IN THE INCOME-TAX APPELLATE TRIBUNAL "F" BENCH MUMBAI

BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER

AND SHRI PAWAN SINGH JUDICIAL MEMBER

ITA No. 4316/Mum/2017 (Assessment Year 2011-12)

M/s Videocon d2h Limited (Formerly known as M/s Bharat Business Channel Ltd.) 171/C, Mittal Court, Nariman Point, Mumbai-400021. **PAN: AACCB1409R**	Vs.	ACIT- 16(1) Room No. 439, 4th Floor, Aayakar Bhavan, M.M. Road, Mumbai-400020.
Appellant		Respondent

Appellant by : Shri Bhupendra Karkhanis (AR)

Respondent by : Shri S. Padmaja (DR)

Date of Hearing : 10.10.2018

Date of Pronouncement : 10.10.2018

ORDERUNDER SECTION 254(1)OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee under Section 253 of Income-tax Act is directed against the order of ld. CIT(A)-4, Mumbai dated 17.03.2017 for Assessment Year 2011-12. The assessee has raised the following grounds of appeal:

> 1. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) [The Ld. CIT(A)] erred in holding that the appellant is not interested in pursuing the appeal and consequently erred in not granting sufficient opportunity of being heard which is unjustified, wrong and contrary to the facts and circumstances of the case, the provisions of the Income Tax Act, 1961 and the Rules made thereunder.
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> 2. On the facts and in the circumstances of the cases, the Ld. CIT (A) erred in summarily dismissing the appeal filed by the assessee for want of prosecution, without deciding the issues on merits which is unjustified, wrong and contrary

to the facts of the case, the provisions of the Income Tax Act, 1961, and the Rules made thereunder.

3. (a) On the facts and in the circumstances of the case and in law, the learned Assessing Officer erred in disallowing an amount of Rs.140,16,56,008/- being Content & other support Costs by invoking the provisions of section 40(a)(ia) by treating said payments made as covered u/s 194-J of the Income Tax Act 1961 and the reasons assigned for doing so are wrong and contrary to the facts of the case, the provisions Act of Income Tax Act, 1961, and the Rules made thereunder.

(b) On the facts and in the circumstances of the case and in law, the learned Assessing Officer erred in holding that the content procurement charges paid by the appellant company of Rs. 140,16,56,008/- comes under the definition of the term "Royalty" as contained in Explanation 2 to Section 9(1)(vi) of the Income Tax Act, 1961 and thus is liable for deduction of tax at source under section 194J and the reasons assigned for doing so are wrong and contrary to the facts of the case, the provisions of Income Tax Act, 1961, and the Rules made thereunder.

(c) Without prejudice to above on the facts and in the circumstances of the case and in law, the learned Assessing Officer failed to appreciate that:

(i) Section 40(a)(ia) of the Act can be invoked only in the event of non-deduction of tax but not for lesser deduction of tax at source.

(ii) The appellant has deducted tax at source u/s 194C of the Act from the said payments as against section 194J as contended by the learned Assessing Officer, and thus disallowance u/s 40(a)(ia) of the Act cannot be made.

2. At the outset of hearing, the ld. Authorized Representative (AR) of the assessee submits that the grounds of appeal raised by assessee are covered in favour of assessee by the decision of Tribunal in assessee's own case for Assessment Year 2010-11 in ITA No. 6795/Mum/2016 dated 30.05.2018.

3. On going through the grounds of appeal and decision of Tribunal in assessee's own case in ITA No. 6795/Mum/2016, the ld. Departmental Representative (DR) for the Revenue fairly conceded that the grounds of appeal raised by assessee is covered in favour of assessee and against the Revenue.

4. We have considered the rival submission of the parties and have gone through the orders of authorities below and the decision of Tribunal. We have noted that the grounds of appeal are covered in favour of assessee and against the Revenue in assessee's own case for Assessment Year 2010-11 has passed the following order:

> "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.

5. Considering the decision of Tribunal in assessee's own case in Assessment Year 2010-11 in ITA No. 6795/Mum/2016 dated 30.05.2018, the grounds of appeal raised by assessee are covered, hence, the grounds of appeal raised by the assessee are allowed.

6. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 10 /10/2018.

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

Mumbai, Date: 10 .10.2018
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Copy of the Order forwarded to :

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

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