

**आयकर अपीलीय अधिकरण “I” न्यायपीठ मुंबई में।**

**IN THE INCOME TAX APPELLATE TRIBUNAL “I” BENCH, MUMBAI**

**श्री महावीर सिंह, न्यायिक सदस्य एवं श्री एन. के. प्रधान लेखा सदस्य के समक्ष ।**

**BEFORE SRI MAHAVIR SINGH, JM AND SRI NK PRADHAN, AM**

**आयकर अपील सं./ ITA No. 6480/Mum/2017**

**(निर्धारण वर्ष / Assessment Year 2013-14)**

SPE India Films Holding LLC C/o. Deloitte Haskins & Sells LLP, Indiabulls Finance Centre, Tower 3, 27 <sup>th</sup> Floor- 32 <sup>nd</sup> Floor, Senapati Bapat Marg, Elphinstone Road (W), Mumbai-400 013	Vs.	Dy. Commissioner of Income Tax (IT), 4(2)(2), 16 <sup>th</sup> floor, Room No. 1613, Air India Building, Nariman Point, Mumbai-400 021
<b>(अपीलार्थी / Appellant)</b>	..	<b>(प्रत्यर्थी / Respondent)</b>
<b>स्थायी लेखा सं./PAN No. AAOC1827L</b>		

अपीलार्थी की ओर से / <b>Appellant by</b>	:	S/shri PJ Pardiwala Paras Savla, Pratik Poddar, ARs
प्रत्यर्थी की ओर से / <b>Respondent by</b>	:	Shri Nishant Samiya, DR

सुनवाई की तारीख / <b>Date of hearing:</b>	03-06-2019
घोषणा की तारीख / <b>Date of pronouncement :</b>	03-06-2019

**आदेश / ORDER**

**महावीर सिंह, न्यायिक सदस्य/**  
**PER MAHAVIR SINGH, JM:**

This appeal is arising out of the order of Dispute Resolution Panel-2, Mumbai [in short 'DRP'], in objection No. 29 vide direction dated 09.08.2017. The Assessment was framed by the Dy. Commissioner of



Income Tax (Int. Tax)-Circle 4(2)(2), Mumbai (in short 'DCIT/AO') for the assessment year 2013-14 vide order dated 04.09.2017 under section 143(3) read with section 144C(13) of the Income Tax Act, 1961(hereinafter 'the Act').

2. At the outset, the learned Counsel for the assessee stated that the assessee has raised the additional ground in regard to non-taxability of royalty received on account of distribution of theatrical rights in India. For this assessee has raised the following additional grounds: -

*"Re.: Non-taxability of royalty received on account of distribution of theatrical rights in India.*

*1.1 The royalty income received by the Appellant on account of distribution of theatrical rights in India is not taxable in India.*

*1.2 The consideration received by the Appellant on account of distribution of theatrical rights in India is not in the nature of royalty as defined by Explanation 2 to section 9(1)(vi) of the Act, and accordingly, not taxable in India.*

*1.3 The Appellant prays that the AO be directed to consider the royalty income received by it on account of distribution of theatrical rights in India. as being not taxable in India."*

3. The learned Counsel for the assessee stated that the additional ground raised is purely legal and it was only during the course of preparation of the appeal the assessee was advised by its legal Counsel to raise this additional ground of appeal, which does not require production of any new material or not bring any new facts from outside



the assessment proceedings for its adjudication. The learned Counsel for the assessee now before us, contended that the relevant agreement dated 01.05.2007 made by and between the assessee namely SPE India Films Holding LLC and SPE Films India Pvt. Ltd was filed before the AO with covering letter dated 10.10.2016 during the assessment proceedings. According to the learned Counsel this will cover the entire facts of the case. On the other hand, the learned sr. Departmental Representative heavily objected for admission of additional ground. According to him, the new facts are necessary to be examined and this agreement for receipt of fees is to be examined by virtue of which the assessee has received the amounts on account of distribution of theatrical rights in India. On the other hand, the learned Counsel for the assessee stated that the entire details are available in the agreement and no new facts need to be gone into. The learned Counsel for the assessee relied on the decision of Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. vs. CIT (1998) 229 ITR 383 (SC).

4. We have heard rival contentions and facts of the case on the issue of admissibility of additional evidences. We noted that the agreement filed before the AO during the course of assessment proceedings vide letter dated 10.10.2016 is sufficient to decide this issue. Hence, in view of the decision of Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. (supra), we admit the ground and decide the issue.

5. The learned counsel for the assessee first of all drew our attention to the provisions of sub clause (v) of explanation 2 section 9(1)(vi) and the same 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-

.....

(v) The transfer of all or any rights (including the granting of a licence) in transfer 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 television or tapes for use in connection with radio broadcasting but not including consideration for the sale, distribution or exhibition of cinematographic films; or.”

6. The learned Counsel for the assessee stated that the consideration received for sale, distribution or exhibition of cinematographic films does not include in the income of royalty. He drew our attention to the specific at page 6 of assessee’s paper book, wherein form No. 3 CEB is enclosed (which were filed before the AO) and the relevant details are as under: -

Name and address of the associated enterprise with whom the international transaction has been entered into		Description of intangible property and nature of transaction		Amount paid/ received or payable/ receivable for purchase/ sale/ transfer/ lease/use of each category of intangible property			Method used for determining the arm’s length price (see section 92C(1))
Name	Address	Description	Nature	Type	As per books of account	As computed by the assessee having regard to the arm’s length price	
SPE Films India	503, Alpha, Hira nandani Gradense, Powai, Mumbai-400 706, Maharashtra, India	Providing license for audio-visual content (Also refer Exhibit to hardcopy form 3CEB)	Receipt of Royalty from SPE India for providing license for audio-visual content	Received/receivable	17630256	17630256	Transactional net margin method
SPE Films	503, Alpha, Hira nandani	Providing film distribution in	Receipt of Royalty from	Received/receivable	195896161	195896161	Transactional net margin



India Private Limited	Gradense, Powai, Mumbai-400 706, Maharashtra, India	India (Also refer Exhibit to hardcopy from 3CEB)	SPE India for providing film distribution rights in India				method
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7. Further, the learned Counsel for the assessee took us through the letter dated 10.10.2016 filed before the AO whereby the copy of agreement entered into by the assessee with SPE films India Pvt. Ltd. and Tata Sky was enclosed and the relevant Para 3 read as under: -

*“3. Copies of agreement entered into by the assessee company with SPE Films India Pvt. Ltd. (SPE Films) and tata sky*

*The copies of agreement entered into by the assessee company with SPE Films and tata Sky are enclosed herewith as Annexure-I”*

8. According to the learned Counsel for the assessee rights are granted vide agreement dated 01.05.2007 and the relevant rights granted are as under: -

*“Rights granted: Licensor hereby grants to licensee and licensee hereby accepts from Licensor, upon the terms and conditions of this agreement, the right to (i) project, exhibit, reproduce, print, transmit, perform, distribute, advertise, promote and market and (ii) authorize and license others to project, exhibit, reproduce, transmit and perform, by means of theatrical and non-theatrical distribution (excluding non-theatrical distribution on airlines and ships) throughout the “Territory” (as hereinafter defined), all of those motion pictures and any trailers, clips and excerpts, therefrom, (individually a*



*“film” and collectively the “films”), which Licensor has or shall have the right to so distribute during the “term” (as hereinafter defined”, in the Territory (Collectively, the Rights”). Distributor shall have the right to authorize and sub-license others to exploit the rights in accordance with the terms and conditions of this agreement. All rights not herein granted to licensee are specifically reserved to Licensor and Licensor shall have the right, concurrently during the Term, to exploit and dispose of all such reserved rights. Licensor shall have the right to (a) reject and exclude from this agreement and its obligations hereunder, from time to time, such Films as it may reasonably deem unsuitable for distribution in the Territory, and (b) exploit and otherwise deal with any such Films free and clear of this Agreement. Notwithstanding anything to the contrary contained herein, during the Term, Licensee shall be entitled to engage in the production and distribution of motion pictures other than those embraced by this Agreement.*

*The grant of rights pursuant to this paragraph 1 shall be exclusive for each territory within the Territory. “*

9. Further, the terms is also defined in Para 3 of the agreement as under: -

*“3. Term The term hereof shall commence on May 1, 2007 and shall continue until either party gives the other party thirty (30) days, notice that it wishes to terminate this Agreement (the “term).”*



10. In view of the above, the learned Counsel for the assessee referred to the decision of co-ordinate Bench of ITAT of Chennai Bench in the case of Indo Overseas Films vs. ITO (2017) 81 taxmann.com 378 (Chennai-Trib), wherein it is held that as per sub-clause (v) of explanation 2 to section 9(1)(vi) there is a specific exclusion for Cinematographic films from the purview of royalty. The learned Counsel for the assessee referred to the findings given in Para 7 which read as under: -

*“7. We have heard the rival submissions and perused the materials available on record. We find that the short issue for our consideration is whether the payments made by the assessee to those parties constitutes "royalty" u/s. 9(1)(vi) of the Act and whether tax ought to have been deducted at source u/s 195 of the Act. The assessee has made payments for the cost of rights in the cinematographic films to exhibit them in India through various mediums. From a perusal of the deal memos and agreements entered with the parties reproduced in the order u/s 201 and 201(1A) of the Act, it is clear that the assessee is only a distributor who has been granted licensed rights by the parties to exhibit those cinematographic films in India. From a plain reading of clause (v) to Explanation 2 to section 9(1)(vi) it is clear that there is a specific exclusion for exhibition of cinematographic films from the purview of "royalty". While in the first part of the clause there is reference to films or video tapes for use in connection with television and video tapes for use in connection with radio broadcasting, there is a specific mention of*



*cinematographic films in the last part of the clause that excludes certain transactions from the purview of "royalty". Therefore it is abundantly clear that the law has expressly excluded consideration paid for exhibition of cinematographic films from the ambit of section 9(1)(vi). Further, irrespective of the medium in which the cinematographic films have been exhibited, the same only constitutes "exhibition of cinematographic films". Hence, the consideration paid by the assessee to the non-residents does not fall within the ambit of "royalty" u/s. 9(1)(vi) of the Act. We find that section 90(2) of the Income tax Act which states that either the provisions of the Income tax Act or the DTAA, whichever is more beneficial to an assessee, would be applicable to the assessee. Further, CBDT Circular No.728 dated 30.10.1995 clarifies that tax should be deducted at source as per the provisions of the Act or DTAA whichever is more beneficial to the assessee. Since the provisions of the Act are beneficial to the assessee, the same would apply and consequently the sums are not chargeable to tax in India and do not warrant deduction of tax at source u/s 195 of the Act. In this regard, we find that the Hon'ble Supreme Court in the case of GE India Techonolgy Cen. (P.) Ltd. v. CIT [2010] 327 ITR 456/193 Taxman 234/7 taxmann.com 18 had held that TDS obligation would arise on the assessee only when the sum is chargeable to tax in India u/s 4, 5 & 9 of the Act."*

11. The learned Counsel for the assessee also relied on the decision of another co-ordinate Bench in the case of ADIT vs. Warner Brother



Pictures Inc. (2012) 17 taxmann.com 171 (Mumbai), wherein identical issue was considered and Tribunal held in Para 9 as under: -

*“9. We have considered the rival contentions and examined the facts on record. There is no dispute with reference to the fact that the assessee has entered into agreement with Warner Brothers Pictures India (P) Ltd outside India and the amounts were also received outside India. There is also no dispute with reference to the fact that the definition of royalty under section 9(1)(vi) Explanation 2 to (v) excludes the payment received with reference to sale, distribution and exhibition of cinematographic films. There is also no dispute with reference to the provisions of DTAA entered into by India with USA, notified on 20th December, 1990, that the term royalty used in the Article 12 does not include payment of any gain received as consideration for the use of any copyright or literary, artistic or scientific work including cinematographic films or work on films, tape or other means of production for use in connection with Radio or T.V. broadcasting. In view of this specific provisions, the amount received by the assessee cannot be considered as royalty as was done by the Assessing Officer while invoking the Article 12(2) of the DTAA for taxing the amounts. To that extent the findings of the CIT (A) are correct and there is no need to deviate from such findings. In view of this the amount received by the assessee cannot be considered as royalty within the meaning of Indian Income Tax Act or under the DTAA.”*



12. In view of the above, the learned Counsel for the assessee Shri PJ Pardiwala, argued that for verification purpose as to how much amount and what is the quantum of deduction, the matter can be referred back to the file of the CIT(A). On the other hand, the learned Counsel for the assessee objected to the admission of the additional evidences as noted above and also stated in that all new facts are to be enquired into but he could not negate the argument of the assessee as regards to the decision to be taken on principle.

13. We have heard rival contentions and gone through the facts and circumstances of the case. We noted that the above additional grounds raised by assessee and issue arising out of the same whether the royalty income received by assessee on account of distribution of theatrical rights in India is admissible or not. According to us, the consideration received by assessee on account of distribution of theatrical rights in India is not in the nature of royalty as defined by clause (v) of explanation 2 to section 9(1)(vi) of the Act and hence, not taxable in India. We direct the AO to verify the quantum of deduction on the basis of the documents to be furnished by assessee. As the issue is covered by co-ordinate Bench decisions cited above in favour of assessee, hence, this issue is decided in favour of assessee in term of the above directions.

14. The next issue in this appeal of assessee is against the final determination of correct amount of royalty raised by way of ground No. 1 which read as under:

*“1.1 The learned DCIT - 4(2)(2) failed to appreciate the fact that the revised Form 26AS of the appellant company reflected the finally determined correct amount of royalty income from SPE Films India Private Limited as R. 21.33,94.311*



as against the amount reflected in Form 3CEB and in the revised statement of total royalty income as Rs. 21.35,26,417/-.

1.2. The learned DCIT - 4(2)(2) has erred in not considering the revised statement of total royalty income from SIT Films India Private Limited amounting to Rs. 21,35,26,417 as submitted during the count of the assessment proceedings, which revised amount was consistent with the amount reported on the Form 3CEB filed. while computing the taxable income.

1.3. The learned DCIT - 4(2)(2) erred in not considering the statement reflecting the computation of income as submitted during the course of assessment proceedings. while passing the assessment order.

1.4 The appellant company prays that the learned DCIT - 4(2)(2) be directed to consider the correct amount of Rs. 2133.943 11 as royalty income received from SPE Films India Private Limited and re-compute the total income reflected in the latest Form 26AS submitted before the Hon'ble Dispute Resolution Panel - 2.”

15. At the outset, the learned Counsel for the assessee as well as the learned Sr. Departmental Representative agreed from the details of royalty income as form No. 26AS and income declared by assessee and the details which given in assessee's paper book at page 3 which read as under:



Sl No.	Name of the deductor	Income (INR)	TDS (INR)
1.	Sun TV Network Limited	5,09,69,834	53,65,904
2.	Bennett Broadcasting & Distribution Services Limited	1,26,00,000	13,23,756
3.	Tenx Entertainment Limited	3,70,62,886	38,90,776
4.	VIACOM18 Media Private Limited	44,07,754	4,63,079
5.	SPE films India Pvt. Ltd	22,65,07,515	2,37,99,878
6.	Star India Private Limited	14,15,28,003	1,48,74,593
7.	Tata Sky Limited	77,42,670	11,61,402
8.	MSM Satellite (Singapore) Private Limited	27,60,28,103	4,14,04,215
9.	UTV Entertainment Television Limited	25,65,190	2,69,602
10.	Zoom Entertainment Network Limited	2,74,93,090	28,89,523
	Total	78,69,05,545	9,54,42,729

16. The learned Counsel for the assessee stated that complete details are given vide letter dated 19.10.2016 but this issue in any case has to go back to AO for verification of facts and correct computation of quantum of royalty. Hence, as agreed by both the sides, the issue is remitted back to the file of the AO for quantification of the income.

17. The next issue in this appeal of assessee for allowing credit for TDS correctly. For this assessee has raised the ground No. 2: -

*“2.1 The learned DCIT - 4(2)(2) has erred in not granting credit for taxes deducted at source amounting to Rs. 18,14,679 in relation to royalty income of Rs. 1,72,72,781 received from Sony DAUC Manufacturing India Private Limited ('Sony DADC') during the Assessment Year 2013-14.*

*2.2 The learned DCIT - 4(2)(2) failed to appreciate that tax amounting to Rs. 18,14,679 has already been deducted at source (as reflected in latest Form 26AS) on the aforesaid income of Rs. 1,72,72,781.*

*2.3 The appellant company prays that the learned DCIT - 4(2)(2), be directed to grant the*



**ITA No.6480/Mum/2017**

*credit for tax deducted at source amounting to Rs.  
18,14,679 in relation to royalty income received from  
Sony DADC Manufacturing India Private Limited.”*

18. At the outset, both the learned Counsel for the assessee as well as the learned Sr. Departmental Representative agreed that the AO can verify the TDS deducted and accordingly allow credit as per law. We direct the AO accordingly.

**19. In the result, the appeal of assessee is partly allowed as indicated above.**

Order pronounced in the open court on 03.06.2019.

Sd/-

(एन. के. प्रधान/ NK PRADHAN)

(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह /MAHAVIR SINGH)

(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 03.06.2019.

सुदीप सरकार, व.निजी सचिव / *Sudip Sarkar, Sr.PS*

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai