IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D" NEW DELHI

BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER
AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

आ.अ.सं/.I.T.A No.3412/Del/2023
निर्धारणवर्ष/Assessment Year: 2021-22

Microsoft Regional Sales Pte. Ltd., C/o Nirmal Malpani, Ernst & Young LLP, 3rd & 6th Floor, Worldmark 1, IGI Airport Hospitality District, Aerocity, New Delhi. **PAN No. AADCM1638A**	बनाम **Vs.**	ACIT, Circle-2(2)(1), International Taxation, E-2 Block, Civic Centre, New Delhi.
अपीलार्थी **Appellant**		प्रत्यर्थी/**Respondent**

Assessee by	**Shri Nageshwar Rao, Parth & Ms. Mehar Verma, Advs.**
Revenue by	**Shri Vizay B. Vasanta, CIT DR**

सुनवाईकीतारीख/ Date of hearing:	01.01.2024
उद्घोषणाकीतारीख/Pronouncement on	21.03.2024

आदेश /O R D E R

PER C.N. PRASAD, J.M.

This appeal is filed by the assessee against the order of the AO dated 30.10.2023 passed u/s 143(3) r.w.s.144C(13) of the Act pursuant to the directions of the DRP dated 31.08.2023 u/s 144C(5) of the Act. The assessee in its appeal raised the following grounds:

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') and Ld. Dispute Resolution Panel ('Ld.DRP') have erred in determining the total income of the Appellant for Assessment Year 2021-22 at Rs.11,44,36,06,367/- in final assessment order dated 30.10.2023 ('Impugned Order').

2. Impugned Order is bad in law, null and void as the same is not in conformity with directions of Ld. DRP.

3. Taxability of consideration from cloud services.

3.1 That Impugned Order erred in holding that revenue earned by Appellant from cloud services amounting to INR 11,44,36,06,367 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 - Singapore Double Taxation Avoidance Agreement ('DTAA').

3.2 That Impugned Order erred in failing to appreciate that income from cloud services cannot be taxed as "Royalty" in the hands of distributor.

3.3 That Ld. DRP and the Ld. AO erred in failing to appreciate that receipt of Rs.11,44,36,06,367/- is not taxable as "Royalty" or "Otherwise" in the hands of Appellant, under the Act or India - Singapore DTAA and further conclusions reached are contrary to decisions of Hon'ble Courts.

3.4 That Impugned Order erred in failing to appreciate that in identical facts and in law, the disputed issue stands conceded before Hon'ble Delhi High Court that the income from cloud services is not taxable as royalty.

3.5 That Impugned Order erred in not following the decision of Hon'ble Supreme Court in Appellant's case.

4. That without prejudice to our contention that the income from cloud services is not taxable in India, the Ld. AO has erred in levying the surcharge and cess amounting to Rs.5,71,06,673/- and Rs.4,79,69,605/- respectively on the tax payable on the total income of the Appellant ignoring rate mentioned in India - Singapore DTAA of 10% (including surcharge and cess).

5. That Ld. AO has erred in adding an amount of Rs.1,01,72,24,177/- in the computation sheet (without any discussion regarding the same in the order) as amount already refunded to the Appellant while computing the tax liability whereas the same was never received by the Appellant.

6. That without prejudice to our contention that the income from cloud services is not taxable as "Royalty" or "Otherwise" in India, the Ld. AO while holding the same to be taxable as royalty, has erred in not granting the refund of "Equalization Levy" paid by the Appellant amounting to Rs.24,76,39,209/-.

7. That as a result of some of the above additions Impugned Order contains additions which were not part of draft assessment order.

8. That on the facts and in the circumstances of the case and in law, Ld. AO has erred in levying excess interest under section 234A and 234B of the Act.

9. That on the facts and in the circumstances of the case and in law, Ld. AO has erred in initiating penalty proceedings under section 270A 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."

2. Ld. Counsel for the assessee submits that ground no. 3 & sub grounds are in respect of taxability of consideration from cloud services as royalty and the issue has been decided in favour of the assessee by the Tribunal in assessee's own case for the assessment years 2012-13 to 2020-21. Ld. Counsel submits that the Tribunal has consistently holding that the Revenue from distribution of cloud services is not taxable as royalty in India and the latest order of the Tribunal for the immediately preceding assessment year i.e. 2020-21 in ITA No.2125/Del/2023 dated 17.10.2023 is placed at pages 51 to 55.

3. Ld. DR fairly submits that the issues have been decided in assessee's own case for earlier years.

4. Heard rival submissions, perused the orders of the Tribunal. We observe that the Tribunal for the immediately preceding assessment year i.e. 2020-21 in ITA No.2125/Del/2023 dated 17.10.2023 noticed that the issue in appeal is squarely covered by the decision of the Hon'ble Supreme Court in the case of Engineering Analysis Center of Excellence Pvt. Ltd. Vs. CIT (432 ITR 471). The Tribunal also noted that in assessee's own case the identical issue was decided for the assessment years 2010-11 onwards. The Tribunal observed as under: -

"2. The dispute in the present appeal is relating to taxability of receipts from Cloud Services as royalty both under the domestic law as well as under India-USA Double Taxation Avoidance Treaty (DTAA). At the very outset, learned counsel appearing for the assessee submitted that the issue is squarely covered by the decision of Hon'ble Supreme Court in case of Engineering Excellence (P) Ltd. vs. CIT - 432 ITR 47 (SC). He further submitted that in assessee's own case in past assessment years, the Tribunal has consistently held that the revenue earned from Cloud Services is not taxable as royalty either under the domestic law or under the treaty provisions. He submitted, even, Hon'ble Supreme Court has dismissed the special leave petition filed by the Revenue in assessee's own case on identical issue, in assessment years 2015-16, 2010-11 and 2017-18. Thus, he submitted, the issue stands squarely covered in favour of the Revenue.

3. Learned Departmental Representative, though, fairly agreed with the aforesaid submissions of the assessee, however, he relied upon the observations of the Assessing Officer and learned DRP.

4. Having considered rival submissions and perused the materials on record, we find that this is a recurring issue between the assessee and the Revenue from assessment years 2010-11 onwards. Beginning from assessment years 2010-11 till assessment year 2019-20, the Tribunal has consistently decided the issue in favour of the assessee by holding that the Revenue earned from Cloud Services, cannot be treated as royalty. The latest order passed by the Tribunal on the issue is for assessment years 2018-19 and 2019-20 vide ITA Nos.1912 and 1913/Del/2023 dated 19.01.2023. It is further observed, the decision of the Tribunal in assessment years 2010-11 and 2017-18 has been upheld by the Hon'ble High Court. Even, the Hon'ble Supreme Court has dismissed the Special Leave Petitions filed by the Revenue raising identical issue of taxability of revenue earned from Cloud Services as royalty in assessee's case. The orders of Hon'ble Supreme Court in this regard are placed in the legal compilation filed before us. Thus, in

our considered opinion, the issue stands squarely settled in favour of the assessee."

5. Facts being identical respectfully following the orders of the Tribunal in assessee's own case these grounds are allowed. Ground no.4 of grounds of appeal is without prejudice ground and since we have allowed the main ground in favour of the assessee. This ground need not be adjudicated.

6. Coming to ground nos. 5 to 7. Ld. Counsel submitted that the rectification application dated 21.11.2023 which is placed at page no. 132 of the paper book is pending consideration of the Assessing Officer. Ld. Counsel submits that in the rectification application request was made for correction of errors which were not part of draft assessment order but appear in the computation post impugned order and, therefore, suitable directions be given to the AO to consider the issues of rectification in accordance with law.

7. Considering the rival contentions. We direct the AO to look into the rectification application dated 21.11.2023 and pass orders as expediently as possible to consider the issues of rectification in accordance with law. These grounds are allowed for statistical purpose.

8. Coming to ground no.8 which is in respect to levy of interest u/s 234A and 234B of the Act the same is consequential and requires no adjudication. Ground no.3 is in respect of initiation of penalty u/s 270A of the Act and the same is pre-mature at this stage.

9. In the result, appeal of the assessee is partly allowed as indicated above.

Order pronounced in the open court on 21/03/2024

Sd/-	**Sd/-**
(DR. BRR KUMAR)	**(C.N. PRASAD)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 21/03/2024

**Kavita Arora, Sr. P.S.*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi