IN THE INCOME TAX APPELLATE TRIBUNAL "L" BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAVISH SOOD, JM

I.T.A. Nos.667 to 674/Mum/2016
(Assessment Year: 2015-16)

Viacom 18 Media Pvt. Ltd. Zion Bizworld, Subhash Road-A, Near Garware Office, Vile Parle (E), Mumbai-400 057	Vs.	Asst. Director of Income – tax (International Taxation)-4(30(1), Scindia House, Mumbai-400 001
PAN/GIR No. AAACM 9164 E		
(**Appellant**)	:	(**Respondent**)

Appellant by	:	Shri Abhishek Tilak
Respondent by	:	Shri M. V. Rajguru

Date of Hearing	:	12.04.2018
Date of Pronouncement	:	09.07.2018

O R D E R

Per Bench:

These are appeals by the assessee against the respective orders of the ld. Commissioner of Income Tax (Appeals) for the concerned assessment years. Since the issues are common and the appeals were heard together these have been disposed of by this common order.

2. The common grounds of appeal read as under:

> 1. On the facts, and in the circumstances of the case, and in law, the learned Commissioner of Income-tax (Appeals) - 58, Mumbai ['CIT(A)'] has erred in holding that the payments of transponder fees by the Appellant to MEASAT Satellite Systems Snd. Bhd, Malaysia ('MEASAT'), are taxable under the Income-tax Act, 1961 ('the Act'), and under the India-Malaysia Tax Treaty ('the Treaty'), and hence, are subject to tax withholding under Section 195 of the Act.
> 2. On the facts, and in the circumstances of the case, and in law, the learned CIT(A) ought to have held that the transponder fees payable by the Appellant to

MEASAT are not taxable in India and consequently, not subject to tax withholding under Section 195 of the Act.

3. The assessee has also raised the common additional grounds which read as under:

> 3. On the facts and in the circumstances of the case, and in law, the transponder fees payable by the Appellant to Measat Satellite Systems Snd. Bhd. ought not to be taxable in India and consequently, not subject to withholding of tax under Section 195 of the Act, in light of the following decision of the Hon'ble Mumbai Tribunal on identical facts and issues:
> • Taj TV Ltd. [(2016) 161 ITD 339 and (2017) 162 ITD 674]
> • United Home Entertainment Pvt. Ltd. (ITA No.2841 to 2856/Mum/2012 and ITANo.5171 to518l/Mum/2013).
> 4. Without prejudice to the above and in the alternative, this issue be referred to a larger / special bench to resolve the views rendered by the Hon'ble Income Tax Appellate Tribunal Mumbai Bench in the case of the Appellant and the other assessees which are conflicting and contrary to one another if the Hon'ble Bench decides to follow decision rendered in assessee's own case.
> The above grounds are independent and without prejudice to the grounds of the appeal filed earlier.

4. For acceptance of the additional ground, it has been submitted that they are essentially for the due dispensation of substantial of justice. In this regard, the assessee has placed reliance on the following case laws:

- Jute Corporation of India Limited v CIT [1991] 187 ITR 688 (SC)
- National Thermal Power Co. Ltd v CIT [19981 229 ITR 383 (SC)
- CIT v Nelliappan (S.) |1967] 66 ITR 722 (SC)
- Ahemdabad Electricity Co. Ltd. v CIT [1993] 199 ITR 351 (Bom.)
- Ashok Vardhan Birla v CWT |1994| 208 ITR 958 (Bom.)
- Inaroo Ltd. v CIT (1993] 204 ITR 312 (Bom.)
- CIT v Goviodram Bros. Pvt. Ltd. [1983] 141 ITR 626 (Bom.)

5. Since the facts are identical, we are referring to the facts and figures from ITA No. 667/Mum/2016. Accordingly, we adjudicate the issues arising out of all the above grounds including the additional grounds as under:

6. The assessee in this case has filed an appeal under section 248 of the income Tax Act, 1961 (the Act) contesting its liability to deduct TDS under section 195 the Act. The assessee has made certain remittances (being transponder lease rentals) to Measat Satellite Systems Snd. Bhd. Malaysia (Measat). Although denying its liability to pay TDS on this amount, the assessee has deducted TDS on its remittances to Measat. It has filed an appeal before the ld. Commissioner of Income Tax (Appeals) claiming that the amounts paid to the non resident are not liable to tax in India and hence it does not have a liability to deduct TDS on these remittances.

7. Brief facts of the case are that the assessee is a company registered in India and is primarily engaged in broadcasting television channels from India. It is also engaged in marketing of advertising airtime on these channels, distribution of the channels, marketing and distribution of films and production of program content/television software. The assessee has leased transponder capacity on a 24 hours a day, 7 days a week basis on satellites owned by Measat Satellite Systems Snd. Bhd. a Malaysian Corporation (Measat) as per the "Transponder Lease Agreement" dated 8thNovember. 2012 entered into between the ass and Measat. In consideration for the transponder capacity leased to the assessee, it has to pay rentals to Measat on a monthly basis as per para 4 and annexure II of the agreement. As per para 4.5 of this agreement, the taxes, if any, payable on the transponder lease rentals, are to be borne by the assessee. The assessee has made various transponder fee payable to Measat.

8. Considering the assessee's appeal, the ld. Commissioner of Income Tax (Appeals) noted that the assessee has also leased transponder capacity from Intelsat, a USA based company. That it has approached the assessing officer for a certificate under section 195(2) of the Act allowing it not to deduct any taxes from the remittances made to Intelsat. That the Assessing Officer passed an order under section 195(2) of the Income Tax Act holding the assessee liable to deduct tax on this amount treating the same as royalty and hence subject to TDS. That the Assessing Officer has also directed grossing up of the amount as well as payment of surcharge on the remitted amount. That while in case of Intelsat, the order under section 195(2) has been a subject matter of appeal, in the case of remittances to Measat, the assessee has filed an appeal under section 248 denying its liability to deduct TDS on these amounts. That the claim of the assessee is that the amounts represent business income of the non-resident and in absence of a permanent establishment; the amounts are not liable to tax in India.

9. The ld. Commissioner of Income Tax (Appeals) elaborately discussed the issue. He noted that in assessee's own case this ITAT has decided the issue against the assessee in ITA No.5143/Mum/2013 vide order dated 8.07.2015. The ld. Commissioner of Income Tax (Appeals) quoted from the said order and concluded as under:

> It is seen that the grounds raised by the appellant are similar to the issues raised by the same appellant before the L Bench of Hon'ble ITAT [2014] 44 taxmann.com 1 (Mumbai – ITAT) ITA No. 1584/Mum/2010 and other appeals wherein the ITAT has held the payments made to Intelsat, USA to be in the nature of royalty, thus upholding the order of the A.O. under section 195(2). The ITAT held that:
> "17. Thus it is clear that in the case of Siemens Aktiengesellschaft (supra) it was found that the payment was not royalty as defined in the clauses of agreement and, therefore, it could not be taxed as royalty as per the provisions of the Act. The

Hon'ble High Court though was of the view that if any term Is not at all defined in the treaty then considering the express language of Article 1(2) of the Indo-German DTAA, the term defined in the act even by subsequent to the date of agreement would be applicable as set out in the Article 1(2) of the treaty Therefore the said decision will not help the case of the assessee before us because the Explanation 6 defines the term process and not royalty and further there is no change in the definition of royalty by virtue of Explanation 6. The other decisions relied upon by the assessee are based on the decision of Hon'ble Delhi High Court in the case Asia Satellite Communication Co Ltd (supra) which was prior to the amendment and without considering the Explanation 6 as well as Explanation below sub-section {2} of section 9. Further the benefit of the decision of Hon'ble Madras High Court In the case of Verizon Communications Singapore Pie. Ltd (supra) was not available at the time of those decisions, therefore, the same was not applicable in the facts of the ass's case. In fact, the said decision, based on the situs of the process itself supports the Revenue's case of the same being a process as contemplated under Explanation 2 to s. 9(1)(vi).

18, In view of the above discussion we (Jo not find any reason to interfere with the orders of authorities below."

5.2 In the above, case, the appellant had made remittances to Intelsat, a US company for the very same reason i e, for leasing of transponder capacity The Hon'be I TAT having factored all the issues which are now raised by the appellant before this office and having considered the judgments of higher judicial authorities, had come to a conclusion that subsequent to the amendment introducing the definition of word 'process', the payment made by the appellant to Intelsat is liable to be categorised as royalty under Artice 12 of the India US DTAA as well as section 9(1)(vi) of the Income Tax Act. This decision has been affirmed by ITAT in other similar appeals fried by the appellant like ITA No. 2910 & 2911/Mum/2012.

5.3 In the present case, the remittances have been made to Measat, Malaysia, it is seen that even in the case of remittances made to Measat, the ITAT has already decided the issue against the appellant in appeal no. ITA No. 5143/M/2013 dated 08/07/2015 wherein the ITAT has held as under:

"4. We have heard the rival contentions and also considered the orders fo the lower authorities as well as the Tribunal's order submitted by the Ld. AR. We find that the Tribunal while rejecting the claim of the ass has observed as under:

"the use of transponder by the ass for telecasting/broadcasting the programme involves the transmission by the satellite including uplinking, amplification, conversion for downlinking of signals which falls within the expression "Process" as per explanation 6 of section 9(1)(vii). Hence, the payment made for the right to use of process falls in the ambit of expression "royalt" as per DTAA as well as provisions of Income Tax Act, 1961 Tax Act."

5. In view of the above, respectfully following the findigs of the Tribunal as noted above, we hold that the transponder fee paid by the ass to MEASAT

> Malaysia was in the nature of royalty under the treaty as well as under the Income Tax Act. Ground no. 2 of the appeal is decided accordingly against the ass and in favour of the Revenue."
>
> 5.4 The facts of the present appeal are entirely same. Respectfully following the above judgment of the Hon'ble ITAT in respect of the same assessee on same issues, the claim made by the appellant in its appeal that it is not liable to deduct tax from the transponder fees payable to Measat is liable to be dismissed.
>
> 6. In the result, it is held that the remittances made by the appellant to Measat represent income in the nature of royalty both under the Income Tax Act as well as the DTAA between India and Malaysia Hence, the amounts are held to be liable to tax in India. The appellant is held liable to deduct suitable tax from the transponder fees payable by the appellant to MEASAT

10. Against the above order, the assessee is in appeal before us.

11. We have heard both the counsel and perused the records. It transpires that this tribunal in assessee's own case has considered the same issue as raised in the main grounds of appeal in ITA No. 3776/Mum/2015 for assessment year 2013-14 vide order dated 07.08.2017. The tribunal had referred to the above said decision of the Tribunal in assessee's own case and held as under:

> 7.2 We note that in coming to the aforesaid decision, this Tribunal has referred the decision of Hon'ble Madras High Court in the case of Verizon Communications Singapore Private Limited 361 ITR 575. In the said decision of the Tribunal the decision of the Hon'ble Delhi High Court in the case of a Asia Satellite Communications was also considered. Thus we note that there is a decision of ITAT in assessee's own case in which ratio from the Hon'ble Madras High Court has been followed. Now the learned Counsel of the assessee is urging us that the decision of the Hon'ble Delhi High Court in the case of DIT v. New Skies Satellite BV (68 Taxmann.com 8) which is in favour of the assessee should be followed.
>
> 7.3 We note that there is no decision of the Hon'ble jurisdictional High Court on this subject. The Tribunal in assessee's own case has rendered the decision against the assessee by placing reliance upon the decision of Hon'ble Madras High Court in the case of Verizon Communication (supra). Here we note that the aforesaid decision of Hon'ble Madras High Court in Verizon Communication (supra) was also considered by Hon'ble Delhi High Court in New Skies Satellite (supra), but the Delhi High Court chose to differ from Hon'ble Madras High Court. The

reference to the Hon'ble jurisdictional High Court decision in the case of Smt.Godavari Devi Sarraf (supra) by the assessee's Counsel does not support the case of the assessee. In the said decision of Hon'ble jurisdictional High Court, there was no issue of choosing a decision when Hon'ble High Court's differ. 7.4 It is not the case here that the Hon'ble Madras High Court decision in the case of Verizon (supra) is not relevant. The plea of the assessee's Counsel is that Hon'ble Delhi High Court has differed from the same. This, in our considered opinion, cannot be a reason to differ from the Tribunal's decision in assessee's own case which has followed the Hon'ble Madras High Court decision. Similar view was also expressed by this Tribunal in the case of Gartner Ireland Ltd. (supra). The contention of the learned Counsel of the assessee that there is no contrary decision of a High Court is not acceptable in the light of Tribunal's finding in assessee's own case supra in paragraph 12 above wherein the Tribunal observed that "Hon'ble Madras High Court in the case of Verizon Communication (supra) while considering identical issue has observed in paragraph 33 as under……." 7.5 Hence in the present situation, we have a Tribunal decision in assessee's own case wherein ratio from decision of Hon'ble Madras High Court has been followed. Hence the learned Counsel of the assessee's pleading to take a different stand on the basis of a Delhi High Court decision which has not followed the Hon'ble Madras High Court decision is not sustainable. This is more so in absence of any jurisdictional High Court decision and after noting the fact that assessee is in appeal before the Hon'ble jurisdictional High Court against the Tribunal's decision in assessee's own case wherein decision of a High Court has been specifically followed. Hence following the aforesaid consistent decisions of the ITAT in assessee's own case, for successive four years, which has been appealed against but not yet reversed by Hon'ble jurisdictional High Court, we do not find any infirmity in the order of the learned CIT(A). Accordingly, we uphold the same.

12. Against the above order, the assessee is in appeal before us.

13. We have heard both the counsel and perused the records. The ld. Counsel of the assessee has given written submissions. It has been submitted that Measat is a tax resident of Malaysia as per Article 4 of Indian Malaysia Tax treaty and it does not have a permanent establishment in India. In the submission it has further been urged that the earlier orders in the assessee's own case are no longer binding in view of substantial favorable judgment of Hon'ble High Courts. It has further been submitted that the ITAT,

Mumbai in several cases has chosen not to apply the ratio of its judgement in assessee's case but has applied subsequent favorable decision of Hon'ble Delhi High Court in the case of *New Skies Satellite BV* (supra). That ITAT failed to consider the other decision of ITAT referred. That the recent decision of ITAT, Mumbai dated 07.08.2017 in assessee's own case is per-in-curium. That merely because the issue was decided in assessee's case in one order, does not debar the tribunal to debar its circumstances so justified. It has further been submitted that the decision of Gartner Ireland Ltd. (supra) relied upon by the Tribunal is distinguishable. Further, the ld. Counsel of the assessee has quoted some decision on rule of consistency and departable there for.

14. Per contra, the ld. Departmental Representative relied upon the orders of the ld. Commissioner of Income Tax (Appeals) and the order of the ITAT in assessee's own case. The ld. Departmental Representative submitted that in orders for successive years in assessee's own case, the issue has been decided against the assessee. The matter is already before the Hon'ble jurisdictional High Court and the same has not yet been reversed. He further submitted that all the issues raised hereinabove have already been dealt with in the above said tribunal order. Hence, the ld. Counsel of the assessee prayed that following the consistent policy, this issue should be decided in favour of the Revenue.

15. Upon careful consideration, we note that the identical issue has been decided by the ITAT in assessee's own case on a number of successive preceding years by a series of orders against the assessee. The submissions of the ld. Counsel of the assessee

hereinabove are already dealt with therein and held that it was incumbent upon the assessee to deduct tax at source. Hence, the present issue in the appeal as to whether the assessee was liable for deducting the TDS on transponder fee payable to MEASAT Malaysia has to be decided against the assessee by following the decision of the ITAT in assessee's own case hereinabove, since the reasoning submitted by the ld. Counsel of the assessee to deviate from the earlier order of the tribunal in assessee's own case had already been dealt with hereinabove.

16. It will further be not out of place to mention that in judicial hierarchy decisions of honourable High Court are ranked higher than that of the tribunal. Furthermore, in some of the decisions of the tribunal referred by the learned counsel of the assessee, the decision in favour of assessee was also rendered by taking into account the fact that it had been conclusively held by honourable High Court that the income was not chargeable to tax in the hands of the payee. Hence, there was no liability on the part of payer to deduct tax at source. In the present case, we find that except for the assessee's submission that the recipient being non-resident is not chargeable to tax on the sum paid, there is no decision of honourable High Court backing the scheme. Furthermore, we are not sitting in judgement on the chargeability in hands of the recipient as the facts and the necessary background material are not available on record before us.

17. In this regard, we may gainfully refer to honourable Delhi High Court decision in the case of *Galileo Nederland BV* 367 ITR 319 for the following proposition:

> "Decision on an issue or question taken in earlier years though not binding should be followed and not ignored unless there are good and sufficient reasons to take a different view. Thus, it was/is possible for the Assessing Officer to depart from the

finding or a decision in one year as it is final and conclusive only in relation to a particular year for which it is made.....
The said principle is also based upon the rules of certainty and consistency that a decision taken after due application of mind should be followed consistently as this leads to certainty, unless there are valid and good reasons for deviating and not accepting the earlier decision. "

18. Accordingly in the background of aforesaid discussion and precedent we uphold the order of learned Commissioner of income tax and decide the issue against the assessee.

19. In the result, all the appeals filed by the assessee stands dismissed.

Order pronounced in the open court on 09.07.2018

Sd/-	Sd/-
(Ravish Sood)	(Shamim Yahya)
Judicial Member	Accountant Member

Mumbai; Dated : 09.07.2018
Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai