

<b>IN THE INCOME TAX APPELLATE TRIBUNAL</b>
<b>COCHIN BENCH, COCHIN</b>
<b>BEFORE S/SHRI CHANDRA POOJARI, AM &amp; GEORGE GEORGE K., JM</b>

I.T.A. No. 160/Coch/2018
Assessment Year : 2012-13

Visual IQ Techno Service India P. Ltd., 3 <sup>rd</sup> Floor, World Trade Centre, Infopark, Kakkanad, Kochi-682 042. PAN:AADDCC 0376K]	<b>Vs.</b>	The Income-tax Officer, Corporate Ward-2(5), Kochi.
<b>(Assessee-Appellant)</b>		<b>(Revenue-Respondent)</b>

<b>Assessee by</b>	Shri P. Sathisan, Adv.
<b>Revenue by</b>	Smt. A.S. Bindhu, Sr. DR

<b>Date of hearing</b>	03/04/2019
<b>Date of pronouncement</b>	04/04/2019

### **ORDER**

Per CHANDRA POOJARI, AM:

This appeal filed by the assessee is directed against the order passed by the Pr. CIT u/s. 263 of the I.T. Act dated 28/12/2017 and pertain to the assessment year 2012-13.

2. The only issue raised for our consideration is with regard to disallowance made u/s. 40(a)(ia) of the I.T. Act.

3. The facts of the case are that from the perusal of records, the CIT observed that the assessment order passed u/s. 143(3) of the Act dated 17/03/2016 was erroneous and prejudicial to the interests of revenue for the following reason:

Omission to consider applicability of section 40(a)(ia) of the Act in respect of a sum of Rs.3,67,294/- deducted as expenses on installation of antivirus programme, skype and other application software having license for a period of maximum 1 year.

3.1 Accordingly, the CIT invoked the provisions of section 263 of the Act. The CIT found that the Assessing Officer had allowed the expenditure without verifying the relevant provisions of sections 40(a)(ia) and 9(1)(vi). According to the CIT, as per Explanation 2(1) to section 9(1)(vi) of the Act, 'royalty' means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head 'Capital Gains' for the transfer of all or any rights (including granting of a licence) in respect of a patent, invention, model design, secret formulae or process or trade mark or similar property. Explanation 4 further includes use or right to use computer software in the above definition with retrospective effect. Under section 40(a)(ia), deduction on interest, commission or brokerage, rent, royalty, fees for technical services payable to a resident or amounts payable to a contractor or a sub-contractor being a resident for carrying out any work on which tax is deductible at source under Chapter XVIIIB and such tax has not been deducted, the same will not be allowed as deduction. Since this issue had not been examined by the Assessing Officer, the CIT held that the assessment order passed by the Assessing Officer was erroneous

in so far as it was prejudicial to the interests of the revenue. Therefore, the CIT set aside the order to the file of the Assessing Officer and directed him to re-examine the issue raised in the 263 order and to pass a speaking order in accordance with law after affording due opportunity of hearing to the assessee.

4. Against this, the assessee is in appeal before us. It was contended before the CIT that assessee purchased software which cannot be considered as purchase of copyright and royalty. Explanation 2 to section 9(1)(vi) cannot be applied to purchase of software. Further, it was contended that software was included in the definition of royalty only by amendment of the Finance Act, 2012. It was submitted that although the amendment was retrospective, there is no liability fastened on the assessee to deduct tax at source for the expenses incurred for the financial year 2011-12. The Ld. AR submitted that during the period when the purchase was made, the assessee did not have the benefit of the clarification brought about by the retrospective amendment that payment for software purchase tantamount to payment of royalty and consequently tax has to be deducted u/s. 194J. According to the Ld. AR, this law extant on the date when the payment for obtaining the software was made, has not categorically laid down that tax is required to be deducted. The Ld. AR submitted that as it was impossible to fasten the liability for deducting TDS retrospectively as tax is to be deducted at the time when the payment is credited or made, the Assessing Officer was not justified in disallowing such amount.

5. On the other hand, the Ld. DR relied on the order of the CIT.

6. We have heard the rival submissions and perused the record. As regards the disallowance made under section 40(a)(ia), the CIT relied on Explanation 4 to section 9(1)(vi) of the I.T. Act which reads as under:

*"Explanation 4 – for the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred."*

6.1 Explanation 4 was inserted by the Finance Act, 2012 with retrospective effect from 01/06/1976. The Ld. AR took the plea before the CIT that during the period when the purchase of software was made, the assessee did not have the benefit of clarification brought about by the amendment that payment made for purchase of software tantamounts to payment of royalty and consequently, tax was to be deducted u/s. 194J. As rightly pointed by the Ld. AR, this view is supported by the following judgments:

- 1) M/s. Kerala Vision Ltd. vs. ACIT (ITA No.794/Coch/2013 dated 06/06/2014) (ITAT, Cochin Bench)
- 2) DCIT vs. M/s. Atkins India Pvt. Lt. (ITA No.1467/Bang/2014 dated 08/05/2015) (ITAT, Bangalore Bench)
- 3) Infotech Enterprises Limited vs. Addl. CIT (ITA Nos.115 and 2184/Hyd/2011 dated 16/01/2014) (ITAT, Hyderabad Bench)

6.2 The crux of the above judgments is that the assessee cannot be held liable to deduct tax at source by relying on the subsequent amendments made in the

relevant provisions with retrospective effect. In our opinion, the assessment year involved herein is 2012-13 and Explanation 4 to section 9(1)(vi) was inserted by Finance Act, 2012 with retrospective effect from 01/06/1976. In the case of the assessee, the financial year ended on 31/03/2012 (2011-12). In the previous year relevant to assessment year 2012-13, Explanation 4 to section 9(1)(vi) of the Act was not available. Hence, in our opinion, when the purchase of software was made, the assessee did not foresee the provision brought by the Finance Act, 2012 where the payment for purchase of software was tantamount to payment of royalty. As rightly pointed out by the learned counsel for the assessee before us, this view taken by the assessee is supported by various judicial pronouncements wherein it was held that the assessee cannot be held to be liable to deduct tax at source by relying on the subsequent amendments made in the relevant provision with retrospective effect. Thus, it was impossible for the assessee to deduct tax in the F.Y. 2011-12 when as per the legal position prevalent in the said F.Y., the obligation to deduct tax was not on the assessee. In all the judgments relied on by the assessee, the question was based on the legal Maxim *lex non cogit ad impossibilia* meaning thereby that the law cannot be possibly compel a person to do something which is impossible to perform.

6.3 In view of the above, we find merit in the argument of the Ld. AR and hold that the assessee was not liable to deduct tax at source on the payment made for purchase of software in the financial year 2011-12 relevant to the assessment year 2012-13 and there is no liability fastened on the assessee to deduct tax at source

for the purchase of software made in the financial year 2011-12 and there is no question of invoking the provisions of section 40(a)(ia) of the Act. This ground of appeal of the assessee is allowed.

7. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on this 4<sup>th</sup> April, 2019

sd/-  
(GEORGE GEORGE K.)  
JUDICIAL MEMBER

sd/-  
(CHANDRA POOJARI)  
ACCOUNTANT MEMBER

Place: Kochi

Dated: 4<sup>th</sup> April, 2019

GJ

Copy to:

1. Visual IQ Techno Service India P. Ltd., 3<sup>rd</sup> Floor, World Trade Centre, Infopark, Kakkanad, Kochi-682 042.
2. The Income Tax Officer, Corporate Ward-2(5), Kochi.
3. The Pr. Commissioner of Income-tax, Kochi.
4. D.R., I.T.A.T., Cochin Bench, Cochin.
5. Guard File.

By Order

(ASSISTANT REGISTRAR)  
I.T.A.T., Cochin