

आयकर अपीलिय अधिकरण, “डी” न्यायपीठ, चेन्नई
IN THE INCOME-TAX APPELLATE TRIBUNAL ‘D’ BENCH, CHENNAI
श्री ए. मोहन अलंकामणी, लेखा सदस्य एवं श्री धुव्वुरु आर.एल रेड्डी, न्यायिक सदस्य के समक्ष
Before Shri A. Mohan Alankamony, Accountant Member &
Shri Duvvuru RL Reddy, Judicial Member

आयकर अपील सं./I.T.A.No.1287/Chny/2013
निर्धारण वर्ष/Assessment Year: 2009-2010

The Deputy Commissioner of
Income Tax, Media Circle 1,
Chennai.

M/s. Kavithalaya Productions Pvt. Ltd.,
Vs. No. 34, Warren Road, Mylapore,
Chennai – 4.

[PAN: AAACK2996E]

(Appellant)

(Respondent)

अपीलार्थी की ओर से / Appellant by : Ms. S. Vijayaprabha, JCIT
प्रत्यर्थी की ओर से/Respondent by : Shri S. Sridhar, Advocate
सुनवाई की तारीख/ Date of hearing : 31.07.2018
घोषणा की तारीख /Date of Pronouncement : 12.10.2018

आदेश /O R D E R

PER DUVVURU RL REDDY, JUDICIAL MEMBER:

This appeal filed by the Revenue is directed against the order of the Id. Commissioner of Income Tax (Appeals) VI, Chennai dated 28.12.2012 relevant to the assessment year 2009-10. The Revenue has raised two grounds viz., (i) the Id. CIT(A) has erred in deleting the disallowance made under section 40(a)(ia) of the Income Tax Act, 1961 [“ Act” in short] on the sum of ₹.3 crores on the ground that the said sum was directly paid by M/s. Pyramid Saimira Entertainment Ltd. to M/s. Seven Arts Film & (ii) the Id. CIT(A) has erred in holding that ₹.75 lakhs repaid to M/s. Pyramid Saimira

Entertainment Ltd., is to be treated as revenue expenditure under section 37 of the Act.

2. Brief facts of the case are that the assessee filed its return of income for the assessment year 2009-10 on 22.09.2009 declaring total income of ₹.52,81,838/-. The return filed by the assessee was selected for scrutiny under CASS. The Assessing Officer completed the assessment under section 143(3) of the Act by determining the taxable income of the assessee at ₹.4,48,79,083/- after making various additions/disallowances.

3. The Assessing Officer disallowed the expenditure incurred on purchase of satellite right etc. under the provisions of section 40(a)(ia) of the Act. After considering the submissions of the assessee and by considering the decisions in the case of Hindustan Coco cola Beverages P. Ltd. 293 ITR 226 (SC) as well as the decision of the Kolkata Benches of the Tribunal in the case of ITO v. Premiere Medical Supplies & Stores in I.T.A. Nos. 1061 & 1062/Kol/2010 dated 28.10.2011, the Id. CIT(A) has held that since the payments for acquiring the said rights are held not exigible for deduction of tax at source under section 194J of the Act since these payments are clearly covered by the exclusion under section 9(1)(vi) of the Act by virtue of the provisions of S.2(f) of Copy Right Act and the payments are covered under section 28 r.w. Rule 9B as trading expenses, there is no need to invoke the judicial authorities relied upon and deleted the addition.

4. Aggrieved, the Revenue is in appeal before the Tribunal. The Id. DR submitted that the addition was erroneously deleted without appreciating the fact that the section 29 of the Act provides that the income referred to in section 28 of the Act shall be computed in accordance with the provisions contained in section 30 to 43D of the Act and therefore, every receipt that comes under section 28 of the Act is subject to the provisions of section 40(a)(ia) of the Act in view of the provisions of section 29 of the Act. It was further submission that the exclusion part given in Explanation 2 to section 9(1)(vi) of the Act specifically relates only to sale distribution of exhibition of cinematographic films and it cannot be applied to the instant case, wherein outright purchase of satellite rights has not been made. By relying on the decision in the case of Samsung Electronics Co. Ltd. & Others (16 taxmann.com 141 (Kar) as well as the decision of the Tribunal in the case of ITO v. M/s. Shri Balaji Communications in I.T.A. No. 1744/Mds/2011 dated 20.12.2012, the Id. DR has submitted that the satellite rights would fall within the ambit of "royalty" and pleaded that the order of the Id. CIT(A) on this issue should be reversed. On the other hand, the Id. Counsel for the assessee strongly supported the order passed by the Id. CIT(A).

5. We have heard both sides, perused the materials available on record and gone through the orders of authorities below as well as paper filed by the assessee. The assessee M/s. Kavithalaya Productions (P) Ltd. acquired

theatrical rights, audio, video and satellite rights of the film “Kuselan” from M/s. Seven Arts Film [SAF] and in turn, the assessee sold all these rights over this film to M/s. Pyramid Saimira Entertainments Ltd. [PSEL]. The Assessing Officer asked the assessee to explain in compliance to section 194J of the Act. It was submitted by the assessee that the provisions of section 194J of the Act are not applicable for the amount paid for theatrical rights as per the provisions of section 9(1)(vi) of the Act since the provisions have excluded the distribution or exhibition of cinematography films from the definition of royalty. With regard to the amount of ₹.7 crores paid for other rights, the assessee has submitted that they had deducted tax on the payment of ₹.4 crores and the balance ₹.3 crores was directly paid by M/s. PSEL to SAF. It was also submitted before the Assessing Officer that the purchase consideration of the film rights and other rights is covered by the provisions of section 28 of the Act and not by the provisions of section 37 of the Act and therefore, the provisions of section 40(a)(ia) of the Act is not attracted. Since the satellite rights being a royalty payment and the provisions of section 194J of the Act are applicable, by invoking the provisions of section 40(a)(ia) of the Act, the Assessing Officer disallowed ₹.3 crores and brought to tax. On appeal, by directing the Assessing Officer to delete the disallowance, the Id. CIT(A) has held as under:

“19. Coming to the TDS on part of the monies i.e., 4 crores paid by the assessee company directly and rest of the money 3 crores paid by PSEL to SAF the appellant company has argued that S.40(a)(ia) has

been introduced to bring in effective compliance to the provisions of TDS and also to avoid escapement of incomes when payments were made to non-assessees. It is also argued that the provisions of S.40(a)(ia) does not envisage that the deduction of TDS shall be on full payment but even if a part of the money is deducted the recipient would still come into the tax net and the obligation u/s.40a(ia) would be fulfilled. They have relied upon the ratio in the case of Hindustan Coca Cola Beverages and also in the case of Premier Medical Supplies (supra) and pleaded for deleting the disallowance. Since the payments for acquiring the said rights are held not exigible for deduction of tax at source u/s.194J since these payments are clearly covered by the exclusion u/s. 9(1)(vi) by virtue of the provisions of the S.2(f) of Copy Right Act and the payments are covered under S.28 read with Rule 9B as trading expenses, there is no need to invoke the judicial authorities relied upon. Accordingly, the addition is directed to be deleted.”

5.1 It has to be adjudicated as to whether the acquisition of satellite rights is in the nature of “royalty” or not in terms of provisions of section 9(1)(vi) of the Act and also as per Copy Right Act. In this case, the assessee had acquired the satellite rights only for a particular period of eleven years and other theatrical rights for a period of ten years, which clearly shows that it was not a perpetual right received by the assessee. Therefore, what the assessee done was not purchasing the rights, but it was only a temporary transfer of rights to it. Thus, the assessee cannot say that it had purchased rights altogether. The Explanation 2 under Section 9(1)(vi) of the Act, clearly brought such type of payments within the purview of “royalty”. Further, section 194J of the Act clearly mentions that it is incumbent on a person making payments for professional service, technical service and royalty, to deduct tax at source. 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 Act. The said Explanation is reproduced hereunder for brevity:-

“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).”

5.2 Thus, the consideration for transfer of all or any rights in respect of theatrical rights, audio, video & satellite rights, etc. would fall within the definition of “royalty”. What is excluded are consideration for sale, distribution and exhibition of cinematographic films. What the assessee paid here was not consideration for sale, distribution or exhibition of cinematographic films. The assessee did not purchase the cinematographic films as such through the transactions. The assessee had only received right

for satellite broadcasting for a period of ten years, the agreement placed in the paper books reproduced as under:

Film: Kuselan (Tamil)

“Annexure-A”

The Rights offered by Party of the First Part through this Agreement limited to Tamil languages are:

1. *Theatrical rights in India, and overseas (excluding the State of Kerala) for a period of 10 years from the date of premier release in India.*
2. *Audio Rights including Audio CD, Cassettes and MP3 — Indian & Overseas - perpetual period.*
3. *Satellite rights and cable TV — Indian and overseas telecast/Terrestrial for 11 years from the date of premier release in India.*
4. *The Rights being offered through this Agreement also include Non theatrical rights (70mm/35mm/16mm) and all other reduced and enlarged sizes, along with DLP Projector/UFO/QUBE, videos copyrights including VHS, tapes, videogame, discs in any /all formats including DVD, VCD, LD, Blue Ray, HDVD computer discs etc, Karaoke, or any other mode or format of video, All video streaming rights, Internet Rights, IPTV Rights, VOD Rights, and convergence rights, Dubbing and Subtitle in any foreign languages only for overseas , Rental Rights, Clipping Rights of Songs Visual and scenes Compilation Rights, Recording, Embodying, Communication, Mechanical Synchronization Processing, Publishing, Exhibition, Exploitation, Distribution, Broadcast rights ,Music ,Sound Track, Dialogues of both versions, Mobile downloads, Ringtones, gaining. merchandising, and all other rights attached to the Tamil version that may be invented in the future during the tenure of the agreement for the territories of whole world. All these are also valid for a period of Ten years from the premier release of the film in India.*
5. *After the expiry period as mentioned above all the above said rights will automatically revert and will rest solely with the party of the First Part only.”*

5.3 In the case of ITO v. Shri Balaji Communications (supra), the Coordinate Benches of the Tribunal has held that the payments made by the assessee towards acquisition of satellite rights would fall within the ambit of

“royalty” and the assessee was duty bound under section 194J of the Act to deduct tax at source on the payments effected. Further, in terms of Section 26 of the Copy Right Act, 1957, in the case of cinematographic film, the copy right shall subsist until 60 years from the beginning of the calendar year next following the year, in which the film is published. Therefore, the agreement in the case on hand, the retention of satellite right is only for a period of ten years, the same cannot be treated as “sale”. Moreover, in the above case, the Tribunal has also held that though section 40 of the Act starts with a *non obstante* clause “Notwithstanding anything to the contrary in section 30 to 38.....”, this would not mean that the said section is not applicable on a deduction claimed under section 28 of the Act, the Id. CIT(A) erroneously held that the said payment is covered under section 28 of the Act. Thus, the assessee having not deducted tax at source as required under section 194J of the Act, the Assessing Officer has rightly invoked section 40(a)(ia) of the Act and made the disallowance.

5.4 However, if the recipient M/s. Seven Arts Films has taken into account the income embedded in these payments, paid due taxes thereon and filed income tax returns in accordance with the law, in our considered view, declining the deduction in respect of expenditure relating to the payments of this nature cannot be treated as an “intended consequence” of section 40(a)(ia) of the Act, in view of the decision in the case of CIT v. Ansal Land

Mark Township (P) Ltd. 377 ITR 635 (Del). Accordingly, the Assessing Officer is directed to call for the details and verify the accounts of the payee and decide the issue afresh after allowing opportunity of being heard to the assessee. Thus, the ground raised by the assessee is allowed for statistical purposes.

6. The next ground raised in the appeal of the Revenue is that the Id. CIT(A) erred in holding that ₹.75 lakhs repaid to M/s. Pyramid Saimira Entertainment Ltd., is to be treated as revenue expenditure under section 37 of the Act. In the assessment order, the Assessing Officer disallowed ₹.75 lakhs being in the nature of “goodwill” and added to the total income of the assessee. On appeal, the Id. CIT(A) directed the Assessing Officer to delete the disallowance by stating that the expense is not “goodwill”, but, it is only a sales-return or a discount as squarely covered by section 9 of the Sale of Goods Act and Accounting Standard 9.

6.1 It was the submissions of the Id. DR that in the agreement itself the assessee has stated that the payment was made “as a gesture of goodwill” and the “goodwill” being a natural intangible asset attached to the business reflects the measure of the assessee’s reputation in the market built over the years. Hence what was paid by the assessee by way of compensation is to secure the intangible asset, viz., “goodwill”. Therefore, the Id. DR pleaded

that the order of the Id. CIT(A) on this issue should be reversed. On the other hand, the Id. Counsel for the assessee strongly supported the order passed by the Id. CIT(A).

6.2 We have considered the rival submissions. Vide agreement dated 16.02.2008, the assessee has purchased the right in movie "Kuselan" for ₹.25.50 crores from M/s. Seven Arts Films and sold the rights to M/s. PSEL for ₹.30 crores vide distribution agreement dated 25.04.2008. However, the assessee has admitted only ₹.29,21,34,208/- and claimed that the assessee has repaid ₹.75 lakhs to M/s. PSEL as a goodwill gesture/compensation. Since there was no goodwill gesture/compensation clause exist in the purchase assignment agreement and what was paid by the assessee by way of compensation is to secure the intangible asset, namely goodwill which tantamount to acquisition/retention of goodwill, the Assessing Officer disallowed the sum of ₹.75 lakhs. After considering the submissions of the assessee, the Id. CIT(A) has observed as under:

"23. Thus it's not that a price of a commodity is as what it is determined at the time of sale and it is a common practice that the price keeps getting reduced by the unfolding of future events. In the event of the goods sold being found defective or delivery not in time or not to the satisfaction of the customer, the seller has and has been always willing to reduce the price to keep himself secured in the business and to keep the good customer at his door step. In this case, even though the agreement dated 25-4-2008 the PSEL has agreed to a sale consideration of Rs. 30 crores for the Kuselan Tamil film, and 7 crores from PSEL for Kathanayakudu Telugu film, since both the films have not done well at the box offices, both the sellers ie., the assessee company and Mr. C. Aswini Dutt along with producer SAF, Mr. Rajini kanth, actor Mr. P. Vasu, Director of the Film have all agreed to compensate the PSEL by specified amounts. Thus it can be said that both the sellers, as a

parties to the renegotiations, have reduced their sale price by means of a discount given as the film did not do well at the box office. It has been very clearly reduced to writing on page 2 of the said Settlement Agreement that the appellant (being First Part) has agreed to reducing the sale consideration of the film by a sum of Rs.75 lacs. As per Accounting Standard 9 what is received on the recognition of a sale has to be taken as revenue. In this case, the assessee even though has received Rs. 30 crores based on the agreement dated 25-4-2008 but out of the same, Rs. 75 lakhs has been returned to PSEL as his share, by virtue of the subsequent unfolding of events and subsequent agreement dated 17-9-2008. Hence it is not correct to say that Rs.75 lakhs is a payment of goodwill. As rightly argued by the AR there is no asset acquired to say that the asset has come along with goodwill. In fact, the payment made to PSEL of Rs.75lakhs is only a reduction in sale consideration, a payment made to protect the reputation of the assessee and. to keep them in good stead in the business. As rightly argued by the AR, there is a difference between "Goodwill" and "Goodwill gesture". The goodwill gesture is one which results in goodwill over a long period of time whereas a goodwill is a crystallised item, price paid in excess of assets over liabilities. Hence a payment made as a goodwill gesture cannot be equated with goodwill, the former is a revenue item and the latter is a capital item as per the Income Tax act. Since the payment made of Rs.75lakhs on the commercial failure of the film is only to compensate the buyer PSEL and also to protect the reputation of the Seller, the same cannot be held as a 'goodwill' but it is only a sales-return or a discount, as squarely covered by S.9 of the Sale of Goods Act and Accounting Standard 9. Moreover, this is not the first time of such instances in the film industry, there are precedents. Hence, the AO is directed to delete the addition."

6.3 Similar compensation/goodwill gesture for said film "Kuselan" was paid by M/s. Seven Arts Films to M/s. PSEL of ₹.150 lakhs and the same was subject matter in appeal before the Tribunal/Hon'ble Madras High Court [T.C.A. No. 613 of 2014 dt. 07.07.2015]. Vide its order dated 30.01.2018 in I.T.A. No. 1291/Mds/2013 for the assessment year 2009-10, by observing that such compensation paid towards losses suffered by the distributors and exhibitors is only a measure of commercial expediency, the Tribunal has held that the payment of ₹.150 lakhs by the assessee [M/s. Seven Arts Films] to M/s. PSEL is only a revenue expenditure and dismissed the appeal

filed by the Revenue. In view of the above decision of the Tribunal, we find no reason to interfere with the order passed by the Id. CIT(A) on this issue and accordingly, the ground raised by the Revenue is dismissed.

7. In the result, the appeal filed by the Revenue is partly allowed for statistical purposes.

Order pronounced on the 12th October, 2018 at Chennai.

Sd/-
(A.MOHAN ALANKAMONY)
ACCOUNTANT MEMBER

Sd/-
(DUVVURU RL REDDY)
JUDICIAL MEMBER

Chennai, Dated, 12.10.2018

Vm/-

आदेश की प्रतिलिपि अग्रेषित/Copy to: 1. अपीलार्थी/Appellant, 2. प्रत्यर्थी/Respondent, 3. आयकर आयुक्त (अपील)/CIT(A), 4. आयकर आयुक्त/CIT, 5. विभागीय प्रतिनिधि/DR & 6. गार्ड फाईल/GF.