SATURDAY INTERNATIONAL TAX GYAN !!!
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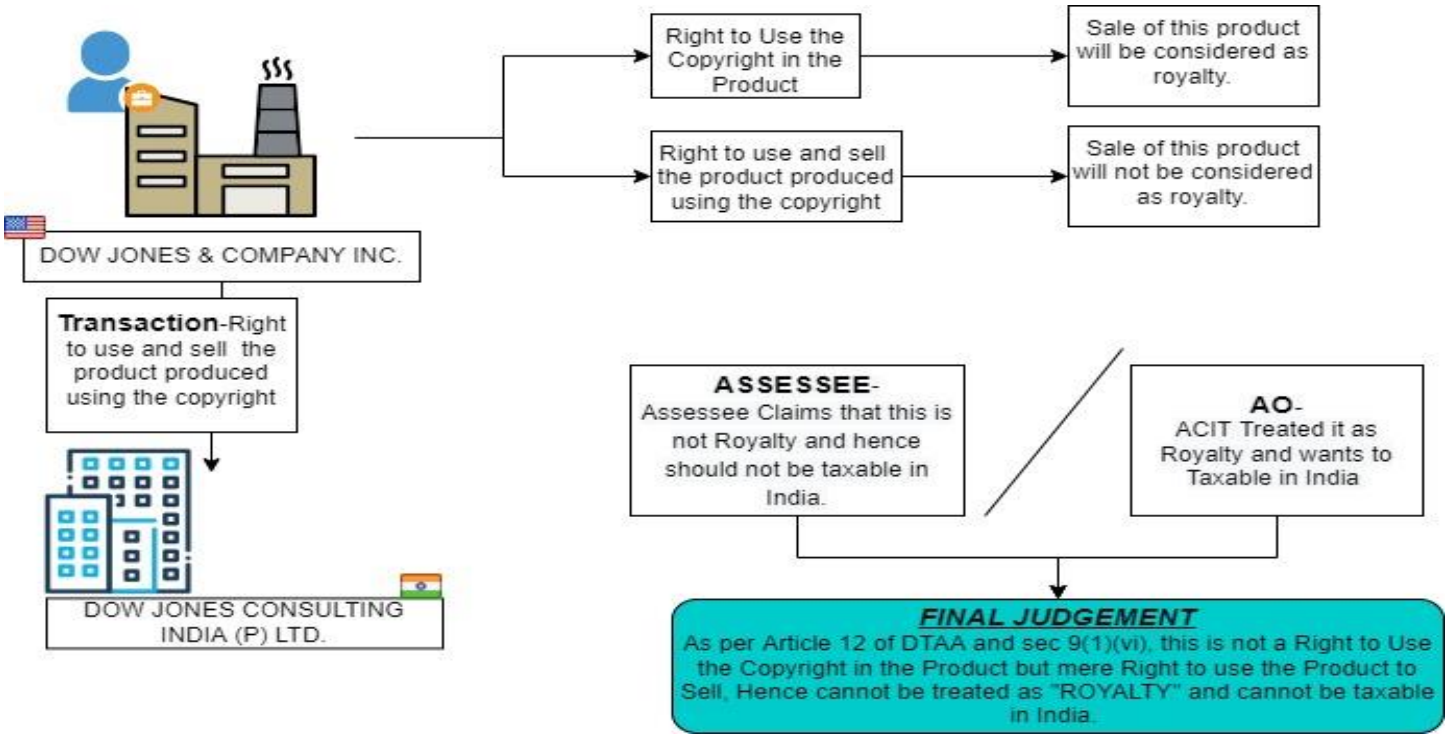
Dow Jones & Company Inc. v. ACIT (International Taxation)[1]

Payment Received for Granting of Access to Data-Base cannot be said 'Royalty' in Nature.



Facts:

- The appellant, a business corporation incorporated in USA, and engaged in the business of providing information products and services containing global business and financial news to organizations worldwide. It offers information via newspapers, newswires, websites, applications, newsletters, magazines, proprietary databases, conferences and radio.
- The appellant company appointed Dow Jones Consulting India (P) Ltd (DJCIPL) on a principal-to-principal basis for distributing its products in the Indian market. Accordingly, the appellant company sells database subscription to Dow Jones Consulting India (P) Ltd at an arm's length price.
- During the course of scrutiny assessment proceedings, the assessing officer was of the firm belief that the receipts from Dow Jones Consulting India (P) Ltd should be taxed in India as 'Royalty Income" under the provisions of the Act as well as India-USA Double Taxation Avoidance Agreement.
- Referring to the definition 'Royalty' given in section 9(1)(vi) of the Act, the assessing officer treated the Indian receipts as taxable as 'Royalty'. The assessing officer further examined the relevant Article of India-USA Double Taxation Avoidance Agreement and again formed a belief that Indian receipts are also taxable under the India-USA Double Taxation Avoidance Agreement and concluded the proceedings by taxing the same.

[1] 2022_TaxPub (DT) 0025 (Del-Trib)

Assessee's contention:

- The payment made by assessee is not for the transfer of all or any rights in respect of the database under the agreement, hence it cannot be considered as Royalty.
- Therefore, services provided were purely in the nature of its business income and in absence of PE of USA Company in India, such an income cannot be taxed in India.

Revenue's contention:

- As referring to the definition 'Royalty' given in Section 9(1)(vi), the receipts from India should be taxable as 'Royalty'.
- As per Relevant Article 12 of India-USA Double Taxation Avoidance Agreement the Assessing Officer treated the Receipts from India as Royalty Income and taxed income accordingly.

Ruling:

- As per Article 12 The term "royalties" is defined as:
  (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, trademark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience; 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 income, derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic.

- Thus, article 12 of the Tax Treaty brings within the ambit of the definition of royalty, a payment made for the use of or the right to use a copyright of a literary, artistic or scientific work. Thus, only those payments that allow a payer to use/acquire a right to use a copyright in a literary, artistic or scientific work arc covered within the definition of royalty.
- **Payments made for acquiring the right in use the product it sells, without allowing any right to use the copyright in the product, are not covered within the scope of royalty which may get covered under the term 'Royalty' as per the Act.** Further, unless the payments are made towards acquiring the right to use a copyright in a literary, artistic, or scientific work, definition of Royalty would not get attracted.
- **In the current case, there is no transfer of legal title in the copyrighted article as the same rests with the Applicant.** All rights, title and interest in the licensed software, which is being claimed to be copyrighted article, are the exclusive property of the Applicant. Dow Jones Consulting India (P) Ltd has no authority to reproduce the data in any material form, to make any translation in the data or to make any adaptation in the data.
- The Applicant submits that the payments made by Dow Jones Consulting India (P) Ltd is not for the transfer of all or any rights in respect of the database Under the agreement, Dow Jones Consulting India (P) Ltd does not acquire any right in relation to the products.
- Thus, Payment received From India cannot be treated as 'Royalty' Income and cannot be taxed in India.

Our comments:

- The decision is in line with Supreme court decision of "**Engineering Analysis Centre of Excellence Pvt Ltd vs. CIT (Supreme Court)".**
  The Hon'ble Supreme Court has clarified that:
  Distribution agreements/EULAs (End User License Agreements) do not create any interest or right in such distributors/end-users, which would amount to the use of or right to use any copyright.
  Therefore, this will not be considered as payment of Royalty and no TDS is required to be deducted by the Indian Buyer**.**

- It is to be noted that as per the Income Tax act, such subscription services could fall in the ambit of Royalty (Section 9(1)(vi)).
  Therefore, to take the treaty benefit, it is suggested that TRC and NO-PE certificate of the service provider should be obtained and to check if such transaction would fall outside the ambit of royalty in respective DTAA.

Section	**Section 9(1)(vi), Article 7, 12**
DTAA/Country	**India-USA**
Court	**Delhi Tribunal**
Date of Decision	**14.12.2021**

Note: Case law name in Red- in favour of the Revenue, Green- In favour of the Assessee, Orange = Partial.

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Thank you