

SATURDAY INTERNATIONAL TAX GYAN !!!

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American Chemical Society v. Deputy Commissioner of Income-tax (IT)-
1(1)(1), Mumbai ¹

Access to database and journals of information, disclosed publicly will not be considered as royalty and hence not liable to tax in India.

Facts:

- The assessee was a not-for-profit corporation based in USA, established to promote and support development of knowledge in the field of chemistry. It filed its return of income declaring nil income on 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).
- It is evident that the assessee merely accumulates and organizes information already available in public domain/publicly disclosed information, and organizes the same at one place, thereby creating a database which is accessed by its customers against payment of subscription fee termed as CAS fee.

Assessee's contention:

- The Ld. Senior Counsel also submitted that mere access to the database is provided by the assessee and in terms of the arrangement, no copyright can be said to be acquired by the customer; and, what is provided to the subscriber/customer in the instant case is neither a copyright and nor any full-fledged right to use, but only a limited right to use of a copyrighted article, which does not give rise to any 'royalty' income in the hands of the assessee company. Further the income earned by assessee is a business income and in absence of PE in India no income is taxable in India.

Revenue's contention:

- The Assessing Officer is of the view that income earned from subscription fees for CAS division be treated as consideration for information concerning industrial or commercial experience, which is defined as 'royalty' within the meaning of section 9(1)(vi) of the Act as well as Article 12(3) of the India-USA DTAA; and that the payments to the assessee can also be treated as payments for use of industrial, commercial or scientific 'equipment' which again is to be understood as 'royalty' within the meaning of section 9(1)(vi) of the Act as well as Article 12(3) of the India-USA DTAA.

¹ 106 taxmann.com 253 (Mumbai)

Ruling:

- From the material available on record it can be seen that it is evident that the assessee merely accumulates and organizes information already available in public domain/publicly disclosed information, and organizes the same at one place, thereby creating a database which is accessed by its customers against payment of subscription fee termed as CAS fee. Thus, prima facie, there is no copyright or intellectual property lying with the assessee itself in relation to such information or the contents of the database.
- The OECD commentary referred in para 7.13 of the assessment order brings out that the payments which are to be understood as 'royalty' in the context of information concerning industrial, commercial or scientific experience ought to be in relation to information which is undivulged and/or arises from previous experience. In other words, in order to be understood as 'royalty', the payment must be for information which is exclusively possessed or secret under the ownership of the grantor of such information.
- The database does not provide any information arising from assessee's own previous experience or knowledge of the subject.
- In the case of a book, the publisher of the book 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.
- It is a well settled law that copyrighted article is different from a copyright, and that consideration for the former, i.e. a copyrighted article does not qualify as royalties.
- 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.

Our comments:

- The principle laid down by Hon'ble Supreme court in case of Engineering Analysis Centre Of Excellence Private Limited is followed here as well wherein transfer of a copyrighted article and a copyright are different and transfer of a copyright would be considered as royalty.
- Further, providing an access to a database or journal having information available in public domain cannot be considered as royalty as information available in public domain cannot be copyrighted and hence cannot be considered as royalty.

Section	Section 9, Article 12
DTAA/Country	India-USA
Court	Mumbai Tribunal
Date of Decision	30.04.2019

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

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