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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA 99/2023**
COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION)-2

..... Appellant

Through: Mr Sanjay Kumar, Sr. Standing Counsel.

versus

MOL CORPORATION Respondent

Through: Mr Akshay Uppal, Advocate.

CORAM:

HON'BLE MR JUSTICE RAJIV SHAKDHER

HON'BLE MS JUSTICE TARA VITASTA GANJU

ORDER

% **16.02.2023**

[Physical Hearing/Hybrid Hearing (as per request)]

1. This appeal concerns Assessment Year (AY) 2017-18.
2. This appeal assails the order of the Income Tax Appellate Tribunal [in short, "Tribunal"] dated 31.08.2022 passed in ITA 554/Del/2021.
3. The following questions of law are proposed by the appellant/revenue:

"A. Whether on the facts and circumstances of the case and in law, the Ld. ITAT erred in holding that licensing of the software products of Microsoft in the territory of India by MOL Corporation is not taxable in India as Royalty under Section 9(1)(vi) of the Income Tax Act, 1961 read with Article 12 of the Indo-USA DTAA?"

B. Whether on the facts and circumstances of the case and in law, the Ld. ITAT erred in holding that licensing of computer is copyrighted article and not copyright and accordingly the sale of software is in nature of business income and not taxable as royalty under Section 9(1)(vi) of Income Tax Act, 1961 and absence of PE in India, it is not taxable under Article 7 of India- USA DTAA?"

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C. Whether on the facts and circumstances of the case and in law, the Ld. ITAT erred in holding that the subscription received towards Cloud Services is not taxable as Royalty income under the provisions of Income Tax Act, 1961?"

4. As would be evident the first two questions of law [i.e., A and B] relate to income earned from licensing/sale of software, while the third question [i.e., C] relates to subscription received against cloud services offered by the respondent/assessee.

5. The Tribunal has ruled that neither income earned from licensing/sale of software products nor subscription fee earned for providing cloud services, could be construed as royalty.

6. Mr Sanjay Kumar, senior standing counsel, who appears on behalf of the appellant/revenue, says that the proposed questions are covered by the judgment of the Supreme Court rendered in *Engineering Analysis Centre of Excellence (P.) Ltd. v. CIT* 432 ITR 471 (SC).

6.1. We are also informed by Mr Kumar that a review petition has been filed which is pending consideration.

7. Accordingly, the appeal is closed as no substantial question of law arises for our consideration, *albeit*, with the caveat that in case the appellant/revenue were to succeed in the review petition, the parties will abide by the decision rendered therein.

RAJIV SHAKDHER, J

TARA VITASTA GANJU, J

FEBRUARY 16, 2023/ tr

[Click here to check corrigendum, if any](#)

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