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

BEFORE SHRI SAKTIJIT DEY, VICE-PRESIDENT
AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA Nos.2416 & 3646/Del/2023
Assessment Years: 2020-21 & 2021-22

Coursera Inc., 381, East Evelyn Avenue, Mountain View, California, USA, 999999	**Vs.**	ACIT, Circle-1(2)(1), International Taxation, New Delhi
PAN :AAICC4141K		
(Appellant)		**(Respondent)**

Assessee by	Sh. Sachit Jolly, Advocate
Department by	Sh. Vijay B Vasanta, CIT(DR) Ms. Sabiha Rizwi, Sr. DR

Date of hearing	19.08.2024
Date of pronouncement	21.08.2024

ORDER

PER SAKTIJIT DEY, VICE-PRESIDENT

Captioned appeals have been filed by the assessee challenging the final assessment orders passed under section 143(3) read with section 144C of the Income Tax Act, 1961 (in short 'the Act'), pertaining to assessment years 2020-21, and 2021-22 in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. The dispute in the present appeals relates to taxability of certain amounts received by the assessee from Indian customers as Fee for Technical Services (FTS)/Fee for Included Services (FIS) in terms with section 9(1)(vii) of the Act and Article 12(4) of India – USA Double Taxation Avoidance Agreement.

3. For the sake of convenience, we will take up ITA No.2416/Del/2023 as the lead case.

4. Briefly the facts are, the assessee is a non-resident corporate entity incorporated in United States of America (USA) and a tax resident of USA. As stated, the assessee operates a global online learning platform, which offers anyone, anywhere access to online courses and degrees from leading universities and companies. For this purpose, the assessee has developed a proprietary platform to host multimedia courses for consumption by end-users. Through its platform, assessee offers online education/courses in various disciplines, including but not limited to management, arts, humanities, data analysis and philosophy etc. For this purpose, the assessee has entered into agreements with Indian customers including universities from outside India to provide access to its platform in India. The assessee had provided services to

individuals, educational institutions and corporates. For providing such services, the assessee had earned fees of Rs.75,66,52,591/-. In the return of income filed for the assessment year under dispute, the assessee had offered income of Rs.17,98,07,270/-.

5. However, as far as the receipts of Rs.75,66,52,591/-, the assessee claimed that such receipts are neither in the nature of royalty nor FIS, hence, not taxable in India. The Assessing Officer, however, was not convinced with the submission of the assessee. After verifying the agreements with one of the Indian customers, viz., Gandhi Institute of Technology and Management, the Assessing Officer observed that the assessee provides two types of services, such as, Content Services and User Services. He observed, under the User Services, the assessee provides (i) customized landing page featuring the Organization logo and selected courses, (ii) user engagement reports, (iii) payment solution(s) that allow users to seamlessly access premium course experiences and skip checkout, and (iv) enterprise-level user support. Whereas, Content Services means, access to assessee's course and/or Specialization certificate services, including access

to Course assessments and grades through online open content offerings.

6. The Assessing Officer observed, the assessee is not merely providing Content Services to the customers of India, but is also providing a whole range of "User Services", which are user specific, and involve a high degree of human intervention. According to the Assessing Officer, the assessee provides customized services to its clients. He observed, though the course content may be prepared by other educational institutions and not by the assessee, however, the fact that the content services and user services are being provided to Indian customers by the assessee and the completion certificate bears the logo of the educational institution as well as assessee, signifies that the training services are being provided by assessee itself. Thus, he held that the nature of services provided by the assessee is technical. He further held that while providing such services, the assessee makes available specialization, technical skill and know-how to its customers. Therefore, make available test is also satisfied in terms of Article 12(4) of the treaty. Insofar as assessee's contention that the receipts should fall within the

exception provided under Article 12(5) of the tax treaty, the assessee being an educational institution providing teaching facility, the Assessing Officer negated such contention by stating that the assessee is not an educational institution, rather an aggregation service provider, which brings the educational institutions and learners on one platform by using special cutting-edge technology and services.

7. The Assessing Officer also observed that there is a training element in provisioning of services as no content can be on-boarded without the training being given by the assessee about the features of that platform on how to use the platform for various functions and utilities. Thus, in the aforesaid premises, he ultimately concluded that the receipts are in the nature of FIS, while framing the draft assessment order. Against the draft assessment order, the assessee raised objections before learned DRP. While deciding the objections of the assessee, learned DRP held as under:

> ***"4.2.3 The Panel has considered the rival averments as mentioned above.*** *The Panel takes a note of the AO's remarks made at para no. 9.3 to 9.4 of the draft order by which he has attempted to substantiate that assessee is not only providing content services to the customer in India but also providing whole range of user services which involve a high degree of human intervention. The AO further states that there is an element of*

training involved with respect to the customer and the client and the basis of the information availed through the proceedings conducting by him u/s 133(6) of the Act

The Panel also takes a note of assessee's submission dated 14.02.2023 by which it has filed a copy of agreement with Gandhi Institute of Technology and Management which does not appear to be considered and discussed by the AO in the draft assessment order. The AO needs to factually examine the assessee's contention as to whether the terms and condition of this agreement do enable the assessee to make it service provider in hosting content services and user services in relation to courses developed by the educational institution and also enabling the assessee for providing technical services to its customer.

Accordingly, the AO is directed to verify the assessee's contention in light of the said agreement by passing a speaking and reasoned order. The Panel hastens to clarify that the AO shall not conduct any fresh inquiry in this regard; the verification shall be made on the basis of documents/submissions available on the assessment records. The assessee's objections in this regard are hereby, disposed off accordingly."

8. However, while passing the final assessment order, the Assessing Officer again treated the receipts as FIS under Article 12(4) of the treaty.

9. Before us, learned counsel appearing for the assessee submitted that the assessee is merely an aggregator of various contents and certification courses offered by different universities. He submitted, the assessee has only provided a single platform, wherein, various courses of different universities are put together and access is provided to customers through subscription. He submitted, except providing platform, the assessee is not at all

involved in creation of the Content. He submitted, the platform is fully automated without any human intervention. He submitted, so far as User Services are concerned, the assessee has only provided a customized landing page featuring the organization logo and selected courses. He submitted, online examinations/tests are conducted by the concerned universities and certificates are also issued by them. He submitted, the certificate merely contains the logo of the assessee along with that of the concerned university. He submitted, apart from providing the platform containing the contents created by various universities, the assessee has not provided any services of technical nature. He submitted, even assuming that services are of technical nature, however, while providing such services, the assessee has not made available any technical knowledge, know-how, skill etc. to the service recipient. Therefore, the receipts cannot fall within the ambit of Article 12(4) of India – USA DTAA. In support of such contention, learned counsel relied upon the following decisions:

1. *CIT Vs. Bharti Cellular Ltd. (2014) 6 SCC 401*
2. *CIT Vs. Tata Teleservices Ltd. (2023) 456 ITR 691 (Del)*
3. *CIT Vs. Bharti Airtel Ltd. (2024) 463 ITR 56 (Del)*
4. *CIT Vs. Bharti Airtel Ltd, SLP(C)No.1700-1701/2024*

5. *Elsevier Information systems GmbH Vs. DCIT, ITA No.1683/Mum/2015*
6. *Relx Inc. Vs. ACIT, ITA No. 1876 & 1877/Del/2022.*
7. *CIT Vs. Relx Inc. (2024) SCC Online Del 1314*

10. Learned Departmental Representative, on the other hand, strongly relied upon the observations of the Assessing Officer and learned DRP. He submitted, the assessee cannot call itself a mere aggregator of services as it provides User Services and training to the customers. Therefore, the receipts have to be treated as FTS/FIS. In this context, he drew our attention not only to the observations of the Assessing Officer, but also the terms and conditions of the agreement between the assessee and the Indian customers.

11. We have considered rival submissions in the light of decisions relied upon and perused the materials on record. Insofar as the activity of the assessee is concerned, it is established on record that the assessee provides a global online learning platform, wherein, various courses and degrees from leading universities and companies are provided. It is a fact on record that the contents of such courses and degrees are created by the concerned universities and companies and not by the assessee. The assessee acts as a mere facilitator between the

concerned university/companies and the customers who want to undertake the courses of the concerned university/companies. The assessee merely provides access to the contents of the universities/companies through the platform on receipt of fees.

12. In fact, the Assessing Officer in the draft assessment order has clearly observed that the assessee is not an educational institution but an aggregation service provider, which brings educational learning on one platform. He has further stated that the course contents were not created by the assessee, but by the educational institutions. The customers who want to undertake course/degree get access to the contents/study materials through the platform provided by the assessee. Tests/examinations are also conducted by the concerned universities and companies and not by the assessee. Certificate for completion of course/degrees are also issued by the concerned universities/companies along with the logo of the assessee. These facts clearly indicate that while providing access to various courses/degrees, the assessee does not provide services of technical nature to the customers. In fact, while disposing of the objections raised by the assessee against the draft assessment order, learned DRP has clearly

observed that the Assessing Officer has neither properly examined the agreement with Gandhi Institute of Technology and Management, nor has factually examined assessee's contention that the terms and conditions of the agreement do not make the assessee a technical service provider. However, while passing the final assessment order, the Assessing Officer has completely ignored the directions of learned DRP. This is evident from the following observations of the Assessing Officer in the final assessment order

> *"13. In response to the directions of Hon'ble DRP, the agreement of the assessee with GITAM was perused.* ***It is seen that the observations regarding the agreement of the assessee with GITAM has been discussed in the Draft assessment order (refer to para 8.2 and 8.3).*** *Accordingly, the final assessment order is being passed at total assessed income of Rs. 75,66,52,591/- taxable at as per provisions of the Income Tax Act, 1961 and applicable surcharge and cess. Necessary forms to be issued, applicable interest to be charged and credit of taxes, if any after verification from the ITD system are to be allowed. Penalty u/s 270A is being proposed to initiate as discussed in earlier paragraphs of the order. Detailed computation of tax payable and interest charged u/s 234A, 234B and 234C of the Act is being attached as part of the final order. Notice of demand is being issued."*

13. As could be seen from the highlighted portion of the observation of Assessing Officer, without properly implementing the directions of learned DRP, he has merely stated that the agreement with Gandhi Institute of Technology and Management

has been discussed in the draft assessment order. By these observations what the Assessing Officer implies is, learned DRP has issued directions without proper application of mind. This, in our view, is highly objectionable and against the provision contained under section 144C(13) of the Act.

14. Be that as it may, Assessing Officer's findings/observations on the role of assessee are self-contradictory. While on one hand, the Assessing Officer has acknowledged the fact that the assessee is an aggregation service provider and not a content creator, in the same breath, he says that assessee's contention that it is a mere aggregator of educational courses is not correct. The Assessing Officer has not brought on record any material to establish the fact that the assessee provides technical services through its online platform. Merely because the assessee has a customized landing page, it does not mean that the assessee provides technical services, that too, through human intervention. The Assessing Officer, in our view, has not been able to prove such fact. Even, assuming for argument's sake, the services provided by the assessee is of technical nature, that by itself would not be enough to bring such receipts within the purview of

Article 12(4) of India – USA DTAA, unless the make available condition is satisfied. Burden is entirely on the Revenue to prove that in course of rendition of services, the assessee has transferred technical knowledge, know-how, skill etc. to the service recipient, which enables him to utilize such technical knowledge, know-how, skill etc. independently without aid and assistance of the service provider.

15. In case of Elsevier Information Systems GmbH Vs. DCIT (supra), wherein identical nature of dispute was involved, the Coordinate Bench has held as under:

> *"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 licence. 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 Services India (P.) Ltd.*

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."

16. Similar view was expressed by another Coordinate Bench in case of Relx Inc. Vs. ACIT (supra). In our view, the ratio laid down in these decisions squarely apply to the facts of the present appeal. In view of the aforesaid, we hold that the receipts do not qualify as FIS under Article 12(4) of India – USA tax treaty.

17. Thus, our decision above, would apply mutatis mutandis to ITA No. 3646/Del/2023 as well.

18. In the result, the appeals are allowed.

Order pronounced in the open court on 21st August, 2024

Sd/-	***Sd/-***
(DR. B.R.R. KUMAR)	**(SAKTIJIT DEY)**
ACCOUNTANT MEMBER	**VICE-PRESIDENT**

Dated: 21st August, 2024.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi