

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D" MUMBAI**

**BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI SUNIL KUMAR SINGH (JUDICIAL MEMBER)**

**ITA No. 3164/MUM/2024
Assessment Year: 2015-16**

Mudra Online Technologies Pvt.
Ltd.,
Mudra House, Opp. Grand Hyatt,
Santacruz East,
Mumbai-400055.

PAN NO. AADCM 1529 Q
Appellant

Vs.

Asst. CIT Circle-14(2)(2),
Aayakar Bhavan,
Maharishi Karve Road,
Mumbai-400020.

Respondent

Assessee by : Mr. Gaurav Kabra
Revenue by : Mrs. Mahita Nair, Sr. DR

Date of Hearing : 07/08/2024
Date of pronouncement : 27/09/2024

ORDER

PER OM PRAKASH KANT, AM

This appeal by the assessee is directed against order dated 30.04.2024 passed by the Ld. Commissioner of Income-tax (Appeals) – National Faceless Appeal Centre, Delhi [in short ‘the Ld. CIT(A)’] for assessment year 2015-16, raising following grounds:



1. On the facts and circumstances of the case as well as in law, the Learned CIT(A) has erred in confirming the actions of the Learned Assessing officer in disallowing the payment made to Facebook Ireland Ltd. amounting to Rs.15,60,955/- u/s.40(a)(i) of the Income Tax Act, 1961, on the alleged plea that the TDS was not deducted, without considering the facts and circumstances of the case.

2 On the facts and circumstances of the case as well as in law, the Learned CIT(A) has erred in confirming the actions of the Learned Assessing officer in making an addition of Rs.15,60,955/- by making the disallowance of the said payment to Face book Ireland Ltd. u/s.40(a)(i) of the Act without appreciating the fact that the said paymerit was not in the nature of Royalty, thus attracting provisions for Tax Deduction.

3 On the facts and circumstances of the case as well as in law, the Learned CIT(A) has erred in confirming the actions of the Learned Assessing officer in making an addition of Rs.15,60,955/- b□ making the disallowance of the said payment to Facebook Ireland Ltd. u/s.40(a)(i) of the Act without appreciating the fact that the said payment was for merely digital advertising and no right of user or access of the Facebook Ad Platform had: been made available to the Appellant by the Advertiser by virtue of the same.

2. Briefly stated, facts of the case are that the assessee company was engaged in the business of advertising agency related services and wind energy generation. For the year under consideration, the assessee filed return of income on 28.11.2015 declaring total income at Rs.11,21,15,120/-. Subsequently, the return of income filed by the assessee was selected for scrutiny assessment and statutory notices under the Income-tax Act, 1961 (in short 'the Act') were issued and complied with. In the course of scrutiny, the Assessing Officer noticed that the assessee made payments of Rs.15,60,955/- to 'Facebook Ireland Ltd'.(in short 'Facebook Ireland') for digital advertising etc services availed. But, no tax was deducted at source on said payments. The Assessing Officer asked the assessee to file a copy of any agreement or Memorandum of Understanding (MoU) entered into with 'Facebook Ireland' in respect



of services availed. However, no such agreement was filed by the assessee. The Assessing Officer therefore, in absence of any agreement relied on the material available on the internet and observed that 'Facebook advertising platform' is driven by a complex algorithm that capture data from various users and allows the advertiser to effectively reach his target audience. The Assessing Officer referred to definition of the 'royalty' provided u/s 9(1)(vi) of the Act and opined that 'Facebook Ireland' has granted he assessee company a right to use 'Facebook Advertising platform' which is a complicated and sophisticated computer program. Accordingly, the assessee has been granted the license to use said software of advertising platform. Therefore, the payment made by the assessee is consideration on account of license to use/right to use computer program which squarely falls within the meaning of clause (v) to Explanation 2 to section 9(1)(vi) of the Act and therefore, Assessing Officer treated the payments in the nature of royalty. The Assessing Officer further referred to the Double Taxation Avoidance Agreement (DTAA) between India and Ireland and observed that under the DTAA also payment for use of or the right to use of any copyright is in the nature of royalty. Since the assessee failed to deduct tax at source on said royalty payments, the Assessing Officer disallowed expenses of Rs.15,60,955/- incurred invoking section 40(a)(i) of the Act vide his order dated 31.12.2017 passed u/s 143(3) of the Act.



3. On further appeal, the Ld. CIT(A) also upheld the disallowance observing as under:

“7.1. These grounds of appeal filed by the appellant relate to disallowance of the payment made of Rs. 15,60,955/- to Face book Ireland Ltd. u/s.40(a)(i) of the Act. The appellant has contested that the disallowance was made without considering the facts of the case. Further the appellant has also claimed that the said payments were made towards the digital advertisement and was not in the nature of Royalty payment.

7.2 As noticed from the assessment order, the AO has considered the payment made to the Facebook Ireland Limited as Royalty in nature and the discuss the issue in depth. During the course of the assessment proceeding, the appellant was asked to produce any agreement copy or Mou entered with the Facebook Ireland Limited, however the appellant failed to submit any detail in this regard. The same was recorded in the Assessment order, therefore the Appellant was well aware of such fact at the time of filing of appeal. Yet, the appellant failed to submit any agreement/Mou copy in this regard either at the time of filing of appeal or during the appellate proceeding. This clearly shows that the appellant either does not have the relevant documents or does not want to produce them as they might not be in accordance with the appellant contention.

7.3 During the course of the Appellate proceedings, the appellant has relied upon various case-laws, however the applicability of those case law can only be ascertained when the Facts of the case are in line with each other. In the instant case the appellant has failed to submit the basic documents, therefore the nature of transaction itself can not be verified. At the time of the filing of appeal, the appellant stated that the additional evidence will be produced during the appellate proceeding. However even after allowing more than sufficient opportunities, the appellant has not submitted any additional evidence/agreement/Mou copy in any of its submission. Therefore in the absence of the documents to ascertain the facts of the case, the case laws relied upon by the appellant are not considered.

7.4 During the course of the assessment proceeding, the AO discussed the case law in the case of Google India Private Limited vs. ADIT (2017) (86 taxmann.com 237) which dealt with the issue of digital advertising provided by the Google Adwords program. In the order it was noticed that the Google Adwords relies upon the keywords while the Facebook relies upon used profiles. Hon'ble ITAT also concluded that the Facebook platform doesnot sell ad space based on the advertiser's requirement bur runs a continuous advertisement campaign on the use profiles so that the customers are targeted in an efficient manner. Relevant portion of the order is re-produced as under:



The appellant makes use of the user data/customer data (personal information, general information like user profile, age, sex, language, type of mobile, time when customer is visiting particular web site/ searching on search engine, how much time is spent on internet and on which website, etc. for the purposes of targeted/focus marketing campaign for the advertisers) and the patented technology, with algorithm to advertise/disseminate ads. Present case is not a case of merely displaying or exhibiting of advertisement by the advertiser on the website, case in hand is a case of use of patented technology, secret process, use of trademark by the appellant.....

....Therefore, the payment made by the appellant to Google Ireland is royalty and not the business profit and therefore chargeable to tax in India.

7.5 The facts of the case similar to appellant wherein, Facebook Ad Platform analyses through its patented technology/algorithm the data/information/content (personal information, general information like user profile, age, sex, language, type of mobile, time when customer is visiting particular web site with respect to the preferences set by the advertiser and the bidding amount. Hence, the payment made by the assessee to FIL is in the nature of Royalty under the Act and the DTAA.

7.6 In view of the above discussion and after careful consideration of the facts of the case, the appellant's claim can not be accepted and accordingly, these grounds of appeal are hereby dismissed."

4. Before us, the Ld. counsel for the assessee relied on the decision of the Co-ordinate Bench of the Tribunal dated 19.10.2022 in the case of M/s Google India Pvt. Ltd. v. Dy. CIT in ITA No. 1513 to 1516/Bang/2013 for assessment years 2009-10 to 2012-13. The Ld. counsel also relied on the decision of the Hon'ble Karnataka High Court in the case of Google India (P.) Ltd. v. Addl. CIT in ITA No. 879/2017 which has been reported in (2021) 435 ITR 284 (Karnataka) dated 17.04.2021. The Ld. counsel also filed copy of the invoices raised by the 'Facebook Ireland' for advertisement booking. On perusal of those invoices it is seen that assessee has booked



advertisements for 'McDonalds India'. The description of the services provided under the two invoices is reproduced as under:

Invoice #: 220346932
Invoice Date : 21-04-2024
Account Id/Group:
1374332989499451
Payment Terms : NET 30
Page : 1 of 1

BILL TO: Mudra Online Technologies Private Limited "Mudra House",
Opp. Grand Hyatt, Santacruz (E), MUMBAI MAHARASHTRA 400055
INDIA

ATTN : Accounts Payable
Advertiser : Hardcastle Restaurants Pvt. Ltd. (Mcdonalds)
Customer I.O. # :

IO Line #	Description	Total
1.	Orders	30,695.02
2.	Posts Engagement	455,959.20
3.	Breakfast Day - Post Engagement	60,000.00
4.	McDonalds India - Post Engagement - Ahmed... - 13-35	210,000.00
5.	McDonalds India - Post Engagement - Ahmed.. - 13-35	30,000.00
6.	MCD Elections - Video Post	72,296.82
7.	McD Elocions - Viduo Post - 3	22,261.60
8.	McD Elections - Video Post - Final	31,026.00
	Subtotal	912,238.70
	Froight	0.00
	VAT @ 0%	0.00
	Invoice Total	912,238.70

Invoice #: 220370703
Invoice Date : 28-May-2014
Billing Period: APR-14
Account ID/Group :
1374332989499451
Payment Terms: NET 30
Page : 1 of 1

BILL TO: Mudra Online Technologies Private Limited "Mudra
House", Opp. Grand Hyatt, Santacruz (E), MUMBAI
MAHARASHTRA 400055
INDIA

ATTN : Accounts Payable
Advertiser : Hardcastle Restaurants Pvt. Ltd. (Mcdonalds)
Customer I.O. # :

IO Line #	Description	Total
1.	McD Elections - Revised - Day 9	31,000.30
2.	McD Elections - Revised - Day 10	42,819.07
3.	McD Elections - Revised - Day 11	31,000.33
4.	McD Elections - Revised - Day 12	31,000.33
5.	McD Elections - New Setup - Day 13	31,000.33
6.	Orders (MDS)	30,422.50
7.	McD Elections - McRoyale Duo Sweeps Into	31,000.00



8.	Power! - Day 1 McD Elections - McRoyale Duo Sweeps Into	31,000.00
9.	Power! - Day 2 McD Elections - McRoyale Duo Sweeps Into	31,000.00
10.	Power!-Day 3 McD Elections - McRoyale Duo Sweeps Into	31,000.00
11.	Power! - Day 4 McD Elections - McRoyale Duo Sweeps Into	37,125.14
12.	Power! - Day 5 McD Elections - McRoyale Duo Sweeps Into	31,000.00
13.	Power! - Day 6 McD Elections - Revised - Day 7	31,000.00
14.	McD Elections - Revised - Day 8	31,000.00
	Subtotal :	451,368.00
	Freight :	0.00
	Invoice Total :	451,368.00

4.1 From the above invoices, it is not clear exactly what kind of services were actually rendered by 'Facebook Ireland'. We find that in this case the assessee was asked to file the copy of the agreement entered into with 'Facebook Ireland'. Before the 1d CIT(A) , the assessee informed that same should be filed during the course of the appellate proceedings before him but it was not filed. In our opinion, verification of the agreement or MOU with the 'Facebook Ireland' in relation to the services of advertising is relevant and important for determination of the kind of services rendered and whether same are in the nature of the royalty or not. It is also relevant for determination of the issue as to whether the agreement was entered with any Indian agent of 'Facebook Ireland' i.e. 'Facebook India' as in that case the issue of permanent establishment (PE) of assessee in India may also arise. In the facts and circumstances of the case, reliance placed by the assessee on the decisions cited without ascertaining the factual background of the assessee will not be in the interest of justice, and therefore, we



feel it appropriate to restore the matter back to the file of the Ld. Assessing Officer with the direction to the assessee to file the copy of the agreement or the MOU entered into with regard to the services availed. If the assessee does not co-operate then the Assessing Officer may collect the said agreement directly from the Facebook Ireland invoking the authority provided under the Act. Accordingly, the grounds raised by the assessee are restored back.

5. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 27/09/2024.

**Sd/-
(SUNIL KUMAR SINGH)
JUDICIAL MEMBER**

**Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER**

Mumbai;
Dated: 27/09/2024
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai