IN THE INCOME TAX APPELLATE TRIBUNAL
"D" Bench, Mumbai

Before Shri P K Bansal, Vice President
and Shri R.L. Negi, Judicial Member

ITA Nos. 3061 & 3062/Mum/2017
(Assessment Years: 2011-12 & 2012-13)

M/s. Dish TV India Ltd. 135, Continental Building Dr. Annie Besant Road Worli, Mumbai 400018	Vs.	ACIT, Range - 11(1) [New ACIT - 11(1)] Room No. 439, 4th Floor Aayakar Bhavan, M.K. Road Mumbai 400020

PAN – AAACA5478M

Appellant **Respondent**

ITA Nos. 3691 & 3692/Mum/2017
(Assessment Years: 2011-12 & 2012-13)

A C I T - 16(1) Room No. 439, 4th Floor Aayakar Bhavan, MK. Road Mumbai 400020	Vs.	M/s. Dish TV India Ltd. 135, Continental Building Dr. Annie Besant Road Worli, Mumbai 400018

PAN – AAACA5478M

Appellant **Respondent**

Assessee by: Shri Vijay Mehta
Revenue by: Shri Sunita Billa

Date of Hearing: 09.10.2017
Date of Pronouncement: 10.10.2017

O R D E R

Per P.K. Bansal, Vice President

Out of these four appeals two appeals are filed by the assessee while the other two appeals are filed by the Revenue for against the orders of the CIT(A) – 4, Mumbai dated 13.02.2017 and 06.02.2017 for assessment years 2011-12 and 2012-13 respectively.

2. In both the appals filed by the assessee in both the years assessee has taken a common ground in respect of disallowance made under section 40(a)(ia) except the change in figures. Both the parties agreed that the appeals of the assessee may be decided on the basis of the facts

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relating to A.Y. 2011-12. During A.Y. 2011-12 the assessee has taken the following effective grounds of appeals: -

> ***"1. Commission of Rs. 33,86,68,406/-***
>
> *(i) The Ld. CIT(A) erred in facts and law in upholding the disallowance of Rs. 33,86,68,406/- u/s 40(a)(ia) of the Act for non-deduction of tax. The reasons given by him for doing so are wrong, contrary to the facts of the case and against the provision of law.*
>
> *(ii) The Ld. CIT(A) ought to have appreciated that Rs. 33,86,68,406/- is discount allowed in the invoice to the distributor or dealer for early payment and hence not liable to TDS.*
>
> *(iii) The Ld. CIT(A) failed to appreciate that the relationship between the appellant and distributor or dealer is on principal to principal basis and the distributor or dealer does not render any service to the appellant but invests at discounted price and recovers face value and earns profit as opportunity cost of money."*

In A.Y. 2012-13 the figure of ₹*33,86,68,406*/- be read as ₹*50,52,75,132/-.*

3. The Revenue in its appeal being ITA Nos. 3691 & 3692/Mum/2017 has taken ground 2, 3, 4, 5 and 6 to be the common ground being grounds A, B, C, D & E in A.Y. 2012-13 while ground No. 1 taken in A.Y. 2011-12 is not taken in A.Y. 2012-13. Both the parties agreed that whatever view the Tribunal may take in respect of grounds 2 to 6 for at 2011-12 the same view may be taken in A.Y. 2012-13 also. Both the parties agreed that these appeals may be decided on the basis of the facts relating to A.Y. 2011-12. The Revenue in A.Y. 2011-12 has taken the following effective grounds of appeal: -

> *"1) Whether on facts and in circumstances of the case and in law, the Ld. CIT(A) was justified in directing to delete the disallowance of interest as well as expenditure u/s.14A read with Rule 8D, without appreciating that once the AO rejects the claim of the assessee of not incurring any expense for earning tax-free income, he is about to follow provisions of Section 14A r.w. rule 8D for determining expenditure which was presumed to be incurred for earning tax-free income.*
>
> *2) Whether on the facts and circumstances of the case and as per law, whether the Ld. CIT(A) was justified in directing to delete the disallowance u/s. 40(a)(ia) rws 194J in respect of 'expenses on customer support services' of Rs.41,41,92,94/-, and failing to*

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appreciate that the payments made for use/right to use of 'process' are 'royalty' as per Explanation 6 to section 9(1)(vi) and therefore covered u/s. 194J of the Income-tax Act, 1961?

3) *Whether on the facts, in the circumstances of the case and as per law, the Ld. CIT(A) has erred in directing to delete the disallowance u/s. 40(a)(ia) rws 194J of 'Carriage Fees/Channel Placement Fees', whereas the jurisdictional ITAT, Mumbai 'L' Bench, in its order dated 28.03.2014 in the case of* ***ADIT-(IT)-2(2), Mumbai Vs. Viacom 18 Media Pvt. Ltd.*** *has confirmed that the payments made for use/right to use of 'process' are 'royalty' in terms of the Income Tax Act, 1961.*

4) *Whether on the facts and circumstances of the case and as per law, whether the Ld. CIT(A) was justified in directing to delete the disallowance u/s. 40(a)(ia) rws 194J in respect of 'CAS, Middleware and SMS charges' and failing to appreciate that the payments made for use/right to use of 'process' are 'royalty' as per Explanation 6 to section 9(1)(vi) hence such payments are covered u/s. 194J of the Income-tax Act, 1961.*

5) *Whether on the facts and circumstances of the case and as per law, whether the Ld. CIT(A) was justified in directing to delete the disallowance u/s. 40(a)(ia) rws 194J in respect of 'CAS, Middleware and SMS charges' whereas the jurisdictional ITAT, Mumbai 'L' Bench, in its order dated 28.03.2014 in the case of* ***ADIT-(IT)-2(2), Mumbai Vs. Viacom 18 Media Pvt. Ltd.*** *has confirmed that the payments made for use/right to use of 'process' are 'royalty' in terms of the Income-tax Act, 1961.*

6) *Whether on the facts, in the circumstances of the case and as per law, the Ld. CIT(A) has erred in directing to delete the disallowance u/s. 40(a)(ia) without appreciating the Hon'ble Kerala High Court in its judgment dated 20.07.2015 in the case of* ***CIT-1, Kochi Vs. PVS Memorial Hospital Ltd. [2015] 60 taxmann.com 69 (Kerala)*** *has decided the issue in favour of the Department."*

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4. The only issue involved in assessee's appeals relates to the sustenance of disallowance under section 40(a)(i) for non deduction of tax.

5. The brief facts of the case are that the AO noted that the assessee has paid commission charges amounting to ₹33,86,68,406/- under section 40(a)(ia) and the assessee has not deducted TDS under section 194H of the Income Tax Act. The AO, therefore, after giving opportunity to the assessee disallowed the same under section 40(a)(ia). The assessee went in appeal

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before the CIT(A). The assessee took the view that the assessee has given cash discount to the distributer and it was not in fact commission but it was in fact the discount given to the distributor and therefore provisions of Section 194H was not applicable. The CIT(A) rejected the plea of the assessee and sustained the disallowance amounting to ₹33,86,68,406/- under section 40(a)(ia). Similarly the disallowance was sustained in A.Y. 2012-13. Aggrieved, the assessee is in appeal before us.

