

**BEFORE THE AUTHORITY FOR ADVANCE RULINGS (INCOME TAX)
NEW DELHI**

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PRESENT

Hon'ble Mr. Justice P.V. Reddi (Chairman)
Mr A. Sinha (Member)
Mr. Rao Ranvijay Singh (Member)
- (Member)

A.A.R. NO. 787 OF 2008

Name and Address of Applicant

FactSet Research Systems Inc.
601, Merrit 7, Norwalk, CT 06851, Connecticut

Commissioner concerned

Director of Income Tax (International Taxation-I), Delhi

Present for the Department

Mr. Sanjeev Sharma, Addl.DIT, (Intl. Taxn), Delhi.

Present for the Applicant

Mr.A.V.Sonde, Advocate, Mr.Sampath Reghunathan, Advocate

RULING

[By Hon'ble Chairman]

1. This application is filed under section 245Q(1) of the Income-tax Act, 1961 (for short 'the Act'). The applicant (referred to hereinafter as 'FactSet') is a company incorporated in USA and is non-resident for the purpose of Income-tax Act.

1.1 The following facts are stated in the application and in the written submissions filed: The applicant maintains a 'database' which is located outside India and which contains the financial and economic information including fundamental data of a large number of companies world-wise. The customers of the applicant are mostly financial intermediaries and investment banks which have the need for such data. The databases contain the published information collated, stored and displayed in an organized manner by FactSet, though the information contained in the database is available in public domain. The applicant, however, through its database enables the customer to retrieve this publicly available information within a shorter span of time and in a focused manner. The database maintains historical information and all the databases of FactSet are maintained at its datacenters in USA. For a customer to access and view FactSet data, the customer need to down-load client interface software (similar to internet browser). The customer can subscribe to specific database as per its requirement. The 'lion-share' database provides information on the shareholding by global holders of global equities. The 'Shark repellent' database provides information on takeover defence strategies adopted by various U.S. Public companies over a period of time. The Mergerstat database tracks formal transfers of ownership. A Call street database includes transcripts of quarterly conference calls (e.g. analysts's queries) held by public companies. There are some more databases also. A customer can view the data on their computer screens. The software, tools database and other related documentation are hosted on the FactSet's main frames and data libraries. Through the tools, any commercial data on FactSet's database can be easily woven into charts, graphs and spread-sheets. FactSet allows the data to be viewed and used only in the internal documents of its customers.

1.2 FactSet enters into a Master Client License Agreement (for short 'MCLA') with its customers under which FactSet grants limited, non-exclusive, non-transferable rights to use its databases, software tools etc. The applicant states that it does not carry on its business operation in India and there is no agent in India acting on behalf of the applicant and having an authority to conclude the contracts. The applicant receives subscription fees from its customers and the same is received outside India.

2. The applicant seeks advance ruling on the following questions formulated by it:

1. Whether, on the facts and circumstances of the case, FactSet Research Systems Inc. ('FactSet' or 'the applicant') will not be taxable in India under the Income-tax Act, 1961, with respect to the subscription fees?

2. Whether, on the facts and circumstances of the case, the applicant will not be taxable under the Double Taxation Avoidance Agreement entered into between the Government of India and the Government of United States of America with respect to the subscription fees?

3. Whether, on the facts and circumstances of the case, if the applicant is not taxable in India for the subscription fees, its customers in India will be required to withhold taxes under section 195 of the Act on subscription fees paid to the applicant?

4. Assuming that the applicant has no other taxable income in India, whether, on the facts and circumstances of the case, the applicant will be absolved from filing a tax return in India, under the provisions of Section 139 of the Act

with respect to the subscription fees?

3. Broadly, the contention of the applicant is that no tax liable to be paid on the subscription fees received from the customers in India as it does not constitute 'royalty' or 'fees for technical services' either under the provisions of the Income-tax Act, 1961 or the DTAA (Treaty) between India and USA. Moreover, as the applicant does not have permanent establishment (PE) in India, the subscription fees cannot be taxed as business income in view of Article 7 of India-USA Treaty.

4. Let us now notice the material terms of MCL Agreement. The applicant is the Licensor and the Licensee is the subscriber/customer. Clause 1.a declares that the licensor grants to the licensee "limited, non-exclusive, non-transferable rights to use the software, hardware, consulting services and databases". As regards the consulting service, it is stated that FactSet provides certain consultants who are able to demonstrate the FactSet's products and its uses to the customers. It is clarified in the rejoinder that consulting services are not really required as FactSet provides helpdesk facilitation free of cost, though at present, there is no such facilitation Centre in India. As regards hardware, it is clarified in the rejoinder that at present no hardware is being provided to the customers in India.

4.1 According to cl. 2.a the licensor provides the services solely and exclusively for licensee's own internal use and business purposes only in the licensee's business premises. The licensee's employees having a password or user ID can access the service. Further, the licensee cannot use or permit any individual or entity under its control to use the services and the licensed material for any unauthorized use or purpose. Clause 1.b makes it clear that all proprietary rights including intellectual property rights in the software, databases and all related documentation ("licensed material") will remain the property of licensor or its third party data/software suppliers. The licensee is permitted to use licensor's name for the limited purpose of source attribution of data got from the database in the internal business reports and the like. Licensee is solely responsible for obtaining required authorization from the suppliers for products received through them and in the absence of such authorization the licensor has the right to terminate the licensee's access to any supplier product.

4.2 Clause 2.c reads as follows:

Clause 2.c. Except as permitted under this Agreement or under a written agreement with a Supplier, Licensee agrees that it will not copy, transfer, distribute, reproduce, reverse engineer, decrypt, decompile, disassemble, create derivative works from or make any part of the Service, including the data received from the Service available to others. Licensee may use Insubstantial amounts of the Licensed Materials in the normal conduct of its business for use in reports, memoranda and presentations to Licensee's employees, customers, agents and consultants, but Licensor, its Suppliers and their respective affiliates reserve all ownership rights and rights to redistribute the data and databases."

4.3 Clause 2.d on which the Revenue placed reliance may also be noticed.

Clause 2.d: Licensor represents and Licensee acknowledges that the Service and its component parts were developed, compiled, prepared, revised, selected and arranged by Licensor, its Suppliers or their respective affiliates through the application of methods and standards of judgment developed and applied through the expenditure of substantial time, effort, money and originality and that they constitute valuable intellectual property and trade secrets of Licensor and its Suppliers. At Licensor's expense and reasonable request, Licensee agrees to cooperate with Licensor and its Suppliers to protect the proprietary rights in the software and databases during the terms of this Agreement."

4.4 Coming to the other clauses, the fees is payable within 30 days of receiving the invoice failing which the Licensor may suspend the licensee's access (vide clause 4). The initial term of the agreement is as set forth in Schedule (A) and thereafter the agreement can be renewed for successive one year periods (vide cl. 5). Clause 5.c stipulates that upon termination of the agreement, licensee will cease using all the licensed material, return any licensor hardware upon request and expunge all data and software from its storage facility and destroy all documentation except such copies of data to the extent required by law. Another restriction placed by cl. 5.d is that the Licensee may not use any part of the services (for eg., Index value) to create a proprietary financial instrument or to list on its exchange facilities. In various schedules relating to different databases, the rates of 'fixed price service' and 'Pay-As-you-Go Service' are set out.

5. *The contentions of the applicant raised in the application and in the course of arguments are briefly as follows:*

FactSet provides to the subscriber a mere right to view the information or access to the database while online. No transfer including licensing of any right in respect of copyright is involved here. Clause 2.c extracted above makes this position clear. The right that a customer gets is a right to use copy-righted database and not copy-right in the database. Clause (v) of Explanation 2 to Section 9(1)(vi) does not encompass the use of copyrighted material. The data is available in public domain and it is presented in the form of statements/charts after analysis, indexing, description and appending notes for facilitating easy access. These value additions are outside the public domain and the copyright in them is not transferred or licensed to the subscribers. The applicant's counsel compares the copyright which his client has to the head-notes and indexing part of law reports. Then, it is submitted that none of the other clauses, especially cl. (iv) can be invoked to bring the subscription fee within the ambit of royalty under section 9(1)(vi) of the Act. Coming to the Treaty, it is submitted that fee has not been paid for the use of or the right to use any copyright. The term 'use' in the context of royalty signifies exploitation of property in the form of copyright but not using the copyrighted product. The customers do not acquire any exclusive rights enumerated in Section 14(a) of the Indian Copy Right Act.

5.1 Utmost reliance is placed on the ruling of this Authority in the case of Dun & Bradstreet Espana, S.A. . Our attention has also been drawn to the decisions of ITAT in Wipro and Sonata Information Technology . It is then pointed out that in the absence of PE, the receipts cannot be taxed as business income. It is, therefore, submitted that neither under the Act nor the Treaty, the tax liability can be fastened on the applicant. Consequently, the subscribers are under no obligation to deduct the tax.

6. *The learned Departmental Representative has endeavoured to bring the fee received by the applicant into more than one limb of the 'royalty' definition, as explained later. Further, it is contended, on the basis of the information furnished in the rejoinder of the applicant that an agency PE may be existing in India and therefore the income attributable to PE might become taxable as business income, even if it is not royalty.*

7. Most of the focus was on 'royalty' provision contained in the Act and in the DTAA and the main and substantial question argued was whether the fee received by the applicant could be brought within any of the limbs of 'royalty' definition. Section 9(1)(vi) of the Act brings the income by way of royalty within the ambit of deemed income. Explanation 2 to clause (vi) of Section 9(1) defines 'royalty' as follows:
Explanation 2 – For the purposes of this clause "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for –

- (i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;
- (ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property;
- (iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property;
- (iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;
- [(iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in Section 44BB;]
- (v) the transfer of all or any rights (including the granting of a license) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films; or
- (vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to [(iv), (iva) and] (v).

7.1 Article 12 of the DTAA between India and USA deals with 'royalty' and 'fee for included services'. Such incomes can be taxed in the Contracting State in which they arise and according to the laws of that State (vide Art. 12.2). The term 'royalty' is defined in Art. 12.3 as follows:

Article 12.3

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; and
- (b) payments of any kind as consideration for the use of, or the right to use, any industrial, commercial, or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) of Article 8.

8. The first question is whether the amounts received by the applicant constitute consideration for the transfer of any rights in respect of the copyright or for the use or right to use any copyright of a literary/scientific work.

8.1 The expression 'copyright' is not defined in the Income tax Act. It must be understood in accordance with the law governing copyright in India viz. Copyright Act, 1957. In *State of Madras vs. Ganon Dunkrley & Co.**, the Supreme Court held that the expression 'sale of goods' in Entry 48 of List II (VII Schedule) of the Govt. of India Act is a nomen juris and shall be construed in its legal sense. The legal sense can only be what it has in the law relating to sale of goods and therefore the said expression shall bear the same meaning as it has in Indian Sale of Goods Act. Looking at the Treaty, we have Art.2.2 which clarifies how the undefined terms shall be understood. In substance, it says that an undefined term shall have the meaning which it has under the taxation law of the State concerned. When the term is not defined in the taxation law (I.T.Act), the definition in the law governing the subject-matter ought to be adopted, more so when there is no basic difference between the statutory definition and the ordinary legal concept. Section 16 of Copyright Act lays down that no person shall be entitled to copyright or any similar right in any work otherwise than under and in accordance with the provisions of this Act or any other law in force.

8.2 Section 14 gives the meaning of copyright. This Section was substituted for the previous one by the Copyright (Amendment) Act of 1994. Section 14 in so far as it is relevant is extracted hereunder:

14. For the purposes of this Act. "Copyright" means the exclusive right subject to the provisions of this Act. to do or

authorize the doing of any of the following acts in respect of a work or any substantial part thereof, namely:

(a) in the case of a literary, dramatic or musical work, not being a computer programme –

(i) to reproduce the work in any material form including the storing of it in any medium by electronics means;

(ii) to issue copies of the work to the public not being copies already in circulation;

(iii) to perform the work in public, or communicate it to the public:

(iv) to make any cinematograph film or sound recording in respect of work;

(v) to make any translation of the work;

(vi) to make any adaptation of the work;

(vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clause (i) to (vi)

xxx xxx xxx
8.3 By an inclusive definition in Section 2(o) of Copyright Act, computer programmes and computer databases are included within the ambit of 'literary work'. The database developed by the applicant can therefore be regarded as literary work within the meaning of clause (v) of Explanation 2 as well. Thus, computer database falls within the scope of 'literary work'. There is no need to discuss whether it can be characterized as a scientific work also.

9. Now, coming to the grips of the first question bearing on the definition of 'royalty', as noticed earlier, the applicant's data base is a source of information on various commercial and financial matters of Companies and similar entities. What the appellant does is to collect and collate the said information/data which is available in public domain and put them all in one place in a proper format so that the customer (licensee) can have easy and quick access to this publicly available information. The applicant has to bestow its effort, experience and expertise to present the information/data in a focused manner so as to facilitate easy and convenient reference to the user. For this purpose, the applicant is called upon to do collation, analysis, indexing and noting wherever necessary. These value additions are the product of the applicant's efforts and skills and they are outside the public domain. In that sense, the data base is the intellectual property of the applicant and copyright attaches to it; but, the question is whether in making this centralized data available to the customer-licensee for a consideration, can it be said that any rights which the applicant has as a holder of copyright in database are being parted in favour of the customer? The answer, in our view, must be in the negative. No proprietary right and no exclusive right which the applicant has, has been made over to the customer. The copyright or the proprietary rights over the 'literary work' remains intact with the applicant notwithstanding the fact that the right to view and make use of the data for internal purposes of the customer is conferred. Several restrictions are placed on the licensee so as to ensure that licensee cannot venture on a business of his own by distributing the data downloaded by it or providing access to others (vide clause 2.a & 2.c of the Agreement). The licensee has not been given the exclusive right to reproduce or adapt the work or to distribute the contents of data-base to others. The grant of license is only to authorize the licensee to have access to the copyrighted database rather than granting any rights in or over the copyright as such. The consideration paid is for a facility made available to the licensee. The license, it must be noted is a non-exclusive license. The term 'exclusive license' confers on the licensee and persons authorized by him, to the exclusion of all other persons, including the owner of the copyright, any right comprised in the copyright in a work*. The expression 'granting of license' placed within brackets takes colour from the preceding expression 'transfer of all or any rights'. It is not used in the wider sense of granting a mere permission to do a certain thing nor does the grant of licence denude the owner of copyrights all or any of his rights. A license granting some rights and entitlements attached to the copyright so as to enable the licensee to commercially exploit the limited rights conferred on him is what is contemplated by the expression 'granting of license' in clause (v) of Explanation 2.

9.1 The learned Departmental Representative has argued relying on Section 14a(i) and (vi) of the Copyright Act that the rights specified therein are granted to the customers and therefore there is a transfer of rights in respect of the copyright. We find no substance in this contention. The expression 'exclusive right' in the opening part of Section 14 is very important and it qualifies all the components of clause(a). The applicant is not conferred with the exclusive right to reproduce the work (including the storing of it in electronic medium), as contemplated by sub clause (i) of Section 14(a). The exclusive right remains with the applicant being the owner of the copyright and by permitting the customer to store and use the data in the computer for its internal business purpose, nothing is done to confer the exclusive right to the customer. Such access is provided to any person who subscribes, subject to limitations. The copyright of the applicant has not been assigned or otherwise transferred so as to enable the subscriber to have certain exclusive rights over the applicant's works. In *SBI vs. Collector of Customs, Bombay***, the Supreme Court held that "Countrywide use of the software and reproduction of software are two different things and licence fee for countrywide use cannot be considered as the charges for the right to reproduce the imported goods." That was also a case in which the property in the software remained with the supplier-a foreign company and the licence fee was payable by SBI for using the software in a limited way at its own centers for a limited period.

9.2 Then, the Departmental Representative has argued that the data can be rearranged according to the needs of the subscriber and therefore it amounts to adaptation. But, that is not the adaptation contemplated by sub-clause (vi) of Section 14(a) of Copyright Act read with the definition of adaptation as per Section 2(a). No right of

adaptation of the work within the meaning of that term in Section 2(o) has been conferred on the applicant.

9.3 We are, therefore, of the view that the subscription fee received by the applicant from the licensee (user of data base) does not fall within the scope of clause (v) of Explanation (2) to Section 9(1) of the Act.

10. Even examining from the standpoint of Treaty, we do not think that "the use of or right to use any copyright of a literary or scientific work" is involved in the subscriber getting access to the database for his own internal purpose. It is like offering a facility of viewing and taking copies for its own use without conferring any other rights available to a copyright holder. The expression 'use' (of copyright) is not used in a generic and general sense of having access to a copyrighted work. The emphasis is on the "use of copyright or the right to use it". In other words, if any of the exclusive rights which the owner of copyright (the applicant) has in the database are made over to the customer/subscriber so that he could enjoy such rights either permanently or for a fixed duration of time and make a business out of it, then, it would fall within the ambit of phrase 'use or right to use the copyright'. What rights of exclusive nature attached to the ownership of copyright have been passed on to the subscriber atleast partially? Is the licensee conferred with the right of reproduction and distribution of the reproduced work to its own clientele? Can it be publicly exhibited or its contents be communicated to the public? Is the applicant given the right to adapt or alter the 'work' for the purpose of marketing it? The answer is obviously – no. The underlying copyright behind the data base cannot be said to have been conveyed to the licensee who makes use of the copyrighted product.

10.1 The following passage from the Commentary on Art.12 in the condensed version of Model Tax Convention (published by OECD) is quite relevant in this context:

"Payments made for the acquisition of partial rights in the copyright (without the transferor fully alienating the copyright rights) will represent a royalty where the consideration is for granting of rights to use the programme in a manner that would, without such license, constitute an infringement of copyright. Examples of such arrangements include licenses to reproduce and distribute to the public software incorporating the copyrighted program, or to modify and publicly display the program. In these circumstances, the payments are for the right to use the copyright in the program (i.e. to exploit the rights that would otherwise be the sole prerogative of the copyright holder.)"

10.2 There is useful discussion on this aspect under the heads 'data retrieval' and 'delivery of exclusive or other high value data' in the OECD Commentary on the "Treaty characterization issues arising from e-Commerce"**. Though the dissertation is on the question whether similar income shall be classified as business income or technical fee, what is stated therein would be equally relevant in considering the royalty issue. The relevant passages are worth quoting:

Category 15: Data retrieval
Definition

The provider makes a repository of information available for customers to search and retrieve. The principal value to customers is the ability to search and extract a specific item of data from amongst a vast collection of widely available data.

Analysis and conclusions

27. The payment arising from this type of transaction would fall under Article 7. Some Member countries reach that conclusion because, given that the principal value of such a database would be the ability to search and extract the documents, these countries view the contract as a contract for services. Others consider that, in this transaction, the customer pays in order to ultimately obtain the data that he will search for. They therefore view the transaction as being similar to those described in category 2 and will accordingly treat the payment as business profits.

28. Another issue is whether such payment could be considered as a payment for services "of a technical nature" under the alternative provisions on technical fees previously referred to. Providing a client with the use of search and retrieval software and with access to a database does not involve the exercise of special skill or knowledge when the software and database is delivered to the client. The fact that the development of the necessary software and database would itself require substantial technical skills was found to be irrelevant as the service provided to the client was not the development of the software and database (which may well be done by someone other than the supplier) but rather making the completed software and database available to that client.

Category 16: Delivery of exclusive or other high-value data
Definition

As in the previous example, the provider makes a repository of information available to customers. In this case, however, the data is of greater value to the customer than the means of finding and retrieving it. The provider adds significant value in terms of content (e.g. by adding analysis of raw data[^]) but the resulting product is not prepared for a specific customer and no obligation to keep its contents confidential is imposed on customers. Examples of such products might include special industry or investment reports. Such reports are either sent electronically to subscribers or are made available for purchase and download from an online catalogue or index.

Analysis and conclusions

29. These transactions involve the same characterization issues as those described in the previous category. Thus, the payment arising from this type of transaction falls under Article 7 and is not a technical fee for the same reason."

10.3 The ruling of this Authority in *Dun and Bradstreet Espana. S.A. (supra)* seems to support the applicant's

contention. There also, the business information reports (BIRs) providing factual information on various aspects relating to various business concerns was electronically made available to the subscribers and they were to be used for internal purposes only in order to make informed business decisions. The data was compiled in a standard digital format. The information collected and made available to the customer was available in public domain. It was held that there was no use or right to use any copyright or literary or scientific work or any patent trade-mark, or imparting of information concerning commercial experience, and therefore, the payment did not fall under the category of 'royalty'. It was observed at page 113 :

"If a group of companies collects information about the historical places and places of interest for tourists in each country and all informations are maintained on a central computer which is accessible to each constituent of the group in each country, can a supply of such information electronically on payment of price be treated as royalty or fee for technical services? We think not.

10.4 The departmental representative tried to distinguish this ruling on the ground that BIRs were in a standard form. This attempted distinction is not correct. Though a standardized digital format was evolved for convenience, the contents and value additions made are quite similar to that of applicant's data base. The BIR even gives the ratings of Companies#, on an evaluation of various factors.

11. The learned departmental representative then invoked clause (iv) of Explanation 2 which speaks of "imparting any information concerning technical, industrial, commercial or scientific knowledge, experience or skill". The DTAA (Art.12.3) uses slightly different language. It speaks of payment received for "information concerning industrial, commercial or scientific experience". We do not think that the payment in question can be brought within the fold of this part of definition of 'royalty'. The clause does not contemplate merely imparting information on technical, industrial or commercial matters. The requirement is imparting of information concerning technical, commercial or scientific knowledge, experience or skill. The information which the licensee gets through the database does not relate to the underlying experience or skills which contributed to the end-product. The applicant does not share its experiences, techniques or methodology employed in evolving the database with the subscribers. The applicant does not impart any information relating to them. As already noted, the information or data transmitted through the database is the published information already available in public domain and it is not something which is exclusively available to the applicant. The applicant compiles and presents the information in proper form by applying its own methodology. It does not amount to imparting of information concerning the applicant's own knowledge, experience or skills in commercial and financial matters. The contention that imparting of information regarding analysis and research done by the applicant is involved here is devoid of merit.

11.1 A provision similar to the one contained in the Treaty has been construed to be a provision concerning transfer of know-how. In paragraph 11 of the Commentary on Art.12 of the OECD Model Tax Convention (Annexure I to Treaty Characterization Issues), the scope of the provision which we are considering and the concept of know-how has been explained thus:

"11. In classifying as royalties payments received as consideration for information concerning industrial, commercial or scientific experience, paragraph 2 alludes to the concept of 'know-how'. Various specialist bodies and authors have formulated definitions of know-how which do not differ intrinsically. On such definition, given by the Association des Bureaux pour la Protection de la Propriete Industrielle' (ANBPPI), states that 'know-how is all the undivulged technical information, whether capable of being patented or not, that is necessary for the industrial reproduction of a product or process, directly and under the same conditions; inasmuch as it is derived from experience, know-how represents what a manufacturer cannot know from mere examination of the product and mere knowledge of the progress of technique.

11.1 In the know-how contract, one of the parties agrees to impart to the other, so that he can use them for his own account, his special knowledge and experience which remain unrevealed to the public".

11.2 The same passage has been quoted by Prof. Klaus Vogel in his treatise on Double Taxation Convention (3rd Edition, page 782). The learned Departmental Representative has invited our attention to Prof. Klaus Vogel's comments at pg.794:

"Industrial, commercial or scientific experience: This know-how in the wider sense of the term covers unprotected, non-secret knowledge derived from experience - experience 'acquise' - (cf. the definition given by ANBPPI and reproduced in para 11 MC.Comm., supra m.no.33). In contrast to general specialist knowledge ('knowledge of the state of the art'), experience is, by definition, person-related. Experience that every person (viz. every specialist) acquires or is aware of, is general knowledge and cannot be considered specialist 'knowledge derived from experience'."

We do not see anything in the above passage which can lead us to the conclusion that know-how has been transferred in the instant case.

11.3 We may also refer to the case of Anapharm Inc, In re* in which this Authority has given ruling. The observations at page 407 may be noted :

"While discussing paragraph (2) of article 12 of the OECD Model Convention, OECD Commentary at paragraph 11 state that information concerning industrial, commercial or scientific experience alludes to the concept of know-how which is all the undivulged technical information that is necessary for the industrial reproduction of a product or process directly. Know-how represents what a manufacturer cannot know from mere examination of the product and mere progress of the technique. The Commentary further states that a know-how contract differs from contracts for the provision of services, in which one party undertakes to use the customary skills of his calling to execute the work himself for the other party. Payments made under the latter contract generally come in the category of business income. We find that, in the present case, the agreements of the applicant fall in the latter category, as the applicant uses its experience and skill itself in conducting the bio-equivalence tests, and provides only the final report containing conclusions, to the applicant. The information concerning scientific or commercial experience of the applicant or relating to the method, procedure or protocol used in conducting bio-equivalence tests is not being imparted to the pharmaceutical companies and the consideration is not paid for that purpose".

11.4 The counsel for the applicant has drawn our attention to the ITAT decision in Wipro (supra) in a similar matter concerning subscription to database of a web-based publishing house abroad in terms of user licence granted to the subscriber. The Revenue's contention that the fee paid by licensee was in the nature of royalty was rejected. The distinction between transfer of rights in the copyright and authorizing use of copyrighted article was stressed. Moreover, it was held that the clause in Art.12(3)(a) of DTAA "information concerning industrial, commercial or scientific experience" was not applicable.

11.5 The learned DR faintly suggested that it can also be brought within the purview of equipment royalty i.e. "use" or "right to use" any industrial commercial or scientific equipment. It is submitted that the server which maintains database is being used by customers as a point of inter-face. We do not think that the consideration is paid by the licensee for the use of equipment. The consideration is for availing of the facility of accessing the data/information collected and collated by the applicant.

12. The income by way of subscription fee having been held to be not in the nature of royalty, the next question is whether it is taxable as business income? The business income is taxable under Art.7.1 of the DTAA only if the enterprise carries on business through a permanent establishment situated in India. If there is a PE, the profits of the enterprise can be taxed only to the extent they are attributable to the PE. The applicant submits that its business is not carried out through any permanent establishment in India and further states that there is no agent in India acting on its behalf or securing orders or having an authority to conclude the contracts. No doubt, on the facts stated in the application, the existence of PE is ruled out. However, some doubt is created by reason of the facts disclosed by the applicant in reply to the queries raised by the Revenue. In the answer to query no.8, it is stated as follows :

"The applicant's group's subsidiary has a wholly owned subsidiary in India. The Indian Company has two offices in India (i.e. Hyderabad and Mumbai). The Hyderabad office is a captive undertaking which currently provides services to FactSet entities located outside India. The Hyderabad office provides backend support in updating FactSet Databases. The Hyderabad undertaking does not provide any services to any Indian customers.

Xx xx xx xx

The Mumbai office provides marketing and support services to Applicant's customers in India. The Mumbai office identifies customer leads and identifies their requirements. The same is communicated to FactSet US. FactSet US, based on its internal procedure will initiate discussions with the prospective customers and agree upon the terms of service. After the discussions surrounding the contracts are concluded, the contract is signed by the customer and then by FactSet US. The marketing support teams do not have any authority to conclude contracts with customers.

12.1 The applicant, in all fairness, should have disclosed these facts in the original application itself. Even the averments in the Rejoinder (reply to queries) in regard to Mumbai office are not very clear. Better particulars with supporting documents should have been furnished to explain the role of Mumbai office maintained by the applicant group's subsidiary. However, it is not appropriate to embark on an enquiry into the correctness of the statement made by the applicant in this proceeding. While accepting the statement of the applicant, we leave it open to the Department to make necessary enquiry on the point of existence or otherwise of agency PE. Even if such PE is found to exist, the question of attribution of income may still linger on. That issue need not be addressed at this juncture.

13. In the result, the questions are answered as follows :

Qn.Nos.(1) & (2):

The subscription fee is not taxable in India as royalty. It is liable to be taxed only as business income if at all it is found by the Department that an agency PE exists. At present, on the facts stated by the applicant, we must hold that PE is not in existence and therefore the income is not liable to be taxed in India.

Qn.No.(3):

The customers are not required to withhold the tax, until and unless the Department finds the existence of PE after due enquiry.

Qn.No.(4):

At present, there is no obligation to file the return in view of our finding that there is no royalty income and on the facts stated by the applicant, there is no PE

Accordingly, the ruling is pronounced on this 30th day of June, 2009.

Sd/-
(A.Sinha)
Member

Sd/-
(P.V.Reddi)
Chairman

Sd/-
(Rao Ranvijay Singh)
Member

F.No. AAR/787/2008

dated the 7th July, 2009

This copy is certified to be a true copy of the Ruling and is sent to:

1. The applicant
2. The Director of Income-tax (International Taxation-I), New Delhi.

(Sanjay Puri)
Secretary, AAR (IT)