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

BEFORE SHRI C. N. PRASAD, JM &
SHRI S. RIFAUR RAHMAN, AM

आयकरअपीलसं./ I.T.A. No. 272/Mum/2019
(**निर्धारणवर्ष** / Assessment Year: 2015-16)

Triton Communications Pvt. Ltd. Prospect Chambers Annexe, 4th floor, Dr. D. N. Road, Fort, Mumbai-400 001	**बनाम**/ Vs.	ACIT Range 2(3), Aayakar Bhava, M. K. Road, Mumbai -400 020
स्थायीलेखासं./जीआइआरसं./PAN No. AABCT1560A		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Appellant by**	:	Shri Behari Lal, AR
प्रत्यर्थीकीओरसे/**Respondentby**	:	Shri Amit Pratap Singh, DR
सुनवाईकीतारीख/ **Date of Hearing**	:	08.01.2020
घोषणाकीतारीख / **Date of Pronouncement**	:	28.02.2020

आदेश / O R D E R

Per S. Rifaur Rahman, Accountant Member:

The present Appeal has been filed by the assessee against the order of Ld. Commissioner of Income Tax (Appeals) – 6,

Mumbai in short referred as 'Ld. CIT(A)', Mumbai, dated 10.10.2018 for Assessment Year (in short AY) 2015-16.

2. The brief facts of the case are, assessee has filed its return of income on 28.11.15 declaring a total loss of Rs. 1,29,81,890/- and assessee has also shown book loss u/s. 115JB at Rs. 1,20,60,624/-. The case was selected for scrutiny under CASS to verify the following:-

1. High ratio of refund to TDS

2. Certificate u/s 197 for Nil or Lower rate of TDS (Form 13)

3.Low income shown by large contractors .

4. Mismatch in sales turnover reported in Audit Report and ITR.

5. Mismatch in amount paid to related persons u/s 40A(2)(b) reported in Audit Report and ITR.

3. Accordingly, notices u/s 143(2) and 142(1) were issued and served on the assessee. In response, AR of the assessee filed the relevant information as called for. Thereafter, AO after considering the submission of assessee, completed the assessment by making addition on deemed rent, payment made to ICOM, entertainment expenses, Non media billing having

difference between sales declared for VAT and service tax and sales declared in profit and loss account and also disallowed leave salary paid.

4. Aggrieved with the above order, assessee preferred appeal before Ld. CIT(A) and Ld. CIT(A) after considering the submission of assessee, partly allowed the appeal of the assessee by allowing deemed rent and leave salary paid and dismissed the other grounds raised by the assessee.

5. Aggrieved by the order of the Ld. CIT(A), assessee is in appeal before us on the following grounds:-

> *1.1 On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals)-6, Mumbai had erred in law as well as on facts by unjustifiably confirming the disallowance made by the Assessing Officer of payment of Rs. 4,85,231/- being the payment made to, ICOM, a non-resident company for services rendered outside India without taking into consideration that ICOM does not have PE in India and all services are rendered outside India and also the payment has been made outside India. Therefore, no TDS is required to be deducted.*

1.2 The learned Commissioner of Income Tax (Appeals)-S has erroneously relied on the provisions of section 9(l)(vi) and section 9(l)vii) of the Act without understanding the fact that these sections would apply only to any income by way of royalty/fees for technical services. Subscription paid by the assessee is neither a royalty nor it is fees for technical services.

1.3 The learned Commissioner of Income Tax Appeals)-6 has failed to understand that subscription paid by the assessee is a membership fees paid to ICOM, the leading independent marketing communication network. ICOM, a US based offers clients an alternative to the huge and increasingly similar agency groups. With 70+ members is more than 50 countries, the network is the most balanced and international independent agency network offering full range of integrated marketing and media communications services. Hence, subscription paid is only a membership fees and it is neither a royalty nor it is a fees paid for technical services.

2. On the facts and circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals)-S, Mumbai had erred in confirming the disallowance of the amount of Rs. 5,640/- made by the

Assessing Officer being the entertainment expenses paid on behalf of Director to gymkhana.

2.1 The learned Commissioner of Income Tax (Appeals)-6 had erroneously concluded that payment has been made to gym and not to any club for its membership without understanding the fact that gym is a part of the club. Therefore, the payment has been made for entertainment of the client which is for the benefit of the business of the company and therefore, the same is allowable under the provisions of section 37 of the Income Tax Act, 1961.

3. On the facts and circumstances of the case, the learned Commissioner of Income Tax (Appeals)-6 has erred in law as well as on facts by unjustifiably confirming the addition made by the Assessing Officer of the billing amount of Rs. 21.82 lakhs as unaccounted sale, without properly verifying the details filed before him during the course of hearing.

3.1 The learned Commissioner of Income Tax (Appeals)-6 failed to appreciate that difference of Rs. 21.82 lakhs as per Service Tax Turnover and Book Turnover is on account of Non-Media Billing at cost. In Media Billing Turnover is calculated on the basis of commission received where in Non-Media Billing, the assessee does not receive any commission, therefore it

does not form part of the Turnover in the Profit and Loss Account, however, this amount of Non-Media Billing forms part of the total Turnover in the Service Tax and Vat Tax Returns. Therefore, the difference of Rs 21.82 lakhs is because of the total amount of Non-Media Billing which has entered into the total turnover in the Service Tax and Vat Tax Returns but the same is not a part of total Turnover as per Profit and Loss Account.

4. The assessee craves leave to add, alter, amplify, modify or delete any of the aforesaid grounds of appeal at or before the hearing of appeal.

6. With regard to ground no. 1 in respect of payment to ICOM, Ld. AR submitted before us that AO observed during the assessment proceedings that assessee made a payment of Rs. 4,85,231/- to ICOM, a non-resident company for service rendered. He further submitted that AO observed that assessee has not withheld tax while making payment to non-resident company even though the service are availed in India. Before AO, assessee has submitted that ICOM has no PE in India and all services are rendered outside India. However, AO observed that

service utilized by the assesse have enhanced the assessee's capabilities in making better decisions, the data services availed by the assessee are in the nature of technical services which are availed by the Indian company and non-resident entity has made them available in India. According to AO, the provision of section 9(1)(vii) of the Act are applicable when any fee for technical services received from India and such services made available in India, entities receiving the amounts which made the services available in India are liable to pay tax as the income earned in India. As the technical services are chargeable to tax in India, assessee should have withheld the tax. Accordingly, he invoked the provision of section 40(a)(ia) and disallowed the expenditure claimed by the assessee.

7. Ld. AR further submitted that Ld. CIT(A) sustained the above addition with observation that the questioned amount has been paid for the services rendered by ICOM to the assessee are subscription /license charges paid. Accordingly, such payment would fall either in the nature of fees for technical services or royalty and would be taxable under the Income Tax Act under the provisions of section 9(1)(vi) /9(1)(vii) of the Act. He further

submitted that ld. AR brought to our notice page no. 24 of the paper book in which assesse has made submission before AO that assessee has made this payment in the nature or subscription and explained that ICOM is US based company and offers effective integrated communication resources to members through which provides a free exchange of ideas, information and support to members internationally with 800+ members in more than 60 countries. Therefore, this services are rendered outside India and the ICOM does not have PE in India, therefore the provisions of TDS is not applicable in this case of transaction. In this regard, he relied on of case of CIT vrs. Indusind Bank Ltd. (2019) 179 DTR (Bom) 18, which is placed at page no. 51 of the paper book and submitted that the facts in this case are similar to the facts of the present case. Accordingly, he submitted that since assessee has made payment for subscription only, which will not fall under any of the FTS provisions.

8. On the other hand, Ld. DR argued in support of the findings of tax authorities and he opposed the case law relied by the assessee and submitted that the case relied by Ld. AR are decided on the issue of GDR, whereas the present case is on the

payment of subscription charges which is distinguishable. With reference to page 24 of the paper book, he submitted that the nature of payment is not clear and assessee has utilized the services, therefore it will fall under technical services and the services were provided by the foreign entity and assessee has utilized the same. Accordingly, it will fall within the ambit of FTS.

9. Considered the rival contentions and the material placed on record, we notice from the record that ICOM is an entity based in USA and it offers services only to its members and these services are subject to only those members who have to get membership by becoming a member in the above said entity. These services are available to its 800+ members spread over 60 countries and it offers a full range of integrated marketing and media communication services. Both AO and Ld. CIT(A) are of the opinion that just because of payment was made to ICOM, it means to utilization of services in India. The courts have held that TDS is to be deducted only in those income which are chargeable to tax in India. Both AO and Ld. CIT(A) have not brought on record any information by which the income of

ICOM is chargeable to tax in India. Assessee has utilized the same services from international independent agency networks through which any of the members can utilize anywhere in the world. The question is whether such utilization of services is taxable in India. Particularly, when the origin and sources of such information are available outside India and merely utilizing such information in India, whether such utilization can be taxable in India. Therefore, in our considered view, the availing of net based services are outside the ambit of FTS provisions particularly when it cannot chargeable to tax in India and further as per the information submitted before us, the assessee has utilized these information outside India. Therefore, any income /payment for which such payments are not taxable in India, certainly such payments are outside the provision of TDS. Accordingly, by respectfully following the decision of CIT vrs. Indusind Bank Ltd. (supra), we are inclined to allow the ground raised by the assessee. Accordingly, this ground raised by the assessee is **allowed.**

10. With regard to ground no. 2 in respect of disallowance of Rs. 5640/- towards entertainment expenses, Ld. AR submitted

before us that entertainment expenses were paid to Gymkhana Club for which director utilized the same and he submitted that Ld. CIT(A) wrongly observed that it is the payment for Gym which is not to any club for its membership. In the gym, there cannot be any entertainment of any client. He further submitted that it is in fact to a club membership for entertainment of the director /clients.

11. On the other hand, Ld. DR submitted that payment to Gymkhana, what is the benefit assessee will get out of such expenditure and he supported the orders passed by tax authorities.

12. Considered the rival contentions and the material placed on record, we notice from the record that both AO and Ld. CIT(A) treated the payment of Rs. 5,640/- to Gym on behalf of the director of the company. Whereas, Ld AR merely submitted that this payment is towards payment to Gymkhana club only any payment made to club is allowable of expenditure and he objected to the findings of Ld. CIT(A) in para no. 8 of its order. We notice that Ld. AR has not brought on any bill or copy of any

voucher which clearly indicate whether this payment is actually to the Gymkhana or towards any payment on behalf of Gym as observed by the tax authorities. Since the payment involved is very small, we direct the AO to verify whether this payment is towards Gymkhana club, then the AO is directed to allow the above expenditure as entertainment expenses. Accordingly, ground raised by the assessee is **allowed for statistical purposes.**

13. With regard to ground no. 3, Ld. AR submitted before us that AO observed that there is a different between the sales declared in VAT and service tax return and sales declared in financial statement. He further submitted that assessee raises bills to media house and non-media houses and with regard to non-media bills are only recovery or charges and it is considered as turnover only for the purposes of sales tax, not for the purposes of income tax, since assessee does not earn any commission income, therefore assessee does not treat this as turnover. He brought to our notice page 20 of the paper book in which assessee has made the reconciliation of total revenues as per the service tax and VAT return. Further, he brought to our notice

page 10 of the paper book which is assessment order for AY 2014-15, in which AO accepted the above said turnover. He further brought to our notice at page no. 4 of the paper book which is written submission by Ld. AR and for the brevity which is reproduced below:-

> *9. As per the Assessing Officer, the assessee has reported total income of Rs. 106.29 lakhs and Rs. 2430.13 lakhs as per VAT return and service tax return respectively. Thus, according to him, the assessee has shown total income of Rs. 2514.60(correct figure is Rs. 2536.42) lakhs as per VAT & service tax returns. The Assessing Officer has further stated that the assessee has shown total income of Rs. 2514.14 lakhs as per profit and loss account. Thus, according to the Assessing Officer the assessee has failed to report income of Rs. 21.82 lakhs in the total sales. The Assessing Officer was not satisfied with the explanation filed by the assessee and added the amount of Rs. 21.82 lakhs to the income of the assessee by treating the same as unaccounted sales.*
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> *10. The assessee filed full details before the Assessing Officer and explained that the difference of Rs. 21.82 lakhs as per service tax turnover and book turnover is on account of Non-Media billing at cost.*

The assessee also filed a statement along with copy of bills and supplier's bills and explained that there is no difference in revenue as per service tax and Vat turnover and turnover as per Profit & Loss Account. The Assessing Officer, however, without applying his mind to the statements filed before him has made the addition which is totally unjustified. The books of account of the assessee are audited and the auditors had never pointed out any such difference. The assessee explained vide its letter dated 20th December, 2017 (copy enclosed at page 27of the paper book) that the difference of Rs. 21.82 lakh as per Service Tax Turnover and book Turnover is on account of Non-Media billing at cost. The assessee further explained by reconciling of total revenue as per service tax & vat returns (copy enclosed at pages 28 to 30 of the paper book).

11 The remarks of the AO that the assessee has failed to report income of Rs. 21.82 lakhs in the total sales are totally unwarranted and without understanding the accounts maintained by the assesse. He has not understood that the amount of Rs. 21.82 lakhs has been shown in the sales as well in the purchases. In fact, the assessee has not earned any income on these sales, the assessee issued the bill to its client for this amount which he has paid to the media

owners. Thus, this amount has been shown in the sales as well in the purchases (this was contra entry in the profit and loss account) and has no effect on the profits. However, the Service Tax is payable even on the sales where the assessee has not earned any profit. Thus, the profit shown for the purpose of payment of Service Tax includes the amount of Rs.21.82 lakhs. In the assessment year 2014-15 similar issue was involved and the Assessing Officer accepted the explanation filed by the assessee (copy enclosed at pages 31 to 32 of the paper book) and no addition was made in that assessment year Copy of the order is enclosed at pages 10 to 12 of the paper book).

12. The learned CIT (A) has also not applied his mind to the issue under consideration. He has simply confirmed the findings of the AO in spite of the fact that the entire case was explained to him in detail. It was explained to him that the differential amount of Rs. 21.82 lakhs is on account of non-media billing which was done at cost. According to him, even if fact be so, the non-media billing done at cost cannot be a transaction which will not be routed through the assessee's P & Loss Account, the corresponding consideration should be credited to the profit and loss account. He has further stated while the consideration cost would be debited in the profit and loss account,

> *the correspondence consideration received at cost should be credited to the profit and loss account. "**The learned CIT (A) in fact has failed to understand the facts of the case. The assessee has credited to the profit and loss account the consideration received at cost and the same cost has been debited to the profit and loss account". So the comments of the learned CIT (A) are not at all relevant and such comments have been made without going through the profit and loss account.***

14. On the other hand, Ld. DR supported the orders passed by the tax authorities.

15. Considered the rival contentions and the material placed on record, we notice from the record that the assessee is dealing two types of turnover i.e. the media billing in which it earns commission income and the other type is non media, in which assessee does not earn any commission. But both type of business, the assessee has to declare the same as turnover, as both type of bills liable to pay sales tax and service tax. It is compulsory on the part of assessee to declare them as sales to sales tax and service tax authorities. The assessee, as per submission, submits that it declares only the turnover in which it

earns commission income and other part of turnover are treated as reimbursement. The reconciliation statement was submitted before tax authorities. Even Ld. CIT(A) acknowledged the method adopted by assessee, but however he observed that the assessee must have claimed the expenditure for the reimbursement and the reimbursement income was not declared by the assessee.

16. After considering the submissions, we notice that the method adopted by assessee must have disclosed the turnover less the non-media turnover as their sales and at the same time, assessee must have claimed cost of services less non media expenditure as their expenditure. On record, assessee has submitted only the reconciliation of sales and not submitted any reconciliation of cost of services as per which it has reduced the corresponding cost of services in the expenditure charged to profit and loss account. Therefore, we are inclined to remit this issue back to AO to verify the cost of services rendered by assessee relevant for both media and non media services. If it is found that the assessee has excluded the cost of services relating to non media, in their profit and loss statement, the addition in

turnover, may be deleted. It is needless to say that assessee may be given proper opportunity of being heard and at the same time, assesse is directed to file reconciliation of cost of services before AO. Accordingly, grounds raised by the assessee are **allowed for statistical purposes**.

17. In the net result the appeal filed by the assessee is **allowed for statistical purposes.**

Order pronounced in the open court on 28th Feb 2020.

Sd/-	*Sd/-*
(C. N. Prasad)	(S. Rifaur Rahman)
न्यायिकसदस्य / Judicial Member	लेखासदस्य / Accountant Member

मुंबई Mumbai;दिनांक Dated : 28.02.2020
Sr.PS. Dhananjay

आदेशकीप्रतिलिपिअग्रेषित/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**