IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'F' NEW DELHI

BEFORE SHRI O.P. KANT, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.2289/DEL/2016 (A.Y 2011-12)

Spice Mobility Ltd. 19A & 19B, Floor No. 5 Global Knowledge Park, Sector-125 Noida AABCM5619D **(APPELLANT)**	Vs	Addl. CIT(TDS) Noida **(RESPONDENT)**

ITA No.2286//DEL/2016 (A.Y 2011-12)

Spice Mobility Ltd. 19A & 19B, Floor No. 5 Global Knowledge Park, Sector-125 Noida AABCM5619D **(APPELLANT)**	Vs	ACIT(TDS) Noida **(RESPONDENT)**

ITA No.2288/DEL/2016 (A.Y 2012-13)

Spice Mobility Ltd. 19A & 19B, Floor No. 5 Global Knowledge Park, Sector-125 Noida AABCM5619D **(APPELLANT)**	Vs	ACIT(TDS) Noida **(RESPONDENT)**

ITA No.2287/DEL/2016 (A.Y 2012-13)

Spice Mobility Ltd. 19A & 19B, Floor No. 5 Global Knowledge Park, Sector-125 Noida AABCM5619D **(APPELLANT)**	Vs	ACIT(TDS) Noida **(RESPONDENT)**

Appellant by	**Sh. Ajay Vohra, Sr. Adv, Sh. Aditya Vohra, Adv & Ms. Meenal Goyal, CA**
Respondent by	**Sh. Atiq Ahmed, Sr. DR**

Date of Hearing	**25.06.2018**
Date of Pronouncement	**19.09.2018**

ORDER

PER SUCHITRA KAMBLE, JM

These appeals are filed by the assessee against the order dated 29/02/2016 passed by CIT(A)-1, Noida.

2. The grounds of appeal are as under:-

ITA No.2289/DEL/2016 (A.Y. 2011-12)

1. That on the facts and circumstances of the case and in law, the CIT(A) erred in confirming the order of the assessing officer holding the appellant to be an assessee in default under section 201(1) for the alleged failure to deduct tax at source under section 194C of the Income-tax Act, 1961 ('the Act') from the amount reimbursed to Regional Distributors ('RDs') in respect of advertisement expenses incurred by them.

1.1. That on the facts and circumstances of the case and in law, the CIT(A) erred in not appreciating that the Regional Distributors ('RDs') were not advertising agencies and did not carry out any advertising work for the appellant and the advertisement expenditure reimbursed to them did not fall within the ambit of section 194C of the Act.

1.2. That on the facts and circumstances of the case and in law, the CIT(A) erred in not holding that no tax was required to be deducted under section 194C of the Act from advertisement expenses reimbursed to RDs as there was no income element embedded therein.

1.3. That without prejudice, on the facts and circumstances of the case and in law, the CIT(A) erred in not holding that tax not deducted at source under section 194C from advertising expenses reimbursed to RDs, was not recoverable from the appellant, being the payer, under section 201(1) of the Act.

2. That on the facts and circumstances of the case and in law, the CIT(A) erred in not deleting interest of Rs.15,41,531 charged under section

201(1 A) of the Act in respect of tax alleged to be deductible under section 194C of the Act but not deducted from advertisement expenses reimbursed to RDs.

2.1. That without prejudice, on the facts and circumstances of the case and in law, the CIT(A) erred in confirming levy of interest of Rs.15,41,531 under section 201(1 A) of the Act without appreciating that the same had not been computed correctly by the assessing officer.

2.2. That without prejudice, on the facts and circumstances of the case and in law, the CIT(A) erred in not appreciating that the interest under section 201(1 A) of the Act was chargeable, if at all, from the date of payment/ credit to the due date of filing return of income by the payee.

3. That on the facts and circumstances of the case and in law, the C1T(A) erred in confirming the order of the assessing officer levying interest under section 201(1 A) of the Act, for the alleged failure of the appellant to deduct tax at source under section 192(1) of the Act, from the amount paid towards salary, at average rate of tax.

3.1. Without prejudice, that on facts and circumstances of the case and in law, the C1T(A) erred in not appreciating that there is no overall short deduction of tax under section the Act and interest could not be levied on the basis of monthly shortage U/S 201(1a) of the Act.

4. That on the facts and circumstances of the case and in law, the C1T(A) erred in confirming the order of the assessing officer levying interest under section 201(1A) of the Act on the provision made for recruitment expenses.

5. That on the facts and circumstances of the case and in law, the CIT(A) erred in confirming the order of the assessing officer levying interest for alleged late deposit of TDS under section 201(1 A) of the Act, in respect of provision made for commission to directors.

ITA No.2286/DEL/2016 (A.Y. 2011-12)

1. *That the CIT(A) erred on facts and in law in confirming the order passed under section 271C of the Income-tax Act, 1961 ('the Act') by the assessing officer levying penalty of Rs.36,70,312 for alleged failure to deduct tax at source from reimbursement of advertisement expenses.*

2. *That on the facts and circumstances of the case and in law, the CIT(A) erred in not appreciating that the appellant had 'reasonable cause' for not deducting tax at source from the aforesaid payment as the appellant was under bona fide belief that the same were not subject to tax deduction at source under Chapter XVII-B of the Act.*

The appellant craves leave to add to, amend, alter or vary the above grounds of appeal at or before the time of hearing.

ITA No.2288/DEL/2016 (A.Y. 2012-13)

1. That on the facts and circumstances of the case and in law, the CIT(A) erred in confirming the order of the assessing officer holding the appellant to be an assessee in default under section 201(1) for the alleged failure to deduct tax at source under section 194C of the Income-tax Act, 1961 (The Act') from the amount reimbursed to Regional Distributors ('RDs') in respect of advertisement expenses incurred by them.

1.1. That on the facts and circumstances of the case and in law, the CIT(A) erred in not appreciating that the Regional Distributors ('RDs') were not advertising agencies and did not carry out any advertising work for the appellant and the advertisement expenditure reimbursed to them did not fall within the ambit of section 194C of the Act.

1.2. That on the facts and circumstances of the case and in law, the CIT(A) erred in not holding that no tax was required to be deducted under section 194C of the Act from advertisement expenses reimbursed to RDs as there was no income element embedded therein.

1.3. That without prejudice, on the facts and circumstances of the case and in law, the CIT(A) erred in not holding that tax not deducted at source under section 194C from advertising expenses reimbursed to RDs, was not recoverable from the appellant, being the payer, under section 201(1) of the Act.

2. That on the facts and circumstances of the case and in law, the CIT(A) erred in not deleting interest of Rs.78,173 charged under section 201(1 A) of the Act in respect of tax alleged to be deductible under section 194C of the Act but not deducted from advertisement expenses reimbursed to RDs.

2.1. That without prejudice, on the facts and circumstances of the case and in law, the CIT(A) erred in confirming levy of interest of Rs.78,173 under

section 201(1 A) of the Act without appreciating that the same had not been computed correctly by the assessing officer.

2.2. That without prejudice, on the facts and circumstances of the case and in law, the CIT(A) erred in not appreciating that the interest under section 201(1 A) of the Act was chargeable, if at all, from the date of payment/ credit to the due date of filing return of income by the payee.

3. That on the facts and circumstances of the case and in law, the CIT(A) erred in confirming the order of the assessing officer levying interest under section 201(1 A) of the Act, for the alleged failure of the appellant to deduct tax at source under section 192(1) of the Act, from the amount paid towards salary, at average rate of tax.

3.1. Without prejudice, that on the facts and circumstances of the case and in law, the C1T(A) erred in not appreciating that there is no overall short deduction of tax under section 192(1) of the Act and interest could not be levied on the basis of monthly shortage under section 201(1 A) of the Act.

4. That on the facts and circumstances of the case and in law, the CIT(A) erred in confirming the order of the assessing officer holding the appellant to be an assessee in default under section 201(1) for non-deduction of tax at source under section 194H in respect of provision made for recruitment expenses.

4.1. That on the facts and circumstances of the case and in law, the C1T(A) erred in not appreciating that provisions of section 194H of the Act were not applicable in respect of aforesaid amount payable towards recruitment expenses.

4.2. That without prejudice, on the facts and circumstances of the case and in law, the CIT(A) erred in not holding that tax alleged to be deductible under section 194H of the Act from aforesaid amount payable towards recruitment expenses, was not recoverable'' from the appellant, being the payer, under section 201(1) of the Act.

5. That on the facts and circumstances of the case and in law, the C1T(A) erred in not deleting interest of Rs.24,693 charged under section 201(1 A) of the Act from the aforesaid amount payable towards recruitment expenses, alleged to be deductible under section 194H of the Act.

6. That on the facts and circumstances of the case and in law, the

CIT(A) erred in confirming the order of the assessing officer holding the appellant to be an assessee in default under section 201(1) for non-deduction of tax at source on payments made for testing expenses.

6.1. That on the facts and circumstances of the case and in law, the CIT(A) erred in affirming the order passed under section 201(1) without appreciating that the assessing officer failed to specify under which section the appellant defaulted in deducting tax at source on payments made towards testing expenses.

6.2. That without prejudice, on the facts and circumstances of the case and in law, the CIT(A) erred in not holding that tax alleged to be deductible from aforesaid amount paid towards testing expenses, was not recoverable from the appellant, being the payer, under section 201(1) of the Act.

7. That on the facts and circumstances of the case and in law, the C1T(A) erred in not deleting interest of Rs.7,951 charged under section 201 (1 A) of the Act from the aforesaid amount payable towards testing expenses.

The appellant craves leave to add to, amend, alter or vary the above grounds of appeal at or before the time of hearing.

ITA No.2287//DEL/2016 (A.Y. 2012-13)

1. *That the CIT(A) erred on facts and in law in confirming the order passed under section 271C of the Income-tax Act. 1961 ('the Act') by the assessing officer levying penalty of Rs.4,01,140 for alleged failure to deduct tax at source from reimbursement of advertisement expenses, recruitment expenses and testing expenses.*

2. *That on the facts and circumstances of the case and in law, the CIT(A) erred in not appreciating that the appellant had 'reasonable cause' for not deducting tax at source from the aforesaid payment as the appellant was under bona fide belief that the same were not subject to tax deduction at source under Chapter XVII-B of the Act.*

The appellant craves leave to add to, amend, alter or vary the above grounds of appeal at or before the time of hearing.

3. Firstly, we take up A.Y. 2011-12. The assessee is a public limited company engaged in the business of trading of mobile phones handsets, manufacturing trading, servicing, maintenance of computer hardware. The

assessee for the Financial Year 2010-11 filed quarterly returns of tax deducted at source under various sections on due dates. The proceedings relating to verification of quarterly TDS returns, were initiated by the Assessing Officer, after which order dated 28.03.2014 was passed under section 201(1)/201(1A) of the Income Tax Act, 1961, treating the assessee as an 'assessee in default' for failure to deduct tax at source from certain payments during the relevant previous year. The assessee, during the relevant previous year, paid Rs. 18,35,15,604/- to regional distributors on account of reimbursement of expenses against third party bills, incurred by them for advertisement in relation to the assessee's products sold by them on their own account. These expenses included manpower reimbursement to RDS, Salesman incentives and other reimbursement to RDS. In the Assessment Order, the Assessing Officer held the assessee as "assessee in default" under section 201 (1) of the Act and also levied interest under section 201 (1A) of the Act, in respect of failure to deduct tax at source in respect of the aforesaid payments made to various distributors/dealers. During the relevant previous year, the assessee deducted tax at source amounting to Rs. 2,22,40,792/- from the amounts paid as salary. The rate of tax deducted at source was calculated at "average rate of income-tax" computed on the basis of the rates in force on the estimated income of the payee for the relevant financial year. The Assessing Officer computed the amount of tax to be deducted on month to month basis of average tax deducted.

4. Being aggrieved by the order u/s 201(1)/201(1A) of the Act, the assessee filed appeal before the CIT(A). The CIT(A) dismissed the appeal of the assessee.

5. As regards Ground Nos.1, 1.1, 1.2 and 1.3, relating to failure to deduct tax at source u/s 194C of the Act from the amount reimbursed to regional distributors in respect of advertisement expenses incurred by them, the Ld. AR submitted that as per Clause 2.6 of the agreement, the distributor is not the agent. Therefore, this is the amount paid from principal to principal.

Therefore, the reimbursement of this amount was claimed by the assessee. For Assessment Year 2009-10, the Tribunal in case of M/s. S. Mobility Ltd. (ITA No. 3898/Del/2013 and CO No. 245/Del/2013 order dated 29.12.2014) held that the tribunal agree with the contention of the assessee that no TDS provisions are attracted where it is a purely reimbursement and there was no profit element for the payee, as held by the CIT(A), but the Tribunal further held that however, it was a structure arrangement wherein the payments are routed through the distributors to circumvent the provisions of Chapter XVII-B of the Act. The Tribunal further observed that the bill raised by the advertisement agency was not in the name of the distributor, therefore, the Tribunal remanded back the issue to the file of the AO and directed the assessee to produce the evidences before the Assessing Officer to establish that the parties to whom the reimbursements have been made had actually complied with the provisions of Chapter XVII-B. The Ld. AR submitted that in the present case the assessee was raised the bill in the name of payee, the CIT(A) has taken into account of these factors and it's a cryptic order. The Ld. AR further submitted that there is no element of profit involved. The Ld. AR relied upon the Hon'ble Allahabad High Court decision in case of Jagran Prakashan Ltd. vs. DCIT(TDS) 345 ITR 288 (All HC) which was followed by Agra Bench of the Tribunal in case of Aligarh Muslim University vs. ITO 189 TTJ 794 (Agra ITAT).

6. The Ld. DR relied upon the Assessment Order and the order of the CIT(A). The Ld. DR submitted that the assessee has failed to deduct tax as and from the record it shows that deductor is in default for having not deducted the TDS on the amounts of Rs.18,35,15,604/- for Financial Year 2010-11 and Rs. 1,30,28,911/- for the Financial Year 2011-12 and is liable for the TDS u/s 194C which amounts to Rs.183,515,604/- under the head of publicity expenses for Assessment Year 2010-11 and Rs. 13,028,911/- for Financial Year 2011-12. Since, the assessee has not produce any details the Assessing Officer has rightly made the addition.

7. We have heard both the parties and perused the material available on record. From the Tribunal's decision in the assessee's own case for Assessment Year 2009-10. The Tribunal has categorically given finding that there was a structure arrangement wherein the payments are rooted through the distributors to circumvent the Provisions of Chapter XVII-V of the Act. Therefore, the Tribunal has confirmed the CIT(A)'s direction as to directing the assessee to produce the evidences before the Assessing Officer to establish that the parties to whom the reimbursement have been made had actually complied with the provisions of Chapter XVI-V. In the present Assessment Year, the assessee during the previous year paid Rs. 18,35,15,604/- to regional distributors on account of reimbursement of expenses against third party bills, incurred by them for advertisement in relation to the assessee's products sold by them on their own account. From the records it is seen that these expenses included manpower reimbursement to RDS, Salesman incentives and other reimbursement to RDS. Thus, the assessee raised the bill in the name of payee and the assessee also produced evidences before the Assessing Officer to establish that the parties to whom the reimbursement have been made had actually complied with the Provisions of Chapter XVII-V. Therefore, we are of the view that the CIT(A) has not looked into the evidences produced before the Assessing Officer as well as before CIT(A). Thus, Ground Nos. 1, 1.1, 1.2 and 1.3 of assessee's appeal are allowed.

8. As related to Ground No. 2, 2.1 and 2.2 regarding levy of interest the same is consequential, hence the same do not require adjudication.

9. As regards Ground No. 3 and 3.1 relating to levy of interest under Section 201(1A) of the Act, for the alleged failure of the appellant to deduct tax at source under section 192(1) of the Act, from the amount paid towards salary, at average rate of tax, as well as short deduction of tax the interest levied on the basis of monthly shortage u/s 201(1A), the Ld. AR submitted that the Assessing Officer, wrongly levied interest under section 201 (1A) of the Act

for the alleged failure to deduct tax at source under section 192 (1) of the Act, from the amount paid towards salary. The Ld. AR further submitted that the Assessing officer failed to appreciate that where there is no overall short deduction of tax under section 192 (1) of the Act, interest cannot be levied on the basis of monthly shortage under Section 201 (1A) of the Act. The Ld. AR further submitted that the assessee company made a provision for recruitment expenses, where TDS has been deducted at the time of actual payment or credit to the party. Thus there is no default in TDS deduction. However, the Assessing Officer levied the interest under section 201(1A) of the Act.

10. The Ld. DR relied upon the Assessment Order and the order of the CIT(A).

11. We have heard both the parties and perused all the relevant material available on record. From the records it can be seen that during the relevant previous year, the assessee deducted tax at source amounting to Rs. 2,22,40,792/- from the amounts paid as salary. The rate of tax deducted at source was calculated at "average rate of income tax" computed on the basis of the rates on the estimated income of the payee for the relevant financial year. But the Assessing Officer proceeded to compute the amount of tax to be deducted on month to month basis of average tax deducted. This needs to be verified as the Ld. AR made submission before us that the Assessing Officer has not given any credit for interest where there is no surplus payment of TDS, while charging interest on deficit amount. Thus, this issue is remanded back to the file of the Assessing Officer for verifying as to whether the interest clause is applicable or not and if applicable whether there is surplus payment of TDS or not. After verifying the same the Assessing Officer decide this issue. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Thus, Ground Nos. 3 and 3.1 are partly allowed for statistical purpose.

12. As related to Ground No. 4, regarding provisions made for recruitment expenses, the Ld. AR submitted that the assessee company made a provision for recruitment expenses, where TDS has been deducted at the time of actual payment or credit to the party. Thus, the Ld. AR submitted that there is no default in TDS deduction. The Ld. AR further submitted that the action of the Assessing Officer in treating the assessee as an "assessee-in-default" and levying interest under Section 201(1A) of the Act is thus not based on proper appreciation of the facts of the case.

13. The Ld. DR relied upon the order of the Assessing Officer and the order of the CIT(A).

14. We have heard both the parties and perused all the material available on record. It can be seen that the assessee company made a provision for recruitment expenses, where TDS has been deducted at the time of actual payment or credit to the party. Thus, there is no default in TDS deduction. Therefore, the action of the Assessing Officer in treating the assessee as an "assessee-in-default" and levying interest under Section 201(1A) of the Act is not based on proper appreciation of the facts of the case. Ground No. 4 is allowed.

15. As relates to Ground No.5, commission to the Director, the Assessing Officer has not made any deduction that only interest has been levied. The Ld. AR submitted that the assessee made a provision for commission to directors at the end of the year, which can be paid strictly in accordance with Section 211 of the Companies Act, 1956 and TDS can be deducted and paid, when actual liability is ascertained, which generally happens after five/six months from the end of the financial year. Further, in Finance Bill, 2012, Section 194J of the Income Tax Act, 1961 has been amended and a clause (ba) to sub section (1) of the Section 194J effective from 1st July, 2012 has been Introduced wherein tax is required to be deducted on the remuneration paid to director, which is not in nature of salary, at the rate of 10% of such

remuneration. Thus, this clause is applicable w.e.f. 1.07.2012. However, the Assessing Officer levied the interest under section 201(1A) of the Act.

16. The Ld. DR relied upon the order of the Assessing Officer and the order of the CIT(A).

17. We have heard both the parties and perused all the relevant material available on record. The assessee made a provision for commission to directors at the end of the year, which can be paid strictly in accordance with Section 211 of the Companies Act, 1956 and TDS can be deducted and paid, when actual liability is ascertained, which generally happens after five/six months from the end of the financial year. Further, in Finance Bill, 2012, Section 194J of the Income Tax Act, 1961 has been amended and a clause (ba) to sub section (1) of the Section 194J effective from 1st July, 2012 has been Introduced wherein tax is required to be deducted on the remuneration paid to director, which is not in nature of salary, at the rate of 10% of such remuneration. Thus, the contention of the Ld. AR that this clause is applicable w.e.f. 1.07.2012 is just and proper. Ground No. 5 is allowed.

18. In result, appeal being ITA No. 2289/DEL/2016 for A.Y. 2011-12 filed by the assessee is partly allowed for statistical purpose.

19. For Assessment Year 2012-13 being ITA No.2288/DEL/2016, except ground nos. 6, 6.1, 6.2 and 7 the rest of the grounds are identical to the earlier assessment year i.e. 2011-12. The Ground Nos. 6, 6.1, 6.2 and 7 regarding testing expenses. The Ld. AR submitted that payment made for purchase of material and not in nature of service. Thus, interest cannot be levied. The Ld. DR relied upon the orders of the Assessing Officer and the CIT(A).

20. We have heard both the parties and perused all the relevant material available on record. As regards Ground Nos. 1, 1.1, 1.2 and 1.3 as well as Ground Nos. 2, 2.1 and 2.2 are identical in nature to that of A.Y. 2011-12, hence, allowed. As regards Ground Nos. 3 and 3.1 are identical in nature to

that of A.Y. 2011-12 and hence partly allowed for statistical purpose. As regards Ground Nos. 4, 4.1 and 4.2 as well as 5 are identical in nature to that of A.Y. 2011-12, hence, allowed. As regards Ground Nos. 6, 6.1, 6.2 and 7, from the records it can be seen that payment made for purchase of material and not for services and thus, the Assessing Officer as well as the CIT(A) was not right in making the additions. Hence, Ground Nos. 6, 6.1, 6.2 and 7 are allowed.

21. In result, appeal being ITA No. 2288/Del/2016 for A.Y. 2012-13 filed by assessee is partly allowed for statistical purpose.

22. As regards, penalty u/s 271(1)(c) of the Income Tax Act, 1961 both the Assessment Years are concerned, since the quantum for both the Assessment Years are decided hereinabove, the same is consequential and hence partly allowed for statistical purpose.

23. In result, appeals being ITA No.2286/Del/2016 for A.Y. 2011-12 and ITA No. 2287/DEL/2016 for A.Y. 2012-13 are partly allowed for statistical purpose.

24. In result, all four appeals are partly allowed for statistical purpose.

Order pronounced in the Open Court on 19th September, 2018.

Sd/- Sd/-

(O. P. KANT) **(SUCHITRA KAMBLE)**

ACCOUNTANT MEMBER **JUDICIAL MEMBER**

Dated: 19/09/2018
R. N*
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	13.06.2018
Date on which the typed draft is placed before the dictating Member	14.06.2018
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	19.09.2018
Date on which the final order is uploaded on the website of ITAT	19.09.2018
Date on which the file goes to the Bench Clerk	19.09.2018
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	