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India's Supreme Court finally settles a two decade old dispute on software taxation

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Introduction

The Supreme Court of India recently settled a two-decade old dispute pertaining to taxability of software income. The Supreme Court ruled that payments to non-resident software vendors/licensors cannot be treated as payment towards royalty, and hence no withholding tax liability can be imposed on the resident payer. Moreover, the Court (perhaps recognizing the significance of the question to the ever-evolving technological landscape) has reconciled its earlier decisions rendered in the context of customs and VAT laws as well as withholding tax, and condensed noteworthy aspects of copyright law together with principles of statutory and treaty interpretation which will undoubtedly guide future jurisprudence and tax policy.

Factual background

The subject of debate was whether importers of software[1] were required to withhold tax on payment towards software purchases. The importers took a position that these transactions constituted purchase of products and hence they were not liable to withhold tax for such payments. The tax office, however, was of the view that such payments constituted royalty for use of copyright and hence tax should be withheld by the importers. The difference in viewpoints essentially revolved around the interpretation of the word "royalty" as defined in the Income-tax Act, 1961, DTAAs and as understood in the context of copyright law[2]. As best stated by the Apex Court itself, the cases in question had had a "chequered history" on account of conflicting judgments from the Karnataka High Court[3], the Delhi High Court[4] and the Authority for Advance Ruling (AAR)[5]. The set of disputes[6] before the Supreme Court hence comprised appeals pressed by the department as well as by taxpayers. The Supreme Court sequentially addressed each of the conflicting rulings, shedding light on its reasons for approval or disagreement, and eventually upheld the rulings of the Delhi High Court.

Domestic law treatment of payments made for software

The Income-tax Act, 1961 in relation to copyright defines royalty as consideration for "*the transfer of all or any rights (including the granting of a licence) in respect of any copyright […]*"[7]. Indian law recognizes a copyright in 'literary works'[8], which include 'computer programmes'.[9] Therefore, a payment is characterized as royalty if made for a transfer of any right in respect of a copyright in a computer programme.

It was in context of this definition read with the DTAA between India & Japan that the earlier ruling in *Dassault Systems K.K..* [10] was issued, holding that no withholding of tax was required. The Delhi High Court had approved of the same in *Ericsson A.B.* (both discussed below). The Act was retrospectively amended in 2012 by insertion of *Explanation 4*, and the term "transfer of all or any rights" was clarified to include "*transfer of all or any right for use or right to use a computer software (including granting of license) […]*".[11] The implications of the amendment are expanded upon later.

The position of law prior to the amendment, however, was laid out best by the AAR in *Dassault Systems K.K..* The Supreme Court has extensively cited findings of the *Dassault* ruling and approved the same. The facts therein revolved around a Japanese resident company selling software to end-users through value added resellers (VARs). End-users entered into End User License Agreements (EULAs) were with the original holder of the copyright, that is, the Japanese company as well as the VAR. The AAR held that the payments would not be royalty under the Act, since there was no transfer of the underlying copyright in the software. Citing paragraphs of *Copinger and Skone James on Copyright* (which the Supreme Court has now termed *locus classicus* on the subject), the AAR had opined that copyright is a negative right to preclude others from performing certain acts which in India are listed under Section 51 of the Copyright Act, 1957.[12] The EULA clearly provided that the intellectual property would be retained only by the Japanese company. In such a case, there is no transfer of a right in respect of the copyright, rather, only a transfer of the copyrighted article. The words "including the grant of a licence" do not cover a EULA, but only apply where a right is transferred through a licence agreement.

The AAR further took support from the fact that the transactions comprised sale of goods under Sales Tax legislations, as per an earlier Supreme Court judgment (*Tata Consultancy Services****[13]***), and therefore could not be royalty. The *Dassault* principle was followed in *Geoquest Systems B.V.****[14]***. While these two rulings were never appealed by the department, a divergent stance was taken by the AAR in *Citrix Systems****[15]*** which is now overruled.

The Karnataka High Court meanwhile in *Samsung Electronics* (2012)***[16]*** held that the payments constituted royalty. The High Court reasoned that the *Tata Consultancy Services* decision was inapplicable to the question of royalty, since the intentions behind imposing Sales Tax and Income-tax are entirely different. In the *Samsung* case, on the fact that the terms of the licence enabled the end-user to make a copy of the computer programme, the Court held that such a right implied a transfer of the underlying copyright. It reasoned that the consideration in question was not for the CD or the software, but for the licence of the underlying copyright, without which, such an act of copying would comprise infringement. Thereafter, the Karnataka High Court in a catena of cases summarily rejected treaty claims of taxpayers by blankly averring to the *Samsung Electronics* decision. All of them formed the present batch of appeals before the Supreme Court.

Around the same time as the *Samsung* decision, however, the Delhi High Court in *Ericsson A.B.****[17]*** gave explicit approval to the AAR ruling in *Dassault Systems*. This was reiterated in *Nokia Networks OY****[18]*** and later in *Infrasoft Ltd.****[19]*** and *ZTE****[20]***. In *Infrasoft*, the Delhi High Court explicitly stated its disagreement with the Karnataka High Court. The conflict between the decisions of the two High Courts has now been addressed and resolved.

Interestingly, the *Dassault* ruling and the *Ericsson* judgment prompted a retrospective amendment of the law which expanded the definition of royalty in respect of computer software to include scenarios where only a right to use the software (and not the copyright) was transferred. Solely on the basis of this amendment, all the payments in question became royalty under domestic law. However, the Delhi High Court in *Nokia Networks* (2012) held that the amendment could not be read into a treaty. Moreover, the treaty provisions are understood to override domestic law, as discussed later.

On the question of the domestic law definition, the Supreme Court judgment has made extensive note of key observations in AAR rulings of *Dassault* and *Geoquest*, and the four abovementioned Delhi High Court judgments to reiterate that the transfer of a right in respect of a copyright as required under Section 9(1)(vi) was never satisfied. Instead, what is transferred is only a copyrighted article. The Karnataka High Court's reasoning is refuted by saying that end-users making copies of the software on their devices in order to use the same is not infringement due to a specific provision in the Copyright Act[21]. Therefore, the licence which enables such copying is not a licence that transfers copyright.

The Court has further given weight to the AAR's reliance on *Tata Consultancy Services* in the context of VAT laws to prove that the transactions were of goods and not of intellectual property. In the same vein, the Court has relied on the *State Bank of India* case[22] pertaining to the treatment of similar payments under the Customs Act, 1962, which requires certain payments in respect of a copyright to be included in transaction value on which duty is charged. However, a specific exclusion is carved out for charges in lieu of right to resell and reproduce the software. SBI's claim was that the consideration in respect of "Licencing fee for use of software country-wide" was for the right to reproduce the software for its various branches across India. The Apex Court had differentiated between a right to use a computer software and a right to reproduce for commercial purposes, holding that under the EULA, no right to reproduce the software was transferred. Similarly, in the present appeals, the licenses only stipulated a right to use software that did not tantamount to transfer of copyright.

In this manner, the Court has condensed and harmonized the treatment of payments for acquiring software under income-tax, sales tax (now GST) and customs law, along with an elaborate discussion of the principles in the Copyright Act, 1957. While this is undoubtedly a landmark decision in bringing together all these aspects, it is difficult not to see the disputes as avoidable, given that as early as in 2010 and 2012, the AAR and the Delhi High Courts had extensively dealt with the issues . Had the department analyzed those decisions correctly and attempted to match its conduct with international practice or even the plain meaning of the term 'royalty', there would have been no cause for the expensive and arduous litigation, or for the misadventure of amending the domestic law retrospectively to force a withholding tax liability.

Treaty meaning of 'royalty' and the relevance of the OECD Commentaries

In all the decisions cited above, a parallel discussion has been undertaken on the meaning of royalty in the relevant Double Taxation Avoidance Agreements (DTAAs). Taking the OECD Model Convention as an example, treaties usually have a definition clause to the effect of "*The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright […]*"[23].

Provisions of the Income-tax Act only apply to the extent that they are more beneficial to the assessee (taxpayer)[24]. Therefore, of critical importance here is the comparatively restricted scope of the applicable DTAA definition. Where the Indian law refers to a transfer of all or any rights in respect of a copyright, royalty provisions under the treaty are only triggered when payment is made for the use of a copyright, or for the right to use a copyright.

The Court noted that use of a copyright relates to the exclusive rights of a copyright owner (which under Indian law are listed under Section 14 of the Copyright Act, 1957)[25]. Only where such exclusive rights are transferred does the consideration received have the nature of royalty. Since in the facts of the appeals neither distributors nor end-users got any exclusive right falling under this Section, the Court reasoned that it was not possible to say that the payments were made for using or a right to use the copyright in a computer programme[26].

It was also argued by the tax administration that India has made reservations, *inter alia*, to the relevant sections of the OECD Model Convention and Commentary and expressed the view that certain payments would constitute royalties. The Supreme Court rejected this argument – stating that a unilateral reservation would not be sufficient to set aside the persuasive value of the Commentary, and no bilateral treaty amendments were taken by India to change the definition of royalties contained in its DTAAs. The Court further suggested that there was a difference between the phrases "India reserves its position" in respect of royalties and the more definitive "India does not agree…" in respect of other paragraphs of the Commentary.

The treaty definition of royalty is narrower than the one in the Act, because it relates to specific exclusive rights of the copyright holder instead of any rights in respect of a copyright. This position was previously taken by the Delhi High Court[27], and is now confirmed by the Supreme Court[28]. In any case, definitions from domestic law can only be imported for the interpretation of treaties in cases where the treaty does not itself provide a definition[29].

It is also worth noting that while the UN sub-committee on international tax is in discussions for amending Article 12 to specifically include 'software' for determining royalty income, it has left its commentary with respect to royalty from distribution[30] of software untouched – implying even in the revised and expanded proposed definition, payment for acquisition of software for distribution would not fall in the ambit of royalty.

Retrospective amendments and the “doctrine of impossibility”

An important challenge raised in the appeals was on the retrospective application of amended domestic law. As highlighted previously, a plain reading of the 2012 amendment[31] shows that it was solely motivated to deal with the cases that were now before the Supreme Court, i.e., payments made for acquiring copies of software or the licence to use a software.

The Revenue’s contention was that withholding tax requirements will apply (under Section 195 of the Act) when the end-users and distributors make payments to foreign companies of any sums chargeable to tax. The chargeability came from the preceding discussion of Section 9(1)(vi) when read with the retrospective amendment. It was argued that the amendment was only clarificatory, and its effect would go back to 1976 which was when the relevant provision on royalty income was introduced.

The Supreme Court turned down this argument entirely, stating that it was ludicrous to suggest that the *Explanation* pertaining to “computer software” could explain the legislative intent as in 1976, when the term itself was introduced in the Act in 1991.

Importantly, the Court further drew reference to a legal principle: *lex non cogit ad impossibilia*, i.e., the law does not demand the impossible[32] to reason that applying the expanded definition of royalty (as per *Explanation 4*) at the time when such explanation was not actually and factually in the statute was expecting a person to do the impossible. Therefore, the persons responsible could not be treated as “assessees in default” for not deducting tax.

Invalidating a demand made through a retrospective amendment stands as an important milestone in Indian jurisprudence and combined with the extensive discussion of case law, will be an important reference point for questions on other categories of income as well (apart from royalty). It hopefully addresses an often and long-criticized[33] policy step of the Government in resorting to retrospective liabilities under the garb of clarificatory explanations. If this decision is given full effect to by the Courts and Tribunals and followed in spirit by the administration, it will signal a monumental boost to taxpayer certainty and investor confidence.

Reference to Vienna Convention on Law of Treaties (VCLT) while treating the OECD Commentary as “Instructive”

The Court has inferred that the OECD commentary is “instructive” and then went on to note observations in the commentary on the Article on Royalties. In arriving at its conclusion that the OECD Commentary is instructive, the Court relied on the ruling of the Australian High Court in the case of *Thiel vs Federal Commissioner of Taxation*[34], where the judge took cognizance of Article 31[35] and Article 32[36] of the VCLT. The Court made mention of an earlier ruling of the Supreme Court in the case of Ram Jethmalani[37] wherein it was noted that though India is not a party to the Vienna Convention on the Law of Treaties, the principles of international law and the principle of interpretation contained in Article 31 thereof provide broad guidelines to interpret treaties in the Indian context also. This is yet another affirmation of the willingness of Indian Courts to adhere to customary international law, even if it is not binding on India.

Applying treaty provisions while withholding tax

The department brought forward an argument that regardless of whether the terms of the DTAA were more beneficial, there was a firsthand requirement on the payers to make deductions and that thereafter a refund could have been claimed. For this argument, it relied on a recent ruling of a coordinate bench of the Supreme Court (*PILCOM v. Commissioner of Income-tax*)[38].

The Court distinguished this ruling by stating that it was in a different context – where the provision with the withholding requirement[39] made no reference to chargeability under the Act. The Supreme Court termed as "absurd" the revenue's contention that any person making payment to a non-resident has to necessarily deduct tax and categorically held that as per its earlier decision[40], a person liable to deduct tax is only liable to deduct tax *first and foremost* if the non-resident person is liable to pay tax, and *second*, that if so liable, deduction is to be made at the rate mentioned in the DTAA.

Doctrine of first sale / principle of exhaustion:

While examining the meaning of copyright in India in order to interpret the phrase "use of, or right to use a copyright" as utilized by treaties, an interesting, connected question arose. Copyright, in relation to computer programmes, includes an exclusive right to sell any copy of the computer programme.[41] The department argued on this basis that the resellers of software were, as per Section 14(b)(ii) of the Copyright Act, granted this exclusive interest in the copyright. This was rebutted by the software companies by relying on the doctrine of first sale (or principle of exhaustion).

The first sale doctrine, or the 'principle of exhaustion' is a defence to infringement claims. It limits the copyright holder's control over copies of a work till they have been sold once. The principle enables free trade. Without this defence, the owner of the copyright would be entitled to regulate each sale or rental of an item indefinitely. Hence, while copyright owners continue to enjoy exclusive rights such as of licensing, reproduction and adaptation etc., they part with the ownership of the particular items/copies upon first sale. As per *Copinger and Skone on Copyright*, the same principle applies to computer software. When a copy of a program is sold, the copyright owner exhausts their distribution right in respect of that copy.

Although not its primary purpose, the principle can be used to differentiate between rights of a copyright holder (intellectual property) and the rights of the owner of an article which has an underlying copyright (tangible object). For this reason, some companies acquiring software (in particular, the resellers of software) argued that their terms did not stipulate any transfer of the underlying copyright, rather they were limited to reselling copies of software on which the distribution rights of the copyright holders had exhausted. The department contended instead that the principle had no application in India with regard to computer programmes.

The Supreme Court has upheld the validity of the principle in India, giving due weight to the context of Section 14(b)(ii). This section was amended in 1999. Prior to the amendment, in relation to computer programmes, the exclusive right to sell the programme extended to copies "regardless of whether such copy has been sold or given on hire on earlier occasions". The Court observed that the conspicuous absence of these words was statutory recognition of the principle of exhaustion. It also cited the Delhi High Court's decision in *Warner Bros. Entertainment Inc. v. Santosh V.G.*[42] pertaining to cinematographic films, in which the doctrine was held to be statutorily recognized on account of a similar amendment.

The Court also made note of the ECJ's pronouncement in *UsedSoft v. Oracle*[43] which acknowledged the applicability of the defence in relation to copyrights in software. It importantly highlighted an additional requirement for the defence to be satisfied – upon reselling software, the first acquirer should delete their copy in order to not infringe upon the exclusive right of reproducing the software that only vests with the holder. While this was not relevant to the present cases pertaining to shrink-wrapped software (since the companies never used the acquired copies) the Court located semblance of this principle in provisions of the Copyright Act as well.[44]

In this manner, the Court has clarified that reselling software without a reproducing copies of cannot be characterized as a use of copyright. It has simultaneously confirmed availability of a well-recognized legal principle that will be relevant for the ever-growing software industry in India.

Conclusion

Prior to this judgment, India had a wide, comprehensive body of jurisprudence on the question of software payments, *albeit* a conflicting one. The Supreme Court's decision has legitimized the position first taken by the AAR in *Dassault Systems* and left no scope for the tax administration, Tribunals and Courts to take a contrary view. It has settled the debate entirely on payments made for acquiring software and harmonized the treatment of such payments under India's various legislations pertaining to income-tax, customs, and VAT. The distinction between a copyright and a copyrighted article has been further clarified.

Beyond just software payments, however, this judgment is a landmark verdict that will undoubtedly be of assistance to non-residents in a variety of contexts. To name a few, the principle in *Azadi Bachao Andolan* has been restated as regards liberal interpretation of treaties in context of their purpose. Secondly, the Supreme Court has once again sought guidance from the VCLT to interpret a DTAA. Thirdly, it has utilized the OECD Commentary as a supplementary means of interpretation and restricted the legal impact of India's reservations which are not incorporated into its agreements. Fourthly, it has been restated that the payer of tax will be able to invoke provisions of the relevant DTAA while calculating the deduction to be made. It is interesting to note here that the Finance Bill 2021 introduced a specific amendment on applicability of beneficial treaty withholding tax rates for dividend paid to Foreign Portfolio Investors.[45]

Finally, and perhaps most importantly, the observations of the court on retrospective withholding tax liability stand out. The judgment is not a reversal of the position that the Parliament has the sovereign right to make retrospective amendments. However, the doctrine of impossibility emphasized by the court may become a popular defence against demands made through such amendments – especially if its a retrospective liability to deduct tax at source.

This judgment reflects a leap forward for India's position on alignment with customary international law, and not merely in respect of software related payments. While the ground-level administration in India is also catching up, Indian jurisprudence has time and again shown remarkable maturity keeping the bigger picture in perspective, and this decision is no different.

[1] This implies importers of software subject to Indian tax laws.

[2] The Copyright Act, 1957.

[3] The Karnataka High Court had ruled that the consideration would be chargeable to income-tax as royalty, treating the purchases to be inseparable from the purchase of the underlying copyright in the software *CIT v. Samsung Electronics Co. Ltd.*, (2012) 345 ITR 494; *CIT v. Synopsis International Old Ltd.*, ITA Nos. 11-15/2008.

[4] The Delhi High Court had arrived at a diametrically opposite conclusion, holding that in all these purchases, the copyright of the non-resident was never transferred to the end-user or distributor, and hence was not royalty under Indian law – *Director of Income Tax v. Ericsson A.B.*, (2012) 343 ITR 470; *CIT v. ZTE Corporation*, (2017) 392 ITR 80; *Director of Income Tax v. Infrasoft Ltd.*, (2014) 264 CTR 329; *Director of Income Tax v. Nokia Networks OY*, (2013) 358 ITR 259.

[5] *Dassault Systems K.K., In re:* [2010] 322 ITR 125 (AAR); *Citrix Systems Asia Pacific Ptyl. Ltd., In Re.*, (2012) 343 ITR 1 (AAR)

[6] The Court considered a batch of 103 appeals together, categorizing them into four categories on the basis of payments made, where:

- Software was purchased directly by resident end-user from non-resident supplier
- Software was purchased by resident distributor from non-resident supplier
- Software was purchased by end-user from non-resident distributor
- Integrated unit (of hardware onto which software is affixed) was purchased by resident end-user or distributor from non-resident supplier

[7] Explanation 2(v) to Section 9(1)(vi) of the Income-tax Act, 1961, inserted by the

Finance Act, 2001 (14 of 2001), s. 4(i) (w.e.f. 1-4-2002)

[8] Section 13(a), The Copyright Act, 1957.

[9] Section 2(o), The Copyright Act, 1957.

[10] *Dassault Systems K.K., In re:* [2010] 322 ITR 125 (AAR)

[11] *Explanation 4* to Section 9(1)(vi) of the Income-tax Act, 1961, inserted by the Finance Act, 2012 (23 of 2012), w.r.e.f. 1-6-1976:

"For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred."

[12] Section 51, The Copyright Act, 1957.

"51. When copyright infringed.—

Copyright in a work shall be deemed to be infringed—

(a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act—

(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or

(ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright; or

(b) when any person—

(i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or

(ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or

(iii) by way of trade exhibits in public, or (iv) imports into India, any infringing copies of the work:

Provided that nothing in sub-clause

(iv) shall apply to the import of one copy of any work for the private and domestic use of the importer.

Explanation.— *For the purposes of this section, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film shall be deemed to be an "infringing copy"."*

[13] *CIT v. Samsung Electronics Co. Ltd.*, (2012) 345 ITR 494

[14] *Geoquest Systems B.V. Gevers Deynootweg, In Re.*, (2010) 327 ITR 1 (AAR)

[15] *Citrix Systems Asia Pacific Ptyl. Ltd., In Re.*, (2012) 343 ITR 1 (AAR)

[16] *CIT v. Samsung Electronics Co. Ltd.*, (2012) 345 ITR 494

[17] *Director of Income Tax v. Ericsson A.B.*, (2012) 343 ITR 470 (2012) 343 ITR 470

[18] *Director of Income Tax v. Nokia Networks OY* (2013) 358 ITR 259

[19] *Director of Income Tax v. Infrasoft Ltd*. (2014) 264 CTR 329

[20] *CIT v. ZTE Corporation*, (2017) 392 ITR 80 (2017) 392 ITR 80

[21] Section 52(1)(aa), according to which making copies or adaptation of a computer programme by the lawful possessor of a copy of such computer programme in order to utilise the computer programme for the purpose for which it was supplied or to make back-up copies does not constitute infringement.

[22] *State Bank of India v. Collector of Customs*, 2000 (1) SCC 727

[23] Article 12(2), OECD Model Convention.

[24] Section 90(2), Income-tax Act, 1961.

[25] *14. Meaning of Copyright.— For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:—*

(a) in the case of a literary, dramatic or musical work, not being a computer programme,—

(i) to reproduce the work in any material form including the storing of it in any medium by electronic means;

(ii) to issue copies of the work to the public not being copies already in circulation;

(iii) to perform the work in public, or communicate it to the public;

(iv) to make any cinematograph film or sound recording in respect of the work;

(v) to make any translation of the work;

(vi) to make any adaptation of the work;

(vii) to do, in relation to a translation or an adaptation of the work, any of the acts

specified in relation to the work in sub-clauses (i) to (vi);

(b) in the case of a computer programme,—

(i) to do any of the acts specified in clause (a);

(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme: Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.

[26] This line of reasoning gets support from the OECD Commentary, which states (as quoted by the Apex Court as well),

"Payments made for the acquisition of partial rights in the copyright (without the transferor fully alienating the copyright rights) will represent a royalty where the consideration is for granting of rights to use the program in a manner that would, without such license, constitute an infringement of copyright. Examples of such arrangements include licenses to reproduce and distribute to the public software incorporating the copyrighted program, or to modify and publicly display the program. In these circumstances, the payments are for the right to use the copyright in the program (i.e. to exploit the rights that would otherwise be the sole prerogative of the copyright holder). […]"[26]

"In other types of transactions, the rights acquired in relation to the copyright are limited to those necessary to enable the user to operate the program, for example, where the transferee is granted limited rights to reproduce the program. This would be the common situation in transactions for the acquisition of a program copy."

[27] *CIT v. DCM Limited*, ITA Nos. 87-89/1992*; Ericsson* (*Supra* note 5);

[28] The Court has therefore clarified that the domestic law definition in terms of "any right in respect of any copyright" being wider than "use of, or right to use any copyright" in the DTAAs will be entirely inapplicable in respect of rights other than ones understood to comprise a copyright (as under Section 14 of the Copyright Act, 1957). *Samsung Electronics* and *Synopsis International* are overruled in this context as well, and the Delhi High Court judgments affirmed.

[29] Article 3(2) of the OECD Model Convention; Explanation 4 to Section 90 of the Income-tax Act, 1961. Expanded upon in *Azadi Bachao Andolan v. Union of India* (2004) 10 SCC 1.

[30] *Arrangements between a software copyright holder and a distribution intermediary frequently will grant to the distribution intermediary the right to distribute copies of the program without the right to reproduce that program. In these transactions, the rights acquired in relation to the copyright are limited to those necessary for the commercial intermediary to distribute copies of the software program. In such transactions, distributors are paying only for the acquisition of the software copies and not to exploit any right in the software copyrights. Thus, in a transaction where a distributor makes payments to acquire and distribute software*

copies (without the right to reproduce the software), the rights in relation to these acts of distribution should be disregarded in analysing the character of the transaction for tax purposes. Payments in these types of transactions would be dealt with as business profits in accordance with Article 7. This would be the case regardless of whether the copies being distributed are delivered on tangible media or are distributed electronically (without the distributor having the right to reproduce the software), or whether the software is subject to minor customisation for the purposes of its installation.

The UN sub-committee released a draft for discussion on 16th February, inviting comments to the text of Article 12 as well to the commentary. The same will be discussed by the sub-committee during its meeting on 22nd-24th March and shall be presented to the Committee on 31st March. A final decision in respect to the same shall be taken by the Commiteee during its meeting on 19-30th Apri 2021.

[31] *Supra* note 11.

[32] The Court relied on two decisions of the Bombay High Court (CIT v. NGC Networks (India) Pvt. Ltd., ITA No. 397/2015; CIT v. Western Coalfields Ltd., ITA No. 93/2008) in which a similar liability to deduct tax had arisen on account of retrospective amendments to the Income-tax Act. It concluded:

"It is thus clear that the "person" mentioned in section 195 of the Income Tax Act cannot be expected to do the impossible, namely, to apply the expanded definition of "royalty" inserted by explanation 4 to section 9(1)(vi) of the Income Tax Act, for the assessment years in question, at a time when such explanation was not actually and factually in the statute."

[33] Mukesh Butani, *Are taxpayers paying the price of a turf battle?*, Business Standard (April 2, 2012), available at: https://www.business-standard.com/article/economy-policy/mukesh-butani-are-taxpayers-paying-the-price-of-a-turf-battle-112040200076_1.html

[34] *Thiel v. Federal Commissioner of Taxation, High Court of Australia*, [1990] 94 ALR 647

[35] Article 31 of the Vienna Convention on the Law of Treaties, 1969.

Clause 1 of Article 31 provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The good faith principle guides all interpretation and takes preference over even the literal meaning of the words of a treaty if it does not match the object and purpose. Clauses 2 and 3 thereafter list various sources which may be used for determining the context of the treaty, including – subsequent agreements and practice as well as unilateral instruments that are accepted by the other party as an instrument related to a treaty.

[36] Article 32 of the Vienna Convention on the Law of Treaties, 1969.

Article 32 stipulates that supplementary means of interpretation can be referred to in order to confirm the meaning resulting from Article 31.

[37] *Ram Jethmalani v. Union of India*, (2011) 8 SCC 1. The Court also observed that OECD commentaries have been relied upon in several earlier rulings and noted the following:

1. *Union of India v. Azadi Bachao Andolan*, (2004) 10 SCC 1 at pages 42-43;
2. *Formula One World Championship Ltd. v. CIT*, (2017) 15 SCC 602 at pages 629-630; and

- *CIT v. E-Funds IT Solution Inc.*, (2018) 13 SCC 294 at pages 322-323.

[38] *PILCOM v. CIT, West Bengal-VII* 2020 SCC Online SC 426

[39] *PILCOM was* rendered in context of Section 194E of the Income-tax Act, 1961.

[40] *GE India Technology Centre (P) Ltd. v. CIT*, (2010) 10 SCC 29

[41] Section 14(b)(ii), The Copyright Act, 1957, *Supra* note 41.

[42] *Warner Bros. Entertainment Inc. v. Santosh V.G.* 2009 SCC OnLine Del 835

[43] *UsedSoft GmbH v. Oracle International Corp.* (Case C-128/11) European Court of Justice

[44] Section 65A of the Copyright Act, 1957 punishes the circumvention of technological protection measures, such as encryption codes, product keys etc. designed to ensure that the first acquirer's copy is made unusable.

[45] Section 49 of the Finance Bill, 2021.

In section 196D of the Income-tax Act, in sub-section (1), the following proviso shall be inserted, namely:––

"Provided that where an agreement referred to in subsection (1) of section 90 or sub-section (1) of section 90A applies to the payee and if the payee has furnished a certificate referred to in sub-section (4) of section 90 or sub-section (4) of section 90A, as the case may be, then, income-tax thereon shall be deducted at the rate of twenty per cent. or at the rate or rates of income-tax provided in such agreement for such income, whichever is lower.

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