

IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI N.R.S.GANESAN, JM and B.R.BASKARAN, AM

I.T.A. No. 794/Coch/2013
Assessment Year: 2009-10

M/s. Kerala Vision Ltd., Alpha Complex, 2 nd Floor, Thoppin Moola, Thrissur-680 004. [PAN:AACCK 6383M]	Vs.	The Assistant Commissioner of Income-tax, Circle-1(1), Trichur.
(Assessee -Appellant)		(Revenue-Respondent)

Assessee by	Shri C.V. Rajan, CA
Revenue by	Shri K.K. John, Sr. DR

Date of hearing	29/04/2014
Date of pronouncement	06/06/2014

ORDER

Per B.R.BASKARAN, Accountant Member:

The appeal filed by the assessee is directed against the order dated 26-09-2013 passed by the Ld. CIT(A)-V, Kochi and it relates to the assessment year 2009-10.

2. The assessee is challenging the decision of the Ld. CIT(A) in confirming the disallowance of Rs.163.30 lakhs, being the amount paid to pay channels by the assessee as "Pay Channel charges", by invoking the provisions of sec. 40(a)(ia) of the Act for the failure to deduct tax at source from the said payment

in terms of sec. 194J of the Act, as according to the assessing officer the said payments fall in the category of "royalty".

3. The facts relating to the said issue are stated in brief. The assessee company is engaged in the business of distributing cable signals. It receives satellite signals from various channel companies like Star Den Media Ltd., Zee Turner Limited, M.S.M. Discovery P. Ltd., U.T.V. Global Broadcasting P. Ltd. etc. in the capacity of Multi System Operator. The assessee is liable to make payment to the above said companies for receiving the signals. During the course of assessment proceedings, the Assessing officer noticed that the assessee has paid/credited to various channel companies a sum of Rs. 163.30 lakhs as "Pay channel charges". The Assessing officer took the view that the "Pay channel charges" referred above falls in the category of "royalty" and is liable for deduction of tax at source under section 194J of the Act. The assessee, however, placed reliance on the decision of the Hon'ble Madras High Court rendered in the case of Skycell Communications Ltd. vs. DCIT reported in 251 ITR 53 and contended that it is not required to deduct tax at source from payments made to the Pay channel companies. However, the Assessing officer held that the decision rendered in the case of Skycell Communications Ltd. (supra) is not applicable to the facts of the instant case. The Assessing officer held that the assessee is liable to deduct tax at source u/s. 194J of the Act on

the pay channel charges paid by it. The relevant observations made by the Assessing officer are extracted below for the sake of convenience:

“3. What is emphasized above is that the technical service given to a subscriber to make use of the result of scientific and technological development for a fee to individual house holder and consumers. Here in the present case under consideration, the assessee company is a Multi System Operator Company, who as per definition given by Telecom Regulatory Authority an MSO means any person who receives a broadcasting service from a broadcaster/or their authorized agencies and retransmits the same to consumers/or retransmits the same to one or more cable operators. Thus, a MSO assumes the character and status which is totally different from the individual consumer.

4. The MSO pays a tariff to the pay channels. This is covered under the definition of royalty as used in clause (c) of sub-section (1) of Section 194J of the I.T. Act, 1961. As per Explanation 2(v) below clause (vi) of sub-section 1 of Section 9, royalty means the *transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films; or (vi) the rendering of any services in connection with the activities referred to in sub-clause (i) to (iv), (iva) and (v).*

5. From the above, what transpires is that the assessee's case falls under royalty payment liable for tax deduction at source as per the provisions of Section 194J as that the assessee paid/credited is towards the charges for receiving a broadcasting service from a broadcaster/or their authorized agencies for retransmission of the same to consumers or one or more cable operators. Thus, the case is distinguishable from the decision relied on by the assessee. In view of the above, an amount of Rs. 1,63,30,205/- paid/credited as pay channel charges to various pay channel companies is disallowed u/s. 40a(ia) for violation of making TDS as per the provisions of Section 194J of the I.T. Act, 1961.”

4. The assessee challenged the addition made by the Assessing officer by filing the appeal before the Ld. CIT(A) but could not succeed, hence the assessee has filed this appeal before us.

5. We have heard the rival contentions and carefully perused the record. For the purpose of sec. 194J, the term "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of sec. 9. The said Explanation reads as under:-

"Explanation 2 – For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for –

i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or **process** or trade mark or similar property;

ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property;

iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property;

iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;

(iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;

(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting but not including consideration for the sale, distribution or exhibition of cinematographic films;

(vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v)."

We notice that clause (i) of Explanation 2 includes the expression "Process". We further notice that the Finance Act, 2012 has inserted Explanation 6 below clause (vi) of sub-section (1) of sec. 9 defining the word "process". The said Explanation 6 reads as under:-

"Explanation 6 – For the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellite (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology whether or not such process is secret;"

We notice that the expression "process" includes and shall be deemed to have always included transmission by satellite, cable, optic fibre or any other technology. In the instant case, the assessee is engaged in the business of transmitting the television channels or signals by cable by receiving signals through satellite. Such kind of transmission (both receipt of signal and transmission of the same) is included in the definition of "Process" under Explanation 6, which has been inserted by the Finance Act, 2012 to remove the doubts. Since this Explanation starts with the words "for removal of doubts", in our view, it is clarificatory in nature and it would apply for the year under consideration also. As stated earlier, the transfer of all or any rights in respect of a "process" shall fall in the category of "royalty" as per clause (i) of Explanation 2. Hence, in our view, the payment made by the assessee as "Pay Channel Charges" shall fall in the category of "royalty" as defined in clause (i) of Explanation 2 to sec. 9(1) of the Act.

6. The Ld Counsel presented an alternative argument, viz., the amendment brought in by the Finance Act with retrospective effect, which was passed in the year subsequent to the year under consideration, should not be considered for penalizing the assessee by way of disallowance u/s 40(a)(ia) of the Act. The Ld Counsel submitted that the Hon'ble Delhi High Court in the case of Asia Satellite Telecommunications Co. Ltd Vs. DIT (332 ITR 340) had taken the view that the transmission of television signals through Satellite / transponders would not fall in the category of "royalty" as defined under Explanation 2 to sec. 9(1) of the Act. He submitted that the Explanation 6, which expanded the scope of the expression "process" has been inserted by the Finance Act, 2012 with retrospective effect, was brought into the Act only to nullify the decision rendered by the Hon'ble Delhi High Court. Accordingly, the Ld A.R submitted that the view entertained by the assessee that the payment of "Pay channel charges" will not fall in the category of royalty was supported by the decision of Hon'ble Delhi High Court referred above. Accordingly he submitted that the disallowance u/s 40(a)(ia) should not be made on the basis of subsequent amendment made with retrospective effect. In this regard, he placed reliance on the following case law:-

(a) Sonata Information Technology Ltd Vs. DCIT (2012)(TaxCorp (INTL)4659 (Mumbai-Trib)

(b) Infotech Enterprises Limited Vs. Addl. CIT (2014) TaxCorp (INTL) 6945 (ITAT – Hyderabad)

(c) Channel Guide India Limited Vs. ACIT (2013) TAxCorp (INTL) 6702 (ITAT-Mum)

We have gone through the above said decisions rendered by different benches of the Tribunal. We notice that they have held that the assessee cannot be held to be liable to deduct tax at source relying on the subsequent amendments made in the Act with retrospective effect.

7. In the instant case, the view entertained by the assessee that the pay channel charges cannot be considered as royalty is in fact gets support from the decision rendered by Hon'ble Delhi High Court in the case of Asia Satellite Telecommunication Co. Ltd (supra). Though the Explanation 6 to sec. 9(1)(vi) inserted by Finance Act, 2012 is clarificatory in nature, yet in view of the fact that the view entertained by the assessee gets support from the decision of Delhi High Court, referred above, we are of the view that the assessee cannot be held to be liable to deduct tax at source from the Pay Channel Charges. Hence, we are of the view that the assessing officer was not justified in disallowing the claim of pay channel charges by invoking the provisions of sec. 40(a)(ia) of the Act. Accordingly, we set aside the order of Ld CIT(A) on this issue and direct the assessing officer to delete the impugned disallowance.

8. Though the assessee has urged many grounds in the form of alternative contentions, we do not find it necessary to adjudicate them in view of the decision taken by us in the preceding paragraphs.

9. In the result the appeal filed by the assessee is allowed.

Pronounced accordingly on 06-06-2014.

sd/-
(N.R.S.GANESAN)
JUDICIAL MEMBER

sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Place: Kochi

Dated: 6th June, 2014

GJ

Copy to:

1. M/s. Kerala Vision Ltd., Alpha Complex, 2nd Floor, Thoppin Moola, Thrissur-680 004.
2. The Assistant Commissioner of Income-tax, Circle-1(1), Trichur.
3. The Commissioner of Income-tax(Appeals)-V, Kochi.
4. The Commissioner of Income-tax, Trichur.
5. D.R., I.T.A.T., Cochin Bench, Cochin.
6. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T, COCHIN