

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH, MUMBAI

**BEFORE SHRI MAHAVIR SINGH, JM AND SHRI MANOJ KUMAR AGGARWAL,
AM**

ITA No. 2281/Mum/2014
(A Y: 2008-2009)

MR. PAHLAJ N. NIHALANI B/2, Two Roses Hsg. Soc. Ltd., Pali Road, Bandra (West), Mumbai – 400 050. PAN: AABPB3366M	Vs.	I.T.O.- 11(1)(2) Aayakar Bhavan M.K. Road, Mumbai – 400 050.
Appellant	..	Respondent

Revenue by	..	Ms. Bharti Singh (DR)
Assessee by	..	Sh. Sameer Dalal (AR)

Date of hearing		28-07-2016
Date of pronouncement		17-08-2016

ORDER

PER MANOJ KUMAR AGGARWAL (AM) :

The instant appeal has been filed by the assessee for Assessment Year 2008-2009 assailing the order of Commissioner of Income Tax (Appeals)-3, Mumbai [CIT(A)] affirming the penalty levied on the assessee u/s. 271(1)(c) of the Income Tax Act, 1961.

2. Facts in brief, are that the assessee is a film producer and distributor and filed its return of income for AY. 2008-2009 during September 2008 declaring total income at Rs. 10,62,979/- and return was initially processed u/s 143(1) and later taken up for scrutiny u/s. 143(3). The assessment was completed by Assessing Officer (AO) vide order dated 24/12/2010 assessing total income at Rs. 61,41,720/- after making certain adjustments and disallowances, one of which was disallowance of publicity expenses of Rs. 43,96,173/- claimed by the assessee in respect of unreleased film “Khushboo”. The same was disallowed as per Rule 9A of the Income Tax Act and accordingly penalty proceedings were initiated for furnishing of inaccurate particulars of income u/s 271(1)(c). An amount of Rs. 14,94,259/- was levied as penalty vide penalty order dated 30/01/2013.

3. The additions were affirmed in quantum proceedings by the CIT(A) and same were accepted by the assessee. Against penalty order, the assessee preferred first appeal before CIT(A) but was unsuccessful vide CIT(A) order dated 28/01/2014. Aggrieved the assessee is in second appeal before us. The Learned Counsel for the assessee (AR) has contended that the assessment has attained finality and due taxes has been paid by assessee and therefore, the penalty ought to have been deleted. Mere making of a claim do not invite penalty action on the part of the authorities and complete information has been provided in the return and during assessment proceedings. No details supplied by the assessee were found to be false or incorrect and claim was made under *bona-fide* mistake. The assessee has not filed inaccurate particulars of income. These expenses have not been claimed by assessee in any subsequent year. The Ld.

Departmental representative (DR), on the other hand, has supported the levy of penalty as assessee has violated the specific rules and there are no ambiguities in interpretation of the rules.

4. We have heard rival contentions and perused the material placed before us. The facts are not in dispute. The assessee is a film distributor and producer and claimed publicity expenses relating to assessee's under production film "Khushboo" and which was not released during the impugned assessment year. The film Censor certificate was obtained on 08/05/2008. Rule 9A is applicable to the case of the assessee and the applicable portion of the same is extracted below:-

(1) In computing the profits and gains of the business of production of feature films carried on by a person (the person carrying on such business hereafter in this rule referred to as a film producer), the deduction in respect of the cost of production of a feature film certified for release by the Board of Films Censors in a previous year shall be allowed in accordance with the provisions of sub-rule (2) to sub-rule (4).

Explanation : In this rule,-

.....

(ii) Cost of Production", in relation to a feature film, means the expenditure incurred on the production of the film, not being-

- (a) The expenditure incurred for the preparation of the positive prints of the film; and*
- (b) The expenditure incurred in connection with the advertisement of the film after it is certified for release by the board of film censors:"*

.....

.....

(5) Notwithstanding anything contained in the foregoing provisions of this rule, the deduction under this rule shall not be allowed unless,-

(a) In a case where the film producer-

- (i) Has himself exhibited the feature film on a commercial basis; or*
- (ii) Has sold rights of exhibition of the feature film; or*
- (iii) Has himself exhibited the feature film on a commercial basis in some areas and has sold the rights of exhibition of the feature film in respect of all or some of the remaining areas,*
the amount realized by exhibiting the film, or the amount for which the rights of exhibitions have been sold or, as he case may be, the aggregate of such amounts, is credited in the books of accounts maintained by him in respect of the year in which the deduction is admissible;"

5. It is undisputed that assessee has incurred expenses for unreleased film and censor certificate has been obtained only in AY 2009-2010 and no amount in respect of exhibitions of the film or sale of right of exhibition of the film has been credited to the Books of Accounts maintained by the assessee. Further, the cost of production excluded only advertisement expenses of the film after it is certified for released by the Board of films censor. Hence, the assessee was clearly not entitled to claim the said expenses during the impugned assessment year.

6. Now, it would be prudent to quote relevant portion of Section 271 which is reproduced here in below:-

(1) If the Assessing officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner in the course of any proceedings under this Act, is satisfied that an person-

.....

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income, or

.....

Explanation 1.- Where in respect of any facts material to the computation of the total income of any person under this Act,-

(A) *Such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or (Commissioner) to be false, or*

(B) *Such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him.”*

then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars has been concealed.

Thus, penalty can be levied in any of the following situation:-

- (i) The person fails to offer an explanation to substantiate his claim, or
- (ii) He offers the explanation which is found by the authorities to be false, or
- (iii) The person offers explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same have been disclosed by him

It is well settled from numerous judicial pronouncements that this penalty is a civil liability and *mens-rea* is not an essential ingredient to be proved to levy this penalty.

Further, Supreme Court in the case of Mak Data Pvt. Ltd. has observed as under :-

“The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income. Explanation to Sec. 271(1) raises a presumption of concealment, when a difference is noticed by the AO, between reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the explanation, has been discharged by him, the onus shifts of the Revenue to show that the amount in question constituted the income and not otherwise.”

7. In the present case, the claim of the assessee has not been accepted by the authorities. Nevertheless, it is also true that the assessee has not claimed any false expenditure or actively concealed his particulars of the income. It is not the case that the genuineness of the expenses has been doubted or proved to be false. The assessment has been accepted by the assessee and due taxes thereupon has duly been paid. No subsequent claim in respect of these expenses has been made and therefore, keeping in view the conduct of the assessee and in the circumstances of the case, at least the penalty deserves to be deleted. Therefore, we delete the penalty and accordingly the appeal of the assessee is allowed.
8. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 17th August, 2016.

Sd/-

(MAHAVIR SINGH)
JUDICIAL MEMBER

Sd/-

(MANOJ KUMAR AGGARWAL)
ACCOUNTANT MEMBER

Mumbai, Dated: 17/08/2016
PS:- Pooja K.

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,

Assistant Registrar
ITAT, MUMBAI