



# SATURDAY INTERNATIONAL TAX GYAN !!!

## #taxmadeeasy

### SITG No. 221

### Coursera Inc.

v.

### ACIT

Offering access to online courses and degrees as an aggregation service, provider can not be brought to tax as FIS or royalty under article 12 of India-USA DTAA

31.08.2024



## Facts of the Case

- ❖ The assessee is a non-resident corporate entity incorporated in USA and a tax resident of USA. Assessee operates a global online learning platform, which offers anyone, anywhere access to online courses and degrees from leading universities and companies. For this purpose, the assessee has developed a proprietary platform to host multimedia courses for consumption by end-users.
- ❖ Through its platform, assessee offers online education/courses in various disciplines, for this purpose, the assessee has entered into agreements with Indian customers including universities from outside India to provide access to its platform in India.
- ❖ The assessee had provided services to individuals, educational institutions and corporates. For providing such services, the assessee had earned fees of Rs.75,66,52,591/-. In the return of income filed for the assessment year under dispute, the assessee had offered income of Rs.17,98,07,270/-.

## Assessee's Contention

- ❖ The assessee contended that such receipts are **neither in the nature of royalty nor FIS.**
- ❖ Assessee submitted that the **assessee is merely an aggregator of various contents** and certification courses offered by different universities. Assessee has only provided a single platform, wherein, various courses of different universities are put together and access is provided to customers through subscription.
- ❖ Assessee contended that the platform is fully automated without any human intervention and for **providing technical / managerial service human intervention is a essential.**
- ❖ Further, so far as **User Services** are concerned, the assessee has only provided a customized landing page featuring the organization logo and selected courses. Assessee submitted that certificates are issued by universities and the certificate merely contains the logo of the assessee along with that of the university.

# Assessee's Contention

- ❖ Assessee contended that even assuming that services are of technical nature, however, while providing such services, the assessee has **not made available** any technical knowledge, knowhow, skill etc. to the service recipient. Therefore, the receipts **cannot fall within the ambit of Article 12(4)** of India - USA DTAA.
- ❖ Merely because the assessee has a customized landing page, it does not mean that the assessee provides technical services, that too, through human intervention.

# Revenue's Contention

- ❖ Assessing Officer contended that the assessee is **not merely providing Content Services** to the customers of India, **but is also providing a whole range of "User Services", which are user specific, and involve a high degree of human intervention.** (Explanation on Content Services and User Services by revenue is on next page)
- ❖ According to the revenue, the assessee provides customized services to its clients. Revenue submitted that though the course content may be prepared by other educational institutions and not by the assessee, however, the fact that the **content services and user services are being provided to Indian customers** by the assessee and the **completion certificate bears the logo of the educational institution as well as assessee**, signifies that the training services are being provided by assessee itself.
- ❖ Revenue submitted that thus the nature of services provided by the assessee is technical. He further held that while providing such services, the assessee **makes available specialization, technical skill and knowhow to its customers.** Therefore, make available test is also satisfied in terms of Article 12(4) of the treaty.

# Revenue's Contention

- ❖ In **User Services**, assessee provides (i) customized landing page featuring the Organization logo and selected courses, (ii) user engagement reports, (iii) payment solution(s) that allow users to seamlessly access premium course experiences and skip checkout, and (iv) enterprise-level user support.
- ❖ **Content Services** means, access to assessee's course and/or Specialization certificate services, including access to Course assessments and grades through online open content offerings.

# Legal provisions

## Article 12 of India US DTAA:

12(3) *The term "royalties" as used in this Article means :*

- 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, trade mark, 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 :”*

12(4) *For purposes of this Article, "fees for included services" means payments of any kind to any person in consideration for the rendering of any technical or consultancy services (including through the provision of services of technical or other personnel) if such services :*

- a) *are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received ; or*
- b) *make available technical knowledge, experience, skill, know-how, or processes, or consist of the development and transfer of a technical plan or technical design.*

# Ruling

- ❖ Honorable ITAT discussed the case law of Elsevier Information Systems GmbH v. DCIT (supra), wherein identical nature of dispute was involved, in which the Coordinate Bench has held as under:

*“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 [2012] 25 taxmann.com 225/212 Taxman 68/358 ITR 259 (Delhi). 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 rightly 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.***

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



# Ruling

- ❖ If we examine the facts of the present appeal in connection 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 assessee 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.
- ❖ Having held so, the **next issue which arises for consideration is, whether the subscription fee can be treated as fees for technical services.**
- ❖ It is evident that the assessee has **collated data** from various journals and articles and **put them in a structured manner in 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 employees of the assessee. **There is no material on record to demonstrate that while providing access to the database there is any human intervention.**
- ❖ Therefore, in the facts of the present case, the **subscription fee received by the assessee cannot be treated as royalty under Article-12(3)** of India-Germany Tax Treaty.

# Our Comments

- ❖ Considering the above case and various other previous case laws, it can be seen that time and again it has been held that any access to a database of information can not be considered as royalty under the treaty as to consider anything as royalty that needs to be a transfer of copyright and not a transfer/use of copyright material.
- ❖ In majority cases, there is access of copyright material rather than access to copyright.
- ❖ Further, all the decisions have been discussed from DTAA perspective and not as per Income Tax law. hence it is not clear as to whether such access to database would be considered as royalty under the Income Tax act, as royalty under Income Tax act includes all computer software.

<b>Section/Article</b>	Article 12
<b>DTAA/Country</b>	India USA
<b>Court</b>	ITAT DELHI BENCH D
<b>Date of decision</b>	21.08.2024

**Note:** Case law name in **Red**- in favor of the revenue, **Green**-In favor of the Assessee, **Orange** = Partial



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