IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D" DELHI

BEFORE SHRI SAKTIJIT DEY-VICE PRESIDENT
&
SHRI PRADIP KUMAR KEDIA-ACCOUNTANT MEMBER

I.T.A. No.2413/DEL/2023
Assessment Year 2020-21

AppDynamics International Limited C/o Lumiere Law Partners (Authorized Representative) India Glycols Building, Tower-2, 3rd Floor, Plot No.2B, Sector-126, Noida, Gautam Budh Nagar.	Vs.	**ACIT Intl. Taxation Circle -1(1)(1)** New Delhi.
TAN/PAN: AANCA3727A		
(Appellant)		(Respondent)

Appellant by:	Shri Nageshwar Rao, Advocate Ms. Anshika Aggarwal, Advocate		
Respondent by:	Shri Vizay B. Vasanta, CIT-DR		
Date of hearing:	19	02	2024
Date of pronouncement:	29	02	2024

O R D E R

PER PRADIP KUMAR KEDIA-A.M. :

The captioned appeal arises from the final assessment order dated 29.06.2023 passed under Section 143(3) r.w. Section 144C(13) of the Act order dated 29.06.2023 for the Assessment Year 2020-21 in question.

2. The grounds of appeal raised by the assessee read as under:

"Based on the facts and circumstances of the case and in law, AppDynamics International Limited (hereinafter referred to as the 'Appellant' or 'AppD UK) respectfully craves leave to prefer an appeal against the order dated June 29, 2023 passed by the Assistant Commissioner of Income tax, International taxation, Circle 1(1)(1), Delhi ('learned AO' or 'Ld AO')) ('Impugned order') under section 143(3) read with 144C(13) of the Income-tax Act, 1961 (the Act) in pursuance of the directions issued by the Hon'ble DRP, dated May 22, 2023, under section 144C(5) of the Act inter-alia on the following grounds:

A. Grounds of appeal challenging the validity of DRP directions

1. Impugned order is contrary to law laid down by Hon'ble Supreme Court of India and fails in not refunding amounts collected as tax deducted at source from receipts towards sale of software in hands of non-resident with no Permanent establishment and Ld. DRP directions

are perfunctory, contrary to section 144C and fail to give clear directions to Ld. AO.

2. Impugned order unlawfully retains amounts collected as tax at source on transactions not chargeable to tax under the Act and completely failed to investigate/ call for / consider relevant material for adjudicating taxability of receipts during the year.

3. Impugned order and Ld. DRP directions erroneously retain amounts collected at source by concluding that the receipts from supply of copyrighted software license customers is in the nature of 'Royalty' as per the provisions of the Act and the Double Taxation Avoidance Agreement ('DTAA").

4. Impugned order and Ld. DRP directions are bad in law, unlawful and illegal as same wrongly assume estopple in law to treat all amounts reflected in form 26AS as Royalty income contrary to provisions of Income Tax Act, relevant Double taxation avoidance agreement, CBDT circular and authentic decisions of Hon'ble Supreme Court.

B. Grounds of appeal in relation to other matters

5. The learned AO has erred in law and in fact by levying of interest without any reference to the section under which the same has been levied.

6. The learned AO has erred in fact by restricting the TDS credits of INR 5,85,95,745 to INR 5,79,40, 187.

7. The learned AO has erred in fact by considering amount of INR 1,55,349 as refund already issued, whereas no refund has been issued to the Appellant till date."

3. As per Grounds No.1 to 4, the assessee seeks to challenge the correctness of the DRP directions and denial of relief from taxation on receipts arising from sale of software in the hands of non-resident assessee.

4. The assessee-company in the instant case is incorporated in the United Kingdom and thus a non-resident assessee for the purposes of Indian Taxation. The assessee claims to be engaged in providing software development services and sales & marketing support services to its group entities. The non-resident assessee had obtained certain receipts from various customers in India which is stated to be sale proceeds of off-the-shelf software. Such receipts were offered to tax in India as 'Royalty Income' while filing its return of income. The customers in India while

remitting the sale proceeds to the non-resident assessee deducted tax on the sum payable to assessee at appropriate rate. The assessee, in turn, claimed credit for such tax deducted by the varied customers on sale of software. In the course of the assessment proceedings, the AO found that the receipts of Rs.60,03,248/- from Bharti Airtel Ltd. have not been included in the taxable receipt offered qua other parties and thus escaped assessment. In response to show cause notice, the assessee took a stand that receipts by assessee from different customers against sale of software to customers in India as reported in the return of income has been offered to tax as 'income from royalty' on a conservative basis. It was contended that such sale of software was for mere distribution/end use of customers which has not resulted in any transfer of any rights against such software. The assessee referred to the judgment delivered by the Hon'ble Supreme Court in the case of *Engineering Analysis Centre of Excellence Pvt. Ltd. vs. CIT, 432 ITR 471 (SC)* to submit that supply of mere copy of software for distribution/use by customer did not result in transfer of any rights in the copyright and consideration received for supply of copyrighted article / software did not fall within the definition of royalty in terms of the relevant tax treaty. On the basis of judgment in the case of *Engineering Analysis (supra) delivered on March 2, 2021*, i.e., delivered after the filing of the return on 08.01.2021, the assessee contended that neither the receipts from different customers incorrectly reported as taxable income in ITR by way of royalty nor receipt from Bharti Airtel remaining unreported can be regarded as income chargeable to tax in India in the absence of Permanent Establishment in India. The assessee thus contended that the benefit of judgment in the case of *Engineering Analysis (supra)* should apply to all the receipts on sale of software including receipts from Bharti Airtel. In the alternative, without prejudice to such plea, the assessee also contended that credit of taxes withheld against such receipts on sale of software must be provided while computing the assessed income in the Assessment Year 2020-21 in question.

5. The AO however while passing draft order under Section 144C(1) of the Act found the claim of the assessee to be untenable on the grounds of non furnishing of cogent submissions or documentary evidences in this regard and addition of Rs.60,03,248/- to the taxable income offered by Assessee was proposed to be carried out as attributable to receipt from Bharti Airtel.

6. Aggrieved, the assessee referred the matter to Dispute Resolution Panel (DRP) for appropriate directions against the draft order. The additional evidences like copy of agreement with Bharti Airtel Ltd. and sample copies of invoices were furnished to support its case for non chargeability of such sale receipts. The DRP however observed that the judgment in *Engineering Analysis (supra)* cannot be applied owing to failure of the assessee to establish that facts involved in the present case support the case of the assessee. It was further noted that the comments of the Assessing Officer by way of remand report on the documents furnished has not been received. The additional evidences filed by the assessee were taken on record and the AO was directed to take these documents into this consideration and ascertain applicability of the judgment relied upon by the assessee after verification of facts.

7. On receipt of DRP directions, the AO passed impugned final assessment order but continued to deny the relief as claimed towards non taxability of receipts on sale of software as Royalty Income. While denying the relief, the AO observed that the assessee company itself has declared receipts from customer as royalty income in its ITR and never contended in the course of hearing that such receipts are exempt from tax in India. The assessee has, in fact, given silent consent on additions on account of non-reporting of receipt from Bharti Airtel by seeking credit for taxes withheld against receipt from Bharti Airtel. The AO further observed that it is the assessee who is in the best position to know the nature of product / services sold by him during the year and has himself offered the same as taxable royalty income on consideration of nature of product sold. The AO further observed that the contextual facts to apply

the ratio of *Engineering Analysis (supra)* have never been examined and the assessee has failed to establish the similarity in facts vis-à-vis facts existing in Engineering Analysis.

8. Aggrieved by the denial of relief claimed on account of non taxability of receipts from various customers including Bharti Airtel towards sale of software, the assessee preferred appeal before the Tribunal.

9. The ld. counsel for the assessee pointed out at the outset that the assessee has reported receipts from various customers on sale of software as 'Royalty Income' in its return of income under wrong belief owing non availability of *Engineering Analysis* case at the time of filing of ITR. However, it is incumbent upon AO to determine taxable income as per the provisions of law regardless of overstatement of income declared by the assessee under wrong belief. The ld. counsel thus submitted that there was no justification in the action of the DRP as well as the AO in its refusal to exclude the receipts on account of sale of software, which are copyrighted, from the ambit of taxation as per the Scheme of the Act read with relevant provisions of DTAA. The ld. counsel submitted that the Revenue has concluded the issue against the assessee merely because the assessee has wrongly declared receipts from various customers on account of sale of software as 'Royalty Income' in its ITR disregarding the relevant evidences available in this regard and filed in the course of DRP proceedings. The ld. counsel submitted that the action of the AO is unlawful and unmindful of the fact that there is no estoppel against law governing the field. The taxability of such sale receipt as 'Royalty Income' is contrary to provisions of Income Tax Act, relevant Double Taxation Avoidance Agreement, CBDT Circular and judgment of Hon'ble Supreme Court and thus unsustainable in law. The ld. counsel thus urged for suitable relief.

10. The ld. DR for the Revenue, on the other hand, relied upon the observations made in the draft assessment order / directions issued by the

DRP under Section 144C(5) of the Act and the final assessment order passed by the AO under Section 143(3) r.w. Section 144C(13) of the Act.

11. We have carefully considered the rival submissions and perused the draft of the proposed order, the DRP directions and final assessment order. The relevant documents referred to and relied upon in the course of hearing in terms of Rule 18(6) of the Income Tax (Appellate Tribunal) Rules, 1963 and case law cited have also been perused.

12. The taxability of receipts on sale of software under the provisions of the Act r.w. applicable DTAA is the core of the controversy. The incidental question that arises is whether the AO was justified in assessing the receipts on sale of software as 'Royalty Income' in the factual matrix merely because the assessee has offered such income as taxable income in its ITR. Similar question extends to receipts from Bharti Airtel on account of sale of software not included in the return of income.

12.1 It is trite that the authorities under the Act are under sacrosanct obligation to act in accordance with law. Tax can be collected only as provided under the Act. If an assessee, under a mistake, misconception or not being properly instructed is over assessed, the authorities under the Act are required to ensure that only legitimate tax dues are collected. This is the view which flows form innumerable judgments including *CIT vs. Shelly Products (2003) 261 ITR 367 (SC), S. R. Koshti vs. CIT (2005) 276 ITR 165 (Guj), Ester Industries vs. CIT (2009) 185 TAXMAN 266 (Delhi) and CIT vs. Pruthvi Brokers & Shareholders (P.) Ltd. [2012] 349 ITR 336 (Bom).* The essence of these decisions are that mere admission on the part of the assessee with respect to an addition/disallowance in its original return or in revised return would not *ipso facto* bar an assessee from claiming an expense or disputing an addition if it is otherwise permissible under law. It is thus well settled that if a particular income is not taxable under the Act, it cannot be taxed on the basis of estoppel or any other equitable doctrine. The Revenue Authorities cannot enforce

untenable actions of the assessee against it which led to declaration of income of higher amount incorrectly. It is thus open to assessee to show that it was overassessed under erroneous impression of law or facts even if it is attributable to the mistake of assessee.

12.2 So viewed, we do see potency in the argument laid on behalf of the assessee that the Assessing Officer committed error in denying the relief claimed. In our considered view, the action of the AO is in defiance of the judicial precedents on the issue and thus cannot be countenanced. In our view, the assessee can not be prevented from raising a claim that receipts from sale of software wrongly offered as royalty income and not chargeable to Indian Taxation merely because such income was wrongly offered in the ROI and which was not revised. The factual matrix towards the nature and character of sale proceeds qua the underlying evidences however does not appear to have been verified by the AO at any stage of the proceedings.

12.3 Without any expression of opinion on merits on taxability of such receipts, in our view, it would be in fitness of things to remit the issue back to the file of AO. It shall be open to the assessee to demonstrate that receipts from various customers in India arises on account of sale of software and does not give rise to any chargeable income in law. The assessee shall be at liberty to adduce such evidences as it may deem expedient to demonstrate that income arising on sale of software were wrongly reported as royalty income and is not chargeable to tax in India in terms of the provisions of the Act read with provisions of DTAA. Similarly, the Assessee may take appropriate plea on taxability or otherwise of receipt from Bharti Airtel which went unreported in the ITR. The issue is accordingly set aside to the file of the AO for fresh determination of taxability of impugned receipts from Bharti Airtel not offered in ITR and other customers included under the ITR in question in accordance with law.

13. Consequently, Ground No.1 to 4 of the appeal of the assessee is

allowed for statistical purposes in terms of observations hereinabove.

14. Grounds No.5 to 7 are consequential to the other grounds and thus do not call for any fresh directions as admitted on behalf of the assessee in the course of hearing. The AO shall thus redo the assessment in accordance with the provisions of law after giving proper opportunity to the assessee in this regard on the issues in question.

15. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 29/02/2024

Sd/-	**Sd/-**
[SAKTIJIT DEY]	**[PRADIP KUMAR KEDIA]**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

DATED: **/02/2024**

Prabhat