INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'I' BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President)
And Kuldip Singh (Judicial Member)]

ITA No. 3830/Mum/2019
Assessment Year: 2014-15

Play Games 24 x 7 Private Ltd., ...……. Appellant
401, B-Wing, 4th Floor, Interface 16, off Malad Link Road,
Malad (W), Mumbai 400067 [PAN: AADCP9139P]

Vs.

Principal Commissioner of Income Tax (Appeals)-13
Mumbai. ……..Respondent

Appearances:
Jeet Kamdar *for the appellant*
Milind Chavan *for the respondent*

Date of concluding the hearing : 25.03.2022
Date of pronouncement : 21.06.2022

O R D E R

Per Pramod Kumar, VP:

1. By way of this appeal, the assessee appellant has challenged correctness of the order dated 5th March 2019 passed by the learned Principal Commissioner of Income Tax, in the matter of revision under section 263 r.w.s. 143(3) of the Income Tax Act, 1961 for the assessment year 2014-15.

2. In the first ground of appeal, the assessee-appellant has raised the following grievance:-

1. Ground 1 - Erred in concluding that the payments made to Facebook, Ireland ('Facebook') towards advertisement expenses amounting to IN 5,57,68,668 are in the nature of 'Royalty' within the meaning of Section 9 of the Income-tax Act(the 'Act'), 1961 and under Article 12 of the Double Tax Avoidance Agreement between India and the Ireland ('DTAA), and thereby, erred in contending that aforesaid sum should be disallowed in view of the provision of section 40 (a)(i) of the Act.

i. On the facts and circumstances of the case and in law, the learned Pr. CIT has legally erred in stating that the order passed by the learned Assessing Officer ('learned AO') is erroneous and prejudicial to the interest of revenue as the learned A failed to conduct inquiries or verification,

without appreciating the fact that appropriate inquiries and verifications with respect to payments made to Facebook were made by him during the course of assessment proceedings.

ii. On the facts and circumstances of the case and in law, the learned Pr. CIT has legally erred in assuming jurisdiction under Section 263 of the Act to re-examine the issue and grossly failed to appreciate that it is not permissible to initiate the proceedings under section 263 of the Act on mere fact that in view of Pr. CIT inquiries and verifications which should have been made before allowing the claim of Appellant were not made.

iii. On the facts and circumstances of the case and in law, the learned Pr. CIT has legally erred in holding the payments made to Facebook, Ireland are in the nature of royalty and thus, chargeable to tax in India. The Pr.CIT has failed to appreciate that the payments were clearly in the nature of business profits as held by several tribunal decisions and admittedly given that Facebook, Ireland does not have a Permanent Establishment in India, such payments would not be liable to tax in India. Accordingly the view of Pr. CIT that the payments would amount to royalty is bad in law

iv. On the facts and circumstances of the case and in law, the learned PR. CIT erred in holding that advertisement expenses paid to Facebook relate to digital content and use of server of Facebook, without appreciating the fact that Appellant has no control over the server of Facebook and the transaction is to mere advertise on the website of Facebook.

v. On the facts and circumstances of the case and in law, the learned PR. CIT erred in holding that advertisement expenses paid to Facebook amount to Royalty being in nature of industrial, commercial or scientific equipment, without appreciating the fact that the Appellant has not made payments towards use of any industrial, commercial or scientific equipment, also the Appellant does not have any control over the functioning of the interface of Facebook and Equipment/ installations owned by Facebook are not maintained for the specific use by the Appellant.

vi. On the facts and circumstances of the case and in law, the learned PR. CIT erred in placing reliance on the principle laid down by Hon'ble Bangalore Tribunal in the case of Google India Private Limited ('Google India') v. ADIT (2017) (86 taxman.com 237) as the facts in both the case are different. Further the learned PR. CIT erred to differentiate that in case of Google India, Google India had distribution rights of Ad space unlike the fact in case of the Appellant.

vi. On the facts and circumstances of the case and in law, the learned PR. CIT erred in not considering the reliance placed by the Appellant on decision laid down by Hon'ble Mumbai Tribunal in the case of Yahoo India (140 TTJ 195) and Pinstorm Technology (54 SOT 78), and decision of Kolkata Tribunal in the case of Right Florist (32 taxmann.com 99), without appreciating that the similar facts are involved in the case of the Appellant.

3. So far as the above issue is concerned, learned representatives fairly agree that the above issue is now covered, on merits in favour of the assessee, by a co-ordinate bench decision in assessee's own case for the assessment year 2015-16. In this order dated 23rd March 2022, a copy of which is placed before us in the paper book, the co-ordinate bench has *inter alia* observed as follows:-

7. We have heard both the parties and perused all the relevant material available on record. The assessee company is engaged in the business of providing a platform for online gaming, more

particularly that of Rummy. The assessee company incurred advertisement expenses amounting to Rs.10,46,35,355/- for banner advertisement on the website of Facebook. It is pertinent to note that for the purpose of uploading the banner advertisement on Facebook the advertisement related information is put up at the interface provided by the Facebook, Ireland in the required format. Facebook, Ireland, after due verification of the advertisements, upload the advertisement on its server. While uploading the advertisement on Facebook it is an admitted position that the assessee company does not have any control over the functioning of the interface provided by the Facebook, Ireland. The entire operation and maintenance of the server while providing the advertisement platform is under the control of Facebook, Ireland. It is an admitted fact that the assessee company makes use of standard facility which is provided for displaying advertisement on the website of Facebook, Ireland which was also provided to its other global customers in the like manner. Equipment/installations are all owned by Facebook, Ireland and the assessee company does not have any role to play in either maintaining or involving into any managerial activities with the Facebook, Ireland. There is no dedicated equipment/installation/any portion of equipment/installation is earmarked/provided by the Facebook, Ireland by the assessee company. As per the payment agreement between the Assessee company and Facebook, Ireland, the assessee company does not have any economic or possessory right with regard to the server of the Facebook and the server is not at the disposal of the assessee company. The assessee company does not get any right to modify/deal with the server in any manner. The server through which the advertisement is uploaded is not at all located in India. Further, there is no role played by the Facebook India Online Pvt. Ltd. in assessee's case and thus there is no element of permanent establishment of Facebook, Ireland in India. The assessee company during the assessment proceedings has provided the tax resident certificate of Facebook, Ireland and as well as copy of remittance of the certificate (form 15CB) to the Assessing Officer. The Assessing Officer has proceeded on the basis that as per the provisions of Section 195 of the Act any amount paid to non-resident will attract this provision and the assessee is liable to make TDS except as provided under Section 195(2) or under Section 197 where such deductee obtain nil deduction certificate from the Assessing Officer and furnish the same to the deductor before receiving the credit of such amount. In the present case, the relevant sub-section 2 to Section 195 has specifically stated that a person responsible for deducting any such sum chargeable under this Act who is a non-resident considers that the whole sum would not be income chargeable in the case of recipient the said person "may make an application" in such form and manner to the Assessing Officer to determine in such a manner as may be a prescribed. The said application though in the present case has not been made by the assessee cannot be treated as a mandate because the Section clearly states that such person "may make an application" as may be prescribed. In the present case, the assessee was very well aware that Facebook, Ireland is a non-resident and the advertisement payment made to Facebook, Ireland will not come under the purview of TDS and, therefore, has chosen not to deduct tax at source. The assessee has relied upon the decision of Uraban Ladder Home Decor Solutions Pvt. Ltd. - ITA No.615 to 620/Bang/2020 - order dated 17.08.2021, Google India Pvt. Ltd. - 127 Taxmann.com 36 - Karnataka High Court, M/s. Inception Business Services - ITA No.2674/Chny/2016 - order dated 18.02.2019, Carat Lane Trading (P) Ltd., 89 Taxmann.com 434 as well as decision in the case of ITO vs. Right Florist Pvt. Ltd., 25 ITR (T) 639 (Kolkata Tribunal). All these decisions are though factually identical yet the observations made in these decisions are applicable in the present case. These decisions also highlight that advertisement expenses in respect of non-resident. It is pertinent to note that the assessee has given specific task of advertisement banner to the Facebook Ireland. The element of fees for technical services is determined if there is any technical aspect involved by providing services by the company from whom the services are rendered. As per letter dated 19.01.2015, Facebook Ireland stated that no servers that host the

Facebook.com product are located in India. In the present case, the assessee has demonstrated before us that the assessee is taking the privilege of platform of Facebook, Ireland which is not either in the nature of royalty or technical services. The payment terms were specifically defined in the payment agreement with Facebook Ireland which clearly indicates that the Facebook Ireland will provide platform banner for advertisement to the assessee-company. Thus there is no element of fees for technical services or royalty is involved in this case. Thus, the Assessing Officer as well as the CIT(A) has totally ignored the actual fact of the present case without demonstrating that the services are coming under the purview of FTS or royalty. Therefore, the appeal filed by the assessee is allowed.

4. In view of the decision of the co-ordinate bench, the stand of the Assessing Officer cannot be faulted. There was thus no occasion for the learned PCIT to exercise his revision powers on this issue. We uphold the plea of the assessee, and vacate the imposed revision order to the extent of learned PCIT's directions with regard to disallowance of Rs. 5,57,68,668/- in respect of payments made to Facebook, Ireland. The assessee gets the relief accordingly.

5. Ground no 1 is thus allowed.

6. In ground no 2 and 3, the assessee-appellant has raised the following grievance:-

2. Ground 2 - Erred in concluding that inadequate inquiries were made by the learned AO on payments made to players on winnings from lotteries/crossword puzzles and withholding of taxes thereon

i. On the facts and circumstances of the case and in law, the learned Pr. CIT has legally erred in stating that the order passed by the learned AO is erroneous and prejudicial to the interest of revenue as the learned AO failed to conduct inquiries, without appreciating the fact that appropriate inquiries and verifications with respect to withholding of taxes on winnings were made by the learned AO during the course of assessment proceedings.

ii. On the facts and circumstances of the case and in law, the learned Pr. CIT has factually erred in holding that taxes were not withheld on entire amount of payment made towards winning, without appreciating the fact that the Appellant has appropriately withheld taxes on payment made towards winnings where the amount payable (net of participation fees) exceeds the threshold of IN 10,000 in case of each game for each player.

3. Ground 3 - Erred in directing the learned A to examine the applicability of provisions of Chapter XVII B of the Act on payments made towards Online Promotional Expenses

i. On the facts and circumstances of the case and in law, the learned Pr. CIT has legally erred in directing the learned AO to examine the applicability of provisions of Chapter XVIl B of the Act. Accordingly, the learned Pr. CIT, vide order under Section 263 of the Act, has directed the learned AO to look into the said matter which do not form a part of the show-cause notice. Also, no inquiries were made in respect to said issue during the revision proceedings, and the order under Section 263 of the Act was passed without providing the Appellant with sufficient and adequate opportunity of being heard, thereby breaching the principles of natural justice as held by the Apex court. Accordingly, directions given by learned Pr. CIT to examine the said issue vide order under Section 263 of the Act is invalid and bad in law.

ii. On the facts and circumstances of the case and in law, the learned Pr. CIT has legally erred in in holding that taxes were not withheld on payment made towards online promotional Games without appreciating the fact that the payments are towards bonuses and the credits which are not on account of a prize/winning as an outcome of a card game, and hence should not be considered as Income under Section 2(24) (ix) of the Act and hence not liable for with-holding of taxes. Further, a part of these payments is towards promotional expenses where the whole or part of prize money is sponsored by the company i.e. promotional tournaments, and if the prize exceeds IN 10,000, tax has been deducted and paid by the Appellant.

iii. On the facts and circumstances of the case and in law, the learned Pr. CIT has legally erred in directing the learned AO to examine the applicability of provisions of Chapter XVII B of the Act, without appreciating the fact that there were inquires made on the matter during the course of assessment proceedings and the Pr. CIT has not recorded any finding to conclude that the order/inquiry to that effect made is erroneous.

iv. On the facts and circumstances of the case and in law, the learned Pr. CIT has legally erred in directing the learned AO to examine the applicability of provisions of Chapter XVII B of the Act without himself examining the matter and recording reasons thereof to conclude that order passed by the learned AO is erroneous and prejudicial to the interest of revenue.

7. So far as these grievances of the assessee are concerned, we find that dealing with identical issue with respect to the immediately following year, i.e. assessment year 2015-16, in assessee's own case and vide order dated 5th January 2021, a co-ordinate bench has concluded as follows:-

12. We have carefully considered the detailed submissions and perused the records. The first challenge before us is that the learned Commissioner had started the revision proceedings on a different ground and has finally passed a revision order on a different ground for which no opportunity was given to the assessee.

13. It has been settled by the judgment of Hon'ble Supreme Court in the case of Amitabh Bachhan (supra) that such an action is permissible to the Commissioner provided sufficient opportunity is given to the assessee. From the records available before us and the order of learned Commissioner, it is not discernable whether proper opportunity in this regard was given to the assessee. Now, the issue is whether this is fatal to the order of revision ? Another concomitant issue is when the learned Commissioner has not given the opportunity to the assessee and has consequently not examined the assessee's response, should the Tribunal fill-in the gap and give a finding that the Assessing Officer has duly examined the issue on the basis of document said to have been filed before Assessing Officer.

14. We find that these issues were examined by Hon'ble Madhya Pradesh High Court in the case of CIT vs. Prem Syndicate, 141 ITR 290 (MP). In this decision, the Hon'ble High Court has duly taken note of Hon'ble Supreme Court decision in the case of CIT vs. Electro House, 82 ITR 824 (SC) and CIT vs National Taj Traders, 121 ITR 535 (SC). We may gainfully refer to paragraph 3 and 4 of the said order as under :-

> *"3. We have already held relying on the decision of the Supreme Court in CIT v. Electro House [1971] 82 ITR 824, that the question of giving an adequate opportunity to the*

assessee has no impact on the question of jurisdiction of the Commissioner to pass an order under Section. 263(1) of the Act. The question of adequate opportunity will affect only the question of legality of the order of the Commissioner. In such a case, the Tribunal undoubtedly had jurisdiction to remand the matter to the Commissioner and to direct him to dispose of the proceedings under Section 263(1) of the Act, afresh, after giving due opportunity to the assessee. This question came up for consideration before the Supreme Court in CIT v. National Taj Traders [1980] 121 ITR 535. The Tribunal in that case had held that the Commissioner had not conformed to the requirements of natural justice by putting it to the assessee what case it had to meet and by giving due opportunity for explaining the same and the Tribunal, therefore, vacated the order of the Commissioner and remanded the case to him with the observation to dispose it of afresh after giving due opportunity to the assessee. On a reference being made, the High Court held that the Tribunal did not act properly in directing the Commissioner to dispose of the case afresh. On appeal, the Supreme Court held that the order of the Tribunal was proper. It is thus clear that in a case, when the order of the Commissioner under Section 263(1) of the Act is set aside by the Tribunal on the ground that there was no adequate opportunity to the assessee, the Tribunal has jurisdiction to remand the case to the Commissioner for deciding the case afresh in accordance with law.

4. Learned counsel for the assessee contended that in the instant case, in view of the fact that there was a flagrant violation of the principles of natural justice, the Tribunal did not deem it proper to remand the case to the Commissioner for fresh disposal. This contention is not founded on facts. The decision of the Tribunal flows from the finding of the Tribunal that the order of the Commissioner was void ab initio. That is the only reason given by the Tribunal for not remanding the case to the Commissioner. As the finding of the Tribunal about the jurisdiction of the Commissioner was not justified, it must be held that the Tribunal was not justified in refusing to direct the Commissioner to pass an order under Section 263(1) of the Act, afresh, after giving due opportunity to the assessee. Our answer to question No. (4) referred to us is, therefore, in the negative and against the assessee."

In this regard the decision of Hon'ble Delhi High Court in the case of CIT vs. DLF Power Ltd in ITA No. 973/2011, order dated 29/11/2011 is also relevant :-

"11. In the present case, the tribunal has disagreed with the CIT and felt that the Assessing Officer had examined the question and formed an opinion. The finding of the CIT that there was lack of enquiry was incorrect. Thereafter, the tribunal went into the bifurcation of interest income submitted by the assessee and examined it on merits and decided whether or not a particular income qualifies for deduction under Section 80IA. In the said exercise, the tribunal has relied upon submissions made by the assessee and accepted, the bifurcation and nature and character of interest income and then decided whether it qualifies for deduction or not. We do not know on what basis the said bifurcation in respect of the two units and the nature and character of income were accepted. This aspect had not been examined by the CIT, who had given only a tentative opinion that some element of interest income may be eligible. The right and proper course in the present case was to ask the CIT to examine the said factual aspect rather than the tribunal giving their own factual finding without there being factual examination and verification or full and proper rebuttal. Without anything more, the mere submission of a letter to the Assessing Officer giving bifurcation does not necessarily mean that proper verification and investigation was done and accepted. Averments made in the letter have to be verified and then accepted or rejected. If the

Assessing Officer keeps a letter on record and does not carry out necessary investigations which are per se required to verify correctness of the averments, there is an error in the sense that he has failed to carry out the requisite enquiry which can be rectified in a revision. It is a different matter if the course adopted by the Assessing officer is permissible, as then there is no error.

12. In view of the aforesaid, we answer the question of law framed above in negative i.e. in favour of the Revenue and against the assessee. The CIT will pass a fresh order under Section 263 of the Act after hearing the assessee. The contentions and issues raised by the assessee will be dealt with by the CIT. He shall also examine whether the issue in question was raised before the Assessing Officer and considered and verified or the course adopted is permissible. If this is correct, then his jurisdiction will be ascribed and limited to the extent of deciding whether the finding is erroneous i.e. contrary to law etc. In the facts of the case, there will be no order as to costs. Appeal is disposed of."

15. In the background of aforesaid discussion and precedents, including that from the Hon'ble Supreme Court, we find that the plea of the learned counsel of the assessee that the revision order deserves to be quashed for lack of opportunity to the assessee is not sustainable. Furthermore, it is also arising out of the ratio of the aforesaid precedents that when the CIT has not examined the issue, the Tribunal should not jump ahead and examine the issue merely on the basis of document said to have been filed before the Assessing Officer without any indication as to whether the Assessing Officer has verified the correctness of the averments. That merely keeping the document on record, without carrying out necessary investigation which are per se required to verify correctness of the averment would lead to an error, in the sense that he has failed to carry out the requisite inquiry which can be rectified in revision.

16. Accordingly, in the interest of justice and following the precedent as above, we are of the opinion that this order of the learned Commissioner is liable to be set aside to his file for fresh consideration. The learned Commissioner is directed to examine the issue afresh after giving the assessee proper opportunity of being heard. In giving the above said direction we draw support from the decision of Hon'ble Supreme Court in the case of Kapurchand Shrimal (supra) for the proposition that it is the duty of the appellate authority to correct the errors in the orders of the authorities below and/or remit the matter for reconsideration unless prohibited by law. In this regard, we note that there is no provision in law prohibiting us to remit the matter back to the learned Commissioner on the facts and circumstances of the case. Learned counsel of the assessee has tried to distinguish this decision of the Hon'ble Supreme Court which was put to him during the course of hearing via submission that it was in a different context and it has further been submitted that in the present case it is not a case where it is necessary to issue such a direction as an officer of the rank of a Commissioner who must be presumed to know the law and the manner in which he has to exercise his powers and if he acts in flagrant violation of the law he should not be given a second opportunity.

17. In our considered opinion, the above submission of the assessee's counsel is not sustainable. We do not find that the aforesaid decision of Hon'ble Supreme Court, by any stretch of imagination, proposes that matters cannot be remanded by the ITAT to the level of Commissioner of income tax. Hence, this limb of argument of the learned counsel of the assessee is rejected. Accordingly, following the aforesaid precedents, including that from the Hon'ble Supreme Court in the case of Kapurchand Shrimal (supra), we set aside this order passed under Section 263 of

the Act to the file of the learned Commissioner. The learned Commissioner shall decide the issue afresh giving the assessee proper opportunity of being heard.

8. We see no reasons to take any other view of the matter than the view so taken by the co-ordinate bench. Respectfully following the same, we remit these two issues to the file of the learned PCIT for fresh adjudication after giving a due and reasonable opportunity of hearing to the assessee. The matter thus stands restored to the file of the learned PCIT.

9. Even as we restore the matter to the file of the Assessing Officer, we cannot help taking note of learned PCIT's concluding remarks, that, "The Assessing Officer is directed to give effect to this order under guidance/supervision of the Additional CIT, Range 13(1) Mumbai……". The assessment proceedings are *quasi* judicial proceedings, and, except as provided for under the scheme of the Act, exercise of such *quasi* judicial function under guidance or supervision of an administrative superior does seem contrary to the scheme of the independence of *quasi* judicial functioning. We leave it at that for the time being.

10. Ground no 2 to 3 are thus allowed for statistical purposes.

11. In the result, the appeal is partly allowed in the terms indicated above. Pronounced in the open court today on the 21st day of June 2022.

Sd/-	Sd/-
Kuldip Singh	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 21st day of June 2022.

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

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai