



ITA No.3782-83/Mum/2016
M/s Next Gen Films Private Limited
Assessment Years :2011-12 & 2012-13

आयकर अपीलीय अधिकरण “आई” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“I” BENCH, MUMBAI

माननीय श्री सी. एन. प्रसाद, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI C.N. PRASAD, JM AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ I.T.A. No.3782/Mum/2016
(निर्धारण वर्ष / Assessment Year:2011-12)
&

आयकर अपील सं./ I.T.A. No.3783/Mum/2016
(निर्धारण वर्ष / Assessment Year:2012-13)

Next Gen Films Private Ltd. 501/502, Om Shanaaz Apartment Juhu Versova Link Road Seven Bungalows, Andheri (West) Mumbai-400 061.	बनाम/ Vs.	ITO (Int. Tax.) TDS (4) Mumbai.
स्थायी लेखा सं./जी आइ आर सं./PAN/GIR No. AACCN-8156-F		
(पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	S/Shri H.S. Raheja & Mani Jain-Ld. ARs
Revenue by	:	Shri Avneesh Tiwari & Shri V.Vinod Kumar-Ld. DRs

Date of final Hearing	:	31/07/2020
Date of Pronouncement	:	11 /08/2020

आदेश / ORDER

Manoj Kumar Aggarwal (Accountant Member)

1.1 Aforesaid appeals by assessee for Assessment Years [in short referred to as ‘AY’] 2011-12 and 2012-13 contest separate orders of learned first appellate authority which has disposed-off appeal against common order dated 29/03/2014 passed by Ld.AO u/s 201(1) & 201(IA)



ITA No.3782-83/Mum/2016
M/s Next Gen Films Private Limited
Assessment Years :2011-12 & 2012-13

r.w.s. 195 of the Income Tax Act, 1961. Since common issues are involved, the appeals were heard together and are now being disposed-off by way of this common order for the sake of convenience and brevity. It is admitted position that adjudication in any one year would equally apply to the other year also.

1.2 We have carefully heard arguments advanced by both the representatives during the course of hearing as well as during clarification and perused relevant material on record including documents placed in the paper-book. The judicial pronouncements as cited during the course of hearing has been deliberated upon. Our adjudication to the appeals would be as given in succeeding paragraphs. First, we take up appeal for AY 2011-12.

ITA No. 3782/Mum/2016, AY 2011-12

2.1 Briefly stated the assessee is a resident corporate entity. It entered into a commissioning agreement (in short 'agreement') with another UK based non-resident corporate entity namely M/s Desi Boyz Production Ltd. (in short 'DBPL') on 01/09/2010 to produce, complete and deliver a feature film namely *Desi Boyz* (in short 'film') as per the terms and conditions agreed therein. The copy of the agreement has been placed on record. As per the terms of the agreement, the assessee as a commissioning party engaged M/s DBPL to produce and deliver a fully complete feature film provisionally named *Desi Boyz* based on certain storyline. To resolve the subject matter of appeal, the correct appreciation of terms of the agreement would be critical and therefore, at the outset, we set out the important terms of the agreement.



2.2 The recitals of the agreement state that M/s DBPL has been granted an assignment of all rights, titles and interest in and to the storyline for a feature film provisionally named *Desi Boyz* and the assessee, as a commissioning party, desire to engage M/s DBPL to produce and deliver a fully complete feature film provisionally named *Desi Boyz* based on certain storyline. As per material terms, M/s DBPL undertook to produce, complete and deliver the film in accordance with the terms of the agreement and was obliged to render all services customarily rendered by production companies in connection with the pre-production, production, post-production and delivery of a feature film. The said services would include provisioning of services of varied nature which has been enumerated in clauses 1.1.1 to 1.1.10 of the agreement. M/s DBPL was to, *inter-alia*, provide assistance in connection with the further development of the storyline and writing and development of screenplay to be based on the storyline, casting, preparation of storyboards and selection of location, production and post-production facilities and third party special and visual effects services. M/s DBPL was to undertake filming primarily in the UK and also in India and procure the services of all necessary creative and technical service providers and engage all personnel for shooting of the film. M/s DBPL was to make arrangements for locations and enter into location agreements. M/s DBPL was to procure production equipment including cameras, grip and lighting equipment, sound equipment, prop, ward robe, make-up etc. with a view to complete the film and delivery of the film to the assessee in a first-class manner. M/s DBPL was to arrange for



comprehensive editing services. It was also required to procure all necessary consents and permissions required for the pre-production, principal photography, post-production and exploitation of the film. It was also to ensure prompt payment all taxes, duties and other levies to the concerned statutory authorities. M/s DBPL was required to deliver the film as per specifications which was to be fully synchronized as to dialogue, music and effects. M/s DBPL was to complete pre-production, production and post-production of the film in a first-class manner and of a technically acceptable quality and ready for commercial exploitation and suitable to enable the commissioning party to commercially exploit the film without further processes or expenditure.

2.3 As per the terms of the agreement, the production of the film was primarily to take place in the United Kingdom and also in India in accordance with the production schedule. It was agreed and understood that in no event shall the period of principal photography of the film in UK was to exceed 90 days.

2.4 Further M/s DBPL was to ensure that the film would satisfy all requirements for qualifying as a British Film for the purposes of the Films Act, 1985 and it was required to carry out all necessary procedures and compliances, in this regard. The assessee was required to render required assistance for this purpose, at the cost of M/s DBPL.

2.5 To ensure that the film was produced and delivered in accordance with material requirement, M/s DBPL was to consult and take consent of the assessee over important aspects like identity of all key cast, budget, production schedule, delivery materials, cash flow, screenplay,



production services companies to be engaged etc. The assessee was to exercise approvals, access, attendance and consultation rights in a timely and reasonable manner without delay. M/s DBPL was to keep assessee informed about any key deviations in the production schedule. Every agreement entered into by M/s DBPL with any principal contributor or other cast and crew would require approval of the assessee but the same was to be entered into by M/s DBPL in his own name. M/s DBPL was to secure all copyrights in and to the production of the contributors' services in its own name for the full term of protection. M/s DBPL was to secure similar other rights, in its own, name. All these rights were agreed to be freely assignable by M/s DBPL.

2.6 M/s DBPL was responsible for its obligations under the agreements entered into by it with any contributors and the assessee was under no obligation to honor such obligations. M/s DBPL had all the responsibility for all creative decisions relating to the control and management of the production of the film.

2.7 As per the terms of the agreement, in consideration of M/s DBPL producing, completing and delivering the film in accordance with the agreement, M/s DBPL was entitled for 100% of the budget less an amount equal to the UK Tax Credit Advance, any under-spend, interest accrued on monies held in production account and any realizable value which M/s DBPL may generate on equipment / materials sale at the end of production of the film. The said consideration was deemed to be full and sufficient consideration for all services rendered and all rights granted and assigned by M/s DBPL to assessee. The said net



ITA No.3782-83/Mum/2016
M/s Next Gen Films Private Limited
Assessment Years :2011-12 & 2012-13

consideration (budget as reduced by UK tax Credit) was payable in advance in certain prescribed manner as per cashflow schedule. In the event M/s DBPL request assessee to pay a third party directly, then those instructions would replace the requirement for funding to that extent. The budgeted cost as per Schedule-2 was not to exceed 12.8 Million Pounds.

2.8 As per Clause-12, the ownership of the film was owned solely and exclusively by the assessee. All the rights, title and interest in and to the film, all underlying literary material relating thereto, all original music, lyrics, physical material of any kind etc. would be owned and solely and exclusively by the assessee and would vest in the assessee. These rights would include sole and exclusive right to exhibit, broadcast, distribute, publicize and exploit the film by every means and rights including benefits of all agreements entered into by M/s DBPL with third parties.

2.9 M/s DBPL had sole responsibility of any overspend except where changes were required by assessee. M/s DBPL was required to deliver the delivery material at its own cost to the assessee as per specified delivery date. The other terms of the agreement provide for warranties, events of default, termination, confidentiality, force majeure etc. which are general in nature.

2.10 The Schedule-1 of the agreement contain film specification. Schedule-2 contain Budget. Schedule-3 contain production schedule. As per the said Schedule, the shoot was to take place in India for 23 days whereas the period of shoot in UK was 55 days. Development & pre-



production was to take place from April to October, 2010 whereas final delivery date was estimated to be 3rd Quarter of 2011.

2.11 The recitals of the agreement take note of the fact that M/s DBPL had an agreement with another entity namely Eros International Limited (EIL) to avail the services of Jyoti Deshpande. M/s DBPL was granted an assignment of all rights, title and interest in and to the storyline of said feature film provisionally named *Desi Boyz*.

2.12 Upon perusal of the terms of the contract between assessee and M/s DBPL, it could be concluded that the contract between the two entities was primarily on principal-to-principal basis. The entire responsibility to produce the film was on M/s DBPL against lump-sum consideration. M/s DBPL was required to produce the film and ensure the delivery of the film as per specifications. The film was to be fully synchronized as to dialogue, music and effects and M/s DBPL was to complete pre-production, production and post-production of the film in a first-class manner and of a technically acceptable quality which was ready for commercial exploitation and suitable to enable the assessee to commercially exploit the film without further processes or expenditure. For the same, M/s DBPL could enter into independent contracts. All the activities of M/s DBPL were to be carried out with assessee's consultation with a view to ensure that the film was produced exactly as per the specification and in line with storyline.

Production Services Agreement

3.1 M/s DBPL entered into one production services agreement on same date i.e. 01/09/2010 with another resident entity namely Eros



International Films Private Limited (EIFPL / service company). M/s DBPL, as a producer of the proposed film, with a view to avail certain specific and limited production services from M/s EIFPL, entered into this contract. These services were subject to the direction and control of the producer. The service fee was settled as Rs.300 Lacs. As per the term, M/s DBPL engaged M/s EIFPL to avail certain production services for the film. The nature of proposed services to be availed have been enumerated in Schedule-1 of the agreement.

3.2 M/s EIFPL was to provide production services, which would, *inter-alia*, include identifying & negotiating with appropriate lead cast, appointment of contributors (crew members) for shooting of the film in UK, travel arrangement for contributors, complete coordination and arrangement for producer's India shoot, making payments for India shoot, production co-ordination, insurance for cast & crew, equipment, cameras, costumes etc., freight & transportation of camera, lighting equipment, props, costumes for use on the shoot, ensure accounting, payment & reconciliation of taxes, obtaining invoices/contracts from the contributors in India etc.

3.3 As per clause 2.5 of this agreement, the producer was to have the day-to-day administration and control of the film and would have creative, business and financial control with respect to the production of the film. The service company was required to procure the services of all persons required by the producer to be engaged by the service company in the provision of the production services in India and UK. All the suppliers and personnel engaged or contracted by the service company



were referred to as the contributors. The contributors were to enter into contracts with service company directly. The service company was responsible for making direct payments to the contributors.

3.4 As per clause 5.1, the producer licensed the service company such necessary rights to enable the service company to carry out on behalf of and as an agent for the producer, the production services. However, the producer would remain the maker and owner of all rights in the film.

3.5 The producer agreed to pay to service company a sum equal to Indian Production Services budget which would include service fee of Rs.300 Lacs. The Indian Production services budget, as per Schedule-3 was estimated at Rs.1066.18 Lacs including service fee of Rs.300 Lacs. As per Schedule-2, the Indian production schedule would include shooting for 23 days in India as against 55 days in UK which is the same as mentioned in the commissioning agreement.

3.6 Upon perusal of the terms of the contract, it could be concluded that the contract between the two entities was primarily that of a principal and an agent. The service company, acting on behalf of producer, was required to provide limited production services of certain nature against payment of lump sum fee of Rs.300 Lacs. The said services were to be rendered under direct control, supervision as well as direction of the producer. The service company was to be reimbursed with Indian budget of Rs.1066.18 Lacs including its service fee of Rs.300 Lacs. The total Indian budget, in terms of total approximate budgeted cost of 12.8 Million Pounds, would be less than 10% of total budgeted cost.



Proceedings before Ld. AO

4.1 In the above background, an order u/s 201(1) & 201(1A) r.w.s 195 of the Act was passed by learned Assessing Officer (AO) on 29/03/2014. It transpired that the assessee remitted an aggregate amount of Rs.5716.65 Lacs during financial years 2010-11 & 2011-12 to M/s DBPL without deducting any tax at source (TDS). The details of the payment so made along with reason for remittances have been tabulated by the assessee in its reply which has been extracted on page-2 of the quantum order. The assessee defended the non-deduction of tax at source by submitting that the recipient did not have any Permanent Establishment (PE) in India, purchases / services were rendered by M/s DBPL outside India and the payment were towards purchase of goods/ services received abroad. The copies of relevant agreements were placed on record along with unaudited financial statements of M/s. DBPL to support the said submissions. In nutshell, it was submitted that this was transaction of buying and selling of a feature film between two independent parties and therefore, TDS provisions as contained in Sec.195 were not applicable and the assessee could not be held to be assessee-in-default for non-deduction of tax at source.

4.2 However, a show-cause notice was issued to the assessee on 17/02/2014 wherein it was stated that as per the terms of commissioning agreement, the assessee participated directly or indirectly in the management and control or budgeting of the company M/s DBPL.



ITA No.3782-83/Mum/2016
M/s Next Gen Films Private Limited
Assessment Years :2011-12 & 2012-13

4.3 Referring to agreement between M/s DBPL and M/s EIFPL, it was alleged that the entire film production of film *Desi Boyz* was being managed and carried on by M/s EIFPL. In the notice, attention was drawn to the fact that another Indian entity namely Eros International Media Ltd. (EIML) was co-producer of the film in association with the assessee. M/s EIFPL & M/s EIML were subsidiaries of M/s Eros International PLC and hence, sister concerns.

4.4 In the said background, it was opined that entire film production activities and budgeting of the film was carried out by the assessee, M/s EIML and M/s EIFPL. Therefore, all these three entities as well as M/s DBPL would be Associated Enterprises (AE) within the meaning of Article-10 of India-UK Double Taxation Avoidance Agreement (DTAA / Treaty). Since M/s EIFPL was carrying on the entire film production activities of the film in India and UK locations, M/s EIFPL would be Permanent Establishment (PE) of M/s DBPL in India. Further since, the assessee has control over the management and budgeting of the film production activities of M/s DBPL and being its AE, assessee becomes PE of M/s DBPL in India. Therefore, the income of M/s DBPL would be liable to be taxed in India and hence, the aforesaid payment would require tax deduction at source in terms of Sec. 195 of the Act. Therefore, the assessee's plea was to be rejected and the assessee was to be treated as assessee-in-default as per the provisions of Sec. 201 of the Act.

4.5 In the absence of any satisfactory reply from the assessee, a conclusion was drawn that the assessee and M/s EIML were the co-



producer of the film. M/s EIFPL and M/s EIML were group companies of Eros International, LLC and therefore, Associated concerns. The fact that M/s EIML was co-producer of the film was gathered from the website of that entity. It was also noted that M/s DBPL was an entity created in UK and it had one shareholder which held one share of £ 1. The directors of that entity were stated to be *Mr. Ashok Grover and Mrs. Sukeshi Doshi*. Mr. Grover signed the commissioning agreement and was stated to be based in Mumbai. Therefore, a conclusion was also drawn that production work was carried out by the persons resident in India.

4.6 Thereafter, the various clauses of the commissioning agreement between the assessee and M/s DBPL as well as service agreement between M/s DBPL and M/s EIFPL were analyzed and tabulated on page nos. 12 to 16 of the order. On the basis of the same, it was concluded by Ld. AO that the assessee owned all the rights, title and copyright of the property in the said film. The assessee was involved in all stages of film production as its recommendations and approvals were necessary for making changes in lead actors, cast, story, screenplay, changes in budgets, tax credit / benefits in UK, items of delivery and therefore, it had direct role and control on all the activities in production of the film.

4.7 Another observation was that M/s EIFPL carried out all the activities of film production in India and UK since it was to negotiate with all the contributors, casts and crew. Therefore, it was managing and controlling all the activities of the film production. The role of M/s DBPL



was only that of facilitator and it had no expertise or experience in film production. In the aforesaid facts, the claim that it was transaction of buying and selling of film was rejected. From the perusal of production schedule, it was noted that production activities relating to shooting in UK were for 55 days whereas all the other activities from the stages of pre-production to post-production were carried out in India which was for a greater period of around 374 days.

4.8 Referring to the term Associated Enterprises as given in Article 10 of Treaty, the facts deduced were that entire decision making was with the assessee and assessee was to dictate the terms and specifications on the basis of which film was to be made. It reserved all rights and authorities for approving any changes to the film story / cast & crew / locations / budget etc. Therefore, the assessee directly or indirectly controlled the project activities in making of the film. The entire capital for the project was received by M/s DBPL from the assessee. Any change in consideration would require approval of the assessee. The assessee directly or indirectly participated in and had control over the capital of the M/s DBPL for film production activities. Similarly, M/s EIFPL directly or indirectly participate in making and management of entire production of the film. The three concerns were not independent parties. For the purposes of acquiring the film, production activities and entire finances, M/s DBPL was entirely dependent on assessee who, in turn, was dependent on M/s EIFPL for entire production activities of the film. The assessee and M/s EMIL were the co producers of the film. M/s EMIL and M/s EIFPL were subsidiaries of the same EROS group and thus the



assessee and M/s EIFPL were related parties in the business project of this film.

4.9 Referring to Article 5 of the Treaty which define the term *Permanent Establishment (PE)*, it was stated that M/s EIFPL carried on entire management, conduct and execution of the film production activities in India as well as in UK for and on behalf of M/s DBPL. Therefore, M/s EIFPL would be place of management of M/s DBPL in India. M/s EIFPL carried on entire film production activities and it would be equivalent to factory and a workshop for production of film for and on behalf of M/s DBPL in India. Since the assessee and M/s EIFPL were Associated Enterprises of M/s DBPL as per Article 10 of India-UK DTAA, the article 5(2)(k) sub-clause (i) & (ii) would apply. M/s EIFPL was furnishing managerial services for and on behalf of M/s DBPL in India as well as in UK for a period aggregating to more than 90 days in a period of twelve months. Further, in terms of paragraph-1 of Article 10, the services were performed for the period or periods aggregating to more than 30 days within any twelve-month period.

4.10 Based on the conclusion that M/s EIFPL is the PE of M/s DBPL in India, the income of M/s DPBL as attributable to its PE would be taxable in India. Therefore, the provisions of Section 195 would apply and the assessee was liable to withhold tax while making remittances to M/s DBPL. In the absence of such deduction, the assessee was to be treated as assessee-in-default u/s 201(1) of the Act. The income of M/s DBPL was to be assessed on net basis. The plea that M/s DBPL incurred losses and therefore no income could be brought to tax was rejected in



ITA No.3782-83/Mum/2016
M/s Next Gen Films Private Limited
Assessment Years :2011-12 & 2012-13

the light of unaudited financial statements of M/s DBPL. Finally, Ld. AO estimated profit ratio of 25% against remittances so made by the assessee. Since M/s EIFPL was carrying out all the core functions of production of film, the rate of profit attribution towards PE was estimated to be 80%. In other words, the effective profit rate that would accrue to M/s DBPL would be 25% of 80% i.e. net 20%. Considering the applicable tax rate of 40%, the effective rate of tax would be 8% (20% of 40%) which was to be further increased by surcharge and education-cess. The net effective rate thus worked out to be 8.4872% which was applied to the remittances made by the assessee to M/s DBPL during the year, to work out the TDS default. Consequently, the assessee would be liable for interest component u/s 201(1A) for non-deduction of tax. Finally, a demand was raised against the assessee u/s 201(1) & 201(1A) for AYs 2011-12 & 2012-13, in the following manner: -

No.	AY	Tax Liability u/s 201	Interest u/s 201(1A)	Total Demand
1.	2011-12	2,66,63,812/-	1,05,46,085/-	3,72,09,897/-
2.	2012-13	2,18,63,092/-	72,95,010/-	2,91,58,102/-
	Total	4,85,26,904/-	1,78,41,095/-	6,63,67,999/-

Appellate Proceedings before Ld. CIT(A)

5.1 Aggrieved as aforesaid, the assessee assailed the demand by way of written submissions which have been extracted at para 3.3. of the impugned order. The assessee reiterated that it was in the business of producing feature films. Keeping in view the storyline of film, it approached a UK-based entity to undertake the production of the film and accordingly entered into a commissioning agreement with M/s DBPL wherein M/s DBPL was obliged to produce and deliver a fully complete



ITA No.3782-83/Mum/2016
M/s Next Gen Films Private Limited
Assessment Years :2011-12 & 2012-13

feature film. The entire services in relation to pre-production, post production and delivery of film was to be provided by M/s DBPL. M/s DBPP was to arrange for filming in India and UK and for the said purpose, it could appoint a production services company. The assessee was to pay an amount equal to the production budget less an amount equal to UK Tax Credit, any under-spend, interest etc. No separate payment was to be made to M/s DBPL for the services. The said consideration was full and sufficient consideration for all the services rendered including all rights / assignment granted therein. The payment was reimbursement of budgeted cost to M/s DBPL. In order to ensure that the film was to be produced and delivered in accordance with the material requirements, the agreement required M/s DBPL to consult with the assessee to make out any adjustment with the stipulated requirements. The said requirement was for the sole purpose to prevent any modification to screenplay or other material requirement as the feature film needed to be very accurate with its storyline and screenplay. Since, M/s DBPL was UK-based entity having no PE in India, no income would accrue to it under the terms of the agreement. The consideration paid by the assessee was towards purchase of the feature film.

5.2 It was further submitted that M/s DBPL, in order to execute the aforesaid project, entered in to another contract with M/s EIFPL to carry out certain activities in relation to the production and post-production. The said agreement was merely to assist the production of the film and to provide requisite services in relation to delivery of a feature film. M/s EIFPL was entrusted with the responsibility of arranging the crew and



ITA No.3782-83/Mum/2016
M/s Next Gen Films Private Limited
Assessment Years :2011-12 & 2012-13

the requisite equipment which were to be procured from India. The said contract was given to the Indian entity in order to perform the Indian part of the production services and M/s DBPL was to pay the requisite fees. M/s EIFPL carried out independent activity and the relationship of M/s EIFPL & M/s DBPL was on principal-to-principal basis. The activities of M/s EIFPL could not be influenced or changed by M/s DBPL. The activities carried out by M/s EIFPL were performed by their own personnel. Reliance was placed on the decision of Authority for Advance ruling in the case of **Pintsch Bamag (226 CTR AAR 1)** rendered under similar circumstances wherein it is held that since agent appointed by foreign entity continues to carry its independent status, the same could not be termed as the PE of foreign entity. On the strength of the factual matrix, it was submitted that M/s EIFPL was an independent agent and therefore, could not be treated as PE of foreign entity as per Article-5 of the Treaty. M/s EIFPL could not be treated as place of management in India for M/s DBPL or a factory or a workshop for production of film in terms of Article-5. Further, M/s EIFPL did not provide any managerial services to M/s DBPL. Therefore, the question of taxing income of M/s DBPL in India would not arise.

5.3 A plea was also raised that as per the terms of the commissioning agreement, M/s DBPL was to be reimbursed with entire production cost and therefore, the said remittances were not liable for TDS provisions as per the decision of Mumbai Tribunal rendered in **M/s Wizcraft International Entertainment Ltd. (ITA No. 3208/Mum/2003)**.



ITA No.3782-83/Mum/2016
M/s Next Gen Films Private Limited
Assessment Years :2011-12 & 2012-13

5.4 Assailing the issue of Associated Enterprises as per Article-10, it was submitted that work performed by M/s DBPL was independent and without any interference by the assessee. M/s DBPL was independent service provider and performed the film production activity as per its own decisions. The various conditions / stipulations requiring prior consultation of the assessee was purely with the motive of passive monitoring of the film production activity since the same was very technical in nature. Even if the parties were to be treated as AEs, no short accrual of business profits has been booked by the assessee.

5.5 However, the aforesaid submissions / arguments could not find favor with Ld.CIT(A), who upheld the stand of Ld.AO. Consequently, the assessee is under further appeal before us with following grounds of appeal: -

The following are the grounds of appeal, which are without prejudice to one another.

- 1) On the facts and circumstances of the appellant's case and in law, learned Commissioner of Income Tax (Appeals) erred in confirming the action of the Assessing Officer to hold that the provisions of section 195 of the Act are applicable to foreign remittances made by the appellant.
- 2) On the facts and circumstances of the appellant's case and in law, learned Commissioner of Income Tax (Appeals) erred in confirming the action of the Assessing Officer to hold that the assessee is in default in respect of non deduction of tax and thereby raising demand of Rs. 2,66,63,812/- u/s. 201(1) r.w.s.195.
- 3) On the facts and circumstances of the appellant's case and in law, learned Commissioner of Income Tax (Appeals) erred in confirming the action of the Assessing Officer in charging interest u/s. 201(1A) amounting to Rs.1,05,46,085/- on alleged default u/s. 201(1) r.w.s. 195.

Rival Submissions

6.1 The arguments of Ld. AR are multi folds. Drawing attention to the production service agreement, Ld. AR submitted that scope of work to be carried out by M/s EIFPL was limited to appointing and negotiating with certain cast and crew members since they were located in India. M/s



EIFPL was required to make travel arrangements for crew members, arranging for costumes and equipment and getting the same transported to UK. The payment to lead cast and all the other major expenses were to be borne by M/s DBPL only. The same would be evident from the fact that out of total production budget of Rs.90 Crores as given to M/s DBPL, the work only to the extent of Rs.7 Crores was assigned to M/s EIFPL.

6.2 It has further been submitted that the period of film production was 452 days as per the production schedule of the commissioning agreement which included only 23 days of film production in India and remaining 429 days was to be performed in UK itself. The period of shooting as per production services agreement was for 78 days out of which only 23 days of film were to be performed in India. The period of activities in India for 374 days, as concluded by Ld. AO, was factually incorrect and do not emanate from the terms of the contract. Another pertinent fact put forward is the fact that only when most of the film was shot in UK only then it could be considered as British Film.

6.3 Controverting the findings of Ld. AO that M/s EIFPL was agent of M/s DBPL in terms of Article-5, our attention has been drawn to the fact that M/s EIFPL has gross receipts of Rs.133.55 Crores & Rs.76.27 Crores for AYs 2011-12 & 2012-13 respectively as against total fees of Rs.3 Crores received from M/s DBPL and therefore, the fees would be very miniscule keeping in view the total revenue of M/s EIFPL. Therefore, M/s EIFPL would be an independent entity carrying on its own business and could not be treated as dependent agent of M/s DBPL.



Hence, it could not be termed as PE of M/s DBPL within the meaning of Article-5 of the Treaty. The attention has further been drawn to the fact that M/s DBPL was not dependent upon assessee for finances since it independently took bank loan for production of the film.

6.4 *Au Contraire, Ld. DR* referring to the order of lower authorities, supported the conclusions drawn therein and assailed the arguments put forth by Ld. AR.

Our findings and conclusion

7.1 We have carefully considered the rival submissions and perused relevant material on record including the two agreements under question. The material terms of both the agreements have already been appreciated by us in preceding paragraphs 2.2 to 3.6.

7.2 Regarding commissioning agreement entered into by the assessee with M/s DBPL, at para 2.12, we reached a conclusion that the contract between the assessee and M/s DBPL was primarily on principal-to-principal basis. The entire responsibility to produce the film was on M/s DBPL against certain lump-sum consideration. M/s DBPL was required to produce the film and ensure the delivery of the film as per given specifications. The film was to be fully synchronized as to dialogue, music and effects and complete pre-production, production and post-production of the film in a first-class manner and of a technically acceptable quality and ready for commercial exploitation and suitable to enable the assessee to commercially exploit the film without further processes or expenditure. For the same, M/s DBPL could enter into independent contracts. All the activities of M/s DBPL were to be carried



ITA No.3782-83/Mum/2016
M/s Next Gen Films Private Limited
Assessment Years :2011-12 & 2012-13

out with assessee's consultation with a view to ensure that the film was produced exactly as per the specification and in line with storyline. The said stipulations were to ensure that the film was produced and delivered in accordance with the material requirements and with a view to prevent any modification to the screenplay or other material requirement as the feature film needed to be very accurate with its storyline and screenplay. Nevertheless, M/s DBPL acted as independent service provider having entire responsibility to produce the film. It was free to take own decisions for the same and could enter into independent contracts. For all these services, it was to be reimbursed with lump sum budgeted cost after adjustment of certain items as mentioned in the agreement which has already been elaborated by us. Any over-spend was to be borne by M/s DBPL. Upon perusal of various terms and conditions of the contract, it could be said that the various conditions / stipulations requiring prior consultation of the assessee was purely with the motive of passive monitoring of the film production activity since the same was very technical in nature. The fact that M/s DBPL worked as an independent entity is further fortified by the fact that as on 31/03/2011, M/s DBPL had obtained independent bank loan of 2.18 Million Pounds from *Coutts & Co.* which was secured against UK Tax credit. Therefore, M/s DBPL could not be said to be solely dependent upon the assessee for finance requirements. In financial year 2011-12, the revenue earned by M/s DBPL from the assessee on account of commissioning of film has been reflected as its turnover. M/s DBPL has reflected loss of 1.67 million pounds as loss on ordinary activities before taxation. This is sole activity



ITA No.3782-83/Mum/2016
M/s Next Gen Films Private Limited
Assessment Years :2011-12 & 2012-13

being carried out by M/s DBPL. Therefore, the provision of Article-10 of the treaty, in our considered opinion, could not be applied in such a situation since it could not be said that the assessee participated directly or indirectly in management, control or capital of M/s DBPL. Further, M/s DBPL was a loss-making entity coupled with the fact that the assessee was assessed u/s 143(3) on 27/01/2014 wherein its returned income was duly accepted by the revenue and there was no allegation of over / under payment to M/s DBPL. Therefore, the assessee could not be said to be Associated Entity of M/s DBPL in terms of Article-10 of the Treaty. Hence, the conclusion drawn by Ld. AO, in this regard, could not be sustained as per the Treaty terms. In our considered opinion, M/s DBPL was acting as an independent entity which was required to carry out the assigned work independently and the assessee could not be said to be PE of that entity in India.

8. So far as the terms of service agreement between M/s DBPL and M/s EIFPL are concerned, at para 3.6, we have concluded that the contract between the two entities was primarily that of a principal and agent. M/s EIFPL, acting on behalf of producer, was required to provide limited production services against lump sum fee of Rs.300 Lacs. The said services were to be provided under control, supervision as well as the direction of the producer. The service company was to be reimbursed with Indian budget of Rs.1066.18 Lacs including its service fee of Rs.300 Lacs. The total Indian budget, in terms of total approximate budgeted cost of 12.8 Million Pounds, was less than 10% of total budgeted cost. It is also evident from financial statements of M/s EIFPL



ITA No.3782-83/Mum/2016
M/s Next Gen Films Private Limited
Assessment Years :2011-12 & 2012-13

that it has gross receipts of Rs.133.55 Crores & Rs.76.27 Crores for AYS 2011-12 & 2012-13 respectively as against total fees of Rs.3 Crores received by it from M/s DBPL and therefore, the proportion of fees vis-à-vis total turnover would be very miniscule. On the basis of the same, it could be said that the status of M/s EIFPL would be that of independent agent and not a dependent agent as alleged by Ld.AO. Further, we concur with Ld. AR's submissions that the said agreement was merely to assist the production of the film and to provide limited services in relation to delivery of a feature film. M/s EIFPL was entrusted with the responsibility of arranging the crew and the requisite equipment which were to be procured from India. The said contract was given to the Indian entity in order to perform the Indian part of the production services and M/s DBPL was to pay the requisite fees. M/s EIFPL carried out its activities as an independent agent. Therefore, it could not be termed as Permanent Establishment for M/s DBPL in terms of Article-5 of the Treaty. This view, as taken by lower authorities, could not be concurred with.

9. Therefore, on the facts and circumstances, we hold that the assessee and M/s DBPL could not be held to be Associated Enterprises in terms of Article-10 of the Treaty. The assessee could not be treated as PE of M/s DBPL in India. Further, the status of M/s EIFPL vis-à-vis M/s DBPL would be that of an independent agent and M/s EIFPL could not be said to be PE of M/s DBPL. Therefore, no profit could be said to have accrued to M/s DBPL in India as alleged by the revenue. As a logical consequence, the assessee could not be treated as assessee-in-default



ITA No.3782-83/Mum/2016
M/s Next Gen Films Private Limited
Assessment Years :2011-12 & 2012-13

in terms of Sec.201(1) & 201(1A) of the Act. Therefore, by deleting the impugned demand, we allow the appeal.

ITA No. 3783/Mum/2016, AY 2012-13

10. Facts are pari-materia the same in this year. In fact, the quantum assessment order is common order for both the years. The appellate order has confirmed the stand of Ld. AO, against which the assessee is under further appeal before us with similar grounds of appeal. Facts being identical, our adjudication as for AY 2011-12 shall *mutatis-mutandis* apply to this year also. Resultantly, the appeal stands allowed, in similar manner.

Conclusion

11. Both the appeal stands allowed in terms of our above order.

Order pronounced in the open court on 11th August, 2020.

Sd/-

(C.N. Prasad)

न्यायिक सदस्य / **Judicial Member**

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 11/08/2020
Sr.PS, Jaisy Varghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent



ITA No.3782-83/Mum/2016
M/s Next Gen Films Private Limited
Assessment Years :2011-12 & 2012-13

3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.