# Kluwer International Tax Blog

## Global Experts debate Landmark Indian Ruling on Software Taxation

Mukesh Butani, Seema Kejriwal (BMR Legal) · Friday, October 8th, 2021

A conversation on International Tax Practice culminated into an IFA webinar series on May 20th with global experts sharing their perspectives on landmark treaty and transfer pricing rulings delivered by Courts in various jurisdictions suggesting areas of alignment and divergence of principles.

In an eminent panel moderated by Professor Robert Danon, Mr. Mukesh Butani introduced India's software royalty case[1] followed with observations made by panelists Mr. Peter Barnes, Mrs. Sophie Chatel, Professor Johann Hattingh, Professor Adolfo Martin Jimenez, and Professor Jonathan Schwarz.

The transfer pricing cases were covered by an illustrious panel comprising Mr. Clark Armitage (who presented the Coca-Cola case), Dr Niv Tadmore & Mr. Benjamin Lancaster (both presented the Glencore case), AL Meghji (who presented the Cameco case), Mr. Matt Andrew (who presented a global perspective in light of these rulings), together with Professor Guglielmo Maisto, Mr. Luis Schoueri, Ms. Isabel Verlinden, Professor Vikram Chand and Professor Johann Hattingh. Our analysis of the transfer pricing cases has been covered in our earlier blog[2].

**Backdrop**

In a landmark[3] ruling in March 2021, the Supreme Court of India ruled on taxability (in India) for certain[4] types of software-related income. The debate arose due to the position taken by India's tax administration and was further exacerbated by retrospective amendments to the domestic law[5] which clarified that payments towards software were royalties and hence taxable in India in the hands of the recipient. The tax officials charged several Indian taxpayers with default in discharging their withholding tax obligation against such payments characterized as Royalty. The first phase of controversy[6] was settled by the Supreme Court in so far as withholding tax obligations are concerned by holding that unless there is income chargeable to tax, no case for withholding can be made out. The Court then did not deal with the merits of chargeability with regard to the characterization. After a series of conflicting High Court rulings, these eventually found their way to the Supreme Court, in the recently decided case.

Broadly, the questions answered by the Court were as under:

1. Was payment for software a royalty payment under India's Income-tax Act? Supreme Court ruled in favour of tax office.
2. Was payment for software towards royalty under the specified tax treaties? Supreme Court ruled in favour of taxpayers.
3. Withholding Tax for non-residents – If income not chargeable to tax in India under tax treaties, is withholding warranted? Supreme Court ruled in favour of taxpayers.

In reaching its conclusions, in a detailed 225-page ruling, the court touched upon various Indian and international judicial precedents, the role of the OECD Model Convention, the Vienna Convention on Law of Treaties, the role of positions in a tax treaty and the relevance of retrospective amendments in domestic law causing friction with the treaty provisions. The ruling has been discussed at length in a separate blog[7].

The key findings of the Court were as below:

- Retrospectivity – Parliament has sovereign power to legislate. However, the law cannot be made retrospective to result in absurd consequences (Technology came in 1990s, whereas retrospectivity was from 1976)[8]. Doctrine of impossibility (*lex non cogit ad impossibilia)* was applied to negate harsh consequences arising from retrospective amendments.
- Definition of "royalty" in DTAAs – Definition in DTAAs are based on OECD Model Tax Convention[9]. "Royalties" as per Treaty means payments of any kind received as a consideration for the use of, or the right to use, any copyright. Treaty definition is narrower than domestic law definition. OECD Commentary will continue to have persuasive value for interpretation of the term royalties.
- Vienna Convention on Law of Treaties (VCLT) – VCLT is relevant for the Indian Treaty interpretation even though India is not a signatory[10]. Good faith principle for Treaty interpretation was reaffirmed. The SC observed a Tax Treaty must be interpreted in the context of aiding commercial relations between treaty partners and as being essentially a bargain between them.
- India's observations on Model OECD Commentary – The Court noted Indian tax administration taking a position has no meaning if the language of the bilateral Treaty does not depart from the OECD Model Commentary. If India executes treaties based on OECD Model despite such policy position, it must be ignored and OECD commentary to be given full effect. In the absence of bilateral renegotiation of Treaty, India's position would not impact existing treaties unless the Treaty is modified.

The Supreme Court relied extensively on first of its kind ruling in the case of Dassault[11] to support the proposition that payment received by a non-resident Licensor for sale of software products to Indian resellers will be characterised as business profits and will not constitute 'royalties' under the treaty (India-Japan DTAA).

The Indian Apex Court referred to a host of international jurisprudence, in particular::

| Case Name | Jurisdiction | Cited by | Referred in para | Ratio | Accepted/ Rejected |
|---|---|---|---|---|---|
| **UsedSoft GmbH v. Oracle International Corp.** | European Court of Justice | Revenue | 131-134 | Copyright owner exhausts his distribution right in copies of a computer program upon making the first sale, provided that the copy is made unusable by the first acquirer. | Accepted |
| **Vernor v. Autodesk, Inc.** | United States Court of Appeal (9th Circuit) | Revenue | 135-139 | Doctrine of first sale would not apply, as in Autodesk, the copyright owner, did not part with title to the copies of the software. | Rejected |
| **Ostime v. Australian Mutual Provident Society** | House of Lords, UK | Taxpayer | 146 | The language employed in tax treaties is to be treated as international tax language. | Accepted |
| **Thiel v. Federal Commissioner of Taxation** | Australian High Court | Taxpayer | 151 | Application of Article 31 and 32 of VCLT to explain the importance of the OECD Commentary | Accepted |
| **Unknown [Case No. 207019/1990 dated 28.02.1995]** | Audiencia Nacional (Spanish National Court) | Revenue | 163 | License for the right to use the patents and the know-how, whereby the consideration paid by the Spanish company to the German company was a royalty under Art. 12 of the Treaty. | Rejected |

**Panel discussion:**

Professor Hattingh opened the Panel discussion with an observation "*Res ipsa loquitur*" – the facts speak for themselves; and according to him, in the Indian case the fact was that the royalty was not for any brainwork in India, or towards exercise of wits and labor in India. Professor Hattingh remarked that without any tax or economic policy rationale, India kept legislating legislation, expanding the ambit of income covered under its deeming fiction rules, seemingly with an intent to bring more non-residents under the tax net. With reference to royalty, that had a two-fold effect, the second being expanding the general, legal, and commercial understanding of the term royalty with amendments to income tax law, which departed from the definition in India's Copyright Act. He emphasized on a copyrighted product being different from a copyright, a concept recognized in the Indian Copyright Act. According to Professor Hattingh, the judicial understanding of nexus for intellectual property payments or the business connection test developed by the Supreme Court in 1976[12] was overridden by virtue of these amendments. Professor Hattingh observed that the case had a lesson for other countries – in absence of a coherent policy for legislation, government will run into trouble. Disputes can be avoided if there is clarity about nexus and more precise sourcing rules. In parting, Professor Hattingh remarked India's use of retrospective legislation is notable and that such actions would have raised taxpayers' rights[13] questions in other jurisdictions.

Mrs. Chatel taking a step back from the technical issues, observed that the parties entering into an agreement can use the language in the model convention. It is important that taxpayers and courts rely on common interpretation and understanding of the meaning of the terms used while entering into the agreement. India did take some positions on the commentary but not specifically on Article 12.2[14]. The is in line with observation and reservation which apply to members and position to non-members.

Professor Schwarz further elaborated on use of reservations and observations and their relevance in the context of tax treaty interpretation. He referred to the Canadian Supreme Court ruling in the case of Prevost[15] where the Court had ruled that the fact that both contracting states had not given observations was a factor in considering whether later commentaries can be used in interpreting a treaty. The Indian Supreme Court's treatment is interesting but not sure, if it is entirely correct, observed Professor Schwarz. Positions taken by India do not address the issue at hand in the *obiter dictum*. Commentary used "position" for both categories of reservation and observations. Reservations on an Article do not change interpretation of Treaty. Observations on the commentary which a country dissents in whole or in part is a complex issue. The Court's general observation that a position should be disregarded seems questionable. According to Professor Schwarz, as per the UK Supreme Court in the case of Fowler[16] – the one real test in treaty interpretation is cogency of reasoning – is it consistent with the ordinary meaning of terms and ordinary interpretation? Any other approach is a sideways way of a country saying it is entitled to disregard status of commentary. For the exact role of commentary, he referred to Paragraph 3 – a Commentary is directed towards tax administrations to follow to avoid dispute. It is not a direction to anybody else. According to Professor Schwarz, in that context one must take seriously the positions that OECD and non-OECD members adopt about use of commentary.

Professor Martin Jimenez stated that Article 12 was originally established as carveout to the PE principle to permit source countries to tax non-residents conducting business relating to activity which does not need a fixed place of business or dependent agent. When Article 12 and commentaries was modified in 1992[17] to exclude from royalties income derived from use of equipment and software, it seemed a radical twist. The majority of states who made reservations wanted to point the twist and that was the function of India's reservation made in 2008. The Supreme Court's decision can be seen as a policy choice to dismantle India's policy choice over the years with regard to taxation of business profits. According to Professor Martin Jimenez, it is questionable if the Court ought to have ventured into it. Commentaries after 1992 proposed an alternate meaning of terms used and they directly say it in Article 12. If the only right granted to the user is the personal copy, then it is sale. There is no need to refer to source country legislation – it is autonomous in the Commentary. Hence, all the reasoning surrounding Indian source country legislation after 1992 is irrelevant since the commentary has an autonomous meaning.

According to Mr. Peter Barnes, Category 4[18] involved embedded software. This is a fascinating area which may see a great deal of litigation. Machines sold today range from 5 USD thermometer to 500 million USD plant and all have software embedded. The Supreme Court's decision pertaining to embedded software may not apply to taxpayers with different facts. It may turn on several facts (software sold separately, updated on regular basis, software which can be removed and transferred, etc.). Whether payments for embedded software are royalties will continue to be a source of litigation. Taxpayers should think about how they are treating embedded software as this could be a burgeoning area of litigation.

**Authors' views:**

India, though a non-member of the OECD does have an observer status and is in advance engagement with OECD. When it comes to the OECD Model Convention, understanding the views of countries on Convention and Commentary in light of the following is useful:

- "Reservation" indicates a disagreement, by a country that is a member of the OECD, concerning the provisions included in the articles of the OECD Model.
- "Observation" indicates a disagreement, by a country that is a member of the OECD, concerning the interpretations that are included in the Commentary of the OECD Model.
- "Position" indicates a disagreement, by a jurisdiction that is not a member of the OECD, concerning the provisions of the articles of the OECD Model or the interpretations in the Commentary on these provisions.
- "Alternative provision" refers to a provision that is different from, or additional to, the provisions found in the articles of the OECD Model.

The OECD Model (2010) includes the positions of approximately 30 jurisdictions including India[19]. Paragraph 5 of the introduction to the section of the OECD Model which includes the positions of the non-OECD economies on the OECD Model indicates that these economies "*generally agree with the text of the Articles of the Model Tax Convention and with the interpretations put forward in the Commentary*," the areas of disagreement being reflected in the positions of these economies.[20] It appears logical to infer the only relevance of using the term position would be to indicate it is from a non-member country, else in practice they would have the same effect as observations and reservations.

The legal effects of reservations to treaties are regulated by Article 21 of the VCLT. However, the legal relevance of reservations to the OECD Model is not so clear. It has been noted that reservations to non-binding instruments have a paradoxical effect. In principle, these reservations should be irrelevant because states are not bound by those instruments anyway. However, the formulation of reservations gives the impression that states do not completely discard the possibility of being affected, for instance indirectly by means of interpretation, and the result is that these reservations reinforce the idea that non-binding instruments could be legally relevant.[21]

If certain provisions of a treaty depart from the OECD Model and are in accordance with the reservations expressed by any of the parties, it is clear that the treaty should not be interpreted according to the Commentaries prepared by the OECD. In such a case, since the parties to the treaty seemed to be willing to depart from the Model, the interpretation that should prevail ought to be in accordance with the spirit of the reservation. If, on the contrary, the reservation was ignored when the treaty was drafted, the Commentaries would not lose their interpretative relevance[22].

The Supreme Court in our view reaffirmed this school of thought when it stated that from these positions taken, which use the language "reserves the right to" and "is of the view that some of the payments referred to may constitute royalties", it is not at all clear as to what exactly the nature of these positions is[23]. The Supreme Court affirmed a ruling of a Division Bench of the High Court of Delhi[24] by stating the High Court had correctly observed that mere positions taken with respect to the OECD Commentary do not alter the Treaty's provisions unless it is actually amended by way of bilateral re-negotiation[25]. The Court further went on to observe that even though India had amended some of its treaties subsequently such as the tax treaties with Morocco, Singapore and Mauritius, no amendment was made to the definition of the term royalties. The

Court further concluded it is thus clear that OECD Commentary on Article 12 of the OECD Model Tax Convention, incorporated in the DTAAs in the cases before it, will continue to have persuasive value. The Court's ruling, among other reasons, hinged on this aspect.

It could thus be said that the Supreme Court ruling in the software royalty case also concurs with the international academic school of thought on the subject when it comes to interpretation of treaties and commentaries.

The Supreme Court of India has displayed remarkable fairness in deciding on an important question of law. Freeman Dyson once said "It is better to be wrong than to be vague" – the Court has clearly upheld there is no room for vagueness when it comes to positions taken on a treaty signed between two sovereign nations.

[1] Engineering Analysis Centre of Excellence Private Limited vs The Commissioner of Income-tax & Anr. [2021] 432 ITR 471 (SC)[02-03-2021]

[ 2 ]
http://kluwertaxblog.com/2021/08/31/global-experts-debate-landmark-transfer-pricing-cases-in-ifa-webinar/

[ 3 ]
http://kluwertaxblog.com/2021/03/24/indias-supreme-court-finally-settles-a-two-decade-old-dispute-on-software-taxation/?print=print

[4] The various categories were:

- End-user: Indian end users who purchase the Software directly from a foreign non-resident supplier or manufacturer
- Distributor: Indian distributors / resellers who purchase computer software from non-resident suppliers for the purpose of resale in India
- Sub-distributor: Non-resident vendors, who, after purchasing software from other foreign, non-resident sellers, resell the same to resident Indian distributors or end-users
- Software in a hardware: Non-resident suppliers who affix computer software onto hardware and then sell the same as an integrated unit/equipment to resident Indian distributors/ end users

[5] Explanation 2 to Section 9 (1) (vi) of the Income-tax Act, 1961 – The said explanation adds to the definition of Royalty, 'the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;', Inserted by the Finance Act, 2001, w.e.f. 1-4-2002.

[Explanation 4. to Section 9 (1) (vi) of the Income-tax Act, 1961 — '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.', Inserted by the Finance Act, 2012, w.r.e.f. 1-6-1976.

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

[ 7 ]
http://kluwertaxblog.com/2021/03/24/indias-supreme-court-finally-settles-a-two-decade-old-disput

e-on-software-taxation/?print=print

[8] *Para 79 of the Judgement*

[9] The court noted all the tax treaties applicable in the various cases in appeal and observed that they were all largely based on the OECD Model Convention.

[10] *Para 154 of the Judgement*

[11] *Groupe Industrial Marcel Dassault, In re* **(2012) 340 ITR 353 (Authority of Advance Ruling)**

[12] In **Carborandum & Co. v. CIT, 2 SCC 862**, the Supreme Court, applying residence-based rules of taxation, held that the technical service fees received by the non-resident assessee (relatable to the assessment year 1957-1958) could only be deemed to accrue in India if such income could be attributed to a business connection in India. In the facts of that case, since no part of the foreign assessee's operations were carried on in India, the technical services being rendered wholly in foreign territory, it was held that no part of the technical service fees received by the foreign assessee accrued in India. This position of law was altered by the Finance Act 1976, which introduced a "source-rule" to tax income by way of royalty in the hands of a non-resident.

[13] India legislated taxpayer rights in Finance Act, 2020

[14] India had provided position on Commentaries in Para 8.2, 9.1, 9.2 and 9.3, 10.1, 10.2, 14, 14.1, 14.2, 14.1, 15, 16 and 17.3 of Article 12. Additionally, India stated it did not agree with the interpretation that information concerning industrial, commercial, or scientific experience, is confined to only previous experience.

The character of payments received in transactions involving the transfer of computer software depends on the nature of the rights that the transferee acquires under the particular arrangement regarding the use and exploitation of the program. The rights in computer programs are a form of intellectual property. Research into the practices of OECD member countries has established that all but one protect rights in computer programs either explicitly or implicitly under copyright law. Although the term "computer software" is commonly used to describe both the program — in which the intellectual property rights (copyright) subsist — and the medium on which it is embodied, the copyright law of most OECD member countries recognises a distinction between the copyright in the program and software which incorporates a copy of the copyrighted program. Transfers of rights in relation to software occur in many different ways ranging from the alienation of the entire rights in the copyright in a program to the sale of a product which is subject to restrictions on the use to which it is put. The consideration paid can also take numerous forms. These factors may make it difficult to determine where the boundary lies between software payments that are properly to be regarded as royalties and other types of payment. The difficulty of determination is compounded by the ease of reproduction of computer software, and by the fact that acquisition of software frequently entails the making of a copy by the acquirer in order to make possible the operation of the software.

With respect to the Model Convention, on Article 12.1, India reserves the right to tax royalties and fees for technical services at source, define these by reference to its domestic law, define the source of such payments which may extend beyond the source defined in Para 5 of Article 11, and modify Para 3 and 4 accordingly. With respect to 12.2, India also reserved its right to include in the

definition of royalties, payments for the use of, or the right to use industrial commercial or scientific equipment.

The Model Tax Convention reads as under:

Article 12

- Royalties arising in a contracting state and beneficially owned by a resident of the other contracting state shall be taxable only in that other State
- 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, of literary, artistic, or scientific work, including cinematograph films, any patent, trademark, design or model, plan, secret formula, or process, or for information concerning industrial, commercial, or scientific experience.

*"[11] The same may be said with respect to later commentaries, when they represent a fair interpretation of the words of the Model Convention and do not conflict with Commentaries in existence at the time a specific treaty was entered and when, of course, neither treaty partner has registered an objection to the new Commentaries. For example, in the introduction to the Income and Capital Model Convention and Commentary (2003), the OECD invites its members to interpret their bilateral treaties in accordance with the Commentaries "as modified from time to time" (par. 3) and "in the spirit of the revised Commentaries" (par. 33). The Introduction goes on, at par. 35, to note that changes to the Commentaries are not relevant "where the provisions… are different in substance from the amended Articles" and, at par. 36, that "many amendments are intended to simply clarify, not change, the meaning of the Articles or the Commentaries*

[15]. Pre?vost Car Inc v Her Majesty the Queen (2008) TCC 231 and Her Majesty the Queen v Pre?vost Car Inc 2009 FCA 57

[16] Fowler v. Commissioners for Her Majesty's Revenue and Customs, [2020] UKSC 22.

*"Nonetheless they are to be given such persuasive force as aids to interpretation as the cogency of their reasoning deserves: see Revenue and Customs Comrs v Smallwood (2010) 80 TC 536, para 26(5) per Patten LJ. Existing UK authority gives some relevant general guidance on the interpretation of double taxation treaties. In Comrs for Her Majesty's Revenue and Customs v Anson [2015] STC 1777 this court was considering the UK / USA Treaty. It was common ground that article 31 of the Vienna Convention applied. At paras 110-111, giving the leading judgment, Lord Reed said:*

*"Article 31(1) of the Vienna Convention requires a treaty to be interpreted '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'. It is accordingly the ordinary (contextual) meaning which is relevant. As Robert Walker J observed at first instance in Memec [1996] STC 1336 at 1349, 71 TC 77 at 93, a treaty should be construed in a manner which is 'international, not exclusively English'."*

[17] 2010 OECD Model tax Convention, Commentary on Article 7, Para 76 – "The definition of "royalties" in paragraph 2 of Article 12 of the 1963 Draft Convention and 1977 Model Convention

included payments "for the use of, or the right to use, industrial, commercial, or scientific equipment", the reference to these payments was subsequently deleted from that definition in order to ensure that income from the leasing of industrial, commercial or scientific equipment, including the income from the leasing of containers, falls under the provisions of Article 7 or Article 8 (see paragraph 9 of the Commentary on that Article), as the case may be, rather than under those of Article 12, a result that the Committee on Fiscal Affairs considers appropriate given the nature of such income."

[18] The Supreme Court considered a batch of 103 appeals together, categorizing them into four categories on the basis of payments made, as under:

- Software was purchased directly by resident end-user from non-resident supplier (Category 1)
- Software was purchased by resident distributor from non-resident supplier (Category 2)
- Software was purchased by end-user from non-resident distributor (Category 3)
- Integrated unit (of hardware onto which software is affixed) was purchased by resident end-user or distributor from non-resident supplier (Category 4)

[19] J. Sasseville, Chapter 1: The Role and Evolution of Reservations, Observations, Positions and Alternative Provisions in the OECD Model in Departures from the OECD Model and Commentaries: Reservations, observations and positions in EU law and tax treaties (G. Maisto ed., IBFD 2014), Books IBFD (accessed 2 Sep. 2021).

[20] Positions of non-OECD countries were first added to the OECD Model in 1997. At that time the positions of 17 non-member countries on the articles of the Model and the Commentary were included in a new section of the OECD Model. In adding the views of non-OECD countries on the OECD Model, the OECD was acknowledging that it could not expect non-members to endorse the contents of the OECD Model unless they were given the same opportunity as member countries to record expressly their disagreements with the articles of the Model and the interpretations included in the Commentary. As noted in paragraph 2 of the Introduction of the new section on "Positions of non-OECD countries" that was then added:

"Recognizing that non-member countries could only be expected to associate themselves to the development of the Model Tax Convention if they could retain their freedom to disagree with its contents, the Committee also decided that these countries should, like Member countries, have the possibility to identify the areas where they are unable to agree with the text of an Article or with an interpretation given in the Commentary."

[21] A. Nollkaemper, *The Distinction between Non-legal and Legal Norms in International Affairs: An Analysis with Reference to International Policy for the Protection of the North Sea from Hazardous Substances*, 13 International Journal of Marine and Coastal Law 3, p. 362 (1998).

[22] M. Lang & F. Brugger, *The Role of the OECD Commentary in Tax Treaty Interpretation*, 23 Australian Tax Forum 7.

[23] *[Para 157 of the Judgement]* The Supreme Court stated this may be contrasted with the categorical language used by India in its positions taken with respect to other aspects ("India does not agree to"), as follows:

"18. *India* does not agree with the interpretation that information concerning industrial, commercial or scientific experience is confined to only previous experience."

"20. *India* does not agree with the interpretation in paragraph 9.1 of the Commentary on Article 12 according to which a payment for transponder leasing will not constitute royalty. This notion is contrary to the Indian position that income from transponder leasing constitutes an equipment royalty taxable both under India's domestic law and its treaties with many countries. It is also contrary to India's position that a payment for the use of a transponder is a payment for the use of a process resulting in a royalty under Article 12. India also does not agree with the conclusion included in the paragraph concerning undersea cables and pipelines as it considers that undersea cables and pipelines are industrial, commercial, or scientific equipment and that payments made for their use constitute equipment royalties.

21. *India* does not agree with the interpretation in paragraph 9.2 of the Commentary on Article 12. It considers that a roaming call constitutes the use of a process. Accordingly, the payment made for the use of that process constitutes a royalty for the purposes of Article 12. It is also the position of India that a payment for a roaming call constitutes a royalty since it is a payment for the use of industrial, commercial, or scientific equipment.
22. *India* does not agree with the interpretation in paragraph 9.3 of the Commentary on Article 12. It considers that a payment for spectrum license constitutes a royalty taxable both under India's domestic law and its treaties with many countries.

[24] **Director of Income Tax v. New Skies Satellite BV, (2016) 382 ITR 114** ["**New Skies Satellite**"]

[25] This was put (by way of an obiter) thus:

"68. On a final note, India's change in position to the OECD Commentary cannot be a fact that influences the interpretation of the words defining royalty as they stand today. The only manner in which such change in position can be relevant is if such change is incorporated into the agreement itself and not otherwise. A change in executive position cannot bring about a unilateral legislative amendment into a treaty concluded between two sovereign states. It is fallacious to assume that any change made to domestic law to rectify a situation of mistaken interpretation can spontaneously further their case in an international treaty. Therefore, mere amendment to Section 9(1)(vi) cannot result in a change. *It is imperative that such amendment is brought about in the agreement as well.* Any attempt short of this, even if it is evidence of the State's discomfort at letting data broadcast revenues slip by, will be insufficient to persuade this Court to hold that such amendments are applicable to the DTAAs."

(emphasis in original)

156.It is significant to note that after India took such positions *qua* the OECD Commentary, no bilateral amendment was made by India and the other Contracting States to change the definition of royalties contained in any of the DTAAs that we are concerned with in these appeals, in accordance with its position. As a matter of fact, DTAAs that were amended subsequently, such as the Convention between the Republic of India and the Kingdom of Morocco for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes On Income, ["**India-Morocco DTAA**"], which was amended on 22.10.2019, incorporated a definition of royalties, not very different from the definition contained in the OECD Model Tax Convention, as follows:

"The term "royalties" as used in this Article means:

(a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or recordings on any means of reproduction for use for radio or television broadcasting, any patent, trademark, design or model, plan, computer software programme, secret formula, or process, or for information concerning industrial, commercial, or scientific experience; and

(b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment"

157.Similarly, though the India-Singapore DTAA came into force on 08.08.1994, it has been amended several times, including on 01.09.2011,50 and 23.03.2017. However, the definition of "royalties" has been retained without any changes. Likewise, the Convention between the Government of the Republic of India and the Government of Mauritius for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains and for the Encouragement of Mutual Trade and Investment, ["**India-Mauritius DTAA**"] was entered into on 06.12.1983, and was amended subsequently on 10.08.2016, without making any change to the definition of "royalties".

158.It is thus clear that the OECD Commentary on Article 12 of the OECD Model Tax Convention, incorporated in the DTAAs in the cases before us, will continue to have persuasive value as to the interpretation of the term "royalties" contained therein.

159.Viewed from another angle, persons who pay TDS and/or assessees in the nations governed by a DTAA have a right to know exactly where they stand in respect of the treaty provisions that govern them. Such persons and/or assessees can thus place reliance upon the OECD Commentary for provisions of the OECD Model Tax Convention, which are used without any substantial change by bilateral DTAAs, in the absence of judgments of municipal courts clarifying the same, or in the event of conflicting municipal decisions. From this point of view also, the OECD Commentary is significant, as the Contracting States to which the persons deducting tax/assessees belong, can conclude business transactions on the basis that they are to be taxed either on income by way of royalties for parting with copyright, or income derived from licence agreements which is then taxed as business profits depending on the existence of a PE in the Contracting State.

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