IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.389 OF 2003

M/s. Star Time Communication (I) Pvt. Ltd. ….. Appellant

Versus

The Commissioner of Income Tax,
Mumbai City – VI ….. Respondent

Mr. B. M. Chatterji, Senior Advocate a/w. Mr. Shreyash J. Shah with Mr. Udyan Mukharjee i/b. Girish Pikale for the appellant

Mr. Suresh Kumar for the respondent

RESERVED ON : APRIL 17, 2025
PRONOUNCED ON : APRIL 22, 2025

JUDGMENT (PER : CHIEF JUSTICE)

1. This appeal under Section 260A of the Income Tax Act, 1961 (**1961 Act**), has been filed by the assessee. The subject matter of the appeal pertains to Assessment Year 1993-94. The appeal was admitted on the following substantial question of law:

> *Whether on the facts and circumstances of the case and in law the Income Tax Appellate Tribunal was right in coming to the conclusion that the appellant was entitled to only 5% of the receipts of the appellant and not 5% of the gross advertising bills raised?*

2. Facts leading to filing of this appeal, briefly stated, are that the assessee is a company incorporated on 29th April 1992. The assessee entered into an agreement dated 27th July 1992 (**said agreement**) with Prime Time Media Services Pvt. Ltd. Under

clause-3 of the said agreement, the assessee was required to pay Prime Time Media Services Pvt. 5% of the total receipts from advertising. The assessee filed return of income for the Assessment Year (**AY**) 1993-94 declaring total income of Rs.7,57,746/-. (Rupees seven lac fifty-seven thousand seven hundred forty-six only). The Assessing Officer, during the course of assessment proceedings, by order dated 14th February 1995, noticed that the assessee had claimed sum of Rs.22,36,544/- (Rupees twenty-two lac thirty-six thousand five hundred forty-four only) as infrastructure fee on the basis of said agreement.

3. The assessee disclosed the total income from advertisement at Rs.63,43,480/- (Rupees sixty-three lac forty-three thousand four hundred eighty only) in its profit and loss account. Out of aforesaid amount of Rs.63,43,480/- (Rupees sixty-three lac forty-three thousand four hundred eighty only), a sum of Rs.4,66,068/- (Rupees four lac sixty-six thousand sixty-eight only) was shown to be outstanding as on 31st March 1993. The Assessing Officer, therefore, restricted the infrastructure fee to the extent of Rs.2,93,870/- (Rupees two lac ninety-three thousand eight hundred seventy only) being 5% of the amount of Rs.58,77,412/- (Rupees fifty-eight lac seventy-seven thousand four hundred twelve only).

4. Being aggrieved by the aforesaid order dated 14th February 1995 passed by the Assessing Officer, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals), *inter alia;* held that

payment of 15% of total advertising revenue actually received by the assessee is a reasonable payment to Prime Time Media Services Pvt. Ltd. and computed the amount at Rs.8,81,611/- (Rupees eight lac eighty-one thousand six hundred eleven only) being 15% of the sum of Rs.58,77,412/- (Rupees fifty-eight lac seventy-seven thousand four hundred twelve only). The Commissioner of Income Tax (Appeals) restricted the disallowance to Rs.10,61,063/- (Rupees ten lac sixty-one thousand sixty-three only) as against Rs.19,42,641/- (Rupees nineteen lac forty-two thousand six hundred forty-one only) and granted a relief to the extent of Rs.8,81,611/- (Rupees eight lac eighty-one thousand six hundred eleven only). The Commissioner of Income Tax (Appeals) partly allowed the appeal preferred by the assessee by order dated 14th December 1995.

5. The assessee, thereupon, preferred an appeal before the Income Tax Appellate Tribunal (**Tribunal**). The Tribunal, by an order dated 31st March 2003, *inter alia;* held that on reasonable interpretation of the agreement entered into by the assessee with Prime Time Media Services Pvt. Ltd., it is evident that the assessee is not entitled to any further relief. In the result, the appeal preferred by the assessee was dismissed. In the aforesaid factual background, this appeal has been filed.

6. Learned senior counsel for the appellant submitted that the Tribunal was not justified in confirming the quantum of disallowance and has not adverted to the issue whether the expenditure payment was real and not done wholly and

exclusively for the purpose of business of the assessee. It is further submitted that the Assessing Officer is not entitled to restrict the allowance of expenditure from 5% on total receipts but 5% on total income as per the profit and loss statement, as the same amounts to challenging the business prerogative of the assessee. It is also submitted that the Assessing Officer has failed to demonstrate any benchmark for infrastructure fee as payable in the industry in which the assessee is carrying on the business. It is contended that it is not open to the Tribunal to re-write the agreement between the parties and restrict the expenditure to Rs.8,81,611/- (Rupees eight lac eighty-one thousand six hundred eleven only). It is urged that the total receipts are Rs.4,47,30,880/- (Four crores forty-seven lac thirty thousand eight hundred eighty only) and the same ought to have been taken into account by the Assessing Officer, Commissioner of Income Tax (Appeals) and the Tribunal. In support of the aforesaid submission, reliance has been placed on decisions of the Supreme Court in ***COMMISSIONER OF INCOME TAX, BOMBAY VS. WALCHAND & CO. (PVT) LTD., BOMBAY***[1] and a division bench judgment of the Karnataka High Court in ***INGERSOLL-RAND (INDIA) LIMITED VS. COMMISSIONER OF INCOME-TAX AND ANOTHER***[2]

7. On the other hand, learned counsel for the revenue has contended that the assessee himself has disclosed the total income from advertising at Rs.63,43,480/- (Rupees sixty-three lac forty-three thousand four hundred eighty only), which is

[1] ***1967 SCC OnLine SC 119***
[2] ***(2020) 427 ITR 158 (Karn)***

evident from the profit and loss account of the assessee. Therefore, it is not open for the assessee to claim infrastructure fee at a total amount of Rs.4,47,30,880/- (Four crores forty-seven lac thirty thousand eight hundred eighty only). It is submitted that the Assessing Officer, the Commissioner of Income Tax (Appeals) and the Tribunal have recorded findings of fact, which cannot be termed as perverse and therefore, no interference in this appeal under Section 260A of the 1961 Act, is called for.

8. We have considered the submissions made on both the sides and have perused the record. Before proceeding further, it is apposite to take note of the principles laid down by Supreme Court in ***WALCHAND & CO. (PVT) LTD., BOMBAY (SUPRA).*** In the said case, the Supreme Court has held that in applying the test of commercial expediency for determining, whether the expenditure was wholly or exclusively laid out for the purpose of business, reasonableness of the expenditure has to be adjudged from the point of view of the businessman and not of the revenue. Similar view was taken by the Supreme Court in ***J. K. WOOLLEN MANUFACTURERS VS. COMMISSIONER OF INCOME TAX, U.P.***[3] and it was held that it is, of course, open to the Appellate Tribunal to come to a conclusion either that the alleged payment is not real or that it is not incurred by the assessee in the character of a trader or it is not laid out wholly and exclusively for the purpose of the business of the assessee and to disallow it. It was further held that it is not the function

[3] ***612 ITR Vol.72***

of the Tribunal to determine the remuneration, which in their view, should be paid to an employee of the assessee.

9. The scope of appeal under Section 260A of the 1961 Act is well settled. This Court, in an appeal under Section 260A, can interfere with the findings of fact only if when the same is shown to be perverse [**See : SYEDA RAHIMUNNISA VS. MALAN BI BY L.RS. AND ORS.**[4] and ***PRINCIPAL COMMISSIONER OF INCOME TAX, BANGALORE & ORS VS. SOFTBRANDS INDIA P.LTD.***[5]

10. In the backdrop of the aforementioned well settled legal principles, we may advert to the facts of the case in hand. Clause-3 of the agreement dated 27th July 1992 reads as under:

> ***"Clause 3***
> *In consideration of the same, STARTIME will pay to PRIMETIME 5% of the total receipts of STARTIME from advertising."*

11. Thus, under clause-3 of the said agreement, the assessee had to pay 5% of the total receipts of STARTIME from the advertising. As per the profit and loss account annexed by the assessee, it is evident that the assessee has disclosed his income for the period ending 31st March 1993 at Rs.63,43,480/- (Rupees sixty-three lac forty-three thousand four hundred eighty only). The Assessing Officer, therefore, in accordance with the terms of the agreement, found that the assessee had to pay PRIMETIME only 5% of the receipts i.e. receipt of Rs.58,77,412/- (Rupees

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[4] ***(2016) 10 SCC 315***
[5] ***(2018) 406 ITR 513***

fifty-eight lac seventy-seven thousand four hundred twelve only). As per the terms and conditions of the agreement, the assessee was required to pay 5% of the receipt of the assessee and not on 5% of the gross advertising bills. The Commissioner of Income Tax (Appeals) found that reasonable payment liable would be 15% of the receipts i.e. Rs.58,77,412/- (Rupees fifty-eight lac seventy-seven thousand four hundred twelve only), which was quantified at Rs.8,81,611/- (Rupees eight lac eighty-one thousand six hundred eleven only). It is pertinent to note that though the order was passed against the revenue, it did not challenge the order of appellate authority before the Tribunal. However, the assessee filed an appeal before the Tribunal, which has been dismissed. The findings of fact recorded by the Assessing Officer, Commissioner of Income Tax (Appeals) and the tribunal with regard to the income from the advertisement i.e. sum of Rs.63,43,480/- (Rupees sixty-three lac forty-three thousand four hundred eighty only), which is evident from the profit and loss account of the assessee, does not, by no stretch of imagination, can be said to be either perverse or based on no evidence. The aforesaid findings of fact do not call for any interference in this appeal.

12. For the aforementioned reasons, the substantial question of law is answered in the affirmative and against the assessee.

13. In the result, the appeal fails and is hereby dismissed.

(M.S.KARNIK, J.) **(CHIEF JUSTICE)**