



Tax Insights

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Amount received for allowing access to the online database of journals and books not taxable as royalty under the India-USA DTAA – Delhi bench of the Tribunal

In brief

The Delhi bench of the Income-tax Appellate Tribunal (Tribunal)¹ held that the amount received for providing access to the online database of books and journals, maintained by the appellant, cannot be categorised as royalty under Article 12 of the India-USA Double Taxation Avoidance Agreement (DTAA). The Tribunal observed that by providing access to the online database, the appellant does not transfer any copyright to the customers; rather, it grants only limited rights of access to the database on subscription basis, which cannot be considered as royalty, in light of the Supreme Court decision in the case of Engineering Analysis Centre of Excellence Private Limited². Accordingly, the Tribunal directed to delete the additions made by the Tax Officer (TO).

In detail

Facts

- The appellant, a tax resident of USA, created a database in relation to healthcare by collating the information available in the public domain. The appellant has picked such collated data of third parties and included it in the database along with providing analysis, indexing, description and appending notes for facilitating easy access to the customers.
- The appellant provided limited access to the contents of the database on a subscription model.
- The facts on record and terms of the subscription agreement provide as follows:
 - The customers were not permitted to copy, print, reproduce, modify, translate, adapt or create derivative works based upon the licensed products;
 - The customers were prohibited from reverse engineering, decoding, decompiling, disassembling or otherwise attempting to access or derive the source code or structural framework of the licensed products;
 - The customers cannot sell, loan, rent or lease access to the licensed products or use the licensed products as part of a service bureau or similar fee for service purposes;

¹ ITA No. 7347/Del/2019

² Engineering Analysis Centre of Excellence Private Limited v. CIT 432 ITR 471 (SC)

- The customers cannot share usernames, passwords or any other security information for access to the licensed products;
 - All rights, title and interest in and to the licensed products, including all copyright and other intellectual property rights, remain with the appellant;
 - The appellant is not obligated to update or revise the contents of the licensed products; and
 - Upon termination, the products are required to be deleted by the licensee from any place of storage.
- The TO held that the amount received by the appellant is for the transfer of the use or right to use of a copyright, and the income is chargeable to tax as royalty under section 9(1)(vi) of the Income-tax Act, 1961 and Article 12 of the India-USA DTAA.

Tribunal's ruling and observations

- The Tribunal observed that the appellant merely collated the information already available in the public domain and provided it to the customers for easy reference. The appellant was neither the creator of the content, nor did it transfer rights to use any copyright.
- The Tribunal further noted that as per Article 12 of the India-USA DTAA, any payment received 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, trademark, 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 or for the use of, or the right to use, any industrial, commercial, or scientific equipment, subject to certain exceptions, can be treated as royalty.
- The Tribunal compared the instant case with the provision of access to online databases containing judgements or orders of the courts and held that the provision of the access to such databases would not be covered under the definition of royalty since there is no transfer of right to use of any copyright.
- Moreover, the terms of the agreement prohibited the customers from exploiting or modifying the contents, and only limited rights were provided to the customers.
- The Tribunal held that the decision of Karnataka High Court³ relied upon by the Revenue has been reversed by Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited².
- The Tribunal further referred to the ruling in the case of the sister concern⁴ of the appellant wherein, on an identical factual matrix, it was held that the end user cannot be said to have obtained the copyright since the customer did not receive the authority to reproduce the data or make any translation or adaptation in the data.
- Considering the above, the Tribunal held that the amount received by the appellant cannot be considered to be royalty under the India-USA DTAA, and in the absence of any permanent establishment of the appellant in India, the amount cannot be considered to be taxable in India.

The takeaways

This is a relevant ruling for taxpayers providing access to online databases wherein the service provider is not the original content creator. This Tribunal ruling, taking reference of the Supreme Court decision in the case of Engineering Analysis² and other decisions, explains that in the absence of any transfer of use or right to use of any copyright, the consideration received cannot be held to be royalty under the India-USA DTAA. It is pertinent to note here that the above ruling has been passed specifically in the context of the India-USA DTAA. Whether similar services would be outside the purview of the definition of royalty under other DTAA with other jurisdictions or in the absence of any such DTAA would have to be analysed on the facts of the case.

³ 16 taxmann.com 141 (Karnataka)

⁴ ITA No.5171/Del/2018

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