IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI 'L' BENCH, MUMBAI

[Coram: Pramod Kumar AM and Pawan Singh JM]

ITA No.3385 and 4414/Mum/2013
Assessment years: 2008-09 and 2009-10

Dy. Commissioner of Income Tax ***.....Appellant***
Circle 7(3), Mumbai.

Vs.

United Home Entertainment Pvt. Ltd. ***.....Respondent***
1st floor, Building No. 14
Solitaire Corporate Park
Guru Hargovindji Marg,
Chakala, Andheri (East)
Mumbai 400 093
[PAN: AAACU6668D]

ITA No.4608/Mum/2013
Assessment year: 2009-10

United Home Entertainment Pvt Ltd., ***.....Appellant***
1st floor, Building No. 14
Solitaire Corporate Park
Guru Hargovindji Marg,
Chakala, Andheri (East)
Mumbai 400 093
[PAN: AAACU6668D]

Vs.

Dy. Commissioner of Income Tax ***.....Respondent***
Circle 7(3), Mumbai.

Appearances by:

Harshad Vengurlekar, *for the revenue*
M P Lohiya and Hemen Chandaniya *for the assessee*

Date of concluding the hearing: January 07, 2016
Date of pronouncing the order: March 31st, 2016

O R D E R

Per Pramod Kumar AM:

1. These three appeals pertain to the same assessee, involve some common and interconnected issues, and were heard together. As a matter of convenience, therefore, all the three appeals are being disposed of by way of this common order.

2. We will first take up ITA No. 3385/Mum/2013.

3. This appeal, filed by the Assessing Officer, is directed against the order dated 20th February 2013 passed by the learned CIT(A) in the matter of assessment under section 143(3) of the Income Tax Act, 1961 for the assessment year 2008-09.

4. In the ground of appeal nos. (i) and (ii), the Assessing Officer has raised the following grievances:

> *i) The Learned CIT(A) has erred on facts and in law in deleting the disallowance of Rs.96,00,000/- made under section 40A(2)(b) of the Income Tax Act, without properly appreciating the factual and legal matrix as clearly brought out by the Assessing Officer.*
>
> *ii) The Learned CIT(A) has erred on facts and in law in deleting the disallowance of Rs.96,00,000/- made under section 40A(2)(b) of the Income Tax Act, ignoring the fact that under the provisions of Section 40A(2)(b) of the Act, if the Assessing Officer is of the opinion that such expenditure is excessive or unreasonable having regard to the fair market value of goods, services for which payment is made, so much of the expenditure as is so considered by him to be excessive or unreasonable shall be disallowed."*

5. Briefly stated, the relevant material facts are like this. The assessee before us is a company engaged in the business of running a television channel, meant specially for children, by the name of "Hangama". During the course of the assessment proceedings, the Assessing Officer noted that the assessee has paid an amount of Rs 1,92,00,000 to Walt Disney Company (India) Limited [**Walt Disney**

India, in short] towards ócentral support feesô, and that the said company is a specified person under section 40A(2) of the Act. He also noted that there was no such expenditure in the past. It was in this backdrop, and observing that ñfurther looking to the fact that he assessee has incurred a loss, the payment to this party is treated as unreasonable and excessive to the extent of 50%ò, he disallowed Rs 96,00,000 under section 40A(2). Aggrieved, assessee carried the matter in appeal before the CIT(A) who deleted the disallowance on the ground that the provisions of Section 40A(2)(b) did not apply to this case at all. It was also held that in any event the payment was neither excessive nor reasonable. The Assessing Officer is aggrieved of the relief so granted by the CIT(A) and is in appeal before us.

6. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal positon.

7. We have noted that there is categorical finding by the CIT(A) that the assessee and Walt Disney India are no covered by the definition of ówspecified personô under section 40A(2)(b). Not only these two entities, i.e. the assessee and Walt Disney India, have no shareholdings in each other, directors of none of these companies hold any shares in any of these companies. There is no question of the requirement of holding at least 20% of normal dividend earning shares in the companies in which substantial interest can be said to have been held. These two companies are owned by different shareholders- while 100 % shareholding in the assessee company is held by Walt Disney Co (Southeast Asia) Pte Ltd Singapore, 99.99% of shares in Walt Disney India are held by a USA based company by the

name of Disney Enterprises Inc, USA. The requirements of Section 40A(2)(b), which is reproduced below for ready reference, is not fulfilled:

> **(b) The persons referred to in clause (a) are the following, namely :—**
>
> **(i) where the assessee is an individual - any relative of the assessee;**
>
> **(ii) where the assessee is a company, firm, association of persons or Hindu un-divided family - any director of the company, partner of the firm, or member of the association or family, or any relative of such director, partner or member;**
>
> **(iii) any individual who has a substantial interest in the business or profession of the assessee, or any relative of such individual;**
>
> **(iv) a company, firm, association of persons or Hindu undivided family having a substantial interest in the business or profession of the assessee or any director, partner or member of such company, firm, association or family, or any relative of such director, partner or member 58a[or any other company carrying on business or profession in which the first mentioned company has substantial interest];**
>
> **(v) a company, firm, association of persons or Hindu undivided family of which a director, partner or member, as the case may be, has a substantial interest in the business or profession of the assessee; or any director, partner or member of such company, firm, association or family or any relative of such director, partner or member;**
>
> **(vi) any person who carries on a business or profession,—**
>
> **(A) where the assessee being an individual, or any relative of such assessee, has a substantial interest in the business or profession of that person; or**
>
> **(B) where the assessee being a company, firm, association of persons or Hindu undivided family, or any director of such company, partner of such firm or member of the association or family, or any relative of such director, partner or member, has a substantial interest in the business or profession of that person.**
>
> **Explanation**
> **For the purposes of this sub-section, a person shall be deemed to have a substantial interest in a business or profession, if,—**
>
> **(a) in a case where the business or profession is carried on by a company, such person is, at any time during the previous year, the beneficial owner of shares (not being shares entitled to a fixed rate of**

> **dividend whether with or without a right to participate in profits) carrying not less than twenty per cent of the voting power; and**
>
> **(b) in any other case, such person is, at any time during the previous year, beneficially entitled to not less than twenty per cent of the profits of such business or profession.**

8. When we put it to the learned Departmental Representative as to how the conditions under section 40A(2)(b) are satisfied in this case, he did not have much to say beyond placing his reliance on the stand of the Assessing Officer. We can understand his plight. The stand of the Assessing Officer is indeed indefensible. As learned counsel points out, the efforts of applying disallowance under section 40A(2) on the notion of group entities, without specifically fulfilling the conditions set out in Section 40A(2)(b), have been repelled by Hon'ble High Court in the case of CIT Vs **VRV Breweries & Bottling Industries Ltd [(2012) 347 ITR 249 (Del)].** While doing so, Their Lordships have, inter alia, observed as follows:

> **23. This brings us to the issue as to whether the AO could have invoked the provisions of s. 40A(2)(a) of the Act in the facts and circumstances of the present case. As is noticed in the earlier part of our judgment, the AO in the asst. yr. 1997-98 after recording that the shares of the assessee were held by six (6) entities goes on to observe that the assessee "became a subsidiary of Shaw Wallace Group of Companies". There is no finding recorded by the AO that SWCL had acquired substantial interest i.e., 20 per cent or more of the share capital with attending voting rights, whether directly or beneficially. If that is so, then the provisions of s. 40A(2)(a) could not have got triggered. It is noticed that the CIT(A) in the asst. yr. 1998-99 has returned a finding that there were five (5) limited companies apart from two (2) individuals who held shares in the assessee, but none of the entities adverted to, by the AO, both in the asst. yr. 1997-98 and 1998-99 is SWCL. As a matter of fact, the CIT(A) in asst. yr. 1998-99 records that not a single share in the assessee is held by SWCL. The CIT (A) further records a finding of fact that, on a perusal of list of shareholders, it is clear that even the employees of SWCL did (sic-not) have ownership of a controlling share holding interest in the assessee. CIT(A) records that six (6) individuals held ten (10) shares each in the assessee while, one gentleman by the name of Mr. Suraj P. Gupta held 8,61,610 shares who was neither an employee of the assessee and nor was any payment made to Mr. Suraj P. Gupta or his relative or to a company of which he was a director. The**

CIT(A) went on to hold that, in the instant case, payments had not been made to persons specified under s. 40A(2)(b) and therefore, the provisions of s. 40A(2) were not applicable. Both CIT(A) as well as the Tribunal have also accepted the explanation given by the assessee with regard to difference in payment of bottling charges vis-à-vis Balbir Industries Ltd. and the assessee. The reference to which we have already made hereinabove. We find no perversity in the findings of the Tribunal and those recorded by CIT(A) in asst. yr. 1998-99.

24. Therefore, for the foregoing reasons, we are of the view that the Tribunal in the impugned judgment and the CIT(A) in its order dt. 15th May, 2000 passed in the asst. yr. 1998-99 has correctly appreciated the provisions of s. 40A(2) of the IT Act thus the contention of the Revenue even on this aspect has to be rejected.

9. In view of these discussions, as also bearing in mind entirety of the case, we approve the well reasoned findings of the learned CIT(A) and decline to interfere in the matter.

10. Ground no. (i) and (ii) are dismissed.

11. In ground no. (iii), the Assessing Officer has raised the following grievance:

> *"iii) The Learned CIT(A) has erred on facts and in law in deleting the disallowance of Rs.70,94,817/- made under section Delhi High Court in the case of Asia Satellite Telecommunications Ltd. vs. Director of Income Tax reported in (2011) 238 CTR (Del) 233: assessee itself had accepted the applicability of TDS and had deducted TDS on expenditure upto September 2007. Further, the assessee had not obtained any certificate from the Income Tax Department under section 195(2) of the Income Tax Act."*

12. So far as this grievance of the Assessing Officer is concerned, the relevant material facts are like this. During the course of the assessment proceedings, the Assessing Officer noticed that the assessee has made a payment of Rs 70,94,817 without any deduction of tax at source. When asked for the reasons of his doing so, the assessee submitted that in the light of decision of this Tribunal in the case of

DCIT Vs Panamsat International Systems Inc [(2006) 103 TTJ 861 (Del)], there was no tax deduction at source requirement in this case. The Assessing Officer, however, rejected this plea. He noted that the assessee was deducting tax at source from such payments till September 2007 and he stopped doing so on his own. He further noted that the assessee has not obtained any authorisation from the income tax department for making the remittances without deducting tax at source. Under these circumstances, according to the Assessing Officer, the plea of the assessee could not be accepted. An amount of Rs 70,94,817 was, accordingly, disallowed under section 40(a)(i). Aggrieved, assessee carried the matter in appeal before the CIT(A). Learned CIT(A), relying upon Hon'ble Delhi High Court's judgment in the case of Asia Satellite Telecommunications Ltd Vs DIT [(2011) 332 ITR 340 (Del)] which held that the payments for transponder hire did not lead to any taxability in the hands of the recipients of such income, deleted the disallowance. The Assessing Officer is aggrieved and is in appeal before us.

13. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal positon

14. We have noted that in the ground of appeal, the Assessing Officer has not even disputed that the amounts paid by the assessee resulted in a taxable income in the hands of the recipient, but he has justified the disallowance on the ground that earlier the assessee was deducting tax at source from such payments and that the assessee did not obtain certificate under section 195(2). As for tax deductions at past, it is wholly irrelevant in examining legal obligations of the assessee. What is material is whether the assessee had the obligation to deduct tax at source or not,

and unless the assessee had the obligations to do so, his actions as a measure of abundant caution in the past would not put him under obligation to do so in future as well. There is no estoppel against the statute. As for the question of approaching the tax authorities under section 195(2), the law is now well settled by Hon'ble Supreme Court in the case of GE India Information Technology Centre Pvt Ltd Vs CIT [(2010) 327 ITR 456 (SC)] which holds that unless the recipient of income has a tax liability in respect of such payments, the person making the payment cannot be saddled with the tax deduction liability just because he did not approach the tax authorities under section 195(2). The grievances raised by the Assessing Officer are thus devoid of any legally sustainable merits. We reject the same, and decline to interfere in the matter on this count as well.

15. Ground no. iii is also dismissed.

16. In ground no.iv, the Assessing Officer has raised the following grievance:

> *"iv) The Learned CIT(A) has erred on facts and in law in deleting the disallowance of Rs.16,83,689/- with respect to distribution costs, relying on the exhaustive submissions that the assessee has satisfactorily explained the nature of services received and the mistakes committed by its employees improperly categorising the invoices, ignoring the fact that the disallowance was made due to mis-statement or improper categorisation of the invoices in the improper heads."*

17. As far as this grievance of the Assessing Officer is concerned, it is sufficient to take note of the fact that the disallowance is made by the Assessing Officer on the basis of the comment in the auditor report to the effect that "a few instances of misstatement of vendor invoices by certain employees to improperly characterize services provided with respect to band placement and trade marketing services were

noticed and reportedò The amount relating to these misstated invoices, which was Rs 16,83,689, was disallowed. However, when the matter was carried in appeal before the CIT(A), he deleted the disallowance by observing as follows:

> *"I have carefully considered the facts of the case. The AO has disallowed the distribution expenses on the basis of auditor's report. On the basis of such audit report the AO concluded that services in respect of such misstated invoices had not been provided by the respective vendors. By holding that the services were not provided, the AO has disallowed the expenses. However, the perusal of auditor's in remarks as produced by the AO in the assessment order itself does not lead to a conclusion that the services were not provided by the respective vendors. The auditors have reported misstatement of invoices by improperly characterising the service provided. However, it was fact on record that invoices were received by the appellant from the vendor's. It was only misstatement or improper categorisation of the invoices in the improper heads. However, misstatement of invoices or not categorising the invoices in proper head does not make them liable for disallowance and does not lead to a conclusion that the expenses were not incurred wholly and exclusively for the purpose of business. In its exhaustive submissions the appellant has satisfactorily explained the nature of services received and the mistakes committed by its employees improperly categorising the invoices. Since, the expenses were incurred wholly and exclusively for the purpose of business, the AO is directed to allow deduction of same. The disallowance made by AO is therefore, deleted."*

18. The Assessing Officer is aggrieved of the relief so granted by the CIT(A) and is in appeal before us.

19. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal positon.

20. As learned CIT(A) rightly holds, in his well reasoned and speaking order, the mere fact of wrong characterization does not imply that no services were rendered by the respective vendors. The error committed by the assesseeôs staff was of no consequences so far as deductibility of these amounts were concerned. The invoices

have been wrongly characterized in the heads is more of a procedural mistake rather than a legally sustainable reason for resorting to disallowance of the expenses concerned. We, therefore, uphold the relief granted by the CIT(A) and decline to interfere in the matter.

21. Ground no. iv is also dismissed.

22. In the result, the appeal filed by the Assessing Officer for the assessment year 2008-09 is dismissed.

23. We now move on to the cross appeals for the assessment year 2009-10.

24. These cross appeal are directed against the order dated 4th March 2013 passed by the CIT(A) in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2009-10.

25. As far as appeal of the Assessing Officer is concerned, the grievances raised by the Assessing Officer are as follows:

i) The learned CIT(A) has erred on facts and in law in deleting the disallowance of Rs.96,00,000/- made under section 40A(2)(b) of the Income-tax Act, without properly appreciating the factual and legal matrix as clearly brought out by the Assessing Officer.

ii) The Learned CIT(A) has erred on, facts and in law in deleting the disallowance of Rs.96,00,000/- made under section 40A(2)(b) of the Income-tax Act, ignoring the fact that under the provisions of Section 40A(2)(b) of the Act, if the Assessing Officer is of the opinion that such expenditure is excessive or unreasonable having regard to the fair market value of goods, services for which payment is made, so much

of the expenditure as is so considered by him to be excessive or unreasonable shall be disallowed.

iii) The Learned CIT(A) has erred on facts and in law in deleting the disallowance of Rs.1,53,58,080/- made under section 40(a)(ia)of the Income-tax Act, by relying on the decision of Delhi High Court in the case of Asia Satellite Telecommunications Ltd. Vs. Director of Income-tax reported in (2011) 238 CTR (Del) 233 : (2011) 332 ITR 340, ignoring the fact that the assessee itself had accepted the applicability of TDS and had deducted TDS on expenditure upto September 2007. Further, the assessee had not obtained any certificate from the Income-tax Department under section 195(2} of the Income-tax Act."

26. Learned representatives fairly agree that whatever we decide on these issues for the assessment year 2008-09 will be equally applicable for this assessment year as well. Vide our discussions above, we have rejected materially similar grounds for the assessment year 2008-09. Respectfully following our above decision, we dismiss all the three above grounds of appeal as well. The order of the CIT(A) stands confirmed on these issues.

27. The appeal filed by the Assessing Officer for the assessment year 2009-10 is also, therefore, dismissed.

28. As regards the appeal filed by the assessee, learned representatives fairly agree that there are only two grounds of appeal, namely second and third grounds of appeal, which are required to be adjudicated by us. These grounds of appeal are as follows:

"2. The learned CIT(A) has erred in upholding the addition of Rs.4,689,670 on account of non-reconciliation of ITS details.

3. The learned CIT(A) has erred in not allowing in entirety, the dubbing cost of Rs.13,794,885, incurred by the Appellant in AY 2009-10."

29. As far as the assesseeôs grievance against learned CIT(A)ôs confirming the disallowance of RRs 46,89,670 on account of non reconciliation of ITS details is concerned, we find that it represents the ITS details given to the assessee which could not be reconciled by the assessee. The CIT(A) has also confirmed the same on the ground that it is on the assessee to reconcile the same. The assessee is not satisfied and is in further appeal before us.

30. Having heard the rival contentions and having perused the material on record, we are of the considered view that the matter is required to be remitted to the file of the Assessing Officer for adjudication de novo by way of a speaking order and in accordance with the law. The nature of ITS detail, which is not reflected in the books of the assessee, needs to be set out and the assessee be asked to explain the particular entries which are not so reflected in the books of accounts. The non reconciliation of ITS detail can only be a starting point of exploring the matter further with respect to making the additions in respect of the revenues which are not accounted for but just because there is some reconciliation difference, the amount of difference cannot be added to income of the assessee. In any event, these inputs are to be dealt with on merits of each input and the explanation of the assessee is to be taken into account for that purpose. Keeping in view these discussions, as also bearing in mind entirety of the case, the matter stands restored to the file of the Assessing Officer on this point.

31. Ground no. 2 is thus allowed for statistical purposes.

32. As regards the assesseeôs grievance against not allowing the entire dubbing cost of Rs 1,37,94,885, we find that the Assessing Officer has virtually treated it as a deferred revenue expenditure by amortizing it over the period of licence of that program. In appeal, CIT(A) confirmed the stand of the Assessing Officer on the basis of ómatching principle of income and expenditureôand by holding that expenditure in question does give benefit for a number of years. The assessee is not satisfied and is in further appeal before us.

33. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal positon

34. While the argument of the learned counsel that there is no concept of deferred revenue expenditure, and, as such, once an expenditure is revenue expenditure, it should be allowed in the year in which the expense is incurred, does indeed seem very attractive at the first blush, it may not hold good in the present case. It is a case in which entire useful period, during which the assessee will reap the fruits for investment in the dubbing costs, is known at the point of time when expenses are incurred. The period for which the assessee holds the licence to use the program is known with precision. The benefit of dubbing the program will be available at least for this period. It is in this background that we may refer to the following observations of Hon'ble Supreme Court in the case of Madras High Court in **Madras Industrial Investment Corpn. Ltd. vs. CIT [(1997)) 225 ITR 802 (SC)]**:

> **"...Sec. 37(1) further requires that the expenditure should not be of a capital nature. The question whether a particular expenditure is revenue expenditure incurred for the purpose of business must be determined on a consideration of all the facts and circumstances, and by the application of principles of commercial trading. The question must be**

viewed in the larger context of business necessity or expediency. If the outgoing or expenditure is so related to the carrying on, or conduct of the business, that it may be regarded as an integral part of the profit making process and not for acquisition of an asset or a right of a permanent character, the possession of which is a condition of the carrying on of the business, the expenditure may be regarded as revenue expenditure. Any liability incurred for the business of obtaining a loan would be revenue expenditure.

Ordinarily, revenue expenditure which is incurred wholly and exclusively for the purposes of business must be allowed in its entirety in the year in which it is incurred. It cannot be spread over a number of years even if the assessee has written it off in his books, over a period of years. However, the facts may justify an assessee who has incurred expenditure in a particular year to spread and claim it over a period of ensuing years. In fact, allowing the entire expenditure in one year might give a very distorted picture of the profits of a particular year. Issuing debentures is an instance where, although the assessee has incurred the liability to pay the discount in the year of issue of debenture, the payment is to secure a benefit over a number of years. There is a continuing benefit to the business of the company over the entire period. The liability should, therefore, be spread over the period of debentures

35. These observations will be equally applicable in the fact situation before us, particularly as the period over which the benefits will be enjoyed by the assessee is clearly established. The dubbing costs should indeed be, therefore, amortized over this period. In this view of the matter, we see no infirmity in the stand of the authorities below. We confirm the order of the CIT(A) on this point and decline to interfere in the matter.

36. Ground no. 3 is thus dismissed.

37. Ground no.1 is general in nature, and it does not call for any adjudication by us. No other ground was pressed before us.

38. In the result, the appeal of the assessee for the assessment year 2009-10 is partly allowed for statistical purposes.

39. To sum up, while both the appeals filed by the Assessing Officer are dismissed, the appeal filed by the assessee is partly allowed for statistical purposes. Pronounced in the open court today on the 31st day of March, 2016.

Sd/-
Pawan Singh
(Judicial Member)

Sd/-
Pramod Kumar
(Accountant Member)

Dated: the 31st day of March, 2016.

Copies to: *(1)* *The appellant* *(2)* *The respondent*
(3) *CIT* *(4)* *CIT(A)*
(5) *DR* *(6)* *Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai Benches, Mumbai