आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'एल' मुंबई ।

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

सर्वश्री पी.एम.जगताप, ले.स. एवं श्री अमित शुक्ला, न्या.स. के समक्ष ।

BEFORE SHRI P.M.JAGTAP, AM & SHRI AMIT SHUKLA, JM

आयकर अपील सं./ **ITA No.6473/Mum/2009**.

(**निर्धारण वर्ष /** Assessment Year: 2000-2001)

DDIT (IT) 2 (1), Mumbai	Vs.	Satellite Television Asian Region Ltd.,C/o Sr.Batliboi, 18th Floor, Express Towers, Nariman Point, Mumbai-400 021.
स्थायी लेखा सं./जीआइआर सं./PAN No. AACS 5680 D		
(अपीलार्थी **/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

एवं/ AND

आयकर अपील सं./ **ITA No.6474/Mum/2009**

(**निर्धारण वर्ष /** Assessment Year: 2001-2002)

DDIT (IT) 2 (1), Mumbai	Vs.	Satellite Television Asian Region Ltd.,C/o Sr.Batliboi, 18th Floor, Express Towers, Nariman Point, Mumbai-400 021.
स्थायी लेखा सं./जीआइआर सं./PAN No. AACS 5680 D		
(अपीलार्थी **/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

एवं/ AND

आयकर अपील सं./ **ITA No.6475/Mum/2009**

(**निर्धारण वर्ष /** Assessment Year: 2002-2003)

DDIT (IT) 2 (1), Mumbai	Vs.	Satellite Television Asian Region Ltd.,C/o Sr.Batliboi, 18th Floor, Express Towers, Nariman Point, Mumbai-400 021.
स्थायी लेखा सं./जीआइआर सं./PAN No. AACS 5680 D		
(अपीलार्थी **/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी-राजस्व की ओर से / Appellant/Revenue by	:	Mr. Narendra Kumar
प्रत्यर्थी-निर्धारिती की ओर से/ Respondent-Assessee by	:	Mr. Porus Kaka

सुनवाई की तारीख **/ Date of Hearing :** 13th June 2012

घोषणा की तारीख /**Date of Pronouncement :** 6th July, 2012

आदेश / O R D E R

PER AMIT SHUKLA (J.M.) :

These are bunch of three appeals filed by the department against consolidated order dated 22-9-2009, passed by the CIT(A)-11, Mumbai in relation to penalty proceedings under Section 271C for the assessment year 2000-2001, 20001-2002 & 2002-2003. Since the common issues are involved in all the three appeals, therefore, all the three appeals are being disposed off by this common order. For the sake of ready reference, grounds of appeal in ITA No.6473/M/2009 (AY 2000-2001), which are common in all the three appeals, are reproduced herein below :-

> *"1. On the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in deleting the penalty u/s. 271C for non deduction of tax at source.*
>
> *2. On the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in holding that the assessee had a bonafide belief that the channel companies are not taxable in India and hence tax was not required to be deducted on payment made to channel companies.*
>
> *3. The appellant prays that the order of the ld. CIT(A) on the above grounds be set aside and that of the Assessing Officer restored.*
>
> *4. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."*

2. Brief facts of the case as culled out from the records are that the assessee 'Star Limited' is a company incorporated in British Virgin Island and having its principal place of business at Hong Kong, is

engaged in the business of media/entertainment. The assessee is part of STAR Group of companies and is wholly owned subsidiary of 'News Corporation" having its worldwide operations in the filed of media and entertainment. The news corporation is also having indirect holding in various 'Channel Companies' which are owning and telecasting TV channels in India. The description and details of 'Channel Companies' are as under :-

Name of the 'Channel Company'	**TV Channels shown in India**
Star Television Entertainment Ltd.	STAR PLUS, STAR WORLD
Star Asian Movies Ltd.	STAR GOLD
Star International Movies Ltd. formerly known as Star Television Sports Ltd.	STAR MOVIES
Star Television News Ltd.	STAR NEWS
Channel V Music Network Ltd.	CHANNEL [V] INDIA

All these companies are also incorporated in British Virgin Island and Principal place of business is Hong Kong. Thus, the assessee and channel companies are non-resident companies.

2.1 With effect from 1st April, 1999, the assessee company sold the advertising airtime for Star Plus, Star Movies, Star World, Star Gold, Channel [V] and Star News and for this purpose, it has appointed Star India Private Limited (in short 'SIPL'), a company incorporated in India for marketing of advertising of airtime in India on the channels and collection of advertisement revenues. These various channel companies have entered into an agreement with satellite companies (Asia Sat) for hiring of transponders, having footprints in India wherein

the channels are uplinked through decoders provided to the cable operators for which prescribed fee are charged depending upon the number of subscribers. The local cable operators decode the signals and distribute the signals to the ultimate viewers via networks of cables across roads, streets, buildings and flats. As per the Assessing Officer, there are two distinct sources of revenue from India i.e. advertisement revenue and subscription revenue. The advertisement revenue is collected by SIPL, which is an Asian concern of the assessee belonging to Star group. The revenue so collected from advertisement is passed on to the Channel Companies through assessee. The assessee had claimed that payments to Channel Companies were being made for the purpose of airtime, therefore, before making the payments to said Channel Companies, it was under a bonafide belief that no tax is deductible at source under section 195 as the payment was made to a non-resident company from a non-resident company in respect of its transaction with a Channel Companies for procuring procurement of advertising time as their companies were not taxable in India.

2.2 The assessment of the assessee company for the assessment years in question were completed by the Assessing officer under Section 143(3), wherein it was held that the channel companies have business connection in India and further they undertake business operations in India, hence, they are taxable in India. Thus, according

to the Assessing Officer, tax was required to be deducted at source by the assessee from the credits/payments made to the Channel Companies under section 195 of the Act. Since, the tax was not deducted and paid to the Government, the Assessing Officer disallowed the cost of advertising airtime procured by the assessee from the Channel Companies under the provisions of section 40(a)(i). Against the said order, the assessee preferred an appeal before the CIT(A), who upheld the order of the Assessing Officer. Thereafter in second appeal before the ITAT, though the Tribunal upheld the disallowance, but gave a categorical remark that this case involves complex issue of question of law. Even though the assessment order was passed under Section 143(3) for the assessment year 2000-2001, 2001-2002 & 2002-2003, however, no order was passed under Section 201(1A) for any of the assessment year under consideration, holding the assessee as 'assessee in default' for failure to deduct tax at source. The Assessing Officer after a gap had issued a show cause notice on 9th March, 2006 for imposition of interest under section 201(IA) along with the levy of penalty under section 271C. In response to the said notice, the assessee filed detail reply on 22-3-2006 and, thereafter only order under section 201(IA) was passed and no penalty order under section 271C was passed. It was only on February, 2008, the Assessing Officer issued a show cause notice for levy of penalty under section 271C. In response to the same, the assessee again made a detail submission as to why it was not liable to deduct tax at

source under Section 195 on the amounts payment to Channel Companies for the cost of advertising airtime and also under what circumstances it had a bonafide belief that TDS was not to be deducted. However, after considering the submissions of the assessee, the Assessing officer, levied the penalty under Section 271C, on the ground that the assessee is a non-resident, which had failed to deduct the withholding tax on the cost of advertising airtime payable to Channel Companies and thus committed a default within the meaning of 271C read with section 273B of the Act. Accordingly, penalty for all assessment years was levied, on the following reasonings :-

(i) The appellant has not provided any 'reasonable cause' for failure to deduct tax on payments made to Channel companies. Considering the facts of the case in its entirety, it is a case of tax avoidance scheme;

(ii) For imposing penalty under section 271C of the Act, the department need not establish that there has been 'mens rea' or guilty mind. Further, it is apparent that there was certainly 'mens rea' involved in the appellant's case and it is a fittest case for imposition of penalty;

(iii) Though the appellant after making an application under section 195 of the Act, cured the defect, the levy of penalty cannot be stopped;

(iv) Levy of penalty under section 271C of the Act operates by operation of law and accordingly, there is no requirement of order under section 201 of the Act before levy of penalty;

(v) Show cause notice dated March 9, 2006 was for default under section 201(1) of the Act and 201(IA) of the Act and any mention of levy of penalty in the said notice has no relevance since the AO did not have jurisdiction to either initiate penalty proceeding or levy the penalty; accordingly, the time limit for levy of penalty under section 271C of the Act should run from the show cause notice dated February, 9, 2008. As a result, the order for levy of penalty under section 271C of the Act is not time barred; and

(vi) The appellant has introduced the abstract concept of 'outright sale of advertisement airtime' and has tried to confuse the Revenue department. The intention of the appellant is to make the issue artificially complicated.

3. Before the CIT(A), the assessee had made detail submissions primarily on these grounds that :-

(i) penalty proceedings are barred by limitation;

(ii) there was bonafide belief for failure to deduct tax at source; and

(iii) the issue involved was a debatable issue where different opinion of various Courts have been rendered.

3.1 On the issue of limitation, learned CIT(A) rejected the contention of the assessee quite elaborately after following the decision of the Special Bench in the case of **Mahindra & Mahindra, reported in 313 ITR 263 (AT), Mumbai Bench**. On the issue of bonafide belief for failure to deduct tax at source, Ld. CIT (A) cancelled the penalty after

giving detail reasonings which are from pages 16 to 32 of the appellate order after referring to various judicial decisions. The sum and substance of his findings are as under :-

i) That, the assessee has disclosed all the relevant facts relating to the claim of deduction of cost of airtime charges in the return of income and a detail note was given below the profit loss account from where the Assessing Officer has taken note of it, while discussing the issue in the order passed under Section 143(3). On the question regarding allowability of deduction in view of the section 40(a)(i), raised by the Assessing Officer, the assessee had filed detail submissions and explanations not only at the time of assessment but also at the time of penalty proceedings. The details regarding channel companies were also filed as required. Thus, the assessee has prima facie, given all the detail and reasoning for non-deducting of tax.

ii) The assessee had a genuine and bonafide belief in making the claim for deduction for the cost of advertising airtime procured from the channel companies that no tax was deductible at source under section 195. This belief was based on the decision of ITAT Mumbai Bench in the case of **Shree Kumar Poddar, reported in 65 ITD 48 (Mum)** and the commentaries given in **Kanga & Palkhivala's** book. Thus, at the time of filing of return and

for non-deducting of tax at source, there was a judicial precedence in favour of the assessee.

iii) Further, the ITAT while deciding the assessee's case for the assessment year 2000-2001 has observed that the issues involved are very complex. There is a wide scope of arguments, proposition and comments and the case involves complex question of law. In such a situation, it cannot be held that the assessee did not have bonafide belief for non-deducting of tax at source.

iv) The Hon'ble Supreme Court in the case of **CIT Vs. Eli Lilly and Company Private Limited, reported in 312 ITR 225**, has held that liability for Penalty under section 271C of the Act can be fastened only if there is no good and sufficient reasons for not deducting tax at source.

3.2 Finally the CIT(A) has concluded his order after observing that in this case there is difference of opinion on three questions of law :-

"(a) Whether the payment by a non-resident made outside India requires application of 195 of the Act and whether such payment is chargeable to tax under the Income Tax Act.

(b) Whether application is required to be made under section 195(2) of the Act by a taxpayer even where the payment to be made by him of any sum to another non-resident which is not chargeable to tax in India. In

other words, even in respect of income not chargeable to tax, whether permission of Assessing Officer u/s 195(2) of the Act is necessary.

(c) Whether the Channel Companies, recipient of payment, have a business connection in India and whether their income is taxable in India."

Accordingly, he deleted the penalty on the ground that the assessee had a genuine bonafide belief and had reasonable cause for non-deduction of tax at source.

4. Before us, the learned counsel on behalf of the assessee submitted that the assessee had duly deposited the tax immediately after the passing of the assessment order passed under Section143(3) at the rate of withholding, determined by the Assessing Officer. For the assessment years 2000-2001 & 2001-2002, the entire payment of TDS was deposited in Central Government's account in 2004 and for assessment year 2002-2003 and all the payments were deposited in 2005. By this time, no order under Section 201(1A) was passed by treating the assessee as 'assessee is in default' by the Assessing Officer. Now, the penalty has been levied after expiry of eight years for delayed of payment of tax.

4.1 On the issue of bonafide belief, learned counsel submitted that the assessee had made on application under Section 197 before the Assessing Officer for all the assessment years involved and order

under Section 197 was also passed. The dates of application and order passed under Section 197 were given as below :-

Assessment Year	Date of Application	Date of order u/s.197
2000-2001	03-05-1999	19-05-1999
2001-2002	04-04-2000	18-04-2000
2002-2003	09-04-2001	13-06-2001
	Revised order	13-07-2001

It was after passing of these orders under Section 197, that in March, 2003, the Assessing Officer had passed order under Section 143(3), wherein it was held that the assessee is liable to deduct TDS, as the Channel Companies have business connection in India, therefore, the gross amount is taxable and, since the assessee has not come in 195(2), therefore, TDS has to be deducted on gross amount. Further, it was submitted that as on the present date, the law has been settled by the Hon'ble Supreme Court in the case of **Vodafone International Holdings Vs. Union of India, reported in (2012) 341 ITR 1**, that section 195 is not applicable on the payments made by one non-resident to other non-resident. Therefore, the entire premises on which the Assessing Officer has determined the income has no legs to stand now.

4.2. On the issue that telecasting of signals by Satellite companies in India is not a source of income in India or is there any business

connection in India or not, has been settled by the Hon'ble Delhi High Court in favour of the assessee in the case of **Asia Satellite Telecommunications Co. Ltd. v. Director of Income-tax, reported in (2011) 332 ITR 340 (Delhi)**. From these case laws, it has been submitted before us, that there cannot be any doubt that the belief entertained by the assessee was based on correct principles of law which has now stands reaffirmed by the judicial pronouncements. Ld. Counsel further submitted that failure to make an application under Section 195(2) does not render the gross amount taxable as held by the Assessing Officer and this view is fully supported by the decision of the Hon'ble Supreme Court in the case of **GE India Technology Centre P. Ltd. v. Commissioner of Income-tax, reported in 327 ITR 456**. Lastly, on the issue of bonafide belief, he has relied upon catena of case laws including that of Hon'ble Supreme Court in the case of **CIT Vs. Eli Lilly and Company Private Limited (supra).**

5. Learned Senior DR submitted that, deductor cannot file application under Section 197 and recourse for the assessee was to file application under Section 195(2), which has not been done. The law was always very clear and the assessee has even admitted its default. All the submissions which were raised before the Assessing Officer has been dealt with extensively with detailed reasons in the penalty order to which he referred and relied upon.

6. We have carefully considered the rival submissions, perused the relevant findings given by the CIT(A) as well as the Assessing Officer and also perused the material placed on record. It is an admitted fact that the assessee is a non-resident company having its principal place of business at Honkong and the various Channel Companies are also non-resident companies based in Honkong. Hence, the payment in question is made by a non-resident company to a non-resident company. In the return of income, while computing the taxable income, the assessee has shown his taxable income and also claimed deduction of the cost of advertising airtime procured from the Channel Companies on principal-to-principal basis outside India. At the time of filing of return there was a prevalent view of the judicial pronouncement by the ITAT Mumbai Bench in the case of **Shree Kumar Poddar Vs. CIT, reported in 65 ITD 248** and commentaries given in Kanga and Palkhivala. Thus, the assessee was under a bonafide belief that no tax was deductible at source under section 195 with respect to transaction with the Channel Companies for advertising airtime, since the companies were not taxable in India. It is also undisputed fact that after passing of the assessment order under Section 143(3), the assessee has deposited all the tax, the details of which have been given at pages 11 to 12 of the impugned penalty order. The basic charge of the Assessing Officer is that since the assessee had not come before the Assessing Officer under Section 195(2), therefore, the gross amount was to be taxed. Even though this

was upheld by the CIT(A) and ITAT, however, it has been observed by the ITAT that the issue involved is quite complex and is debatable. Now in wake of law settled by the Hon'ble Apex Court in the case of **Vodafone International Holdings(supra),** one can say that the assessee was definitely under the bonafide belief that there was no requirement to deduct TDS on the payment made by a non-resident to a non-resident under Section 195. Even the telecasting of signals by Satellite companies and location of ultimate viewership in India is not a source of income in India or business connection in India, has been upheld by the Hon'ble Delhi High Court in the case of **Asia Satellite Telecommunications Co. Ltd.**(supra). From all these judicial propositions, which have been settled recently, we hold that there was no liability to deduct tax and atleast one can say that there was a bonafide belief and reasonable cause for non-deducting of tax on the payments made to the Channel Companies under section 195.

6.1. Thus, in view of the decision of the Hon'ble Supreme Court in the case of **Eli Lilly & CO. Ltd. (supra)**, that if the assessee had a bonafide belief that it was not required to deduct tax at source even if the amount is held taxable lateron will not result in levy of penalty under section 271C, we hold that no penalty under Section 271C cannot be levied. Accordingly, the reasoning given by the CIT(A) for deleting the penalty is upheld and the grounds taken by the department are dismissed.

7. Since, the facts in issues in all the three appeals are same, hence, all the three appeals filed by the departments are dismissed.

8. In the result, all the three appeals of the revenue are dismissed.

परिणामतः राजस्व की सभी तिन अपीलें खारिज की जाती है ।

Order pronounced in the open court on 6th July, 2012 .

आदेश की धोषणा खुले न्यायालय में दिनांकः 6th July, 2012 को की गई ।

Sd/-	Sd/-
(पी.एम.जगताप)	(अमित शुक्ला)
(**P.M.JAGTAP)**	(**AMIT SHUKLA)**
लेखा सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated 06 / July /2012

प्र.कु.मि/pkm.नि.स./PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार
(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**