

**THE INCOME TAX APPELLATE TRIBUNAL
DELHIBENCH 'D', NEW DELHI**

Before Sh. Saktijit Dey, Judicial Member

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

ITA No. 1912/Del/2022 : Asstt. Year : 2018-19

ITA No. 1913/Del/2022 : Asstt. Year : 2019-20

Microsoft Regional Sales Pte. Ltd. (Formerly known as Microsoft Regional Sales Corporation), C/o. Mr. Nirmal Malpani Ernst & Young LLP, 3 rd & 6 th Floor, Worldmark 1, IGI Airport Hospitality District Aerocity, New Delhi-110037	Vs	ACIT, Circle-2(2)(1), International Taxation, New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AADCM1638A		

Assessee by : Sh. Nageshwar Rao, Adv.

Revenue by : Sh. Gangadhar Panda, CIT-DR

Date of Hearing: 07.11.2022

Date of Pronouncement: 19.01.2023

ORDER

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

The present appeals have been filed by the assessee against the orders dated 28.06.2022 passed by the AO u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961.

2. The only tangible issue raised by the assessee in this appeal is as under:

"2.1 That on the fact and in the circumstances of the case and in law, Id. Dispute Resolution Panel ('DRP') and the Id. AO have erred in holding that revenue earned by Appellant from cloud services amounting to Rs.544,41,77,571/- is taxable as "Royalty" in India in the hands of Appellant without appreciating the same

is not in the nature of "Royalty" under the Income Tax Act, 1961 ('the Act') or India - USA/Singapore Double Taxation Avoidance Agreement ('DTAA')."

3. For the A.Y. 2018-19 (ITA No. 1912/Del/2022), the addition has been made by the AO on protective basis and substantially in the case of Mol Corporation (ITA No. 1914/Del/2022). The substantive addition has been dealt vide order dated 28.12.2022 and hence the appeal in the instant ITA No. 1912/Del/2022 is liable to be dismissed as infructuous.

4. For the A.Y. 2019-20 (ITA No. 1913/Del/2022), the issue of taxation of revenue from Cloud Services is a subject matter of addition on protective and substantive basis in two different entities.

5. While in the A.Y. 2018-19, the protective addition has been made in the hands of the assessee and the substantive addition has been made in the Mol Corporation during the A.Y. 2019-20, the substantive addition has been made in the case of assessee as the case of Mol Corporation has not picked up for scrutiny u/s 143(3) by CASS.

6. This led to an oxymoronic situation for the department. The revenue tried to triumph over such situation by imperfectly making the addition in this year in the case of the assessee instead of Mol Corporation. The justification given by the revenue is as under:

"28.5 On the ground no. 7, regarding taxation revenue from cloud services received by the assessee on substantive basis, the DRP held that in this case services are provided by MOLC and routed through the assessee. Accordingly, the same receipt cannot be added to the income of both the

companies on substantive basis. In the earlier years the receipts were taxed on protective basis in the hands of assessee and substantive basis in the hands of MOLC. This year AO has taxed it in the hands of the assessee on substantive basis. There will be no material difference as the income is to be taxed in the hands of one company only. However, AO is directed to verify that the income has to be taxed in the hands of MOLC on protective basis only if the income in the hands of MOLC has been taxed on substantive basis same may be taxed on protective basis in the hands of assessee. Since, the case of the MOL Corporation (MOLC) is not selected for scrutiny through CASS. Accordingly, the revenue received by the assessee during the financial year 2018-19 from cloud services is being taxed on substantive basis in the hands of the assessee."

7. Alas, with heavy heart, we hereby hold that such flip flop cannot be legally supported and hence the addition made in the hands of the assessee is liable to be deleted.

8. In the result, the appeal in 1912/Del/2022 is dismissed as infructuous and the appeal in ITA No. 1913/Del/2022 is allowed. Order Pronounced in the Open Court on 19/01/2023.

Sd/-

(Saktijit Dey)
Judicial Member

Dated: 19/01/2023

Subodh Kumar, Sr. PS

Copy forwarded to:

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

Sd/-

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

ASSISTANT REGISTRAR