

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE**

**BEFORE SHRI GEORGE GEORGE K, VICE PRESIDENT AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

ITA No.37/Bang/2023
Assessment Year : 2016-17

M/s. Pluralsight LLC, 182N Union Avenue, Farmington, Utah, Foreign, United States. PAN : AAHCP 5337 K	Vs.	DCIT, ASMT, Circle – 2(1), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri. Dhanesh Bafna, CA
Revenue by	:	Dr. Satyasai Rath, CIT(DR), ITAT, Bengaluru.

Date of hearing	:	16.08.2023
Date of Pronouncement	:	21.08.2023

ORDER

Per George George K, Vice President:

This appeal at the instance of the assessee is directed against CIT(A)’s order dated 28.11.2023, passed under section 250 of the Income Tax Act, 1961 (hereinafter called ‘the Act’). The relevant Assessment Year is 2016-17.

2. The solitary issue that is argued is whether the CIT(A) is justified in confirming the addition of Rs.11,75,30,601/- received by assessee from the Indian customers as subscription revenue by treating it as “royalty” under section 9(1)(vi) of the Act and also under Article 12(3) of the tax treaty between India and USA (India – US DTAA).

3. Brief facts of the case are as follows:

Assessee is a foreign company incorporated in USA. It provides online technology learning platform on its website and earns subscriptions revenue by facilitating viewing of online videos by customers who can acquire business subscriptions for their employees or affiliates' employees. During the relevant Assessment Year, assessee was in receipt of subscription charges from its Indian customers to the tune of Rs.11,75,30,601/-. The said receipts were not offered to tax in the return of income filed by the assessee. The assessment was selected for scrutiny and notice under section 143(2) of the Act was issued to the assessee on 01.08.2017. During the course of assessment proceedings, assessee filed submissions in support of its contentions that the subscription earned by the assessee from its Indian customers were not taxable in India under the provisions of India-US DTAA as well as the Act. The AO, however, rejected the said contentions of the assessee and held that subscription revenue received by the assessee from the subscribers in India is towards granting of right to use any copyright of a literary, artistic or scientific work and thereof, hence, the same amounts to "royalty". The AO also stated that the subscription fee received by the assessee is "royalty" for information concerning industrial, commercial or scientific experience as per Article 12 of the DTAA. Furthermore, the AO also remarked that the subscription fee could also be the "royalty" for the use, or the right to use any equipment as the server containing the database is used by the customers as a point of interface. Accordingly, the AO completed the assessment under section 143 of the Act vide order dated 26.09.2019 by holding that the subscription fees received by the assessee amounts to royalty under Article 12(3)(a) of the India-US DTAA and under section 9(1)(vi) of the Act.

4. Aggrieved by the assessment completed, assessee filed appeal before the First Appellate Authority. Assessee relied on the judgment of the Hon'ble Apex

Court in the case of Engineering Analysis Centre of Excellence (P.) Ltd., Vs. CIT432 ITR 471 (SC) in support of its contention. However, the CIT(A) upheld the addition made by the AO and dismissed the appeal of the assessee vide impugned order dated 28.11.2022. As regards the case laws relied on by the assessee, the CIT(A) held that the facts of those cases are specific to those assessees and cannot be applied to the facts of the instant case.

5. Aggrieved by the order of the CIT(A), assessee has filed the present appeal before the Tribunal. Assessee has filed two sets of Paper Books, one enclosing the case laws relied on and the other enclosing therein the submissions made before the AO, CIT(A), sample copy of the master subscription agreement, etc. The learned AR has also filed a brief written submission essentially reiterating the submissions made before the Income Tax authorities.

6. The learned DR, on the other hand, supported the orders of the AO and the CIT(A).

7. We have heard the rival submissions and perused the material on record. In order to adjudicate the issue raised, it is necessary to understand the business profile of the assessee. Briefly, the business profile of the assessee is that it is incorporated under the laws of United States of America ('USA') and is a tax resident of USA. It is in the business of uploading online videos on its website and earns subscription revenue by facilitating viewing of such online videos by individuals, government enterprises, small businesses and enterprises globally. The assessee aggregates video content from content authors all around the world. Such videos are stored on its online content library which is hosted on servers located in the United States of America and also in other parts of the world other than India. The online videos are pre-recorded (i.e., not live) and are audio visual

in nature. Using such videos, the assessee compiles different kinds of courses in areas such as manufacturing, software development, etc. The online videos/courses are segregated on the basis of variety of users from various fields. Online viewing facility of these courses/video content is provided to customers through the assessee's website or mobile application. The assessee sells subscription plans to customers in India and prices are agreed between the assessee and the customers. In this regard, sample Master Subscription Agreement ('MSA') which the assessee enters with subscribers/customers is enclosed at pages 97-108 of the Paper Book. Subsequent to entering into agreements and payment of subscription amount, the customers are provided with login information (login ID and password). After the customers log in on the website, the customers/subscribers can view all or any of the 5000+ online videos/courses stored in the content library for the duration of the subscription period, based on their choice and interest at subscription charges (currently Rs. 1,499 per month for standard plan – providing access to 2500+ courses and Rs. 2,299 per month for premium plan – providing access to 7,000+ courses) Along with the same, there are certain ancillary add-on features, such as short quizzes, exercises, discussion board etc. Prima facie, the online video content is very generic and routine in nature. The customers/subscribers can only view the videos and are not allowed to download, store, transmit or edit such videos. Further, the customers/subscribers do not get any right on the content or the infrastructure facilities. However, the customers are allowed to download certain ancillary course material such as exercise files, course slides, course index etc., but even such material cannot be shared, transferred, sold or exploited in any manner.

8. The AO had given three reasons to bring to tax the subscription amount received by assessee as "royalty". The three reasons are as follows:

- i) The subscription revenue is towards use of, or right to use any copyright.
- ii) The subscription revenue is for information concerning industrial, commercial or scientific experience.
- iii) The subscription revenue is received by assessee for granting right to use of equipment.

9. The provisions of India-USA DTAA have a more restrictive scope than the provisions of the Act (in view of section 90(2) of the Act), hence, we confine our adjudication of taxability of subscription fee under the India-USA DTAA. The Article 12(3) of India-USA DTAA defines the term “Royalties”. The same reads as under:

“3. The term "royalties" as used in this Article means:

- (a) payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof ; and*
- (b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial, or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8.”*

10. Now let us examine each of the reasonings given by the AO for bringing to tax subscription revenue as “royalty”.

i) **Whether the subscription revenue is towards use of, or right to use any copyright:**

11. Based on the definition of 'Royalty' under the India-USA DTAA, it is important to understand the meaning of the term 'copyright'. The term 'copyright' is not defined under the provisions of the Act. Therefore, the provisions of the Copyright Act, 1957 ('Copyright Act') has to be examined. As per section 14 of the Copyright Act, 'copyright' means the exclusive right to do any of the acts specified therein, viz., to reproduce the work, to issue copies of the work to public, to make any translation or adaptation of the work, etc. Unless any of the exclusive rights or a combination thereof as stated under section 14 of the Copyright Act are transferred by the copyright holder, it cannot be said that the use or right to use the copyright has been granted. Thus, payment made for acquiring the right to use any copyrighted product, wherein the payer does not get any of the 'exclusive right' as stated in section 14 of the Copyright Act, does not amount to payment made for the use or right to use the 'copyright' in the product and therefore, shall not be covered within the scope of 'royalty'. The aforesaid principles have been upheld by the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT (supra). The Hon'ble Supreme Court has held that the amount paid by resident Indian end-user/distributors to non-resident computer software manufacturers/suppliers is not payment of royalty for use of copyright since the end-use/distributor does not get any of the rights under section 14 of the Copyright Act and does not get the right to reproduce a computer programme and exploit the reproduction by way of sale, transfer, license etc., which is at the heart of the definition of 'copyright' under the Copyright Act. While holding so, the Apex Court has upheld the conclusions derived from the judgements of the Hon'ble Delhi High Court on the said issue as under:

“117. The conclusions that can be derived on a reading of the aforesaid judgments are as follows:

...

- iv. **A licence from a copyright owner, conferring no proprietary interest on the licensee, does not entail parting with any copyright**, and is different from a licence issued under section 30 of the Copyright Act, which is a licence which grants the licensee an interest in the rights mentioned in section 14(a) and 14(b) of the Copyright Act. Where the core of a transaction is to authorize the end-user to have access to and make use of the "licensed" computer software product over which the licensee has no exclusive rights, no copyright is parted with and consequently, no infringement takes place, as is recognized by section 52(1)(aa) of the Copyright Act. It makes no difference whether the end-user is enabled to use computer software that is customised to its specifications or otherwise.
- v. **A non-exclusive, non-transferable licence**, merely enabling the use of a **copyrighted product**, is in the nature of restrictive conditions which are ancillary to such use, and **cannot be construed as a licence to enjoy all or any of the enumerated rights mentioned in section 14 of the Copyright Act, or create any interest in any such rights so as to attract section 30 of the Copyright Act.**
- vi. **The right to reproduce and the right to use** computer software are **distinct and separate rights**, as has been recognized in *Starke Bank of India* (supra) (see paragraph 21), the former amounting to parting with copyright and the latter, in the context of non-exclusive EULAs, not being so.

118. **Consequently, the view contained in the determinations of the AAR in *Dassault Systems K.K.* (supra) and *Geoquest Systems B.V.* (supra) and the judgments of the High Court of Delhi in *Ericsson A.B.* (supra), *Nokia Networks OY* (supra), *Infrasoft Ltd.* (supra), *ZTE Corporation* (supra), state the law correctly and have our express approval.** We may add that the view expressed in the aforesaid judgments and determinations also accords with the OECD Commentary on which most of India's DTAA's are based.”

(emphasis supplied)

12. The assessee in the instant case also does not transfer any copyright or the right to use any copyright of any nature to any of the subscribers. The relevant clauses of the sample MSA which the assessee enters with the subscribers read as under:

MASTER SUBSCRIPTION AGREEMENT

.....

*Pluralsight provides an online technology learning platform on its websites <http://www.pluralsight.com> and any applicable sub domains thereof, and through any applications, functionalities, content, materials, Interactive Features (as defined below), or other online services provided by Pluralsight (collectively, the "site"). Customer desires to acquire business subscriptions for a number of its employees or its Affiliates' employees (collectively, the "**Business Users**") to access the Site, and Pluralsight agreed to grant such subscriptions subject to the terms and conditions set forth in this Agreement.*

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....

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3. PROHIBITED CONDUCT

a. Prohibited Conduct. Customer will use the Site in compliance with applicable law and acknowledges and agrees that **neither it nor its Business Users may:**

1. reproduce, redistribute, transmit, assign, sell, broadcast, rent, share, lend, modify, adapt, edit, create derivative works of, license, capture, download, save, upload, print, or otherwise retain information and content available on the Site other than with regard to Authorized Downloadable Materials, subject to the limited permissions set forth in this Agreement;
2. permit or provide others access to the Site's library using a Business User username and password or otherwise, or the username and password of another authorized user;
3. remove or modify any copyright, trademark, legal notices, or other proprietary notations from the Proprietary Materials or any other content available on the site;
4. violate or attempt to violate the Site's security mechanisms or digital rights management, or otherwise breach the security of the Site or corrupt the Site in any way;
5. attempt to gain unauthorized access to the Site or assist others to do so;
6. co-brand or frame the Site or establish a link in such a way as to suggest any form of association, approval, or endorsement on our part, without the prior express written permission of an authorized representative of Pluralsight;

7. *post to the Interactive Features or any other portion of the Site any inappropriate, offensive, racist, hateful, sexist, pornographic, false, misleading, infringing, defamatory, or libelous content;*
8. *use or attempt to use the Site to store or transmit software viruses, worms, time bombs, Trojan horses, or any other computer code, files, or programs designed to interrupt, destroy, or limit the functionality of any computer software, hardware, or telecommunications equipment; or*
9. *manually or systematically harvest, scrape, collect or otherwise extract information or data contained on the Site, other than permitted use of Authorized Downloadable Materials or temporary storage of video materials for offline viewing as permitted by the Site's intended features.*

(Emphasis supplied)

13. From a perusal of the MSA, we find that the subscribers only get a non-exclusive, non-transferable license to view the videos on the website. Neither any copyright in the software/database, nor any copyright in the videos is granted to the subscribers. The assessee reserves all intellectual property rights in its Proprietary Material, which includes the source code, videos, text, software, intellectual property of the assessee etc. The subscribers are not even allowed to download, store, transmit or edit such videos. Further, while the subscribers are allowed to download certain ancillary course material (Authorized Downloadable Materials) such as exercise files, course slides etc., are subject to all the restrictions mentioned in the agreement and even such material cannot be shared, transferred, sold or exploited in any manner. In essence, in view of the restrictions imposed under the MSA, the subscribers are **not allowed:**

- to download or reproduce the Proprietary Material in any form including the storing of it in any medium by electronic means;
- to further distribute, sell, sub-license, rent, lease or issue copies of the Proprietary Material;
- to create any derivative work or exploit the Proprietary Material in any manner;
- to remove or alter any copyright, trademark or proprietary notice in the Proprietary Material;

- to decompile, disassemble, or reverse engineer the Proprietary Material/database.

14. Therefore, by subscribing to the assessee's database, the subscribers merely get 'access' to the database to view the videos - which are akin to 'copyrighted articles'. The subscribers do not receive any right to use the copyright in the videos/database at any point in time. Thus, in view of the principle laid down by the Hon'ble Supreme Court in the case of Engineering Analysis (supra), the subscription fees received by the assessee does not amount to payment for the 'use of or right to use copyright' but rather payments for access to copyrighted products, i.e., the videos on the assessee's database. The Mumbai Bench of the Tribunal in the case of Elsevier Information Systems GmbH v. DCIT: ITA No. 1683/Mum/2015, wherein on similar facts, has held as under:

*"13. ... It is also clear from the terms of subscription agreement, the assessee has not transferred use or right to use of any copyright of literary, artistic or scientific work to its subscribers. **What the assessee has done is, it has allowed customers to access its database and utilize the information available therein for their use.** Further, it is observed, the data available in assessee's database relates to the subject of chemistry and from the list of clients submitted in the paper book it is very much clear that they are either chemical or chemical related companies. **There is no material on record which could even remotely demonstrate that while allowing the customer /users to the access the database, the assessee had transferred its right to use the copyright of any literary, artistic or scientific work to the subscribers.** Further, from the invoices raised by the assessee, sample copies of which are placed in the paper book, **it is noticed that the subscription is period based and further the subscriber may not even use the data stored in the database.** That being the case, the payment made cannot be treated as royalty under Article-12(3) of the India-Germany Tax Treaty.*

....

*17. ... By way of illustration we may further observe, online databases are provided by Taxman, CTR online, etc. which are accessible on subscription not only to professionals but also any person who may be having interest in the subject of law. **When a subscriber accesses the online database maintained by Taxman/CTR online etc. he only gets access to a copyrighted article or judgment and not the copyright.** Similar is the case with the assessee. Therefore, in the facts of the*

present case, the subscription fee received by the assessee cannot be treated as royalty under Article-12(3) of India-Germany Tax Treaty."

(emphasis supplied)

15. Similar view has been taken in the following cases:

- a) Elsevier BV, In re: (2021) 123 taxmann.com 143 (AAR)
- b) Dow Jones & Company Inc. vs. ACIT: (2022) 135 taxmann.com 270 (Del ITAT)
- c) DIT(IT) vs. Dun & Bradstreet Information Services India (P.) Ltd.: (2011) 338 ITR 95 (Bom HC)
- d) Dun & Bradstreet Espana S.A., In re : (2005) 272 ITR 99 (AAR)
- e) Mc Kinsey Knowledge Centre India Pvt Ltd v. ITO: ITA No. 407/Del/2013 (Del ITAT)
- f) DCIT (IT) vs. Welspun Corporation Ltd.: (2017) 183 TTJ 697 (Ahd ITAT)
- g) ITO (IT) vs. Cadila Healthcare Ltd.: (2017) 184 TTJ 178 (Ahd ITAT)
- h) Iqvia AG v. DCIT: ITA No. 1203/Mum. /2021 (Mumbai ITAT)

16. In view of the above, we hold that the subscription fees received by the assessee does not amount to 'royalty' for use of or right to use of any 'copyright'.

ii) **The subscription revenue received by the assessee whether it is for any information concerning industrial, commercial or scientific experience:**

17. In the impugned assessment order, while alleging that the subscription fees received by the assessee is for the use of copyright, the AO has also made a remark that there is a transfer of copyright to the extent of having access to the database and such access to videos would also amount to access to information concerning industrial, commercial or scientific experience (refer page 17 of the assessment order). The assessee is in the business of aggregating videos, creating a database on its website and earning subscription revenue by granting access to such database. Thus, the skill and experience of the assessee lies in creating and

evolving the database of videos on the website, maintaining the website, marketing for the subscription plans etc. By granting access to the videos forming part of the database on its website, the assessee neither shares its own experience, techniques, methodology or strategies employed in running its business, nor imparts any information in relation thereto with the subscribers. Further, even the subscribers make the payment to the assessee merely for viewing the videos on its website. The subscribers do not make the payment for availing the knowledge of the assessee's experience regarding its business of creating/maintaining the database of videos. Therefore, the subscription fees received by the assessee from various subscribers does not constitute payment for “information concerning industrial, commercial or scientific experience”. In this regard, we rely on Mumbai Bench’s Tribunal order in the case of American Chemical Society vs. DCIT(IT) reported in (2019) 106 taxmann.com 253 (Mum ITAT), wherein on similar facts, the Mumbai Bench of the Tribunal held that the customers do not make payments for availing the knowledge of assessee's experience of creating/maintaining database; on the contrary, what they pay for is to access the information that such database encompasses. Therefore, it was concluded by the Mumbai Bench of the Tribunal that the payment does not constitute payment made for information concerning industrial, commercial or scientific experience. Relevant finding of the Tribunal reads as follows:

“8. ... The assessee's experience lies in the creation and maintaining the database, which cannot be labelled as industrial or commercial or scientific in any way in the context of the receipts in question. In fact, it is nobody's plea that such experience is shared by the assessee with the Indian customers. The Indian customers do not make payments for availing the knowledge of assessee's experience of creating/maintaining database; what they pay for is access to information that such database encompasses. By granting access to the information forming part of the database, the assessee neither shares its own experience, technique or methodology employed in

evolving databases with the users, nor imparts any information relating to them.

(emphasis supplied)

18. On similar facts as that of the assessee, the Hon'ble AAR in the case of Factset Research Systems Inc., reported in 317 ITR 169 (AAR) had held as under in Para 11 of the ruling:

“11. The learned Departmental Representative then invoked clause (iv) of Explanation 2 which speaks of "imparting any information concerning technical, industrial, commercial or scientific knowledge, experience or skill". The DTAA (Article 12.3) uses slightly different language. It speaks of payment received for "information concerning industrial, commercial or scientific experience". We do not think that the payment in question can be brought within the fold of this part of definition of 'royalty'. The clause does not contemplate merely imparting information on technical, industrial or commercial matters. The requirement is imparting of information concerning technical, commercial or scientific knowledge, experience or skill. The information which the licensee gets through the database does not relate to the underlying experience or skills which contributed to the end-product. The applicant does not share its experiences, techniques or methodology employed in evolving the database with the subscribers. The applicant does not impart any information relating to them. As already noted, the information or data transmitted through the database is the published information already available in public domain and it is not something which is exclusively available to the applicant. The applicant compiles and presents the information in proper form by applying its own methodology. It does not amount to imparting of information concerning the applicant's own knowledge, experience or skills in commercial and financial matters. The contention that imparting of information regarding analysis and research done by the applicant is involved here is devoid of merit.” (emphasis supplied)

19. In view of the above, since the assessee receives subscription fees merely to grant access to the database of videos and not for imparting any information concerning the assessee's own knowledge or experience of creating/maintaining the database, the said subscription fees cannot be said to be for imparting of 'any

information concerning industrial, commercial or scientific experience of the Appellant’.

iii) The subscription revenue received by the assessee whether it is for granting any right to use of equipment:

20. In the impugned assessment order, the AO also made a remark that the subscription fee could also be for the use of, or right to use, any industrial, commercial or scientific equipment as the server containing the database is used by the customers as “a point of interface” (refer page 13 of the assessment order). The consideration received by the assessee is merely for granting access to the database of videos and not for the use or right to use any equipment whatsoever. The subscribers have no access, right or control of any manner whatsoever over the server on which the assessee maintains the database. Therefore, the subscription fee received by the assessee cannot, in any manner, be termed as consideration for use or right to use any industrial, commercial or scientific equipment. In the case of Factset Research Systems Inc. (supra), the Revenue raised an identical contention that the server is used by the customers as ‘a point of interface’. However, the said contention of Revenue was rejected by the Hon’ble AAR. The finding of the Hon’ble AAR in this regard is as under:

“11.5 The learned DR faintly suggested that it can also be brought within the purview of equipment royalty i.e., "use" or "right to use" any industrial, commercial or scientific equipment. It is submitted that the server which maintains database is being used by customers as a point of inter-face. We do not think that the consideration is paid by the licensee for the use of equipment. The consideration is for availing of the facility of accessing the data/information collected and collated by the applicant.” (emphasis supplied)

21. Similarly, in the case of American Chemical Society vs. DCIT(IT) (supra), the Hon’ble Mumbai Bench of the Tribunal held as under:

*“17. By granting access to the journals, the assessee neither shares its experiences, techniques or methodology employed in evolving databases with the users, nor imparts any information relating to them. **Furthermore, the information resides on servers outside India, to which the customers have no right or access, nor do they possess control or dominion over the servers in any way. Therefore, the question of such payments qualifying as consideration for use or right to use any equipment, whether industrial, commercial or scientific, does not arise.**” (emphasis supplied)*

22. In view of the above rulings, we hold that the payment made for viewing the videos on the database cannot be termed as consideration for use or right to use any industrial, commercial or scientific equipment.

23. In view of the aforesaid reasoning and judicial pronouncements, we hold that the subscription revenue received by the assessee is not taxable as ‘Royalty’ in the hands of the assessee under Article 12 of the India-USA DTAA read with the provisions of the Act. Accordingly, the impugned addition made by the AO in this regard, as upheld by the CIT(A) is hereby deleted. It is ordered accordingly.

24. In the result, appeal filed by the assessee is allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-

(LAXMI PRASAD SAHU)
Accountant Member

Sd/-

(GEORGE GEORGE K)
Vice President

Bangalore.

Dated: 21.08.2023.

/NS/*

Copy to:

- | | |
|-------------------------|---------------|
| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR, ITAT, Bangalore. | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.