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Sums paid to DTH operators for placement of channels in a particular frequency couldn't be deemed as royalty

Summary – The Mumbai ITAT in a recent case of NGC Networks (I) (P.) Ltd., (the Assessee) held that Channel placement fee paid by assessee to cable TV operator/DTH provider could not be regarded as royalty in terms of Explanation 2 to section 9(1)(vi).

Facts

- During relevant year, assessee made payments to the cable T. V. operator/DTH provider for placing its channel in a particular frequency to get better viewership on account of good picture and sound quality.
- Assessing Officer was of the view that the payment made by the assessee for placement of its channel was in the nature of royalty as per *Explanation* 2 of section 9(1)(vi) and, therefore, TDS should have been deducted as per provisions of section 194J.
- Since the assessee had deducted TDS at the rate of 2 per cent instead of 10 per cent as per provisions of section 194J, the Assessing Officer invoked provisions of section 40(a)(ia) for short deduction of tax at source.
- The DRP, however, opined that the payment of channel placement fee was not tantamount to payment of fee for transmission purpose which includes hiring of transponder, uplinking/downlinking etc. Thus the DRP held that the disallowance under section 40(a)(ia) on account of short deduction of tax was not warranted.
- On revenue's appeal:

Held

- The channel placement fee paid to the cable TV operator/DTH provider could not be regarded as royalty as it did not fall under the definition in terms of *Explanation*-2 of section 9(1)(vi). Though there is an amendment in the provision and as per newly inserted *Explanation*-6 with retrospective effect the term process has been defined and it includes transmission, uplinking and down linking of signals etc. But the said retrospective amendment cannot be pressed into service for the purpose of disallowance under section 40(a)(ia) because of the reason that at the relevant time when the assessee has deducted the tax at source it was not in the statute.
- When the assessee has deducted the tax as per provisions of section 194C which is a *bona fide* decision of assessee keeping in view the nature of payments and facts of the case, then, the assessee was not supposed to foresee the subsequent retrospective amendment in the statute to be held liable to tax deduction at source under the provisions of section 194J.
- Further, there is force in the contension of the assessee that payment in question does not fall under the term royalty as defined in *Explanation*-2 of section 9(1)(vi) and *Explanation*-6 cannot be

pressed into service as the definition of royalty for the purpose of section 40 is taken only under *Explanation*-2 to section 9(1)(c).

- In view of the above, there is no reason to interfere with the direction of the DRP.