# Communiqué

## International Tax

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## Dismisses Revenue's SLP on taxability of licensing of Microsoft software

### Facts

After setting out the facts in one of the appeals treated as the lead matter, namely ITA No. 2808/2005 concerning Samsung Electronics Co. Ltd., and the relevant provisions of the Income Tax Act, India's DTAAs with USA, France and Sweden respectively, the High Court of Karnataka, on an examination of the End-User Licence Agreement involved in the transaction, found that what was sold by way of computer software included a right or interest in copyright, which thus gave rise to the payment of royalty and would be an income deemed to accrue in India under section 9(1)(vi) of the Income Tax Act, requiring the deduction of tax at source.

Leading the charge on behalf of the appellants in the appeals against this impugned judgment of the High Court of Karnataka, Shri Arvind Datar, learned Senior Advocate, appearing on behalf of IBM India Ltd. in C.A. No. 4419/2012, which is a resident Indian distributor of computer software products purchased from IBM Singapore Pte Ltd., submitted that his client is a nonexclusive distributor, which purchases off-the-shelf copies of shrink wrapped computer software from a foreign company in Singapore for onward sale to Indian end-users under a Remarketer Agreement. He stressed that IBM India, the distributor, is not party to the EULA between IBM Singapore and the ultimate end-users/customers in India. The Indian

end-user pays IBM India, and in turn, IBM India pays this amount to IBM Singapore after deducting a portion of profit. Importantly, under the Remarketer Agreement, IBM India does not own any right, title or interest in copyright and other intellectual property owned by IBM Singapore, and merely markets IBM Singapore's software products in India.

### Ruling

Supreme Court relied upon the case of Engineering Analysis Centre of Excellence Private Limited vs CIT vide Civil Appeal No. 8733-8734 of 2018 on August 07, 2024 wherein it has been held that given the definition of royalties contained in Article 12 of the DTAAs mentioned in paragraph 41 of this judgment, it is clear that there is no obligation on the persons mentioned in section 195 of the Income Tax Act to deduct tax at source, as the distribution agreements/EULAs in the facts of these cases do not create any interest or right in such distributors/end-users, which would amount to the use of or right to use any copyright. The provisions contained in the Income Tax Act (section 9(1)(vi), along with explanations 2 and 4 thereof), which deal with royalty, not being more beneficial to the assessees, have no application in the facts of these cases.

HC stated that the amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software through EULAs/distribution agreements, is not the payment of royalty for the use of

copyright in the computer software, and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in section 195 of the Income Tax Act were not liable to deduct any TDS under section 195 of the Income Tax Act. The appeals from the impugned judgments of the High Court of Delhi are dismissed.

***Supreme Court in the case of CIT (International Taxation) vs Gracemac Corporation Gold View Corportae vide Civil Appeal No. 3081/2023 on September 13, 2024***

## SC issues notice on a Revenue SLP challenging the Karnataka HC judgment in favour of assessee on secondment issue

### Facts

This appeal under Section 260A has been filed by the revenue. The subject matter of the appeal pertains to the Assessment Year 2006-07. The appeal was admitted by a Bench of this Court on the following substantial questions of law:

a) Whether the Tribunal was correct in holding that the disallowance made u/s.40(a)(i) for non-deduction of tax on payment made to abbey National Plc., UK., in not liable to TDS u/s.195 of the Act and consequently the said payments are not liable for disallowance u/s.40(a)(i) of the Act?

b) Whether the Tribunal was correct in allowing relief to the assessee holding that the reimbursement of salary costs and other expenditure was without any profit element and hence cannot be regarded as income chargeable in the hands of Abbey National Plc., UK under Article 13 of the

***Supreme Court in the case of CIT vs Abbey Business Services India Pvt. Ltd. vs CIT vide IA No. 203472/20224 on September 17, 2024***

a) India-UK Treaty, without properly appreciating the nature and content of the transactions with reference to the provisions of section 195 and section 40(a)(i) of the Act?" When the matter was taken, ld. counsel for the assessee submitted that the aforesaid substantial questions of law have already been answered in favour of the assessee by judgment dated 01-12-20 passed in ITA Nos.214/2014 and 215/2014. It is also urged that the appeal filed by the revenue is barred by limitation and no application for condonation of delay has been filed. Therefore, the appeal itself cannot be entertained. In support of aforesaid submission, reliance has been placed on the decision of Full Bench of Delhi High Court in CIT vs Odeon Builders Pvt. Ltd. [393 ITR 27]. The ld. counsel for the revenue was unable to point out as to why the judgment in ITA Nos.214/2014 and 215/2014 does not apply to the facts of this case.

**Facts**

HC ruled that the substantial questions of law are answered against the revenue and in favour of the assessee. The question whether or not the appeal is barred by limitation, is kept open and the parties are granted liberty to adjudicate the same in an appropriate proceeding. The Apex Court held the case in favour of assessee on secondment issue affirming ITAT ruling which held that reimbursement of salary costs and other expenditure was without any profit element and hence does not constitute income chargeable to tax in the hands of the UK entity under Article 13 of India-UK DTAA;

## US Broadcasting company's TV Channel distribution revenue, not 'royalty', business income as per MAP

### Facts

The assessee is a tax resident of USA within the meaning of Article 4 of the India-USA DTAA and holds a valid Tax Residency Certificate for the FY relevant to AY 2020-21 as well as 2021-22. For the years under consideration, the assessee entered into an agreement with Warner Media India Private Limited effective from April 01, 2011, as amended from time to time, wherein the assessee granted Warner Media India Private Limited the rights to sell advertising and distribution of television and interactive platforms namely Cartoon Network, Cartoon Network HD (CN HD+) and POGO, and any other television, interactive television, and/or telecommunication services for viewership in India. As per the said agreement, WarnerMedia India Private Limited is to retain 50% of revenues earned from sale of advertisement inventory for the channels in India and from distribution of channels in India as an Arm's Length Price consideration for services rendered to the assessee subject to an annual minimum guarantee.

The assessee filed return of income in respect of AYs under consideration offering the above-mentioned revenues to tax on the basis of erstwhile Mutual Agreement Procedure resolution arrived at between the Competent Authorities of USA and Competent Authorities of India under Article 27 of

the Treaty, for earlier years (i.e. A.Y 2001-02 to 2004-05) whereby 10% of the both the advertising and distribution revenues were held as business income in India.

The case of the assessee was selected for scrutiny and a draft assessment order came to be passed on 28I09I2022 by determining total income as under:

(a) Distribution revenues were held as royalty and taxed at 10% as per Article 12 of the TreatyISection 9(1)(vi) of the Act; and

(b) 15% of net advertising revenues received by TBSAP from WMIPL are attributable to the alleged Permanent Establishment ('PE') of TBSAP in India.

The assessee filed objections before the Dispute Resolution Panel and the DRP directed the A.O. to examine the order of the Tribunal in Assessee's own case for AY 2009-10 to 2017-18 in respect of taxability of distribution revenues and held that altering the attribution based on a factor which had no bearing in FAR profile is against the law, and not warranted.

**Facts**

By respectfully following the order of the Co-ordinate Bench of the Tribunal and the order of the Jurisdictional High Court, we hold that the subject distribution revenue earned by the assessee cannot be taxed as Royalty albeit as a business income. Since the assessee has already offered the said income as business income in terms of MAP and the income as declared by the assessee in accordance with the MAP which has been accepted by the Department in earlier years has been accepted, we delete the additions made by the AO for the AY 2020-21 and 2021-22. In result appeal of the assessee is allowed.

***ITAT, New Delhi in the case of Turner Broadcasting System Asia Pacific, Inc. USA vs DCIT on September 09, 2024***

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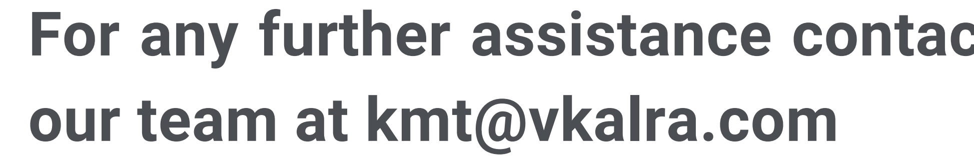


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+91.135.2743283, +91.135.2747084

3rd Floor, MJ Tower, 55, Rajpur Road, Dehradun - 248001

E: info@vkalra.com | W: vkalra.com

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