IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH, NEW DELHI
BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No. 5171/DEL/2018 [A.Y 2013-14]
ITA No. 4302/DEL/2019 [A.Y 2014-15]

OVID Technologies Inc. C/o 10th Floor, Building No. 10 Phase – II, DLF Cyber City Gurgaon, Haryana	Vs.	The Dy. C.I.T. Inttl. Taxation New Delhi
PAN: AABCO 3041 P (Applicant)		(Respondent)

Assessee By : Shri Salil Kapoor, Adv
Ms. Soumya Singh, Adv

Department By : Shri Bhagwati Charan, Sr. DR

Date of Hearing : 08.03.2022
Date of Pronouncement : 08.03.2022

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

Both the above captioned separate appeals by the assessee are preferred against the separate orders of the CIT(A) -23 dated 01.06.2018 and ld. CIT(A) – 43 dated 28.02.2019 pertaining to Assessment Years 2013-14 and 2014-15 respectively.

2. Since the underlying facts in issue are common in all these appeals, they were heard together and are disposed of by this common order for the sake of convenience and brevity.

3. The common grievance in both the above captioned appeals relates to the taxation of the revenue from online database of text journals and books as royalty income under the provisions of Article 12 of the India USA Double Taxation Avoidance Agreement [DTAA].

4. The representatives of both the sides were heard at length, the case records carefully perused.

5. Briefly stated, the facts of the case are that the appellant is an entity incorporated under the laws of USA. At the very outset, we have to state that basis the provisions of section 92 of the Act, the assessee is entitled to invoke the provisions of India -USA DTAA to the extent it is more beneficial to the assessee. Our view is fortified by the decision of the Hon'ble Supreme Court in the case of Union of India Vs. Azadi Bachao Andolan 263 ITR 706.

6. Accordingly, we will consider the beneficial provisions of the tax treaty to see whether the contention of the assessee that the alleged revenue is not royalty income.

6. As per Article 12 of the Tax Treaty, 'Royalty" is defined as under:

> "10.1.4.1 (a) "payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; and (b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than income, derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic. 10.1.5 Thus, Article 12 of the Tax Treaty brings within the ambit of the definition of royalty, a payment made for the use of or the right to use a copyright of a literary, artistic or scientific work. Thus, only those payments that allow a payer to use / acquire a right to use a copyright in a literary, artistic or scientific work arc covered within the definition of royalty. Payments made for acquiring the right in use the product it sell, without allowing any

right to use the copyright in the product, are not covered within the scope of royally winch may gel covered under the term 'Royalty' as per the Act. Further, unless the payments are made towards acquiring the right to use a copyright in a literary, artistic, or scientific work, definition of Royalty would not get attracted.

Furthermore, in determining whether or not a payment is for the use of copyright, it is important to distinguish between a payment for the right to use the copyright in a programme and the right to use the programme itself. We have outlined below our detailed submission on the distinction between copyright and the copyrighted article:"

A perusal of the above Article shows that it brings within the ambit of the definition of 'Royalty' the payment made for use of, or the right to use any copyright of a literary, artistic, or scientific work. In our understanding of the Article, only those payments that allow a payer to use/acquire a right to use copyright in literary, artistic or scientific work are covered within the definition of 'Royalty'. In our considered view, the payments made for acquiring right to use product itself, without allowing any right to use the copy right in the product are not covered with the scope of 'Royalty' which may get covered under the term under Royalty as per the Act."

7. In light of the above, let us now consider the facts of the appellant.

8. The assessee is allowing access to data/information on payment of a fee. Data is available in public domain and the appellant makes some value additions like analysis, indexing, description and appending notes for facilitating easy access. The appellant is allowing this centralized data available to the customer/licencee for a consideration.

9. The Assessing Officer/CIT(A) were of the firm belief that the assessee has granted license to access online data base which falls within the definition of 'Royalty'.

10. On an understanding of the entire factual matrix of the business of the assessee shows that there is no transfer of legal title in the copy righted article as the same rests with the assessee. The user has no authority to reproduce the data in any material form to make any translation in the data or to make adaptation in the data. The end user cannot be said to have acquired a copyright or right to use the copyright in the data. In our considered view, for determining whether or not a payment is for use of copy right, it is important to distinguish between "a payment for right to use copy right in a program" and "right to use program itself".

11. In the case in hand, the revenue derived by the assessee from granting limited access to its data base is akin to sale of book, wherein purchaser does not acquire any right to exploit the underlying copyright. When the purchaser reads the book, he only enjoys the content. Similarly, user of the data base does not receive the right to exploit the copyright in the database, he only enjoys the product in the normal course of his business.

12. Facts on record show that the appellant is granting access to its data base. Transaction under consideration is for provision of accessing data base of the assessee. Hence the same cannot be considered as royalty under Article 12 of the India USA - DTAA.

13. While taxing the revenue as royalty, the Assessing Officer has relied upon the decision of the AAR in the case of Skillsoft Ireland Limited wherein the AAR has followed the decision of the Hon'ble Karnataka High Court in the case of Synopsis International Ltd. 2112 Taxmann.com 454.

14. The Hon'ble Supreme Court in the case of Engineering Analysis Center of Excellence Pvt Ltd. [2021] 432 ITR 471 has considered the

decision of the Hon'ble High Court of Karnataka [supra] at para 103 of its order and at Para 105 has observed as under:

> "105. The reasoning of the High Court of Karnataka in *Synopsis International Old Ltd. (supra)* does not commend itself to us. First and foremost, as held in *Swastik Tobacco Factory (supra),* the expression "in respect of, when used in a taxation statute, is only synonymous with the words "on" or "attributable to". Such meaning accords with the meaning to be given to the expression "in respect of' contained in Explanation 2(v) to section 9(l)(vz) of the Income-tax Act, and would not in any manner make the expression otiose, as has wrongly been held by the High Court of Karnataka."

15. The Hon'ble Supreme Court has settled the impugned quarrel in favour of the assessee and against the Revenue by concluding as under:

> 168. Given the definition of royalties contained in Article 12 of the DTAAs mentioned in paragraph 41 f this judgment, it is clear that there is no obligation on the persons mentioned in section 195 of the income-tax Act to deduct tax at source, as the distribution agreements/EULAs in the facts of these cases do not create any interest or right in such distributors/end-users, which would amount to the use of or right to use any copyright. The provisions contained in the Income-tax Act (section 9(l)(vi), along with

explanations 2 and 4 thereof), which deal with royalty, not being more beneficial to the assessees, have no application in the facts of these cases.

169 Our answer to the question posed before us, is that the amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/suppliers, as consideration for :he resale/use of the computer software through EULAs/distribution agreements, is not the payment of royalty for the use of copyright in the computer software, and that the same does not give rise to any income taxable in India, as a result of which the persons referred to in section 195 of the Income-tax Act were not liable to deduct any TDS under section 195 of the Income-tax Act. The answer to this question will apply to all four categories of cases enumerated by us in paragraph 4 of this judgment.

170. The appeals from the impugned judgments of the High Court of Karnataka are allowed, and the aforesaid judgments are set aside. The ruling of the AAR in Citrix Systems (AAR) *(supra)* is set aside. The appeals from the impugned judgments of the High Court of Delhi are dismissed.

16. Considering the facts of the case in hand in totality in light of the judgment of the Hon'ble Supreme Court,, we set aside the findings of the ld. CIT(A) and direct the Assessing Officer to delete the impugned addition.

17. In the result, both the appeals of the assessee in ITA Nos. 5171/DEL/2018 and 4302/DEL/2018 are allowed.

The order is pronounced in the open court on 08.03.2022.

Sd/-	**Sd/-**
[ANUBHAV SHARMA]	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 08th March, 2022.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

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ITAT, New Delhi

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