**IN THE INCOME TAX APPELLATE TRIBUNAL**
**"B" BENCH : BANGALORE**

**BEFORE SMT. BEENA PILLAI, JUDICIAL MEMBER**
**AND**
**SHRI. O.P. MEENA, ACCOUNTANT MEMBER**

| **ITA Nos.1213 to1215/Bang/2018 AND ITA No. 736/Bang/2018** |
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| **Asst. Yrs: 2011 – 2012 to 2014 – 15** |

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| M/s. Vidal Health Insurance TPA Pvt. Ltd.,<br>1st Floor, Tower – 2,<br>SJR I Park, EPIP Zone,<br>Whitefield,<br>Bangalore – 560 066.<br>**PAN NO : AABCT9272F** | **Vs.** | The Joint Commissioner of Income – tax (OSD),<br>BMTC Building,<br>80 Feet Road,<br>Koramangala,<br>Bangalore – 560 095. |
| **APPELLANT** | | **RESPONDENT** |

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| Appellant by | : | Shri. Ajay Rotti, C.A |
| Respondent by | : | Shri. Muzaffar Hussain CIT – DR |

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| Date of Hearing | : | 20.01.2020 |
| Date of Pronouncement | : | 26.02.2020 |

## ORDER

**PER BEENA PILLAI, JUDICIAL MEMBER :**

Present appeals have been filed by assessee against order passed dated, 02/01/2018 and consolidated order 02/02/2018 by

Ld. CIT (A)-7, Bangalore, for assessment year 2014 – 15 and 2011 – 12 to 2013 – 14 respectively.

**2.** At the outset, Ld. AR submitted that, facts and circumstances in all years under consideration are identical and similar to each other, insofar as disallowance made by Ld. AO and confirmed by Ld. CIT(A) involves same issues. He submitted that Ld. CIT(A) passed impugned order for assessment year 2014 – 15 on earlier date, was followed in consolidated order for assessment year 2011 – 12 to 2013 – 14. For the reason stated above, Ld. AR submitted that, it would be convenient to consider grounds of appeal for assessment year 2014 – 15 which is followed by Ld. CIT(A) in other years under consideration. In addition to common issues arised in years under consideration, Ld. AR submitted that for assessment year 2012 – 13 there is additional issue in respect of restricting depreciation on batteries and UPS at 15% as against 60% claimed by assessee.

**2.1.** Ld. CIT DR do not have any objection in considering assessment year 2014 – 15 as requested by Ld. AR. For sake of convenience, we reproduce herewith, grounds raised by assessee for A.Y: 2014 – 15.

1. ***Disallowance of expenses incurred towards toll free telephone charges u/s. 40(a)(ia) of the Income-tax Act,1961 ('the Act')***

*1.1. The learned Assistant Commissioner of Income-tax Circle 7(1)(2), Bangalore['ACIT' or 'AO']erred in disallowing expenditure of Rs.58,80,650 incurred towards toll-free telephone charges under section 40(a)(ia) of the Act for non-deduction of taxes under section 194J of the Act on the basis that the payments would qualify as 'royalty' under the Act. The leaned Commissioner of Income-tax (Appeals)-7 Bangalore ['CIT(A)"] erred in upholding the finding of the learned AO.*

*1.2. Without Prejudice to the above, the learned AO and the learned CIT (A) erred in not taking cognizance of the Appellant's contention that for the purposes of disallowance under section 40 (a)(ia) of the Act, the term royalty would be restricted to the definition as provided under Explanation 2 to section 9(1)(iv) of the Act and would, therefore, not include payments for toll free telephone charges provided under Explanation 6 to section 9(1)(iv) of the Act.*

*1.3. The learned CIT(A) erred in not directing the learned AO to verify and allow relief based on the certificates in from 26A that the Appellant proposes to file with the learned AO, in line with second proviso to section 40(a)(ia), read with first proviso to section 201(1) of the Act.*

***2. Addition of difference of receipts appearing in form 26AS to the income of the Appellant as undisclosed income***

*2.1. The learned AO erred in making an addition to the Appellant on the basis that unreconciled income of Rs.5,59,513 appearing in Form No. 26AS vis-à-vis the books of account represents undisclosed income. The learned CIT(A) erred in upholding the action of the learned AO.*

*2.2. The learned AO and the learned CIT(A) erred in not appreciating the fact that the amounts appearing in Form 26AS cannot be a legally sustainable basis for making additions to the income of the Appellant.*

*The learned AO and the learned CIT(A) failed to appreciate that the Appellant would be liable to income tax on the income recognized under mercantile basis (as is evidenced by the audited financial statements), whereas amounts appearing in From No. 26AS merely represent amount "paid" or "credited" to a taxpayer which has been subjects to deduction of taxes under the Act.*

*2.3. The learned AO and the learned CIT(A) failed to appreciate that the Appellant recognizes revenue using the proportionate Completion Method in line with the requirements of Accounting Standard -9 on 'Revenue Recognition' issued by the Institute of Chartered Accountants of India.*

*2.4. The learned AO and the learned CIT(A) erred in not appreciating the fact that the discrepancies in receipts as per books of account vis-a-vis the Form No.26AS is merely a timing difference.*

*2.5. Without prejudice to the above, the learned CIT (A) erred in not directing the learned AO to allow relief in previous/ subsequent assessment years in which the aforesaid income of Rs. 5,59,91,513 has been offered to income-tax by the Appellant in its income-tax returns.*

***3. Non-grant of credit for tax deducted at source ('TDS') credit***

*3.1. The learned AO erred in denying TDS credit of Rs. 1,00,93,973 available to the Appellant for Ay 2014-15 on the basis that the underlying income pertains to other assessment years.*

*3.2. Without prejudice to the above, the learned AO, after having reached a finding that TDS credit of Rs. 1,00,93,973 pertained to previous assessment years, erred in not allowing TDS Credit in such assessment years where the underlying income was offered to tax by the Appellant. The learned CIT(A) erred in not directing the learned AO to allow TDS credit in earlier assessment years in which the underlying income was offered to tax by the Appellant.*

*3.3. The learned CIT(A) erred in not directing the learned AO to grant TDS credit for AY 2014-15 as per the latest Form No. 26AS, thereby resulting in non-grant of TDS credit of Rs. 12,04,317 (being TDS credit as per latest From 26AS of Rs.591,64,877 less TDS credit of Rs. 57,960,560 claimed in the return of income).*

***4. Relief***

*4.1. The Appellant prays that directions be given to grant all such relief arising from the preceding grounds as also all reliefs consequential thereto.*

*The Appellant Craves to add to or alter, by deletion, substitution, modification or otherwise, any or all of the above grounds of appeal, at any time before or during the hearing of the appeal.*

**Brief facts of the case are as under:**

**3.** Ld. AR submitted that assessee is a company engaged in the business of providing Third Party Administration (hereinafter referred to as TPA) services to insurance companies. It has been submitted that, income is earned by assessee based on the contract entered with insurance companies in respect of policies entrusted to assessee for rendering TPA services. Ld.AR submitted that assessee has been given license by Insurance Regulatory and Development Authority in May 2002, to operate as a TPA, vide License No.16. Assessee has attached said certification at page 124 of paper book.

On perusal of the certificate, it is observed that, license has been renewed from 16/05/14 to 15/05/17.

**3.1.** Assessee for year under consideration, filed its return of income declaring loss of Rs.4,49,76,074/-. The case was selected for scrutiny and notices under section 143 (2) and 142 (1) was issued, in response to which, representative of assessee appeared before Ld.AO and filed relevant details, particulars and clarifications as called for.

Ld. AO observed that, assessee claimed sum of Rs.58,80,650/- in respect of toll-free numbers. He observed that assessee did not deduct any TDS on these payments. Ld. AO accordingly, called upon assessee to show cause, as to how provisions of TDS were not applicable to these payments. In response to show cause, assessee submitted that, these payments were not towards professional services rendered, and also that, these payments are not in the nature of royalty. Contentions of assessee were not accepted by Ld. AO. Ld. AO opined that due to amendment to section 194J, tax is required to be reduced on domestic royalty payment w.e.f. 13/07/06. He thus made disallowance under section 40 (a) (ia) of the Act in the hands of assessee, for failure to deduct TDS as per provisions of section 194J of the Act.

**3.2.** Ld. AO further observed that, receipts as per 26 AS did not match with the amount recorded in books of assessee. Ld. AO accordingly, called for reconciliation, which was furnished and has been annexed as Annexure A to the assessment order. Ld. AO on

verification of reconciliation statement observed that, assessee could not furnish any explanation in respect of certain amounts recorded less in assessee's books for relevant period, as compared to gross receipts appearing in 26 AS statements.

**3.3.** Ld. AO was of the opinion that, such sum appearing as shortfall in the books of assessee, amounts to be undisclosed income and added it to the returned income of assessee. He thus disallowed a sum of Rs.5,59,91,513/-, as a consequence to which, TDS credit was also disallowed, as it pertained to earlier assessment years.

Aggrieved by additions made by Ld. AO, assessee preferred appeal before Ld.CIT (A), who upheld observations of Ld.AO.

**3.4.** As regards application section 9 (1) (vi) of the Act to toll-free charges paid by assessee being royalty, Ld. CIT(A) observed as under:

*"4.5 On cogent reading of definition of "royalty" with these explanations would reveal that the payment made by the assessee for data/voice transmission through leased line/temp telecommunication charges would fall within the definition of "royalty" under section 9 (1) (vi) of the act. Since the year under consideration is a Y 2014-15, so these amendments introduced by the finance act 2012 would be squarely applicable as for this year the dispute of their retrospective nature would not be there.*

*4.6 in case of Verizon Communications Singapore PTE Ltd vs income tax officer, international taxation (2014) 361 ITR 575 (Madras), the High Court has gone in depth into an identical issue. Expert opinion of a technical expert (an IIT asst. Professor) was used by the High Court to examine the technical aspect of communication through a leased line. The court held that payment was in nature*

*of 'Royalty'. The court further observed that even if the payment is not treated as one for the use of equipment, the use of the process was provided by the assessee, whereby through the assured bandwidth the customer is guaranteed the transmission of the Tata and voice and thus the consideration being for the use and the right to use of the process, it is "royalty". So the decision of Verizon (supra) is squarely applicable to the present case. It also needs to be noted that the decision relied by the appellant have been taken into consideration in the verdict of orderable High Court in the Verizon (supra) case. In the case of Bharat Sanchar Nigam Ltd vs union of India (282 ITR 273) relied by the appellant, the issue under consideration was the nature of the transaction by which mobile phone connections are enjoyed. It is a sale or is it a service or is it both? The question for payment of lease line was not before Hon'ble Court for adjudication. Therefore this decision will not be applicable in the case of the appellant."*

**3.5.** Ld. CIT(A) relying on decision of *Hon'ble Madras High Court* in case of *Verizon Communications Singapore PTE Ltd vs Income tax Officer, International Taxation (2014) 361 ITR 575 (Madras)* upheld disallowance made u/s.40(a)(ia) for non-deduction of TDS u/s.195J. Ld.CIT(A) was of the opinion that Finance Act, 2012, introduced *Explanation 5-6* to Section 9(1) (vi) with retrospective effect and therefore *Explanation 6* was applicable to assessee.

In respect of difference in receipt appearing in Form 26 As and books of accounts, Ld. CIT(A) held that, difference amounted to suppression of income and that assessee cannot seek immunity under AS9 standards.

**3.6.** In regards, disallowance of TDS credit, Ld. CIT(A) opined that as assessee claimed TDS on gross receipts that pertained to

previous years and that TDS cannot be differed by the payer once payment is made or credited to the assessee.

Aggrieved by order of Ld. CIT(A), assessee is in appeal before us.

**4. Ground no. 1**

Ld.AR argued that, Ld. AO wrongly held payments for toll-free telephone charges as royalty in view of insertion of definition of the term *'process'* by Finance Act 2012, with retrospective effect from 01/06/1976. It has further been submitted that section 194J deals with deduction of taxes towards payment of *'royalty'*, as defined under *Explanation 2* to section 9 (1) (vi) of the Act. He submitted that, amendment to the meaning of the term *'royalty'* by way of insertion of *Explanation 6* to section 9 (1) (vi) of the Act, by defining the term *'process'*, is not relevant to determine requirement to deduct TDS under section 194J. Ld. AR thus submitted that the term 'royalty' would be restricted to the definition as provided under *Explanation 2* to section 9(1)(vi), and would therefore not include software payments as provided in *Explanation 4* to section 9 (1) (vi) of the Act. He thus submitted that there is no requirement to deduct TDS on payments to resident under section 194J of the Act.

**4.2.** Referring to assessment order, Ld.AR submitted that assessing officer has applied *Explanation 6* to present facts of the case which has been inserted w.e.f. 01/06/76, by Finance Act, 2012. In support of his contention Ld.AR placed reliance upon order dated 29/01/18 passed by *Hon'ble Bombay High Court* in case of *CIT vs*

*M/s NGC Networks India Pvt. Ltd.,* in *ITA No. 397/2015,* wherein *Hon'ble Court* observed and held as under*:*

*"……. (d) we find that view taken by the impugned order dated 09/07/14 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 accordance with the view taken by this court in CIT vs 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 introduced by Explanation-6 to section 9 (1) (vi) of the act took place in the year 2012 with retrospective effect from 1976. This could not have been contemplated by the responded when he made the payment which were subject to tax deduction at source under section 194C of the Act during the subject assessment year, would require deduction under section 194J of the Act due to some future amendment with retrospective effect."*

**4.3.** On the contrary, Ld.CIT DR placed reliance on order passed by authorities below and decision of *Hon'ble Madras High Court*, in case of *Verizon Communications Singapore PTE Ltd vs Income tax Officer, International Taxation (supra).*

**5.** We have perused submissions advanced by both sides in light of records placed us.

Ld.CIT(A) dismissed the issue raised by assessee by relying on decision of *Hon'ble Madras High Court* in case of *Verizon (supra).*

In the present facts of case, payments made are towards toll-free telephone charges paid for toll free telephone number provided by telecom operators, whereby charges for calls made by consumers to the toll-free number is borne by assessee. These are dedicated

private circuit lines available to assessee. In other words, a toll-free telephone number or free phone number is a telephone number billed on assessee for all arriving calls, instead of levying charges on telephone caller. For the calling party, call to such toll-free number is free of charge. It is for this exclusive telephone line that payment is made by assessee. Revenue is of the opinion that payment made by assessee for such services amounts to Royalty u/s.9(1) (vi) of the Act, and that assessee is liable to deduct TDS u/s194 J of the Act. There are various judgements relied on by both sides in support of their contentions.

**5.1.** Section 194J of the Act, enjoins upon any person not being an individual or a HUF to deduct tax at source on certain payments, one of them being royalty, to a resident. *Explanation (ba)* to section 194J(1) defines 'royalty', by referring to the meaning given in *Explanation 2* to section 9(1)(vi) of the Act. For sake of convenience, *Explanation 2 of section 9(1) (vi)* is extracted hereunder :

> *'Explanation 2. - For the purposes of this clause, 'royalty' means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head 'Capital gains') for—*
>
> *(i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property ;*
>
> *(ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property ;*
>
> *(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property ;*
>
> *(iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill ;*

*(iva) the use or right to use, any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB ;*

*(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films ; or*

*(vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v).'*

**5.2. '**Royalty', as defined herein above, has very wide import. It brings within its ambit payment made for any kind of services received. As can be seen from the above, 'royalty' as per clause (vi) of Section 9 would take within its ambit, rendering of any services in connection with activities referred in sub-clauses (i) to (v). In our view consideration paid by assessee is towards provision of bandwidth/telecommunications services for the "use of', or 'right to use equipment".

As we analyse services received by assessee in present facts of case, assessee is assured, bandwidth through which, assessee was guaranteed transmission of data and voice, of customers. We observe that there is a 'process' involved for exclusive communication link of customers with assessee. It is pertinent to note that, definition of term "royalty" in *Explanation 2* to section 9(1)(vi) includes the term 'process'.

Ld AR substantially argued against retrospective application of *Explanation 6* applied by authorities below. In our view, this explanation merely defines the expression, *'process'* , which has to

be read into *Explanation 2*, while examining definition of the term 'royalty' into facts of a case.

For the sake of convenience the same is reproduced herein below:

*"Explanation 6- for the removal of doubts, it is hereby clarified that the expression "process" includes and shall be deemed to have always included transmission by satellites (including up-linking, amplification, conversion for down-linking of any signal), cable, optic fibre or by any other similar technology, whether or not such process is secret;"*

As we analyse above *Explanation 6*, it is a deeming definition for the term 'process' to have included various services mentioned therein. As *Explanation 2* does not define the term, 'process', Explanation 6 will have to be considered while analyzing, a particular service to be 'process' for purposes of section 9 (vi) of the Act. As the term 'process' always existed in *Explanation 2*, legislature introduced *Explanation 6* with retrospective effect.

We therefore reject argument advanced by Ld.AR that *Explanation 6* cannot be applied to definition of 'Royalty'

Facts in decision relied upon by Ld.AR rendered by *Hon'ble Bombay High Court* in case of *CIT vs M/s. NGC Networks India Pvt. Ltd., (supra)* is different from facts in present case and therefore will be of any help to assessee.

On the basis of above discussions, we are of the opinion that, payments made by assessee is royalty, in terms of Section 9(1)(vi) of

the Act, and is liable to deduct TDS under section 194J of the Act. We therefore are in agreement with the view taken by Ld.CIT (A).

Admittedly, assessee has not deducted TDS on payments made towards toll-free charges, and therefore, disallowance under section 40 (a) (ia) is warranted. However, we set aside this issue to Ld.AO for verification as to whether the payee paid taxes on such payments received from assessee during relevant period. Reliance is placed on decision of *Hon'ble Supreme Court* in case of *Hindustan Coca-Cola Beverages Pvt. Ltd vs CIT* reported in *(2007) 163 taxman 355*, wherein it has been observed that, where tax due has been paid by the deducted, demand under section 201 (1) of the Act cannot be enforced on assessee. In the event, assessee is able to establish that, due taxe has been paid by Payee on such payments received, the disallowance made under section 40 (a) (ia) shall be deleted. Needless to say that assessee shall be granted proper opportunity of being heard as per law.

With the above directions we set aside this issue back to Ld. AO.

**Accordingly Ground 1 stands dismissed and Ground 2-3 raised by assessee for A.Y 2014 – 15 stands partly allowed for statistical purposes.**

**A.Y: 2011 – 12 to 2013 – 14**

Bothe sides submitted that assessee in appeals for A.Y: 2011 – 12, 2012 – 13 and 2013 – 14 has raised same issue in Grounds 1-3, considered herein above. They also submitted that facts and

circumstances of the case are similar and identical to facts for A.Y: 2014 – 15. Both parties rely on arguments advanced herein above. Accordingly, applying view taken herein above *mutatis mutandis*, we dismiss ground 1 and set aside Ground 2-3 to Ld. AO with similar direction.

**A.Y:2012-13**

**Ground No.4**

Ld. AR submitted that there is one additional issue in A.Y:2012 – 13 regarding disallowance of depreciation on UPS at 60%.

Both sides agree that this issue is covered in favour of assessee by decision of *Hon'ble Delhi High Court* in case of *CIT vs. BSES Yamuna Power Ltd.*, reported in *(2013) 40 taxmann.com 108*.

Respectfully following the same, we direct Ld. AO of grant depreciation on UPS at 60%.

Accordingly this ground stands allowed.

**In the result appeals for A.Y:2011 – 12 to 2014 – 15 stands partly allowed for statistical purposes as indicated herein above.**

Order pronounced in open court on 26th February, 2020.

| Sd/- | Sd/- |
|---|---|
| **(O.P.Meena)** | **(Smt. Beena Pillai)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

Bangalore
Dated the 26th February, 2020.

Copy to :

1. The Appellant.
2. The Respondent.
3. The CIT(A)-7, Bengaluru.
4. The Pr.CIT-7, Bengaluru.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst. Registrar/ITAT, Bangalore

| | | Date | Initial | |
|---|---|---|---|---|
| 1. | Draft dictated on | 29.01.2020 | | Sr.PS |
| 2. | Draft placed before author | 30.01.2020 | | Sr.PS |
| 3. | Draft proposed & placed before the second member | | | JM/AM |
| 4. | Draft discussed/approved by Second Member. | | | JM/AM |
| 5. | Approved Draft comes to the Sr.PS/PS | | | Sr.PS/PS |
| 6. | Kept for pronouncement on | | | Sr.PS |
| 7. | Date of uploading the order on website | | | |
| 8. | If not uploaded, furnish the reason | | | |
| 8. | File sent to the Bench Clerk | | | Sr.PS |
| 9. | Date on which file goes to the AR | | | |
| 10. | Date on which file goes to the Head Clerk. | | | |
| 11. | Date of dispatch of Order. | | | |
| 12. | Draft dictation sheets are attached | | | Sr.PS |