

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH : KOLKATA

[Before Hon’ble Shri M.Balaganesh, AM & Hon’ble Shri S.S.Viswanethra Ravi, JM]

I.T.A No. 1359/Kol/2015

Assessment Year : 2011-12

DCIT, Circle-7(1), Kolkata

-vs-

M/s Jet Age Securities Pvt. Ltd.

[PAN: AABCJ 0993 R]

(Appellant)

(Respondent)

For the Appellant : Shri Saurabh Kumar, Addl. CIT Sr. DR

For the Respondent : Shri Manoj Kataruka, Advocate

Date of Hearing : 19.09.2018

Date of Pronouncement : 26. 10.2018

ORDER

Per M.Balaganesh, AM

1. This appeal by the Revenue arises out of the order of the Learned Commissioner of Income Tax(Appeals)-11, Kolkata [in short the Id CIT(A)] in Appeal No.570/CIT(A)-11/Circle-7/Kol/14-15 dated 20.08.2015 against the order passed by the DCIT, Circle-7, Kolkata [in short the Id AO] under section 143(3) of the Income Tax Act, 1961 (in short “the Act”) dated 18.03.2014 for the Assessment Year 2011-12.

2. The first issue to be decided in this appeal is as to whether the Id CITA was justified in directing the Id AO to treat the profits from sale of shares to be taxed as short term capital gains (STCG) instead of business income as done by the Id AO, in the facts and circumstances of the case.

2.1. The brief facts of this issue are that the assessee is a private limited company engaged in stock broking, trading activities as well investment. The return of income for the Asst Year 2011-12 was filed on 28.9.2011 declaring total income of Rs 2,13,73,564/-. The assessee company has turnover from operations at Rs 2,96,66,907/- and income from investment is Rs 2,92,97,473/- only. This investment income consists of dividend (net) of Rs 12,33,282/- and the balance income is from units of mutual fund of Rs 1,49,34,415/- ; profit on investment in shares of Rs 1,13,56,022/- and profit from Gold Exchange Traded Fund of Rs 17,73,752/-. The assessee suffered loss of Rs 69,97,401/- on derivative transactions. The assessee disclosed short term capital gains of Rs 1,14,78,523/- which included loss u/s 94(7) of the Act of Rs 1,22,500/-. From the analysis of the chart showing the computation of STCG, the Id AO observed that the assessee had repeatedly purchased shares of few companies in large quantities with very low average period of holding. The Id AO accordingly sought to treat the said gains as income from business as against STCG, for which show cause notice was issued to the assessee.

2.2. The assessee replied that it has dual portfolio i.e investment and trading in shares and accordingly two separate depository participant (DP in short) accounts with HDFC Bank are maintained. At the time of purchase of securities, the assessee company decides whether the same is meant for investment portfolio or trading portfolio and accordingly the said shares on taking delivery are dematted with the respective DP account. This practice is followed by the assessee consistently over the past several years and there was no deviation from the earlier years. It was specifically brought to the notice that mere purchase and sale of shares at large with minimum period of holding of shares in some cases cannot be the ground for considering STCG u/s 111A of the Act as business income especially when there is no change in pattern of investment and transaction carried out by the assessee in shares during the year under consideration.

It was also submitted before the Id AO that principle of consistency is maintained by the assessee and the Id AO cannot take a different view for certain year when claim of assessee has been accepted for others.

2.3. The assessee also submitted that in addition to the investment in shares, it is also involved in derivative activities in shares, trading and speculation activities in shares and income from which is being considered as business income. So when income from trading shares, derivatives in shares and speculation in shares are being considered as business income, then income from investment activities in shares cannot be denied as STCG or LTCG as the case may be based on the period of holding.

2.4. The Id AO however disregarded the aforesaid contentions of the assessee by stating that the assessee company has the advantage of being itself the broker, where it has the ability to control the pace of transactions, coupled with the fact that a large information bank and infrastructure is available to it through the network of other brokers and clients, which an average investor is lacking. The assessee company can monitor the investments by minutes and to take further position of either holding it or selling it as per prevailing market conditions. The transactions involving the same share have been executed in small lots within a short span of time with the precision and accuracy of a professional broker and not as an amateur investor. He stated that such investment has not been done with an intention to earn dividend or long /medium term appreciation in the value. The immediate motive is to make some quick money, which is called 'day trading' in professional terms. Accordingly he observed that the assessee had declared STCG only to take advantage of lesser tax rates compared to that of business income which is to be denied in the instant case. The Id AO with these observations brought the STCG of Rs 1,14,78,523/- to tax under the head income from business as against STCG claimed by the assessee.

2.5. The Id CITA accepted the fact of dual portfolios maintained by the assessee and also gave weightage to the fact that the same was accepted by the department in the past years. He observed that in income tax assessment of earlier years, no finding was recorded by the Id AO that the assessee was a dealer in shares alone and for that reason income was assessable under the head business. The balance sheet of the assessee showed that its own capital and reserves were Rs 42.50 crores which was substantially higher than cost of investments in shares of Rs 29 crores. The investments were accounted in the books of accounts of the assessee company 'at cost' and not by following the 'lower of cost or market value' principle which is applicable to stock in trade. He observed that in the past assessment also, the assessee had disclosed the shares by way of investments and income derived from transfer of shares were always disclosed under the head 'capital gains' which was not disputed by the revenue in earlier years. With regard to principle of res judicate not applicable to income tax proceedings, he held that principle of consistency is one of the judicial principle which is required to be followed when fundamental facts permeating through various years are same and identical. He also placed reliance on the decision of Hon'ble Bombay High Court in the case of CIT vs Gopal Purohit reported in 336 ITR 28 (Bom) . Accordingly he directed the Id AO to treat the gains of Rs 1,14,78,523/- as STCG and not as business income. Aggrieved, the revenue is in appeal before us.

2.6. We have heard the rival submissions. We find from the materials available on record, the following facts are undisputed and indisputable :-

- a) The assessee has maintained dual portfolios i.e investment portfolio and trading portfolio .
- b) This has been maintained by the assessee for past several years.
- c) In the earlier years, the assessee had reported profits on sale of shares from investment portfolio under the head 'capital gains' and that from trading portfolio as 'income from business', which were accepted by the revenue in scrutiny assessments .

The relevant scrutiny assessment orders for the Asst Years 2007-08 , 2008-09 and 2009-10 are enclosed in pages 67 to 78 of paper book.

d) The assessee has maintained two separate Demat accounts with Depository Participant i.e one for investment portfolio and other for trading portfolio , to clearly identify the treatment to be given on sale of respective shares, depending upon the intention of the assessee at the time of purchase of shares. The relevant evidences are enclosed in pages 93 to 97 of paper book.

e) The assessee had derived interest income of Rs 1,42,79,959/- and interest expenditure of Rs 82,73,689/-. The interest expenditure is paid on bank overdrafts by pledging fixed deposits held by the assessee . In other words, the interest is paid on loans against fixed deposits.

f) The assessee has taken delivery of shares in respect of transactions in shares in investment portfolio and the same were duly dematted in the respective DP account.

g) The assessee had also offered business income in respect of sale of shares which were transacted from trading portfolio.

2.6.1. We find that the following chart would prove the treatment of gains on slae of shares under investment portfolio given by the assessee vis a vis the treatment of the ld AO :-

<u>Asst Year</u>	<u>Own Capital & Reserves</u>	<u>STCG u/s 111A</u>	<u>Other STCG</u>	<u>Remarks</u>
2006-07	175565350	13524936	1215270	143(3) and STCG u/s 111A Accepted by AO
2007-08	203199590	(3814596)	3976627	143(3) and STCG u/s 111A Accepted by AO
2008-09	343838436	35219673	3142977	143(3) and STCG u/s 111A Accepted by AO

2009-10 361453864 (13083594) 3534942 143(3) and STCG u/s 111A
Accepted by AO

For Asst Year 2010-11 , the Own Capital & Reserves was Rs 39,95,55,262/- ; STCG offered u/s 111A of the Act was Rs 1,93,33,138/- and Other STCG was Rs 8,93,714/-. Assessment was framed u/s 143(3) of the Act wherein STCG claimed u/s 111A of the Act was sought to be taxed as business income by the Id AO.

For Asst Year 2011-12 , the Own Capital & Reserves was Rs 42,64,37,583/- ; STCG offered u/s 111A of the Act was Rs 1,13,56,023/- (1,14,78,523-1,22,500) and Other STCG was Rs 45,83,787/-. Assessment was framed u/s 143(3) of the Act wherein STCG claimed u/s 111A of the Act was sought to be taxed as business income by the Id AO.

2.6.2. We find that this tribunal in assessee's own case for the Asst Year 2010-11 in ITA No. 1352/Kol/2011 dated 13.12.2017 in similar facts and circumstances had held as under:-

"7. Heard rival submissions and perused the material available on record. It is not disputed that treatment of income from sale of shares from investment portfolio is short term capital gain from A.Y 2006-07 to 2009-10. We find that in the A.Y 2006-07 this Tribunal held that the said income is not business income, directed the AO to treat the same as short term capital gain. Thereby the Revenue has been following the same from A.Y 2007-08 to 2009-10, which are evident from pages 65-75 of the Paper book-No. 2. We further find that the similar issue was disposed by the Hon'ble High Court of Calcutta in the case of Amitabh Sonthalia supra, wherein it was held that there is distinction between the investment and stock in trade. The income arises out of investment has to be treated as income from capital gain. In this regard, we may refer to the following observation of the Hon'ble High Court of Calcutta, as below:-

"We have heard both the parties and are of the opinion that no interference is called for. The Tribunal in its order under challenge held, inter alia, as follows:

" Once this is an established position, that assessee maintained the distinction in books of accounts between his investments and stock in trade and also maintained distinction

of short term investments as well as long term investment and such investment were accepted by revenue in earlier years all long, now they cannot take u-turn and change the head of income without any basis".

Mr. Bhowmick, learned advocate appearing in support of the appeal submitted that the appeal preferred by the Revenue was dismissed by the Tribunal merely because the income in the past had been treated to have arisen out of investment rather than A business income. Mr. Murarka, learned advocate appearing for the assessee submitted that one of the reasons assigned by the Tribunal is that the income had earlier been treated to have arisen out of investments but the other reason given by the Tribunal is that the assessee has always maintained a distinction in its books of accounts between the investments and stock in trade and has, therefore, led appropriate evidence to show which part of the income arose out of investments and which part of the income arose out of the business. He drew our attention to the judgment in the case of Commissioner of Income Tax, Calcutta Vs. Associated Industrial Development Pvt. Ltd. reported in 82 ITR 586 wherein the Apex Court held as follows:

" Whether a particular holding of shares is by way of investment or forms part of the stock-in-trade is a matter which is within the knowledge of the assessee who holds the shares and it should, in normal circumstances, be in a position to produce evidence from its records as to whether it has maintained any distinction between those shares which are its stock-in- trade and those which are held by way of investment".

Mr. Murarka submitted that the assessee has duly discharged his burden by proving that it has always maintained a distinction between the investment and the stock-in-trade. The Revenue was not in a position to find any fault with the evidence adduced by the assessee. He submitted that the Tribunal in the circumstances had no option, but to dismiss the appeal."

8. Further, we may refer to the finding of the Tribunal in assessee's on case for the A.Y 2006-07 and relevant portion at para no. 8, which is reproduced herein below:-

"8. After hearing the rival submissions and on careful perusal of the materials available on record, keeping in view of the fact that the assessee has shown the shares as well as the units of the mutual fund as investments since from the inception and further declared the income from sale of such shares either long- term capital gains or short-term capital gains depending upon the period of holding, we find no justification on the part of the AO to treat the short-term capital gains arising to the assessee as business income, though the said shares of units of the mutual funds are shown by the assessee as investment. Therefore, we find no infirmity in the orders of the Ld. CIT(A) in directing the AO to treat the short-term capital gains instead of business income."

9. In view of our above discussion and the findings of the Hon'ble High Court in the case of supra and the Tribunal in assessee's own case for the A.Y 2006-07, we find that the CIT-A was justified in treating the net profit on purchase and sale of shares as short term capital gain. Therefore, the ground raised by the revenue on this issue is dismissed.

2.6.3. Respectfully following the same, we hold that the Id CITA had rightly directed the Id AO to treat the subject mentioned gains on sale of shares as STCG u/s 111A of the Act instead of business income, which does not require any interference. Accordingly, the Ground No.1 raised by the revenue is dismissed.

3. The next issue to be decided in this appeal is as to whether the Id CITA was justified in allowing the loss on derivatives to be treated as business loss instead of speculative loss and consequentially allowing set off of the same with the profit from the share transactions, in the facts and circumstances of the case.

3.1. The Id AO from Schedule 12 of the audited financial statements observed that the assessee company had suffered a loss of Rs 69,97,401/- on derivative transactions. The assessee submitted monthwise details of transactions in derivative segment. He observed that assessee has not shown any satisfactory reason as to why such a loss should not be treated as speculative in nature. Accordingly, he held that loss of Rs 69,97,401/- as speculative loss eligible for adjustment with speculative gains of Rs 86,811/-.

3.2. The assessee submitted that the Id AO had treated the derivative loss incurred in the sum of Rs 69,97,401/- as speculation loss contrary to the provisions of section 43(5) of the Act which excludes from the purview of a speculative transaction, the dealing in derivatives and therefore the action of the Id AO in treating the derivative loss as speculation loss is bad in law and erroneous. It was submitted that alternatively even if the loss is considered as speculation loss as per Explanation to section 73 of the Act, the entire business of purchase and sale of shares is to be considered as speculative business and the loss on derivatives is to be allowed to be set off with the business income of purchase and sale of shares.

3.3. The Id CITA observed that the Hon'ble Delhi High Court in the case of CIT vs DLF Commercial Developers Ltd reported in 218 Taxman 45 (Del) had laid down the principle that Explanation to Section 73 of the Act is independent of section 43(5) of the Act and the language used in section 43(5) of the Act cannot be applied to Explanation to Section 73 of the Act. On this point the Id AO correctly held that even though the loss on account of derivatives are not speculative by virtue of section 43(5) of the Act, as per Explanation to section 73 of the Act, it is speculative transaction and can be set off against speculative profits. The Id CITA observed that the assessee's plea that the entire purchase and sale of shares is to be considered as speculative business also find merits. The assessee is having profits from purchase and sale of shares as business income and loss on derivatives is to be allowed to be set off with the business income. He placed reliance in this regard on the decision of Hon'ble Jurisdictional High Court in the case of CIT vs Baljit Securities Ltd reported in 88 CCH 313 (Cal) vide order dated 12.3.2014. Accordingly, he directed the Id AO to allow the loss on derivatives to be set off with the profits from the purchase and sale of shares. Aggrieved, the revenue is in appeal before us.

3.4. We have heard the rival submissions. The facts stated herein above remain undisputed and hence the same are not reiterated for the sake of brevity. We find that the Id CITA had held that the Explanation to section 73 of the Act is independent of section 43(5) of the Act and accordingly the loss on derivative transactions is to be considered as speculative loss and that the same would be eligible to be set off with the profits and gains on sale of shares treating the same as speculative profits. This has been duly considered and approved by the Hon'ble Jurisdictional High Court in the case of CIT vs Baljit Securities Ltd reported in 368 ITR 470 (Cal) wherein it was held as under:-

2. The assessee basically is a share broker. The assessee also deals in buying and selling of shares for himself. The assessee is also dealing in derivatives. Dealing in derivatives has been excluded from the ambit of speculative transactions with effect from assessment year 2006-07. We are concerned with the assessment year 2005-06. The question arose whether the assessee was entitled to set off the loss arising out of business in derivatives against the income arising out of purchase and sale of shares. The question basically was as regards the meaning of the expression "speculative transaction". The definition of the term "speculative transaction" appearing from Section 43(5) of the Act is as follows:

'(5) "Speculative transaction" means a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips:

Provided that for the purposes of this clause —

- (a) A contract in respect of raw materials or merchandise entered into by a person in the course of his manufacturing or merchanting business to guard against loss through future price fluctuations in respect of the contracts for actual delivery of goods manufactured by him or merchandise sold by him; or
- (b) a contract in respect of stocks and shares entered into by a dealer or investor therein to guard against loss in his holdings of stocks and shares through price fluctuations; or
- (c) a contract entered into by a member of a forward market or a stock exchange in the course of any transaction in the nature of jobbing or arbitrage to guard against loss which may arise in the ordinary course of his business as such member; [or] (d) an eligible transaction in respect of trading in derivatives referred to in clause [(ac)] of section 2 of the **Securities** Contracts (Regulation) Act, 1956 (42 of 1956) carried out in a recognised stock exchange;]

shall not be deemed to be a speculative transaction;'

3. Clause (d) of Section 43 (5) became effective with effect from 1st April, 2006. Therefore, prior to 1st April, 2006 any transaction in which a contract for the purchase or sale of any commodity including stocks and shares was periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrip was a speculative transaction.

Sub-section 1 of Section 73 provides as follows:

"(1) Any loss, computed in respect of a speculation business carried on by the assessee, shall not be set off except against profits and gains, if any, of another speculation business."

4. The resultant effect was that any loss arising out of speculative transaction could only have been set off against profits arising out of speculative transaction. In the present case, the assessee, as already indicated, has been dealing in shares where delivery was in fact

taken and also in shares where delivery was not ultimately taken. In other words, the assessee has been dealing in actual selling and buying of shares as also dealing in shares only for the purpose of settling the transaction otherwise than by actual delivery. The question arose whether the losses arising out of the dealings and transaction in which the assessee did not ultimately take delivery of the shares or give delivery of the shares could be set off against the income arising out of the dealings and transactions in actual buying and selling of shares. An answer to this question is to be found in the explanation appended to Section 73 which reads as follows:

'Explanation : Where any part of the business of a company ([other than a company whose gross total income consists mainly of income which is chargeable under the heads "Interest on securities", "Income from house property", "Capital gains" and "Income from other sources"], or a company the principal business of which is the business of banking or the granting of loans and advances) consists in the purchase and sale of shares of other companies, such company shall, for the purposes of this section, be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sale of such shares.'

5. In order to resolve the issue before us, the section has to be read in the manner as follows:

"Explanation : Where any part of the business of a company

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consists in the purchase and sale of shares of other companies, such company shall, for the purposes of this section, be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sale of such shares."

6. It would, thus, appear that where an assessee, being the company, besides dealing in other things also deals in purchase and sale of shares of other companies, the assessee shall be deemed to be carrying on a speculation business. The assessee, in the present case, principally is a share broker, as already indicated. The assessee is also in the business of buying and selling of shares for self where actual delivery is taken and given and also in buying and selling of shares where actual delivery was not intended to be taken or given. Therefore, the entire transaction carried out by the assessee, indicated above, was within the umbrella of speculative transaction. There was, as such, no bar in setting off the loss arising out of derivatives from the income arising out of buying and selling of shares. This is what the learned Tribunal has done.

7. The appeal preferred by the revenue is without any merit and is, therefore, dismissed.

Respectfully following the said judicial precedent, we hold that the order of the Id CITA in this regard requires no interference. Accordingly, the Ground No. 2 raised by the revenue is dismissed.

4. The last issue to be decided in this appeal is as to whether the Id CITA was justified in deleting the disallowance made u/s 40(a)(ia) of the Act in the sum of Rs 21,73,664/- in the facts and circumstances of the case.

4.1. The brief facts of this issue are that the assessee company paid Rs 2,22,624/- to ISI Emerging Market (India Services) ; Rs 2,00,000/- to Industrial Analysis Services and Rs 21,73,664/- to Bloomberg Data Services india, totaling to Rs 25,96,288/- without deduction of tax at source. The Id AO observed that all these payments are liable to withholding tax u/s 194J of the Act and accordingly disallowed a sum of Rs 21,73,664 u/s 40(a)(ia) of the Act treating the said payment as royalty. The Id CITA deleted the said disallowance by observing as under:-

“6.1. During the appellate proceedings, the AR of the appellant submitted the case of the appellant was covered by the decision of the Kolkata Tribunal in the case of Right Florist and further submitted as under:

“The appellant had paid Rs. 21,73,664/- to Bloomberg Data Services India for internet bandwidth. It was submitted to the Assessing Officer that there was no technical services provided and therefore there was no requirement of deduction of tax at source u/s 195 of the Income Tax Act. It was further submitted that there was no human intervention in the services provided and therefore the provisions of section 9 was not applicable and also provisions of section 195 did not apply and as such there was no requirement for deduction of tax at source. The assessing officer has not accepted the submissions and made disallowance of Rs. 21,73,664/- u/s 40a(ia) of the IT Act for non-deduction of tax at source which is contrary to the provisions of law and the additions are prayed to be deleted.”

6.2 I have heard the contentions raised by the AR of the appellant and the findings of the Assessing Officer. The only dispute arising from this ground is whether the appellant was liable to deduct tax at source on payments made to Bloomberg Data Services India Ltd. In the case of ITO vs. Right Florists Pvt. Ltd. ITA No.1336/Kol/2011 the assessee was a florist and he uses advertising on search engines, i.e. by Google and Yahoo, to generate business. Whenever anyone does a web search on the respective search engines, in looking for a particular website, and uses certain keywords, the advertisement of the assessee is shown along with the search results. The assessee had made payments aggregating to Rs 30,44,166 in respect of online advertising to US based entities, namely Google Ireland Limited (Google Ireland, in short) and Overture Services Inc USA (Yahoo USA, in short). However, no taxes ere withheld from these payments. The crucial question was whether these online advertising services, by

producing the sponsored results in the search results or by web banners through adservers, could be covered by the connotation of 'technical services' as set out in Explanation 2 to Section 9(1)(vii). It was held by the tribunal as under:

"Let us now once again revert to the facts of this case. The service which is rendered by the Google is generation of certain text on the search engine result page. This is a wholly automated process. There is no dispute that in the services rendered by the search engines, which provide these advertising opportunities, there is no human touch at all. The results are completely automated and, as evident from the screenshots we have reproduced earlier in this order, these results are produced in a fraction of a second- 0.27 seconds in the screenshot reproduced earlier. For the reason that there is no human touch involved in the whole process of actual advertising service provided by Google, in the light of the legal position that any services rendered without human touch, even if it be a technical service, it cannot such a technical service which is covered by the limited scope of Section 9(1)(vii), the receipts for online advertisement by the search engines cannot be treated as fees for technical services taxable as income, under the provisions of the Income Tax Act, in the hands of the Google . The wordings of Explanation 2 to Section 9(1)(vii) as also that of the definition of fees for technical services under Article 12(2)(b) being similar in material respects, the above legal proposition equally applies to the definition under article 12 (2)(b) of India Irish tax treaty. The income earned by Google, in respect of online advertising revenues discussed above and based on the facts on record, cannot be brought to tax as income deemed to accrue or arise under section 9(1)(vii), i.e. last limb of Section 9(1), as well."

It was as observed by Kolkata Tribunal in the case of Kotal Securities Ltd Vs DCIT (50 SOT 158) that:

"The lowest common factor in 'managerial, technical and consultancy services' being . the human intervention, as long as there is no human intervention in. a technical service, it cannot be treated as a technical service under Section 9(1)(vii) "

The Hon'ble Delhi High Court in the case of CIT Vs Bharti Cellular Limited (319 ITR 139 observed as follows:

"In the said Explanation [i.e. Explanation 2 to Section 9(1)(vii)] the expression fees for technical services means any consideration for rendering of any managerial, technical or consultancy services. The word technical is preceded by the word managerial and succeeded by the word consultancy. Since the expression technical services is in doubt and is unclear, the rule of noscitur a sociis is clearly applicable. The said rule is explained in Maxwell on The Interpretation of Statutes (Twelfth Edition) in the following words: - Where two or more words which are susceptible of analogous meaning are coupled together, noscitur a sociis, they are understood to be used in their cognate

sense. They take, as it were, their colour from each other, the meaning of the more general being restricted to El sense analogous to that of the less general. This would mean that the word technical would take colour from the words managerial and consultancy, between which it is sandwiched. The word managerial has been defined in the Shorter Oxford English Dictionary, Fifth Edition as.- of pertaining to, or characteristic of a manager, esp. a professional manager of or within an organization, business, establishment, etc. The word manager has been defined, inter alia, as.' - a person whose office it is to manage an organization, business establishment, or public institution, or part of one; a person with the primarily executive or supervisory function within an organization etc, a person controlling the activities of a person or team in sports, entertainment, etc. It is, therefore, clear that a managerial service would be one which pertains to or has the characteristic of' a manager. It is obvious that the expression manager and consequently managerial service has a definite human element attached to it. To put it bluntly, a machine cannot be a manager.

14. Similarly, the word consultancy has been defined in the said Dictionary as the work or position of a consultant; a department of consultants. Consultant itself has been defined, inter alia, as a person who gives professional advice or services in a specialized field. It is obvious that the word consultant is a derivative of the word consult which entails deliberations, consideration, conferring with someone, conferring about or upon a matter. Consult has also been defined in the said Dictionary as ask advice for, seek counsel or a professional opinion from; refer to (a source of information); seek permission or approval from for a proposed action. It is obvious that the service of consultancy also necessarily entails human intervention. The consultant, who provides the consultancy service, has to be a human being. A machine cannot be regarded as a consultant.

15. From the above discussion, it is apparent that both the words managerial and consultancy involve a human element. And, both, managerial service and consultancy service, are provided by humans. Consequently, applying the rule of noscitur a sociis, the word technical as appearing in Explanation 2 to Section 9 (1) (vii) would also have to be construed as involving a human element."

In the case of Pinstorm Technologies Pvt Ltd Vs ITO [TS 536 ITAT (2012)Mum] it was held as under:

"We have heard arguments of both the sides and also perused the relevant material on record. It is observed that a similar issue had come up for consideration before the Tribunal in the case of Yahoo India Pvt. Lid. and vide its order dated 24th June, 2011 passed in IT A NO.506/Mum/2008, the Tribunal decided the same in favour of the assessee for the following reasons given in paragraph No. B of it s order: "B. As already noted by us, the payment made by assessee in the present case to Yahoo Holdings (Hong Kong) Lid. was for services rendered for uploading and display of the banner advertisement of the Department of Tourism of India on its portal. The banner advertisement hosting services did not involve use or right to use by the assessee any

industrial, commercial or scientific equipment and no such use was actually granted by Yahoo Holdings (Hong Kong) Ltd. to assessee company. Uploading and display of banner advertisement on its portal was entirely the responsibility of Yahoo Holdings (Hong Kong) Ltd. and assessee company was only required to provide the banner Ad to Yahoo Holdings (Hong Kong) Ltd. for uploading the same on its portal. Assessee thus had no right to access the portal of Yahoo Holdings (Hong Kong) Ltd. and there is nothing to show any positive act of utilization or employment of the portal of Yahoo Holdings (Hong Kong) Ltd by the assessee company. Having regard to all these facts of the case and keeping in view the decision of the Authority of Advance Rulings in the case of Isro Satellite Centre 307 ITR 59 and Dell International Services (India) P. Ltd 305 ITR 37 we are of the view that the payment made by assessee to Yahoo Holdings (Hong Kong) Ltd. for the services rendered for uploading and display of the banner advertisement of the Department of Tourism of India on its portal was not in the nature of royalty but the same was in the nature of business profit and in the absence of any PE of Yahoo Holdings (Hong Kong) Ltd. in India, it was not chargeable to tax in India. Assessee thus was not liable to deduct tax at source from the payment made to Yahoo Holdings (Hong Kong) Ltd. for such services and in our opinion, the payment so made cannot be disallowed by invoking the provisions of section 40(a) for non-deduction of tax. In that view of the matter we delete the disallowance made by the A.O and confirmed by the learned CIT (A) u/s 40(a) and allow the appeal of the assessee." 7. As the issue involved in the present case as well as all the material facts relevant thereto are similar to the case of Yahoo India P. Ltd. (supra), we respectfully follow the decision rendered by the coordinate Bench of this Tribunal in the said case and delete the disallowance made by the A. O. and confirmed by the Ld. CIT (A) by invoking the provisions of sec.40(a)(i) holding that the amount paid by the assessee to M/s. Google Ireland Ltd. for the services rendered for uploading and display of banner advertisement on its portal was in the nature of business profit on which no tax was deductible at source since the same was not chargeable to tax in India in the absence of any PE of Google Ireland Ltd. in India"

The above decision, as also decision in the case of Yahoo India Pvt. Ltd Vs Dell (140 TTJ 195) which has been relied upon, is certainly an authority in support of the proposition that the payment by Indian arm of foreign owner of search engine portal, in connection with online advertising services, is not in the nature of royalty under Explanation 2 to Section 9(1)(vi) -of the Income Tax Act, 1961. In the facts of the appellant's case it is paying fees for circuit connectivity only using the services as part of the share market. These payments cannot be termed as Royalty and no human intervention is required. Respectfully following the cited decisions the additions made by the AO u/s 40(a)(ia) stands deleted."

Aggrieved, the revenue is in appeal before us.

4.2. We have heard the rival submissions. The assessee had submitted that it had taken connection of Bloomberg terminal for the purpose of its business activities. This is a

paid terminal and according to nature of its business, it had to view and download international data related to stock markets and other markets and for this, it had to pay per view charges, appraisal portal charges etc on quarterly basis. It is just like an internet connection wherein it gets the connection and charges are paid on usage basis. No deduction of tax at source u/s 194J of the Act is required as they are not providing any professional or technical services like legal, medical, engineering, any managerial, technical or consultancy services or such other professional and technical services as is notified by the Board. Thus the payment towards network access / circuit connectivity availing of communication facility for transmitting data cannot be considered as being either in the nature of fees for professional or technical services. Accordingly, it was pleaded that the payment made to Bloomberg is not covered by the provisions of section 194J of the Act as the assessee was just utilising the product of modern technology such as use of telephone, cable TV, internet and such facilities when used by the subscribers are not capable of being regarded as technical services. At the outset, we find that the Id AO had proceeded on the premise that the impugned payment has been made to a non-resident so as to bring the said payment within the ambit of 'royalty', whereas, in the instant case, the payment is made to a resident. We find that the case laws relied upon by the Id AO were in the context of payment made to non-residents and hence the same are not applicable to the facts of the instant case. We find that the payment to Bloomberg Data Services India was for internet bandwidth. There was no technical services provided and therefore there was no requirement of deduction of tax at source and there was no human intervention involved in the services provided. We find from page 102 of the paper book filed before us a certificate issued by Bloomberg stating no tax is required to be made u/s 194C or 194J of the Act in respect of payments made to it by the users. It is specifically confirmed in the said certificate that Bloomberg Data Services India Private Limited had duly included all the payments made by the assessee in its determination of total income and return filed in India. We find that the issue under dispute is squarely covered by the decision of Mumbai Tribunal

in the case of M/s Kitara Capital Private Limited vs ITO in ITA No. 130/Mum/2014 for Asst Year 2010-11 dated 21.6.2017 wherein it was held as under:-

“10. We have heard the parties and perused material placed on record. After analyzing the relevant facts we have noted that the subscription fee paid by the assessee to M/s Bloomberg Data Services India Pvt.Ltd data service was for accessing the database and is in the nature of subscription of emagazine/journal. Therefore, the payment made cannot be treated as royalty or Fees Paid for Technical Services coming within the purview of section 194J. Notably, the aforesaid view has also been expressed by the Co-ordinate Bench of the Tribunal in the case of M/s. India Capital Markets P. Ltd (supra). Even otherwise also, the ld.DR has failed to controvert the contention of the assessee that the payee has offered the income received towards subscription charges as in the return filed by it. In the aforesaid view of the matter, neither there is requirement for the assessee to deduct tax at source on payment towards subscription charges paid to M/s Bloomberg Data Services India Pvt.Ltd. nor the assessee can be treated as an assessee in default u/s 201(1) read with sec.40(a)(ia). Consequently, the disallowance made u/s 40(a)(ia) cannot be made. Ground raised by the assessee is allowed.”

Respectfully following the same, we hold that the order of the ld CITA in this regard requires no interference. Accordingly, the Ground No. 3 raised by the revenue is dismissed.

5. In the result, the appeal of the revenue is dismissed.

Order pronounced in the Court on 26.10.2018

Sd/-

[S.S. Viswanethra Ravi]
Judicial Member

Sd/-

[M.Balaganesh]
Accountant Member

Dated : 26.10.2018

SB, Sr. PS

Copy of the order forwarded to:

1. DCIT, Circle-7(1), Kolkata, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-700069.
2. M/s Jet Age Securities Pvt. Ltd. 804, Subham, 1, Sarojini Naidu Sarani, Kolkata-17.
- 3..C.I.T.(A)- 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Assistant Registrar
ITAT, Kolkata Benches