



IN THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA no.1683/Mum./2015
(Assessment Year :2011-12)

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Mumbai 400 013 PAN – AACCE5671L

..... Applicant

v/s

Dy. Commissioner of Income Tax (IT)
Circle-2(2)(1), Mumbai

..... Respondent

Assessee by : Shri J.D. Mistry a/w
Shri Niraj Sheth
Revenue by : Shri V. Sreekar

Date of Hearing – 17.01.2019

Date of Order – 15.04.2019

ORDER

Aforesaid appeal has been filed by the assessee challenging the assessment order dated 14th January 2015, passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 (for short "*the Act*") for the assessment year 2011-12 in pursuance to the directions of the Dispute Resolution Panel-1 (DRP), Mumbai.

2. The core issue which arises for consideration is, whether the amount of ₹ 8,16,35,185, received by the assessee is in the nature of royalty or fees for technical services, hence, chargeable to tax in India.

3. Brief facts are, the assessee company is a tax resident of Germany. As stated, the assessee maintains an on-line database pertaining to chemical information which includes articles on chemistry topic, substance data and inputs on preparation and reaction methods as experimentally validated. By providing access to the database the assessee has earned subscription fee from customers worldwide, including India. For the impugned assessment year, the assessee filed its return of income on 30th March 2012, declaring nil income. In the course of assessment proceedings, in pursuance to a query raised by the Assessing Officer, the assessee submitted that the subscription fee received by the assessee from various customers in India for providing access to its online database is neither in the nature of royalty nor fees for technical services. Thus, it was submitted that in the absence of a Permanent Establishment (PE) in India as per Article-5 of India-Germany Tax Treaty, the subscription fee received by the assessee is not taxable in India. The Assessing Officer after calling for various information including copies of the agreement entered with various Indian entities and invoices raised and examining them was of the view that the subscription fees received by the assessee is in the

nature of royalty/fees for technical services, hence, taxable in India. Therefore, he called upon the assessee to explain why the amount received by the assessee towards subscription fee from Indian entities should not be brought to tax in India. In response to the show cause notice issued by the Assessing Officer, the assessee filed a detailed reply submitting in sum and substance that the subscription fee received from Indian entities is neither in the nature of royalty nor fees for technical services either under section 9(1)(vi) and (vii) of the Act nor under the India–Germany Tax Treaty.

4. The Assessing Officer after considering the submissions of the assessee in the context of the facts materials brought on record like agreement, invoices, etc., was of the view that the assessee received the subscription fee for providing scientific database facilities to different Indian Chemical and Pharmaceutical Companies. He observed, the database is managed in an organized way to make sure that the user can get desired result without much effort. He observed, the database includes general science books, magazines, as well as specific research-based report, formula for complex reaction and its result, etc. Once the user enters into the database, the execution tools after interaction of general database converts it into a structured and quality controlled specific database analogous to a general physical library. Thus, he observed that the database is akin to a very well-

equipped library of relevant information along with an knowledgeable and expert librarian which on demand will provide instant required information. Referring to the term fees for technical services under section 9(1)(vii) of the Act, he observed that the online database, named "reaxys" provided by the assessee is an online workflow solution for research chemists. He observed, reaxys covers historical data dating back to 1771 which are excerpted from journals and articles and structured carefully to meet controlled selection criteria. He observed, the domain in which reaxys operates is in the chemical substances and by its own nature is a technical subject. The number of substances and reaction that are made available for researchers are collated from various researchers, journals through a careful selection process. Thus, he observed, this activity could not have been done without technical expertise and further the selection of data cannot be done without human element. Thus, he was of the view that the payments made by the Indian entities are for receipt of technical services. Therefore, the subscription fee has to be treated as fees for technical services. In this context, he relied upon various judicial precedents.

5. Further, the Assessing Officer observed that certain copyrighted products of the assessee like cross fire were loaned to the customers in India and were sold. Referring to section 9(1)(vi) of the Act and the

provisions of The Indian Copyright Act, 1957 as well as various judicial precedents, the Assessing Officer held that the subscription received by the assessee for providing access to the online database is in the nature of literary work, hence, has to be treated as royalty under section 9(1)(vi) of the Act. Further, referring to Article-12(3) of India-Germany Tax Treaty, the Assessing Officer held that the subscription received by the assessee is also in the nature of royalty under India-Germany Tax Treaty, as it amounts to transfer of right to use of a copyright. Thus, ultimately the Assessing Officer concluded that the subscription fee received by the assessee is in the nature of fees for technical services/royalty under the provisions of India-Germany Tax Treaty, hence, it has to be taxed @ 10% as provided under the India-Germany Tax Treaty. Accordingly, he passed the assessment order.

6. The assessee raised objections against the draft assessment order before the DRP without any success. Accordingly, the impugned assessment order was passed by the Assessing Officer.

7. Shri J.D. Mistry, learned Sr. Counsel appearing for the assessee submitted, the subscription fee received by the assessee from Indian customers for providing access to the database is not in the nature of royalty or fees for technical services either under the Act or under the India-Germany Tax Treaty. He submitted, the subscription fees received by the assessee are in the nature of business income.

However, in the absence of a PE in India, the amount received is not taxable as per the provisions of India–Germany DTAA. Proceeding further, learned Sr. Counsel submitted, the assessee being a tax resident of Germany has to be governed under the India–Germany Tax Treaty. He submitted, the definition of royalty under Article–12 of the India–Germany Tax Treaty is narrower than the definition of royalty under the Income Tax Act, 1961. He submitted, while providing access to the online database the assessee does not provide the customers any right to use the copyright in the database. He submitted, the assessee does not transfer any ownership right to the subscriber such as right to copy the database for reproduction and sale, right to grant license to any person who wishes to use the database. He submitted, by providing access to the database the assessee does not impart any information relating to underlying experience, skill, etc., which is required for evolving the database. It does not share its experience, technique, or methodology employed in evolving the database with the subscriber. It does not provide any right to the subscriber to use any industrial, commercial or scientific equipment. He submitted, the articles in the database provided by the assessee are collated from various magazines and journals which are available publicly. Thus, he submitted, the subscription fee received by the assessee for providing publicly available information cannot be treated as royalty. In support

of such contention, learned Sr. Counsel relied upon the following decisions:-

- i) *DIT (IT) v/s Dun & Bradstreet Information Service India Pvt. Ltd., [2012] 20 taxmann.com 695 (Bom.);*
- ii) *DIT v/s Dun & Bradstreet Information Services India Pvt. Ltd., 338 ITR 95;*
- iii) *ITO v/s Cadila Healthcare Ltd., 77 taxmann.com 309;*
- iv) *DCIT v/s Welspun Corporation Ltd., 77 taxmann.com 165;*
- v) *McKinsey Knowledge Centre India Pvt. Ltd. v/s ITO, ITA no.407/Del./2013;*
- vi) *Kitara Capital Pvt. Ltd. v/s ITO, ITA no.130/Mum./2014;*
- vii) *DCIT v/s Welspun Corporation Ltd., [2017] 77 taxmann.com 165 (Ahd.); and*
- viii) *Authority For Advance Rulings v/s Dun & Bradstreet Expana, A.A. In re; [20056] 272 ITR 99.*

8. Without prejudice to the aforesaid contentions, learned Sr. Counsel submitted, the subscription fees received by the assessee cannot be treated as fees for technical services also as it is not coming within the ambit of fees for technical services as defined under the Act as well as under the India-Germany Tax Treaty. He submitted, the definition of fees for technical services both under Article-12 of the India-Germany Tax Treaty and under the provisions of the Act are similar. He submitted, as per the said definition, payment of any amount for services of managerial, technical or consultancy nature including the provisions of services by technical or other personnel are

in the nature of fees for technical services. He submitted, by providing access to the database assessee is not rendering any services in the nature of managerial, technical or consultancy service. He submitted, merely because the subject matter of the database is highly technical and the articles in the database are collated by personnel who possess knowledge of the chemical industry, it cannot be said that the assessee has rendered any technical services. He submitted, the personnel by collating articles for creating database are not rendering any service to any of the subscribers. The subscribers never interact with the personnel involved in the data collation. The assessee is merely providing a facility to its subscribers. He submitted, unless through human intervention the assessee provides any managerial, technical or consultancy services, the amount received cannot be characterized as fees for technical services. He submitted, the entire process of accessing and searching the database is fully automated and does not require any assistance from the assessee. It only provides a facility to its subscribers in which publicly available articles from various magazines and journals are collated. The database does not provide any customised response to any specific queries of the subscribers. The database is designed to provide multiple answers near to the query raised by the client based on key words entered in the search engine. He submitted, it may so happen that a subscriber after subscribing to database may not access the database at all. In

such eventuality the question of rendering any service will definitely not arise. He submitted, similar databases provided by various other companies on subscription do not amount to royalty or fees for technical services. In this regard, he tried to draw a parallel between the online database provided by the assessee and the other online databases provided by taxman, CTR online, etc. Thus, he submitted, subscription fee received by the assessee cannot also be treated as fees for technical services under the provisions of the Act or the India-Germany Tax Treaty to make it taxable in India. In support of such contention, learned Sr. Counsel for the assessee relied upon the following decisions:-

- i) DIT v/s A.P. Moller Maersk A.S., 392 ITR 186 (SC);*
- ii) CIT v/s Kotak Securities Ltd., 383 ITR 001 (SC); and*
- iii) CIT v/s Bharati Cellular Ltd., 330 ITR 239 (SC).*

9. The learned Departmental Representative strongly relying upon the observations of the Assessing Officer and the DRP submitted that the data provided by the assessee through the database are customized data catering to the specific need of the customer. Therefore, the subscription fee received by the assessee is in the nature of royalty/fees for technical services as the assessee has provided technical services and has transferred the right to use the copyright to the customers in India. He submitted, the decisions relied

upon by the learned Sr. Counsel are also not applicable to the facts of the present case.

10. We have considered rival submissions and perused material on record. We have also applied our mind to the decisions relied upon. Before we proceed to decide the nature of subscription fee earned by the assessee from Indian entities, whether fees for technical services/royalty or business profit, it is necessary to understand the activities carried on by the assessee for generating such income. Undisputedly, the assessee has created an online database named "*reaxys.com*" pertaining to chemical information which the users having interest in chemistry topic, substance data and preparation and reaction method can access for their own benefit and use. It is also not disputed that the data stored in the online database is collated by the assessee from articles printed in various journals on similar topics which are otherwise available to public on subscription basis. The data collated by the assessee from various journals are entered and stored in the database in a structured and user-friendly manner to enable the users to search and retrieve the data required by them and beneficial to them. The users of the online database can access it through regular web browsers such as Internet Explorer, Google Chrome or Firefox on payment of subscription fee. The customers and users are allowed to access the online database on a 24 hours basis from an

agreed internet protocol range either authenticated via user name and password or via Internet Protocol (IP) number. Thus, it is evident, the database is accessible to the users through regular internet access and no particular software or hardware is required for accessing it. However, each customer/user has to enter into a subscription agreement with the assessee for accessing the database. While accessing the database the customer/user can access, search, browse and view the subscribed products. On a perusal of a sample copy of the subscription agreement placed at Page-56 of the paper book it is to be seen that as per Clause-1.1 of the said agreement, the assessee grants non-exclusive and non-transferrable right to the subscriber to access and use the products and services identified in schedule-I. As per schedule-I, the product to be accessed by the subscriber is reaxys.com. Further, schedule-I of the subscription agreement provides that upon termination of the subscription agreement, the subscriber shall delete all stored copies of items from reaxys and document the same to assessee's reasonable satisfaction. By agreeing to such subscription, the authorised user/customer may access search and browse and view the subscribe product. Further, the customer or user can print, make electronic copies of and store for its exclusive use individual items from the subscribed products. Further, it can incorporate links to the subscribed products to the subscriber's intranet and internet websites provided the appearance of such link

and / or statements accompanying such links shall be changed as per the request of the assessee. Clause 1.4 of the subscription agreement enlists the following restrictions on use of subscribed products.

"1.4 Restrictions on Use of Subscribed Products.

Except as may be expressly permitted in this Agreement, the Subscriber and its Authorised User may not;

1.4.1 abridge, modify translate or create any derivative work based on the Subscribed Products without the prior written permission of Elsevier, except to the extent necessary to make them perceptible on a computer screen to Authorised Users;

1.4.2 remove, obscure or modify in any way any copyright notices, other notices or disclaimers as they appear in the Subscribed Products; or

1.4.3 Substantially or systematically reproduce, retain or redistribute the Subscribed Products.

Authorised Users who are independent contractors may use the Subscribed Products only for the purposes of the contracted work for the Subscriber."

11. Clause 1.5 of the agreement makes it clear that all right, title and interest in the subscribed products remain with the assessee and any unauthorized re-distribution of the subscribed products which may harm the assessee and its supplier is prohibited. Clause-2.3 of the agreement provides that the assessee reserves the right to withdraw from the subscribed products content that it no longer retains the right to provide or that it has reasonable grounds to believe is unlawful, harmful, false or infringing. As per clause-4 of the agreement, subscriber shall pay the subscription fee to the assessee as set forth in

Schedule-1 within 30 days of the date of invoice. Clause-5.1 of the agreement stipulates the duration of agreement from 1st February 2010 to 30th June 2010 with an option for renewal of the agreement for an addition term upon mutual agreement.

12. Thus, on reading of the aforesaid important terms of the agreement it is very much clear that the assessee has created a database wherein the data relating to Chemistry are collated from various journals and articles and are stored in a structured and user friendly manner which is accessible to customers/users on subscription basis without conferring any exclusive or transferrable right on the customer/user. Further, the assessee retains its exclusive right and ownership over the intellectual property relating to the product and the users subscribers are specifically debarred from using the data in any manner other than for their own exclusive purpose. Keeping in view the aforesaid factual position, we need to examine whether the subscription fee received by the assessee from the customers in India for allowing access to the online database is transfer of right to use the copyright, hence, can be treated as royalty under the India-Germany Tax Treaty. The departmental authorities have held that while allowing access to use its online database i.e., reaxys.com the assessee has transferred the right to use the copyright which is in the nature of a literary work, hence, to be treated as royalty. No doubt, the assessee

being a tax resident of Germany is governed by India–Germany DTAA. Therefore, it is necessary to examine whether the subscription fee received by the assessee fits into the definition of royalty as provided under Article–12 of the India–Germany Tax Treaty. Article–12.1 of the Tax Treaty provides that royalty and fees for technical services arising in a contracting state and paid to a resident of the other contracting state may be taxed in the other state. As per the plain meaning of the aforesaid provision, the subscription fee paid to the assessee is ordinarily taxable in Germany. However, Article–12.2 also provides for taxation of royalty and fees for technical services in India subject to condition that the tax leviable shall not exceed 10% of the gross amount of royalty or fees for technical services. Article–12.3 of the Tax Treaty defines royalty in the following manner.

"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, any copyright of literary, artistic or scientific work, including cinematograph films or films or tapes used for radio or television broadcasting any patent, trade mark, cinematograph films or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience."

13. As per the aforesaid definition of royalty in the tax treaty, any amount received for use of or right to use of any copyright or literary, artistic or scientific work, etc., can be treated as royalty. In the facts of the present case, there is no dispute that the assessee has collated

data from various journals and articles, which are otherwise available for subscription to the general public, and entered them into the database in structured manner. It is also clear from the terms of subscription agreement, the assessee has not transferred use or right to use of any copyright of literary, artistic or scientific work to its subscribers. What the assessee has done is, it has allowed customers to access its database and utilize the information available therein for their use. Further, it is observed, the data available in assessee's database relates to the subject of chemistry and from the list of clients submitted in the paper book it is very much clear that they are either chemical or chemical related companies. There is no material on record which could even remotely demonstrate that while allowing the customer /users to the access the database, the assessee had transferred its right to use the copyright of any literary, artistic or scientific work to the subscribers. Further, from the invoices raised by the assessee, sample copies of which are placed in the paper book, it is noticed that the subscription is period based and further the subscriber may not even use the data stored in the database. That being the case, the payment made cannot be treated as royalty under Article-12(3) of the India-Germany Tax Treaty.

14. Having held so, at this juncture, it is necessary to look into some of the decisions governing the issue as cited by the learned Sr.

Counsel for the assessee. The first decision which we may refer to is the decision of Authority for Advance Ruling in Dun & Brad Street Espana, S.A., (272 ITR 99), wherein the assessee concerned is maintaining a database of Business Information Reports (BIRs). BIR is a standardized product of Dun & Brad Street Espana, S.A., providing the following information in respect of a company:–

- i) Factual information on the existence, operations, financial condition, management experience, line of business, facilities and locations of prospect;*
- ii) Special Events as well as any suits, leans, judgments or previous data being bankrupts;*
- iii) Banking relationship and accounts;*
- iv) Parent company affiliated concern, subsidiaries branches and divisions, referred with name and D&B D-U-N-S number; and*
- v) A rating which would help to predict which prospect will pay slowly or not at all.*

15. A customer/subscriber can access the data stored in the database by paying subscription. The Department held the subscription paid to Dun & Brad Street Espana, S.A., for accessing the data to be in the nature of royalty. The Authority for Advance Ruling after dealing with the issue ultimately concluded that the subscription received by Dun & Brad Street Espana, S.A., for allowing access to the database is

not in the nature of royalty/fees for technical services. Following the aforesaid decision, the Tribunal, Ahmedabad Bench, in ITO v/s Cedilla Healthcare Ltd. [2017] 77 taxmann.com 309, while considering the nature of subscription paid to a U.S. based company viz. Chemical Abstract Services, which is in the same line of business and is stated to be the competitor of the assessee, held that the subscription paid for online access to the database system "scifinder" is not in the nature of royalty. The observations of the Tribunal while deciding the issue in favour of the assessee are as under:–

"17. We find that as the treaty provision unambiguously requires, it is only when the use is of the copyright that the taxability can be triggered in the source country. In the present case, the payment is for the use of copyrighted material rather than for the use of copyright. The distinction between the copyright and copyrighted article has been very well pointed out by the decisions of Hon'ble Delhi High Court in the case of DIT v. Nokia Networks OY [2013] 358 ITR 259/212 Taxman 68/25 taxmann.com 225. In this case all that the assessee gets right is to access the copyrighted material and there is no dispute about. As a matter of fact, the AO rightly noted that 'royalty' has been defined as "payment of any kind received as a consideration for the use of, or right to use of, any copyright of literary, artistic or scientific work" and that the expression "literary work", under section 2(o) of the Copyright Act, includes 'literary database' but then he fell in error of reasoning inasmuch as the payment was not for use of copyright of literary database but only for access to the literary database under limited non exclusive and non transferable licence. Even during the course of hearing before us, learned Departmental Representative could not demonstrate as to how there was use of copyright. In our considered view, it was simply a case of copyrighted material and therefore the impugned payments cannot be treated as royalty payments. This view is also supported by Hon'ble Bombay High Court's judgment in the case of DIT (International Taxation) v. Dun & Bradstreet Information

Services India (P.) Ltd. [2011] 338 ITR 95/[2012] 20 taxmann.com 695."

16. The same view was again expressed by the Tribunal in DCIT v/s Welspun Corporation Ltd., [2017] 77 taxmann.com 165. If we examine the facts of the present appeal in juxtaposition to the facts of the decisions referred to herein before, it can be seen that the facts are almost identical and akin. In the referred cases the assesseees were also maintaining databases of information collated from various journals and articles and allowed access to the users to use such material as required by them. Keeping in view the ratio laid down in the decisions (supra), the payment received by the assessee has to be held to have been received for use of copyrighted article rather than for use of or right to use of copyright.

17. Having held so, the next issue which arises for consideration is, whether the subscription fee can be treated as fees for technical services. As discussed earlier, it is evident that the assessee has collated data from various journals and articles and put them in a structured manner in the database to make it more user friendly and beneficial to the users/customers who want to access the database. The assessee has neither employed any technical/skilled person to provide any managerial or technical service nor there is any direct interaction between the customer/user of the database and the

employees of the assessee. The customer/user is allowed access to the online database through various search engines provided through internet connection. There is no material on record to demonstrate that while providing access to the database there is any human intervention. As held by the Hon'ble Supreme Court in CIT v/s Bharati Cellular Ltd., [2010] 193 taxman 97 (SC) and DIT v/s A.P. Moller Maersk A.S., [2017] 392 ITR 186 (SC), for providing technical / managerial service human intervention is a *sin qua non*. Further, Article-12(4) of India-Germany Tax Treaty provides that payment for the service of managerial, technical or consultancy nature including the provisions of services by technical or other personnel can be termed as fees for technical services. None of the features of fees for technical services as provided under Article 12(4) of the India-Germany Tax Treaty can be found in the subscription fee received by the assessee. Further, the Department has not brought any material on record to demonstrate that the assessee has employed any skilled personnel having knowledge of chemical industry either to assist in collating articles from journals / magazines which are publicly available or through them the assessee provides instructions to subscribers for accessing the online database. The assessee even does not alter or modify in any manner the articles collated and stored in the database. In the aforesaid view of the matter, the subscription fee received cannot be considered as a fee for technical services as well. By way of

illustration we may further observe, online databases are provided by Taxman, CTR online, etc. which are accessible on subscription not only to professionals but also any person who may be having interest in the subject of law. When a subscriber accesses the online database maintained by Taxman/CTR online etc. he only gets access to a copyrighted article or judgment and not the copyright. Similar is the case with the assessee. Therefore, in the facts of the present case, the subscription fee received by the assessee cannot be treated as royalty under Article-12(3) of India-Germany Tax Treaty.

18. In view of the aforesaid, the addition made has to be deleted, as, the payment received by the assessee is only in the nature of business profit which cannot be brought to tax in India in the absence of PE. Grounds are allowed.

19. In the result, appeal is allowed.

Order pronounced in the open Court on 15.04.2019

SD/-
MANOJ KUMAR AGGARWAL
ACCOUNTANT MEMBER

SD/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 15.04.2019

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

(Sr. Private Secretary)
ITAT, Mumbai