

# Payment made for limited right to use of copyrighted information not taxable as Royalty

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## In brief

The Delhi bench of the Income-tax Appellate Tribunal (Tribunal), held that in absence of transfer of any or all rights in respect of copyright of literary work, the payment could not be taxed in India as Royalty as defined under the Income-tax Act, 1961 (the Act) read with India Singapore Double Taxation Avoidance Agreement (tax treaty). The Tribunal has highlighted that the payment was made towards use of “copyrighted material” rather than the use of “copyright” causing the payment to fall out of the definition of Royalty. Further, the Tribunal has observed that the payment made by the taxpayer was for merely accessing databases, without any licence for commercial exploitation of the copyright with regard to the database maintained by the recipient of the payment.

## In detail

### Background

- In this case,<sup>1</sup> the taxpayer was engaged in the business of export of computer software (including data processing), rendering of support services and acting as a back office for its parent entity.
- For the purpose of its business, the taxpayer obtained access to database maintained by another entity, T Limited, a company incorporated in Singapore and a tax resident therein, for a consideration. (*T Limited neither rendered any services in India nor had any place of business in India.*)
- The database contained general information on

share price, market, commodity price, currency exchange rates etc. and was publically available.

- As per the terms of agreement, payment was merely for accessing database and did not have any license for commercial exploitation of copyright with respect to database maintained and owned exclusively by T Limited
- Accordingly, the taxpayer filed an application under section 195 of the Act with the Tax Officer (TO)
- The TO rejected the application of the taxpayer and directed to withhold tax @10% as per India Singapore tax treaty, treating the payment as Royalty/ Fees for Technical Services (FTS) as per

section 9(1)(vi) of the Act.

- On first appeal, the Commission of Income-tax (Appeals) upheld the order of TO.

### Issues before the Tribunal

Whether the payment made by the taxpayer was in the nature of Royalty as defined under the Act read with the tax treaty and therefore subject to withholding tax at source.

### Taxpayer's contention

- The taxpayer contented that the payment was merely in the nature of subscription fee for accessing database of general, publicly available information, which, as per law was not liable to be taxed in India.
- In order to treat the payments to T Limited as

<sup>1</sup> ITA No. 407/Del/2013

Royalty, it was necessary to establish there was a transfer of all or any rights in respect of copyright of literary, artistic or scientific work.

- In the present case there was no transfer of any right in respect of copyrights by T Limited and it was a simple case of transfer of copyrighted article.
- The issue was squarely covered by the decision of the jurisdictional High Court (HC) in the matter of *Infrasoft*<sup>2</sup>.

#### ***Revenue's contention***

The information received by the taxpayer from T Limited was covered by Explanation 2 clause (iv) to section 9(1)(iv) of the Act and Explanation 2 clause (v) to section 9(1)(iv) of the Act could not be made applicable to the taxpayer.

#### ***Tribunal's ruling***

- In order to qualify a payment

as royalty under Article 12 of the tax treaty, it was necessary to establish that there was a transfer of all or any rights in respect of copyright of literary work.

- From a perusal of the agreement between the taxpayer and T Limited, Tribunal noted that the database was merely a compilation of general information relating to share market which was neither relating to T Limited's own experience nor was it secret or divulged information.
- The payment was made by the taxpayer for merely accessing databases and it did not receive any knowledge as to how the databases were maintained nor did the taxpayer receive any licence for commercial exploitation of the copyright with regard to the database maintained by T Limited.

- That the payment made by the taxpayer was for the use of 'copyrighted material' rather than use of copy right and hence could not be treated as Royalty. .

#### ***The takeaways***

- The pronouncement has reaffirmed that the payment made for the use of the copyrighted material cannot be taxed as Royalty relying on jurisdictional HC in the matter of *Infrasoft*.
- On the issue of taxability of Royalty there are divergent views of various courts and its tax treatment depends upon specific facts of the case.

#### ***Let's talk***

For a deeper discussion of how this issue might affect your business, please contact your local PwC advisor

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<sup>2</sup> DIT v. *Infrasoft* (2014) 264 CTR 329

## Our Offices

### Ahmedabad

1701, 17th Floor, Shapath V,  
Opp. Karnavati Club,  
S G Highway,  
Ahmedabad – 380051  
Gujarat  
+91-79 3091 7000

### Hyderabad

Plot no. 77/A, 8-2-624/A/1, 4th  
Floor, Road No. 10, Banjara Hills,  
Hyderabad – 500034,  
Telangana  
+91-40 44246000

### Gurgaon

Building No. 10, Tower - C  
17th & 18th Floor,  
DLF Cyber City,  
Gurgaon – 122002  
Haryana  
+91-124 330 6000

### Bengaluru

6th Floor  
Millenia Tower 'D'  
1 & 2, Murphy Road, Ulsoor,  
Bengaluru – 560 008  
Karnataka  
+91-80 4079 7000

### Kolkata

56 & 57, Block DN.  
Ground Floor, A- Wing  
Sector - V, Salt Lake  
Kolkata – 700 091,  
West Bengal  
+91-033 2357 9101/  
4400 1111

### Pune

7th Floor, Tower A - Wing 1,  
Business Bay, Airport Road,  
Yerwada, Pune – 411 006  
Maharashtra  
+91-20 4100 4444

### Chennai

8th Floor  
Prestige Palladium Bayan  
129-140 Greams Road  
Chennai – 600 006  
Tamil Nadu  
+91 44 4228 5000

### Mumbai

PwC House  
Plot No. 18A,  
Guru Nanak Road (Station Road),  
Bandra (West), Mumbai – 400 050  
Maharashtra  
+91-22 6689 1000

### For more information

Contact us at  
[pwctr.knowledgemanagement@in.pwc.com](mailto:pwctr.knowledgemanagement@in.pwc.com)

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