IN THE INCOME TAX APPELLATE TRIBUNAL
"I" Bench, Mumbai

Before Shri Ramit Kochar, Accountant Member
and Shri Ravish Sood, Judicial Member

ITA No.6950/Mum/2017 & ITA No. 167/Mum/2018
(Assessment Years: 2013-14 & 2014-15)

Gartner Ireland Limited C/o B.S.R & Co., LLP Lodha Exellus, 1st Floor, Apollo Mills Compound; Mumbai – 400 011	Vs	Dputy Commissioner of Income Tax -2(3)(2), 17 Floor, Air India Building Nariman Point Mumbai – 400 011
PAN – AACCG2919B		
(Appellant)		**(Respondent)**

Appellant by: Shri Farrokh V. Irani, A.R.
Respondent by: Shri Nishant Somaiya, D.R

Date of Hearing: 07.08.2019
Date of Pronouncement: 09.08.2019

O R D E R

PER RAVISH SOOD, JM

The present appeals filed by the assessee are directed against the respective orders passed by the CIT(A)-56, Mumbai, dated 18.09.2017 and 16.10.2017, which in turn arises from the respective assessment orders passed by the A.O under Sec. 143(3) r.w.s 144C(3), dated 26.04.2016 and 26.12.2016 for A.Y 2013-14 and A.Y 2014-15, respectively. As a common issue is involved in the captioned appeals, therefore, they are being taken up and disposed off by way of a consolidated order. We shall first advert to the appeal of the assessee for A.Y 2013-14. The assessee has assailed the impugned order on the following effective grounds of appeal before us :

"Ground No. 1:- Erroneous treatment of Business income as Royalty income.

On the facts and circumstances of the case and in law, the Ld. DCIT has erred in treating and further the Honble CIT(A) has erred in confirming that the entire income earned by way of sale of online subscription based products amounting to Rs. 901,034,288/- by the appellant during the captioned year are taxable as "royalty" under section 9(1)(vi) of the Income-tax Act, 1961 and under Article 12 of India-Ireland Double taxation Avoidance Agreement.

Ground No. 2 :- Erroneous levy of interest under Section 234B of Rs. 79,15,262/-.

On the facts and circumstances of case and in law, the ld. DCIT has erred in levying interest under Section 234B of the Act amounting to RS. 79,15,262/- by treating the above income as Royalty income instead of Business income. Consequently, levy of interest would not be warranted.

Ground No. 3 : - Initiation of penalty proceedings under section 271(1)(c) of the Act

On the facts and circumstances of the case and in law, the ld. DCIT has erred in initiating penalty proceedings under Section 271(1)(c)."

2. Briefly stated, the assessee viz. Gartner Ireland Limited is a company incorporated in the Republic of Ireland and is a resident of Ireland. The assessee is engaged in the business of distributing Gartner Groups Research Products in form of subscriptions, both in Ireland, and also through its distributors in the territories where the group does not have a local presence. The aforesaid research products consists of qualitative research and analysis that clarifies decision making for Information Technology buyers, users and vendors and helps clients stay ahead of IT trends. The areas of industry covered in such subscriptions include technology and telecommunications including hardware, software and systems, services, IT management, market data and forecasts and vertical industry issues. The various forms of research offered includes statistical analysis, growth protections and market share rankings of suppliers and vendors of IT manufacturers and the financial community. As is discernible from the orders of the lower authorities, the assessee sells subscriptions to its Indian customers/subscribers, on the basis of which they are able to access Gartner's research products over the internet from its data server which is located outside India. The research subscriptions at

the nascent stage were delivered through print media and other physical means of delivery, however, with the passage of time the clients would now access the research products over the internet at www.gartner.com. The assessee enters into a 'Service agreement' with its Indian customers for each Gartner service purchased, setting out the details of the services to be provided and the subscription fees applicable. Accordingly, the Indian subscribers would pay the subscription/access fees to the assessee as per the terms of the 'Service agreement'. The assessee during the year under consideration viz. A.Y 2014-15 had received gross subscription fees of Rs. 90,10,34,288/-.

3. The assessee company had e-filed its return of income for A.Y 2013-14 on 27.09.2012, declaring its total income at Rs. Nil. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) of the Act. Thereafter, the assessee filed a revised return of income on 30.03.2015. A draft assessment order was passed by the A.O u/s 143(3) r.w.s 144C(1), dated 25.02.2016. However, as the assessee submitted that it would prefer to file an appeal before the CIT(A), therefore, the A.O proceeded with and passed the final assessment order u/s 143(3) r.w.s 144C(3), dated 26.04.2016.

4. During the course of the assessment proceedings it was observed by the A.O that it was the claim of the assessee that as it did not have any fixed place of business or permanent establishment in India, therefore, the subscription fees received by it from the Indian customers/subscribers was not liable to be taxed in India. However, the A.O was not persuaded to subscribe to the said view of the assessee. The A.O held a conviction that the subscription fees was liable to be taxed in India as 'royalty' within the meaning of Sec.

9(1)(vi) of the Act and also Article 12 of the India-Ireland Double Taxation Avoidance Agreement (for short "DTAA"). Accordingly, the A.O recharacterised the amount of Rs. 90,10,34,288/- received by the assessee from the Indian customers/subscribers as "royalty". In order to fortify his conviction that the subscription fees was to be assessed as 'royalty', it was observed by the A.O, that the assessee as the copyright owner of the research products exploited copyright protection vigorously. On the basis of his aforesaid deliberations the A.O held a conviction that the subscription receipts of the assessee were liable to be assessed as 'royalty' under all pervasive provisions of Income-tax Act r.w Copyright Act r.w India-Ireland DTAA. The A.O while concluding as hereinabove, observed, that the Hon'ble High Court of Karnataka in the case of Wipro Ltd. Vs. ITO (2011) 203 Taxman 621 (Kar), had concluded, that the subscription fees paid by Wipro Limited to the Gartner group for license to use the Gartner database was "royalty". Also, he observed that the Tribunal in the assesses own case for A.Y 2007-08 viz. M/s Gartner Ireland Limited Vs. The Asst. Director of Income-tax (International taxation), Mumbai [ITA No. 7101/Mum/2010; dated 24.07.2013], had decided the issue against the assessee and had concluded that the subscription fees received by the assessee fell within the realm of the definition of "royalty", and was thus taxable under the Act and also the India-Ireland DTAA. Accordingly, on the basis of his aforesaid deliberations the A.O assessed the subscription fees of Rs. 90,10,34,288/- as 'royalty', and subjected the same to tax @10% on gross basis as per Article 12 of the India-Ireland DTAA.

5. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The CIT(A) observed that the Tribunal while disposing off the appeals of the assessee for the preceding years, viz. A.Ys 2003-04, 2005-06, 2008-09, 2009-10 and 2010-11, wherein identical facts were

involved, had vide its consolidated order passed in ITA Nos. 2619 to 2622/Mum/2014 and ITA No. 4534/Mum/2014; dated 21.09.2016, had upheld the recharacterisation of the subscription fees as 'royalty' by the A.O. On the basis of his aforesaid observations the CIT(A) upheld the order of the A.O and dismissed the appeal.

6. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The Ld. Authorised representative (for short 'A.R') for the assessee, at the very outset of the hearing of the appeal, fairly admitted, that the issue involved in the present appeal was squarely covered against the assessee by the orders of the Tribunal in the assesses own case for the preceding yeas ,viz. A.Ys 2003-04, 2005-06, 2008-09, 2009-10 and 2010-11, in ITA Nos. 2619 to 2622/Mum/2014 and ITA No. 4534/Mum/2014; dated 21.09.2016. The ld. A.R drew our attention to the orders of the Tribunal in the assesses own case for the aforementioned preceding years.

7. Per contra, the ld. Departmental representative (for short 'D.R') endorsed the said factual position as stated by the ld. Counsel for the assessee.

8. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record. As is discernible from the orders of the lower authorities, the recharacterisation of the subscription fees received by the assessee company from the Indian customers/subscribers as 'royalty', by the A.O, had been upheld by the Tribunal in the assesses own case for the preceding years. For the sake of clarity, we shall briefly cull out the view taken by the Tribunal while disposing off the appeals of the assesse in the preceding years. Initially, the Tribunal while disposing off the appeal of the assessee for A.Y 2004-05 in ITA

No. 1482/Mum/2008, dated 30.07.2010, had relied on the order of ITAT, Bangalore in the case of **Wipro Limited vs. ITO (2005) 278 ITR (AT) 57 (Bang)**, and had concluded that the subscription fees received from the Indian subscribers shall not be taxed as 'royalty' in India, but was to be treated as 'business income', which could not be taxed in India. However, the decision in the case of Wipro Limited (supra) was reversed by the **Hon'ble High Court of Karnataka** in **Wipro Ltd. Vs.. ITO (2011) 203 Taxman 621 (Kar)**, and it was held by the High Court that the subscription charges paid by Wipro Limited to Gartner group was 'royalty' under the provisions of the domestic tax laws of India as well as under the India-Ireland DTAA. On the basis of the aforesaid order of the **Hon'ble High Court of Karnataka** in the case of **Wipro Ltd. Vs.. ITO (2011) 203 Taxman 621 (Kar)**, the revenue had assailed the order of the Tribunal for A.Y 2004-05 before the Hon'ble High Court of Bombay, which had admitted the appeal, vide its order dated 16.04.2014 .

9. Subsequently, the Tribunal while disposing off the appeal of the assessee for A.Y 2007-08 vide its order passed in ITA No. 7101/Mum/2010, dated 24.07.2013, placed reliance on the decision of the Hon'ble High Court of Karnataka in the case of Wipro Ltd. Vs.. ITO (2011) 203 Taxman 621 (Kar), and had concluded, that the subscription fees received by the assessee would constitute 'royalty'. The Tribunal in its order had observed as under:

> "6. We are not convinced with the submissions advanced on behalf of the assessee for the obvious reason that the Hon'ble Karnataka High Court considered a case in which Wipro Limited made payment to the assessee and the same has been held to be in the nature of `royalty', liable for deduction of tax at source u/s 195. The Hon'ble High Court noticed in the penultimate para of the judgment that : "the payment made by the respondent to M/s.Gartner, which is a non-resident company, would amount to `royalty' and wherefor, there is a statutory obligation on the part of the respondent to make tax deduction ……". We are unable to see as to how the contrary view expressed by the Tribunal in three orders can be adopted in the case of the payee-assessee, when the Hon'ble Karnataka High Court has rendered

> judgment on the very same transaction in the hands of the payers. If the argument tendered by the ld. AR is accepted, it would amount to delivering an opinion contrary to that of the Hon'ble High Court, which is obviously out of question. We, therefore, do not find any substance in the arguments put forth by the ld. AR. The impugned order is upheld."

Thereafter, the Tribunal while disposing off the appeals of the assessee for A.Ys 2003-04, 2005-06, 2008-09, 2009-10 and 2010-11, in ITA Nos. 2619 to 2622/Mum/2014 and ITA No. 4534/Mum/2014; dated 21.09.2016, had with a purpose of maintaining consistency followed its earlier order for A.Y 2007-08, and had upheld the view therein taken. As is discernible from the case law compilation of the assessee, the Tribunal had thereafter while disposing off its appeal for A.Y 2011-12, in ITA No. 497/Mum/2015, dated 12.04.2017 and A.Y 2012-13, in ITA No. 195/Mum/2016, date 07.11.2017 had followed its earlier view, and had concluded, that the subscription fees received by the assessee from the Indian customers/subscribers was to be brought to tax as 'royalty' in the hands of the assessee.

9. Admittedly, the issue and also the facts and the circumstances in the present appeal of the assessee remains the same as were involved in its appeals for the preceding years. Accordingly, finding ourselves to be in agreement with the view taken by the Tribunal while disposing off the appeal of the assessee for the aforementioned years viz. A.Y 2007-08 in ITA No. 7101/Mum/2010, dated 24.07.2013; A.Ys 2003-04, 2005-06, 2008-09, 2009-10 and 2010-11, in ITA Nos. 2619 to 2622/Mum/2014 and ITA No. 4534/Mum/2014, dated 21.09.2016; A.Y 2011-12 in ITA No.497/Mum/2015, dated 12.04.2017; and A.Y 2012-13 in ITA No. 195/Mum/2016, dated 07.11.2017, we respectfully follow the same. Accordingly, we uphold the view taken by the CIT(A) that the A.O had rightly concluded that the subscription fees of Rs. 90,10,34,288/- received by the assessee from its Indian customers/subscribers was to be assessed as 'royalty' as per the provisions of Sec. 9(1)(vi) of the Act r.w Article 12 of the India-Ireland

DTAA and subjected to tax @10% on gross basis as per Article 12 of the India-Ireland DTAA.

10. The appeal filed by the assessee is dismissed.

A.Y 2014-15

ITA No. 167/Mum/2018

11. We shall now advert to the appeal of the assessee for A.Y 2014-15. The assessee has assailed the impugned order on the following effective grounds of appeal before us :

> "Ground No. 1:- Erroneous treatment of Business income as Royalty income.
>
> On the facts and circumstances of the case and in law, the Ld. Deputy Commissioner of Income-tax- International Taxation 2(3)(2) [Ld. DCIT] has erred in treating and further the Honble Commissioner of Income-tax (Appeals)[CIT(A)] has erred in confirming that the entire income earned by way of sale of online subscription based products amounting to Rs. 126,50,63,210/- by the appellant during the captioned year are taxable as "royalty" under section 9(1)(vi) of the Income-tax Act, 1961 and under Article 12 of India-Ireland Double taxation Avoidance Agreement.
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> Ground No. 2 :- Erroneous levy of interest under Section 234B of Rs. 79,15,262/-.
>
> On the facts and circumstances of case and in law, the ld. DCIT has erred in levying interest under Section 234B of the Act amounting to Rs. 89,75,241/- by treating the above income as Royalty income instead of Business income. Consequently, levy of interest would not be warranted.
>
> Ground No. 3 : - Initiation of penalty proceedings under section 271(1)(c) of the Act
>
> On the facts and circumstances of the case and in law, the ld. DCIT has erred in initiating penalty proceedings under Section 271(1)(c)."

12. Briefly stated, the assessee company had e-filed its return of income for A.Y 2014-15 on 30.09.2014, declaring its total income at Rs. Nil. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) of the Act. A draft assessment order was passed by the A.O u/s 143(3) r.w.s 144C(1), dated 23.11.2016. However, as the assessee submitted that it would prefer to file an appeal before the CIT(A), therefore, the A.O proceeded with and passed

the final assessment order vide his order u/s 143(3) r.w.s 144C(3), dated 26.12.2016.

13. During the course of the assessment proceedings it was observed by the A.O, that it was the claim of the assessee that as it did not have any fixed place of business or permanent establishment in India, therefore, the subscription fees received by it from the Indian customers/subscribers were not liable to be taxed in India. However, the A.O was not persuaded to subscribe to the said view of the assessee. The A.O held a conviction that the subscription fees was liable to be taxed in India as 'royalty' with the meaning of Sec. 9(1)(vi) of the Act and also Article 12 of the India-Ireland Double Taxation Avoidance Agreement (for short "DTAA"). Accordingly, the A.O recharacterised the amount of Rs. 126,50,63,206/- received by the assessee from the Indian customers/subscribers as "royalty". On the basis of his aforesaid deliberations the A.O was of the view that the subscription receipts of the assessee was liable to be assessed as 'royalty' under all pervasive provisions of Income-tax Act r.w Copyright Act r.w India-Ireland DTAA. The A.O while concluding as hereinabove, observed, that the **Hon'ble High Court of Karnataka in the case of Wipro Ltd. Vs. ITO (2011) 203 Taxman 621 (Kar)**, had concluded, that the subscription fees paid by Wipro Limited to Gartner group for license to use the Gartner database was "royalty". Also, it was noticed by him, that the Tribunal in the assesses own case for A.Y 2007-08 viz. **M/s Gartner Ireland Limited Vs. The Asst. Director of Income-tax (International taxation), Mumbai [ITA No. 7101/Mum/2010; dated 24.07.2013]**, had decided the issue against the assessee and had concluded that the subscription fees received by it fell within the realm of the definition of "royalty" and was taxable under the Act and also the India-Ireland DTAA. It was also noticed by him that the Tribunal while disposing off the appeals of the assessee

for A.Ys 2003-04, 2005-06, 2008-09, 2009-10 and 2010-11, had vide its order passed in ITA Nos. 2619 to 2622/Mum/2014 and ITA No. 4534/Mum/2014, dated 21.09.2016, had followed its earlier view and had concluded that the subscription charges received by the assessee fell within the ambit of 'royalty' and was taxable as per the Act/DTAA. Accordingly, on the basis of his aforesaid deliberations the A.O assessed the subscription fees of Rs. 126,50,63,206/- as 'royalty', and subjected the same to tax @10% on gross basis as per Article 12 of the India-Ireland DTAA.

14. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The CIT(A) observed that the Tribunal while disposing off the appeal of the assessee for A.Y 2007-08 in ITA 7101, dated 24.07.2013, had decided the issue against the assessee, and had concluded, that the subscription fees received by the assessee fell within the realm of the definition of "royalty" and was taxable under the Act and also the India-Ireland DTAA. Further, it was noticed by him that the Tribunal while disposing off the appeals of the assessee for A.Ys 2003-04, 2005-06, 2008-09, 2009-10 and 2010-11, had vide its consolidated order passed in ITA Nos. 2619 to 2622/Mum/2014 and ITA No. 4534/Mum/2014; dated 21.09.2016, wherein identical facts were involved, had upheld the recharacterisation of the subscription fees as 'royalty' by the A.O. On the basis of his aforesaid observations the CIT(A) upheld the order of the A.O and dismissed the appeal.

15. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. As the facts and the issue involved in the present appeal remains the same as were there before us in the appeal of the assessee for A.Y 2013-14 in ITA No. 6950/Mum/2017, therefore, our order therein passed shall apply *mutatis mutandis* for disposing the present appeal of the assessee for

A.Y 2014-15 in ITA 167/Mum/2018. Accordingly, we uphold the view taken by the CIT(A) that the A.O had rightly concluded that the subscription fees of Rs. 126,50,63,206/- received by the assessee from its Indian customers/subscribers was to be assessed as 'royalty' as per the provisions of Sec. 9(1)(vi) of the Act r.w Article 12 of the India-Ireland DTAA and subjected to tax @10% on gross basis as per Article 12 of the India-Ireland DTAA.

16. The appeal filed by the assessee is dismissed in terms of our aforesaid observations.

17. Resultantly, both the appeals of the assessee for A.Y 2013-14 and A.Y 2014-15 in ITA No. 6950/Mum/2017 and ITA NO. 167/Mum/2018, respectively, are dismissed in terms of our aforesaid observations.

Order pronounced in the open court on 09/08/2019.

Sd/-	Sd/-
(Ramit Kochar)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 09.08.2019
Ps. Rohit

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai.**