



ITA No.1205/Mum/2018  
M/s. UBJ Broadcasting P. Limited  
Assessment Year-2012-13

**आयकर अपीलीय अधिकरण "एफ" न्यायपीठ मुंबई में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"F" BENCH, MUMBAI**

**माननीय श्री संदीप गोसाईं, न्यायिक सदस्य एवं**  
**माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।**  
**BEFORE HON'BLE SHRI SANDEEP GOSAIN, JM AND**  
**HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM**

आयकरअपील सं./ I.T.A. No.1205/Mum/2018  
(निर्धारणवर्ष / Assessment Year: 2012-13)

<b>ACIT-16(1)</b> Room No.439, 4 <sup>th</sup> Floor Aaykar Bhavan, M.K. Marg Churchgate,Mumbai-400 020	<b>बनाम/</b> Vs.	<b>M/s. UBJ Broadcasting Private Ltd.</b> 6 <sup>th</sup> Floor, Adhikari Chambers Oberoi Complex, New Link Road Andheri (W), Mumbai-400 053.
स्थायी लेखासं./जीआइआरसं./PAN/GIR No.		<b>AABCU-1341-G</b>
(अपीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )
अपीलार्थीकीओरसे/ <b>Appellant by</b>	:	Shri Rajiv Gubgotra, Ld.DR
प्रत्यर्थीकीओरसे/ <b>Respondent by</b>	:	Shri Nikunj Gada, Ld. AR
सुनवाईकीतारीख/ <b>Date of Hearing</b>	:	26/02/2019
घोषणाकीतारीख / <b>Date of Pronouncement</b>	:	19/03/2019

**आदेश / O R D E R**

**Per Manoj Kumar Aggarwal (Accountant Member):-**

1. Aforesaid appeal by revenue for Assessment Year [AY] 2012-13 contest the order of Ld. Commissioner of Income-Tax (Appeals)-4, Mumbai,



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[CIT(A)], Appeal No. CIT(A)-4/IT-22/AC-16(1)/2014-15 dated 18/12/2017 on 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) and thereby holding that the short deduction of tax will not result into disallowance u/s. 40(a)(ia) of the Act, without appreciating that the Hon'ble Kerala High Court in its judgment dated 20.07.2015 in the case of CIT-1, Kochi Vs. PVS Memorial Hospital Ltd. [2015] 60 taxmann.com 69 (Kerala) has clearly laid down that the disallowance u/s. 40(a)(ia) would be made even in the cases of short deduction of tax.*
2. *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) without appreciating that Section 40(a)(ia) is into a charging Section but is a machinery Section and thus the expression "tax deductible at source under Chapter XVII-B" occurring in the said Section has to be understood as tax deductible at source under the appropriate provision of Chapter XVII-B and hence, tax deductible under wrong section of Chapter XVII-B would result into invoking of Section 40(a)(ia) of the Act.*
3. *The appellant prays that the order of CIT(A) on the above grounds be set aside and that of the Assessing Officer restored."*

2.1 The assessment for impugned AY was framed by Ld. Assistant Commissioner of Income Tax-16(1), Mumbai [AO] u/s. 143(3) on 31/12/2014 wherein the loss of the assessee was determined at Rs.709.13 Lacs as against returned loss of Rs.898.52 Lacs e-filed by the assessee on 28/09/2012. The assessee being *resident corporate entity* is stated to be engaged in *broadcasting television channels*.

2.2 In the quantum assessment order the assessee has been saddled with disallowance u/s. 40(a)(ia) for want of deduction of tax at source as per statutory provisions, which is the sole subject matter of present appeal



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before us. The nature and quantum of disallowance is as per the following details: -

<b>No.</b>	<b>Nature of Payment</b>	<b>Disallowance Rs. (Rounded Off)</b>
1.	Payment of Carriage Fees	Rs.150.33 Lacs

2.3 The facts *qua* the addition are that during assessment proceedings, it transpired that the assessee debited an amount of Rs.150.33 Lacs as *carriage fees* under the head *Distribution Expenses*. The assessee had deducted tax at source [TDS] against the same @ 2% u/s. 194C. However, the Ld. AO opined that the same being technical services attracted higher TDS @10% u/s 194J and therefore, disallowance as envisaged by Section 40(a)(ia) was attracted to the facts of the case. Although the assessee defended his stand vide reply dated 02/12/2014 and supported the same with various judicial pronouncements, however, Ld. AO noted that *carriage fee* were the charges paid by the broadcaster to MSO (*Multi System Operators*) to transmit their channels and hence these charges constituted *process*, being covered in the definition of *royalty* as contained in sub-clause (v) to explanation 2 to Section 9(1). Resultantly, the said expenditure was disallowed u/s 40(a)(ia) for want of deduction of higher tax at source u/s 194J.

3. Aggrieved, the assessee contested the same with success before Ld. first appellate authority vide impugned order dated 18/12/2017 wherein the assessee made details submissions, the relevant part of which have



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already been extracted in the impugned order at *para 6.2*. The assessee, as in alternative plea, submitted that short deduction of tax at source do not attract the rigors of Section 40(a)(ia) in view of certain judicial pronouncements rendered by the Tribunal as well as by Hon'ble Kolkata High Court in *DCIT Vs. S.K.Tekriwal 48 SOT 515*. The Ld. first appellate authority, convinced with alternative plea, concurred with the stand of assessee and concluded the matter in assessee's favor in the following manner: -

*6.4 It is further seen that Hon'ble Mumbai ITAT in the case of Chandabhoy & Jassobhoy vs DCIT 49 SOT 448 has held that it is not the case that assessee has not deducted any amount. Assessee had deducted tax u/s 192 of the ITA and therefore provisions of section 40(a)(ia) of the ITA do not apply as the said provision can be invoked only in the event of non deduction of tax but not for lesser deduction of tax. Further the Hon'ble Calcutta High Court vide its order dated 03.12.2012 ITA No. 183 of 2012 has upheld the decision of Kolkata ITAT in case of DCIT vs S. K. Tekriwal 48 SOT 515, which has held similarly that provisions of section 40(a)(ia) would not apply in case short deduction. The Hon'ble Mumbai ITAT has in case of ACIT vs. NGC Networks Pvt Ltd. ITA No.: 1382/M/2014, relying on the decision of Hon'ble Calcutta High Court in case of S. K. Tekriwal held that section 40(a)(ia) of the ITA applies only in the event of non deduction of tax but not for lesser deduction of tax. It is further seen that in their decision, the Hon'ble Tribunal in the case of M/s Hindustan Thompson Associates Pvt. Ltd. for A.Yr. 2010-11 in ITA NO. 6729/Mum/2014 at Para 5 have held as under:*

*"We have heard the rival contentions and perused the orders of the authorities below and the decision of the Co-ordinate Bench in assessee's own case for A.Yr. 2008-09 and 2009-10. The Coordinate Bench for the A.Yr. 2009-10 in of the I.T, Act, 1961 No. 746/M/2014 dated 19.02.2016 considered similar issue and held that provisions of Sec. 40(a)(ia) have no application when there is short deduction of tax observing as under :*

*"We have heard the rival submissions and perused the material before us. We find that the Hon'ble Kerala High Court in the case of V.S Memorial Hospital (supra), has held that deduction of TDS under wrong provision of law will not save assessee from disallowance u/s 40(a)(ia) of the Act.*

*However, the Kolkata High Court in the matter of Samir Tekriwal (supra), has held that expenses are not liable to be disallowed u/s 40(a)(ia) on account of short deduction of tax. The Hon'ble jurisdictional High Court has not decided the issue. Thus, we are faced with two diagonally opposite views about applicability of the provisions of section 40(a)(ia) of the Act. We find that the Hon'ble Bombay High Court has in the case of Ashok Kumar Parekh (186 IT R212) has dealt with the binding precedence of the High Court judgements. Here,*



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*we would also like to reproduce the portion of the judgment delivered by the Hon'ble Bombay High Court in the case of Siemens India Ltd (156ITR 11) and same reads as under:*

*"So far as the legal position is concerned, the ITO would be bound by a decision of the Supreme Court as also by a decision of the High Court of the state within whose jurisdiction he is (functioning), irrespective of the pendency of any appeal or special leave application against that judgment. He would equally be bound by a decision of another High Court on the point, because not to follow that decision would be to cause grave prejudice to the assessee. Where there is a conflict between different High Courts, he must follow the decision of the High Court within whose jurisdiction he is (functioning), but if the conflict is between decisions of other High Courts, he must take the view which is in favour of the assessee and not against him. Similarly, if the Tribunal has decided a point in favour of the assessee, he cannot ignore the decision and take a contrary view, because that would equally prejudice the assessee".*

*Considering the above, we are taking the view which is in favour of the assessee. We, are following the judgement of Samir Tekriwal (supra) of the Hon'ble Kolkata High Court as well as the orders of the Mumbai Tribunal delivered by it for the earlier years. Effective ground of appeal is decided against the AO".*

*It can accordingly be seen that issue of short deduction of tax and consequent non-applicability of section 40(a)(ia) has been covered in favour of appellant in view of above decision. Respectfully following the above decisions of Hon'ble ITAT, the disallowance made by the AO of carriage fees amounting to Rs.1,50,33,608/- u/s.40(a)(ia) of the Act is deleted. The issue pertaining to the questioned payment being Royalty or not, therefore, becomes academic in nature and as such need not be decided. For statistical purposes the same is treated as **rejected**. This Ground is accordingly **partly** allowed.*

Aggrieved, the revenue is in further appeal before us.

4. The Ld. Departmental Representative [DR] placed reliance on the decision of Hon'ble Kerala High Court rendered in CIT Vs. PVS Memorial Hospital [60 taxmann.com 69] to support the stand taken by Ld. AO. Per *Contra*, Ld. Authorized Representative for Assessee [AR], placed reliance on the favorable decision of this Tribunal rendered in *ACIT Vs. M/s T.V.Vision Ltd. [ITA No.3387/Mum/2016 dated 28/02/2018]* which has considered the decision being relied upon by the revenue.

5. We have carefully considered the submissions and material on record including the decisions cited before us. The undisputed position that



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emerges is that the assessee has suffered impugned disallowance u/s 40(a)(ia) for want of deduction of tax at source at higher rate i.e. 10%. It is undisputed fact that the assessee has deducted tax @2% and the additions have been made for short-deduction of tax as per Section 40(a)(ia). We find that the facts of the present case are squarely covered by the cited decision of this Tribunal rendered in *ACIT Vs. M/s T.V.Vision Ltd. [supra]* wherein the co-ordinate bench, after considering various decisions, decided the issue in assessee's favor, in the following manner:-

*7. We notice that the Ld. CIT(A) has deleted the disallowance in question holding that carriage fees does not come within the ambit of the definition of Royalty. Therefore, the assessee was not required to deduct the tax at source u/s 194J. Further the Ld. CIT(A) has held that it is not the case of 'no TDS' but the case of 'less TDS' therefore, the disallowance made by the AO is bad in law. The Ld. CIT(A) has relied on the decision of the Hon'ble Calcutta High Court rendered in CIT vs S. K. Tekriwal 48 SOT 515 and the decisions of coordinate Bench of the Tribunal in the cases of CIT vs M/s Star Den Media Services pvt .Ltd( ITA No 1413/MUM/2014) and Chandabhoy & Jassobhoy vs DCIT 49 SOT 448 (Mumbai ITAT). As pointed out by the Ld. counsel for the assessee this issue is covered by the judgment of the Hon'ble Bombay High Court delivered in CIT vs. M/s UTV Entertainment Television Ltd. in Income Tax Appeal (supra) in favour of the assessee. Similarly, the Hon'ble Gujarat High Court in CIT vs. Prayas Engineering Ltd., (supra) and the Karnataka High Court in CIT vs. Kishore Rao & others (HUF) (supra) have held that in case of shortfall due to any difference of opinion as to the taxability of any item or the nature of payments falling under various TDS provisions, no disallowance can be made by invoking provisions of 40(a)(ia) of the Act.*

Respectfully following the same, we confirm the stand of first appellate authority in the impugned order.

6. The appeal stands dismissed.

*Order pronounced in the open court on 19<sup>th</sup> March, 2019.*

**Sd/-**

**(Sandeep Gosain)**

न्यायिक सदस्य / **Judicial Member**

मुंबई Mumbai; दिनांक Dated : 19/03/2019

Sr.PS:-Jaisy Varghese

**Sd/-**

**(Manoj Kumar Aggarwal)**

लेखा सदस्य / **Accountant Member**



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**आदेश की प्रतिलिपि ँ प्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

**आदेशानुसार/ BY ORDER,**

**उप/सहायकपंजीकार (Dy./Asstt.Registrar)  
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.**