IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH " A "

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER AND
SHRI JASON P. BOAZ, ACCOUNTANT MEMBER

I.T.A. Nos.1193 & 1194/Bang/2013
(Assessment Years : 2008-09 & 2009-10)

M/s. Metropolitan Media Company Ltd.,
Du Parc Trinity, 9th Floor, 17,
M.G. Road, Bangalore-560 001. .... Appellant
PAN AABCV 6912C

Vs.

Asst. Commissioner of Income Tax,
Range 12(1), Bangalore. ..... Respondent.

Appellant By : Shri Rajan Vora, C.A.
Respondent By : Shri C.H. Sundar Rao, C.I.T (D.R)

Date of Hearing : 19.11.2014.
Date of Pronouncement : 6.2.2015.

O R D E R

Per Shri Jason P. Boaz :

These appeals by the assessee are directed against the common order of the CIT (Appeals), Hubli dt.9.1.2013 for Assessment Years 2008-09 and 2009-10. Since common issues are involved, these appeals were heard together and we deem it fit to dispose of these appeals by way of this order.

2. The facts of the case, briefly, are as under :-

2.1 The assessee company, is engaged in the business of printing and publication of newspaper called "Vijay Karnataka".

2.2 For Assessment Year 2008-09, the assessee filed its return of income on 30.9.2008 declaring income of Rs.20,32,10,289. The return was processed under Section 143(1) of the Income Tax Act, 1961 (in short 'the Act') and the case was subsequently taken up for scrutiny. The assessment was completed under Section 143(3) of the Act vide order dt.6.12.2010 wherein the income of the assessee was determined at Rs.27,52,10,290, as against the returned income of Rs.20,32,10,289, in view of the Assessing Officer making a disallowance of Rs.7,20,00,000 under Section 40(a)(ia) of the Act. In the course of assessment proceedings, the Assessing Officer observed that the assessee had debited an amount ofRs.7,20,00,000 under the head 'cost of advertisement space', on which there has been no deduction of tax at source at the time of payment of this amount. The Assessing Officer was of the view that this payment came within the ambit of the provisions of section 194C of the Act and the assessee was therefore liable to deduct tax at source thereon. Since the assessee had not made any deduction of tax at source on this payment, the Assessing Officer held that the provisions of section 40(a)(ia) of the Act were attracted and therefore disallowed the same.

2.3 For Assessment Year 2009-10, the assessee filed its return of income on 24.9.2009 declaring income of Rs.40,06,99,810. The return was processed under Section 143(1) of the Act and the case was subsequently taken up for scrutiny. The assessment was completed under Section 143(3) of the Act vide order dt.28.12.2011, wherein the assessee's income was

determined at Rs.47,26,99,808, as against the returned income of Rs.40,06,97,810, in view of the Assessing Officer making a disallowance of Rs.7,20,00,000 under Section 40(a)(ia) of the Act for non-deduction of tax on the said payment which fell within the ambit of the provisions of section 194C of the Act. In doing so, the Assessing Officer followed the finding rendered by the Assessing Officer in the order of assessment for Assessment Year 2008-09 in the assessee's own case (supra).

3. Aggrieved by the orders of assessment for Assessment Years 2008-09 and 2009-10 dt.6.12.2010 and 28.12.2011 respectively, the assessee preferred appeals before the CIT (Appeals), Hubli. On appeal, the learned CIT (Appeals) confirmed the action of the Assessing Officer in disallowing the expenditure under Section 40(a)(ia) of the Act for both Assessment Years 2008-09 and 2009-10 by way of a common order dt.9.1.2013.

4. Aggrieved by the orders of the CIT (Appeals), Hubli for Assessment Years 2008-09 and 2009-10 dt.9.1.2013, the assessee has preferred these two appeals before this Tribunal raising the following grounds for both assessment years involved :-

Repr of grounds of appeal 2008-09.

"On the facts and circumstances of the case, Times VPL Limited respectfully submits that the learned CIT (Appeals) :

1. *Erred in holding that the appellant is liable to deduct tax at source under the provisions of section 194C of the Act on expenditure aggregating Rs.7,20,00,000 made towards cost of purchase of bulk advertisement space from Bennett, Coleman & Company Ltd. and consequently upholding the disallowance made by the Assessing Officer under section 40(a)(ia) of the Act.*
2. *Erred in not appreciating the purpose and the intention of section 40(a)(ia) of the Act, which cannot be invoked, when the appellant relying on the CBDT Circular No.715 is*

under a bonafide belief that tax is not required to be deducted at source under Section 194C of the Act.

3. *Was not justified in invoking the provisions of section 40(a)(ia) of the Act without appreciating the fact that BCCL has already paid taxes on sale of advertisement space to TVPL and consequently, the appellant should be deemed to be treated as having deducted and paid such taxes and hence, there is no question of directing to disallow the payments made to BCCL towards the purchase of bulk advertisement space.*
4. *Erred in not appreciating that the provisions of section 40-(a)(ia) of the Act can be invoked only to disallow expenditure which remains payable as on the date of the balance sheet and it cannot be invoked to disallow the expenditure which was actually paid within the previous year."*

From a perusal of the grounds raised (supra), Grounds Nos.1 & 2 challenges the decision of the authorities below that the assessee is liable to deduct tax at source under Section 194C of the Act. Grounds at S.Nos.3 & 4 challenge the decision of the Assessing Officer in invoking the provisions of section 40(a)(ia) of the Act to disallow the expenditure of Rs.7,20,00,000 which was already paid before the end of the concerned previous years i.e. 31st March.

5.1 The facts of the case are that the assessee is in the business of printing and publishing of newspapers. It had entered into an agreement with Benett Coleman & Company Ltd. ('BCCL') another media company for purchase and utilization of advertisement space in a daily newspaper, 'Times of India (Kannada)' owned by BCCL. The advertisement space so acquired was claimed to have been used by the assessee to feature advertisements of its clients or the advertising agency, as the case may be. The purchase price of the advertisement space has been debited in the books of account of the assessee as expenditure. However, no tax deducted at sources (TDS) had been made on the payment to BCCL towards the purchase of advertisement space, through the above agreement.

5.2 In the course of assessment proceedings, the Assessing Officer examined the Agreement in question with BCCL, considered the submissions made by the assessee and concluded that the payments made by the assessee for the purchase of advertisement space fell within the ambit of the provisions of section 194C of the Act and therefore the assessee was required to make TDS from the payments made to BCCL. As the assessee had failed to make TDS on the said payments, the Assessing Officer disallowed the expenditure by invoking the provisions of section 40(a)(ia) of the Act; holding that the agreement with BCCL for purchasing the bulk space in the newspaper is for the purpose of advertising and is nothing but a contract which falls under the category of "work" which includes advertising as per clause (iii) to the Explanation to section 194C of the Act. In coming to this finding, the Assessing Officer derived support form the decision of the Hon'ble Apex Court in the case of ACC Ltd. V CIT (201 ITR 435) and the decision of the Hon'ble Madras High Court in the case of CIT V Poompuhar Shipping Corporation (Madras) (2006) 282 ITR 3. The Assessing Officer also placed reliance on the CBDT Circular No.715 dt.8.8.1995. On appeal, the learned CIT (Appeals) upheld this finding of the Assessing Officer for both Assessment Years 2008-09 and 2009-10.

5.3 Before us, the learned Authorised Representative of the assessee made elaborate oral and written submissions and also submitted a paper book containing several judicial pronouncements in this regard. In these appeals, the submissions of the assessee are in respect of the following issues :-

(i) That the assessee is not liable to deduct tax at source under Section 194C of the Act in respect of its payments to BCCL.

(ii) Section 40(a)(ia) of the Act cannot be invoked to disallow this expenditure of Rs.7,20,.00,000 on payments made by the assessee to BCCL for both Assessment Years 2008-09 & 2009-10.

6. **Ground Nos. 1 & 2 : Liability to deduct tax at source u/s. 194C of the Act on payments to BCCL**.

6.1 The main contention of the assessee is that it is not liable to deduct tax at source on the payments of Rs.7,20,00,000 to BCCL in both assessment years concerned. It is the contention of the assessee that the provisions of section 194C of the Act apply only to "contract for work" and not to "contract of sale". According to the assessee, the contract with BCCL related to the purchase and sale of bulk advertisement space is not a "contract for work". As per the assessee, the term "advertising" only includes payments made by clients to advertising agency and not payments made by the advertising agency to the print media and the TDS provisions are applicable only when the client makes payment for advertising either to media directly or to advertising agencies and not when advertising agencies make payment to the media. It was contended by the assessee that BCCL is not doing any work for it and they are only buying the advertisement space in bulk from BCCL for entering into onward agreement to advertise with their clients. Therefore, the provisions of withholding of tax are not attracted on the

payments made by the assessee to BCCL. In support of its contentions, the assessee cited and placed reliance, inter alia, on the following :-

(i) CBDT Circular NO.714 dt.3.8.1995 and CBDT Circular No.715 dt.8.8.1995;

(ii) The decision of the co-ordinate bench of the Bangalore Tribunal in the case of Sands Advertising Communication (P) Ltd V DCIT (37 SOT 179) (Bang).

6.2 In the decisions cited by the assessee, the scope and meaning of work is explained in detail and there is no dispute on this score. In terms of clause (iv) of Explanation to section 194C of the Act, advertising is also an activity which falls within the ambit of "Work". This, in the context of the case on hand, is the work which the media does for a client for a certain consideration. In the case on hand, the media is BCCL which does the advertisement for the assessee or its clients. Therefore, we find that there is no merit in the assessee's contention that BCCL is not doing any "Work" for the assessee. The payments made for booking of the advertisement space is essentially for advertisement purposes and not for the space as such. The client does not pay to take ownership of the space but for advertisement of his product / service. At the time of booking the advertisement space, BCCL is not concerned about whom the advertisement is intended for. It's only requirement is that the advertisement should comply with the laws in force at that time. Therefore, it follows that the payment made by the assessee to BCCL is for advertisement, which is unambiguously included in the provisions of section 194C of the Act.

6.3 The assessee has placed reliance on CBDT's Circular No.714 dt.3.8.1995 to contend that the transaction in question would not fall under "advertising" within the meaning of section 194C of the Act. Section 194C of the Act provides that tax is to be deducted at source against payments made to contractors / sub-contractors, for carrying on any work (including the supply of labour for carrying out any work) by a contractor. Such work must be in pursuance of a contract (including sub-contractor) between the contractor and a specified persons defined in the Explanation to section 194C of the Act. The word "work" in this section would include advertising.

6.4 In CBDT Circular No.715 of 1995, cited by the assessee, the scope of advertising contract was clarified in Answer to Question 1 as under :-

> *"The term "advertising" has not been defined in the Act. During the course of consideration of the Finance Bill, 1995, the Finance Minister clarified on the floor of the House that the amended provisions of tax deduction at source would apply when a client makes payment to an advertising agency and not when an advertising agency makes payment to the media, which includes both print and electronic media…."*

In the case on hand, various terms of the Agreement between the assessee and BCCL indicate that the assessee has not entered into the agreement in the capacity of an advertising agency. The terms of the Agreement indicate that the assessee purchased bulk advertisement on principal-to-principal basis. After purchasing the same, the assessee is at liberty to sell the space to anyone and BCCL has no role or part in that regard. In this factual matrix, the inevitable conclusion that follows is that the assessee has purchased the advertisement space for itself and not on behalf of any specific clients in the capacity of an advertising agency.

Therefore, it is clear from the agreement that at the time of purchasing the bulk advertisement space, the assessee is merely a client to the media, BCCL in this case. In this view of the matter, it can be inferred from the CBDT Circular No.715 of 1995 that the assessee was liable to deduct tax at source on the payments of Rs.7,20,00,000 in the impugned assessment years.

6.5 The assessee has also placed reliance on the decision of the co-ordinate bench of this Tribunal in the case of Sands Advertising Communications (P) Ltd. (supra). On perusal thereof, we find that the facts of the cited case are distinguishable. In the case of Sand Advertising Communication (P) Ltd. (supra), the assessee was an advertising agency involved in activity of advertising in the print media. It's sister concern was in similar business, but was an accredited agency. The assessee extend into an agreement with the sister concern under which all advertisements created / developed by the assessee for its clients were to be released to the print media through the sister concern, for which certain consideration was to be paid to it. The Assessing Officer was of the view that the provisions of section 194C of the Act was applicable, while the contention of the assessee was that the sister concern was only a routing agency and not a sub-contractor. It was held by the co-ordinate bench of the Tribunal that the provisions of section 194C of the Act is applicable only when payment is to be made to an advertising agency and not when payment is made by an advertisement agency to the print media as clarified in CBDT Circular NO.715 of 1995 and therefore it was held that no TDS was required to be made in that case. In the case on hand, however, the assessee is not a routing

agency. It makes outright purchase of advertising space and exercises exclusive control over the space. It has the right to sell the space or retain it with itself. Further, this is not a case of payment made by an advertising agency to the print media. There is a transfer of advertisement space from BCCL to the assessee, who in turn sells it to other parties. In this factual matrix, we are of the view that the reliance placed on the CBDT Circular nO.715 of 1995 and the decision in the case of Sands Advertising Communications (P) Ltd. (supra) does not come to the rescue of the assessee.

6.6 In view of the discussion of the facts and circumstances of the case from paras 6.1 to 6.5 of this order, we are of the considered view that the payment made by the assessee to BCCL is towards advertisement and the assessee was liable to deduct tax at source under Section 194C of the Act. In view of the assessee's failure to deduct tax at source as required, the provisions of section 40(a)(ia) of the Act are attracted in the facts of the case and the payments of Rs.7,20,00,000 by the assessee to BCCL for both assessment years 2008-09 and 2009-10 are liable to be disallowed thereunder. We, consequently, uphold the finding of the authorities below in this regard and dismiss the grounds raised at S.Nos.1 & 2 for both assessment years 2008-09 and 2009-10.

7. **Ground Nos. 3 & 4 : Section 40(a)(ia) of the Act cannot be invoked to disallow expenditure that was actually paid within the previous year.**

7.1 The assessee has raised alternate grounds that the provisions of section 40(a)(ia) of the Act cannot be invoked to disallow expenditure which was actually paid within the previous year.

In support of this proposition, the assessee has, inter alia, placed reliance on the decision of the Special Bench of the ITAT, Visakhapatnam, in the case of Merilyn Shipping & Transport V ACIT in 16 ITR (Trib) 001 (SB – Visakhapatnam).

7.2 The assessee has also contended that the amendment to section 40(a)(ia) of the Act is clarificatory in nature and hence cannot be invoked when the tax due on the said amount has been paid by the payee. In support of this proposition, the assessee has placed reliance on the following judicial pronouncements :-

(i) CIT V Alom Extrusions Ltd. 319 ITR 306 (SC);

(ii) Allied Motors (P) Ltd. V CIT 224 ITR 677 (SC); and

(iii) DCIT V Ananda Markala (2014) 150 ITD 323 (Bang).

7.3 It is the contention of the assessee that BCCL has already been paid these amounts by the assessee within the concerned previous years and nothing was outstanding as on 31st March, 2008 and 31st March, 2009. It was submitted that the provisions of section 40(a)(ia) of the Act can be invoked only to disallow expenditure which remains payable / outstanding as on the date of the Balance Sheet i.e. as on 31st March and it cannot be invoked to disallow the expenditure which has been actually paid within the concerned previous years. The assessee further contends that since BCCL has already offered for tax the payments made to it by the assessee on sale of advertisement space, consequently the assessee cannot be held as an assessee in default and therefore the question of disallowing the payments of Rs.7,20,00,000

each under Section 40(a)(ia) of the Act for both assessment years 2008-09 and 2009-10, does not arise.

7.4 We have heard both the learned Authorised Representative and the learned Departmental Representative on this alternate ground raised by the assessee. As pointed out by the learned Departmental Representative, the issues raised in the alternative grounds, has been raised for the first time before us and was never raised before the authorities below. The details as to whether the payee, BCCL, has actually offered as income and paid taxes on the amounts ofRs.7,20,00,000 each for the relevant Assessment Years 2008-09 & 2009-10 and whether these expenditure have actually been paid during the concerned previous year's or remained payable / outstanding as on 31.3.2008 and 31.7.2009 are facts which are material to come to a decision on this issue and the examination of such details as are required are not available before us. In view of the above, in the interest of equity and justice, we deem it necessary to restore this issue to the file of the Assessing Officer to decide thereon, after verification of the facts of the matter and taking into account the judicial pronouncements cited at para 7.1 (supra) and placed reliance upon by the assessee, after affording the assessee adequate opportunity of being heard and to file details / submissions on the issue, which are to be duly considered. It is ordered accordingly. Consequently, Grounds at S.Nos. 3 & 4 are treated as allowed for statistical purposes only for both assessment years 2008-09 and 2009-10.

8. In the result, the assessee's appeal for both assessment years 2008-09 and 2009-10 are partly allowed for statistical purposes.

Order pronounced in the open court on 6th Feb., 2015.

Sd/-	Sd/-
(RAJPAL YADAV)	**(JASON P BOAZ)**
Judicial Member	Accountant Member

*Reddy gp

Copy to :

1. Appellant
2. Respondent
3. C.I.T.
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard File.

(True copy) By Order

Asst. Registrar, ITAT, Bangalore