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

BEFORE SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER AND DR. S.T.M PAVALAN, JUDICIAL MEMBER

ITA No. 5826/Mum/2011
Assessment Year : 2008-09

Highlight Pictures (India) Pvt. Ltd. Mahalaxmi Silk Mills Premises Mathurdas Mill Compound N.M. Joshi Marg Lower Parel Mumbai-400 013. PAN No.AAACB 6674 L	Vs.	ACIT -11(1)(2) Aayakar Bhavan M.K. Road Mumbai-400 020.
(Appellant)		(Respondent)

Assessee by	:	Shri F.V. Irani
Revenue by	:	Shri G.N. Makwana

Date of hearing	:	27/08/2013
Date of Pronouncement	:	30/08/2013

O R D E R

PER B. RAMAKOTAIAH, AM:

This is an assessee's appeal against the order of CIT(A)-3, Mumbai dated 30.6.2011 . The assessee raised six grounds and one additional ground on various issues. We have heard the ld. Counsel and the ld. DR in detail.

2. Ground Nos.1 to 4 and additional ground pertain to the issue of disallowance under section 40(a)(ia). The AO noticed that the assessee has deducted TDS u/s 194 C in respect of payments which are in nature of fees for technical and profession services or rent on which TDS should

have been deducted as per provisions of section 194 I or 194 H. AO was of the view that where specific provisions for deduction of tax at source are provided under section 194I, 194H, then the provisions of residuary section 194C would not apply. The AO observed that the assessee has deducted TDS @ 2.06% u/s 194 C on the payment made on Art Designing and Film Post Production whereas the TDS should have been deducted @5.61% u/s 194J of the Act as the services rendered by Prime Focus are in the nature of editing of films, hence these are in the nature of fees for professional/technical services as defined under Explanation 2 to section 9(1)(vii) of the Act; hence provision of section 194J would apply for TDS on such payments. Accordingly the AO disallowed the same u/s 40(a) (ia) of the Act. The TDS in the payments under location hire charges deducted u/s 194C @ 2.06% whereas the payment should have been made @ 22.44% u/s 194I, as the location hire charges are the expenses on equipment/ location hired the production houses are deducting tax u/s 194I with applicable rate of 15 to 20%. AO disallowed the short deduction on account payment made under location hire charges. The AO has supported his view by case law in the case of CIT Vs. Prasar Bharti (2007) 292 ITR 580 (Del), Chambers of Commerce of Income-tax Consultant v CBDT 75 Taxman 669 (Bom) and All Gujarat Federation v CBDT 214 ITR 2.

3. It was contended before the ld. CIT(A) that the assessee has correctly deducted tax under section 194C and provisions of section 40(a)(ia) are not applicable for short deduction of tax. The ld. CIT(A) however, did not agree and confirmed the disallowance made by the AO.

3.1 It was submitted that the provisions of section 40(a)(ia) can only be invoked if there is no deduction of tax but not in a case where there was short deduction. The ld. Counsel relied on the decision of *Hon'ble High Court of Calcutta* in the case of *CIT-Kolkata-XI vs. M/s. S.K. Tekriwal ITAT*

No.183 of 2012, dated 03/12/2012 in support. The other contentions raised by the ld. Counsel are that provisions of section 40(a)(ia) cannot be invoked as the amount was not payable at the end of the year as held by the *Special Bench of the ITAT, Vizag* in the case of *Merilyn Shipping & Transports Vs Addl. CIT, Range-1[136 ITD 23(SB]).* Further, on merits it was contended that the assessee has correctly deducted tax under section 194C and no proceedings under section 201 were initiated for any short deduction of tax.

4. The ld. DR however relied on the orders of the authorities.

5. We have considered the issue. Without going into the merits whether the provisions of section 194C will apply or 194I or 194J will apply, the issue can be decided under the provisions of section 40(a)(ia) which was invoked by the AO. The said provision is as under :-

> *"40. Amounts not deductible.--Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",--*
>
> *(a) in the case of any assessee--*
>
> .
>
> .
>
> .
>
> *(ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work),* ***on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139****."* *(Emphasis supplied.)*

5.1 As can be seen from the above provision, this can be invoked only when tax has not been deducted or has not been paid as per the provisions. In this case the assessee has already deducted tax if not under section 194I or 194J but under 194C. It is not a case of non-deduction of tax or no-deduction of tax as per the import of section 40(a)(ia) of the Act. We are of the opinion that when tax was deducted by the assessee, even under bonafide impression under wrong provisions of TDS, the provisions of section 40(a)(ia) can not be invoked. This principle is being followed uniformly by various co-ordinate Benches and has the approval of Calcutta High Court in the case of CIT vs. M/s. S.K. Tekriwal (supra) relied on by the assessee. Therefore, we are of the opinion that disallowance under section 40(a)(ia) does not arise in this case. The other contentions raised by the ld. Counsel need not be adjudicated as provisions of section 40(a)(ia) can not be invoked in a case of shortfall of TDS. Moreover, the revenue has also not taken any steps u/s. 201 wherein the issue whether the deduction has to be made u/s. 194I or 194J or 194C can be considered/ examined. The ground 1 to 4 and additional ground raised are considered as allowed.

6. Ground No.5 pertain to disallowance of depreciation on paintings which were part of furniture and fixtures. The assessee is in the business of production and distribution of advertising films and over and above it also provides assistance like making availability of locations, equipments, models and crew to the foreign as well as domestic companies. The assessee claimed depreciation on certain paintings purchased by it on the reason that these are utilized in the said preparation/advertising films etc. AO however was of the opinion that depreciation can not be allowed on the paintings as he was of the opinion that presence of paintings is immaterial for the conduct of business. The ld. CIT(A) confirmed the opinion of Assessing Officer on the reason that no live evidence was produced for using the paintings in advertising of films. He further considered that these are more of the nature of personal effects.

7. After considering the rival contentions we agree with the claim of assessee. Obviously assessee is in the business of producing ad-films or assisting in locations, settings etc., which is its nature of business. It was submitted that hiring of the paintings for original shoots was unaffordable. Therefore, they have purchased and utilized the paintings which were either hung in the office or given to the producer for the original shoots, or used in various setting. Therefore, the claim was that paintings are also part of furniture. This opinion is supported by the decision of co-ordinate Bench at Chennai in the case of *Burnside Investments & Holdings Ltd. vs. Dy. CIT* (61 ITD 601), wherein similar issue was considered and depreciation on paintings was allowed. It was held that :

> *FACTS*
>
> *"The assessee-company was denied depreciation on paintings which, according to the assessee, constituted part of interior decoration and part of the furniture and fittings used in the course of business. The Assessing Officer was of the opinion that such paintings could not be taken to constitute items of furniture and fittings. On appeal, the Commissioner (Appeals), upheld the Assessing Officer's order.*
>
> *HELD*
>
> *From the dictionary meaning of the word 'furniture', it is clear that all articles of convenience or decoration used for the purpose of furnishing a place of business or an office are articles of furniture.*
>
> *In the instant case, there was no dispute that these paintings were used as decorations in the office and the office was used for the purpose of business. Therefore, these paintings constitute interior decoration to give a good look to the place of business. Therefore, the assessee was entitled to depreciation on these paintings."*

7.1 Respectfully following the same we direct AO to allow depreciation as claimed under the head furniture and fixtures. Ground is allowed.

8. Ground No.6 pertains to disallowance of 25% of expenditure paid in cash on adhoc basis for the reason of non verifiability of expenditure

by AO and confirmed by ld. CIT(A). It was pointed out that the assessee paid Rs.20,15,703/- in cash out of the total expenditure of Rs.3,74,21,577/- which is about 5% and mostly for art designing, location hire, production shoot expenses and travelling and wardrobe expenses. It was further submitted that out of the administrative expenses of Rs.56,69,514/- the cash expenses are only Rs.3,54,887/- which is about 6% of the total expenditure. It was the submission that in the nature of business of the assessee some payments are to be made in cash and same cannot be disallowed on the reason of non-verifiable nature. Even otherwise, it was submitted that the disallowance at 25% is very high. The ld. DR supported the orders of Assessing Officer.

8.1 We have considered the issue. There is no dispute with reference to the fact that assessee's business requires on site expenditure for various production shootings, wardrobe expenses etc. As seen from the claims 95% of the expenditure was by way of cheques and AO allowed the entire amount as such. Therefore, we are of opinion that disallowance of 25% of the cash expenses is not warranted. However, since expenditure is un verifiable in nature, we are of the opinion that disallowance can be restricted to 5% of the cash expenses which should meet ends of justice. AO is directed to reduce the disallowance accordingly. The ground is partly allowed.

9. In the result, assessee appeal is partly allowed.

Order pronounced in the open court on 30th August, 2013.

Sd/-	**Sd/-**
(DR. S.T.M PAVALAN)	**(B. RAMAKOTAIAH)**
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dated: 30/08/2013.
Jv.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT(A) Concerned, Mumbai
The DR " " Bench

True Copy

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.