

IN THE INCOME TAX APPELLATE TRIBUNAL "C", BENCH KOLKATA

BEFORE SHRI N. V. VASUDEVAN, JM & DR. A.L.SAINI, AM

आयकर अपील सं./ITA No.2205/Kol/2014

(निर्धारण वर्ष / Assessment Year: 2011-12

D.C.I.T, Circle-12(2), Kolkata	Vs.	M/s Selvel Media Services Pvt. Ltd. 10/1B, Diamond Harbour Road, Kolkata – 700 027.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AADCS 7951 G		
(REVENUE/DEPARTMENT)	..	(ASSESSEE)

Assessee by :Shri Subash Agarwal, Advocate
Revenue/Department by :Shri G. Mallikarjuna, CIT DR

सुनवाई की तारीख / **Date of Hearing** : **13/07/2017**

घोषणा की तारीख/**Date of Pronouncement** : **30/08/2017**

आदेश / O R D E R

Per Dr. Arjun Lal Saini, AM:

The captioned appeal filed by the assessee, pertaining to assessment year 2011-12, is directed against the order passed by the Id. Commissioner of Income Tax (Appeals)–XII, Kolkata, in Appeal No.237/XII/Cir-12/14-15 dated 17.09.2014, which in turn arises out of an order passed by the Assessing Officer U/s.143(3) of the Income Tax Act 1961, (hereinafter referred to as the 'Act'), dated 20.03.2014.

2. Revenue has taken the following grounds of appeal:

1. *"That in the facts and circumstances of the case and in the law the Ld. CIT(A) erred in deleting the disallowance of Rs. 1,42,76,824/- made by the A.O. on depreciation on Hoarding Structures."*
2. *"That in the facts and circumstances of the case and in the law the Ld. CIT(A) erred in deleting the disallowance of Rs. 1,66,53,847/- made by the A.O. on account of deduction u/s. 80-IA."*

3. *“That in the facts and circumstances of the case and in the law the Ld. CIT(A) erred in deleting the disallowance of Rs. 6,61,13,770/- made by the A.O. on account of expenditure u/s 40(a)(ia).”*
4. *“That in the facts and circumstances of the case and in the law the Ld. CIT(A) erred in deleting the disallowance of Rs. 30,79,771/- made by the A.O. on account of prior period expenses.”*

3. The ground No.1 raised by the Revenue relates to disallowance of Rs. 1,42,76,824/- made by the A.O. and which was deleted by CIT(A), on account of depreciation on Hoarding Structures.

3.1 The brief facts qua the issue are that the assessee filed its return of income for AY 2011-12 declaring total income of Rs.88,64,800/- on 12.09.2012. The said return had processed on 22.03.2013 u/s 143(1) of the I.T. Act, 1961. Later on, the assessee's case was selected for scrutiny u/s 143(2) of the I.T. Act and AO has completed assessment by making addition on account of depreciation on hoarding structures at Rs.1,42,76,824/-. During the assessment proceedings it was found that assessee claimed depreciation on hoardings at the rate of 100% for more than 180 days and at the rate of 50% for less than 180 days considering it 'purely temporary erection such as wooden structure'. The total depreciation claimed at the rate of 100% is of Rs.14,699,165/- and at the rate of 50% is of Rs.2,097,099/-. The depreciation claimed by assessee on hoarding at the rate of 100% considering it a temporary structure was wrong as per AO and it should be considered under plant and machinery. It was seen by the AO that the hoarding consists of a cement/iron base on which an iron structure is fabricated, on this iron structure there was a wooden/plastic/flex/glow sign board on which the final advertisement sheet is displayed. Generally, it is understood that the iron hoarding has a life time period of a

considerable period. It is only the sheet on the wooden/plastic/flex/glow sign board that is, changed or gets damaged due to rain or sun shine. As per AO, the major part of the hoarding was permanent in structure and not temporary. Assessee has considered hoarding a purely temporary erection. In such a scenario it needs to be established that the structure is purely temporary in nature. The word temporary has not been defined. But to establish that it is purely temporary it is important to ascertain the lifetime of the hoardings. Assessee was show caused why depreciation on hoarding should be allowed at the rate of 100% and not 15% considering it a plant and machinery.

During the assessment proceedings the Assessee vide his submission dated 28.02.2014 relied on the judgement passed by CIT(A) and ITAT vide following orders in its own case and in case of sister concerns:

(a) ITA No.1065/Kol/2008

(b) ITA No.820/Kol/2008

(c) A.Y. 08-09 being Appeal No. 430/XII/R-12/10-11 dt.20/07/2012.

(d) A.Y. 09-10 being Appeal No. 482/XII/Cir-12/11-12 dt 20/07/2012.

(e) A.Y. 10-11 being Appeal No. 482/XII/Cir-12/11-12 dt 16/04/2013.

The Assessing Officer had gone through the submissions of assessee and it was observed by him that submission of assessee was based on appeals filed by him before the appellate authorities which had not reached to a conclusion. Moreover the AO found that submission of assessee was not tenable on following grounds:

(i) Hoardings now-a-days are made of iron and steel mainly with minimum use of any temporary material. These permanent structures are leased out by various municipal

authorities for a fixed period of time and advertising agency hire these hoarding on lease or sub-lease.

(ii) Assessee himself made expense of cement, pipes, bricks, GI pipes etc. for erection of the hoarding to advertise product and services.

(iii) Assessee uses the erected hoarding for a considerable period of time i.e. 1 year, 3 year or 5 year for which lease is given to them. It was not the case that one hoarding is only used for one advertisement and for next advertisement another hoarding will be required. One erected hoarding was rent out to customer for advertise their product for 1 month, 3 months, 6 months or sometimes a year and same hoarding with some repairs is used for this period. Therefore hoardings are permanent structure.

iv) As per Income Tax Rules in context of assessee, the depreciation is allowed only on "purely temporary erections such as wooden structures". In the case of assessee the erection was not temporary and the expenditure on account of wood or wood like material is negligible. Therefore assessee is not eligible to claim 100% depreciation under this head.

(v) As a matter of general fact, with the advancement of technology the hoardings these days mostly consist of neon glow sign board, flex sign boards and LED sign boards which mostly comprises of plastics and electrical equipments and are permanent in nature having scrap value also.

Therefore, the AO held that the depreciation at the rate of 100% of an amount Rs. 14,699,165/- and depreciation at the rate of 50% of an amount of Rs.20,97,099/- is disallowed. The hoardings are considered as Plant & Machinery and depreciation @ 15% is allowed on the same. Therefore depreciation of Rs. 2,204,875/- is allowed on

hoardings used for more than 180 days use and Rs. 314,565/- is allowed on hoardings for less than 180 days use. On the basis of above discussion Rs.14,276,824/-(12,494,290/- + 1,782,534/-) is disallowed and added back to total income of assessee.

3.2 Aggrieved by the order of the Assessing Officer, the assessee filed an appeal before the CIT(A) who has deleted the addition made by the Assessing Officer. Regarding the disallowance of Rs.1,42,76,824/- made by the Assessing Officer on account of depreciation on hoarding structures, the Ld. CIT(A) observed that Assessing Officer disallowed of Rs.1,42,76,824/- by holding that the hoardings are permanent structures not entitled to 100% depreciation merely for the reason that part of the structure include iron frames which is in deviation from the consistent admission of the hoardings as temporary structures and eligible for 100% depreciation in the past assessments and approved by the Tribunal. It was seen by CIT(A) that the Assessing Officer had observed in the assessment order that the hoardings are principally of steel structure and therefore permanent and not entitled to 100% depreciation. During the appellate proceedings, the assessee submitted that on the identical facts the hoarding had been accepted over the years since inception as temporary structures eligible for 100% depreciation and approved by the tribunal in the assessee's own case in ITA No.1965/Kol/2008 wherein the Tribunal held that where the hoardings were used for less than 180 days in a year the assessee shall be entitled to 50% depreciation in that year and the balance 50% in the subsequent year. The assessee further submitted before the Ld. CIT(A) that on identical issue leading to disallowance of 100% depreciation was raised in the assessment of the assessee's sister concern Selvel advertising Pvt. Ltd, where in the appeal for A.Y.

2009-10 order of the Assessing Officer was reversed as a covered issue in favour of the assessee by the ITAT order in appeal from earlier A.Y 2005-06 vide ITA No.820/Kol/2008 dated 11.12.2007 which the Department has accepted as conclusive, there being no further appeal to the High Court. The Ld. CIT(A) observed that Assessing Officer has made the disallowance of the claim of 100% depreciation on hoardings merely by holding that the hoardings are permanent structures as part of the structures include iron frames and therefore they are not entitled to 100% depreciation. The Ld. CIT(A) observed that on identical facts the hoardings had been accepted over the years since inception as temporary structures eligible for 100% depreciation and approved by the Tribunal in the assessee's own case in ITA No.1965/Kol/2008 where the Hon'ble Tribunal held that the hoardings are eligible for 100% depreciation as temporary structures and where the hoardings were used for less than 180 days in a year the assessee shall be entitled to 50% depreciation. Therefore, the Ld. CIT(A) held that since the issue is squarely covered in favour of the assessee in assessee's own case, therefore, he directed the Assessing Officer to allow the claim of the assessee and accordingly, the Ld. CIT(A) allowed the appeal of the assessee.

3.3 The Id DR for the Revenue has submitted before us that the Assessing Officer disallowed of Rs.1,42,76,824/- by holding that the hoardings are permanent structures not entitled to 100% depreciation for the reason that part of the structure include iron frames and cement. Any structure made by iron and cement would be permanent in nature. This way, the Id DR for the Revenue has defended the order passed by the Assessing Officer.

3.4 On the other hand, the Id Counsel for the assessee has submitted before us that the disallowance of Rs.1,42,76,824/- made by the Assessing Officer on account of depreciation on hoarding structures, by holding that the hoardings are permanent structures and therefore not entitled to 100% depreciation was merely for the reason that part of the structure include iron frames which is in a deviation from the consistent admission of the hoardings as temporary structures and eligible for 100% depreciation in the past assessments. The assessee has been following the said practice, since a long and Revenue has been accepting the said practice in scrutiny assessments in past years. On the identical facts the hoarding had been accepted over the years since inception as temporary structures eligible for 100% depreciation and approved by the tribunal in the assessee's own case in ITA No.1965/Kol/2008 wherein the Tribunal held that where the hoardings were used for less than 180 days in a year the assessee shall be entitled to 50% depreciation in that year and the balance 50% in the subsequent year. The Id Counsel also relied on the following judgment in assessee's own case:

M/s Selvel Media Services Pvt. Ltd:ITA No.100/Kol/2014,

6. *Aggrieved by the order of the CIT(A), the revenue has raised Gr. No. 1 before the Tribunal. The Id. DR. submitted that under part-A in Appendix-I of the Rules, under the head 'Tangible assets' entry (4) depreciation at 100% on "Purely temporary erections such as wooden structure is allowed. According to him the hoardings in question cannot be regarded as purely temporary erection. In this regard the Id. DR filed before us policy guidelines on display of advertisement within the Kolkata Municipal Corporation Area wherein the guidelines have laid down with regard to the size of the hoardings, structural design and erection of the hoardings structural stability certificate for erection of hoardings etc. These guidelines are meant to ensure that the hoardings do not fall injuring person or property. He laid emphasis on the fact that in the light of such stringent conditions for erection of advertisement of hoardings, it cannot be said that hoardings are purely temporary erection. He placed reliance on the decision of the Hon'ble Mumbai ITAT in the case of Asian Advertising, Mumbai in ITA No. 2349/Mum/2013 order dated 23.03.2016. In that order the question that was considered by ITAT, Mumbai Bench was as to whether hoardings were buildings entitled to 10% depreciation or plant entitled to depreciation at 15%. The Tribunal in para 43 of its order held that advertising hoarding structures which are permanent structures embedded in the building having*

foundation being erected and constructed by the assessee was building and the assessee was entitled to claim depreciation at 10%.

8. *We have given a very careful consideration to the rival submissions. We are of the view that the Tribunal has already taken a view in favour of the assessee in the past assessment referred to in the earlier part of this order. It cannot be argued by the Id. DR at this stage that in none of these decisions the question whether the hoardings were temporary or permanent structure was considered by the Tribunal. Going by the principle of consistency we are of the view that it would be just and proper to take a view different from the view which has already been taken in assessee's own case in the past. Even in the order of assessment the facts to substantiate a stand taken by the revenue have not been brought out.*

9. *Keeping in mind the precedents on the issue we are of the view that the order of CIT(A) does not call for any interference. Accordingly ground no 1 raised by the revenue is dismissed.*

3.5 We have heard both the parties and perused the material available on record, we notice that issue is fully covered by the assessee's own case. We note that the Department has been consistently accepting in scrutiny proceedings, purely temporary structure therefore, we uphold the order of the Id. CIT(A) following the Rule of consistency. For that we rely on the order of the Hon'ble Supreme Court in RadhasoamiSatsang vs. CIT 193 ITR 321 (SC). Therefore, we do not find any infirmity in the order passed by the CIT(A), hence we confirm the order passed by CIT(A).

3.6 In the result, the appeal filed by the Revenue (Ground No.1), is dismissed.

4. Ground No. 2 raised by Revenue relates to disallowance of Rs. 1,66,53,847/- made by the A.O. on account of deduction u/s. 80-IA.

4.1 Brief facts qua the issue are that the disallowance of Rs.1,66,53,847/- made by the Assessing Officer on account of deduction u/s 80IA. The Ld. CIT(A) observed that the Assessing Officer disallowed the deduction of Rs.1,66,53,847/- in respect of

profit derived from engagement in construction and maintenance of bus shelters, toilet blocks and foot over-bridges for the road system of different cities, by ignoring the facts of the case that the identical claim of deduction by the assessee in earlier years u/s. 80IA of the Act have been allowed by the ITAT. It was observed by the Assessing Officer that the assessee during the year under appeal had claimed deduction u/s.80IA of the Act being income earned from the business of developing/operating and maintaining infrastructure facility being foot over bridge amounting to Rs.1,66,53,847/-. During the assessment proceedings, the Assessing Officer had asked certain details/information in connection with claim of deduction u/s.80IA of the Act, in response to which a detailed reply was submitted by the assessee before the Assessing Officer. However, the Assessing Officer disallowed the claim of deduction u/s.80IA of the Act for a sum of Rs.1,66,53,847/- being the profit derived from engagement in construction and maintenance of bus shelters, toilet blocks and foot over-bridges for the road system of different cities.

4.2 Aggrieved by the addition made by AO, the assessee filed an appeal before the Id CIT(A), who has allowed the assessee`s appeal. It was observed by the CIT(A) that the AO had disallowed Rs. 1,66,53,847/- u/s. 80IA of the I.T. Act, 1961 in respect of profit derived from engagement in construction and maintenance of bus shelters, foot over-bridge etc. The assessee submitted before the CIT(A) that this issue is covered by the decision of the Hon`ble ITAT, Kolkata in ITA No. 1065/Kol/2008 in assessee`s own case for A.Y. 2005-06 in order dt. 31-07-2009 and in the case of another sister concern of the assessee, M/s. Vantage Advertising Pvt. Ltd. in ITA No. 1055/Kol/2008 dt. 30-06-2009. It was noted by CIT(A) that the AO has disallowed the claim of the assessee in respect of deduction under section 80IA

of the Act by applying the principles of the Hon'ble supreme Court in the case of Liberty India vs CIT (2009) 317 ITR 218 (Sc). Regarding the applicability of the decision of the Hon'ble supreme Court in the case of Liberty India vs CIT (supra). The CIT(A) noted that the facts of present case is distinguishable from the facts of Liberty India case. The Hon'ble Supreme Court in the said case has dealt with the issue of whether the DEPB credit/Duty drawback receipt can be considered as profit 'derived' from the industrial undertaking. It is pertinent to note that the Hon'ble Supreme Court observes that profit which covers the **first degree of source** should be considered as profit 'derived' from industrial undertaking and the incentives provided in the Act are **linked to profits and not to investment**. Accordingly, the Hon'ble Supreme Court held that DEPB is an incentive and profit derived from incentive does not fall within the expression 'profit derived from industrial undertaking'. However, in the instant case, profit is derived only from the first degree of source and in fact there is no other sources from where the profit can be derived. The assessee had collected advertisement revenue in consideration of construction and maintenance of the infrastructure facility. The assessee has only been given the right to collect advertisement revenue by display of advertisement panels. The assessee was carrying the business of developing, operating and maintaining the infrastructure facility continuously and systematically by the application of its labour and skill with a view to earning advertisement income. Since the Central Local Authority/other statutory body, did not have the funds to compensate the assessee hence it gave the assessee the license to collect advertisement revenue by display of advertisement panels. The advertisement revenue collected by the assessee does not change the character of the business of the assessee from developing and maintaining "infrastructure facility" to "advertisement business". The immediate

source of advertisement income is the infrastructure facility business and the effective source of the genealogy of the source of the advertisement income is the infrastructure facility business. There was a direct nexus between the advertisement revenue and infrastructure facility business of the assessee. From the terms of the agreements, it is crystal clear that the advertisement revenue was part of and directly related to said infrastructural facility. This way, in the light of the above factual position of the case after considering the assessee's submission and as the issue is covered by the Hon'ble Tribunal's decision in assessee's own case stated above and following the decision of predecessor of CIT(A) in the AYs 2008-09, 2009-10 & 2010-11 on the same set of facts, the CIT(A) directed the AO to allow the claim of the assessee.

4.3 The Id DR for the Revenue has submitted before us that assessee had not submitted the copy of the agreement for advertisement and for the infrastructure facility business therefore this issue is required to be sent back to the file of the AO to examine the agreements.

4.4 On the other hand Id Counsel submitted before us that the said issue of the assessee is fully covered by the judgments of Hon'ble ITAT Kolkata in assessee's own case (supra). In addition to the judgments cited above, the Id Counsel also relied on the judgment of Hon'ble ITAT in assessee's own case:

M/s Selvel Media Services Pvt. Ltd: ITA no.100/Kol/2014:

"20. We have considered the rival submissions. We find that identical issue had been considered and decided in favour of the assessee in assessee's own case, beside in case of assessee's who are engaged in identical line of business. Therefore we are of the view that the income from the business in the nature of work carried on by the assessee would clearly be covered by the provision of section 80IA(4) of the Act. The only question is as to whether the assessee was himself developing or was operating and maintaining or was developing the infrastructural facility. The Explanation below section 80IA(13) of the Act excludes from the purview of Sec. 80IA(4) of the Act, any activity of developing infrastructure facility which is in the nature of work contract. It has been the stand of the revenue before us that the nature of the contract under

which the assessee carried on advertising infrastructural facility had not been examined properly. The Id. Counsel for the assessee also made submissions before us that it is a difficult exercise to correlate the income under which deduction was claimed by the assessee and the corresponding agreements under which development of infrastructure facility was carried out by the Assessee. In these circumstances, we set aside the order of CIT(A) on this issue and remand the issue to the AO for the limited purpose of verifying as to whether the assessee was himself developing all the infrastructural facility or carrying out the contracts which are in the nature of works contract. The assessee will lead necessary evidence before the AO who shall consider the same after affording the assessee opportunity of being heard.

4.5 .We have heard both the parties and perused the material available on record, we notice that identical issue had been considered and decided in favour of the assessee in assessee's own case, beside in case of assessee's who are engaged in identical line of business. Therefore we are of the view that the income from the business in the nature of work carried on by the assessee would clearly be covered by the provision of section 80-IA(4) of the Act. The only question is as to whether the assessee was himself developing or was operating and maintaining or was developing the infrastructural facility. The Explanation below section 80-IA(13) of the Act excludes from the purview of Sec. 80-IA(4) of the Act, any activity of developing infrastructure facility which is in the nature of work contract. It has been the stand of the revenue before us that the nature of the contract under which the assessee carried on advertising infrastructural facility had not been examined properly. The Id. Counsel for the assessee also made submissions before us that it is a difficult exercise to correlate the income under which deduction was claimed by the assessee and the corresponding agreements under which development of infrastructure facility was carried out by the Assessee. In these circumstances, we set aside the order of CIT(A) on this issue and remand the issue to the AO for the limited purpose of verifying as to whether the assessee was himself developing all the infrastructural facility or carrying out the contracts which are in the nature of works contract. The assessee will lead necessary evidence before the AO who shall consider the same after affording the assessee opportunity of being heard.

4.6 In the result, the appeal filed by the Revenue (Ground No.2), is allowed for statistical purposes.

5. The ground No.3 raised by the Revenue relates to the disallowance of Rs. 6,61,13,770/- made by the A.O. on account of expenditure u/s 40(a)(ia) of the Act.

5.1 The brief facts qua the issue are that the assessee, during the assessment proceedings, submitted before the AO, that payment made to obtain right to display advertisement on hoarding is not rental but are advertising contract. Assessee relied that contract for putting hoarding is in nature of advertising contract and section 194C would be applicable. Assessee had made a distinction between taking hoarding on rent for use and taking the right of display of advertisement on hoarding. It stated that payments are being made to commercially exploit the right to display and not using the hoarding sites. **Without prejudice it further stated that disallowance under section 40(a)(ia) can only be done in case of no deduction not in short deduction of TDS.** Assessee relied on ITAT judgment in the case of DCIT vs. S.K. Tekriwal and DCIT Vs. Chandabhoy & Jassobhoy. The AO did not accept the assessee's contention. Assessee has relied on CBDT circular which states that contract for putting hoarding is in nature of advertising contract and section 194C would be applicable. However, AO noted that assessee has ignored Question No. 1 of the same circular, which clearly clarifies what would be advertising payments. The payment made by company

advertising its products will be termed as advertising contract. The payment made by Assessee Company is not to advertise its products hence the payment cannot be termed as advertising and TDS is liable to deducted under section 194I and not 194C. The AO noted that the assessee had made a distinction between taking hoarding on rent for use and taking the right to display of advertisement on hoarding. It stated that payments are being made to commercially exploit the right to display and not using the hoarding sites. However the distinction is stretching the common understanding of the facts. There can be no other use of hoarding other than the exploitation of the right to display the advertisement. If this logic is applied then, even in cases where the site was taken on hire to put hoarding, the same would be payment to commercially exploit the right to display and not rental. Therefore, the AO held that the assessee had deducted TDS at lower rate under section 194C and not the prescribed rate under section 194-I. The AO, therefore held that the lower deduction is equivalent to non-deduction of TDS and hence Rs. 134,442,523/- was disallowed. However, the AO noted that since the assessee could not produce any documents to substantiate the department had not filed appeal before Hon`ble Supreme Court and hence to keep the issue alive Rs.6,61,13,770/- was disallowed by the AO for lower deduction of TDS.

5.2 Aggrieved by the addition of Rs.6,61,13,770/-, the assessee filed an appeal before the CIT(A), who has deleted the addition. The CIT(A) observed that the appeal filed by the assessee, on these grounds of appeal, are against the application of Sec. 194-I of the I.T. Act, 1961 for deducting TDS on payments for temporary hoardings on contractual basis to different parties. The assessee had deducted tax at source u/s 194C of the Act on the payment made to the payees. The AO has disallowed Rs. 6,61,13,770/- (actually should be Rs. 13,66,68,043/-) u/s. 40(a)(ia) of the I.T. Act, 1961 on account of the failure on the part the assessee to deduct tax at source as per the provisions of TDS u/s. 194-I of the I.T. Act, 1961. The assessee had contended that this issue is also covered in the case of the assessee's sister concern, M/s. Selvel Advertising Pvt. Ltd. and the Hon'ble ITAT decided the same in favour of the assessee in ITAT No. 820/Kol/2008. The assessee further argued before the CIT(A) that the Hon'ble ITAT in the case of Mr. S.K. Tekriwal in ITA No. 1135/Kol/2010 for AY 2007-08 dt. 21-10-2011 has held "if there is any short fall due to any difference of opinion as to the taxability of any item or the nature of payments falling under various TDS provisions the assessee cannot be declared to be an assessee in default u/s. 201 of the I.T Act, 1961 and no disallowances can be made by invoking the provisions of Sec. 40(a)(ia) of the I.T. Act, 1961". The assessee further stated before the CIT(A) that the decision of the ITAT has been confirmed by the Hon'ble jurisdictional High Court vide its order, ITAT No. 183 of 2012, GA No. 2069 of 2012 dt 03.12.2012 and his order is binding on the AO and, therefore, it was argued that the action of the AO in disallowing the expenditure under section 40(a)(ia) is not maintainable.

The assessee contended that if there is any shortfall due to any difference of opinion as to the taxability of any item or the nature of payments falling under various TDS provisions, the assessee can be declared to be an assessee in default u/s 201 of the Act and no disallowance can be made by invoking the provisions of section 40(a)(ia) of the Act. Thus, it is submitted that the AO has negated the ratio of the jurisdictional High Court in CIT vs M/s. S.K. Tekriwal stating that the assessee could not produce any documents to substantiate that the department has not filled an appeal before Hon'ble Supreme Court and hence to keep the issue alive, Rs. 13,66,68,043/- is disallowed for lower deduction of TDS. The assessee is not liable to prove or

substantiate whether or not the department has filed an appeal to the higher authority in a case. The assessee further submitted before the CIT(A) that similar addition on the identical ground and under identical facts and circumstances made by the AO in the assessee's own case for A.Y. 2008-09 & 2009-10 have been deleted in the appeal by the predecessor of CIT(A) in Appeal No. 430/XII/R-12/10-11 & 482/XII/Cir-12/11-12 respectively. Therefore, CIT(A), in the light of the above discussion, keeping in view, the Hon'ble Tribunals' decision on identical issue in the case of assessee's sister concern i.e. M/s. Selvel Advertising Pvt. Ltd. , respectfully following the decision on the issue of the Hon'ble High Court & Tribunal in the case of S.K. Tekriwal's case (supra) and following the appellate orders of predecessors passed for the AYs. 2008-09, 2009-10 & 2010-11 stated above, the CIT (A) deleted the disallowance of Rs. 6,61,13,770/-.

5.3 Ld. DR for the Revenue has primarily reiterated the stand taken by the AO, which we have already noted in our earlier para and in not being repeated for the sake of brevity.

5.4 Ld Counsel for the assessee has submitted before us that the assessee had made a distinction between taking hoarding on rent for use and taking the right to display of advertisement on hoarding. It stated that payments are being made to commercially exploit the right to display and not using the hoarding sites. The payment made to obtain right to display advertisement on hoarding is not rental but are advertising contract. Assessee relied that contract for putting hoarding is in nature of advertising contract and section 194C would be applicable. In addition to this, the Id Counsel has relied on the following judgment:

M/s Selvel Media Services Pvt. Ltd: ITA no.100/Kol/2014:

26. The Assessee also relied on the decision of the Hon'ble Jurisdictional High Court, in its judgement vide CIT vs M/s. S.K. TEKRIWAL 361 ITR 432 (Cal) wherein it has been held the same issue and decided the same in favour of the assessee that "if there is any shortfall due to any difference of opinion as to the taxability of any item or the nature of payments falling under various TDS provisions, the assessee can be

declared to be an assessee in default u/s 201 of the Act and no disallowance can be made by invoking the provisions of sec 40(a)(ia) of the Act.”

5.5 We have heard both the parties, perused the material available on record, we notice that issue under consideration is fully covered in assessee`s favour. This issue is covered in the case of the assessee`s sister concern, M/s. Selvel Advertising Pvt. Ltd. and the Hon`ble ITAT decided the same in favour of the assessee in ITAT No. 820/Kol/2008. The Hon`ble ITAT in the case of Mr. S.K. Tekriwal in ITA No. 1135/Kol/2010 for AY 2007-08 dt. 21-10-2011 has held “if there is any short fall due to any difference of opinion as to the taxability of any item or the nature of payments falling under various TDS provisions the assessee cannot be declared to be an assessee in default u/s. 201 of the I.T Act, 1961 and no disallowances can be made by invoking the provisions of Sec. 40(a)(ia) of the I.T. Act, 1961”. The decision of the ITAT has been confirmed by the Hon`ble jurisdictional High Court vide its order, ITAT No. 183 of 2012, GA No. 2069 of 2012 dt 03.12.2012 and his order is binding on the AO and, therefore, the action of the AO in disallowing the expenditure under section 40(a)(ia) is not maintainable. Therefore, we do not find any infirmity in the order passed by the CIT(A), hence we confirm the order passed by the CIT(A).

5.6 In the result, the appeal filed by the Revenue (Ground No.3), is allowed.

6.Ground No.4 raised by the Revenue relates to disallowance of Rs. 30,79,771/- made by the A.O. on account of prior period expenses

6.1 The brief facts qua the issue are that during the course of assessment proceedings it was found by AO, from the computation of income that the assessee deducted the amount of Rs.30,79,771/- as prior period expenditure which was pertaining to earlier years and was not allowed as deductible expenses during this financial Year. The same has been also pointed out in Tax Audit Report in Schedule IX. Therefore Rs.30,79,771/- was disallowed and added back by the AO to total income of the assessee as prior period expenditure.

6.2 Aggrieved by the addition of Rs. 30,79,771/-, the assessee filed an appeal before the CIT(A) who has deleted the addition made by AO. The CIT(A) observed that it

was contended by the assessee that the bills and vouchers for the same have been received in the relevant year. For lack of information about the liability no expenses were charged or provision made in the earlier years and hence the same should be allowed in full.

6.3 The counsel for the assessee submitted before us that assessee had received the bills and vouchers during the previous year relevant to the assessment year under consideration. The said expenses was not known to the assessee in earlier years therefore he could not record in the books of accounts. The assessee came to know only when he received the bills and vouchers during the previous year, therefore the said expenditure had been known by the assessee only during the previous year.

6.4 On the other hand Ld DR for the Revenue has primarily reiterated the stand taken by the AO, which we have already noted in our earlier para and is not being repeated for the sake of brevity.

6.5 having heard the rival submissions and perused the material available on record, we are of the view that in the light of the above discussion & findings perusing the facts of the case and respectfully following the decision of the jurisdictional ITAT in the assessee's own case as well as the decision of the Hon'ble Calcutta High Court in the case of CIT vs Satna Stone & Lime Co. Ltd. relied upon by the assessee. We are of the view that Rs. 30,79,771/- is an admissible deduction in the relevant assessment year. Therefore, we confirm the order passed by the Id CIT(A).

6.6 In the result, the appeal filed by the Revenue (Ground No. 4), is deleted.

Order pronounced in the open court on this **30/08/2017**.

Sd/-

(N. V. VASUDEVAN)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

(DR. A.L.SAINI)

लेखा सदस्य / ACCOUNTANT MEMBER

कोलकाता /Kolkata; दिनांक Dated **30/08/2017**
[RS SPS]

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

1. अपीलार्थी / The Assessee – M/s Selvel Media Services Pvt. Ltd.
2. प्रत्यर्थी / The Revenue/Department- DCIT, Circle – 12(2), Kolkata
3. आयकर आयुक्त(अपील) / The CIT(A), :Kolkata.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाईल / Guard file.
सत्यापित प्रति

True Copy

By Order

Senior Private Secretary,
Head of Office/D.D.O,
I.T.A.T, Kolkata Benches,
Kolkata.