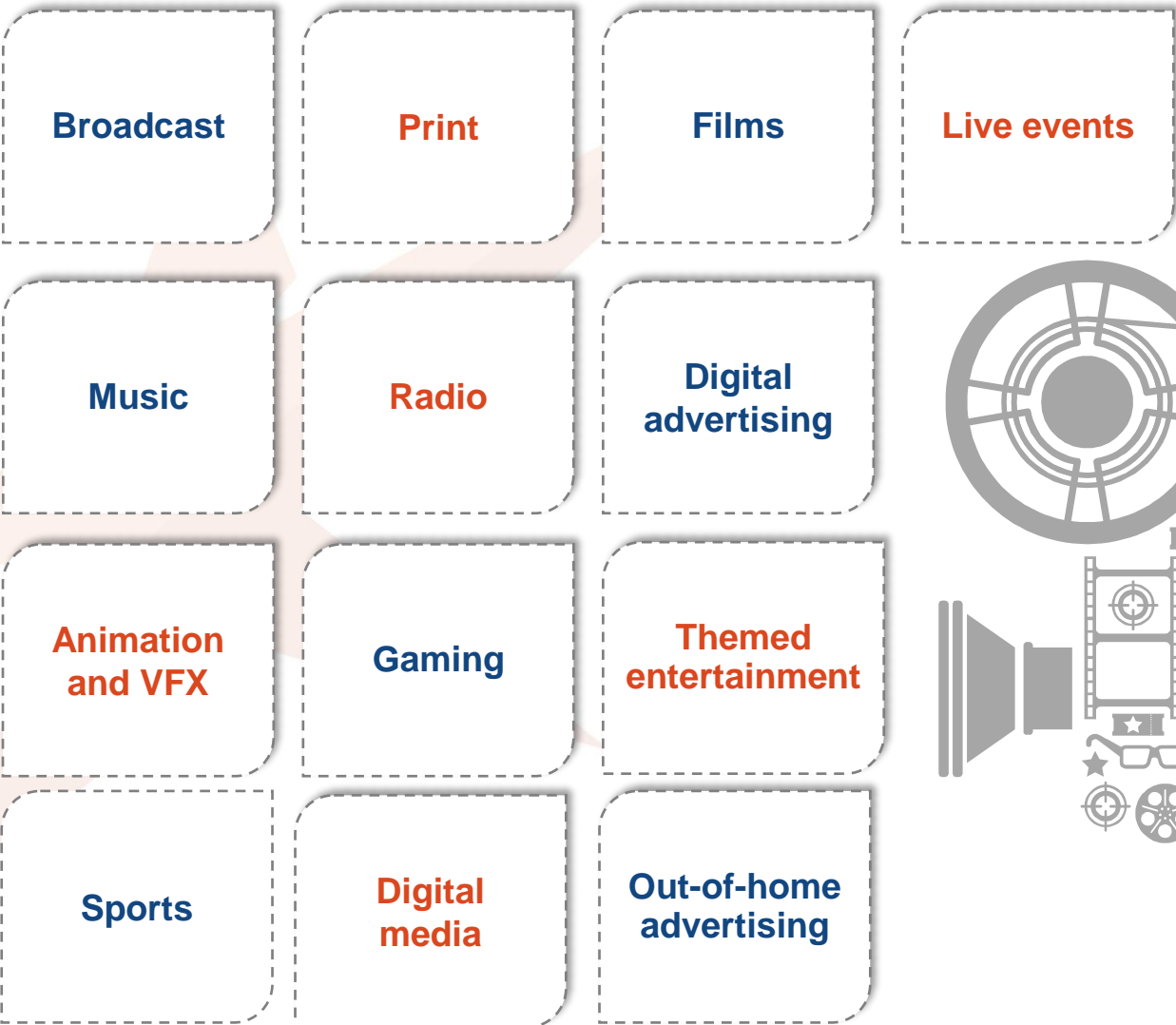


# Media & entertainment industry - Direct tax landscape

Prashant Bhojwani

23 April 2021

# Sectors - overview



# Content production



- **Issue:** withholding tax implications on payments for content production
- Business models:
  - In-house production
  - Production of content as per specification of broadcaster
  - Acquisition of broadcasting rights of content
- Circular No. 4/2016 dated 29 February 2016 [F.No.275/07/2016/IT(B)]
  - (a) content produced as per specification of broadcaster and (b) copyright of such content vests with broadcaster is covered by definition of 'work' under section 194C of the Income-tax Act, 1961 (Act) [i.e. 2 percent]
- Circular No. 715 dated 8 August 1995 and Circular No 714 dated 3 August 1995
  - In respect of payments to actors, cameraman, director, models, artists, photographers, etc, tax shall be deducted at rates applicable to fees for professional and technical services under section 194J of the Act

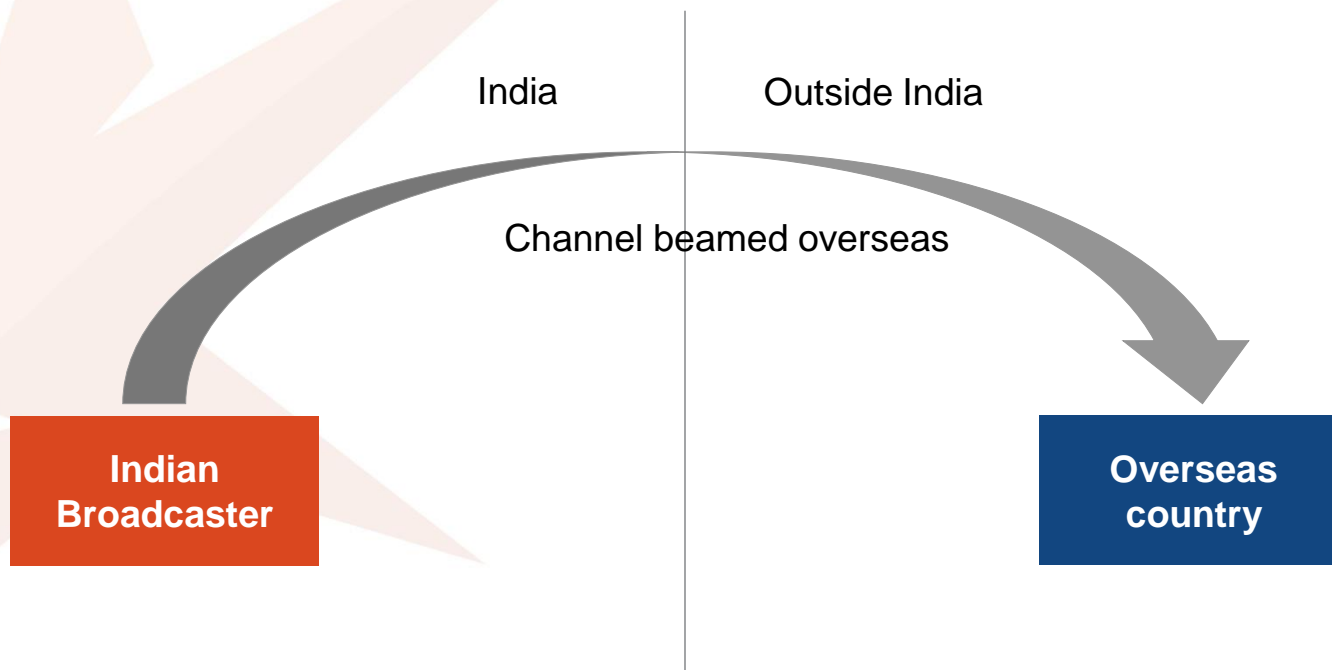
# Content amortization



- Content (films, TV serials) is typically considered as inventory by broadcasters
- Accounting policy: content cost (commissioned programmes) is debited to profit and loss account in the first year of telecast of such content
- **Issue:** year of allowability of content cost
- **Sun TV Network Limited (Chennai Tribunal)**
  - Assessing officer classified payment for film, TV serial rights as an intangible asset and allowed depreciation on the same
  - Tribunal upheld taxpayer's position of amortization of film, TV serial rights in the first year of telecast of such content
- **Mavis Satcom Limited (Chennai Tribunal)**

# Overseas channel

- Withholding tax implications on payments by Indian Broadcaster to overseas service providers (e.g. downlinking fees, transponder fees)



- Issue:** whether such service fees/ royalty would be deemed to accrue or arise in India?

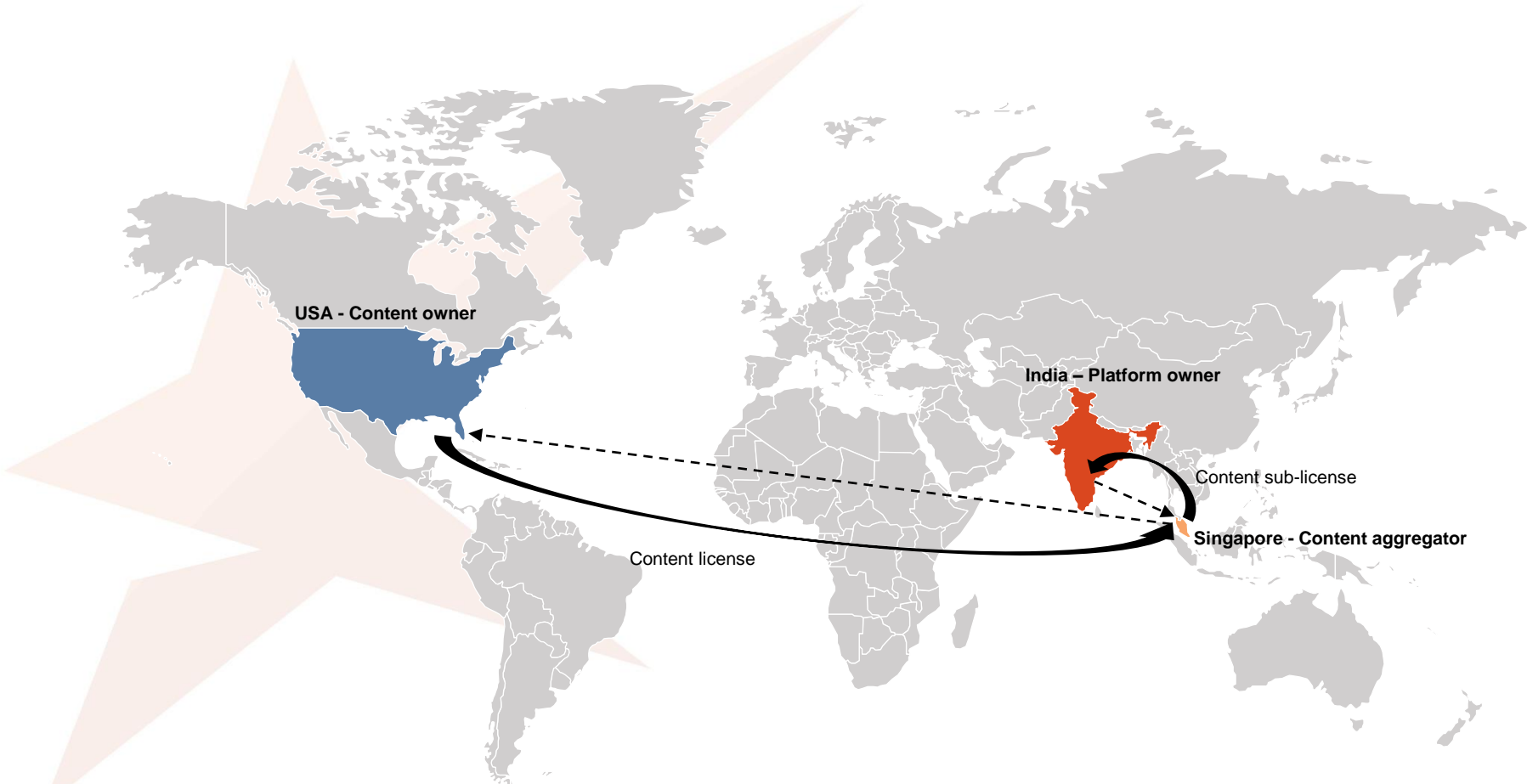
# Overseas channel

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- Exclusion from royalty, fees for technical services under section 9 of the Act
- Royalty or fees for technical services payable by resident to non-resident is not taxable if:
  - Amount is payable in respect of (a) any right, property or information used or services utilized for purposes of business carried on by such person outside India or (b) for purposes of making or earning income from a source outside India
- Findings in recent decision of **NGC Network Asia LLC (Mumbai Tribunal)**
- Decision is in the context of a foreign telecasting company beaming its channel in India

*“we find that the telecast of the channel happens from outside India. All the other core activities such as procurement/ aggregation of the content, editing, uplinking, etc. are conducted by the assessee from outside India. Hence, the source of income for the assessee, even based on the principle laid down in Performing Arts Society cannot be considered to be in India. Further, it is also a settled position that merely because the footprint of the satellite is in India and/ or advertisers are in India, the source of income cannot be considered to be in India.”*

# Content aggregator



**Issue:** withholding tax applicability on payment of license fee by content aggregator (Singapore company) to content owner (USA company)

-----> Payment flow

# Content aggregator

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## India-USA tax treaty

### Royalty and fees for included services

Second-source rule

Article 12(7)(b)

*Where under sub-paragraph (a) royalties or fees for included services do not arise in one of the Contracting States, and the royalties relate to the use of, or the right to use, the right or property, or the fees for included services relate to services performed, in one of the Contracting States, the royalties or fees for included services shall be deemed to arise in that Contracting State.*



# Celebrity shout-outs

- End-users (i.e. customers) can obtain personalised videos from celebrities e.g. birthday greetings
- Parties involved:
  - Celebrity (Indian or overseas)
  - Customer (Indian or overseas)
  - Platform
- Customers can download, view and share such videos
- Copyright in video owned by Platform
- **Issue:** withholding tax implications on payments to foreign celebrities



# Equalisation levy 2.0

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- Levy of 2% on consideration received or receivable by e-commerce operator from e-commerce supply or services to:
  - Person resident in India
  - Non-resident under specified circumstances-
    - Sale of advertisement targeted towards a customer in India or who accesses advertisement through IP address in India
    - Sale of data collected from a person resident in India or a person who uses IP address in India
  - Person who buys goods or services through IP address located in India
- Compliance obligations and levy on non-resident e-commerce operator
  - Unlike Equalisation levy 2016 on online advertisement, where compliance obligation cast on resident payers
- Income of non-resident e-commerce operator from supply or services exempt from Income-tax Act, 1961
- Impact: content streaming, gaming, subscription of e-journals/ e-papers

# Films - revenue streams

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Domestic box office

International box office

Satellite rights



Home video

Music

Licensing and merchandising



Digital media

In-film advertising

Miscellaneous (eg:  
sequel, dubbing,  
remake)

# Film production

- Deduction in respect of expenditure on production of films governed by Rule 9A of the Income-tax Rules, 1962:

Milestone	Deductibility
Release 90 days before end of financial year	Entire cost of production allowable
Release less than 90 days before end of financial year	Deduction of cost of production allowable to the extent of amount realized by <b>exhibiting film on a commercial basis</b>

- Decisions:
  - **Suneel Darshan (Mumbai Tribunal)**
    - Music rights
  - **Vishesh Films Private Limited (Mumbai Tribunal)**
    - TV rights
  - **Vijaykumar Thimmegowda (Bangalore Tribunal)**
    - TV and audio rights

# Royalty definition - amended

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- The Finance Act, 2020 - amendment

Following exclusion from royalty definition under section 9 of the Act deleted:

*“but not including consideration for the sale, distribution or exhibition of cinematographic films”*

Following inserted under section 194J of the Act (dealing with withholding tax on fees for technical services, professional fees, royalty, etc):

*“two percent of such sum in case of...or royalty where such royalty is in the nature of consideration for sale, distribution or exhibition of cinematographic films...”*

- **Issue:** withholding tax implications post the Finance Act, 2020 on payment for sale, distribution or exhibition of cinematographic films

# Film incentives



## Film incentives

**Government of various countries offer film incentives to attract film shoots in their countries**

- Prevalent in some countries for a long time (example: Canada since 1974)

**Film incentives serve as a mechanism to support production of films, TV serials**



## Advantages for producer

- Reduction in cost of production of film
- Opportunity to showcase new locations to audiences
- Access to overseas expertise/ latest technology

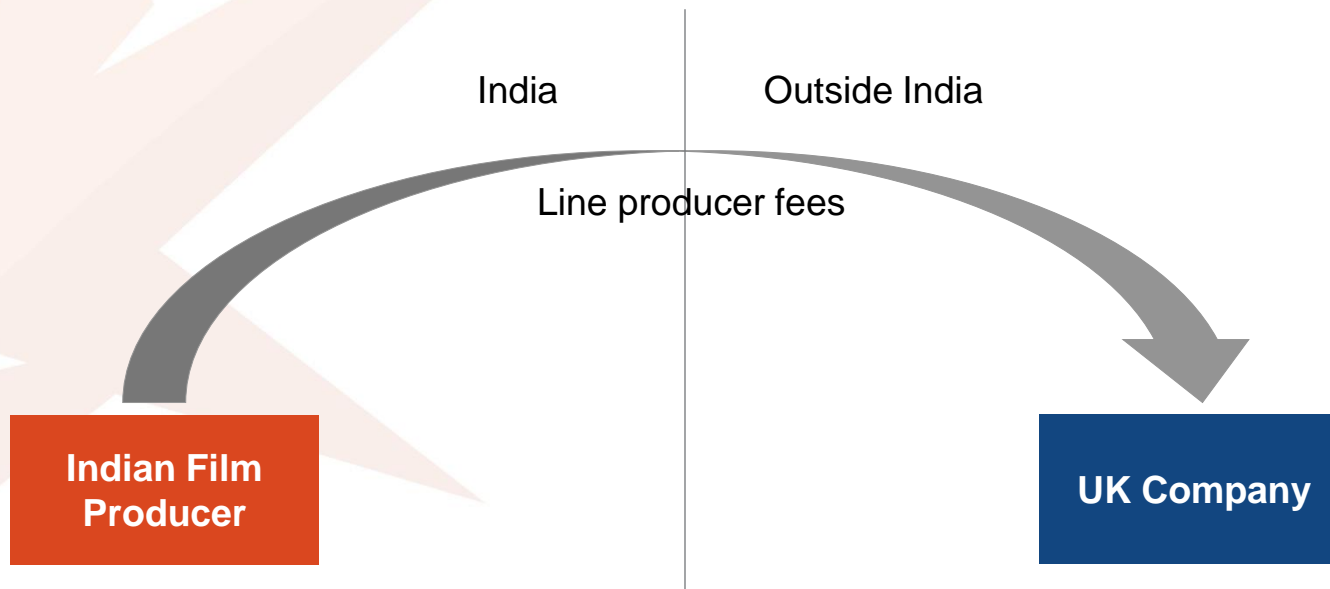
### Example:

- United Kingdom: 25% of qualifying expenditure

- **Issue:** tax treatment of film incentives

# Overseas film shoot

- Indian Film Producer shoots a film (i.e. principal photography) in UK and appoints a line producer for UK shoot
- Line producer fees are typically paid for logistic related arrangements for film shoots – this involves transportation, permission for shooting, hotel accommodation etc



- Issues:** (a) withholding tax implications on overseas payment of line producer fees  
(b) Income-tax implications for Indian actors

# Overseas film shoot

## Line producer fees - decisions





# Co-productions

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- Association of persons (AOP): where two or more persons voluntarily join in a common purpose/ action the object of which is to produce income, profits or gains
- AOP implications:
  - AOP is assessed to tax as a separate entity
  - Payments made inter-se between members not allowable as deduction for AOP
  - Profit/ loss of members not available for set-off against income of AOP
  - Losses of an AOP can be carried forward in its own hands and not in the hands of its members

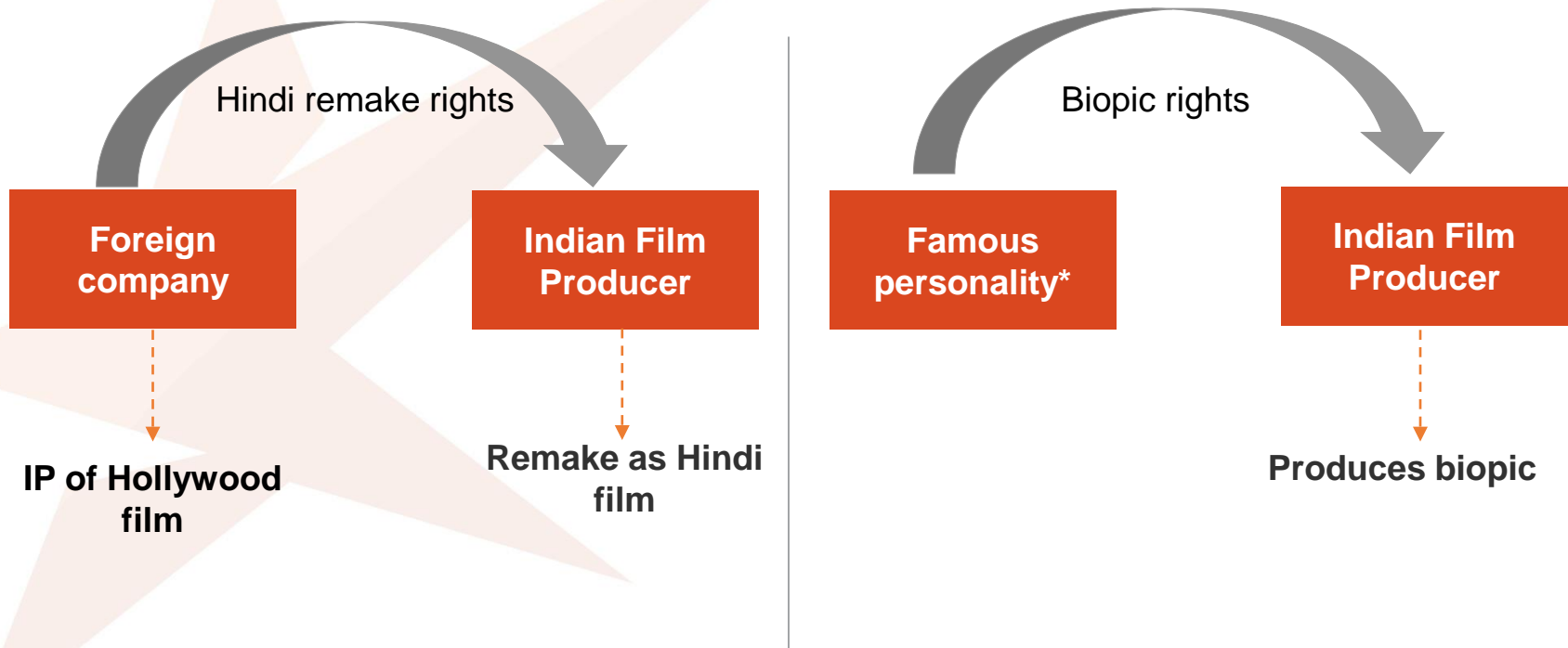
# Co-productions

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- Circular No. 7/2016 dated 7 March 2016 - following attributes should not constitute AOP:
  - Each member is individually responsible for executing its part of work through its own resources and bears the risk for its scope of work (i.e. clear demarcation in work)
  - Each member earns profits/ incurs losses based on performance within its scope of work
  - Men/ materials used for an area of work are under the risk and control of respective members
  - Control and management is not unified and common management is only for inter-se co-ordination for administrative convenience
- Additional factors/ aspects also to be considered based on facts and circumstances of the case
- Above circular issued in the context of engineering, procurement and construction contracts, turnkey projects
- Guidance may be considered relevant for film co-productions

# Remakes, Biopics

- Grant of rights to produce film (a) remakes e.g. Hindi remake of Hollywood film (b) based on famous personality, biopic



- Payout for above rights for film: lumpsum or minimum guarantee with overflow
- Issue:** withholding tax implications on aforesaid payment for grant of rights for film

\*Resident Indian

# Concluding thoughts

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- 1 Significant impact on media and entertainment industry on account of pandemic
- 2 Digital transformation accelerated - business models continuously evolving
- 3 Digital media and online gaming sectors performed well
- 4 Regulatory framework update – OTT, social media
- 5 Demand for content to continue to grow
- 6 Global trends in taxation of digital economy



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