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

[Coram: Pramod Kumar (Vice President) and Amarjit Singh, JM]

ITA No.6445/Mum/2016
Assessment year: 2013-14

IMS AG
(Now known as Iqvia AG) **…… Appellant**
Dorfplatz 4, Postfach, CH 6330 Cham, Switzerland
C/o BSR & Associates LLP 1st Floor, Lodha
Excelus Appollo Mills Compound, Mahalaxmi,
Mumbai 400011
[PAN: AACCI5872K]

Vs

Dy Commissioner of Income Tax **……Respondent**
International Taxation Circle 2(2)(1),
Mumbai

Appearances by
P J Pardiwala *along-with* **Madhur Agarwal** *for the appellant*
Avanessh Tiwari *for the respondent*

Date of concluding the hearing: : February 6th , 2020
Date of pronouncement : July 13th , 2020

ORDER

Per Pramod Kumar, VP:

1. This appeal challenges correctness of the order dated 31st August 2016, passed by the learned Assessing Officer under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961, for the assessment year 2013-14.

2. Grievance of the assessee, in substance, is that the learned Assessing Officer erred in making the addition of Rs 23,01,00,058 on account of alleged royalty taxable under section 9 (l)(vi) of the Income Tax Act, 1961 read with article 12(3) of India Switzerland Double

Taxation Avoidance Agreement [(1995) 214 ITR (Stat) 223- as updated till the relevant point - of time; Indo Swiss tax treaty in short].

3. To adjudicate on this appeal, only a few material fads need to be taken note of. The assessee before us is a company incorporated, and fiscally domiciled, in Switzerland. The assessee company is engaged in providing market research report on pharmaceutical sector to its customers across the world at a predetermined subscription prices, The company collects, processes and utilizes the data and information, particularly in the field of medicine and pharmaceuticals for the delivery of reports through online IMS knowledge link. The company enters into agreements with its customers for providing the review reports (IMS reports) setting out the details of modules required to be accessed by the customers and the consideration for these services. In essence thus, the IMS reports, based on module selected, are statistical database compilations, providing geo economical data, about a pharma molecule, providing insight into the connected issues relating to information and developments. The licence access so granted is a non-exclusive and non-transferable right. It is consideration received, as allowing this non-exclusive, non-transferable access to the database and IMS reports which is subject matter of dispute before us. The authorities below have held that in the light of Hon'ble Karnataka High Court's judgment in the case of CIT Vs Wipro Ltd [(2011) 203 Taxman 621 (Kar)] and other judgments by the same Hon'ble High Court, which have been followed by a coordinate bench of this Tribunal as well, these receipts are required to be taxed as royalty under section 9(l)(vi) as also under article 12(3) of the Indo Swiss DTAA. The assessee is aggrieved and is in further appeal before us.

4. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

5. We find that Hon'ble jurisdictional High Court, in the case of **DIT Vs Dun and Breadstreet Information Services India Pvt Ltd[(2012) 20 taxmann.695 (Mum)]** has, while approving and concurring with the approach of Authority for Advance Ruling in the case of this very assessee, observed as follows:

> **The assessee had imported business information reports from Dun and Bradstreet, USA, and made remittances in respect thereof without deducting tax at source. The Assessing Officer held that the assessee was liable to deduct tax at**

source and accordingly passed an order under section 195 read with section 201 of the Act. The appeal filed by the assessee was dismissed by the Commissioner of Income-tax (Appeals). On further appeal, the Income-tax Appellate Tribunal set aside the order passed under section 195 read with section 201 of the Act by following its decision in the assessee's own case for the assessment year 2002-03 in I.T.A. No. 1773/Mum/2006 and the decision of the Authority for Advance Rulings on identical facts in the case of Dun and S.A. Bradstreet Espana In re Authority for Advance Rulings No. 615 of 2003 [2005] 272ITR 99 (AAR)), D and B Europe Authority for Advance Rulings No. 657 of 2005, dated October 27, 2005, and D and B UK Authority for Advance Rulings No. 656 of 2005, dated October 27, 2005. In all these cases the Authority for Advance Rulings held that the sale of very same business information reports by the subsidiaries of Dun and Bradstreet US in Spain, Europe and V. K. to the assessee did not attract the provisions of section 195 of the Act. Though the decision of the Authority for Advance Rulings is not binding in the present case, since the decision of the Authority for Advance Rulings relates to the very same business information reports imported by the petitioner and no fault in the decision of the Authority for Advance Rulings is pointed out, we see no reason to interfere with the decision of the Income-tax Appellate Tribunal.

