

**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. 1135/Del/2017 (A.Y 2013-14)**

Microsoft Regional Sales Pte. Ltd. (formerly known as Microsoft Regional Sales Corporation) C/o. Mr. Aakash Uppal, SRBC & Associates LLP, 3 <sup>rd</sup> & 6 <sup>th</sup> Floor, World mark 1, IGI Airport Hospitality, District, Aero city New Delhi <b>PAN: AADC1638A</b> <b>(APPELLANT)</b>	Vs	ACIT International Taxation, Circle 2(2)(1), New Delhi  <b>(RESPONDENT)</b>
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**I.T.A. No. 7257/Del/2017 (A.Y 2014-15)**

Microsoft Regional Sales Pte. Ltd. (formerly known as Microsoft Regional Sales Corporation) C/o. Mr. Aakash Uppal, SRBC & Associates LLP, 3 <sup>rd</sup> & 6 <sup>th</sup> Floor, World mark 1, IGI Airport Hospitality, District, Aerocity New Delhi <b>PAN: AADC1638A</b> <b>(APPELLANT)</b>	Vs	DCIT International Taxation, Circle 2(2)(1), New Delhi  <b>(RESPONDENT)</b>
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**I.T.A. No. 6832/Del/2018 (A.Y 2015-16)**

Microsoft Regional Sales Pte. Ltd. (formerly known as Microsoft Regional Sales Corporation) C/o. Mr. Aakash Uppal, SRBC & Associates LLP, 3 <sup>rd</sup> & 6 <sup>th</sup> Floor, World mark 1, IGI Airport Hospitality, District, Aerocity New Delhi <b>PAN: AADC1638A</b> <b>(APPELLANT)</b>	Vs	DCIT International Taxation, Circle 2(2)(1), New Delhi  <b>(RESPONDENT)</b>
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<b>Appellant by</b>	<b>Sh. Nageshwar Rao, Adv and Sh. Akshay Uppal, Adv</b>
<b>Respondent by</b>	<b>Ms. Anupama Anand, CIT- DR</b>

<b>Date of Hearing</b>	<b>17.05.2022</b>
<b>Date of Pronouncement</b>	<b>05.07.2022</b>

### **ORDER**

#### **PER YOGESH KUMAR U.S., JM**

These three appeals have been preferred by the assessee for the assessment years 2013-14, 2014-15 & 2015-16 against orders dated 31/01/2017, 31/10/2017 & 31/08/2018 respectively passed u/s 143(13) read with Section 144C (1) of the Act, by DCIT, International Taxation, New Delhi .

#### **I.T.A. No. 1135/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 4064,82,52,315 as against the returned income at INR 204,90,61,907.*
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 holding that revenue amounting to INR 38,32,90,74,884 earned by the Appellant from sale of Microsoft Retail Software Products to distributors in India is taxable as "Royalty" ignoring the fact that the same is not in nature of "Royalty" under Article 12 of the India - USA DTAA and is not taxable in India.*
  - 2.2 *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.*

- 2.3 *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 not following the decision of the Hon'ble ITAT in the Appellant's own case for AY 2010- 11 & AY 2011-12 and the decision of Hon'ble Delhi High Court in the case of Infrasoftware Limited (220 Taxman 273).*

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 not holding that the revenue earned by MRSC from cloud services amounting to INR 27,01,15,524 is taxable as "Royalty" in India without appreciating that the same is not in the nature of "Royalty" under India - USA DTAA.*

4. **Transfer of TDS Credit**

*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 MOL Corporation 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 surcharge and education cess on interest on income-tax refund, which is taxable as per the at the rate of 15% as prescribed under the India - USA DTAA.*
6. *That on the facts and in the circumstances of the case and in law, the Ld. AO has erred in not granting the TDS credit of INR 13,74,99,642 to the Appellant.*
7. *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 27,08,71,276 under section 234B of the Act.*

8. *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. 7257/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 2270,03,49,198 as against the returned income at INR 72,08,35,574.*
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 holding that revenue amounting to INR 2037,46,16,031 earned by the Appellant from sale of Microsoft Retail Software Products to distributors in India is taxable as "Royalty" ignoring the fact that the same is not in nature of "Royalty" under Article 12 of the India - USA DTAA and is not taxable in India.*
  - 2.2 *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.*

2.3 *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 not following the decision of the Hon'ble ITAT in the Appellant's own case for AY 2010-11 & AY 2011-12 and the decision of Hon'ble Delhi High Court in the case of Infracsoft Limited (220 Taxman 273).*

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 not holding that the revenue earned by MRSC from cloud services amounting to INR 160,48,97,593 is taxable as "Royalty" in India without appreciating that the same is not in the nature of "Royalty" under India - USA DTAA.*

3.2 *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.*

*Other Grounds*

4. *That on the facts and in the circumstances of the case and in law, the Ld. AO has erred in not granting the TDS credit of INR 16,63,66,857 to the Appellant.*

5. *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 and 234C of the Act.*

*That on the facts and in the circumstances of the case and in law, the Ld. AO has erred in initiating*

6. *penalty proceedings under section 271(l)(c) of the Act against the*

*Appellant.*

*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.*

**I.T.A. No. 6832/Del/2018 (A.Y 2015-16)**

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 16,58,61,71,149 as against the returned income of INR 26,11,80,744.*
2. *Without prejudice to other grounds, Ld. DRP and LD. AO failed to appreciate that in any case income is not chargeable in appellant's hands under Income Tax Act, 1961 as the same was earned outside of India.*
3. *Taxability of revenue from sale of software*
  - 3.1 *That on the facts and in the circumstances of the case and in law, the Ld. Dispute Resolution Panel ('Ld. DRP') and the Ld. AO have erred in holding that receipt of INR 14,57,54,90,041 earned by the Appellant from sale of Microsoft Retail Software Products to distributors belonging to India is taxable as "Royalty" ignoring the fact that the same is not in nature of "Royalty" under Article 12 of the India - USA DTAA and is not taxable in India.*
  - 3.2 *That on the facts and in circumstances of the case and in law, reiteration by Ld. DRP and Ld. AO that revenue of INR 14,57,54,90,041 earned by the Appellant from sale of Microsoft Retail Software Products to distributors belonging to India is taxable as "Royalty" (on protective basis) contrary to decision of this Hon'ble ITAT (ITA No. 1970/Del/2014) dated September 26, 2016 in Appellant's own case.*

- 3.3 *That on the facts and in the circumstances of the case and in law, the Ld. 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.*
- 3.4 *That on the facts and in the circumstances of the case and in law, the Ld. DRP and the Ld. AO have erred in not following the decision of this Hon'ble ITAT in the Appellant's own case for AYs 2010-11 & 2011-12 and the decision of Hon'ble Delhi High Court in the case of Infrasoftware Limited (220 Taxman 273).*
- 1.1 *Ld. DRP and Ld. AO erred in failing to appreciate that receipt of INR 14,57,54,90,041 is not taxable as 'Royalty'<sup>5</sup> or 'otherwise' in the hands of Appellant, under the Act or DTAA.*

4. *Taxability of consideration from cloud services*

4.1 *That in the facts and in circumstances of the case and in law, Ld. DRP and the Ld. AO have erred in not holding that receipt of INR 1,74,95,00,364 earned by MRSC from cloud services is not taxable as "Royalty" in India both under Act and/ or India - USA DTAA.*

4.2 *Ld. DRP and Ld. AO erred in failing to appreciate that receipt of INR 1,74,95,00,364 is not taxable as 'Royalty' or 'otherwise' in the hands of Appellant, under the Act or DTAA.*

4.3 *Ld. DRP and Ld. AO failed to cite any valid reasons for not accepting detailed submissions and case law submitted during the proceedings in support of Appellant's claims and erred in ignoring the same.*

*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 under section 234C 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(l)(c) of the Act against the Appellant.*

*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.*

**I.T.A. No. 1135/Del/2017 (A.Y 2013-14)**

2. Brief facts of the case are that, erstwhile M/s Microsoft Regional Sales Corporation ('MRSC') now called as Microsoft Regional Sales Pte. Ltd. is a Company incorporated in USA and is wholly owned subsidiary of Microsoft Corporation, USA. The assessee is engaged in the business of distribution of Microsoft regional products in the Asia Pacific region, including India.

