IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'D' NEW DELHI

BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA No.7347/Del/2019
Assessment Year: 2016-17

M/s. Uptodate Inc., 10th Floor, Building No. 10, Phase-II, DLF Cyber City, Gurgaon	**Vs.**	DCIT, Circle-3(1)(1), Intl. Taxation, New Delhi
PAN :AABCU1828Q		
(Appellant)		**(Respondent)**

Appellant by	Sh. Salil Kapoor, Advocate Ms. Ananya Kapoor, Advocate Sh. Vibhu Jain, Advocate Sh. Amarbir Singh Walia, CA
Respondent by	Sh. Sanjay Kumar, Sr. DR

Date of hearing	17.02.2023
Date of pronouncement	28.02.2023

ORDER

PER SAKTIJIT DEY, JM:

This is an appeal by the assessee challenging the order dated 25.06.2019 passed by learned Commissioner of Income Tax (Appeals)-43, New Delhi, pertaining to assessment year 2016-17.

2. Though, the assessee has raised multiple grounds, however, the core issue arising for consideration is, whether the amount received by the assessee for allowing access to online database of journals and books is in the nature of royalty under section

9(1)(vi) of the Income-tax Act, 1961 (for short 'the Act') and Article 12 of India – United States of America (USA) Double Taxation Avoidance Agreement (DTAA).

2. The relevant facts relating to this issue are, the assessee is a non-resident corporate entity incorporated in USA and a tax resident of USA. For the assessment year under dispute, the assessee filed its return of income on 30.11.2016 declaring income of Rs.18,71,520/-. In course of assessment proceeding, the Assessing Officer, after calling for and examining various information from the assessee, noticed that during the year, the assessee has received an amount of Rs.3,52,84,277/- from customers in Indian for providing access to online data base created by the assessee. Noticing that the assessee has not offered this income for taxation, the Assessing Officer called upon the assessee to explain as to why the amount received, being in the nature of royalty, should not be brought to tax. In reply to the show-cause notice issued by the Assessing Officer, the assessee furnished a detailed submission. Vehemently opposing taxability of the amount received assessee pleaded that while granting access to the online database it has not transferred any copyright or licence. Therefore, the amount received is not in the nature of

royalty, either under the treaty provisions or under the provisions of the Act. The Assessing Officer, however, was not convinced with the submissions of the assessee. Referring to the definition of royalty under Explanation 2 to section 9(1)(vi) of the Act, the Assessing Officer observed that the assessee has transferred the use or right to use of a copyright. Further, he observed that the amount received would even fall under the definition of royalty under Article 12(3) of India – USA DTAA.

3. While coming to such conclusion, the Assessing Officer strongly relied upon the decision of the Hon'ble Karnataka High court in case of CIT Vs. Samsung Electronics Pvt. Ltd. (2011) 16 taxmann.com 141 (Ker.). Thus, ultimately, the Assessing Officer treated the amount received as royalty and brought it to tax by applying the rate of 15% as per Article 12 of India – USA DTAA. Though, the assessee contested the aforesaid decision of the Assessing Officer by filing appeal before learned Commissioner (Appeals), however, learned Commissioner (Appeals) upheld the addition.

4. Before us, learned counsel appearing for the assessee submitted that the assessee has collated information available in public domain in relation to healthcare and created a database.

The assessee allows access to database from customers across the world, including India on subscription basis. He submitted, the database is the intellectual property of the assessee and copyright is attached to the database. He submitted, by making available the centralized data to customers for a consideration, the assessee has not transferred any right to use of the copyright in favour of the customers. He submitted, the payments received by the assessee for accessing data/information cannot be characterized as royalty, as, while giving access to the database, the user does not get any copyright in the content of the database. The customer merely acquires a right to view information online or to access the database and there is no transfer, including licensing of any right in respect of database. He further submitted, the data is otherwise available in public domain and the only value addition the assessee has made is like analysis, indexing, description and appending notes for facilitating easy access. He submitted, by allowing access to the database the assessee has not given any use or right to use of any industrial, commercial or scientific equipment. Thus, he submitted, the amount received by the assessee cannot be treated as royalty under Article 12(3) of India – USA DTAA. Further, he

submitted, though the departmental authorities relied upon the decision of the Hon'ble Karnataka High Court in case of CIT Vs. Samsung Electronic Pvt. Ltd. (surpa), however, the aforesaid decision of the Hon'ble Karnataka High Court has been reversed by the Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence Pvt. Ltd. 432 ITR 471. Thus, he submitted, the addition should be deleted. In support of his contention, learned counsel relied upon the following decisions:

1. *Engineering Analysis Centre of Excellence (P.) Ltd. Vs. CIT [2021] 125 taxmann.com 42 (SC)*
2. *ITO Vs. Cadila Healthcare Ltd. (77 taxmann.com 309) (ITAT, Ahmadabad)*
3. *Reliance Corporate IT Park Ltd. Vs. Dy. Commissioner of Income Tax, Mumbai [ITA No.7300/Mum/2016] [Mumbai-Trib.]*
4. *Elsevier Information Systems GmbH Vs. Dy. Commission of Income Tax (IT), Circle Mumbai [2019] 106 taxmann.com 401 (Mumbai – Trib.)*

