Payment made for connectivity facility for sending bulk SMS couldn't be held as royalty: Mumbai ITAT

Summary – The Mumbai ITAT in a recent case of Gupshup Technology India (P.) Ltd., (the Assessee) held that where assessee was engaged in sending SMS and for sending SMS it availed services of a telecom operator and it had neither any access nor control over equipments of telecom operator, payment made to telecom operator could not be treated in nature of royalty in terms of section 194J

Facts

- The assessee was engaged in the business of sending bulk SMS and for sending SMS, it availed the services of a telecom operator, namely, Tata Tele Services Ltd. Once the agreement was entered into between the assessee and the telecom operator, the telecom operator created customer's account from its end and provided IP address, user name and pass word to the assessee. The assessee then integrated such details in its application programming interface system for transmitting bulk messages to the telecom operator without any access or control over any of the connectivity facilities. The assessee received the content of the message which required to be sent as bulk SMS from its client for which assessee used its own software and computer system to convert it in a form that could be transmitted. Once the SMS was ready for transmission, the assessee caused its system to connect with the system of the telecom operator to send the messages in bulk.
- During the assessment years 2011-12 and 2012-13, the assessee deducted TDS under section 194C from the payment made to the telecom operator.
- The Assessing Officer held that the payment to the telecom operator as SMS and short code charges was in the nature of royalty, therefore, tax was to be deducted under section 194J. Accordingly he held the assessee to be assessee in default under section 201(1).
- The Commissioner (Appeals) held that transmission of bulk SMSs was through a process which fell within the category and ambit of definition of royalty as provided in section 9(1)(*vi*) specifically in light of retrospective amendment brought by the Finance Act, 2012 with retrospective effect from 1-6-1996. He further held that the payment made by the assessee was covered under section 194J. Therefore, the assessee was liable to deduct TDS under section 194J and not under section 194C. As regards the assessee's contention that on similar services provided to the Income Tax Department TDS had been deducted under section 194C and not under section 194J, the Commissioner (Appeals) held that the same was irrelevant because payment made by the assessee to the telecom operator was liable to be deducted at a higher rate under section 194J.
- On appeal to Tribunal:

Held

- In the instant case, the assessee has neither any access nor control over the equipments nor there is usage of any process or equipment which can be said to have been made available to the assessee.

It is a kind of a standard connectivity facility which has been provided by the telecom operator, nothing else. The agreement is more in the nature of works contract with the telecom operator for which the assessee has rightly deducted TDS under section 194C. Even the assessee from its customers like Income Tax Department for providing such services has received the payment which has been subjected to tax under section 194C. Thus it cannot be held that the assessee is making any payment for use or right to use any equipment.

- Further the concept of 'use' or 'right to use any equipment' alludes to the concept of 'leasing' which, in the instant case, admittedly is not there. Much emphasis has been laid by the revenue that it is a kind of a 'process' in view of *Explanation* 6 to section 9(1)(*vi*) brought with retrospective effect by the Finance Act, 2012, whereby the 'process' includes transmission by satellite, cable, optic fiber or by any other similar technology whether or not such process is not secret. Even if such a contention of the revenue is to be accepted, then whether at the time of making the payment where no such amendment was brought in the statute, can assessee be accepted to deduct the TDS. Here the maxim of 'lex non cogit ad impossplia', that is, the law of the possibly compelling a person to do something which is impossible, that is, when there is no provision for taxing an amount in India then how it can be expected that a tax should be deducted on such a payment. This view has been upheld by the Mumbai Bench of the Tribunal in the case of *Channel Guide India Ltd.* v. *Asstt. CIT* [2012] 139 ITD 49/25 taxmann.com 25.
- Therefore, the assessee was not liable to deduct TDS by treating the payment in the nature of royalty in terms of section 194J or in terms of retrospective amendment brought in section 9(1)(*vi*) from subsequent date. Accordingly, the assessee cannot be treated as assessee in default within section 201(1).