

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'D', NEW DELHI**

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER  
AND  
SH. ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No.3418/Del/2023  
(Assessment Year: 2021-22)

Automation Anywhere Inc., 633, River Oaks Parkway, San Jose, CA 95134, USA PAN No.AAMCA9481A	Vs.	DCIT Circle Intl. Taxation 1(1)(1), Civic Centre, Minto Road, New Delhi.
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>

Assessee by	Shri Damodar Vaidya, Adv.
Revenue by	Shri Vijay B Vasanta, CIT DR

Date of hearing:	12.02.2024
Date of Pronouncement:	19.02.2024

**ORDER**

**PER SHRI ANUBHAV SHARMA, J.M.**

The Assessee has come in appeal against the order dated 30.10.2023, pertaining to AY 2021-22 whereby the assessment order u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 passed by the ITO, Circle Int. Tax 1(1)(1), Delhi.

2. The assessee is in appeal raising following grounds:

A) FIRST GROUND OF APPEAL

1. *"The Final Assessment Order passed u/s 143(3), read with Section 144C, and the Demand Notice issued by the Ld. AO u/s 156 are bad in law and on facts of the case. The Assessment Order passed by*

*the Ld. AO is based on the suspicion and conjectures without considering material on record and without the application of mind.*

- 2. Therefore, Automation Anywhere Inc. (Appellant) prays that the assessment order should be set aside.*

**B) SECOND GROUND OF APPEAL**

- 3. The Ld. AO erred, both in facts and in law, in concluding the existence of “Dependent Agent Permanent Establishment” (hereinafter referred as to “DAPE”) of the Appellant based on his findings that he condition of paragraph 4 of Article 5 of the DTAA between India and USA are fulfilled in the present case.*
- 4. Therefore, the Appellant prays that the addition of Rs.33,86,83,526/- to the income of the Appellant should be deleted.*

**C) THIRD GROUND OF APPEAL**

- 5. The Ld. AO has erred, both in facts and in law, that Automation Anywhere Software Private Limited (AASPL) has secured the orders of the Appellant without appreciating or considering the material on record and relying merely on conjectures and suspicion.*
- 6. The Ld. AO erred, both in facts and in law, in holding that the market support activities provided by AASPL to the Appellant amount to “securing orders”. It is trite in law that business support or marketing support activities and it does not amount to securing or concluding orders.*

**D) FOURTH GROUND OF APPEAL**

- 7. The Ld. AO erred, both in facts and in law, in holding that AASPL is an agent, whereas the services provided by AASPL to the Appellant under the inter-company agreement are on “Principal to Principal” basis.*

**E) FIFTH GROUND OF APPAL**

- 8. The Ld. AO erred, both in facts and in law, in concluding that AASPL is the DAPE of the Appellant by disregarding the material on record that AASPL is compensated by the Appellant at arm’s length price as per paragraph 5 of Article 5 of the DTA between the USA and India.*

**F) SIXTH GROUND OF APPEAL**

- 9. Without prejudice, the Ld. AO erred, both in facts and in law, in attributing the income to DAPE without considering the facts that the*

*Appellant has paid the equalization levy under the Finance Act, 2016, on the income earned from the sale of licenses through e-commerce platform in AY 2021-22. Therefore, such income of the Appellant cannot be included in the total income as per the provision of Section 10(50) of the Act.*

G) SEVENTH GROUND OF APPEAL

10. *The Ld. AO, both in facts and in law, in adding income of Rs.33,86,83,526/- to the alleged DAPE, without appreciating the material on record that the Appellant incurred losses in AY 2021-22 globally. The Ld. AO ignored audited financial statements submitted by the Appellant substantiating that the Appellant incurred loss in AY 2021-22.*

11. *The Ld. AO erred, both in facts and in law, in invoking Rule 10(i), and not invoking Rule 10(ii), for estimating the profit of the alleged PE even after the Appellant made submissions to him and the audited financial statement for AY 2021-22.*

12. *The Appellant prays that the attribution of income or profit of Rs.33,86,83,526/- is arbitrary and is liable to be rejected.*

H) EIGHTH GROUND OF APPEAL

13. *The Ld. AO erred in not considering the order of the Transfer Pricing Officer (TPO) that all the transactions between AASPL and the Appellant had been determined at arm's length. Therefore, no further income could be attributed to the Appellant in view of the Article 7 of the DTAA between the USA and India.*

I) NINTH GROUNDS OF APPEAL

14. *The Ld. AO erred, both in facts and in law, in attributing 100% amount of total receipts of Rs.1,35,47,34,107/-, which are received from Indian customers, without appreciating the fact that the rights or property in licenses are transferred outside India under contractual obligation and payments are also made outside India.*

15. *The Appellant prays that the addition made by the AO of Rs.33,86,83,526/- to the returned income of the Appellant for AY 2021-22 is liable to be deleted.*

J) TENTH GROUNDS OF APPEAL

16. *The Ld. AO erred, both in facts and in law, in levying the interest of Rs.28,41,025/- u/s 234A of the Act even though the*

*Appellant has filed its income tax return before the due date as per Section 139(1) of the Act.*

17. *Therefore, the Appellant prays that the interest levied by the Ld. AO upon the Appellant is liable to be deleted.*

K) ELEVENTH GROUNDS OF APPEAL

18. *The Ld. AO erred, both in facts and in law, in initiating the penalty proceedings u/s 270A of the Act, for reasons of misreporting or underreporting of income.*

19. *Therefore, the Appellant prays that the penalty proceeding initiated by the Ld. AO is liable to be quashed.*

L) TWELTH GROUND

20. *The Ld. AO erred, both in facts and in law, by committing the calculation error of Rs.50,53,010/- in computing the tax liability.*

21. *Therefore, the Appellant prays that the Ld. AO should correct the calculation error in the computation sheet.*

3. Heard and perused the record.

3.1 Ground numbers B to I along with the sub grounds relate to the AO's conclusion of the assessee having a PE in India and consequently attributing 25% of receipts on account of Software License Fees from Indian clients amounting to Rs. 33,86,83,526/- as taxable in India as business income. Since all these grounds are interrelated, these are taken up together for disposal.

4. The Assessee is a tax resident of the USA M/s Automation Anywhere Inc. and is a developer, marketer and seller of robotic process automation (RPA) technology and related products and

services. The company develops and sells RPA software and a digital Workforce Platform (DWP). RPA services enables customers to automation business processes through the use of configurable software "bots".

4.2 During the year under consideration Assessee Company received following receipts from its Indian Clients:

<b>Nature of receipt</b>	<b>Amount of receipt</b>	<b>Income offered to tax in India</b>
Software License fee	135,47,34,107/-	Nil
Rendering of services	12,09,19,901/-	12,09,19,901/-
Interest Income	28,97,370/-	28,97,370/-
<b>Total</b>	<b>147,85,51,378/-</b>	<b>12,38,17,271/-</b>

4.3 The AO proceeded to hold that the assessee has a PE in India and attributed 25% of receipts on account of the software license fees as attributable to the PE and consequently, taxable in India, The assessee has further objected to the attribution of profit in respect of the PE of the assessee in India. Having held the assessee to have a PE in India, the AO proceeded to attribute profits to the DAPE of the assessee by resorting to Rule 10 of the IT Rules. The assessee has not only denied the existence of the PE in India but also objected to the attribution of profit to the alleged PE stating that the basis of attribution of profit to the PE is arbitrary. It is submitted that the attribution of profit is contrary to rule 10(2) of the Rules and as per Article 7(1) and 7(2) of the DTAA. The assessee has further claimed

exemption in respect of the equalization levy paid in AY 2021-22 u/s 10/50 of the Act.

4.4 The issue of existence of PE in India and attribution of profits to the alleged PE has been a legacy issue in the case of the assessee. Till FY 2019-20 i.e. AY 2020-21 the employees of the assessee visited India regularly for almost the entire part of the year and operated from the fixed premises of assessee's Indian employees of the assessee were also using the premises of the subsidiary of the assessee in India to execute important functions including core functions of the assessee through regular visits almost throughout the year. Thus, the place of operation and the premises from where the activities of the employees were held to be a PE of the assessee in India. The same was confirmed by the DRP by following directions for AY 2018-19 as under:

*"4.2.7 The panel has considered the submissions of the assessee as well as the argument of the AO in the draft assessment order. The submissions made and the arguments taken by the assessee are similar to those placed before the AO during assessment proceedings. After inquiries through a series of notices u/s 142(1) and 133(6), the AO observed that 30 employees of the assessee visited and worked in India for a total period of 459 days. These employees visited India for different purposes including training, general office visit, client visits, attending a conference, participation in hiring, to assessee and standardize financial processes, to provide guidance on technical standards, to assessee and review*

*documentation, to set up service standards, to conduct demo, to resolve product issues, to review HR process etc. The visiting employees are in the rank of senior management, directors, senior engineers, CFO, VP etc. These employees worked at the premises of Automation Anywhere Software Private Limited (AASPL), a subsidiary of the assessee company which has been appointed by the assessee under inter-company agreement to provide services to AA Inc. in the nature of Developing Robotic Process Automation (RPA) related software development which includes coding, testing, financial modelling, technical and customer support and other related services. As per the assessee, these employees would be working from the office of AA IPL. The employees of the assessee are operating from the offices of the Indian subsidiary of the assessee company. Key components of work were performed by these senior functionaries of the assessee from premises of the subsidiary of the assessee in India. Many of the work performed by these executives of the assessee form a part of the core functions of the assessee. Thus a significant chunk of the core functioning of the assessee company is executed from the Indian premises. As observed by the AO in para 8 of the draft Assessment order, the employees of the assessee visited India regularly for almost the entire part of the year and operated from the fixed premises of assessee's Indian subsidiary. The employees of the assessee are not only using the premises of the subsidiary of the assessee in India but also execute important functions including core functions of the assessee through regular visits almost throughout the year. Thus the place of operation and the premises from where the activities of the employees were carried out satisfies permanency test, Disposal test, Duration test and the functional test. In the facts and circumstances of the case, the conclusion of the AO that the assessee has a PE in India cannot be faulted with."*

5. In the present AY, relying the aforesaid findings for AY 2018-19, the DRP observed in Para 4.2.6 as follows:

*“4.2.6 In the AY 2021-21, the only difference as submitted by the assessee, is that no employee of the assessee visited in India during the relevant financial year. The AO has held a subsidiary of the assessee in India, namely AASPL to be assessee’s DAPE in India. The assessee submits that the key facts in the case as well as the key arguments of the AO regarding treatment of AASPL as DAPE of the assessee in India remains the same as in AY 2018-19 and 2019-20. It is submitted that the Hon’ble ITAT vide order dated 24.08.2023 in assessee’s own case for AY 2018-19 and 2019-20 has decided the issue of existence of PE as well as attribution of profit in respect of the alleged PE in favour of the assessee. The Panel directs the AO to verify from records if the decision of the Hon’ble ITAT relied upon by the assessee has been accepted by the revenue, and follow the same. If however, the same has not been accepted by the Revenue, and further appeal filed, the panel upholds the conclusion of the AO following its directions in AY 2018-19 and 2019-20. Needless to say, the AO will pass a speaking order in this regard. Ground numbers B to P along with sub grounds are accordingly disposed of.”*

6. The DRP accordingly gave following directions to the AO in para 5:

*“5. Directions under section 144C of the Income Tax Act.*

*5.1 The Assessing Officer is directed to complete the assessment as per the above directions of the DRP. The AO shall place a copy of these directions as annexure to the final order, to be read as a part of the order. While passing the final order, the AO shall incorporate the reasons given by the DRP in respect of various objections, at appropriate places. The Grounds of Objections are decided as above.”*

7. Thereafter, the Ld. Assessing Officer had passed the final assessment order which following the relevant findings:

*“30. Hon’ble DRP of its direction dated 11.09.2023 noted that the Hon’ble ITAT vide order dated 24.08.2023 in assessee’s own case for AY 2018-19 & 2019-20 has decided the issue of existence of PE as well as attribution of profit in respect of the alleged PE in favour of the assessee and directed the AO to verify from records if the decision of the Hon’ble ITAT has been accepted by the revenue, follow the same. If however, the same has not been accepted by the revenue, and further appeal filed, Hon’ble DRP upholds the decision of the AO.*

*31. Upon perusal of decision of Hon’ble ITAT in assessee’s own case for AY 2018-19 & 2019-20 has been perused carefully and noted that the Hon’ble ITAT on the issue of PE of the assessee held that-*

*“Facts on record reveal that, though, many of the employees visited India, but there is no evidence to suggest that all of them used the premises of AASPL. Even assuming that all those employees used the premises of AASPL but there is no evidence to suggest that they used the premises for the activity relating to the sale of software. Undisputedly, the receipts, which are sought to be attributed to the PE are from sale of software licence, however; as could be seen from the facts on record, the transfer of licence takes place, once, the licence key is generated and made available to the licensee after execution of the contract. Insofar as the receipts from provision of services, undisputedly, the assessee has offered them to tax. Though, learned Departmental Representative has alleged before us that the licence agreement was executed in India contrary to the claim of the assessee, however, no documentary evidences has been brought to establish such facts.*

*“27. Thus, considering the totality of facts and circumstances of the case, we are of the view that the Revenue has failed to establish on record through credible evidence that the assessee has a fixed placed PE in India through which it has earned the income relating to sale of software licence. Therefore, in our*

*considered opinion, no part of such income can be attributed to the PE”*

*32. The said observation of the Hon’ble ITAT ‘is not acceptable on merits as it’s facts that the employees of the assessee company visited India on frequent basis in the previous A.Ys. Hon’ble ITAT has not considered the facts of the case and business model of the assessee while deciding such appeals.*

*32.1 These employees visited India during previous year for different purposes including training, general office visit, client visits, attending a conference, participation in hiring, to assessee and standardize financial processes, to provide guidance on technical standards, to assessee and review documentation, to set up service standards, to conduct demo, to resolve product issues, to review HR process etc. The visiting employees are in the rank of senior management, directors, senior engineers, CFO, VP etc. These employees worked at the premises of Automation Anywhere Software Private Limited (AASPL), a subsidiary of the assessee company which has been appointed by the assessee under inter-company agreement to provide services to AA Incin the nature of Developing Robotic Process Automation (RPA) related software development which includes coding, testing, financial modelling, technical and customer support and other related services. As per the assessee, these employees would be working from the office of AA IPL. The employees of the assessee were operating from the offices of the Indian subsidiary of the assessee company. Key components of work were performed by these senior functionaries of the assessee from premises of the subsidiary of the assessee in India. Many of the work performed by these executives of the assessee form a part of the core functions of the assessee. Thus a significant chunk of the core functioning of the assessee company is executed from the Indian premises.*

*33. Further observation of the Hon’ble ITAT that Revenue has failed to establish on record through credible evidence that the assessee has a fixed placed PE in India is also*

*not acceptable on merits as assessee also failed to produce the cogent supporting documents and evidences regarding the actual functions performed by these employees of the assessee company either during the course of assessment proceedings or during the appellate proceedings.*

*34. Without prejudice to the above, it is important to mention here that in the above paragraph of this order it was also held that AASPL is a Dependent Agent PE (DAPE) of the assessee company and Hon'ble ITAT or assessee failed to substantiate such claim of the revenue.*

*35. In view of the above facts, it is held that the income of INR 33,86,83,526/- is taxable as business income as per Article 7 of India-USA DTAA and the provisions of the Income Tax Act, 1961. After considering facts and circumstances of the case and subject to above, total income of the assessee is computed as under:*

<b>Particulars</b>	<b>Amount (in INR)</b>
Total Taxable Income (as per the ITR declared by the assessee as FTS)	12,38,17,271/-
Addition- as business income on account of Fixed Place PE as discussed above to be taxed @40% plus surcharge and taxes	33,86,83,526/-
<b>Total Income</b>	<b>46,25,00,797/-</b>

*Penalty proceedings u/s 270A for under-reporting the income to the extent of INR 33,86,83,526/- would be initiated separately with the final assessment order.*

*Accordingly, proposed to be assessed at income of INR 46,25,00,797/-, out of which business income of Rs. 33,86,83,526/- taxed @ 40% plus applicable surcharge and cess as per the Income Tax Act, 1961. Credit for prepaid taxes is to be allowed after verification. Detailed computation of tax payable and interest chargeable as per provision of law will be made in ITNS-150 as part of final order. Demand Notice u/s 156 of the Act & penalty notice u/s 270A of the Act will be issued accordingly with the final order.”*

8. At the time of arguments it came up that primarily the Ld. AR stressed on the fact that Ld. DRP had also considered the case of the assessee with regard to there being no dependent agent PE in India still the Ld. AO in final assessment order has held about existence of the DAPE. However, on considering the findings of Ld. DRP para 4.2.6 as reproduced above, we are of the considered view that Ld. DRP seems to have fallen in factual error in mentioning the plea of the assessee that the issue of DAPE of the assessee in India has been considered by the Tribunal in AY 2018-19 and 2019-20. While that is not correct as with regard to the fixed place PE of the assessee the issue certainly stands settled in favour of the assessee. DRP has erred in not dealing with the issue of assessee company having a DAPE in India on merits and erroneously directed AO for verifying if the issue of DAPE was decided in favour of assessee by the Tribunal in AY 2018-19 and 2019-20, which admittedly is not covered in earlier years.

9. Thus, we are inclined to set aside the order of the Ld. DRP with regard to examination of the question of existence of DAPE in the relevant assessment year. Grounds B to I as raised are allowed for statistical purposes so is the appeal allowed for statistical purposes. Resultantly the impugned final assessment order is set aside. The Ld.

DRP, after giving an opportunity of hearing to the assessee, shall pass fresh order in regard to the issue of existence of DAPE and consequential directions be accordingly issued to the AO.

**Order pronounced in the open court on 19.02.2024**

**Sd/-  
(SHAMIM YAHYA)  
ACCOUNTANT MEMBER**

**Sd/-  
(ANUBHAV SHARMA)  
JUDICIAL MEMBER**

Date:-19.02.2024

*\*Kavita Arora, Sr. PS*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT NEW DELHI