

**INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'I' BENCH, MUMBAI**

**[Coram: Pramod Kumar, Vice President, and,
Pavan Kumar Gadale, Judicial Member]**

ITA No.: 3130/Mum/19
Assessment year: 2015-16

Interactive Avenues Private Limited **Appellant**
3rd floor, Chibber House, M VasANJI Road
Sakinaka, Andheri East, Mumbai 400 072
[PAN: AACCI0954J]

Vs.

Deputy Commissioner of Income Tax **Respondent**
Circle 14(2)(1), Mumbai

Appearances:

P J Pardiwalla *for the appellant*

Vijaykumar Subramanyam, *for the respondent*

Date of concluding the hearing: : November 20, 2020
Date of pronouncement : December 1st, 2020

O R D E R

Per Pramod Kumar, VP:

1. By way of this appeal, the assessee appellant has called into question correctness of the order dated 25th January 2018 passed by the learned Commissioner (Appeals) in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2015-16.

2. Grievance of the assessee appellant is as follows:

- 1. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income tax (Appeals)- 22 ['CIT-(A)'] has erred in upholding the disallowance made by the learned Assessing Officer under**

section 40(a)(i) of the Income tax Act, 1961 ('the Act') for non-deduction of taxes from payment made to Facebook Ireland Limited.

3. To adjudicate on this appeal, in our humble understanding, only a few material facts need to be taken note of. The assessee before us is, what is termed as, internet advertising agency. During the relevant previous year, the assessee appellant has made certain payments to Facebook Ireland Limited towards the cost of advertisements, carried by facebook, for its clients. In the course of the scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has not deducted tax at source from these payments to Facebook Ireland Limited, whereas, for the detailed reasons set out by the Assessing Officer, the tax was deductible from the same under section 195 of the Income Tax Act, 1961. It is for this reason that the Assessing Officer disallowed these payments to Facebook Ireland Limited, in computation of business income, under section 40(a)(i). Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. The assessee is not satisfied and is in further appeal before us.

4. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

5. We have taken note of the fact that the assessee before us is an advertisement agency, and, as such, advertisements are placed by the assessee on behalf of its clients. There is thus ordinarily no occasion to claim the costs of advertisements as deduction in computation of its business income, and, so far as the advertisement agencies are concerned, their revenues consist of only the commission received in respect of the advertisements so placed. In the light of this factual position, let us take a look at the provision of section 40(a)(i) relevant extracts from which are as follows:

Section 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—
(i) any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or other sum chargeable under this Act, which is payable,—

(A) outside India; or

(B) in India to a non-resident, not being a company or to a foreign company,

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 8[on or before the due date specified in sub-section (1) of section 139

6. A plain reading of the above statutory provision shows that section 40(a)(i) acts as a restriction on deductibility of expenses under section 30 to 38, but then, as a corollary to this legal position, when the related expenditure is not claimed as deduction under section 30 to 38, this disallowance cannot be pressed into service at all. In other words, a disallowance under section 40(a)(i) can come into play only when the deduction for the related expenditure is claimed under sections 30 to 38.

7. In the light of the above legal position, let us deal with one of the contentions that Shri Pardiwalla, learned senior counsel, has canvassed before us, which is that the assessee has not claimed any deduction in respect of expenditure incurred on payments made to Facebook Ireland Limited, and, therefore, the impugned disallowance of payment made to Facebook Ireland Limited is wholly devoid of any legally sustainable merits. Learned counsel points out that, as noted in the assessment order itself, the assessee before us is an advertisement agency, and the share of assessee, so far as the amount paid to Facebook Ireland Limited is concerned, is represented by the agency commission of 15% of the net billing amount, and it is this agency commission which is accounted for in the books of accounts of the assessee. There is thus no occasion to claim deduction for the amount paid to Facebook Ireland Limited. When it was so pointed out by the learned senior counsel, learned Departmental Representative did not have much to say, on this aspect of the matter, beyond placing his reliance on the stand of the authorities below and beyond submitting that this aspect of the matter is not discernable, one way or the other, from the proceedings before the authorities below and the material on our records.

8. Learned senior counsel's plea is indeed well taken. Unless a claim for deduction in respect of payments made to Facebook Ireland Limited is made in the computation of business income, there cannot be any occasion for invoking section 40(a)(i) for its disallowance in computation of business income. As we have analyzed earlier also in this order, section 40(a)(i) acts as a restriction on the deductibility of expenses under section 30 to 38, and, as a corollary to this legal position, when the related expenditure is not claimed as deduction under section 30 to 38, this disallowance cannot be pressed into service at all. To that extent, we uphold the plea of the assessee in principle- subject to factual verification about no such claim having been made in the computation of business income i.e. in the

profit and loss account filed by the assessee alongwith computation of business income. In case the assessee has indeed accounted for the agency commission on these advertisement revenues, rather than taking entire billing revenues as billing revenues of the assessee and claiming deduction for the advertisement paid to Facebook Ireland Limited in its profit and loss account, the assessee will succeed in its claim on this point. For this limited purpose, the matter is remitted to the file of the Assessing Officer. Ordered, accordingly.

9. As we remit the matter back to the file of the Assessing Officer in the terms indicated above, we make it clear, as learned senior counsel has also fairly accepted, that is without any prejudice to the assessee being visited with other consequences for non-deduction of tax at source from payments made to non-residents. These consequences are set out, for example, in sections 201(1), 201(1A) and 271C, and under these provisions the revenue authorities may as well recover, in appropriate cases, entire tax that the assessee failed to deduct at source, alongwith compensatory interest for delay in its collection by the revenue authorities, and the penalty for non-deduction at source. Irrespective of whether or not the disallowance under section 40(a)(i) is eventually sustained or not, these courses of action are open to the revenue authorities in accordance with the law.

10. In view of the above discussions and directions as set out above, we see no need to address the broader issue of whether or not tax is deductible from the payments made by the assessee to Facebook Ireland Limited for the advertisements placed on Facebook, and whether or not income embedded in such payments is taxable in India. Learned Departmental Representative informs us that the Facebook Ireland Limited is being assessed to tax in Hyderabad, and, at this stage and in the present context, we must refrain from making any observations that may have impact on determination of tax liability in respect of advertisement payments to the Facebook. Even though we had the benefit of hearing very erudite and profound arguments on that issue, by learned senior counsel as also by learned senior departmental representative, we need not really adjudicate on that issue at this stage and in this case. That issue is left open for determination in an appropriate case.

11. In the result, appeal is allowed for statistical purposes in the terms indicated above. Pronounced in the open court today on the 1st day of December, 2020

Sd/-
Pavan Kumar Gadale
(Judicial Member)

Sd/-
Pramod Kumar
(Vice President)

Mumbai, dated the 1st day of December, 2020

Copies to:

<i>(1)</i>	<i>The Applicant</i>	<i>(2)</i>	<i>The respondent</i>
<i>(3)</i>	<i>CIT</i>	<i>(4)</i>	<i>CIT(A)</i>
<i>(5)</i>	<i>DR</i>	<i>(6)</i>	<i>Guard File</i>

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai