

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ "ई" मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE SHRI SHAILENDRA KUMAR YADAV, JM AND SHRI RAJESH KUMAR, AM

आयकर अपील सं./I.T.A. No.4023/Mum/2014

(निर्धारण वर्ष / Assessment Year : 2009-10)

Shri Sajid Iqbal Qureshi, A-203, Orchid Evershine Park, Veera Desai road, Andheri (E), Mumbai-400053	बनाम/ Vs.	Asstt.Commissionr of Income Tax 20(3), 4 th floor, Room No.402, BKC, Bandra (E), Mumbai-400050
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स्थायी लेखा सं./ PAN : AACPQO189L

अपीलार्थी ओर से / Assessee by	Shri Rajeev Khandelwal and Neelkanth Khandelwal
प्रत्यर्थी की ओर से/Revenue by	Love Kumar

सुनवाई की तारीख / **Date of Hearing** : **20.6.2016**

घोषणा की तारीख / **Date of Pronouncement** : **28.06.2016**

आदेश / ORDER

PER RAJESH KUMAR, A. M:

This is an appeal filed by the assessee and challenging the order dated 28.3.2014 of Id.CIT(A)-31, Mumbai, for assessment year 2009-10.

2. The issue raised in the various grounds of appeal raised by the assessee is against the confirmation of rejection of books of account upholding the addition of Rs.60,33,735/- arising out of short accounting of receipts in the books of accounts vis-à-vis in the TDS certificates by upholding the applicability of section 40(a)(ia) of the Income Tax Act, 1961 for non deducting of tax at source.

3. Brief facts of the case are that the assessee filed return of income on 30.9.2009 declaring total income of Rs.7,77,890/-. The case of the assessee was processed under section 143(1) of the Act, however, later on the case was selected for scrutiny and statutory notices under section 143(2) and 142(1) were issued and served upon the assessee. The assessee was a sole selling agent of M D Salauddin, Prop of S S Films and was engaged in the marketing of films procured by M/s S S Films. In the said arrangement, the assessee was responsible for all agreements of M/s S S Films with the prospective customers/sub-distributors and also responsible for collection of money on its behalf. The money collected by the assessee was being remitted to M/s S S Films after deducting various expenses incurred by the assessee on behalf of the said M/s S S Films such as dubbing, mixing, recording, researching and publicity etc and after retaining its commission which was at the rate of 10% of the agreement value of business done by the assessee. For the purpose of rendering all these services, the assessee was given General Power of Attorney by M/s S S Films. During the course of collection of payment by the assessee on behalf of M/s S S Films were to the tune of Rs.2,20,42,656/- and accordingly accounted for the commission at the rate of 10% Rs.22,04,265/-. However, some sub-distributors deducted tax on the entire amount of payment due from them which as per TDS certificates total receipt came to Rs.82,38,000/- and the TDS thereon was

deducted Rs.7,99,383/- which was claimed by assessee in his return of income.

4. The AO, during the course of assessment proceedings, observed that the assessee only accounted for receipt to the tune of Rs.22,04,265/- whereas as per TDS certificates the total receipts were Rs. Rs.82,38,000 and thus was shown less by Rs.60,33,735/- and was added to the same to the total income of the assessee by rejecting the books of account of the assessee and further held that the assessee paid an amount of Rs.60,33,735/- without deduction of TDS and therefore disallowed the same for want of non compliance of provisions of section 194J of the Act and therefore the assessee is not entitled to be allowed expenditure of the equal amount as per the provision of section 40(a) (ia) of the Act. Aggrieved by the order of the AO, the assessee has preferred an appeal before the Id. CIT(A), who after considering the detailed submissions of the assessee which has been incorporated in para 4 of the appellate order dismissed the appeal of the assessee by observing and holding as under (para 5):

"5. I have carefully considered the facts related to the issue at hand as they emerge from the impugned assessment order and the submissions made in appeal. The grounds of appeal raised in the instant case being related, the same are taken up together for disposal for the sake of convenience.

5.1 In Ground No. 1 to 4, the appellant has challenged the addition of Rs.60,33,735/-. During the scrutiny proceedings, the AO after perusal of TDS certificates furnished by the appellant found that the total receipts as per TDS certificates were Rs.82,38,000/- whereas the appellant had shown total receipt of only Rs.22,04,265/-. The A.O.

asked the appellant to reconcile the difference. The AR explained that the appellant received gross proceeds of the entire amount on behalf of those persons, from whom, he had taken rights of films and the appellant paid the amount not reflected in his receipts, directly to the right-holders after taking his part of commission income. It was submitted that accordingly, the appellant accounted for only that part of commission income, on which he was liable to pay income tax. The A.O. however noted that the appellant subsequent to the aforesaid arrangement, should have deducted the TDS on the gross amount as per the provisions of section 194J and rejected the averments of the appellant, adding back the difference as income of the appellant u/s 40(a)(ia) of the Act. During appellate proceedings, it was stated that the A.O. rejected the books of accounts on the ground that the gross receipts are not included in the books of the appellant and therefore, the books has picked up the figure of gross receipts from 5 tax deductors in their form no.16A aggregating to Rs.82,88,000 and after reducing the commission amount, he has added the difference as no TDS was deducted by the appellant on this amount. The appellant stated that the total sale value received by the appellant on behalf of his principals amount to Rs.2,20,42,656/- fro 33 parties including the above referred 5 parties from whom the appellant had earned commission of Rs.2,04,265/-.

5.1.1 The arguments of the appellant are duly considered and it is found that there is nothing on record to prove that the appellant had actually incurred the expenditure on behalf of the so-called exhibitors or onward distributors. The fact remains that the appellant had not accounted for the gross turnover in its books of accounts and had claimed the entire amount of TDS on the said receipts. The appellant's theory that he was only accounting for commission income, lacks force since, if that were so, the receipts of the appellant should have been" subjected to TDS of the respective payers, however, this is not the case. As regards the other contention of the appellant that he had reduced the amount of commission from the gross receipts and forwarded the remaining receipts to the film distributors, the A.O. has observed that if that been the case, then the said amount was Subjected to deduction of TDS u/s 194J. As the requisite tax was not deducted nor deposited into Government Treasury, the provisions of section 40(a)(ia) are squarely applicable to the facts of the appellant's case.

5.2 It is the contention of the appellant that the gross receipts never belonged to him but were diverted by overriding title and therefore the

accounting concepts and conventions do not allow him to show such receipts as his income. In this regard it has to be noted that the appellant has been unable to adduce any agreement entered into with the exhibitors / onward distribution either before me or before the A.O. as has discussed in his submissions. As regards the so-called 'agency agreement' the appellant has only produced samples that only indicate that the appellant is entitled to received 10% of commission on gross value of business generated by him. A general submission has been made to the effect that there is a diversion of income at source, but to prove the veracity of this claim, no documentary evidence was placed on record. The appellant has himself admitted that after receiving films from the exhibitors/onwards distributors, he incurred the said expense for the process of films and that the expenditure was incurred on behalf of exhibitors / onward distributors. Thus the entire amount either being paid or received by the appellant is of the character of contractual receipts between the film exhibitors/ distributors and the appellant and is therefore subject to TDS. Even otherwise, such payments are disallowable as per the provisions of section 40(a)(ia) of the Act if the conditions stipulated by the Act are not met. As observed earlier, the appellant has failed to adduce any documentary evidence to show that there is diversion of income. In such a situation, it is difficult to accept the proposition made by the AR of the appellant. Therefore, after consideration of the facts of the instant case, the addition made by the A.O. being in accordance with the provisions of section 40(a)(ia) of the Act is upheld and the grounds of appeal raised are therefore dismissed."

5. The Id.AR submitted before us that the assessee was acting as a sole selling agent of M/s S S Films to market, sell the films on its behalf to the prospective distributors/sub-distributors and was also responsible for collecting money on its behalf and therefore the Id. Counsel further submitted that the assessee used to remit the amount collected as an agent from various parties after deducting various expenditures incurred by him on behalf of M/s S S Films such as dubbing, mixing recording and publicity and also his commission at the rate of 10% of the gross receipt collected on

behalf of the assessee. It was argued by the Id.AR that during the year the total sale value received by the assessee on behalf of the principle from 33 parties amounting to Rs.2,20,42,656/-, the details whereof was filed at page 7 of the paper book. During the year the five parties (sub-distributors /exhibitors) from whom the total payment of RS.82.38 lakhs was received deducted TDS of Rs.7,99,383/- on the said amount which was also included in the gross payment collected by the assessee of Rs.2,20,42,656/-. Thus, the appellant accounted for commission at the rate of 10% of Rs.2,20,42,656/- i.e. Rs.22,04,265/- and rightly claimed credit of TDS of Rs.7,99,383/-.

6. The Id. AR drew our attention to page no.1 of the paper book which is an extract of income and expenditure statement is contained which shows the commission charges received at Rs.22,04,265/-, net profit after deducting various expenses as per Sch.11,12 and 13 at Rs.7,92,887/-. The Id. AR strongly argued that the assessee was acting as a sole selling agent of the principal and therefore the AO was wrong in arriving at the conclusion that the assessee should have accounted for the receipt of Rs.82.38 lakhs as against Rs.22,04,265/- actually accounted for by the assessee. Whereas, as a matter of fact, the assessee collected Rs.2,20,42,656/- from 33 parties including the five parties from whom the payment of Rs.82.38 lakhs were received after deduction of TDS of Rs.7,99,383/- and rejection of books of account by the AO was also based on the wrong facts that the total

processional receipts as per TDS on Rs.82.38 lakhs whereas the total commission was paid as the rate of Rs.10% of Rs.22,04,265/-. The Id. AR finally argued that the orders of authorities below be reversed as being incorrect and contrary to the facts and law and the appeal of the assessee be allowed.

7. On the other hand, the Id. DR strongly supported the orders of authorities below by submitting that the assessee has accounted for only Rs.22,04,265/- in respect of Rs.82.38 lakhs and therefore the books of account maintained by the assessee were rightly rejected by the AO and also justified the addition made of Rs.60,33,737/- for non deduction of TDS u/s 40(a)(ia) of the Act.

8. We have carefully considered the rival contentions of the parties and perused the material placed before us including the orders of authorities below. We find that the assessee was acting as sole selling agent of M/s S S Films for which the assessee was given General Power Authority to carryout various works and duties like, marketing, sales and advertising etc of the films at the remuneration of 10% commission on the receipts collected from the parties on behalf of the principal. We further find that the assessee used to make payment to the principal of M/s S S Films after deducting various expenses which were of the nature of dubbing, mixing and recording etc

including the publicity and his commission and after deducting the above expenses, the agent used to remit balance payment to the principal.

9. During the year, the assessee collected Rs.2,20,42,656/- from 33 parties including the payment of Rs.82.38 lakhs collected from five parties which after deducting TDS to the tune of Rs.7,99,383/-. We further observed that as per the terms of payment, the sole selling agent was entitled to 10% commission on the total collected made by him from sales of films from various distributors- exhibitors. The assessee during the year accounted for his commission at Rs.22,04,265/- being 10% of the total sale value realized of Rs.2,20,42,656/- from 33 parties which was not disputed by the income tax authorities and passed on the payment directly to the principal thus, without showing the same in his books of account as its receipt which is correct as he was only acting as sole selling agent on behalf of the principle M/s S S Films. We have observed from the record that 5 persons from whom the payment of Rs.82.38 lakhs on which TDS was deducted of Rs.7,99,383/- which was part of the total sale value realized by the assessee on behalf of the principal amounting to Rs.2,20,42,656/- from 33 parties that the assessee has rightly accounted for the commission on the gross sale value instead of accounting for the payment from 5 parties on which TDS was deducted by the said parties. We are therefore are not in agreement with the observations of the AO as well as the CIT(A) on this issue and therefore the order of the

lower authorities cannot be sustained. We find from the record before us that the books of account of the assessee were rejected without appreciating the fact of the case and was wrongly upheld by the Id. CIT(A). Since the assessee is working as sole selling agent of M/s S S Films the provisions of section 194J or 194C and 40(a)(Ia) of the Act were not attracted and the observations of the AO that Rs.60,33,735/- was paid without deduction of TDS and disallowed u/s 40(a)(ia) wrong and against the provisions of law. In view of the above facts and circumstances of the case, we set aside the order of the Id.CIT(A) and direct the AO to delete the addition made of Rs.60,33,736/-.

10. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 28.6.2016.

Sd

(SHAILENDRA KUMAR YADAV)

न्यायिक सदस्य / JUDICIAL MEMBER

sd

(RAJESH KUMAR)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई MUMBAI; दिनांक DATED :28.6.2016

Sr.PS:SRL:

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 – concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai