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

SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
and
SHRI YOGESH KUMAR US, JUDICIAL MEMBER

ITA No.554/Del./2021
(ASSESSMENT YEAR : 2017-18)

M/s. MOL Corporation, USA C/o Nirmal Malapani, SRBC & Associates LLP, 3rd & 6th Floor, World Mark 1, IGI Airport Hospitality, District Aerocity, New Delhi – 110 037.	vs.	ACIT, Circle 2(2)(1), International Taxation, New Delhi.
(PAN : AAFCM9676A)		
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Nageshwar Rao, Advocate
REVENUE BY : Ms. Sapna Bhatia, CIT DR

Date of Hearing : 08.08.2022
Date of Order : 31.08.2022

ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER :

This appeal by the assessee is directed against the order of the Assessing Officer dated 25.03.2021 passed under section 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 (for short 'the Act') pursuant to the directions of the Dispute Resolution Panel (DRP) for Assessment Year 2017-18.

2. The grounds of appeal taken by the assessee read as under :-

"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 175,50,75,667 as against the returned income of INR Nil.

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 Ld. DRP and the Ld. AO have erred in holding that the revenue earned and received from sale of software by Microsoft Regional Sales Pte. Ltd. ('MRS') amounting to INR 44,17,46,478 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 Double Taxation Avoidance Agreement (' DT AA') and is not taxable in India.

2.2 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 accordingly, that revenue from sale of software is in the nature of business income not taxable under Article 7 of India - USA DT AA 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, Ld. DRP and Ld. AO erred in holding that revenue from sale of software is taxable as 'royalty' in India, which is contrary to the Supreme Court decision in the case of Engineering Analysis Centre of Excellence Private Limited vs. CIT (Civil Appeal 8733-8734 of 20 18).

2.4 That on the facts and in the circumstances of the case and in law, the Ld. DRP and the Ld. AO have erred in law in disregarding decisions of Hon 'ble Courts and routinely holding to the contrary.

2.5 Ld. DRP and Ld. AO erred in failing to appreciate that receipts by MRS of INR 44,17,46,478 is not taxable as 'Royalty' or 'otherwise' in the hands of Appellant, under the Income Tax Act, 1961 (' Act') or India - USA DT AA.

2.6 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 the Act! India-USA DT AA as the same was earned outside of India.

3. Taxability of consideration from cloud services

3.1 That on the facts and in the circumstances of the case and in law, the Ld. DRP and the Ld. AO have erred in holding that the revenue earned by MRS from cloud services amounting to INR 1,3.1,33,29,189 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 the Act or India - USA DTAA.

3.2 Ld. DRP and Ld. AO erred in failing to appreciate that receipt of INR 1,31,33,29,189 is not taxable as 'Royalty' or 'otherwise' in the hands of Appellant, under the Act or India - USA DTAA.

Other Grounds

4. 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 MRS to MOLC despite the directions of Ld. DRP.

5. That on the facts and in the circumstances of the case and in law, the Ld. AO has erred in levying excess interest 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 270A of the Act against the Appellant."

5. At the outset in this case, ld. counsel of the assessee submitted that the issues involved in this appeal relate to taxability of receipts towards software licencing and cloud services which are already decided in favour

of assessee by ITAT decision in assessee's own case for AY 2012-13 in ITA Nos.1553 & 1554/Del/2016 vide order dated 13.04.2022 and ITA Nos.7855 & 7856/Del/2019 for AYs 2015-16 & 2016-17..

6. Per contra, ld. DR for the Revenue did not dispute the proposition that the issues are so covered.

7. We have carefully considered the submissions and perused the records. Brief facts of the case are that the assessee company, MOL Corporation 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, Nevada 89119, USA. Microsoft Corporation, USA is the ultimate parent entity of the assessee. Assessee is a tax resident of USA and therefore, it is entitled to claim the applicability of beneficial provisions of the Double Taxation Avoidance Agreement entered into between India and US (India – US tax treaty) vis-à-vis the provisions of the Income-tax Act, 1961 (for short 'the Act'). The AO/TPO made adjustment/addition to the returned income which was confirmed by DRP based upon earlier year similar direction of DRP. The addition made as per AO's order read as under :-

> "13. Following the directions of the Hon'ble DRP, the total income of the assessee is assessed at Rs.175,50,75,667/- (44,17,46,478/- + 1,31,33,29,189/-) on substantive basis as royalty income taxable @ 10% as per Income Tax Act, 1961 along with applicable surcharge and cess. Charge interest u/s 234A, 234B, 234C & 234D, as applicable after giving credit to pre-paid taxes. Necessary forms and notices are being issued with this order. Penalty proceedings u/s 270A is being initiated separately

for mis-reporting of income. The order should be read together with order of DRP attached with the assessment order."

8. The ITAT in assessee's own case for AY 2012-13 referred above has adjudicated the identical issues as under :-

"<u>Issue of taxability of revenue from sale of software</u>

6. On behalf of the assessee in regard to ground no 1 it was submitted that Ld. Tax Authorities have failed to follow the ratio and principles of law in regard to the sale of software products not giving rise to royalty income as held by Hon'ble Delhi High Court in DIT vs. Infrasoft Ltd. (2014) 220 Taxman. 273. It was submitted that Hon'ble Supreme Court of India in its judgment dated 02.03.2021 in Engineering Analysis Centre of Excellence (P) Ltd. vs. Commissioner of Income Tax (2021) 125 taxmann.com 42 (SC) has upheld the Hon'ble Delhi High Court judgment. It was submitted that in the case of Gracemac Corporation which stands amalgamated with MOL Corporation for the assessment year 2005-06, 2006-07 and 2007-08 the Co-ordinate Bench B at Delhi by order dated 16.12.2020 has allowed the appeals which have been further upheld by Hon'ble Delhi High Court by judgment dated 07.03.2022. The Ld DR supported the findings of Tax authorities below.

6.1 Giving thoughtful consideration to the matter on record, the Bench is of considered opinion that the revenue has been following a persistent approach in regard to assessee and its sister assessee subsidiaries of MS Corp holding sale of MS Retail Software Products to Indian Distributors as royalty under the Act as well as under DTAA between India and US. The assessment in the hands of present assessee was made on protective basis while the substantive assessment was in the hands of MOLC. The assessment in the hands of Gracemac which stands amalgamated with MOLC stands set aside in regard to assessment years 2005-06, 2006-07 and 2007-08 by the co-ordinate Bench's judgment dated 16.11.2020 which have been further upheld by Hon'ble Delhi High Court by judgment dated 07.03.2022. The same were based on the principles of law that sale of software products does not give rise to royalty income as laid down by the Hon'ble Delhi High Court in Infrasoft Ltd. case which have now further been affirmed by the Hon'ble Supreme Court of India in the case of Engineering Analysis Centre of Excellence P. Ltd. (supra).

6.2 In the light of aforesaid as there are no distinguishing facts with regard to present assessment years and as this Bench has also allowed the similar grounds for the assessment year AY for 2010-11 and 2011-12, vide separate order of even date the grounds in hand are sustained. The assessment order for AY for 2012-13 are liable to be set aside."

"**<u>Issue of taxability of cloud based service receipts</u>**

7. It was submitted for the assessee that Ld. Tax Authorities below have failed to appreciate the functional aspects of Cloud base service while holding the subscription to cloud base service as royalty. In this context, the co-ordinate bench judgment in M/s. Salesforce.com Singapore Pte. Vs. Dy. D.I.T. Circle-2(2) ITA No. 4915/DEL/2016 [A.Y 2010-11] with six other connected was relied to contend that subscription to the cloud computing services do not give rise royalty income. The Ld DR supported the findings of Tax authorities below.

7.1 Giving thoughtful consideration to the matter on record, the bench is of considered view that the cloud base services do not involve any transfer of rights to the customers in any process. The grant of right to install and use the software included with the subscription does not include providing any copy of the said software to the customer. The assessee's cloud base services are though based on patents / copyright but the subscriber does not get any right of reproduction. The services are provided online via data centre located outside India. The Cloud services merely facilitate the flow of user data from the front end users through internet to the provider's system and back. The ld. AO has fallen in error in interpreting it as licensing of the right to use the above Cloud Computing Infrastructure and Software (para 10.5 of the Ld. AO order). Thus the subscription fee is not royalty but merely a consideration for online access of the cloud computing services for process and storage of data or run the applications.

7.2 While dealing with similar question in regard to the case of M/s. Salesforce.com Singapore Pte. (supra) where the said assessee was provider of comprehensive customer relationship management servicing to its customer by using Cloud Computing Services / Web Casting Services, the Bench in its order dated 25.03.2022 held as under :

> **"28. Considering the facts of the case in totality, in light of the Master Subscription Agreement, we are of the considered view that the customers do not have any access to the process of the service provider i.e. the assessee, and the assessee does not have any access except otherwise provided in the master subscription agreement to the data of the subscriber.**
>
> **29. In our considered opinion, all the equipments and machines relating to the service provided by the assessee are under its control and are outside India and the subscribers do not have any physical access to the equipment providing system service which means that the subscribers are only using the services provided by the assessee."**

7.3 The Mumbai Tribunal in the case of DDIT v Savvis Communication Corporation [2016] 69 taxmann.com 106 (Mumbai – Trib.) has held that payment received for providing web hosting services though involving use of certain scientific equipment cannot be treated as 'consideration for use of, or right to use of, scientific equipment' which is a sine qua non for taxability under section 9(1)(vi), read with Explanation 2 (iva) thereto as also article 12 of Indo-US DTAA. The

> **Chennai Tribunal in the case of ACIT v Vishwak Solutions Pvt. Ltd ITA No. 1935 & 1936/MDS/2010 dated 30.01.2015 has upheld the findings of CIT(A) that "the amount paid to the non-resident is towards hiring of storage space." The aforesaid squarely covers the controversy in regard to the present assessee also. In the light aforesaid, the Bench is of considered view that the ld. Tax Authorities below had fallen in error in considering the subscription received towards Cloud Services to be royalty income."**

The aforesaid was also followed by ITAT in assessee's own case for AYs 2015-16 & 2016-17.

9. Facts in the present case are identical. Hence respectfully following the precedent from coordinate Bench, we set aside the order of Revenue authorities and decide the issues in favour of the assessee.

10. Other issues raised are consequential. The AO shall give effect accordingly.

11. In the result, assessee's appeal is allowed.

Order pronounced in the open court on this 31st day of August, 2022.

Sd/-	**sd/-**
(YOGESH KUMAR US)	**(SHAMIM YAHYA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated the 31st day of August, 2022
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Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.DRP.
5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.