



M/s Dish TV India Limited
ITA Nos.5900 & 5534/Mum/2018
Assessment Year: 2013-14

आयकर अपीलीय अधिकरण "डी" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, MUMBAI

माननीय श्री छल्ला नागेन्द्र प्रसाद, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI C.N. PRASAD, JM AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM
(Hearing Through Video Conferencing Mode)

आयकर अपील सं./ I.T.A. No.5900/Mum/2018
(निर्धारण वर्ष / Assessment Year: 2013-14)

M/s Dish TV India Limited 135, Continental Building 135, Dr. Annie Besant Road Worli, Mumbai 400 018	बनाम/ Vs.	ACIT-16(1) R.No.439, 4 th Floor Aaykar Bhavan, Mumbai 400 020.
PAN/GIR No. AAACA-5478-M		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

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ACIT-16(1) R.No.439, 4 th Floor Aaykar Bhavan, Mumbai 400 020	बनाम/ Vs.	M/s Dish TV India Limited 135, Continental Building 135, Dr. Annie Besant Road Worli, Mumbai 400 018
PAN/GIR No. AAACA-5478-M		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Shri Jay Bhansali – Ld. AR
Revenue by	:	Shri Sreekar-Ld. DR

सुनवाई की तारीख/ Date of Hearing	:	18/08/2020
घोषणा की तारीख / Date of Pronouncement	:	07/ 09/2020



आदेश / O R D E R

Per Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid cross-appeals for Assessment Year (AY) 2013-14 contest the order of Ld. Commissioner of Income Tax (Appeals)-4, Mumbai [CIT(A)], Appeal No. CIT(A)-4/IT-104/ACIT16(1)/2016-17 dated 10/07/2018.

The grounds raised by the assessee read as under: -

1. The Commissioner of Income Tax (Appeals) [hereinafter referred to as "the CIT(A)"] erred in upholding the action of assessing officer [hereinafter referred to as "the AO"] in disallowing expenditure in the nature of discount amounting to Rs.56,48,42,447/- under section 40(a)(ia) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') for non-deduction of tax. The reasons given by him for doing so are wrong, contrary to the facts of the case and against the provision of law.
2. The A.O/CIT(A) failed to appreciate the expenditure of Rs.56,48,42,447/- was in the nature of discount given to its distributors working on a principal to principal basis, for early/advance payment and not in the nature of commission for provision of any service and therefore, did not warrant tax deduction under section 194H of the Act.
3. Assuming without admitting the arrangement with the distributor is in the nature of commission, the Assessing Officer/CIT(A) failed to appreciate that the distributors had the liberty to sell the electronic recharge balance on price, terms and conditions decided by the distributor and therefore, it was not possible to compute the amount in the nature of commission liable to withholding tax under section 194H of the Act in which case the provisions of section 194H would fail and therefore, could not be applied;
4. The Assessing Officer/ CIT(A) erred in drawing an analogy with expenditure of Rs.10,78,92,519/- suo-motu disallowed by the assessee for non-deduction of tax without appreciating that the said sum related to commission given to distributors for distribution of equipment, liable to withholding tax and therefore, the nature of such expenditure was completely different from the expenditure in the nature of discounts of Rs.56,48,42,447/- which did not warrant any tax deduction at source.
5. The CIT(A) erred in upholding the action of the AO on the grounds of judicial consistency without appreciating that the earlier order of CIT(A) on a similar issue had been set aside by the Hon'ble Income Tax Appellate Tribunal to the file of the AO for fresh adjudication.



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6. The Id. CIT(A) failed to consider the order of Hon'ble ITAT, Mumbai in the case of Videocon d2h Ltd. (now merged with Dish TV India Ltd.), wherein on similar issues, the Hon'ble ITAT held in favour of appellant.
7. The above grounds/sub-grounds are without prejudice to each other.

The grounds raised by the revenue read as under: -

1. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT is justified in confirming the order of Ld. CIT(A) of deleting the disallowance u/s. 40(a)(ia) rws 194J in respect of 'Customer Support Charges' and also that of 'CAS, Middleware and SMS Charges' without even deciding the section under which the tax was supposed to be deducted as per law and merely restricting itself over the issue of short deduction of tax?
2. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT is justified in confirming the order of Ld. CIT(A) of deleting the disallowance u/s. 40(a)(ia) rws 194J in respect of 'Customer Support Charges' and also that of 'CAS, Middleware and SMS Charges' without appreciating the ratio of judgement laid down by 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] taxmann.com 69 (Kerala)?**
3. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT is justified in confirming the order of Ld. CIT(A) of deleting the disallowance u/s. 40(a)(ia) rws 194J in respect of 'Customer Support Charges' and also that of 'CAS, Middleware and SMS Charges' by making a wrong assumption that the Hon'ble Kerala High Court in the case of PVS Memorial Hospital Ltd. (supra) has not considered the decision of Hon'ble Calcutta High Court in the case of CIT vs. S.K. Tekriwal (361 ITR 432) thereby rendering the order of the Tribunal perverse.
4. The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored."

As evident, the assessee is aggrieved by confirmation of certain disallowance u/s 40(a)(ia) whereas the revenue is aggrieved by deletion of certain similar disallowance by Ld. CIT(A).

2. The learned Authorized Representative for assessee, Shri Jay Bhansali, at the outset, submitted that the issues in cross-appeals are fully covered by the earlier orders of Tribunal in assessee's own case for AYs 2010-2011 to 2012-13, 2014-15 & 2015-16. The copy of the orders has been placed on record. The Ld. DR could neither controvert the



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same nor demonstrated any distinguishing facts. In the light of aforesaid submissions, our adjudication to the subject matter of appeal would be as given in succeeding paragraphs.

3.1 Facts on record would reveal that the assessee being resident corporate assessee was assessed for year under consideration u/s 143(3) on 15/03/2016 wherein the assessee was saddled with disallowance of Rs.6783.90 Lacs on account of *customer support charges* and another disallowance of Rs.5648.42 Lacs on account of *commission charges*. Both these disallowances are the subject matter of cross-appeals before us. During the year, the assessee, *inter-alia*, operated as direct-to-home (DTH) operator i.e. distribution of television channels via satellite.

3.2 During the course of assessment proceedings, it transpired that the assessee paid *customer support charges* of Rs.6741.90 Lacs and other charges (like SMS charges) for Rs.42 Lacs. The *customer support charges* were in the nature of call-center charges paid by the assessee. Against both these payments, tax was deducted at source (TDS) @2% u/s 194C. However, the said payments, in the opinion of Ld.AO, would require higher TDS of 10% u/s 194J and the failure to do so would attract consequential disallowance u/s 40(a)(ia). The assessee, *inter-alia*, submitted that short deduction, if any, would not lead to any disallowance u/s 40(a)(ia) as held in various decisions of the Tribunal. Further, the assessee, drawing attention to the contractual terms, justified its stand in deducting TDS @2% u/s 194C against the aforesaid payments and submitted that the services availed would not fall under the head *fees for professional or technical services* in terms of Sec.194J.



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However, disregarding the same, Ld. AO opined that the services were technical in nature and the expenses would fall under the category of professional / technical services which would require higher deduction of 10% u/s 194J. Since similar disallowance was made in AYs 2010-11 to 2012-13, Ld. AO chose to make similar disallowance in this year as per the provisions of Sec. 40(a)(ia).

3.3 Regarding commission payment, it was observed that the assessee did not deduct any TDS on commission of Rs.5648.42 Lacs stated to be paid to various distributors during the year. The assessee, in its submissions dated 15/03/2016, explained that distributors paid lump sum payment in advance as *advance subscription*. To incentivize the same, cash discount was offered by the assessee and the amount would actually represent cash discount and not commission on sales. The distributors did not render any service to the assessee and hence, the same would not require any TDS u/s 194H. However, Ld. AO, *inter-alia*, opined that there was principal-to-agent relationship between the assessee and the distributor and the provisions of Sec 194H were applicable to the said payments. Noticing that the assessee debited aggregate commission of Rs.15586.74 Lacs in the Profit & Loss Account and *suo-moto* disallowed an amount of Rs.1078.92 Lacs due to non-deduction of tax in its computation of income, this payment of Rs.5648.42 Lacs would also require further disallowance. Accordingly, the same was disallowed while framing the assessment.

4.1 The learned CIT(A), following Tribunal's order in assessee's own case for AYs 2011-12 & 2012-13, ITA Nos.3061-62/Mum/2017 & 3691-92/Mum/2017 order dated 10/10/2017 deleted the disallowance of



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Rs.6783.90 Lacs representing *customer support charges*. Aggrieved, the revenue is in further appeal before us.

4.2 However, the commission disallowance of Rs.5648.42 Lacs was confirmed by Ld. CIT(A) since similar disallowance was confirmed by the same authority in AY 2012-13 and further, in view of the fact that Tribunal had restored this matter back to the file of Ld. AO for fresh adjudication in AYs 2011-12 & 2012-13. Aggrieved, the assessee is in further appeal before us wherein Ld. AR seek similar directions as given in AYs 2011-12 & 2012-13.

5. We have carefully considered the rival submissions and perused relevant material on record. So far as the disallowance of Rs.6783.90 Lacs on account of *customer support charges* due to short deduction of TDS, is concerned, it is quite evident from impugned order that Ld. CIT(A) has merely followed the cited order of the Tribunal in assessee's own case for AYs 2011-12 & 2012-13. A copy of the same is on record. We concur with the submission of Ld. AR that this issue is squarely covered in assessee's favor by the order of the Tribunal for AYs 2011-12 & 2012-13 wherein at para-16 of the common order dated 10/10/2017, the coordinate bench found no infirmity or illegality in the order of the CIT(A) in holding that provisions of Section 40(a)(ia) will not be applicable in the case of the assessee as there was nothing in the section to treat the assessee as defaulter where there is shortfall in deduction of TDS. In fact, this decision has subsequently been followed by the co-ordinate bench of this Tribunal in assessee's own case for AY 2010-11 (ITA Nos. 3739 & 3383/Mum/2016 order dated 08/06/2018). Therefore, facts being *pari-materia* the same, no fault could be found in



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the impugned order, on this issue. Resultantly, the revenue's appeal stands dismissed.

6. Coming to assessee's appeal, it is common point of agreement that the issue would stand restored back to the file of Ld. AO for re-adjudication as per decision of the Tribunal for AYs 2011-12 & 2012-13 wherein the matter was restored back with certain directions. Similar directions were given in order for AY 2010-11, ITA No. 3739/Mum/2016 order dated 08/06/2018 which are as under: -

12. We have considered rival submissions and perused materials on record. As could be seen, identical issue arose in assessee's own case for assessment years 2011-12 and 2012-13. The Tribunal after considering the submissions made by the assessee and the evidences produced passed an order in ITA no.3061 3062/MUM/2017, dated 10.10.2017 restoring the issue to the Assessing Officer with the following observations: -

"8. We have gone through the copy of the agreement entered into by the assessee with the distributor available on pages 138 to 148 as well as the sample subscription application form available on pages 149 to 150 of the paper book. On the basis of the document and the issue involved we are of the view that examination of these documents as a whole along with the terms and conditions of the agreement entered into between the assessee and the distributor in respect of talk time card is essential to determine the true nature of the transaction whether the transaction entered into between the assessee and the distributor relates to discount or commission. The TDS provisions are applicable under section 194H in case it is held that the nature of the transaction entered into between the assessee and the distributor is that of commission but in case if it is decided that the nature of transaction is not commission but discount given on sales it cannot be regarded to be commission which is hit by the provisions of Section 194H of the Income Tax Act. We, therefore, in the interest of justice and fair play to both the parties set aside this issue and restore it to the file of the AO with the direction that the AO shall redecide this issue afresh in accordance with law after going through the agreement which the assessee has entered into with the distributor as well as the sample subscription application form, whether the amount represents the expenditure incurred by the assessee towards commission or whether the said amount represents cash discount given by the assessee to the distributor for sale of talk time card. We may mention that in this regard the AO while determining the true nature of the transaction whether it is a commission or discount should not be influenced by the nomenclature given by the assessee in the said agreement. We, accordingly set aside the order of the CIT(A) and restore this issue to the file of the AO."



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13. Facts being identical, respectfully following the aforesaid decision of the Co-ordinate Bench, we restore the issue to the file of the Assessing Officer for fresh adjudication keeping in view the directions of the Tribunal in assessment year 2011-12 and 2012-13. This ground is allowed for statistical purposes.

Similar directions have been given in AYs 2014-15 & 2015-16 common order dated 02/12/2019 (ITA Nos. 6168-69/Mum/2018). Therefore, in tune with consistent stand of Tribunal in other years, we restore this issue back to the file of Ld.AO for fresh adjudication on similar lines. Resultantly, the assessee's appeal stands allowed for statistical purposes.

7. Finally, the revenue's appeal stands dismissed whereas the assessee's appeal stands allowed for statistical purposes.

Order pronounced on 07th September, 2020.

Sd/-
(C.N. Prasad)

न्यायिक सदस्य / **Judicial Member**

Sd/-
(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 07/09/2020
Sr.PS, Jaisy Varghese

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/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.