

IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH, CHENNAI

**BEFORE SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER
AND SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER**

I.T.A. No. 1744/Mds/2011
Assessment Year: 2008-09

The Assistant Commissioner of
Income Tax,
Media Circle – II,
Chennai - 600 034.

(Appellant)

M/s Shri Balaji Communications,
No.18, Flat No.8, Perumal
Apartments, Periyar Pathai,
Choolaimedu, Chennai - 600 034

PAN : ABIFS0605A
(Respondent)

C.O. No. 166/Mds/2011
(in I.T.A. No. 1744/Mds/2011)
Assessment Year: 2008-09

M/s Shri Balaji Communications,
No.18, Flat No.8, Perumal
Apartments, Periyar Pathai,
Choolaimedu, Chennai - 600 034
(Cross-objector)

The Assistant Commissioner
of Income Tax,
Media Circle – II,
Chennai - 600 034.
(Respondent)

Revenue by : Smt. Jayanthi Krishnan, CIT
Assessee by : Shri Philip George, Advocate

Date of Hearing : 04.12.2012
Date of Pronouncement : 20.12.2012

O R D E R

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER :

These are appeals and cross-objection filed by the Revenue and assessee respectively, directed against an order dated 5.7.2011 of

Commissioner of Income Tax (Appeals)-VIII, Chennai. Grievance of the Revenue is that CIT(Appeals) deleted the disallowance of ₹ 25,71,19,000/- made by the Assessing Officer under Section 40(a)(ia) of Income-tax Act, 1961 (in short 'the Act').

2. Facts apropos are that assessee, engaged in purchase and sale of rights in satellite and movies, had filed its return for impugned assessment year, declaring an income of ₹ 45,62,850/-. This was later revised to 1,27,12,850/-. During the course of assessment proceedings, it was noted by the Assessing Officer that assessee had debited in its account a sum of ₹ 25,71,19,000/- for purchasing satellite rights of films and programs. On verification of records, the Assessing Officer found that such rights were brought from various parties at varying cost. Assessee had filed the agreements with all the parties. The A.O. was of the opinion that such agreements were only for assignment of rights and not for sale of right to assessee. As per A.O., assignor only assigned his rights to the assessee through such agreements. The rights were only for 20 to 25 years and were not of permanent nature. Therefore, according to him, there was no sale of rights to the assessee. Further, as per A.O., Section 194J was applicable since payments were in the nature of royalty.

3. A.O. put the assessee on notice as to why Section 40(a)(ia) should not be applied since tax was not deducted at source when payments were effected. Reply of the assessee was that it was only purchasing and selling broadcasting rights and the obligation to deduct tax at source was only on the ultimate owner of broadcasting rights. However, the Assessing Officer was not impressed. According to him, assessee had paid the sum of ₹ 25,71,19,000/- without deducting tax at source as required under Section 194J, which called for application of Section 40(a)(ia) of the Act. He disallowed the claim and completed the assessment.

4. In its appeal before CIT(Appeals), argument of the assessee was that there were various types of rights in a film. Examples were distribution right, dubbing right, audio right, video right, satellite right, television right, DTH right, internet right, etc. The assignee here had transferred the rights with regard to satellite transmission. The assignment agreements were nothing but purchase agreements whereby assessee purchased such rights. Accordingly, exclusive ownership of satellite copy right came to the assessee. As per the assessee, what assignor was doing was selling the rights. Assessee though called an assignee, was only a purchaser. Assignor had relinquished its right of ownership insofar as satellite copy right was concerned. Though assessee had received the rights only for a certain

specific period, it had sold such rights with same period limitation. According to assessee, Section 194J was not applicable since, Explanation 5 to Section 9(1)(vi) clearly excluded from the scope of 'royalty', consideration received for sale or distribution or exhibition of cinematographic film. Reliance was placed on the decision of Hon'ble Bombay High Court in the case of Abdulgafar A. Nadiadwala v. ACIT (267 ITR 488) and that of Hon'ble jurisdictional High Court in the case of CIT v. V.C. Kuganathan (293 ITR 15). According to assessee, goods would include such rights also.

5. Ld. CIT(Appeals) was appreciative of the contentions of the assessee. According to him, assessee had only purchased the rights and sold it to different purchasers. Satellite copy rights, which were purchased, were sold to various TV channels. Assessee had never retained any rights with itself after selling of such rights. Though the agreements were named as 'assignments', these were only purchase agreements. Complete ownership of satellite copyrights were transferred. He thus held that assessee was not liable to deduct any tax at source since it acquired the rights over the movies. Therefore, according to him, rigours of Section 40(a)(ia) of the Act were not attracted. The addition made was deleted.

6. Now before us, strongly assailing the order of CIT(Appeals), learned D.R. submitted that royalty would include transfer of any right including copyright. As per learned D.R., the argument that the assessee had acquired the rights only for a particular period, clearly showed that it was not a perpetual right received by the assessee. It was of varying terms from 20 to 25 years. Therefore, what the assessee was doing was not purchasing the rights. It was only a temporary transfer of rights to it. According to her, assessee could not say that it had purchased rights altogether. Explanation 2 under Section 9(1)(vi) of the Act, clearly brought such type of payments within the purview of Royalty. Assessee having not deducted tax at source as required under Section 194J of the Act, Assessing Officer had rightly invoked Section 40(a)(ia) of the Act.

7. Per contra, learned A.R. strongly supporting the order of Id. CIT(Appeals), submitted that the agreements clearly showed the rights to have been purchased by the assessee. Such rights which assessee had acquired for a period of 99 years were perpetual in nature. There were no residuary value in a film after 25 to 100 years of its release. In such a situation, it could not be considered that the payments effected were royalty. The payments were only consideration for purchase. According to him, therefore, CIT(Appeals) was justified in deleting the disallowance.

8. We have perused the orders and heard the rival submissions. Section 194J of the Act clearly mentions that it is incumbent on a person making payments for professional service, technical service and royalty, to deduct tax at source. Explanation (ba) to the said section also states that term 'Royalty' will have the same meaning as given in Explanation 2 to clause (vi) of Section 9(1) of the Act. The said Explanation is reproduced hereunder for brevity:-

“Explanation 2.—For the purposes of this clause, “royalty” means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head “Capital gains”) for—

- (i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property ;*
- (ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property ;*
- (iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property ;*
- (iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill ;”*
- [(iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in [section 44BB](#) ;]*
- (v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films ; or*
- (vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to [(iv), (iva) and] (v).”*

Thus, the consideration for transfer of all or any rights in respect of any copyright, including copyright for films and video tapes, used in connection with television or tapes, would fall within the definition of “royalty”. What is excluded are consideration for sale, distribution and exhibition of cinematographic films. What the assessee paid here was not consideration for sale, distribution or exhibition of cinematographic films. Assessee did not purchase the cinematographic films as such through the transactions. Assessee had only received right for satellite broadcasting. The definition also does not say that it would apply only if the rights are considered only for a definite period. Even if the transfer of rights is perpetual or even if the transfer is only a part of the rights, as long as transfer is of any right relatable to a copyright of a film or video tape, which is to be used in connection with television or tapes, the consideration paid would be royalty only. Thus, the impugned transaction, in our opinion, would fall within the definition of “royalty”. One of the typical agreements placed at paper-book page 22 is reproduced as under:-

“NOW THIS AGREEMENT WITNESSETH AS FOLLOWS:

- 1) The Assignor irrevocably assigns to the Assignee the said picture sole and exclusive copyrights for broadcasting the above said Film through any Satellite System, Satellite Broadcasting Rights, Satellite Television Broadcasting Rights, Satellite Radio Broadcasting, Public Service Broadcasting, Private Communication / Broadcast, Terrestrial Broadcasting Service (Excluding Doordarshan Rights), Terrestrial digital

Airborne Rights, Seaborne / Railborne Rights, Pay TV Rights, Broadband, Telephony, Local Delivery Service, Video on Demand, MOD (Movie on Demand), MMDS, Cable TV Rights, Web Based Technology Rights, DTH, Cable, Wire, Wireless and all other electric and electronic media now in existence and that may come into use in future, in any forms of communication like signs, signals, writing, pictures, images and sounds of all kinds by transmission of electro-magnetic waves through space or through cables intended to be received by the general public either directly or indirectly through the medium of relay stations and all its grammatical variations and cognate expressions shall be construed accordingly or any other systems without restriction of geographical area.

- 2) The Assignee does not have any rights in respect of (a) Doordarshan Kendra Rights, Doordarshan satellite telecasting by Government of India and its autonomous bodies and quasi - Government bodies etc., (b) enter Overseas Satellite Rights and Overseas TV Rights. The above mentioned rights are retained by the Assignor exclusively. However the Assignee will be entitled to exploit the Exclusive Overseas Satellite Rights through their Channels without affecting the Assignors Rights.
- 3) The ASSIGNOR irrevocably assigns to the ASSIGNEE the sole and exclusive rights for broadcasting the said Film through Satellite System, Direct to Home Service, Compact Video, Digital Video, Local Delivery Service, MMDS, Cable, Wire, Wireless or any other system without any restriction of geographical area.
- 4) The Assignor assigns to the Assignee the sole and exclusive right for the entire World as specified in Clause 1,2,3 & for a Perpetual Period as per the enclosed schedule.
- 5) In consideration thereof the Assignee have agreed to make payment for the said Films of ₹ 3,00,000/- (Rupees Three Lakhs only) to the Assignor. The Assignee paid to the Assignor ₹ 3,00,000/- (Rupees Three Lakhs only) by way of as full and final settlement and the assignor agrees and acknowledges the same.”

Above will clearly show that the payments made would fall within the definition of “royalty”. In such a situation, we are of the opinion that assessee was duty bound under Section 194J to deduct tax at source on the payments effected. Such deduction having not been made, rigours of Section 40(a)(ia) stood attracted. Insofar as reliance placed by the

learned A.R. on the decision of the decision of Hon'ble Bombay High Court in the case of Abdulgafar A. Nadiadwala (supra) and that of Hon'ble jurisdictional High Court in the case of V.C. Kuganathan (supra), these were not concerned with eligibility to claim exemption of Section 194J, but were all concerned with claim of deduction claimed by the assessee under Chapter VIA of the Act. Such cases will not help the assessee in any manner on an issue of disallowance under Section 40(a)(ia) of the Act, where tax as required under Section 194J has not been deducted.

9. Now coming to the cross-objections of the assessee, one of its contentions is that the payments were in the nature of direct cost and Section 40(a)(ia) could not be applied. Learned A.R., in support of such cross-objection, submitted that Hyderabad Bench of this Tribunal in the case of Teja Constructions v ACIT (2010) 36 DTR 220, had held that rigours of Section 40(a)(ia) could be applied only with regard to claim for deduction under Sections 30 to 38 of the Act. An additional ground has also been taken in the cross-objection by which it is stated that Section 40(a)(ia) would apply only on amounts standing payable at the end of relevant previous year and not on the amounts paid during the relevant year. Learned D.R. did not raise any objection to the additional ground. Such additional ground is admitted being a pure question of law.

10. We have considered both the averments of the assessee. Insofar as reliance placed on the decision of Teja Constructions (supra) is concerned, there the books of accounts of the assessee were rejected and estimation of income was done on percentage basis. The main reason why the Tribunal held invocation of Section 40(a)(ia) was not called for, was that it would result in double jeopardy. As per the Tribunal, once the books were rejected, there was no question of further invocation of Section 40(a)(ia) of the Act. It was, in such circumstances, Tribunal held that expenditure covered under Sections 30 to 38 of the Act alone were subject to Section 40 of the Act. Such observation of the Tribunal cannot be seen divorced from the facts of that case. Here, books of the assessee were not rejected. Therefore, in our opinion, the said case would not help the assessee in any manner. Though Section 40 starts with non-obstante clause “Notwithstanding anything to the contrary in sections 30 to 38.....”, in our opinion, this would not mean that said section is not applicable on a deduction claimed under Section 28. We cannot say computation of business income will not be susceptible to the restriction mentioned under Section 40 of the Act, just because certain allowances claimed were outside sections 30 to 38, especially when books were not rejected. However, the additional ground raised by the assessee that the rigours of Section 40(a)(ia) are attracted only on amounts standing payable at the end of the relevant

previous year, is justified in view of the decision of Special Bench of this Tribunal in the case of Merilyn Shipping and Transport v. ACIT (2012) 16 ITR (Trib.) 1 (SB).

11. In the result, we allow appeal of the Revenue, but at the same time, remit the issue back to the file of the A.O. for applying Section 40(a)(ia) of the Act as per law. In the view of Special Bench in Merilyn Shipping and Transport's case (supra), rigours of Section 40(a)(i) will not be attracted on amounts paid in the relevant previous year. However, the A.O. shall be free to consider decisions of higher authorities, if available to him, when the issue is taken up afresh. Ordered accordingly.

12. In the result, appeal of the Revenue is allowed, whereas, cross-objection of the assessee is partly allowed.

The order was pronounced in the Court on Thursday, the 20th of December, 2012, at Chennai.

sd/-
(Challa Nagendra Prasad)
Judicial Member

sd/-
(Abraham P. George)
Accountant Member

Chennai,
Dated the 20th December, 2012.

Kri.

Copy to: Assessee/Assessing Officer/CIT(A)-VIII, Chennai/
CIT, Chennai-VI, Chennai/D.R./Guard file