

**आयकर अपीलीय अधिकरण “एल” न्यायपीठ मुंबई में।**

**IN THE INCOME TAX APPELLATE TRIBUNAL “L” BENCH, MUMBAI**

**BEFORE SHRI SHAMIM YAHYA, AM AND SHRI SANDEEP GOSAIN, JM**

रोक आवेदन सं./SA Nos.419 & 420/Mum/2017

(Arising out of ITA Nos. 2494 & 2495/Mum/2015)

(निर्धारण वर्ष / Assessment Years: 2011-12 & 2012-13)

Hungama Digital Media Entertainment Pvt. Ltd. SF-B-07, Art Guild House, Phoenix Market City, LBS Marg, Kurla (W), Mumbai-400 070	<b>बनाम/</b> Vs.	ITO (OSD) (TDS) 1 (1) Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACV 7289 H		
(Applicant)	:	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. Nos.2494 & 2495/Mum/2015

(निर्धारण वर्ष / Assessment Years: 2011-12 & 2012-13)

Hungama Digital Media Entertainment Pvt. Ltd. SF-B-07, Art Guild House, Phoenix Market City, LBS Marg, Kurla (W), Mumbai-400 070	<b>बनाम/</b> Vs.	CIT(A)- 59 The Income Tax Department, Aaykar Bhavan, Karve Road, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACV 7289 H		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri S. C. Tiwari
प्रत्यर्थी की ओर से/Respondent by	:	Shri M. V. Rajguru

सुनवाई की तारीख / Date of Hearing	:	23.10.2017
घोषणा की तारीख / Date of Pronouncement	:	01.11.2017

आदेश / ORDER

Per Shamim Yahya, A. M.:

**ITA Nos.2494 & 2495/Mum/2015**

These are appeals by the assessee against the respective orders of Id. CIT(A) for the assessment years 2011-12 and 2012-13 respectively. Common grounds have been raised and the appeals are relating to orders are passed u/s. 201(1) and 201(1A) of the I. T. Act.

2. For the sake of reference, we refer to grounds of appeal raised in assessment year 2011-12 which read as under:

**I TDS ON RETAINERSHIP CHARGES**

The Honourable CIT Appeal in her order dated 12<sup>th</sup> March, 2015 has erred in deciding that there is a short deduction of tax at source on retainership expenses of Rs.9,91,604/- incurred by the appellant. Gross amount of retainership expenses Rs.11,46,914/- less payments of Rs.1,55,310/- amounts below threshold limit -Net amount Rs.9,91,604/-

The Honourable CIT Appeal in her order has erred in deciding that the TDS deduction should be made u/s 194J under the category of professional fees. The appellant contends that the tax needs to be deducted u/s 194C under the category of payments to contractors.

The appellant contends that the said payments would fall under the ambit of section 194C and not u/s 194J of the Act.

The appellant prays that the said claim for short deduction of tax at source be deleted.

**II TDS ON ACTIVITY COSTS (EVENTS & PROMOS)**

The Honourable CIT Appeal in her order Dated 12<sup>th</sup> March, 2015 has erred in deciding that the TDS deduction should be made u/s 194J under the category of professional fees in respect of payments of Rs. 6,05,20,060/- [Rs. 4,76,000/-

referred to in 7.3.(i) & Rs. 6,00,44,060/- referred to in 7.3.(ii)] made in respect of activity costs. The appellant contends that the tax needs to be deducted u/s 194C under the category of payments to contractors.

The appellant contends that the said payments would fall under the ambit of section 194C and not u/s 194J of the Act. Without prejudice to the above the appellant prays that out of the ninety-two parties listed by the Honourable CIT Appeal a number of payees fall into the category of vendors for services such as advertising, courier services etc. which squarely fall under the ambit of section 194 C and tax needs to be deducted on their services at the rate applicable u/s 194C.

### III TDS ON FACEBOOK CHARGES

The Honourable CIT Appeal in her order dated 12<sup>th</sup> March, 2015 has erred in deciding that the tax at source amounting to Rs.56,65,119/- needs to be deducted at source on payments of Rs.1,38,17,366/- made to Facebook.

The appellant contends that no tax needs to be deducted at source on payments made to Facebook.

### IV TDS ON EI LINE CHARGES

The Honourable CIT Appeal in her order dated 12<sup>th</sup> March, 2015 has erred in deciding that the tax at source amounting to Rs.2,34,835/- needs to be deducted on payments made for El line charges, which are akin to telephone charges.

The appellant contends that no tax should be deducted at source on payments made to El Line charges.

### V TDS ON MOBILE CONTENT EXPENSES

The Honourable CIT Appeal in her order Dated 12<sup>th</sup> March, 2015 has erred in deciding that the TDS deduction should be made u/s 194J under the category of professional fees. The Honourable CIT Appeal has upheld the contention of the assessing officer that there is a short deduction of tax amounting to Rs. 48.602/- . The appellant contends that the tax needs to be deducted u/s 194C under the category of payments to contractors.

The appellant contends that the said payments would fall under the ambit of section 194C and not u/s 194J of the Act.

3. The assessee has also filed an additional ground for both the years. The additional ground read as under:

1. That on the facts and in the circumstances of the appellant's case and in law, learned CIT(A) has erred in confirming the impugned order u/s. 201(1) and 201(1A) because the appellant cannot be treated as an assessee in default for want of outstanding demand against the payee(s).
  
4. For the admission of the additional ground, it has been pleaded that the additional ground raises a pure question of law that disputes the jurisdiction of Assessing Officer to pass the impugned order and, hence, it goes to the root of the matter.
  
5. Upon careful consideration and hearing both the Id. Counsel, we find that the additional ground raises a question of law and goes to the root of the matter. Hence, on the anvil of Hon'ble Apex Court decision in the case of *NTPC Ltd. vs. Central Electricity Regulatory Commission* [2017] 80 taxmann.com 259 (SC), we admit the additional ground. In support of the additional ground, the Id. Counsel of the assessee has referred to the provisions of section 191 which reads as under:

**Direct payment.**

**191.** In the case of income in respect of which provision is not made under this Chapter for deducting income-tax at the time of payment, and in any case where income-tax has not been deducted in accordance with the provisions of this Chapter, income-tax shall be payable by the assessee direct.

*Explanation.* —For the removal of doubts, it is hereby declared that if any person including the principal officer of a company,—

- (a) who is required to deduct any sum in accordance with the provisions of this Act; or
- (b) referred to in sub-section (1A) of section 192, being an employer, does not deduct, or after so deducting fails to pay, or does not pay, the whole or any part of the tax, as required by or under this Act, and where the assessee has also failed to pay such tax directly, then, such person shall, without

prejudice to any other consequences which he may incur, be deemed to be an assessee in default within the meaning of sub-section (1) of section 201, in respect of such tax.

6. In support thereof, the Id. Counsel of the assessee has placed reliance upon the following case laws:

Sr. No.	Particulars	Citation
1	Mahindra & Mahindra Ltd. DCIT	(2009) 22 DTR 0361 ITAT Mumbai
2	Hindustan Coca Cola Beverage Pvt. Ltd. v. CIT	(2007) 293 ITR 0226 Supreme Court
3	CIT v. Dewan Chand	(2009) 17 DTR 0337 HC Del.
4	IVRCL-KBL (JV) v. ACIT	(201 6) 133 DTR 0234 HCA&P
5	CIT v. Life Insurance Corporation of India	(1987) 166 ITR 0191 HCM&P
6	CIT v. Kannan Devan Hill Produce Co. Ltd.	(1986)161 ITR 0477 HC Ker.
7	Vudafone Essar Ltd. DCIT	(2011) 9 ITR 0182 ITAT Mumbai
8	Allahabad Bank v. ITO	(2015) 152 ITD 0383 ITAT Agra
9	Wockhardt Hospitals Ltd. v. ACIR	(201 6) 46 ITR 0259 ITAT Mumbai
10	RBL Bank Ltd. v. ITO	(201 5) 45 CCH 0244 ITAT Panaji

7. Referring to aforesaid section and case laws, the Id. Counsel submitted that the assessee cannot be treated as assessee in default for want of outstanding demand against the payee, as there is no finding in this regard.

8. The Id. DR on the other hand submitted that this ground was never taken before the Id. CIT(A). He submitted that this issue now raised also needs factual verification with respect to outstanding demand against the payee. Hence, he pleaded that the ground should be remitted to the files of the authorities below.

9. Upon careful consideration, we find that the afore-said issue was never raised before the authorities below. Hence, in our considered opinion, since the adjudication of this issue may also need reference to factual matrix of the outstanding demand/tax liability accruing to payees, we remit the issue to the file of the Assessing Officer. The Assessing Officer shall consider the issue by referring to the factual records and the legal proposition as emanating hereinabove. Needless to add, the assessee should be accorded adequate opportunity of being heard.

10. Since, the issue is being remitted on jurisdictional aspect, the other grounds on merits are not being dealt with by us and their survival will be dependent on the outcome of the issue remitted hereinabove.

11. In the result, these appeals filed by the assessee stand allowed for statistical purpose.

**SA Nos.419 & 420/Mum/2017**

12. These are stay applications by the assessee arising out of ITA Nos. 2494 & 2495/Mum/2015 for the assessment years 2011-12 and 2012-13 respectively.

13. In these stay applications, the assessee has sought stay of recovery proceedings for the demand of Rs.1,20,90,967/- and Rs.2,20,16,825/- respectively. Since the appeals in connection with which these stay applications have been filed have already been remitted by us to the files of the Assessing Officer vide our order in those appeals hereinabove, the stay applications have become infructuous. Accordingly, these stay applications are dismissed as infructuous.

14. In the result, the assessee's stay applications are dismissed.

*Order pronounced in the open court on 01.11.2017*

Sd/-

(Sandeep Gosain)

न्यायिक सदस्य / Judicial Member

Sd/-

(Shamim Yahya)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 01.11.2017

व.नि.स./Roshani, Sr. PS

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

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

**आदेशानुसार/ BY ORDER,**

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)**

**आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**