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

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND DR. BRR KUMAR, ACCOUNTANT MEMBER

ITA No. 2350/Del/2022
Assessment Year: 2018-19

Elsevier Inc, New York C/o. Relx India Pvt. Ltd., 14th Floor, Tower-B, Building No. 10, DLF Cyber City, Gurgaon, Haryana PIN: 122002	**Vs.**	ACIT, Circle-1(2)(2), International Circle, Delhi
PAN :AADCE3074G		
(Appellant)		**(Respondent)**

Assessee by	Shri Rishabh Malhotra, AR
Department by	Shri Vijay Vazanta, CIT-DR

Date of hearing	18.04.2023
Date of pronouncement	27.04.2023

ORDER

PER SAKTIJIT DEY, JUDICIAL MEMBER:

Captioned appeal has been filed by the assessee challenging the final assessment order passed by the Assessing Officer under Section 143(3) read with section 144C(13) of the Income-Tax Act,1961 pertaining to assessment year 2018-19, in pursuance to directions of learned Dispute Resolution Panel (DRP).

2. The core issue arising in the appeal is whether the amount received by the assessee from Indian customers towards subscription fee is either in the nature of royalty or Fee for Technical Services (FTS) or Fee for Included Services (FIS).

3. Briefly, the facts relating to this issue are, assessee is a non-resident corporate entity incorporated in United States of America (USA) and a tax resident of USA. Admittedly, the assessee didn't have any Permanent Establishment (PE) in India. Basically, the assessee maintains a database of books, journals, material in the field of science, technology, life, health, physical and social sciences subject areas. The assessee provides eccess to such database to interested person on subscription basis. In the year under consideration, the assessee received subscription fee of Rs.1,91,21,570 for providing access to the database.

4. Before the Assessing Officer, assessee claimed that the amount not being in the nature of royalty/FTS/FIA either under the domestic law or under the India-USA Double Taxation Avoidance Agreement (DTAA) is not taxable in India. The Assessing Officer, however, did not find merit in the submissions of the assessee and treated the

subscription fee as royalty/FTS, both under the provisions of the Act as well as under the India-USA DTAA and brought it to tax. Accordingly, he framed the draft assessment order. Against the draft assessment order, assessee raised objections before learned DRP. However, learned DRP upheld the decision of the Assessing Officer.

5. Before us, learned counsel appearing for the assessee submitted, the issue is squarely covered by the decision of Authority for Advance Ruling and ITAT in case of sister concerns. In this context, he relied upon the following decisions:

i) Elsevier BV, In [2021] 432 ITR 251 (AAR-Mum);
ii) Elsevier Information System GmbH vs. DCIT (2019) 108 Taxmann.com 401 (Mum);
iii) RELX Inc. Vs. CIT – ITA No.1876 & 1877/Del/2022 dated 05.04.2023.

6. In reply, learned Departmental Representative, though, agreed that the decisions cited by the learned counsel for the assessee covers the issue in dispute, however, he submitted that those decisions have not considered two decisions of Hon'ble Karnataka High Court, wherein, receipts from similar nature of transactions have been held to be in the nature of royalty/FTS. In this context, he relied upon the following decisions:

i) CIT vs. Wipro Ltd. (2011) – 16 Taxmann.com 275 (Kar.);
ii) CIT vs. Infosys Technology Ltd. (2012) 17 Taxmann.com 115 (Kar,) .

7. In rejoinder, learned counsel for the assessee submitted that the decision cited by the learned Departmental Representative have been set aside by the Hon'ble Supreme Court and matters have been restored back to the Hon'ble High Court for fresh adjudication.

8. We have considered rival submissions and perused material on record.

9. Undisputedly, the assessee collects material/information in the field of Science, technology, medical information and product and services and created a database to store them. Assessee's products include printed books and journals and online database solution. The disputed revenue was earned by the assessee towards subscription fee for Indian subscribers for providing access to its science database, wherein, various information relating to the subject have been collated and stored. As per the assessee, the subscription fee received is in the nature of business income and in absence of a PE in India, is not taxable in terms of India-USA DTAA. The aforesaid submission of the assessee has not found favour with the departmental authorities. However, from the material placed before us, it is observed, while

deciding identical issue in case of assessee's sister concern, Elsevier Information System GmbH (supra), the co-ordinate Bench has held that the subscription fee received by the assessee is not in the nature of royalty or FTS. The observations of the Tribunal in this regard are as under:

> "10. We have considered rival submissions and perused material on record. We have also applied our mind to the decisions relied upon. Before we proceed to decide the nature of subscription fee earned by the assessee from Indian entities, whether fees for technical services/royalty or business profit, it is necessary to understand the activities carried on by the assessee for generating such income. Undisputedly, the assessee has created an online database named "reaxys.com" pertaining to chemical information which the users having interest in chemistry topic, substance data and preparation and reaction method can access for their own benefit and use. It is also not disputed that the data stored in the online database is collated by the assessee from articles printed in various journals on similar topics which are otherwise available to public on subscription basis. The data collated by the assessee from various journals are entered and stored in the database in a structured and user-friendly manner to enable the users to search and retrieve the data required by them and beneficial to them. The users of the online database can access it through regular web browsers such as Internet Explorer, Google Chrome or Firefox on payment of subscription fee. The customers and users are allowed to access the online database on a 24 hours basis from an agreed internet protocol range either authenticated via user name and password or via Internet Protocol (IP) number. Thus, it is evident, the database is accessible to the users through regular internet access and no particular software or hardware is required for accessing it. However, each customer/user has to enter into a subscription agreement with the assessee for accessing the database. While

accessing the database the customer/user can access, search, browse and view the subscribed products. On a perusal of a sample copy of the subscription agreement placed at Page–56 of the paper book it is to be seen that as per Clause–1.1 of the said agreement, the assessee grants non–exclusive and non–transferrable right to the subscriber to access and use the products and services identified in schedule–I. As per schedule–I, the product to be accessed by the subscriber is reaxys.com. Further, schedule–I of the subscription agreement provides that upon termination of the subscription agreement, the subscriber shall delete all stored copies of items from reaxys and document the same to assessee's reasonable satisfaction. By agreeing to such subscription, the authorized user/customer may access search and browse and view the subscribe product. Further, the customer or user can print, make electronic copies of and store for its exclusive use individual items from the subscribed products. Further, it can incorporate links to the subscribed products to the subscriber's intranet and internet websites provided the appearance of such link and/or statements accompanying such links shall be changed as per the request of the assessee. Clause 1.4 of the subscription agreement enlists the following restrictions on use of subscribed products.

> "1.4 Restrictions on Use of Subscribed Products. Except as may be expressly permitted in this Agreement, the Subscriber and its Authorized User may not;
>
> 1.4.1 abridge, modify translate or create any derivative work based on the Subscribed Products without the prior written permission of Elsevier, except to the extent necessary to make them perceptible on a computer screen to Authorized Users;
> 1.4.2 remove, obscure or modify in any way any copyright notices, other notices or disclaimers as they appear in the Subscribed Products; or
>
> 1.4.3 Substantially or systematically reproduce, retain or redistribute the Subscribed Products.

> Authorized Users who are independent contractions may use the Subscribed Products only for the purposes of the contracted work for the Subscriber."

11. Clause 1.5 of the agreement makes it clear that all right, title and interest in the subscribed products remain with the assessee and any unauthorized re–distribution of the subscribed products which may harm the assessee and its supplier is prohibited. Clause–2.3 of the agreement provides that the assessee reserves the right to withdraw from the subscribed products content that it no longer retains the right to provide or that it has reasonable grounds to believe is unlawful, harmful, false or infringing. As per clause–4 of the agreement, subscriber shall pay the subscription fee to the assessee as set forth in Schedule–1 within 30 days of the date of invoice. Clause–5.1 of the agreement stipulates the duration of agreement from 1st February 2010 to 30th June 2010 with an option for renewal of the agreement for an addition term upon mutual agreement.

12. Thus, on reading of the aforesaid important terms of the agreement it is very much clear that the assessee has created a database wherein the data relating to Chemistry are collated from various journals and articles and are stored in a structured and user friendly manner which is accessible to customers/users on subscription basis without conferring any exclusive or transferrable right on the customer/user. Further, the assessee retains its exclusive right and ownership over the intellectual property relating to the product and the users subscribers are specifically debarred from using the data in any manner other than for their own exclusive purpose. Keeping in view the aforesaid factual position, we need to examine whether the subscription fee received by the assessee from the customers in India for allowing access to the online database is transfer of right to use the copyright, hence, can be treated as royalty under the India–Germany Tax Treaty. The departmental authorities have held that while allowing access to use its online database i.e., reaxys.com the assessee has transferred the right to use the

copyright which is in the nature of a literary work, hence, to be treated as royalty. No doubt, the assessee being a tax resident of Germany is governed by India–Germany DTAA. Therefore, it is necessary to examine whether the subscription fee received by the assessee fits into the definition of royalty as provided under Artricle–12 of the India–Germany Tax Treaty. Article–12.1 of the Tax Treaty provides that royalty and fees for technical services arising in a contracting state and paid to a resident of the other contracting state may be taxed in the other state. As per the plain meaning of the aforesaid provision, the subscription fee paid to the assessee is ordinarily taxable in Germany. However, Article–12.2 also provides for taxation of royalty and fees for technical services in India subject to condition that the tax leviable shall not exceed 10% of the gross amount of royalty or fees for technical services. Article–12.3 of the Tax Treaty defines royalty in the following manner.

> "The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work, including cinematograph films or films or tapes used for radio or television broadcasting any patent, trade mark, cinematograph films or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience."

13. As per the aforesaid definition of royalty in the tax treaty, any amount received for use of or right to use of any copyright or literary, artistic or scientific work, etc., can be treated as royalty. In the facts of the present case, there is no dispute that the assessee has collated data from various journals and articles, which are otherwise available for subscription to the general public, and entered them into the database in structured manner. It is also clear from the terms of subscription agreement, the assessee has not transferred use or right to use of any copyright

of literary, artistic or scientific work to its subscribers. What the assessee has done is, it has allowed customers to access its database and utilize the information available therein for their use. Further, it is observed, the data available in assessee's database relates to the subject of chemistry and from the list of clients submitted in the paper book it is very much clear that they are either chemical or chemical related companies. There is no material on record which could even remotely demonstrate that while allowing the customer /users to the access the database, the assessee had transferred its right to use the copyright of any literary, artistic or scientific work to the subscribers. Further, from the invoices raised by the assessee, sample copies of which are placed in the paper book, it is noticed that the subscription is period based and further the subscriber may not even use the data stored in the database. That being the case, the payment made cannot be treated as royalty under Article–12(3) of the India–Germany Tax Treaty.

14. Having held so, at this juncture, it is necessary to look into some of the decisions governing the issue as cited by the learned Sr. Counsel for the assessee. The first decision which we may refer to is the decision of Authority for Advance Ruling in Dun & Brad Street Espana, S.A., (272 ITR 99), wherein the assessee concerned is maintaining a database of Business Information Reports (BIRs). BIR is a standardized product of Dun & Brad Street Espana, S.A., providing the following information in respect of a company:–

i) Factual information on the existence, operations, financial condition, management experience, line of business, facilities and locations of prospect;

ii) ii) Special Events as well as any suits, leans, judgments or previous data being bankrupts;

iii) iii) Banking relationship and accounts;

iv) iv) Parent company affiliated concern, subsidiaries branches and divisions, referred with name and D&B D–U–N–S number; and

v) v) A rating which would help to predict which prospect will pay slowly or not at all.

15. A customer/subscriber can access the data stored in the database by paying subscription. The Department held the subscription paid to Dun & Brad Street Espana, S.A., for accessing the data to be in the nature of royalty. The Authority for Advance Ruling after dealing with the issue ultimately concluded that the subscription received by Dun & Brad Street Espana, S.A., for allowing access to the database is not in the nature of royalty/fees for technical services. Following the aforesaid decision, the Tribunal, Ahmedabad Bench, in ITO v/s Cedilla Healthcare Ltd. [2017] 77 taxmann.com 309, while considering the nature of subscription paid to a U.S. based company viz. Chemical Abstract Services, which is in the same line of business and is stated to be the competitor of the assessee, held that the subscription paid for online access to the database system "scifinder" is not in the nature of royalty. The observations of the Tribunal while deciding the issue in favour of the assessee are as under:–

> "17. We find that as the treaty provision unambiguously requires, it is only when the use is of the copyright that the taxability can be triggered in the source country. In the present case, the payment is for the use of copyrighted material rather than for the use of copyright. The distinction between the copyright and copyrighted article has been very well pointed out by the decisions of Hon'ble Delhi High Court in the case of DIT v. Nokia Networks OY [2013] 358 ITR 259/212 Taxman 68/25 taxmann.com 225. In this case all that the assessee gets right is to access the copyrighted material and there is no dispute about. As a matter of fact, the AO righty noted that 'royalty' has been defined as "payment of any kind received as a

> consideration for the use of, or right to use of, any copyright of literary, artistic or scientific work" and that the expression "literary work", under section 2(o) of the Copyright Act, includes 'literary database' but then he fell in error of reasoning inasmuch as the payment was not for use of copyright of literary database but only for access to the literary database under limited non exclusive and non transferable license. Even during the course of hearing before us, learned Departmental Representative could not demonstrate as to how there was use of copyright. In our considered view, it was simply a case of copyrighted material and therefore the impugned payments cannot be treated as royalty payments. This view is also supported by Hon'ble Bombay High Court's judgment in the case of DIT (International Taxation) v. Dun & Bradstreet Information 18 Elsevier Information Systems GmbH Services India (P.) Ltd. [2011] 338 ITR 95/[2012] 20 taxmann.com 695."

16. The same view was again expressed by the Tribunal in DCIT v/s Welspun Corporation Ltd., [2017] 77 taxmann.com 165. If we examine the facts of the present appeal in juxtaposition to the facts of the decisions referred to herein before, it can be seen that the facts are almost identical and akin. In the referred cases the assessees were also maintaining databases of information collated from various journals and articles and allowed access to the users to use such material as required by them. Keeping in view the ratio laid down in the decisions (supra), the payment received by the assessee has to be held to have been received for use of copyrighted article rather than for use of or right to use of copyright.

17. Having held so, the next issue which arises for consideration is, whether the subscription fee can be treated as fees for technical services. As discussed earlier, it is evident that the assessee has collated data from various journals and articles and put them in a structured manner in the database to make it more user friendly and beneficial to the users/customers who want to access the database. The assessee has neither employed any

technical/skilled person to provide any managerial or technical service nor there is any direct interaction between the customer/user of the database and the employees of the assessee. The customer/user is allowed access to the online database through various search engines provided through internet connection. There is no material on record to demonstrate that while providing access to the database there is any human intervention. As held by the Hon'ble Supreme Court in CIT v/s Bharati Cellular Ltd., [2010] 193 taxman 97 (SC) and DIT v/s A.P. Moller Maersk A.S., [2017] 392 ITR 186 (SC), for providing technical / managerial service human intervention is a sin qua non. Further, Article–12(4) of India–Germany Tax Treaty provides that payment for the service of managerial, technical or consultancy nature including the provisions of services by technical or other personnel can be termed as fees for technical services. None of the features of fees for technical services as provided under Article 12(4) of the India– Germany Tax Treaty can be found in the subscription fee received by the assessee. Further, the Department has not brought any material on record to demonstrate that the assessee has employed any skilled personnel having knowledge of chemical industry either to assist in collating articles from journals / magazines which are publicly available or through them the assessee provides instructions to subscribers for accessing the online database. The assessee even does not alter or modify in any manner the articles collated and stored in the database. In the aforesaid view of the matter, the subscription fee received cannot be considered as a fee for technical services as well. By way of illustration we may further observe, online databases are provided by Taxman, CTR online, etc. which are accessible on subscription not only to professionals but also any person who may be having interest in the subject of law. When a subscriber accesses the online database maintained by Taxman/CTR online etc. he only gets access to a copyrighted article or judgment and not the copyright. Similar is the case with the assessee. Therefore, in the facts of the present case, the subscription fee received by the assessee cannot be treated as royalty under Artile–12(3) of India–Germany Tax Treaty."

10. Following the decision of the Tribunal, the Authority for Advance Ruling and Delhi Bench of the Tribunal have decided the issue in favour of two other sister concerns of the assessee. At this stage, we must observe, learned Departmental Representative has brought to our notice two decisions of the Hon'ble Karnataka High Court in case of CIT vs. Wipro Ltd. (supra) and CIT vs. Infosys Technology (supra) wherein contrary view has been expressed by the Hon'ble High Court. However, it is observed, while deciding the Special Leave Petitions filed by the concerned assessees, the Hon'ble Supreme Court has set aside the respective judgments of the Hon'ble Karnataka High Court and restored the matters back for fresh adjudication keeping in view the decision of the Hon'ble Supreme Court in case of Engineering Analgris Centre of Excellence Vs. CIT 222 3SCC 321. This is so because, while deciding the matters relating to Wipro Ltd. and in Infosys Technology Ltd., the Hon'ble Karnataka High Court followed its own decisions in case of CIT vs. Samsung Electronics Co. Ltd. 345 ITR 494 which stood reversed by the Hon'ble Supreme Court in case of Engineering Analysis. Centre of Excellence-Pvt. Ltd. (supra). Thus, considering the fact that the issue in dispute is

squarely covered by the decisions cited before us by the learned counsel for the assessee, we hold, the subscription fee received by the assessee from Indian customers is not in the nature of royalty/ FTS/FIS under the provisions of India-USA DTAA. Thus, the receipts being in the nature of business profit, in absence of a PE in India, they are not taxable.

11. In the result, the appeal is allowed.

Order pronounced in the open court on April, 2023.

Sd/-	***Sd/-***
(DR. BRR KUMAR)	**(SAKTIJIT DEY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: April, 2023.
Mohan Lal

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi