

# Nangia Andersen LLP

## NEWSLETTER

March, 2020

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*Direct Tax*





## 1. Payment cannot be construed as 'royalty' income in the absence of commercial exploitation of copyright

**Outcome:** In favor of the assessee

**Category:** Royalty

### Background

- Trimble Solutions Corporation (assessee), a company incorporated in Finland, received payment from its Indian distributors towards distribution of off-the shelf software and also towards performance of maintenance and support services
- The Indian distributors distributed the said software and rendered the said services to the end customers. The Assessing officer (AO) had opined that the income derived by the assessee, on account of distribution of off-the shelf software and performance of maintenance and support services are in the nature of royalty
- The Income Tax Appellate Tribunal, Mumbai (ITAT) ruled that assessee had only granted the right to distribute the software products and not any right to use the copyright embedded in the software product
- On similar grounds, the ITAT held that taxability of payments received towards maintenance and support services was not royalty as per article 12 of the Indo-Finland Tax Treaty (DTAA) as well as The Income Tax Act, 1961 (Act) and held that same be treated as business income of the assessee

### Brief facts and contentions

- The assessee appointed its wholly owned Indian subsidiary as its non-exclusive resellers/distributors for distribution of its software products in India
- The assessee claimed that the payments received by it towards distribution of off-the shelf software and towards provision of maintenance and support services did not constitute royalty under Article 12 of the DTAA, since the intellectual property rights for the said software vested with the assessee and it had merely granted its distributors, the right to distribute 'copyrighted article' to the end users for the use as a 'copyrighted article' and not the 'copyright' embedded in the said software
- The AO, referring to explanation 4 and 5 to section 9(1)(vi) of the Act, observed that after the amendment, transfer of any right to use a computer software fell within the ambit of term 'royalty' under the Act and held that the payments for distribution of off-the shelf software and towards provision of maintenance and support services constituted 'royalty' and taxed the same at 10% as per Article 12(2) of the DTAA
- Aggrieved, the assessee preferred an appeal before the ITAT

## ITAT's Judgement

The ITAT ruled that payments received by it towards distribution of off-the shelf software and towards provision of maintenance and support services did not constitute royalty under Article 12 of the DTAA as well as the Act. While holding the same, it observed as under:

### ▪ Taxability of distribution of 'off-the shelf' software

Perusing the terms of agreement between the assessee and the Indian distributors, ITAT noted that the assessee had only granted the right to distribute the software products and not any right to commercially exploit the intellectual property engraved in the copyrighted article.

Moreover, it was noted that the term 'royalty' as defined in Article 12 of the DTAA is exhaustive and no amendment in the definition of 'royalty' as stipulated in the Act has to be envisaged as applicable in DTAA

### ▪ Taxability of software updates and maintenance/ support services

It was noted that the assessee rendered maintenance and support services to its distributors in the form of a right of new official sub-release (a modification to the licensed software product for functional improvement) and main releases (update to the existing software product with enhanced features), who in turn, upon entering into a maintenance agreement with the end users, would provide the same to end user customers, thereby enabling the customers to download the updates offered by the assessee

It was opined that the payments received towards distribution of sub-releases and main releases were also for a right to provide a copyrighted article i.e. software updates, being similar to payment received for distribution of off-the shelf software and not for the right to use the copyright embedded in the said copyrighted article. Hence, the same could not be construed as royalty and shall be treated as business income of the assessee

## Nangia-Andersen's Take

This ruling reiterates that taxation of an income as 'royalty' must be read light of the definition as per the Act as well as the tax treaty. The definition stipulated in the DTAA shall be exhaustive and it cannot be modified on account of any amendment introduced in the Act. ITAT has also reiterated that in the absence of commercial exploitation of copyright embedded in the copyrighted article, no 'royalty income' shall arise.

## 2. ITAT: Assessee has the choice to opt for either “Gross basis” or “Net basis” of taxation as regards FTS

**Outcome:** In favor of the assessee

**Category:** Fee for Technical Services (FTS)

### Background

The Income Tax Appellate Tribunal, Mumbai (ITAT) held that Fee for Technical Services (FTS) received by AGT International GmbH (assessee) would be taxable at 10% on gross basis as per Article 12(2) of the Indo-Swiss Tax Treaty (DTAA). This is irrespective of the fact of constitution of Service PE of the assessee. The ITAT allowed the assessee's plea of applicability of beneficial provision as per the Protocol to the DTAA, wherein assessee has the choice to be taxed either on gross basis as per the rates prescribed under Article 12 of the DTAA or on net basis under Article 7.

### Brief facts and contentions

- Assessee, a company incorporated in Switzerland, received payment on account of FTS from an Indian company and offered the same to tax @10% on gross basis under Article 12 (2) of the DTAA
- The Assessing Officer (AO), considering that tax has been withheld by the Indian company at the rate of 42.024% held that rendition of concerned services by the assessee led to the constitution of service PE of the assessee in India under Article 5(2) of the DTAA and after allowing estimated expenses equivalent to 40% of total revenue, brought the balance amount to tax at normal tax rate applicable to foreign companies
- Aggrieved, the assessee preferred an appeal before the ITAT

### ITAT's Judgement

The ITAT ruled that income received by the assessee as FTS towards rendition of certain services to Indian company would be taxed in view of Article 12 of the DTAA. while holding the same, it observed as under:

- Protocol to the DTAA encompasses a provision wherein assessee has a choice to be taxed on gross basis as per the rates prescribed under Article 12 of the DTAA or on net basis under Article 7
- The fact that PE has been triggered stands tax neutral, unless the assessee has lower tax liability on taxability of PE on net basis under Article 7 vis-a-vis taxability of FTS on gross basis under Article 12 of the DTAA. Hence, the plea of the assessee to be taxed on gross basis in accordance with the provisions of Article 12(2) of the DTAA should prevail

### Nangia-Andersen's Take

This ruling allows that the assessee has the liberty to choose the basis of taxation (Gross vs Net basis) irrespective of constitution of Service PE of the assessee in source jurisdiction as per the India-Swiss DTAA. ITAT has legitimately accorded the benefit as laid down in Protocol to the DTAA, thereby extending the beneficial provisions available to the assessee.

# *Transfer Pricing*





## 1. ITAT allows custom duty adjustment to Indian tested party's margin while benchmarking imports

**Outcome:** In favour of taxpayer

**Category:** Adjustment on tested party's margin, Selection of foreign comparables

### | Facts and Contentions

- Swatch Group India Private Limited (“taxpayer”) is distributor of watches manufactured by Swatch Group brands in India. The taxpayer also provides customer services in the nature of after sales services to customers.
- The taxpayer has an exclusive license to undertake wholesaling operations of Swatch Group in India and had adapted global advertising campaign for its product in India. Additionally, the taxpayer also used print media for below-the line marketing activities.
- During the year under consideration, the taxpayer entered into certain international transactions with its associated enterprise (“AE”) including import of watches & spares for resale & pricing support/ subsidy to support and push sales of Swatch India and benchmarked the same by adopting the Resale Price Method (“RPM”) as the Most Appropriate Method (“MAM”).
- The Transfer Pricing Officer (“TPO”) issued a show cause notice seeking an explanation for the aggregation of marketing subsidy with cost of import.
- In response of the aforesaid notice, the taxpayer explained that in order to support and push sales of Swatch India, the AE provided price support and the same could be considered as a marketing support service provided by the AEs to Swatch India. Therefore, the said marketing subsidy was considered as a subsidy on cost of goods sold and hence was closely linked to trading or distribution business of the taxpayer.
- Basis the above, the TPO accepted RPM as MAM, but was not convinced with the aggregation of price/market support received from the AEs. However, for the assessment year under consideration, the TPO concluded that no adverse inference shall be drawn and thus, held the international transactions to be at Arm's Length Price (“ALP”).
- Also, the TPO accepted the MAM selected by the taxpayer but did not accept the comparable selection done by the taxpayer and did a fresh search.
- Aggrieved by the same, the taxpayer agitated the matter before the Commissioner of Income Tax (Appeals) (“CIT (Appeals)”), contending that the comparables selected by the TPO are foreign companies operating in well-developed market and enjoys the benefit of negligible customs duty whereas the taxpayer operates in a highly unorganised market with high customs duty on import.
- Further, the CIT(A) held that in the light of the lack of information, foreign comparables can be used, however, the CIT(A) allowed high custom duty difference adjustment to the taxpayer.
- Since, after adjustment, the taxpayer was earning high margin, thus, the CIT(A) deleted the upward addition made by the TPO.
- Aggrieved by the same, the Revenue filed an appeal before the Income Tax Appellant Tribunal (“ITAT”) stating that adjustment could only be made to the comparables and not the taxpayer's margin; prayed for fresh adjudication of the instant case.

## ITAT's Ruling

The ITAT made the following observations:

- The MAM has been accepted by the TPO for benchmarking the international transactions under consideration. Therefore, the entire quarrel in the instant case was related to the adjustment of custom duty allowed by the CIT(A) to the taxpayer.
- The ITAT referred to Rule 10B(3)(ii) of the Income Tax Rules (“the Rules”) and stated that for certain type of adjustments, relevant data for comparables may either not be available in public domain or may not be entirely reliable. Whereas, the data for the tested party in order to make ‘reasonably accurate adjustments’ as per the aforesaid Rule may be easily available.
- Further, the ITAT also stated that, it is an undisputed fact that import of watches carry heavy customs duty in India as compared to the foreign comparables and also clarified that the regulations do not restrict making adjustments to the tested party.
- Furthermore, the ITAT remarked that “net profit margin of the tested party drawn can be suitably adjusted to facilitate its comparison with other uncontrolled entities/transactions as per sub-clause (i) of Rule 10B(1)(e) of the Rules.
- Considering the above, the ITAT observed that the rate prevailing at the time was 4.5% whereas the taxpayer paid custom duty more than 75% of purchase value and 50% of the total cost of goods sold. Accordingly, the ITAT upheld the deletion made by the CIT(A) and thereby dismissed Revenue’s appeal.

## Nangia-Andersen’s Take

The instant ruling is a positive addition to the limited number of rulings permitting adjustments to the tested party instead of the comparable companies. Also, the ruling reiterates the fact the as per Rule 10B(2) of Rules & the OECD TP Guidelines, the use of foreign comparables is allowable in cases wherein there is lack of availability of reliable information on the comparable companies.

Further, the ITAT also highlighted a major point that there is no specific provision provided in Rule 10B(1)(e)(iii) of the Rules, which impedes the adjustment of the profit margin of the tested party. In light of the same, it is imperative to note that the tax authorities cannot outrightly reject the adjustments made by a taxpayer to the profit margin of the tested party instead of the comparable companies wherein the relevant data for adjustment may not be either available in public domain or may not be reliable for carrying out accurate adjustments. Also, the ITAT re-emphasized on the appropriate selection of comparable companies considering geographical location, custom duty paid etc. and making accurate and reliable adjustments if required as some of the characteristics whilst choosing the comparable companies.

Such rulings are welcomed for enhancing the confidence of the taxpayer since these issues assist in reducing the matters of prolonged litigations.

Source: Swatch Group [India] Pvt Ltd [TS-86-ITAT-2020(DEL)-TP]

## 2. ITAT confirms issue of Letter of Comfort to AE not an international transaction;

**Outcome:** In favour of taxpayer

**Category:** Guarantee, Commission

### Facts of the case:

- During AY 2005-06, Tata International Limited (“the taxpayer”) issued Letter of Comfort (“LOC”) to the Bankers of its Associated Enterprises (“AEs”). During the course of assessment proceedings, the Transfer Pricing Officer (“TPO”), the TPO issued a Show Cause Notice (“SCN”) for the purpose of determination of Arm’s Length Price (“ALP”) for issuance of such LOC.
- In reply to the SCN, the taxpayer submitted that LOC is merely an unequivocal statement of intention expressed by taxpayer not being bilateral. Further LOC is a private affair between the taxpayer and the lender/banker, accordingly, it does not represent international transaction within the meaning of section 92B(1);
- On the other hand, TPO held that LOC provided benevolent advantage to the AEs in obtaining credit facility from the Banks on better terms. Accordingly, the TPO treated the LOC as a guarantee and opined that it would fall within the definition of international transaction 92B of the Act. In this regard, TPO used the guarantee fees charged by HSBC bank as a comparable under CUP and made a TP-adjustment of Rs. 8.70 crore. Aggrieved, the taxpayer filed an appeal before CIT(A).
- CIT(A) noted that in LOC, the party issues only a letter that a subsidiary or group company would comply term of financial transaction and has no obligation to indemnify, however, in case of corporate guarantee, the party issuing guarantee is under obligation to the lender. In view of the same, CIT(A) held that such transaction had no bearing on the profit, income or loss as the taxpayer did not incur any cost or expenditure in relation to such issuance and hence it did not constitute an international transaction under section 92B of the Act. Aggrieved, the Revenue is in appeal before the Hon’ble Income Tax Appellate Tribunal (“ITAT”).

### ITAT’s Ruling

The following observations were made by the ITAT:

ITAT relied on the High Court ruling in case of United Breweries (Holding) vs. Karnataka State Industrial Investment and Development Corporation wherein it was held that the issuance of LOC does not constitute an international transaction.

Further, ITAT also relied on the ITAT rulings in case of Indian Hotels Company Ltd [TS-977-ITAT-2019 (Mum)-TP] and SIRO Clinpharm Private Ltd. [TS-185-ITAT-2016(Mum)-TP] and held that “we do not find any illegality or infirmity in the order passed by Id. CIT(A)” and allowed assessee’s appeal.

### Nangia-Andersen’s Take

The intra-group financial transactions with respect to corporate guarantee and LOC are very common in corporate world but are also one of the most contentious issue and perpetually under litigation in some or the other form. In the instant ruling, ITAT and CIT(A) differentiates between Corporate Guarantee and LoC on the elementary premise that LOC merely indicates the assurance without guaranteeing the performance in the event of default, as in case of corporate guarantee and held that LOC cannot be characterized as Corporate Guarantee and therefore is not an international transactions.

*Regulatory*





## 1. Simplification of company incorporation process & facility to obtain multiple statutory registration - opening of bank account and ease of doing business

In a process to further simplify the process to Incorporate a company in India, Ministry of Corporate Affairs (MCA) on February 23, 2020 has rolled out a new web based Incorporation form (SPICE+) and Companies Incorporation rules. This web based, (SPICE+), integrates various services from different ministries and departments.

Under this new incorporation regime other registrations such as Employees' Provident Fund Organization (EPFO), Employees' State Insurance Corporation (ESIC), Professional tax for Mumbai region, PAN, TAN, opening of Bank account and optional GST registration will be provided in a single incorporation form.

## 2. Filling of financial statements by NBFC in E-Form -AOC-4 NBFC

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Under this new incorporation regime other registrations such as Employees' Provident Fund Organization (EPFO), Employees' State Insurance Corporation (ESIC), Professional tax for Mumbai region, PAN, TAN, opening of Bank account and optional GST registration will be provided in a single incorporation form.

## 3. Introduction of press note 1 2020 series: Review of foreign investment in insurance sector

The Department for Promotion of Industry and Internal Trade (DPIIT), has issued press note 1 of 2020 series to provide for increase of FDI in Insurance intermediary from 49% to 100%.

The said change was announced in the Union Budget 2019 but had escaped enactment all this while. Relevant changes in FEMA would be introduced upon suitable amendment to FEMA (Non Debt) instrument Rules, 2019. The term insurance intermediaries, includes insurance brokers, reinsurance brokers, insurance consultants, corporate agents, third party administrators, surveyors and loss assessors. FDI for insurance company is still capped at 49%.

## 4. The terminated employees (welfare) bill, 2020

The Terminated Employees (Welfare) Bill, 2020 was recently introduced in Rajya Sabha (the upper house) which proposes to provide unemployment benefits to employees who are asked to leave due to reasons such as slump in the economy, political instability, technological changes, a court order, or if the business becomes insolvent, etc. and is not in any way responsible for being rendered jobless by the employer.

The Bill seeks to provide assured unemployment compensation which shall not be less than 60% of the gross salary, health insurance benefits or any other benefits as may be prescribed by the Central Government to the terminated employees for 9 months or till he gets employed.

The bill also proposes an employer to contribute at least 5 % of the net profit of the organization to a fund, which shall be also be utilised for education, medical facilities etc. to the families of the terminated employee.



## 5. Draft framework for authorisation of a pan-India new umbrella entity (nue) for retail payment systems

The Reserve bank of India on February 11, 2020 proposed a draft framework for setting up a new umbrella entity (NUE) for retail payments system, along the lines of National Payments Corporation of India (NPCI).

The entity eligible to apply as promoter/promoter group for the NUE shall be 'owned and controlled by residents' with 3 years' experience in the payments ecosystem as Payment System Operator (PSO) / Payment Service Provider (PSP) / Technology Service Provider (TSP).

The basic activities proposed to be carried on by NUE are:

- Set-up, manage and operate new payment system(s) especially in the retail space comprising of but not limited to ATMs, White Label PoS; Aadhaar based payments and remittance services; develop new payment methods, standards and technologies; monitor related issues in the country and internationally; take care of developmental objectives like enhancement of awareness about the payment systems.
- Operate clearing and settlement systems; identify and manage relevant risks such as settlement, credit, liquidity and operational and preserve the integrity of the system(s); monitor retail payment system developments and related issues in the country and internationally to avoid shocks, frauds and contagions that may adversely affect the system(s) and / or the economy in general.
- Fulfil its policy objectives and ensure that principles of fairness, equity and competitive neutrality are applied in determining participation in the system; frame necessary rules and the related processes to ensure that the system is safe and sound, and that payments are exchanged efficiently.
- Carry on any other business as suitable to further strengthen the retail payments ecosystem in the country.

The entity is proposed to be a company incorporated under The Companies Act, 2013, with a minimum paid-up capital of ₹500 crore and shall maintain a minimum net worth of 300 crores at all times. Further, no single promoter/promoter group shall hold more than 40% investment in the capital of the company at the time of making the application, which shall be diluted to 25% after 5 years of the incorporation. The promoters shall have to demonstrate capital contribution of not less than 10% upfront i.e. Rs.50 crore at the time of making an application for setting up of the entity.

## 6. The population regulation bill, 2019

To control the increasing Indian population, 'Population Regulation Bill, 2019', has been introduced in upper house of the parliament, which calls for retributive action against people with more than two living children and making them devoid of all government services, subsidies, benefits of Public Distribution System, disallowing maternity or paternity benefits, etc..

The bill proposes to provide benefits to those who adopt small family norm by undergoing sterilization operation of either of the partner. The proposed benefits under the bill includes: additional increment during the entire service tenure, subsidy towards purchase of plot or house site or built house from Housing Board or Development Authority of the Government, loan for construction or purchasing a house from Banks/FI at subsidised rate of interest, Rebate under Income tax, subsidy for travel by road, rail or air, rebate on charges for electricity, water, telephone, etc..

The image features a dark background with a complex network of glowing blue lines and dots, resembling a digital or data visualization. On the left side, a large, glowing blue 'N' logo is prominent. A hand is visible on the right side, with the index finger pointing towards the center of the image. A red rectangular box is positioned in the upper left quadrant, containing the text 'Compliance Calendar' in a white, italicized serif font.

*Compliance Calendar*



## Direct Tax

Due Date	Particulars
7 <sup>th</sup> March 2020	Payment of TDS - For the period 1 <sup>st</sup> February 2020 to 29 <sup>th</sup> February 2020
	Payment of Equalisation Levy - For the period 1 <sup>st</sup> February 2020 to 29 <sup>th</sup> February 2020
15 <sup>th</sup> March 2020	Payment of fourth instalment of Advance Tax for FY 2019-20
	Issuance of TDS certificate in Form 16C for tax deposited u/s 194-IB (TDS on rent of immovable property) in the month of January'2020 - tax deduction in January'2020
	Issuance of TDS certificate in Form 16B for tax deposited u/s 194-IA (TDS on sale of immovable property) in the month of January'2020 - tax deduction in January'2020
30 <sup>th</sup> March 2020	Payment and furnishing of challan-cum- statement via Form 26QB in respect of tax deducted under section 194-IA (TDS on sale of immovable property) in the month of February'2020
	Payment and furnishing of challan-cum-statement (Form 26QC) in respect of tax deducted under section 194-IB in the month of February'2020
31 <sup>st</sup> March 2020	Due Date for linking of PAN with Aadhaar Number



## GST

Return Form	Particulars	Return to be furnished by	Periodicity	Due Date
GSTR- 1	Outward supplies return	Registered person	Monthly/ Quarterly	11 <sup>th</sup> of the succeeding month/ 30 <sup>th</sup> April' 2020 (for the quarter Jan'20 –March'20)
GSTR- 3B	Summary of inward and outward supplies and payment of tax	Registered person	Monthly	<ul style="list-style-type: none"> <li>■ 20<sup>th</sup> of the succeeding month for all the states &amp; UTs by taxpayers having annual turnover of INR 5 Cr &amp; above for the previous financial year;</li> <li>■ 22<sup>nd</sup> of the succeeding month for the taxpayers<sup>1</sup> with an annual gross turnover of less than 5 Cr in 15 specified States/UTs;</li> <li>■ 24<sup>th</sup> of the succeeding month for all the taxpayers<sup>2</sup> in specified 22 States/UTs</li> </ul>
GSTR- 6	ISD return	Input Service Distributor	Monthly	13 <sup>th</sup> of the succeeding month
GSTR- 7	TDS return	Person deducting TDS	Monthly	10 <sup>th</sup> March'2020 (for the tax deducted in the month of February 2020)
GSTR- 8	TCS return	E-Commerce Operators	Monthly	10 <sup>th</sup> March'2020 (for taxpayers liable to pay TCS for the month of February 2020)
GSTR- 9	Annual return	Registered person	Annual	31 <sup>st</sup> March'2020 (for the Financial year 2018-19)
GSTR- 9C	Audit report and reconciliation statement	Registered person	Annual	31 <sup>st</sup> March'2020 (for the Financial year 2018-19)

**Note 1:** 15 Specified States/ UTs: Taxpayers whose principal place of business is in the states of Chhattisgarh, Madhya Pradesh, Gujarat, Maharashtra, Karnataka, Goa, Kerala, Tamil Nadu, Telangana or Andhra Pradesh or the Union territories of Daman and Diu and Dadra and Nagar Haveli, Puducherry, Andaman and Nicobar Islands and Lakshadweep.

**Note 2:** 22 Specified States/ UTs: Taxpayers whose principal place of business is in the states of Himachal Pradesh, Punjab, Uttarakhand, Haryana, Rajasthan, Uttar Pradesh, Bihar, Sikkim, Arunachal Pradesh, Nagaland, Manipur, Mizoram, Tripura, Meghalaya, Assam, West Bengal, Jharkhand or Odisha or the Union territories of Jammu and Kashmir, Ladakh, Chandigarh and Delhi.

Form GSTR 1 and Form GSTR 3B (GSTR 2 & GSTR 3 deferred for the time being) to be furnished by every registered person [other than taxpayer registered under the composition scheme, nonresident taxpayer, taxpayer registered as an ISD, a person liable to deduct or collect the tax (TDS/TCS)]

GST Audit Report (in Form GSTR 9C) has to be filed along with the Annual Return (in Form GSTR 9) in respect of each GST registration where the aggregate turnover [of all the registered units within India (under the same PAN)] is more than INR 2 Crores during the financial year

Form GSTR ANX 1 is required to be filed on monthly basis from April 2020 onwards by person registered for GST, having aggregate turnover of more 5 Crore in previous financial year



## Regulatory

S. No.	S. No.	Due Date
1	BEN-2	31/03/2020
2	ECB-2	31/03/2020



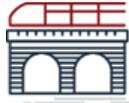
## About Us

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Quality of our people is the cornerstone of our ability to serve our clients. For this reason, we invest tremendous resources in identifying exceptional people, developing their skills, and creating an environment that fosters their growth as leaders. From our newest staff members through senior partners, exceptional client service represents a dedication to going above and beyond expectations in every working relationship.

We strive to develop a detailed understanding of our clients' business and industry sector to offer insights on market developments and assist our clients develop effective strategies and business models. We have the resources and experience necessary to anticipate and competently serve our clients on issues pertaining to all facets of Tax and Transaction Advisory. We take pride in our ability to provide definite advice to our clients with the shortest turnaround time.

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