<u>आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'बी', मुंबई ।</u>

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

BEFORE SHRI R.C.SHARMA, AM
&
SHRI RAM LAL NEGI, JM

आयकर अपील सं./**ITA No.4010&4011/Mum/2014**

(**निर्धारण वर्ष /** Assessment Year :2010-11 & 2011-12)

Neo Sports Broadcast Pvt. Ltd., Nimbus Centre, Oberoi Complex, Andheri(W), Mumbai-400053	Vs.	CIT(TDS), Charni Road, Mumbai-400002
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AACCN 2854 Q**		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

निर्धारिती **की ओर से** /Assessee by : Dr. K.Shivram

राजस्व **की ओर से** /Revenue by : Shri N.P.Singh

सुनवाई की तारीख **/ Date of Hearing : 02/12/2015**

घोषणा की तारीख**/Date of Pronouncement : 19/02/2016**

<u>आदेश / O R D E R</u>

<u>PER R.C.SHARMA (A.M.)</u> **:**

These are the appeals filed by the assessee against the order of CIT, Mumbai, for the assessment years 2010-11 & 2011-2012, in matter of order passed u/s.263 of the I.T.Act.

2. In both these appeals common grievance of assessee relates to CIT's direction to subject the reimbursement of bank guarantee commission u/s.194A @10%, in place of deduction done by the AO u/s.194C @2%.

3. Rival contentions have been heard and record perused. Facts in brief are that the assessee company is engaged in the business of broadcasting. It has two channels namely Neo Cricket and Neo Sports. The assessee(NEO) is a step-down subsidiary of Zenith Sports Pvt. Ltd. ,

a subsidiary of Nimbus Communication Ud.(NCL), the main company of the Nimbus Group. The group is engaged in the business of acquiring telecast rights of BCCl's Cricket matches, apart from IPL, being organized in India and broadcasting the same through two of its sports channels namely Neo Sports(exclusively within Indian territory) and Neo Cricket (lndia as well as its neighbouring countries). The NCL has acquired the telecast rights from BCCI in respect of cricket matches played in India for which as per terms of agreement between BCCI and NCL, NCL was under obligation to provide for the Bank Guarantee to BCCI for Rs.2000 Crore. To secure this, NCL has been paying Bank Guarantee Commission (BGC) to various banks year after year as per agreed terms. NCL has entered into another agreement with the assessee (NEO) for telecast of the cricket matches for which NCL has set a condition that 80% of the BGC has to be reimbursed to it by the assessee. Accordingly during the F.Y.2009-10 relevant to A.Y.2010-2011 the assessee reimbursed Rs.21,31,28,582/- to Nibus Communication Limited(NCL). No tax has been deducted at source on these payments by the assessee. In order passed u/s.201(1)/201(1A) dt.18.03.2012, ITO(TDS)-2(4) treated that these payments are subject to TDS u/s.194C and passed order accordingly. However, the CIT did not accept the provisions of Section 194C invoked by the AO and held that payment of bank guarantee commission was in the nature of interest, therefore, assessee was liable for deduction of tax at source @10% u/s.194A. As per CIT, the order passed by AO was erroneous as well as prejudicial to the interest of

revenue. Against this order of CIT u/s.263, the assessee is in further appeal before us.

4. It was argued by ld. AR Dr. K.Shivram that the AO after analyzing the nature of payment had applied the relevant provisions of law and made the assessee liable for payment of TDS u/s.194C. As per ld. AR if two views are possible revision cannot be done and for this purpose he placed reliance on the decision of Hon'ble Supreme Court reported at 295 ITR 282, 243 ITR 83 & 372 ITR 303. He further contended that provisions of Section 194 is not applicable because there was no element of profit for the reimbursement so made. For this purpose he placed reliance on the decision of Hon'ble Bombay High Court reported at 375 ITR 364. In support of the proposition that bank guarantee commission is not in the nature of interest, he placed reliance on the decision of Hon'ble Delhi High court in the case reported at 355 ITR 94.

5. Ld. AR further placed reliance on the decision of the Mumbai Tribunal in the case of Kotak Securities Ltd. in support of the proposition that no TDS is required to be deducted in case of payment of bank guarantee commission to the bank, since the payment of commission was not principal to agent but was on principal to principal basis. Reliance was also placed on the decision of Mumbai Tribunal in the case of Holding Company M/s Nimbus Communications Ltd. in ITA No.3156&3157/Mum/2014, order dated 6-11-2015, wherein the Tribunal held that no TDS is required to deduct tax on such bank guarantee

commission and the AO was wrong in applying provisions of Section 201(1)&201(1)A of the Act.

6. On the other hand, ld. CIT DR contended that incorrect interpretation of law and facts by the AO renders the order of AO erroneous as well as prejudicial to the interest of revenue, therefore, the CIT was justified in invoking his power u/s.263. He placed reliance on the order of Hon'ble Madras High Court in the case of Viswapriya Financial Services, 258 ITR 496 in support of the proposition that any charges paid for services rendered is coming under the definition of the interest u/s.2(28A), accordingly CIT has correctly held that assessee was required to deduct tax on such bank guarantee commission u/s.194A.

7. We have considered rival contentions, carefully gone through the orders of authorities below and deliberated the judicial pronouncements cited by ld. AR and DR as well as relied on by the lower authorities in their respective orders. From the record we found that an agreement was entered between assessee Neo Sports Broadcast Private Limited (Neo) and Nimbus Communications Limited (NCL) for transfer of media rights of BCCI matches. It was agreed that New Shall reimburse NCL 80% of the cost incurred in providing Bank Guarantee to BCCI and thereby to the extent of 80% of Bank Guarantee was joint and several liability, primarily of assessee, who had acquired the rights from NCL and secondary liability was of NCL who had acquired rights from BCCI. BCCI was concerned with the Bank Guarantee for the media rights fees to be received from NCL/Neo. It is not the case that NCL has given any

guarantee to BCCI for and on behalf of Neo. NCL has received the reimbursement of the Bank Guarantee Commission (BGC) paid to the Banks from Neo towards its 80% share. We found that only one bank Guarantee was taken jointly by Neo and NCL which was given to BCCI and there is BGC payment to banks either by NCL directly to the extent of 20% or by Neo directly to the banks to the extent of 80%. In case BGC payment is first made by NCL to the banks, 80% of BGC is reimbursed by Neo to NCL. We found that AO has dealt with the issue very elaborately and after taking into consideration the provisions of Section 194H and 194C came to the conclusion that assessee was liable to deduction of tax on the reimbursement of bank guarantee u/s.194C of the Act.

8. As regards applicability of TDS provisions, not two but three views exist on the impugned issue - (i) TDS u/s 194H - which was discussed by AO in the assessment order dt. 18/3/2012; TDS u/s 194C - which was discussed and upheld by AO in the assessment order dt. 18/3/2012; TDS u/s.194A - (which the assessee does not agree with) and not sought to be taken by CIT. Revision of order u/s 263 cannot be done if two views are possible on the issue. Hon'ble Supreme Court in the case of CIT v. Max India Limited [2007] 295 ITR 282 (SC) held as under :-

> *"The phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an ITO adopts one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the ITO is unsustainable in law .*

Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83 (SC) held as under :-

> *In case of a debatable issue on which more than one plausible view is reasonably possible and if Assessing Officer takes one plausible view, it cannot be said that assessment is erroneous or prejudicial to interest of revenue.*

In the case of Grasim Industries Ltd. vs. CIT [2010] 321 ITR 92, it has been held as under :-

> *"If the Assessing Officer has taken a possible view, it cannot be said that the view taken by him is erroneous nor the order of the Assessing Officer in that case can be set aside in revision. It has to be shown unmistakably that the-order of the Assessing Officer is unsustainable. Anything short of that would not clothe the Commissioner with jurisdiction to exercise power under section 263."*

9. With regard to CIT's contention that bank guarantee commission is in the nature of interest, therefore, the AO was required to deduct tax u/s.194A, we found that as per CBDT Notification No.56, no tax is required to be deducted on various commission paid to the bank including bank guarantee under any provisions of Income Tax Act. It is a matter of record that Neo has not obtained any services from NCL and in no circumstances it can be treated as interest within the definition of section 2(28A) of the Income Tax Act, 1961. Furthermore, the ultimate beneficiary of bank guarantee commission (name itself suggests guarantee commission paid to the banks) is Bank and it cannot be treated as BGC paid to NCL since NCL has not provided any guarantee for and on behalf of Neo to any third party or BCCI. The provisions of Section 194A are not applicable on any payment made to any baking company to which the Banking Regulation Act, 1949 applies as in the case of assessee, the

payment reimbursed to NCL towards BGC is what is paid by NCL to Banks. The case law relied on by the ld. DR is not applicable to the facts of the instant case, insofar as the assessee has not taken any loan or deposit from the investors. In case decided by Hon'ble Madras High Court in the case of Viswapriya Financial Services(supra), the assessee was required to pay 1.5% to the investors, which was held by the Hon'ble High Court as subject to deduction of tax u/s.194A.

10. Section 194A(1) is applicable only to "income by way of interest". However, the impugned transaction is that of reimbursement of bank guarantee commission and does not involve payment of interest. There is no borrowing whatsoever. "Interest" as per sec. 2(28A) means "interest payable ... in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred ... " In the case of CIT v. Car gill Global Trading Co. (P.) Ltd. [2011J 335 ITR 94, Hon'ble Delhi High Court held as under :-

> *"It is clear from the provisions of section 2(28A) that before any amount paid is construed as interest, it has to be established that the same is payable in respect of any money borrowed or debt incurred. In the instant case, on the aforesaid facts appearing on record, the Tribunal rightly held that the discounting charges paid were not in respect of any debt incurred or money borrowed, instead, the assessee had merely discounted the sale consideration respectively on sale of goods."*

CBDT Circular No. 202 dt. 5/7/1976 - [1976J 105 ITR (St.) 17, pg. 24 para 12.1, provides that :-

> *Definition of interest u/s 2(28A) covers "interest payable in any manner in respect of loans, debts, deposits, claims and other similar rights or obligations. This definition will be applicable for all purposes of the Income-tax Act."*

11. CBDT circulars are binding on the Revenue. Therefore, Department cannot invoke provisions of sec. 194A r.w.s. 2(28A) to the impugned transaction which does not relate to loans, deposit, money etc. as held by Hon'ble Supreme Court in the case of UCO Bank v. CIT [1999J 237 ITR 889 (SC).

12. In the instant case, there is no money borrowed or debt incurred. Therefore, provisions of sec. 2(28A) and sec. 194A do not apply. Payment made to NCL is not "income by way of interest". The impugned receipt would be in the nature of reimbursement of expenses incurred by it. In view of the above discussion, we do not find any merit in the order passed u/s.263 in respect of one of the possible view taken by the AO. Even on merit, we found that bank guarantee commission does not come under the purview of interest so as to make assessee liable for TDS u/s.194A.

13. In the result both appeals of the assessee are allowed.

Order pronounced in the open court on this 19/02/2016

Sd/-	**Sd/-**
(RAM LAL NEGI)	**(R.C.SHARMA)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक Dated 19/02/2016

प्र.कु.मि/pkm, नि.स/ PS

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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