



Tax alert: Delhi HC holds payment for right to use trademark, taxable as royalty

16 March 2026

The Delhi High Court (HC) has, based on facts of the case, held that sponsorship/advertisement payment to a Singapore entity which included payment for right to use trademarks, shall constitute 'royalty'.

In a nutshell



The Agreement granted license to use and reproduce the ABC Mark and Events Mark to LMN through licensed territory in any advertising material. Further, licensed territory was defined to mean the 'world' and 'advertising material' was defined widely to include every material in any medium with no nexus of its usage to any venue or geographical location.



The consideration in the Agreement included total consideration for both on-ground advertising and license to use the ABC Mark and Events Mark. As such, a substantive right to use the marks was created by virtue of the Agreement.



No substantial challenge was made to the apportionment of the total payment into 1/3rds and 2/3rds. It was also not the case of the taxpayer that the apportionment of the amount into royalty, was to be at a lower rate.



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Background:

- A Singapore entity (S Co) had entered into an agreement with an entity (ABC), to obtain commercial rights (such as the right to appoint third party sponsors, suppliers, broadcasters and other licensees) connected with the cricket match events owned by ABC.
- In exercise of the rights granted to S Co in the agreement between S Co and ABC, S Co signed an agreement with three group entities (Agreement), one of them being the taxpayer¹, appointing the taxpayer's group (say LMN) as a Global Partner for the event specified in the Agreement.

As a Global Partner, LMN acquired the advertising and promotional rights before and at the event, which inter-alia included rights to display the LMN mark on certain advertising sites like ground level pen meter boards; outfield mats; 3rd umpire traffic lights; sight screens; advertisement on electronic screens at stadium; on tickets; official website for the event; welcome board on the main entrance to the venue; flag at any designated flag court at the venue and at other places which can be subsequently agreed between parties.

For the aforesaid advertisement and promotional rights, LMN group agreed to pay an amount to S Co, part of which was borne by the taxpayer.

- The taxpayer filed an application under section 195 of the Income-tax Act, 1961 (ITA) requesting the Deputy Director of Income Tax (DDIT), to issue a certificate allowing the taxpayer to remit the aforesaid amount without deduction of tax. The application was rejected by Revenue authorities, and it was held that the payment fell under the definition of royalty requiring deduction of tax at 10%, amongst others, on the following grounds:
 - The amount paid by the taxpayer was in the nature of royalty for acquisition of rights to exploit the commercial potential of the events.
 - LMN (the Global Partner), was empowered to use certain marks (say ABC marks) and derive the benefits of strength, popularity and goodwill and the clout of ABC.
 - Such rights were acquired to benefit from enhanced visibility to customers deriving the benefits of association on account of reputation, goodwill and standing of ABC.
- Aggrieved, the taxpayer filed an application for revision of the order under section 264 of the ITA before the Director of Income-tax (DIT). The DIT granted a partial relief to the taxpayer by observing as follows:
 - The petitioner had filed a submission stating that there was an element of use of ABC's trademark (which was by the taxpayer but the same was merely incidental and add-on rights. On the basis of a letter given by ABC, the said incidental use of trademark was valued at USD 1,000.
 - As per certain clauses of the Agreement, the taxpayer had acquired the right to use ABC logo.
 - The right to use ABC trademark was bought by ABC from S Co.
 - The consideration was paid both for the physical space as well as the right to use the ABC trademark.
 - Maximum payment was made to acquire visible space in the field thus 2/3rd of the total payment needed attribution towards the advertisement and 1/3rd of the total payment towards right to use trademark.
 - Only 1/3rd of the total consideration was chargeable to tax as royalty and tax was required to be withheld @ 15% on such payments.
- Aggrieved, the taxpayer filed a writ petition before the Delhi High Court (HC).

¹ [2025] 181 taxmann.com 915 (Delhi HC)

Relevant provisions in brief:

Section 5 of the ITA

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(2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which- (a) is received or is deemed to be received in India in such year by or on behalf of such person; or (b) **accrues or arises or is deemed to accrue or arise to him in India during such year.**

Section 9(1)(vi) of the ITA

1) The following incomes shall be deemed to accrue or arise in India-

vi) income by way of royalty payable by -

a) the Government; or

b) a person who is resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

c) a person who is a non-resident, where the royalty is payable in respect of any right, property or information used or service utilized for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India:

Article 12 of India-Singapore Tax treaty

1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the recipient is the beneficial owner of the royalties or fees for technical services the tax so charged shall not exceed:

a) in the case of royalties referred to in paragraph 3(a) and fees for technical services as defined in this Article [other than services described in sub-paragraph (b) of this paragraph], 15, per cent of the gross amount of the royalties and fees;

b) in the case of royalties referred to in paragraph 3(b) and fees for technical services as detailed in this Article are ancillary and subsidiary to the enjoyment of property for which royalties under paragraph 3(b) are received, 10 per cent of the gross amount of the royalties and fees;

3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of or the right to use:

(a) any copyright of a literary artistic or scientific work, including cinematograph mm or films or tape used for radio or television broadcasting, any patent, **trademark**, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right, property or information;

(b) any industrial commercial or scientific equipment, other than payments derived by an enterprise from activities described in paragraph 4(b) or 4(c) of Article 8.

Decision of the HC

The HC acknowledged that the issue which arose for consideration was whether part payment made by the taxpayer to S Co for acquiring advertising/sponsorship rights in a sporting event could be re-characterized as a royalty for the incidental use of ABC's trademark? Whether the Revenue authorities were justified in considering 1/3rd of the amount paid by the taxpayer to S Co towards 'royalty' payment on which 15% shall be charged as tax?

In this regard, the HC observed as follows:

- As per Article 12 of the India-Singapore tax treaty and section 9(1)(vi) of the ITA, the definition of ‘royalty’ includes the consideration of the right to use the mark.
- As per the taxpayer’s letter submitted to the tax authorities, there was an element of use of ABC mark by the taxpayer as per the Agreement between S Co and the taxpayer. Further, the reliance placed by the taxpayer on S Co’s letter (addressed to the taxpayer), justifying the attribution of an amount to use the ABC mark out of the total consideration showed the usage of the mark as a trademark.
- The use of ABC mark as a trademark as per the Agreement was to be read in conjunction with the other definitions of the Agreement which stated that S Co granted global partnership to the taxpayer to use the ABC Mark in the licensed territory during the term in the light of the Agreement.
- The Agreement clearly demonstrated that all the advertisement sites were under S Co’s control and it was the responsibility of S Co to put out physical advertisement boards, signage etc., which clearly demonstrated that there was no need for the taxpayer to get the license to use the ABC Mark.
Also, the Agreement granted license to use and reproduce the ABC Mark and Event Mark to LMN through the licensed territory in or any of the advertising material. Further, the licensed territory was defined to mean the ‘world’ and the ‘advertising material’ was defined in a wide manner to include every material in any medium with no nexus of its usage to any venue or geographical location.

The consideration in the Agreement included total consideration for both on-ground advertising and license to use the ABC Mark and Events Mark. As such, a substantive right to use the marks was created by virtue of the Agreement.

- The AO held that the payment was fully covered within the meaning of ‘royalty’ and accordingly subjected it to withholding tax rate @10% of the gross payment. The DIT varied that order to hold that 2/3rd of the total payment was attributed to advertisement and 1/3rd towards the right to use the ABC trademark and directed that 1/3rd payment be apportioned towards royalty and 15% be taken as tax.
- No substantial challenge was made to the apportionment of the total payment into 1/3rd and 2/3rd. It was also not the case of the taxpayer that the apportionment of the amount into royalty was to be at a lower rate. Hence, the HC held that the DIT’s order could not be faulted with.
- The earlier SC ruling² relied upon by the taxpayer was distinguishable since in that case the royalty through license to use the trademark was held to be incidental to the purpose of advertising. In another earlier ruling³, relied upon by the taxpayer, the same was distinguishable on facts as it was dealing with a situation where 3% of the room sales had a bearing on the interpretation of the agreement.

Comments:

Commercial arrangements may have certain activities which are incidental to the core business activity / arrangement. However, whether a particular activity is incidental or core, is dependent on facts of a particular case and accordingly, one would need to determine its taxability.

The HC in the case under consideration, has upheld that the payment along with advertising and promotional rights was also towards use of trademark.

The HC, in this ruling, based on facts of the case, has held as follows:

- The Agreement granted license to use and reproduce the ABC Mark and Event Mark to LMN through the licensed territory in or any of the advertising material. Further, the licensed territory was defined to mean the

² Formula One World Championship Ltd. vs. CIT, (International Taxation)-3, Delhi [2017] 80 taxmann.com 347 (SC)

³ Director of Income-tax vs. Sheraton International Inc. [2009] 178 Taxman 84 (Delhi HC)

'world' and the 'advertising material' was defined in a wide manner to include every material in any medium with no nexus of its usage to any venue or geographical location.

- The consideration in the Agreement included total consideration for both on-ground advertising and license to use the ABC Mark and Events Mark. As such, a substantive right to use the marks was created by virtue of the Agreement.
- No substantial challenge was made to the apportionment of the total payment into 1/3rd and 2/3rd. It was also not the case of the taxpayer that the apportionment of the amount into royalty was to be at a lower rate.

Taxpayers may want to evaluate the impact of this ruling to the specific facts of their cases.

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