

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई।
**IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH: CHENNAI**

श्री जॉर्ज माथन, न्यायिक सदस्य एवं
श्री इंटूरी रामा राव, लेखा सदस्य एवं

**BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER AND
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA Nos.304 & 305/Chny/2018
निर्धारण वर्ष /Assessment Years: 2009-10 & 2011-12

The Deputy Commissioner of Income
Tax,
Large Tax Payer Unit -1,
Room No.712, Wanaparthy Block,
7th Floor, Aayakar Bhawan,
No.121, Mahatma Gandhi Road,
Chennai – 600 034.

(अपीलार्थी/Appellant)

M/s. Sify Technologies Limited,
2nd Floor, TIDEL Park,
Vs. No.4, Canal Bank Road,
Taramani, Chennai – 600 113.

[PAN: AAACS 9032R]

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by
प्रत्यर्थी की ओर से /Respondent by

: Mr. D. Manoj Kumar, CIT
: Mr. R. Vijayaraghavan,
Advocate

सुनवाई की तारीख/Date of Hearing

: 25.02.2020

घोषणा की तारीख /Date of Pronouncement

: 25.02.2020

आदेश / ORDER

PER GEORGE MATHAN, JUDICIAL MEMBER:

I.T.A. No.304/Chny/2018 is an appeal filed by the Revenue against the order of the learned Commissioner of Income Tax (Appeals)-17, Chennai in ITA No.06/2015-16 dated 21.11.2017 for the Assessment Year 2009-10 against the deletion of the levy u/s.201(1) and 201(1A) of the Income Tax Act, 1961.

2. Mr. D. Manoj Kumar, CIT represented on behalf of the Revenue and Mr. R. Vijayaraghavan, Advocate represented on behalf of the Assessee.

3. In the Revenue's appeal, the Revenue has raised the following grounds:

Grounds of appeal:

- 1) The learned CIT(A) failed to consider that the proceedings u/s.201(1) / 201(IA) are independent of assessment proceedings. As there was failure on the part of the assessee to deduct tax on payments made to foreign entities in connection with (i) Bandwidth charges, (ii) Legal & Professional charges and (iii) Direct cost and Networking & Communication charges.
 - 2) The CIT(A) failed to consider that as per the provisions of Section 195, the assessee ought to have filed an application u/s.195 before the Assessing Officer at the time of making / crediting the payment to these foreign entities.
 - 3) For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the learned CIT(A) may be set aside and that of the Assessing Officer be restored.
4. It was submitted that the learned Departmental Representative that there was a liability to deduct TDS on the bandwidth charges, legal and professional charges and the direct cost and networking and communication charges. On account of the failure on the part of

the assessee to deduct TDS, the Assessing Officer had levied tax u/s.201(1) and 201(1A) of the Income Tax Act, 1961. It was a submission that the learned Commissioner of Income Tax (Appeals) had deleted the same holding that there was no liability to deduct tax by the assessee in respect of the bandwidth charges, legal and professional charges and the direct cost and networking and communication charges. The learned Departmental Representative vehemently supported the order of the learned Assessing Officer.

5. In reply, the learned Authorized Representative submitted that the issue on merits had been adjudicated by this Co-ordinate Bench of this Tribunal in the assessee's own case in I.T.A. No.1650/Chny/2017 dated 18.12.2018 for the Assessment Year 2010-11 and I.T.A. Nos.1793, 1794 & 1795/Chny/2016 for the Assessment Years 2009-10, 2010-11 & 2011-12 vide order dated 18.12.2018, wherein the Co-ordinate Bench of this Tribunal has in para-5.3 to 5.6 has held as follows:

“5.3 On Networking Cost: 13. We heard the rival submissions and perused the material on record and judicial decisions cited. Similar issue was dealt in ITA No. 1084/Mds/2012, for the assessment year 2002-2003, dated 20.11.2012, where the Tribunal observed in para No.13 as under:-

‘13. We have heard the rival contentions and gone through the relevant findings as well as case law above said. The only issue between the parties is that per Revenue, the payment in

question made by the assessee is liable to TDS provisions as comprised in Chapter XVII B of the "Act" which the assessee is disputing. We notice that the Coordinate Bench in I.T.A. No. 1277 and 1283/Mds/2008 (*supra*) decided on 02.02.2012 [in which one of us N.S. Saini, A.M. Member of the Bench] has held as under:4. We have heard the rival submissions and perused the orders of the lower authorities as well as the cited decisions. We find that the Ld. CIT(A) has decided this issue by observing as under:

"6. I have carefully considered the facts of the case and the rival submissions and also examined the issues carefully with reference to applicability of sec. 195, which has been denied by the appellant. The appellant company is engaged in the business of providing networking and e-commerce services by way of internet. In order to carry out its business of providing broadband internet connectivity the appellant company has entered into agreements with certain non-resident companies. The assessee therefore made certain remittances in foreign currency towards connectivity charges and bandwidth charges which are called telecommunication charges without deduction of tax at source. The Assessing Officer examined the matter and found that the equipments used by the appellant company through which connectivity was provided are used by the assessee. Therefore, it treated the payment as royalty for the use of the equipments. Consequently, the Assessing Officer held that the appellant committed default u/s 195 in so far as it had not deducted tax at source. He therefore, worked out short deduction of tax u/s. 201(1) at Rs.3,45,99,751/- and Rs.3,33,39,659/- for A.Ys. 2002-03 and 2003-04 respectively. The Assessing Officer also charged interest u/s. 201(1A) amounting to Rs.1,99,68,927/- and Rs.1,52,71,474/- for A.Ys. 2002-03 and 2003-04 respectively. The Assessing Officer has, therefore, taken the following arguments for raising the impugned demands.

(1) The service provided by the Telecommunication service Provider in the case is different from that provided by the nonresident companies in the present case.

(2) Telephone is fundamentally different from a bandwidth service.

(3) *The bandwidth service is not a specified service.*

(4) *Equipment of the nonresident company through which connectivity is provided is used by the assessee the requisite bandwidth along with equipments is for exclusive for the assessee which cannot be used by others nor by the nonresident company; on termination of the agreement the assessee must cease to use the service and all equipment of the non-resident company. Thus the payment by the assessee can be treated as royalty for use of equipment. The ITO further argued that case has to be distinguished from the case of BSNL and Others Vs. Union of India (Supreme Court). In that case the Supreme Court dealt with the issue of using standard facility provided to an average :- householder or consumer whereas in the present case it dealt with payment for use of equipment.*

6.1. *In the report dated 07-09-2007 the Assessing Officer has reiterated the arguments made in the impugned order*

6.2 *On the other hand the learned AR has vehemently argued that the learned Assessing Officer has not properly appreciated the facts of the case and submitted that the bandwidth charges are provided either by way of undersea cables or by satellite earth stations and the appellant does not have any control over the equipments as it has only leased a part of the transponder capacity and not leased the transponder. Therefore, the right of use of the equipment is not exclusively with the appellant. Further, the right to use equipment mainly arises if there is physical equipment and since the equipments used by the appellant are not under its control. Therefore, the payments made do not have the character of royalty.*

6.3 *On the above facts and in the circumstances of the case, only one question arises for decision whether the remittances made by the appellant company to the foreign parties would fall within the purview of sec. 195(1) which requires deduction of tax at source. Bandwidth is bought and sold to consumers and it acts as a conduit only. In the appellant's case there are no equipments installed in its premises and the contract entered with the foreign parties is only for the services. Mere use of equipment in providing bandwidth services would not amount to transfer of right*

to use. As a matter of fact there are no goods involved in the transaction and the payments are made only for the use of services. The word "royalty" and its meaning was introduced vide Finance Act, 1976 and was defined under explanation 2 to sec. 9(1)(i) which was further expanded to include 'the right to use any industrial commercial or scientific equipment but not including the amounts referred to in sec.,. 44B. The amendment was made by Finance Act, 2001 by incorporating clause (iv a) w.e.f. 01-04-2002 i.e., applicable for A.Y. 2002-03. In simple words, therefore, royalty means the payment of any kind received as a consideration for the use of' or the right to use, any copy right of literary artistic or scientific work but, does not include the words 'use' or right to use, industrial, commercial or scientific equipment. In the appellant's case there is no "right to use equipment. Therefore, the payments made do not fall under 'royalty'. On similar facts the ITAT, Bangalore Bench in the case of ACIT Vs. Infosys Technologies Ltd. in ITA Nos. 653 and 969/Bang/2006 dated 17-10-2007 held that any payment made to database owners outside India for accessing such databases and the services provided by such telecom operator to the customers do not amount to technical services or royalty u/s 9(1)(vii) of the IT Act. Accordingly, it was held that no TDS is to be made. The Hon'ble Tribunal also held that payments for accessing data is like reading a book in a library which could not be passed on to anyone else. Since the copyright was not for literary, artistic or scientific work, the payment is not to be treated as royalty and it was held that no TDS was required to be made. The Hon'ble ITAT, Bangalore Bench in the case of ITO Vs. Madhura Coats Pvt. Ltd., in ITA No. 1711 and 1712/Bang/2005 for A.Ys. 2005-06 and 2006-07 vide order dated 28-09-2006, relying on the decision of the Apex court in the case of Bharat Sanchar Nigam Ltd., (Supra)' wherein, it was held that providing telecom services do not fall under the category of 'goods', the Hon'ble ITAT held that payments made for connectivity for transmission of data would not fall into the category 'royalty' or 'fees for technical.

6:4. In view of these facts and In the circumstances of the case and the position of law set out above, it is held that the transactions in respect of which the impugned payments were made was purely on account of services and there is no transfer of right to use the goods. In the result, it is held that the Assessing Officer was not justified

in treating the payment as royalty and invoking the provisions of sec. 195 for both the assessment years. Consequently, the impugned order u/s, 195 r.w.s. 201(1) and 201(1A) dated 21-03-2006 for A.Ys. 2002-03 and - 2003-04 is cancelled.”

6. On a query from the Bench from the ld. D.R. as to whether there is any contrary decision of any other High Court, the ld. D.R. replied that the Hon’ble Delhi High Court decision is a lone decision on the issue.

7. On the above facts, when there is only one decision of the High Court, then the same requires to be followed by us. Our view finds support from the decision of the Hon’ble Bombay High Court in CIT Vs. Godavari Devi Saraf [Smt] [1978] 113 ITR 589 [Bom] We, therefore, confirm the order of the ld. CIT(A) and dismiss the grounds of appeals of the Revenue.

8. In the result, both the appeals of the Revenue are dismissed.” After going through the operative portion above said, there is no iota of doubt that the payments in question made by the assessee cannot be subjected to the applicability of TDS provisions contained in the “Act”. Therefore, in view of the same and in order to maintain consistency, we rely on the above said order of the ITAT and decide the grounds against the Revenue”. We respectfully following the above decision, we upheld the order of the Commissioner of Income Tax (Appeals) and dismiss the Revenue appeal.”

5.4 On Content Development Costs: “53. We have considered the facts and submissions made by the ld. Authorised Representative and Departmental Representative, on similar issue was adjudicated by us for the assessment year 2001-02 in ITA No.435/Mds/2010 at para 13 and we dismiss the ground of the Revenue.”

5.5 On Direct Costs: “32. We have considered the facts and submissions made by the ld. Authorised Representative and Departmental Representative, on similar issue was adjudicated by us for the assessment year 2001-02 in ITA No.435/Mds/2010 at para 13 and we dismiss the ground of the Revenue.

5.6 Legal and Professional Charges” “53. We have considered the facts and submissions made by the ld. Authorised Representative and Departmental Representative, on similar issue was adjudicated by us for the assessment year 2001-02 in ITA No.435/Mds/2010 at para 13 and we dismiss the ground of the Revenue.”

Following, the co-ordinate bench decisions, supra, on the above issues the Revenue's appeals on the above issues are dismissed."

It was a submission that it has been held by the Co-ordinate Bench of this Tribunal that the payments in question made by the assessee cannot be subjected to the applicability of Tax Deducted At Source [TDS] provision. It was a submission that consequently the order of the learned Commissioner of Income Tax (Appeals) cancelling the levy u/s.201(1) /201(1A) was liable to be sustained.

6. We have considered the rival submissions and perused the materials available on record.

7. A perusal of the order of the Co-ordinate Bench of this Tribunal in the assessee's own case referred to supra and which has been extracted earlier clearly shows that the issue on which the Revenue has raised the levy u/s.201(1) and interest u/s.201(1A) has already been held to be not liable for deduction of TDS under the relevant provisions of the Income Tax Act, 1961.

This being so, as there is no liability of the assessee to deduct TDS on the said payments, there can be liability on the assessee for

the levy u/s.201(1) and consequently 201(1A) of the Income Tax Act, 1961. In the circumstances, we find no error in the order of the learned Commissioner of Income Tax, 1961 which calls for any interference.

8. In the result, the appeal of the Revenue in I.T.A. No.304/Chny/2018 is dismissed.

9. I.T.A. No.305/Chny/2018 is an appeal filed by the Revenue against the order of the learned Commissioner of Income Tax (Appeals)-17 in appeal No.I.T.A. No.37/2016-17 dated 17.11.2017 for the Assessment Year 2011-12 against the action of the learned Commissioner of Income Tax (Appeals) in granting the assessee the benefit of set off of the unabsorbed depreciation.

10. At the time of hearing, it was fairly agreed by both the sides that the issue was squarely covered by the decision of the Co-ordinate Bench of this Tribunal in the assessee's own case in I.T.A. No.1650/Chny/2017 for the Assessment Year 2010-11 vide order dated 18.12.2018, wherein in para-8.1 and 8.2. the Co-ordinate Bench of this Tribunal has held as follows:

8.1 With regard to set off of brought forward unabsorbed depreciation, the AR relied on the Delhi High Court decision in the case of *PCIT vs British Motor Car Co. (1934) Ltd.*, reported in 400 ITR 569 (Delhi) and invited our attention the head not which is extracted as under:

“Section 32 of the Income-tax Act, 1961 - Depreciation - Unabsorbed depreciation (Scope of) - Whether amendment in section 32(2) dispensed with restriction against set off and carry forward that was limited to 8 years beyond which benefit could not be claimed - Held, yes - Whether unabsorbed depreciation that was carried forward up to assessment year 2001-02 would be carried forward to assessment year 2002-03 and become part thereof and it would be governed by provisions of section 32(2) as amended by Finance Act, 2001 and would be available for carry forward and set off against profits and gains of subsequent years without any limit whatsoever.”

8.2. We heard the rival submissions. Since, the assessee has not earned any exempt income, in accordance with the Jurisdictional High Court decisions, *supra*, no disallowance can be made u/s. 14A :- and hence, we do not find any merit in the grounds of Revenue's appeal. With regard to the set off of brought forward unabsorbed depreciation for assessment year 2001-02 against the income for assessment year 2010-11, since the issue is decided by the Hon'ble Delhi High Court, *supra*, in favour of assessee, we do not find any merit in the ground of the Revenue's appeal. The Revenue's appeal for assessment year 2010-11 in ITA No. 1650/Chny/2017 is dismissed.

11 We have considered the rival submissions and perused the materials available on record.

12. As it is noticed, the issue is squarely covered by the decision of the Co-ordinate Bench of this Tribunal in the assessee's own

case referred to supra, we find no error in the order of the learned Commissioner of Income Tax (Appeals) which calls for any interference. Thus, the appeal of the Revenue in I.T.A. No.305/Chny/2018 is dismissed.

13. In the result, the appeals of the Revenue in I.T.A. No.304/Chny/2018 and I.T.A. No.305/Chny/2018 are dismissed.

Order pronounced in the open Court on 25th February, 2020 in Chennai.

Sd/-
(इंटूरी रामा राव)
(INTURI RAMA RAO)
लेखा सदस्य/**ACCOUNTANT MEMBER**

Sd/-
(जॉर्ज माथन)
(GEORGE MATHAN)
न्यायिक सदस्य/**JUDICIAL MEMBER**

चेन्नई/Chennai,
दिनांक/Dated: 25th February, 2020

IA, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant 2. प्रत्यर्थी/Respondent 3. आयकर आयुक्त (अपील)/CIT(A) 4. आयकर आयुक्त/CIT 5. विभागीय प्रतिनिधि/DR 6. गार्ड फाईल/GF