

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I', NEW DELHI**

Before Sh. Saktijit Dey, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 802/Del/2021 : Asstt. Year : 2016-17

&

SA No. 102/Del/2022 : Asstt. Year : 2016-17

Microsoft Corporation (India) Pvt. Ltd., 807, New Delhi House, Barakhamba Road, New Delhi-110001	Vs	Addl. CIT, National E-Assessment Centre, New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAACM5586C		

**Assessee by : Sh. Nageswar Rao, Adv. &
Sh. Akshay Uppal, Adv.**

**Revenue by : Sh. Mahesh Shah, CIT DR &
Sh. Mrinal Kumar Das, Sr. DR**

Date of Hearing: 20.07.2022	Date of Pronouncement: 01.08.2022
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ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal as well as the Stay Application has been filed by the assessee against the order passed by the AO dated 29.04.2021 u/s 14(3) r.w.s. 144C(13) of the Income Tax Act, 1961.

2. Following grounds have been raised by the assessee:

"1. That on the facts and in the circumstances of the case and in law, draft assessment order passed by Assistant Commissioner of Income Tax, Circle 17(1), New Delhi, direction given by learned dispute resolution panel ('Ld. DRP') and final assessment order passed by National e-Assessment Centre, Delhi ('Ld. AO') (determining total income of the Appellant at INR 7,84,45,49,210 as against returned income of

INR 6,17,87,33,470) are based on erroneous facts, surmises and conjectures, hence bad in law and are liable to be quashed.

2. That Impugned final assessment order is invalid and bad in law for having been passed without following the procedure laid down in law.

3. That the Ld. AO and Hon'ble DRP have erred in facts and in law in treating 50% of the expenditure incurred on advertisement, publicity and sales promotion as capital expenditure disregarding the fact that the expenditure incurred is revenue in nature.

3.1 That on the facts and in the circumstances of the case and in law, the Ld. AO and Hon'ble DRP has grossly erred in disallowing 50% of the expenditure on notional/ ad-hoc basis without any cogent evidence and reasoning.

3.2 That on the facts and in the circumstances of the case and in law, the Ld. AO and Hon'ble DRP has grossly erred in not appreciating the principles laid down by Jurisdictional High Court judgments cited during the course of the assessment proceedings that the advertisement, publicity and sales promotion expenditure is revenue in nature.

3.3 Without prejudice to our contention that the advertisement, publicity and sales promotion expenditure is revenue in nature, the Ld. AO and Hon'ble DRP has erred in assuming and holding that the alleged block was used for less than 180 days as the Appellant has not provided the details when the details were duly provided on 30 March 2021 (well before the final assessment order passing date i.e. 29 April 2021).

3.4 Without prejudice to our contention that the advertisement, publicity and sales promotion expenditure is revenue in nature, the Ld. AO and Hon'ble DRP has erred in law in not allowing depreciation on the opening block of advertisement, publicity and sales promotion expense treated as capital in nature in previous AYs (i.e. AY 2013-14, AY 2014-15 & AY 2015-16).

4. *That on the facts and circumstances of the case and in law, the Ld. AO has erred in allowing TDS credit of INR 2,62,46,96,262 as against INR 2,64,89,93,803 claimed by the Appellant in the return of income thereby not granting TDS credit to the extent of INR 2,42,97,541.*

5. *That on the facts and circumstances of the case, the Ld. AO has grossly erred in not allowing deduction claimed by the Appellant u/s 80G of the Act amounting to INR 25,52,78,282.*

6. *That on the facts and circumstances of the case/the Ld. AO has grossly erred in not granting credit with respect to Dividend Distribution Tax ('DDT') already paid by the Appellant amounting to INR 25,52,78,282.*

7. *That on the facts and circumstances of the case, the Ld. AO has grossly erred in law as well as facts in levying interest u/s 115P of the Act amounting to INR 17,10,36,449 without considering the fact that the Appellant has duly deposited entire Dividend Distribution Tax ('DDT1) liability within the time limit as prescribed u/s 1150 of the Act.*

8. *That on the facts and circumstances of the case and in law, the Ld. AO erred in levying interest u/s 234A of the Act amounting to INR 18,02,906 without considering the fact, that return of income for relevant AY has been furnished within due date as specified u/s 139(1) of the Act.*

9. *That on the facts and in law, on disposal of this appeal, material adjustment would be required in computing total income, tax, interest u/s 234B of the Act. Necessary directions may please be given to the Ld. AO in this regard.*

10. *That on the facts and circumstances of the case and in law, the Ld. AO erred in initiating the penalty proceedings under section 271(1)(c) of the Act."*

3. The assessee has filed appeal against the addition made by the Assessing officer on Transfer Pricing issues as well as Corporate Tax issues.

4. (As per DRP)

Briefly stated, based on the Inter-Company Commission Agreement with Microsoft Operations Pte. Ltd., Singapore ("MO") and License Agreement with Microsoft India Corporation, USA, the AO held that the advertisement, publicity and sales promotion expense also include expense incurred for efforts to make Microsoft USA's trademarks, service marks and trade names well know in India. The AO observed that the assessee was a wholly owned subsidiary of Microsoft Corporation (USA) and was also advertising, publicizing and marketing Microsoft products and services in India. By undertaking such activities, the assessee apart from promoting Microsoft products is also building/promoting the brand of 'Microsoft'. The AO accordingly disallowed 50% of such expenditure as being capital in nature resulting in an addition of Rs.188,08,60,000/-.

The assessee contended that it had executed a market service agreement with the abovementioned Microsoft Operations Pte. Ltd. ("MO"), whereby MO had appointed it to provide market and support services for Microsoft products and services in India. As per the agreement, MCIPL had a non-exclusive right to market Microsoft products and services in India. The assessee stated that under this Agreement, its function was to facilitate demand of Microsoft products from end customers and to assist distributors and resellers in fulfillment of this demand for which it was remunerated at cost plus 15% towards such services provided to MO. The assessee stated that it was also engaged in the business of manufacturing, replicating, marketing and selling of MS Retail software products and services in India for which it incurred marketing & selling expenses to promote its sales. It further stated that the said License Agreement was not with parent company and that it only 'allowed the assessee to use Microsoft trademark and brand name in India for marketing and promotion of its own products to customers in India, Further, it also allows MS Corp or Microsoft to confirm that these trademarks and brand name are owned by Microsoft and Assessee is only an authorized user. The assessee contended that that advertisement expenditure is an allowable business expenditure under section 37(1) of the Act as the same was wholly incurred for the business purpose and cannot be treated as capital expenditure even if a third party is benefitted out of it. These transactions had been approved as arm's length by the

TPO. Any expenses incurred by the Assessee cannot be considered as acquisition of any asset, as there are paid to third party vendors. The assessee primarily relied on the decisions in Seagram Manufacturing Pvt. Ltd. [245 Taxman 389 (Delhi) - 2017] and Nestle India Ltd. Vs. DCIT 111 TTJ 498 (Delhi)(2009)-Delhi Tribunal in support of its contentions.

The Intercompany Commission Agreement which was effective from July 1, 2010 between Microsoft Operations Pte. Ltd., Singapore (MO) and the assessee company was perused Para 2.2.1 thereof stipulates that the assessee was to use its best efforts to further the interests of MO and to maximize the markets for Microsoft Products and Services in the specified Territory. Such services which were to be provided by the assessee included marketing services as required by MO. Under the same, the assessee had no right to enter into any agreements with the customers regarding any Microsoft products and services. The customers are not that of the assessee, but that of MO. Further, the License Agreement, which was effective from April 1, 2013 between Microsoft India Corporation, a Nevada Corporation (MI Corp) and the assessee provided the assessee a non-exclusive right to use the trademarks and services marks 'MICROSOFT' and 'WINDOWS' etc. The services with which such trademarks and service marks were associated were subject to the control of MI CORP and Microsoft Corporation, USA (MSFT). Under Para 4.1.2 of the said Agreement, the assessee was required to use its best efforts to make MSFT's trademarks, service marks and trade names well known in the Territory which has been defined therein as including India, Bhutan, Maldives, Nepal and British Indian Ocean Territory. As pointed out by the AO in para 4.8 of the assessment order that vide Para 4.1.3 of the Agreement, the assessee agreed to take such steps as MI CORP or MFST requests to establish or confirm MSFT's ownership. Para 4.11 of the AO's order also draws attention to the 2014 10K for Microsoft Corporation report whereby enforcement of copyright, trademark etc that apply to Microsoft's software and hardware products, services and branding, collectively termed therein as Microsoft's 'intellectual property investments' are protected in various ways.

Given the above specific facts of the case, the Panel is of the view that the case laws relied upon by the assessee are distinguishable in facts and hence are not applicable.

The Agreements of the assessee in the present case with the overseas group entities contain the abovementioned aspects which are specific to the assessee and have not been within the scope of the said decisions which are on a different factual matrix. For instance, in the Seagram Manufacturing Pvt. Ltd. case, the overseas owner did not set up any other licensee in the area where the assessee operated, to operate as a rival, which is not the case with the assessee which had been granted a non-exclusive license. It is also seen from the public domain that an SLP was filed by Revenue against the order of the Hon'ble Delhi High Court in the Seagram Manufacturing Pvt. Ltd case [245 Taxman 389 (2017)] before the Hon'ble Supreme Court and that the SLP was dismissed on the ground of delay, however, the question of law was kept open by the Hon'ble Supreme Court. Similarly, in the Nestle India case, the finding of fact was that the expenditure has been incurred to promote sales in India in respect of only those products in which India company is dealing in, whereas in the assessee's case, the expenditure was dearily to be incurred under the specific terms of the Agreements to further the interests of the overseas group companies and the brands they own by maximizing the markets for them in not only India, but other territories as well. This is further affirmed by the fact that the customers are not that of the assessee, but The Agreements of the assessee in the present case with the overseas group entities contain the abovementioned aspects which are specific to the assessee and have not been within the scope of the said decisions which are on a different factual matrix. For instance, in the Seagram Manufacturing Pvt. Ltd. case, the overseas owner did not set up any other licensee in the area where the assessee operated, to operate as a rival, which is not the case with the assessee. which had been granted a non-exclusive license. It is also seen from the public domain that an SLP was filed by Revenue against the order of the Hon'ble Delhi High Court in the Seagram Manufacturing Pvt. Ltd. case [245 Taxman 389 (2017)] before the Hon'ble Supreme Court and that the SLP was dismissed on the ground of delay, that of the overseas group companies. Besides, the case was decided in the context of sec. 92 as it existed before its substitution by sec. 92 to 92F by the Finance Act, 2001, which is not applicable in the present case. It is also relevant that such AMP expenses being of the nature of international transactions with the AE resulting in creation of marketing intangibles and requiring separate benchmarking under transfer

pricing for arm's length remuneration only supports the position that such expenses have been incurred for brand building.

From the above, the Panel is in agreement with the AO's conclusion that the Advertisement, Publicity and Sales Expenses included expenses incurred for brand building / promotion of the Microsoft brand owned by MFST. The disallowance to the extent of 50% of such expenses as being of capital nature in terms of section 37(1) of the Act is upheld. Depreciation under section 32(1) shall be allowable as per the Act. The assessee's objections are disposed off as above.

5. Heard the arguments of both the parties and perused the material available on record.

6. We find that the determination of ALP or the capitalization of 50% of advertising expenses on ad-hoc basis has no legal validity. The Id. DRP distinguished the case laws relied upon by the assessee but could not substantiate by the way of any adjudication how the 50% of the expenses on account of advertisement, publicity and sales incurred by the assessee culminated in brand building and promotion of the Microsoft brand globally. In the absence of any tangible explanation or reasoning given in treating the advertisement expenses as capital as no corporeal asset has been created, we hold that no the expenses incurred cannot be treated as capital in nature.

7. Ground No. 3.3 not pressed.

8. Ground No. 4 pertains to credit of TDS and we hereby direct the AO to grant the credit after due verification.

9. Ground No. 5, 6 & 7 pertains to deduction u/s 80G, credit of Dividend Distribution Tax(DDT) and interest u/s 115P for which the request for rectification has been filed on 28.05.2021. It has been brought to our notice that no

rectification has been carried out till now. Since, a time period of more than 14 months has already been elapsed which is a matter of serious concern in the interest of exchequer, we hereby direct the revenue authorities to pass order u/s 154, taking into consideration the details filed by the assessee within 21 days from the date of this order.

10. In view of the above, the ground no. 2 becomes academic in nature and hence not being adjudicated.

11. Since, the appeal of the assessee stands decided, the Stay Application No.102/Del/2022 filed by the assessee is dismissed as infructuous.

12. In the result, the appeal of the assessee is allowed and Stay Application of the assessee is dismissed as infructuous.

Order Pronounced in the Open Court on 01/08/2022.

Sd/-

(Saktijit Dey)
Judicial Member

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

Dated: 01/08/2022

Subodh Kumar, Sr. PS

Copy forwarded to:

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

ASSISTANT REGISTRAR