

आयकर अपीलीय अधिकरण “आई” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“I” BENCH, MUMBAI

माननीय श्री छल्ला नागेन्द्र प्रसाद, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI C.N. PRASAD, JM AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM
(Hearing Through Video Conferencing Mode)

1. आयकरअपील सं./ I.T.A. No.1030/Mum/2021
 (निर्धारण वर्ष / Assessment Year: 2017-18)

&

2. Stay Application No.110/Mum/2021
 (निर्धारण वर्ष / Assessment Year: 2017-18)

American Chemical Society C/o Deloitte Haskins and Sells LLP 7 th floor, Building 10, Tower B DLF Cyber City Complex DLF City Phase-II, Gurgaon Haryana-122 002	बनाम / Vs.	ACIT (IT) Circle – 1(3)(2) R. No. 1810, 18 th floor AIR India Building Nariman Point Mumbai-400021
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. AALCA-4959-L		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Shri Vishal Kabra – Ld. AR
Revenue by	:	Shri S.S. Iyengar– Ld. Sr. DR

सुनवाई की तारीख/ Date of Hearing	:	22/09/2021
घोषणा की तारीख / Date of Pronouncement	:	26/10/2021

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1 Aforesaid appeal by assessee for Assessment Year 2017-18 arises out of final assessment order dated 16/04/2021 passed by Ld. Assessing Officer (AO) u/s 143(3) r/w Section 144C(13) of the Income Tax Act, pursuant to the directions of Ld. Dispute Resolution Panel-1, Mumbai-3

(DRP) u/s 144C(5) dated 24/02/2021. The grounds raised by the assessee read as under: -

1. That on the facts and circumstances of the case and in law, the Ld. AO has erred in assessing the total income of the Appellant under section 143(3) read with section 144C(13) of the Act at INR 102,66,92,087 as against Nil returned income.
2. That on the facts and circumstances of the case and in law, the Ld. AO / Dispute Resolution Panel ("DRP") have erred in holding that the receipts from Indian customers amounting to INR 102,66,92,087 are chargeable to tax as royalty in terms of Article 12(3) of India-US Double Tax Avoidance Agreement ("DTAA") and under section 9(l)(vi) of the Act.
 - 2.1 That on the facts and in the circumstances of the case and in law, the Ld. AO/ DRP have erred in holding that the subscription charges received under Chemical Abstract Service (CAS) division and Publications (PUBS) division would be chargeable to tax in India under India-US DTAA being received for use or right to use of copyright in artistic, literary or scientific work and / or for use of information concerning industrial, commercial or scientific experience and / or for use of industrial, commercial or scientific equipment.
 - 2.2 That on the facts and circumstances of the case and in law, the Ld. AO/ DRP have erred in holding that the subscription charges received under CAS and PUBS divisions would be chargeable to tax in India under India-US DTAA being received for use of ACS databases / software.
 - 2.3 That on the facts and circumstances of the case and in law, the Ld. AO has erred in disregarding the recently pronounced decision of the Hon'ble Supreme Court in the case of **Engineering Analysis Centre of Excellence Private Limited (Civil Appeal No. 8733-8734 of 2018)** while holding that the receipts of the Appellant be treated as being received for the use or right to use copyright in a literary or scientific work within the meaning of royalty as per section 9(l)(vi) of the Act as well as Article 12(3) of India-US DTAA.
 - 2.4 That on the facts and circumstances of the case and in law, the Ld. AO/DRP have erred in not following the decision passed by the Hon'ble Mumbai Bench of the Income-tax Appellate Tribunal ("ITAT") in Appellant's own case for immediately preceding assessment years i.e. 2014-15 to 2016-17, wherein on similar facts and circumstances, the Hon'ble ITAT held that the revenue from CAS and PUBS division cannot be taxed as royalty under section 9(l)(vi) of the Act as well as Article 12(3) of India-US DTAA.
 - 2.5 Without prejudice to the above grounds of appeal, the Ld. AO has erred in computing the tax payable on assessed income at the rate of 15 percent, instead of 10 percent (inclusive of surcharge and cess), as per the beneficial provisions of the Act.
3. That on the facts and circumstances of the case and in law, the Ld. AO has erred in levying interest of Rs. 60,128,488 under section 234B of the Act

The draft assessment order was passed by Ld. AO on 24/12/2019 which was subjected to assessee's objections before Ld. DRP.

2. The Ld. AR, at the outset, submitted that all the issues are squarely covered in assessee's favor by the decision of this Tribunal in assessee's own case for AY 2014-15, ITA No.6811/Mum/2017 order dated 30/04/2019. This decision has subsequently been followed in AY 2015-16 (ITA No.5928/Mum/2018 order dated 21/08/2019) as well as in AY 2016-17 (ITA No.6952/Mum/2019 order dated 13/12/2019). The copies of the orders have been placed on record. No change in facts could be demonstrated before us in this year by the revenue. Nothing could be placed on record to suggest that aforesaid decisions have been reversed, in any manner, by any higher judicial authority. In the said background, our adjudication to the appeal would be as given in succeeding paragraphs.

3.1 The material facts are that the assessee being US based non-resident entity in engaged in promotion and development of knowledge in the field of chemistry. It is organized into various divisions which are as under:-

i) Chemical Abstracts Service (CAS) division: This division identifies, aggregates, and organizes publicly disclosed chemistry and related scientific information. It offers online, web-based and desktop access to databases of scientific content to its customers. Search and analysis tools help customers in locating chemistry-related substance information in the databases.

ii) Publications (PUBS) division: This division reviews and publishes research work submitted by scientists worldwide. It is engaged in subscription sales of web-based and printed copies of research journals / e-journals in the subject of chemistry, to its subscribers. The assessee

grants online/web-based access to e-journals, e-books, chapters, articles, proceedings etc.

The customers of the assessee would generally include organizations and individuals interested in the field of chemistry such as educational institutes, research organizations, companies etc. The assessee has such customers in India as well and receives payments for provision of products / services from outside India to Indian customers. Accordingly, the assessee earned revenue of Rs.62.48 Crores as fee for providing access by subscription to online chemistry databases (CAS division) and revenue of Rs.40.18 Crores as subscription revenue from sale of online journals (PUBS division). The assessee submitted that none of these receipts would qualify as royalties or fee for included services under India-US Tax-Treaty and accordingly, not liable to tax.

3.2 However, Ld. AO noted that similar revenues earned in AYs 2014-15 to 2016-17 were held to be royalty and taxable @15% as per Tax-Treaty. It transpired that the business model as well as stream of revenues for assessee remained the same. Though the assessee advanced various arguments to support that subscription fees from CAS division as well as from PUBS division would not constitute royalty or fees for technical services, however, Ld. AO treated the receipts to be royalty payments as held in earlier assessment years and brought these receipts to tax while passing draft assessment order on 24/12/2019.

4. Before Ld. DRP, the assessee made elaborate written submissions to assail the stand of Ld. AO. The Ld. DRP noted that the issue was recurring in nature and was elaborately been dealt with by Ld. DRP in its directions for AYs 2014-15 to 2016-17. The favorable decisions of the Tribunal were already considered in earlier orders of the DRP and

moreover, the Tribunal's order were in further appeal u/s 260A by the department and matter had not attained finality by the decision of higher judicial forums. Therefore, the action of Ld. AO was upheld. Pursuant to these directions, final assessment order was passed by Ld. AO on 16/04/2021 assessing the income of the assessee at Rs.102.66 Crores. Aggrieved, the assessee is in further appeal before us.

5. The undisputed position that emerges is that the issues are squarely covered in assessee's favor by the earlier decision of this Tribunal for AYs 2014-15 to 2016-17. The fact that the business-model as well as streams of income for the assessee remains the same in this year is undisputed. The Ld. DRP has followed earlier stand of DRP and chose not to follow the decision of Tribunal since the orders were in further appeal before higher judicial forums. However, as of now, the issues are squarely covered in assessee's favor by cited decisions of Tribunal for AYs 2014-15 to 2016-17 and we see no reason to deviate from the same. The relevant findings of the Tribunal in AYs 2014-15 were as follows: -

11. With respect to the subscription fee for the CAS division being considered as Royalty for "use" of or "right to use" of a copyright, a reference to Copyright Act, 1957 is also relevant. A person can be said to have acquired a copyright or the right to use the copyright in a computer software or database (as described by the Assessing Officer), where he is authorized to do all or any of the acts as per the definition of the term "copyright" under Section 14 of the Copyright Act, 1957. However, mere access to that work or permission to use the work cannot imply that the payer is paying for use or right to use the copyright. In other words, when no copyright is acquired by the payer, question of using it or getting a right to use it does not arise.

12. In the present context, we may also examine the issue from another angle as follows. The transfer of a copyrighted right means that the recipient has a right to commercially exploit the database/software, e.g. reproduce, duplicate or sub-license the same; such payments may be classified as royalty, but factually speaking in the present no such rights in database or search tools (SciFinder or STN) are acquired by the customers, as is evident from the terms of the sample agreement of CAS customers. In our considered view, transfer of any right in a copyrighted article is analogous to the rights acquired by the purchaser of a book. In the case of a book,

the publisher of the book grants the purchaser certain rights with respect to the use of the content of the book, which is copyrighted, but the purchaser of the book does not acquire the right to exploit the underlying copyright. When the purchaser reads the book, he only enjoys its contents. Similarly, the user of the copyrighted software does not receive the right to exploit the copyright in the software; he only enjoys the product/benefits of the product in the normal course of his business. Similarly, in the instant case, customers of the assessee only enjoy the benefits of using SciFinder and STN and do not acquire the right to exploit any copyright in these software. The difference between a copyright and a copyrighted article in context of software has been brought out very clearly by the Hon'ble Supreme Court of India in the case of Tata Consultancy Services vs. State of Andhra Pradesh (supra).

13. In view of the aforesaid discussion, in our considered view, the income earned by the assessee from the Indian Customers with respect to the subscription fees for CAS cannot be taxed as royalty as per section 9(1)(vi) of the Act as well as Article 12(3) of the India-USA DTAA. Thus, assessee succeeds on this issue.

14. We shall now advert to another issue, which pertains to whether income earned by the assessee from the Indian Customers with respect to the subscription fees for PUBS division be taxed as royalty in terms of section 9(1)(vi) of the Act as well as Article 12(3) of the India-USA DTAA.

15. Before us, the Ld. Senior Counsel pointed out that the characteristics of the PUBS divisions is similar to CAS division, which has been dealt at length by us in the foregoing paragraphs. The Learned Senior Counsel submitted that the PUBS division of the assessee reviews and publishes research work submitted by scientists worldwide, organizes the same into research journals/ e-books and engages in subscription sales of internet and print copies of such research journals. The assessee grants online/ webbased access to e-journals, e-books, chapters, articles, proceedings, etc., stored on the server, in consideration for an annual fee /subscription charges. Such e-journals / e-books can be searched by a subscriber by using relevant keywords on PUBS website after logging in by using their log-in credentials. Customers are merely granted access to search and view the ejournals and obtain standardized reports / research articles available therein with no right to use the copyright in the e-journals/ articles. The agreements (as filed in the Paper book at page 43 to 71) entered by the assessee with the customers provide that copyright in the e-books, e-journals etc., remain with the assessee and the customers do not have any right of ownership on the same. The access to e-journals etc. is given only for limited users and the same is restricted to specified authorized sites /users per customer through the IP address of customers. The web access journals can only be accessed by the customers/authorized users through a secure network as prescribed in the agreements. 16. On the other hand, the Ld. Departmental Representative for the Revenue has merely reiterated the stand of the lower authorities on the PUBS division similar to stand with respect to taxability of the CAS fee.

17. We have heard the rival submissions and perused the relevant material on record including the order of the lower authorities on the issue in dispute. We find that issue with respect to the PUBS division coincides with the issues on the CAS fee. The journal provided by the PUBS division do not provide any information arising from assessee's previous experience. The assessee's experience lies in the creation of / maintaining such information online. By granting access to the journals, the assessee neither shares its experiences, techniques or methodology employed in evolving databases with the users, nor imparts any information relating to them.

As is clearly evident from the sample agreements, all that the customers get is the right to search, view and display the articles (whether online or by taking a print) and reproducing or exploiting the same in any manner other than for personal use is strictly prohibited. Further, the customers do not get any rights to the journal or articles therein. They can only view the article in the journal that they have subscribed to and cannot amend or replicate or reproduce the journal. Thus, the customers are only able to access journal/articles for personal use of the information. No 'use or right to use' in any copyright or any other intellectual property of any kind is provided by the assessee to its customers. Furthermore, the information resides on servers outside India, to which the customers have no right or access, nor do they possess control or dominion over the servers in any way. Therefore, the question of such payments qualifying as consideration for use or right to use any equipment, whether industrial, commercial or scientific, does not arise.

18. To put a comparison, if someone purchases a book, then the consideration paid is not for the use of the copyright in the book/ article. The purchaser of a book does not acquire the right to make multiple copies for re-sale or to make derivative works of the book, i.e., the purchaser of a book does not obtain the copyright in the book. Similarly, the purchaser of the assessee's journals, articles or database access does not have the right to make copies for re-sale and does not have the right to make derivative works. In short, the purchaser has not acquired the copyright of the article or of the database. What the buyer gets is a copyrighted product, and accordingly the consideration paid is not royalty, but for purchase of a product. In the instant case too, what is acquired by the customer is a copyrighted article, copyrights of which continue to lie with assessee for all purposes. It is a well settled law that copyrighted article is different from a copyright, and that consideration for the former, i.e. a copyrighted article does not qualify as royalties.

19. Thus, the principles noted by us in the earlier part of this order in the context of the income earned by way of CAS fee are squarely applicable to the subscription revenue received from customers of PUBS division for sale of journal also, and accordingly PUBS fee also does not qualify as 'Royalty' in terms of section 9(1)(vi) of the Act as well as Article 12(3) of the India-USA DTAA.

Facts being *pari-materia* the same in this year, respectfully following earlier decisions of the Tribunal in assessee's own case, we would hold that receipts from CAS division as well as from PUBS division could not be held to be royalty and hence, not taxable in the hands of the assessee. Ground Nos.1 to 2.4 stands allowed which render ground nos. 2.5 & 3 as infructuous in nature. The stay application has also been rendered infructuous.

6. In the result, the assessee's appeal stand allowed whereas the stay application for recovery of outstanding demand stand dismissed.

Order pronounced on 26th October, 2021.

Sd/-

(C. N. Prasad)

न्यायिक सदस्य / **Judicial Member**

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 26/10/2021
Sr.PS, Dhananjay

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

**उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.**