Tax Hotline

September 15, 2023

SUBSCRIPTION FEES PAID TO FOREIGN ED-TECH PLATFORM IS NOT TAXABLE IN INDIA

- **Subscription fees paid by Indian customers to a foreign Ed-tech platform for access to online educational videos did not constitute payments for the 'use' or 'right to use' any copyright.**
- **Such fees did not constitute payments for information concerning industrial, commercial or scientific experience**
- **Such fees did not constitute payments for the 'use' or 'right to use' scientific equipment**

Recently, the Income-tax Appellate Tribunal, Bangalore[1] held that payment of subscription fees ("**Fees**") to a non-resident for access to educational videos was not taxable in India as 'royalty'.

Pluralsight LLC is a limited liability corporation incorporated in the United States (US) – ("**Pluralsight US**"). Pluralsight US has an online education platform which offers video training courses pertaining to technology on its website ("**Website**"). It works on a subscription model where it allows access to its database of educational videos ("**Database**") to customers (including individuals, businesses, and government enterprises) ("**Customers**") in exchange for the Fees.

In this context, the question which came up for the tribunal's consideration was whether the Fees paid by the Indian Customers was taxable in India as 'royalty'.

The tax department argued that the Fees constituted 'royalty' on the basis of the following three grounds:

- The Fees was towards use of or right to use any copyright;
- The Fees was for information concerning industrial, commercial or scientific experience;
- The Fees was received by the taxpayer for granting the right to use the equipment.

At the outset, the tribunal observed that since the provisions of the India-US tax treaty are more restrictive in scope than the provisions of the (India) Income-Tax Act, 1961, ("**Act**"), it would be confining itself to the provisions of India-US tax treaty in determining the taxability of the Fees.

The three grounds taken by the tax department and the ruling rendered by the tribunal in respect of each of the grounds are discussed in the table below:

Grounds	Ruling
The Fees was towards use of, or right to use any copyright.	As upheld by the Hon'ble Supreme Court in *Engineering Analysis*[2], payment made for acquiring the right to use any 'copyrighted article' wherein the payer does not get any copyright as per section 14 of the Copyright Act, 1957, shall not constitute payment towards 'use' or 'right to use' any copyright. Under section 14 of the Copyright Act, 1957, copyright means the exclusive right to do any of the acts specified therein, i.e. to reproduce the work, issue copies of the work to public, to make any translation or adaption of the work etc. In the present case, by subscribing to the Database, the Indian Customers merely get access to the Database to view the videos, without any right over the copyright in the Database. Thus, the Fees paid to access the Database did not constitute payments towards use of or right to use any copyright.
The Fees was for information concerning industrial, commercial or scientific experience. In this regard, the tax department specifically argued that access to the Database amounted to access to information concerning industrial, commercial or scientific experience.	The tribunal observed that Pluralsight US is in the business of aggregating videos, creating the Database and earning the Fees by granting access to the Database. As such, the skill / experience of Pluralsight US lies in creating and evolving the Database, maintaining a website, marketing the subscription plans etc. In the present case, Pluralsight US merely granted access to the

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Database and did not share with its Customers, any information concerning its skill / experience of creating / maintaining the Database.

Hence, the Fees could not have been considered to be payments for information concerning industrial, commercial or scientific experience.

In other words, the tribunal drew a distinction between the information actually provided to the Customers (i.e. the online content such as educational videos) and the skill and experience of the assessee (i.e. developing/creating/maintaining the database itself), the information concerning which was not provided to the Customers.

The Fees was received by the taxpayer for granting right to use the equipment. The tax department argued that the Fees constituted payments for the use or right to use any industrial, commercial or scientific equipment as the server containing the Database was used by the Customers as a 'point of interface'.	The tribunal held that the Customers had no access, right or control (in any manner whatsoever) over the server on which Pluralsight US maintains its Database. Hence, the Fees could not have been construed as payments made for the use or right to use any industrial, commercial or scientific equipment.

NDA ANALYSIS

This is a welcome ruling and we agree with the conclusion of the tribunal. Its analysis on the interpretation of the terms '*payments made for information concerning industrial, commercial or scientific experience'* appearing within the definition of 'royalties' is particularly noteworthy. There exists very limited literature on the interpretation of this limb of the definition of 'royalties. The tribunal has clarified that in interpreting it, a distinction must be created between payments made for access merely to any information and the access to information concerning the skill or experience of the payee, particularly the skill or experience of the payee in the context of the business that it is engaged in.

Having said so, the tribunal could have delved a little deeper into the discussion around the interpretation of the terms 'use' or 'right to use' and travelled beyond the definition of 'copyright' under the Copyright Act, 1957 in this regard. This could have been done even by way of referring to other judgments including *Dell International Services India (P.) Ltd.*[3] which contain extensive discussions on the interpretation of these terms.

Lastly, while the tribunal is correct in relying on the definition of 'royalties' under the India-US tax treaty as opposed to under the Act, it should have done so by first analysing whether the Fees are taxable in India under the provisions of the Act and only then having examined whether such taxing rights are restricted by an appropriate distributive rule of the India-US tax treaty. This in our view, would have been the correct application of section 90(2) the Act which states that the provisions of the Act should apply only to the extent they are more beneficial than the provisions of the applicable tax treaty.

– Anirudh Srinivasan & Afaan Arshad

You can direct your queries or comments to the authors.

[1]Pluralsight LLC, ITA No. 37/Bang/2023.

[2]Engineering Analysis Centre of Excellence (P.) Ltd., v. CIT, 432 ITR 471 (SC).

[3][2009] 305 ITR 37 (AAR)

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