3. A return of income of Rs. 204,90,61,907/- was filed by the assessee on 30/09/2013 claiming TDS of Rs. 381,22,30,714/- and a revised return claiming the same income of Rs. 204,90,61,907/-, claiming the TDS of Rs. 392,67,91,700/- was filed on 31/03/2105. The case was selected for scrutiny and the notices were issued. In response, the Representative of the assessee attended the proceedings. A final assessment order came to be passed on 31/01/2017 u/s 143(13) read with Section 144C (1) of the Act against the assessee by considering the direction of the DRP, the total income of the assessee was assessed protectively at Rs. 4064,82,52,315/-. An amount of Rs.

3859,91,90,408/- is assessed protectively as royalty an amount of Rs. 204,90,61,907/- as interest on Income Tax refund disclosed in the return of income. The royalty income has been taxed @ 10%. Surcharge and Education cess charged as applicable limit u/s 234A, 234B, 234C & 234D as applicable order to be charged after giving credit to pre-paid taxes.

4. Aggrieved by the final assessment order dated 31/01/2017 the assessee has preferred the present appeal on 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 is regarding levying surcharge and education cess on interest on income tax refund, Ground No. 6 against not granting TDS credit, Ground No. 7 is regarding levying interest u/s 234B of the Act and Ground No. 8 is 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 butter 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 dated 13/04/2022 in the Assessee's own case in ITA No. 1615/Del/2015 and 1970/Del/2014 for the AY 2010-11 and 2011-12.

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 lower Authorities.

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 ratio laid down in the above judicial pronouncements have been relied by the Coordinate Bench in the Assessee's own case in ITA No. 1615/Del/2015 and 1970/Del/2014 for the AY 2010-11 and 2011-12 and decided the issue in favour of the assessee .

9. We have applied the above legal proposition laid down by the Hon'ble Supreme Court and also the Coordinate Bench of this Tribunal in Assessee's own case (supra) for the AY 2010-11 and 2011-12. 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 2010-11 and 2011-12, 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 the case of MOL Corporation by the Co-ordinate Bench of the Tribunal vide order dated 13/04/2022 in ITA No. 1554/Del/2016.

11. 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 lower Authorities.

12. We have heard the parties and verified the material on record. The very same issue regarding the cloud service in the case of MOL Corporation 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. Circled-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.

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

14. **Grounds No. 4 to 7**

The Ground No. 4 & 6 are relates to transfer and short credit of TDS. The Ld. Counsel for the assessee submitted that, the Revenue has already given relief by passing an order u/s 154 of the Act, during the pendency of the appeal. Therefore, the Ground No. 4 & 6 have becomes in-fructuous. The Ground No. 5 is relates to charging of surcharge and education cess. The Ld. Counsel for the assessee has submitted that the same has become in-fructuous. Since, the relief has already been granted vide order dated 29/03/2018. The Ground No. 7 is consequential in nature. Therefore, the Ground Nos. 4 to 7 are dismissed.

15. **In the result, the appeal in ITA No. 1135/Del/2017 of the assessee is partly allowed.**

16. **I.T.A. No. 7257/Del/2017 (A.Y 2014-15)**

In view of the deciding the Appeal in ITA No 1135/Del/2017, since the assessee has raised the similar grounds of Appeal and the issue involved in the Appeal in ITA No 1135/Del/2017 are identical to the above appeal, we allow the Grounds of Appeal No.2, 3 and their sub grounds. The ground No. 4 relates to TDS Credit, we direct the Ld. A.O to allow the TDS Credit in accordance with law. The ground No. 5 is dismissed which is consequential one.

17. **In the result, Appeal in ITA No. 7257/Del/2017 is partly allowed.**

18. **I.T.A. No. 6832/Del/ 2018 (A.Y 2015-16)**

In view of the deciding the Appeal in ITA No 1135/Del/2017, since the assessee has raised the similar grounds of Appeal and the issue involved in the Appeal in ITA No. 1135/Del/2017 are identical to the above appeal, we allow the Grounds of Appeal No. 3 & 4 and their sub grounds. The grounds No. 5 and 6 are dismissed since the same are consequential in nature.

19. **In the result, Appeal in ITA No. 6832/Del/2018 is partly allowed.**

**Order pronounced in the Open Court on this 05<sup>th</sup> Day of July, 2022**

Sd/-

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

Dated: 05/07/2022

*R. Naheed \**

Sd/-

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

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

ASSISTANT REGISTRAR  
ITAT NEW DELHI