

**आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, 'आई', मुंबई।**

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "I", MUMBAI**

**Before Shri Saktijit Dey, Judicial Member and**

**Shri G. MANJUNATHA, Accountant Member,**

**ITA No.6573Mum/2016  
Assessment Year: 2013-14**

Elsevier Information Systems GmbH, C/o Deloitte Haskins and Sells LLP Tower-3, 27-32 Floor, Indiabulls Finance Centre, Elphinstone Mill Compound Senapati Bapat Marg, Elphinstone (W) Mumbai 400 013	<b>बनाम/</b> Vs.	Dy. Commissioner of Income Tax (IT) Circle-2(2)(1), Mumbai
(निर्धारिती / Assessee)		(राजस्व / Revenue)
<b>P.A. No. AACCE5671L</b>		

**ITA No.7267/Mum/2017  
Assessment Year: 2014-15**

Elsevier Information Systems GmbH, C/o Deloitte Haskins and Sells LLP Tower-3, 27-32 Floor, Indiabulls Finance Centre, Elphinstone Mill Compound Senapati Bapat Marg, Elphinstone (W) Mumbai 400 013	<b>बनाम/</b> Vs.	Dy. Commissioner of Income Tax (IT) Circle-2(2)(1), Mumbai
(निर्धारिती / Assessee)		(राजस्व / Revenue)
<b>P.A. No. AACCE5671L</b>		

**ITA No.7098/Mum/2018**  
**Assessment Year: 2015-16**

Elsevier Information Systems GmbH, C/o Deloitte Haskins and Sells LLP Tower-3, 27-32 Floor, Indiabulls Finance Centre, Elphinstone Mill Compound Senapati Bapat Marg, Elphinstone (W) Mumbai 400 013	<b>बनाम/</b> Vs.	Dy. Commissioner of Income Tax (IT) Circle-2(2)(1), Mumbai
(निर्धारिती / Assessee)		(राजस्व /Revenue)
<b>P.A. No. AACCE5671L</b>		

निर्धारिती की ओर से / Assessee by	Shri Niraj Seth
राजस्व की ओर से / Revenue by	Shri Narendra Kumar CIT-DR
सुनवाई की तारीख / <b>Date of Hearing :</b>	<b>17/06/2019</b>
<b>आदेश</b> की तारीख / <b>Date of Order:</b>	<b>28/06/2019</b>

**आदेश / O R D E R**

Per Bench

These three appeals filed by the assessee are directed against separate, but identical orders of the Ld. Assessing Officer passed u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961(hereinafter 'the Act') dated 31/08/2016, 31/10/2017 and 28/09/2018 for Assessment Years 2013-14, 2014-15 and 2015-16 in pursuance to the direction of DRP-1, Mumbai. Since, the facts are identical and issues are common, for the sake of convenience, these appeals were heard together and are disposed of by this consolidated order.

2. The assessee, has more or less filed common grounds of appeal for all assessment Years. For the sake of brevity, grounds of appeal taken for AY-2013-14, in ITA No.6573/Mum/2016 are reproduced as under:-

“The appellant company objects to the order dated 31 August 2016 passed by the Deputy Commissioner of Income Tax (International Taxation), 2(2)(1), Mumbai CAO' under section 143(3) read with section 144C(13) of the Income Tax Act, 1961 ('the Act') on the following grounds:

1. The learned AO erred in holding that an amount of Rs. 13,09,24,870 received by the appellant is chargeable to tax in India.

**2. Subscription amounts considered as fees for technical services**

The learned AO erred in holding the subscription amounts of Rs. 13,09,24,870 received by the appellant are in the nature of "fees for technical services" ('FTS') as defined under section 9(l)(vii) of the Act and also under Article 12 of the India-Germany Tax Treaty.

**3. Subscription amounts considered as Royalty**

The learned AO erred in holding the subscription amounts of Rs. 13,09,24,870 received by the appellant are in the nature of "Royalty" as defined under section 9(l)(vi) of the Act and also under Article 12 of the India-Germany Tax Treaty.

**4. Interest under section 234B of the Act**

The learned AO erred in levying interest of Rs.51,22,366 under section 234B of the Act.

**5. Interest under section 234C of the Act**

The learned AO erred in levying interest of Rs.6,30,925 under section 234C of the Act.

**6. Penalty proceedings under section 271(l)(c) of the Act**

The learned AO erred in holding that the appellant has concealed the particulars of his income or furnished inaccurate particulars of such income and also erred in initiating penalty proceedings under section 271(l)(c) of the Act.”

3. The brief facts of the case are that the assessee company is resident of Germany and it is 100% subsidiary of Reed Elsevier Deutschland GmbH. The assessee is involved in the business of providing access to general database to the desired users in online database management system 'Reaxys'. The online database system 'Reaxys' pertaining to chemical information which allows users with an interest in chemistry topics, substance data and preparation and reaction methods to find the relevant data conveniently. The assessee provides access to the data base and earn subscription fee from customers worldwide,

including from India. For the impugned assessment Years, the assessee has filed its return of income declaring at NIL income on the ground that subscription fee earned from subscribers from India is neither in nature of fees for technical services as defined u/s 9(1)(vi) and (vii) of the Act, nor in the nature of royalty under the Act as well as under Article-5 of India Germany Tax Treaty.

4. During the course of assessment proceedings, the AO asked the assessee to furnish a copy of agreement entered into with various Indian entities and details of amount earned from them. In response, the assessee has filed sample copy of agreement and also filed details of subscription fee earned for the years under consideration. The assessee further claimed that in absence of permanent establishment in India (PE) as per Article-5 of India Germany Tax Treaty, the subscription fee received from the subscribers cannot be taxed India either under provisions of section 9(1)(vi) and (vii) of the Act, or under India Germany Tax Treaty. The AO after considering relevant submissions of the assessee and also taken note of copy of agreement entered into with various Indian entities was of the view that subscription fee received by the assessee is in the nature of royalty/ fee for technical services on the ground that the assessee has received subscription fee for providing specific database facility to different Indian chemical and pharmaceutical companies. He further observed that 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 knowledgeable, therefore, he came to the conclusion that service rendered by the assessee to its subscribers is in the nature of fees for technical services as defined u/s.9(1)(vii) of the Act. He further 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, he came to the conclusion that subscription received by the assessee for providing access service to the online database to the subscribers is in the nature of literary work, hence, has to be treated as royalty as defined under section 9(1)(vi) of the Act. Therefore, computed income on the basis of Article 12(3) of Indo-Germany Tax Treaty @ 10% of total subscription fee received in India as taxable income under the Indo-German Tax Treaty.

5. The assessee has raised objection against the draft assessment order before the Ld. DRP-1, Mumbai, but could not succeed. The Ld. DRP, for the reasons stated in its order even dated upheld the findings of the Ld. AO and reject the objections filed by the assessee. Aggrieved by the findings of Ld. DRP, the assessee is in appeal before us.

6. The Ld. AR for the assessee, at the time of hearing, submitted that this issue is squarely covered in favour of the assessee by the decision of the ITAT, Mumbai ' I' Bench in assessee's own case for AY 2011-12 in ITA No.1683/Mum/2015 dated 15/04/2019, where under identical set of facts, the Tribunal has examined the issue of taxability of subscription fee received by the assessee from its customers in India in light of definition of

fees for technical services and royalty as defined u/s 9(1)(vi) and 9(1)(vii) of the Act and also under India Germany tax treaty and held that subscription fees received by the assessee from its customers in India is neither in the nature of fees for technical services nor royalty within the meaning of section u/s 9(1)(vi) and 9(1)(vii) of the Act, nor under India Germany tax treaty. The Ld. AR further submitted that facts for the impugned assessment years are identical and the Ld. AO as well as the Ld. DRP had reproduced the order for the AY 2011-12 in verbatim and held that subscription fee received from customers in India for access to online database is in the nature of fees of technical services/royalty. The Ld. AR for the assessee further submitted that for AY 2015-16, there is slight difference in facts in as much as for this year the assessee has two data process in addition to existing database which has already been considered by the Tribunal for earlier years in the name of EMBASE but both database are scientific database rendering unique search and research access, therefore, except this limited changes no other changes in its agreement with subscribers as well as content of database. Further, the Ld. DRP has accepted the fact that facts were also similar to the facts considered by the Department for AY 2011-12.

7. The Ld. DR on the other hand, fairly accepted that the issue involved in the present appeals is covered by the decision of ITAT for earlier years, where under identical set of facts, the Tribunal held that subscription fees received by the assessee in India is neither in the nature of fees for technical services nor royalty, as defined under section 9(1)(vi) and 9(1)(vii) of the Act and also under India Germany Tax Treaty. However, he strongly supported the order of the AO as well as the Ld. DRP.

8. We have heard both parties, perused the material available on record and gone through orders of the authorities below. We have also carefully considered the decision of the Co-ordinate Bench of ITAT, Mumbai 'I' Bench in assessee's own case for AY 2011-12. We find that the Co-ordinate Bench has discussed the issue threadbare in the light of facts brought out by the assessee and provision of section 9(1)(vi) and 9(1)(vii) and also Article 5 and 12(3) of the Indo Germany Tax Treaty and held that subscription fees received by the assessee from its customers in India is neither in the nature of fees for technical services nor royalty as defined under section 9(1)(vi) and 9(1)(vii) of the Act, and also under India Germany Tax Treaty. Therefore, the same cannot be taxed in India unless the assessee is having permanent establishment in India. The relevant findings of the Tribunal are as under:-

*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 1<sup>st</sup> February 2010 to 30<sup>th</sup> 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:-*

*Factual information on the existence, operations, financial condition, management experience, line of business, facilities and locations of prospect;*

*Special Events as well as any suits, leans, judgments or previous data being bankrupts;*

*Banking relationship and accounts;*

*Parent company affiliated concern, subsidiaries branches and divisions, referred with name and D&B D-U-N-S number; and*

*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."*

9. In this view of the matter and consistent with view taken by the Co-ordinate Bench, we are of the considered view that subscription fees received by the assessee from customers in India for allowing them to access online database created by the assessee in the name of 'Reaxys' and 'EMBASE' cannot be considered as fees for technical services or royalty within the meaning of section 9(1)(vi) and 9(1)(vii) of the Act, nor under India Germany Tax Treaty. Therefore, by respectfully following the decision of the co-ordinate bench of the Tribunal in assessee's own case, we direct the AO to delete the additions made towards income computed @10% of total subscription fees as per India Germany Tax Treaty.

10. In the result, appeals filed by the assessee for all assessment years are allowed.

Order pronounced in the open Court on 28/06/2019.

**Sd/-**

(Saktijit Dey)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 28/06/2019

*Shekhar. P.S./नि.स.*

**Sd/-**

(G. Manjunatha)

लेखा सदस्य / ACCOUNTANT MEMBER

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant (Respective assessee)
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)**

**आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**