IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, VP AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.2599/Mum/2019

(**निर्धारण वर्ष** / Assessment Year: 2014-15)

DCIT, Circle-15(3)(2) Room No.451, 4th Floor, Aayakar Bhavan, M. K. Road, Mumbai-400020.	**बनाम**/ Vs.	M/s. Shivaami Cloud Services Pvt. Ltd. C-11, St. Floor Aishwarya Society, Goshala Road, Mulund (W), Mumbai-400080.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAUCS4444F		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Revenue by:	Shri T. S. Khalsa (DR)
Assessee by:	Shri Himanshu Gandhi

सुनवाई की तारीख / Date of Hearing: 20/04/2021

घोषणा की तारीख /Date of Pronouncement: 30/06/2021

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The revenue has filed the present appeal against the order dated 18.01.2019 passed by the Commissioner of Income Tax (Appeals) -24 Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2014-15.

2. The revenue has raised the following grounds: -

> *"1. Whether on the facts and circumstances of the case, the Ld. CIT(A) is right in holdig to rely upon the judgement in the case of DDIT Vs. Reliance Industries Ltd. (2016) 69 taxmann.com 311 (Mum. Trib,) on the issue of withholding the tax from the payment made to non-residents when the*

revenue has not accepted the order of the tribunal and has filed further appeal before the Hon'ble High Court.

2. *The appellant prays that the order of CIT(A) on the above ground be set aside and that of the assessing officer be restored.*

3. *The appellant craves leave to add, amend or alter any grounds or add a new ground, which may be necessary."*

3. The brief facts of the case are that the assessee filed its return of income on 26.09.2015 declaring total income loss to the tune of Rs.86,35,818/-. The case was selected for scrutiny under CASS. Notices u/s 143(2) & 142(1) of the Act were issued and served upon the assessee. The assessee is in the business of Providing Services Domain & Google Applications. The assessee has shown the revenue from operations of Rs.1,83,21,072/- and other income of Rs.40,06,912/-. It was observed that the assessee had credited in sum of Rs.26,175,735/- as advance subscription revenue under the head other current liabilities. Notice was given. After the reply of the assessee, the AO disallowed the said advance subscription revenue and added to the income of the assessee. The total income of the assessee was assessed to the tune of Rs.1,05,10,380/-. Feeling aggrieved, the assessee filed an appeal before the CIT(Appeals) who partly allowed the claim of the assessee but the revenue was not satisfied on the grounds mentioned above, therefore, the revenue has filed the present appeal before us.

4. We have heard the arguments advanced by the Ld. Representative of the parties and perused the record. The Ld. Representative of the revenue has argued that the revenue has not accepted the judgment of the Hon'ble

ITAT in the case of **DDIT Vs. Reliance Industries Ltd. (2016) 69 taxmann.com 311 (Mum)** and filed the appeal before the Hon'ble High Court, therefore, the order of the CIT(A) is not justifiable, hence, is liable to be set aside. However, on the other hand, the Ld. Representative of the assessee has strongly relied upon the order passed by the CIT(A) in question. Before going further, we deem it necessary to advert the finding of the CIT(A) on record.: -

> *"2.1.3 I have carefully considered the above submission of the appellant, the impugned assessment order, paper book and material available on record. The assessee is into the business of selling of subscription of Google App Product. Assessee is doing mostly yearly contract with its customers. Assessee had offered the revenue on straight line basis over period of time of subscription. Subscription period fall into the previous year offered as revenue and period beyond the end of previous year shown as "Advance Subscription" and offered in the subsequent year when the subscription was provided. Thus, it is not the case that assessee had suppressed the revenue. The revenue has been offered, but spread over the subscription period on straight me basis. I find that assessee had followed the accrual system of accounting under matching principal for booking revenue from sale of subscription of Google product. The assessee had booked the revenue from subscription up to 31.03.2015 as revenue of previous year and subscription period beyond 31.03.2015 shown as "Advance Subscription" under current liability and offered the same in Assessment Year 2016-17 when the subscription was provided. At same time the Google billed to assessee on monthly basis. Therefore, the assessee had claimed the product purchase cost for the subscription provided upto 31.03.2015. Thus, the revenue matches with the corresponding expenses as per Matching Principal of Accounting. Further, Accounting Standard-9 "Revenue Recognition" laid down the principal for recognition of Revenue for the previous year. Point No. 7 of Illustration provided under Annexure to Accounting Standard-9 covered the Subscription based business. Revenue from Subscription based business required to be recognize on straight line basis over the time. In present case also assessee had recognized the subscription*

revenue for the period fall upto 31.03.2015 on straight line basis over the time.

2.1.4 The hon'ble Delhi High Court in case of CIT V/s Dinesh Kumar Goel [2011] 331 ITR 10 (Del HC) considered the timing of revenue of recogoilica after considering the Decision of Hon'ble Supreme Court in case of Calcutta Co. Ltd. v. CIT [1959] 37 ITR 1 (SC) and given finding as under :-

11. Section 5 of the Act gives the 'scope of total income'. Sub-se. &a (1) thereof, with which we are concerned, reads as under :

"(1) Subject to the provisions of this Act, the total income of any previous raw of a person who is a resident includes all income from whatever source derived which - (a) Is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) Accrues or arises or is deemed to accrue or arise to him in India during such year or

(c) Accrues or arises to him outside India during such year"

As is clear from reading of clause (b) above, even when the income accrues or arises or is deemed to accrue or arise to the assessee in India during previous year, that is to be taxed in that year. It is important, therefore, that receipt of a particular amount in the relevant year should be an "income" under the aforesaid provision. What is the relevant yardstick is the time of accrual or arisal for the purpose of its taxation, viz., in order to be chargeable, the income should accrue or arise to the assessee during the previous year. If income has accrued or arisen, even if actual receipt of the amount is not there, it would be chargeable to tax in the said year. Though the amount may be received later in the succeeding year, the income would be said to accrue or arise if there is a debt owed to the assessee by somebody at that moment. From this, it follows that there must be the "right to receive the income on a particular date, so as to bring about a creditor and debtor relationship on the relevant date". The Court further explained that a right to receive a particular sum under the agreement would not be sufficient unless the right accrued by rendering of services and not by promising for services and where the right to receive is interior to rendering of service, the income, therefore, would accrue on rendering of services. Following

discussion in this judgment would demonstrate the principle which we have highlighted above :

"37. Mukerji J. has defined these terms in Rogers Pyatt Shellac & Co. v. Secretary of State for India 1 I. T. C. 363:

"Now what is income? The term is nowhere defined in the Act. In the absence of a statutory definition we must take its ordinary dictionary meaning - 'that which comes in as the periodical produce of one's work, business, lands or investments (considered in reference to its amount and commonly expressed in terms of money); annual or periodical receipts accruing to a person or corporation' (Oxford Dictionary). The word clearly implies the ideal of receipt, actual or constructive. The policy of the Act is to make the amount taxable when it is paid or received either actually or constructively. 'Accrues,' 'arises' and 'is received' are three distinct terms. So far as receiving of income is concerned there can be no difficulty; it conveys a clear and definite meaning, and I can think of no expression which makes its meaning plainer than the word 'receiving' itself The words 'accrue' and 'arise' also are not defined in the Act. The ordinary dictionary meanings of these works have got to be taken as the meanings attaching to them. 'Accruing' is synonymous with 'arising' in the sense of springing as a nature growth or result. The three expressions 'accrues,"arises' and 'is received' having been used in the section, strictly speaking 'accrues' should not be taken as synonymous with 'arises' but in the distinct sense of growing up by way of addition or increase or as an accession or advantage; while the word 'arises' means comes into existence or notice or presents itself The former connotes the idea of a growth or accumulation and the latter of the growth or accumulation with a tangible shape so as to be receivable. It is difficult to say that this distinction has been throughout maintained in the Act and perhaps the two words seem to denote the same idea or ideas very similar, and the difference only lies in this that one is more appropriate than the other when applied to particular cases. It is clear, however, as pointed out by Fry L.J. in Colquhoun v. Brooks (1888) 21 Q.B.D. 52, [this part of the decision not having been affected by the reversal of the decision by the House of Lords (1889) 14 App. Cas. 493 that both the words are used in contradistinction to the word "receive" and indicate a right to receive. They represent a stage anterior to the point of time when the income becomes receivable and connote a character of the income which is more or less inchoate.

One other matter need be referred to in connection with the section. What is sought to be taxed must be income and it cannot be taxed unless it has arrived at a stage when it can be called 'income.'"

38. The observations of Lord Justice Fry quoted above by Mr. Mukerji J. were made in Colquhoun v. Brooks (1888) 21 Q.B.D. 52 while construing the provisions of 16 and 17 Victoria Chapter 34 section 2 schedule 'D'. The words to be construed there were 'profits or gains, arising or accruing,' and it was observed by Lord Justice Fry at page 59:

"In the first place, I would observe that the tax is in respect of 'profits or gains arising or accruing.' I cannot read those words as meaning 'received by.' If the enactments were limited to profits and gains 'received by' the person to be charged, that limitation would apply as much to all Her Majesty's subjects as to foreigners residing in this country. The result would be that no Income-tax would be payable upon profits which accrued but which were not actually received, although profits might have been earned in the kingdom and might have accrued in the kingdom. I think, therefore, that the words 'arising or accruing' are general words descriptive of a right to receive profits."

39. To the same effect are the observations of Satyanarayana Rao J. in Commissioner of Income-tax, Madras v. Anamallais Timber Trust Ltd. 119501 18 ITR 333 (Mad) and Mukherjea J. in Commissioner of Income-tax, Bombay v. Ahmedbhai Umarbhai & Co., Bombay [19501 18 ITR 472 (SC) where this passage from the Judgment of Mukerji J. in Rogers Pyatt Shellac & Co. v. Secretary of State for India 1 I.T. C. 363, is approved and adopted. It is clear therefore that income may accrue to an assessee without the actual receipt of the same. If the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on its being ascertained. The basic conception is that he must have acquired a right to receive the income. There must be a debt owed to him by somebody. There must be as is otherwise expresses debitum in presenti, solvendum in future; See WS. Try Ltd. v. Johnson (Inspector of Taxes) [1946] 1 A.E.R. 532, and Webb V. Stenton and Others, Garnishees 11 Q.B.D. 518. Unless and until there is created in favour of the assessee a debt due by somebody it cannot be said that he has

acquired a right to receive the income or that income had accrued to him."

12. Ms. Prem Lata Bansal, learned counsel for the Revenue, emphatically submitted that the effect that the moment agreement(s) with students were signed and they were called upon to pay the fee, right to receive the fee had been acquired by the assessee. It was for this reason that every student admitted to the course is under obligation to pay the entire fee for the whole course at the time of admission itself. Thus, it conferred upon the assessee 'right to receive the money' in the form of fee at that stage and the conditions of section 5 of the Act Were fulfilled, as it would be inferred that the income has accrued. She submitted that there was a distinction between the executor contract and executed contract and even if the contract was not executed at that time in the sense that the services are yet to be provided, the money received would be the income at the hands of the assessee. In support of her argument, she referred to the judgment of the Madras High Court in the case of Lakshminarayana Films v. CIT [2000) 244 ITR 344 and particularly impressed upon the following discussion :

"7. We have considered the rival submissions made by the assessee as well as the Revenue. The fact remains that the assessee had leased out the dubbing rights of its above said picture for Tamil and Malayalam to Jay Films and Gine Link Service by agreements dated May 25, 1974, and August 27, 1974, respectively. It is equally not in dispute that the assessee had shown an income of Ps. 25,80,000 in the return presented by the assessee for the relevant assessment year regarding the sale of Telugu version of the above-said picture. A perusal of the agreement dated August 27, 1974, by Sri Lakshminarayana Films, represented by its partner, Sri N. S. Moorthi, with Jay Films, represented by its managing partner. Sri A. T Abraham, would disclose that Jay Films had agreed to pay royalty of Ps. 45,000 for acquiring Malayalam dubbing rig/its of the above said film and Sri Lakshminarayana Films had agreed to lease out the above said Malayalam dubbing rights of the above said picture for the above said royalty of Ps. 45,000 on August 27, 1974. It is also evident from a perusal of the above said agreement that a sum of Rs. 10,000 was paid by demand draft dated June 21, 1974, Ps. 7,500 was paid by cheque dated June 26, 1974, Ps. 7,500 was paid by cheque dated July 26, 1974 and Ps. 7,500 was paid by cheque

dated August 27, 1974, which the assessee had acknowledged. Another sum of Ps. 7,500 was also agreed to be paid by cheque on or before August 27, 1974, the date of the agreement. There was a balance of Ps. 5,000 on the date of agreement, which Jay Films had agreed to pay at the time of taking delivery of the prints from the assessee. if the above said facts contained in the agreement dated August 27, 1974, are considered, it is evident that the assessee had already received a sum of Rs. 40,000 out of Ps. 45,000 and agreed to receive the balance amount of Rs.5,000 at the time of delivery of the prints. It is also evident from one of the clauses of the agreement that the agreement with the above said method of payment was offered by Jay Films and the said offer was accepted by the assessee on August 27, 1974, itself. Therefore, there was offer and acceptance and the same was completed on the date of the agreement dated August 27, 1974, so far as the dubbing rights of the above said picture in Malayalam. Simply because the assessee has not received the balance of Ps. 5,000 which was to be paid to the assessee at the time of the delivery of the print, it cannot be said that there was no conclusion of the contract by offer and acceptance on August 27. 1974, since the offer of Jay Films was accepted by the assessee on August 27 1974, itself by postponing the payment of Ps. 5,000 to the time of delivery of the print.

& The Revenue has brought to the notice of this court the decision of Union of India v. Chaman Lal Loona and Co. [1957] 1 SCR 1039, wherein the apex court was pleased to hold as follows (head note)

"The distinction between the two classes of contracts, where the consideration is either executed or executory is that an executed consideration consists of an act for a promise. It is the act which forms the consideration. No contract is formed unless and until the act is performed, e.g., the payment for a railway ticket, but the act stipulated for exhausts the consideration, so that any subsequent promise, without further consideration, is merely a nudum pactum. In an executed consideration the liability is outstanding on one side only; it is a present as opposed to a future consideration, in an executory consideration the

liability is outstanding on both sides. It is in fact a promise for a promise, one promise is bought by the other. The contract is concluded as soon as the promises are exchanged. In mercantile

contracts this is by the most common variety. In other words, a contract becomes binding on the exchange of valid promises, one being the consideration for the other It is clear, therefore, that there is nothing to prevent one of the parties from carrying out his promise at once, ie., performing his part of the contract whereas the other party who provides the consideration for the act of or detriment to the first may not carry out his part of the bargain simultaneously with the first party."

13. She also referred to the judgment of the Jodhpur Bench of the Rajasthan High Court in the case of Suraj Prakash Soni v. Asstt. CIT 120081 303 ITR 366 which is to the same effect.

14. Mr C. S. Aggarwal, learned Senior Counsel for the assessee, on the other hand, submitted that the two authorities below, viz., CIT (A) as well as the Tribunal had considered the facts of the case at greater detail and had rightly opined that till the services were rendered, there was no right to receive the fee. He argued that the amount that the tuition fee which pertained to the financial year 1996-97 was only a 'deposit and advance' and not an income at the hands of the assessee, as the services against the said advance were yet to be provided, which could be rendered by the assessee only in the year 1996-97 and therefore, income qua those receipts would accrue only in that year. He also emphasized the matching concept highlighted by the Tribunal as well as by the C/T (A) submitting that these were only receipts and the taxable income would be only after deduction of expenses, which were to be incurred by the assessee for rendering the services and that happened only in the succeeding year, i.e., financial year 1996-97. Further, he also submitted that the Department was taking a wrong view that the fee was non-refundable and irrecoverable, which contention was proved to be wrong in view of the judgment of the Consumer Court, Chandigarh.

15. After considering the respective submissions, we are not in a position to take a view different from what is taken by the Tribunal in the instant case. In the facts of this case, it is apparent that at the time of admission, the students are required to deposit the whole fee of the entire course, but that would only remain a 'deposit' or 'advance' and it cannot be said that this fee had become 'due at the time of deposit. Fee is charged in advance for the entire course, presumably because of the reason that there should not be any default in making the said by the students during

the period of course. Interestingly, the Assessing Officer in his assessment order has himself stated that "students were required to deposit the fee for the whole module of course at the time of registration itself". The Assessing Officer has used the expression 'deposit'. In the very next breadth, he draws the conclusion that this would mean that the fee had become 'due'. Thus, the Assessing Officer knew the significance of the expression 'deposit' viz-a-viz 'due', though he committed the mistake in treating the said deposit as the fee becoming due. When we applies the principles of law laid down in E.D. Sassoon & Co. Ltd. 's case (supra) and Calcutta Co. Ltd. v. CIT 119591 37 1TR 1 (SC), it becomes apparent that the fee was not due at the time of deposit. The services in respect of financial year 1997-98, for which also the payment was taken in advance were yet to be rendered. Therefore, applying the principle in the case of Calcutta Co. Ltd. (supra), this could only be treated as advance otherwise it would lead to an anomaly situation, highly derogatory to the assessee, which is not intended in law, viz., even when the very amount received, expenses are to be deducted to arrive at the net income and those expenses are yet to be incurred (which may be incurred in the next financial year), the entire receipts become income which would be exigible to much higher tax. It is for this reason, the following principle was enunciated by the Supreme Court in Calcutta Co. Ltd. 's case (supra) :

"The expression "profits or gains" in section 10(1) of the Income-tax Act has to be understood in its commercial sense and there can be no computation of such profits and gains until the expenditure which is necessary for the purpose of earning the receipts is deducted therefrom - whether the expenditure is actually incurred or the liability in respect thereof has accrued even though it may have to be discharged at some future date."

16. We may also, at this stage, usefully refer to another judgment of the Apex Court in the case of C/T v. Shri Goverdhan Ltd. 9681 69 ITR 675 in the following terms :

"It is, however, well-established that the income may accrue to an assessee without actual receipt of the same and if the assessee acquires a right to receive the income, the income can be said to have accrued to him though it may be received later on, on its being ascertained. The legal position is that a liability depending upon a contingency is not a debt in presenti or in futuro till the contingency happens. But if it is a debt the fact that the amount has

to be ascertained does not make it any the less a debt if the liability is certain and what remains is only a quantification of the amount: debitum in praesenti, solvendum in futuro."

17. The judgments cited by the learned counsel for the Revenue do not concern the issue, which we are dealing with these appeals.

18.We, thus, answer the question in the affirmative and as a consequence, dismiss these appeals.

2.1.5 In present case, it is undisputed fact that the contract was made on yearly basis. The contention of the AO is that period/time of recognition of revenue. The AO taken a view that even though the subscription period falls beyond the period, then also assessee need to offer entire income as assessee only distributor and its parts gets over on handing over subscription product to client. But, the Ld. AO's finding remains silent on matching principal of revenue. If the contention of the Ld. AO is applied, then the financial results will get distorted. For example, that if the contract is executed in the month of 1.12.2014 to 30.11.2015., then the financial result for the year ending on 31.03.2015 will show the income of 12 months (Dec.2014 to Nov.15) as against the expenses of 4 month (Dec.14 to Mar. 15 because google is charging on monthly basis), resulted into higher profit for the year ending 31.03.2015. But, in next financial year i.e. 31.03.2016 revenue from that contract will be NIL as entire revenue already offered in the previous year ending on 31.03.2015. But, there will be expenses for the 8 months (i.e. April 2015 to Nov.2015), resulted into loss for the year ending 31.03.2016 which is against the matching principal as laid down by Hon'ble Supreme Court in case of Calcutta Co. Ltd. v. CIT (1959) 37 ITR 1 (SC) which duly considered by the Hon'ble Delhi Court in case of CIT V/s Dinesh Kumar Goel [2011] 331 ITR 10 (Del HC) as referred in PARA 3.4 of this order. By entering into yearly contract the assessee had promised for providing subscription for contracted period, but doesn't mean that assessee earned the entire subscription of contracted period. If the entire subscription fee taxed in the year of contract itself then it will be against the concept of Matching Principal. Income should match with the expenses of corresponding period. Against the unexpired subscription period assessee had not incurred expenses. Subscription of unexpired period had been offered for tax in assessment year 2016-17 when the corresponding expenses were incurred which in line with

matching principal of accounting. If the advance subscription taxed in the year under consideration, then it will be amount to double taxation of same income as the assessee had already offered the advance subscription in Assessment Year 2016-17. The Hon'ble Supreme Court in case of Laxmipat Singhania V. CIT [1969] 71 ITR 291 (SC)laid down the principal that "It is a fundamental rule of the law of taxation that, unless otherwise expressly provided, income cannot be taxed Mice". Thus, the action of Ld. AO taxing the income twice is contrary to principal laid down by the Hon'ble Supreme Court. Thus, the revenue from subscription period fall into the previous year ending 31.03.2015 only requires to be taxed in current year. Hence, the assessee rightly claimed the unexpired subscription period revenue as advance subscription.

2.1.6 Considering the entire facts and circumstances of the case under appeal and respectfully following the decision of Hon'ble Supreme Court & Delhi High Court, I hold that the AO was not justified in making addition of Advance Subscription. Therefore, I hereby direct the Ld. AO to delete the addition made on account of Advance Subscription. Accordingly, these grounds of appeal are allowed."

5. On appraisal of the above mentioned finding, it is quite clear that the CIT(A) has relied upon the decision of the Hon'ble Supreme Court in the case of **Calcutta Co. Ltd. Vs. CIT (1959) 37 ITR 1 (SC)** and Hon'ble Delhi Court in the case of **CIT Vs. Dinesh Kumar Goel (2011) 331 ITR 10 (Del High Court) and Laxmipat Singhania Vs. CIT (1969) 71 ITR 291 (SC) and** other which have been discussed in the order. No distinguishable material has been placed on record. The revenue has taken the plea of non-acceptance the judgment in the case of **DDIT Vs. Reliance Industries Ltd. (2016) 69 taxmann.com 311 (Mum)** but the same judgment is in connection with other issue which is in connection with disallowance of payment made to Google Asia Pacific PTE amounting to Rs.1,74,94,684/- u/s 40(a)(i) by treating the payment made to Google as

Royalty on which assessee failed to deduct TDS. However, the same was also allowed. Anyhow, non accepting the order is not a ground to interfere with unless the said order was reversed by any of higher authority. No material is on record to which it can be assumed that the order wants interfere with the Appellate Court. Taking into account all the facts and circumstances, we are of the view that the finding of the CIT(A) is quite justifiable which is not liable to be interfere with at this appellate stage. Accordingly, we decide this issue in favour of the assessee against the revenue.

8. In the result, the appeal filed by the revenue is hereby dismissed.

Order pronounced in the open court on 30/06/2021

Sd/-	Sd/-
(PRAMOD KUMAR)	**(AMARJIT SINGH)**
उपाध्यक्ष / VICE PRESIDENT	**न्यायिक सदस्य/JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 30/06/2021
Vijay Pal Singh (Sr. P.S.)

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**