IN THE INCOME TAX APPELLATE TRIBUNAL

HYDERABAD " A " BENCH, HYDERABAD

BEFORE CHANDRA POOJARI, ACCOUNTANT MEMBER &
SMT. ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER

ITA No. 1706/Hyd/2008	Assessment year 2004-05
ITA No.1707/Hyd/2008	Assessment year 2005-06
ITA No.1708/Hyd/2008	Assessment year 2006-07
The ACIT, Circle 15(2), Hyderabad	Vs M/s Ushodaya Enterprises Pvt. Ltd., Hyderabad
	(PAN AAACU 2690P)
Appellant	Respondent

ITA No. 1699/Hyd/2008	Assessment year 2004-05
ITA No.1700/Hyd/2008	Assessment year 2005-06
ITA No.1701/Hyd/2008	Assessment year 2006-07
M/s Ushodaya Enterprises Pvt. Ltd., Hyderabad	Vs The ACIT, Circle 15(2), Hyderabad
(PAN AAACU 2690P)	
Appellant	Respondent

Appellant by : Shri V. Siva Kumar
Respondent by : Smt. Nivedita Biswas

Date of hearing : 16.2.2012
Date of Pronouncement : 22.3.2012

ORDER

PER ASHA VIJAYARAGHAVAN, JM .

These appeals preferred by the assessee as well as the Revenue are directed against the common orders passed by the CIT(A)-II, Hyderabad dated 29.9.2008 and they are pertaining to the assessment years 2004-05, 2005-06 & 2006-07. Since issues involved in these appeals are common in nature, they are

clubbed together, heard together and disposed off vide this common order for the sake of convenience.

REVENUE APPEALS ITA 1706 to 1708/Hyd/2008

2. The assessee company is engaged in publishing of Newspaper, manufacture of food items, diary products, and electronic media i.e. TV channels etc. The Assessing Officer examined the various transactions in the case of the assessee and payments made by the assessee. The AO was of the view that the assessee defaulted in deducting tax at source from various payments made by it. The AO called for information and after considering the same and also the clarifications and explanations furnished by the assessee, the Assessing Officer held that the assessee is a defaulter in respect of deduction of tax at source from various categories of payments.

3. Discount on advertisements:

The Assessing Officer stated that advertising agents collect money from clients who want to place their advertisements in the various media published/run by it and pass on the money to the assessee after deducting the discount/commission at 15%. The AO proposed to treat the assessee as defaulter u/s 201.

The Assessing Officer held that assessee is in default and raised demand u/s 201(1)(and 201(1A).

4. In appeal the CIT (A) held that the assessee cannot be held as an assessee in default after discussing various cases cited and relied on by the assessee.

5. On further appeal before us, it was submitted by the learned counsel that the impugned amounts are nothing but discounts and are recognised as such by the entire trade. It was submitted that the assessee is not under obligation to deduct Tax under the TDS provisions.

6. It was further submitted that it is of utmost importance to note that the advertising agencies are not appointed by the assessee.

7. The learned counsel for the assessee Shri. Shiva Kumar relied on the decision in the case of United Exports Vs. CIT 185 Taxman 174 Del. It has been held:

"This provision 40A(2) in the Act pertains to disallowance to an expenditure which is made by the assessee i.e. an amount actually spent by the assessee as on expenditure. The expression used in this provision is 'incurs any expenditure in respect of which payment has been or is to be made to any person". The emphasized words clearly show that actual payment must be made and there has to be an expenditure incurred before the provision can be said to be applicable. A trade discount, and admittedly it is not in dispute that the subject matter of the claim is a trade discount, and not an expenditure, clearly therefore there does not arise the question of applicability of section 40A(2)(b)".

8. The learned Departmental Representative on the other hand relied on the order of the AO and the decision in the case of CIT Vs. Director, Prasar Bharti (325 ITR 205) (Ker).

9. We heard both the parties. We have perused the order of the Delhi Bench 'C' wherein it has been decided in M/s TV Today Network Ltd. in ITA No.3943/Del./2006 by their order dated 15.7.2011 that the assessee is not liable to deduct tax u/s 194H. The Tribunal followed another decision of Hon'ble Tribunal Delhi 'H' Bench in the case of Living Media India Ltd. in ITA No.3807/Del/2005 dated 31.5.2007. The CIT(A) followed the said decision in the case of living Media India Ltd. He also noticed that the Department's appeal against the said of the Tribunal was dismissed vide order in ITA No.1264 of 2007, a copy of which was placed before him by the assessee. We also find that the department conceded before the Tribunal and when the matter reached up to the Supreme Court and the decision of the Tribunal was upheld. Therefore, we are of the opinion that the issue is covered by the decision of the Co-ordinate Bench in the case of Living Media India Limited in ITA No.3807/Del./2005. Hence we confirm the order of the CIT (A) on this issue and hence the departmental appeal is dismissed on this issue.

10. The next issue in the Departmental appeals is **Payment of data circuit rentals:**

The Assessing Officer noticed that in the publication division and ETV other channels division, the assessee made payments towards use of data circuit lines to BSNL and that the assessee has not made TDS on these payments.

11. The CIT(A) took note of the fact that data circuit lines were taken on lease by the assessee from BSNL for transmitting data/news in its office from various places where the reporters

or contributors collect news from various events across the country. He also took into account the contention of the assessee that the data circuit lines are akin to telephone lines and hence the provision of section 194J are not attracted since BSNL is only providing only the line and not any professional or technical services to the assessee. After examining the invoices issued by BSNL towards rent for channel and rent for local lead at the end "A" refers to location of the assessee at Eenadu complex, Somajiguda, Hyderabad and end 'B' refers to assessee's location at various places in and out of AP. He opined that payments for obtaining connectivity, which is what the assessee paid for, does not come under the purview of professional or technical services. He held that the payment is nothing but a standard tariff depending upon the speed and usage of the dedicated leased lines. He relied upon the decisions of the Madras High Court in the case of Skycell Communications Ltd. Vs. DCIT 251 ITR 53 MAD and the Delhi High Court decision in the case of CIT Vs. Estel Communications P Ltd. 217 CTR 102 DEL and held that payment made to BSNL for taking dedicated circuit lines on lease will not come under the purview of section 194J.

12. Aggrieved, the department is in appeal before us.

13. We heard both the parties and perused the materials available on record. We find that the decision in the case of Skycell communications has taken support of in the case of CIT Vs. Bharati Cellular Ltd. (319 ITR 0139) (Del) wherein it has been held that interconnect charges/port access charges cannot be regarded as fees for technical services. In this decision the meaning of technical services was explained and it was held that

there had to be involvement of human interface for a service to be called technical services.

14. Further, the authority for advancing Ruling has held in the case of Intertek Testing Services India P Ltd. (307 ITR 418)(AAR) that the offer of a standard facility to a number of customers such as telephone/cell phone users does not amount to rendering any 'technical service' within the meaning of the definition of technical service. Technical or consultancy service rendered should be of such a nature that it 'makes available' the technical knowledge, skills etc. must remain with the person receiving the services even after the particular contract comes to an end. It is enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider have gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. Hence, we confirm the order of the CIT(A) that tax is not deductible on payment Data circuit rentals and dismiss the departmental appeal on this issue.

15. The next issue raised by the Department is **Payment of band width charges**:

The Assessing Officer held that payments made to various companies towards bandwidth charges are liable for TDS u/s 194J. He brushed aside the assessee's plea that the payments were made for providing facilities and not any services. In appeal, the CIT(A) accepted the contention of the assessee and held that the payments are in the nature of rent paid for space

allotted in the transponder and the same will not come under the purview of section 194J. The CIT(A) followed the decision of the Hon'ble Madras High Court in the case of Skycell Communications Ltd. Vs. DCIT 251 ITR 53 MAD. The CIT(A) also relied on the decision of the Bangalore Bench of the Tribunal in the case of Software Technology Parks of India Vs. ITO 3 SOT Bang. The CIT(A) held that section 194J will not be applicable to the impugned payments.

16. Aggrieved, the department is in appeal before us.

17. The learned counsel for the assessee Shri Shiva Kumar relied on the decision of the Tribunal Mumbai Bench in the case of Pacific Internet (India) P Ltd. Vs. ITO 318 ITR (AT) 0197 Mum wherein it has been held that payment made for using bandwidth and network operation are not technical services and tax needed not be deducted from such payments u/s 194J. The learned counsel for the assessee submitted that it is now settled that mere provision of facility to use equipment, whatever may be the sophistication that went into the creation of such facility, is not technical service. Following decision of the Coordinate Bench in Pacific Internet (India) P Ltd. Vs. ITO 318 ITR (AT) 0197 Mum. We uphold the order of the CIT(A) that payments of bandwidth are not liable for TDS under section 194J and dismiss the departmental appeal on this issue.

18. The next issue in departmental appeals is **Payments of internet charges.**

The Assessing Officer opined that payments made by the assessee towards internet charges are similar in nature to

Bandwidth charges in respect of which he fastened liability u/s 194J. The AO brushed aside the explanation of the assessee that internet charges are akin to charges for use of telephone lines. The CIT(A) analysed the payments made to various companies as also VSNL and concluded that the payments in the nature of circuit charges to VSNL are not liable for TDS following Hon'ble Madras HC decision in the case of Skycell Communications Ltd. He also found that the payments made to M/s Web India Services (Chennai) P Ltd. were for bandwidth which do not come under TDS provisions. As regards website maintenance charges to M/s Scape Velocity net Solutions Ltd., u/s 194C. He held that the payment does not attract TDS u/s 194J.

19. Aggrieved, the revenue is in appeal before us.

20. The learned counsel for the assessee submitted before us that the issue should be decided in a similar manner as in the case of payments for Band width charges. Hence, the case law relied on in the case of payments for bandwidth charges are applicable to payment of internet charges also.

21. We heard both the parties. We uphold the order of the CIT(A) that payments of Internet Charges are not liable for TDS relying on the following decisions:

1. Skycell Communications Ltd. Vs. DCIT 251 ITR 53 MAD.
2. Software Technology Parks of India Vs. ITO 3 SOT 529 (Bangalore)
3. Pacific Internet (India) Pvt Ltd. Vs. ITO (318 ITR (AT) 0179 (Mum).

4. Hence we uphold the order of the CIT(A) holding the provisions of section 194J are not applicable to the impugned payments.

22. Hence we dismiss the revenue appeal on this ground.

23. The next ground is **Payment of Data Circuit Rental Charges:**

The payments relate to Data Circuit Rentals charges. In the assessment order, the AO has observed that the assessee has made payments to BSNL towards use of data circuit lines on which tax was not deducted at source. The AO (TDS) referred to the assessment order dated 26.12.2007 passed u/s 143(3) by the jurisdictional AO wherein it was held that the payments are towards contractual obligation and are liable to TDS. Apparently no explanation was offered by the assessee either during the assessment or during the TDS proceedings. The AO therefore held the payments to be of the fees for technical services and held that the assessee to be an assessee in default for non deduction of tax at source u/s 194J of the IT Act.

24. In the statement of fact the assessee submitted that it has taken Data Circuit line on lease from BSNL for transmitting data/news in its office from various places where the reporters or contributors collect news from various events across the country. These data circuit lines are akin to telephone lines and hence the provisions of section 194J is not attracted since BSNL is only providing the line and not any professional or technical services to the assessee. During the appellate proceedings, the AR of the assessee reiterated the fact stated earlier in the statement of fact and relied on the decision in the case of CIT Vs.

Estel Communications P Ltd. 217 CTR 102 (Del.) and the decision of Hon'ble Madras High Court in the case of Skycell Communications Ltd. Vs. DCIT. The AR also filed copies of the invoices of BSNL for the period 1.7.04 to 30.9.04 in respect of the circuit lines taken on lease.

25. The CIT(A) held that the payment for such connectivity charges will not come under the purview of technical or professional services as held by AO since the payment is nothing but standard tariff depending on the speed and usage of the dedicated leased lines.

26. The CIT(A) relying on the decision of CIT Vs. Estel Communications P Ltd. held that the payment made to BSNL for taking on lease of dedicated circuit lines will not come under the purview of section 194J and therefore the assessee cannot be held to be in default u./s 201(1) for non deduction of Tax on such payments made to BSNL.

27. Aggrieved the revenue is in appeal before us.

28. We heard both parties. Relying on the decision of CIT Vs. Estel Communication P. Ltd. 217 CTR 102 Delhi and the Madras High Court decision in the case of Skycell Communications P Ltd. Vs. DCIT, we uphold the order of the CIT(A) that the connectivity charges cannot come under the purview of technical/professional services. It is similar to telephone connection and therefore, provisions of section 194C are inapplicable. The revenue's appeal on this issue is dismissed.

29. The next ground is **Payment of transponder Rent: Relevant to assessment year 2004-05:**

The Assessing Officer noticed that the assessee had entered into an agreement with VSNL to reserve space segment on the INTELSAT satellite vide agreement dated 27.7.99. The Assessing Officer held that the services provided are of very technical nature requiring highly skilled professionals. It was not only the facility provided but services are also inherently included therein. The assessee cannot utilise or operate the facility as per its choice. The assessee makes a payment for the entire contract. Having opined so, the Assessing Officer brushed aside the contentions of the assessee and reliance by the assessee on decision of the Tribunal in the case of DCIT Vs. Pan Amsat International Systems Inc. 103 TTJ 861 Delhi. The AO held that the assessee was liable to make deduction of tax at source u/s 194J on the transponder rent and raised demand accordingly.

30. On appeal, the CIT(A) analysed the nature of facility that the assessee has obtained by making the impugned payment. By following the Hon'ble Madras High Court decision in the case of Skycell Communications Ltd. Vs. DCIT 251 ITR 53 MAD the CIT(A) deleted the demand raised by the Assessing Officer. The CIT(A) also relied on the decision of the Tribunal Madras Bench in the case of Raj Television Network in ITA No.1827/MDS/98 holding that payment of transponder charges is not fee for technical services.

31. Aggrieved, the revenue is in appeal before us.

32. We heard both the parties and perused the materials available on record. We find that in the case of ISRO satellite centre in 175 Taxman 97 AAR, the assessee was to make payment for taking on lease Space Segment Capacity consisting of L-1 and L-5 transponder Centered on an Inmarsat 4th Generation Satellite whose capacity is utilised through data commands sent from a ground station set up by applicant. The assessee paid a fixed annual charge regardless of actual use of transponder capacity. The AAR held that when by earmarking a space segment capacity of transponder for its use assessee does not get possession or control of equipment of IGL and the agency that received the payment charges paid by assessee cannot be regarded as payment for use of IGL's equipment. The AAR held that income arising to IGL out of payments received from applicant is neither in nature of 'royalty' under Act nor is fee for technical service. We are of the opinion that the ratio of the decision of the AAR is equally applicable to the assessee's case. Having regard to the facts of the case, the decision of the CIT(A) is upheld. The Revenue's appeal is dismissed on this issue.

In the result, the Revenue's appeals in ITA No.1706 to 1708/Hyd/2008 are dismissed.

33. ASSESSEE'S APPEAL IN ITA NOs.1699, 1700 & 1701/Hyd/2008:

34. The first issue is payments to News service agencies.

The assessee deducted tax at source u/s 194C from payments made to various news service agencies. The Assessing

Officer held that the payments fall u/s 194J. He raised demand to the extent of difference of tax liable to be deducted u/s 194J and that deducted u/s 194C. He also charged interest u/s 201(1A) on the difference.

35. On appeal the CIT(A) agreed with the Assessing Officer. The CIT(A) observed that service rendered by the news service agencies is deployment of their man power for gathering news reports from across India ultimately to be used by the assessee and that the job of the news reporter requires effective communication skill, presence of mind and interrogative capabilities. The CIT(A) stated that quite often the reporters possess professional qualification and that services provided by the news service agencies are based on high quality data base. The CIT(A) held that the services rendered to the assessee attract TDS u/s 194J. The CIT(A) however, accepted the alternative plea of the assessee that if the assessee proves that the payees have included the amounts paid to them in their returns, the demand may be reduced to that extent.

36. Aggrieved, the assessee is in appeal before us.

37. It is submitted that the CIT(A) erred in considering the payments as made for professional/technical services. The CIT(A) erred in holding that the professional qualifications and skills required to be possessed by news reporters result in professional services by the news service agencies. The CIT(A) ought to have appreciated that professional service is to be understood as the application of personal skill by persons who is trained/qualified and the word professional service attaches to services rendered by individuals. The news service agencies may

be utilising professional services but in the hands of the assessee the data is raw data which has to undergo processes for being converted into news or features fit for publication/presentation. The work carried out by news service agencies in getting the news gathered and transmitted to the assessee is not a technical service in the sense that any process/skill is made available to the assessee. The CIT(A) ought to have deleted the demand raised by the Assessing Officer who applied provisions of section 194J.

38. Aggrieved, the assessee is in appeal before us.

39. The learned DR relied on the order of the AO & CIT(A).

40. We heard both the parties and perused the materials available on record. We are unable to appreciate that no professional services are rendered by the reporters in collecting the data for publication of news. The work carried out by news paper agents requires professional qualifications and skills. Though, the data collected by such reporters has to be reviewed glossed up and made fit to be published/presented. Nevertheless, procurement of the basic data cannot be done without qualified reporters who utilise their professional skills for collection of the same. Further, the newspapers employ reporters who have been trained to have interrogative ability, presence of mind and have specialised in a way for doing their work and hence they are rendering work in their professional capacity. Hence we agree with the CIT(A) in deducting TDS u/s 194J and not under section 194C and dismiss the assessee's appeal on this issue. The assessee's appeal is dismissed on this issue.

41. The next issue in assessee's appeal is **Payment of software expenses:**

The Assessing Officer treated the assessee as defaulter u/s 201(1) r.w.s. 194C for non deduction of TDS on software expenses paid by the assessee to M/s Usha Kiron Television, M/s Usha Kiron Movies and other parties holding that the provisions of section 194C are attracted to such payments. In this connection the assessee submitted that M/s Usha Kiron Television is engaged in the business of production of TV serials. Similarly M/s Usha Kiron Movies is in the business of production of TV serials and movies. One of the activities of the assessee is telecasting various programmes in its TV channels. The assessee entered into an agreement with M/s Usha Kiron Television, M/s Usha Kiron Movies and other parties for telecasting their programmes through the assessee's TV channels on an understanding that the revenue generated on advertisements for time slots during telecasting of the programmes supplied by the said parties shall be shared between them. Therefore the assessee submitted that it had not entered into any agreement for production of any programmes with M/s Usha Kiron Television, M/s Usha Kiron Movies and other parties. The assessee also submitted that the said parties are absolute owners over their programmes, feature films, serials etc. and the assessee is not owning the rights over their programmes except telecasting their programmes in its TV channels. The assessee also further submitted that the revenue paid to M/s Usha Kiron Television, M/s Usha Kiron Movies and other parties out of advertisement revenue from the time slots in telecasting the programmes is not towards cost of programmes,

serials etc. In this connection, the assessee further submitted that it had credited the gross revenue generated during said programmes and debited the amount paid to the said parties to P&L account under the head 'cost of TV programmes" for accounting purposes. In fact it would have been enough if the assessee had credited its shares of revenue to its profit and loss account instead of passing entries as stated above.

42. In the above circumstances, the assessee submitted that the provisions of section 194C are not attracted to the transaction between the assessee and M/s Usha Kiron Television, M/s Usha Kiron Movies and others for the reason that these parties did not carry out any work for the assessee within the meaning of section 194C of the Act.

43. However, the Assessing Officer invoked section 194C and raised demand in respect of the amounts paid over on sharing basis. He also levied interest u/s 201(1A).

44. In appeal, the CIT(A) noticed that in respect of outright purchases, the assessee deducted tax and paid over the same to govt. account. As regards the assessee's contention that the Assessing Officer erred in holding that revenue paid to M/s Usha Kiron Television etc. from out of the advertisement revenue is towards cost of production of the programmes, feature films, serials etc. the CIT(A), after going through the agreements, noticed that revenue sharing with M/s Usha Kiron Movies is 70:30 except feature films and film based programmes. In respect of feature films and film based programmes, the ratio is 50:50. In the case of M/s Usha Kiron Television, the sharing ratio is 60:40 upto 30.9.2003 and thereafter it was 70:30. The

CIT(A) concluded that the assessee is parting with a portion of advertisement revenue so as to get the right to re-telecast the programmes on its channels which in turn is the source for generating advertisement revenue. The CIT(A) concluded that the features and the further fact that the assessee was paying advances to the producers, showed that the assessee is having inherent interest in getting the programmes produced and obtaining telecast rights thereon. The CIT(A) also noticed agreements with other parties and concluded that here also the assessee has associated itself with the producers to act in consortium with them in telecasting of such programmes on ETV channel. Relying on Explanation III to section 194C the CIT(A) upheld the action of the Assessing Officer in holding that section 194C is attracted in case of the impugned payments.

45. The CIT(A) however agreed with alternate plea of the assessee that if the assessee proves to the satisfaction of the Assessing Officer that the payments made by the assessee are included by the payees in their returns of income, and taxes have been paid by them thereon, the Assessing Officer may modify the demand raised u/s 201(1).

46. Aggrieved the assessee is in appeal before us.

47. The learned counsel for the assessee Shri Siva Kumar submitted that its case is totally outside the provisions of section 194C for the reason that it has been undisputedly admitted on record that the payments made as per revenue sharing agreed by the contracting parties, both in form as well as in substance, there is no scope to hold otherwise. The fact that the assessee advances money to the producers of the programmes does not

convert the payment as payment for work done/agreed to be done by the payee. The assessee reiterated its reliance on the decisions in the cases of ACIT Vs. NIIT 112 TTJ 800 DEL and HFCL Infotel Limited Vs. ITO 99 TTJ 440 CHD.

48. We heard both the parties and perused the materials available on record. From the Profit and Loss account it was seen that in the ETV Telugu Division and ETV Other Channel Division, the assessee has made payments towards software expenses. These payments are further subdivided into 'revenue share'. 'Other programmes' and 'Direct purchases'. Expenses towards revenue shares are towards the agreed cost for production of TV serials/programmes. From the agreements with other parties, it can be concluded that the assessee is associating itself with the producers for getting the programmes telecasted on ETV channel and thereby the assessee gets a source for generating advertisement revenue. Hence the assessee is making payments to various agencies on revenue sharing basis from the income generated through advertisements by way of telecasting the serials or programmes produced by the agencies. The mode of payment is nothing but a payment for contract of work and is squarely covered by explanation III to section 194C which says 'work' shall include programmes for such broadcasting or telecasting. In view of the same, we hold that the nature of payments fall within the purview of section 194C. Therefore, we uphold the order of the CIT(A) on this issue.

49. In the result, the appeals of the assessee as well as the Revenue are dismissed.

Order pronounced in the open Court: 22. 3.2012

Sd/-	sd/-
(CHANDRA POOJARI)	**(ASHA VIJAYARAGHAVAN)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated the 22nd March, 2012

Copy forwarded to:

1. M/s Ushodaya Enterprises Pvt. Ltd., 6-3-570, Somajiguda, Hyderabad
2. The ACIT, Circle 15(2), Hyderabad
3. The CIT(A)-II, Hyderabad
4. The CIT, Hyderabad
5. The DR, ITAT, Hyderabad

Np/