आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
`A' BENCH : CHENNAI

श्री चंद्र पूजारी, लेखा सदस्य एवं
श्री जी.पवन कुमार, न्यायिक सदस्य के समक्ष।
[BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SHRI G. PAVAN KUMAR, JUDICIAL MEMBER**]**

आयकर अपील सं./I.T.A.No.332/Mds/2016
&
C.O.No.49/Mds/2016
निर्धारण वर्ष /Assessment year : 2012-13

The Asstt. Commissioner of Income-tax Corporate Circle 4(1) Chennai **(Appellant)**	**Vs.**	M/s Mgage India Pvt. Ltd [Formerly M/s Velti India P. Ltd] Unit I and 2, Taramani Chennai 600 013 **[PAN AACCA 8496 P]** **(Respondent/Cross objector)**

Department by	:	Shri Shiva Srinivas, JCIT
Assessee by	:	Ms. Jharna, CA
सुनवाई की तारीख/Date of Hearing	:	23-08-2016
घोषणा की तारीख /Date of Pronouncement	:	09-09-2016

आदेश / O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER

This appeal of the Revenue and the cross objection of the assessee are directed against the order of the Commissioner of Income-tax (Appeals)-11, Chennai, dated 6.11.2015 for assessment year 2012-13.

2. In its appeal the Revenue has taken the following grounds:

"1. The order of the learned CIT(A) is contrary to law and facts of the case.

2.1. The CIT(A) erred in deleting the disallowance of Rs.2,08,52,080/- made under Sec40(a)(i) read with Sec.195 of the IT Act, 1961.

2.2. The CIT(A) failed to appreciate that Explanation 6 to Sec.9(1)(vi) reads thus : "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;]

2.3. The CIT(A) failed to appreciate the finding of the A.O. that data transmission services rendered by the non-resident carrier were in nature of 'royalty' taxable under section 9(1)(vi) in view of Explanation 6 to Section 9(1)(vi) which were inserted retrospectively by Finance Act 2012, receipts earned from providing data transmission services through satellites is to be considered as royalty and hence the assessee is liable to deduct tax at source from the carrier payments.

2.4. It is submitted that the CIT(A)'s relied upon order of the Hon'ble ITAT in assessee's own case for AY.2009-10 has not become final and against which department's appeal is pending before the Hon'ble High Court of Madras vide TCA NO.909 of 2014.

3. The CIT(A) erred in deleting the addition of Rs. 1,46,93,906/- made on advance received from customers.

3.1. The CIT(A) failed to appreciate the fact that income received or deemed to be received in the previous year is to be offered for taxation and hence the addition made by the AO on advance received from customers ought to have been upheld by the CIT(A).

4. The CIT(A) erred in deleting the disallowance u/s40(a)(ia) on payment of premium content of Rs.15,00,000/-.

4.1. The CIT(A) failed to appreciate the findings of the AO that premium content is a fee for technical services paid to BSNL and hence the assessee is liable to deduct TDS u/s.194J from the premium content payment.

5. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the learned CIT(A) may be set aside and that of the Assessing Officer restored."

3. Regarding Ground No.1, the facts are that the assessee is engaged in the business of turn-key mobile messaging solutions. During the previous year, the assessee made carrier payments to non-resident telephone operators. On the carrier payments of ₹2,08,52,080/- tax was not deducted at source. The Assessing Officer observed that the assessee was liable to deduct TDS u/s 195 as these payments made were in the nature of royalty/technical service for which income accrues or arises in India even though the deductee does not have a permanent establishment in India. Therefore, the Assessing Officer has disallowed u/s 40(a)(ia) of the Act a sum of ₹2,08,52,080/- paid to the non-resident for non-deduction of tax u/s 195 by replying upon Explanation 6 to sec. 9(1)(vi) of the Act. On appeal, the CIT(A) has given a finding that the issue was covered in favour of the assessee by the order of the Tribunal dated 27.2.2014 in assessee's own case in I.T.A.No.1030/ Mds/2013 for assessment year 2009-10. Accordingly, he deleted the addition against which the Revenue is in appeal before us.

4. After hearing both parties, we are of the opinion that the issue is squarely covered by the order of the Tribunal in assessee's own case for assessment year 2009-10. The Tribunal in para 8 of its order has observed as under:

> "8. On going through the order of the Commissioner of Income Tax (Appeals), we find that the nature of services rendered by non-resident i.e. M/s. Clickatel is only to transmit bulk SMS. The nature of service provided by Clickatel requires no technical knowledge and what was rendered was just transmission of data which requires no technical skill. The finding of the Commissioner of Income Tax (Appeals) that carrier which is a medium for sending bulk SMS and as such cannot be considered to be rendering any technical services. The Commissioner of Income Tax (Appeals) held that Clickatel which is a non-resident carrier rendered services outside India and no part of the payment made to Clickatel is chargeable to tax in India. The Commissioner of Income Tax (Appeals) also followed the decision of Hon'ble Supreme Court in the case of CIT Vs.Bharti Cellular Ltd. (330 ITR 239) on the issue. The Hon'ble Delhi High Court the case of CIT Vs. Bharti Cellular Ltd. (319 ITR 139) held that these services do not involve human intervention and these services cannot be regarded as fee for technical services. The Hon'ble Madras High Court in the case of Verizon Communications Ltd. Vs. ITO in T.C.(Appeal) Nos. 147 to 149 of 2011 and 230 of 2012 dated 7.11.2013 held that collection of fees for usage of standard facility would not amount to payment made for providing technical services. In the circumstances, we do not find any good reason to interfere with the decision of the Commissioner of Income Tax (Appeals) in holding that payment made by the assessee to Clickatel is not fees for technical services and no TDS is required to be made."

5. Being so, the CIT(A) has taken a correct view in the facts and circumstances of the case. Therefore, no interference in the order of the CIT(A) is called for.

6. The next ground is with regard to deletion of addition of ₹1,46,93,906/- made on advance received from customers.

7. The facts of the case are that the assessee-company entered into contract with its clients for rendering services of transmission of data. The contract entered into shall be based either on the number

of SMS to be sent over a period or it shall be for transmitting of SMS for a period irrespective of the number to be transferred. The assessee-company received the payment for the said contract in advance from the client for rendering of the service. The assessee recorded the income based on the service rendered on proportionate basis depending upon either the number of SMS or the period of contract. During the year, the assessee had accounted ₹1,46,93,906/- as advance received from the customer in Schedule - 8 - Other current liabilities – (B) to the Balance Sheet. The Assessing Officer has treated the 'Advance received from the customer' as income in the year in which advance was received. The Assessing Officer has observed that the income that is received or deemed to be received in the previous year, is liable for taxation. The Assessing Officer by relying on the following decisions, added the advance received from the customers of ₹1,46,93,906/- as income of the assessee:

(i) EID Parry(I) Ltd vs CIT 258 ITR 404
(ii) LD Sassoon & Company Ltd vs CIT, 26 ITR 27(S.C)

8. On appeal, before the CIT(A), the assessee reiterated the submissions made before the Assessing Officer. Further the assessee relied on the order of the Tribunal in its own case for assessment year 2009-10 dated 27.2.2014 (supra) and also the judgment of the Madras High court in CIT vs Coral Electronics P Ltd, 274 ITR 336 wherein held

that service charges received in advance for the services to be rendered in future years is not liable to tax in the year of receipt. By following the order of the Tribunal in assessee's own case for assessment year 2009-10, the CIT(A) deleted the addition. Against this, the Revenue is in appeal before us.

9. We find that similar issue came up before this Tribunal in assessee's own case for assessment year 2009-10 (supra) and the Tribunal in para 13 & 14 of its order has observed as under:

> "13. Heard both sides. Perused orders of lower authorities and decisions relied on. On reading of the assessment order as well as order of Commissioner of Income Tax (Appeals), find that assessee received advance income from its customers and whenever services were provided by the assessee, assessee adjusts the advances received from customers and recognizes the income in the year in which services were rendered. However, the Assessing Officer taxed the advances received by the assessee and the Commissioner of Income Tax (Appeals) deleted the said addition observing as under:"
>
> > "7.2 I have considered the AO's observations and the appellants submissions in this regard. Since the appellant maintains books on accrual system, income shall be recognized only when it accrues. In the given case, the income accrues only when the appellant sends the required no. of SMS. Therefore, the service charges received in advance for the service to be rendered in future years are not liable to tax in the year of receipt. Only on completion of the service, the appellant has right over the amount that was received in advance. .In view of the above, the action of the AO is not justified in making the above disallowance of `1,33,01,684/-and hence directed to be deleted. This ground of appeal is allowed."

> 14. On reading of the above order, we do not find any good reason to interfere with the findings of the Commissioner of Income Tax (Appeals). Thus, the ground of appeal raised by the Revenue on this issue is rejected."

10. In view of the above order of the Tribunal and the facts are similar for this assessment year also, we find that the CIT(A) is justified in holding that the service charges received in advance cannot be treated as income of the assessee for the impugned assessment year. Accordingly, the ground raised by the Revenue is dismissed.

11. The next ground is with regard to deleting the disallowance u/s 40(a)(ia) of the Act on payment of premium content of ₹15,00,000/-.

12. Facts of the case are that the assessee has paid ₹15,00,000/- as premium content which is a pull service where the mobile users send the request by using a keyword. The carrier charges the mobile user for the same. With regard to treatment of amount paid to BSNL as premium content, the Assessing Officer had disallowed the same on the ground that the payment was made towards utilizing the services of BSNL without TDS. According to the Assessing Officer, it is a fee for technical services and the assessee was liable to deduct TDS u/s 194J on the above said expenditure of ₹15,00,000/-. He, therefore, made addition ₹15,00,000/- to the income of the assessee. On appeal, before the CIT(A), the

assessee submitted that the agreement between the assessee and BSNL specifies as follows:

> - Velti India P. Ltd has committed top line revenue of Rupees One crore in one year to BSNL from the date of signing of agreement and from the services specified in the agreement agreed together.
>
> - Velti India P. Ltd shall submit a bank guarantee of ₹15,00,000/- with a validity of 18 months to BSNL as a back up to the committed top line revenue of Rs. 1 Crore in the year.
>
> - The bank guarantee of ₹15,00,000/- shall be encashed by BSNL if Velti India P. Ltd is not able to meet its commitment to generate top line revenue of Rs. 1 Crore within one year from the date of signing of the agreement with BSNL.
>
> - The bank guarantee shall be valid for 18 months from the date of signing the agreement.
>
> - BSNL will invoke the guarantee if the minimum committed top line revenue is not generated in one year period.

13. The assessee further submitted that it was not able to generate the minimum committed top line revenue, the bank guarantee given was invoked by BSNL. During the year the assessee recorded this payment of bank guarantee as premium content under the head other expenses which was treated by the Assessing Officer as rendering of fee for technical service by BSNL. After considering the submissions of the assessee and after examining the contractual agreement filed by the assessee, the CIT(A) found that it was a bank guarantee and not FTS warranting TDS u/s 194J of the Act . He, therefore, deleted the addition made by the Assessing Officer.

14. We have heard the rival submissions and perused the material on record. We find that on account of the assessee's failure to meet the commitment of generating top line revenue, the Bank guarantee given by the assessee was invoked by BSNL. Therefore, it cannot be treated as fee for technical services provided to the assessee for which no TDS deduction could be made as there was no service involved in it. As such, in our opinion, the assessee is not liable for deduction of TDS. Further, the Bombay High Court in CIT vs Regaslia Apparels P. Ltd, 352 ITR 71, has held that forfeiture of bank guarantee was compensatory in nature under sec. 37(1) of the Act and no TDS to be made on this payment. We, therefore, find no reason to interfere with the order of the CIT(A) on this issue.

15. In the cross objection, the assessee has only supported the order of the CIT(A). Since we have dismissed the Revenue's appeal, the cross objection is also dismissed as infructuous.

16. In the result, the appeal of the Revenue and cross objection of the assessee are dismissed.

Order pronounced in the open court on 9th September, 2016, at Chennai.

Sd/-	Sd/-
(जी. पवन कुमार)	**(चंद्र पूजारी)**
(G. PAVAN KUMAR)	**(CHANDRA POOJARI)**
न्यायिक सदस्य/JUDICIAL MEMBER	**लेखा सदस्य /ACCOUNTANT MEMBER**

चेन्नई/Chennai
दिनांक/Dated: 9th September, 2016
RD

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant	4. आयकर आयुक्त/CIT
2. प्रत्यर्थी/Respondent	5. विभागीय प्रतिनिधि/DR
3. आयकर आयुक्त (अपील)/CIT(A)	6. गार्ड फाईल/GF