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TAX FLASH NEWS

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Consideration for providing database access is not taxable as royalty under the India-US tax treaty

Recently, the Delhi Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Dow Jones & Company Inc.[1] (the taxpayer) dealt with the issue of taxability of consideration to provide access to databases. The Tribunal held that the payment received by the US based entity from an Indian entity for providing database access is not taxable as royalty under Article 12 of India-USA tax treaty (tax treaty) since such services do not result into transfer of a copyright. The revenue derived by the taxpayer from granting limited access to its database is akin to sale of book, where the purchaser did not acquire any right to exploit the underlying copyright. These rights do not create any right to transfer the copyright in the database. Therefore, the consideration paid for the use of such database, cannot be taxed as 'royalty'.

Facts of the case

The taxpayer, a US based entity engaged in the business of providing information products and services containing global business and financial news to organisations worldwide. It offers information via newspapers, newswires, websites, applications, newsletters, magazines, proprietary databases, conferences, and radio. The taxpayer appointed its Indian counterpart on a principal-to-principal basis for distributing its products in the Indian market. During the Assessment Year 2015-16, the taxpayer received a consideration for providing access of the database. The Assessing Officer (AO) treated these receipts taxable as 'Royalty' under Article 12 of tax treaty as well as under Section 9(1)(vi) of the Income-tax Act, 1961.

Tribunal's decision

A perusal of Article 12 of the tax treaty indicates that it brings within the ambit of the definition of 'Royalty' the payment made for use of, or the right to use any copyright of a literary, artistic, or scientific work. It was observed that only those payments that allow a payer to use/acquire a right to use copyright in literary, artistic or scientific work are covered within the definition of 'Royalty'.

The payments made for acquiring right to use product itself, without allowing any right to use the copyright in the product were not covered within the scope of 'Royalty'. The facts of the case in the present case indicates that there was no transfer of legal title in the copyrighted article as the same rests with the taxpayer. All rights, title and interest in the licensed software which was being claimed to be copyrighted article were the exclusive property of the taxpayer. Indian entity had no authority to reproduce the data in any material form, to make any changes 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 data. A perusal of the agreement with Indian entity indicates that Indian entity does not acquire any right in relation to the products. In determining whether or not a payment is for use of copyright, it is important to distinguish between 'a payment for right to use the copyright in a program' and 'right to use the program itself'.

In the present case, the revenue derived by the taxpayer from granting limited access to its database is akin to sale of book, where the purchaser does not acquire any right to exploit the underlying copyright. In the case of a book, the publisher of the book grants the purchaser certain rights to use the content of the book, which is copyrighted. The purchaser of the book does not acquire the right to exploit the underlying copyright. When the purchaser reads the book, he only enjoys the contents. Similarly, the user of the database does not receive the right to exploit the copyright in the database he only enjoys the product in the normal course of his business.

[1] Dow Jones & Company Inc. v. ACIT (ITA No. 7364/DEL/2018) – Taxsutra.com

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In the present case, the taxpayer granted access to its database to the Indian entity. Thus, the payments received cannot be said to be 'Royalty' under Article 12 of the tax treaty.

Our comments

The issue with respect to the taxability of consideration to access online database has been a matter of debate before the Courts/Tribunal.

The Karnataka High Court in the case of Wipro Ltd[2] held that the payment to a non-resident in order to obtain license to use database is taxable as royalty. Further, the Mumbai Tribunal in the case of Gartner Ireland Limited[3] held that the subscription fee paid to subscribe to a research product sold by a foreign company is taxable as royalty. However, in some of the cases Courts/Tribuna[4] have held that subscription fees paid for grant of license to the customers to have access to a copyrighted database is not taxable as royalty.

The Tribunal in the case of IMS AG[5] held that consideration received for non-exclusive and non-transferable access to the database and market research report is not taxable as 'royalty' under the India-Switzerland tax treaty.

The Delhi Tribunal in the present case has held that the payment received by the US based entity from the Indian entity for providing database access is not taxable as royalty since such services do not result into transfer of a copyright.

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[2] CIT v. Wipro Ltd [2011] 203 Taxman 621 (Kar)
[3] Gartner Ireland Ltd v. ADIT (ITA no. 7101/Mum/2010) (Mum)
[4] DIT v. Dun & Bradstreet Information Services India (P.) Ltd [2011] 338 ITR 95 (Bom), Factset Research Systems Inc [2009] 317 ITR 169 (AAR), Elsevier Information Systems GmbH [2019] 106 taxmann.com 401 (Mum), American Chemical Society [2019] 106 taxmann.com 253 (Mum), Mc Kinsey Knowledge Centre India (P.) Ltd. [2018] 92 taxmann.com 226 (Del), Cadila Healthcare Ltd. [2017] 77 taxmann.com 309 (Ahm), GVK Oil & Gas Ltd v. ADIT (ITA.No.317 & 318/Hyd/2012) (Hyd)
[5] IMS AG v. DCIT (ITA No.6445/Mum/2016) (Mum)

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