IN THE INCOME TAX APPELLATE TRIBUNAL
"D" Bench, Mumbai

Before Shri Shamim Yahya, Accountant Member
and Shri Ravish Sood, Judicial Member

ITA No.3217/Mum/2017
(Assessment Year: 2013-14)

Dy. Commissioner of Income Tax (TDS)-1(3), Room No. 604, Smt. K.G. Mittal Ayurvedic Hospital Building, Charni Road (W), Mumbai-400002 PAN – AACCM4036G	Vs.	M/s Music Broadcast Pvt. Ltd. 5th Floor, RNA Corporat Park Kalanagar, Bandra (E) Mumbai-400051
Appellant		**Respondent**

Appellant by: Shri Chaitanya Anjaria, A.R
Respondent by: Shri Manish Malik, D.R

Date of Hearing: 23.10.2018
Date of Pronouncement: 31.10.2018

O R D E R

Per Ravish Sood, JM

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-59, Mumbai, 27.02.2017, which in turn arises from the order passed by the A.O under Sec.201(1)/201(1A) of the Income Tax Act, 1961 (for short 'Act'), dated 27.03.2015. The revenue assailing the order of the CIT(A) has raised before us the following grounds of appeal:

"1 Grounds of appeal:

On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that the amount paid to "Radio Jockeys" does not fall within the ambit of provisions of section 192 of the Act ignoring the terms of contract which include reporting time, fixed working hours, fixed remuneration, increase, EL reimbursement etc. and consequently deleting the demands raised u/s.201(1) and 201(1A) of the Act.

2. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary at the time of the hearing of the case or thereafter.

3. The order of the CIT(A) being erroneous be set aside and A.O.'s order be restored."

2. Briefly stated, the assessee company is engaged in broadcasting private FM Radio, and had started India's first private FM station, "Radio City 1", Bangalore in July, 2001. Proceedings under Sec. 201(1)/201(1A) of the Act were initiated against the assessee company. The A.O in his order passed under Sec. 201(1)/201(1A) of the Act, held the assessee as being in default as regards deduction/short deduction of tax at source on various counts, viz. (i) default under Sec.201(1) on account of non-deduction of tax at source on commission/discounts to advertising agencies under Sec.194H of the Act: Rs.2,25,63,999/-; (ii) interest under Sec.201(1A) in respect of default under Sec.201(1) pertaining to discount/commission paid to advertising agencies (for the period 01.04.2012 to the date of the order, i.e 27.03.2015): Rs.81,23,039/-; (iii) default under Sec.201(1) on account of short deduction of tax at source on salary paid to Radio Jockeys under Sec. 194J: Rs.58,82,159/-; and (iv) interest under Sec.201(1A) on account of short deduction of tax at source on salary paid to Radio Jockeys for the period 01.04.2012 to the date of the order i.e. 27.03.2015) :Rs.21,17,577/-. On the basis of his aforesaid deliberations, the A.O worked out the total liability under Sec. 201(1)/201(1A) of the assessee company at Rs.3,86,86,774/-.

3. Aggrieved, the assessee carried the matter in appeal before the CIT(A). It was observed by the CIT(A), that the issue involved in the present appeal had been decided in favour of the assessee by the ITAT, Mumbai in its own case for A.Y. 2011-12 in ITA No. 548/Mum/2015 and C.O No. 138/Mum/2016, dated 07.12.2016. In the backdrop of the aforesaid facts the CIT(A) respectfully following the order of the Tribunal in the assessee's own case for A.Y. 2011-12 wherein identical facts were involved, reversed the action of the A.O and allowed the appeal of the assessee.

4. The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The ld. Authorized Representative (for short 'A.R') for the assessee company at the very outset of the hearing of the

appeal submitted that the issue involved in the present appeal was squarely covered by the order of the Tribunal in the assesses own case for A.Y. 2011-12 viz. ACIT (TDS)-1(3), Mumbai Vs. M/s Music Broadcast Pvt. Ltd, Mumbai [ITA No. 548/Mum/2015 & C.O. No. 138/Mum/2016; 07.12.2016] (copy placed on record). The ld. A.R drawing our attention to the observations of the Tribunal in the aforementioned case of the assessee for A.Y. 2011-12, averred that the appeal was squarely covered by the aforementioned order. Further, it was submitted by the ld. A.R that the aforesaid order of the Tribunal for A.Y 2011-12, was thereafter followed by another coordinate bench of the Tribunal i.e ITAT "J" Bench, Mumbai while disposing off the appeal of the revenue in the assessee's own case for A.Y. 2012-13 viz. DCIT(TDS)-1(3), Mumbai Vs. M/s Music Broadcast Pvt. Ltd.[ITA No. 3935/Mum/2015 & C.O. No. 20/Mum/2017, dated 18.04.2017] (copy placed on record).

5. Per contra, the ld. Departmental Representative (for short 'D.R') relied on the order passed by the A.O. However, the ld. D.R did not controvert the fact that the issue involved in the present appeal was squarely covered by the aforementioned orders of the coordinate benches of the Tribunal in the assessee's own case.

6. We have heard the authorized representatives of both the parties, perused the orders of the lower authorities and the material available on record. On a perusal of the order of the Tribunal in the assessee own case for A.Y. 2011-12 i.e ACIT (TDS)-1(3), Mumbai Vs. M/s Music Broadcast Pvt. Ltd., Mumbai [ITA No. 548/Mum/2015 & C.O 138/Mum/2018], it stands revealed that all of the issues involved in the present case viz. (i) default under Sec.201 on account of failure on the part of the assessee in not deducting tax at source on discount/commission paid to advertising agency under Sec. 194H; (ii) interest under Sec. 201(1A) on account of short deduction of tax at source on discount/commission paid to advertising agencies; (iii) default under Sec.201(1) on account of short deduction of tax at source for the failure on the part of the assessee in not deducting tax at source on the salary paid to Radio Jockeys under Sec. 194J of the Act; and

(iv) interest under Sec.201(1A) on account of short deduction of tax at source on salary paid to Radio Jockeys, were squarely covered by the said order. We find that the Tribunal while disposing off the aforementioned appeal, had after deliberating at length on the issue under consideration, observed as under:

> *"5. We have heard both the parties, perused the material on record and have given a thoughtful consideration to the issue before us. We find substantial force in the findings of the CIT(A) that the 'discount' allowed by the assessee while raising the invoices on the advertising agencies as regards the advertising work procured by the assessee through them, was in the normal course of its business, which practice of giving discounts was not only restricted to the advertising agencies, but rather as a prevailing industry practice, was uniformly allowed to any person who would buy airtime from the assessee, i.e direct advertisers or the advertising agencies. We further find ourselves to be in agreement with the findings of the CIT(A), that now when it was a matter of fact borne from the records that there was no evidence from where it could be concluded that the advertising agencies were either directly or indirectly the agents of the assessee, and they had received any remuneration from the assessee to sell their airtime, therefore it was absolutely impermissible to re-characterize the 'discounts' given by the assessee to the advertising agencies, as amounts passed over by way of 'Commission' for the advertising work procured by the assessee from the said advertising agencies. We though are one with the observation of the A.O that the term 'Commission or brokerage' as stands contemplated u/s 194H of the 'Act', is a term of wide connotation and had been so defined by the legislature in all its wisdom in Explanation (i) of Section 194H, as a result whereof, an amount which is paid/credited by an assessee, which safely can be brought within the scope of gamut of the said definition, cannot be allowed to escape in the garb of a different nomenclature. However, in the backdrop of the aforesaid settled position of law, we cannot also remain oblivious of the settled principle of law, that the 'Onus' to establish that what is apparent is not true, lies on the persons who so alleges. Thus now when in the case of the present assessee, it was alleged by the A.O that the assessee in the garb of 'discounts' allowed to the advertising agencies, was as a matter of fact passing over 'Commissions' to them, then except for harping on the said claim, it was for the A.O to place on record substantial clinching evidences which could irrebutably fortify the said factual position. However, the A.O after claiming that the assessee was passing over commissions to the advertising agencies in the garb of discounts, had failed to place on record any such material on the basis of which the claim of the assessee that it was allowing 'discounts' the normal course of its business, could be disturbed and dislodged. That a doubt or suspicion, howsoever strong and logical it may be, cannot be allowed to nullify a claim which is based on evidence or facts borne from records. We further find that even the convictions held by the A.O on the basis of doubts and suspicions, also, had been dispelled and put to rest by the CIT(A) on the basis of material available on record and strong reasoning backing the same. Thus in the absence of any material on record, much the less evidence, from where it could be safely concluded that the advertising agencies were agents of the assessee, or they had received any remuneration from the assessee to sell their airtime, the 'discounts' allowed by the assessee to the advertising agencies, cannot be held to be a smoke screen in the garb of which commission was being passed over to the advertising agencies. We are thus of the considered view that the CIT(A) on the basis of concrete findings based on the material on record and by taking support of host of judicial*

pronouncements, had thus rightly concluded that the assessee had not paid any commission to the advertising agencies, and in the backdrop of the said observations, thus cannot be held to be in default u/ss. 201(1)/201(1A) for not having deducted tax at source u/s 194H of the 'Act' on the said amounts. Thus finding no infirmity in the order of the CIT(A), we uphold the same. Thus the ground of appeal No. 1(i) so raised by the revenue is dismissed.

6. We have further given a thoughtful consideration to the issue pertaining to the payments by the assessee to the Radio Jockeys for hosting shows on radio, in light of the 'Agreements' executed between the said parties. We find force in the findings of the CIT(A) that now when there is no fact borne from the records from where it could be safely and' inescapably gathered that the Radio Jockeys were the employees of the assessee, but rather the facts available on the record prove to the contrary, therefore on the said count itself the claim of the assessee that the payments made to the Radio Jockeys were in the nature of payments being made to free lance professionals, on which tax had rightly been deducted at source u/s 194J of the 'Act', thus cannot be dislodged. We further find ourselves as being in agreement with the findings of the CIT(A), that the inconsistent stand taken by the A.O, wherein the latter as regards payments made to Radio Jockey's, by categorizing them into two categories, as observed hereinabove, can safely be held to be an incoherent action on the part of the A.O, which in itself would put to rest his observations that an employer-employee relation did exist between the assessee and the Radio Jockeys. We are thus of the considered view that the CIT(A) on the basis of concrete findings based on the material on record had rightly observed that the payments made by the assessee to the Radio Jockeys, which were claimed by the assessee as being in the nature of payments to free lance professionals, and as such were rightly subjected to deduction of tax at source u/s 194J of the 'Act', in the absence of any evidence available on record, could not be whimsically held as being in the nature of payments to employees. Thus in the backdrop of the aforesaid observations, we are of the considered view that the CIT(A) has safely and rather inescapably held that the payments made by the assessee to the Radio Jockeys, as per the facts discernible from the records, were in the nature of payments to professionals, which had rightly been subjected to deduction of tax at source u/s 194J of the 'Act'. We are thus persuaded to accept the observations of the CIT(A), that in light of the facts of the case as they so remain, the assessee cannot be held to be in default u/ss. 201(1)/201(1A) for short deduction of tax at source u/s 194J of the 'Act' on the said amounts. Thus finding no infirmity in the order of the CIT(A), we uphold the same. Thus the ground of appeal No. 1 (ii) so raised by the revenue is dismissed."

We have perused the order passed by the Tribunal in the assesses own case for A.Y 2010-11, and find that all the issues involved in the present appeal before us had been deliberated upon and therein stands adjudicated. We have given a thoughtful consideration to the observations of the Tribunal, and finding ourselves as being in agreement with the view therein taken, thus respectfully follow the same. In terms of our aforesaid observations, we are of the considered view that no infirmity does emerge from the order of the CIT(A) who had rightly followed the aforesaid view taken by the Tribunal in respect of the issues under consideration while disposing off the appeal in the assesses case for A.Y. 2011-12. We thus, finding no reason to dislodge

the well reasoned order of the CIT(A) uphold his order and dismiss the appeal of the revenue.

7. The appeal filed by the revenue is dismissed.

Order pronounced in the open court on 31.10.2018

Sd/-	Sd/-
(Shamim Yahya)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 31.10.2018
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**