**IN THE INCOME TAX APPELLATE TRIBUNAL**
**MUMBAI BENCH "A", MUMBAI**

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND**
**SHRI PAWAN SINGH, JUDICIAL MEMBER**

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| **ITA NOS. 2793 & 5152/MUM/2016** | : | **(A.Ys : 2011-12 & 2012-13)** |
| ACIT-16(1), Mumbai<br>(Appellant) | Vs. | M/s. Lamhas Satellite Services Limited,<br>T-161 Tower, 16th floor,<br>International Infotech Park, Vashi Railway Station, Vashi, Sector-30, Navi Mumbai 400073.<br>**PAN : AAACL8423D** (Respondent) |
| **CO NOS. 279 & 325/MUM/2017**<br>(ITA NOS. 2793 & 5152/MUM/2016) | : | **(A.Ys : 2011-12 & 2012-13)** |
| M/s. Lamhas Satellite Services Limited,<br>T-161 Tower, 16th floor,<br>International Infotech Park, Vashi Railway Station, Vashi, Sector-30, Navi Mumbai 400073.<br>**PAN : AAACL8423D**<br>(Cross Objector) | Vs. | ACIT-16(1), Mumbai<br>(Respondent/Orig. Appellant) |

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| **Assessee by** | **:** | **Shri B.V. Jhaveri, Shri B.J. Vyas, Shri Devang Divecha & Shri Meet Shah** |
| **Revenue by** | **:** | **Shri Saurabh Kumar** |
| **Date of Hearing** | **:** | **15/02/2018** |
| **Date of Pronouncement** | **:** | **27/04/2018** |

**O R D E R**

**PER G.S. PANNU, AM** :

The captioned are two appeals by the Revenue pertaining to Assessment Years 2011-12 and 2012-13 and respective cross objections by the assessee and since the issues involved are common, they have been clubbed and heard together and a consolidated order is being passed for the sake of convenience and brevity.

2. First, we may take-up the appeal and cross objection pertaining to Assessment Year 2011-12 wherein the respective Grounds of appeal raised read as under :-

ITA No. 2793/Mum/2016 (Revenue's appeal)

*1) On the facts and circumstances of the case and in law, whether the Ld. CIT(A) was justified in directing to delete the disallowance u/s. 40(a)(ia) rws 194J placing reliance on the decision of ITAT, Mumbai in the case of Cinetek Telefilms Pvt.Ltd. in ITA No.7834/M/2010 wherein further inter-alia reliance had been placed by the ITAT on the judgment of the Calcutta High Court in CIT Vs S.K.Tekriwal [2014] 46 taxmann.com 444 (Calcutta) without appreciating that the Hon'ble Kerala High Court in its judgment dated 20.07.2015 in the case of CIT-1, Kochi Vs PVS Memorial Hospital Ltd. [2015] 60 taxmann.com 69 (Kerala), after discussing in detail the judgment in the case of CIT Vs S.K.Tekriwal [2014] 46 taxmann.com 444 (Calcutta) has held as under –*

*"In so far as the judgment of the Calcutta High Court in S.K. Tekriwal (supra) which was relied on by the Tribunal is concerned, with great respect, for the aforesaid reasons, we are unable to agree with the views that if tax is*

*deducted even under a wrong provision of law, Section 40(a)(ia) cannot be invoked."*

2) *On the facts and circumstances of the case and in law, whether the Ld. CIT(A) was justified in directing to delete the disallowance u/s. 40(a)(ia) r.w.s. 194J placing reliance on the decision of ITAT, Mumbai in the case of Cinetek Telefilms Pvt.Ltd. in ITA No.7834/M/2010, without appreciating that the principle of res judicata does not apply to Income-tax proceedings.*

3) *The appellant prays that the order of CIT(A) on the above grounds be set aside and that of the Assessing officer be restored."*

CO No. 279/MUM/2017 (Assessee's Cross objection)

*"1. The Commissioner (Appeals) erred in law in not adjudicating the contention of the Assessee that it has neither entered into a contract for rendering technical services nor a contract for rendering managerial services and therefore, the provisions of sec.194J has no application, more so when the contract of the Assessee is to provide satellite services.*

*2. The Commissioner (Appeals) failed to take into consideration that sec.194C defines the word 'work' which includes broadcasting and telecasting and production of programmes for such broadcasting or telecasting and therefore, the nature of the business of the Assessee company of providing Space Segment Services for up-linking and Content Distribution and Aggregation Services for down-linking of international channels would be the 'work' within the meaning of sec. 194C of the Act.*

*3. The Commissioner (Appeals) failed to consider the contention of the Assessee company that provisions of sec. 194C are applicable in its case and not the provisions of sec. 194J of the Act."*

3. Briefly put, the relevant facts are that the appellant is a company incorporated under the provisions of the Companies Act, 1956 and is, *inter-alia*, engaged in the business of satellite service provider, i.e. space segment

services, channel placement services, up-linking and down-linking services for broadcasting and telecasting international channels and distributing the same across various platforms in India. In the course of assessment proceedings, the Assessing Officer noted as per the details in para 4 of the assessment order that assessee had paid up-linking charges and space segment charges in connection with the aforesaid services to various parties. In relation to some of the parties, namely, Reliance Big TV Ltd., Bharti Telemedia Ltd., Wire & Wireless (India) Ltd., Seven Star DoT Comm. P. Ltd., Sun Direct TV Pvt. Ltd. and Indusind Media and Communication Ltd. assessee had deducted tax at source @ 2% in terms of Sec. 194C of the Act instead of deducting the same u/s 194J of the Act @ 10%. In this context, the Assessing Officer in para 5.1.4 of his order has tabulated such payments to the extent of Rs.6,31,37,025/- and noticing that the required tax was not deducted at source, disallowed the corresponding expenditure by invoking Sec. 40(a)(ia) of the Act. The disallowance so made by the Assessing Officer was carried in appeal before the CIT(A). The CIT(A) noted that the controversy was short-deduction of tax at source inasmuch assessee has deducted tax at source @ 2% in terms of Sec. 194C whereas the Assessing Officer required it to be deducted @ 10% in terms of 194J of the Act. As per the CIT(A), mere short-deduction of tax at source would not bring the corresponding expenditure within the disallowance envisaged u/s 40(a)(ia) of the Act and for this, he has relied upon the decision of the Mumbai Bench of the Tribunal in the case of *Cinetek Telefilms P. Ltd., ITA No. 7834/Mum/2010 dated 07.06.2013*. The CIT(A) also noted that in the assessee's own case for Assessment Year 2010-11, a similar issue had arisen and the CIT(A) had deleted the disallowance. Following the aforesaid

precedent, CIT(A) directed the Assessing Officer to delete the disallowance of Rs.6,31,37,025/- made u/s 40(a)(ia) of the Act.

4. At the time of hearing, it was a common point between the parties that so far as the decision of CIT(A) for Assessment Year 2010-11, which has been relied upon by the CIT(A) in the instant year, is concerned, the same has since been affirmed by the Tribunal vide its order in ITA No. 5966/Mum/2013 dated 16.03.2016, a copy of such order has also been placed on record. In the said decision dated 16.03.2016 (supra), the Tribunal noted, by relying on the judgment of the Hon'ble Calcutta High Court in the case of *CIT vs S.K. Tekriwal, 361 ITR 432 (Cal.),* that short-deduction of tax at source cannot be a ground to invoke Sec. 40(a)(ia) of the Act. It was also a common point between the parties that the decision of the Tribunal dated 16.03.2011 (supra) continues to hold the field and, therefore, under the circumstances, the impugned decision of the CIT(A) deserves to be affirmed, which is in line with the precedent in assessee's own case. We hold so.

5. Pertinently, in the present case, the only case sought to be made out by the Assessing Officer is that the tax ought to be deducted at source at a higher rate of 10% instead of the deduction made by the assessee @ 2%. The Hon'ble Calcutta High Court in the case of *S.K. Tekriwal (supra)* noticed that the conditions prescribed u/s 40(a)(ia) of the Act for making the disallowance envisaged that tax was deductible at source, but such tax had not been deducted. However, as per the Hon'ble High Court, where tax has been deducted by the assessee, even under a *bona fide* wrong impression, under wrong provisions of the TDS, the disallowance envisaged u/s 40(a)(ia)

of the Act is not triggered. The said decision squarely covers the controversy before us and, in view of the precedents noted above, order of CIT(A) is hereby affirmed and accordingly, Revenue fails in its appeal.

6. Insofar as the assessee's cross objection is concerned, the grievance is that CIT(A) has not adjudicated on merits the plea of the assessee that tax was rightly deducted by assessee u/s 194C of the Act and that invoking of Sec. 194J of the Act by the Assessing Officer was not correct.

7. Notably, CIT(A) proceeded to set-aside the disallowance u/s 40(a)(ia) of the Act noticing its inapplicability in the given fact-situation which involved a mere short deduction of tax and not failure to deduct tax at source. For this reason, the CIT(A) did not advert to the impugned plea of the assessee that the deduction was otherwise correctly made in pursuance to Sec. 194C of the Act.

8. In this background, the learned representative pointed out that in Assessment Year 2010-11 also, similar situation had prevailed and the Tribunal, vide its order dated 16.03.2016 (supra), *qua* the cross objection of the assessee, remanded the issue for adjudication at the level of the First Appellate Authority. Our attention has been drawn to the relevant discussion in para 7 of the order of Tribunal dated 16.03.2016 (supra) in this regard. The learned representative submitted that assessee had no objection if the matter is sent back to CIT(A) on the same lines in this year too. The ld. DR has also not objected to the plea of the assessee, having regard to the aforesaid precedent.

9. In view of the aforesaid fact-situation, so far as the Grounds raised by the assessee in its cross objection are concerned, the same are remanded back to the file of the CIT(A) for adjudication as per law. Needless to mention, the CIT(A) shall allow the assessee a reasonable opportunity of being heard and thereafter pass an order afresh, as per law.

10. In the result, whereas the appeal of the Revenue is dismissed, the cross objection of the assessee is allowed, as above.

11. It was a common point between the parties that the facts and circumstances in the appeal of Revenue and cross objection of the assessee for Assessment Year 2012-13 are *pari materia* to those considered by us in the appeal of Revenue and cross objection of the assessee for Assessment Year 2011-12, therefore, our decision therein shall apply *mutatis mutandis* to the said appeal and cross objection also.

12. In the result, whereas the appeals of the Revenue are dismissed, the cross objections of the assessee are allowed, as above.

Order pronounced in the open court on 27th April, 2018.

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| Sd/- | Sd/- |
| **(PAWAN SINGH)** | **(G.S. PANNU)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

Mumbai, Date : 27th April, 2018

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Copy to :

1) The Appellant
2) The Respondent
3) The CIT(A) concerned
4) The CIT concerned
5) The D.R, "A" Bench, Mumbai
6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai