IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'I-1' BENCH, NEW DELHI [THROUGH VIDEO CONFERENCE]

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No. 1479/DEL/2016
[Assessment Year: 2011-12]
&
ITA No. 507/DEL/2017
[Assessment Year: 2012-13]

Microsoft India (R&D) Pvt. Ltd., 807, New Delhi House, Barakhamba Road, New Delhi.	Vs.	DCIT, Circle-16(2), New Delhi.
PAN: AABCM 6358 F		
[Appellant]		[Respondent]

Date of Hearing : 09.06.2021
Date of Pronouncement : 14.06.2021

Assessee by : Shri Nageshwar Rao, Adv
Ms Sherry Goyal, Adv

Revenue by : Shri Surendar Pal, CIT-DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

Pursuant to the directions given by the Hon'ble High Court of Delhi in ITA No. 247 of 2019 and 357 of 2019 order dated 04.01.2021,

ITA No. 1479/DEL/2016 and ITA No. 507/DEL/2017 were heard for adjudication of the issues restored by the Hon'ble High Court of Delhi vide its order dated 04.01.2021.

2. Representatives of both the sides were heard at length. Decision of the Hon'ble High Court carefully perused and facts on record duly considered.

3. The underlying facts are that the decision of the Tribunal in A.Ys 2011-12 and 2012-13 were challenged before the Hon'ble High Court of Delhi and the Hon'ble High Court of Delhi, while deciding the appeals before it, had the occasion to consider the following substantial grounds of appeal for A.Y 2011-12:

> *""(a) Whether impugned order is perverse and bad in law to the extent it upholds substantial variations to determination of arm's length price in transfer pricing study in the face of clear, unambiguous and express finding by Transfer Pricing Officer that "It is emphasized that Transfer Pricing study was not rejected at all"?*
>
> *(b) Whether conclusion in impugned order classifying software development services rendered by Appellant as "High end" in nature for purposes of Chapter X of the Act is (a) contrary to*

facts and law as also material on record, (b) perverse as it does not consider all relevant material on record, selectively considers statements recorded by Respondent in the course of Advance Pricing Agreement proceedings and (c) unlawful and unsustainable in law as same arises from gross misinterpretation of facts, law and agreement between parties?

(c) Whether impugned order, to the extent it finally upholds rejection of several companies as being not comparable to Appellant for determination of arm's length price of international transaction, is bad in law, unjust and unsustainable as interalia such conclusion arises from total misinterpretation of facts and law including impact and relevance of patents registration by and in the name of Overseas Associated enterprise, as also relevance and impact of research & development activities of such companies?

(d) Whether to the extent impugned order ignores intervening decision of jurisdictional High Court on identical issues involving head under which income is taxable i.e., Income from house property or Income from other sources, and routinely restores the issue to file of Assessing officer on the pretext of following coordinate bench order in earlier year, is unlawful, unsustainable and not in accordance with law as per section 254 of the Act?"

4. The Hon'ble High Court of Delhi decided as under:

"11. At the outset, Mr. Rao submits that in view of the rejection of the appeal preferred by the Assessee, he would not like to press the questions enumerated as (a), (b) and (c). He submits that in the event, the Revenue challenges the dismissal order, he would agitate the grounds in respect of the said questions. Nevertheless, he sill urges the questions enumerated as (d) and (e) above.

12. Mr. Rao submits that the learned ITAT has erred in restoring for adjudication, the questions of law to the file of the AO, thereby allowing him a second inning on a topic which both the AO and the DRP have already considered. He submits that the impugned order fails to finally decide the issue or provide guidance on questions of law involved in corporate tax dispute of taxability of composite rental income under the heads 'income from house property' or 'income from other sources'. He submits that the ITAT ought to have followed the decision of the High Court in the case of ***Jay Metal Industries (P) Ltd. v. CIT-V,***2 and granted relief finally and conclusively, especially as all the facts are available on record. He further submits that in these circumstances, it would only prolong litigation on an issue which had already been settled by a decision of this Court. We are inclined to agree with Mr. Rao. The learned ITAT has restored the above issues to the AO for a fresh decision following its earlier order dated 28.06.2016 in ITA No. 2058/DEL/2015. The ITAT being a last fact finding authority, is empowered to examine the documents and law placed by the assessee in support of its claim. It is well settled law that remand is not a power to be exercised in a routine manner and should be used sparingly, as an exception only

> when the facts warranted such course of action. In our opinion, when the requisite materials and the intervening decision of the jurisdictional high court was available for deciding the issue urged by the Assessee, the Tribunal ought to have arrived at a conclusion rather than remanding the matter back to the Assessing Officer.
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> 13. Accordingly, we partly allow the appeal of the Assessee on question (d) and direct the learned ITAT to take up and decide the corporate tax grounds urged by the Assessee in its appeals. Thus, the appeal of the Assessee is restored to the file of the ITAT for AY 2011-12 to the limited extent , noted above."

5. Similarly, same directions were given by the Hon'ble High Court in ITA No. 652 of 2019 and 710 of 2019 for A.Y 2012-13.

6. Representatives of both the sides fairly conceded that the under lying facts in the impugned issues are identical in both the A.Ys under consideration i.e. 2011-12 and 2012-13. Therefore, for the sake of convenience, we decided to consider the facts of A.Y 2011-12.

7. The relevant grounds for A.Y 2011-12 in ITA No. 1479/DEL/2016, which need adjudication as per the directions of the Hon'ble High Court of Delhi [supra], are as under:

"20. That on the facts and in law, the Hon'ble DRP and the Ld. AO were not justified and have erred by taxing gross composite rental income of Rs. 17,22,16,198 received from let out building space alongwith inbuilt infrastructure and other amenities under the head 'Income from House Property' instead of 'Income from Other Sources' completely disregarding the provisions of section 56 of the Act and Hon'ble Jurisdiction High Court judgment.

20.1 That on the facts and in law, the Ld. AO be directed to tax the composite rental income of Rs. 17,22,16,198 under the head come from Other Sources' after allowing/considering proportionate tax depreciation and expenses u/s 57 of the Act amounting to Rs.16,29,82,109 pertaining to let out building space/inbuilt infrastructure/ other amenities as claimed in the Return of Income."

8. It would be pertinent, at this point, to consider the decision of the Hon'ble High Court of Delhi in the case of Jay Metal Industries Pvt Ltd 84 Taxmann.com 11 wherein a similar issue was considered and decided.

9. The question involved in this case reads as under:

"The question of law that is sought to be urged is whether the ITAT was right in confirming the order of the Assessing Officer ('AO') and reversing the order of the Commissioner of Income Tax ['CIT (A)'] and holding that the income received by the Assessee from letting of the premises in question had to be assessed as 'income from other sources' under Section 56 (2) (iii) of the Act and not as 'income from house property'?"

10. The Hon'ble High Court, while deciding the aforementioned question of law, observed as under:

"17.1 The basic test for determining whether a lease for the letting of a building together with fixtures etc is a composite one was laid down by the Supreme Court in Sultan Bros. (P) Limited v. CIT (1964) 51 ITR

353. In the above decision, the Supreme Court was dealing with Section 12 (3) and (4) of the Indian Income Tax Act, 1922 which correspondence Section 56 of the Act. There the Assessee had constructed a building for the purpose of running a hotel and for certain ancillary purposes. With this objective, the Assessee equipped with the building, furniture and fixtures. The lease deed in that case provided for a monthly rent of Rs. 5,950 for the building and hire of Rs. 5,000 for the furniture and fixtures.

17.2 The Department disallowed the claim of the Assessee stating that the entire sum received under the lease was to be treated as 'income from other sources'. While the rent receipt for the

building was treated as 'income from house property', the rent received on account of furniture and fixtures alone was held to be admissible under 'income from other sources'.

17.3 However, the Supreme Court accepted the Assessee's claim by holding that 'when a building, plant, machinery or furniture are inseparably let, the Act contemplates the rent for the building as a residuary head of income'. The Court observed as under:

"It seems to us that the inseparability referred to in sub-Section (4) is an inseparability arising from the intention of the parties. That intention may be ascertained by framing the following questions: Was it the intention in making the lease - and it matters tot whether there is one lease or two, that is separate leases in respect of the furniture and the building - that the two should be enjoyed together? Was it the intention to make the letting of the two practically one letting? Would one have been let alone and a lease of it accepted without the other? If the answers to the first two questions are in the affirmative, and the last in the negative then, in our view, it has to be held that it was intended that the lettings would be inseparable. This view also provides a justification for taking the case of the income from the lease of a building out of Section 9 and putting it under Section 12 as a residuary head of income. It then becomes a new kind of income, not covered by Section 9, that is income not from the ownership of the building alone but an income which though arising from a building would not have arisen if the plant, machinery and furniture had not also been let along with it."

18. Section 56 (2) (iii) of the Act reads as under:

56. (2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely:

...

(iii) where an Assessee lets on hire machinery, plant or machinery belonging to him and also buildings, and the letting of the buildings is inseparable from the letting of the said machinery, plant or furniture, the income from such letting, if it is not chargeable to income-tax under the head "Profits and gains of business or profession."

19. In the present case, the preamble clauses clause of the lease deed, extracted hereinbefore, make it plain that what was given on rent to the Lessee was not just the basement, ground floor, first floor and second floor of the building but also the fixtures, furniture which included the air-conditioning and power backup through a 200 KVA diesel generator set. In particular, Clause 2 (d) makes it clear that the Lessor had to hand over the office "with furniture & fixture, 200 KIVA diesel generator and adequate air conditioners to the Lessee in good working condition."

20. There can be no manner of doubt that the Lease Deed was a composite one and the rental receipts thereunder answered the description in Section 56 (2) (iii) of the Act."

11. In light of the aforementioned findings of the Hon'ble High Court, we will now consider the facts of the case in hand.

12. During the course of scrutiny assessment proceedings, vide show cause notice dated 17.12.2014, the assessee was asked to show cause as to why income offered to tax as “Income from house property” should not be treated as “Rental income”.

13. The assessee filed detailed submissions vide letter dated 26.02.2014 explaining the contents of the lease agreement and pointing out that it is a composite agreement and the amount received by the assessee is not simply for the let out of building simplicitor i.e. only towards the letting out of the building space but the same is composite rent received towards composite/inseparable letting of building, furniture and fixtures, equipments air conditioners, etc. It was explained that it is a case of renting of the premises with a host of facilities by way of infrastructure/amenities and maintenance.

14. Strong reliance was placed on the judgment of the Hon'ble Supreme Court in the case of Sultan Brothers Pvt Ltd vs CIT 51 ITR 353. It was brought to the notice of the Assessing Officer that relying on the

judgement of the Hon'ble Supreme Court [supra], the Hon'ble Jurisdictional High Court in the case of Garg Dyeing & Processing Industries in ITA No. 319 of 2012 has held that where the rent is received towards the composite let out i.e. letting out of building, furniture, fixtures, fittings, air conditioning plants etc, the same shall be taxable as “Income from other sources”.

15. After considering these submissions and judicial decisions relied upon by the assessee, the Assessing Officer observed as under:

> “4.2 The above submission of the assessee has been perused along with the details and case laws submitted by it. It is an accepted fact that the assessee has not claimed the above treatment of income received from letting of the buildings either in the original return of income and has made the claim in the revised return of income. In the previous years the assessee has made this claim during assessment proceedings only, which has been duly rejected because of the below stated reason:
>
> - Assessee is receiving the rent receipts from its Associated Enterprise/ related party since last so many financial years and the assessee has never claimed the above receipts as 'income from other sources'.

- There is plethora of judgments on the 'consistency'. Since, the assessee has been consistently disclosing the above receipts as 'income from house property' which were accepted by the Department, hence, there is absolutely no justification for changing the treatment of above receipts especially considering the fact that the assessee is providing the same building premise and other amenities to the same lessee since last so many years.

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- - The submission of the assessee that the above receipts have been disclosed as 'income from house property' due to inadvertence is highly misleading. The assessee has disclosed the above receipts as 'income from house property' in the original return of income as well as in the revised return of income. It is evident that is an afterthought to take benefit of the recent decision of jurisdictional High Court given in the case of GARG DYEING & PROCESSING INDUSTRIES on 22.11.2012. It is strange that the assessee realized that the above rent is a 'composite rent' only after the above judgement.

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- The submission of the assessee that the receipts of Rs. 17,22,16,198/- from Microsoft Global Services Center (India) Private Limited are composite rent received towards inseparable letting of building, furniture and fixtures, equipments, air conditioners etc. is also factually incorrect.

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4.3 In the current year also the facts of the case are similar to that of the earlier years. The cases relied upon by the assessee

are also factually different from the case of the assessee. The Hon'ble Supreme Court in the case of Sultan Brothers (relied upon by the assessee) has held that few tests are required to be conducted to ascertain whether the rent has been received towards inseparable letting of building, furniture and fixtures etc. The relevant extract of the above judgment is reproduced below:-

> "It seems to us that the inseparability referred to in sub-section (4) is an inseparability arising from the intention of the parties. That intention may be ascertained by framing the following questions: *Was* it the intention in making the lease—and it matters not whether there is one lease or two, that is, separate leases in respect of the furniture and the building—that the two should be enjoyed together? *Was* it the intention to make the letting of the two practically one letting? Would one have been let alone and a lease of it accepted without the other? If the answers to the first two questions are in the affirmative, and the last in the gative then, in our view, it has to be held that it *was* intended it the lettings would be inseparable. "

Few relevant provisions of the Lease Agreement are reproduced below to understand the nature of agreement: -

> The LESSEE shall pay to the LESSOR monthly rent of Rs.29,93,050/- (Rupees Twenty Nine Lakhs Ninety Three Thousand Fifty Only) calculated at the rate of Rs.50/- per square feet for

the super built up area of 59,861 square feet of the LEASED PREMISES (hereinafter referred to as "Rent"). The rent shall be payable monthly in advance subject to deduction of applicable taxes at source as is required by law, starting from April 2010. The rent payable in arrear shall be payable by cheque/ DD/ Pay Order by the Tenth (1&^{h}) of each month of the Lease Term. No rent shall be payable for unused period in any month.

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> The LESSOR hereby agrees and confirms that the LESSEE shall have the right to modify, renovate and refurbish the LEASED PREMISES at its own cost and expense and shall also have the right to change flooring, wall finish, install partitions, air-conditioning unit or units, other electrical or electronic appliances and the like as may be required by the LESSEE. The LESSEE shall also be entitled to carry out all modifications and alterations in the LEASED PREMISES, wherever and whenever required, to install any equipment for its use including wiring and electrical fittings as may be required by the LESSEE and for such purpose to do ducting and the like. The LESSEE shall maintain the permanent structure, facade and aesthetics of the BUILDING and the inbuilt infrastructural facilities. The LESSEE may employ contractors selected by the LESSEE.

> The LESSOR has agreed that during the term of this LEASE DEED, including the extended term, the LESSOR shall, without any extra or additional cost and charges, allocate a minimum space of fifty (50) sq. ft. at the roof top/terrace of the BUILDING

("Antenna Site"), to the LESSEE for installation of its own dish or other microwave equipment/ V Sat Link equipment/ tower/ dish antennae and/ or satellite, etc. of such size and dimension as may be required by the LESSEE. The LESSOR shall be liable for all cost, charges and taxes, including Municipal Coloration taxes for installation of such dish or other microwave equipment, V Sat Link equipment, tower, dish antennae, and, or, satellite ythe LESSEE.

The LESSOR has agreed to provide the following services to the LESSEE in the LEASED PREMISES during both the Initial Term and the Extended Term:

0) Power back up - The LESSOR shall provide 50 KW diesel generator set power back up for the LEASED PREMISES at no additional cost. The running cost for the said 50 KW diesel generator set, during the Initial Term and Extended term, shall be payable as mutually agreed upon by the Parties.

(ii) Air conditioning - The LESSOR shall provide 25 TR air-conditioning for the LEASES Premises at no additional cost.

The LESSOR will ensure an ambient temperature of +/-1 degree from 23 degree Celsius.

Now we are in a position to conduct the tests suggested by the Hon'ble Apex Court.

> Was it the intention to make the letting of the two practically one

letting? No, as the assessee has computed the rent only on the basis of the space and not on the basis of the amenities provided by it.

> Whether the assessee would have given the lease to its related party if the related party had not agreed for the furniture & fixtures etc.? Yes, as the above transaction is not between independent parties and the assessee would have given its unutilized space to one of its related party for proper utilization of commercial space.

> Why separate leases were not provided? Because, the assessee has no intention for charging for the amenities provided by it.

Thus, it is evident on the basis of the above tests, recommended by the Hon'ble Apex Court, that the assessee is not receiving 'composite rent'.

It is extremely pertinent to mention that the above lease deed is between two related parties and not between two independent parties.

From the bare perusal of the above provisions of lease deed it is evident that the rent is primarily for the space as the rent has been computed @ Rs.50 per square feet. The fact that the assessee is charging monthly rent at such a paltry amount despite the fact that the property is located at a premium locality at Hyderabad clearly proves that the above transaction is not at arm's length. If cost of maintenance of the above property is

taken into account then the rate of rent will become abysmally low. Hence, the assessee is apparently not charging for the amenities being provided by it from its related party.

4.4 In view of the above facts, the claim of deduction of the above amount is rejected. Additions of Rs. 10,72,58,335/- i.e. being the difference of income claimed as 'Income from house property' and income claimed as 'income from other sources', (Rs.11,64,92,424/- - Rs.92,34,089/-) is being made to the computation of income.

4.5 Without prejudice to the above discussion, it is further held that the claim of the assessee regarding other expenses of Rs. 16,29,82,109/- u/s 57(iii) of the Income-tax Act is rejected as the assessee has neither furnished any evidence regarding its allow ability u/s 57(iii) nor the assessee has charged the above expenses from the lessee. The income from house property is assessed at Rs. 17,22,16,198/- as disclosed by the assessee in its original return of income."

16. We have given thoughtful consideration to the findings of the Assessing Officer but we do not concur with the findings. There is no dispute that the lease agreement is a composite lease agreement which included the inbuilt infrastructural facilities provided which included central air conditions with ducting, DG power supply, net

work equipments, access control equipments, electrical equipments, VAVs and controllers, smoke detectors and occupancy sensors.

17. The agreement also included other amenities, namely installation of dish antenna/satellite, parking space, repair and maintenance which includes repairs, interior or exterior, electrical and plumbing work, repair and maintenance of common and open areas and facilities provided at the building like compounds, gardens, passage, elevators, lifts, terrace, DG sets etc and also 100% power backup and centralised air conditioning.

18. In our considered opinion, for similar set of amenities/facilities, the Hon'ble Supreme Court in the case of Sultan Brothers [supra] has laid down certain tests which have been followed by the Hon'ble High Court of Delhi in the case of Garg Dyeing & Processing Industries [supra] and later on in the case of Jay Metals [supra]. We are of the considered view that in light of the facts discussed hereinabove, there can be no doubt that lease deed was composite one and rental receipt thereunder answered the description u/s 56(2)(iii) of the Income tax Act, 1961.

19. We find that the main thrust in rejecting the claim of the assessee by the Assessing Officer is that it is a related party transaction. The undisputed fact is that the assessment was subject to transfer pricing assessment for determination of ALP with AE and no such determination has been done by the TPO. We further find that though the Assessing Officer has discarded the claim of the assessee stating that it is a related party transaction, but the provisions of section 40A(2) of the Act have never been invoked.

20. In fact, the Assessing Officer himself has extracted the relevant clauses of lease deed himself showing that the lessor has agreed to provide services which have been enumerated hereinabove elsewhere. Therefore, considering the facts of the case in hand, we find that letting is not merely of the building but a composite let out of both the building as well as equipment/furniture etc and thereby section 56(2)(iii) of the Act is attracted.

21. Respectfully following the ratio laiddown by the Hon'ble Supreme Court in the case of Sultan Brothers [supra] and the Hon'ble High Court of Delhi in the case of Jay Metals [supra], we direct the Assessing

Officer to treat the income from letting out of the building as income under the head “Income from other sources”.

22. The other ground which relates to the claim of expenses and depreciation u/s 57 of the Act has already been answered by the Hon'ble High Court of Delhi in the case of Jay Metals [supra] as under:

> 26. However, the last plea made by the Assessee is that in that event the entire income from the letting is treated as 'income from source sources', it cannot be deprived of the corresponding deduction in terms of Section 57 (iii) of the Act. The Revenue too has not disputed the fact that the Assessee has not claimed depreciation.
>
> 27. Accordingly, it is directed that while giving the appeal effect, the AO will grant the Assessee the benefit of Section 57 (iii) of the Act.

23. Respectfully following the findings of the Hon'ble High Court, we direct accordingly.

24. As mentioned elsewhere, facts of A.Y 2012-13 being identical to A.Y 2011-12, we decide accordingly.

25. In the result, the grounds restored to the file of the Tribunal by the Hon'ble High Court are decided in favour of the assessee and against the Revenue.

The order is pronounced in the open court on 14.06.2021.

Sd/-	**Sd/-/-**
[KULDIP SINGH] JUDICIAL MEMBER	[N.K. BILLAIYA] ACCOUNTANT MEMBER

Dated : 14th June, 2021

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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 the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
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