IN THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI

BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER&
MS. KAVITHA RAJAGOPAL, JUDICIAL MEMBER,

ITA No.4615/Mum/2023

(A.Y. 2021-22)

American Chemical Society, C/o Deloitte Haskins and Sells LLP, 7th Floor, Building 10, Tower B, DLF Cyber City Complex, DLF City Phase-II, Gurgaon – 122002	Vs.	The Deputy Commissioner of Income Tax, (IT), Circle -1(1)(1), Room No. 17, 3rd Floor, Mittal Court, 22 Nariman Point, Mumbai Maharashtra – 400021
स्थायी लेखा सं./जीआइआर सं./ PAN/GIR No:AALCA4959L		
Appellant	..	Respondent

Appellant by :	Vishal Karla
Respondent by :	Ajay Kumar Sharma

Date of Hearing	15.02.2024
Date of Pronouncement	27.03.2024

आदेश / O R D E R

Per Amarjit Singh (AM):

This appeal filed by the assessee is directed against the order passed by the ld. DCIT(IT) Circle 1(1)(1), Mumbai, dated 30.10.2023 for A.Y. 2021-22 in pursuance of directions of the Dispute Resolution Panel under section 144(C(5) of the Act issued on 21/09/2023. The assessee has raised the following grounds before us:

"Appeal under section 253(1)(d) of the Income-tax Act, 1961 (hereinafter referred to as the "Act"), against the order dated 30 October 2023, passed by the Deputy Commissioner of Income Tax, International Taxation Circle 1(1)(1), Mumbai ("Ld AO") under section 143(3) read with section 144C(13) of the Act.

1. *That on the facts and circumstances of the case and in law, the Ld. AO has erred in assessing the total income of the Appellant under*

section 143(3) read with section 144C(13) of the Act at INR 1,37,25,62,534 as against the returned income of Nil.

2. *That on the facts and circumstances of the case and in law, the Ld. AO/ Dispute Resolution Panel ("DRP") have erred in holding that the receipts from Indian customers are chargeable to tax as royalty in terms of Article 12(3) of India-US Double Tax Avoidance Agreement ("DTAA") and under section 9(1)(vi) of the Act.*

2.1 That on the facts and in the circumstances of the case and in law, the Ld. AO/ DRP have erred in holding that the subscription charges received under Chemical Abstract Service (CAS) division and Publications (PUBS) division would be chargeable to tax in India under India-US DTAA being received for use or right to use of copyright in artistic, literary or scientific work and / or for use of information concerning industrial, commercial or scientific experience and / or for use of industrial, commercial or scientific equipment.

2.2 That on the facts and circumstances of the case and in law, the Ld. AO/ DRP have erred in holding that the subscription charges received under CAS and PUBS divisions would be chargeable to tax in India under India-US DTAA being received for use of ACS databases/software.

2.3 That on the facts and circumstances of the case and in law, the Ld. AO/DRP have erred in completely ignoring the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited (Civil Appeal No. 8733-8734 of 2018) while holding that the receipts of the Appellant be treated as being received for the use or right to use copyright in a literary or scientific work within the meaning of royalty as per section 9(1)(vi) of the Act as well as Article 12(3) of India-US DTAA.

2.4 That on the facts and circumstances of the case and in law, the Ld. AO/DRP have erred in not following the decision passed by the Hon'ble Mumbai Bench of the Income-tax Appellate Tribunal ("ITAT") in Appellant's own case for immediately preceding assessment years ie. AY 2014-15 to 2020-21, wherein on similar facts and circumstances, the Hon'ble ITAT held that the revenue from CAS and PUBS division cannot be taxed as royalty under section 9(1)(vi) of the Act as well as Article 12(3) of India US DTAA.

3. *That on the facts and circumstances of the case and in law, the Ld. AO has erred in incorrectly computing the demand for the subject assessment year by erroneously considering the receipts of the Appellant at INR 2,71,61,78,122 as against the actual receipt amount of INR 1,37,25,62,534, even after correctly mentioning the receipt amount in the impugned assessment order.*

4. *That on the facts and circumstances of the case and in law, the Ld. AO has erred in levying interest of INR 1,28,03,845 under section 234A of the Act without appreciating that the return of income was*

furnished by the Appellant within the due date prescribed under section 139(1) of the Act.

5. *That on the facts and circumstances of the case and in law, the Ld. AO has erred in levying interest of INR 7,93,83,839 under section 2348 of the Act.*

The Appellant craves leave to add, alter, amend or vary from the aforesaid grounds of appeal before or at the time of hearing."

2. The American Chemical Society (ACS) (the assessee) is a scientific society based in the United States that support scientific inquiry in the field of chemistry. Its publications division produces 51 scholarly journals including prestigious journal of the American Chemical Society, as well as weekly trade magazine Chemical & Engineering News. The assesse filed return of income for the assessment year under consideration on 09.03.2022 disclosing a total income of Rs.2,89,46,950/-. The case was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued on 27.06.2022. After considering the various submission of the assessee, the assessing officer passed draft assessment order u/s 143(3) r.w.s 144C(1) of the Act on 17.12.2022 and held that assessee had received payment for providing following product/services from outside India to Indian customers:

1.	*Fee for providing access (by subscription) to online chemistry databases (CAS division)*	*Rs.88,27,92,099*
2.	*Subscription revenue from sale of online journals (PUBS division)*	*Rs.46,08,23,489*
3.	*Subscription revenue from membership of M & SA division*	*Rs.33,27,724*
4.	*Advertising revenues*	*Rs.2,46,371*

The AO also stated that similar receipts were also scrutinised for the assessment year 2014-15 to 2020-21 and the AO has treated such receipts except membership revenue and advertisement revenue as its income from royalty taxable @ 15% under the beneficial provisions of the DTAA with the USA. The AO also stated that the ITAT, Mumbai has adjudicated the similar issue for A.Y. 2014-15 TO A.Y. 2017-18 in

favour of in favour of the assessee and the department has filed appeal before the Hon'ble High Court for assessment year 2014-15 to 2017-18 which was pending on the date of passing the assessment order. The assessee explained that it has only granted access (by subscription) to view online chemistry database which was not taxable as royalty. The assessee also explained that it has not granted any right to use the copyright in the database and the agreement entered by the assessee with the customers provides that copyright in the database will remain with the assessee and the customers do not have any right of ownership in the database. It is also explained that the access to online database was given only for limited users and the same was restricted to specify number of authorized users per customers through the IP address of customers. The assessee has made various submission on this issue that no right to use the copyright in the database was provided to the subscribers. However, the assessing officer has not agreed with the submission of the assessee. He was of the view that assessee did not merely grants access to publicly disclosed data only for viewing by its customers but the assessee make available recordings of some oral presentations as well. He also stated that assessee collects data and documents from various sources, journals etc, and classifies, categorises, catalogues and indexes these data in appropriate database for access and use for its customers and subscribers. The AO further stated that the payments made by the customers to the assessee were nothing but consideration for transfer or any rights in respect of copyright, literary artistic or scientific work and the same was royalty within the meaning of clause (v) of explanation 2 of Sec. 9(1)(vi) of the Act. Therefore, the amount of Rs.88,27,92,099/- and Rs.46,08,23,489/- being revenue from subscription CAS division and revenue from

subscription - PUBS division aggregating to Rs.1,34,36,15,588/- was taxable as royalty income of the assessee.

3. The assessee filed objection before the ld. Dispute Resolution Panel. The DRP after following the direction of the DRP for the earlier years dismissed the objection filed by the assessee for the reason that revenue has not accepted the decision of the ITAT for earlier years and has filed appeal in Bombay High Court against the same. The Assessing Officer passed final assessment order under section 143(3) read with section 144(13) in pursuance to the directions of the Dispute Resolution Panel by making the impugned additions as discussed supra in this order.

4. During the course of appellate proceedings before us the ld. counsel submitted that similar issue on identical fact in the case of the ITAT has been decided by the ITAT, Mumbai in favour of the assessee and referred the following such decisions:

1. Tribunal's order in assessee's own case for A.Y. 2014-15 (2019) 106 taxmann.com 253(Mumbai)
2. Tribunal's order in assessee's own case for A.Y. 2015-16 in ITA No.5928/Mum/2018
3. Tribunal's order in assessee's own case for A.Y. 2016-17 in ITA No.6952/Mum/2019
4. Tribunal's order in assessee's own case for A.Y. 2017-198 in ITA No.1030/Mum/2021
5. Tribunal's order in assessee's own case for A.Ys. 2018-19 & 2019-20 (2019) 106 taxmann.com 253 (Mumbai)
6. Tribunal's order in assessee's own case for A.Y. 2020-21 (2023) 151 taxmann.com 74 (Mumbai)

On the other hand, ld. D.R supported the order of lower authorities.

5. Heard both the sides and perused the material on record. The assessee is a corporation based in USA established to promote and

support development and knowledge in the field of chemistry. The customer of the assessee include organization and individual in the filed of chemistry viz. educational institutes, research organisation, companies etc. The assessee submitted that receipt from Indian customer for subscription to database, sale of e-journals and membership fees, do not constitute royalties under the India –US tax treaty. The assessee submitted that receipt constitute business profit which were not taxable in absence of any permanent establishment (PE) in India as the products/services were provided entirely from outside India. The assessing officer after referring the proceedings assessment years treated the subscription fees receipt from the customer as royalty. The assessee submitted before the lower authorities that subscriber were merely granted access to view the database and obtained standardised refund/research available therein and no right to use the copyright in the database was provided to the subscribers. The agreement entered into by the assessee with the customers provides copyright in the database will remain with the assessee and the customer do not have any right of ownership in the database. During the course of appellate proceedings before us the ld. Counsel has referred various decision of the ITAT on the similar issue and identical fact for earlier years in the case of the assessee itself wherein held that subscription received from customer in India in respect of subscription to database and subscription to journals was not taxable as royalty. With the assistance of ld. representative we have perused the decision of ITAT in the case of the assessee itself for assessment year 2016-17 which was further followed in the other assessment year wherein the ITAT in its decision dated 30.04.2019 vide ITA No. 6952/Mum/2019 held that subscription fees received by the assessee from its customers for providing access to database and journals were not royalty as customers did not acquire copyright,

therefore, such fees were not liable to be taxed in India. The relevant operating part of the decision is reproduced as under:

> *"7. We have heard the rival submissions of the parties and also gone through the material on record. The assessee has challenged the action of the AO/Ld. DRP in holding that the subscription charges received under Chemical Abstract Services (CAS) division and publications (PUBS) division would be chargeable to tax in India under India US DTAA being received for use of copyright of artistic, literary or scientific work and /or for use of information concerning industrial, commercial or scientific experience and/ or for use of industrial, commercial or scientific equipment. As pointed out by the Ld. counsel for the assessee, the coordinate Bench has decided the identical issue in favour of the assessee by following the decision of the coordinate Bench rendered in the assessee's own case for the AY 2014-15. The findings of the coordinate Bench in ITA No. 5928/Mum/2018 for the AY 2015-16 read as under:-*
>
> > *"The appeal for the A.Y. 2014-15 has since been decided by the Tribunal (ITA No. 6811/Mum/2017, dated 30.04.2019). The relevant paras of the order are as under:-*
> >
> > *11. With respect to the subscription fee for the CAS division being Royalty for use of or "right to use" of a copyright, a reference to Copyright Act, 1957 is also relevant. A person canbe said to have acquired acopyright or the fight to use the copyright in a computer software or database (as described by [he Assessing Officer), where he is authorized to do all or any of the acts as per the definition of the term "copyright" under Section 14 of the Copyright Act, 1957. However, mere access to that work or permission touse the work cannot imply that the payer is paying for use or right TO use the copyright. In other words, when no copyright is acquired by the payee, question of using it or getting a right to use it does not arise.*
> >
> > *12.In the present context, we may also examine the issue from another angle as follows. The transfer of a copyrighted rightmeans 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, but factually speaking in the present no such rights in database or search tools (SciFinder or STN are acquired by the customers, as is evident from the terms of the sample agreement of CAS customers. In our considered view, transfer of any right in 3 copyrighted article is an alogous to the rights acquired by the purchaser of a book. In the case of a book, the publisher of the hook grants the purchaser certain rights with respect to the use of the content of the book, which is copyrighted, but the purchaser of the book does not acquire the right to exploit the underlying copyright. When the purchaser reads the book, he only enjoys its contents. Similarly, the user of the copyrighted software docs not receive the right to exploit the copyright m the software; he only enjoys the product/benefits of the product in the normal course of his business. Similarly, in the instant ease, customers of the assessee only enjoy the benefits of using SciFinder and do not acquire the right to exploit any copyright m these software. The a copyright and a copyrighted article in context of*

software has been brought out very clearly by the Hon'ble Supreme Court of India in the case of Tata Consultancy Services vs. State of Andhra Pradesh(supra).

13. In view of the aforesaid discussion, in our considered view, the income earned by the assessee from the Indian Customers with respect to the subscription fees for CAS cannot be taxed as royalty as per section 9(1) (v) of the Act as well as Article 12(3) of the India USA DTAA. Thus, assessee succeeds on this issue…….

17. We have heard the rival submissions and perused the relevant material on record including the order of the fewer authorities oil the issue in dispute. We find that issue with respect to the PUBS division coincides with the issues on the CAS fee The journal provided by the PUBS division do not provide any information arising from assesse's previous expedience. The assessed experience ties in the creation of/maintaining such m format! an online. 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. 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 thesame in any manner other than for personal usestrictly prohibited. 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 journals. Thus, the customers are only able to access journal/articles for personal use of the information No use or right to ruse in any copyright or any other intellectual property of any kind is provided by the assessee to its customers. Furthermore, the information resides on servers outside India, to which the customers have no right or access, nor do they possescontrol 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.

18. To put a comparison, if someone purchases a book, then the consideration paid is not for the use of the copyright in the book/article. The purchaser of a book does not acquire the right to make multiple copies for re-sale or to make derivative works of the book, i.e. the purchaser of a book does not obtain the copyright in the book. Similarly, the purchaser of the assessee journals, articles or database access does not have the right to make copies for re-sale and does not have the right to make derivatives work. In short, the purchaser has not acquired the copyright of the article or of the database. What the buyer gets is a copyrighted product and accordingly the consideration paid is not royalty, but for purchase of a product, in the instant case too, what is acquired by the customer is a copyrighted article, copyrights of which continue to lie with assessee for all purposes. It is a well settled law that copyrighted article is different from a copyright and that consideration for the former i.e. a copyrighted articles does not qualify as royalties.

19. Thus, the principles noted by us in the earlier part of this order in the context of the income earned by way of CAS fee are squarely applicable to the subscription revenue received from customers of PUBS division for sale of journal also, and accordingly PUBS fee also does not qualify as 'Royalty' in terms of section 9(1))vi) of the Act as well as Article 12 (3) of the India-USA DTAA.

20. Ground No. 3 relates to alternative plea that the Assessing Officer erred in determining tax payable on the assessed income @ 20%, instead of 15% as prescribed in Article 12(2) of India-USA DTAA. Since we have allowed Ground No. 2 of the appeal holding that the income of the assessee is notliable to be taxed in India, therefore, this Ground of appeal is rendered academic."

8. We notice that in the assessment year 2014-15, the assessee filed its return of income declaring nil income on the plea that it was a tax resident of USA and entitled to be taxed in accordance with the provisions of India USA Double Taxation Avoidance Agreement (DTAA) to the extent they are more beneficial. The AO however, taxed the income earned by the assessee from Indian customers with respect to the subscription fees for Chemical Abstracts Services (CAS) division and (PUBS) Division as royalty in terms of section 9(1) (vi) of the Act as well as Article 12(3) of the India USA DTAA. The contention of the assessee was that these incomes constitute business profits which are not taxable in the absence of any permanent establishment (PE) in India and since the services were being provided from outside India. The coordinate Bench decided both the issues in favour of the assessee. The coordinate Bench has decided the identical issues in favour of the assessee in assessee's appeal pertaining to the assessment year 2015-16 by following the decision of the coordinate Bench for the AY 2014-15. Since, the grounds of appeal raised by the assessee are covered in favour of the assessee by the decision of the coordinate Bench and since there is no change of facts in the present case, we hold that the impugned order is not in accordance with the decision of the coordinate Bench. Hence, respectfully following the orders of the coordinate Benches discussed above allow the appeal of the assessee.
9. Ground No. 3 relates to alternative plea that the AO erred in determining tax payable on the assessed income @ 15% instead of 10% (with applicable surcharge and cess) as per the beneficial provisions of the Act. Since, we have allowed Ground No. 1 and 2 holding that the income of the assessee is not liable to be taxed in India, this ground is rendered academic.

10. Since, we have allowed the appeal of the assessee, the application filed by the applicant/appellant has become infructuous, hence dismissed.

In the result, the appeal filed by the assessee is allowed and the application for stay on the recovery of outstanding demand filed by the applicant/assessee is dismissed."

We find that similar issue on identical fact has been adjudicated by the ITAT in the various decision for the earlier years. This is a recurring issue and identical issue was dealt by the Tribunal in the earlier years as cited above. therefore, following the decision of the

ITAT we direct the AO to delete the addition made on account of royalty. Accordingly, ground no. 1 & 2 are allowed.

Ground No.3: Considering the receipt of the assessee at Rs.2,91,61,72,122/- as against the actual receipt of Indian Rs.137,25,62,534/-:

6. After hearing both the sides we restore this issue to the file of the assessing officer for deciding after verification of the relevant supporting material. Therefore, ground no. 3 of appeal of the assessee is allowed for statistical purposes.

Ground No.4& 5: Erred in levying interest of Rs.128,63,845/- u/s 234A of the Act.

Levying of interest of Rs.793,83,839/- u/s 234B of the Act:

7. After hearing both the sides we restore these two grounds of appeal of the assessee to the file of the AO for deciding afresh after verification of the relevant material. Therefore, this two grounds of appeal are allowed for statistical purposes.

8. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 27.03.2024

Sd/-	sd/-
(KavithaRajagopal)	(Amarjit Singh)
Judicial Member	Accountant Member

Place: Mumbai
Date 27.03.2024
Rohit: PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण/ ITAT, Bench, Mumbai.