IN THE INCOME TAX APPELLATE TRIBUNAL

"I" BENCH, MUMBAI

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.3145/Mum./2022	**ITA no.3146/Mum./2022**
(Assessment Year : 2016–17)	(Assessment Year : 2017–18)

ITA no.3147/Mum./2022
(Assessment Year : 2018–19)

Asstt. Commissioner of Income Tax
Circle–1(2)(1), Mumbai ..... Appellant

v/s

Celltick Mobile (India) Pvt. Ltd.
207–B Wing, Everest Grande Mahakali Road
Chakala, MIDC, S.O. Mumbai 400 093 ..... Respondent
PAN – AAECC3150C

Assessee by : None
Revenue by : Shri Soumendu Kumar Dash

Date of Hearing – 16/03/2023	Date of Order – 18/04/2023

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeals have been filed by the Revenue challenging the separate impugned orders of even date 16/10/2022, passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi, [*"learned CIT(A)"*], for the assessment years 2016–17, 2017–18 and 2018–19.

2. When the present batch of appeals was called for hearing neither anyone appeared on behalf of the assessee nor was any application seeking adjournment filed. Therefore, in view of the above, we proceed to dispose off

the present appeals ex–parte, qua the assessee after hearing the learned Departmental Representative ("*learned DR*") and on the basis of material available on record.

3. Since the appeals pertain to the same assessee involving similar issues, therefore, as a matter of convenience, these appeals were heard together and are being disposed off by way of this consolidated order.

ITA no.3145/Mum./2022
Revenue's Appeal – A.Y. 2016–17

4. In its appeal, the Revenue has raised the following grounds:–

> *"1. Whether on facts and in the circumstance of the case and in law, the ld.CIT (Appeal) is correct to hold that license fee paid to M/s. Celltick Technologies Limited of Rs. 26,51,98,008/- is not taxable in India?*
>
> *2. Whether on facts and in the circumstance of the case and in law, the ld. CIT(Appeals) is correct to hold that no tax is deductible on the remittance of Rs. 26,51,98,008/- M/s. Celltick Technologies Limited?*
>
> *3. The Appellant prays that the order of the CIT(A) on the above ground be set aside and that of the ACIT 1(2)(1), Mumbai be restored.*
>
> *4. The Appellant craves leave to amend or alter any grounds or add a new ground which may necessary. The appellant craves leave to add, amend or withdraw the aforesaid grounds of appeal."*

5. The brief facts of the case as emanating from the record are: The assessee is a company incorporated in India for marketing and distributing the software solutions of Celltick Israel and providing certain services in the Indian subcontinent. The assessee is a wholly owned subsidiary of Celltick Israel, which is a company incorporated in and under the laws of Israel. Celltick Israel is engaged in the business of developing software and marketing active content for mobile phones across the globe. For the year under consideration, the assessee filed its return of income on 27/11/2017

declaring a total income of Rs.2,24,36,978. The return filed by the assessee was selected for scrutiny and statutory notices under section 143(2) as well as section 142(1) were issued and served on the assessee. During the assessment proceedings, it was found that the assessee company has paid Rs.26,51,98,008 as a licence fee to Celltick Israel. Accordingly, the assessee was asked to furnish the details of the nature of the license fees paid and proof of TDS deduction on the licence fee paid to Celltick Israel. In response thereto, the assessee by placing reliance upon the decision of the coordinate bench of the Tribunal in its own case for the assessment year 2014-15 submitted that since the payee has filed its income tax return declaring the income received from the assessee, therefore as per the provisions of section 40(a)(i) r/w section 201 no deduction can be made in the hands of the assessee for non-deduction of TDS. The Assessing Officer ("*AO*") vide order dated 29/09/2021 passed under section 143(3) r/w section 144B of the Act did not agree with the submissions of the assessee and held that the payment made by the assessee to Celltick Israel is in the nature of Royalty under the provisions of the India Israel tax treaty and the same would be taxable in India at the rate of 10% of the gross amount of the royalties. Since the assessee has not deducted TDS while making the said payment, the AO made an addition of Rs.26,51,98,008 under section 40(a)(i) of the Act to the total income of the assessee.

6. The learned CIT(A) vide impugned order allowed the appeal filed by the assessee following the decision of the coordinate bench of the Tribunal in assessee's own case for the assessment year 2014-15. Being aggrieved, the Revenue is in appeal before us.

7. During the hearing, the learned DR vehemently relied upon the order passed by the AO

8. We have considered the submissions of the learned DR and perused the material available on record. We find that the coordinate bench of the Tribunal in assessee's own case in Celltick Mobile (India) Pvt. Ltd. vs DCIT, in ITA No. 1673/Mum./2020, vide order dated 26/03/2021, for the assessment year 2014-15 allowed the appeal filed by the assessee and deleted similar addition made in the hands of the assessee for non-deduction of TDS while making the licence fees payment to Celltick Israel. The relevant findings of the coordinate bench of the Tribunal, in the aforesaid decision, are as under:-

> *"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."

9. We find that in the present case also the assessee filed the certificate from the Chartered Accountant in Form 26A as well as the return and computation of income of the payee before the learned CIT(A), as noted on page 8 of the impugned order, in support of its submission that Celltick Israel

has disclosed such payment in its return of income and paid the taxes due thereon. The learned CIT(A), after taking into consideration the documents filed by the assessee, allowed the assessee's appeal following the decision of the coordinate bench of the Tribunal in assessee's own case in the preceding assessment year. The learned CIT(A) also noted that the AO while passing the assessment order under section 147 r/w section 144 of the Act, for the assessment year 2015-16, accepted the aforesaid decision of the Tribunal and made no addition on account of non-deduction of TDS on payment made to Celltick Israel. In the impugned order, it is also noted that the reopening proceedings for the assessment year 2013-14 have also been dropped, which were proposed to be reopened on the same grounds. No material contrary to the aforesaid findings in the impugned order was brought on record by the Revenue. Further, the learned DR could not show us any reason to deviate from the aforesaid decision rendered in assessee's own case. Thus, respectfully following the order passed by the coordinate bench of the Tribunal in assessee's own case cited supra, we find no infirmity in the impugned order passed by the learned CIT(A). As a result, grounds raised by the Revenue are dismissed.

10. In the result, the appeal by the Revenue is dismissed.

ITA no.3146/Mum./2022
Revenue's Appeal – A.Y. 2017–18

11. In its appeal, the Revenue has raised the following grounds:–

> *"1. Whether on facts and in the circumstance of the case and in law, the Id.CIT (Appeal) is correct to hold that license fee paid to M/s. Celltick Technologies Limited of Rs. 39,70,40,519/- is not taxable in India?*

2. Whether on facts and in the circumstance of the case and in law, the ld. CIT(Appeals) is correct to hold that no tax is deductible on the remittance of Rs. 39,70,40,519/- M/s. Celltick Technologies Limited?

3. The Appellant prays that the order of the CIT(A) on the above ground be set aside and that of the ACIT 1(2)(1), Mumbai be restored.

4. The Appellant craves leave to amend or alter any grounds or add a new ground which may necessary.

5. The appellant craves leave to add, amend or withdraw the aforesaid grounds of appeal."

12. The issue arising in the present appeal is pertaining to the deletion of addition under section 40(a)(i) of the Act on account of non-deduction of TDS on payment made to Celltick Israel. Since a similar issue has been decided in Revenue's appeal for the assessment year 2016-17, the decision rendered therein shall apply *mutatis mutandis*. As a result, grounds raised by the Revenue are dismissed.

13. In the result, the appeal by the Revenue is dismissed.

ITA no.3147/Mum./2022
Revenue's Appeal – A.Y. 2018–19

14. In its appeal, the Revenue has raised following grounds:–

"1. Whether on facts and in the circumstance of the case and in law, the ld.CIT (Appeal) is correct to hold that license fee paid to M/s. Celltick Technologies Limited of Rs. 37,27,90,636/- is not taxable in India?

2. Whether on facts and in the circumstance of the case and in law, the ld. CIT(Appeals) is correct to hold that no tax is deductible on the remittance of Rs. 37,27,90,636/- M/s. Celltick Technologies Limited?

3. The Appellant prays that the order of the CIT(A) on the above ground be set aside and that of the ACIT–1(2)(1), Mumbai be restored.

4. The Appellant craves leave to amend or alter any grounds or add a new

ground which may necessary.

5. The appellant craves leave to add, amend or withdraw the aforesaid grounds of appeal."

15. The issue arising in the present appeal is pertaining to the deletion of addition under section 40(a)(i) of the Act on account of non-deduction of TDS on payment made to Celltick Israel. Since a similar issue has been decided in Revenue's appeal for the assessment year 2016-17, the decision rendered therein shall apply *mutatis mutandis*. As a result, grounds raised by the Revenue are dismissed.

16. In the result, the appeal by the Revenue is dismissed.

17. To sum up, all the appeals by the Revenue are dismissed

Order pronounced in the open Court on 18/04/2023

Sd/-	**Sd/-**
B.R. BASKARAN	**SANDEEP SINGH KARHAIL**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 18/04/2023

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The PCIT / CIT (Judicial);
(4) The DR, ITAT, Mumbai; and
(5) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai