

# TAX FLASH NEWS

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## Subscription fees for online databases and journals are not taxable as royalty under the India-USA tax treaty as well as under the Income-tax Act

Recently, the Mumbai Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of American Chemical Society<sup>1</sup> (the taxpayer) dealt with the issue of taxability of income from providing access by subscription to online databases and subscription revenue from online journals. The Tribunal held that such services does not result into transfer of copyright and thus income from such services are not taxable as royalty under Article 12 of India-U.S. tax treaty (tax treaty) as well as under Section 9(1)(vi) of the Income-tax Act, 1961 (the Act).

### Facts of the case

The taxpayer, a U.S. based non-resident entity, engaged in promotion and development of knowledge in the field of chemistry. It has divisions and one of the divisions namely Chemical Abstracts Service (CAS) division, identifies, aggregates, and organises publicly disclosed chemistry and related scientific information. It offers online, web-based and desktop access to databases of scientific content to its customers. Search and analysis tools help customers in locating chemistry-related substance information in the databases. Publications (PUBS) division which reviews and publishes research work submitted by scientists worldwide. It is engaged in subscription of web-based and printed copies of research journals / e-journals in the subject of chemistry, to its subscribers. The taxpayer grants online/web-based access to e-journals, e-books, chapters, articles, proceedings etc.

The customers of the taxpayer would generally include organisations and individuals interested in the field of chemistry such as educational institutes, research organisations, companies, etc. The taxpayer also has

such customers in India. Accordingly, the taxpayer earned revenue as fee for providing access by subscription to online chemistry databases (CAS division) and subscription revenue from online journals (PUBS division). The taxpayer contended that none of these receipts would qualify as royalties or fees for included services under the tax treaty and accordingly, not liable to tax in India.

The Assessing Officer (AO) observed that similar revenues earned in Assessment Years (AYs) 2014-15 to 2016-17 were held to be royalty and taxable at 15 per cent under the tax treaty. It was observed that the business model as well as stream of revenues for the taxpayer remained the same. Therefore, during the year under consideration also, the receipts to be treated as royalty and liable to tax. The Dispute Resolution Panel (DRP) upheld the order of the AO.

### Tribunal's decision

The Tribunal observed that the issue in the present case were covered in taxpayer's favour by the earlier decision of the Tribunal in taxpayer's own case for AYs 2014-15 to 2016-17. The fact that the business-model as well as streams of income for the taxpayer remains the same in this year was undisputed. The relevant findings of the Tribunal in AYs 2014-15 were as follows:

#### ***Fees for providing access by subscription to online chemistry databases (CAS division)***

- Reference was made to the Copyright Act, 1957 and observed that a person can be said to have acquired a copyright or the right to use the copyright in a computer software or database where he is authorised to do all or any of the acts as per the definition of the term 'copyright' under Section 14 of the Copyright Act, 1957.

<sup>1</sup> American Chemical Society v. ACIT (ITA No.1030/Mum/2021) – Taxsutra.com

- Mere access to that work or permission to use the work cannot imply that the payer is paying for use or right to use the copyright. When no copyright was acquired by the payer, the question of using it or getting a right to use it does not arise.
- The transfer of a copyrighted right means that the recipient has a right to commercially exploit the database/software, e.g., reproduce, duplicate or sub-license the same; such payments may be classified as royalty. However, in the present case, no such rights in database or search tools were acquired by the customers.
- The user of the copyrighted software does not receive the right to exploit the copyright in the software; he only enjoys the product/benefits of the product in the normal course of his business.
- The customers of the taxpayer only enjoy the benefits of using software and do not acquire the right to exploit any copyright in this software. The difference between a copyright and a copyrighted article in context of software has been brought out very clearly by the Supreme Court of India in the case of Tata Consultancy Services<sup>2</sup>.
- Accordingly, the income earned by the taxpayer from the Indian Customers with respect to the subscription fees for CAS cannot be taxed as royalty as per Section 9(1)(vi) of the Act as well as Article 12(3) of the tax treaty.
- Further, the customers do not get any rights to the journal or articles therein. They can only view the article in the journal that they have subscribed to and cannot amend or replicate or reproduce the journal.
- Thus, the principles in the context of the income earned by way of CAS fee were squarely applicable to the subscription revenue received from customers of PUBS division for journals also, and accordingly PUBS fee also does not qualify as royalty under Section 9(1)(vi) of the Act as well as Article 12(3) of the tax treaty.

Facts being pari-materia the same in this year and therefore, relying on its earlier decisions of the Tribunal in taxpayer's own case, it was held that receipts from CAS division as well as from PUBS division could not be held as royalty and hence, not taxable in the hands of the taxpayer.

### Our comments

In database subscription related business, generally the business arrangement is such that the customer would be given a non-exclusive licence for access to the vendor's database on payment of an annual subscription fee. The issue that arises from a direct tax perspective is whether the payment of subscription charges to access such databases would be characterised as royalty income and would consequently trigger TDS implications.

The Karnataka High Court in the case of Wipro Ltd<sup>3</sup> 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 Limited<sup>4</sup> 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 cases the Courts/Tribunal<sup>5</sup> have held that subscription fees paid for grant of license to the customers to have access to a copyrighted database are not taxable as royalty.

The Tribunal in the instant case has held that since customers did not acquire copyright of database and journals, income earned by way of subscription fees did not qualify as 'royalty'.

### Subscription revenue from online journals (PUBS division)

- The journal provided by the PUBS division do not provide any information arising from taxpayer's previous experience.
- The taxpayer's experience lies in the creation of/maintaining such information online. By granting access to the journals, the taxpayer neither shares its experiences, techniques or methodology employed in evolving databases with the users, nor imparts any information relating to them.
- As is clearly evident from the sample agreements, all that the customers get is the right to search, view and display the articles (whether online or by taking a print) and reproducing or exploiting the same in any manner other than for personal use is strictly prohibited. Further, the customers do not get any rights to the journal or articles therein.
- All that the customers get is the right to search, view and display the articles (whether online or by taking a print) and reproducing or exploiting the same in any manner other than for personal use is strictly prohibited.

<sup>2</sup> Tata Consultancy Services v. State of Andhra Pradesh [2004] 271 ITR 401 (SC)

<sup>3</sup> CIT v. Wipro Ltd [2011] 203 Taxman 621 (Kar)

<sup>4</sup> Gartner Ireland Ltd v. ADIT (ITA no. 7101/Mum/2010)

<sup>5</sup> 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), IMS AG v. DCIT (ITA No.6445/Mum/2016)

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