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

SHRI OM PRAKASH KANT ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 50/MUM/2019
(ASSESSMENT YEAR: 2012-13)

Dy. Commissioner of Income Tax-8(3)(2), Mumbai,
Aaykar Bhavan, Room No. 615,
M.K. Road, New Marine Lines,
Mumbai - 400020 ..... **Appellant**

M/s Zoomin Online India Pvt. Ltd., **Vs**
Jetha Compound, Opposite Nirmal Park, Dr. B. Ambedkar Road,
Byculla (East),
Mumbai - 400027
[PAN: AACCD4694B] ..... **Respondent**

Appearances
For the Appellant/Department : Shri Hoshang B. Irani
For the Respondent/Assessee : None

Date of conclusion of hearing : 04.05.2022
Date of pronouncement of order : 27.07.2022

O R D E R

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Appellant/Revenue has challenged the order, dated 20.08.2018, passed by the Learned Commissioner of Income Tax (Appeals)-14, Mumbai, [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2012-13, whereby the CIT(A) had allowed the appeal filed by the Assessee against the Assessment Order, dated 26.02.2015, passed under section 143(3) of the Act.

2. The Revenue has raised the following grounds of appeal which read as under:

1. *"On the facts of the case and circumstances and in law, the CIT(A) erred in directing the AO to delete the disallowance u/s. 40(a)(1) of Rs.88,11,937/- holding that the server charges and web hosting charges paid by the assessee to Amazon Web Services and Softlayer Technologies were not in the nature of interest or royalties or fee for technical services or other sum chargeable to tax in India and the assessee was not required to deduct tax at source u/s. 195 while making payments outside India.*

2. *On the facts of the case and circumstances and in law, the CIT(A) erred in directing the AO to delete the disallowance u/s. 40(a)(i) of Rs.70,12,134/- without appreciating that the payment by the assessee to foreign companies on account of "online advertising" falls within the meaning of royalty as per provisions of section 9(1)(vi) of the Act as well as provisions of the DTAA between India and Ireland and USA as held by the Bangalore Tribunal in the case of Google India (P) Ltd., [2018] 93 taxmann.com 183 (Bangalore-Trib.).*

3. *On the facts of the case and circumstances and in law, the CIT(A) erred in directing the AO to delete the disallowance on the basis of additional evidence filed before CIT(A)*

without calling the remand report from the Assessing Officer."

All the grounds, being connected, are being taken up together herein under.

3. The relevant facts, in brief, are that the Assessing Officer completed assessment vide order dated 26.02.2015, at assessed loss of INR 12,42,76,949/- as against return loss of INR 14,01,01,020/- after making following disallowances under section 40 (a)(i) of the Act – (a) disallowance of INR 88,11,937/- being server charges and web hosting charges paid to various parties outside India by the Assessee during the relevant previous year without deducting tax at source, and (b) disallowance of INR 70,12,134/- being payments made to parties outside India for rendering services for display of advertisements of the Assessee on the web portals.

4. Being aggrieved, the Assessee preferred an appeal before CIT(A) against the above disallowances. The CIT(A) allowed the appeal of the Assessee vide order dated 20.08.2018 and deleted both the disallowances holding that the payments to parties outside India were not liable to tax in India in terms of the provisions of the Act and/or the provision of the applicable double taxation avoidance agreements.

5. Being aggrieved the revenue is in appeal before us.

6. We have heard the Ld. Departmental Representative, considered the contentions that were raised on behalf of the Assessee before lower authorities and perused the material on

record. Having examined the order passed by the CIT(A) we note that the CIT(A) accepted the contentions of the Assessee and deleted the disallowances. In respect of server charges and web hosting charges aggregating to INR 88,11,973/-, the CIT(A) concluded that the payments made to foreign payees were not in the nature of fee for included services as per the provisions of Section 9 of the Act read with Article 12 of Double Taxation Avoidance Agreement between India and USA, being country of tax residence of the payees as the foreign payees did not make available to the Assessee any technical knowledge, skill, experience etc. Further, the CIT(A) returned a finding that the foreign payees did not have a permanent establishment in India, and therefore, payments to the foreign payees were not liable to tax in India. Thus, the provisions of Section 195 as well as the provisions of Section 40(a)(i) of the Act were not attracted in respect of such payments. Similarly, as regards the payment of INR 70,12,134/- pertaining display of advertisement of the Assessee on the platforms of the foreign payees, the CIT(A) concluded that the services were neither specialised nor exclusive, and did not cater to specific requirements of the Assessee. The foreign payees were merely providing a ‘facility’ and the payment for the same was not liable to tax as Fee for Technical Services in terms of the provisions of the Act as per the decision of the Hon’ble Supreme Court in the case of CIT Vs. Kotak Securities Ltd: 383 ITR 1 SC. Further, the payments made to foreign payees, being in the nature of business profits, were not liable to tax in India in absence of the foreign payees having a permanent establishment in India. CIT(A) relied upon the decision of the Tribunal in the case of Pinstorm Technologies (P.) Ltd versus ITO: 54 SOT 78 (Mumbai).

7. A perusal of assessment order shows that even during the assessment proceedings the Assessee had raised a contention that Assessee was not under obligation to deduct tax from payments to the foreign payees in terms of Section 40(a)(ia) read with Section 195 of the Act as the payments made to foreign payees were not in the nature of royalties and/or fee for included/technical service and therefore, not liable to be taxed in India in terms of Double Taxation Avoidance Agreement between India and country of tax residence of the foreign payee. However, the Assessing Officer completely ignored the aforesaid contention and did not examine the relevant provisions of the applicable double taxation avoidance agreements. The Assessing Officer relying upon the provisions of the Act concluded that the Assessee was under obligation to deduct tax in terms of section 195 of the Act, and made a disallowance of the payments made by the Assessee to foreign payees on the ground that the Assessee had failed to deduct tax at source in terms of Section 40(a)(ia) of the Act. The approach adopted by the Assessing Officer cannot be countenanced. Without relying upon any evidence/ additional evidence, and merely on perusal of Assessment Order it becomes clear that no factual foundation was laid during the assessment proceedings to establish the chargeability to tax in India of the payments made by the Assessee to the foreign payees which was necessary to attract provisions of Section 195 read with Section 40(a)(ia) of the Act. Further, the findings returned by the CIT(A) have also not been established to be perverse or contrary to record in proceedings before us. The reliance by the Revenue on the decision of the Tribunal in the case of Google India P Ltd. (2018) 93 Taxmann.com 183

(Bangalore-Tribunal) is also misplaced. In paragraph 116 of the aforesaid decision, the Tribunal has made following observations:

> *"116. In all these cases, the assessee was either an advertiser or act on behalf of some other advertiser and has purchased space from the owner of search engine to display its advertisements online. Therefore, the payment made by the assessee to the owner of the search engine was considered to be business receipt / business profit in the hands of the owner of search engine who is non-resident and in the absence of permanent establishment (PE) in India, the business profits / business receipts received by them were not chargeable to tax in India. But in the instant case, appellant has not purchased the advertisement space for putting its advertisement online from the GIL. The assessee has been duly appointed a distributor under the Google Adword Distribution Agreement to distribute and sell the advertisement space obtained from the GIL under the Distribution Agreement. Under the distribution agreement, appellant was under obligation to provide pre-sale and after sale services with the help of ITES division. While providing after sales services / technical services, the assessee had access to the intellectual property rights and tools and informatives, derivative works owned by the GIL. In the instant case, assessee is not a simpliciter buyer of AdWord Space for putting the advertisement either for himself or for others which was the position in the aforesaid cases referred to by the assessee. Therefore, we are of the view that the facts of the case referred to by the assessee i.e., Pinstorm Technologies Ltd., Right Florist and Yahoo IndiaLtd., are different than the facts of the instant case. Thus the ratio laid down in those cases would not be applicable to the present facts of the case." (Emphasis Supplied)*

The above observations of the Tribunal establish that the CIT(A) was justified in relying upon the decision in the case of Pinstorm Technologies (P.) Ltd *(supra)* as in the present case the Assessee was simply a buying advertising space for putting the advertisement either for himself or others, whereas in the case of Google India (P.) Ltd. (supra) the assessee was acting as a distributor.

8. In view of the above, we are not persuaded to overturn the decision of CIT(A) on the issues raised by the Revenue in the present appeal. Ground No. 1, 2 and 3 raised by the Revenue in the appeal are dismissed.

9. In result, the present appeal filed by the Revenue is dismissed.

Order pronounced on 27.07.2022.

Sd/-	*Sd/-*
(Om Prakash Kant)	(Rahul Chaudhary)
Accountant Member	Judicial Member

मुंबई Mumbai; दिनांक Dated : 27.07.2022
Alindra, PS

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2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
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