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Tax alert: Bombay High Court holds licensing of copyright in films as not licensing of IT software, but licensing of broadcasting, film rights

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The Bombay High Court has held that licensing of copyright in cinematographic films cannot be classified as licensing of 'Information Technology Software' taxable at GST rate of 18% and is appropriately classifiable as licensing of broadcasting and film rights taxable at 12%, for periods prior to 01 October 2021.

In a nutshell

Licensing of copyright in cinematographic films cannot be classified as licensing of Information Technology Software. A cinematographic film is a passive audio-visual work, incapable of execution, manipulation or interactivity, and therefore does not fall within the statutory definition of IT software.

The manner in which the content is delivered whether through encrypted hard disks or electronically, cannot determine its GST classification. Classification must be based on the essential character of the supply. Digital content cannot be equated with software merely on account of its mode of transmission.

GST classification framework specifically provides for licensing of rights to broadcast and show original films, sound recordings and television programmes under HSN 997332. Accordingly, licensing of cinematographic film rights is appropriately covered under the specific classification for such rights, rather than being subsumed under the classification applicable to IT software (HSN 997331).

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Background:

- The petitioner engaged in producing cinematographic films, web series and other audio-visual content, is the original owner of the copyrights therein. The petitioner licensed various intellectual property rights ('IPR') including theatrical, satellite, digital and other exploitation rights in its cinematographic films, to distributors under Rights License Agreements.
- The petitioner transferred the cinematographic films (i.e., the movie content constituting copyrightable intellectual property) by loading the content onto a hard disk which is then physically delivered to the offices of the respective distributors. In some cases, such films are transferred electronically.
- The petitioner classified such transactions under SAC 997332 – Licensing services for the right to broadcast and show original films, sound recordings, radio and television programmes and the like and discharged GST at 12% under Entry 17(i) of Notification No. 11/2017-Central Tax (Rate) (Rate notification), for the period prior to 01 October 2021. Post 1 October 2021, the said entry was amended and GST was leviable @ 18%.
- Following investigation proceedings, the GST authorities alleged that the licensing of cinematographic films constituted licensing of Information Technology Software and was accordingly taxable at 18% under Entry 17(ii) of the said Notification.
- Aggrieved, the petitioners approached the Bombay High Court.

Bombay High Court (HC) Judgement[1]:

- The High Court held that the issue under consideration was not a disputed question of fact but an error of law going to the root of jurisdiction. Accordingly, despite the availability of an alternative statutory remedy, the writ petitions were entertained.
- The Bombay High Court held as follows:
  - Prior to 01 October 2021, Entry 17 of the Rate Notification consciously created two separate and distinct taxable entries namely –
    - licensing of intellectual property rights in respect of goods other than Information Technology Software; and
    - licensing of intellectual property rights in respect of Information Technology Software.
  - It observed that a cinematographic film is a passive audio-visual work, incapable of execution, manipulation or interactivity, and it does not satisfy the statutory definition of Information Technology Software.
  - Existence of a separate SAC 997331 for licensing of right to use computer software and databases and SAC 997332 for licensing the right to broadcast and show original films, sound recordings and television programmes demolishes the Department's assumption that such licensing can be subsumed within 'software'. The explanatory notes reinforces the distinction.
  - The mode of delivery i.e., whether the content is transmitted physically through an encrypted hard disk or electronically, cannot determine classification. To be specific, the classification needs to be determined based on the essential character of supply.
  - CBIC Circular dated 11 October 2024 regularising GST payment on theatrical rights transactions on an "as is where is" basis for the period from 01 July 2017 to 30 September 2021 acknowledges the long-standing overlap/ ambiguity in classification of theatrical rights in cinematographic films prior to 01 October 2021 and regularized it under SAC 9973 at 12% for such period.

[1] Dharma Productions Pvt. Ltd. v. State of Maharashtra & Ors - Writ Petition No.2029 OF 2025

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- It was observed that such benefit could not be selectively denied merely because the licensor was the producer instead of the distributor and that there is no distinction between a license given by license holder to distributor and a license given by the distributor to exhibitor.

- Accordingly, the Court held that the impugned orders suffered from jurisdictional errors apparent on the face of the record and allowed the writ petitions.

Comments:

The ruling provides important clarity on the GST classification of licensing of intellectual property rights in cinematographic films for the periods prior to 01 October 2021. The key takeaway is that classification should be determined based on the essential character of the supply and not based on mode of delivery. The Court has specifically distinguished cinematographic films from IT software, noting that a film is a passive audio-visual work and does not satisfy the statutory characteristics of IT software.

From a direct tax perspective, receipts from licensing cinematographic films to be characterized as 'royalty' or otherwise, may need evaluation to determine their taxability under the Income-tax Act. It is pertinent to note that the Supreme Court in an earlier ruling in case of Engineering Analysis held that consideration for resale/use of computer software or distribution agreements is not 'royalty' for the use of copyright in computer software.

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