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

BEFORE SHRI G.S. PANNU, HON'BLE ACCOUNTANT MEMBER AND SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER

ITA.No.6730/MUM/2014 (A.Y: 2011-12)

ACIT 11(1) R.No.439, Aayakar Bhavan, M.K.Road, Mumbai-400 020	*v.*	Shri Sanjay Navin Bhansali, 701B, Swati Mitra CHS, Gulmohar Cross Road No.7, JVPD Scheme, Mumbai – 400 049 **PAN NO: AEOPB 8845 G**
(Appellant)		**(Respondent)**

Assessee by	**:**	**Shri Chetan Karia**
Revenue by	**:**	**Shri V. Janardhanan**
Date of Hearing	**:**	**18.08.2017**
Date of Pronouncement	**:**	**11.10.2017**

O R D E R

PER C.N. PRASAD (JM)

1. This appeal is filed by the Revenue against the order of the Learned Commissioner of Income Tax (Appeals)–3, Mumbai dated 22.08.2014 for the Assessment Year 2011-12.

2. The only grievance in its appeal of the Revenue is, whether on the facts and in the circumstances and in law the Ld.CIT(A) was justified in allowing the expenditure claimed by the assessee on account of refund

and the professional fees amounting to ₹.10 Crores when there was no provision in the documented contracts between the assessee and the producer M/s. UTV Software Communication Ltd. to refund any portion of the professional fees.

3. Briefly stated facts are that, the assessee is a Film Director and Producer filed his return of income on 27.09.2011 declaring total income of ₹.8,04,19,580/-. The return of income was accepted u/s. 143(1) and subsequently the scrutiny assessment was completed u/s. 143(3) on 26.02.2014 determining the income of the assessee at ₹.18,07,47,030/-. While completing the assessment the Assessing Officer disallowed ₹.10 Crores which was claimed as expenditure by the assessee. The Assessing Officer in the course of Assessment Proceedings noticed that assessee has shown in his Profit and Loss Account receipts from M/s. UTV Software Communication Ltd [UTV] ₹.17.97 Crores during the Assessment Year 2011-12. He noticed that from this receipt ₹.10 Crores was reduced in the P&L account. The assessee was required to explain as to why the said amount was reduced and assessee submitted that the said ₹.17.97 Crores received during the year from UTV includes receipt of ₹.6.85 crores on account of professional fee for directing the film “Guzarish” produced by UTV along with SLB Films Private Limited and the remaining ₹.11.12 crores is given by the UTV to the assessee as an

advance for the project to be undertaken in future. The assessee further explained that the amount of ₹.10 Crores was refunded to UTV from the professional fees of ₹.22 Crores paid to him for the film "Guzarish" which was already offered to tax in the Assessment Years 2008-09 to 2011-12 on receipt basis as the assessee is following cash basis as method of accounting. The assessee further submitted that he is also a film maker, and last two films "Saawariya" and "Black" were not commercially success and "Guzarish" was a make or break film and marketing of film has become very crucial for its commercial success. It was submitted that UTV was not ready to spend enough amount on its marketing, assessee pushed them to spend more on marketing and there was an oral commitment that if the film is not successful at box office then the assessee will reduce his fees. It was submitted that the film had released in Assessment Year 2011-12 but the collections were not to the extant expected and therefore the assessee kept his word and returned ₹.10 Crores as per the oral understanding. The assessee also furnished copy of letter dated 20.12.2010 addressed to Mr. Ronnie Screwvala and Mr. Siddharth Roy Kapoor of UTV by the assessee as an evidence that there was an oral commitment between the assessee and the UTV that if the film Guzarish did not perform to the scale as expected then assessee will contribute back some part of the costs from his Director's fees.

Assessee also submitted that this letter shows that assessee insisted that UTV should go all out and promote the movie across all media in a big way and it also shows that assessee will return ₹.10 crores to honour his oral commitment to maintain the ongoing working relationship for future movie projects. It was submitted that the since the film did not do well commercially, assessee returned ₹.10 Crores and the decision was made to maintain relation with a powerhouse studio like UTV.

4. It was further submitted that to survive in the industry it is essential to be practical and consider the loss incurred by the producer and take a cut in fees if the film does not do well commercially. It is only if one is practical in such matters that a producer will endeavor to make a new film with the assessee as a writer and director and it is normal industry practice to return fees. It was further submitted that there are innumerable instances in the film industry where people have refunded money and similarly on success of films they have paid extra money to lead Artists/Directors. It was further submitted that the motivating reason for the refund is commercial expediency and the assessee has returned his part of fee received. It is also submitted that even UTV has confirmed the refund of money by the assessee and reduced their marketing expenses. Assessee also relied on various judicial pronouncements in support of its

contention that when the refund is out of commercial expediency it is an allowable expenditure.

5. However, the Assessing Officer rejected the contentions of the assessee observing that assessee had received the income from performing his duty as a Director of the film Guzarish and it was not a case where the refund was given because the performance of duty by the assessee could not be done or the project could not materialize etc., He observed that the project was completed and released and assessee had fulfilled his obligation intoto for which he was paid ₹.22 Crores, hence assessee has earned this entire income. It was also observed that there was no agreement to refund any part of the fees if the film did not do well or if the marketing cost is escalated. He also observed that though there was subsequent agreement for reduction in reimbursement from ₹.27 Crores to ₹.22 Crores there was no clause with regard to any situation whether there would be a refund to be made to UTV for any reason and the letter written by the assessee to the UTV is stated to be an afterthought by the Assessing Officer. He further observed that the marketing responsibility as per the agreement is solely of UTV and not the assessee. Marketing of the film is not the director's reasonability and he finally observing that the transaction has been entered into in a manner by the parties the assessee and UTV to accommodate each other and they have

into sham transactions for the sake of avoiding tax, concluded that the refund of fees by the assessee is not allowable expenditure.

6. On appeal the Ld.CIT(A) allowed the claim of the assessee holding that the refund of fees by the assessee is out of commercial expediency and it is not a sham or colorable transaction as stated by the Assessing Officer. Against this order the Revenue is in appeal before us.

7. Ld. DR vehemently supported the order of the Assessing Officer in denying the expenditure claimed by the assessee. The Learned Counsel for the assessee strongly placed reliance on the order of the Ld.CIT(A). Further Learned Counsel for the assessee also placed reliance on the decision of the Coordinate Bench in the case of Shahrukh Khan in ITA.No. 623/Mum/2013 and ITA.No.4763/Mum/2013 dated 17.03.2017 and submitted that similar claim was accepted in the case of Sharukh Khan where he has agreed to meet the part of loss incurred by the producer.

8. We have heard the rival submissions, perused the orders of the authorities below. On a careful reading of the order of Ld.CIT(A), the Ld.CIT(A) allowed the claim of the assessee holding that the refund of fees by the assessee is out of commercial expediency it is not a sham or colorable transaction as stated by the Assessing Officer and assessee has entered into a fresh contract from UTV during this very same

Assessment Year and received professional fees of ₹.11.11 Crores and this was offered to tax and further Ld.CIT(A) also observed that the refund part of professional fee by the assessee to UTV has been taken as income by the UTV in its Books of Accounts. While holding so the Ld.CIT(A) considered the decision of the Hon'ble Supreme Court in the case of CIT *v.* Walchand & Co. Pvt Ltd., [65 ITR 381] and Sassoon J. David & Co., Pvt. Ltd., [1 Taxman 485] wherein it has been held that ordinarily it is for the assessee to decide whether any expenditure should be incurred in the course of his or its business and such expenditure may be incurred voluntarily and without any necessity and if it is incurred for promoting the business and to earn profits assessee is entitled to deduction even though there was no compelling necessity to incur such expenditure. Further the Ld.CIT(A) also considered the issue elaborately with reference to the submissions of the assessee and the averments of the Assessing Officer and held that assessee is entitled for deduction of the fee refunded to UTV observing as under: -

> *"1.13 From the above sequence of event it is clear that there is no contradiction between the plea of the appellant and the confirmation filed by UTV at the insistence of the AO. During the course of assessment proceedings, the assessee had pleaded that the refund of the Directors fee was pursuant to an Oral agreement between the assessee and UTV in keeping with the terms of the Production Agreement. In order to verify the same the AO sent two*

notices u/s.133(6) to M/s. UTV calling for confirmation of the appellant plea and other supporting documentary evidences. M/s.UTV, as seen above, confirmed the explanation of the assessee and supplied supporting documentation, as asked for. It is in this context that M/s.UTV supplied to the AO copy of letter exchanged between it and the appellant. The AO cannot now say that the said letter is an afterthought or that there was no agreement to refund the fees. The Calcutta High Court in the case of Vishnu Agencies Pvt. Ltd., (117 ITR 754) has held that while considering a question of allowability of an item of expenditure, the authority should take into account both oral and documentary evidence, as produced or submitted by the assessee. Likewise, the Patna High Court in the case of Jamshedpur Motor Accessories Stores (95 ITR 664) has held that the fact of incurring on expenditure evidenced by a proper entries in the books of accounts kept in the normal course of business is not to be disbelieved merely because there is no written agreement between the parties to support it.

1.14 The AO has also alleged that the transaction between UTV and the appellant was not revenue neutral, as alleged by the assessee. In para 9.4(f) of his order the AO has stated that this was because the assessee would have paid tax on the Rs.10 crore in A.Y.2011-12, whereas M/s.UTV was having losses for the same year and. hence, paid no taxes on the receipt of Rs.10 crores. In this context, during the course of assessment proceedings it was submitted that the AO was wrong in slating that UTV has not paid any taxes on the refund of Rs. 10 crores.

1.15 I have perused the facts in the matter. From the perusal of the income-tax return of M/s. UTV Software Communications Ltd it is seen that the company has paid taxes a Rs 24,20,09,475/- on the book profits of

Rs.134,44,97,086/- u/s 115JB. At the applicable rate of 18% M/s. UTV has paid Rs 1,80,00,000/- on the refund of Rs 10,00,00,000/-. I therefore agree with the appellant that the AO is wrong in holding that M/s. UTV has not paid any taxes on the refund of Rs.10 crores. This would also negate the AO's allegation in para 9.4(h), that the entire transaction of refund was a shown one a colorable device. It is difficult to envisage that M/s.UTV would collaborate in a sham or colorable transaction, which involved a tax liability of Rs.1.80 crores. it is also to be noted that M/s.UTV is a widely held listed company where the majority shareholding is with a multinational company M/s. Walt Disney Company (Southeast Asia) Pvt Ltd. Moreover, the appellant and M/s.UTV have no common directors or shareholders, which could allude to any collusion. I find that various courts have held that a transaction cannot be held to be a sham on the basis of surmises and conjectures. The Rajasthan High Court - Jodhpur in the case of M/S Indian Gum industries Ltd vs Asst. Commissioner, dt. on 29 August, 2013 held as under:

> *……However, this Court cannot lose sight of a very vital aspect of the matter that no revenue authority should term a genuine sole transaction as a sham on mere conjectures and surmises. Thus, in the considered opinion of this Court before castigating an assessee for a fake, or spurious transaction, or for his conduct of evasion of tax, a proper and meaningful enquiry is utmost essential which confirms adherence of principles of natural justice…"*

In these circumstances, I am unable to agree with the AO that the transaction regarding refund of Director Fee is a sham transaction.

1.16. In para 9.5, the AO has alleged that the refund of fees would come within the purview of diversion of income by overriding title and application of income, which is not an allowable deduction. The AO has unfortunately not elaborated on both the propositions. The appellant on the other hand has submitted that the refund of Rs.10 crores, is as per oral agreement and out of commercial expediency and therefore allowable u/s.37(1).

1.17. I have perused the various judicial decisions on the issue of allowability of expenditure u/s 37(1) The salient conditions to allowability of any expenditure u/s.37(1) are:

I. Any expenditure
II. not being expenditure of the nature described in sections 30 to 36(for assessment years 1976-176 ri 1985-86, and section 8OVV) and
III. not being in the nature of capital expenditure or
IV. personal expenses of the assessee
V. laid out or expended
VI. wholly and exclusively for the purposes of the business or profession

1.18 'Spending' in the sense of paying out or away' of money is the primary meaning of expenditure. Expenditure is what is paid out or away and is something which is gone irretrievably. Expenditure, which is deductible for income-tax purposes, is one which is either actually paid or, if the accounts are on mercantile basis, provided for towards a liability actually existing at the time. Now the appellant is following the 'Cash System of Accountancy' as per which expenditure paid for during the year is only allowable. There is no doubt that the sum of Rs.10 crores has been paid to UTV during the previous year. There is also no evidence to show that this amount has not gone out irretrievably. Therefore, the payment of Rs.10 crores qualifies as an 'expenditure', in the general sense of the term. There is also

no case of the AO that, the expenditure is 'capital in nature' or of the nature described in section 30 to 36. It is also not the case of the AO that the said expenditure is prohibited under any other provision of the Act. That leaves us with the last condition that, the expenditure has been laid out 'wholly and exclusively for the purposes of the business'. In this regard, the appellant has contended that, had it not honored its oral commitment with UTV, it would have lost, its goodwill with an important client.

1.19. I have examined the facts in this regard. M/s. UTV has incurred a loss of Rs.54.18 crores, till 31-12-2010, on the release of the film 'Guzarish. After the refund of Rs.10 crores this loss has got reduced to Rs.44.18 crores. By any standards, this is a major loss for M/s.UTV, especially when it had paid a colossal amount of Rs.22 crores as Directors Fee. If the appellant wanted to carry on getting fresh work from M/s.UTV it was imperative that it honor its oral commitments. In the case of Gujarat Agro Oil Enterprises Ltd. v. CIT [2002] 125 Taxman 912 (Guj), the Gujarat High Court has held as under:

> *"……The expenditure was incurred for the purpose of protecting and safeguarding goodwill of the business which was an important business asset of the assessee. Therefore, the expenditure incurred by the assessee for engaging the advocate was an expenditure allowable under the provisions of section 37(1)…"*

1.20 The appellant's commitment in honoring its agreement subsequently paid rich dividends, in as much as, the appellant was able to secure a fresh contract from M/s.UTV for Rs.11.11 crores during the previous year itself; which was also offered for taxation in this year. Therefore, the refund of the Directors Fees was totally out of

commercial expediency; even though profit is not an essential requirement for an expenditure to qualify u/s.37(1). The Allahabad High Court in CIT vs. A.Telery & Sans Pvt. Ltd., held that a man's business may be benefited in a number of ways. One of the them may be the promoting of good business relations with those who he has to deal with in the course of his business. In CIT vs. Walchand & Co. Pvt. Ltd., (65 ITR 381), the Supreme Court held that reasonableness of expenditure has to be judged from the point of view of the businessperson and not of the revenue. Likewise, the Supreme Court in the case of Sassoon J. David & Co., Pvt. Ltd., (1 Taxman 485) held that the expression 'wholly and exclusively' used in section 10(2)(xv) does not mean necessarily. Ordinarily, it is for the assessee to decide whether any expenditure should be incurred in the course of his or its business. Such expenditure may be incurred voluntarily and without any necessity and if it is incurred for promoting the business and to earn profits, the assessee is entitled to deduction even though there was no compelling necessity to incur such expenditure. The fact that somebody other than the assessee is also benefited by the expenditure should not come in the way of an expenditure being allowed by way of deduction under section 10(2)(xv) if it satisfies otherwise the test laid down by the low." It is in this context that the appellant's decision to refund Rs.10 crores cannot be held not to qualify on the condition of business expediency, for deduction u/s 37(1).

1.21 *Keeping in view the above, I am unable to agree with the AO that the refund of Rs.10 crores is a sham / colourable transaction or that the said transaction constitutes diversion of income by overriding title. On the other hand, as discussed supra, I am of the opinion that the transaction constitutes an expenditure u/s 37(1), as the same has been incurred out of commercial expediency and is therefore wholly and exclusively for the purposes of*

business. I am also of the opinion that the expenditure has been made as per the terms of the Oral agreement entered into between M/s.UTV and the appellant and which is in consonance with the terms of the Production Agreement. In the circumstances, the AO is directed to allow deduction of ₹.10 Crores from the total income of the appellant. This ground of appeal is therefore, allowed.

9. Further more or less similar situation arose in the case of Shahrukh Khan and the Coordinate Bench by order dated 17.03.2017 in ITA.Nos.623/Mum/2013 and 4763/Mum/2013 held as under: -

"*7. We have carefully considered the rival submissions. Evidently, the dispute in this Ground revolves around the import of the provisions of section 37(1) of the Act. Section 37(1) of the Act, inter-alia, relates to deduction of an expenditure laid out or extended wholly and exclusively for the purpose of business or profession while computing the income chargeable under the head "profits and gains of business or profession". Precisely put, the controversy before us is as to whether the expenditure of Rs.10 crores incurred by the assessee by way of payment to Knight Riders Sports Pvt. Ltd. for obtaining sponsorship rights in favour of Star India Pvt. Ltd. would constitute an expenditure expended wholly and exclusively for the purpose of asessee's business or profession so as to be deductible in terms of section 37(1) of the Act. The fact-situation lies in a narrow compass and has already been noted by us in sufficient detail in the earlier part of this order. Be that as it may, it would suffice to note that assessee, who is an Actor by profession, entered into an Artist Service Agreement on 30/03/2007 with Star India Pvt. Ltd. for acting as anchor and host of a programme - "Kaun Banega Crorepati", which was to be produced by Star India Ltd. The agreement was for a*

total of 104 Episodes divided into two seasons of 52 Episodes each. The total consideration payable was Rs.72 crores, which was received by the assessee in advance and the same has also been offered to tax in an earlier assessment year on receipt basis. It transpires that after production of 52 Episodes in the ITA No.623/Mum/2013, A.Y.2009-10) ITA No.4763/Mum/2013, A.Y. 2010-11 first season, the Star India Pvt. Ltd. decided not to produce the balance 52 Episodes for commercial reasons. It further emerges that since the balance Episodes were not produced, Star India Pvt. Ltd. wanted to recover the value of the unutilized amount from the assessee for non-shooting of the second season. In terms of a mutually agreed arrangement, assessee, inter-alia, agreed to secure for Star India Pvt. Ltd. a sponsorship association with Kolkata Knight Riders Cricket Team for IPL Season -2. For securing such sponsorship, assessee paid Rs.10 crores to Knight Riders Sports Pvt. Ltd. and in return sponsorship rights were awarded to Star India Pvt. Ltd. The said expenditure has been claimed as deductible while computing the income chargeable under the head "profits and gains of business or profession".

7.1 Factually speaking, there is no dispute that assessee and Star India Pvt. Ltd. share a business relationship, inasmuch as, the assessee has earned substantial professional receipts from Start India Pvt. Ltd. not only in this year but also in the past years. At this point, we may observe that the Assessing Officer has wrongly noted that assessee has not received any professional receipt from the said concern in the instant assessment year. On the contrary, the details on record reveal that assessee has earned a sum of Rs.60 crores from Star India Pvt. Ltd., which is a part of the total professional receipts for the year under consideration. In fact, the Ld. Representative for the assessee submitted that the amount of Rs.60 crores received from Star India Pvt. Ltd. during the year under consideration constituted almost

40% of the total receipts. Be that as it may, what we are trying to emphasize is that there is a subsisting professional relationship between assessee and Star India Pvt. Ltd.and the impugned arrangement has to be viewed from the prism of a Principal - client relationship. In terms of the Artist Service Agreement dated ITA No.623/Mum/2013, A.Y.2009-10) ITA No.4763/Mum/2013, A.Y. 2010-11 30/03/2007, assessee was to shoot for 104 Episodes but no shooting took place for 52 Episodes on account of a decision of Star India Pvt. Ltd., whereas the consideration for the entire Episodes was paid to the assessee in advance. In such a situation, intention of Star India Pvt. Ltd to obtain or recover the value of the unutilized amount from assessee for non-shooting of the balance 52 Episodes is quite plausible. As per the Revenue, the Artist Service Agreement dated 30/03/2007 did not obligate the assessee to refund the unutilized amount because the non-shooting on a decision taken by Star India Pvt. Ltd. No doubt, the point made by the Revenue may be correct in the context of the terms and conditions of the Artist Service Agreement dated 30/03/2007 but the allowability of the impugned expenditure has to be examined in the context of its commercial expediency. The assessee entered into an arrangement with Star India Pvt. Ltd. on a mutually agreed basis whereby the loss suffered by Star India Pvt. Ltd. was sought to be recouped with the earnings from the sponsorship of Kolkata Knight Riders Cricket Team for which assessee incurred Rs.10 crores on behalf of Star India Pvt. Ltd. In our considered opinion, it is not the legal necessity to spent the expenditure which is determinative of its allowability; rather, it is the existence or otherwise of commercial expediency which guides the allowability of expenditure under Section 37(1) of the Act. From the point of view of commercial expediency, it is abundantly clearly that assessee had a long-standing professional relationship with Star India Pvt. Ltd. and there is a nexus between the impugned expenditure and the

purpose of business. The Ld. Representative for the assessee has rightly relied upon the judgment of Dhanrajgiri Raja Narasingiriji (supra) to contend that it was not for the Revenue to prescribe what expenditure should an assessee incur and under what circumstances. In ITA No.623/Mum/2013, A.Y.2009-10) ITA No.4763/Mum/2013, A.Y. 2010-11 the present case, there is no challenge to the bonafides of the expenditure incurred and, in our view, the same can be understood to have been incurred wholly and exclusively for the purposes of business within the meaning of section 37(1) of the Act. In fact, the Hon'ble Supreme Court in the case of Sassoon J. David (supra) has held that the expression "wholly and exclusively" used in section 10(2)(xv) of the Income Tax Act, 1922 (which is pari-materia to section 37(1) of the Act) does not mean that expenditure has to be "necessarily" incurred. As per Hon'ble Supreme Court, an expenditure incurred voluntarily and without any necessity would be allowable so long as it has been incurred for promoting the business of the assessee. In our considered opinion, the commercial expediency canvassed by the assessee in the instant case clearly establishes that the impugned expenditure falls within the scope of the expression "wholly and exclusively for the purpose of business or profession" within the meaning of section 37(1) of the Act. Therefore, on this aspect, assessee has to succeed. Accordingly, the order of the CIT(A) is set-aside and the Assessing Officer is directed to delete the addition of Rs.10 crores. Thus, assessee succeeds on this Ground."

10. In view of what is stated as above, we hold that the assessee in the course of his business and out of commercial expediency refunded an amount of ₹.10 Crores to UTV and this amount can be said to have been incurred whole and exclusively for the purpose of business/profession of the assessee within the meaning of the section 37(1) of the Act. In the

circumstances we uphold the order of the Ld.CIT(A) in holding that the refund of fee by the assessee is an allowable expenditure.

11. In the result, Revenue's appeal is dismissed.

Order pronounced in the open court on the 11th October, 2017.

Sd/-	Sd/-
(G.S. PANNU)	**(C.N. PRASAD)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai / Dated 11/10/2017
VSSGB, SPS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mum