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

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAL LAL NEGI,

ITA No. 4652/Mum/2016
(Assessment Year: 2013-14)

Zee Entertainment Enterprises Ltd. 18th Floor, A Wing Marathon Futurex N. M. Joshi Marg, Lower Parel, Mumbai-400 013	Vs.	ITO(IT)-TDS-2, Presently with DCIT(IT)-4(3)(2), Mumbai
PAN/GIR No. AAACZ 0243 R		
(Appellant)	:	**(Respondent)**

Appellant by	:	Shri Madhur Agarwal/ Shri Jai Bhansali
Respondent by	:	Shri Himanshu Sharma

Date of Hearing	:	23.08.2018
Date of Pronouncement	:	06.11.2018

O R D E R

Per Shamim Yahya, A. M.:

This appeal by the assessee is directed against the order of the learned Commissioner of Income Tax (Appeals)-58, Mumbai ('ld.CIT(A) for short) dated 29.03.2016 and pertains to the assessment year (A.Y.) 2013-14.

2. The grounds of appeal read as under:

1. Transponder Charges
i) The Ld. CIT(A) erred in law and facts in upholding that the payment for use of 'transponder space' as Royalty under section 9(1)(vi) and applying provisions of section 195 of the Act treated the assessee in default for u/s 201 (1) of the Act and charged interest on amount u/s 201(1 A). The reasons given by him for doing so are wrong, contrary to the facts of the case and against the provisions of law.
ii) The Ld. CIT(A) erred in law and facts in upholding that the payment for use of transponder space as Royalty under the provisions of section 9(1){vi) of the Act as well as Article 12 of the India US DTAA without considering the fact that

the assessee has claimed benefit of DTAA of section 90(2) of the Act and there is no change in the DTAA with USA. The reasons given by him for doing so are wrong, contrary to the facts of the case and against the provisions of law.

Hi) The Ld. CIT(A) erred in laws and facts in applying retrospective amendment made by Finance Act, 2012 to Section 9 and treating the fees for use of transponder space as Royalty without considering the fact that the assessee has claimed benefit of DTAA of section 90(2) of the Act. The reasons given by him for doing so are wrong, contrary to the facts of the case and against the provisions of law.

iv) The Ld. CIT(A) erred in law and facts in not appreciating the fact that CA Certificate as per Rule 37BB and appellate authorities decisions in earlier years in assessee's own case that payment made for use of transponder space to Intelsat Corporation is not liable to be taxed in India, hence the assessee cannot be held as assessee in default u/s 201(1) of the Act.

v) The Ld. CIT(A) failed to appreciate that the payment for use of transponder space neither represents payment towards acquiring rights nor for the use nor for the imparting of any information concerning the working of a patent, invention, model, design, secret formula or trademark or similar property and the assessee has not been transferred, granted or allowed such rights so as to constitute such payment as royalty.

vi) The Ld. CIT(A) failed to appreciate that the payment towards the use of transponder space does not represents payments towards the use of, or the right to use, any industrial, commercial or scientific knowledge equipment hence the payment cannot be liable to be held as royalty

vii) The Ld. CIT(A) erred in laws and facts in holding transponder as an equipment and treating the payment towards use of the transponder space as royalty for use of an equipment. The reasons given by him for doing so are wrong, contrary to the facts of the case and against the provisions of law.

3. Brief facts of the case are as under:

The assessee, Zee Entertainment Enterprises Ltd or ZEE in short, is engaged in the business of broadcasting and distribution of TV channels, production, commissioning, purchase and export-sale of TV programmes, films, news, distribution of films, and also acts as canvassing agent for space selling on TV Channels.

In this case, the Assessing Officer was of the opinion that the assessee was liable to deduct taxes in respect of certain remittances to a non-resident. During the year, the

assessee has entered into a lease agreement for the transponder facility offered by M/s Intelsat Corporation, USA to enable transmission of uplinked programs to be seen over the footprint of the satellite (mainly India) and paid Rs 26,576,716 as user charges for the period January to March 2013. The A.O. noted that the assessee has not deducted any tax from the remittance at source relying on a certificate issued by a CA in form 15CB. It has made a declaration in form 15CA before making the remittance and based on this declaration, the assessing officer has initiated proceedings under section 201(1) & (1A) of the Act. He arrived at a conclusion that the remittance represents income of the non-resident in the nature of royalty, being payment for use or right to use a process and has held that the assessee was liable to deduct TDS on this amount and has accordingly, held the assessee as assessee in default passing suitable orders under section 201 (1) and 201 (IA) of the Act.

4. Before the Assessing Officer, the assessee has relied on the ITAT judgment in the case of same remittee *M/s Intelsat Corporation* (ITA No. 4662/Del/2011) for AY 2006-07 dated 16.1.2012 and the decision in the case of *B4U International Holdings*, 21 taxmann.com 529 (Mum). In the judgment in the case of Intelsat, the ITAT held that the service rendered by the non-resident did not fall under the category of term 'process' as contemplated under section 9(l)(vi) of the Act and hence the payment did not constitute royalty under this section. The Assessing officer has gone into the facts of the case elaborately, has noted that in the case of *M/s Intelsat Corporation*, the ITAT decided that the case did not fall under the definition of 'royalty' as defined in section 9(l)(vi) of the

Income Tax Act and hence there was no need to analyse the transaction with lect to India-US DTAA. He has also observed that the main issue related to whether the service of the non-resident was covered under the term 'use or right to use process' and the word process was not defined in the Act at that time. Since the provisions of section 9(l)(vi) have been amended to include a definition of term 'process', the decision in the case of M/s Intelsat Corporation (supra) is no longer applicable. As regards the case of B4U International Holdings, the AO has proceeded to analyse the transaction in detail. He has noted that the definition of royalty in both the Act as well as Treaty is para materia. He has also noted that as per Article 3(2) of the Treaty, any term not defined in the treaty shall have the meaning which it has under the laws of that State concerning the taxes to which the Convention applies. Meaning thereby that a term not defined in the Treaty will be interpreted as per the definition in the Income Tax Act. While the term 'process' is not defined in the Treaty, it is defined in IT Act and hence, it is liable to be interpreted as per the definition in the Act.

5. In order to examine the nature of transaction, the AO sought copies of invoices raised by M/s Intelsat Corporation, copy of account of M/s Intelsat Corporation and copies of form 15CA and 15CB for the specified period. It is observed that the assessee has failed to comply with the requirements of the Assessing Officer. It is seen that form 15CA and 15CB has been submitted by a letter dated 6/9/2013 by the assessee which remains the only submission before the AO prior to issue of show cause notice. The assessee has not made any submission with respect to the further queries and shown

cause notice issued by the AO. The decision of the AO is without the above material desired by him but not furnished by the assessee.

6. The AO has held that the business of M/s Intelsat Corporation was to help ZEE relay its programmes from the satellites in the footprint including India. ZEE has up-linking facility in India from where the programs are uplinked to the satellite. These programmes are subjected to various processes and subsequently signals were made available in the footprint of the transponders including India. The AO concluded that although the control of the satellite was with M/s Intelsat, it was the control of the transponder with was important. Zee had the effective control and use of the transponder to the extent of capacity assigned to it. The transponder was an active transponder where amplification of the signal took place. The AO held that a process means a series of action or steps taken in order to achieve a particular end and in the present case, that particular end i.e. viewership by public at large was achieved only through a series of steps taken by receiving the uplinked signals, amplifying them and relaying them after changing the frequency in the footprint area. He held that such an action constituted a process and hence the payment represented royalty in the hands of Intelsat.

7. The A.O. held that the remitted amount constituted an income liable to tax under the Income Tax Act. The AO also held that the assessee had a statutory responsibility to deduct tax on this amount and he had no mandate under the Act to decide suo moto, on the basis of a CA certificate, not to deduct TDS on this amount. For this he relied on the Supreme Court decision in the case of *Associated Cement Co Ltd vs CIT* (201 ITR 435)

and *Transmission Corporation of AP vs CIT* (239 ITR 587). Accordingly, he treated ZEE as a defaulter under section 201 of the Act.

8. Upon the assessee's appeal, the ld. CIT(A) elaborately dealt with the issue. He decided the issue against the assessee by placing reliance upon the decision of the Hon'ble Karnataka High Court in the case of *Lakshmi Audio Visual Inc. vs. Asst. CIT* [2001] 124 STC 426 (Kar). He also placed reliance upon the decision of Hon'ble Madras High Court in the case of *Verizon Communications Singapore (P.) Ltd v. ITO* [2013] 39 taxmann.com 70 (Mad.). Accordingly, he confirmed the A.O.'s action.

9. Against the above order, the assessee is in appeal before us.

10. We have heard both the counsel and perused the records. At the outset, the ld. Counsel of the assessee submitted that as per the decision of Hon'ble Delhi High Court the transponder fee are not taxable in the hands of the recipient Intelsat Corporation, USA, there cannot be any liability on the assessee to deduct tax at source u/s. 195 of the Act. Further, the assessee has made submissions in this regard that as per the law laid down by the Hon'ble Apex Court in the case of *G. E. Technology Centre Pvt. Ltd. vs. CIT* (327 ITR 456)(SC), there is no liability to deduct TDS when the income is held to be not chargeable to tax in the hands of the recipient.

11. We find that the identical issue was considered by this Tribunal in the case of *Viacom 18 Media Pvt. Ltd. vs. Asst. Director of Income – tax (International Taxation)* (in

I.T.A. Nos.599 to 614/Mum/2016 vide order dated 09.07.2018). This issue was dealt with by this Tribunal as under:

> 8. We have heard both the counsel and perused the records. We note that the Hon'ble Apex Court in the case of *G. E. Technology Centre Pvt. Ltd.* (supra), has held that where an amount is payable to a non-resident, the payer's obligations to deduct tax at source arises only when such remittances is a sum chargeable under the Act, i.e., chargeable u/s. 4, 5, 9 of the Act in the hands of the recipient. It has further been expounded that section 195(2) of the Act is not merely a provision to provide information to the ITO(TDS), so that the department can keep track of the remittances being made to non residents outside India, rather it gets attracted to the case where payment made in a composite manner which has an element of income chargeable to tax in India and the payer seeks determination of the "appropriate proportion of such sum so chargeable". From the above case law it emerges that when in the hands of the nonresident recipient, the sum paid is not chargeable under the Act, there is no liability on the payer to deduct tax at source. Now we note that the Hon'ble Delhi High Court in the case of *DIT(International Taxation) vs. Intelsat Corporation* (in ITA No. 977/2011 dated 19.08.2011) considering the issue of chargeability of tax of similar payments received by Intelsat Corporation, USA has held as under:
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> > The respondent assessee is a tax resident company of the United States of America with its registered office located in Washington D.C. The assessee owns and operates global network of telecommunication satellites in outer space. It is engaged in the business of transmitting telecommunication signals to and fro from the earth station(s). Its customers are various TV Channels, NICNET and Internet Service providers.
> >
> > For this purpose, the assessee enters into contracts with various parties around the world. The assessee leased its transponder capacity and bandwidth to various customers in India and outside India, who used the transponders for their business in India. According to the assessee, for the aforesaid activities no income accrued or attributed to India and therefore, the assessee was not liable to be taxed in India. For this reason, in respect of assessment year in question, i.e., Assessment Year 2007-08 it filed ?Nil? income return. The A.O., however, going by the past history of the assessments in the case of assessee in the years 1996-97 to 2004-05 held that certain percentage of the income of the assessee was exigible to tax in India as it was attributed to the receipts from the customers in India. The matter was referred to the Disputes Resolution Panel (DRP). Objections preferred by the assessee were dismissed by the DRP and the DRP directed the A.O. to compute the income as per the draft order prepared by

it.In arriving at the conclusion that revenue receipts on account of providing transmission services to its identified customers was in the natureof royalty to be taxed @ 10% of the total revenues, as per Article 12(7)(b) of the DTAA between India and the USA and the provisions of Section 9(1)(vi) of the Income-Tax Act, reliance was placed on the judgmentdated 16.10.2009 of the Special Bench of the ITAT, Delhi in the caseof New Skies Satellite NV v. ADIT, International Taxation, Circle-2(1),New Delhi. Pursuant to the directions given by the DRP the Assessing Officer passed assessment orders and taxed the income pertaining to satellite transmission service/telecasting companies as royalty income. This order of the Assessing Officer was challenged before the ITAT. The ITAT has allowed the appeal of the assessee. Perusal of the order of the Tribunal would reveal that it is relied upon the judgment of this Court in the case of Asia Satellite Communication Company Ltd. v. DIT and Vice Versa in I.T.A. Nos.131 and 134/2003 decided on 31.01.2001. Operative portion of the order of the Tribunal stating the manner in which the judgment of this Court in Asia Satellite?s case (supra) was relied upon, reads as under:-

3.2 Thereafter he drew our attention towards paragraph Nos.72 to 81 of the judgment. In paragraph No.72, it is mentioned that the Tribunal has made an attempt to trace the fund flow and observed that since the end customers being persons watching televisions in India are paying the amounts to cable operators who in turn are paying the same to TV Channels, the flow of fund is traced to India. This is a far-fetched ground to rope in payment received by the appellant in the taxation net. The Tribunal has glossed over an important fact that the money, which is received from the cable operators by the telecast operators, is treated as income by the telecast operators, which has accrued in India, and they have offered and paid tax. Thus, the income, which is generated in India, has been subjected to tax. It is the payment, which is made by the telecast operators who are situated abroad to the appellant, which is also a non-resident, i.e., sought to be brought within the tax net. It is concluded that it is difficult to accept such far-fetched reasoning with no causal connection. It may be mentioned here that the assessee has received revenues from Indian residents also, as can be seen from the table mentioned in the assessment order and reproduced by us while summarizing the order.

3.3 Thereafter he drew our attention towards paragraph No.79 of the judgment, in which it has been held that the Court is unable to subscribe to the view taken by the Tribunal in the impugned judgment on the interpretation of section 9(1)(vi) of the Act. Thus question No.3 was answered in favour of the assessee which is ? whether, on the facts and

in the circumstances of the case, the Tribunal was justified in holding that the amount paid to the appellant by its customers represented income by way of royalty as defined in Explanation 2 to Section 9(1)(vi) of the Act? In arriving at this decision, the Hon?ble Court inter alia referred to OECD convention, commentary thereon, commentary written by Klaus Vogel, decision in the case of Union of India and Another Vs. Azadi Bachao Aandolan and Another, (2003) ITR 706, CIT Vs. Ahamdabad Manufacturing and Calico Printing Company 139 ITR 806 (Gujarat), and CIT vs. Vishakhapatnam Port Trust, (1983) 144 ITR 146 (AP).

3.4 The revenue had also raised the question regarding applicability of section 9(1)(vii) for the first time before the Tribunal. Although this ground was admitted, it was not decided as the income was held to be assessable u/s 9(1)(VI). No argument was advanced by the learned counsel for the revenue before the Hon?ble Court in this matter. Therefore, the submission in the ground regarding applicability of section 9(1)(vii) was not accepted. The result of the decision is that the revenues received by the assessee is not taxable either u/s 9(1)(vi) or section 9(1)(vii) of the Act.? Learned Counsel for the Revenue could not dispute the positionthat issues raised in this appeal are directly covered by the judgmentofhis Court in the case of Asia Satellite Telecommunications Ltd. Vs. Commissioner of Income Tax (ITA 131/2003 decided on 31.01.2011). In that judgment, a categorical view is taken that the income received from the activities undertaken by the respondent/assessee would not be exigible to tax in India. Following that judgment, this appeal is dismissed.

9. Similar order was passed by the Hon'ble Delhi High Court in the case of *DIT(International Taxation) vs. Intelsat Corporation* (in ITA No.530 & 545/2012 dated 28.09.2012), wherein the Hon'ble High Court has held as under:

The Revenue claims to be aggrieved by the orders dated 2.2.2012 and 16.01.2012, whereby its appeals before the Tribunal were dismissed. The substantial question of law sought to be urged is whether the Tribunal fell into error in holding that the assessee did not incur any tax liability under provisions of the Income Tax Act? An elaborate discussion on the merits is not warranted since the impugned orderand notices are based upon a previous order of the Tribunal dated 4th March, 2011 (ITA 5443/Del/2010), for AY 2007-08 that was subsequently followed by the Tribunal in its own decision for AY 2006-07 (ITA No.4662/Del/2011). This Court by its judgment and order dated 19th August, 2011 in ITA No.977/2011, affirmed the findings of the Tribunal by a reasoned order. In view of these developments, no substantial question of law can be said to arise; there is no infirmity in the finding of the Tribunal with regard to the taxability of the

assessee for the assessment years in question i.e. 2006-07 and 2008-2009. The appeals are accordingly dismissed.

10. From the above case laws it is evident that similar payments received by the Intelsat Corporation USA have been held to be not chargeable to income tax in the hands of the same recipient. When this point is considered in light of the Hon'ble Apex Court decision in the case of *G. E. Technology Centre Pvt. Ltd.* (supra) it emerges that no liability fasten on the assessee to deduct tax at source on payments made to Intelsat Corporation USA. Hence, the additional grounds of the assessee deserve to be allowed. Accordingly, we hold that since the Hon'ble High Court has held that the payment was not income chargeable to tax in the hands of the same recipient, there was as a corollary no liability on the part of the assessee (the payer) to deduct tax at source on the similar payment made to the same payee. Hence, the assessee succeeds on the additional ground.

12. Since facts are identical and it is undisputed that the Hon'ble Delhi High Court has held that the payment is not taxable in the hands of the recipient. Respectfully following the precedent of the Hon'ble Apex Court in the case of *G. E. Technology Centre Pvt. Ltd.* (supra), we are of the considered opinion that when this income is not chargeable to tax in the hands of the recipient, no liability is there on the assessee to deduct tax at source. Accordingly, in the background of the aforesaid discussion and precedent, we set aside the orders of the authorities below and decide the issue in favour of the assessee.

13. Since the issue has been decided in favour of the assessee, the other limbs of the assessee's challenge in the grounds of appeal are treated as academic.

14. In the result, this appeal by the assessee stands allowed.

Order pronounced in the open court on 06.11.2018

Sd/-	Sd/-
(Ram Lal Negi)	(Shamim Yahya)
Judicial Member	Accountant Member

Mumbai; Dated : 06.11.2018
Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai