आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'C' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, AHMEDABAD

BEFORE JUSTICE SHRI P. P. BHATT, PRESIDENT
& SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. Nos. 1808/Ahd/2017 & 388/Ahd/2018

(**निर्धारण वर्ष /** Assessment Years : 2014-15 & 2013-14)

Income Tax Officer Ward-2(1)(1), A'bad 1st Floor, Navjivan Trust Building, Ahmedabad – 380014	**बनाम**/ Vs.	**M/s. Eylex Films Pvt. Ltd.** 3rd Floor, Chaitanya, Kunjlal Street, Gandhi Chowk, Upper Bazar, Ranchi - 834001 & **M/s. Eylex Films Pvt. Ltd.** R.R.S. & Associates, 211, Kamal Complex, Nr. Stadium Circle, Opp. State Bank of India, C.G.Road, Ahmedabad - 380009
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCE2522N		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से /**Appellant by :**	Shri Lalit P. Jain, Sr.D.R.
प्रत्यर्थी की ओर से /**Respondent by :**	Shri S. N. Soparkar & Shri Bandish Soparkar, A.Rs.

सुनवाई की तारीख / **Date of Hearing**	07/03/2019
घोषणा की तारीख /**Date of Pronouncement**	12/03/2019

आदेश/O R D E R

PER PRADIP KUMAR KEDIA - AM:

The captioned appeals have been filed at the instance of the Revenue against the respective orders of the Commissioner of Income Tax (Appeals)-2, Ahmedabad ('CIT(A)' in short), dated 04.05.2017 & 02.11.2017 arising in the respective assessment orders dated 13.12.2016 & 22.03.2016 passed by the Assessing Officer (AO) under s. 143(3) of the Income Tax Act, 1961 (the Act) concerning AYs 2014-2015 & 2013-14.

2. As claimed on behalf of the Revenue, the facts are similar and common issues are involved in both assessment years and therefore both the appeals were heard together and disposed of by common order.

3. The controversy involved in both the assessment years is identical and based on similar facts. Accordingly, both the appeals have been heard together and are being disposed of by this common order.

4. We shall take note of facts and issue involved in ITA No. 1808/Ahd/2017 concerning AY 2014-15 for adjudication purposes for the sake of convenience.

ITA No. 1808/Ahd/2017 - AY 2014-15

5. The grounds of appeal raised by the assessee read as under:

> *"1. The Ld. CIT(A) has erred in law and on facts in deleting the disallowance of Rs.4,76,26,714/- u/s. 40(a)(ia) of the IT Act on account of non deduction of TDS."*

6. When the matter was called for hearing, the learned DR for the Revenue relied upon the observations made by the AO and contended

that the payments made by the assessee to the distributors are in the nature of royalty. The assessee having failed to deduct tax at source under s.194J of the Act, the AO has rightly disallowed the expenses of Rs.4,76,27,714/- by invoking Section 40(a)(ia) of the Act.

7. The learned AR for the assessee, on the other hand, broadly reiterated the facts placed before the CIT(A) and relied upon the decision drawn by the CIT(A). The learned AR for the assessee in furtherance referred to the judgment of the Hon'ble Madras High Court in the case of Mrs. K. Bhagyalaxmi vs. DCIT [2013] 40 taxmann.com 350 (Mad.) and decision of the co-ordinate bench referred in the case of Indo-Overseas Film vs. ITO (2017) 81 taxmann.com 378 (Chennai) for the proposition that revenue sharing expenses paid to the distributor of the cinematographic film out of revenue earned from exhibition of film is out of the ambit of Section 194J of the Act which in turn refers to Explanation 2 to Clause (vi) of subsection (1) of Section 9 for the purposes of ascertaining the meaning of expression 'royalty'. The learned AR referred to the aforesaid Explanation to Section 9 and submitted that the aforesaid Explanation clearly excludes the consideration for the sale, distribution or exhibition of cinematographic film from the sweep of definition of royalty. It was thus submitted that Revenue sharing expenses incurred by the assessee with the Distributors of the Film does not partake the character of royalty for the purposes of Section 194J of the Act in view of the express statutory exclusion. The learned AR asserted that the CIT(A) has correctly appreciated the facts in proper perspective and rightly decided the issue in favour of the assessee in view of the judicial decisions as well as the express and unambiguous language of Section 194J r.w.s. 9(1) of the Act. The learned AR accordingly submitted that no interference with the order of the CIT(A) is plausible.

8. We have carefully considered the rival submissions. The short controversy as to whether payments made by the assessee to the Distributors of the Films constitutes fee for professional or technical services within the ambit of Section 194j of the Act. Section 194J of the Act *inter alia* includes 'royalty' for the purposes of deduction of tax at source. It is the case of the assessee that the revenue sharing expenses incurred by the assessee in the nature of royalty is not covered within the sweep of Section 194J of the Act in view of the specific exclusion provided for consideration for the sale, distribution or exhibition of cinematographic film. Thus, the payment in respect of exhibition films is specifically excluded under s.194J of the Act. It is thus the case of the assessee that provisions of Section 40(a)(ia) of the Act does not get triggered in the absence of any obligation to deduct TDS under s.194J of the Act. On facts a reference was made to sample invoices raised by the Distributors, namely, Rose Valley Films Pvt. Ltd. and UTV Software Communication Ltd. to demonstrate the sharing of the revenue between the assessee and Distributors out of gross revenue collected from exhibition of the Film.

8.1 We have perused the order of the CIT(A) taking note of the relevant facts and applicable law in great length while concluding the issue. It will be apt to reproduce the relevant operative para of the order of the CIT(A) in this regard:

> *"3.3 I have carefully considered the facts of the case, assessment order and submission of the appellant. The AO has made the disallowance of Rs.4,76,27,714/- towards the payment made by the appellant for purchase of the films from the distributors invoking the provisions of Section 40(a)(ia) of the Act stating that the appellant has not made the TDS on the aforesaid payments and hence it has violated the provisions of Section 194J of the Act. The AO observed that the aforesaid payments were in the nature of royalty for acquiring rights in the intellectual property of the produce through the distributors.*
>
> *3.4. On the other side, the appellant has submitted that it was mainly the exhibitor of the films by procuring from the distributors. Further it has also derived the monthly fixed charges income for facilitating small*

cinema halls to procure cinematographic film under the banner of appellant from the principal, distributors. In this regard the film is supplied directly.by the principal distributor to such small cinema houses, but it has also acted as distributor as well sub-distributor of movies. Thus for the business purpose, it has made the payment for film distribution share expenses paid to distributors for purchase of cinematographic films to exhibit in the cinema houses. The nature of income derived by the appellant was from box office collection net of entertainment tax and these revenues are shared with the film distributors from whom the film is procured for exhibitions. The sharing of revenue proceeds with both the parties is based on the independent terms negotiated with the exhibitors as per the contract and the film distributors on a film wise and week wise basis. This contract varies from film to film and generally far a fixed period of one week or two week and the same is also dependent on type of cinemas, the geographical territory, the centre and the other factor including pre release film rating etc. The movie is downloaded through V-sat and screened through computerized system as new technology has come in place removing the old anlog system. It has also been submitted that the provisions of chapter-XVIIB are not attracted for sharing of the revenue proceeds with the distributors out of the box office collections. Even the provisions of Section 194C is also not applicable in view of the judgment of Hon'ble Mumbai High Court in the case of M/s.Shringar Cinemas Pvt. Ltd. and others. Even the provisions of Section 1941 are also not applicable in view of the Circular No,736 dtd. 13.2.1996 which has been reproduced by the appellant in its written submission reproduced above.

3.5. Now with regard to the provisions of Section 194J of the Act, fhe royalty is defined u/s.9 of the Act and as per the said section the consideration for sale /distribution or exhibition of cinematographic films has been excluded from the definition of royalty. This has been specifically mentioned in sub-clause [vj of Section 9 of I.T. Act. From the above definition the payment made by the appellant cannot be included under the definition of royalty u/s.9 of the Act and therefore the provisions of Section 194J are not applicable. The appellant has also submitted that the TDS survey in the year 2013 has also token place at his premises and no such defaults for these type of payments have been observed by the TDS Survey party and they were satisfied with the explanations given by the appellant.

3.6. Having considered the facts and submissions, it has been noticed that mainly the appellant has the business of exhibition of cinematographic films by procuring the same from the distributor. In consideration of such procurements, the appellant has different modules for payments towards revenue sharing such as lumpsum payment, weekly basis payments, percentage in box office collections etc. All these payments are nothing but the procurement charges meaning thereby purchases of the rights of exhibition for o certain period as per the terms and conditions of the contract. Thus, the same has been debited in the books of account under the head of film distribution share expenses in the profit and loss account. It has also been noticed that the AO has alleged of invoking the provisions of

Section 194J of the Act which are in respect of professional services, technical services, royally etc. It has been noticed that these payments have been made by the appellant to the distributors and the same have been excluded from the definition of royalty provided u/s,9(1)[v) of LT. Act.

3.7. For ready reference the said provision is reproduced as under:- "9(1)(v)

(1) The following income shall be deemed to accrue or arise in India

(v) the transfer of all or any rights (including the granting of a license) 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."

3.8. Similarly, the provisions of Section 9(1)(vii) Explanaiton-2 are also not applicable for the reason that these procurement charges cannot be said to be for rendering of any managerial, technical or consultancy services. Thus the payments does not fall neither as royalty u/s.9(1)(v) nor u/s.9(1)(vii) of I.T. Act as a fee for technical services.

*3.9. It has also been noticed that the **Hon'ble 1TAT, Ahmedabad in the case of Sunset Drive-In Cinema (P) Ltd. Vs. ITO [5 SOT 64]** has held that no TDS is required to be deducted for the payment of film distribution share. The relevant extract of the decision is reproduced hereunder:-*

> ***"6.** From the above, it is clear that section 194C would be applicable if any person is making payment of any sum to any resident for carrying out any work. In the case under consideration before us the assessee is exhibiting the films in the cinema owned by it. The receipt from the exhibition of films is shared between the assessee and the Distributor on the terms agreed between them. Therefore, the question is whether the amount collected by the assessee on exhibition of films and part of which is shared with the Distributor, is covered within the ambit of definition of "contract for carrying out any work". In our opinion, there is no work carried out by the Distributor. The Distributor is getting his share because he has acquired rights of the distribution of the films in particular area. No work is carried out by the Distributor for which the payment is made.*
>
> *Moreover, Explanation (iii) to section 194C defines the word "work". In such definition of "work" also the exhibition of films does not fall. It was vehemently contended by the learned DR that the above definition of "work" is only inclusive definition and therefore, even if the distribution of film is not mentioned in the definition, the same be covered by the definition. We are unable to agree with this contention of the learned DR because*

the Legislature has included the word 'broadcasting" and "telecasting" and production of programmes. If the Legislature wanted to include the distribution of film they could have included the same along with broadcasting and telecasting. We find that similar view is token by the SMC Bench of ITAT in the case of Essem Entertainment (PJ Ltd. (supra) and also by the ITAT, Ahmedabad Bench "C" in the case of City Gold Entertainment (P.) Ltd. [supra) wherein it is held as under:—

"8. We have considered the submissions of Ld. DR in the light of material available on record. There is no material on record to raise any doubt about the facts mentioned in the order of the CIT(A). Therefore, we proceed on the basis that the findings of the learned CIT[A) on facts are undisputed. Main basis for the Assessing Officer for holding that the assessee was liable to deduct at source under section 194C of the Act is the decision of the Hon'ble Supreme Court in the case of ACC Ltd. (supra) and also Circular No. 681 of CBDT. We found that the Hon'ble jurisdictional High Court in the case of All Gujarat Federation of Tax Consultants v. CBDT [supra) has considered the decision of the Hon'ble Supreme Court in the case of ACC Ltd. (supra) as well as Circular No. 681. After considering the decision of the Hon'ble Supreme Court Their Lordships have quashed the Circular No. 681 issued by the CBDT. Therefore, the Assessing Officer was wrong in taking cognizance of circular which was purported to be given by the CBDT in accordance with the decision of Hon'ble Supreme Court in the case of AAC Ltd. The ratio of the decision of the Hon'ble jurisdictional High Court in the case of All Gujarat Federation of Tax Consultants v. CBDT (supra) is that the intendment for professional services 'or service simplicitor which do not involve contract for carrying out any work itself or a contract for a labour for carrying out such services are not within the purview of section 194C of the Act as it existed at the relevant time. As mentioned earlier, the activity carried on by the assessee is exhibition of film in its theatre which has been supplied by the distributor. The said activity cannot fall within the category of "work" within the ambit of section 194C, as per the decision of jurisdiction^ High Court in the case of All Gujarat Federation of Tax Consultants v. CBDT (supra). Now the question will remain that whether such activity falls under the Explanation III to section 194C. The Explanation 111 reads as under:

'Explanation III. —For the purposes of this section, the expression "work" shall also include—

(a)advertising;
(b)broadcasting and telecasting including production of programmes for such broadcasting or telecasting;
(c)carriage of goods and passengers by any mode of transport other than by railways;
(d)catering.'

9. The abovementioned Explanation has been inserted by the Finance Act, 1994 w.e.f 1-7-1995. The exhibition of film in theatre is not an activity expressly covered by the Explanation 111. Anything which is not expressly covered under the category of work cannot be regarded as "work" by extended meaning of work as described in section 194C of the Act. The following observation of the Hon'ble Gujarat High Court from the decision in the case of All Gujarat Federation of Tax Consultants v. CBDT (supra) (Page Nos. 292-293) support this view.

'In our conclusion, we are further strengthened by the fact that the Legislature intended to make a separate provision for bringing the service contract and professional service within the purview of the provision relating to tax deduction at source, by the Finance Bill, 1987 which has been quoted above. Once again the Finance Bill, 1995, a similar insertion has been proposed. Had the service rendered by the professionals like, Advocates, chartered accountants, engineers, physicians, architects etc. already been within the scope and ambit of section 194C, the Legislature would not have resorted to this exercise. It cannot be assumed that the Legislature uses or indulges in on exercise for bringing something by way of surplus. Likewise, it may be noticed that the profession/business of advertising, broadcasting and telecasting including production of programmes for such broadcasting or telecasting, carriage of goods by railway etc. which are being now been designed to be inserted to be given effect with effect from July 1, 1995. In view of this clear intention of including being effective from a prospective date, it is clearly by indicate of the fact that the proposed amendment is not brought by way of clarification of any existing professions but is intended to bring substantial change in the existing provision. We may not be taken to have construed the existing provision with the aid of the proposed amendment, but we have referred to them only by way of strengthening the conclusion to which we have arrived independently of it.'

10. Therefore, there is no possibility of any assumption that Legislature uses or indulges in exercise for bringing something by way of surplus. The activity mentioned in the Explanation III only can be considered to be as a "work" within the extended meaning of "work". The exhibition of film in the theatre has not been described in the above Explanation therefore also, there is no case of the revenue, by which it can be held that the assessee was required to deduct tax at source from the payments made by it to the distributor of films. In view of above discussion on facts and laws, we find no merits in the appeals filed by the department and the same are dismissed."

We entirely agree with the above finding of the Tribunal, Ahmedabad Bench "C". No contrary decision is brought to our knowledge. In view of above, we hold that the assessee was not required to deduct IDS on sharing of receipt from the exhibition

of films with the Distributor. Accordingly, we quash the orders passed under section 201(1) and 201(1A).

7. In these appeals the only common ground raised by the assessee is against the levy of penalty under section 271(1)(c)-C amounting to Rs. 1,93,160, Rs. 1,23,100 and Rs. 1,19,254 for Assessment years 2002-03, 2003-04 and 2004-05 respectively. The Assessing Officer has levied the penalty for failure of the assessee to deduct the tax on the payment to Distributor. While considering the assessee's appeals against the orders under section 201, we have already held that the assessee was not required to deduct the tax on the payment of Distributor's share by the assessee. Since we have already cancelled the orders of Assessing Officer under section 201 (1)/201(1A), the penalty based upon such order cannot be sustained. The same are also cancelled.

8. In the result, the assessee's appeals are allowed."

3.9.1. Similarly, the Honourable ***ITAT SMC Bench, Ahmedabad in the case of ACIT Vs. Essem Entertainment Pvt. Ltd. in IT Appeal No.3731 & 3732 of 2004*** *has hold the similar views.*

3.9.2. In another judgment of the ***Hon'ble Gujarat High Court in the case of CIT(A) Vs. City Gold Entertainment Ltd. in ITA No.236 of 2006 dtd. 28,11.2014*** *has held that exhibition of films are not covered under the definition of work under Explanation to Section 194C of the Act.*

3.10. Having considered the facts and submission, it is apparent that the procurement charges paid by the appellant to the film distributors does not attract the TDS provisions as alleged by the AO and therefore invoking the provisions of Section 40(a)(ia) of I.T. Act is not justified and the disallowance made by the AO is ***deleted****.*

The ground of appeal is accordingly ***allowed****."*

8.2 A perusal of the order of the CIT(A) would show that assessee is in the exhibition of films procured from distributors on revenue sharing basis. The Revenue shared by the assessee with the distributor to exhibit the cinematographic film is outside the scope of expression 'royalty' under Clause (v) to Explanation 2 to Section 9(1)(vi) of the Act referred to under the provisions of Section 194J of the Act. Therefore, such payment to distributor does not call for deduction of TDS. The CIT(A), in our view, has rightly held in applicability of Section 194J of the Act or other similar provisions of the Act and

thus, rightly concluded that Section 40(a)(ia) of the Act do not come into play for disallowance of the expenses incurred by the assessee for exhibition of films. We thus find no infirmity in the process of reasoning adopted by the CIT(A) while determining the issue in favour of the assessee. Hence, the Revenue's appeal is without any merit.

9. In the result, appeal of the Revenue is dismissed.

10. In parity, Revenue's appeal in ITA No. 388/Ahd/2018 raising identical grievance is also dismissed.

11. In the combined result, both appeals of the Revenue are dismissed.

This Order pronounced in Open Court on 12/03/2019

Sd/-	Sd/-
(JUSTICE P. P. BHATT)	(PRADIP KUMAR KEDIA)
PRESIDENT	ACCOUNTANT MEMBER

Ahmedabad: Dated 12/03/2019

True Copy

S. K. SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

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5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
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By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।