6. We heard the rival submissions and gone through the orders of the tax authorities below. Before us the learned A.R. filed additional evidence by making application by way of agreement between the assessee and one of the distributors along with copy of the subscription application and contended that on the basis of the decisions of the Hon'ble Delhi High Court in the case of CIT vs. Text Hundred India Pvt. Ltd. 351 ITR 57 and Hon'ble Patna Tribunal in the case of Abhay Kumar Shroff vs. Income Tax Officer 63 ITD 144 (TM) additional evidence should be admitted if it is vital and essential for the purpose of consideration of the subject matter of the appeal. We noted that in this case the issue before us is whether the payment made by the assessee to the distributor is a commission or cash discount. For deciding the substantial issue, in our view, it is necessary to analyse the agreement which the assessee had with the distributor. To render the substance of justice looking into the terms and conditions of the agreement is necessary. Only then the true nature of the transaction between the assessee and the distributor can be decided, whether it is a case where the assessee has given discount or whether the assessee had paid commission to the distributor. We, therefore, to render the substance of justice admit the additional evidence. Before us, on the basis of the agreement as well as the sample subscriber application form, the learned A.R. vehemently contended that as per Annexure-A of the said agreement the assessee has to give discount to the distributor although in the agreement the term has been used as commission. The learned A.R. also pointed out on the basis of the bills that in fact the assessee has raised bills by showing this amount as discount out of the total value of the talk

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time cards. It is submitted by referring to page 129 of the paper book that this represent the discount given in the topup which entitles the person for talk time for a certain time. It was further contended that it is in fact a buying scheme under which the talk time cards are sold to the distributor at a discount and the distributor sells it to the retailers and the retailers sells it to the customers.

7. The learned D.R., on the other hand, vehemently contended that the assessee has not submitted the agreement between the distributor and the assessee as well as the sample subscription form neither before the AO nor before the CIT(A). Accepting the document at the level of the Tribunal will prejudice the Revenue.

8. We have gone through the copy of the agreement entered into by the assessee with the distributor available on pages 138 to 148 as well as the sample subscription application form available on pages 149 to 150 of the paper book. On the basis of the document and the issue involved we are of the view that examination of these documents as a whole along with the terms and conditions of the agreement entered into between the assessee and the distributor in respect of talk time card is essential to determine the true nature of the transaction whether the transaction entered into between the assessee and the distributor relates to discount or commission. The TDS provisions are applicable under section 194H in case it is held that the nature of the transaction entered into between the assessee and the distributor is that of commission but in case if it is decided that the nature of transaction is not commission but discount given on sales it cannot be regarded to be commission which is hit by the provisions of Section 194H of the Income Tax Act. We, therefore, in the interest of justice and fair play to both the parties set aside this issue and restore it to the file of the AO with the direction that the AO shall redecide this issue afresh in accordance with law after going though the agreement which the assessee has entered into with the distributor as well as the sample subscription application form, whether the amount represents the expenditure incurred by the assessee towards commission or whether the

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said amount represents cash discount given by the assessee to the distributor for sale of talk time card. We may mention that in this regard the AO while determining the true nature of the transaction whether it is a commission or discount should not be influenced by the nomenclature given by the assessee in the said agreement. We, accordingly set aside the order of the CIT(A) and restore this issue to the file of the AO.

9. In the result, both the appeals filed by the assessee are statistically allowed.

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10. Now coming to the appeals filed by the Revenue, ground No. 1 taken by the Revenue in A.Y. 2011-12 relates to the deletion of disallowance made by the AO under section 14A r.w. Rule 8D.

11. After hearing the rival submissions and going through the order of the tax authorities below we noted that the assessee has not earned any exempt dividend income during the impugned assessment year. Since the assessee has not earned any exempt income no disallowance under section 14A of the Income Tax Act can be made in view of the decision in the case of Principal CIT vs. Ballarpur Industries Ltd. ITA No. 51 of 2016 dated 13.10.2016 in which the Hon'ble Jurisdictional High Court, following the decision of the Hon'ble Delhi High Court in the case of Cheminvest Ltd. vs. CIT 378 ITR 33 (Del) took the view that provisions of Section 14A of the Income Tax Act, 1961 would not apply to the facts of the case as no exempt income was received or receivable during the relevant previous year by the assessee. Similar view has been taken by the Hon'ble Allahabad High Court in the case of CIT vs. Shivam Motors (P) Ltd. 272 CTR 277 and that of Hon'ble Punjab & Haryana High Court in the case of CIT vs. Winsome Textile Industries Ltd. 319 ITR 204.

12. The learned D.R., even though vehemently relied on the orders of the authorities below but has not brought to our knowledge any contrary decision. We, therefore, dismiss ground No. 1 taken by the Revenue in A.Y. 2011-12.

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13. Ground Nos. 2 to 6 in A.Y. 2011-12 and grounds A to E in A.Y. 2012-13 in Revenue's appeal relate to the deletion of disallowance under section 40(a)(ia) rw.s. 194J in respect of expenses on customer support services or disallowance under section 40(a)(ia) r.w.s. 194J in respect of CAS, Middleware and SMS charges.

14. The brief facts relating to this issue are that the AO noted that the assessee has deducted TDS in respect of expenditure on customer support services under section 194C by applying a rate of 2% whereas it should have been deducted tax under section 194J @10%. The AO was of the view that these expenses are incurred mainly for the purpose of solving customer grievances and technical issues raised by such customers. These services are incurred for availing BPO services. Therefore, the nature of service availed by the assessee is technical and TDS would have been deducted in accordance with section 194J instead of section 194C The AO, therefore, disallowed a sum of ₹41,41,92,984/- under section 40(a)(ia). Assessee went in appeal before the CIT(A). The CIT(A) took the view that it is not a case of non deduction of TDS but at most it can be a case of less deduction of TDS and, therefore, he deleted the disallowance made under section 40(a)(ia). Similarly, the AO has noted that the assessee has paid a sum of ₹36,61,17,648/- towards CAS, Middleware and SMS charges to Integrated Subscriber Management Services Ltd. and on which the assessee has deducted TDS under section 194C. The AO was of the view that the said expenditure has to be incurred under the provisions of Section 194J. Therefore, he disallowed a sum of ₹36,61,17,648/-. When the matter went before the CIT(A), the CIT(A) deleted the disallowance in this case also on the basis that this is not a case of no deduction of tax at source but it is a case of less deduction of tax at source.

15. We heard the rival submissions and gone through the orders of the tax authorities below. We noted that in both the cases the assessee was of the opinion that tax had to be deducted under section 194C @2% but the Revenue was of the view that tax has to be deducted under section 194J @10%. Therefore, the AO applied provisions of Section 40(a)(ia) and made

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the disallowance in respect of both the expenditures. Before us the learned D.R. relied on the decision of the Hon'ble Kerala High Court in the case of CIT vs. PVS Memorial Hospital Ltd. 60 taxmann.com 69 copy of which was placed before us in which it was held that deduction under a wrong provisions of the law will not save an assessee from section 40(a)(ia), i.e. where the tax was deductible under section 194J but was actually deducted under section 194C, such a deduction would not meet the requirements of section 40(a)(ia). We noted that prior to this decision the Hon'ble Calcutta High Court in the case of CIT vs. S.K. Tekriwal 361 ITR 432 vide order dated 3rd December, 2014 taken a view by which the Hon'ble High Court dismissed the appeal of the Revenue against the order of the Tribunal by holding that where tax was deducted by the assessee, though under a bona fide wrong impression under wrong provisions, the provisions of Section 40(a)(ia) could not be invoked and if there was any shortfall due to any difference of opinion as to the taxability of any item or the nature of payments falling under various tax deduction at source provisions, the assessee could be declared to be an assessee in default under section 201 but no disallowance could be made invoking the provisions of Section 40(a)(ia). The said decision of the Hon'ble Calcutta High Court has not been referred to before the Hon'ble Kerala High Court and the Kerala High Court, therefore, did not consider the decision of the Calcutta High Court. This Tribunal in the case of CIT vs. Shri Zubin J. Gandevia in ITA No. 3357/Mum/2014 vide order dated 1st February, 2016 had the occasion to consider the binding nature of both the decisions and ultimately under para 8 of its order held as under: -

> *"8. Before us the Ld. Counsel has pointed out that there is a divergent view also taken by the Hon'ble Kerala High Court in the case of P V M Memorial Hospital (supra). But such a decision may not have a persuasive value as it is quite a trite law that if there are two conflicting decisions of non- Hon'ble Jurisdictional High Courts, then the decision in favour of the assessee should be taken. We agree with such a contention raised by the assessee that, if there are two conflicting decisions and in absence of any Hon'ble Jurisdictional High Court, decision one favourable to the assessee should be preferred and this proposition has been long back settled by the Hon'ble Supreme Court in the case of Vegetable Products Ltd. (supra).*

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Thus, we hold that, no disallowance under section 40(a)(ia) should be made on short deduction of tax under different or wrong provision of the section."

Similarly, Visakhapatnam Bench of this Tribunal in the case of P.S.R. Associates vs. ACIT in ITA No. 345/Viz/2013 vide order dated 6th January, 2016 had also an occasion to consider both the decisions of Hon'ble Calcutta High Court as well as that of Hon'ble Kerala High Court on the same issue and ultimately under paras 10 & 11 of its order held as under: -

"10. The Departmental Representative relied upon the Hon'ble Kerala High Court judgment in the case of M/s. P.V.S. Memorial Hospital Ltd. (supra) and argued that the provisions of section 40(a)(ia) is applicable even for short deduction of TDS. The Hon'ble Kerala High Court has upheld the disallowance of expenditure under sec. 40(a)(ia) of the Act, for short deduction of TDS. With due respect to the Hon'ble Kerala High Court, we prefer to follow the judgment referred by the Authorized Representative of the assessee in the case of S.K. Tekriwal (supra), for the reason that when there are two reasonable constructions are possible on similar issue i.e. one in favour of the assessee and another in favour of the Revenue, the decision in favour of the assessee should be followed as held by the Hon'ble Supreme Court in the case of CIT vs. Vegetable Products Ltd. (1973) 88 ITR 192.

11. Considering the facts and circumstances of the case and also applying the ratio of the Hon'ble Calcutta High Court judgment in the case of S.K. Tekriwal (supra), we are of the opinion that the CIT(A) rightly deleted the addition made under sec. 40(a)(ia) of the Act. In the present case on hand, the assessee has deducted TDS and deposited the same with the Central Govt. account as prescribed under the Act. The allegation of the A.O. is that the assessee failed to deduct TDS under appropriate provisions of the Act. Therefore, we are of the view that the provisions of sec. 40(a)(ia) of the Act is applicable, in case there is a failure on the part of the assessee to deduct TDS and remit the same to the government account. There is nothing in the said section to treat inter alia that the assessee is defaulter where there is shortfall in deduction of TDS. If there is any shortfall due to any difference of opinion as to the taxability of any item or the nature of payments falling under the various TDS provisions, the assessee can be declared to be an assessee in default under sec. 201 of the Act and no disallowance can be made by invoking the provisions of sec. 40(a)(ia) of the Act. Therefore, we do not find any error or infirmity in the CIT(A)'s order, hence, we inclined to uphold the order of the CIT(A) and reject the ground raised by the Revenue."

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16. No contrary decision of this Tribunal or of the Hon'ble Jurisdictional High Court or Hon'ble Supreme Court was placed before us. We, therefore, are bound to follow the decision of the Coordinate Bench. Therefore, we do not find any infirmity or illegality in the order of the CIT(A) in holding that provisions of Section 40(a)(ia) will not be applicable in the case of the assessee as there is nothing in the section to treat the assessee as defaulter where there is shortfall in deduction of TDS. We, therefore, affirm the CIT(A) and dismiss the grounds taken by the Revenue in both the appeals.

17. In the result, both the appeals filed by the assessee are allowed for statistical purposes while both the appeals of the Revenue are dismissed.

Order pronounced in the open court on 10th October, 2017.

Sd/-	Sd/-
(R.L. Negi)	**(P.K. Bansal)**
Judicial Member	**Vice President**

Mumbai, Dated: 10th October, 2017

<u>*Copy to:*</u>

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -4, Mumbai*
4. *The CIT - 16, Mumbai*
5. *The DR, "D" Bench, ITAT, Mumbai*

By Order

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Assistant Registrar
ITAT, Mumbai Benches, Mumbai

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