

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 397 OF 2015

The Commissioner of Income Tax-11 .. Appellant.  
v/s.  
M/s. NGC Networks (India) Pvt. Ltd., .. Respondent.

Mr. Charanjeet Chanderpal with Ms. Namita Shirke, for the Appellant.  
Mr. Diwesh Chawla with Mr. A. K. Jasani, for the Respondent.

**CORAM: M.S.SANKLECHA &  
RIYAZ I. CHAGLA, JJ.**

**DATE : 29<sup>th</sup> JANUARY, 2018.**

**P.C:-**

This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 9<sup>th</sup> July, 2014, passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order dated 9<sup>th</sup> July, 2014 is in respect of Assessment Year 2009-10.

2 Revenue urges the following question of law, for our consideration:

*“(a) Whether on the facts and in the circumstance of the case and in law, the Tribunal is justified in holding that the disallowance of Channel Placement Fee cannot be made u/s. 40(a)(ia) of the I.T.Act when the tax was deducted thereon u/s. 194C instead of Sec. 194J of the I.T. Act?”*

*“(b) Whether on the facts and in the circumstances of the case and in law, the Tribunal is justified in holding that the Channel Placement Fee is not in the nature of royalty u/s. 9(1)(vi) and so the tax is not required to be deducted u/s. 194J of the I.T. Act despite Explanation 6 thereto inserted w.e.f.01/06/1976?”*

3 **Re Question (a):-**

- (a) During the subject Assessment Year, the Respondent-Assessee had paid channel placement fee of Rs,7.18 Crores to the cable operators. On the aforesaid payment of tax, it had deducted tax at source under Section 194C of the Act at the rate of 2%. During the Assessment Proceedings, the Assessing Officer was of the view that the tax deducted at source on payment of Rs.7.18 Crores to the cable operator, had to be at the rate of 10% and not at the rate of 2%. This on the ground that, the provision applicable was Section 194J of the Act and not 194C of the Act, as the payment made, was in the nature of royalty, as defined in Explanation 6 to Section 9(1)(vii) of the Act. In the above view, in the draft Assessment Order dated 25<sup>th</sup> March, 2013 passed under Section 144C of the Act, the Assessing Officer disallowed the entire expenditure of Rs.7.18 Crores under Section 40(a)(ia) of the Act, for failure to deduct tax under Section 194J of the Act;
- (b) On receipt of the draft assessment order dated 25<sup>th</sup> March, 2013, the Respondent preferred its objections to it before the Dispute Resolution Panel (DRP). By an order dated 31<sup>st</sup> December, 2013, the DRP upheld the objections by holding that deduction of tax at source under Section 194C of the Act, was appropriately made by the Respondent as the payment made for channel placement fee, would not fall within the ambit of royalty as defined in Section 9(1)(vi) of the Act.
- (c) Consequent to the directions dated 31<sup>st</sup> December, 2013 of the DRP, the Assessing Officer passed as Assessment Order dated 20<sup>th</sup>

January, 2014 under Section 143(3) r/w. 144C(13) of the Act. Being aggrieved with the Assessment Order dated 20<sup>th</sup> January, 2014, the Revenue filed an appeal to the Tribunal. By the impugned order dated 9<sup>th</sup> July, 2014, the Tribunal by following a decision of Co-ordinate Bench in the case of *M/s. Channel Guide India Ltd., v/s. ACIT* (ITXA No. 1221/M/2006 rendered on 29<sup>th</sup> August, 2012) – held that Assessee is not liable to deduct the tax at source, at higher rates only on account of subsequent amendment made in Act, with retrospective effect from 1976. Thus, dismissed the Revenue's Appeal.

- (d) We find that view taken by the impugned order dated 9<sup>th</sup> July, 2014 of the Tribunal that a party cannot be called upon to perform an impossible Act i.e. to comply with a provision not in force at the relevant time but introduced later by retrospective amendment. This is in accord with the view taken by this Court in *CIT v/s. Cello Plast (2012) 209 Taxmann 617* – wherein this Court has applied the legal maxim *lex non cogit ad impossibilia* (law does not compel a man to do what he cannot possibly perform).
- (e) In the present facts, the amendment by introduction of Explanation-6 to Section 9(1)(vi) of the Act took place in the year 2012 with retrospective effect from 1976. This could not be have been contemplated by the Respondent when he made the payment which was subject to tax deduction at source under Section 144C of the Act during the subject Assessment Year, would require deduction under Section 144J of the Act due to some future amendment with retrospective effect.

- (f) Further, we also notice that under Section 40(a)(i) of the Act, under which the expenditure has been disallowed by the Revenue, meaning of royalty as defined therein, is that as provided in Explanation 2 to Section 9(1)(vi) of the Act and not Explanation 6 to Section 9(1)(vi) of the Act. Thus, the disallowance of expenditure under Section 40(a)(i) of the Act can only be if the payment is 'Royalty' in terms of Explanation 2 to Section 9 (1)(vi) of the Act. Undisputedly, the payment made for channel placement as a fee, is not royalty in terms of Explanation 2 to Section 9(1)(vi) of the Act. Therefore, no disallowance of expenditure under Section 40(a)(vi) of the Act, can be made in the present facts.
- (g) In the above view, as it is a self evident position from the reading Section 40(a)(i) of the Act, no substantial question of law. Thus, question (a) not entertained.

4 **Re Question (b):--**

- (a) In view of the appeal not being entertained on question (a), as pointed out herein above, the issue raised in question(b) becomes academic. This is so, as irrespective of the nature of payment made in the present facts, no expenditure can be disallowed under Section 40(a)(i) of the Act in respect of fee paid for Channel Placement.
- (b) Thus, question (b) in these facts being academic, does not give rise to any substantial question of law. Thus, not entertained.

5 Accordingly, **Appeal dismissed.** No order as to costs.

**(RIYAZ I. CHAGLA,J.)**

**(M.S.SANKLECHA,J.)**