Supreme Court decision in Engineering Analysis Centre of Excellence

…an analysis

The 4 types of transactions examined

- Indian end-users purchase software from foreign suppliers
- Indian entities, as distributors/resellers, purchase software from foreign suppliers and resell to Indian end-users
- Foreign entities, as distributors/resellers, purchase software from foreign suppliers and resell to Indian distributors/ end-users
- Software affixed onto hardware and sold as integrated unit by foreign suppliers to Indian distributers/end-users

Category 1 – Indian end-user purchasing from foreign supplier - facts

- EULA under which Samsung Electronics Co to supply Samsung Software (=computer software + media, etc.) to Indian end-user
- Non-exclusive licence to install, use, etc. 1 copy of Samsung Software on a single hardware including Samsung Mobile Device
- Indian end-user may make 1 copy for backup purposes
- The software is licensed, not sold
- End-user not permitted to copy, reverse engineer, discover source code of the software, modify or create derivative product, rent, lease the software
- Samsung Mobile Device to be sold (customer to agree to all the EULA terms) with the software but seller will not retain any copy of the software

Category 2 - Indian distributor/reseller purchasing software from foreign suppliers and reselling to Indian end-users - facts

- Remarketer Agreement providing for supply of software by IBM Singapore to IBM India
- IBM India permitted to resell software to end user or other remarketer
- Software is protected by foreign supplier's patents/ copyrights other than or in addition to remarketer's patents
- Agreement is non-exclusive
- IBM India's rights under this agreement are not property rights (IBM India cannot transfer / encumber them in any way)

Category 2 – facts – Cont'd…

- IBM India does not own any right, etc. in copyright in the software
- Patent or copyright infringement suit brought against IBM India by any third party to be defended by IBM Singapore
- IBM India to market the computer programs (software) purchased from IBM Singapore

Category 2 – facts – Cont'd…

- IBM Singapore entering into EULA with Indian end-users for software remarketed by IBM India
- End-user is authorized to execute the computer program at level to be specified by IBM Singapore (e.g. number of users, 'millions of service units', 'processor value units')
- The computer program is owned by IBM Singapore/ affiliate is copyrighted and licensed, not sold.
- End-user has right to use the program up to authorized level, make and install copies for that purpose, make backup copy
- End-user not allowed to reverse engineer the program, sub-license, rent or lease the program.

Category 3 – Foreign distributor selling to Indian end-users - facts

- Microsoft software sold to Indian end-user by Microsoft Corp.,a foreign distributor
- EULA allows end-user to install and use 1 copy of software on a single computer; maximum 5 computers may be connected to the 1 for limited purpose
- End-user may store a copy on a storage device, e.g. a network server
- End-user may not reverse engineer, etc. the software
- All title and IP rights in and to the software are owned by Microsoft or its suppliers
- 1 copy of the software may be made solely for backup or archival purposes

Category 4 – software embedded in hardware - facts

- Contract between JT Mobiles, India and Ericsson, Sweden for supply of mobile telephone system
- Non-exclusive restricted licence to JT Mobiles to use the software only for own operation and maintenance of the system
- JT Mobiles receives no title or ownership rights to the software
- JT Mobiles not to make any copies of software or part thereof except for archival backup purposes
- JT Mobiles not to license, sell, alienate in any manner or part with possession of the software
- If any third party acquires the hardware system the above licence will be transferred provided the third party agrees to abide by all terms and conditions of the licence

Revenue's contention- tax law based

- Explanation 2(v) to section 9(1)(vi) provides that payment for transfer of all or any rights (including the granting of a licence) in respect of any copyright is royalty, which covers all these cases
    - 'in respect of' needs to be given a wide meaning
- CBDT Circular 152 dated 27 Nov. 1974 and FM's speech made before the Lok Sabha on 7 Sept. 1990 (recorded in CBDT Circular 588 dated 2 Jan. 1991) explain the intent of the provision from inception
- Explanation 4 to section 9(1)(vi) introduced by FA 2012 w.r.e.f 1 June 1976 provides that transfer of all or any rights in respect of any right, property or information always included transfer of all or any right for use or right to use a computer software
- CBDT Notification 21/2012 dated 13 June 2012 provides that Explanation 4 clarifies intent of law from the date the section was brought into the Act

Revenue's contention - tax law based – cont'd…

- TDS provisions are distinct and exist apart from assessment provisions
- DTAAs therefore are not relevant at the time of TDS because the payers are not 'assessees'
  - Article 30, US DTAA provides for separate entry into force dates for withholding taxes and other taxes
  - In Transmission Corpn it was held that 'payer' and 'assessee' are different
  - In PILCOM it was held that tax must be deducted irrespective of whether tax is otherwise payable
  - CBDT Circular 588 of 2 Jan. 1991
- India's reservations on OECD commentary dealing with parting of copyright and royalty
- OECD commentary to the extent conflicting with domestic law must give way to the latter
- sale of software treated as sale of goods in indirect tax laws not relevant for income tax

Revenue's contention – copyright law based

- Since adaptation of software could be made, even for use on a particular computer, copyright is parted with by owner
- These cases come under section 51(b) of Copyright Act, thereby constituting 'infringement'; hence parting with copyright is involved
- Under section 52(1)(ad) of Copyright Act making of copies for non-commercial personal use is not infringement; copies made for commercial use amounts to infringement and therefore transfer of copyright

The stage set for litigation…

Revenue contended…

Consideration that the Indian payers paid to the foreign suppliers in these cases amounted to 'royalty' on which the Indian payers should have deducted tax at source under section 195 of the Income-tax Act, 1961.

And payers asked the Court…

Do the amounts paid by Indian entities to foreign software suppliers amount to "royalty" in the facts and circumstances of the cases and in law?

Interlude

The Copyright Act, 1957

… a flashcard

Frequently referred provisions in this judgment…

- *Computer* – includes any electronic or similar device having information processing capabilities [section 2(ffb)]
- *Computer programme* – 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 [section 2(ffc)]
- *Author* – in relation to any literary…work which is computer-generated, the person who causes the work to be created [section 2(d)(vi)]
- *Adaptation* – in relation to any work, any use of such work involving its rearrangement or alteration [section 2(a)(v)]
- *Literary work* – includes computer programmes, tables and compilations including computer databases [section 2(o)]

Frequently referred Copyright Act terms…

- Section 14 - Meaning of copyright – the exclusive right subject to the provisions of this Act, to do or authorize the doing of any of the following acts in respect of a work –
  - (a) In the case of a 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) …
    - (iv) …
    - (v) …
    - (vi) To make any adaptation of the work
    - (vii) Any of the above acts in relation to an adaptation of the work

Frequently referred Copyright Act terms…

- Meaning of copyright – cont'd…

  (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

- Section 16 – No copyright except as provided in this Act –

  No person shall be entitled to copyright …in any work…otherwise than under and in accordance with the provisions of this Act…

- Section 18 – assignment of copyright

  (1) The owner of copyright in an existing work …may assign to any person the copyright either wholly or partially and either generally or subject to limitations …

Frequently referred Copyright Act terms…

- Assignment of copyright …

  (2) Where the assignee of a copyright becomes entitled to any right comprised in the copyright, the assignee as respects the rights so assigned and the assignor as respects the rights not assigned, shall be treated…as the owner of copyright

- Section 19 – Mode of assignment – the assignment of copyright in any work shall also specify the amount of royalty …payable to the author or his legal heirs…
- Section 30 – Licences by owners of copyright – The owner of the copyright in any existing work…may grant any interest in the right by licence in writing …

Frequently referred Copyright Act terms…

- Section 52 – Certain acts not to be infringement of copyright
  - (1) the following…
    - (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 utilize 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 utilize the computer programme for the purpose for which it was supplied;
      - …
    - (ad) the making of copies or adaptation of the computer programme from a personally legally obtained copy for non-commercial personal use.

Frequently referred Copyright Act terms…

- Section 58 – Right of owner against persons possessing or dealing with infringing copies –

  All infringing copies of any work in which copyright subsists and all plates used or intended to be used for the production of such infringing copies shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of possession thereof or in respect of the conversion thereof

Why is reference to Copyright Act relevant?

- In para 108 of the judgment Supreme Court has held that it is not a right approach to refer to the domestic tax law provision and then apply it to interpret the provisions of the DTAA
- The relevant article of the DTAA (in that case DTAA with Ireland) defining ‘royalties’ would alone be relevant to determine taxability under the DTAA as it is more beneficial to the assessee
- The term ‘copyright’ is not defined in the DTAA.
- Article 3(2) of the Ireland DTAA - 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 (which is applying the DTAA) concerning the taxes to which the Convention applies.

More on Article 3(2)…Supreme Court rejecting AAR in Citrix Systems Asia –

- Citrix Australia entered into software and hardware distribution agreement with Ingram India
- Ingram India was non-exclusive distributor of Citrix's software products in India
- AAR opined that DTAA definition of 'royalty' must give over to common understanding of the term
- AAR also held that it need not be constrained by the definition of 'copyright' in section 14 Copyright Act when construing the DTAA

Citrix …cont’d -

- Supreme Court held that any wider definition of the term ‘royalty’ must be ignored, and the more beneficial treaty definition must be adopted
- article 3(2) principle must also be kept in mind
- The term ‘copyright’ must be understood in the context of the statute that deals with it
- Municipal laws which prevail in the contracting state must be applied unless there is any repugnancy to the terms of the DTAA
- Citrix was therefore held to be not stating the correct law

Reference to Copyright Act...

- Income-tax law of India uses the term ‘Copyright’ but the meaning of the term is not mentioned therein.
- Hence reference is required to the Copyright Act which is the special law dealing with the subject of copyrights.
- Also, as stated in section 16 of the Copyright Act, there cannot be any copyright except as under and in accordance with the provisions of the Copyright Act.
- Thus, Copyright Act seems to be the only source from which to know the meaning of the term ‘copyright’.

Common features of the distribution agreements noted by the Supreme Court

- What is granted to the distributor is only a non-exclusive, non-transferable licence to resell computer software
- It is expressly stipulated that no copyright in the computer programme is transferred either to distributor or to end-user
- Distributor does not get the right to use the product at all

Therefore, what the distributor pays is price of the programme as goods, either in a medium that stores the software or in a hardware where the software is embedded

Common features of EULAs noted by the Supreme Court

- Apart from right to use the programme by end-user himself there is no further right to sub-licence/transfer/reverse engineer/ modify/reproduce in any manner other than as permitted by the licence
- End-user can only use it by installing it in the computer hardware owned by end-user and cannot it any manner reproduce it for sale or transfer
- Thus, these EULAs are not licences under section 30 of Copyright Act; section 30 provides for transfer of interests in all or any of the rights mentioned in section 14 whereas these licences only imposed restrictions

Copyright explained with example of book

No copyright granted

- English publisher sells 2000 copies of a particular book to Indian distributor
- Indian distributors resells them at profit
- No right of distributor to reproduce the book and sell copies of same
- No copyright transferred by way of licence or otherwise

Copyright granted

- English publisher sells same book to Indian publisher
- Indian publisher given right to reproduce and make copies with permission of author
- Copyright has been transferred by way of licence or otherwise
- Indian publisher pays royalty – for right to reproduce the book in the territory mentioned in the licence

State Bank of India v. Collector of Customs, (2000) 1 SCC 727 – what is not copyright

- SBI imported computer software and manuals from Ireland
- SBI contended that part of the price paid by it ('countrywide licence fee') was royalty for reproduction of the software and was thus exempt from customs duty
- Court noted;
  - Software remained property of supplier
  - SBI only permitted to use the software in its own centres for a limited period
  - SBI not allowed to reproduce software
  - Reproduction # use (reproduce – parting of copyright by owner, use – not so)
  - SBI not to copy the software save as may be strictly required for its own sites
- Court ruled – SBI did not get copyright; consideration not royalty

Definition of ‘Royalty’ – Treaty and Act

Treaty (e.g. Singapore treaty)

- Exhaustive definition (“royalty means…”)
- Consideration for the use of or right to use any copyright in a literary work

Act

- Consideration includes lumpsum consideration (except that generating capital gains)
- For transfer of “all or any rights” including granting of a licence in respect thereof
- Such transfer must be “in respect of” a copyright
- Post 2012 amendment – transfer of all or any right for use or right to use a computer software

Definition of ‘royalty’ – Act – Court explains...

- There must be transfer by way of licence or otherwise
- of all or any of the rights mentioned in section 14(b) read with section 14(a) of the Copyright Act
- ‘in respect of’ means ‘on’ or ‘attributable’ (placing reliance on State of Madras v. Swastik Tobacco Factory, (1966) 3 SCR 79)
- The “ , “ after the word ‘copyright’ is a drafting error because copyright is always of a literary, etc. work. This error was sought to be rectified in DTC, 2010

Software Royalty – Treaty and Act (pre-2012 amendment) – no fundamental difference

- Treaty – consideration for ‘use of or the right to use’ copyright
- Act – consideration for transfer of all or any right in respect of copyright
  - Any of the rights contained in section 14(a) or 14(b) Copyright Act
  - ‘granting of a licence’ would necessarily mean a licence in which transfer is made of an interest in rights ‘in respect of copyright’
  - There should be parting with an interest in any of the rights mentioned in section 14(a) read with 14(b)

Thus, no basic difference in the definition of software ‘Royalty’ between Treaty and Act (pre-2012 amendment)

Explanation 4 and date of its coming into effect

- Explanation 4 brings under the ambit of royalty transfer of all or any right for use or right to use a computer software irrespective of the medium
- Rejected Revenue's contention that Expl. 4 applies w.r.e.f 1 June 1976
  - CBDT circular 152 of 27 Nov. 1974 cannot explain a position that comes in the statute later (1976)
  - Expl. 3 introduced the term 'computer software' first time in 1991. Expl. 4 cannot relate to a period before that
  - The term 'computer software' was introduced in Copyright Act in 1994. Expl. 4 cannot even relate to a period before that
  - Thus Expl. 4 is only prospective

Even after Explanation 4 is there really any change?

- Explanation 4 – transfer of all or any rights in respect of any right, property or information includes transfer of all or any right for use or right to use a computer software
- Note – it does not talk about ‘transfer of all or any rights’ in respect of any copyright. It talks about ‘transfer of all or any rights’ in respect of any right, property or information
- That includes transfer of all or any right for use or right to use a computer software (including granting of a licence)
- Does Explanation 4 create a parallel definition of royalty where rights in respect of copyright need not be transferred; any right transferred for use or right to use a computer software is royalty?
- Memorandum explains as follows…

Memorandum explaining Explanation 4…

"Considering the conflicting decisions of various courts in respect of income in nature of royalty and to restate the legislative intent, it is further proposed to amend the Income Tax Act in following manner:-

(i) To amend section 9(1)(vi) to clarify that the consideration for use or right to use of computer software is royalty by clarifying that transfer of all or any rights in respect of any right, property or information ***as mentioned in Explanation 2****, 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."* (emphasis supplied)

How Supreme Court explains Explanation 4

- the expression “as mentioned in *Explanation* 2” in sub-para (i) of the aforesaid Memorandum shows that *explanation* 4 was inserted retrospectively to expand the scope of *explanation* 2(v).
    - Note – ‘right, property or information’ is not mentioned in Explanation 2.

- In any case, *explanation* 2(v) contains the expression, “the transfer of all or any rights” which is an expression that would subsume “any right, property or information” and is wider than the expression “any right, property or information”.

Supreme Court's way of explaining Explanation 4 – a critique

- 'as mentioned in Explanation 2' in the Memorandum is wrong referencing; Explanation 2 mentions right in respect of copyright, not right in respect of 'right, property or information'
- Supreme Court referred to the wording of the memorandum to accept the Revenue's contention that Explanation 4 was meant to expand the definition of 'royalty'
- It held that 'all or any rights' is wide enough to subsume 'right, property or information'

Supreme Court summarizing its view after survey of several decided cases

- One cannot have copyright right without the copyrighted article; but just because one has the copyrighted article it does not follow that he also has the copyright in it
- Copying the program onto the computer's hard drive or RAM or making an archival copy is necessary to utilize the program. Rights in relation to these acts of copying, where they do no more than enable the operation of the program by the user should be disregarded in analysing the character of the transaction for tax purposes
- Parting with copyright entails parting with the right to do any of the acts mentioned in section 14 of Copyright Act

Supreme Court summarizing…

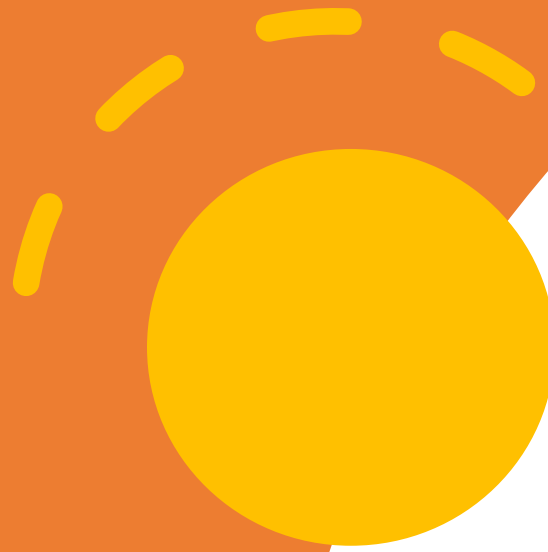
- Licence from a copyright owner conferring no proprietary interest does not entail parting with copyright; it is not a licence issued under section 30 of Copyright Act
- It makes no difference whether end-user is enabled to use the computer software that is customized to its specifications or otherwise
- A non-exclusive non-transferable licence merely enabling the use of a copyrighted product does not convey rights of section 14(a) and 14(b) of Copyright Act and is not a licence under section 30 of the said Act
- Right to reproduce and right to use computer software are different; former amounts to parting with copyright, latter, in the context of non-exclusive EULAs does not amount to parting of copyright

TDS possible on a retrospective amendment?

- The years concerned were pre-2012
- Could TDS have been made on the basis that the amendment was retrospective?
- Supreme Court answered that it was not possible for payer to do TDS at the time of credit or payment because the changed law was not actually and factually in the statute at the relevant time
  - *Lex non cogit ad impossibilia* – the law does not demand the impossible
  - *Impotentia excusat legem* – when there is a disability that makes it impossible to obey the law the alleged disobedience of the law is excused
  - Hence, the payers could not be visited with the consequences of ‘assessee in default’

Principles of Treaty Interpretation – Court lays down…

- DTAAs have to be interpreted liberally with a view to implement the true intention of the parties
- When treaty definition of ‘royalty’ is modelled on Article 12 of OECD Model Convention it is relevant to refer to OECD commentary. It carries persuasive value. Many occasions where Supreme Court has referred to OECD commentary – Azadi Bachao, Formula One, E-Funds IT Solutions.
- Merely taking positions with respect to OECD commentary do not alter the DTAA provisions unless the DTAA is amended after bilateral re-negotiation



Result

Supreme Court holds...

The payments in the cases before it did not constitute royalty, based on treaty definition and there was no obligation to deduct tax at source.

Some new directions, some controversies…

- Reference to Memorandum as aid to interpretation – Explanation 4 – law not clear?
- The decision is relevant to shrink wrapped software as well as bespoke software.
- The payments have been held to be not ‘royalty’; the question whether any of them are ‘fees for included/ technical services’ was not before the Court
    - Therefore, it cannot be generalized that payment for software (even without copyright rights) is never taxable

New directions, controversies…

- The ‘,’ after the word ‘copyright’ in the domestic law might not be drafting error. Similar wording and comma usage in Australian law
- Para 54 –
  - does section 195 not apply to a non-resident payer?
  - Does section 9 refer to non-residents only?
- Para 108 – treaty is alternative taxing regime; not an exemption regime
- India-Morocco treaty specifically includes payment for computer software in the definition of royalty - not pointed out

Treaty – an alternative taxation regime – significance*

(*analysis based on Birla Corpn. Ltd. v. ACIT – ITA 251 & 252/JAB/13)

- As section 90 unambiguously states, so far as aassessees covered by a duly notified tax treaty is concerned, the provisions of the Act come into play only when those provisions are more beneficial to the assessee. Accordingly, when an assessee has no taxability based on the applicable treaty, there cannot be any occasion to look at the provisions of the Act.
- Revenue generally contends that we should begin by examining taxability, of the income earned by the foreign company, under the provisions of the Act and, when this income is found to be taxable in terms of the domestic tax legislation, we should hold its taxability as such, unless, of course, the income is exempt from taxation in India under the provisions of the tax treaty
- This approach was not approved in Motorola Inc. vs. Dy. CIT (96 TTJ 1 (SB)), wherein the Tribunal had observed that "DTAA is only an alternate tax regime and not an exemption regime“ and, therefore, "the burden is first on the Revenue to show that the assessee has a taxable income under the DTAA, and then the burden is on the assessee to show that its income is exempt under DTAA
- No tax treaty can impose a tax but a tax treaty does something far more fundamental—in case of competing tax jurisdiction claims, which are inevitable corollaries of inherently contradictory source and residence rules a tax treaty decides which tax jurisdiction can levy tax on a tax object, and to what extent it can do so.

Tax treaty – alternative regime – significance*

(*analysis based on Birla Corpn. Ltd. v. ACIT – ITA 251 & 252/JAB/13)

- To examine taxability of a cross-border income in a source tax jurisdiction, without first establishing the right to tax that income by the source tax jurisdiction, is like putting the cart before the horse. Therefore, before proceeding to consider taxability of a non-resident, covered by the provisions of a tax treaty, in terms of the provisions of the domestic tax laws of the source jurisdiction, it is useful to first check whether source jurisdiction has a right to tax that income at all. It is therefore preferable to follow the approach of first examining whether the source country has right to tax a particular cross-border income, and, in case the right is so established, to examine whether the domestic tax laws of the source country provide for taxation of such an income, and if so, to what extent and in what manner
- There are of course literature which support 'domestic law first' approach.
- Supreme Court in this case have supported the other approach
- Ramification – example – India-Netherlands tax treaty does not have 'Other income' article and certain items of income may not be taxed under the treaty at all.

Australian law on software taxation – brief comparison

Draft Taxation Ruling TR 2021/D4

Example	In brief	Characterisation according to ATO	Comments
1.	DCo is an Australian subsidiary of a foreign co. Foreign co develops database software which it licenses to DCo. DCo obtains right to reproduce the software for sale to local customers and makes payment to foreign co for the right	The payment is royalty since it is against the right to reproduce software	DCo seems to be a distribution intermediary. Its right does not seem to be more than what is necessary to distribute copies of the software. May not be royalty under OECD MC commentary to Article 12 (Referred to in para 152, sub-para 14.4 of the Supreme Court judgment)

DTR - TR2021/D4

2.	S Co develops system software under contract with manufacturers of devices for installation on the devices and manufacturers have access to the source code and can modify and make future updates to the software	Payment received by S Co from manufacturers is royalty because manufacturers have the right to modify the software. Source code access imparts knowhow about the software	Contrast category 4 in the Supreme Court judgment. JT Mobiles, India had no such right. Payment not considered Royalty.

DTR – TR2021/D4

3.	UCo subscribes for access to cloud-based applications provided by SCo. UCo can only use the software; cannot be used simultaneously in more than 10 devices; no sub-licensing, no access to source code	Payment not royalty. Payment is for simple use of software and access to technical information therefor	Case not exactly of any type mentioned in the Supreme Court judgment but the principle is same, namely, no copyright right was transferred, hence not royalty

DTR – TR2021/D4

4.	SP is copyright holder of some softwares. SCo, its Australian subsidiary, enters into distribution agreement for right to distribute the softwares in Australia. SCo enters into EULA with Australian customers. SCo does not have right to reproduce or modify the software. SCo grants customers non-exclusive, non-transferable licence to download, install, use the software for own use.	Payment by SCo to SP is royalty because the payment is for right to sub-license the use of software to end-users and to specify the terms of end-use. This is the exclusive right of SP as copyright owner which SCo would not be able to exercise without licence.	Specific mode of the distribution notwithstanding, the arrangement does not seem to be anything other than software distribution. Whether it would be royalty under OECD test / Supreme Court ruling needs further examination.

DTR –TR2021/D4

6	GH, a retailer of computer games enters into distribution agreement with GCo, a games developer to distribute GCo's games. GH to sell packaged software under 'shrink-wrap' EULAs between customers and GCo; GH is not party to these agreements.	Fees paid by GH to G not royalty. GH is not getting to use any copyright right.	In line with Category 2 in the Supreme Court judgment.

DTR – TR2021/D4

7	A Co subscribes to S Co's cloud-based retail management software to manage point of sale, inventory and customer relationships at their homewares stores.	Not royalty being for simple use of retail management software	In line with the principles set in the Supreme Court ruling.

Some significant aspects of software taxation in the Australian law

Royalty includes amounts paid for the use of, or the right to use, any copyright, patent, design or model, plan, secret formula or processes, trademark or other like property or right (subsection 6(1) of the Income Tax Assessment Act, 1936)

An amount is considered to be for the use of or right to use copyright if it is paid as consideration for right to do something in relation to copyright that is the exclusive right of the copyright owner

The exclusive rights of a copyright owner (including in a software) include the right to – reproduce the work in a material form, make an adaptation of the work, communicate the work to the public (ss.31(1), Copyright Act)

Concept of reproduction connotes the copying of a work in which copyright subsists. A reproduction may be of the whole or a substantial part of a work and may include any form of storage of the work whether visible or not

Software taxation in Australia – cont'd…

Simple use of software is use for the purpose for which software was designed or intended to be used, provided the licensee/end-user has only been granted the right to use the copyright to the extent necessary to facilitate the intended use. Payments therefor not generally royalty

Where a software distributor is granted the right to do something in relation to software that is the exclusive right of the copyright owner the payment made for that right will be royalty. If such right is not given to the distributor the payment made by distributor is not royalty

Software bundled with hardware – generally the price is not royalty. E.g. mobile system pre-installed with OS software. When software sold on physical carrying media separately from any device on which the software may be used the payment is not royalty when licence limits end-user's power to deal with the software (e.g. cannot be sold/ hired without permission) or end-user has simple user rights and no right to sub-license or otherwise use the copyright in the software