Kluwer International Tax Blog

Subscription Fee Charged for Providing Access to an Online Database: Should It Be Taxed?

Amrit Singh (Nirma University) · Friday, July 19th, 2019

The Income Tax Appellate Tribunal (hereinafter referred to as the **"Tribunal"**), Mumbai delivered a landmark judgment in the case involving two parties namely, Elsevier Information Systems Gmbh and Dy. Commissioner of Income Tax. Recently, the Tribunal held that the subscription fees charged by the taxpayer for access to an online database is in the nature of a business income which cannot be brought to tax in India in the absence of a Permanent Establishment (hereinafter referred to as the **"PE"**).

In the matter of Elsevier Information Systems Gmbh (hereinafter referred to as the "**taxpayer**") v. Dy. Commissioner of Income Tax (hereinafter referred to as the "**IT**"), the taxpayer is a tax resident of Germany and has an online database which provides information related to the subject of chemistry. The information is limited to those people who pay the subscription fee (hereinafter referred to as "**fee**") and so the taxpayer received this payment from its users worldwide. However, the taxpayer declared nil income when it filed its return of income on 30th March 2012.

The Assessing Officer (hereinafter referred to as the "**AO**") had some doubts with respect to this income, therefore, he asked for a clarification. The taxpayer stated that the fee is not in the form of any royalty or fees for technical services. Also, as per Article 5 of the India-Germany Tax Treaty (hereinafter referred to as the "**Treaty**"), it contended that since the company does not have a PE in India, the fee that it received from its customers is not liable to be taxed in India.

The AO called for certain documents from the taxpayer and after scrutinizing them, he formed an opinion that the fee is the nature of fees for technical services/royalty and is taxable in India. He also called upon the taxpayer to explain the reason as to why this fee is not taxable in India. The taxpayer submitted that the fee received from the Indian entities does not fall within the ambit of "income by way of royalty" under Section 9(1)(vi) or "income by way of fees for technical services" under Section 9(1)(vii) of the Income Tax Act 1961 (hereinafter referred to as the "**Act**").

So, the main issue before the Tribunal was, whether the fee received by the taxpayer was in the nature of royalty or fees for technical services and chargeable to tax in India. As per the AO, the fee was liable to be taxed in India. The taxpayer company basically has a database which has magazines, formula for complex reactions, general science books, etc. and once a user logs in to the database, that person can find a very organised and structured database. So, in the opinion of the AO, this database is very similar to a library which requires human intervention.

Also, in reference to Section 9(1)(vii) of the Act, he noted that the online database "reaxys" offers a highly intuitive interface and robust database to help leading chemists retrieve valid compound properties, relevant chemical literature and experimental procedures. He observed that the database has collected a lot of data in relation to chemical substances. Therefore, a careful selection process is undergone wherein data is collated from various journals, etc. Hence, the fees falls within the purview of the expression "technical services" and that the fees shall be taxed in India.

Moreover, he contended that the fee received by the taxpayer is in the form of a literary work, which can therefore, be treated as royalty under the Act. He relied on Article 12(3) of the Treaty when he stated that the fee is in the form of royalty as it amounts to transfer of right to use of a copyright. Therefore, in his assessment order, he held that the fees had to be taxed at the rate of 10%.

Aggrieved by the said order, the taxpayer raised objections before the DRP, i.e. Dispute Resolution, however, the impugned order was affirmed by the DRP as well.

The matter finally went before the Tribunal. The Tribunal noted the characteristics of the database and also observed that it is accessible through any regular web browser such as Mozilla Firefox or Google Chrome. Therefore, it seemed clear that there was no requirement of having any particular software. The Tribunal also looked at the terms of the Agreement that the users of the service and the taxpayer enter into.

It is worth mentioning that the terms were crystal-clear and unambiguous as the taxpayer never intended to confer any exclusive or transferable right on the customer or user. The terms also stipulate that the user, after the termination of the agreement, has an obligation to delete all stored copies of things from reaxys as per the taxpayer's reasonable satisfaction.

Clause 1.5 of the Agreement specified that the user has no right over the subscribed products and that all right, title and interest vest with the taxpayer and it prohibited any unauthorized redistribution of the items. After going through the terms of the agreement, the Tribunal pondered upon the question whether the fee charged by the taxpayer falls within the ambit of Article 12 of the Treaty.

Article 12 essentially provides that royalty and fees for technical services arising in a contracting state and paid to a resident of the other contracting state may be taxed in the other state.[1] This meant to show that the fee is taxable in Germany only. However, Article 12 (2) provides for taxation of royalty and fees for technical services in India subject to the condition that the tax leviable shall not exceed 10% of the gross amount of royalty or fees for technical services.[2]

Further, Article 12(3) reads as under:

> *"The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work, including cinematograph films or films or tapes used for radio or television broadcasting any patent, trade mark, cinematograph films or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience."*

The Tribunal noted the fact that in the present circumstances, the taxpayer has not transferred the use or right to use to any of its users and that it has only allowed them to access the material that is available on the database. Also, once the subscription ended, the user could not even use the information relating to chemistry which is there on the database.

All of these facts presented a view that the fee received by the taxpayer is not a royalty as per Article 12(3) of the Treaty. The Tribunal arrived at its decision after relying on several judgments such as Dun & Brad Street Espana, S.A., ITO v. Cedilla Healthcare Ltd.,[3] DCIT v. Welspun Corporation Ltd., which were along the same lines as this case.

In the case of DCIT v. Welspun Corporation Ltd., the Tribunal (Ahmedabad) held:

> *"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. In our considered view, it was simply a case of copyrighted material and therefore the impugned payments cannot be treated as royalty payments."*

The Tribunal also decided on the issue whether the fee received by the taxpayer can be treated as fees for technical services. It held that the respondent could not prove that there was any kind of human intervention while providing access to the database. This had to be proved by the respondent since human intervention is a prerequisite for providing any type of managerial/technical service as has been held by the Supreme Court in various cases such as CIT v. Bharati Cellular Ltd. and DIT v. A.P. Moller Maersk A.S.

Therefore, the Tribunal held that the fee charged by the taxpayer falls neither under the ambit of "royalty" nor "fees for technical services". It also drew a comparison with the services offered by Taxmann and observed that the users only get access to a copyrighted article not the copyright itself. Hence, it pointed out that the same happens when the taxpayer charges a fee for rendering services as it merely allows its users to access the information and material that is readily available on its database.

The decision of the Tribunal is extremely crucial as it highlights the difference between the payment made for the use of copyrighted item and use of copyright. The ruling is also very significant as it does not impose any kind of unnecessary liability on the taxpayer to pay tax when the taxpayer does not have a PE in India.

Amrit Singh is a fourth-year B.A., LL.B. (Hons.) student at the Institute of Law, Nirma University.

END NOTES

[1] Elsevier Information Systems GmbH v. Dy. Commissioner of Income Tax, ITA no. 1683/Mum./2015, para

12, https://www.itat.gov.in/files/uploads/categoryImage/1555910704-1683%20-%20SD%20%2B%20MKA%20-%20ELSEVIER%20INFORMATION%20SYSTEMS%20GmbH%20-%20MEM-CORRECTED%20-%20COPIED%20-%20OK.pdf.

[2] ibid.

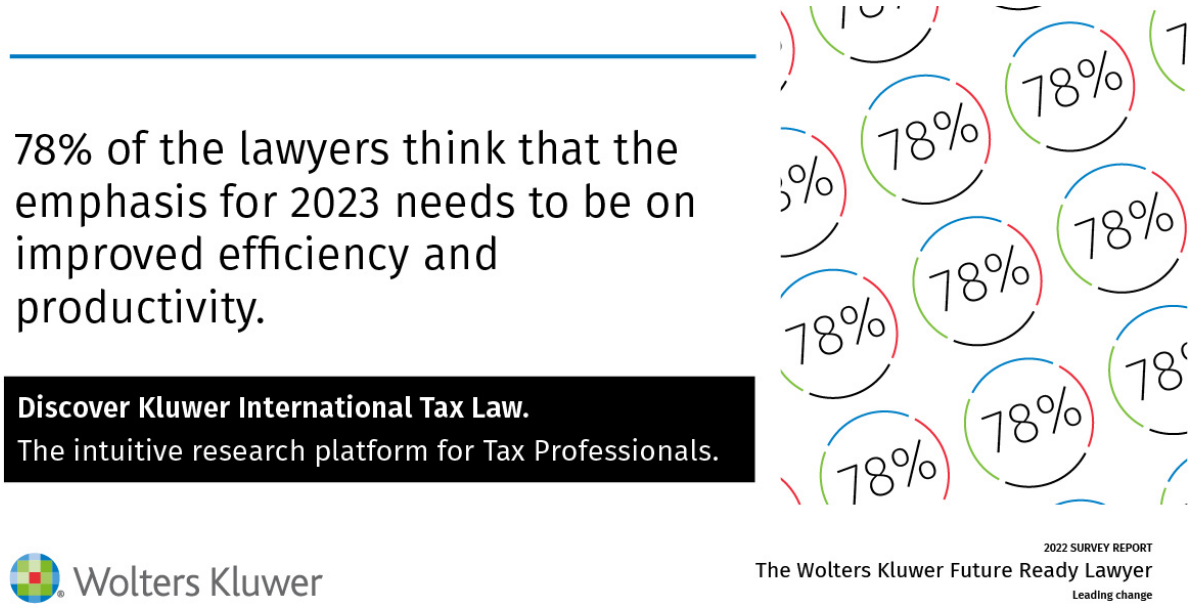
[3] [2017] 77 taxmann.com 309.

To make sure you do not miss out on regular updates from the Kluwer International Tax Blog, please subscribe here.

Kluwer International Tax Law

The **2022 Future Ready Lawyer survey** showed that 78% of lawyers think that the emphasis for 2023 needs to be on improved efficiency and productivity. Kluwer International Tax Law is an intuitive research platform for Tax Professionals leveraging Wolters Kluwer's top international content and practical tools to provide answers. You can easily access the tool from every preferred location. Are you, as a Tax professional, ready for the future?

Learn how **Kluwer International Tax Law** can support you.



This entry was posted on Friday, July 19th, 2019 at 10:20 am and is filed under Fees for technical services, India, Royalties, Tax Treaties
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a

response, or trackback from your own site.