

# **Webinar on Recent Supreme Court Decision on Software Payments**

**Organized by The Chamber of Tax Consultants**

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# Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT

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# Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT

[2021] 125 taxmann.com 42 (SC)

## FACTS

- The assessee, an Indian Co., imported shrink-wrapped computer software from an F Co. During AY 2001-2002 and 2002-2003, the assessee made payment to the said F Co. for the purchase of shrink-wrapped computer software without deduction tax at source.
- The Assessing Officer (AO) held that the F Co. had transferred copyright in the said software and hence the payment was taxable as royalty under the Act as well as under the relevant DTAA, and hence the assessee was held as an 'assessee in default'. The Commissioner of Income-tax (Appeals) [CIT(A)] dismissed the appeal of the assessee, however the Tribunal decided in favor of the assessee. On further appeal, the Karnataka High Court held that since no withholding application was made u/s 195(2) of the IT Act, the assessee was liable to deduct tax at source u/s 195(1) of the IT Act.
- On further appeal, the Supreme Court (hereinafter referred as 'SC') while adjudicating / disposing a batch of **103 connected appeals**, categorized the appeals under the following four categories:
  - Sale of software directly by non-resident (NR) - to an **end user**
  - Sale of Software by an NR - **to Indian distributors for resale to end customers** in India
  - Sale of software by an NR - **to a foreign distributor for resale to end customers in India**
  - Sale of **software bundled with hardware** by an NR - to **Indian distributors or end users**
- On further appeal, the Supreme Court held:

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## Applying the provisions of DTAA at the time of withholding taxes u/s 195

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- After taking into consideration the provisions of **section 4, section 5, section 9, section 90 and section 195** of the IT Act, the SC held that once provisions of **DTAA** are applicable to a non-resident, the provisions of the IT Act could only apply **to the extent that they are more beneficial** to the assessee and not otherwise. The SC reaffirming the position laid down in **GE Technology Centre Pvt Ltd v. CIT [2010] 193 Taxman 234 (SC)** and **Vodafone International Holdings BV v. UOI [2012] 17 taxmann.com 202 (SC)**, held that **the machinery provisions u/s 195** of the Act were inextricably **linked with the charging provisions** (i.e. section 4, section 5 and section 9), as a result of which, tax withholding obligation arose only when the payment to the non-resident was chargeable to tax under the provisions of the IT Act, read with the DTAA.
- The SC also referred to the **CBDT Circular No 728 dated 30 October 1995**, wherein it was clarified that the **tax deductor should take into consideration the effect of the DTAA provisions** in respect of payment of royalties and technical fees while deducting taxes at source u/s 195 of the IT Act.
- Further, the SC also distinguished the decision of SC in case of **PILCOM v. CIT [2020] 271 Taxman 200 (SC)** by observing that the said judgement was in the context of **section 194E** of IT Act, dealing with “income” payable to a non-resident sportsman which does not have any reference to payments made to non-resident being **“chargeable to tax”** as in section 195 under the Act.

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## Applying the provisions of DTAA at the time of withholding taxes u/s 195

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- Further, reliance of the Revenue on **Article 30** (entry into force) of the India-USA DTAA to contend that the provisions of the DTAA's could not be looked upon at the time of determining taxability u/s 195, was rejected by the SC for the reason that the said Article could not be read out of context and the same was only dealing with the 'entry into force' provisions which was to be determined as per the domestic municipal laws.

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## Relevance of the Copyright Act, 1957

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- **Explanation 4 to section 90** of the IT Act provides that **if any term used in the DTAA** is defined therein, the said term shall have the **same meaning** as assigned to it under the said DTAA; and where any term is not defined in the DTAA, **but defined in the Act**, the **said term shall have the same meaning** as assigned to it in the Act and explanation, if any, given to it by the Central Government.
- **Article 3(2)** of the DTAA provides that **any term not defined in the DTAA shall, unless the context otherwise requires**, have, the meaning which it has under the **law of that State** concerning the taxes to which the DTAA applies.
- Further, the SC observed that the expression **“copyright”** has to be understood in the context of the **statute which deals with it**, it being accepted that municipal laws which apply in the Contracting States must be applied unless there is any repugnancy to the terms of the DTAA.
- Section 16 of the Copyright Act provides as follows –  
*“16. No copyright except as provided in this Act.-- **No person shall be entitled to copyright or any similar right in any work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act .....**”*

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## Relevance of the Copyright Act, 1957

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- Section 14 of the Copyright Act provides as follows—

*“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.”*

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## Relevance of the Copyright Act, 1957

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- Section 2(y) of the Copyright Act provides as follows—  
“(y) **“work” means** any of the following works, namely:—  
(i) **a literary, dramatic, musical or artistic work;**  
(ii) **a cinematograph film;**  
(iii) **a [sound recording]”**
- Section 2(O) of the Copyright Act provides as follows—  
“(o) **“literary work” includes computer programmes, tables and compilations including computer databases;”**
- Section 2(ffc) of the Copyright Act provides as follows—  
“(ffc) **“computer programme” means a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result;”**

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## Relevance of the Copyright Act, 1957

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- Section 52 of the Copyright Act provides as follows—  
    ***“52. Certain acts not to be infringement of copyright.***  
    *(1) The following acts shall not constitute an infringement of copyright, namely,—*  
    .....  
    *(aa) the making of copies or adaptation of a computer programme by the lawful possessor of a copy of such computer programme, from such copy—*  
    *(i) in order to utilise the computer programme for the purpose for which it was supplied; or*  
    *(ii) to make back-up copies purely as a temporary protection against loss, destruction or damage in order only to utilise the computer programme for the purpose for which it was supplied;”*
- The SC observed that the right to reproduce a computer programme and exploit the reproduction by way of sale, transfer, license etc. is at the heart of the said exclusive right.

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## Doctrine of First Sale / Principle of Exhaustion – Section 14(b)(ii) of the Copyright Act

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- A copyright owner has an exclusive right to make copies and distribute the same.
- On the **first occasion** when the **copyright owner parts with its distribution rights** (i.e. the right to **distribute copies of the work**), his rights in the work gets exhausted. This is known as the **Doctrine of First Sale / Principle of Exhaustion**.
- **Revenue argued that the Doctrine of First Sale / Principle of Exhaustion was not applicable to the sale of software** in light of the provision of section 14(b)(ii) of the Copyright Act, which is reproduced as under:

*“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--*

.....

*(b) in the case of a computer programme--*

.....

*(ii) to sell or give on commercial rental or offer for sale or for commercial rental **any copy** of the **computer programme** (regardless of whether such copy has been sold or given on hire on earlier occasions – deleted)”*
- The SC observed that - ***“After the 1999 Amendment, what is conspicuous by its absence is the phrase “regardless of whether such copy has been sold or given on hire on earlier occasions”. This is a statutory recognition of the doctrine of first sale/principle of exhaustion.”***

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## Doctrine of First Sale / Principle of Exhaustion – Section 14(b)(ii) of the Copyright Act

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- A copyright owner has an exclusive right to make copies and distribute the same.
- The SC referred to the *locus classicus* on the subject i.e. **Copinger and Skone James on Copyright** (14th Edition) (1999), as follows:

*“The distribution right: general. **One of the acts restricted** by the copyright in all work is **the issue of the original or copies of the work to the public**, often called the **“distribution right”**.*

.....

*“Exhaustion of the distribution right: tangible objects. Exhaustion applies to the tangible object into which a protected work or its copy is incorporated if it has been placed on the market with the copyright holder’s consent.”*
- The SC referred to the decision of **Delhi High Court** in case of **Warner Bros. Entertainment Inc. v. Santosh V.G.**, CS (OS) No. 1682/2006 reported in 2009 SCC OnLine Del 835, wherein the Single Judge bench held as under:

*“58. Exhaustion of rights is linked to the distribution right. The right to distribute objects (making them available to the public) means that such objects (or the medium on which a work is fixed) are released by or with the consent of the owner as a result of the transfer of ownership. In this way, the owner is in control of the distribution of copies since he decides the time and the form in which copies are released to the public. **Content-wise the distribution right are to be understood as an opportunity to provide the public with copies of a work and put them into circulation, as well as to control the way the copies are used. The exhaustion of rights principle thus limits the distribution right, by excluding control over the use of copies after they have been put into circulation for the first time.**”*

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## Doctrine of First Sale / Principle of Exhaustion – Section 14(b)(ii) of the Copyright Act

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- The SC observed that likewise, when it comes to section 14(a)(ii) of the Copyright Act, the distribution right subsists with the owner of copyright to issue copies of the work to the public, to the extent such copies are not copies already in circulation, thereby manifesting a legislative intent to apply the doctrine of first sale/principle of exhaustion, as has been found by the High Court of Delhi in Warner Bros. (supra).

- The SC concluded as follows:

*“142. ....*

*Thus, a distributor who purchases computer software in material form and resells it to an end-user cannot be said to be within the scope of the aforesaid provision. The sale or commercial rental spoken of in section 14(b)(ii) of the Copyright Act is of “any copy of a computer programme”, making it clear that the section would only apply to the making of copies of the computer programme and then selling them, i.e., reproduction of the same for sale or commercial rental.*

*143. The object of section 14(b)(ii) of the Copyright Act, in the context of a computer program, is to interdict reproduction of the said computer programme and consequent transfer of the reproduced computer programme to subsequent acquirers/end-users.*

*.....*

*Thus, once it is understood that the object of section 14(b)(ii) of the Copyright Act is not to interdict the sale of computer software that is “licensed” to be sold by a distributor, but that it is to prevent copies of computer software once sold being reproduced and then transferred by way of sale or otherwise, it becomes clear that any sale by the author of a computer software to a distributor for onward sale to an end-user, cannot possibly be hit by the said provision.”*

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## Analysis of the License Agreements entered by the F Co. and I Co.

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- W.r.t the **distribution agreements**, the SC observed as under:
  - It was evident that the distributor was granted only a **non-exclusive, non-transferable** license to **resell computer software** and it was expressly stated that **no copyright was transferred** either to the **distributor** or to the **ultimate end user**.
  - Further, **no right** was granted to sub-license or transfer, nor there was any right to **reverse engineer, modify, and reproduce** in any manner otherwise than permitted by the licence to the end user.
  - **What was paid for by way of consideration** by the distributor in India to the F Co., was therefore the **price of a copy of the computer programme as goods** (direct software sale or hardware embedded with software).
- W.r.t the category where the computer programme was directly sold to the end user, the SC observed that the end user could only use the computer programme by installing it in the computer hardware and the end user could not reproduce the same for sale or transfer.
- The SC also observed that the License Agreements in all the appeals did **not** grant any such right or interest, least of all, a **right** or interest **to reproduce the computer software** u/s 14(a) and 14(b) of the Copyrights Act (supra) and **such reproduction was expressly interdicted**, and it was also expressly stated that no vestige of copyright was at all transferred, either to the distributor or to the end-user.

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## Analysis of the License Agreements entered by the F Co. and I Co.

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- The SC relied on the decision of SC in case of **State Bank of India v. Collector of Customs (2000) 1 SCC 727** (though delivered under the **Customs Act 1962**) and observed that there was a difference between ‘**right to reproduce**’ and ‘**right to use**’, in as much as that under **right to reproduce, there would be a parting of the copyright by the owner thereof**, whereas in case of right to use, there would not be parting of any copyrights.
- With respect to the **Revenue’s argument** that in some of the **EULA’s**, it was clearly **stated** that **what was licensed to the distributor / end users by the non-resident would not amount to sale**, thereby making it clear that what was transferred was not goods – the SC, by placing reliance on **Sundaram Finance Ltd. v. State of Kerala, (1966) 2 SCR 828**, observed that the **real nature of the transaction** must be **looked** at upon, by **reading the agreement as a whole**.
- Relying on the decision of the **SC** in case of **Tata Consultancy Services v. State of AP (2005) 1 SCC 308** (in the context of a sales tax statute), the SC observed that **what was “licensed”** by the F Co. to the I Co. and resold to the end-user, or directly supplied to the end-user, **was in fact the sale of a physical object which contained an embedded computer programme, and was therefore, a sale of goods**.

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## Definition of royalty under the DTAA and the IT Act

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- The SC observed that by virtue of explanation 4 to section 90 of the IT Act and under Article 3(2) of the DTAA, the definition of the term “royalties” shall have the meaning assigned to it by the DTAA, in Article 12. The said position was also clarified by CBDT Circular No. 333 dated 02.04.1982.
- Taking India-Singapore DTAA as the base, the SC observed that the **definition of royalty under the IT Act was much wider** than the definition under the DTAA, for the following three reasons:
  - ‘consideration’ under the IT Act also includes **lump sum consideration** other than income chargeable under the ‘capital gains’
  - **Granting of a license** is expressly included within transfer of “all or any rights”
  - Transfer should be **“in respect of”** any **copyright of any literary work**.
- Further, the SC also observed that the **comma after the word “copyright” does not fit** as copyright would obviously exist only in a literary, artistic, or scientific work.
- The SC observed that the **transfer** (license or otherwise) of “all or any rights” (which includes the grant of a license) **in relation to copyright is a sine qua non** under explanation 2 to section 9(1)(vi) of the IT Act, in as much as that **there should be a parting with an interest in any of the rights mentioned in section 14(b) read with section 14(a)** of the Copyright Act.

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## Definition of royalty under the DTAA and the IT Act

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- The SC had also observed that there would be no difference in the position between the definition of “royalties” in the DTAA and the definition of “royalty” in explanation 2(v) of section 9(1)(vi) of the IT Act, to the extent of the expression “use of, or the right to use”.
- The SC also held that **explanation 4 to section 9(1)(vi)** of the IT Act was **not clarificatory** in nature (as it expands the definition of royalty), by observing as under:
  - **Explanation 3 to section 9(1)(vi)** of the IT Act which refers to the term “**computer software**”, was introduced for the first time with effect from **1st April, 1991** and therefore explanation 4 could not apply to any right for the use of or the right to use of computer software - even before the term “computer software” was inserted in the statute.
  - Under the **Copyright Act** the term “**computer software**” was introduced for the first time in the **definition of a literary work**, only in the year **1994** (vide Act 38 of 1994).
  - **Technology relating to transmission by a satellite, optic fibre or other similar technology, was regulated by the Parliament for the first time through the Cable Television Networks (Regulation) Act, 1995, much after the year 1976.**
  - Circular No. 152 dated 27th November, 1974 (cited by the Revenue) would not be applicable as it would then be explanatory of a provision (i.e. section 9(1)(vi) of the IT Act) that was introduced vide Finance Act, 1976

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## Obligation to withhold taxes pursuant the aforesaid retrospective amendments

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- The SC, by relying upon two latin maxims - **lex non cogit ad impossibilia**, i.e., the law does not demand the impossible and **impotentia excusat legem** i.e., when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused, held that the “person” mentioned in u/s 195 of the IT Act could not 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 IT Act, at a time when such explanation was not actually and factually inserted in the statute.
- The SC also relied on the decision in case of **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal**, (2020) 7 SCC 1, wherein on the basis of the aforementioned legal maxims, the respondent was relieved of the mandatory obligation to furnish certificate under the Evidence Act, 1872, after failing to obtain it despite several steps taken by the respondent. Further, the SC also referred to the decision of **Bombay HC ruling in NGC Networks (India)** (ITA No. 397/2015) in the context of explanation 6 to section 9(1)(vi) introduced in 2012 w.r.e.f. 1976 and **Western Coalfields Ltd.** (ITA No. 93/2008) in the context of retrospective amendment to section 17(2)(ii) to highlight the impossibility of discharging withholding obligation.

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## AAR/High Court decisions upheld/set aside by the SC

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- The **SC approved** the decision of **AAR** in case of **Dassault Systems, K.K.**, In Re., (2010) 322 ITR 125 (AAR) and **Geoquest Systems B.V.** Gevers Deynootweg, In Re., (2010) 327 ITR 1 (AAR) by observing that the **AAR had correctly applied the principle that the ownership of copyright in a work was different from the ownership of the physical material in which the copyrighted work may happen to be embedded.**
- Further the **adverse decision of AAR** in case of **Citrix Systems Asia Pacific Ptyl. Ltd.**, In Re., (2012) 343 ITR 1 (AAR), was **set aside** as it did not state the law correctly, by observing as:
  - Under a non-exclusive license, an end-user only gets the right to use computer software in the form of a CD and does not get any of the rights that the owner continues to retain under section 14(b) of the Copyright Act read with sub-section (a)(i)-(vii) thereof.
  - The **AAR had incorrectly held that it was not constrained by the definition of ‘copyright’ under the Copyright Act** while construing the provisions of the DTAA, **without appreciating that u/s 16 of the Copyright Act no person shall be entitled to copyright otherwise than under the provisions of the Copyright Act** or any other law in force. The SC also observed that **the expression “copyright” has to be understood in the context of the statute which deals with it**, it being accepted that municipal laws which apply in the Contracting States must be applied unless there was any repugnancy to the terms of the DTAA.

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## AAR/High Court decisions upheld/set aside by the SC

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- Similarly, the SC held the **Karnataka High Court in case of CIT v. Samsung Electronics Co. Ltd., (2012) 345 ITR 494** made the same error as done by the AAR in case of Citrix (supra) in as much as that **no distinction was made between a computer software that was sold/licensed on a CD/other physical medium and the parting of copyright** in respect of any of the rights or interest in any of the rights mentioned in sections 14(a) and 14(b) of the Copyright Act. In view of the same, the SC held that the payment for such computer software could not amount to royalty within the meaning of Article 12 of the DTAA or section 9(1)(vi) of the Income Tax Act.
- The SC also held that the decision of **CIT v. Synopsis International Old Ltd., ITA Nos. 11-15/2008**, did not state the law correctly:
  - The observation of Karnataka High Court that the expression ***“in respect of” (copyright)*** should be given a **wider meaning i.e. “attributable”** to the copyright and therefore consideration paid for **transfer of a copyrighted article, would be taxable**, though the right in the copyright is not transferred, since a right in respect of a copyright contained in the article is transferred.
  - **Section 16** of the Copyright Act, which states that *“no person shall be entitled to copyright...otherwise than under and in accordance with the provisions of this Act or of any other law for the time being in force”* made it clear that the expression ***“copyright”*** had to be understood in terms of section 14 of the Copyright Act and not otherwise.
  - The HC was wholly incorrect in holding that the **storage of a computer programme** per se would constitute **infringement** of copyright, since it would directly be **contrary to** the provisions of **section 52(1)(aa)** of the Copyright Act.

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## AAR/High Court decisions upheld/set aside by the SC

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- The finding that **when a copyrighted article** was sold, the **end-user gets the right to use** the intellectual property rights embodied in **the copyright** which would therefore amount to transfer of an exclusive right of the copyright owner in the work, was **wholly incorrect**.
- The **SC approved** the decision of **Delhi High Court** in case of **DIT v. Ericsson A.B.** [2012] 343 ITR 470 (Del), **DIT v. Nokia Networks OY** [2013] 358 ITR 259 (Del), **DIT v. Infrasoftware Ltd.** [2014] 264 CTR 329 (Del), **CIT v. ZTE Corporation** [2017] 392 ITR 80 (Del), by observing:
  - **Copyright is an exclusive right**, which is **negative in nature**, being a right to restrict others from doing certain acts.
  - Copyright is an **intangible, incorporeal right**, in the nature of a **privilege**, which is quite **independent of any material substance**. Ownership of copyright in a work is different from the ownership of the physical material **in which the copyrighted work may happen to be embodied**.
  - **Parting with copyright entails parting with the right to do any of the acts mentioned in the Copyright Act.**
  - The transfer of the material substance does not, of itself, serve to transfer the copyright therein. The **transfer** of the ownership of the **physical substance**, in which **copyright subsists**, **gives the purchaser the right to do with it whatever he pleases**, except the right to reproduce the same and issue it to the public. No copyright is parted.

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## AAR/High Court decisions upheld/set aside by the SC

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- The **right to reproduce** and the **right to use computer software** are **distinct and separate rights**.
  - The **use of a copyrighted product** cannot be construed as a **license to enjoy** all or any of the **enumerated rights in the Copyright Act**.
  - **It would make no difference** as to whether the **end-user was enabled to use computer software that is customised to its specifications or otherwise**.
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- The SC also held that vide Circular No. 10/2002 dated 09.10.2002, the Revenue itself had appreciated the difference between the payment of royalty and the supply/use of computer software in the form of goods, which would be then treated as business income of the assessee taxable in India if it has a PE in India.

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## Interpretation of the DTAA's in light of the Model commentaries and India's position / reservations on the said commentaries.

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- The SC, by placing reliance on the decision of **Azadi Bachao Andolan (2004) 10 SCC 1**, held that the **DTAAs** entered into between India and other Contracting States had to be **interpreted liberally with a view to implement the true intention of the parties**.
- The SC observed that the **DTAAs** under consideration had their starting point either from the **OECD Model Tax Convention** or the **UN Model Convention**, insofar as the taxation of royalty for parting with copyright was concerned. The definition of “royalties” under the concerned DTAA's were in a manner either identical with or similar to the definition contained in Article 12 of the OECD Model Commentary and therefore the same becomes relevant.
- The SC perused the **OECD Model Commentary** on Article 12, which supported the position that
  - There is a **distinction between the copyright in the program** and software which incorporates a copy of the **copyrighted program**.
  - **Making a copy or adaptation of a computer program to enable the use of the software for which it was supplied did not constitute royalty**
  - **Payment made by distributors and end users did not qualify as royalty**.
- Further, the SC also referred to the **India's positions / reservations** on the said **OECD Model Commentary** on **Article 12** and observed that the said positions / reservations **were not clear / vague** as contrasted with the categorical language used by India in its positions taken with respect to other aspects in Article 12.

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## Interpretation of the DTAAs in light of the Model commentaries and India's position / reservations on the said commentaries.

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- India's position / reservation on the commentary dealing with computer software is as under:

*“4.1 India reserves the right to: tax royalties and fees for technical services at source; define these, particularly by reference to its domestic law; define the source of such payments, which may extend beyond the source defined in paragraph 5 of Article 11, and modify paragraphs 3 and 4 accordingly.”*

*“17. India reserves its position on the interpretations provided in paragraphs 8.2, 10.1, 10.2, 14, 14.1, 14.2, 14.4, 15, 16 and 17.3; it is of the view that some of the payments referred to may constitute royalties”*
- India's position / reservation on the commentary dealing with other aspect of Article 12 (eg. transponder charges) is as under:

*“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.”*

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## Interpretation of the DTAs in light of the Model commentaries and India's position / reservations on the said commentaries.

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- Further, the **SC** also referred to the decision of **Delhi High Court** in case of **Director of Income Tax v. New Skies Satellite BV, (2016) 382 ITR 114** wherein it was held that **mere positions taken with respect to the OECD Commentary do not alter the DTAA's provisions, unless it were actually amended by way of bilateral re-negotiation.**
- Further, it was also observed that after India took such positions qua the **OECD Model Commentary**, **no bilateral amendments were made by India** and the other Contracting States to change the definition of royalties contained in any of the concerned DTAs, in accordance with its position.
- The SC also observed that though **India-Singapore DTAA** and **India-Mauritius DTAA** were amended several times, however **no changes in the definition of 'royalty'** was made. Therefore, it was thus clear that the **OECD Commentary** on Article 12 of the OECD Model Tax Convention, incorporated in the concerned DTAs had a **persuasive value** as to the interpretation of the term "royalties" contained therein.
- The SC also observed that the **OECD Commentary** would be **significant for persons deducting tax / for assessees** to 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 would be then taxed as business profits depending on the existence of a PE in the Contracting State.

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## Interpretation of the DTAA's in light of the Model commentaries and India's position / reservations on the said commentaries.

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- The SC also held that the **HPC Report 2003** and the **E-Commerce Report 2016** were recommendatory reports expressing the views of the committee members, which the Government of India may accept or reject and however, for the purpose of DTAA, **a DTAA would have to be bilaterally amended before any such recommendation can become law in force** for the purposes of the IT Act.

# THANK YOU

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**4400 Domestic tax cases**

**3100 TP cases and**

**500 International tax cases**

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