IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH MUMBAI

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER

AND SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No.6795/Mum/2016 (Assessment Year 2010-11)

ACIT- 16(1), Room No. 439, Aayakar Bhavan, M.K. Road, Mumbai-400020.	Vs.	M/s Videocon D2H Ltd. (Formerly known as Bharat Business Channels Ltd.), 171/C-Wing, Mittal Court, Nariman Point, Mumbai-400021. **PAN: AACCB1409R**
Appellant		Respondent

Appellant by : Ms S. Padmaja (DR)

Respondent by : Sh. Bhupendra Karkhanis (AR)

Date of Hearing : 14.05.2018

Date of Pronouncement : 30.05.2018

Order Under Section 254(1) of Income –tax Act

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by Revenue under section 253 of the Income-tax Act (the Act) is directed against the order of ld. Commissioner of Income-Tax (Appeals)-4 [ld. CIT(A)], Mumbai dated 10.08.2016 for Assessment Year 2010-11.

2. Brief facts of the case are that the assessee-company is engaged in the Entertainment Industries-Television Channels Business for providing Direct to Home Services ('DTH') through Satellite. The assessee distribute various channels through DTH platform by subscribing various channels like Star, Sony, Zee etc. and pays them subscription charges to re-distribute their TV Channels. During the assessment, the Assessing

Officer on perusal of Profit & Loss Account noted that assessee has debited from Profit & Loss Account of Rs. 30,36,11,392/- as a Programming and other costs. The assessee was asked to submit the details of the expenses and show-cause as to why the said expenses should not be disallowed under section 40(a)(ia). The assessee filed its reply and contended that the payment paid for the pay channel charges are not for a right transferred, information imparted, allowed use of patent, invention, model, design, trademark, etc. The assessee did not receive any information, technical knowledge, experience or skill. The assessee is also not granted right to use any right, information or intellectual property or any equipment. Therefore, payment of carriage fees is not fitting anywhere in the definition of 'royalty' and hence section 194J is not applicable. Further, Explanation 6 to Section 9(1)(vi) of the Act was not at all on statute in the captioned AY, it is impossible for the assessee company to foresee such provision and deduct tax at source u/s 194J of the Act. The assessee also contended that the term 'Royalty' has been defined in Explanation (v) to Section 40(a)(ia) to mean to have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9. Explanation 6 has not been included in definition of royalty in Section 40(a)(ia) and accordingly, the disallowance of channel placement fees u/s 40(a)(ia) of the Act by invoking Explanation 6 of the Act does not arise. The assessee also contended that they had deducted TDS u/s 194C of the Act out of

abundant caution, at best, only proportionate disallowance of channel placement fees should be made and not the entire expenditure. The contention of assessee was not accepted by Assessing Officer. The assessee was asked to produce the copy of agreement that the contents/channel provider. The assessee provided the copy of said agreement. The Assessing Officer after referring the various clauses on agreement concluded that assessee was required to deduct TDS under section 194H, therefore, the discount to dealer and distributor amounting to Rs. 30,36,36,11,392/- was disallowed under section 40(a)(ia). On appeal before the ld. CIT(A), the entire addition was deleted. Therefore, aggrieved by the order of ld. CIT(A), the Revenue has filed the present appeal before us. The Revenue has raised the following grounds of appeal:

> 1. Whether on the facts, in the circumstances of the case and as per law, the Ld. CIT(A) has erred in directing to delete the disallowance u/s. 40(a)(ia) rws 194J in respect of Pay channel Charges/ Subscription Charges' and failing to appreciate that the payments made for use/right to use of 'process' are 'royalty' as per Explanation 6 to section 9(1)(vi) hence such payments are covered u/s. 194J of the Income-tax Act, 1961.
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> 2. Whether on the facts, in the circumstances of the case and as per law, the Ld. CIT(A) has erred in relying on the order of Hon'ble ITAT Mumbai in the cases of ACIT(TDS)-3(1) Vs. UTV Entertainment (ITA No. 2699/Mum/2012 dt.29.10.2014) and that of ACIT-11(1) Vs. NGC Networks (I) Pvt. Ltd. (ITA NO. 1382/Mum/2014 dt. 09.07.2014) without realizing that both these decisions are rendered in respect of short deduction of channel placement fees, whereas m the instant case the payment was made by the assessee who is a MSO to various broadcasters for acquiring the rights in the program content owned by them.

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.

3. We have heard the ld. Departmental Representative (DR) for the Revenue and ld. Authorized Representative (AR) of the assessee and have gone through the orders of authorities below. The ld. DR for the Revenue supported the order of Assessing Officer and prayed for restoring the order of assessing officer. The ld. DR for the Revenue submits that the ratio decided in CIT v/s Vatika Township Pvt. Ltd. 367 ITR 466 (SC) is squarely applicable on the fact of the present case. The ld. DR for the Revenue relied upon the decision of Hon'ble Delhi High Court in case of CIT v/s Prasar Bharti (Broadcasting Corporation of India) (292 ITR 580 (Del), Hon'ble Bombay High Court in CIT v/s UTV Entertainment Television Ltd. (399 ITR 443 (Bombay) and decision of Mumbai Tribunal in case of ACIT v/s NGC Network (I) (P.) Ltd. [2014] 48 taxmann.com 149 (Mumbai Trib.).

4. On the other hand, the ld. AR of the assessee supported the order of ld. CIT(A). The ld. AR of the assessee further submits that Hon'ble Delhi High court in case of CIT v/s Prasad Bharti (Broadcasting Corporation of India) (supra) held that payment toward broadcasting and telecasting including production of programmes for such broadcasting and telecasting would fall under the provision of section 194C. The ld. AR for the

assessee submits that the payments to channel charges or subscriptions is not royalty. In support of his submissions he relied on the decision of Punjab and Haryana High Court in Kurukshetra Darpan (P) Ltd Vs CIT (169 Taxman 344), decision of Tribunal in Kerala Vision Ltd Vs ACIT ITA No.794/Cochin/2013, ITO Vs Wire & Wireless (India) Ltd. 2384 to 2386/M/2013. The ld. AR of the assessee submits that no disallowance can be made under section 40(a)(ia) in case there is short deduction of TDS. In support of his submission, the ld. AR of the assessee relied upon the decision of CIT vs. S.K. Tekriwal (46 taxmmann.com (444) (Calcutta High Court), CIT vs. S.K. Tekriwal (15 taxmmann.com 289) (Kolkata ITAT), DCIT vs. Chandubhoy and Jassobhoy (49 SOT 448) (Mumbai ITAT) & Nitin Panchamiya vs. ACIT 950 SOT 468) (Mumbai ITAT). The ld. AR of the assessee further submits that assessee cannot hold liable on subsequent amendment made on account of retrospective amendment in the law. In support of his submission, the ld. AR of the assessee relied upon the decision in case of Channel Guide India Ltd. vs. ACIT (25 Taxman.com 25) (Mumbai ITAT), Rich Graviss Products (P.) Ltd. vs. ACIT (ITA No. 7772/Mum/2011 (Mumbai ITAT) and Kerala Vision Ltd. vs. ACIT (ITA No. 794/Cochin./2013 (Cochin ITAT). The d AR for the assessee finally submits that the case law relied by ld. DR for the revenue in Vatika Township Pvt Ltd (supra) is favorable to the assessee.

5. We have considered the rival submission of the parties and have gone through the orders of authorities below. During the assessment, the Assessing Officer the assessee was asked to submit the details of the expenses of Rs. 30,36,11,392/- as a Programming and other costs and show caused as to why it should not be disallowed under section 40(a)(ia). The assessee filed its reply and contended that the payment paid for the pay channel charges are not for a right transferred, information imparted, allowed use of patent, invention, model, design, trademark, etc. The assessee did not receive any information, technical knowledge, experience or skill. The assessee is also not granted right to use any right, information or intellectual property or any equipment. The payment of carriage fees is not fitting anywhere in the definition of 'royalty' and hence section 194J is not applicable. The assessee also contended that Explanation 6 to Section 9(1)(vi) of the Act was not at all on statute book during the relevant period so it was impossible for the assessee company to foresee such provision and deduct tax at source u/s 194J of the Act. The assessee also contended that the term 'Royalty' has been defined in Explanation (v) to Section 40(a)(ia) to mean to have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9. Explanation 6 has not been included in definition of royalty in Section 40(a)(ia) and the disallowance of channel placement fees u/s 40(a)(ia) by invoking Explanation 6 of the Act does not arise. The assessee also contended that they had deducted TDS u/s 194C

of the Act out of abundant caution, at best, only proportionate disallowance of channel placement fees should be made and not the entire expenditure. The contention of assessee was not accepted by Assessing Officer. The assessing officer concluded that the legislature has always intended that a "Process" such as transmission by satellite (including up linking, amplification, conversion, or down linking of any signal) cable, optic fiber or any other similar technology, whether or not such process is a secret constitute and embedded in the definition of 'Royalty'. The Assessing Officer also perused the various clauses on agreement and took the view that assessee was required to deduct TDS on discount to dealers and distributors under section 194H, therefore, the discount to dealer and distributor amounting to Rs. 30,36,36,11,392/- was disallowed under section 40(a)(ia).

6. The assessee urged the similar contention before ld. CIT (A). The assessee also contended that the said payment falls under the definition of 'work' as provided under section 194C. In support of its contention the assessee relied on the decision of Hon'ble Delhi High Court in CIT Vs Prasar Bharat [2007]158 Taxman 470 in context that where two provisions are simultaneously introduced in the Act, one is specific and other is general in term then the resort must be to the specific provision. Therefore, the assessee contended that the work of broadcasting and telecasting of the programme specifically falls under the ambit of section 194C and section

194J cannot apply. The assessee also relied on the CBDT Circular No.720 dated 30.08.1995. The ld CIT(A) after considering the submissions of the assessee and on relying the decision of Tribunal in ACIT Vs U TV Entertainment, ITA No. 2699/M/2012 dated 29.10.2014 and ACIT Vs NGS Network(I) Pvt Ltd, ITA No.1382/M/2014 dated 09.07.2014, wherein it was held that when the amount in question was paid by the assessee was not taxable in India in under section 9(1)(vi) or (vii) as per the legal position at the relevant time and therefore, the assessee was liable to deduct tax at source from the amount by invoking section 40(a)(ai) and granted relief to the assessee.

7. The Hon'ble Punjab and Haryana High Court in Kurukshetra Darpans (P) Ltd Vs CIT (supra) held that when the assessee, a cable operator , entered in to a contract with licensor for various TV channels for obtaining telecast signals for local distribution through its cable network and paid subscription charges to the licensors, payments made to licensor would attract provisions of section 194C, as licensor is a person who perform work which is covered within the meaning of clause(b) of Explanation III to section 194C(2).

8. We have noted that the coordinate bench of Mumbai Tribunal in Channel Guide India Ltd (supra) while considering the scope of 'process' introduced in Exploration 6 to section 9(1)(vi), inserted by Finance Act 2012 with retrospective effect from 1 June 1976. The Tribunal held that

based on a decision of legal Maxim ***lex non cogit ad impossiblia*** meaning thereby that the law cannot possibly compel a person to do something which is impossible to perform the Tribunal relied on a decision of Supreme Court in case of Krishna Swamy S PD and others Versus Union of India and others (281 ITR 305SC) and held that the amount in question paid by assessee, which was not taxable in India in the hand of assessee as per section 9(1)(vi), as per legal position, at the relevant time and the assessee, therefore, was not liable to tax at source from the said amount paid by them and therefore, there was no question of disallowance of the said amount by invoking the provision of section 40(a)(ai). Further in case of Rich Graviss Products (P) Limited Versus ACIT (supra) held that the provision of section 194J bring 'Royalty' under its purview, however, the transaction made by the assessee before the insertion of clause (c) in section 194J, which has been inserted with effect from 13 July 2006, will not be hit by the provisions of section 194J accordingly section 194J will not be attracted to the payment made by assessee for the purchase of software before 13 July 2006. It was held that the disallowance under section 40(a)(ia) cannot be made for the payment of purchase of software in assessment year 2007-08, on the basis of amendment made in section 9(1)(vi) by Finance Act 2012 with retrospective effect. We have noted that the assessee has made the payments in the financial year 2010-11 relevant to the assessment year

2010-11, therefore the assessee has no occasion to foresee such amendment and the assessee cannot be held liable for deduction of tax at source. Moreover, the Hon'ble Punjab and Haryana High Court has held that the payment made in contract with licensor for various TV channels for obtaining telecast signals for local distribution through its Cable network and paid subscription charges to the licensors, payments made to licensor would attract provisions of section 194C. Therefore, keeping in view of the above discussed factual and legal position the assessee succeeded on both the counts that the payments made on account of cable network and paid subscription charges are not royalty and payments made to licensor would attract provisions of section 194C. Even otherwise the assessee cannot be held liable due to due to subsequent amendment in law for deduction of tax at source for previous financial year.

9. We have further noted that the case law relied by ld. DR for the revenue is not helpful to her, as the same are more favorable to the assessee. In Vatika Township Private limited (supra) held that proviso in the Finance Act, 2003 further makes it clear that such a provision was necessary to provide for surcharge in the cases of block assessments and thereby making it prospective in nature. The charge in respect of the surcharge, having been created for the first time by the insertion of the proviso to section 113, is clearly a substantive provision and hence is to be construed prospective in operation. The amendment neither purports to be merely

clarificatory nor is there any material to suggest that it was intended by Parliament. Furthermore, an amendment made to a taxing statute can be said to be intended to remove 'hardships' only of the assessee, not of the Department. On the contrary, imposing a retrospective levy on the assessee would have caused undue hardship and for that reason Parliament specifically chose to make the proviso effective from 01.06.2002 and dismissed the appeal of the revenue. We have also noted that the other case law relied by ld DR in CIT v/s Prasar Bharti (supra), in CIT v/s UTV Entertainment Television Ltd. (supra), and decision of Mumbai Tribunal in case of ACIT v/s NGC Network (I) (P.) Ltd.(supra) are more favorable to the assessee. Hence, the grounds of appeal raised by the revenue are dismissed.

10. In the result, appeal filed by Revenue is dismissed.

Order pronounced in the open court on 30.05.2018.

Sd/- **B.R. BASKARAN** **ACCOUNTANT MEMBER**	**Sd/-** **PAWAN SINGH** **JUDICIAL MEMBER**

Mumbai, Date: 30.05.2018
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<u>Copy of the Order forwarded to</u> :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4.The concerned CIT
5. DR “A” Bench, ITAT, Mumbai
6. Guard File

BY ORDER,
Dy./Asst. Registrar
ITAT, Mumbai