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

Before Shri R.S. Syal, Accountant Member and
Dr. S.T.M. Pavalan, Judicial Member

ITA No.7834 & 7645/Mum/2010
(Assessment year: 2007-08)

Cinetek Telefilms P.Ltd. 2503 Silver Arch Bldg, No. B-29 Shastri Nagar, Andheri (West) Mumbai 400053. PAN: AABCC8145N	Vs.	ACIT 11(1) Aayakar Bhavan, M.K.Road, Mumbai 400020
(Appellant)		**(Respondent)**

Assessee by: Shri Vipul Joshi
Department by: Shri Rajashri Dwivedy

Date of Hearing: 05/06/2013
Date of Pronouncement: 07/06/2013

<u>O R D E R</u>

Per R.S. Syal, A.M.

These two cross appeals - one by the assessee and the other by the Revenue arise out of the order passed by the CIT(A) on 20.08.2010 in relation to the assessment year 2007-08.

2. Briefly stated the facts of the case are that the assessee is engaged in the business of making T.V. serials and add films. The AO noticed that certain expenses were incurred by assessee on which tax was deductible, but the assessee either did not deduct tax at source at all or deducted at lower rate. This position has been tabulated on page 4 of the assessment order as under:-

SHORT-DEDUCTION – Table 1:

Sl. No.	*Head of expenses*	*Name*	*Total Tax deducted*	*Total payment*	*Rate at which tax should have been deducted (%)*	*Actual amt. on which tax deducted*	*Amount on which tax not deducted*
(i)	*(ii)*	*(iii)*	*(iv)*	*(v)*	*(vi)*	*(vii) (iv/vix 100)*	*(viii) (v-vii)*
1	Professional	Sanjay Sawant	450	62,000	5.61		**53,979**

						8,021	
2	Location Expenses	Aram Studio	20810	750,000	22.44	92,736	**657,264**
3	Property hire	Stage Star Multimedia	60480	2,700,000	22.44	269,519	**2,430,481**
4	Studio Hire	Aram Studio	15,544	7,54,555	22.44	69,269	**685,286**
		S.J. Studio	4,350	1,75,000	22.44	19,385	**155,615**
5	Equipment Hire	Two Star	4816	234,000	22,44	21,462	**212,538**
		A.S.Vision P. Ltd.	86960	443,200	22,44	164,706	**278,494**
		Roshni Audiomatics	5152	340,800	22,44	22,959	**317,841**
6	Sound Recordist	Arun Nadkar	784	59,100	5.61	13,975	**45,125**
7	Camera Fees	Eugene D'souza	7013	124,999	16.83	41,670	**83,329**
		Lenin Zavier	67320	1,276,000	16.83	400,000	**876,000**
		Sanjay Memane	11221	175,000	16.83	66,673	**108,327**
8	Artist Fees	Sanjay Sharma	2805	252,805	5.61	50,000	**202,805**
		Shabnam Merchant	2805	152,805	5.61	50,000	**102,805**
		Siddharth Jadhav	561	21,000	5.61	10,000	**11,000**
		Samita Sharma	561	23,000	5.61	10,000	**13,000**
						Total	**6,233.890**

<u>NON-DEDUCTION- Table 2</u>:

Sl. No.		*Head of Expenses*	*Total payment*	*Tax deducted*	*Amount on which tax not deducted*
(i)	*(ii)*	*(iii)*	*(iv)*	*(v)*	*(ii)* *(iv-v)*
1	Shri Sharma	Professional fees	20,590	--	20,590
2	Saroj Traders	Set Construction	5,09,776	--	5,09,776
3	Filmistan	Studio Hire	2,15,397	--	2,15,397
4	Ranveer	Editor fees	48,000	--	48,000
5	Anuradha		75,980	--	75,980
6	Preeta	Artist fees	27,000	--	27,000
				Total	**8,96,743**

3. Resultantly disallowance was made u/s 40(a)(ia) for Rs. 71,30,633/- (Rs. 62,33,890 for short deduction and Rs. 8,96,743/- for non-deduction of tax at source). The Ld. CIT(A) entertained some additional evidence. On that basis, he deleted certain disallowances and confirmed the remaining.

4. First ground of the assessee's appeal is against the confirmation of disallowance u/s 40(a)(ia) in respect of

(a) Rs. 62,000/- paid to Shri Sanjay Sawant towards short-deduction

(b) Rs. 1,75,000/- paid to S.J. Studio and Entertainment Pvt. Ltd. for short-deduction

(c) Rs. 2,34,000/- paid to Two Star Enterprises for short-deduction

(d) Rs. 4,43,200/- paid to A.S. Vision Pvt. Ltd. for short-deduction

(e) Rs. 3,40,800/- paid to Roshni Audiomatics for short-deduction

(f) Rs. 2,52,805/- paid to Sanjeev Sharma towards short deduction, and

(g) Rs. 1,52,805 paid to Shabnam Merchant towards short-deduction.

5. All the items mentioned above against the respective names find place in Table 1 of the assessment order being the instances of short-deduction of tax at source calling for disallowance u/s 40(a)(ia). The short question which requires our adjudication is as to whether disallowance u/s 40(a)(ia) can be made where the assessee short-deducted tax at source instead of non-deduction of tax at source. It is seen that in some cases, the assessee treated the payment as covered u/s 194C of the Act whereas the authorities below have treated such payment as covered u/s 194I etc. thereby resulting into short deduction of tax at source. In our considered opinion this issue is no more *res integra* in view of several orders passed by various benches of the Tribunal across the country holding that short-deduction of tax at source cannot lead to disallowance u/s 40(a)(ia). To cite a few, we make a mention of *U.E. Trade Corporation (India) Ltd. Vs. DCIT (2012) 54 SOT 596 (Delhi)* and *DCIT Vs. Tekriwal (2011) 48 SOT 515 (Kolkata).* It has been brought to our notice that the above referred order passed by the *Kolkata* Bench of the Tribunal has been upheld by the Hon'ble Calcutta High Court in *CIT Vs. S.K. Tekriwal* vide its judgment dated 03.12.2012. A copy of the said judgment has been placed on record. In all these cases, it has been held that provision of section 40(a)(ia) do not apply in case of short fall in

the deduction of tax at source. No contrary precedent has been brought to our notice by the Ld. Departmental Representative. Respectfully following the above referred cases, we hold that the Ld. CIT(A) was not justified in sustaining disallowance u/s 40(a)(ia) in respect of expenses on which short deduction of tax at source was made. Resultantly, ground no.1 of the assessee's appeal is allowed.

6. Ground No.2 of the assessee's appeal is against the confirmation of disallowance u/s 40(a)(ia) for non deduction of tax at source on the following amounts.

a) Mr. Ranveer towards editor fees Rs. 48,000/-

b) Mr. Anuradha towards artist fees Rs. 75,980/-

c) Ms. Preeta towards artist fees Rs. 27,000/-

The AO made disallowance u/s 40(a)(ia) for non-deduction of tax at source, *inter alia*, in respect of the above three items covered in Table 2 of the assessment order. The Ld. CIT(A) got convinced with the assessee's explanation in respect of the other items of non-deduction at source not warranting any disallowance u/s 40(a)(ia) except the above referred three items. He noticed that the assessee did not even give complete identification of the above three recipients except for making a sweeping statement that these were temporary employees. The Ld. CIT(A) noticed that the payment details clearly indicated that these were in the category of `professional and technical services' requiring deduction of tax at source u/s 194J of the Act.

7. After considering the rival submissions and perusing the relevant material on record, we find from the nature of payments as mentioned above that these are in the category of professional and technical services. The assessee has placed no material on record to prove that these were small time employees engaged on temporary basis. What to talk of furnishing complete details, the assessee did not give even complete identification of these three persons before the authorities below. The position continues to remain the same before us as well. There is no denying the fact that the

assessee did not deduct any tax at source from these payments. Since these payments are in the nature of fees for professional and technical services requiring deduction of tax at source u/s 194J, the act of the assessee in making these payments without deduction of tax at source, clearly brought this case within the mischief of section 40(a)(ia). This ground is therefore, not allowed.

8. Ground Nos. 1 and 4 of the Revenue's appeal are against the deletion of addition on account of payment of location expenses of Rs. 6,57,26,420/- to Aaram Studio; Rs. 24,30,484/- to Stage Star Multimedia towards property hire charges and Rs. 6,85,286/- to Aaram Studio for studio hire charges. Admittedly, these amounts were paid by the assessee after deduction of tax at source but at lower than the eligible rate. The discussion made while dealing with ground No.1 of the assessee's appeal is fully applicable in respect of these ground as well. In view of our decision given on ground No.1 of the assessee's appeal, we uphold the finding given by the Ld. CIT(A) in respect of these grounds on this legal issue.

9. Ground No.2 of the appeal is against the deletion of addition of Rs. 5,09,776/- towards payment made to Saroj Traders on account of Set Construction Expenses. Ground No.3 is against the admission of fresh evidence by the Ld. CIT(A) without confronting the same to the AO. The facts apropos this issue are that the AO made the disallowance because the assessee did not deduct any tax at source before making this payment. It was argued before the Ld. CIT(A) that the payment of Rs. 5,09,776/- made to Saroj Traders was on account of purchases made for set construction. Copies of purchase bills were also submitted. The Ld. CIT(A) ordered to delete this disallowance in view of the fact that it represented payments made for purchase of material for set construction. On a pertinent query, it was fairly admitted on behalf of the assessee that these purchase bills were not submitted before the AO. It is noticed from the impugned order that the Ld. CIT(A) did not call for any remand report from the AO before admission of this additional evidence. In our considered opinion, the ends of justice

would meet adequately if the impugned order on this issue is set aside and the matter is restored to the file of AO for making a proper verification in this regard. We order accordingly and direct the AO to decide this issue afresh in the light of additional evidence placed before the Ld. CIT(A). Needless to say, the assessee will be at liberty to file any other fresh evidence during the course of such proceedings.

10. In the result the assessee's appeal is partly allowed and that of the revenue is partly allowed for statistical purposes.

Order pronounced in the open court on 07th June, 2013

Sd/-	Sd/-
(Dr S.T.M. Pavalan)	**(R.S. Syal)**
Judicial Member	**Accountant Member**

Mumbai, dated 07th June, 2013.

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

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

By Order

Assistant Registrar
Income Tax Appellate Tribunal,
Mumbai Benches, MUMBAI