

**IN THE INCOME TAX APPELLATE TRIBUNAL "H" BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA,AM AND SHRI RAVISH SOOD, JM**

ITA No(s). 2854/Mum/2016 & 2961/Mum/2016
(निर्धारण वर्ष / Assessment Year:2006-07)

Highlight Pictures (India) Pvt. Ltd., Mahalaxmi Silk Mills Premises, Mathurdas Mill Compound, N.M. Joshi Marg, Lower Parel, Mumbai-400013.	बनाम/ Vs.	Asstt. Commissioner Of Income-tax-11(1), 4 th Floor, Aaykar Bhavan, M. K. Road, Mumbai-400 020.
स्थायी लेखा सं./जीआइआर सं./PAN No. AAACB6674L		
(अपीलार्थी / Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Sh. Apurva R. Shah, A.R
प्रत्यर्थी की ओर से / Respondent by	:	Sh. M.C. Omi Ningshen, D.R

सुनवाई की तारीख / Date of Hearing	:	03.04.2018
घोषणा की तारीख / Date of Pronouncement	:	25.05.2018

आदेश / O R D E R

PER RAVISH SOOD, JUDICIAL MEMBER:

The present appeals filed by the assessee are directed against the respective orders passed by the Commissioner of Income Tax (Appeals)-4, Mumbai, dated 07.01.2016 and 12.01.2016, which in itself arises from the order passed by the A.O under Sec. 143(3) of the Income-tax act, 1961 (for short 'Act'), dated 14.11.2008 and the order passed under Sec. 271(1)(c) of the Act, dated 30.03.2013 for the A.Y. 2006-07, respectively. We shall first take up the quantum appeal filed

by the assessee before us. The assessee assailing the order of the CIT(A) had raised before us the following grounds of appeal:-

“The Commissioner of Income Tax (Appeals) – 4, Mumbai erred :-

- 1. in confirming a disallowance of Rs. 49.39 lakhs being production expenses incurred in cash without appreciating correctly the submissions made.*
- 2. In not appreciating that the expenses incurred were on behalf of a client who had reimbursed the assessee for the same and hence the question of making a disallowance to that extent did not arise.*
- 3. In holding that the Balance Sheet did not reflect receivables of Rs. 30,20,618/- which was contrary to submissions made and evidence adduced during the appeal.*
- 4. Without prejudice, in not following the appellate order of the Hon’ble ITAT for A Y 2008-09 and restricting the disallowance of cash expenses to 5% of the total of such expenses.*

The appellant reserves the right to add, alter or amend the grounds as may be advised from time to time.”

2. Briefly stated, the facts of the case are that the assessee had filed its return of income for A.Y. 2006-07 on 30.11.2006, declaring income of Rs. Nil. The issue involved in the present appeal lies in of narrow compass. The assessee company which is engaged in the business of production and distribution of advertisement films and other programmes as well as providing production services to ad films maker firms, had during the year under consideration undertaken one job termed as ‘Holiday in Goa’ (hereinafter referred to as ‘HIG’). During the course of the assessment proceedings, it was observed by the A.O that the assessee had incurred cash expenditure of Rs. 84 lac in respect of HIG job and an amount of Rs. 8.78 lac for certain other projects. Survey conducted under Sec. 133A on the assessee on 29.08.2008 revealed that majority of the expenses pertained to site expenses. On the basis of the information as had emerged during the

course of the survey proceedings, it was submitted by the assessee that it had during the year carried out a special job of HIG for its customer, viz. India Film Investor, LLC (for short 'IFA') having its office at 133 West 19th Street, 3rd Floor, New York, NY 10011. The project undertaken by the assessee was based on total cost reimbursement plus service fees. The total project expenses incurred as per the assessee were Rs. 4.48 crores (including cash expenses) against which the assessee claimed to have received service fees of Rs. 28.60 lac. It was submitted by the assessee that out of the total project cost of Rs. 4.48 crores, cash expenses of Rs. 84 lac were incurred.

3. It was observed by the A.O that the assessee claimed that as the total project expenses incurred were reimbursed by IFA, therefore, neither the total receipts, nor the project expenses of Rs. 4.48 crores did affect its Profit & Loss A/c. In the backdrop of its aforesaid claim, the assessee only routed the service fees of Rs. 28.60 lacs (forming part of total sales of Rs. 1,14,22,332/-) through its profit & loss a/c, and did not route the project receipts and expenses through its books of account. The A.O held a conviction that in the backdrop of the aforesaid facts, the assessee had entered into a transaction which was clearly in contravention of Accounting Standard 1 (AS-1) and Accounting Standard 9 (AS-9). The A.O was of the firm belief that the assessee had erred in not recording the gross revenues by stating that under the reimbursement scheme the net effect would be zero. In the backdrop of the aforesaid facts, the A.O observed that the assessee had gone wrong in not recognizing revenue receipts to the tune of Rs. 4.48 crores. The aforesaid method of accounting and recording of the revenue did not find favour with the A.O. The A.O being of the view that as the cash expenses aggregating to Rs. 92 lac were claimed to have been spent by the assessee outside the books of accounts,

therefore, as the genuineness of the said expenses could not be verified, he disallowed the aggregate amount of cash expenses of Rs. 92 lac that were claimed by the assessee to have been incurred.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). The CIT(A) noticed that a perusal of the ledger account of IFA revealed an outstanding cash balance of Rs. 30,20,618/- as receivable on 31.03.2006. The CIT(A) observed that now when it was the claim of the assessee that the expenditure in respect of HIG job was reimbursed on weekly basis, therefore, the claim of the assessee that an amount of Rs. 30,20,618/- was receivable on 31.03.2006 could not be accepted. The CIT(A) was also of the view that it was beyond comprehension that the assessee as against the commission receipt of Rs. 28.60 lac for the HIG job would have incurred cash expenditure of Rs. 30 lac on its own account. The CIT(A) on the basis of his aforesaid observations confirmed the disallowance of Rs. 30,20,618/-. Still further, the CIT(A) observed that as the cash expenses of Rs. 8.78 lac which as claimed by the assessee pertained to other jobs undertaken during the year, in absence of any supporting details were also not verifiable, therefore, concluded that the addition of the said amount was also rightly made by the A.O. As regards the balance expenditure of Rs. 53.02 lac i.e. [total Rs. 92 lac (-) Rs. 38.98 lac] the CIT(A) observed that as the same were also not fully verifiable, therefore, 20% of the same i.e. Rs. 10.41 lac was liable to be disallowed. The CIT(A) on the basis of his aforesaid observations upheld the disallowance of cash expenses of Rs. 49.39 lac [Rs. 38.98 lac + Rs. 10.41 lac] and deleted the balance addition of Rs. 42.61 lac.

5. The assessee carried the matter in appeal before the Tribunal, which vide its order passed in ITA No. 5825/Mum/2011, dated 07.05.2014, taking cognizance of the fact that the CIT(A) had carried

out an enhancement of income of Rs. 30,20,618/- without following the proper procedure, set aside the issue pertaining to disallowance of cash expenditure of Rs. 92 lac to the file of the CIT(A).

6. The CIT(A) in the course of the set aside proceedings called upon the assessee to explain as to why the disallowance so confirmed by his predecessor to the extent of Rs. 49.39 lac should not be retained/confirmed. The assessee submitted before the CIT(A) that for the HIG job it was entitled to a fee which was undisputedly offered for tax, therefore, no part of the expenses which were incurred by the assessee in cash and reimbursed by its customer i.e. IFA were liable to be disallowed. Alternatively, it was submitted by the assessee that the Tribunal in its own case for A.Y. 2008-09 had upheld the disallowance to the extent of only 5 % of the cash expenses.

7. The CIT(A) after deliberating on the contentions advanced by the assessee before him, was however not persuaded to accept the same. The CIT(A) did find favour with the observations of the A.O that as the entire expenses amounting to Rs. 4.48 crores were fully spent out of the books of account, therefore, there was no possibility whatsoever to verify the genuinity of the expenses. It was observed by the CIT(A) that his predecessor was also not convinced with the unique method of accounting in respect of HIG job undertaken by the assessee on behalf of its customers i.e. IFA, as the same was clearly in contravention of the Accounting Standard AS-1 and AS-9. It was further observed by the CIT(A), that as the outstanding cash balance receivable of Rs. 30,20,618/- on 31.03.2006 clearly militated against the claim of the assessee that the expenses were reimbursed on weekly basis, therefore, the addition to the said extent in the absence of any supporting evidence was confirmed by him. Similarly, in the absence of supporting evidence, the disallowance of the amount of Rs. 8.78 lac

claimed by the assessee as cash expenditure in respect of the other projects was also retained by the CIT(A). As regards the balance cash expenses of Rs. 53.02 lac, as the same was also not verifiable, therefore, the disallowance to the extent of 20% i.e. Rs. 10.41 lac was retained by the CIT(A). The CIT(A) observed that the assessee during the course of the set aside proceedings had merely reiterated the earlier submissions that as cash expenses of Rs. 92 lac was by way of reimbursement by the customers, therefore, no disallowance was liable to be made. The CIT(A) observing that the assessee had failed to adduce any evidence which could substantiate the aforesaid expenses, thus found no reason to dislodge the disallowance of Rs. 49.39 lac made by his predecessor. The CIT(A) was also not persuaded to accept the claim of the assessee that in its own case for A.Y. 2008-09 the Tribunal had upheld the disallowance only to the extent of 5% of cash expenses, for the reason that the facts involved in the case of the assessee for the year under consideration were found to be distinguishable.

8. The assessee being aggrieved with the order of the CIT(A) had carried the matter in appeal before us. The ld. Authorised representative (for short 'A.R') at the very outset of the hearing of the appeal placed on record a copy of the order of the coordinate bench of the Tribunal, i.e ITAT, Mumbai Bench "H", Mumbai in ITA No. 5826/Mum/2011; dated 30.0.2013 for A.Y 2008-09 and ITA No. 5825/Mum/2011; dated 07.05.2014 for A.Y 2006-07. The ld. A.R taking support of the aforesaid orders submitted that though no disallowance was called for in the hands of the assessee, however even if any disallowance was to be made, the same as observed by the coordinate benches of the Tribunal in the assesses own case was liable to be sustained only to the extent of 5% of the cash expenses. Per

contra, the Ld. Departmental representative (for short 'D.R') relied on the orders of the lower authorities.

9. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that it remains as a matter of record that the assessee had failed to substantiate the genuineness of the cash expenses of Rs. 92 lac, which were claimed to have been incurred in respect of HIG job and other projects. Though, the A.O in the absence of any evidence substantiating the genuineness of the expenses had made an addition of the entire amount of Rs. 92 lac, however, the CIT(A) taking a liberal view had restricted the addition to the extent of Rs. 49.39 lac. Before proceeding further, we may herein observe that we are persuaded to be in agreement with the view of the lower authorities that the unique method of accounting followed by the assessee in respect of HIG project undertaken by it on behalf of its customer i.e. IFA and certain other projects was clearly in contravention of the Accounting Standard AS-1 and AS-9. We are of the considered view that now when the cash expenses of Rs. 92 lac as claimed by the assessee were spent out of the books of accounts, therefore, there remained no possibility whatsoever to study and figure out the genuinity of the said expenses. We are of a strong conviction that the CIT(A) by restricting the disallowance to an amount of Rs. 49.39 lac had adopted a liberal view and deleted the balance addition of Rs. 42.61 lac (out of Rs. 92 lac).

10. We have deliberated at length on the issue before us and are unable to find any reason to principally dislodge the well reasoned observations of the CIT(A). We are also not impressed by the reliance placed by the Ld. A.R. on the order of the coordinate bench of the Tribunal, viz. ITAT Mumbai Bench "H", Mumbai in the assesses own

case for A.Y. 2008-09 i.e. Highlight Pictures (India) Pvt. Ltd. Vs. ACIT-11(1)(2), Mumbai, ITA No. 5826/Mum/2011, dated 30.08.2013. We find that as observed by the CIT(A), the facts involved in the case before the Tribunal were clearly distinguishable, as against the facts of the case for the year under consideration. We are in agreement with the view taken by the CIT(A) that unlike the case before us where there are 19% cash expenses, the genuineness of which too is not open for verification, in the case before the Tribunal, the cash expenses pertaining to art designing, location hire, production shoot expenses and travelling and wardrobe expenses were about 5%. Still further, while for in the present case not only the claim of the assessee as regards incurring of the cash expenses is not found to be verifiable in the absence of bills and vouchers, but rather, as observed by us hereinabove, the genuineness of expenditure is in itself under serious doubts. We thus are of the considered view that in the backdrop of the aforesaid facts the observations arrived at by the coordinate bench of the Tribunal, having been recorded in context of distinguishable facts, therefore, would not in any way assist the case of the assessee before us. We are further of the view that on the basis of specific observations arrived at by the CIT(A) in context of the disallowance of expenses of Rs. 30,20,618/-, in the absence of any material which could persuade us to dislodge the same, no infirmity as regards the said addition/disallowance of Rs. 30,20,618/- does emerge from the order of the CIT(A). We are further of the view that despite the fact that there was no material to substantiate not only the verifiability of the cash expenses of Rs. 53.02 lac, but rather, even the genuinity of the said expenditure so claimed by the assessee was also not free from doubts, however, the CIT(A) had adopted a liberal view and restricted the disallowance/addition to 20% i.e. Rs. 10.41 lac. We find no reason to dislodge the disallowance of Rs. 10.41 lac sustained by the CIT(A).

However, we are of the considered view that now when the CIT(A) had restricted the addition/disallowance in respect of cash expenses claimed to have been incurred by the assessee in respect of HIG job to 20%, therefore, the sustaining of the entire amount of disallowance of cash expenses of Rs. 8.78 lac claimed by the assessee to have been incurred for the other projects cannot be upheld. We thus, direct the A.O to restrict the disallowance in respect of cash expenses of Rs. 8.78 lac also to the extent of 20%.

11. The appeal of the assessee is partly allowed in terms of our aforesaid observations.

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12. We shall now advert to the appeal filed by the assessee against the penalty of Rs. 19,41,354/- imposed by the A.O, which thereafter had been upheld by the CIT(A). The assessee had assailed the order of the CIT(A) by raising before us the following grounds of appeal :

“The Commissioner of Income Tax (Appeals) – 4, Mumbai erred :-

- 1. In confirming a penalty of Rs. 19,41,354 u/s 271(1)(c) of the Act without appreciating correctly the submissions made.*
- 2. In confirming a penalty even o matters where addition was deleted by the ITAT or by the AO himself in 154 proceedings done subsequently – such penalty aggregating to Rs. 2,78,888.*

The appellant reserves the right to add, alter or amend the grounds as may be advised from time to time.”

13. Briefly stated, the A.O had called upon the assessee to show cause as to why penalty under Sec. 271(1)(c) may not be imposed on it in respect of the addition of Rs. 57,67,544/- [including the cash

expenses of Rs. 49,39,000/- (out of total cash expenses of Rs. 92 lac) and certain other additions/disallowances] which were sustained by the CIT(A). The explanation of the assessee that as the disallowance of cash expenses had been done on adhoc basis, therefore no penalty under Sec. 271(1)(c) was liable to be imposed, as well as the contentions advanced by the assessee in context of the other additions/disallowances did not find favour with the A.O, who imposed a penalty of Rs. 19,41,354/- for furnishing of inaccurate particulars of income under Sec. 271(1)(c). On appeal, the CIT(A) observing that all the other additions/disallowances except for the disallowance of cash expenses of Rs. 49,39,000/- had been deleted by the Tribunal, therefore, restricted the issue as regards sustainability of penalty imposed by the A.O under Sec. 271(1)(c) in respect of the disallowance of cash expenses of Rs. 49,39,000/-. The CIT(A) being of the view that as the assessee had not submitted the proper verifiable evidence, therefore concluded that the disallowance of Rs. 49,39,000/- sustained in appeal was liable to be subjected to penalty under Sec. 271(1)(c). The CIT(A) thus upheld the penalty imposed by the A.O under Sec. 271(1)(c) in respect of cash expenses of Rs. 49,39,000/-.

14. The assessee being aggrieved with the order passed by the CIT(A) had carried the matter in appeal before us. The Ld. A.R relying on the orders of the lower authorities submitted that no penalty under Sec. 271(1)(c) could have validly been imposed in respect of adhoc disallowance of expenses. Per contra, the Ld. D.R. relied on the order of the CIT(A).

15. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We are of the considered view that disallowance of cash expenses claimed by the assessee to have been incurred on HIG

project and certain other projects, in the absence of supporting documentary evidence, had been sustained by the CIT(A) to the extent of Rs. 49,39,000/- and thereafter scaled down by us to some extent while disposing off the quantum appeal. We though are of the view that it remains as a matter of fact that in the absence of supporting documentary evidence, the claim of the assessee in respect of the cash expenses could not be proved, therein leading to a consequential addition of Rs. 49,39,000/- in the hands of the assessee. However, we are of the considered that though it is a case where the assessee had failed to prove its claim of cash expenses, which though did justifiably lead to an addition of the same, however, as it is not a case of expenses claimed by the assessee which had been disproved by the revenue, therefore, no penalty under Sec. 271(1)(c) could be validly imposed in the hands of the assessee for the reason that his claim of cash expenses had remained unproved. We thus are of a strong conviction that though the assessee had justifiably been subjected to addition/disallowance of the cash expenses, but the same cannot lead to levy of penalty under Sec. 271(1)(c). We find that our aforesaid view stands fortified by the judgment of the **Hon'ble High Court of Bombay** in the case of **CIT Vs. Upendra V. Mithani (ITA (L) No. 1860 of 2009)**, dated **05.08.2009**, wherein the **Hon'ble High Court** had observed as under:-

“The issue involved in the appeal revolves around deletion of penalty under Section 271(1)(c) of the I.T. Act. The Tribunal has concurred with the view taken by the Commissioner of Income Tax (A). The Commissioner of Income Tax (A) has rightly taken a view that no penalty can be imposed if the facts and circumstances are equally consistent with the hypothesis that the amount does not represent concealed income as with the hypothesis that it does. If the assessee gives an explanation which is unproved but not disproved, i.e. it is not accepted but circumstances do not lead to the reasonable and positive inference that the assessee's case is false. The view taken by the Tribunal is a reasonable and possible view. The appeal is without any substance. The same is dismissed in limine with no order as to costs.”

16. We thus in terms of our aforesaid observations quash the penalty imposed by the A.O under Sec. 271(1)(c) in context of the cash expenses disallowed by the A.O and upheld by the CIT(A). The order of the CIT(A) sustaining the penalty imposed by the A.O under Sec. 271(1)(c) is set aside in terms of our aforesaid observations.

17. The appeal of the assessee in ITA No. 2854/Mum/2016 is partly allowed, and the appeal of the assessee in ITA No. 2961/Mum/2016 is allowed.

Order pronounced in the open court on 25/05/2018

Sd/-

(Shamim Yahya)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक 25.05.2018

Ps. Rohit

Sd/-

(Ravish Sood)

JUDICIAL MEMBER

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

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

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

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

आयकर अपीलीय अधिकरण, मुंबई / ITAT,

Mumbai