5. Strongly relying upon the observations of the departmental authorities, learned Departmental Representative submitted, subscription received by the assessee allowing access to the online database amounts to royalty as in the process, the assessee has transferred use or right to use of copyright created by it in the database Thus, he submitted, the amount received has to be treated as royalty. In support, learned Departmental Representative relied upon the following decision:

1. *CIT Vs. Samsung Electronics Co. Ltd. (supra)*
2. *Gartner Ireland Ltd. Vs. DCIT, ITA No.6950/Mum/2017 and Another, dated 09.08.2019.*

6. We have considered rival submissions in the light of the decisions relied upon and perused the materials on record. As far as the activities of the assessee are concerned, there is no dispute that the assessee collates data relating to healthcare as available in public domain and has put them in one place by creating a database. Thus, the content which is put in the database is not created by the assessee but created by third parties, which the assessee has picked up from public domain and created a database. The only improvement the assessee has made in the database is like analysis, indexing, description, appending notes for facilitating easy access to the customers. For allowing access to the database to customers the assessee charges subscription fee. It is further observed from the facts on record, as per the terms of the subscription agreement; customers are only granted access to the contents of the database. However, they are not permitted to copy, print, reproduce, modify, translate, adapt or create derivative works based upon the licensed products. Customers are also prohibited to reverse engineer, decode,

decompile, disassemble or otherwise attempt to access or derive the source code or structural framework of the licensed products. They cannot access the licensed products for the purpose of developing, marketing, selling or distributing any product or service that competes with or includes features substantially similar to the licensed products. They cannot sell, loan, rent or lease access to the licensed products or use the licensed products as part of a service bureau or similar fee for service purposes. They cannot share usernames, passwords or any other security information for access to the licensed products. All right, title and interest in and to the licensed products, including all copyright and other intellectual property rights under United States of America and international laws treaties, remain with the assessee. The assessee is not obligated to update or revise the contents of the licensed products. The subscription agreement further provides that upon termination of all rights, products are required to be deleted by the licensee from any place of storage. Thus, from the aforesaid facts, it is clear that the assessee is neither the creator of the content put in the database, nor it has transferred any such non-existent right. Article 12(3) of India – USA DTAA defines royalty as under:

"3. The term "royalties" as used in this Article means:

(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, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof; 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 payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8."

7. As could be seen from the definition of royalty in the treaty, payment received 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, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof can be treated as royalty. Further, any payment received for the use of, or the right to use, any industrial, commercial, or scientific equipment subject to certain exception can be considered as royalty.

8. In the facts of the present appeal, undisputedly, the materials/contents available in the database of the assessee are collated from public domain and assessee certainly is not the creator of such content or material. The assessee has simply put the collated data in database in a user friendly manner. That being the factual position emerging on record, it cannot be said that in terms with Article 12(3) of the Treaty, the assessee has transferred right to use of any copyright of literary, artistic or scientific work or any other secret formula or process or information concerning industrial, commercial, scientific experience. Further, the assessee has not transferred right to use of any industrial, commercial, or scientific equipment as the subscriber are only granted access to online database. By way of illustration, we may observe that various law journals have created online database by collating judgments/orders of courts, tribunals etc. and access is allowed to subscribers upon payment of subscription. However, by allowing such access there is no transfer of right to use of any copyright. Further, the terms of the agreement, as discussed earlier, restricts the subscribers from exploiting or modifying the contents. Thus, it is very much clear, only limited right of access to the database was granted to

customers on subscription basis. Therefore, in our view, the amount received will not fall within the ambit of royalty as defined under Article 12(3) of the tax treaty. It is relevant to observe, while treating the subscription fee received by the assessee as royalty, the Departmental Authorities have heavily relied upon the decision of the Hon'ble Karnataka High Court in case of CIT Vs. Samsung Electronics Co. Ltd. (supra). The other decision cited by learned Departmental Representative has simply relied upon the decision rendered in case of Samsung Electronics Co. Ltd. (supra). However, the decision of the Hon'ble Karnataka High Court stands recovered by the decision of Hon'ble Supreme Court in case of Engineering Analysis (supra)

9. On the contrary, the decisions cited by learned counsel for the assessee squarely apply to the facts of the present appeal. In fact, in our view, the issue is no more res-integra in view of the ratio laid down by the Hon'ble Supreme Court in case of Engineering Analysis Centre of Excellence (P.) Ltd. (supra). However, for the sake of completeness, we must observe, while deciding identical issue in case of assessee's sister concern, the Tribunal in case of Ovid Technology Inc. Vs. DCIT [ITA

No.5171/Del/2018 and Ors., dated 08.03.2022] has held as under:

> *"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".*
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> *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.*
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> *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.*
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> *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.*
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> *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.*
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> *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."*

10. In view of the aforesaid, we hold that the amount received by the assessee, being not in the nature of royalty under Article 12(3) of the treaty, cannot be brought to tax in India in absence of a Permanent Establishment. Accordingly, we direct the Assessing Officer to delete the addition. The other grounds, being consequential or premature, are dismissed.

11. In the result, the appeal is allowed, to the extent indicated above.

Order pronounced in the open court on 28th February, 2023

Sd/-	***Sd/-***
(G.S. PANNU)	**(SAKTIJIT DEY)**
PRESIDENT	**JUDICIAL MEMBER**

Dated: 28th February, 2023.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi