THE INCOME TAX APPELLATE TRIBUNAL
"E" Bench, Mumbai

Before Shri S. Rifaur Rahman, Accountant Member
and Shri Ravish Sood, Judicial Member

ITA No.5862/Mum/2017
(Assessment Year: 2013-14)

Assistant Commissinoer of Income Tax-16(1), R. No. 439, Aayakar Bhavan, M.K. Marg, Mumbai – 400 020	Vs.	M/s TV Vision Ltd. 4th Floor, Adhirai Chambers, Oberoi Complex, New Link Road, Andheri West, Mumbai – 400 053
PAN – AACCT7276Q		
(Appellant)		**(Respondent)**

Appellant by: Shri R. Manjunatha Swamy, D.R
Respondent by: Ms. Indra G. Anand, A.R

Date of Hearing: 16.10.2019
Date of Pronouncement: 23.10.2019

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)-4, Mumbai, dated 23.06.2017, which in turn arises from the order passed by the A.O under Sec. 143(3) of the Income Tax Act, 1961 (for short 'Act'), dated 03.03.2016 for A.Y. 2013-14. The revenue has assailed the impugned order on the following grounds of appeal before us:

"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) r.w.s 194J in respect of 'Carriage Fees/ Channel Placement fees' and failing to appreciate that the payments made for use/right to use of 'process' are 'royalty' as per Explanation 6 to section 9(1)(vi) hence such payments are covered u/s. 194J of the Income Tax Act, 1961.

2. Whether on the facts and 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) r.w.s 194 J of 'Carriage Fees/Channel Placement fees', whereas the jurisdictional ITAT, Mumbai 'L' Bench, in its order dated 28.03.20 14 in the case of ADIT-

(IT)-2(2), Mumbai Vs Viacom 18 Media Pvt. Ltd. has confirmed that the payments made for use/right to use of 'process' are 'royalty' in terms of the Income Tax Act, 1961".

3. 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) placing reliance on the decision of Calcutta High Court dated 10. 12.2012 in CIT vs S.K. Tekriwal [2014] 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 decided the issue in favour of the Department after discussing in detail the judgment in the case of CIT vs. S.K. Tekriwal (supra).

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

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

2. Briefly stated, the assessee company which is engaged in the business of broadcasting of television channels had e-filed its return of income for A.Y. 2013-14 on 29.09.2013, declaring its total income at Nil. Subsequently, the assessee had filed a revised return of income on 18.03.2014 declaring its income at Nil. Return of income filed by the assessee was processed as such under Sec.143(1) of the Act. Thereafter, the case of the assessee was selected for scrutiny assessment under Sec.143(2).

3. Assessee, a 100% subsidiary of Shri Adhikari Brothers Television Network Limited is running a television channel called "Masti". The T.V channel was distributed/broadcasted by the assessee through cable operators. Accordingly, the assessee company had contracted with various cable operators/multi system operators for carrying out the process of placing their channel on the desired network. It was observed by the A.O, that the assessee company had during the year debited an amount of Rs.25,32,42,535/- under the head "Operational cost" in its profit and loss account. On being queried, it was submitted by the assessee that the said amount was paid towards "carriage fees" to the cable operators for placing its channel on different frequency bands. On the said "carriage fees", the assessee had deducted tax at source under Sec.194C of the Act. A.O after deliberating at length, was of the view that carrying a particular channel on a particular frequency formed an integral part of transmission or broadcasting process. On the basis of his aforesaid observations, the A.O was of the view that neither the broadcaster nor the Multi System Operators could independently carry a channel without the intervention of the entire process involved. Accordingly, the A.O held a conviction that placement or carriage was nothing but a process by which a broadcaster gets their channel carried at a prime band of frequency. In sum and substance, the A.O was of the view that the "carriage fees" paid by the assessee to the cable operator was for a process that was involved

in facilitating the assesses channel to be carried at a particular frequency. In the backdrop of his aforesaid observations, the A.O was of the view that the payment made by the assessee towards placement or transmission fee was a payment for/of "Royalty". Accordingly, the A.O backed by his aforesaid conviction concluded that the assessee which was obligated to have deducted tax at source on the "carriage fees" under Sec.194J, had however, wrongly deducted the same under Sec.194C of the Act. On the basis of his aforesaid observations, the A.O observing that the assessee had failed to comply with the statutory obligation of deducting tax at source as envisaged under Chapter XVII-B of the Act, therefore, disallowed the assesses claim of "carriage expenses" amounting to Rs.25,32,42,535/- under Sec.40(a)(ia) of the Act. After making the aforesaid disallowance, the A.O assessed the income of the assessee company at Rs.26,67,72,620/-.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). After deliberating at length on the contentions advanced by the assessee, the CIT(A) was persuaded to subscribe to its claim. It was observed by the CIT(A) that "carriage fees" did not fall within the realm of the definition "Royalty" as contemplated in Explanation 2 to Sec.9(1)(vi) of the Act. Observing, that the assessee had rightly deducted tax at source on the carriage fees paid to cable operators under Sec.194C, the CIT(A) was of the view that no disallowance under Sec.40(a)(ia) was called for in its hands. Alternatively, it was also observed by the CIT(A), that even otherwise as the assessee had deducted tax at source under Sec.194C, therefore, no disallowance under Sec.40(a)(ia) could have been made for short deduction of tax at source by the assessee. The CIT(A) while concluding as hereinabove had drawn support from the judgment of the Hon'ble High Court of Calcutta in the case of DCIT Vs. S.K. Tekriwal, ITA No. 183 of 2012. Accordingly, the CIT(A) in terms of his aforesaid observations allowed the appeal.

5. 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 at the very outset of the hearing of the appeal submitted, that the issue involved in the present appeal was squarely covered by the orders of the Tribunal in the assesses own case for the preceding years viz. **(i) ACIT-16(1), Mumbai Vs. M/s T.V. Vision Ltd. [ITA No. 3386/Mum/2016, dated 28.02.2018 for A.Y. 2011-12]** (copy placed on record); and **(ii) ACIT-16(1), Mumbai Vs. M/s T.V. Vision ltd. [ITA No. 3387/Mum/2016, dated 28.02.2018 for A.Y. 2012-13]** (copy placed

on record). Apart there from, it was submitted by the ld. A.R that the issue was also covered by the judgment of the **Hon'ble High Court of Bombay** in the case of **CIT, TDS-2, Mumbai Vs. UTV Entertainment Television Ltd. (2017) 399 ITR 443 (Bom)**. In the backdrop of the aforesaid facts, it was submitted by the ld. A.R that as the issue was squarely covered in favour of the assessee, therefore, the appeal filed by the revenue did not merit acceptance and was liable to be dismissed.

6. Per contra, ld. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities. As regards the observation of the CIT(A) that deduction of tax at source under the wrong provision would not render the assessee amenable for disallowance under Sec.40(a)(ia) of the Act, the ld. D.R had relied on the judgment of the Hon'ble High Court Kerala in the case of CIT-1, Kochi Vs. PVS Memorial Hospital Ltd. (2016) 380 ITR 284 (Ker).

7. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements relied upon by them. Our indulgence in the present appeal has been sought by the revenue to adjudicate as to whether the CIT(A) is right in law and the facts of the case in concluding that no disallowance under Sec. 40(a)(ia)was called for in respect of the payments made by the assessee towards "carriage fees" to the cable operators, which had been subjected to deduction of tax at source under Sec.194C of the Act. As observed by us hereinabove, the A.O held a conviction that the "carriage fees" paid by the assessee to the cable operators was liable to be subjected to deduction of tax at source under Sec.194J of the Act. Observing, that the assessee had subjected the aforesaid payment of carriage fees amounting to Rs.25,32,42,535/- to deduction of tax at source under Sec.194C of the Act, the A.O had disallowed the entire amount by invoking the provisions of Sec.40(a)(ia) of the Act.

8. The core issue involved in the present appeal is as to whether any obligation was cast upon the assessee to subject the "carriage fees" paid to the cable operators for deduction of tax at source under Sec.194J, or not. We find that the aforesaid issue had been permeating in the assesses own case for the immediately preceding year i.e A.Y. 2011-12 and A.Y. 2012-13. As is discernible from the order of the ITAT "D" bench, Mumbai in the assesses own case for A.Y. 2012-13, the Tribunal had observed that as "carriage fees" paid by the assessee to the cable operators did not fall within the realm of the definition of "Royalty", therefore, no obligation was

cast upon the assessee to deduct tax at source under Sec.194J of the Act. Apart there from, the Tribunal had also approved the alternative view taken by the CIT(A), that in case of shortfall due to any difference of opinion as to the taxability of any item or the nature of payment falling under the various TDS provisions, no disallowance could be made by invoking the provisions of Sec.40(a)(ia) of the Act. In fact, the Tribunal while concluding as hereinabove had observed as under:

> "6. We have heard the rival contentions of the parties and carefully gone through the material on record including the decisions relied upon by the parties. The only grievance of the revenue is that the Ld. CIT(A) has wrongly deleted the disallowance made by the AO u/s 40(a)(ia) of the Act. The operative part of the order of the Ld. CIT(A) reads as under:
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> > "3.3. I have considered the issue under appeal carefully. I find that carriage fees is not at all royalty as defined in Explanation 2 to section 9(1)(vi) of the Act. The AO has not properly appreciated the fact and nature of payment. Further, such carriage fees is subject to TDS u/s 194C paid to cable operators and such fees do not qualify as fees for technical services or royalty, hence section 194J of the Act is not applicable. Further, it is pertinent to mention that this case is not of "no TDS" but it is a case of "less TDS" u/s 194C, hence no such disallowance can be made/s 40(a)(ia) as has been held by Hon'ble Calcutta High Court in the case of the CIT vs S. K. Tekriwal 48 SOT 515. Recently in the case of the DCIT vs Zee Entertainment Ltd. ITA No. 3931 to 3935/MUM/2013, it has been held that such payment to cable operators should be subject to TDS @2% u/s 194C. Further appellant gets support from the jurisdictional ITAT, decision in the case of a 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). Respectfully following the decision over the issue, the AO is directed to of genuine expenditure of Rs.30,42,13,444/-."
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> 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.
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> 8. Hence, in our considered opinion, the findings of the Ld CIT(A) are based on the evidence on record and in accordance with the principles of law laid down by the High courts including the jurisdictional High Court discussed above. We therefore do not find any reason to interfere with the same. Accordingly, we uphold the decision of the Ld. CIT(A) and dismiss the sole ground of issue of the revenue.

Also, we find, that the **Hon'ble High Court of Bombay** in the case of **CIT, TDS-2, Mumbai Vs. UTV Entertainment Television Ltd. (2017) 399 ITR 443 (Bom)**, had observed, that in case of an assessee carrying on the business of broadcasting television channels, the payments made

towards placement charges would fall within the meaning of "work" covered in Clause (iv) of Explanation to Sec.194C of the Act. On the basis of our aforesaid observations, we are of the considered view, that the CIT(A) had rightly vacated the disallowance of Rs.25,24,75,535/- that was made by the A.O under Sec. 40(a)(ia) of the Act. Accordingly, finding no infirmity in the order of the CIT(A), we uphold the same.

9. Resultantly, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 23.10.2019

Sd/-	Sd/-
(S. Rifaur Rahman)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 23.10.2019
PS. Rohit

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

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

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