IN THE INCOME TAX APPELLATE TRIBUNAL DELHI
BENCH 'D', NEW DELHI

BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND SH. AMIT SHUKLA, JUDICIAL MEMBER

(THROUGH VIDEO CONFERENCING)

ITA No.5998/Del/2014
(for Assessment Year : 2010-11)

ACIT Circle – 19(1), New Delhi PAN No. AAAPT 0403 G	Vs.	Yashovardhan Tyagi 56, Madhya Marg, DLF Phase-II, Gurgaon-122002
(APPELLANT)		**(RESPONDENT)**

Assessee by	Shri Satish Agarwal, C.A.
Revenue by	Dr. Kumar Pranav, Sr. D.R.

Date of hearing:	13/04/2021
Date of Pronouncement:	27/05/2021

ORDER

PER ANIL CHATURVEDI, AM:

This appeal filed by the Revenue is directed against the order dated 29.05.2014 passed by the Commissioner of Income Tax (Appeals) - XXII, New Delhi relating to Assessment Year 2010-11.

2. The relevant facts as culled from the material on records are as under :

3. Assessee is an individual who is stated to be engaged in the business of Film distribution under the name and style of M/s. Sukrit Pictures. Assessee filed his return of income for A.Y. 2010-11 on 22.09.2010 declaring total income at Rs.43,96,168/-. The case was selected for scrutiny and thereafter assessment was framed under section 143(3) of the Act vide order dated 30.03.2013 and the total income was determined at Rs.7,64,35,070/-. Aggrieved by the order of AO, assessee carried the matter before the CIT(A) who vide order dated 29.05.2014 (in Appeal No.47/13-14) granted substantial relief to the assessee. Aggrieved by the order of CIT(A), Revenue is now in appeal before us and has raised the following grounds of appeal :

1. *"The Ld CIT(A) erred in law and on facts in deleting the addition of Rs.6,00,000/- by not appreciating the fact of the case and explanation 2 to Section 9(1)(VI) of IT Act, 1961.*

2. *The Ld. CIT(A) erred in law and on facts in deleting the additions of Rs.20 lacs which had not been recorded by the assessee in his books of accounts despite TDS deduction on the said amount and the assessee failed to substantiate his claim by documentary evidence."*

4. The Revenue subsequently vide letter dated 31.7.2019 has stated that due to typographical error, the amount in ground no.1 is stated to be Rs.6,00,000/- while the correct amount should be considered to be Rs.6,00,00,000/-. After considering the aforesaid letter, we proceed to dispose of the appeal.

5. Ground No.1 is with respect to the deletion of addition of Rs.6 crore by CIT(A).

6. During the course of assessment proceedings, AO noticed that assessee had debited a sum of Rs. 6 crore as "M. G. Royalty account" in his Profit and Loss account on which no deduction of tax under Section 194J of the Act was made by the assessee. The assessee was asked to show-cause as to why the payment not be disallowed u/s 40(a)(ia) of the Act on account of non-deduction of TDS to which assessee *inter alia* submitted that Minimum Guarantee Royalty paid by the assessee per se is not Royalty as defined in the explanation 2 to Section 9(1)(vi) and is not subject to TDS. The submissions of the assessee were not found acceptable to AO. AO was of the view that Section 194J states that it is incumbent on a person making payments for professional service, technical service and royalty, to deduct at source and Explanation (ba) to the said section also states that term 'Royalty' will have the same meaning as given in Explanation 2 to clause (vi) of Section 9(1) of the I.T. Act. AO was thus of the view that consideration for transfer of all or any rights in respect of any copyright, including copyright for films and video tapes, used in connection with television or tapes, would fall within the definition of 'royalty'. He was therefore of the view that the payment made by the assessee falls within the definition of 'royalty' and the assessee was required to deduct the TDS u/s 194J of the Act. Since assessee had not deducted the TDS, the provisions of Section 40(a)(ia) of the Act stood attracted and he accordingly disallowed the payment of Rs.6 crore claimed as 'Royalty'.

7. Aggrieved by the order of AO, assessee carried the matter before the CIT(A). CIT(A) while deleting the addition has given a finding that AO has been unable to show as to under which of the clauses of Explanation 2 to Section 9(1)(vi) of the Act the payment on 'Royalty' falls so as to bring it into the definition of Royalty for the purposes of Section 194J. The CIT(A) also relied on the decision of the Mumbai Tribunal in the case of Asiavision Home Entertainment (P.) Ltd. vs ACIT (2010) 37 SOT 111 (Mum) to come to the conclusion that assessee was not required to deduct TDS u/s 194J on the payment of Minimum Guarantee Royalty paid for distribution of Cinematographic Film and therefore there was no justification for disallowance u/s 40(a)(ia) of the Act. Aggrieved by the order of CIT(A), Revenue is now before us.

8. Before us, Learned DR took us to the order of AO and supported the order of AO.

9. Learned AR on the other hand reiterated the submissions made before the lower authorities and further submitted that assessee had paid Rs.6 crore as Minimum Guarantee Royalty to M/s Baba Art Limited for acquiring theatrical, distribution, exhibition and exploitation rights of the movie 'De Dana Dan' for the territory of Delhi and UP, and the minimum guarantee paid in terms of Film License MOU/ Agreement could not be considered as 'Royalty' as per the provisions of Section 194J of the Act as the case of the assessee was covered by the exception to the definition

of Royalty under clause (v) to Explanation 2 to Section 9(1)(vi) of the Act wherein the payments relating to sale, distribution or exhibition of cinematographic films are excluded from the definition of Royalty. He further submitted that identical issue arose in assessee's own case in A.Y. 2011-12 before the Hon'ble Tribunal and the Tribunal vide order dated 27.04.2020 in ITA No.2880/Del/2016 had dismissed the ground of Revenue. He therefore submitted that in such a situation, no interference to the order of CIT(A) is called for.

10. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to the deletion of addition made by the AO by invoking the provision of Section 40(a)(ia) of the Act. We find that CIT(A) while deleting the addition has noted that AO was unable to show as to under which of the clause (v) to Explanation 2 to Section 9(1)(vi) of the Act the payment of royalty for the purpose of Section 194J of the Act was covered and the payment of minimum guarantee royalty paid by the assessee was outside of the royalty to sub section (vi) of Section 9(1) and therefore the provisions of Section 194J were not applicable. We further find that on identical issue in assessee's own case for A.Y. 2011-12 vide Para No.9 the co-ordinate Bench of the Tribunal ITA No.2880/Del/2016 had dismissed the ground of Revenue by observing as under :

> *"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."

11. Before us, Revenue has not pointed any fallacy in the findings of CIT(A) nor has pointed to any distinguishing feature in the facts of the case for the year under consideration and that of AY 2011-12. The Revenue has also not placed any material on record to demonstrate that the order of the co-ordinate Bench of the Tribunal in Assessee's own case for AY 2011-12 has been setaside/stayed/orverruled by higher judicial forum. In such a situation, we find no reason to interfere with the order of CIT(A). We therefore dismiss the ground of the Revenue.

12. Thus the ground of Revenue is dismissed.

13. Second ground is with respect to the deletion of additions of Rs.20,00,000/- made by the AO.

14. AO noted that as per Form 26AS, the assessee has received a sum of Rs.40,00,000/- from M/s. Eagle Home Entertainments Pvt. Ltd., under section 194J and on such sum Rs.4,53,200/- was also deducted as TDS. As per the Ledger Account of M/s. Eagle Home Entertainments Pvt. Ltd., in the books of M/s. Sukrit Pictures, assessee had shown a receipt of Rs.20,00,000/- from M/s. Eagle Home Entertainments Pvt. Ltd. as DVD rights. The assessee was asked to explain about the receipt of Rs.40,00,000/- from the M/s. Eagle Home Entertainments Pvt. Ltd. to which assessee *inter alia* submitted that M/s. Eagle Home Entertainments Pvt. Ltd. paid Rs.20,00,000/- to it from home video rights of the Film "Dhund the Fog" and TDS was deducted. The other payment of Rs.20,00,000/- related to the payment due from M/s. Jordan Electronics, a unit of Eagle Entertainment Pvt. Ltd. and said amount was due from them in respect of outstanding for the satellite rights of Film "Dhund the Fog" which was pending since 31.03.2001 and the income has already been considered in the F.Y. ending 31.03.2004. It was further submitted that since M/s Jordan Electronics has became a part of Eagle Entertainment Pvt. Ltd., their TDS has been issued in the said name. The submissions made by the assessee was not found acceptable to AO as according to AO, assessee had failed to substantiate the contentions with support of documentary

evidences. He therefore considered Rs.20,00,000/- to be received by the assessee which were not recorded in the Books of accounts of the assessee to be unexplained money u/s 69A of the Act and accordingly made its addition. Aggrieved by the order of AO, assessee carried the matter before the CIT(A) who deleted the addition by observing as under:

> *"8.26 The Appellant has challenged in Ground No.2(d) & 8, the addition of Rs.20,00,000/- made in the assessment order u/s 69A. The Assessing Officer has made an addition of Rs.20,00,000/- on the ground that as per Form 26AS, the assessee had received a sum of Rs.40,00,000/- from M/s Eagle Home Entertainments Pvt. Ltd., but as per the ledger Account of this company in the books of M/s Sukrit Pictures, Proprietary concern of the Assessee, the assessee had shown a receipt of only Rs.20,00,000/- from M/s. Eagle Entertainments Pvt. Ltd. It was explained by Sh. R. S, Singhvi, CA, the Learned Counsel of the Appellant that M/s Eagle Home Entertainments Pvt. Ltd. paid an amount of Rs.20,00,000/- for the home video rights for the film 'Dhund the Fog' and that the other amount of Rs.20,00,000/- was paid to the Assessee by M/s Eagle Home Entertainments Pvt. Ltd. in respect of payment due to the Assessee from M/s Jordan Electronics since earlier years. It was stated that M/s Jordan Electronics was taken over by M/s Eagle Home Entertainments Pvt. Ltd. and the outstanding old carried forward balance pertaining to M/s Jordan Electronics was transferred to M/s Eagle Home Entertainments Pvt. Ltd. It was explained that M/s. Jordan Electronics, having their office at 257, Palika Bazar, Cannaught Place, New Delhi – 110001, being a partnership firm, having the partners as Sh. Surender Suneja and Sh. Vinod Suneja, merged and became a division of M/s Eagle Home Entertainment Pvt. Ltd. having the registered office at J-12, Jungpura Extension, New Delhi-110014, w.e.f. 1-04-07 and that both the partners were Directors in the new company. Perusal of the Declaration letter from M/s Eagle Home Entertainments Pvt. Ltd. shows that it has been clearly stated that M/s Jordan Electronics has merged and become a division of M/s Eagle Home Entertainments Pvt. Ltd. and also other facts as claimed by the Learned Counsel.*

8.27 Once the concern M/s Jordan Electronics has merged with M/s Eagle Home Entertainments Pvt. Ltd., it is obvious that the payments for the liabilities of M/s Jordan Electronics will be made by M/s Eagle Home Entertainments Pvt. Ltd. The Learned Assessing Officer has brushed aside the declaration form M/s Eagle Home Entertainments Pvt. Ltd., and has stated that the authenticity of this declaration letter is in question because it is not endorsed by M/s Jordan Electronics. However, the Ld. Assessing officer has filed to appreciate that once M/s Jordan Electronics has merged with M/s Eagle Home Entertainments Pvt. Ltd., and both the partners of M/s Jordan Electronics have become Directors in the company M/s Eagle Home Entertainments Pvt. Ltd., then M/s. Jordan Electronics has no separate entity and is a part of M/s Eagle Home Entertainments Pvt. Ltd. If the Assessing Officer had any doubt amount the merger of M/s Jordan Electronics with M/s Eagle Home Entertainments Pvt. Ltd., or about the authenticity of the declaration letter from M/s Eagle Home Entertainments Pvt. Ltd. filed by the Assessee during the assessment proceedings, then direct enquiry could have been done from that company which was having its registered office at J-12, Jangpura Extension, New Delhi-110014. It is obvious that the Assessing Officer has made this addition merely on the basis of suspicion without having any material or evidence against the Assessee. If the Learned Assessing Officer was having suspicion regarding the claimed merger or the authenticity of the declaration filed, than further enquiries could have been done to gather evidence against the Assessee, but the Assessing Officer could not take the decision against the Assessee without any evidence or material.

8.28 It is further seen that the Ld. Assessing Officer has made the addition u/s 69A treating the amount of Rs.20,00,000/- received in respect of old balance of M/s Jordan Electronics, from M/s Eagle Home Entertainments Pvt. Ltd. as not being recorded in the books of accounts of the Assessee, i.e. in the proprietary concern M/s Sukrit Films. However, this is not the case and the Assessee has recorded the receipt of the Rs.20,00,000/- received from M/s Eagle Home Entertainments Pvt. Ltd. in the amount of M/s Jordan Electronics in addition to the other Rs.20,00,000/- recorded in the accunt of M/s Eagle Home Entertainments Pvt. Ltd. Thus the entire Rs.40,00,000/- received from M/s Eagle Home Entertainments Pvt. Ltd. by the Assessee has been recorded in the books of M/s Sukrit Films. As M/s Eagle Home Entertainments Pvt. Ltd. has taken over M/s Jordan Electronics, it has paid the

amount payable by the company directly and also the earlier amounts payavle by M/s Jordan Electronics; and hence it cannot be blamed. Similarly, the Assessee cannot be blamed if it accounted the Rs.20,00,000/- which was due from M/s Jordan Electronics and whose account continued in the books of account of Assessee, in the account of M/s Jordan Electronics even if the payment was received from M/s Eagle Home Entertainments Pvt. Ltd., once he was aware that the payment was for the outstanding balance of M/s Jordan Electronics particularly when Jordan Electronics has merged with M/s Eagle Home Entertainments Pvt. Ltd. It can at most be argued that if M/s Jordan Electronics had merged with M/s Eagle Home Entertainments Pvt. Ltd., than the assessee should also have merged the account of M/s Jordan Electronics with that of M/s Eagle Home Entertainments Pvt. Ltd., so as to create one account where the entire receipt of Rs.40,00,000/- could be accounted for. However, once the entire amount of Rs.40,00,000/- is accounted for in the books of the Assessee, no addition u/s 69A can be made merely because the receipt was disclosed as Rs.20,00,000/- each in two different accounts. Thus there is no merit in the addition of Rs.20,00,000/- made u/s 69A which is hereby deleted. Accordingly, ground of appeal 2(d) & 8 are allowed."

15. Aggrieved by the order of CIT(A), Revenue is now before us. Before us, Learned DR took us to the findings of AO and supported the order of AO. Learned AR on the other hand reiterated the submissions made before the AO and CIT(A) and supported the order of CIT(A).

16. We have heard both the parties and perused the material on record. The issue in the present ground is with respect to the addition of Rs.20,00,000/- made u/s 69A of the Act. AO made the addition u/s 69A of the Act and treated the amount of Rs.20,00,000/- from M/s. Eagle Home Entertainments Pvt. Ltd.

to be as not recorded in the books of account of the assessee. We find that CIT(A) while deleting the addition has given a finding that the AO has made addition merely on the basis of suspicion without having any material against the assessee. He has further given a finding that entire Rs.20,00,000/- has been received by the assessee, recorded in the Books of account and therefore no addition u/s 69A can be made merely because the receipt was disclosed of Rs.20,00,000/- in each two different account.

17. Before us, no material has been placed by the Revenue to point out any fallacy in the findings of CIT(A). We therefore find no reason to interfere with the order of CIT(A) and **thus the ground of Revenue is dismissed.**

18. **In the result, the appeal of Revenue is dismissed.**

Order pronounced in the open court on 27.05.2021

Sd/-	**Sd/-**
(AMIT SHUKLA)	**(ANIL CHATURVEDI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Date:- 27.05.2021

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Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI