

**IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI  
BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAVISH SOOD, JM**

ITA No.1311/Mum/2016

(निर्धारण वर्ष / Assessment Years:2011-12)

Asstt. Commissioner of Income-tax-16(1), Room No. 439, 4 <sup>th</sup> Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020	<b>बनाम/ Vs.</b>	M/s Star Den Media Services Pvt. Ltd. 7 <sup>th</sup> Floor, Blue Wave, Off Link Road, Mahalaxmim, Beh Kumer Chambers, Andheri (W), Mumbai-400053
स्थायी लेखा सं./जीआइआर सं./PAN No.		AACCD7658Q
(अपीलार्थी / <b>Revenue</b> )	:	(प्रत्यर्थी / <b>Assessee</b> )

अपीलार्थी की ओर से / <b>Revenue by</b>	:	Shri V. Justin, D.R
प्रत्यर्थी की ओर से / <b>Assessee by</b>	:	Shri Manish Kanth, A.R

सुनवाई की तारीख / <b>Date of Hearing</b>	:	01.06.2018
घोषणा की तारीख / <b>Date of Pronouncement</b>	:	08.06.2018

**आदेश / O R D E R**

**PER RAVISH SOOD, JUDICIAL MEMBER:**

The present appeal filed by the revenue is directed against the order passed by the A.O under Sec.143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (for short 'Act')[wrongly mentioned in the memorandum of appeals as Sec. 144C(5) of the Act], dated 27.01.2016. The revenue assailing the order passed by A.O had raised before us the following grounds of appeal:

- “1. On the facts and circumstances of the case and in law, whether the Hon’ble DRP was justified in directing to delete the disallowance u/s. 40(a)(ia) r.w.s. 194J of ‘Channel Placement Fees’ placing reliance on the decision of Hon’ble ITAT, ‘K’ Bench, Mumbai in the assessee’s own case for the AY 2009-10 in ITA No. 1413/M/2014 dated 05.08.2015, without appreciating that decision of the ITAT in the case of NGC NETWORKS (I) PVT.LTD. interalia relied upon therein, on this issue by the Hon’ble ITAT, K Bench was not accepted by the Department and appeal was filed with the Bombay High Court on 17.04.2015 vide ITA/397/2015.
2. On the facts and circumstances of the case and in law, whether the Hon’ble DRP was justified in directing to delete the disallowance u/s. 40(a)(ia) r.w.s. 194J of ‘Channel Placement Fees’ whereas the Hon’ble ITAT, ‘L’ Bench, in its order dated 28.03.2014 in the case of ADIT-(IT)-2(2), Mumbai Vs Viacom 18 Media Put. Ltd. answered in the affirmative, the following questions of law raised by the Department-
  - a) Whether definition of term ‘process’ in Explanation 6 to section 9(1)(vi), by way of retrospective amendment is clarificatory in nature and did not amend definition of ‘royalty’ per se - Held, yes; and
  - b) Whether payments made for use/right to use of ‘process’ are ‘royalty’ in terms of the Income-tax Act, 1961- Held Yes.
3. On the facts and circumstances of the case and in law, whether the Hon’ble DRP was justified in directing to delete the disallowance u/s. 40(a)(ia) r.w.s. 194J of ‘Channel Placement Fees’ placing reliance on the decision of Hon’ble ITAT, ‘K’ Bench, Mumbai in the assessee’s own case for the AY 2009-10 in ITA No.1413/M/2014 dated 05.08.2015, where the Hon’ble Kerala High Court, after discussing in detail the judgment in the case of CIT Vs. S.K. Tekriwal [2014] 46 [taxmann.com](http://taxmann.com) 444 (Calcutta) interalia relied upon by the Hon’ble ITAT, in the case of NGC NETWORKS (I) PVT.LTD. 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.”
4. On the facts and circumstances of the case and in law, whether the Hon’ble DRP was justified in directing to delete the disallowance u/s. 40(a)(ia) r.w.s 194J of ‘Channel Placement Fees’ placing reliance on the decision of Honb1e ITAT, ‘K’ Bench, Mumbai in the assessee's own case for the AY 2009-10 in ITA No. 1413/M/2014 dated 05.08.2015, without appreciating that the principle of resjudicata does not apply to Income-tax proceedings.

5. *The Appellant prays that the order of the Ld. DRP-II on the above grounds be set aside and that of the Assessing Officer be restored.*
6. *The appellant craves, leave to amend or alter any ground or add a new ground which may be necessary.”*

2. Briefly stated, the facts of the case are that the assessee company which is engaged in the business of distribution of television channels on all modes of distribution including cable, direct to home, digital or analog, terrestrial satellite or any emerging mode had e-filed its return of income for A.Y. 2011-12 on 29.11.2011. The return of income filed by the assessee was revised on 28.03.2013 at an income of Rs. 55,43,37,199/-. The case of the assessee was thereafter taken up for scrutiny assessment under Sec. 143(2) of the Act.

3. During the course of the assessment proceedings, it was observed by the A.O that the assessee had paid ‘Channel Placement Fees’ of Rs.158,55,69,763/-. On perusal of the details, it was observed by the A.O that the assessee had deducted tax at source on the aforesaid payments of channel placement fees at the rate of 2% under Sec. 194C of the Act. The A.O holding a conviction that the assessee was liable to deduct tax at source on the channel placement fees at the rate of 10% under Sec.194J of the Act, thus called upon the assessee to show cause that as it had failed to deduct tax at source as per the correct statutory provision contemplated under Chapter XVIIB of the Act, resulting into short deduction of tax at source, why the same may not be disallowed under Sec.40(a)(ia) of the Act. The explanation of the assessee that as the payment of channel placement fees had rightly been subjected to deduction of tax at source under Sec. 194C of the Act, thus in the absence of any short deduction of tax at source, no disallowance under Sec. 40(a)(ia) was called for in its hands, however did not find favour with the A.O. The AO holding a conviction that as the assessee had failed to deduct tax at source as per the statutory provision contemplated under Chapter XVIIB of the Act, thus vide his draft assessment order passed under Sec. 143(3) r.w.s. 144C(1) of the Act, dated 30.03.2015, proposed a disallowance of the expense of Rs.158,55,69,763/-

claimed by the assessee in its profit and loss account under the head 'Channel Placement Fees'.

4. The assessee filed its objections before the Dispute Resolution Panel-2, Mumbai (for short 'DRP') in respect of the variance proposed by the A.O in his draft assessment order, dated 30.03.2015. The DRP after deliberating on the contentions advanced by the assessee as regards the proposed disallowance under Sec.40(a)(ia) of the channel placement fees of Rs.158,55,69,763/- paid by the assessee company during the year under consideration observed, that a similar ground of objection was raised by the assessee company before the DRP in the immediately preceding year i.e A.Y 2010-11. It was noticed that the DRP while disposing off the objection raised by the assessee in A.Y 2010-11, had vide its directions dated 29.12.2014 accepted the same and had concluded that no disallowance under Sec. 40(a)(ia) of the channel placement fees was called for in the hands of the assessee. It was further observed that the DRP in the assessee's own case for A.Y 2009-10, vide its directions dated 31.12.2013 had accepted a similar objection which was raised by the assessee company. The said issue had thereafter travelled to the ITAT, Mumbai "K" Bench, which had vide its order dated 05.08.2015 in ITA No. 1413/Mum/2014 for A.Y 2009-10 upheld the relief given by the DRP. On the basis of its aforesaid deliberations, the DRP respectfully followed the order of the Tribunal in the assessee's own case for A.Y 2009-10 and directed the A.O to delete the proposed disallowance under Sec.40(a)(ia) of channel placement fees of Rs.158,55,69,763/-.

5. The A.O after receiving the order of the DRP passed the final assessment order under Sec. 143(3) r.w.s. 144C(13) of the Act, dated 27.01.2016. The A.O on the basis of the directions given by the DRP-2, Mumbai, vide its order dated 14.12.2015 deleted the proposed disallowance of channel placement fees of Rs.158,55,69,763/- under Sec. 40(a)(ia) and assessed the income of the assessee at Rs.63,06,45,217/-.

6. Aggrieved, the revenue had carried the matter in appeal before us. The ld. Authorized Representative (for short 'A.R') for the assessee at the very

outset of the hearing of the appeal submitted that the issue involved in the present case was squarely covered by the order of the Hon'ble High Court of Bombay in the case of Commissioner of Income Tax-11 Vs. M/s NGC Networks (India) Pvt. Ltd. (ITA No. 397/Mum/2015; dated 29.01.2018). The ld. A.R drew our attention to the order of the High Court at Page 19-22 of the 'Paper Book' filed by the assessee (for short 'APB'). It was averred by the ld. A.R that as observed by the Hon'ble High Court, as the *Explanation 6* to Sec. 9(1)(vi) of the Act was made available on the statute, vide the Finance Act, 2012 with retrospective effect from 1976, thus it could not have been contemplated by the assessee at the time when he had deducted tax at source under Sec.194C during the subject assessment year viz. A.Y 2011-12, that a subsequent amendment would require deduction of tax at source under Sec. 194J with retrospective effect. The ld. A.R further submitted that the issue even otherwise was squarely covered by the orders of the coordinate benches of the Tribunal in the assessee's own case, viz. (i) ACIT-11(1), Mumbai Vs. M/s Star Den Media Services Pvt. Ltd (ITA No. 1413 and 1414/Mum/2014; dated 05.08.2015) for A.Y 2009-10; and (ii). ACTT-16(1) Vs. M/s Star Den Media Services Pvt. Ltd. (ITA No. 1553/Mum/2015; dated 12.01.2016) for A.Y 2010-11. Per contra, the ld. Departmental Representative (for short 'D.R') though relied on the order passed by the CIT(A), but fairly conceded that the issue as on date was squarely covered by the order of the Tribunal in the assessee's own case.

6. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that our indulgence in the present appeal has been sought by the revenue for adjudicating as to whether the lower authorities were right in law in concluding that as the assessee was not liable for deduction of tax at source in respect of the channel placement fees under Sec.194J of the Act, and had rightly subjected the same for deduction under Sec.194C, therefore, no disallowance under Sec. 40(a)(ia) of the Act was called for in its hands. We have deliberated at length on the issue under consideration and are of the considered view that the issue involved in the present appeal is

squarely covered by the judgment of the Hon'ble High Court of Bombay in the case of the Commissioner of Income Tax-11, Vs. M/s NGC Networks (India) Pvt. Ltd. (ITA No. 397/Mum/2015; dated 29.01.2018). The Hon'ble High Court in its aforesaid order, not finding any infirmity with the view taken by the Tribunal that as the channel placement fees was to be subjected to deduction of tax at source under Sec.194C and not Sec. 194J of the Act, thus no disallowance of the same was called for under Sec. 40(a)(ia) of the Act in the hands of the assessee, had upheld the order of the Tribunal, observing as under:

- (d) We find that view taken by the impugned order dated 9<sup>th</sup> July, 2014 of the Tribunal that a party cannot be called upon to perform an impossible Act i.e. to comply with a provision not in force at the relevant time but introduced later by retrospective amendment. This is in accord with the view taken by this Court in CIT v/s. Cello Plast (2012) 209 Taxmann 617- wherein this Court has applied the legal maxim *lex non cogit ad, impossibilia* (law does not compel a man to do what he cannot possibly perform).*
- (e) In the present facts, the amendment by introduction of Explanation-6 to Section 9(1)(vi) of the Act took place in the year 2012 with retrospective effect from 1976. This could not be have been contemplated by the Respondent when he made the payment which was subject to tax deduction at source under Section 194C of the Act during the subject Assessment Year, would require deduction under Section 194J of the Act due to some future amendment with retrospective effect.*
- (f) Further, we also notice that under Section 40(a)(i) of the Act, under which the expenditure has been disallowed by the Revenue, meaning of royalty as defined therein, is that as provided in Explanation 2 to Section 9(1)(vi) of the Act and not Explanation 6 to Section 9(1)(vi) of the Act. Thus, the disallowance of expenditure under Section 40(a)(i) of the Act can only be if the payment is 'Royalty' in terms of Explanation 2 to Section 9 (1)(vi) of the Act. Undisputedly, the payment made for channel placement as a fee, is not royalty in terms of Explanation 2 to Section 9(1)(vi) of the Act. Therefore, no disallowance of expenditure under Section 40(a)(i) of the Act, can be made in the present facts.*
- (g) In the above view, as it is a self evident position from the reading Section 40(a)(i) of the Act, no substantial question of law. Thus, question (a) not entertained."*

We also find that the issue that channel placement fees was liable for deduction of tax at source under Sec. 194C of the Act, had also been looked

into and approved by the coordinate benches of the Tribunal in the assessee's own case, viz. ACIT-11(1), Mumbai Vs. M/s Star Den Media Services Pvt. Ltd. (ITA No. 1413/Mum/2014; dated 05.08.2015) for A.Y 2009-10 and ACIT-16(1), Mumbai Vs. M/s Star Den Media Services Pvt. Ltd.(ITA No. 1553/Mum/2015; dated 12.01.2016) for A.Y 2010-11.

7. We thus, respectfully following the order of the Hon'ble High Court of Bombay and finding no reason to take a view different from that arrived at by coordinate benches of the Tribunal in the assessee's own case for A.Ys 2009-10 and 2010-11, follow the same. We thus finding no infirmity in the order of the CIT(A), uphold the same.

8. The appeal filed by the revenue is dismissed.

Order pronounced in the open court on 08.06.2018

Sd/-  
(Shamim Yahya)  
ACCOUNTANT MEMBER

Sd/-  
(Ravish Sood)  
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 08.06.2018  
Ps. Rohit

**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
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /  
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,  
उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT,  
Mumbai

