

TAX FLASH NEWS

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Payment for database access and market research report is not taxable as 'royalty' under the India-Switzerland tax treaty

Recently, the Mumbai Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of IMS AG¹ (the taxpayer) 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 (tax treaty).

Facts of the case

The taxpayer, a company incorporated, and fiscally domiciled, in Switzerland, is engaged in the business of providing market research report on pharmaceutical sector to its customers across the world at predetermined subscription prices. The company collects, processes and utilises the data and information, particularly in the field of medicine and pharmaceuticals for the delivery of reports through online IMS knowledge link. The taxpayer has entered into agreements with its customers for providing the review reports (IMS reports) setting out the details of modules required to be accessed by the customers. The IMS reports, based on the module selected, are statistical database compilations, providing geo-economic data, about a pharma molecule, providing insight into the connected issues relating to information and developments. The licence access so granted is a non-exclusive and non-transferable right.

During the Assessment Year 2013-14, the taxpayer received consideration for non-exclusive, non-transferable access to the database and IMS reports. The tax authorities relying on the decision of the Karnataka High Court in the case of Wipro Ltd² held that these receipts were taxable as 'royalty' under Section 9(l)(vi) of the Income-tax Act, 1961 (the Act) as well as under Article 12(3) of the tax treaty.

Tribunal's decision

Taxability of royalty

The Bombay High Court in the case of Dun and Bradstreet Information Services (DBIS) India Pvt Ltd³ while approving AAR ruling⁴ held that the payment to foreign subsidiaries for sale of Business Information Reports (BIR) did not attract the provisions of Section 195 of the Act. The AAR had held that when the payments are made by the DBIS for purchases of BIRs it is not a case of paying consideration for the use of or right to use any copyright of literary, artistic or scientific work or any patent trade mark or for information of commercial experience. Therefore, such payments do not fall within the term 'royalties' under Article 13(3) of the India-Spain tax treaty. BIR is a standardized product and the information that are provided in a BIR is publicly available. The taxpayer had rightly equated the transaction of sale of BIRs to sale of a book, which does not involve any transfer of intellectual property or a book.

The Tribunal observed that Article 12(3) of the tax treaty is verbatim the same as Article 13(3) of India-Spain tax treaty that AAR was dealing with. The conclusions so arrived at by the AAR, which now stand approved by the Bombay High Court, are equally applicable in the context of the India-Switzerland tax treaty as well. It is only elementary that when the taxpayer is not taxable under the provisions of the respective tax treaty, there was no occasion to examine the taxability under the Act, since the provisions of the Act apply only when these provisions are more favourable to the taxpayer vis-a-vis the provisions of the applicable tax treaty. Once the jurisdictional High Court has expressed a view, it cannot be open for the

¹ IMS AG v. DCIT (ITA No.6445/Mum/2016) – Taxsutra.com

² CIT v. Wipro Ltd [2011] 203 Taxman 621 (Kar)

³ DIT v. Dun and Bradstreet Information Services India Pvt Ltd [2012] 20 taxmann.695 (Mum)

⁴ Dun and S.A. Bradstreet Espana [2005] 272 ITR 99 (AAR)

Tribunal to be swayed by a contrary view expressed by any other High Court. No decision from the jurisdictional High Court, contrary to the above decision of High Court, was brought to the notice of the Tribunal. Accordingly, the addition made as royalty was to be deleted in the hands of the taxpayer.

Exclusion of lockdown period due to COVID-19 impact

In the present case, the appeal was concluded on 6 February 2020. However, this decision was pronounced on 13 July 2020, much after the expiry of 90 days from the date of conclusion of hearing. On perusal of Rule 34(5) of the Income Tax Appellate Tribunal Rules 1963, which deals with pronouncement of orders it has been observed that 'ordinarily' the order on an appeal should be pronounced by the Bench within 90 days from the date of concluding the hearing. This rule was inserted as a result of directions of jurisdictional High Court in the case of Shivsagar Veg Restaurant⁵ wherein it was observed that all the revisional and appellate authorities under the Act are directed to decide matters heard by them within a period of 3 months from the date case is closed for decision. The Tribunal observed that the expression 'ordinarily' has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond 90 days, was necessitated by any 'extraordinary' circumstances.

It has been observed that due to COVID-19 pandemic there was a lockdown all over the country and it was extended from time to time. The Supreme Court in an unprecedented order dated 6 May 2020 extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that in case the limitation has expired after 15 March 2020 then the period from 15 March 2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of the lockdown. Further, the Bombay High Court, has also taken similar types of steps. The extraordinary steps taken suo-moto by the jurisdictional High Court and the Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force.

The Tribunal observed that even without the words 'ordinarily', the period during which lockout was in force shall be excluded for the purpose of time limits set out in the Appellate Tribunal Rules, 1963.

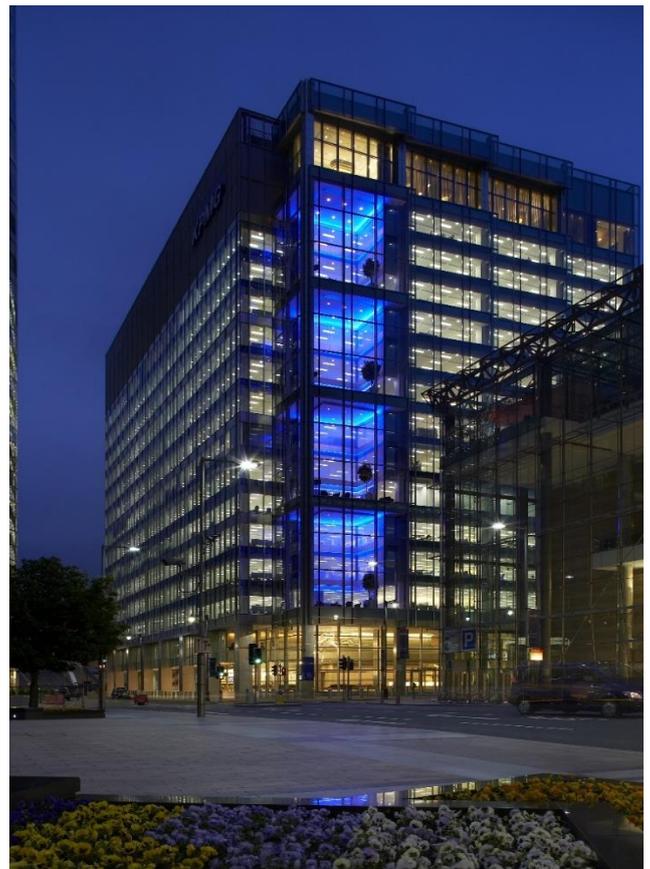
Our comments

The issue with respect to the taxability of payment of subscription charges for access to online database has been a subject matter of debate before the Courts/Tribunal.

The Karnataka High Court in the case of Wipro Ltd⁶ held that the payment to a non-resident in order to obtain license to use database maintained was to be regarded as royalty. Further the Mumbai Tribunal in the case of Gartner Ireland Limited⁷ held that the subscription fee paid to subscribe to a research product sold by a foreign company was taxable as royalty.

However, in some of the case the Courts/Tribunal⁸ have held that subscription fees paid for grant of license to the customers to have access to a copyrighted database was not taxable as royalty.

The Tribunal in the present case has relied on the Bombay High Court decision in the case of Dun & Bradstreet Information Services India (P.) Ltd and held that the consideration 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.



⁵ Shivsagar Veg Restaurant v. ACIT [2009] 317 ITR 433 (Bom)

⁶ CIT v. Wipro Ltd [2011] 203 Taxman 621 (Kar)

⁷ Gartner Ireland Ltd v. ADIT (ITA no. 7101/Mum/2010)

⁸ 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)

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