

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH,
NEW DELHI [THROUGH VIDEO CONFERENCE]**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI K. N CHARY, JUDICIAL MEMBER**

ITA No. 5233/DEL/2010 [A.Y 2007-08]
ITA No. 945/DEL/2012 [A.Y 2006-07]
ITA No. 946/DEL/2012 [A.Y 2005-06]
ITA No. 947/DEL/2012 [A.Y 2006-07]

Gracemac Corporation
[Now amalgated with MOL Corporation
S.R. Batliboi & Co.
Golf View Corporate, Tower B
Sector - 42, Sector Road,
Gurgaon, Haryana

Vs.

The Dy D.I.T
Circle 1(2)
New Delhi

PAN: AABCG 8458 N

[Appellant]

[Respondent]

Assessee by : Shri Nageshwar Rao, Adv

Revenue by : Shri Satpal Gulati, CIT-DR

Date of Hearing : 09.11.2020

Date of Pronouncement : 16 .11.2020

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

The above captioned appeals by the assessee in ITA No. 5233/DEL/2010, ITA No. 945/DEL/2012 & ITA No. 946/DEL/2012 are preferred against three separate orders framed u/s 143(3) r.ws. 144C of the Income tax Act, 1961 [hereinafter referred to as 'The Act' for short] for A.Ys 2005-06, 2006-07 and 2007-08. Since common issues are involved in all these appeals, they were heard together and are being disposed of by this common order. ITA No. 947/DEL/2012 is against the assessment order framed u/s 154 of the Act relating to the charging of interest u/s 234B of the Act. For the sake of convenience and brevity, we have considered the facts of A.Y 2005-06.

2. Briefly stated the facts of the case are that the assessee is a wholly owned subsidiary of Microsoft Corporation, USA ("MS Corp"). MS Corp entered into a Parent Subsidiary agreement ("PSA") with Gracemac on January 1, 1999 wherein MS Corp has granted Gracemac:

- the exclusive license to manufacture Microsoft products;
- exclusive license to distribute the products so manufactured directly to retailers or to MS Corp or to subsidiaries of MS Corp, and
- exclusive right to license any third party to directly grant customers the right to reproduce Microsoft software products for internal use.

3. On the same date the assessee entered into a License Agreement with Microsoft Operations Pte. Limited, Singapore ("MS Ops"), wherein Gracemac has granted MS Ops the:

- non-exclusive license to manufacture Microsoft products in Singapore;
- non-exclusive license to distribute the products so manufactured to retailers or to MS Corp or to subsidiaries of MS Corp; and
- non-exclusive right to license or sublicense the right to reproduce Microsoft software products to certain end users (large account customers) for their internal use.

4. This agreement was renewed w.e.f. April 3, 2004. There is no significant difference on account of activities and license granted by the assessee but the only distinction between the two agreements is the alteration in the abbreviated names, namely, from MS Corp to MSFT and from MO Ops to MO. These new abbreviated names have been used in further discussion of the case.

5. In lieu of the abovementioned rights, the assessee earns royalty from MO. The royalty is computed on the basis of the net selling price of Microsoft products manufactured by MO and distributed to retailers, MSFT or subsidiaries of MSFT. In turn, MO has entered into a non-exclusive distribution and intercompany services agreement ("distribution agreement") with Microsoft Regional Sales Corporation, USA ("MRSC") wherein MRSC has been appointed as a distributor of Microsoft products manufactured by MO. MRSC has been given the right to distribute Microsoft products in Asia (with restrictions in China, Korea and Taiwan), Japan, South East Asia and the South Pacific as per Schedule A of distribution agreement. Pursuant to the distribution agreement, MRSC has entered into agreements with various distributors in India. The distributors have a right to distribute the products in India.

6. Thus, all the three companies i.e. the assessee company, the licensee and the distribution company i.e. MSRSC are all associated enterprises and subsidiaries of Microsoft Corporation USA.

7. During the course of scrutiny assessment proceedings the assessee was required to furnish the following details:

- (i) Copy of agreement between Gracemac Corporation and Microsoft Corporation relevant to F.Y. 2004-05.
- (ii) Copy of license agreement with Microsoft Operations Pte. Ltd., Singapore relevant to F.Y. 2004-05.
- (iii) Please state as to why not the payments received by the assessee from sale of products in India be taxed as royalties as per the provisions of the Income Tax Act, 1961 as well as the tax treaty between India and USA, for the detailed reasons mentioned in the assessment order of previous year. Please state whether any new facts relevant to the characterization of income have occurred during the year, if yes, the same be submitted.

- (iv) The total amount of software products sold distributors in respect of finished in India and the software products sold under open licensing programme during F.Y. 2004-05 be stated.
- (v) Please state the amounts received/receivable by Gracemac Corporation during the period 01.04.2004 to 31.03.2005.
- (vi) The copy of financial statements of Gracemac Corporation relevant to Indian F.Y. 2004-05."

8. The assessee furnished the requisite details and after carefully perusing the documents furnished by the assessee, the Assessing Officer formed a belief that on the basis of granting of rights, the assessee got the exclusive rights with regard to Microsoft Products in exchange of stocks to MS Corp. Due to this, the intellectual property rights owner is Gracemac Corp. and any payments arising in India in light of provisions of Paragraph 7(b), Article 12 of the India-US tax treaty, are taxable as royalties. Forming this belief, the Assessing Officer held that not only 35% or 40% of the amount but total amount of USD 155,646,892 is taxable as royalty @ 15% as provided in Article 12 of India US DTAA.

9. Before us, the ld. counsel for the assessee, at the very outset, stated that the entire action by the Assessing Officer has been decided in favour of the assessee and against the revenue by the Tribunal in the case of Microsoft Corporation for AY.s 1997-98 to 1999-2000 in the case of MOL Corporation for A.Y 2011-12 and further in the case of MOL Corporation for A.Ys 2007-08 to 2010-11. Copies of the orders of the Tribunal have been supplied to us.

10. Per contra, the ld. DR, relying upon the orders of the lower authorities, however conceded that the impugned dispute has been decided in favour of the assessee by the Tribunal in the earlier years.

11. For the sake of brevity, we have considered the decision of the co-ordinate bench in ITA Nos. 1328 to 1330/DEL/2008 for A.Ys 1997-98 to 1999-2000 order dated 13.05.2019. The relevant discussions are as under:

"9. We have gone through the record in the light of the submissions made on either side. We find that the facts of this case are identical to the facts involved in the case of infra-soft Ltd (supra), more particularly on a reading of the reasoning of the Ld. AO in this case to arrive at the conclusion that the

sales/licensing of the software was royalty in juxtaposition to Paragraph No. 11 of order of the Hon'ble jurisdictional High Court which are strikingly similar. Hon'ble Court after dealing with this issue extensively held that what is transferred in this matter is neither the copyright nor the use of the copyright in the software, but what is transferred is the right to use the copyrighted material or article which is clearly distinct from the rights in the copyright, and the right that is transferred is not a right to use the copyright but is only limited to the right to use the copyrighted material and the same does not give rise to any royalty income and would be business income only.

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12. On a careful reading of the facts of Infra-soft Ltd (supra), as could be culled out from paragraphs 3 to 12 we find that the facts in both the cases are identical and the issue that was dealt with is also identical. We, therefore, do not have any hesitation in our mind to hold that in view of the decision of the Hon'ble jurisdictional High Court in the case of Infrasoftware (supra), the issue involved in this matter is no longer res integra and has to be answered by stating that there is no transfer of any right in respect of copyright by the assessee and it is the case of mere transfer of copyrighted article and the payment was for a copyrighted article and represents the purchase price of an article and cannot be considered as royalty even under the

Income Tax Act, 1961 or under the DTAA. When once we reach such a conclusion, we do not find any need for further verification of any fact at the end of the Assessing Officer. Insofar as the law laid down by the Hon'ble High Court is concerned, whether or not this particular judgement was available before the Assessing Officer at the time of framing of the assessment, it makes little difference because the decision of the Hon'ble High Court binds the learned Assessing Officer in the same way as it binds this Tribunal also. We, therefore, do not find any need to remand the matter back to the file of the learned Assessing Officer.

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14. On the aspect of interest under Section 234B, Ld. AR placed reliance on the decision of the Hon'ble Delhi High Court in the case of DIT Vs GE Packaged Power Inc. (2015) 373 ITR 0065 (Delhi). In this case, the Hon'ble High Court of Delhi referred and followed its decision in the case of Director of Income Tax vs. Jacobs Civil Incorporated (2011) 330 ITR 0578 wherein it was held that Sec. 195 put an obligation on the payer i.e., any person responsible for paying any amount to a non-resident, to deduct tax at source at the rates in force from such payments, thus, entire tax is to be deducted at source which is payable on such payments made by the payer to the non-resident; that if the said payer has defaulted in deducting tax at source, the

Department can take action against the payer under the provisions of Section 201 of the Act and compute the amount accordingly; that in such a case, the non-resident is liable to pay tax but there is no question of payment of advance tax; and that, therefore, assessee is not liable to pay interest under Section 234B on account of default of the payer in deducting tax at source from the payments made to the assessee. It is pertinent to note that the decision in *Jacobs Civil incorporated*(supra) relates to the AY2001-02.

15. Be that as it may, inasmuch as we held in the preceding paragraphs that there is no royalty income involved in this matter, and for want of Permanent Establishment, the business income of the assessee is not taxable in India,we, therefore, in these circumstances and also while respectfully following the decision of the Hon'ble Jurisdictional High Court, hold this issue in favour of the assessee in all the assessment years."

12. As no distinguishing decision has been brought to our notice and on finding parity in the facts with the facts of the year under consideration, respectfully following the findings of the co-ordinate bench [supra], we decide accordingly.

13. In the result, all the appeals of the assessee ITA No. 946, 947, 9451/DEL/2012 and 5233/DEL/2010 are allowed.

The order is pronounced in the open court on 16.11.2020.

Sd/-

**[K. N. CHARY]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 16th November, 2020

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before	
Date on which the typed draft is placed before	
Date on which the approved draft comes to	
Date on which the fair order is placed before	
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The date on which the file goes to the	
Date of dispatch of the Order	