

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'D' NEW DELHI**

**BEFORE DR. B. R. R. KUMAR, ACCOUNTANT MEMBER
AND
SH. YOGESH KUMAR U.S., JUDICIAL MEMBER**

I.T.A. No. 1134/Del/2017 (A.Y 2013-14)

MOL Corporation C/o. Aakash Uppal, SRBC & Associates LLP, 3 rd & 6 th Floor, World mark 1, IGI Airport Hospitality district, Aerocity, New Delhi PAN: AAFCM9676A (APPELLANT)	Vs	ACIT Circle 2(2)(1), International Taxation, New Delhi (RESPONDENT)
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I.T.A. No. 7258/Del/2017 (A.Y 2014-15)

MOL Corporation C/o. Aakash Uppal, SRBC & Associates LLP, 3 rd & 6 th Floor, Worldmark 1, IGI Airport Hospitality district, Aerocity, New Delhi PAN: AAFCM9676A (APPELLANT)	Vs	DCIT Circle 2(2)(1), International Taxation, New Delhi (RESPONDENT)
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Appellant by	Sh. Nageshwar Rao, Adv and Sh. Akshay Uppal, Adv
Respondent by	Ms. Anupama Anand, CIT- DR

Date of Hearing	17.05.2022
Date of Pronouncement	05.07.2022

ORDER

PER YOGESH KUMAR U.S., JM

These two appeals by the assessee are arising out assessment order passed u/s 143(13) read with Section 144C (1) of the Act dated 31/01/2017 and 31/10/2017 for Assessment Year 2013-14 & 2014-15 respectively.

I.T.A. No. 1134/Del/2017 (A.Y 2013-14)

1. *That on the facts and in the circumstances of the case and in law, the Assistant Commissioner of Income Tax, Circle - 2(2)(1), International Taxation, Delhi ('Ld. AO') has erred in computing the total income of the Appellant at INR 3859,91,90,408 as against NIL income reported in the return of income by the Appellant.*

2. *Taxability of revenue from sale of software*
 - 2.1 *That on the facts and in the circumstances of the case and in law, the Hon'ble Dispute Resolution Panel ('Hon'ble DRP') and the Ld. AO have erred in observing that amount paid by Microsoft Operations Pte Ltd. ('MO') to Appellant was for earning income from a source in India.*

 - 2.2 *That on facts and in law, the Hon'ble DRP and the Ld. AO have erred in holding that the revenue earned and received from sale of software by MRSC amounting to INR 38,32,90,74,884 is taxable in India as "Royalty" in the hands of the Appellant without appreciating that the same is not in the nature of "Royalty" under Article 12 of the India - USA DTAA and is not taxable in India.*

 - 2.3 *That on the facts and in the circumstances of the case and in law, the Hon'ble DRP and the Ld. AO have 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 - USA DTAA in the absence of a Permanent Establishment of the Appellant in India.*

 - 2.4 *That on the facts and in the circumstances of the case and in law, the Hon'ble DRP and the Ld. AO have erred in law in not following*

the decision of the Hon'ble ITAT in the Appellant's own case for AY 2007-08 to 2010-11 and the decision of Hon'ble Delhi High Court in the case of Infracsoft Limited (220 Taxman 273).

2.5 *Without prejudice to the abovementioned grounds of appeal, the Hon'ble DRP and Ld. AO have erred on the facts of the case and in law, in determining the income of the Appellant for the subject Assessment Year at INR 38,32,90,74,884 thereby completely ignoring the fact that the payments received by the Appellant from licensing of manufacturing and distribution rights to MO pertaining to India was INR 22,99,74,44,930 only.*

3. *Taxability of consideration from cloud services*

3.1 *That on the facts and in the circumstances of the case and in law, the Hon'ble DRP and the Ld. AO have erred in observing that amount paid by MO to Appellant was for earning income from a source in India.*

3.2 *That on the facts and in the circumstances of the case and in law, the Hon'ble DRP and the Ld. AO have erred in holding that the revenue earned by MRSC from cloud services amounting to INR 27,01,15,524 is taxable as "Royalty" in India in the hands of the Appellant without appreciating that the same is not in the nature of "Royalty" under India * USA DTAA.*

3.3 *Without prejudice to the above, the Hon'ble DRP and the Ld. AO have erred on facts and in law in determining income of the Appellant from cloud services as INR 27,01,15,524, thereby completely ignoring the fact that the payments received from licensing of cloud services rights to MO pertaining to India was INR 16,20,69,314 only.*

4. Transfer of TPS Credit

4.1 *That on the facts and in the circumstances of the case and in law, the Ld. AO has 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 case of ITO vs. Bachu Lai Kapoor (60 ITR 74) (1966) (SC).*

Other Grounds

5. *That on the facts and in the circumstances of the case and in law, the Ld. AO has erred in levying interest amounting to INR 182,88,29,636 under section 234B of the Act.*
6. *That on the facts and in the circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under section 271(1)(c) of the Act against the Appellant.*

I.T.A. No. 7258/Del/2017 (A.Y 2014-15)

1. *That on the facts and in the circumstances of the case and in law, the Deputy Commissioner of Income Tax, Circle - 2(2)(1), International Taxation, Delhi ('Ld. AO') has erred in computing the total income of the Appellant at INR 2197,95,13,620 as against NIL income reported in the return of income by the Appellant.*

2. Taxability of revenue from sale of software

2.1 *That on the facts and in the circumstances of the case and in law, the Hon'ble Dispute Resolution Panel ('Hon'ble DRP') and the Ld. AO have erred in observing that amount paid by Microsoft Operations Pte Ltd. ('MO') to Appellant was for earning income from a source in India.*

2.2 That on facts and in law, the Hon'ble DRP and the Ld. AO have erred in holding that the revenue earned and received from sale of software by MRSC amounting to INR 2037,46,16,031 is taxable in India as "Royalty" in the hands of the Appellant without appreciating that the same is not in the nature of "Royalty" under Article 12 of the India - USA DTAA and is not taxable in India.

2.3 That on the facts and in the circumstances of the case and in law, the Hon'ble DRP and the Ld. AO have 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 - USA DTAA in the absence of a Permanent Establishment of the Appellant in India.

2.4 That on the facts and in the circumstances of the case and in law, the Hon'ble DRP and the Ld. AO have erred in law in not following the decision of the Hon'ble ITAT in the Appellant's own case for AY 2007-08 to 2010-11 and the decision of Hon'ble Delhi High Court in the case of Infrasoftware Limited (220 Taxman 273).

2.5 Without prejudice to the abovementioned grounds of appeal, the Hon'ble DRP and Ld. AO have erred on the facts of the case and in law, in determining the income of the Appellant for the subject Assessment Year at INR 2037,46,16,031 thereby completely ignoring the fact that the payments received by the Appellant from licensing of manufacturing and distribution rights to MO pertaining to India was INR 1222,47,69,619 only.

3. Taxability of consideration from cloud services

3.1 That on the facts and in the circumstances of the case and in law,

the Hon'ble DRP and the Ld. AO have erred in observing that amount paid by MO to Appellant was for earning income from a source in India.

- 3.2 *That on the facts and in the circumstances of the case and in law, the Hon'ble DRP and the Ld. AO have erred in holding that the revenue earned by MRSC from cloud services amounting to INR 160,48,97,593 is taxable as "Royalty" in India in the hands of the Appellant without appreciating that the same is not in the nature of "Royalty" under India - USA DTAA.*
- 3.3 *Without prejudice to above, on the facts and in the circumstances of the case, revenue from the cloud services has been inadvertently taken as INR 160,48,97,593 instead of INR 155,16,55,505.*
- 3.4 *Without prejudice to the above, the Hon'ble DRP and the Ld. AO have erred on facts and in law in determining income of the Appellant from cloud services as INR 160,48,97,593, thereby completely ignoring the fact that the payments received from licensing of cloud services rights to MO pertaining to India was INR 96,29,38,556 only.*

Other Grounds

4. *That on the facts and in the circumstances of the case and in law, the Ld. AO has erred in levying interest under section 234B of the Act.*
5. *That on the facts and in the circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under section 271(l)(c) of the Act against the Appellant.*

I.T.A. No. 1134/Del/2017 (A.Y 2013-14)

3. Brief facts of the case are that, that MOL Corporation ('MOLC') is a company incorporated in the United States of America, having its registered office at C/o, Corporation Services Company, 2215-B, Renaissance Drive, Las Vegas, NV 89119, USA. Microsoft Corporation, USA, ('MS Corp') is the ultimate parent entity of MOLC. Gracemac Corporation ('Gracemac'), a corporation incorporated in the USA and a Wholly Owned Subsidiary of MS Corp got merged with MOLC with effect from 2nd October 2006. All the rights and obligations of Gracemac got merged into the affairs of MOLC. 'MS Corp' is the sole owner of intellectual property rights vested in Microsoft Software. It has granted exclusive license to manufacture and distribute Microsoft products to one of its wholly owned subsidiary, M/s Gracemac (now merged with MOL Corporation, the assessee in this case), which, in turn, granted non-exclusive rights to its wholly owned subsidiary, Microsoft Operations Pte. Ltd., Singapore, ("MO Singapore"), to manufacture Microsoft Products in Singapore and distribute such products in Asia (excluding non- English-language products in China and Taiwan). M/s Microsoft Regional Sales Corporation (MRSC) has been appointed as a distributor of Microsoft products in Asia by MO, Singapore.

4. The assessment order came to be passed on 31/01/2017 against the assessee u/s 143(3) read with Section 144C (13) of the Income Tax Act by the Assistant Commissioner of Income Tax, wherein the Ld. A.O has computed the total income of the assessee at Rs. 3859,91,90,408/- as against NIL income reported in the return of the assessee. The Ld. A.O has held that the Revenue earned and received from sale of software by MRSC amounting to Rs. 38,32,90,74,884/- is taxable in India as royalty in the hands of the assessee. Further, held that the Revenue earned by MRSC from Cloud Services amounting to INR 27,01,15,524/- is also taxable as royalty in India in the hands of the assessee. Aggrieved by the assessment order dated 31/01/2017,

the assessee has preferred the present appeal and the Grounds mentioned above.

5. The Ground No. 1 is general in nature which enquires no adjudication. Ground No. 2 & its sub Grounds are in respect of taxability of revenue for sales software. Ground No. 3 and its Sub Grounds are in respect of taxability of consideration from cloud services. Ground No. 4 is on transfer of TDS credit. Ground No. 5 & 6 are regarding levying of interest u/s 234B and on initiation of penalty proceedings u/s 271(1)(c) of the Act.

6. **Ground No. 2 and its sub grounds:** The Ld. Counsel for the assessee arguing on the Ground No. 2 and its sub grounds submitted that, the authorities below failed to follow the ratio laid down on the sales of software product which will not giving rise to royalty income as held in Delhi High Court in DTI Vs. Infra Soft Ltd. to (2014) 220 Taxman 273. Further to buttress his submission, relied on the decision of Hon'ble Supreme Court of India dated 02/03/2021 in the case of Engineering Investigation centre of Excellence Pvt. Ltd. Vs. Commissioner of Income Tax (2021) 125 Taxman.com 42(S.C). The Ld. Counsel has also relied on the order of Coordinate Bench in the assessee's own case in ITA No. 1554/Del/2016 dated 13/04/2022.

7. Per contra, the Ld. DR has not disputed the above facts and could not produce any ratio laid down contrary to the above decisions, but relied on the orders of the Ld. AR.

8. It is well settled law that, the sale of software product which will not giving rise to royalty income as held in the case of Delhi High Court in DTI Vs. Infra Soft Ltd. to (2014) 220 Taxman 273 and also in the decision of Hon'ble Supreme Court of India dated 02/03/2021 in the case of Engineering Investigation centre of Excellence Pvt. Ltd. Vs. Commissioner of Income Tax (2021) 125 Taxman.com 42(S.C). The ratios laid down in the above judicial pronouncements have been relied by the Coordinate Bench in the assessee's

own case in ITA No. 1554/Del/2016 dated 13/04/2022 and decided the issue in favour of the assessee for Assessment Year 2012-13.

9. We have applied the above ratio laid down by the Hon'ble Supreme Court and also the Coordinate Bench of the Tribunal in assessee's own case for the Assessment Year 2012-13 in ITA No. 1554/Del/2016 dated 13/04/2022. Thus, we are also of the opinion that the sale of software product does not give rise to the royalty income. In the light of aforesaid, since there are no distinguishing facts with regard to present Assessment Year than the Assessment Year 2012-13, we allow the Ground No. 2 and its Sub Grounds of the assessee.

10. **Ground No. 3**

The Ld. Counsel for the assessee submitted that, the authorities below have failed to appreciate functional aspect of cloud base service while holding subscription to cloud base service as royalty and the additions made by the Ld. A.O. Contrary to the India USA Double Taxation Avoidance Agreement. The Ld. Counsel for the assessee submitted that, the similar issue has been dealt and decided in Assessee's own case by the Co-ordinate Bench of the Tribunal in ITA No. 1554/Del/2016 vide order dated 13/04/2022.

11. We have heard the parties and verified the material on record. The very same issue regarding the cloud service in assessee's own case for the AY 2012-13 came up for consideration before the Co-ordinate Bench of the Tribunal. The Co-ordinate Bench, by following the ratio laid down in the case of M/s. Salesforce.com Singapore Pte. Vs. Dy. D.I.T. Circed-2(2) ITA No. 4915/Del/2016 [A.Y 2010-11] and also the decision of Mumbai Tribunal in the case of DDIT Vs. Savvis Communication Corporation [2016] 69 Taxman.com 106 (Mumbai- Trib.) and the Chennai Tribunal decision in the case of ACIT Vs/. Vishwak Solutions Pvt. Ltd. ITA No. 1935 & 1936/MDS/2010 dated

30/01/2015, held that the authorities fallen in error in considering the subscription received towards cloud serviced to be royalty income.

12. In the light of above binding decisions, since the Ld. DR has not produced any distinguishing facts or the decisions in the present appeal, we are inclined allow the Assessee's Grounds of appeal No. 3.

13. **Ground No. 4**

The Ground No. 4 is regarding transfer of TDS credit. Since, the Revenue has already given relief by passing an order u/s 154 of the Act, during the pendency of the appeal, the Ground No. 4 has becomes in-fructuous. Ground No. 5 & 6 are consequential in nature. Accordingly, we dismissed the Ground Nos. 4 to 6.

14. In the result, the appeal in ITA No 1134/Del/2017of the assessee is partly allowed.

ITA NO. 7528/Del/2017

15. In view of the deciding the Appeal in ITA No 1134/Del/2017, since the assessee has raised the similar grounds of Appeal and the issue involved in the Appeal in ITA No 1134/Del/2017 are identical, we allow the Grounds of Appeal No.2, 3 and their sub grounds, dismiss the Ground Nos. 4 & 5 which are consequential.

16. In the result, Appeal in ITA No. 7528/Del/2017 is partly allowed.

Order pronounced in the Open Court on this 05th Day of July, 2022

Sd/-

**(B. R. R. KUMAR)
ACCOUNTANT MEMBER**

Sd/-

**(YOGESH KUMAR U.S.)
JUDICIAL MEMBER**

Dated: 05/07/2022
R. Naheed *

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI