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IP & Taxation Policy

Need for Invention in the Taxation Regime of Patents

Anjali Agrawal[1], Shiv Singhal[2] and M Sakthivel[3†]
[1]Saikrishna & Associates, Delhi – 110 003, India
[2] J Sagar Associates, Gurugram — 122 009, Haryana, India
[3]University School of Law and Legal Studies, GGSIP University, Dwarka, Delhi — 110 078, India

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The patent system was introduced with the motto of ensuring furtherance of science and technology for the benefit of society. When compared with other Intellectual Property (IP), patent has a different dimension that is of technology transfer, and the same has been playing a vital role in domestic and international trade and commerce. Every event of commercialising patent attracts economic returns to the patentee as well as the country where it is registered, retained and commercialised. Thus, merely having inventor friendly ecosystem without foreseeing to retain the registered patents in India for commercialisation to the fullest extent will not favour the developmental goals of the nation. In this context, the paper examines the Indian Taxation regime for the taxing events of patents, both under direct and indirect taxes, and their conduciveness for the effective promotion of creation, retention and commercialisation of patents in India. This paper also compares the taxation of patents in other jurisdictions with India and recommends a favourable tax regime for patents which would incentivise innovation and consequent commercialisation leading to the advancement of the nation.

Keywords: Patent, Economic Rights, Commercial Exploitation, Taxation, Royalty, Income, Income Tax, GST, Patent Box

Inventions and Incentives should go hand in hand. Incentives ignite the race to concretise solutions to social problems in exchange for the reward of a patent monopoly for 20 years. The patent monopoly not only rewards the individual developer but is an opportunity for the state to reap economic returns from other jurisdictions in relation to these intellectual assets and thereby pave for the overall economic growth of the nation.

Consequent to the Agreement on Trade-Related Aspects of Intellectual Property ("TRIPS"), Patent protection has been more streamlined across the globe and being a party to the TRIPS Agreement, India has also suitably amended the Patents Act, 1970 so as to comply with the mandate under the TRIPS. Thus, a limited product patent regime, which was not available for some fields of inventions, including pharmaceuticals, has extended to all fields of inventions. As a result, a level playing field has been created for the patentees to maximise the returns out of the patented inventions.[1]

A patentee can commercialise their patents by way of license or assignment as prescribed under law. Through such transfers, the research/innovation that is siloed within the four walls of a laboratory is commercialised by piloting such research/innovation to the industrial world. Such commercialisation provides dual benefits: the inventor receives payment or royalty for their labours while society benefits from such invention.

This paper analyses the tax implications arising out of the commercialisation of patented inventions and their implications on the overall growth of the nation. In order to analyse the same, the paper is divided into three parts. The first part highlights the nature, meaning and scope of the patent monopoly and the modes of commercialising the patent monopoly that may have tax ramifications.

The second part enumerates the various provisions under which commercialization of the patent is taxable under the Income Tax Act, 1961 ("IT Act") and the Central Goods and Services Tax Act, 2017 ("CGST Act").The third part analyses the various Patent Box Regimes that are available across the world (like in China, Ireland, Israel, Luxembourg to name a few) and the general impact of such regimes on the increase of patent registration.

Patent

The Patents Act, 1970 ("Patents Act") recognises the need to strike a balance between the inventor and the user of the innovation. Accordingly, the Patents Act recognises the followingobjectives:[2]

†Corresponding author: Email: msakthi1985@gmail.com

(i) A patent is granted to encourage invention
(ii) A patent is granted to ensure that the invention is worked in India
  a. on a commercial scale
  b. to the fullest extent that is reasonably practicable without undue delay
(iii) A patent is not granted merely to enable patentees to enjoy a monopoly
(iv) Protection and enforcement of patent rights contribute to the promotion of
a. technological innovation; and
b. transfer and dissemination of technology
(v) Patent rights are conducive to social and economic welfare
(vi) Rights granted in a patent should not impede the protection of public health and nutrition
(vii) Rights granted in a patent should act as an instrument to public interests, especially in sectors of vital importance for socio-economic and technological development
(viii) The patentee should not resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology
(ix) The patented invention is made available at reasonably affordable prices to the public

As far as the Patents Act is concerned, the subject matter of protection is 'invention' which has been defined as a new product or process having inventive steps and capable of being commercially produced in a large scale. The Patents Act provides protection to the inventions that fulfil the 'standards' prescribed in it.[3] Though the Patents Act mandates to disclose the 'true and first inventor'[4], the 20 years of patent protection commencing from the date of application is extended to the 'patentee' who had either acquired the invention or had the right to file application.[5] The patentee enjoys the exclusive right to prevent others from unauthorised activities such as: *make, use, sell, offer for sale, import, etc*.,[6] The exclusive rights granted to a patentee are only enforceable within the territory of India.[7] Unlike copyright and trade mark, in patent, registration is mandatory for the enjoyment of these exclusive rights.[8] The rights could be exploited by a patentee or a person registered as a grantee or proprietor of patent by way of a licence, assignment, transfer, etc for consideration.[9] Such transfer may be for a single right or more or for all and can be an exclusive or general transfer. It would be based on the contractual terms of the transfer.[9] However, all such commercial exploitations should be in writing and should be duly executed.[10] The same should be registered with the controller general of patents as prescribed under Patents Act in order to inform the public about the owner of the patent.[10]

In case by virtue of an assignment, transmission or operation of law (instances such as transfer caused by the death of the patentee, restructuring of the patentee etc.), a person is entitled to a patent or a share in a patent, the same refers to an absolute right in a patent or share in a patent. The assignor or transferor retains no rights in the patent or shares in the patent so transferred. It is also important to note that the Patents Act allows the assignment of right to apply for a patent.[11] However, in case the person transfers an interest in a patent or interest in a share in a patent by way of mortgage, licence or otherwise, the transferor retains certain rights, that is, such a transfer will not be considered a complete transfer. In the former case, the transferee's name has to be registered in the register of patents, while in the latter case, the transferee is only entitled to a notification in the register of patents.[9] Furthermore, the Patents Act allows the patentee to grant an exclusive license, that is, license which grants the licensee, to the exclusion of all other persons (including the patentee), any right in respect of the patented invention.[12] Such a license is a *'right under a patent and not a right in a patent'*.[13] People/companies generally prefer to grant exclusive licenses to have a monopoly in a particular invention and/or field. The licensor/patentee is restrained from imposing restraints on trade with respect to the patents.[14]

Patent and Taxation

The use of a patent and the transfer of a patent generate income for the patentee, which is subject to income tax, and such activities are a transaction which are also subject to GST. In order to examine this, the relevant provisions of the IT Act and the CGST Act, which impose liability on the patent owner for the commercialisation of their patent, are discussed in detail here in below.

Income Tax

The provisions that were discussed in the previous papers titled "Commercializing Copyright – A Taxing Event for the Copyright Owner?" [15] and "Taxing the Trade of the Trade Mark"[16] related to taxation of the transfer of copyright and trade mark are similar to patent since the IT Act, generally, does not create a

distinction between the taxation of different kinds of intangible assets. The summary of the provisions analysed in the previous papers is discussed herein under for ease of reference.

Tax is levied on the income of a 'person'[17] which is earned by such 'person' [18] The residential status of the person[19] is the basis on which the income of such a 'person' is taxed, that is,– (1) a 'person' resident in India under the IT Act; and (2) a 'person' [20] not a resident in India. Different rules determine the residential status of a person, which *inter-alia*[21] includes an individual, company and partnership firm.[22]

For a 'person' resident in India, their 'income' (including that income which (a) is received or is deemed to be received in India in such FY by or on behalf of such person; or (b) accrues or arises or is deemed to accrue or arise to such person in India during such FY; or (c) accrues or arises to such person outside India during such FY[23]) is subject to income tax in India.

In case of a non-resident, only such 'income' that (a) is received or is deemed to be received in India in such FY by or on behalf of such person; or (b) accrues or arises or is deemed to accrue or arise to such person in India during the FY is subject to income tax in India under the IT Act.[24]

For the computation of 'total income'[25] under the IT Act, 'income' is classified under five heads : (a) Salaries; (b) Income from house property; (c) Profits and gains of business or profession (PGBP); (d) Capital gains; and (e) Income from other sources (IoS). Broadly, income from the commercialisation of a patent can be generated in two ways: (i) Licensing of patent, or (ii) Assignment of patent.

Licensing of Patent

I. A 'person' resident in India

The 'income' arising from licensing of patent may be taxable under either the head (a) PGBP, or (b) IoS.

PGBP

The profits and gains of any 'business' or 'profession' which is carried on by a taxpayer at any time during the FY is chargeable to income tax under the head PGBP as per the IT Act. The term 'profession' involves *"occupation requiring purely intellectual or manual skill"*.[26] The term 'business' is inclusively defined to include any *'trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture'*.[27]

Where licensing of patents qualifies as the 'business' of a 'person', the profits (which are computed in accordance with Sections 30 – 43D of the IT Act) derived from such 'business' is chargeable to income tax under the head PGBP. Any expenditure, not in the nature of capital expenditure (or personal expenses of the taxpayer), which is laid out or expended wholly and exclusively for the purposes of the 'business' is allowed as deduction in computing the income chargeable under the head PGBP.[28]

Irrespective of the 'person' carrying out the 'business' of licensing of patents, 25% of the 'written down value'[29] of a patent acquired on or after 1st April 1998 by a taxpayer and used for the purposes of the 'business', forming part of a 'block of assets'[30] ,is allowed as deduction in computing the income chargeable under the head PGBP.[31]

IoS

In case, 'income' arising from the licensing of patent does not fall under the head of PGBP then such 'income' is chargeable to income tax under the head IoS.[32]Any expenditure (not in the nature of capital expenditure) laid out or expended wholly and exclusively for the purpose of making or earning such 'income' is allowed as deduction in computing' income' chargeable to income tax under the head IoS.[33]

Specific Provisions for Patents

Deductions specified in Sections 80C to 80U of the IT Act are allowed from the 'gross total income'[34] in computing the 'total income' of a taxpayer.[35] There is a specific deduction available to 'patentee' in computing' total income' under the IT Act.

According to Section 80RRB of the IT Act, where the 'gross total income' of a 'patentee', being an individual resident in India, includes income by way of 'royalty' in the previous year, a deduction equal to the whole of such 'income', or an amount of INR 3,00,000, whichever is less, is allowed in computing the 'total income' of such 'patentee'.

In addition to the general regime of taxation of licensing of patent and the above-mentioned specific deduction for 'patentee', a concessional tax regime is prescribed under Section 115BBF of the IT Act inserted by the Finance Act, 2016. This is commonly referred to as the Patent Box Regime. It provides a tax rate of 10% on the income by way of 'royalty' in respect of a patent 'developed' and registered in India included in the 'total income' of the 'patentee', being a

'person' resident in India (hereinafter referred to as the "**Eligible Taxpayer**").This tax rate is applicable on gross basis that is tax is payable on such 'royalty' income without any deduction of any expenditure or allowance incurred on such earning such income. For the purposes of Section 115BBF of the IT Act, the term 'developed' means at least 75% of the expenditure is incurred in India by the Eligible Taxpayer for any invention in respect of which patent is granted under the Patents Act.

The term 'royalty' means[36] consideration (including any lump sum consideration but excluding any consideration which would be the income chargeable under the head' Capital gains' or consideration for sale of product manufactured with the use of 'patented process' [37] or of the 'patented article' [38] for commercial use) for:

a. the transfer of all or any rights (including the granting of a licence) in respect of a patent; or
b. the imparting of any information concerning the working of, or the use of, a patent; or
c. the use of any patent; or
d. the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iii);

II. A 'person' not a resident in India

Income tax is levied under the IT Act for the 'income' that is deemed to accrue or arise in India to 'person' not a resident of India during the FY. The 'income' by way of 'royalty' is deemed to accrue or arise in India, when it is payable by[39]:

a. the Indian Government; or
b. a 'person' who is a resident in India, excluding the case where the 'royalty' is payable in respect of any right, property or information used or services utilized 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 not a resident in India, where the 'royalty' is payable in respect of any right, property or information used or services 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.

There is a concessional income tax regime for the 'income' by way of 'royalty' earned by a non-resident, in pursuance of an agreement made with the Indian Government or an Indian concern after 31st March 1976. In case the agreement is with an Indian concern, the agreement is approved by the Central Government. However, in case such an agreement with an Indian concern relates to a matter included in the industrial policy, the same must be in accordance with the industrial policy of the Indian Government[40] On qualification of these conditions, the 'income' by way of 'royalty' will be subject to income tax[41], as against the standard rate[41], depending on the type of 'person' earning such 'income'.

It is worth to note that the above-mentioned concessional income tax regime is not applicable where (a) the 'royalty' income from the Indian Government or an Indian concern is received under an agreement entered into with the non-resident after 31st March 2003, (b) where the non-resident carries on business in India through a 'permanent establishment' [42] in India, or performs professional services from a fixed place of profession situated in India and (b) the right, property or contract in respect of which the 'royalty' is paid is effectively connected with the 'permanent establishment' or fixed place of profession. In such a case, a special mechanism[43] is provided for taxation of such 'royalty' income under the IT Act.

India has entered into Double Taxation Avoidance Agreement ("Tax Treaty") with various countries. The provisions of the IT Act or the respective Tax Treaty apply, whichever are more beneficial to the taxpayer.[44]

Assignment of Patent

Any profits or gains arising from 'transfer' of a 'capital asset' is chargeable to income tax under the head 'Capital Gains'. The 'income' chargeable to income tax under the head 'Capital Gains' is computed as follows:

Capital Gains = Full value of consideration - (expenditure incurred wholly and exclusively in connection with such transfer + the 'cost of acquisition' of the 'capital asset' + the 'cost of any improvement' thereto).[45]

The term' capital asset' is defined as a property of any kind held by a taxpayer whether or not connected with the taxpayer's' business' or 'profession' and it excludes, *inter-alia*, any 'stock-in-trade' held for the purpose of 'business' or 'profession'.[46] Given a wide definition of 'capital asset' in the IT Act, a patent owned by a taxpayer can qualify as a 'capital asset', unless it qualifies as 'stock-in-trade'[47] of the taxpayer. The Mumbai Bench of the Income Tax Appellate

Tribunal in *Albright & Wilson Ltd.* v *Income Tax Officer*[48] recognized the qualification of a patent as a 'capital asset', irrespective of the specific submission by the taxpayer that a patent is not a positive right rather a negative right, that is once the know-how is patented others would not be able to exploit it in a given territory.

The term 'transfer' in relation to a 'capital asset' includes, *inter-alia,* (a) the sale, exchange or relinquishment of the asset, and (b) the extinguishment of any rights therein.Where the 'capital asset', being a patent, is held for a period of more than 36 months preceding the date of 'transfer', such' capital asset' is considered as a 'long-term capital asset', else it is considered as a 'short term capital asset'.[49]

In case of 'transfer' of 'long-term capital asset' by a 'person', indexation benefit is available for the 'cost of acquisition' and 'cost of improvement'.[50] Indexation benefit for the 'cost of acquisition' refers to stepping up of the 'cost of acquisition' amount based on the ratio of the Cost Inflation Index between the year of 'transfer', and either (a) the first year in which such 'capital asset' was held by the taxpayer or (b) the year beginning on 1st April 2001, whichever is later. Indexation benefit for the 'cost of improvement' refers to stepping up of the 'cost of improvement' amount based on the ratio of the Cost Inflation Index between the year of 'transfer', and the year in which the improvement to the 'capital asset' took place.

Further, the 'transfer' of a 'long-term capital asset' is subject to concessional income tax at 20%[51], while 'transfer' of a 'short-term capital asset' is subject to income tax at the rate prescribed depending on the type of 'person' transferring such 'short-term capital asset'.

The terms' cost of acquisition' has not been defined in the IT Act. However, it has been a subject matter of various judicial decisions. In *CIT* v *Trikamlal Maneklal (HUF)*[52]

> *"Capital gains tax is thus levied on the profit or gain that arises on the transfer of a capital asset. This, ordinarily, is the actual profit or gain. It is to be computed by deducting from the consideration received on the sale of the capital asset, inter alia, the cost of its acquisition. Ordinarily, it is the actual cost of acquisition that has to be taken into account. If the actual cost of acquisition is nil, it is that nil figure that must be taken into account……. In the context of sections 45 and 48 of the Income-tax Act, 1961, what is required to be considered is the actual cost of acquisition of the capital asset by the assessee. It cannot be calculated on any notional basis, except in the circumstances mentioned in sections 49 and 55 of the said Act. The notional basis which is employed for the purposes of calculating the cost of acquisition for the purposes of a claim for depreciation has no application in the context of the computation of capital gains."* [*Emphasis supplied*]

Accordingly, unless a cost on notional basis has been prescribed in the IT Act, the actual cost incurred for acquisition of the 'capital asset' is considered as the 'cost of acquisition', where the patent is purchased by the taxpayer. However, in case of a self-generated patent by the taxpayer, the 'cost of acquisition' for the purposes of computing the 'income' chargeable to income tax under the head 'Capital Gains' can be considered as nil when the patent relates to a right to manufacture, produce or process any article or thing.[53] This position is confirmed by the Mumbai Bench of the Income Tax Appellate Tribunal in *Bharat Serums & Vaccines Ltd* v *ACIT*.[54]

Please note that a special mechanism[55], to compute 'income' chargeable to income tax under the head 'Capital Gains', is applicable where the 'capital asset', such as a patent, form part of a 'block of assets' in respect of which depreciation has been allowed under the IT Act, that is such' capital asset' is used for the purpose of business.

As mentioned above, consideration which is chargeable to income tax under the head' Capital gains' in the hands of the recipient of such consideration is excluded from chargeability of income tax as 'royalty'.[56] In the light of above discussion on the Indian Patent Box regime, an analysis of patent box regime of other jurisdictions is discussed in the latter part of the paper.

a. Goods and Services Tax

For the purposes of GST, the term 'goods' means

"every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply" .[57]

The term 'services' means

"anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one

form, currency or denomination to another form, currency, or denomination for which a separate consideration is charged" .[58]

The 'supply'[59] of 'goods' or 'services' is the taxable event under GST law.[60] The following transactions fall under the scope of 'supply'[61]:

a. *"all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;*
b. *the activities or transactions, by a person, other than an individual, to its members or constituents or vice-versa, for cash, deferred payment or other valuable consideration;*
c. *import of services for a consideration whether or not in the course or furtherance of business;*
d. *the activities specified in Schedule I, made or agreed to be made without a consideration."*

Certain transactions are specified to be treated either as 'supply' of 'goods' or 'services', where such transaction constitutes a 'supply'.[62] A temporary transfer or permitting the use or enjoyment of any intellectual property right is treated as 'supply' of 'services'.[63]

As was the case in copyright, a permanent transfer of a patent is considered as 'supply' of 'goods' and is subjected to GST at the rate of 18%.[64] A temporary or permanent transfer or permitting the use or enjoyment of patent is considered as 'supply' of 'services', is also subjected to GST at the rate of 18%.[65] Given that a 'permanent transfer' is being considered both as 'supply' of 'goods' or 'supply' of 'services', the nature of assignment of patent, similar to the case of copyright and trade marks, is still an open question.[66]

i. Patent Box Regime – Analysis

A concessional tax regime for patents is provided under the Indian law. Similar provisions are also made available in various countries, a comparative analysis of such incentives are elucidated here in under Table 1.[67]

Table 1 — A Concessional tax regime for patents in various countries

Country	Name of incentive	Category of IP qualifying for such incentive	Tax rate under regime	Normal Tax rate	Remarks
China	Reduced rate for high & new tech enterprises	Patents	15.00%	25.00%	Qualifying IP income explicitly excludes trademarks and includes a variety of patents on crops, new medicines, exclusive rights for integrated circuit design, utility models and software copyrights, which is also nexus compliant.
France	Reduced rate for long term capital gains and profits from the licensing of IP rights	Patents, Category 3	10.00%	32.02%	Qualifying assets refers to patent, patentable inventions or improvements thereto provided they are capitalized as a fixed asset.Industrial manufacturing processes may also qualify provided they are necessary accessories to the use of eligible patents and patentable inventions.
Ireland	Knowledge development box	Patents, Category 3	6.25%	12.50%	Qualifying assets refers to computer programs, qualifying patents, plant breeders rights
Israel	Amended preferred enterprise regime	Patents, Software, Category 3	5.00%/8.00%/ 7.50%/16.00 %	23.00%	Patent, computer software protected by copyright, a right under the Plant Breeders' Rights Act
Korea	Special taxation for transfer, acquisition, etc. of technology	Patents, Category 3	5.00% to 12.50% Transfer; 7.50% to 18.75% Licence	10.00% to 25.00%	Qualifying assets refers to software protected by copyright, industrial patents, trademarks, designs and models, as well as processes, formulas and information relating to experience acquired in the industrial, commercial or scientific field, capable of legal protection. Patent rights, utility model rights, technical know-how that a national has obtained through his/her research and development activities in the field of science and technology (excluding industrial property rights, overseas construction services and engineering services), and technology defined under subparagraph 1 of Article 2 of the Technology Transfer and Commercialization Promotion Act

(*Contd.*)

Table 1 — A Concessional tax regime for patents in various countries (*Contd.*)

Country	Name of incentive	Category of IP qualifying for such incentive	Tax rate under regime	Normal Tax rate	Remarks
Luxembourg	IP regime	Patents, Software	4.988%	24.94%	Qualifying assets refers to patents, utility models, supplementary protection certificates, prorogations of supplementary protection certificates, plant breeders' rights, orphan drug designations and copyrighted software.
Portugal	Partial exemption for income from patents and other industrial property rights	Patents	10.50%	21.00%	Only patents and industrial designs or models (utility models) subject to registration on National Institute of Industrial Property (INPI)
Singapore	IP development incentive	Patents, Software	5.00% or 10.00% (depending on amount of investment)	17.00%	
United Kingdom	Patent box	Patents	10.00%	19.00%	A right similar to a patent is included - (a) Rights relate to human and veterinary medicines, plant breeding and plant varieties; and (b) marketing authorisation rights in respect of a product in accordance with any European Union legislation where product benefits from either "marketing protection" or "data protection"

In the implementation of patent box regimes in various countries, the literature points towards a positive effect of innovation outputs.[68] On a marginal basis, with a 1% increase in the tax advantage offered by patent box regime, the number of patents in the relevant country is estimated to rise by 11.8%, 8.6% and 17.0% for the pharmaceutical, Information and Communications Technology ("ICT"), and automobile industries, respectively. The comparatively low sensitivity of tax advantage towards the ICT industry was explained based on the shorter R&D and product cycle, i.e., the short-lived nature of the technology.[69]

Furthermore, the literature points towards a positive and significant correlation between patent registration and patent box regimes which offer a tax advantage to a larger range of rights than just patents and local R&D activity in countries which provide a specific local development condition for granting the benefit of the patent box regime.[69]

In India, the explanatory notes to the Patent Box Regime provide the following rationale for its introduction:[70]

> *"In order to encourage indigenous research & development activities and to make India a global R&D hub, the Government has decided to put in place a concessional taxation regime for income from patents. The aim of the concessional taxation regime is to provide an additional incentive for companies to retain and commercialise existing patents and to develop new innovative patented products. This will encourage companies to locate the high-value jobs associated with the development, manufacture and exploitation of patents in India. The Organization for Economic Cooperation and Development (OECD) has recommended, in Base Erosion and Profit Shifting (BEPS) project under Action Plan 5, the nexus approach, which prescribes that income arising from exploitation of Intellectual property (IP) should be attributed and taxed in the jurisdiction where substantial research & development (R&D) activities are undertaken rather than the jurisdiction of legal ownership only." [Emphasis supplied]*

The issue in the implementation of the right/appropriate patent box regime is determining a suitable nexus in providing such an incentive, which encourages the policy's primary objectives and discourages patent migration.[68] The nexus for providing the benefit of the Patent Box Regime in India is linked to the tax resident 'patentee' having 'developed' the patent in India, i.e., incurring at least 75% of the expenditure in India in respect of the patent.

Conclusion

Government of India has been launching and implementing various programs such as the establishment of National Science and Technology

Entrepreneurship Development Board, Patent Acquisition and Collaborative Research & Technology Development, AICTE Training and Learning (ATAL) Academy, MHRD's Innovation Cell (MIC), Smart India Hackathon (SIH) 2019, Institution Innovation Council and the Kalam Program for IP Literacy and Awareness, to name a few, to promote innovations in educational institutions, provide funding to start-ups and to provide a platform for these "innovators" to interact with the industry.These efforts have paved the way for more patent filings by Indian institutions there by, overall, the patent filing has surpassed foreign applications. However, only a handful of such patents get finally commercialised because of lack of funding to commercialize and high tax rates on commercialisation and exploitation, to name a few.

Though the government has been able to promote patent filling, the current taxation regime does not create adequate incentives for the creation, retention and exploitation of patents in India. To boost innovation in India, a different taxation regime maybe provided in case a company/non-resident commercialises the innovation developed by higher educational institutes / and national research labs. This will incentivise the companies to invest in Indian educational institutes, which in turn will help in innovating. Such inventions should only be handed over to third parties (companies/government/non-residents, etc.) under a formal contract, and the educational institutes should put in place an intellectual rights policy in place to safeguard the interests of the inventors with respect to royalty. In case the higher educational institutes / national research labs themselves intend to analyse the viability of the commercialisation of such inventions, it is suggested that the SEZs model (i.e. provision of 100% or 50% tax holiday for a specified number of years in the initial years of commercialisation of the patent) be adopted to boost the patents to be retained and commercialised in India.

Moreover, in case the patent is transferred either by way of license or assignment, the tax levied on it should be different, and guidance may be taken from the method adopted by Korea. Furthermore, in cases where an exclusive license is provided, a higher tax rate should be levied in order to ensure there is no abuse of the monopoly by way of unfair competition.

In order to incentivise the registration of patents in India, there is a need to provide a graded form of a patent box regime for non-residents, which will also consider the region from which the non-resident belongs to. In case the non-resident is from a developing or an underdeveloped country, a lower tax rate may be offered, while for those coming from the developed countries, a higher tax rate may be levied. Furthermore, the commercial working of the patented invention in India should be seen in order to determine how beneficial it has been for the Indian market. The more benefits the Indian market sees, a better tax rate may be provided. Thus, apart from having a country-specific taxation regime with respect to patented technology, exemptions or further deductions may be provided in case the patented technology is considered beneficial to the Indian market or the same is in the public interest.

The current GST regime provides a single rate of taxation irrespective of the amount collected by the commercialisation of the patent. Thus, in the authors' opinion, a graded and a gradual rate of taxation should be implemented. This will incentivise start-ups/micro, small and medium enterprises to innovate. In order to further support these enterprises, the government may consider an exemption on the levy of taxes on the commercialisation of patents that such enterprises register in India for a few years. Thus, the current schemes initiated by the government and the above mentioned suggestions may pave the way for further creation, retention and commercialisation of patents in India.

References

1 Patents (Amendment) Act, 2005 through which Section 5 was omitted.

2 Section 83 of the Patents Act.

3 Section 2(j) of the Patents Act.

4 Section 7 of the Patents Act.

5 Section 53 of the Patents Act.

6 Section 48 of the Patents Act.

7 Patent rights are territorial in nature.

8 Patents Act mandates to go for registration for protection unlike in copyright and trademark.

9 Section 70 of the Patents Act.

10 Section 69 of the Patents Act.

11 Section 20 and Section 7(2) of the Patents Act.

12 Section 2(1)(f) of the Patents Act.

13 *Insitu form Technical Services* v *Inliner UK Plc* (1992) RPC 83, p 105.

14 Section 140 of the Patents Act.

15 Singhal S, Agrawal A & Sakthivel M, Commercializing Copyright–A Taxing Event for the Copyright Owner?, *Journal of Intellectual Property Rights*, 27 (4) (2022) 290.

16 Singhal S, Agrawal A & Sakthivel M, Taxing the Trade of the Trade Mark, *Journal of Intellectual Property Rights*, 27 (5) (2022) 367.

17 Section 2(24) of the IT Act.
18 Section 4 of the IT Act.
19 Section 2(31) of the IT Act.
20 Section 5 of the IT Act.
21 Section 6 of the IT Act.
22 Section 6 of the IT Act. For instance: A company is a resident in India under the IT Act in a FY when either (a) it is an 'Indian company'; or (b) its 'place of effective management'. The phrase' place of effective management" means 'a place where key management and commercial decisions that are necessary for the conduct of business of an entity as a whole are, in substance made'.
23 Section 5(1) of the IT Act.
24 Section 5(2) of the IT Act.
25 Section 2(45) of the IT Act.
26 *CIT* v *Manmohan Das* [1966] 59 ITR 699 (SC).
27 Section 2(13) of the IT Act.
28 Section 37(1) of the IT Act.
29 Section 43(6)(c) of the IT Act
30 Section 2(11) of the IT Act. It means a group of assets falling within a class of assets comprising either (a) tangible assets, or (b) intangible assets, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, not being goodwill of a business or profession, in respect of which the same percentage of depreciation is prescribed.
31 Section 32(1)(ii) of the IT Act read with Rule 5(1) of the Income Tax Rules, 1962 ("IT Rules") and Part B of Appendix I of IT Rules.
32 Section 56(1) of the IT Act.
33 Section 57(iii) of the IT Act.
34 Section 80B(5) of the IT Act. It means *'the total income computed in accordance with the provisions of this Act, before making any deduction* 'under Chapter VIA of the IT Act.
35 Section 80A(1) of the IT Act.
36 Clause (h) of the Explanation to Section 115BBF of the IT Act and Clause (g) of the Explanation to Section 80RRB of the IT Act.
37 As defined in Section 2(1)(q) of the Patents Act.
38 As defined in Section 2(1)(q) of the Patents Act.
39 Section 9(1)(vi) of the IT Act.
40 Section 115A(1)(b) of the IT Act.
41 Plus applicable surcharge and cess
42 As per Explanation (c) to Section 44DA of the IT Act, the term 'permanent establishment' is defined to include *"a fixed place of business through which the business of the enterprise is wholly or partly carried on"*.
43 Section 44DA of the IT Act.
44 Section 90(2) of the IT Act.
45 Section 48(1) of the IT Act.
46 Section 2(14) of the IT Act.
47 As per *H. Mohmed & Co.* v *CIT* [1977] 107 ITR 637 (Gujarat), a' stock-in-trade' is *"something in which a trader or a businessman deals; whereas his capital asset is something with which he deals. It is possible that one and the same commodity may in the case of one assessee be his stock-in-trade, whereas in the case of another assessee it may be his capital asset. For example, in the case of an assessee who carries on the business of buying and selling land, land may be his stock-in-trade but in the case of an assessee who has invested his savings in land and gets income from the land or the structures put up on the land, the land is his capital asset. Therefore, one of the indications for deciding as to what is stock in-trade is whether a particular assessee is buying or selling the commodity or whether he has merely invested his amount with a view to earn further income or with a view to carry on his other business. It may be pointed out that 'trade' means that particular business activity where the person engaged in the profession buys or sells. All businesses may be carried on for the purpose of earning a profit but that particular kind of business where the businessman buys and sells a commodity can only be designated as 'trade'." [Emphasis supplied]*
48 [1984] 8 ITD 57 (BOM.).
49 Section 2(42A) of the IT Act.
50 Second proviso to Section 48 of the IT Act.
51 Plus applicable surcharge and cess. Section 112(1) of the IT Act.
52 [1987] 168 ITR 733 (Bombay).
53 Section 55(2)(a) of the IT Act.
54 [2017] 78 taxmann.com 188 (Mumbai - Trib.).
55 Section 50 of the IT Act.
56 Explanation 2 to Section 9(1)(vi) of the IT Act.
57 Section 2(52) of the CGST Act.
58 Section 2(102) of the CGST Act.
59 Section 9(1) of the CGST Act and Section 5(1) of the IGST Act.
60 'GST laws collectively refers CGST Act and Integrated Goods and Services Tax Act, 2017 ("**IGST Act**").
61 Section 7(1) of the CGST Act.
62 Schedule II to the CGST Act.
63 Entry 5(c) of Schedule II to the CGST Act.
64 Serial No. 452P of Notification No. 1/2017 Central Tax (Rate), dated 28-6-2017 read with Notification No. 13/2021 Central Tax (Rate), dated 27-10-2021.
65 Serial No. 17 item (ii) of Notification No. 11/2017 Central Tax (Rate) dated 28-6-2017 read with Notification No. 6/2021 Central Tax (Rate), dated 30-9-2021.
66 USV (P.) Ltd., In re, [2021] 133 taxmann.com 296 (AAR - MAHARASHTRA), the question of classification of transfer of registered trademarks as either supply of goods or supply of services under GST law was raised. However, based on the certain procedural the application for advance ruling was rejected as being not maintainable under section 95 of CGST Act.
67 Comparative analysis by OECD available at https://qdd.oecd.org/data/IP_Regimes
68 Griffith R, Miller H & O'Connell M, Ownership of intellectual property and corporate taxation, *Journal of Public Economics*, 112 (2014) 12, ISSN 0047-2727, https://doi.org/10.1016/j.jpubeco.2014.01.009.
69 Alstadsæter A, Barrios S, Nicodeme G, Skonieczna A M & Vezzani A, Patent Boxes Design, *Patents location, and local R&D, Economic Policy*, 33(93) (2018) 131, https://doi.org/10.1093/epolic/eix021
70 Departmental Circular No. 3 of 2017, dated 20th January 2017.