6. The AAR's decision, which is so concurred with, inter alia states as follows:

The instant case it is not a case of paying consideration for the use of or right to use any copyright of literary, artistic or scientific work or any patent trade mark or for information of commercial experience. The Commissioner sought to bring the payments under royalty/fees for technical service for the reason that the BIRs are copyright protected and end-users are required to use for their own purpose and the analysis of raw data provided in the BIRs would be similar to that of providing a technical or consultancy services. We have already mentioned above that a BIR is a standardized product of D&B, it provides factual information on the existence, operation, financial condition, management and experience line of business, facility and location of a company; it also provides special events like any suit, lien, judgment or previous or pending bankruptcy. Further, banking relationship and accountants, information like whether it is a patent company or authority concerned, has any branches etc. It also gives a rating of the company. The informations that are provided in a BIR are said to be publicly available; they are collected and complied by D&B associates. A BIR is accessible by any subscriber on payment of requisite price with regular internet access for which no particular software or hardware is required. The applicant states that access to data base of the applicant is available to public at large at a price as in case of buying a book and it is not a pre-requisite, that BIR must be downloaded by DBIS only and in fact some clients, such as Expert credit guarantee corporation, in fact, access the server themselves to download BIR. The applicant does not have any server in India for the use of DBIS. Indeed the applicant has specifically averred that the copyright in the BIR would neither be licensed nor assigned to either the DBIS or the Indian customer. From these aspects it is clear that the aforementioned ruling of the Authority is

distinguishable on facts. If a group of companies collects information about the historical places and places of interest for tourists in each country and all informations are maintained on a central computer which is accessible to each constituent of the Group in each country, can a supply of such information electronically on payment of price be treated as royalty or fee for technical services ? We think not.

The next case relied upon by the Commissioner is also a ruling of the Authority in Ericsson Telephone Corpn. India AB, In re [1997] 224ITR 2031. In that case the applicant was a company incorporated in Sweden. It provided, inter alia, services within radio and telecommunication. It entered into contracts with three Indian companies for the introduction of the cellular system of telecommunication in India and opened branch offices in India at New Delhi, Bombay and Madras. The Indian company informed applicant that while making payments under the agreement they would withhold income tax at 55% as provided in the Finance Act, 1995. According to the applicant tax deduction could not have exceeded 5,5% of the gross payments, as the net profit on the contract would not be more 10%, It was, therefore, not a case of whether the amount paid could be termed as fee for technical services. It was admittedly a case of payment of fee for technical services.

For the abovementioned reasons, payments made by the DBIS to the applicant for purchases of BIRs do not answer the description of 'royalties' within the meaning of para 3 of article 13 of the treaty. So payments made by the DBIS to the applicant cannot be regarded as royalty payment. In our view, the applicant has rightly equated the transaction of sale of BIRs to sale of a book, which does not involve any transfer of intellectual property or a book.

7. Article 12(3) of Indo Swiss DTAA, that we are currently dealing with, is verbatim the same as Article 13(3) of India Spain DTAA that Hon'ble Authority of Advance Ruling was dealing with. The conclusions so arrived at by the Authority for Advance Ruling, which now stand approved by Hon'ble jurisdictional High Court, are equally applicable in the context of Indo Swiss DTAA as well. It is only elementary that when the assessee is not taxable under the provisions of the respective DTAA, there is no occasion to examine the taxability under the Income Tax Act 1961, since the provisions of the Income Tax Act 1961 apply only when these provisions are more favourable to the assessee vis-a-vis the provisions of the applicable DTAA.

8. When the above position was brought to the notice of the learned Departmental Representative, he simply placed his reliance on the stand of the authorities below. He could not, however, neither point out any legally distinguishable features between the case before Hon'ble jurisdictional High Court vis-a-vis this case, nor any other reasons for not following

the binding precedent from Hon'ble jurisdictional High Court. Once our Hon'ble jurisdictional High Court has expressed a view, it cannot be open for us to be swayed by a contrary view expressed by any other Hon'ble High Court. No decision from Hon'ble jurisdictional High Court, contrary to the above decision of Hon'ble jurisdictional High Court, was brought to our notice.

9. In view of the above discussions, as also bearing in mind entirety of the case, we delete the impugned addition of Rs 23,01,00,058 as royalty in the hands of the assessee. The assessee gets the relief accordingly.

10. No other issues were pressed before us. In any event, the other points raised in the appeal were in the nature of consequential levies. Once the main addition itself is deleted, all these issues are rendered academic.

11. However, before we part with the matter, we must deal with one procedural issue as well. While hearing of this appeal was concluded on 06th February 2020, these orders are being pronounced today on 13th day of July, 2020, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income Tax Appellate Tribunal Rules 1963, which deals with pronouncement of orders, provides as follows:

> ***(5) The pronouncement may be in any of the following manners :—***
>
> ***(a) The Bench may pronounce the order immediately upon the conclusion of the hearing.***
>
> ***(b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement.***
>
> ***(c) In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not ordinarily (emphasis supplied by us now) be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board.***

12. Quite clearly, "ordinarily" the order on an appeal should be pronounced by the bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression "ordinarily" has been used in the said rule itself. This rule was inserted as a result of directions of Hon'ble jurisdictional High Court in the case of **Shivsagar Veg Restaurant Vs ACIT [(2009) 317 ITR 433 (Bom)]** wherein Their Lordships had, inter alia, directed that **"We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the Apex Court in the case of Anil Rai (supra) and to issue appropriate administrative directions to all the benches of the Tribunal in that behalf.We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. In the meanwhile** *(emphasis, by underlining, supplied by us now),* **all the revisional and appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment".** In the ruled so framed, as a result of these directions, the expression "ordinarily" has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any "extraordinary" circumstances.

13. Let us in this light revert to the prevailing situation in the country. On 24th March, 2020, Hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income Tax Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial wok all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that Hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated 6.5.2020 read with order dated 23.3.2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that **"In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the**

lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown". Hon'ble Bombay High Court, in an order dated 15th April 2020, has, besides extending the validity of all interim orders, has also observed that, **"It is also clarified that while calculating time for disposal of matters made time-bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly",** and also observed that **"arrangement continued by an order dated 26th March 2020 till 30th April 2020 shall continue further till 15th June 2020".** It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated 19th February 2020, taken the stand that, the coronavirus "should be considered a case of natural calamity and FMC (i.e. force majeure clause) maybe invoked, wherever considered appropriate, following the due procedure…". The term ***'force majeure'*** has been defined in Black's Law Dictionary, as **'an event or effect that can be neither anticipated nor controlled'** When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an "ordinary" period.

14. In the light of the above discussions, we are of the considered view that rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case **of Otters Club Vs DIT [(2017) 392 ITR 244 (Bom)],** Hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation Hon'ble Bombay High Court itself has, vide judgment dated 15th April 2020, held that directed **"while calculating the time for disposal of matters made time-**

bound by this Court, the period for which the order dated 26th March 2020 continues to operate shall be added and time shall stand extended accordingly". The extraordinary steps taken suomotu by Hon'ble jurisdictional High Court and Hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the words "ordinarily", in the light of the above analysis of the legal position, the period during which lockout was in force is to excluded for the purpose of time limits set out in rule 34(5) of the Appellate Tribunal Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the benches to refix the matters for clarifications because of considerable time lag between the point of time when the hearing is concluded and the point of time when the order thereon is being finalized, but then, in our considered view, no such exercise was required to be carried out on the facts of this case.

15. In the result, the appeal filed by the Assessee is allowed. Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

Sd/- Sd/-

Amarjit Singh **Pramod Kumar**
(Judicial Member) (Vice President)

Mumbai, dated the 13th day of July, 2020

Nishant Verma Sr.PS

Copies to: *(1)* *The appellant* *(2)* *The respondent*
(3) *CIT* *(4)* *CIT(A)*
(5) *DR* *(6)* *Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai