

आयकर अपीलीय अधिकरण "H" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "H" BENCH, MUMBAI

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.1206 /Mum/2018

(निर्धारण वर्ष / Assessment Year: 2012-13)

Assistant Commissioner of Income-tax, Circle 16(1) Room No. 439, 4 th Floor, Aayakar Bhawan M.K.Marg , Churchgate Mumbai-400 020	बनाम/ v.	Hindustan Thompson Associates Private Limited 4 th Floor, Peninsula Chambers, Ganpat Rao Kadam Marg, Lower Parel(W), Mumbai-400013
स्थायी		लेखा सं./PAN: AAACH1463M
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Revenue by:	Shri. B. Srinivas (CIT-DR)	
Assessee by:	Smt. Aarti Vissanji & Shri. Ajit C. Shah & Ms. Aastha Shah	

सुनवाई की तारीख /**Date of Hearing** : 27.02.2019

घोषणा की तारीख /**Date of Pronouncement** : 23.05.2019

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member:

This appeal, filed by Revenue, being ITA No. 1206/Mum/2018, is directed against appellate order dated 12.12.2017, passed by learned Commissioner of Income Tax (Appeals)-4, Mumbai (hereinafter called "the CIT(A)"), for assessment year(AY) 2012-13, the appellate proceedings had arisen before learned CIT(A) from the assessment order dated 23.03.2016 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) r.w.s. 144C(3) of the Income-tax Act, 1961 (hereinafter called "the Act") for AY 2012-13.

2. The grounds of appeal raised by Revenue in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

"i) 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) in respect of payments made to field agents without appreciating that the aforementioned payments were made for conducting market research survey and on data analysis/tabulation, thus falling under section 194J of the Act and warranting deduction of tax at 10%.

ii) 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 even examining the issue of applicability of proper provisions under TDS Chapter to the payments under dispute.

iii) 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 there by holding that the short deduction of tax will not result into disallowance u/s 40a(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.

iv) 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 not 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 40a(ia) of the Act.

v) The appellant prays that the order of CIT(A) on the above grounds be set aside and that of the Assessing Officer restored.

vi) The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

3. The assessee is engaged in the business of Advertising & Market Research. The assessee had made payments to various fields agent for conducting research surveys, data compilation and translation etc. on which undisputedly the assessee had deducted income-tax at source u/s 194C of the 1961 Act while AO was of the view that the said services rendered were in the nature of technical services and as per AO income-tax ought to have been deducted at source u/s. 194J of the 1961 Act and hence additions u/s 40(a)(ia) were made by the AO as the assessee had deducted income-tax at source u/s 194C as against income-tax which ought to have been deducted u/s 194J of the 1961 Act on payments to various fields agent for conducting research surveys, data compilation and translation etc., wherein the AO vide assessment order dated 23.03.2016 passed u/s 143(3) read with Section 144C(3) held as under:-

“ 6.2. The contention put forth by the authorised representative of the assessee has been duly considered but not found acceptable. The Field Agents for conducting research survey and Data Analysis & Tabulation as the services availed for these expenses were in the nature of professional/ technical services. The provisions of section 194C come into force when the work is labour intensive and when the element of technical service is involved, the matter will be governed by section 194J. The harmonious interpretation of the said two section 194C and 194J is apparent; 194C is labour dominated and sec. 194J is technical / professional service oriented. Thus, providing 'Field Agents for conducting research survey and Data Analysis & Tabulation services' which is covered u/s 194J, as the element of technical/ professional service is present. Services provided by the vendors in all these cases are standard and normal services which are performed mechanically through sophisticated equipments for which machines are already placed in operation. However, service for 'Field Agents for conducting research survey and Data Analysis & Tabulation', as is being done in instant case, application of human mind by a technical person is essential and the same cannot be done merely by mechanical means. This type of work cannot be done by the layman and very specialized skills are needed to accomplish work in proper manner to maximized revenue. Hence, it does come within the ambit of that service as application of human mind by a technical person is essential for doing so and this service is squarely coming within the ambit of section 194J for the purpose of TDS. It is thus seen that assessee's contention that section 194C is applicable on payment of digital print fee is not correct and the same is liable to TDS u/s 194J.

6.3. Service for 'Field Agents for conducting research survey and Data Analysis & Tabulation' required the use of the highly professional personnel and it required the technical staff to render the service. Very few companies/entities in India provide these specialized services

which show it is highly technically services. Hence, assessee has deducted the TDS U/s 194C instead of U/s. 194J. Therefore, claim of assesses that TDS Deduction U/s. 194C does not sustain good in the law. As law has specially covers the provision for the deduction on TDS on technical service or professional service U/S.194J.

6.4. It is true that the normal rule is that a taxing statute must be strictly interpreted from the language used in the provisions. Fiscal laws are expected to be strictly construed. The words must say what they mean and nothing more must be implied or read in to. The interpretation of the provisions must proceed from the express language in the statute and nothing more. To the above effect, one will find several authorities and suffice it will be to rely on the Supreme Court decisions in the case of *Goodyear India Ltd. vs. State of Haryana* [1991] 188 ITR 402 (SC) and also *CIT vs. National Taj Traders* [1980]121 ITR 535 (SC).

6.5. Section 40 has certain clauses providing for the amounts which are not deductible. Sub-clause (ia) of clause (a) of section 40 was inserted by the Finance (No.2) Act, 2004 with effect from 1st April, 2005 reading as under;-

"40. Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computed the income chargeable under the head 'Profits and gains of business or profession'-.....

(ia) any interest, commission or brokerage, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on or, after deduction, has not been paid during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section(1) of section 200;

Provided that where in respect of any such sum, tax has been deducted in any subsequent year or, has been deducted in the previous year but paid in any subsequent year after the expiry of the time prescribed under sub-section (1) of section 200, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

Explanation. - For the purposes of this sub-clause, -

(i) "commission or brokerage" shall have the same meaning as in clause (i) of the Explanation to section 194H;

(ii) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (I) of section 9;

(iii) "professional services" shall have the same meaning as in clause (a) of the Explanation to section 194J;

(iv) "work" shall have the same meaning as in Explanation HI to section 194C;"

6.6. The Memorandum explaining the provisions in the Finance Bill explained the rationale of the insertion of the new provision in following words:-

"With a view to augment compliance of TDS provisions, it is proposed to extend the provisions of section 40(a)(i) to payments of interest, commission or brokerage, fees for professional services or fees for technical services to residents, and payments to a resident contractor or sub-contractor for carrying out any work (including supply of labour for carrying out any -work), on which tax has not been deducted or after deduction, has not been paid before the expiry of the time prescribed under sub-section (1) of section 200 and in accordance with the other provisions of Chapter XVII-B, It is also proposed to provide that where in respect of payment of any sum, tax has been deducted under Chapter XVII-B or paid in any subsequent year, the sum of payment shall be allowed in computing the income of the previous year in which such tax has been paid.

The proposed amendment will take effect from 1st day of April, 2005 and will, accordingly, apply in relation to the assessment year 2005-2006 and subsequent years, [Clause 11]"

Here it is important to note that Chapter IV-D deals with the income under the head 'Profits and gains of business or profession'. Section 28 contains a list of items of income which shall be chargeable to income-tax under this head. Section 29 is computing provision which provides that income referred to in section 28 shall be computed in accordance with the provisions contained in sections 30 to 43D. Sections 30 to 37 grant various deductions on account of expenses / allowances etc. Section 38 restricts the amount of depreciation allowance u/s 32. Then comes section 40 with the marginal note "Amounts not deductible". It starts with the non-obstante clause by providing that notwithstanding anything to the contrary in sections 30 to 38, the amounts specified in this section shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession". Thus it is vivid that section 40 has overriding effect over sections 30 to 38. In other words if any expenditure or allowance is deductible as per the provisions contained in sections 30 to 38, it shall cease to be deductible if it falls within the domain of section 40. But for the prescription of section 40, the expenses or allowances otherwise deductible u/s 30 to 38 do not fail to qualify for deduction. Thus it is palpable that section 40 is a substantive provision which approaches to increase the tax liability of the assessee in the year of failure to deposit tax within the prescribed period.

6.7. From the above discussion the following conclusions are drawn:

- 1) The very intention of the introduction of provision of section 40(a)(i) and 40(a)(ia) is to augment tax collection as well as TDS compliance.*
- 2) The very provision of Section 40(a)(ia) refers to the deduction of Tax at source in accordance with the Provisions of Chapter XVII-B.*
- 3) Chapter XVII-B of the Act read with the corresponding rules, specify and lay down series of Provisions, Procedures and Compliances including specification of the rates of applicable TDS in respect of different types of expenditure such as Section 192, 194A, 194 C ,194J, 195 etc*
- 4) If the assessee is permitted to short deduct TDS, then the very intended purpose of the Provisions of Chapter XVII-B and the consequence prescribed U/s.40(a)(i) / 40(a)(ia) stand defeated. Further, if this be the case, an assessee who is liable to deduct TDS, say at 20%, shall go scot free by applying a token rate of 1% TDS, and*

get away from true and correct compliance. This surely was not the intention of the legislators. Furthermore, this would also result in a "CHAOS" situation as all the Tax payers would find short deduction as a convenient escape route

5) In fact, the Provisions of Section 40(a)(i) & 40(a)(ia) only to bound the Tax payer to a true and correct compliance of the Provision of Chapter XVII-B.

6) So far as the judicial precedents, relied upon by the assessee, the same has no applicability for the primary reason that the said judgments have dealt with short deduction of TDS arising out of genuine and bonafide error of judgment or difference of opinion as to the correct rates applicable. The assessee has not brought anything on record that his case is that of a difference of opinion or judgmental error. Hence these case laws shall not come to his rescue.

6.8. Hence, in light of the above discussion and details of Field Agents for conducting research survey and Data Analysis & Tabulation the assessee was liable to deduct tax as per provisions of section 194J for following expenses:

<i>Field Agents for conducting research survey</i>	<i>Rs.38,67,70,433</i>
<i>Data Analysis & Tabulation</i>	
<i>(Rs.15,31,42,352/-Minus Rs.4,07,52,456/-)</i>	<i>Rs.11,23,89,896</i>
<i>Total</i>	<i><u>Rs.49,91,60,329</u></i>

*6.9. Therefore, for non-deduction of the TDS as per provision of Section 194J of the Income Tax Act, 1961 on amount of **Rs.49,91,60,329/-**, by invoking provisions of Section 40(a)(ia) of Income Tax Act, 1961, is hereby disallowed and added back to the total income of the assessee. **Penalty proceedings u/s. 271(1)(c) of the Income-tax Act, 1961 is initiated separately for furnishing inaccurate particulars of income.**"*

4. Aggrieved by an assessment framed by the AO u/s 143(3) read with Section 144C(3), the assessee filed first appeal with Ld. CIT(A) who observed that tribunal in assessee's own case from AY 2005-06 to 2010-11 has decided this issue in favour of the assessee . The learned CIT(A) vide appellate order dated 12.12.2017 by following the decision of tribunal in assessee's own case for AY 2010-11 in ITA no. 6729/Mum/2014 decided the issue in favour of the assessee wherein learned CIT(A) held that no additions u/s 40(a)(ia) of the 1961 Act is warranted under factual matrix of the case on short deduction of income-tax at source as the assessee has duly deducted income-tax at source u/s 194C of the 1961 Act .

5. Being aggrieved by the decision of learned CIT(A) vide appellate order dated 12.12.2017, the Revenue has filed an appeal with tribunal and it was submitted by learned DR that income-tax was deducted at

source by the assessee u/s. 194C which ought to have been deducted u/s. 194J as payments were made to various field agents for conducting research surveys, data compilation and translation etc. which services are professional in nature. It was submitted by learned DR that keeping in view provision of section 40(a)(ia) , these expenses cannot be allowed. The Ld. DR relied upon the decision of Hon'ble Kerala High Court in the case of CIT v. PVS Memorial Hospital (2015) 60 taxmann.com 69 (Ker).

6. The Ld. Counsel for the assessee on the other hand had relied upon the decision of Tribunal in assessee's own case for the earlier years viz. AY 2005-06, 2006-07, 2007-08, 2008-09, 2009-10 , 2010-11 and 2011-12, detailed as hereunder:-

1. *Hindustan Thompson Associates P. Ltd. v. ACIT [ITA No. 6184, 1302, 6185/Mum./2011 - Assessment Year 2005-06, 2006-07, 2007-08, Order dated 25th May, 2012]*
2. *ACIT v. Hindustan Thompson Associates Pvt. Ltd.[ITA No. 1208/Mum/2017 - Assessment Year 2011-12 Order dated 4th July, 2018]*
3. *ACIT v.. Hindustan Thompson Associates Pvt. Ltd. [ITA No. 6729/Mum/2014 - Assessment Year 2010-11 Order dated 13th July, 2016]*
4. *ACIT v. . Hindustan Thompson Associates Pvt. Ltd. [ITA No. 746/Mum/2014 - Assessment Year 2009-10 Order dated 19th February, 2016]*
5. *ACIT v.. Hindustan Thompson Associates Pvt. Ltd. [ITA No. 6030/Mum/2012 - Assessment Year 2008-09 Order dated 07th February, 2014]*

It was submitted by the Ld. Counsel for the assessee that in all these appeals in assessee's own cases for earlier years, the tribunal has decided the issue in favour of the assessee . It was submitted that the assessee has in any case deducted income-tax at source u/s. 194C and it is not a case wherein no income-tax was deducted at source by the assessee. Thus, it was prayed by learned counsel for the assessee that the appellate order of the Ld. CIT(A) be upheld as Section 40(a)(ia) has no applicability on short deduction of income-tax at source.

7. We have considered rival contentions and perused the material on record including cited case laws. We have observed that the

assessee is engaged in the business of Advertising & Marketing Research. The assessee had made payments to various field agents for conducting research surveys, data compilation and translation etc., during the previous year relevant to the impugned assessment year against which income-tax was deducted at source by the assessee by relying on the provision of section 194C while the revenue has contended that the income-tax ought to have been deducted at source u/s. 194J of the 1961 Act. The tribunal in its own case for earlier years has consistently held in favour of the assessee and deleted the additions on the ground that income-tax in any case has been deducted at source u/s. 194C and Section 40(a)(ia) has no applicability on short deduction of income-tax at source and consequently no disallowances are warranted u/s. 40(a)(ia). The tribunal has followed the decision of Hon'ble Calcutta High Court in the case of CIT v. S.K.Tekriwal (2014) 361 ITR 432(Cal.HC) to adjudicate the issue in favour of the assessee, wherein it was held that in case there is a short deduction of income-tax deducted at source under Chapter XVII-B due to difference of opinion between the taxpayer and Revenue, then provisions of Section 201 can be invoked but provisions of Section 40(a)(ia) cannot be invoked to make disallowance of expenses claimed. In the instant case before us, the assessee has been consistently submitting before the authorities that the payments were made to field agents for conducting research surveys, data compilation and translation etc. which was in the nature of contracts, including supply of labour and were covered by provisions of Section 194C and income-tax has been correctly deducted at source u/s 194C but Revenue is contending that these are payments for professional services covered u/s 194J for deductibility of income-tax at source. There was thus clearly difference of opinion between assessee as well as Revenue as to the true nature of these payments made by the assessee to field agents as to whether these are contractual payments, including for supply of labour or professional services. However, in the case of CIT v. P V S Memorial Hospital Limited (supra), there was

a categorical finding by the Hon'ble Kerala High Court based on appreciation of facts that payments were made for professional services at para 5 of the judgment and it was clearly held by Hon'ble High Court that income-tax was deducted under wrong provisions of the 1961 Act. The finding of the Court on nature of services for which payments were made in the case of P V S Memorial Hospital(supra) in para 5 of the judgment of Hon'ble Kerala High court is reproduced hereunder:

“5. As per these provisions of the agreement, M/s Lakeshore Hospital and Research Centre had undertaken to render professional services to the assessee and this was not a case where they were undertaking a contract work. If that be so, tax was deductible under Section 194J and not under Section 194C as done by the assessee.”

The assessee is consistently taking a stand that it has deducted income-tax at source under Chapter XVII-B on these payments made to field agents by correctly invoking provisions of Section 194C as these payments were contractual in nature, including supply of labour but Revenue is contending that these payments are for rendering of professional services and the assessee had wrongly deducted income-tax at source u/s 194C instead of applying provisions of Section 194J for deduction of income-tax at source. Thus, there was clearly a difference of opinion between the assessee and the Revenue. Thus, clearly facts are distinguishable in the instant appeal before us. One of the laudable objective of introducing system of deduction of income-tax at source under Chapter XVII-B of the 1961 Act is to collect income-tax at source at the time of making payment by payer to the payee to shore up the Revenue of Government while the other important objective of the system of deduction of income-tax at source under Chapter XVII-B by payers at the time of making payments to payee is to capture complete details of the transaction viz. nature of payments, quantum of payments, details of payee and payer by Income-tax Department so that reporting mechanism is created with income-tax data base as well audit trail is created to bring the transaction to income-tax so that there is no leakages of revenue or

escapement of income which could remain un-taxed, at both ends i.e. both payer and payee. Thus, the objective of scheme of deduction of income-tax at source by payer of the income at the time of making payments to the payee is not only to shore revenue of the Government but to widen tax base and is an anti tax avoidance measure. It is important to refer at this stage to newly inserted provisions of Section 194IA which was introduced by Finance Act, 2013 w.e.f. 01.06.2013 which stipulate deduction of income-tax at source @1% on transfer of certain immovable properties. The rate of income-tax to be deducted at source is only provided at a nominal rate of 1% of consideration amount of immovable property transferred . The Memorandum explaining provisions of Finance Bill , 2013 provides as under:

“E. Widening of tax base and anti tax avoidance measures

TAX DEDUCTION AT SOURCE (TDS) ON TRANSFER OF CERTAIN IMMOVABLE PROPERTIES (OTHER THAN AGRICULTURAL LAND)

There is a statutory requirement under section 139A of the Income-tax Act read with rule 114B of the Income-tax Rules, 1962 to quote Permanent Account Number (PAN) in documents pertaining to purchase or sale of immovable property for value of Rs. 5 lakh or more. However, the information furnished to the department in Annual Information Returns by the Registrar or Sub-Registrar indicate that a majority of the purchasers or sellers of immovable properties, valued at Rs. 30 lakh or more, during the financial year 2011-12 did not quote or quoted invalid PAN in the documents relating to transfer of the property.

Under the existing provisions of the Income-tax Act, tax is required to be deducted at source on certain specified payments made to residents by way of salary, interest, commission, brokerage, professional services, etc. On transfer of immovable property by a non-resident, tax is required to be deducted at source by the transferee. However, there is no such requirement on transfer of immovable property by a resident except in the case of compulsory acquisition of certain immovable properties. In order to have a reporting mechanism of transactions in the real estate sector and also to collect tax at the earliest point of time, it is proposed to insert a new section 194-IA to provide that every transferee, at the time of making payment or crediting of any sum as consideration for transfer of immovable property (other than agricultural land) to a resident transferor, shall deduct tax, at the rate of 1 % of such sum.

In order to reduce the compliance burden on the small taxpayers, it is further proposed that no deduction of tax under this provision shall be made where the total amount of consideration for the transfer of an immovable property is less than fifty lakh rupees.

This amendment will take effect from 1st June, 2013.”

Thus, in the memorandum explaining provision of Finance Bill, 2013 , it is clearly stipulated that insertion of Section 194IA is an measure to widen tax base and is an anti tax avoidance measure . Both the rival parties did not brought to our notice , judgment of Hon’ble jurisdictional High Court on this issue. Coming back to the instant appeal before us, the details of appeals in assessee’s own case for earlier years wherein tribunal had decided this issue in favour of the assessee are as under:

1. *Hindustan Thompson Associates P. Ltd. v. ACIT [ITA No. 6184, 1302, 6185/Mum./2011 - Assessment Year 2005-06, 2006-07, 2007-08, Order dated 25th May, 2012]*
2. *ACIT v. Hindustan Thompson Associates Pvt. Ltd.[ITA No. 1208/Mum/2017 - Assessment Year 2011-12 Order dated 4th July, 2018]*
3. *ACIT v.. Hindustan Thompson Associates Pvt. Ltd. [ITA No. 6729/Mum/2014 - Assessment Year 2010-11 Order dated 13th July, 2016]*
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5. *ACIT v.. Hindustan Thompson Associates Pvt. Ltd. [ITA No. 6030/Mum/2012 - Assessment Year 2008-09 Order dated 07th February, 2014]*

7.3 Respectfully following the aforesaid decision(s) of tribunal in assessee's own case in preceding years viz. AY 2005-06 to 2011-12 as outlined above with a view to maintain judicial discipline and also to maintain consistency as outlined by Hon’ble Supreme Court in the case of Radhasoami Satsang v. CIT (1992) 193 ITR 321(SC) , we decide this issue in favour of the assessee by holding that keeping in view factual matrix of the case , no disallowance u/s 40(a)(ia) of the 1961 Act is warranted in the instant case after observing that the assessee has duly deducted income-tax at source u/s. 194C of the 1961 Act on payments made by the assessee to field agents for conducting

research surveys, data compilation and translation etc.. Thus , Revenue fails in this appeal. We order accordingly.

8. In the result, appeal of the Revenue in ITA no. 1206/Mum/2018 for AY 2012-13 stand dismissed.

Order pronounced in the open court on 23.05.2019.

आदेश की घोषणा खुले न्यायालय में दिनांक: 23.05.2019 को की गई

Sd/-

(SAKTIJIT DEY)

JUDICIAL MEMBER

Sd/-

(RAMIT KOCHAR)

ACCOUNTANT MEMBER

Mumbai, dated: 23.05.2019

Nishant Verma
Sr. Private Secretary

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

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BY ORDER

DY/ASSTT. REGISTRAR
ITAT, MUMBAI