IN THE INCOME TAX APPELLATE TRIBUNAL

"D" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA no.5271/Mum./2013
(Assessment Year : 2010–11)

Red Chillies Entertainment Pvt. Ltd.
Plot no.612, Junction of Ram Krishna
Mission Road & 15th Cross Road ……. Appellant
Santacruz (W), Mumbai 400 054
PAN – AACCR2518P

v/s

Asstt. Commissioner of Income Tax
Central Circle–29, Aayakar Bhawan ……. Respondent
101, M.K. Road, Mumbai 400 020

ITA no.1577/Mum./2013
(Assessment Year : 2009–10)

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Asstt. Commissioner of Income Tax
Central Circle–29, Aayakar Bhawan ……. Respondent
101, M.K. Road, Mumbai 400 020

Assessee by : Shri Hiru Rai
Revenue by : Shri B.S. Bist

Date of Hearing – 02.05.2016	Date of Order – 31.05.2016

O R D E R

PER SAKTIJIT DEY, J.M.

Instant appeals by the assessee are directed against separate orders passed by the learned Commissioner (Appeals)–40, Mumbai, for the assessment year 2009–10 and 2010–11.

ITA no.1577/Mum./2013 – A.Y. 2009–10

2. In grounds no.1 and 2, the assessee has challenged disallowance of certification expenses of ₹ 6,59,613 by treating it as capital in nature.

3. Brief facts are, the assessee a company engaged in production of feature films and Television programs. For the assessment year under consideration, assessee filed its return of income on 30th September 2009, declaring loss of ₹ 5,84,57,272. During the assessment proceedings, the Assessing Officer noticed that assessee has debited an amount of ₹ 6,59,613 to the Profit & Loss account on account of certification expenses. He, therefore, called upon the assessee to justify the claim. In response to the query raised, it was submitted by the assessee that ISO 27001 and ISO 9001:2008 certification are valid for a period of three years but they are neither intangible fixed asset nor transferrable. Hence, the expenditure incurred for obtaining such

certificate is revenue in nature as the certificates can be withdrawn if the assessee does not adhere to the requirement of the certificates. The Assessing Officer, however, did not find merit in the submissions of the assessee. He observed, the fact that the assessee has made payment for certificate which is valid for three years, denotes that it is for enduring benefit hence, it is capital in nature. Accordingly, he disallowing claim of deduction, he treated it as part of the assessee's capital asset and allowed depreciation @ 25% by treating it as intangible asset. As a result, the excess claim of ₹ 4,94,710, was added back to the income of the assessee.

4. Though the assessee challenged the disallowance before the learned Commissioner (Appeals), he also confirmed the addition. While doing so, the learned Commissioner (Appeals) further observed that as the certificates were issued on 28th April 2009, the deduction cannot be claimed in the impugned assessment year.

5. Learned Authorised Representative submitted, merely because the certificate was issued for three years, it cannot be considered to be of enduring nature. Learned Authorised Representative submitted, since the certificate do not create any asset either tangible or intangible and there is no accretion to the capital asset of the assessee, the expenditure incurred cannot be considered to be capital

in nature. Contesting the allegation of the learned Commissioner (Appeals) that the expenditure does not pertain to the impugned assessment year, learned Authorised Representative submitted only because the certificate was issued on 28th April 2009, could not make the expenditure inadmissible because the expenditure was incurred during the relevant previous year. In support of his contention that the expenditure incurred on certification is revenue in nature, the assessee relied upon the following decisions.

i) *CIT v/s Infosys Technologies Ltd. [2012 349 ITR 582 (Kar.);*

ii) *CIT v/s Infosys Technologies Ltd. [2012] 349 ITR 606 (Kar.);*

iii) *CIT v/s Upper India Steel Mfg. & Engg. Co. Ltd. [2014] 227 Taxman 173 (P&H);*

iv) *CIT v/s Empire Jute Co. Ltd. [1980] 124 ITR 001 (SC);*

6. Learned Departmental Representative relied upon the decisions of the learned Commissioner (Appeals) and the Assessing Officer.

7. We have considered the submissions of the parties and perused the material available on record in the light of the decisions relied upon. It is evident from the order of the Departmental Authorities that they have considered the expenditure to be capital in nature because the certificate is valid for three years. However, in our view, that cannot be a ground to treat the expenditure as capital in nature unless

it creates an asset of enduring nature. Neither the Assessing Officer nor the learned Commissioner (Appeals) has established on record that by obtaining the certificate, the assessee created any asset of enduring nature. On the other hand, the decisions relied upon by the learned Authorised Representative as referred to above have held that sum paid by the assessee for obtaining ISO certificates are revenue expenditure. Therefore, following the rulings of Hon'ble Karnataka High Court as referred to above, we allow assessee's claim of deduction. As far as the allegation of learned Commissioner (Appeals) that the expenditure does not pertained to the impugned assessment year, we are not convinced with the same. As rightly pointed out by the learned Authorised Representative, there is no dispute that the expenditure was incurred during the relevant previous year. That being the case, assessee is eligible to claim the deduction. Grounds no.1 and 2, are allowed.

8. In ground no.3, assessee has challenged the disallowance of ₹ 52,58,118, on account of cost of production of feature film.

9. Brief facts are, during the assessment proceedings, the Assessing Officer verifying the information / details available on record, found that the assessee has debited an amount of ₹ 52,58,118 towards expenditure on gift. On a query raised by the Assessing Officer it was

explained by the assessee that it had given gift of certain items to its business associates who had worked for the film *"Billu Barber"*. Furnishing the details of gift, it was submitted by the assessee that they are in the nature of perquisites to the concerned persons towards their contribution for the production of the film. Assessee also submitted, it has paid fringe benefit tax on such gift items, hence, it is allowable as expenditure. The Assessing Officer, however, did not find merit in the submissions of the assessee. He observed that the major item of gift amounting to ₹ 45 lakh was given to two actors for participating in some song sequences in the movie. He observed, the assessee company being the producer of the movie, the transaction between the assessee and the concerned persons cannot be considered as in the nature of gift as assessee being a company there is no love and affection between the assessee and the concerned persons to term the transaction as *"gift"*. He was of the view that the so called gift is nothing but revenue paid to the concerned persons towards their services rendered for the film. Therefore, assessee has to deduct tax at source on such professional fees paid to them in terms of section 194J. The Assessing Officer observed, as the assessee has failed to deduct tax on the value of the gift items, the deduction claimed is to be disallowed under section 40(a)(ia) of the Act. Accordingly, he added back the amount of ₹ 52,58,118, to the income

of the assessee. Being aggrieved of such disallowance, assessee challenged the same in an appeal preferred before the learned Commissioner (Appeals) who also confirmed the addition by holding that gift is nothing but professional fees paid to the concerned person, hence, attracts the provisions of section 194J.

10. Learned Authorised Representative reiterating the stand taken before the the Departmental Authorities submitted, instead of making payment in money the assessee has given gifts to the concerned persons towards their services rendered by them in making the films. Drawing a reference to the provisions of section 194J, learned Authorised Representative submitted, it is applicable in case of payment of *"any sum"* towards fees for professional services. He submitted, the term *"any sum"*, used in section 194J would denote payment in money terms and not in kind. He, therefore, submitted, provisions of section 194J would not be applicable to the facts of the present case as the assessee has not paid any money. In support of such contention, he relied upon the following decisions:–

i) *H.H. Sri Rama Verma v/s CIT [1990] 187 ITR 308 (SC);*

ii) *CIT v/s Hindustan Lever Ltd. [2014] 361 ITR 001 (Kar.);*

iii) *CIT v/s Chief Accounts Officer, Bruhat Bangalore Mahagar Palike, [2015] ITA no.94 of 2015 and 466 of 2015, dated 20th September 2015 (Kar.).*

11. Without prejudice to the aforesaid contention learned Authorised Representative, submitted, as per second proviso to section 40(a)(ia), no disallowance can be made in case the payee in terms of proviso to section 201(1) has declared such payment as his income and paid tax. Learned Authorised Representative submitted, in the present case, the payees have declared such items of gift as their income in the return of income filed by them, therefore, in terms of second proviso to section 40(a)(ia), which is retrospective in operation no disallowance can be made. For such proposition, he relied upon the following decisions:–

i) CIT v/s Ansal Land Mark Township P. Ltd. [2015] 377 ITR 635 (Del.);

ii) DCIT v/s UPS Jetair Express Pvt. Ltd. [2015 56 Taxmann.com 387 (Mum. Trib.);

iii) Rajiv Kumar Agarwal v/s ACIT, [2014] 165 TTJ 228 (Agra);

iv) DCIT v/s Ananda Marakala, [2014] 150 ITD 323;

v) Brijgopal Madhusudan Bhattad v/s ITO, [2015] 155 ITD 90 (Nag. Trib.); and

vi) Modi Builders v/s JCIT, [2015] 69 SOT 758 (Pune Trib.).

12. The learned Departmental Representative relied upon the reasoning of the learned Commissioner (Appeals) and the Assessing Officer.

13. We have considered the submissions of the parties and perused the material available on record and also gone through the decision relied upon. As far as the factual aspect is concerned, there is no dispute that instead of making payment in cash or in money terms to some of the actors / actresses, who acted in the movie *"Billu Barber"*, the assessee has paid in kind which has been termed as *"Gift"*, Thus, there is no dispute that this so called gift is actually professional fees paid to the concerned persons for acting in the movie. However, the issue before us is whether provisions of section 194J is applicable to such payments made in kind. On a reference to the provisions contained in section 194J, it is evident that any person not being a individual or HUF responsible for paying to a resident any sum by way of fees for professional services or technical services, etc., is required to deduct tax at source. The expression *"any sum"* used in section 194J, whether should mean payment made in money terms or also in kind requires to be examined. It is the contention of the assessee that *"any sum"* as referred to in section 194J, would only relate to payment made in money term. It is observed, in case of Shri H.H. Sri Rama Verma (supra), the Hon'ble Supreme Court while referring to the expression *"any sum paid"* used in section 80G, held that *"any sum"* referred to in the provision would only mean cash amount of money. The Hon'ble Karnataka High Court in CIT v/s Hindustan Lever Ltd.

(supra), referring to the provisions of section 194B of the Act, held, where the payments are in kind there is no requirement of deduction of tax at source. Further, the Hon'ble Karnataka High Court in CIT v/s Chief Accounts Officer, Bruhat Bangalore Mahanagar Palika, ITA no.94 and 446 of 2015, held as under:–

> *"12. The concept of tax deduction at source (TDS) and depositing the same with the Revenue is where payment is made by cash, cheque, demand draft or any other similar mode. When such payment in terms of money is made, the deduction is to be made by the person responsible to pay, and is to deposit the same with the Income Tax Department, which would be adjusted and credited to the account of the person on whose behalf such amount is paid to the Income Tax Department, and in such a case, such person, who would then be an assessee before the Department, would be entitled to adjustment of the amount so deducted as TDS on behalf of the said assessee. When no payment is made by BBMP to the land owner in terms of money, such deduction is neither possible nor is conceived under section 194LA."*

14. Thus, applying the principles laid down in the decisions referred to above, we are of the view that since the payment made by the assessee is in kind, the provisions of section 194J are not applicable. Accordingly, allowing assessee's claim, we delete the addition made by the Assessing Officer. Ground no.3, is allowed.

15. In ground no.4, assessee has challenged the disallowance of ₹ 2,39,39,631, out of advertisement and publicity expenses.

16. Brief facts are, on verifying the details submitted by the assessee, the Assessing Officer found that assessee has debited an

amount of ₹ 2,62,77,421, on account of advertisement and publicity expenses for the movie *"Billu Barber"*. Referring to rule 9A of the Income Tax rules, 1962, the Assessing Officer observed that expenditure incurred in connection with advertisement of film after its certification by the Board of Film Censors is not allowable as expenditure. On verifying the details, he noticed that the Board of Film Censors has certified the film for release on 30th January 2009. He further noticed that out of the total advertisement expenditure of ₹ 2,62,77,421 an amount of ₹ 2,39,39,631, was incurred by the assessee after the certification of film by the Board of Film Censors on 30th January 2009. He, therefore, in terms of rule 9A, disallowing the expenditure claimed added back to the income of the assessee. Being aggrieved with such addition, the assessee challenged the same in appeal preferred before the learned Commissioner (Appeals).

17. The learned Commissioner (Appeals) also confirmed the addition rejecting the claim of the assessee.

18. The learned Authorised Representative reiterating the stand taken before the Departmental Authorities submitted, rule 9A is restricted to computation of expenditure of cost of production of feature film and has no application in respect of expenditure incurred

with respect to business or distribution of film by the assessee in the normal course of his business.

19. Learned Authorised Representative submitted, even if the expenditure incurred towards cost of production may not be allowable under rule 9A, but certainly it has to be allowed under section 37. He submitted, though the expenditure incurred towards advertisement is part of cost of production but definitely it is for the purpose of business, hence, is allowable as business expenditure under section 37 of the Act. In support of such contention, learned Authorised Representative relied upon the following decisions:–

i) DCIT v/s Dharma Productions Pvt. Ltd. [2014] 62 SOT 177 (Mum. Trib.); and

ii) CIT v/s Prasad Productions Pvt. Ltd. [1989] 179 ITR 147 (Mad.)

20. Learned D.R. relied upon the observations of the learned Commissioner (Appeals) and the Assessing Officer.

21. We have considered the submissions of the parties and perused the material available on record. As is evident, the Assessing Officer has disallowed the expenditure incurred on advertisement by applying the provisions of rule 9A on the ground that the assessee has incurred such expenditure after certification of film by the Board of Film Censors. The learned Commissioner (Appeals) has also confirmed the

disallowance by agreeing with the conclusion drawn by the Assessing Officer. However, it is not disputed by the Department that the assessee has incurred the expenditure towards advertisement of the movie in the normal course of business. That being the case, even though it cannot be considered as part of cost of production in terms of rule 9A, but at the same time, it cannot be denied that the expenditure incurred was in connection with the production of the movie, hence, is business expenditure. It is observed, identical dispute came up for consideration before the Tribunal, Mumbai Bench, in Dharma Productions Pvt. Ltd. v/s DCIT. The co–ordinate bench following the decision of the Hon'ble Madras High Court in CIT v/s Prasad Productions Pvt. Ltd., [1989] 179 ITR 147 (Mad.) and the decision of the Tribunal, Mumbai Bench, in Mukta Arts Pvt. Ltd. v/s ACIT, [2015] 105 ITD 533 (Mum.), held that the advertisement expenditure incurred after certification by Board of Film Censors cannot be included as part of cost of production, hence, provisions of rule 9A, will not apply. It was held, the expenditure incurred in regular course of business has to be allowed under section 37. The ratio laid down by the co–ordinate bench of the Tribunal is squarely applicable to the facts of the present case. Therefore, expenditure incurred by the assessee being wholly and exclusively laid down for the purpose of assessee’s business is allowable as deduction under section 37 of the

Act. Accordingly, allowing assessee's claim of deduction, we delete the addition made by the Assessing Officer. Ground no.4, is allowed.

22. In Ground no.5, assessee has challenged the disallowance of 19,19,286, representing the cost of Television serials and film projects abandoned during the year.

23. In the course of assessment proceedings, the Assessing Officer noticed that the assessee has debited an amount of ₹ 19,19,286 on account of cost of abandoned project. In response to the query raised by the Assessing Officer to justify its claim, it was submitted by the assessee that it has worked on various concept for making television program and films and incurred expenditure. However, some of the concepts cannot be completed as they are found to be non–workable at various stages of development. It was submitted, these concepts are stock–in–trade of the assessee, hence, un–realisable stock which has no value has to be written–off as per the accounting principles. However, it was submitted, the assessee had incurred 7,85,806 as seven abandoned television serial projects which was claimed as revenue expenditure. Further, it was submitted by the assessee that the expenditure of ₹ 11,33,000 was incurred for the film project *"Robot"* and the amount was paid to Shri S. Sankar. It was submitted, the film was to be produced by the assessee under his direction but

the company decided not to pursue the project. Assessee submitted, out of the total money paid, Shri S. Sankar, did not return ₹ 11,33,000 which was claimed as revenue expenditure. Assessing Officer after considering the submissions of the assessee, did not find merit in the same. He observed, assessee has not brought anything on record to substantiate that the television and film projects were not completed. Accordingly, he disallowed deduction claimed of ₹ 19,19,386.

24. The learned Commissioner (Appeals) also confirmed the disallowance.

25. Learned Authorised Representative submitted, the very fact that the assessee abandoned the projects proves that such film and television projects weree not in the business interest of the assessee, therefore, the assessee took decision as a prudent businessman to abandon such projects. Hence, it allowable as deduction since it is out of commercial expediency. Learned Authorised Representative referring to the CBDT circular dated 6th October 2015 submitted, the Board has also clarified that cost of production of an abandoned feature film has to be treated as revenue expenditure under section 37 of the Act. In support of his contention the learned Authorised Representative also relied upon the decision of the Hon'ble Jurisdictional High Court in CIT v/s Venus Records and Tapes Pvt. Ltd.,

ITA no.310 of 2013, judgment dated 28th January 2015 and the decision of the Hon'ble Madras High Court in B. Nagi Reddy v/s CIT [1993], 199 ITR 451 (Mad.).

26. Learned Departmental Representative relied upon the order of the learned Commissioner (Appeals) and the Assessing Officer.

27. We have considered the submissions of the parties and perused the material available on record in the light of the decisions relied upon by the learned Authorised Representative. On a perusal of the orders of the Departmental Authorities, it is observed that the Department has not disputed the fact that the assessee has incurred the expenditure. It is also not disputed that the television and film projects have been abandoned. The expenditure has been disallowed only on the ground that the assessee has not been able to prove that by abandoning the projects, the assessee has benefited. In our view, the reasoning of the Departmental Authorities for disallowing the expenditure is not valid. The very fact that the assessee abandoned the projects goes to prove that the projects were not found to be viable or workable. Therefore, keeping in view the business interest, the assessee decided to abandon the projects. In fact, in the CBDT circular no.16 of 6th October 2015, the Board has clearly stated that cost incurred in abandoned projects should be allowed as revenue

expenditure under section 37 of the Act. In view of the aforesaid, we allow assessee's claim of deduction. Ground no.5, is allowed.

