

IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, MUMBAI
BEFORE SHRI RIFAUR RAHMAN, ACCOUNTANT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 104/Mum/2019
(A.Y: 2010-11)

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| Nadiadwala Grandson Entertainment Pvt Ltd. Nadiadwala Villa, ocean View, Versova, JP Road, Andheri (W), Mumbai – 400 061. | Vs. | ITO (TDS) – 2(4) Room No. 705, KG Mittal Ayurvedic Hospital Bldg, Charni Road (W), Mumbai – 400002. |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCN0909J | | |
| Appellant | .. | Respondent |

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|-----------------|-----------------------|
| Appellant by : | Mr.Mani Jain. AR |
| Respondent by : | Mr.C.T. Mathews.Sr.DR |

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|-----------------------|------------|
| Date of Hearing | 25.01.2022 |
| Date of Pronouncement | 14.02.2022 |

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The assessee has filed the appeal against the order of the Commissioner of Income Tax (Appeals)-60, Mumbai passed u/s 201(1)/201(1A) and 250 of the Act. The assessee has raised the following grounds of appeal:

1. *On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in confirming the action of the Ld. AO in*

treating the payment made by the appellant to Mr. Sajid nadiadwala amounting to Rs. 3,25,00,000/- as salaries, thereby requiring deduction of tax at source u/s 192 of the Act instead of professional fees.

- 2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in confirming the action of the Ld. AO in levying interest on the appellant u/s 201(1A) of the Act to the tune of Rs. 7,44,700/-.*
- 3. The appellant craves leaves to alter, amend, withdraw or substitute any ground or grounds or to add new ground or grounds of appeal on or before the hearing.*

2. The brief facts of the case are that, the assessee is a leading film production company. A survey operations u/s 133A of the Act was conducted at the premises of the assessee on 14-10-2010, where the survey team found that there is no proper TDS compliance on payments and statement of financial officer was recorded u/s 131 of the Act. Further, on verification of books of accounts and documents it was found that the assessee company has made a payment of Rs.1.25 crores to Mr. Arjun Rampal for the movie 'Housefull' without deduction of TDS. The A.O dealt on the provisions and the transaction of payment and observed that the assessee is liable for deduction of TDS u/s 194J of the Act on the payments which worked out to Rs.12.50 lakhs u/sec201(1) of the Act and the interest u/s 201(1A) of

the Act Rs.2.75 lakhs aggregating to Rs15.25 lakhs and the assessee has paid TDS & interest of Rs.15 lakhs vide challan No.05024 on 5-01-2011 and there was a short payment of Rs.25,000/-.

3. Similarly in respect of payment of processing and printing fees of Rs.5,53,209/-, the assessee has deducted TDS U/sec 194C of the Act. The A.O. has applied the provisions of Sec194J of the Act and calculated short deduction of TDS u/sec201(1) of the Act of Rs. 44,257/- and interest u/s 201(1A) of the Act of Rs. 7,963/- aggregating to Rs.52,223/-. Whereas on the third disputed issue, the survey team found that the assessee company has paid Rs.3.25 crores to director Mr Sajid Nadiadwala towards producer's fee after deduction of TDS u/s 194J of the Act and also salary of Rs.6,60,000/-was paid and a statement was recorded for short deduction of TDS. The A.O has dealt on this disputed issue at page 8 to 10 of the assessment order. The assessee has submitted a letter explaining the nature of technical / professional services rendered during the year by Mr Sajid Nadiadwala. The A.O. dealt on the aspects and the meaning of "producer" and TDS implications.

Finally the A.O. has treated the assessee as “assessee in default” and observed at page 11 Para 4.6 to 5 of the order read as under and passed the order u/s 201(1)& 201(1A) of the Act dated 26.03.2012:

“4.6. In view of the fore going discussion, I am of the considered opinion that the payment made to Shri Nadiadwala, ought to have been correctly subject to TDS u/s 192. Accordingly, the assessee is deemed to be in default within the meaning of Sec. 201(1), for short deduction of TDS o Rs. 3.25 crore @ 10% u/s 194J instead of @ 30.6% as Shri Sajid Nadiadwala income during the year under consideration falls under the highest tax bracket. It is placed on record that Shri Sajid Nadiadwla has filed his Return of income on 27th Sec 2010 vide acknowledgement number 161698141270910, duly accounting for the receipt in question and paying Rs. 63,00,000/- as self assessment tax on 29th Sec 2010. In view of the same, the interest liability u/s 201(1A) has been computed till Sec 2010 from respective dates of payment. Short deduction u/s 201(1) and interest liability u/s 201(1A), has accordingly been worked out as under:

| Date paid | Amount paid | TDS+Edn.Cess | | Short Deduction | Int u/s 201(1A) |
|-----------|-------------|--------------|------------|-----------------|-----------------|
| | | Deducted | Deductible | | |
| 1.10.09 | 20,000,000 | 2,060,000 | 6,120,000 | 4,060,000 | 487,200 |
| 5.12.09 | 12,500,000 | 1,250,000 | 3,825,000 | 2,575,000 | 257,500 |
| Total | 32,500,000 | 3,310,000 | 9,945,000 | 6,635,000 | 744,700 |

4.7 As the assessee has provided the details in respect of payee i.e Shri Nadiadwala with regard to the discharge of tax obligation on the transaction in question, filing of return of income etc, the short deduction computed u/s 201(1) at Rs. 66,35,000/- is required to be considered for

the purpose of levying of penalty u/s 271C by ACIT(TDS) and charging of interest u/s 201(1A). Payable interest liability u/s 201(1A) on the issue stands computed as above at Rs. 7,44,700/-.

4.8 Intimation to Addl.CIT(TDS), is being given for initiation of penalty proceedings on the issue.

5. The demand payable by the assessee is summarized in the table below:-

| <i>Particular</i> | <i>Short Deduction</i> | <i>Intt u/s 201(1A)</i> |
|-------------------------------------|------------------------|-------------------------|
| <i>As discussed in para 2 above</i> | <i>0</i> | <i>25,000</i> |
| <i>As discussed in para 3 above</i> | <i>44,257</i> | <i>7,966</i> |
| <i>As discussed in para 4 above</i> | <i>0</i> | <i>7,44,700</i> |
| <i>Total</i> | <i>44,257</i> | <i>7,77,666</i> |

4. Aggrieved by the A.O. order, the assessee has filed an appeal before the CIT(A). Whereas the CIT(A) considered the grounds of appeal, findings of the AO and submissions of the assessee. Finally on the disputed issue with respect to deduction of TDS on payments to Mr.Sajid Nadiadwala, the CIT(A) observed at page 7 to 8 of the order and confirmed the action of the A.O. and granted relief in other grounds of appeal and partly allowed the appeal:

“Further, in the Sec 194J91), subsection (ba) has been introduced from 01.07.2012 which stated that:

any remuneration or fees or commission by whatever name called, other than those on which tax is deductible u/s 192 to a director of company or

It means thereby, the concept for any fee for professional or technical services other than those on which tax is deductible u/s 192 is only applicable from 01.07.2012. This case pertains to F.Y 2009-10 which is prior to the amended legislation on this aspect. Accordingly, that benefit can also not be given in this year.

Considering the above factual and legal provisions, the producers fee given to Mr. Sajid Nadiadwala, the director of the company is in the nature of salary paid and not professional fee as claimed by the appellant. Since, the tax has been paid on this amount, the assessee is not treated as a deemed defaulter u/s 201(1) but interest u/s 201(1A) will be charged as per the legal provisions. Under such circumstances, the calculation of interest liability u/s 201(1A) of the Act as calculated by the TDS AO is as per law and hence upheld. This ground of appeal is disallowed.

Aggrieved by the CIT(A) order, the assessee has filed an appeal before the Honble Tribunal.

5. At the time of hearing, the Ld. AR submitted that the CIT(A) has erred in confirming the action of the A.O. on short deduction of TDS and the payment made to Mr. Sajid Nadiadwala as salary income and also requiring the assessee to make TDS u/s 192 of the Act instead of professional fee U/sec 194J of the Act. The Ld. AR emphasized that Mr. Sajid Nadiadwala is associated with the film industry from many years

and he is paid salary for day to day running of the assessee company and also paid producer fee for his creative control and administration. The producer fee was paid after deduction of TDS@10% under sec194J of the Act. The Ld. AR substantiated his arguments with the amendment in finance Act 2012, judicial decisions and the paper book. Contra, the Ld. DR supported the order of the CIT(A).

6. We heard the rival submissions and perused the material available on record. The sole crux of the disputed issue envisaged by the Ld. AR is with respect to the revenue authorities treated the producer fee payments to Mr SajidNadiadwala as salary and applicability of TDS u/s 192 of the Act. Whereas, the assessee has deducted TDS u/s 194J of the Act treating as professional fee and the A.O.has calculated the short deduction of tax and levied interest u/s 201(1A) of the Act. The contentions of the Ld.AR are that the producer fee is regularly paid referred to page 1 of the paper book, chart disclosing the salary and producer fees paid to the Mr.Sajid Nadiadwala from A.Y.2010-11 to A.Y.2013-14 as under:

| <i>A.Y</i> | <i>Particulars</i> | <i>Amount</i> | <i>Remarks</i> |
|----------------|----------------------|--------------------|--|
| <i>2010-11</i> | <i>Salary</i> | <i>6,60,000</i> | <i>NA</i> |
| | <i>Producer Fees</i> | <i>2,00,00,000</i> | <i>Kambakkhat Ishq</i> |
| | <i>Producer Fees</i> | <i>1,25,00,000</i> | <i>Houseful</i> |
| | | | |
| <i>2011-12</i> | <i>Salary</i> | <i>6,60,000</i> | <i>NA</i> |
| | <i>Producer Fees</i> | <i>2,50,00,000</i> | <i>Arjun Anjani</i> |
| | <i>Producer Fees</i> | <i>40,00,000</i> | <i>Houseful</i> |
| | | | |
| <i>2012-13</i> | <i>Salary</i> | <i>4,40,000</i> | <i>NA</i> |
| | <i>Salary</i> | <i>7,50,000</i> | <i>Received from Nadiadwala Grandson Finvest Pvt Ltd</i> |
| | <i>Producer Fees</i> | <i>3,00,00,000</i> | <i>Houseful-2</i> |
| | | | |
| <i>2013-14</i> | <i>Salary</i> | <i>15,00,000</i> | <i>NA</i> |
| | <i>Producer Fees</i> | <i>NIL</i> | <i>N/A</i> |

7. The Ld.AR demonstrated the income tax returns and computation of income filed by the Mr.Sajid Nadiadwala for the A.Y 2010-11 to 2013-14 at page 2 to 36 of factual paper book. Whereas, for the A.Y 2010-11 Mr. Sajid Nadiadwala has received salary of Rs.6,60,000/- and production fee of Rs. 3.25 crores. Similarly for the A.Y 2011-12 received the salary of Rs. 6,60,000/- and producer fee of Rs. 2.90 crores. For the A.Y 2012-13, the salary was Rs. 11.50 lakhs and producer fee was Rs.3 crores. And whereas for the A.Y 2013-14 only salary of Rs. 15 lakhs and no producer fee was paid. These payments have been

recorded in the books of accounts and the recipient has been offering to tax in the income tax return and cannot be disputed. Further in the assessee's assessment order u/s 143(3) r.w.s 153A of the Act for the A.Y 2010-11, placed at page 37-138 of the paper book, the facts of TDS deduction was considered and there is no disallowance of claim. We find there is an amendment to the provisions of Sec. 194J of the Act in finance Act 2012, and the relevant provision is extracted as under:

“Under the existing provisions of the IT Act, a company being, an employer, is required to deducted tax at the time of payment of salary to its employees including Managing director/whole time director. However, there is no specific provisions for deduction of tax on the remuneration paid to a director which is not in the nature of salary.

It is proposed to mend section 194J to provide that tax is required to be deducted on the remuneration paid to a director, which is not in the nature of salary, at the rate of 10% of such remuneration.

This amendment will take effect from 1.7.2012 ”

8. We find that the amendment to deduct tax @10% on remuneration paid to director not in the nature of salary is applicable prospectively w.e.f 1-7-2012. Whereas, in the present case, the payment of

producer fee is during the F.Y. 2009-10 i.e A.Y.2010-11. Though the provisions of amendment are not applicable, but the assessee has deducted TDS u/sec194J of the act, which cannot be overlooked.

9. We, on similar disputed issue and applicability of amended provisions, rely on the observations of the Hon'ble Tribunal in ITO Vs. Unichem Laboratories Ltd in ITA No. 4592 & 4593/Mum/2014 dated 29.01.2016 at page 20 Para 13 of the order, which is read as under:

13. We have heard the rival parties and perused the material on record and we are in respectful agreement with the decision of the Pune Tribunal in the case of Bharat Forge Limited(supra) that no tax is to be deducted at source on Director sitting fee payable to Director u/s 194J of the Act prior to the amendment w.e.f. 01-07-2012 in Section 194J by insertion of sub-section (ba) to Section 194J(1) of the Act . The insertion of sub-section (ba) to Section 194J of the Act has clearly stipulated that tax is to be deducted at source on any remuneration or fees or commission by whatever name called to a director of a company, other than those on which tax is deductible at source u/s 192 of the Act . The said amendment is brought in by the Finance Act, 2012 w.e.f. 01-07-2012 . The Memorandum to the Finance Bill 2012 has stipulated that there is no specific provisions in the Act providing for deduction of tax at source on remuneration paid to

directors which is not in the nature of salary whereby tax is deductible covered u/s 192 of the Act, which clearly indicates that there was no provision for deduction of tax at source prior to the amendment by Finance Act, 2012 w.e.f. 01-07-2012 on payment of remuneration or fee or commission by whatever name called to Directors other than those on which tax is deductible at source u/s 192 of the Act. The amendment to the Section 194J(1) of the Act by insertion of subsection (ba) to Section 194J(1) of the Act has casted an additional burden on the taxpayer with respect to deduction of tax at source on remuneration, fee or commission to Director other than salary which as per memorandum to Finance Bill 2012 was not existing as per specific provisions of the Act prior to the aforesaid amendments and the amendments to Section 194J(1) of the Act by insertion of sub-section (ba) to Section 194J(1) of the Act were made effective from 01-07-2012, which in our considered view is prospective in nature to be applicable only from 01-07-2012 as it has casted an additional burden on the tax-payer by way of deduction of tax at source on remuneration, fees or commission to directors other than the salary for which tax is to be deducted at source under Section 192 of the Act. Since the instant appeal is for the assessment year 2009-10 which is prior to the assessment year 2013-14, we hold that no tax was deductible at source on payment of Directors sitting fee paid by the assessee company to its Directors u/s 194J of the Act and the assessee company could not be held as 'assessee in default' u/s 201(1) and 201(1A) of the Act. We order accordingly.

10. We find the submissions of the Ld.AR are realistic and cannot be overlooked. The recipient has been offering the income in the income tax return duly

evidenced from the computation of income and the Assessement order U/sec143(3) r.w.s 153A of the Act for the A.Y.2010-11 placed at page 7 of the paper book and in particular at Para 6 of the assessee order. We considering the facts, circumstances, ratio of decision, provisions of the Act and the amendment to sec194 J of the Act in finance bill 2012 are of the reasoned view that the assessee cannot be treated as “assessee in default”. Accordingly, we direct the A.O to delete the short deduction of TDS U/sec201(1) of the Act and interest u/s 201(1A) of the Act and allow the grounds of appeal in favour of the assessee.

11. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 14.02.2022.

Sd/-
(S RIFAUH RAHMAN)
ACCOUNTANT MEMBER

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 14.02.2022

KRK, PS

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

1.

(Asst. Registrar)
ITAT, Mumbai