

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'C', NEW DELHI**

Before Ms. Sushma Chowla, Vice President

Dr. B. R. R. Kumar, Accountant Member

ITA No. 2880/Del/2016 : Asstt. Year : 2011-12

ITO Ward-34(3), New Delhi	Vs	Sh. Yashovardhan Tyagi, 56, Madhya Marg, DLF, Phase-II, Gurgaon, Delhi-122002
(APPELLANT)		(RESPONDENT)
PAN No. AAAPT0403G		

ITA No. 2439/Del/2016 : Asstt. Year : 2011-12

Sh. Yashovardhan Tyagi, 56, Madhya Marg, DLF, Phase-II, Gurgaon, Delhi-122002	Vs	Asstt. Commissioner of Income Tax, Circle-19(1), New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAAPT0403G		

Assessee by : None

Revenue by : Sh. S. N. Meena, Sr. DR

Date of Hearing: 24.02.2020	Date of Pronouncement: 27.04.2020
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ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeals have been filed by the revenue and the assessee are directed against the order of Id. CIT (A)-12, New Delhi dated 29.02.2016.

2. In ITA No. 2880/Del/2016, following grounds have been raised by the Revenue:

"The CIT(A) erred on facts and circumstances of the case by deleting the addition of Rs.2,00,00,000/- in respect of claim of royalty for non deduction of TDS observing that the 'Minimum Guarantee Royalty'

debited by the assessee in this P&L a/c which does not fall in the definition of 'Royalty'.

2. The CIT(A) erred on facts and circumstances of the case by deleting the addition of Rs.1,00,000/- made on deemed dividend u/s 2(22)(e) of the IT Act.

3. The CIT(A) erred on facts and circumstances of the case by deleting the addition made on account of 'Unexplained Investments' – Increase in Capital amounting to Rs.28,76,819/- observing that the transaction between the assessee and the company in which he was a director is in the nature of advance for commercial purposes.

4. The CIT(A) erred on facts and circumstances of the case by deleting the addition of Rs.9,17,000/- made on account of 'Unexplained Cash Credits' – As the cash receipts are in respect of film distribution income of the assessee."

Non-deduction of TDS:

3. The assessee is in the business of film distribution in the name of M/s Sukrit Pictures.

4. The relevant facts are that the assessee has paid an amount of Rs.2 crores as Minimum Guarantee Royalty (MGR) and has not deducted TDS. The Assessing Officer held that the payment would fall within the definition of "Royalty" and failure to deduct TDS as per Section 194J of the Income Tax Act, 1961 would attract provisions of Section 40(a)(ia) of the Act. The Id. CIT (A) deleted the addition on the grounds that the provisions of Section 194J of the Act cannot be applicable to the instant case.

5. Before us during the arguments, the Id. DR quoted the provisions of the Section 194J of the Act and argued that

consideration for transfer of rights in respect of any copyright for films used in connection with would fall within the definition of royalty. It was contented that the assessee's payments cannot be regarded as for sale, distribution or exhibition of films. He argued that the assessee did not purchase the cinematographic film but purchased only theatrical distribution rights.

6. Heard the arguments and perused the material available on record.

7. The provisions of Section 194J of the Act with relation to "Royalty" are as per the Explanation 2 to Clause (vi) of Sub-Section (1) of Section 9.

8. The Explanation 2 to Section 9(1)(vi) reads as under:

"Explanation 2.—For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for—

(i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;

(ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property ;

(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property ;

(iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill ;

[(iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;]

(v) the transfer of all or any rights (including the granting of a licence) 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 ; or

(vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to [(iv), (iva) and] (v)."

9. We find that Clause (v) of Explanation 2 to Section 9(1) consists of two different transactions, one inclusive another non-inclusive. The inclusive part consists of the transfer of all or any rights (including the granting of a licence) 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. The non-inclusive part consists of consideration for the sale distribution or exhibition of cinematographic films. The Assessing Officer misread the provision in the second part of the clause with regard to exhibition of cinematographic films. He wrongly held that what the assessee purchased is copyrights and hence liable to TDS. In fact, the copyrights are always with the producer. The distributor is only given the right exhibition of cinematographic films. Hence, such transactions do not attract

the provisions of TDS. Further, the minimum guarantee amount which is paid by the distributor for acquiring the exhibition rights of a movie is a fixed expenditure for the distributor that is paid to producers irrespective of the fact whether the film generates a profit or incurs losses. Hence, the payments made by the assessee do not fall under the term "Royalty" and do not attract the provisions of TDS. The appeal of the revenue on this ground is dismissed.

Deemed Dividend:

10. The Assessing Officer observed that the assessee was a shareholder and director in M/s Associated Cine Exploiters Pvt. Ltd. (ACEL) and obtained loan of Rs.1,00,000/-. The Assessing Officer held this to be a deemed dividend in accordance with the provisions of Section 2(22)(e) of the Act. After hearing the arguments and perusal of the material on the record, we find that the assessee has received Rs.1,50,000/- as commercial advance for granting rights for distribution of movie and the amount was paid to M/s Sukrit Pictures on 03.05.2010 was commercial advance for screening of the movie. It is a fact on record that the amount received from ACEL which is running a Cinema Theatre in Rohtak has given loan to Sukrit Pictures which is the distributor. Thus, this is the amount received from the theatre owner to the distributor of the films. It is a pure commercial transaction between the movie theatre and the distributor. In view of the judgment of Hon'ble Jurisdiction High Court in the case of CIT Vs Creative Dyeing & Printing Pvt. Ltd. 318 ITR 476 wherein it has been held that amounts advanced to the assessee by another company for the business purpose

wherein both the entities are having common Directors and if it is in the nature of a commercial transactions, the provisions of Section 2(22)(e) of the Act are not attracted. We find that the facts of the instant case are similar wherein the ratio of the above judgment is applicable. Hence, the addition made by the AO is hereby directed to be deleted.

Unexplained Investments:

11. The Assessing Officer observed that as per capital account appearing in the balance sheet as on 31.03.2010, the capital of the assessee was mentioned at Rs.(-)1,39,578/- whereas as per capital account appearing in the balance sheet as on 31.03.2011, the opening capital of the assessee as on 01.01.2010 was at Rs.27,37,241/-. Hence, the Assessing Officer made addition of Rs.28,76,819/- (Rs.27,37,241/- + Rs.1,39,578/-).

12. As per the submissions filed before the Id. CIT (A), the assessee has transferred the capital from M/s Sukrit Pictures of Rs.1,22,60,619/-. Further, the profit of the Sukrit Pictures of Rs.14,06,155/- has been added. Thus, the total amounts stands at Rs.1,35,27,196/-. Out of this amount of Rs.1,35,27,196/-, an amount of Rs.1,13,21,118/- has been withdrawn. The closing balance reflected is Rs.22,06,078/-. The Id. CIT (A) has examined the entire account and did not find any discrepancy. Hence, the addition made by the Assessing Officer can be said to be an addition made cursorily without looking into the capital introduced and the profits of the year. Therefore, the addition is hereby directed to be deleted.

Unexplained Cash Credits:

13. The Assessing Officer observed that the assessee made cash deposits of Rs.9,17,000/- in the bank account of Karur Vysya Bank Ltd. and treated the same as unexplained. Before us the Id. DR argued that the assessee could not prove the sources of this cash deposits satisfactorily. We find as per Id. CIT (A), the cash was duly reflected in the cash book and the same has been deposited in the bank account. The Id. CIT (A) held that the assessee has earned an amount of Rs.2,06,73,705/- which was generated during the course of film distribution business. The Id. CIT (A) has examined the cash book and tallied the same with the sales register. The Id. CIT (A) thereafter deleted the addition since no discrepancy has been found. The factual observation of the Id. CIT (A) could not be controverted by the revenue by any documentary evidence. Hence, we hereby decline to interfere with the order of the Id. CIT (A).

ITA No. 2439/Del/2016**Unrealized Rent:**

14. Facts relevant to the adjudication of the issue are that the assessee has leased his commercial property at a monthly rent of Rs.3,00,000/-, for a period of three years commencing from 04.03.2010 to 03.03.2013. The assessee received rent which has been paid by the tenant only for a period of two months and no further payments have been received during the year. The assessee has declared an amount of Rs.5,40,000/- as the annual rental value u/s 23 of the Income Tax Act, 1961 and after claiming deduction u/s 24(a) of Rs.1,62,000/- offered an

amount of Rs.3,78,000/- to taxation under the head 'income from house property'. The Assessing Officer held that since the rent agreement reflects monthly rent of Rs.3,00,000/-, the property should be treated as deemed let out and the annual rental value is determined at Rs.36,00,000/-. After giving deduction u/s 24(a) of the Act of Rs.10,80,000/- and after giving allowance for Rs.3,78,000/- declared by the assessee, the Assessing Officer brought to tax an amount of Rs.21,42,000/-. The Id. CIT (A) held that the deduction of unrealized rent is available subject to conditions prescribed in Rule 4 of the IT Rules. Rent is considered unrealizable if and only if it is proved to be lost and irrecoverable, where-

- (a) Tenancy is bonafide.
- (b) Defaulting tenant has vacated, or steps have been taken to compel him to vacate property.
- (c) Defaulting tenant is not in occupation of any other property of the assessee.
- (d) Assessee has taken all reasonable steps to institute legal proceedings for the recovery of the unpaid rent or satisfies the Assessing Officer that legal proceedings would be useless.

15. The Id. CIT (A) confirmed the addition holding that in this case, the assessee has submitted no evidence that the defaulting tenant has vacated the property in question and no evidence whatsoever was submitted by the assessee showing that the steps have been taken to compel the defaulting tenant to vacate the property. Further, the assessee did not furnish any document as regards to satisfaction that the legal

proceedings for the recovery of the unpaid rent would be useless.

16. The provisions relating to the taxability of the income from house property are as under:

"23. (1) For the purposes of section 22, the annual value of any property shall be deemed to be—

*(a) **the sum for which the property might reasonably be expected to let from year to year; or***

*(b) **where the property or any part of the property is let and the actual rent received or receivable by the owner in respect thereof is in excess of the sum referred to in clause (a), the amount so received or receivable; or***

(c) where the property or any part of the property is let⁶⁰ and was vacant during the whole or any part of the previous year and owing to such vacancy the actual rent received or receivable by the owner in respect thereof is less than the sum referred to in clause (a), the amount so received or receivable:

Provided that the taxes levied by any local authority in respect of the property shall be deducted (irrespective of the previous year in which the liability to pay such taxes was incurred by the owner according to the method of accounting regularly employed by him) in determining the annual value of the property of that previous year in which such taxes are actually paid by him.

*Explanation.—**For the purposes of clause (b) or clause (c) of this sub-section, the amount of actual rent received or receivable by the owner shall not include, subject to such rules as may be made in this behalf, the amount of rent which the owner cannot realise.***

(2) Where the property consists of a house or part of a house which—

(a) is in the occupation of the owner for the purposes of his own residence; or

(b) cannot actually be occupied by the owner by reason of the fact that owing to his employment, business or profession carried on at any other place, he has to reside at that other place in a building not belonging to him, the annual value of such house or part of the house shall be taken to be nil.

(3) The provisions of sub-section (2) shall not apply if—

(a) the house or part of the house is actually let during the whole or any part of the previous year; or

(b) any other benefit therefrom is derived by the owner.

(4) Where the property referred to in sub-section (2) consists of more than [one house]—

(a) the provisions of that sub-section shall apply only in respect of [one] of such houses, which the assessee may, at his option, specify in this behalf;

(b) the annual value of the house or houses, [other than the house] in respect of which the assessee has exercised an option under clause (a), shall be determined under sub-section (1) as if such house or houses had been let.]

[(5) Where the property consisting of any building or land appurtenant thereto is held as stock-in-trade and the property or any part of the property is not let during the whole or any part of the previous year, the annual value of such property or part of the property, for the period up to [one year] from the end of the financial year in which the certificate of completion of construction of the property is obtained from the competent authority, shall be taken to be nil.]

17. The facts with relation to the Act are to be interpreted as under: [Section 23(1)]

- (A) The sum for which the property might reasonably be expected to let from year to year; or= not quantified
- (B) where the property or any part of the property is let and the actual rent received or receivable by the owner in respect thereof is in excess of the sum referred to in clause (a), the amount so received or receivable; or = Rs.3,78,000/-

The Explanation.—For the purposes of clause (b) or clause (c) of this sub-section, the amount of actual rent received or receivable by the owner shall not include, subject to such rules as may be made in this behalf, the amount of rent which the owner cannot realise.

18. The Explanation can be invoked if (B) above is applicable. When (B) is invoked, the benefit of explanation is subjected to the rules (Rule 4).

19. Rule 4 reads as under:

"4. For the purposes of the Explanation below sub-section (1) of section 23, the amount of rent which the owner cannot realise shall be equal to the amount of rent payable but not paid by a tenant of the assessee and so proved to be lost and irrecoverable where,—

(a) the tenancy is bona fide;

(b) the defaulting tenant has vacated, or steps have been taken to compel him to vacate the property;

(c) the defaulting tenant is not in occupation of any other property of the assessee;

(d) the assessee has taken all reasonable steps to institute legal proceedings for the recovery of the unpaid rent or satisfies the Assessing Officer that legal proceedings would be useless.]"

20. We find that the Id. CIT (A) has confirmed the addition owing to failure of the assessee to fulfill the conditions laid

down in the Rules. Hence, we decline to interfere in the order of the Id. CIT (A).

Sale of Jewellery:

21. During the year, the assessee has sold jewellery on 23.10.2010 for Rs.12,75,220/-. The assessee filed purchase bills of such jewellery which reflects the purchase of gold ornaments whereas the sale bills of the jewellery reflects sale of gold bars. Before the Assessing Officer, the assessee submitted that they sold 500 gms gold bars standard @1950 per gm and the purchase was of ornaments. It was argued before the Id. CIT (A) that the bullion was received at the time of marriage and cost of acquisition should be taken as Nil. Thus, we find that there are two different explanation offered by the assessee. No evidence of gold bars received by the assessee.

22. We have gone through the order of the Id. CIT (A) wherein the issues relating to purchase of gold ornaments in the year 1999 and 2000 have been adequately demolished by going through the items purchased and items sold which do not tally and could not be reconciled. Hence, we hereby uphold the decision of the Id. CIT (A) on this issue.

Cash deposits:

23. The Assessing Officer made addition of Rs.64,17,645/- on account of cash deposits in Karur Vysya Bank. Assessing Officer observed that as per AIR information there was cash deposit of Rs.64,17,645/- in his saving bank account. Assessee stated that amount did not pertain to him or his family members. Assessing

Officer added the amount of Rs.64,17,645/- as the onus to prove the nature and source was on the Assessee which was not discharged. The assessee has stated that cash deposits were not reflected in personal name or in the name of his proprietary concern and, therefore, the deposits were neither in respect of the income of Assessee nor they were made in the bank account of the Assessee.

24. It is seen that the deposits of Rs.39,47,470/- and Rs.24,70,175/- was in the name of M.S. Education Society and Tyagi Public School in which assessee was the authorized signatory. It is a fact that the amounts of cash deposits were reflected against the assessee in the AIR information as the amounts were clubbed under the same PAN. It is a fact that M.S. Education Society and Tyagi Public School are different entities other than the assessee. Therefore, right course of action would have been examine these deposits in the cases of M.S. Education Society and Tyagi Public School. From the perusal of pages 27 to 31 of Paper Book which is a confirmation from Chief Manager of Karur Vysya Bank dated 07.03.2014, it is seen that transactions of Rs.39,47,470/- dated 30.03.2011 and of Rs.24,70,175/- dated 31.03.2011 were in the name of M.S. Education Society and Tyagi Public School. It was also stated that Sh. Yashovardhan Tyagi was the authorized signatory for these accounts. Therefore, it is a fact that deposits of Rs.39,47,470/- and Rs.24,70,175/- were made in the accounts of M.S. Education Society and Tyagi Public School which are separate entities. The fact that assessee is an authorized signatory of those accounts does not establish that accounts belonged to the assessed when both these entities are

separately assessed. Therefore, the nature and source of deposits amounting to Rs.39,47,470/- and Rs.24,70,175/- needs to be examined in the hands of M.S. Education Society and Tyagi Public School respectively but not in the hands of the assessee. Hence, we hereby direct that the addition is liable to be deleted in the hands of the assessee.

25. In the result, the appeal of the revenue is dismissed and the appeal of the assessee is partly allowed.

Order Pronounced in the Open Court on 27/04/2020.

Sd/-

(Sushma Chowla)
Vice President

Dated: 27/04/2020

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR