THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 08.12.2015

\+ **ITA 163/2002**

HONEY ENTERPRISES ..... Appellant

versus

COMMISSIONER OF INCOME TAX, DELHI ..... Respondent

Advocates who appeared in this case:
For the Appellant : Ms Shashi M. Kapila with Mr Pravesh Sharma.
For the Respondent : Ms Suruchi Aggarwal, Senior Standing Counsel with Ms Lakshmi Gurung, Junior Standing Counsel and Mr. Abhishek Sharma.

AND

\+ **ITA 377/2004**

M/S HONEY ENTERPRISES ..... Appellant

versus

COMMISSIONER OF INCOME TAX, DELHI ..... Respondent

Advocates who appeared in this case:
For the Appellant : Ms Shashi M. Kapila with Mr Pravesh Sharma.
For the Respondent : Ms Suruchi Aggarwal, Senior Standing Counsel with Ms Lakshmi Gurung, Junior Standing Counsel and Mr. Abhishek Sharma.

AND

\+ **ITA 260/2002**

COMMISSIONER OF INCOME TAX ..... Appellant

versus

HONEY ENTERPRISES ..... Respondent

Advocates who appeared in this case:
For the Appellant : Ms Suruchi Aggarwal, Senior Standing Counsel

with Ms Lakshmi Gurung, Junior Standing Counsel and Mr. Abhishek Sharma.

For the Respondent : Ms Shashi M. Kapila with Mr Pravesh Sharma.

AND

\+ **ITA 537/2004**

THE COMMISSIONER OF INCOME TAX ..... Appellant

versus

M/S HONEY ENTERPRISES ..... Respondent

Advocates who appeared in this case:

For the Appellant : Ms Suruchi Aggarwal, Senior Standing Counsel with Ms Lakshmi Gurung, Junior Standing Counsel and Mr. Abhishek Sharma.

For the Respondent : Ms Shashi M. Kapila with Mr Pravesh Sharma.

CORAM:
DR. JUSTICE S. MURALIDHAR
MR. JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. These appeals – four in number – are filed under Section 260A of the Income Tax Act, 1961 (hereafter the 'Act') impugning two separate orders of the Income Tax Appellate Tribunal (hereafter 'ITAT') in respect of Assessment Years (hereafter 'AY') 1992-93 and 1993-94. Whilst ITA Nos. 163/2002 and 377/2004 are Assessee's appeals impugning ITAT's orders dated 19th December, 2001 for AY 1992-93 and 15th December, 2003 for AY 1992-93 respectively; ITA No. 260/2002 and ITA No. 537/2004 have been preferred by the Revenue against the aforementioned orders passed by

the ITAT.

2. Identical questions have been raised in the appeals preferred by the Revenue as well as the Assessee. These appeals were admitted by an order dated 21st September, 2004. Insofar as the appeals of the Revenue are concerned (being ITA Nos. 260/2002 and 537/2004), the following question of law was framed:-

> "Whether the ITAT was correct in law in admitting the addition made by the assessing officer under Section 40A(3) of the Income-tax Act, 1961?"

3. Insofar as the Assessee's appeals are concerned (being ITA Nos. 163/2002 and 377/2004), the following question of law was framed:-

> "Whether the ITAT has erred in concluding that the Assessing Officer's working of Rule 9B was correct in view of the scheme of computation of business income as envisaged under Sections 28 to 44 of the Income-tax Act, 1961?"

Assessee's Appeals – ITA 163/2002 & ITA 377/2004

4. The controversy involved in the appeals preferred by the Assessee relate to the interpretation of Rule 9B of the Income Tax Rules, 1962 (hereafter 'Rules'), which concerns the deduction in respect of expenditure on acquisition of distribution rights of feature films. According to the

Assessee, the Assessee is entitled to first deduct all expenses relating to its business pertaining to a feature film that has not been screened for a period of 180 days till the end of the financial year, from the gross realizations pertaining to that feature film and thereafter, amortize the cost of acquisition of the distribution rights of the feature films to the extent of the remaining surplus. It is claimed that the remaining unamortized cost of acquisition is to be carried forward for amortization against business income of the subsequent year. This is disputed by the Revenue. The Revenue contends that the cost of feature films, which have not run for a period of 180 days – reduced to 90 days by virtue of the Income Tax (Ninth Amendment) Rules, 1998 with effect from 1st April, 1999 – till the end of the financial year, can be amortized to the extent of the gross realizations pertaining to the said film during the year and only the balance is permitted to be carried forward.

5. Both the counsels agreed that the facts and the issues involved in appeals were similar and, accordingly, the counsel advanced their arguments on the basis of the facts in ITA 163/2002. Briefly stated, the said facts are as under:-

5.1 The Assessee is a partnership firm engaged in the business of distribution of Hindi motion-pictures/films in the Territory of Delhi and Uttar Pradesh. The Assessee filed its return of income on 31st October, 1992 for the AY 1992-93 declaring an income of Rs.1,13,380/-. The return was initially processed under Section 143(1)(a) of the Act and, subsequently, picked up for scrutiny.

5.2 The Assessee filed separate trading accounts in respect of various films along with its consolidated Profit and Loss Account for the financial year ending 31st March 1992 as well as its Balance sheet as on that date. The Assessee claimed set off for certain expenses pertaining to the preceding year relevant to the AY 1991-92. These expenses related to feature films *viz*. *'Farishtey', 'Saugandh', 'Patthar ke Phool' and 'Patthar ke Insaan'*, which were released during the financial year 1991 but had not completed a commercial run of 180 days as on 31st March, 1991. The Assessee claimed that this expenditure, which was sought to be set off against the income in the current year, was unamortized expenditure that was carried forward in accordance with Rule 9B of the Rules.

5.3 The AO analysed the expenses claimed to have been carried forward by the Assessee from the preceding year and concluded that the same

included costs of prints, which according to the AO could not be carried forward under Rule 9B of the Rules. The Table indicating the analysis made by the AO and as appearing in the assessment order is reproduced below:-

	M.G. Paid	Business upto 31.3.91	Cost of prints	Amt. c/f to next yr.	Amount to be c/f as per Rule 9B i.e. (2-3)
1.	2.	3.	4.	5.	6.
Farishtey	55,00,000	43,99,079	16,63,006	2763974	11,00,921
Saugandh	12,50,000	15,68,809	7,29,995	411185	Nil
Pathar Ke Phool	20,00,000	20,28,817	9,93,252	96,44,34	Nil
Pathar Ke Insaan	25,00,000	17,79,558	10,01,622	1779558	7,20,442
Total				59,19,154	18,21,363

5.4 According to the Assessee, the amount of Rs.59,19,154/- pertained to Minimum Guaranteed Royalty (MG Royalty) in respect of four films namely *'Farishtey', 'Saugandh', 'Patthar ke Phool' and 'Patthar ke Insaan'* and did not include the costs of prints. The Assessee claimed that the costs of prints had already been set off against gross realizations relating to the respective films and only the MG Royalty amount was carried forward for amortization during the financial year 1991-92 relevant to the AY 1992-93.

5.5 In order to appreciate the rival contentions, it is also essential to refer to the return filed by the Assessee for the preceding year, i.e., financial year 1991 relevant to the AY 1991-92. The Assessee had filed a return declaring an income of Rs. 80,350/- for AY 1991-92. The Assessee had prepared separate trading accounts for each film including the four films in question, which had not completed screening of 180 days post their release. The trading accounts prepared by the Assessee in respect of the four films are reproduced below:-

FARISHTAY PICTURE A/C Release 21.2.91			
Particulars	Amount	Particulars	Amount
To C/o Royalty	55,00,000.00	By Business	43,99,031.73
To C/o Prints	16,63,006.25	By Loss on picture	27,63,974.52
	71,63,006.25		71,63,006.25

SAUGANDH PICTURE A/C Release 24.1.91			
Particulars	Amount	Particulars	Amount
To C/o Royalty	12,50,000.00	By Business	15.68.809.60
To C/o Prints	7,29,995.30	By Loss on picture	4,11,185.70
	19,79,995.30		19,79,995.30

PATTHAR KE PHOOL PICTURE A/C Release 21.2.91			
Particulars	Amount	Particulars	Amount
To C/o Royalty	20,00,000.00	By Business	20,28,817.67
To C/o Prints	9,93,252.65	By Loss on picture	9,64,434.98
	29,93,252.65		29,93,252.65

PATTHAR KE INSAAN PICTURE A/C Release 24.1.91

Particulars	Amount	Particulars	Amount
To C/o Royalty	25,00,000.00	By Business	17,22,063.52
To C/o Prints	10,01,622.42	By Loss on picture	17,79,558.90
	35,01,622.42		35,01,622.42

5.6 The trading losses reflected in the above trading accounts did not include other expenses incurred by the Assessee including expenses such as publicity expenses specifically incurred in respect of the aforesaid films. Such expenses were directly debited by the Assessee to its Profit and Loss Account for the year ended 31st March, 1991 and were claimed as expenses against income generated from distribution of other films.

5.7 For the AY 1992-93, the Assessee claimed that the expenditure sought to be amortized against business income was only MG Royalty and the same was in accordance with Rule 9B of the Rules. In other words, the Assessee claimed that the costs of prints had been deducted from the gross realizations relating to the respective films and the loss as reflected in the trading account was only the unabsorbed MG Royalty. The AO, on the other hand, was of the view that MG Royalty to the extent of gross realization in respect of each film was to be amortized during the preceding year and only the amount of MG Royalty, which exceeded the gross realizations from exhibition of that film was available for amortization

during the year in question. Thus, according to the AO, the amount carried forward by the Assessee included the cost of prints which was not permissible.

5.8 The AO also allowed a deduction of Rs.15,66,162/- as expenses for the financial year 1991-92. These expenses were not claimed by the Assessee as according to the Assessee, the same were available for being amortized in the next year (AY 1993-94) as per its interpretation of Rule 9B of the Rules. Thus, whilst the AO disallowed the deduction of Rs.40,97,791/- on account of expenses pertaining to the previous year, he also allowed a deduction of Rs.15,66,162/- (which was not claimed by the Assessee) and, thus, made a net addition of Rs.25,31,629/-.

5.9 The AO held that the Assessee's claim of unamortized MG Royalty, in fact, included a claim for deduction on account of the cost of prints, which expense did not pertain to the year in question. The AO, therefore, disallowed the claim in respect of the cost of prints, as indicated in the table extracted hereinbefore, and restricted the claim of unamortized MG Royalty carried forward from the preceding year to Rs. 18,21,363/-.

6. The CIT(A) accepted the Assessee's contention as well as its method of accounting and deleted the addition made by the AO. The CIT(A) held

that MG Royalty paid by the Assessee could be set off only against realizations from the film in question that were available to the Assessee after deduction of the cost incurred by the Assessee.

7. The Revenue carried the aforesaid decision of CIT(A) in appeal before the ITAT (ITA No. 747/D/95). In this appeal, the Revenue also appealed against the decision of CIT(A) to delete the addition of Rs.8,14,175/- under Section 40A(3) of the Act. The ITAT allowed the Revenue's appeal in respect of the addition of Rs.25,31,629/-, which was deleted by the CIT(A) but rejected the Revenue's appeal in respect of the deletion of the additions made under Section 40A(3) of the Act. The question regarding deletion of the addition under Section 40A(3) of the Act is the subject matter of the Revenue's appeal being Appeal No. 260/2002. The ITAT's decision to allow the Revenue's appeal in respect of the issue concerning Rule 9B of the Rules is the subject matter of the Assessee's appeal – ITA 163/2002.

Submissions

8. Ms Shashi M. Kapila, learned counsel appearing for the Assessee contended that the short issue involved in the Assessee's appeals was

whether the Assessee could set off the expenses as allowable under Section 28 to 50 of the Act and amortize the cost of films to the extent of the remaining balance or whether the cost of films was to be amortized before allowance of any expenditure? She submitted that the expenditure incurred by the Assessee in respect of a feature film would have to be deducted from the gross realizations from that film in order to ascertain the amount available for absorbing the cost of acquisition of distribution rights of that film and the unabsorbed cost of acquisition of rights would be carried forward to the next year for amortization against the income of the Assessee. She contended that if this procedure was not followed, the Assessee would not be in a position to set off its normal expenditure against his income in respect of feature films that had not been exhibited for a period of 180 days prior to the end of financial year. She submitted that in the circumstances, such normal expenditure could never be set off and this would render the expenses allowable under Section 37(1) of the Act as "dead expenses" and the normal computation provisions as wholly unworkable. Ms Kapila referred to the decision of the Bombay High Court in the case of ***CIT v. Prakash Pictures***: **(2003) 260 ITR 456 (Bom.)** in support of her contention that Rule 9B of the Rules has to be interpreted as

laying down a principle for amortization of the cost of films for arriving at the true profits. She submitted that if the cost of feature films is amortized to the extent of the gross realizations then there would be no scope to set off other expenses incurred in connection with the distribution of the feature film and this would distort the true profits of the Assessee.

9. Ms Kapila next referred to the decision of the ***Commissioner of Income Tax v. Joseph Valakuzhi*: (2008) 302 ITR 140** wherein the Supreme Court had held that unamortized expenses, which were permitted to be carried forward in the subsequent year under Rule 9A of the Rules were not in the nature of carry forward of losses and, therefore, did not fall within the purview of Section 80 of the Act. She contended that since the carry forward of unamortized expenses were not in the nature of carried forward losses, Rule 9B of the Rules must be interpreted to only provide for amortization of costs of a feature film to the extent the same could be absorbed by the Assessee in the relevant financial year. She submitted that the amount available for absorption of cost of films was only the net income that remained after deduction of other expenses incurred by the Assessee in connection with the feature film(s), which had not been

commercially screened for a period of 180 days before the end of the previous year.

10. Ms Kapila also contended that the Assessee had consistently followed the accounting practice of computing the cost of acquisition of the distribution rights to be carried forward to the next year and the same had not been objected to by the assessing officers in the past. She contended that in the circumstances, following the principle of consistency, the disallowance made by the AO was not sustainable. She also referred to the decision of the Supreme Court in ***Radhasoami Satsang v. CIT*** **: [1992] 193 ITR 321 (SC)** in support of her contention.

11. Ms Suruchi Aggarwal, learned senior standing counsel appearing for the Revenue supported the decision of the Tribunal and contended that the language of Rule 9B of the Rules was clear and the cost of acquisition of feature films did not include the amount of expenditure incurred in preparation of positive prints of feature films. She argued that in effect the Assessee was seeking to carry forward the cost of the films for being amortized in the subsequent year, which was not permissible.

Reasoning & Conclusion

12. At the outset, it is necessary to refer to Rule 9B of the Rules which reads as under:-

> **"Deduction in respect of expenditure on acquisition of distribution rights of feature films.**
>
> **9B.** (1) In computing the profits and gains of the business of distribution of feature films carried on by a person (the person carrying on such business hereafter in this rule referred to as film distributor), the deduction in respect of the cost of acquisition of a feature film shall be allowed in accordance with sub-rule (2) to sub-rule (4).
>
> *Explanation* : For the purposes of this rule, "cost of acquisition", in relation to a feature film, means the amount paid by the film distributor to the film producer or to another distributor under an agreement entered into by the film distributor with such film producer or such other distributor, as the case may be for acquiring the rights of exhibition and, where the rights of exhibition have been acquired on a minimum guarantee basis, the minimum amount guaranteed, not being—
>
> (*i*) the amount of expenditure incurred by the film distributor for the preparation of the positive prints of the film; and
>
> (*ii*) the expenditure incurred by him in connection with the advertisement of the film.
>
> (2) Where a feature film is acquired by the film distributor in any previous year and in such previous year—

(*a*) the film distributor sells all rights of exhibition of the film, the entire cost of acquisition of the film shall be allowed as a deduction in computing the profits and gains of such previous year; or

(*b*) the film distributor,—

(*i*) himself exhibits the film on a commercial basis in all or some of the areas; or

(*ii*) sells the rights of exhibition of the film in respect of some of the areas; or

(*iii*) himself exhibits the film on a commercial basis in certain areas and sells the rights of exhibition of the film in respect of all or some of the remaining areas,

and the film is released for exhibition on a commercial basis at least ninety days before the end of such previous year, the entire cost of acquisition of the film shall be allowed as a deduction in computing the profits and gains of such previous year.

(3) Where a feature film is acquired by the film distributor in any previous year and in such previous year the film distributor—

(*a*) himself exhibits the film on a commercial basis in all or some of the areas; or

(*b*) sells the rights of exhibition of the film in

respect of some of the areas; or

(*c*) himself exhibits the film on a commercial basis in certain areas and sells the rights of exhibition of the film in respect of all or some of the remaining areas,

and the film is not released for exhibition on a commercial basis at least ninety days before the end of such previous year, the cost of acquisition of the film in so far as it does not exceed the amount realised by the film distributor by exhibiting the film on a commercial basis or the amount for which the rights of exhibition have been sold or, as the case may be, the aggregate of the amounts realised by the film distributor by exhibiting the film and by the sale of the rights of exhibition, shall be allowed as a deduction in computing the profits and gains of such previous year; and the balance, if any, shall be carried forward to the next following previous year and allowed as a deduction in that year.

(4) Where during the previous year in which a feature film is acquired by the film distributor, he does not himself exhibit the film on a commercial basis or does not sell the rights of exhibition of the film, no deduction shall be allowed in respect of the cost of acquisition of the film in computing the profits and gains of such previous year; and the entire cost of acquisition shall be carried forward to the next following previous year and allowed as a deduction in that year.

(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 distributor,—

(*i*) has himself exhibited the feature film on a commercial basis; or

(*ii*) has sold the 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 realised by exhibiting the film, or the amount for which the rights of exhibition have been sold, or, as the case may be, the aggregate of such amounts, is credited in the books of account maintained by him in respect of the year in which the deduction is admissible ;

(b) in a case where the film distributor has transferred the rights of exhibition of the feature film on a minimum guarantee basis, the minimum amount guaranteed and the amount, if any, received or due in excess of the guaranteed amount, or where the film distributor follows cash system of accounting, the amount received towards the minimum guarantee and the amount, if any, received in excess of the guaranteed amount, are credited in the books of account maintained by him in respect of the year in which the deduction is admissible.

(6) For the purposes of this rule,—

(*i*) the sale of the rights of exhibition of a feature film includes the lease of such rights or their transfer on a minimum guarantee basis ;

(*ii*) the rights of exhibition of a feature film shall be deemed to have been sold only on the date when the positive prints of the film are delivered by the film distributor to the purchaser of such rights ;

(*iii*) distributor shall include a sub-distributor."

13. Rule 9B of the Rules has been framed under Section 295 of the Act by the Central Board of Direct Taxes (hereafter 'CBDT') and provides for the deduction in respect of expenditure incurred on acquisition of distribution rights of feature films. Rule 9B(1) of the Rules provides that deduction in respect of cost of acquisition of a feature film shall be allowed in accordance with sub-rule (2) to sub-rule (4) of Rule 9B of the Rules. A plain reading of the explanation to Rule 9B(1) of the Rules indicates that where the rights of exhibition have been acquired on a minimum guarantee basis, the minimum guarantee amount, not being the expenditure incurred by the distributor for preparation of the positive prints of the film and the expenditure incurred by him in connection with the advertisement of the film, would be taken as a cost of acquisition for the purposes of Rule 9B of

the Rules. Thus, it has been expressly indicated that the cost of acquisition for the purposes of Rule 9B would not include any publicity expenditure in connection with films or any expenditure incurred for preparation of the positive prints of films. Indisputably, in view of the plain language of Rule 9B, the expenditure incurred on preparation of positive prints of a film cannot be carried forward for amortization in terms of Rule 9B of the Rules as cost of acquisition of distribution rights of that film.

14. In terms of sub-rule (3) of Rule 9B of the Rules, if a film is not released for exhibition on a commercial basis at least 180 days (now amended to 90 days w.e.f. 1st April, 1999) before the end of the relevant previous year, the cost of acquisition of the distribution rights of that film insofar as it does not exceed the amount realized by the film distributor by exhibiting the film on a commercial basis, would be allowed as a deduction in computing the profits and gains for the relevant previous year. In the facts of the present case, the four films, namely, *'Farishtey', 'Saugandh', 'Patthar ke Phool' and 'Patthar ke Insaan'* had not completed a commercial run of 180 days during the preceding financial year, i.e., financial year 1990-91 relevant to the AY 1991-92. Therefore, the Assessee was entitled to a deduction to the extent that the cost of acquisition of the

films did not exceed the amount realized by the Assessee from exhibiting the film on a commercial basis and/or sale of rights of exhibition in respect of some of the areas.

15. The principal issue that needs to be addressed is whether the expression "*amount realized by the film distributor by exhibiting the film on a commercial basis*" would mean the gross realizations less the cost of preparation of positive prints of the films or would it mean the amount realized by the Assessee without considering any other deduction.

16. In our view, the plain language of Rule 9B(3) of the Rules is unambiguous and the expression "amount realized" must be given its plain meaning; that is, the amount realized by the Assessee without accounting for any expenditure that is incurred by the Assessee in its business. The Profit & Loss Account of the Assessee for the financial year 1990-91 clearly indicates that the Assessee had debited the expenditure incurred on publicity of the films including the four films in question that had not completed a commercial run of 180 days prior to the end of the financial year, to the Profit and Loss Account. Thus, whilst the Assessee had charged a part of the expenses relating to the four films in question directly to its Profit & Loss Account, it had sought to treat the minimum guarantee

payable and the cost of prints separately by debiting the amounts in separate Trading Accounts drawn up for each film. Essentially, the Assessee has sought to club the two expenses, that is, the cost of acquisition of distribution rights of films and the cost of prints for the purposes of charging the same against realizations from those films and for carrying forward the excess to the next year for the purposes of Rule 9B of the Rules. In other words, whilst the Assessee excluded the expenditure incurred on publicity of the films for the purposes of calculating the amount to be set off against realizations of the said film and directly debited the same to its Profit & Loss Account, it sought to treat the cost of preparing positive prints as part of the cost of acquisition of distribution rights of films for the purpose of Rule 9B of the Rules. However, this is precisely what is not permissible in terms of the explanation to Rule 9B(1) of the Rules.

17. The Assessee has contended that the revenue expenses pertaining to the cost of films and publicity/advertisement charges must be deducted from the gross realizations in the year in which they were incurred for determining the extent of realizations available for amortization of MG Royalty. It has been further contended that if the same is not done, then in

every case where MG Royalty exceeds the collection, it would swallow up the entire realization and consequently the cost of prints and publicity expenses would never be allowed and would become "dead expenses". This, according to the Assessee, results in the scheme of computation of business profits under Section 28, 29 and 37(1) becoming "inert, lifeless and redundant". It is contended that Rule 9B of the Rules must be read in a manner so as to avoid such "manifest absurdity". In our view, the aforesaid contentions are wholly bereft of any merit. Rule 9B of the Rules only provides for the method of computing the deduction available in respect of the expenditure on acquisition of distribution rights of feature films. In terms of sub-rule (1) of Rule 9B of the Rules, the cost of acquisition of a film as determined in terms of explanation to sub-rule (1) of Rule 9B is allowed as a deduction from profits and gains of business in accordance with sub-rule (2) to sub-rule (4) of Rule 9B of the Rules, In terms of explanation to sub-rule (1) of Rule 9B, in cases where the rights for exhibition of the films are acquired on a minimum guarantee basis, the minimum guarantee amount excluding the expenditure incurred on preparation of positive prints and expenditure incurred in connection with the advertisement of the films, is considered to be the cost of acquisition of

distribution rights of films. In cases where the feature film has not completed a commercial run of hundred and eighty days (ninety days with effect from 1st April, 1999) before the end of the previous year, the deduction on account of cost of acquisition of the distribution rights of the feature film is restricted to the realization from exhibition of the film on a commercial basis and/or partial sale of the said rights in respect of sum of the arrears. Rule 9B of the Rules does not address the sequence in which deductions are to be allowed. The amount permissible as a deduction in terms of Rule 9B would be *pari passu* with any other deduction permissible under Section 37(1) of the Act. It must be understood that the profits and gains of business or profession are computed in accordance with the machinery provisions placed in part D of Chapter IV of the Act, i.e., Sections 28 to 44 DB of the Act. Broadly speaking, under the said computation provisions, income is determined by deducting allowable expenditure from the gross profits and gains of business. In the aforesaid scheme, the cost of acquisition of feature films computed in accordance with Rule 9B of the Rules would also be one such deduction and would be allowed in the same manner as other expenditure incurred by the Assessee. The apprehension that other expenditure incurred by the Assessee would be

rendered 'dead expenses' is unjustified. If the deductions as allowable exceed the gross income, the Assessee would return loss which would be permitted to be set off and/or carried forward in accordance with the provisions of the Act. It is also relevant to bear in mind that whether an Assessee incurs a loss or makes a profit would be dependent on the results of business carried out by the Assessee during the entire year. Thus, in the cases where the minimum guarantee payable for acquiring the distribution rights in respect of films that have not completed a commercial run of 180 days prior to the end of the financial year exceeds the realizations from the commercial exhibition of the film in that year, the Assessee would account for a loss in respect of that film in that year, *albeit* to the extent of other revenue expenditure incurred for that film; this is so because the Assessee is unable to recover even the cost of acquisition of rights of that film. However, the question whether the Assessee returns a loss for the relevant assessment year would depend on the profits or gains made by the Assessee in respect of his business as a whole, which would include not only the profits and gains from films that have not completed a commercial run for a period of 180 days but also the profits or gains made by the Assessee in respect of other films. In the present case, the separate Trading Accounts

drawn up by the Assessee in respect of four films for the financial year ended 31st March, 1991 in question indicate a loss which is sought to be carried forward under Rule 9B of the Rules but the Assessee has in fact shown a profit of Rs.76,751.99/- in its Profit & Loss Account for the year ended 31st March, 1991. This includes the expenditure incurred by the Assessee for the publicity and advertisement of the four films in question. If the Assessee had also charged the expenditure incurred on the cost of positive prints in respect of the four films in question to the Profit and Loss Account, the Assessee's Profit & Loss Account for the year would have reflected a loss of Rs.40,21,039.01/- (cost of prints in respect of the four films amounting to Rs.40,97,791/- less the profit of Rs.76,751.99/- disclosed by the Assessee in its Profit & Loss Account). The question whether the expenditure incurred by the Assessee is absorbed in a particular year would depend on the income generated by the Assessee in that year. However, it was incorrect on the part of the Assessee to include the cost of prints along with the MG Royalty amount for the purposes of determining the amount to be carried forward under Rule 9B of the Rules.

18. The decision of the Bombay High Court in ***Prakash Pictures*** (*supra*) does not assist the Assessee in any manner. In that case, the Assessee had

acquired distribution rights in respect of a film named *"Charas"* on payment of Rs.13.7 lacs being the minimum guarantee payment for acquiring the distribution rights. In terms of the agreement between the Assessee and the producer of the film *"Charas"*, the Assessee was entitled to recover the minimum guarantee payment and receive commission of 20% on further collections up to Rs.8.50 lacs and 50% for further collections exceeding Rs.8.50 lacs. The film was released on 28th May, 1976. Thereafter, on 28th March, 1978 the agreement entered into by the Assessee (distributor) and the producer (Sagar Enterprises) was modified and the Assessee paid a sum of Rs.4.25 lacs to Sagar Enterprises for acquiring the rights of Sagar Enterprises in the overflow profits of the unexpired period of the contract. This amount of Rs.4.25 lacs was claimed by the Assessee as a deduction out of the total collection shown in the Profit & Loss Account for the year ended 30th June, 1978. The Income Tax Officer disallowed the deduction on the ground that Rule 9B of the Rules allowed deduction only in respect of the amount paid to acquire distribution rights and, in this case, the amount was paid not to acquire distribution rights but to acquire the rights of the producer in respect of overflow of profits. In appellate proceedings, CIT(A) held that the payment of Rs.4.25

lacs was by way of additional cost and, therefore, allowable as deduction under Rule 9B of the Rules. The Tribunal also held that the amount of Rs.4.25 lacs was paid for acquiring full rights of exhibition of the film and, therefore, the amount paid was admissible as a deduction under Rule 9B of the Rules. On a reference, the Division Bench of the Bombay High Court held that Rule 9B was applicable to the modified contract dated 20th March, 1978. However, the Court also held that the Assessee could not claim the entire deduction of Rs.4.25 lacs under Rule 9B of the Rules as the deduction was admissible only where the receipts were credited in the Profit & Loss Account and if there were no receipts credited, no amount could be amortized under Rule 9B, which the Court observed was a special code for computing the deduction available to an Assessee. In that case, it was estimated that the Assessee had credited a sum of Rs.1,49,783/- for the period 1st February, 1978 to 30th June, 1978 and 80% of that amount was taken as the proportionate cost of acquisition which was allowed as a deduction. It is seen that even in this case, the amount to be amortized was linked to the receipts credited to the Profit & Loss Account. However, the controversy involved in that case was materially different from the one involved in the present appeals.

19. In ***Joseph Valakuzhy*** *(supra)*, the Supreme Court considered the nature of the allowance permitted to be carried forward under Rule 9A of the Rules. The Supreme Court held that the carry forward of the unamortized cost of acquisition was not in the nature of the business loss under Section 80 of the Act. It is not disputed that the part of cost of acquisition of the film, which is allowed to be carried forward under Rule 9B of the Rules, is not in the nature of carry forward of a business loss. The said amount represents the amount which is not allowed as a deduction in the current year and, therefore, obviously, does not form a part of the profit or loss of that year. Clearly, the decision in ***Joseph Valakuzhy*** *(supra)* has no bearing on the issue at hand.

20. It is next necessary to consider the Assessee's contention that it had consistently followed the accounting practice of calculating the amount to be carried forward under Rule 9B of the Rules. The same was not objected to by the Assessing Officer in the past and, therefore, applying the rule of consistency, a departure from the past practice was not warranted. In our view, the aforesaid contention also cannot be accepted in cases where the mandate of law is clear. The principle of consistency is a principle of equity and would not override the clear provisions of law. It is well accepted that

each assessment year is separate and the fact that a particular accounting treatment followed by the Assessee under the preceding year was not objected to, would not fetter the Assessing Officer from correcting the mistake in a subsequent year as the principles of *res judicata* are not applicable. In ***Radhasoami Satsang*** (*supra*) the Supreme Court held that *"where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year"*. As is apparent from the said decision, the rule of consistency has limited application – where a fundamental aspect permeates through several assessment years; the said aspect has been found as a fact one way or the other; and the parties have not challenged the said finding and allowed the position to sustain over the years. Clearly, the said principle will have no application where the position canvassed militates against an express provision of law.

21. This Court in ***Krishak Bharati Cooperative Ltd. v. Deputy Commissioner of Income Tax*****: (2013) 350 ITR 24 (Del)** had observed as under:-

> "20. This court notices that there cannot be a wide application of the rule of consistency. In Radhasaomi itself, the Supreme Court acknowledged that there is no res judicata, as regards assessment orders, and assessments for one year may not bind the officer for the next year. This is consistent with the view of the Supreme Court that "there is no such thing as res judicata in Income-tax matters" (Raja Bahadur Visheshwara Singh v. CIT [1961] 41 ITR 685 (SC) ; AIR 1961 SC 1062). Similarly, erroneous or mistaken views cannot fetter the authorities into repeating them, by application of a rule such as estoppel, for the reason that being an equitable principle, it has to yield to the mandate of law. A deeper reflection would show that blind adherence to the rule of consistency would lead to anomalous results, for the reason that it would engender the unequal application of laws, and direct the tax authorities to adopt varied interpretations, to suit individual assessees, subjective to their convenience—a result at once debilitating and destructive of the rule of law. A previous Division Bench of this court, in Rohitasava Chand v. CIT [2008] 306 ITR 242 (Delhi) had held that the rule of consistency cannot be of inflexible application."

22. As explained earlier, the language of Rule 9B is unambiguous and the Assessee cannot be permitted to claim a carry forward of the cost of distribution rights, which is in variance with the computation as provided in Rule 9B of the Rules.

23. In view of the above, the question of law framed is answered in the negative, that is, in favour of the Revenue and against the Assessee.

Revenue's Appeals - ITA Nos. 260/2002 & 537/2004

24. The controversy involved in these appeals relates to the deletion of disallowance made by the AO under Section 40A(3) of the Act. For the AY 1992-93, the AO disallowed a sum of Rs.8,14,175/- as the aggregate of the cash payments made in excess of Rs.10,000/-. Similarly, for AY 1993-94 the AO disallowed a sum of Rs.15,88,243/- under Section 40A(3) of the Act. The Assessee contended that the said payments had been made in cash to the film producers in terms of the agreements entered into with them. It was also contended that the exigencies of business required the Assessee to make such payments to producers in Bombay. The Assessee explained that its office was located at Delhi and it carried on its business in Delhi and the payments made in cash were made to producers in Bombay. Further, in the line of the Assessee's business, the producers expected the payments to be made in cash immediately on concluding the agreements. It was further suggested that the producers needed cash payments as they were shooting films in different locations and such payments were also made to meet their urgent requirements. It was submitted that although the Assessee has a bank account in Bombay, the same was inoperative.

25. Before the AO, the Assessee, *inter alia*, contended that such cash payments were not on account of expenditure incurred but were only advance payments against minimum guarantee agreed to by the Assessee. Such payments were recouped by the Assessee from the collections made in respect of the films. According to the Assessee, such payments were not covered under the provisions of Section 40A(3) of the Act. The AO did not accept the Assessee's contentions and made the additions as mentioned above. In appeals preferred by the Assessee, the CIT(A) accepted the Assessee's contention that the payments were not made for purchase of prints but were advanced against the MG Royalty payable for acquiring the limited right of exhibition of film in a particular territory. The CIT(A) held that *"such payments were held in the nature of royalty for the exploitation of the film i.e. in the nature of price paid for exploitation of a capital asset and therefore the payments would not come under the purview of Section 40A(3)"*. The CIT(A) further found that there was no doubt as to the identity of the persons receiving the payment and also as to the genuineness of the transactions.

26. The Revenue did not accept the CIT(A)'s decision and preferred appeals before the ITAT. The ITAT did not accept the view that the

payments in question were outside the scope of Section 40A(3) of the Act; however, the ITAT accepted the contention that such payments had been made on account of exigencies of business. The ITAT further observed that the rigours of Section 40A(3) of the Act had been relaxed by virtue of Rule 6DD of the Rules as well as CBDT Circular No. 220 dated 31st May, 1977 and the instances indicated in the circular were not exhaustive.

27. The learned counsel appearing for the Revenue submitted that although the identity of the recipients of cash payments as well as genuineness of the transactions was not disputed, the Assessee had failed to establish exceptional or unavoidable circumstances, which compelled the Assessee to make such payments in cash. He submitted that in the absence of establishing extraordinary circumstances, the payments made in cash were liable to be added to the income of the Assessee by virtue of Section 40A(3) of the Act.

28. Countering the submissions made on behalf of the Revenue, Ms Kapila submitted that not only the genuineness of the transactions had been established but the ITAT had also accepted, as a fact, that such payments were necessary in the course of conducting business. She also contended that it was necessary to look at the circumstances under which payments

had been made and by keeping in view of the commercial constraints and the practicality of the circumstances which had to be dealt with by the Assessee as a businessman. She emphasised that the Assessee had made payments in cash keeping in mind the commercial necessity and the practicality of the business.

29. Before considering the rival contentions, it is necessary to observe (i) that there is no dispute as to the identity of the producers to whom cash payments have been made by the Assessee; and (ii) that the payments were made *bonafide* and in consideration of a genuine transactions as advances either for processing the positives of the film or acquiring the rights of exhibition of feature films. Thus, indisputably, such payments were allowable as deduction being revenue expenses incurred wholly and exclusively for business. The only issue to be considered is whether the same have to be disallowed by virtue of Section 40A(3) of the Act because the same were made in cash.

30. Section 40A(3) of the Act as in force during the AYs 1992-93 and 1993-94 reads as under:-

> "(3) Where the assessee incurs any expenditure in respect of which payment is made, after such date (not being later than the 31st day of March, 1969) as may be specified in this behalf

by the Central Government by notification in the Official Gazette, in a sum exceeding ten thousand rupees otherwise than by a crossed cheque drawn on a bank or by a crossed bank draft, such expenditure shall not be allowed as a deduction:

Provided that where an allowance has been made in the assessment for any year not being an assessment year commencing prior to the 1st day of April, 1969, in respect of any liability incurred by the assessee for any expenditure and subsequently during any previous year the assessee makes any payment in respect thereof in a sum exceeding ten thousand rupees otherwise than by a crossed cheque drawn on a bank or by a crossed bank draft, the allowance originally made shall be deemed to have been wrongly made and the Assessing Officer may recompute the total income of the assessee for the previous year in which such liability was incurred and make the necessary amendment, and the provisions of section 154 shall, so far as may be, apply thereto, the period of four years specified in sub-section (7) of that section being reckoned from the end of the assessment year next following the previous year in which the payment was so made:

Provided further that no disallowance under this sub-section shall be made where any payment in a sum exceeding ten thousand rupees is made otherwise than by a crossed cheque drawn on a bank or by a crossed bank draft, in such cases and under such circumstances as may be prescribed, having regard to the nature and extent of banking facilities available, considerations of business expediency and other relevant factors."

31. Rule 6DD of the Rules expressly provides that no disallowance under Sub-section 3 of Section 40A shall be made, *inter alia*, in circumstances specified thereunder. Clause (j) of Rule 6DD of the Rules (as applicable during the relevant assessment years) expressly provided that

no disallowance under Section 40A(3) of the Act would be made in cases where the Assessee furnishes evidence to the satisfaction of the Income-tax Officer as to the genuineness of the payment and the identity of the payee. And, the Assessee further satisfies the Income-tax Officer that payment could not be made by crossed cheque drawn on a bank or by a crossed bank draft *"(a) due to exceptional or unavoidable circumstances; or (b) because payments in the manner aforesaid was not practicable, or would have cause genuine difficulty to the payee, having regard to the nature of transaction and the necessity for expeditious settlement thereof."*

32. Apparently, several representations were received by the CBDT regarding difficulties that were being faced by tax payers due to the lack of uniformity in the interpretation of the aforesaid Rule. In the circumstances, the CBDT issued a circular – being Circular No. 220 dated 31st May, 1977, *inter alia*, providing as under:-

> "4. All the circumstances in which the conditions laid down in rule would be applicable cannot be spelt out. However, some of them which would seem to meet the requirements of the said rule are ;
>
> (i) The purchaser is new to the seller ; or
>
> (ii) The transactions are made at a place where either the purchaser or the seller does not have a bank account; or

(iii) The transactions and payments are made on a bank holiday ; or (iv) The seller is refusing to accept the payment by way of crossed cheque/draft and the purchaser's business interest would suffer due to non-availability of goods otherwise than from this particular seller ; or

(v) The seller, acting as a commission agent, is required to pay cash in turn to persons from whom he has purchased the goods; or

(vi) Specific discount is given by the seller for payment to be made by way of cash."

33. CBDT further clarified that *"the above circumstances are not exhaustive but illustrative. There could be cases other than those falling within the above categories which would also meet the requirements of rule"*

34. The ITAT had considered the above mentioned CBDT Circular and had rightly concluded that the circumstances as spelt out in CBDT Circular No. 220 (*supra*) were not exhaustive but were merely illustrative of situations where business exigencies required that the payments be made in cash. The ITAT also referred to the decision of the Gujarat High Court in ***Hasanand Pinjomal v. CIT***: **(1978) 112 ITR 134 (Guj.)** wherein the Court had observed that the practicability would have to be judged from the angle of a businessmen and not the Revenue.

35. In the present circumstances neither the genuineness of the payment nor the identity of the payee is disputed. The only controversy that needs to be addressed is whether the ITAT's decision that such payments had been made by the Assessee on account of business exigencies is perverse.

36. In the present case, the AO does not dispute that the Assessee carried on its business in Delhi and its officers had to travel to Bombay to negotiate the purchase of distribution rights. The Assessee had also contended that such payments were made as the producers required the payments urgently at various sites where films being produced by them were being shot and it was expected that such payments be made in cash in the normal course of conducting business.

37. In our view, the question whether the Assessee's business exigencies required payments to be made in cash, is a question of fact. The ITAT has returned a finding in favour of the Assessee and it is not possible to conclude that such finding is without any basis or any material on record. The ITAT's decision, thus, cannot be held to be perverse. Accordingly, the question of law is answered in favour of the Assessee and against the Revenue.

38. In view of the above, all appeals, both Revenue's as well as Assessee's are dismissed. The parties are left to bear their own costs.

VIBHU BAKHRU, J

S. MURALIDHAR, J

DECEMBER 08, 2015
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