IN THE INCOME TAX APPELLATE TRIBUNAL
"G" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
& SHRI N. K. CHOUDHRY, JM

I.T.A. No. 1814/Mum/2023
Assessment Year: 2019-20

Dy. CIT (TDS)-2(3) Room No. 320, 3rd Floor, MTNL Building, Cumballa Hill, Mumbai-400036.	Vs.	**M/s Yash Raj Films Pvt. Ltd.** 5, Shah Industrial Estate, Veera Desai Road, Andheri (W), Mumbai-400053. PAN No. **AAACY1176E**
Appellant)	:	**Respondent**)

Appellant/ Department by	:	Sh. Raj Singh Meel, Sr. DR
Assessee/Respondent by	:	Sh. Rajesh P. Shah, Adv. & Vishal D. Shah, Adv.
Date of Hearing	:	21.11.2023
Date of Pronouncement	:	22.12.2023

O R D E R

Per N. K. Choudhry, JM:

The Appellant/Department herein has preferred this appeal against the order dated 24.03.2023 impugned herein passed by National Faceless Appeal Centre (NFAC), Delhi/ Ld. Commissioner of Income Tax (Appeals)-60 {in short 'Ld. Commissioner'} u/s 250 of the Income Tax Act 1961 (in short 'the Act').

2. Brief facts relevant for adjudication of the instant appeal are that the Assessee is engaged in the business of production & distribution of features films, selling of Audio & Video Cassettes, compact disc and digital discs of movies. On dated 27.08.2019 a verification of compliance of Tax at Source (TDS) under the proviso of Chapter-XVIIB of the Act was conducted in the case of the Assessee, wherein certain discrepancies were found qua deduction of TDS by the Assessee. **The AO perused the alleged agreement dated July 2018 executed between the Assessee and** Salman Khan Ventures Pvt. Ltd. (in short 'SKVPL') **and observed** *"that a perusal of the agreement (annexed with this order) reveals that Yash Raj Films Pvt. Ltd. has taken distribution rights of the film(s) from Salman Khan Ventures Pvt. Ltd, for a limited period of 1 (one) year. Further, royalty has been paid to Salman Khan Ventures Pvt. Ltd. by Yash Raj Films Pvt. Ltd. for such rights. The transaction is not payment for purchase of cinematographic films but consideration for transfer of rights in respect of artistic work films. Therefore, the said transaction is covered within the meaning of royalty as per Sub- clause (v) of Explanation 2 to Clause (vii) of Sub-section (1) of Section 9 of the Income Tax Act, 1961. Accordingly TDS at the applicable rate of 10% has to be deducted by Yash Raj Films Pvt. Ltd on royalty payment u/s 194J however, the same has not been done."* And consequently by issuing notice dated 29.10.2019 show caused the Assessee to explain as to why the Assessee should not be treated as an Assessee in default within the meaning of section 201(1)/201(1A) of the Act with regard to the non-deduction of TDS on the payment of Rs. 4,66,17,528/- made to 'SKVPL'.

3. The Assessee in response to the said show-cause notice, filed its replies dated 31.10.2019, 07.10.2019, 14.10.2019 and 22.11.2019 and mainly claimed as under:

> *"4 in response to the show cause notice, Shri Jatin S Makhecha, SR. G. M Accounts of the assessee attended and filed the reply on 31/10/2019, 07/11/2019. 14/11/2019 & 22/11/2019 Submitting that:*
>
> *"As regards to the transactions entered between YRFPL and SKVPL we have to state that the agreement reproduced in the notice is quite self-explanatory.*
>
> *In the first para itself the agreement clearly states that the producer permits the agent to DISTRIBUTE the theatrical rights of the film.*
>
> *The second para also clearly states that SKVPL APPOINTS YRFPL AS AN AGENT TO ARRANGE AND FACILITATE FOR DISTRIBUTION OF THE MOVIE ON BEHALF OF THE PRINCIPAL*
>
> *Principal has also agreed to bear the expenses incurred for the distribution of the movie or reimburse the agent any such expenses as agent has done ON THEIR BEHALF*
>
> *The facts mention in the above extracts of the agreement clearly brings out the role of the company that they are acting as un agent and not distributors for which they are receiving the agency commission on which SKVPL has deducted TDS u/s 1941 and deposited.*
>
> *The payment made to SKVPL other than the commission is the part of the agency job from which the functions arrived ie to collect all the collections from various exhibitors and after deducting the commission pass on the principal i.e. M/s SKVPL.*
>
> *The above payment made do not fall under the preview of terminology of royalty and hence your contention of purchase of films for distribution is incorrect.*
>
> *In view of the above facts, we state that the company should not be treated as assessee in default as per the provisions of section 201(1) and 201(1A).*

The distribution has been done by us only on the revenue sharing bass with the exhibitors. Hence the question of distribution transaction with outsiders does not arise The exhibition of the films as rated above is exclusively distributed by us in which no nights or ownership of the product is passed to any exhibitor.

in view of the above facts, we state that section 9(1) read with section 1943 is not applicable to us.

The issue has been decided by various HC, which has clearly stated that the payment in respect of exhibition is a specifically excluded u/s 194J of the act. The Bombay ITAT in our own case for AY 2009-10 ITA No 5738 Mum/2015 has uphold that TDS is not applicable on the distribution of firms on a revenue basis. The extract of the above order is reproduced for your convenience.

"Before the learned CIT(A), assessee submitted that the amount of Rs. 3.73 lakhs paid to Mrs. Applause Bhansali Pvt. Ltd, actually related to share of profit for theatrical distribution of films, on which there is no requirement to deduct tax at source. The learned CIT(A) agreed with the same and accordingly deleted the disallowance of 3.73 lakhs With regard to payment made to Reliance Media Works Ltd. assessee placed reliance on the decision rendered by Hon'ble Calcutta High Court in the case of SK Kekwal (361 ITR 432), wherein it was held that disallowance made u/s. 40(a)(a) of the Act cannot be made for short deduction of tax at source Accordingly, the learned CIT(A) deleted the disallowance of Rs. 375.00 lakhs also.

We heard the parties on this issue and perused the record. With regard to the payment of Rs. 3.73 lakhs made to Applause Bhansali Pvt. Ltd the assessee has submitted that the same represents share of profit and hence the learned CIT(A) has deleted the same. Before us no material was placed by the Revenue to contradict the factual aspect presented before the learned CIT(A). Hence, we confirm the order passed by the leaned CIT(A) on this issue.

Even though the sun was of non-deduction, it is equally applicable to the TDS section as the above section is directly connected and related to the TDS section."

3.1 The Assessee before the AO more or less claimed that the Assessee is acting as an Agent for 'SKVPL' as a distributor, for which it has received agency commission, on which the 'SKVPL' has deducted TDS under

section 194H of the Act and deposited the same. Payment made to "SKVPL" other than the commission is the part of the Agency Job from which the funds arrived i.e. to conclude all the collections from various Exhibitors and after deducting the commission, pass on the said remaining amount to the principle i.e. M/s SKVPL and therefore, commission payment made to the Assessee does not fall under the preview of terminology of royalty. The Assessee in support of its case also relied on various judgments.

3.2 The AO though considered the said claim/replies of the Assessee as well as judgments as relied upon by the Assessee, however, not being satisfied rejected the same and by perusing and reproducing the provisions of section 194J of the Act and section 26 & 27 of the Copyrights Act, 1957 and by considering the sub-clause (v) of Explanation-(2) to Clause (vi) of sub-section (1) to section 9 of the Act treated the amount of Rs. 4,66,17,528/- as "Royalty" payment, by holding as under:

> *"5. Section 194J of the Income Tax Act, 1961 clearly states that any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any sum by way of royalty shall, at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to ten (10) per cent of such sum as income tax on income comprised therein.*
>
> *6. Clause (ba) of Explanation to section 1943(1) defines royalty, by referring to the meaning given in clause (vi) of Explanation 2 to section 9(1). For ready reference. Explanation 2 of section 9(1) is extracted hereunder.*

"Explanation 2-For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for-

- *(i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;*
- *(ii) the imparting of any information concerning the working of, or the use of, a patent invention, model, design, secret formula or process or trade mark or similar property;*
- *(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property;*
- *(iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill; (iva) the use or right to use any industrial commercial or scientific equipment10a but not including the amounts referred to in section 44BB;]*
- *(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale. distribution or exhibition of cinematographic films: or*
- *(vi) the rendering of any services in connection with the activities referred to in sub-clauses (1) to [(iv), (iva) and] (v).*

7. As can be seen from the provision extracted herein above, royalty as per clause (vi) would take within its ambit rendering of any services in connection with the activities referred in sub-clause (i) to (v). It is further evident from the aforesaid provision that payments made by assessee can only be classified within clause (v) and (vi) of the Explanation 2 to section 9(1). On a perusal of distribution agreement between assessee and producer of film, it becomes clear that distribution right over the films for a designated territory have been assigned in favour of assessee for a limited period of one year. It is not a case of perpetual transfer without any restriction of geographical area as is the case in a sale. It is further evident that the assignee has assigned only the distribution right without transferring any other right.

8. As per the Copyright Act of 1957, the producer is the owner of any cinematography film which is the property created by him, which is termed as negative rights as per trade The producer has the absolute right to exploit the said film through various modes and means, both theatrically and non-theatrically. In such case, he gets royalty

paid for exploitation of every individual night. Whereas in case of sale of negative nights, he is selling his entire property created by him in the form of a cinematography film. Hence this is deemed to be a sale instead of royalties (royalties are paid only for permitted usage of single or multiple rights, temporarily or for specified periods only).

9. As per sections 26 and 27 of the Copyrights Act, 1957 the copyright in:

a. *Cinematograph film's subsist until 60 years from the beginning of the calendar year next following the year in which the film is published and*
b. *Sound recordings subsist until 60 years from the beginning of the calendar year next following the year in which the sound recording is published.*

Thus where the copyright in the cinematograph film is assigned for periods longer than 60 years it would be regarded as permanent transfer and the intention is transfer of the rights to use the film rather than providing service. In the case of transfer of copyright in cinematograph film for a period of less than 60 years from the beginning of the calendar year next to the year in which the sound recording/cinematograph is published, the transfer is temporary in nature and such rights would again vests with the original owner after the expiry of the assigned period it is not a transfer in the right to use the goods but is a temporary transfer of rights.

10. Thus, when the transfer is for perpetual period or 99 years or a period more than 60 years or when negative rights are transferred then it amounts to sale. In the instant case, the transfer is only for a single calendar year that too only with regard to distribution rights A close look of the above narration in the agreement shows that the substance of the transaction is in the nature of royalty but not a sale because ownership is not acquired. It is not an absolute sale but for the payment of royalty.

11. Further, the common understanding of the term 'royalty is the amount received by a person who has exclusive right over a property, for allowing another person to make use of such property. The opening line of the agreement itself clearly states that the producer (Salman Khan Ventures Pvt. Ltd) is in the business of production and sale of cinematographic films but intends to transfer only distribution rights for a designated territory that too for a specified period of a year only. Further, the agreement is to distribute the theatrical rights and not consideration for sale, distribution or exhibition of cinematographic films: The payment is not for sale as discussed previously as no absolute transfer is made Additionally, the payment is neither for

exhibition as the assessee is not in line of business of exhibition. Further, the payment is neither still for distribution as the same is also carried on by different persons.

12. The terms of the agreement clearly state that print cost/virtual print cost/content distribution charges including freight shall be borne by YRFPL but fully recoverable from SKVPL Additionally the publicity material including advertisement and promotion shall either be paid for by SKVPL or fully reimbursed by SKVPL at cost. YRFPL is only entitled to license by itself or authorise any other person to exploit the theatrical rights. So, the activity being carried out by YRFPL is exploitation of theatrical rights and not any sale, distribution or exhibition of cinematographic films. If there is no activity in the nature of sale, distribution of exhibition of cinematographic films carried out by the assessee, the exception as enumerated in clause (V) of Explanation 2 of section 9(1) is ruled out. Accordingly, if the payment is not towards sale, distribution or exhibition of cinematographic films, the nature of payment as specified in agreement comes to right to exploit the theatrical rights for a specified period in a specified territory. The payment is with regard to right to use the artistic work for a specified period of time (one year). As dealt previously, the consideration is not for sale but for right of usage. Accordingly, the said transaction is squarely covered by the definition of royalty as in clause (v) of Explanation 2 of section 9(1) for the purposes of Section 194J of the Act.

13. The assessee has cited several case laws in its favour. A perusal of the same reveals that the nature of transaction in those cases was primarily of sale, distribution or exhibition of cinematographic films. In some of the cases: the issue involved transaction between a non resident and a resident. The case law of the assessee himself is with regard to distribution of films done by itself. As dealt previously, the same is not the case here. Additionally, the case law is with respect to section 40(a)(a) disallowance and not Section 194J as is the case here. Hence, the case laws is completely different as far as the issue in instant case, is concerned. The assessee plea that no TDS would be applicable as no specified payment has been made is factually incorrect as in the books of YRFPL the same has been booked as distribution cost and billed as such to SKVPL. Therefore, the said transaction is covered within the meaning of royalty as per Sub-clause (v) of Explanation 2 to Clause (vii) of Sub-section (1) of Section 9 of the Income Tax Act, 1961. Accordingly, TDS at the applicable rate of 10% has to be deducted by Yash Raj Films Pvt. Ltd. on royalty payment u/s 194J."

3.3 The AO also held the Assessee in default under section 201(1) of the Act and ultimately determined the demand/addition of Rs.

52,84,693/- (Rs. 46,61,753/- qua TDS @ 10% of the payment made u/s 194J of the Act **+** Rs. 6,22,940/- as interest @ 1% pm for delayed months).

4. The Assessee being aggrieved challenged the aforesaid demand /addition before the Ld. Commissioner and during the appeal proceedings reiterated its claim by making following submissions:

> *"5 The appellant during the appeal proceedings has made the following submission:*
>
> *"..... Sir the assessing officer had erred in ignoring the facts mentioned in the agreement.*
>
> *In the para 1 of the agreement, it is very clearly mentioned that YRFPL was to be appointed as an agent for distributing the movies produced by SKVPL para 3 of the terms and conditions mentioned in the agreement on page 2 clearly states that consideration for the agent shall be commission.*
>
> *The above commission received from SKVPL is received after the TDS deducted by them and has been disclosed in our final accounts, the copy of the ledger account, bills and extract of 26AS to substantiate that we have received only commission and have paid to Salman khan the amount collected from theatres on their behalf, the assessing officer has also erred in changing the section of 194J to suits his convenience and ignored the crux of the agreement, to bring the amount under the ambit of TDS provisions. The procedures to conduct the assessment proceedings has been settled by various court judgments which is as follows:*
>
> *While proceeding under section 143(3) the Assessing officer is bound to hear such evidence as the assessee may produce in support of to hear such evidence as the assessee may produce in support of his return and, if after hearing the evidence so produced, he still thinks that he is not satisfied on any particular point, he can require the assessee to produce further evidence on that point. If not satisfied with the character of the evidence produced by the assessee, he is not bound to lead evidence on his own account with a view to rebutting it. He may gather information in any manner he likes and utilize it against the assessee even if it does not in all respects*

satisfy the requirements of the Indian Evidence Act. But if he makes up his mind to reject the evidence of the assessee on any grounds which appeal to him to be sufficient for that purpose, it is but fair and just that he should acquaint the assessee with those grounds so as to enable him to disabuse his mind, if possible, by explaining them away as baseless or untenable. At the same time, it is not correct to say that if once the assessee leads evidence, whether reliable or unreliable, or produce any documents, whether genuine or fictitious, the Income Tax Officer must base his decision on that evidence unless he is in position to bring on the record any definite evidence to the contrary.

An assessment based on mere conjecture, surmise or suspicion or irrelevant and admissible evidence and material is invalid and unsustainable in law 9see. Dhirajlal Girdharilal V. CIT, 91954) 26 ITR 736(SC): Dhakeswari Cotton Mills Ltd. v. CIT, (1954) 26 ITR 775, (SC); Lalchand Bhagat Ambica Ram V. CIT. (1959) 37 ITR 288 9ac0. Umacharan Shaw 7 Bros v. CIT. (1959)371TR 271 (SC): Omar Salay Mohamed Sait v. CIT, (1959) 37 ITR 151 (SC)J.

Natural Justice:

Dhakeshwari Cotton Mills Ltd. v. CIT (1954) 26 ITR 775 (SC) (782)-Ratio.

The evidence brought on record without the knowledge of the assessee and used against him without giving him an opportunity to rebut it, offends the principle of natural justice. In making assessment under S. 143(3), the Assessing Officer is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment.

Without prejudice to our above stand we have to state that, the above income has been declared by Salman Khan Ventures Pvt. Ltd. in the respective final accounts and has paid the applicable tax on it."

4.1. The Assessee before the Ld. Commissioner more or less claimed that in para-1 of the alleged agreement, it is clearly mentioned that Assessee was appointed as an Agent for distributing the Movies produced by SKVPL and in para-3 it is also clearly stated that consideration for the

Agent shall be commission. The commission received from 'SKVPL' has been received after TDS deducted by 'SKVPL' and has also been disclosed in Assessee's accounts. The Assessee in order to substantiate its claim also filed the copy of the Ledger A/c, bills and extract of 26AS.

5. The Ld. Commissioner considered the issue "whether the payments made by the Assessee to M/s SKVPL amounts to "Royalty" and consequently whether the TDS has to be deducted under section 194J of the Act". The Ld. Commissioner by relying on the judgment passed by the Hon'ble Co-ordinate Bench of the Tribunal in the case of Sri V. Ramakirshna Vs. Department of Income Tax in ITA Nos. 2099 of 2011 and 113 of 2013 decided on 03.07.2015, held the transaction on account of the agreement between the Assessee and SKVPL as 'sale' which is excluded from the definition of 'Royalty' as per **Explanation-2 to section 9(1)(vi)** of the Act and accordingly the Assessee is not liable to deduct TDS on payment of Rs. 4,66,17,528/- under section 194J of the Act. The Ld. Commissioner also held the Assessee is not in default under section 201(1) of the Act.

6. We have heard the parties and perused the material available on record. Let us peruse the provisions of section 194J of the Act on the basis of which, the AO raised the demand of TDS.

> *"**194J** (1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any sum by way of -*
>
> *a) fees for professional services, or*

(b) fees for technical services [or]

(ba) any remuneration or fees or commission by whatever name called, other than those on which tax is deductible under section 192, to a director of a company, or]

(c) royalty, or

(d) any sum referred to in clause (va) of section 28,]

shall, at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to "[ten] per cent of such sum as income-tax on income comprised therein:

***Provided** that no deduction shall be made under this section-*

(A) from any sums as aforesaid credited or paid" before the 1st day of July, 1995; or

(B) where the amount of such sum or, as the case may be, the aggregate of the amounts of such sums credited or paid or likely to be credited or paid during the financial year by the aforesaid person to the account of, or to, the payee, does not exceed-

(i) [thirty thousand rupees], in the case of fees for professional services referred to in clause (a), or

(ii) [thirty thousand rupees], in the case of fees for technical services referred to in "[clause (b), or]

(ii) [thirty thousand rupees], in the case of royalty referred to in clause (c), or

(iv) thirty thousand rupees), in the case of sum referred to in clause (d):]

*[**Provided further** that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (a) or clause (b) of section 44AB during the*

financial year immediately preceding the financial year in which such sum by way of fees for professional services or technical services is credited or paid, shall be liable to deduct income-tax under this section:]

*[**Provided also** that no individual or a Hindu undivided family referred to in the second proviso shall be liable to deduct income-tax on the sum by way of fees for professional services in case such sum is credited or paid exclusively for personal purposes of such individual or any member of Hindu undivided family:]*

***[Provided also** that the provisions of this section shall have effect, as if for the words "ten per cent", the words "two per cent" had been substituted in the case of a payee, engaged only in the business of operation of call centre.]*

(2)[…]

(3)[…]

Explanation-For the purposes of this section,-

> *(a) "professional services" means services rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the Board for the purposes of section 44AA or of this section;*
>
> *(b) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9.*
>
> *(ba) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9:]*
>
> *(c) where any sum referred to in sub-section (1) is credited to any account, whether called "suspense account" or by any other name, in the books of account of the person liable to pay such sum, such crediting shall be deemed to be credit of such sum to the account of the payee and the provisions of this section shall apply accordingly."*

6.1 Provisions of section 194J mandates that for deduction of TDS by any person not being Individual or a Hindu Undivided family, who is responsible for paying to a resident in sum, by way of fees for professional services or technical services or any remuneration or fees or commission by whatever name called other than those on which tax is deductible under section 192, to a Director of company or "Royalty" or any sum referred to in clause-(va) of section 28 of the Act. The provisions further provide the exceptions and in explanation clarified that "Royalty" shall have the same meaning as in **Explanation-2 to Clause-(vi) of sub-section (1) of section 9.** For brevity and ready reference, the provisions of section 9(1)(vi) (Explanation-2) are reproduced below:

> ***"Explanation 2 -*** *For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for-*
>
> *(i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property:*
>
> *(ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property:*
>
> *(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property;*
>
> *(iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;*

> *"[(iva) the use or right to use any industrial, commercial or scientific equipment" but not including the amounts referred to in section 44BB:]*
>
> *(v)* ***the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films****; or*

6.2 From Clause-v to Explanation-(2), it is clear that transfer of all or any right (including the granting of 'license') in respect of any Copyright, literacy, artistic or scientific works including films or Video Tapes for use in connection with Television or Tapes for use in connection with Radio broadcasting comes within the meaning and parameters of "Royalty" however Clause-v to Explanation-(2) carved out the exception qua consideration for sale, distribution or exhibition of Cinematographic films, which means *consideration received for the sale, distribution or exhibition of cinematographic films, will not fall within the meaning and domain of "Royalty".*

6.3 Coming to the instant case, let us peruse the relevant part of the alleged agreement wherein 'SKVPL' has been shown as reputed company being engaged inter-alia in the business of production and sale of Cinematographic films and the owner of the Movies and had shown its intention to appoint the Agent for the distribution of its Movie in the territory as per Annexure-A excluding India, Nepal, Bhutan. The Assessee represented itself as a reputed company being engaged inter-alia in the

business of distribution and marketing of Cinematographic films in India and rest of the world.

As per agreement 'SKVP'L (Principal) has appointed the Assessee to arrange and facilitate for distribution of the Movie (**Race-3 in Hindi**) on behalf of 'SKVPL' and further authorized the Assessee to enter into an agreement(s) on its behalf for distribution of the Movie. Further, 'SKVPL' has also agreed for expenses to be incurred for the distribution of the Movie and accordingly authorized the Assessee to incur such expenses as an agent on its behalf.

The tenure of the agreement has been fixed 'one year' commencing from the release date unless terminated earlier. According to the agreement the parties have agreed to incur the expenditure on promotion, publicity advertisement and publicity material and direct release cost for the Movie in the following terms:

10.	*Publicity Material, Promotion and Advertisement Cost*	*A. The Principal shall provide to the Agent the entire quota and publicity material including but not limited to theatrical trailers together with DVD of theatrical trailers with prescribed sub- tilted versions in .avi format, 30X40 posters, vinyl banners. backlit posters, photosets, sheet posters (3(three) sheet. 4(four) sheet and/or 6(six) sheet), standees, key open layered artwork for all designs of entire quota publicity material, all of the above in English and Hindi language versions etc. free of cost including any/all costs*

		without limitation to packaging, transport, customs, freight and/or any other charges and duties pertaining to publicity material, promotion and advertisement cost. The quota publicity quantity shall be mutually agreed by the Parties in writing: *B. The Agent shall bear and incur all the promotion and advertisement and direct release costs for the Movie as mutually agreed between the Parties subject to prior written approval from the Principal for the Territory directly for all mediums including but not limited to print, television and digital mediums and where such costs are incurred by the Agent then the same shall be on recoverable basis from the Net Agent's Share and/or from Principal as the case may be.*

6.4 Clause-14 further shows that the Agent/Assessee herein was empowered to appropriate the net realization as under:

14.	*Appropriation of Net Realization*	*The Agent shall appropriate the Net Realisation as under:* *A. Commission to the Agent at the rate 5% (five per cent) in respect of Net Realisation from the overseas sub-distributor's share of Theatrical Rights;* *B. Expenses incurred by the Agent on behalf of the Principal in accordance with clause 9A, 9B and 9C:*

		C. Expenses incurred by the Agent on behalf of the Principal in accordance with clause 10B: *D. Goods and Service Tax and/or any other applicable taxes that may be levied in accordance with law as on the date of raising of the invoice payable on Commission;* *E. Balance entirely in favour of the Principal, wherein the due and payable shall be paid by the Agent as under:* *a. The minimum guarantee's s received and/or receivable by the Principal shall be paid to the Principal, within 10 (ten) days from the Release Date;* *b. the first round of overflow, if any, shall be paid to the Principal within 60 (sixty) days from the Release Date only on actual realization basis by the Agent:* *c. thereafter second round of overflow. if any, and any remaining part of the first round of overflow as stated in 14 F (b), which remains unrealized till this relevant date, shall be paid to the Principal, within a period of 90 (ninety) days from the Release Date only on actual realization basis by the Agent;* *d. thereafter third round of overflow, if any, and any part of overflow as stated in 14 F (b) and 14 F (c), which remained*

		unrealized till this relevant date, shall be paid to the Principal, within a period of 120 (one hundred twenty) days from the Release Date, on accrual basis by the Agent: *e. Thereafter for Phase 2 countries as mentioned in Annexure A, the treatment of overflow will be the same as set out in 14 F (a) to 14 F (d). The reference to Release Date will mean the release date of the Movie in the respective Phase 2 country as mentioned in Annexure A.* *F. The Principal's share of the Net Realisation, i.e. the overflows as mentioned above shall be paid to the Principal within 15(fifteen) days of acceptance of the business statement of accounts, specified below in clause 16 E and the minimum guarantee amounts shall be paid as per clause 14 (F) (a).* *G. The Agent undertakes to be responsible for collecting the revenues from the parts of the Territory in local currency and for in freely convertible foreign currency and remit the same to the Principal after conversion of the same in Indian Rupees as per clause 15 below.*

6.5 As per 'Annexure-A' attached with the alleged agreement, the Assessee was entitled for the right of distribution of the Movie in the part of the territories, language, dubbing/over-voice, language, for the period and rights in the following manner:

ANNEXURE A

S. No.	Part of Territory (Excluding all countries not specifically set out herein.)	Subtitle Language	Dubbing/Voice Over Language	Period	Rights
	Phase 1				
1.	Australia	English	N.A.	1 Year from Release Date	Theatrical Rights
2.	South Africa	English	N.A.	1 Year from Release Date	Theatrical Rights
3.	Mauritius	English	N.A.	1 Year from Release Date	Theatrical Rights
4.	Reunion Island	French	N.A.	1 Year from Release Date	Theatrical Rights
5.	Singapore	English	N.A.	1 Year from Release Date	Theatrical Rights
6.	Malaysia	English	N.A.	1 Year from Release Date	Theatrical Rights
7.	New Zealand	English	N.A.	1 Year from Release Date	Theatrical Rights
8.	Papua New Guinea	English	N.A.	1 Year from Release Date	Theatrical Rights
9.	Fiji	English	N.A.	1 Year from Release Date	Theatrical Rights
10.	EAST AFRICA (Kenya-Tanzania-Uganda-Zambia-Rest of E.A.)	English	N.A.	1 Year from Release Date	Theatrical Rights
11.	WEST AFRICA (Nigeria-Ghana-Liberia-Togo-Rest of W.A.)	English	N.A.	1 Year from Release Date	Theatrical Rights
12.	CENTRAL AFRICA (Congo-Rest of C.A.)	English	N.A.	1 Year from Release Date	Theatrical Rights
13.	Botswana	English	N.A.	1 Year from Release Date	Theatrical Rights
14.	Myanmar	English	N.A.	1 Year from Release Date	Theatrical Rights
15.	Maldives	English	N.A.	1 Year from Release Date	Theatrical Rights
16.	Sri Lanka	English	N.A.	1 Year from Release Date	Theatrical Rights
17.	Indonesia and East Timor	Bahasa - English	N.A.	1 Year from Release Date	Theatrical Rights
18.	Thailand	Thai - English	N.A.	1 Year from Release Date	Theatrical Rights

19.	Hong Kong	English	N.A.	1 Year from Release Date	Theatrical Rights
20.	Philippines	English	N.A.	1 year from Release Date	Theatrical Rights
	Phase 2				
1.	Brunei	English	N.A.	1 year from Release Date	Theatrical Rights
2.	Mozambique	Portuguese	N.A.	1 Year from Release Date	Theatrical Rights
3.	Vietnam	English - Vietnamese	N.A.	1 Year from Release Date	Theatrical Rights
4.	Cambodia	English - Khmer	Khmer	1 Year from Release Date	Theatrical Rights
5.	Russia and CIS	Russian	Russian	1 Year from Release Date	Theatrical Rights
6.	Japan	English-Japanese	N.A.	1 Year from Release Date	Theatrical Rights

6.6 From the aforesaid clauses of alleged agreement, it is clear that the Assessee has acquired theatrical rights/distribution rights of the Movie **Race-3** on behalf of 'SKVPL' and therefore, question emerge "whether the distribution/theatrical rights is covered under the definition of "Royalty" or not".

6.7 We have already observed in preceding paras that Explanation-(2) to section 9(1)(vi) of the Act defines 'Royalty' and including certain consideration such as transfer of all or any rights (including the granting of a license) qua any copyright, literacy work or scientific work including film(s) or video tapes for using connection with Television or tapes for using in connection with Radio broadcasting by but carved out the exception by excluding **"the consideration for the sale, distribution or exhibition of cinematographic film(s)"** which goes to show that consideration for the sale, distribution or exhibition of cinematographic film(s) has been excluded in the clause of "Royalty". It is also a fact the

vide Finance Act, 2020 w.e.f. 01.04.2021, the consideration for sale distribution or exhibition of cinematographic films omitted from the explanation (clause v) which means exception carved for exclusion of consideration for sale distribution or exhibition of cinematographic films, has been removed and therefore w.e.f. 01.04.2021, the consideration for sale distribution or exhibition of cinematographic films would fall under the domain of "Royalty". As the language of the provisions of clause 'v' of the Explanation-2 of section 9(1)(vi) of the act, is very much clear and therefore, no interpretation is needed.

6.8 The Assessee before us also relied upon the judgment passed by the Hon'ble Co-ordinate Bench of the Tribunal in the case of ITO Vs. M/s Eyelex Film(s) Pvt. Ltd. (ITA No. 1808/Ahd/2017 and 388/Ahd/2018 decided on 12.03.2019 wherein procurement charges have been considered for distribution of film(s). On the contrary, the Ld. DR placed reliance on the judgment passed by the Hon'ble Co-ordinate Bench of the Tribunal at Chennai in ACIT Vs M/s Shri Balaji Communication {ITA No. 1744/Mad/2011 and C.O. No. 166/Mad/2011 decided on 20.12.2012} wherein the Hon'ble Co-ordinate Bench has also dealt with satellite broadcasting/satellite rights of films and programs for 20-25 years, but herein the instant case, the Assessee as per alleged agreement was appointed as an agent for distribution of the Movie for 'one' year only, therefore the facts of the judgments referred to above are dissimilar and consequently not applicable to the instant case in its true spirit.

6.9 On the aforesaid analyzations, we are of the considered view that consideration amount received for sale distribution or exhibition of cinematographic films in the AY 2019-20, would not fall under the domain of "Royalty" and consequently warrants no demand/addition for non-deduction of TDS u/s 194J of the ACT.

6.10 However, coming to the facts and circumstances of this case, as the Assessee has mainly relied on the alleged agreement on the basis of which rights of distribution qua theatrical release of film(s) have been assigned, infact is undated, unstamped and even otherwise not signed by any witnesses, which dent the veracity of the alleged agreement, therefore, requires proper verification, as the alleged agreement is the foundation of the claim of the Assessee. It is very strange that the Assessee and "SKVPL" and even otherwise both the authorities below blindly relied upon the alleged agreement, which is otherwise lacking the basic conditions of contract and infact in derogation of laws of land such as "Contract Act 1872, Indian Registration Act 1908 and Indian Stamp Act 1899, etc." Though we have given opportunity to the Assessee to substantiate its claim and the MOU by producing corroborate evidence, however the Assessee failed to do so.

6.11 **In conclusion**, considering the peculiar facts and circumstances in totality and for just decision of the case and for the ends of justice, we direct the AO to verify the veracity of the alleged agreement and claim of the Assessee by examining other supportive documents and on finding the claim of the Assessee as genuine and in accordance with law as

applicable hereto, then delete the demand/addition made. We clarify that onus to establish the claim as genuine and alleged agreement and other documents executed by the Assessee are in accordance of law, would be on the Assessee.

6.12 Now coming to the second aspect of the case, the Assessee before the Bench also claimed that 'SKVP'L has already offered the amount received from the Assessee as receipt in its income tax return and paid the relevant taxes on such amount and therefore, the Assessee cannot be held as the "Assessee in default".

6.13 The provisions of section 201(1) of the Act relevant for adjudication of the instant issue are that "if any such person and in the cases referred to in section 194, the principal officer and the company of which he is the principal officer does not deduct or after deducting fails to pay the tax as required by or under this Act, he or it shall, without prejudice to any other consequences which he or it may incur, be deemed to be an Assessee in default in respect of the tax:" Provided that no penalty shall be charged under section 221 from such person, principal officer or company unless the Assessing Officer is satisfied that such person or principal officer or company, as the case may be, has without good and sufficient reasons failed to deduct and pay the tax.

6.14 As per the provisions of section 201(1) when any person including the Principal Officer of the company who is required to deduct any sum in accordance with the provisions of this Act or referred to sub-section (1A)

of section 192, being an employer does not deduct or does not pay or after so deducted fails to pay, the whole in any part of the tax, as required by or under this Act, then such person shall without prejudice but any other consequences, which may incur, be deemed to be an "Assessee in default" qua such tax.

First proviso provides that if any person including principal officer of a company who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter i.e. (XVII), on the sum paid to a "payee" or on the sum credited to the account of a payee shall not be deemed to be an Assessee in default qua such tax, *if such payee has furnished his return of income under section 139 of the Act and has taken into account such sum for computing income in such return of income and has paid the tax due on the income declared by him in such return of income and the person furnishes a certificate to this effect from an Accountant in such Firm as may be prescribed*, hence, considering the peculiar facts and circumstances, we direct the AO, *on establishing by the Assessee its claim and the alleged agreement (MOU) and other documents executed by the Assessee as genuine and in accordance with law as applicable thereto by producing supportive documents,* to verify the claim of the Assessee qua taking into account by 'SKVPL' the amount paid by the Assessee to 'SKVPL' for computing income in its return of income and as to whether the relevant taxes have been paid on such income as declared by 'SKVPL' and 'SKVPL' has furnished a certificate to this effect from an Accountant and recompute the liability accordingly.

7. In the result, appeal filed by the Department is allowed for statistical purposes in the aforesaid terms.

Orders pronounced in the open court on 22-12-2023.

Sd/- *Sd/-*

(PRASHANT MAHARISHI)
Accountant Member

(N. K. CHOUDHRY)
Judicial Member

SK, Sr.PS.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File
5. CIT

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai