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

BEFORE HON'BLE JUSTICE P. P. BHATT, PRESIDENT & HON'BLE SHRI S. RIFAUR RAHMAN, AM

आयकरअपीलसं./ I.T.A. No. 1673/Mum/2020
(**निर्धारणवर्ष** / Assessment Year: 2014-15)

Celltick Mobile Media (India) Pvt. Ltd. 309, B-Wing, Everest Grande, Mahakali Caves Road, Andheri (East), Mumbai-400 093	**बनाम**/ Vs.	DCIT -9(2)(1), R. No. 655A, Aayakar Bhavan, M. K. Road, Mumbai-400 020
स्थायीलेखासं ./जीआइआरसं ./PAN No. AAECC3150C		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Appellant by**	:	Shri Chetan Agarwal, AR
प्रत्यर्थीकीओरसे/**Respondentby**	:	Ms. Shreekala Pardeshi, DR

सुनवाईकीतारीख/ **Date of Hearing**	:	19.01.2021
घोषणाकीतारीख / **Date of Pronouncement**	:	26.03.2021

आदेश / O R D E R

PER S. RIFAUR RAHMAN (ACCOUNTANT MEMBER):

The present appeal has been filed by the assessee against the order of Ld. Commissioner of Income Tax (Appeals)-16, in short 'Ld. CIT(A)', Mumbai, dated 30.01.2020 for AY 2014-15.

2. The brief facts of the case are, assessee filed its return on income for Assessment Year: 2014 – 15 on 26.11.2014 declaring total income of ₹ 3,63,50,740/–. The assessee filed revised return of income on 30.11.2015 declaring total income of ₹ 4,35,64,090/–. Subsequently, the case was selected for scrutiny and accordingly notices under section 143(2) and 142(1) of the Act were issued and served on the assessee. In response, authorized representative of the assessee attended the proceedings and filed relevant information as called for.

3. The assessee is engaged in the business of distributing live screen/flash services on mobile through telecom operators. The Celltick's live screen platform enables operators, marketers and advertisers to monetize their mobile users. The system intelligently targets the right services and products to be marketed to users based on their location, context and purchase history. In live screen, Celltick provides a managed Mass market solution that closes the loop between mobile marketing and mobile commerce with patent technology.

4. During assessment proceeding, assessing officer observed that assessee has paid an amount of ₹ 16, 31, 65, 734/– as license fees to Celltick Technologies Ltd Israel pursuant to the agreement entered into by them. He observed that assessee is a non-exclusive distributor of the licensed system in the Indian subcontinent territory and it is responsible for marketing and distributing the system and installing the system on client infrastructure. The assessee withheld tax at the rate of 10% on the amount of license fees paid from April 2013 to August 2013. For the remaining months assessee has not deducted tax at source which amounts to ₹ 6,98,38,225/– when assessee was asked to show cause why the amount on which tax was not deducted at source should not be disallowed under section 40(a)(i) of the Act. In response, assessee submitted that as per the provisions of section 195 of the Act, assessee is responsible to deduct tax only on those income which is chargeable to tax in India. In the given case, the income of the assessee is not chargeable to tax for the reason that assessee is a tax resident in Israel and is eligible to claim the benefit of Indo – Israel treaty and the article 7 of the treaty is applicable to the assessee. The assessing officer rejected

the contention of the assessee and invoked the provisions of section 40(a)(i) of the Act and disallowed payment to the extent of ₹ 6,98,38,225/–.

5. Aggrieved with the above order assessee preferred an appeal before Ld. CIT(A) – 16, Mumbai. Before Ld CIT(A), assessee made similar submissions as was made before assessing officer and Ld CIT(A) dismissed the appeal by sustaining the additions made by the assessing officer.

6. Aggrieved with the above order assessee is in appeal before us raising the following grounds of appeal:-

> ***Non-taxability of the remittances by the Appellant as 'royalties' under the India-Israel Tax Treaty***
>
> *1. The learned CIT(A) has erred in holding that the remittances made by the Appellant to Celltick Technologies Limited ("Celltick Israel") for provision of the software solutions for onward distribution to third party customers in India is taxable in India as 'royalties' under the provisions of Article 12 of the India-Israel Tax Treaty ('tax treaty');*
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> ***Disallowance under Section 4(a)(i) of the Act***

2. The learned C1T(A) has erred in upholding the disallowance of the remittances made by the Appellant to Celltick Israel under Section 40(a)(i) of the Act on account of non-deduction of taxes at source;

3. Assuming (without admitting) that Celltick Israel had established a permanent establishment ('PE') in India as per Article 5 of the tax treaty, the learned CIT(A) has erred in

a. holding that the remittances made by the Appellant to Celltick Israel would be dealt with by the provisions of Article 12 of the treaty and not Article 7 thereof;

b. disallowing remittances made by the Appellant to Celltick Israel under Section 40(a)(i) of the Act without appreciating the fact that the income earned by Celltick Israel is not chargeable to tax in India on account of the remuneration to the PE being at arm's length and no further income being attributable to it, as held in the case of Celltick Israel by the Hon'ble Income Tax Appellate Tribunal, Mumbai ('Hon'ble Tribunal) for AYs 2012-13 to 2014-15 and by Hon'ble Dispute Resolution Panel for AY 2015-16;

c. disallowing remittances made by the Appellant to Celltick Israel under Section 40(a)(i) of the Act without appreciating the fact that there was no requirement for the Appellant to deduct taxes on remittances to Celltick

Israel as the Appellant had remitted sums collected by it from customers on behalf of Celltick Israel;

4, The learned CIT(A) has erred in upholding the disallowance under section 40(a)(i) of the Act without appreciating that the fact that there was no requirement for the Appellant to deduct taxes on the remittances as they were not chargeable to tax in India, as held by the assessing officer for the AY 2016-17 in case of Celltick Israel after going through the characterization of the remittances;

5. The learned CIT(A) has erred in holding that the agreement between the Appellant and Celltick Israel for distribution of software solution can be considered as a colourable device as to hide the reality behind the created documents and to evade tax on transfer of the rights to use.

Each of the above grounds is independent and without prejudice to one another. The Appellant craves leave to add, to alter, to amend or to delete any or all of the above grounds of appeal, at or prior to hearing of the appeal so as to enable the Hon'ble Income Tax Appellate Tribunal to decide the appeal according to law.

The Appellant prays that appropriate relief be granted based on the above grounds of appeal and the facts and circumstances of the case.

7. Before us assessee filed additional grounds of appeal which is reproduced below:-

Ld. CIT(A) erred in law and in confirming disallowance of Rs.6,98,38,225 u/s. 40(a)(i) made by Ld. AO in view of insertion of second proviso to section 40(a)(i) w.e.f 01.04.2020, which was held to be of retrospective effect from 01.04.2005 by various Hon. High courts

8. The Counsel for the Assessee submitted that the additional grounds of appeal filed by the assessee is legal issue and the amendment to section 40(a)(i) and section 201, its applicability is question of law. Accordingly, he prayed that the additional grounds may be admitted for adjudication and in this respect, he relied in the case of NTPC Ltd (229 ITR 383) (Supreme Court).

9. On the other hand, Ld. DR agreed with the proposition and left to the bench to decide the admissibility of the additional grounds of appeal.

10. Considered the submissions of both the counsels, we agreed with the submissions of the Ld AR, accordingly proceeded to adjudicate the additional grounds of appeal.

11. At the time of hearing, Ld AR did not pressed the original grounds of appeal and pressed only the additional grounds of appeal and submitted the submissions of his argument and filed a written submission as below:-

> *1. I invite your honours kind attention to second proviso to section 40(a)(i) inserted w.e.f 01.04.2020, which reads as under.*
>
> *"Provided further that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purposes of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the payee referred to in the said proviso."*
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> *2. I invite your honours kind attention to first proviso to sub-section (1) of section 201 which reads as under.*

"Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a payee or on the sum credited to the account of a payee shall not be deemed to be an assessee in default in respect of such tax if such payee —

(i) has furnished his return of income under section 139;

(ii) has taken into account such sum for computing income in such return of income; and

(iii) has paid the tax due on the income declared by him in such return of income, and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed:

3. I enclose herewith following documents

(i) Certificate from chartered accountant in form 26A

(ii) Return and computation of income of payee filed u/s.139

4. I also invite your honours kind attention to following judicial decisions in which second proviso to section 40(a)(ia) inserted w.e.f 01.04.2013 was held to be of retrospective effect from 01.04.2005. second proviso to section 40(a)(i) inserted w.e.f 01.04.2020 is pari materia with second proviso to section 40(a)(ia), hence the issue is squarely covered,

a. PCIT vs. Perfect Circle India Pvt. Ltd, hon. Bombay High Court ITA No. 707 of 2016 dated 07/01/2019

b. CITv. Ansal Land Mark Township (P.) Ltd [2015] 61 taxmann.com 45 HIGH COURT OF DELHI

5. I also invite your honours kind attention to memorandum explaining amendment made to section 40(a)(i) and section 201 of the Act by Finance (No.2) Bill, 2019, which explains that amendment is remove anomaly and curative in nature, hence the same is in retrospective in nature

Relaxing the provisions of sections 201 and 40 of the Act in case of payments to non-residents

"Section 201 of the Act provides that where any person, including the principal officer of a company or an employer (hereinafter called 'the deductor'), who is required to deduct tax at source on any sum in accordance with the provisions of the Act, does not deduct or does not pay such tax or fails to pay such tax after making the deduction, then such person shall be deemed to be an assessee in default in respect of such tax. The first proviso to sub-section (1) of section 201 specifies that the deductor shall not be deemed to be an assessee in default if he fails to deduct tax on a payment made to a resident, if such resident has furnished his return of income under section 139,

disclosed such payment for computing his income in his return of income, paid the tax due on the income declared by him in his return of income and furnished an accountant's certificate to this effect. This relief in section 201 is available to the deductor, only in respect of payments made to a resident. In case of similar failure on payments made to a non-resident, such relief is not available to the deductor. To remove this anomaly, it is proposed to amend 16 the proviso to sub-section (1) of section 201 to extend the benefit of this proviso to a deductor, even in respect of failure to deduct tax on payment to non-resident. Consequent to this amendment, it is also proposed to amend the proviso to sub-section (1A) of section 201 to provide for levy of interest till the date of filing of return by the non-resident payee (as is the case at present with resident payee). These amendments will take effect from 1st September, 2019. [Clause 49] For the same reason, it is also proposed to amend clause (a) of section 40 to provide that where an assessee fails to deduct tax in accordance with the provisions of Chapter XVII-B on any sum paid to a non-resident, but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of the return of income by the payee referred to in that

proviso. Thus, there will be no disallowance under section 40 in respect of such payments. This amendment will take effect from 1st April, 2020 and will, accordingly, apply in relation to the assessment year 2020-21 and subsequent assessment years. [Clause 10]"

6. In view of above, I pray your honours to consider the submission and amendment made to Section 40(a)(i) and 201(1) are similar to Section 40(a)(ia) of the Act. Therefore, the amendment are in the nature of removing anomaly. Hence, it is applicable retrospectively.

12. On the other hand, Ld DR submitted that assessee is in the distribution and marketing of the live screen/Flash services. He submitted it is not only distribution of services, the parent company allowed the assessee to use the program exclusively or non-exclusively depending upon requirement of the mobile companies. Therefore, as per the findings of the Ld CIT(A), it is falling under the category of royalty. He brought to our notice page 2 of the AO's letter on additional grounds of appeal. Further he brought to our notice para 6 of the assessment order and submitted that assessee has deducted TDS in the 1st half of the assessment year and not deducted in the 2nd half of the

assessment year. With regard to submission on the issue of Celltick Mobile Israel and findings of ITAT, he submitted that the issue is pending before the High Court. Further he brought to our notice para 4 of the order of CIT(A).

13. In the rejoinder, Ld AR brought to our notice page 29 of the paper book, which is findings of the ITAT on the issue of applicability of taxable income of Celltick Technologies Ltd, Israel. He relied on the findings of the ITAT.

14. Considered the rival submissions and material placed on record. We notice that assessee is incorporated in India under the Companies Act 1956 and is engaged in the business of distributing live screen/flash services on mobiles through telecom operators. The principal activity of the assessee is to provide mobile home screen marketing services to telecom operators and other services that enable an interactive communication channel with consumers on their mobile devices. We notice that during this assessment year, assessee made payments to Celltick Israel towards license fees of ₹ 16,31,65,734 pursuant to the distribution agreement entered between them. The assessee while

making payment to Celltick Israel deducted withholding tax for the period April 2013 to August 2013. The assessee made further payments without deducting TDS for the reason that the income of the payee is not taxable in India as the transaction of the payee comes under article 7 of the Indo Israel Treaty. We notice that assessing officer disallowed the above said payments invoking the provisions of section 195 and 40(a)(i) of the Act.

15. The assessee also filed a copy of the return of income filed by Celltick Israel, which clearly shows that the payee has declared the income and claimed the benefit under Indo Israel treaty, claimed the withholding tax as refund. It is also brought to our notice that in the case of payee that is Celltick Israel, the income earned by them were brought to tax in India treating the income received from the present assessee as income earned in India. In appeal, the coordinate bench has given the finding that the income earned by the payee as the income chargeable to tax outside India under the Article 7 of Indo Israel treaty. Therefore it is clear that whatever the income earned by the payee is not chargeable to tax in India. With that background, let us address the issue raised in additional grounds of appeal.

16. It is submitted that the 2nd proviso to section 40(a)(i) inserted with effect from 01.04.2020 as per which, where assessee fails to deduct the whole or any part of the tax in accordance with the provisions of chapter XVII – B on any such sum but is not deemed to be an assessee in default under the 1st proviso to section 201(1). It shall be deemed that the assessee has deducted and paid the taxes on such sum on the date of furnishing of return of income by the payee referred to in the said proviso. As per proviso to section 201(1), a payee shall not be deemed to be an assessee in default in respect of such tax if such payee, (a) furnished its return of income under section 139, (b) has taken into account such sum for computing income in such return of income and (c) has paid the tax due on the income declared by him in such return of income and along with such payee furnishes a certificate to this effect from an accountant as per form prescribed for this purpose.

17. In the given case, we notice that the payee has already furnished certificate from a chartered accountant, return of income and computation of income under section 139. Further we also noticed that the income of the payee is not chargeable to

tax in India as per the decision of the coordinate bench. Even though as submitted by learned DR that the matter of payee is pending before High Court. In our view, as far as the current position available on record that the income of the payee is not chargeable to tax in India. Considering the facts on record and additional ground raised by the assessee. The question raised before us that whether the amendments made in Section 40(a)(i) is applicable retrospective or not. It is clear that the 2nd proviso to section 40(a)(ia) and section 40(a)(i) are evenly worded and Pari materia to each other. Both the provisions were introduced by the legislature in order to remove the anomaly and curative in nature. In the case of section 40(a)(ia) the Hon'ble Bombay High Court in the case of Perfect Circle India Pvt. Ltd. (supra) and Hon'ble Delhi High Court in the case of Ansal Land Mark Township (P) Ltd. (supra) have already held that these provisions are applicable retrospectively with effect from 01.04.2005. Since the amendment was carried out in order to remove the anomalies in the sections similar to section 40(a)(ia) and in our considered view, the amendment in section 40(a)(i) is also made in order to remove the anomaly and it is no doubt curative in nature.

Therefore, considering the findings of the Hon'ble High Courts, in our view the amendment to the section 40(a)(i) is also applicable retrospectively.

18. Considering our observation in the above paragraphs, in our considered view, the documents submitted before us clearly shows that the income of the payee is not taxable in India and assessee has already filed the relevant information u/s 201(1) of the Act which shows that the assessee cannot be regarded as 'assessee in default'. Therefore, we set aside the order passed by the AO under section 143(3) of the Act. Considering the above discussion, the additional ground raised by the assessee is allowed and the main grounds raised by the assessee are dismissed as infructuous.

19. In the net result, appeal filed by the assessee is **partly allowed.**

Order pronounced in the open court on 26/03/2021.

Sd/-	*Sd/-*
(Justice P. P. Bhatt)	(S. Rifaur Rahman)
President	Accountant Member

मुंबई Mumbai;दिनांकDated : 16/03/2021
Sr.PS. Dhananjay

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ **ITAT, Mumbai**