IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D', NEW DELHI

Before Dr. B. R. R. Kumar, Accountant Member,

Sh. Sudhir Pareek, Judicial Member

ITA No. 2344/Del/2023 : Asstt. Year: 2020-21

John Wiley and Sons Inc., C/o Deloittee Haskings & Sells, 7th Floor, Tower-B, Building No. 10, Cyber City, DLF-II, Gurgaon-122002	Vs	DCIT, International Taxation, Circle-2(1)(2), New Delhi-110002
(APPELLANT)		(RESPONDENT)
PAN No. AACCJ5564B		

Assessee by : Sh. Vishal Kalra, Adv. &
Ms. Snigdha Gautam, Adv.
Revenue by : Sh. Vijay B. Vasanta, CIT-DR

Date of Hearing: 27.05.2024		**Date of Pronouncement: 21.08.2024**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order dated 27.06.2023 passed by the AO u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961.

2. Following grounds have been raised by the assessee:

"1. That on the facts and in the circumstances of the case and in law, the Assessing Officer ("AO") has erred in assessing the total income of the Appellant for the relevant AY at INR 16,32,72,111 as against the returned income of 1NR 17,93,540, making an addition of INK 16,12,78,571, pursuant to the directions issued by Dispute Resolution Panel ("DRP").

2. That on the facts and in the circumstances of the case and in law, the AO /' DRP have erred in holding the consideration amounting to INR 16,12,78,571 received by the Appellant for sale of online journals or books constitutes royalty under the provisions of section 9(1)(vi) of the Act read with Article 12 of India-USA tax treaty.

2.1. That on the facts and in the circumstances of the case and in law, the AO /' DRP have erred in holding that the Appellant's receipts were for use or right to use copyright in artistic, literary or scientific work.

3. That on the facts and in the circumstances of the case and in law, the AO / DRP have erred in holding that consideration amounting to INR 16,12,78,571 received by the Appellant for sale of online journals or books constitutes Fees for Technical Services ("FTS") /' Fees for Included Services ("FIS") under section 9(1)(vii) of the Act read with Article 12 of India-USA tax treaty.

3.1. That on the facts and in circumstances of the case and in law, the AO / DRP have failed to appreciate that receipts for services provided to Indian customers merely constitute standard services provided without human intervention, thereby not constituting FTS under section 9(1)(vii) of the Act or FIS Article 12 of the India-USA tax treaty.

3.2. That on the facts and in the circumstances of the case and in law, the AO / DRP have failed to appreciate that receipts for services provided to Indian customers do not make available any technical knowledge, skill, know-how etc. and thus do not constitute FIS under Article 12 of the India-USA tax treaty.

4. That on the facts and in the circumstances of the case and in law, the AO / DRP erred in holding that the application of benefits of India-USA tax treaty to the Appellant is debatable and hence taxation is to be carried out only under the provisions of domestic tax law.

5. That on the facts and in the circumstances of the case and in law, the directions issued by the DRP do not bear a valid Document Identification Number and are thus against the mandatory procedure laid down in law. The final assessment order dated June 27, 2023 passed by the AO under section 143(3) read with section 144C(13) of the Income Tax Act, 1961 ("the Act"), based on such erroneous directions of DRP, is bad in law, and liable to be quashed.

6. That on the facts and in circumstances of the case and in law, the final assessment order dated 27.06.2023 having been issued on 12.07.2023 is barred by limitation in terms of Section 144C(13) of the Act and hence, bad in law and liable to be quashed.

7. That on the facts and circumstances of the case and in law, the AO has erred in initiating penalty proceedings under section 270A of the Act."

3. The issue of DIN is not pressed.

4. The assessee is registered in United States of America and a tax resident and engaged in the business of providing access to online journals/online library, containing Wiley Blackwell Journals ("WB Journals"), publications, distribution of WB Journals, online books, etc. The assessee online Library provides access to over 7.5 million articles, reference works, laboratory protocols and databases. During the year, the assessee entered into agreements from outside of India with customers in India to provide access to online journals / online library available at its online database maintained outside of India and earned revenue amounting to Rs.16.12 Cr. in consideration for sales or providing access to online databases / journals etc. to Indian customer from outside of India.

5. The assessee filed its return of income on January 5, 2021, declaring taxable income of Rs. 17,93,540/- and claiming receipts from Indian customers amounting to Rs.16.12 Cr. as not chargeable to tax as Royalty / FTS/FIS under the provisions of the Act read with the India-US DTAA. Further, given the undisputable fact that the assessee did not have a Permanent Establishment ('PE') in India, as per Article 5 of the India-USA DTAA, income earned by it was not taxable as business income. Accordingly, the tax withheld by Indian customers on the receipts of Rs.16,12,78,571/- was claimed as a refund in the return filed by the assessee.

6. The AO passed draft assessment order dated September 30, 2022 proposing to treat the receipts of Rs.16.12 Cr. from Indian customers as Royalty and Fees for Included Services

("FIS") / Fee for Technical Services ("FTS") as per the provisions of the Act read with Article 12 of India-US tax treaty and proposed an addition of Rs.16,12,78,571/-.

7. Aggrieved, the assessee sought directions from the ld. DRP which affirmed the findings of the AO in the draft Assessment Order which has been subsequently culminated in the final Assessment Order.

8. Aggrieved, the assessee filed appeal before the Tribunal.

9. Before us, the ld. AR relied on the submissions made before the revenue authorities and ld. DR supported the order of the ld. DRP. At the conclusion, both the parties fairly submitted that the issue has been adjudicated by the Tribunal in a number of cases.

10. Heard the arguments of both the parties and perused the material available on record.

Amount received for sale of online or hard copy journals – Royalty/FIS – u/s 9(1)(vi) of the Act r.w. Article 12 of India-USA DTAA.

11. The facts reveal that the assessee is a copyrighted product which does not give right to the users to amend, modify or alter the product sold to them. The assessee sells compiled, indexed or curated articles obtained from other authors as copyrighted article / product, for easy access to customers. Further it is submitted that information accessed by customers on assessee's online journals, was publicly available and could be obtained

through various other means such as purchasing a book published on the subject matter.

12. It was submitted that Article 12 of the Treaty deals with the taxation of royalty and FIS. Article 12(3) of the Treaty defines 'royalty' mean 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. Limited rights to access online journals granted by the assessee to Indian customers, do not amount to granting of any right in the copyright in any manner whatsoever, and hence the receipts from Indian customers do not constitute royalties under the Treaty.

13. In this regard, reliance is placed on following decisions, wherein subscription fees from its Indian customers for providing access to online database and/or journals were not 'royalty' as customers did not acquire copyright:

- ACIT vs. Relx Inc. [2024] TS-129-HC-2024(Delhi) upholding Relx Inc. vs. ACIT: [2023] 149 taxmann.com 78 (Delhi – Trib.)
- Uptodate Inc. vs. DCIT: [2023] 150 taxmann.com 231 (Del. - Trib.)
- Elsevier Information System GmbH vs. DCIT [2019] 106 taxmann.com 401 (Mum.)

14. For the sake of ready reference, the relevant portion in the order in the case of ACIT Vs. Relx Inc. (supra) is reproduced below:

> *"10. We have heard the parties and perused the material available on record and gave our thoughtful consideration.*

11. It is found that the assessee earns income in the nature of subscription fees from Indian subscriber for providing subscription to data base Lexis Nexis wherein host of information started on subject/topic relating to legal and tax matters. The person interested to purchase the electronic version of the books/journals/articles can be purchased it on line by paying the price of the book and in so far as the frequent customers of the books/journals /articles available on Lexis Nexis can opt to subscribe data base for certain period which allows the customers to access the e-books/e-journals/e-articles on the online data base. In both the cases, the content received by the user remains the same that is books, journal and articles in an electronic format.

12. The assessee is a part of Elsevier Group and in case of other group entities on the similar issue of access/subscription to web-site, the ITAT Tribunal of Mumbai Bench in the case of Elsevier Information Systems GmbH Vs. Dy. Commissioner of Income Tax (IT) in ITA No. 1683/Mum/2015, dealing with the similar issue for the Assessment Year 2011-12 held as under:-

> *"15. A customer/subscriber can access the data stored in the database by paying subscription. The Department held the subscription paid to Dun & Brad Street Espana, S.A., for accessing the data to be in the nature of royalty. The Authority for Advance Ruling after dealing with the issue ultimately concluded that the subscription received by Dun & Brad Street Espana, S.A., for allowing access to the database is Elsevier Information Systems GmbH not in the nature of royalty/fees for technical services. Following the aforesaid decision, the Tribunal, Ahmedabad Bench, in ITO v/s Cedilla Healthcare Ltd. [2017] 77 taxmann.com 309, while considering the nature of subscription paid to a U.S. based company viz. Chemical Abstract Services, which is in the same line of business and is stated to be the competitor of the assessee, held that the subscription paid for online access to*

the database system "scifinder" is not in the nature of royalty. The observations of the Tribunal while deciding the issue in favour of the assessee are as under:-

"17. We find that as the treaty provision unambiguously requires, it is only when the use is of the copyright that the taxability can be triggered in the source country. In the present case, the payment is for the use of copyrighted material rather than for the use of copyright. The distinction between the copyright and copyrighted article has been very well pointed out by the decisions of Hon'ble Delhi High Court in the case of DIT v. Nokia Networks OY [2013] 358 ITR 259/212 Taxman 68/25 taxmann.com 225. In this case all that the assessee gets right is to access the copyrighted material and there is no dispute about. As a matter of fact, the AO righty noted that 'royalty' has been defined as "payment of any kind received as a consideration for the use of, or right to use of, any copyright of literary, artistic or scientific work" and that the expression "literary work", under section 2(o) of the Copyright Act, includes 'literary database' but then he fell in error of reasoning inasmuch as the payment was not for use of copyright of literary database but only for access to the literary database under limited non exclusive and non transferable licence. Even during the course of hearing before us, learned Departmental Representative could not demonstrate as to how there was use of copyright. In our considered view, it was simply a case of copyrighted material and therefore the impugned payments cannot be treated as royalty payments. This view is also supported by Hon'ble Bombay High Court's judgment in the case of DIT (International Taxation) v. Dun & Bradstreet Information Elsevier Information Systems GmbH Services India (P.) Ltd. [2011] 338 ITR 95/[2012] 20 taxmann.com 695."

16. The same view was again expressed by the Tribunal in DCIT v/s Welspun Corporation Ltd., [2017] 77 taxmann.com

165. If we examine the facts of the present appeal in juxtaposition to the facts of the decisions referred to herein before, it can be seen that the facts are almost identical and akin. In the referred cases the assessees were also maintaining databases of information collated from various journals and articles and allowed access to the users to use such material as required by them. Keeping in view the ratio laid down in the decisions (supra), the payment received by the assessee has to be held to have been received for use of copyrighted article rather than for use of or right to use of copyright.

17. Having held so, the next issue which arises for consideration is, whether the subscription fee can be treated as fees for technical services. As discussed earlier, it is evident that the assessee has collated data from various journals and articles and put them in a structured manner in the database to make it more user friendly and beneficial to the users/customers who want to access the database. The assessee has neither employed any technical/skilled person to provide any managerial or technical service nor there is any direct interaction between the customer/user of the database and the Elsevier Information Systems GmbH employees of the assessee. The customer/user is allowed access to the online database through various search engines provided through internet connection. There is no material on record to demonstrate that while providing access to the database there is any human intervention. As held by the Hon'ble Supreme Court in CIT v/s Bharati Cellular Ltd., [2010] 193 taxman 97 (SC) and DIT v/s A.P. Moller Maersk A.S., [2017] 392 ITR 186 (SC), for providing technical / managerial service human intervention is a sin qua non. Further, Article-12(4) of India-Germany Tax Treaty provides that payment for the service of managerial, technical or consultancy nature including the provisions of services by technical or other personnel can be

termed as fees for technical services. None of the features of fees for technical services as provided under Article 12(4) of the India- Germany Tax Treaty can be found in the subscription fee received by the assessee. Further, the Department has not brought any material on record to demonstrate that the assessee has employed any skilled personnel having knowledge of chemical industry either to assist in collating articles from journals / magazines which are publicly available or through them the assessee provides instructions to subscribers for accessing the online database. The assessee even does not alter or modify in any manner the articles collated and stored in the database. In the aforesaid view of the matter, the subscription fee received cannot be considered as a fee for technical services as well."

13. In the case of Elsevier Information System GmbH (supra) held that receipt of the assessee therein do not qualify as FTS as per the provisions Section 9(1) (vii) of the Act, wherein the Tribunal Bench of Mumbai adjudicated the issue regarding treaty of 'Indo-German Tax Treaty' wherein the provisions of FTS are similar to Section 9(1)(7) of the Act. The only difference to the present appeal is that the applicable treaty is Indo-US Tax Treaty. The Article 7 of India-US DTAA, the income from subscription to Assessee's data base is in the nature of business profit, therefore, the same is not taxable in India as the assessee has no permanent establishment in India. By respectfully following the ratio laid down by the Mumbai Tribunal in the case of Elsevier Information System GmbH (supra), in the absence of any material available on record to prove that the assessee is providing full fledged service and solutions for legal professions, we are of the opinion that the A.O. has committed an error in making the addition. In view of the same, the payment received by the assessee is in the nature of 'Business Profit' which cannot be

brought to tax in India in the absence of PE. Accordingly, the grounds of both the appeals of the assessee are allowed."

15. Further, in view of above facts, it is clear that providing access to online database / journals is nothing but providing access to copyrighted article which does not amount to royalty. In this regard, reliance is placed on following decisions, wherein difference between a Copyright and a copyrighted article has been brought out very clearly:

- Engineering Analysis Centre of Excellence (P.) Ltd. vs. CIT, [2021] 432 ITR 471 (SC)
- CIT vs. ZTE Corporation, [2021] 282 Taxman 304 (SC) dismissed the SLP filed by Revenue.
  Review Petition filed by the Revenue also dismissed by the Hon'ble Supreme Court (TS-741-SC-2023)

16. Even as per Explanation 2 to the Section 9(1)(vi) of the Act, the impugned receipts from Indian customers do not constitute consideration for grant of any rights in the copyright, hence are not taxable as royalty. Thus, receipts from Indian customers for offshore sales of books / journals or providing access to online journals / online library do not qualify as Royalties under the Act as well as under the Treaty. The services are also do not fall under FIS as the services do not satisfy the clause 'make available' as required for the provisions of Article 12 of DTAA.

17. Since, the matter has been adjudicated on merits of the case viz., Royalties / FIS, the other grounds taken up by the assessee are not being adjudicated being academic in nature.

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

Order Pronounced in the Open Court on 21/08/2024.

Sd/-	**Sd/-**
(Sudhir Pareek)	**(Dr. B. R. R. Kumar)**
Judicial Member	**Accountant Member**

Dated: 21/08/2024
Subodh Kumar, Sr. PS
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR