

**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.845/Del./2021  
(ASSESSMENT YEAR : 2011-12)**

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

(APPELLANT)

(RESPONDENT)

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

Date of Hearing : 11.08.2022  
Date of Order : 21.09.2022

**ORDER**

**PER SHAMIM YAHYA, ACCOUNTANT MEMBER :**

This appeal by the assessee is directed against the order of Assessing Officer dated 26.03.2021 passed under section 144C(3) read with section 143(3)/254 of the Income-tax Act, 1961 (for short 'the Act') pursuant to the directions of the Dispute Resolution Panel (DRP).

2. The grounds of appeal raised 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 27,79,45,07,738 as against the returned income of INR Nil.

2. That on the facts and in the circumstances of the case and in law, the Ld. AO has failed to provide the Appellant with the computation of tax liability and demand sheet along with the final assessment order dated March 26, 2021 rendering the Appellant unable to determine the veracity and correctness of the computation done by the Ld. AO.

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 final assessment order dated March 26, 2021 passed by Ld. AO pursuant to directions of Ld. Dispute Resolution Panel ('Ld. DRP') is bad in law 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 2018).

3.2. That on the facts and in the circumstances of the case and in law, the final assessment order dated March 26, 2022 passed by Ld. AO pursuant to directions of Ld. Dispute Resolution Panel ('Ld. DRP') is bad in law, unlawful and invalid as the same is passed by completely disregarding specific directions issued by this Hon'ble Tribunal vide its order (ITA No.1714/Del/20 15) dated October 31, 2018 to follow decision of the Hon'ble Delhi High Court in case of Infrasoftware Limited (220 Taxman 273).

3.3. That on the facts and in the circumstances of the case and in law, the Ld. DRP and Ld. AO failed to grant legitimate relief, by wrongly placing reliance on Gracemac vs DIT (42 SOT 550), even while noting that same has been held to be not good law by Hon'ble ITAT vide its order in ITA No.1969/Del/2014 dated September 26, 2016.

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 holding that the revenue earned and received from sale of software by Microsoft Regional Sales Pte. Ltd. ('MRS') (earlier known as Microsoft Regional Sales Corporation) amounting to INR 27,79,45,07,738 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 ('DTAA') and is not taxable in India.

3.5 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.

3.6. 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.

3.7. Ld. DRP and Ld. AO erred in failing to appreciate that receipts by MRS of INR 27,79,45,07,738 is not taxable as 'Royalty' or 'otherwise' in the hands of Appellant, under the Income Tax Act, 1961 ('Act')/India-USA DTAA.

3.8. 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 or India - USA DTAA as the same was earned outside of India.

#### 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 to this effect in the original assessment proceedings and despite the Ld. AO itself stating the same while passing the draft assessment order in remand back proceedings.

5. That on facts and in circumstances of the case and in law, the Ld. AO has grossly erred in raising incorrect demand on the Appellant.

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.

3. Grounds No.1 & 2 are general in nature, hence do not require any specific adjudication.

4. Ground No.3 relates to taxability of revenue from sale of software.

5. 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.

6. In the assessment order passed in this case, the total income of the assessee was assessed at Rs.2779,45,07,738/- as against nil income

returned by the assessee. AO was of the opinion that the revenue earned and received from sale of software by MRSC is taxable in India as royalty in the hands of the assessee.

7. Against this order, assessee has preferred an appeal before us. We have heard both the parties and perused the record.

8. At the outset, ld. Counsel of the assessee contended that this issue is squarely covered in favour of the assessee in series of orders of Hon'ble High Court/ITAT in assessee's own case and submitted the copies of the same as under:-

- (i) Copy of order dated 07.03.2022 passed by the Hon'ble Delhi High Court in case of Gracemac Corporation (now MOL Corporation) for A Y 2005-06 and 2007-08 (ITA 32 & 34/2022)
- (ii) Copy of order dated 15.03.2022 passed by the Hon'ble Delhi High Court in case of Gracemac Corporation (now MOL Corporation) for AY 2006-07 (ITA 48/2022)
- (iii) Copy of order dated 29.07.2022 passed by the Hon'ble Delhi High Court in case of MOL Corporation for A Yes) 1999-2000 to 2004-05 (ITA 657 to 662/2011)
- (iv) Copy of order dated 05.08.2022 passed by the Hon'ble Delhi High Court in case of MOL Corporation for AY(s) 2007-08 to 2010-11 (ITA 250 to 253/2022)
- (v) Copy of order dated 13.04.2022 passed by the Hon'ble Tribunal in case of MOL Corporation for A Y 2012-13 (ITA No.1554/Del/2016)
- (vi) Copy of order dated 05.07.2022 passed by the Hon'ble Tribunal in case of MOL Corporation for AY 2013-14 & 2014-15 (ITA Nos.1134 & 7258/De1/2017)

- (vii) Copy of order dated 07.06.2022 passed by the Hon'ble Tribunal in case of MOL Corporation for AY 2015-16 & 2016-17 (ITA Nos.7855 & 7856/Del/2019)

He further stated that the issue is also covered by the decision of Hon'ble Supreme Court in the case of Engineering Analysis Centre of Excellence (P.) Ltd. Vs. CIT 432 ITR 471 (SC).

9. Per contra ld. DR for the Revenue did not dispute the above and relied upon the order of the AO.

10. Upon careful consideration, we note that the same issue has been decided by the ITAT in assessee's own case by a series of order in assessee's own favour as rightly contended by the assessee. The issue is also covered by the decision of Supreme Court in the case of Engineering Analysis Centre of Excellence (P.) Ltd. (supra). We may gainfully refer to latest decision of ITAT in assessee's own case for AY 2013-14 vide order dated 05.07.2022 wherein ITAT has adjudicated and decided the issue as under :-

“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 9 ITA No. 1134/Del/2017 & 7258/Del/2017 MOL Corporation, USA 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."

11. Accordingly, respectfully following the aforesaid precedent, we direct that the addition in this regard is liable to be deleted. We order accordingly.

12. Ground No.4 : In this ground, assessee contended that the total TDS credit has not been given by the AO. We direct that the AO may examine this issue and passed order as per law.

13. In the result, the appeal filed by the assessee stands allowed.

**Order pronounced in the open court on this 21<sup>st</sup> day of September, 2022.**

**Sd/-  
(YOGESH KUMAR US)  
JUDICIAL MEMBER**

**sd/-  
(SHAMIM YAHYA)  
ACCOUNTANT MEMBER**

**Dated the 21<sup>st</sup> day of September, 2022  
TS**

Copy forwarded to:

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

**AR, ITAT  
NEW DELHI.**