IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'I' BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President),
and Saktijit Dey (Judicial Member)]

ITA No. 3719/Mum/2019
Assessment year: 2013-14

Deputy Commissioner of Income Tax-16(1)
Mumbai ………………… **Appellant**

Vs.

M/s. ABP Network Private Ltd. ………………**Respondent**
(Formerly Known as M/s. ABP News Pvt. Ltd.)
301, 3rd Floor, Boston House, Suren Road, Andheri,
Mumbai 400 093 [PAN: AADCM0507A]

Appearances by

S.S Iyengar (DR) *for the revenue*
Sanjay Parikh *for the assessee*

Date of concluding the hearing : 19/07/21
Date of pronouncement of this reference : 13/10/21

O R D E R

Per Pramod Kumar, VP:

1. By way of this appeal, the Assessing Officer has challenged correctness of the order dated 18th March 2019, passed by the learned CIT(A) in the matter of under section 143(3) of the Income Tax Act 1961, for the assessment year 2013-14.

2. In ground no. (i) to (iv) the Assessing Officer has raised the following grievances:-

> ***(i) Whether, on the facts and in the circumstances of the case, and in the law the Ld.CIT(A) has erred in directing to delete the disallowance u/s. 40(a)(ia) rws 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.***
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> ***(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) rws 194J of 'Carriage***

Fees/Channel Placement fees', whereas the jurisdictional ITAT, Mumbai 'L' Bench. In its order dated 28.03.2014 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.

(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 thereby holding that the short deduction of tax will not result into disallowance u/s 40(a)(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 mad even in the case 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 1he 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 40(a)(ia) of the Act.

3. The learned representatives fairly agree that these issues are covered by co-ordinate bench decisions in order dated 15.01.2019 in assesses own case for the immediately preceding assessment year 2012-13, wherein the co-ordinate bench has *inter alia* observed as follows:-

9. In this appeal, the Revenue has raised the following grounds:

"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) rws 194J 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, 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) rws 194J of 'Carriage Fees/Channel Placement fees', whereas the jurisdictional ITAT, Mumbai 'L' Bench, in its order dated 28.03.2014 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".

Ground Nos. 3 & 4 are general in nature.

10. The only issue raised by the Revenue is against the order of CIT(A), directing the AO to delete the disallowance u/s. 40(a)(ia) of the Act, r.w.s. 194J, in respect of Carriage Fees/Channel Placement Fees without appreciating the fact that the said payment was made for use/right to use of possess and in the nature of royalty as per the Explanation-6 to Section 9(1)(vi) and hence, the payments are covered by the provisions of Section 194J of the Act and were rightly disallowed by the AO.

11. Ld. AR at the outset submitted that the issue is squarely covered in favour of the assessee by the decision of the Co-ordinate Bench of the Tribunal in the case of Dish TV India Ltd., Vs. ACIT [169 DTR 253] (Mumbai) (Trib) and the Hon'ble Bombay High Court in the case CIT Vs. NGC Network (India) P.Ltd., ((supra)). Ld. AR therefore prayed that in view of the ratio laid down by the Co-ordinate Bench of the Tribunal and the decision of Hon'ble Jurisdictional High Court, the appeal of the Revenue may be dismissed.

12. Ld. DR on the other hand, relied on the grounds of appeal.

13. We have heard the rival submissions and perused the material on record including the impugned decisions cited by the Ld. AR. We find that the issue of this appeal is squarely covered by the decision of the Co-ordinate Bench of the Tribunal in the case of Dish TV India Ltd., Vs. ACIT [169 DTR 253] (Mumbai) (Trib), wherein the Co-ordinate Bench has held as under:

> ***"Held : The dispute between the assessee and the Department is confined to the appropriate rate at which tax should have been deducted at source while making the payment of channel subscription charges. Thus, it is not a case of failure to deduct tax at source but, if at all, it is a case of deduction of tax at source at a lower rate. On a reading of the provisions contained under s. 40(a)(ia) it appears that any payment to a resident which is subject to deduction of tax at source, if paid, without deducting tax or after deduction it was not paid to the Government account before the due date of return of income under s. 139(1), it has to be disallowed under s. 40(a)(ia). Thus, the aforesaid provision operates under two conditions; firstly, if tax is not deducted at source; and secondly, if after deduction it is not paid to the Government account before the prescribed date. In the present case, admittedly, the assesses has deducted tax at source on the payment made, though, at a lower rate. Therefore, the first condition of s. 40(a)(ia) does not apply. Also, there is no allegation that after deduction of tax the assessee has not remitted it to the Government account before the prescribed date. Therefore, the second condition of s. 40(a)(ia) also does not apply. Accordingly, the deletion of disallowance made by the AO is upheld".***

13.1. In the case of assessee, ld CIT(A) has given the findings and concluded that there is no default on account of non deduction of tax in the case of assessee and there is difference of opinion regarding the rate of withholding tax, which has been deducted under the provisions of Section 194C, whereas as per the AO, the Carriage Fees/Channel Placement Fees are in the nature of royalty and the deduction of tax has to be made u/s. 194J of the Act. The Hon'ble Bombay High Court in the case of CIT Vs. NGC Networks (India) (P) Ltd., in IT Appeal No. 397 of 2015 [167 DTR (Bom) 245] has held as under:

> ***"Further, under s. 40(a)(ia) under which the expenditure has been disallowed by the Revenue, meaning of royalty as defined therein is that as provided in Expln. 2 to s. 9(1)(vi) and not Expln. 6 to s. 9(1)(vi). Thus, disallowance of expenditure under s. 40(a)(ia) can only be made if the payment is 'royalty' in terms of Expln. 2 to s. 9(1)(vi). Undisputedly, the payment of channel placement fee, is not royalty in terms of Expln. 2 to s. 9(1)(vi). Therefore, no disallowance of expenditure under s. 40(a)(ia) can be made in the present facts. In the above view, this being a selfevident position from the reading s. 40(a)(ia), no substantial question of law arises".***

> ***13.2. The facts of the case before us are materially same as has been decided herein above by the Co-ordinate Bench of the Tribunal and the Hon'ble High Court. We,therefore, respectfully following the same dismiss the grounds raised by Revenue.***
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> ***14. In the result, the appeal of Revenue is dismissed.***

4. We see no reasons to take any other view of the matter than the view so taken by the co-ordinate bench - which has also been reproduced by the learned CIT(A) in the impugned order. Respectfully following the same, we approve, the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

5. Ground no. (v) the Assessing Officer has raised the following grievance:-

> ***(v) 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 of Rs. 8,06,281/- made out of Advertisement and Promotional Charges.***

6. So far as this grievance of the Assessing Officer is concerned the relevant material facts are like this. In the course of the scrutiny assessment proceedings the Assessing Officer disallow 25% of the advertisement and promotional charges on the ground that these expenses are incurred for marketing and promotion of capital brand 'STAR'. Then, even, though the assessee company did not owned the said brand. Aggrieved assessee carrying the matter in appeal before the learned CIT(A). Who following the decision of coordinate bench dated 15.01.2019 (s*upra)* in assessee's own case deleted the said disallowance. The Assessing Officer is aggrieved of the relief so granted by the learned CIT(A) and his appeal before us.

7. Having heard the rival contentions and having perused the material on record we find that all the learned CIT(A) has done is to follow the decision of the co-ordinate bench of this tribunal in assessee's own case for immediately assessment year. We see no infirmity in this approach- particularly when learned Departmental Representative was unable to invite our attention to any distinguishing facts *vis a vis* the facts of the year before the co-ordinate bench i.e., assessment year 2012-13 which is the immediately preceding assessment year. In view of these discussions and bearing in mind entirety of the case we uphold the conclusion arrived at by the learned CIT(A) on this point as well.

8. Ground no. (v) is also thus dismissed.

9. In the result, this appeal is dismissed in the terms indicated above. Pronounced in the open court today on the 13th day of October 2021.

Sd/-	Sd/-
Saktijit Dey	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the13th day of October, 2021

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order

Assistant Registrar/ Sr PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai