INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'I' BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President)]
and Sandeep S Karhail (Judicial Member)]

ITA No.6602/Mum/2018
Assessment Year: 2015-16

Mergermarket Limited., **…….. Appellant**
10 Queen Street Palace, London EC4R 1 BE,
United Kingdom [PAN: AAHCM8084E]

Vs.

Assistant Commissioner of Income Tax (IT)-3(2)(1)
Mumbai **…….Respondent**

Appearances:
Madhur Agarwal *for the appellant*
Milind Chavan *for the respondent*

Date of concluding the hearing : June 01, 2022
Date of pronouncement the order : August 30, 2022

O R D E R

Per Pramod Kumar, VP:

1. By way of this appeal, the assessee-appellant has challenged the correctness of the order dated 19th September 2018 passed by the Assessing Officer, in the matter of assessment under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 for the assessment year 2015-16.

2. In the first ground of appeal the assessee-appellant has raised the following grievance:-

> *1. Addition made in the computation of taxable income on account of subscription fees received by the Company*
>
> *1.1 On the facts and in the circumstances of the case and in law, the Hon'ble Dispute Resolution Panel – 3 ('Hon'ble DRP') erred in confirming the additions made by the Learned*

Assistant Commissioner of Income Tax (International Taxation) - 3(2)(1), Mumbai ('the Learned AO') of the subscription fees received by the Company from Indian customers amounting to INR 3,63,63,554.

1.2 On the facts and in the circumstances of the case and in law. the Hon'ble DRP/Learned AO erred in holding the receipts from subscription fees as income by way of royalty under the Income tax Act, 1961 ('the Act') as well as the Double Taxation Avoidance Agreement between India and UK (Tax Treaty').

1.3 The Appellant prays that the subscription fees received by the Appellant be held as not in the nature of Royalties under the Act as well as Article 13(3) of the Tax Treaty.

3. When the matter came up for hearing before us, learned representative fairly agree that the issue in appeal is squarely covered by a co-ordinate bench decision in the case of ***IMS AG vs DCIT (ITA No. 6445/Mum/2016 order dated 13th July 2020),*** even though learned Departmental Representative vehemently rely upon the stand of the authorities below. In the said order the co-ordinate bench, and speaking through one of us *(i.e. the Vice President), inter alia,* has observed as follows:

*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.

4. We see no reasons to take any other view of the matter accordingly respectfully following the view of the co-ordinate bench we uphold the plea of the assessee and direct the Assessing Office to delete the impugned addition of Rs. 3,63,63,554/-

5. Ground no. 1 is thus allowed.

6. In ground no. 2 the assessee has raised the following grievance:-

2. Short credit of Tax Deducted at Source ('TDS')

2.1 On the facts and circumstances of the case, and in law, the Learned AO has erred in not granting TDS credit to the extent of INR 2,52,483.

2.2 The Appellant prays that the Learned AO be directed to grant full TDS credit of INR 2,52,483 as claimed by the Appellant in the return of income.

7. The learned representative fairly agree that the matter may be restored to the file of the Assessing Officer for adjudication *de novo* by way of a speaking order after giving a reasonable opportunity of hearing to the assessee in accordance with the law. We therefore order so. The matter thus stand restored to the file of the Assessing Officer for fresh adjudication, by way of a speaking order.

8. Ground no. 2 is thus allowed for statistical purposes.

9. In ground 3 the assessee has raised the following grievance:-

3. Incorrect levy of interest under section 234A and 234B of the Act

3.1 On the facts and circumstances of the case, and in law, the Learned AO has erred in levying interest of INR 6,28,898 and INR 15,53,748 under section 234A and under section 234B respectively of the Act.

3.2 The Appellant prays that the Learned AO be directed to delete the interest levied under section 234A and under section 234B of the Act.

10. In view of the fact that ground no 1 has been allowed and the impugned taxability is thus set aside, this grievance becomes infructuous and dismissed as such.

11. Ground no 3 is thus dismissed as infructuous.

12. In the result, the appeal is allowed in the terms indicate above. Pronounced in the open court today on the 30th of August 2022

Sd/-	Sd/-
Sandeep S Karhail	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 30th day of August, 2022

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

By order

Assistant Registrar/Sr. PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai