IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E', NEW DELHI

Before Sh. N. K. Saini, Hon'ble Vice President
and
Smt. Beena A. Pillai, Judicial Member

ITA No. 1714/Del/2015 : Asstt. Year : 2011-12

MOL Corporation, C/o Mr. Ashwin Ravindranath (Partner), SRBC & Associates LLP, Golf View Corporate Tower B, Sector-42, Sector Road, Gurgaon, Haryana	Vs	Deputy Commissioner of Income Tax, International Taxation, Circle-Gurgaon, New Delhi
(APPELLANT)		**(RESPONDENT)**
PAN No. AAFCM9676A		

Assessee by : Sh. Nageshwar Rao, Adv.
Revenue by : Sh. G. K. Dhall, CIT DR

Date of Hearing : 17.10.2018		**Date of Pronouncement : 31.10.2018**

ORDER

Per N. K. Saini, Vice President:

This is an appeal by the assessee against the order dated 09.02.2014 passed by the AO u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter referred to as the Act).

2. Following ground have been raised in this appeal:

"1. That on facts and in law, the Dy. Commissioner of Income Tax, Circle - 'Gurgaon', International Taxation, New Delhi ('Learned AO') erred in computing the total income of the Appellant at INR 27,79,45,07,738 as against 'Nil' income reported in the return of income by the Appellant.

2. Without prejudice to the below mentioned grounds of appeal, the Hon'ble Dispute Resolution Panel ('DRP') and Learned AO erred on the facts of the case and in law, in determining the income of the Appellant for the subject Assessment Year at INR 27,79,45,07,738 thereby completely ignoring the fact that the payments received by the Appellant from licensing of manufacturing and distribution rights to Microsoft Operations Pte Ltd. ('MO') pertaining to India was INR 16,67,67,04,643.

3 Tax on revenue alleged as 'Royalty' under the India US tax treaty:

3.1 That on facts and in law, the Hon'ble DRP erred in confirming the variations proposed by the Learned AO in the draft assessment order by holding that:

3.1.1 payments received by the Appellant are deemed to arise in India under Article 12(7) of the India US tax treaty, disregarding the fact that 'royalty' paid by MO is not for earning income from a source in India;

3.1.2 revenue earned and received from sale of software by MRSC is taxable in India in the hands of the Appellant under the provisions of Article 12(2) and Article 12(3)(a) of the India US tax treaty.

3.2 That on facts and in law, the Hon'ble DRP and the Learned AO erred in not appreciating that:

3.2.1 the definition of Royalty is different in the Act and the India US tax treaty;

3.2.2 the benefits available under the India US tax treaty have not been impacted by the amendments in the Finance Act, 2012 in any manner;

3.3 That on facts and in law, the Hon'ble DRP and the Learned AO grossly erred in not following the judgment

of the Hon'ble jurisdictional High Court in the case of ***DIT vs. Infrasoft Ltd (ITA 1034/2009)*** *which is binding on the lower tax administrative bodies and the other judicial precedents as they are squarely applicable to the facts of the Appellant.*

3.4 That on facts and in law, the Hon'ble DRP and the Learned AO failed to appreciate that the sale of software is a sale of 'Copyrighted Article' and not 'Copyright' and accordingly, the revenue from sale of software is in the nature of business income not taxable under Article 7 of India US tax treaty in the absence of the PE of the Appellant in India.

3.5 That on facts and in law, the Hon'ble DRP and the Learned AO erred in disregarding OECD commentaries, US IRS regulations, International tax commentaries, UN model convention, International court rulings on classification of transactions involving computer software while interpreting tax treaties.

3.6 That on facts and in law, the Hon'ble DRP and the Learned AO erred in placing reliance on the decision of Samsung Electronics Co. Ltd (245 CTR 481) (Kar HC).

3.7 That on facts and in law, the Hon'ble DRP and the Learned AO erred in not following the decisions of Tata Consultancy Services (271 ITR 401) (SC), Ericsson A.B. and Metapath (ITA 504 / 2007) (Del HC), Nokia Networks OY (ITA 512 / 2007) (Del HC) and various other Tribunal / AAR rulings relied on by the Appellant.

4 Tax on revenue alleged 'as royalty' under the Income-tax Act. 1961 ('the Act'):

4.1 That on facts and in law, the Hon'ble DRP erred in confirming the variations proposed by the Learned AO in the draft assessment order by holding that payments

received by the Appellant from MO is taxable as 'Royalty' under the provisions of section 9(1)(vi) of the Act.

4.2 That on facts and in law, the Hon'ble DRP erred in confirming the conclusion drawn by the Learned AO in the draft assessment order that revenue received from sale of software by a group company of the Appellant - Microsoft Regional Sales Corporation ('MRSC'), from Indian distributors is taxable in India in the hands of the Appellant under the provisions of the section 9(1)(vi) of the Act.

4.3 That on facts and in law, the Learned AO erred in observing that amount paid by MO to Appellant was for earning income from a source in India and from licensing of software carried out in India.

4.4 That on facts and in law, the Hon'ble DRP and the Learned AO erred in placing reliance on the order passed by the Hon'ble Income-tax Appellate Tribunal (ITAT) in case of Gracemac Corporation (now MOLC) for Assessment Years 1999-00 to 2004-05 which is not a good law.

4.5 That on the facts and in law, the Learned AO erred in observing as under:

4.5.1 that the agreement between MO and MRSC clearly establishes that the Appellant is getting royalty out of licensing of software carried out in India;

4.5.2 that the payment received by the Appellant is related to number of software that is ultimately licensed and distributed in India;

4.5.3 that the use of computer programme is a use of process;

4.5.4 that computer programme being patented are inventions;

4.5.5 that all payments made for import of software are royalty and the only exception is the second proviso to section 9(1)(vi);

4.5.6 that no distinction exists between copyright and copyrighted article;

4.5.7 the provisions of section 115A of the Act characterizes the income from sale of software as 'Royalty' under the Act in case of Non-residents, without appreciating that section 115A does not enlarge the scope of the term "Royalty" as defined in section 9(1)(vi) of the Act;

4.6 That on the facts and in law, the Learned AO erred in placing reliance on the judgment of Hon'ble Supreme Court in the case of Swadeshi R Anjan Sinha vs. Hardev Banerjee (AIR 1992 SC 1590).

4.7 That on the facts and in law, the Learned AO erred in relying on the Explanations 4, 5 and 6 inserted by Finance Act 2012 completely disregarding the detailed submission filed by the Appellant that the said explanations did not have any bearing on the position of non-taxability of revenue earned by Appellant in the Act as well as the Double Taxation Avoidance Agreement between India and US ('India US tax treaty').

5 That on facts and in law, the Learned AO grossly erred in not transferring the TDS credit claimed by MRSC to MOLC in view of the mandatory directions of Hon'ble DRP and the law laid down by the Supreme Court in the decision of ITO vs. Bachu Lal Kapoor (60 ITR 74)(1966)(SC).

6 That the Ld. AO and DRP has grossly erred on facts and in law in levying surcharge and education cess on the income which is assessed to tax under the provisions of the India -US Tax Treaty.

7 That on facts and in law, the Learned AO has erred in initiating penalty proceedings u/s 271 (1)(c) of the Act against the Appellant.

8 The Learned AO has grossly erred on facts and in law in levying interest under section 234B of the Act.

8.1 which is not maintainable in law in view of the decisions of jurisdictional High Court and various other judicial precedents decided in favor of taxpayers on this issue.

8.2 which is otherwise not leviable as DRP has directed the Ld. AO for transferring the TDS credit claimed by MRSC to the appellant and the law laid down by the Supreme Court in the decision of ITO vs. Bachu Lal Kapoor (60 ITR 74) (1966) (SC).

The above grounds of appeal are mutually exclusive and without prejudice to each other. The appellant craves leave to add, alter, amend and / or modify any of the grounds of appeal at or before the hearing of the appeal.

The appellant prays for appropriate relief based on the said grounds of appeal."

3. From the above grounds, it is gathered that the only grievance of the assessee relates to the nature of the payments received from licensing of manufacturing and distribution rights of Microsoft Operations Pte Ltd. and as to whether the said payment is taxable as ñroyaltyò under the provisions of Section9(1)(vi) of the Act or not.

4. During the course of hearing, the ld. Counsel for the assessee at the very outset sated that this issue is squarely covered in assesseeôs favour vide order dated 26.09.2016 in assesseeôs own case for the assessment years 2007-08 to 2010-11 in ITA Nos. 6089 to 6091/Del/2012 and 1969/Del/2014 respectively (copy of the said order was furnished which is placed on record). It was also stated that the issue vide the aforesaid order had been restored to the AO, however, he had not followed the directions given by the ITAT in right perspective and had not held that the said payment received was not a royalty.

5. In his rival submissions, the ld. CIT DR submitted that the ITAT in the aforesaid referred to cases of the assessee restored the issue to the AO for fresh adjudication and no direction was given that the said payment was to be considered as royalty.

6. We have considered the submissions of both the parties and perused the material available on the record. In the present case, it is noticed that the issue under consideration was also a subject matter of the assesseeôs appeal for the assessment years 2007-08 to 2010-11 in ITA Nos. 6089 to 6091/Del/2012 and 1969/Del/2014 wherein vide order dated 26.09.2016, it has been held in paras 17 & 18, 30 & 31 and 38 & 39 as under:

> *ñ17. Furthermore Hon'ble Delhi high court has examined this issue in CIT versus Halliburton export incorporation (ITA No. 363 and 365 of 2016 dated 11/07/2016 wherein, after considering the decision of the DIT versus Infrasoft Ltd, has held that at the consideration received by appellant on sale of prepackaged software in terms of article 12 (3) would*

not be chargeable to tax as "royalty" or "fees or technical services" or "business income". The Hon'ble high court made it clear that according to section 90 (3) of the act it is clear that in context of Double Taxation Avoidance Agreement that it is only when the provisions of the Income Tax Act are more beneficial to the assessee , The ACT will prevail over the Double Taxation Avoidance Agreement. Conversely, where the provisions of the Double Taxation Avoidance Agreement are more beneficial to the assessee, the treaty would prevail over the act. Accordingly the retrospective amendment made to the Income Tax Act, if are not beneficial to an assessee, who is also entitled to the benefit of the Double Taxation Avoidance Agreement, then whatever is less rigorous to the assessee should be followed for the purpose of the taxation in case of that assessee. In the present case therefore Double Taxation Avoidance Agreement between India and USA is required to be seen and applied, if by retrospective amendment to the Income Tax Act the taxation regime with respect to the "royalty" and "fees for technical service" have become more stringent. Likewise, on many issues about taxation of sale of software, after the decision of Honorable Delhi high court in DIT V Infrasoft limited (supra) view of the coordinate bench in case of Gracemac corporation no longer remains a good law.

18. In view of the above facts it is apparent that after rendering of the decision of the tribunal based on which the reopening has been initiated by revenue and addition has been made in the hands of the appellant, the decision of the Hon'ble Delhi high court in case of DIT V versus Infrasoft limited covers the issue in favour of the assessee. As the lower authorities did not have any benefit of the decision of the Hon'ble Delhi high court while deciding the issue about the taxation of copyrighted article i.e. the software being sold by the appellant but have solely relied upon the decision

of the coordinate bench in case of M/s Gracemac Corporation, it would be in the interest of the Justice to set the whole issue back to the file of the Ld. assessing officer to decide it afresh after considering the decision of Hon'ble Delhi high court DIT versus Infrasoft Ltd (supra), applying it to nature of the software of the appellant, which covers the issue with respect to the sale of software holding that according to article 12 (3) of the Indo US DTAA, is a sale of "copyrighted article", and is not chargeable to tax as "royalty". In view of above, ground No. 3 to ground number 4.13.4 of the appeal of the assessee are allowed with above direction.

30. It was submitted before us that the issue involved in the present appeal are identical to the appeal of the assessee for assessment year 2007-08. The mainly ground No. 3 and ground No. 4 of the above appeal are against the action of the Ld. Assessing officer in charging the income of the appellant as "Royalty". It was further submitted that argument of the parties remains the same as arguments advanced by them for assessment year 2007-08.

31. We've carefully considered the rival contentions. The only issue involved in the appeal of the assessee is that that whether the income received by it is chargeable to tax as royalty. We have decided this issue in the appeal of the assessee for assessment year 2007-08 wherein we set aside the whole issue to the file of the assessing officer to decide it afresh in accordance with the decision of the Hon'ble Delhi High Court in case of DIT V Infrasoft Limited (supra). Similarly in this year also we set aside the whole issue to the file of the assessing officer with similar direction as contained in ITA number 6089/Del/2012.

38. It was submitted before us that the issue involved in the present appeal are identical to the appeal of the

assessee for assessment year 2007-08. The mainly ground No. 3 and ground No. 4 of the above appeal are against the action of the Ld. Assessing officer in charging the income of the appellant as "Royalty". It was further submitted that argument of the parties remains the same as arguments advanced by them for assessment year 2007-08.

39. We've carefully considered the rival contentions. The only issue involved in the appeal of the assessee is that that whether the income received by it is chargeable to tax as royalty. We have decided this issue in the appeal of the assessee for assessment year 2007-08 wherein we set aside the whole issue to the file of the assessing officer to decide it afresh in accordance with the decision of the Hon'ble Delhi High Court in case of DIT V Infrasoft Limited (supra). Similarly in this year also we set aside the whole issue to the file of the assessing officer with similar direction as contained in ITA number 6089/Del/2012."

7. It is also noticed that against the order, the assessee preferred a Miscellaneous Application in MA No. 74 to 77/Del/2017 for the assessment years 2007-08 to 2010-11 wherein vide order dated 04.10.2017, it has been held in paras 20 & 21 as under:

"20. The third error pointed out was that specific ground of appeal No. 3.3 as under has not been adjudicated upon:

"That on facts and in law, the Hon'ble DRP and the learned AO erred in not following the judgments of the Hon'ble jurisdictional High Court in the case of DCIT Vs Infrasoft (ITA No. 1034/2009) and the judgment of the jurisdictional ITAT in the case of convergys Customer Management Group Vs ADIT (ITA No. 1443/2012) (Del ITAT) which are squarely applicable to the facts of the appellant."

21. The above ground of appeal was already decided in the main appeal of the assessee wherein, the whole issue of taxation of royalty on software of the assessee has been sent back to the file of the ld. Assessing Officer to decide afresh. Therefore, there is no error in the order of the coordinate bench. In view of this on this ground the miscellaneous application of the assessee is dismissed."

8. We, therefore, by considering the aforesaid referred to facts and by respectfully following the order dated 26.09.2016 ITA Nos. 6089 to 6091/Del/2012 and 1969/Del/2014 in assesseeôs own case set aside this issue back to the file of the AO to be adjudicated afresh in accordance with law as has been directed in the aforesaid referred to order dated 26.09.2016.

9. In the result, the appeal of the assessee is allowed for statistical purposes.

(Order Pronounced in the Court on 31/10/2018)

Sd/-
(Beena A. Pillai)
JUDICIAL MEMBER

Sd/-
(N. K. Saini)
VICE PRESIDENT

Dated: /10/2018
Subodh
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR