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Subscription fees for online database not taxable as royalty or fees for technical services

Subscription fees for use of online database not taxable in India as royalty or fees for technical services

Facts of the case:

- Elsevier Information Systems GmbH (the Assessee), a tax resident of Germany, maintained an online database containing information / articles from various journals on chemistry topics, substance data and inputs on preparation and reaction methods, validated experimentally.
- The Assessee provided access to this online database to Indian customers and earned subscription fees from them. The Assessee filed a nil return of income, not offering these fees to tax in India.
- Key details regarding the online database of the Assessee as contained in the case law facts are provided below:
 - The data stored in the online database was collated by the Assessee from articles printed in various journals on similar topics which were available to public on subscription basis;
 - The data was entered and stored in the database in a structured and user-friendly manner which enabled customers to search and retrieve the data as required;
 - The database was accessible to customers using their login credentials, through regular internet access and no particular software or hardware was required for accessing it;
 - Each customer was required to enter into a subscription agreement with the Assessee for accessing the online database;
 - The Assessee granted non-exclusive and non-transferrable right to the customer to access and use the online database;
 - Upon termination of the subscription agreement, the customer was required to delete all stored copies of items and document this to the satisfaction of the Assessee;
 - The customer could print, make electronic copies of and store for its exclusive use, individual items from the online database;
 - The customer was restricted to abridge, modify, translate or create any derivative work based on the online database, without prior written permission of the Assessee;
 - The customer was restricted to remove, obscure or modify in any way any copyright notices, other notices or disclaimers as appearing in the online database;
 - The customer was restricted to reproduce, retain or redistribute the online database;
 - All rights, title and interest in the online database remained with the Assessee and any unauthorised redistribution of the online database was prohibited.
- During the course of assessment proceedings, the Assessee submitted that the subscription fees received for providing access to the online database was not in the nature of royalty or fees for technical services under the Income-tax Act, 1961 and the India-Germany Double

Taxation Avoidance Agreement (tax treaty). In the absence of a Permanent Establishment (PE) in India as per Article 5 of the India-Germany tax treaty, it should not be taxable in India.

- The Assessing Officer (AO), however, after examining the agreements, invoices, etc, was of the view that the subscription fees received by the Assessee was in the nature of royalty / fees for technical services as per India-Germany tax treaty and hence, taxable in India.

Issue under consideration:

Whether the subscription fees received by the Assessee was in the nature of royalty or fees for technical services and hence, chargeable to tax in India?

Ruling of the Mumbai bench of the Tribunal:

Whether the subscription fees is in the nature of royalty

- The Tribunal held that there was no material on record to demonstrate that the Assessee had transferred its right to use the copyright of any literary, artistic or scientific work to the customers while allowing the customer to access the database.
- Therefore, placing reliance on similar past court precedents referred to by the Assessee¹, the Tribunal concluded that the subscription fees received by the Assessee is for the use of copyrighted article and not for the use of or right to use of copyright and hence, is not in the nature of royalty as per Article 12 of the India-Germany tax treaty.

Whether the subscription fees is in the nature of fees for technical services

- The Tribunal observed that the Assessee had neither employed any technical / skilled person to provide any managerial or technical service, nor was there any direct interaction between the customer of the online database and the employees of the Assessee.
- The Tribunal also observed that there was no material on record to demonstrate that there was any human intervention while providing access to the online database, which is sine qua non for providing technical / managerial services.
- Accordingly, the Tribunal concluded that the subscription fees received by the Assessee is not in the nature of fees for technical services as per Article 12 of the India-Germany tax treaty.

Accordingly, the Tribunal held that the subscription fees, being in the nature of business income, is not taxable in India in the absence of a PE.

Conclusion:

This ruling by the Mumbai Tribunal is a welcome judgement. It correctly differentiates between a copyright and a copyrighted article to determine whether a payment is royalty in nature. Further, it iterates the accepted principle that the element of human intervention should be present for a payment to be characterised as fees for technical services.

¹Dun & Brad Street Espana SA [2005] 272 ITR 99 (AAR), ITO vs Cedilla Healthcare Ltd [2017] 162 ITD 575 (Ahd), DCIT vs Welspun Corporation Ltd [2017] 55 ITR(T) 405 (Ahd)



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