



Comments and Suggestions on Discussion Draft released on 16th February 2021

Discussion Draft: Possible Changes to the United Nations Model Double Taxation Convention Between Developed and Developing Countries Concerning Inclusion of software payments in the definition of royalties, issued by the United Nations Committee of Experts on International Cooperation in Tax Matters

16th March 2021

To,

United Nations Committee of Experts

Dear Sir/Madam,

Ref.: Comments and Suggestions on Discussion Draft released on 16th February 2021

This is with reference to the comments and suggestions invited on the Discussion Draft on possible changes to the United Nations Model Double Taxation Convention Between Developed and Developing Countries Concerning Inclusion of software payments in the definition of royalties.

Before we make our suggestions on the said Discussion Draft, permit us to introduce ourselves.

Bombay Chartered Accountants' Society (BCAS) is a voluntary organisation established on 6th July 1949 in Mumbai, India. BCAS has presently about 9,000 members from all over India and abroad. BCAS is a principle-centered and learning-oriented organisation promoting quality service and excellence in the profession of Chartered Accountancy. The organisation is a catalyst to bring out better and more effective Government Policies and Laws in order to have clean and efficient administration and governance.

In this document, we have made an attempt to give our comments and suggestions on some of the specific questions raised for consultation.

- Is the description of “software” in paragraph 12.1 of the Commentary on Article 12 of the OECD Model (extracted in paragraph 12 of the proposed UN Commentary) (a) consistent with current business practice and (b) appropriate for use as a definition in this context, perhaps by adding the definition to Article 3?

BCAS Comments:

BCAS agrees with the inclusion of the “software” in the definition in Art. 3, which would remove uncertainty in the context of software and the need for referring in domestic laws in case of interpretation issue.

- Do paragraphs 16 and 17 of the proposed UN Commentary adequately distinguish between goods that constitute “computers” and those that are not “computers” notwithstanding that they incorporate software to execute their functions or provide some degree of connectivity? What additional language or examples would help to clarify the distinction?

BCAS Comments:

More examples are required akin to US technical explanation.

- The proposed Commentary continues to adopt paragraph 14.4 of the Commentary on Article 12 of the 2017 OECD Model on distribution intermediaries. Some participants in the Subcommittee do not agree with the analysis in that paragraph for the reasons set out in the Annex to this Discussion Draft. Do you agree with the position set out in paragraph 19 of the proposed Commentary or with the analysis in the annex? If the latter, do you agree that the appropriate approach is to delete the words ‘for the purposes of using it’ at the end of subparagraph (c)?

BCAS Comments:

We do not agree with the Para 19 and agree with the analysis in the annexure to the Discussion Draft, in order to avoid unilateral measures of Contracting State to levy Digital Services Tax or Equalisation Levy or alike.

Our reasons for the above comments are provided below:

1. Overall Suggestion

While we sincerely appreciate UN’s efforts and hard work in the Discussion Draft, we feel that the proposed solution is highly effective, but has to be implemented in a careful and gradual manner.

2. Distributor / End User – Computer Programme

Para 14.4 provides for a classification rule that payment from distributor to the copyright holder for resale to end-users would be classified as business income under Art. 7 of the Tax Treaty. However, the Discussion Draft proposes to amend this

equation to some extent. It introduced references of computer software in new subdivision (a)(iv) and subparagraph (c) of Para 3 that defines the term “royalty”.

We agree to the addition of the computer software as above, with minor edits.

- 1) We should not refer to copyrights law of or the application of Exhaustion Doctrine in the Source State or the Resident State, but rather treat this inclusion as a means to distribute taxing rights.
- 2) The distributor even if a distributor *simplicitor* should be treated as having made the payment of royalty to the copyrights holder. The right to distribute copyrighted software product should be specifically referred to the above addition in new subdivision (a)(iv) to avoid any doubts.
 - a. It should also be verified that the payment for distribution rights, if composite with purchase price, that is when not separately charged, would be treated as royalty. And if royalty is separately charged, the purchase costs should not be again be subject to royalty and should fall under Art. 7 (Business Income).
 - b. However, the inclusion should come with a threshold (whether monetary or quantum) and the withholding tax rate should be retained at a maximum of 3-5% on gross basis.
- 3) Further, it is recommended to include additional examples similar to Para 16 and 17 of the Discussion Draft.

BCAS Recommendation:

We agree with the inclusion of computer software and have certainty in the tax treatment. However, it should not be blanket inclusion. In order to provide relief to few copyrights holders, there should be an element of threshold and a differential withholding tax rate.

3. End user

A new scope is inserted as sub-para (c) wherein it is provided that “the acquisition of any copy of computer software for the purposes of using it” would also be covered in the definition of Royalty. While an analogy is drawn from the Exhaustion Doctrine that is differently applied in Contracting States, several courts have found that a contract had been validly formed by the purchaser’s conduct, even though the specific terms of EULA were not disclosed until after the sale. At the same time, the Contracting States have introduced Digital Services Tax or Equalisation Levy or similar regime for which the payer is not permitted to claim tax credit for the same. The unilateral addition to taxes should be avoided.

BCAS Recommendation:

In order to avoid unilateral legislation of digital services, we agree to the inclusion of acquisition of software product for the purposes of using it.

We trust that the above comments and suggestions will be duly considered.

Yours Faithfully,

For Bombay Chartered Accountants' Society



Suhas Paranjpe
President – BCAS

+91 9869074643



Mayur Nayak
Chairman – International Tax Committee–
BCAS

+91 9324271980

Email: president@bcasonline.org Email: mayur@mayurnayak.com