28. In ground no.6, assessee has challenged the disallowance of ₹ 33,91,821 under section 14A r/w rule 8D.

29. Brief facts are, during the assessment proceedings, the Assessing Officer after verifying the balance sheet for the impugned assessment year noticed that the assessee had made investment in shares amounting to ₹ 12,50,57,300, as on 31st March 2009, and opening balance was ₹ 1,51,57,300. He further noticed that assessee has claimed interest expenditure on loan amounting to ₹ 2,92,80,083. He, therefore, called upon the assessee to explain why disallowance under section 14A r/w rule 8D should not be made as the investment in shares would yield exempt income. In response to the query, it was submitted by the assessee that as no expenditure was incurred for earning tax free income, no disallowance under section 14A can be made. Th Assessing Officer, however, was not convinced with the explanation of the assessee and proceeded to disallow an amount of ₹ 33,91,821 under section 14A r/w rule 8D. The disallowance was also confirmed by the learned Commissioner (Appeals).

30. Learned Authorised Representative submitted, during the relevant previous year, assessee has not earned any exempt income, hence, no disallowance under section 14A r/w rule 8D can be made. Further, it was submitted by him, entire investment of ₹ 11 crore in the shares of Knight Riders Sports Pvt. Ltd., was out of interest free funds borrowed from Shri Shah Rukh Khan and no interest bearing borrowed funds were utilised by the assessee. Therefore, as there is no interest expenditure incurred by the assessee on account of investment in shares, no disallowance under section 14A can be made. For such proposition, learned Authorised Representative relied upon following decisions:–

i) CIT v/s Delite Enterprises, ITA no.110 of 2009, dated 26th February 2009;

ii) Cheminvest Ltd. v/s CIT, [215] 378 itr 33 (Del.);

iii) CIT v/s Winsome Textile Industries Ltd., [2009] 319 ITR 204 (P&H);

iv) CIT v/s Corrtech Energy P. Ltd., [2015] 372 ITR 97 (Guj.);

v) CIT v/s Holcim India Pvt. Ltd., [2014] 272 CTR 282 (Del.);

vi) CIT v/s Shivam Motors P. Ltd., [2014 272 CTR 277 (All.);

vii) CIT v/s Lakhani Marketing Incl., [2014] 272 CTR 265 (P&H).

31. Learned Departmental Representative on the other hand relied upon the decision of the learned Commissioner (Appeals) and the Assessing Officer.

32. We have considered the submissions of the parties and perused the material available on record in the light of the decisions relied upon. On a perusal of the assessment order, we do not find any observations by the Assessing Officer to the effect that during the relevant previous years, assessee had earned / claimed any exempt income. It is the assertion of the learned Authorised Representative before us that assessee has not earned any exempt income during the previous year relevant to the assessment year under dispute. As held by the Hon'ble Delhi High Court in Cheminvest (supra), unless during the relevant previous year, assessee earns any exempt income no disallowance under section 14A r/w rule 8D can be made. Therefore, applying the ratio laid down by the Hon'ble Delhi High Court as aforesaid, we hold that no disallowance under section 14A r/w rule 8D can be made in case assessee had not earned any exempt income during the relevant previous year. Therefore, we direct the Assessing Officer to verify this aspect and if it is found that the assessee has not earned any exempt income during the relevant previous year, no disallowance under section 14A can be made. In view of our aforesaid observation, there is no need to deal with the alternative contention of the assessee that the investment in shares since was made out of interest free funds available with the assessee, no disallowance under

section 14A can be made out of the interest expenditure. Thus ground no.6, is allowed for statistical purpose.

33. In the result, assessee's appeal for A.Y. 2009–10 is partly allowed.

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34. At the outset, learned Authorised Representative expressed his intention not to press ground no.3 due to smallness of the amount in dispute. Considering such submissions, we dismiss ground no.3, as *"not pressed"*.

35. In ground no.1, assessee has challenged disallowance of ₹ 69,88,164, representing the cost of abandoned projects.

36. After hearing both the parties, we find that this issue is similar the issue raised in ground no.5, by the assessee in its appeal being ITA no.1577/Mum./2013, for assessment year 2009–10, wherein, vide Para–26, we have allowed the ground raised by the assessee for the reasons stated therein. Consistent with the view taken by us, this ground being identical, the same is also allowed.

37. In ground no.2, assessee has challenged the disallowance of ₹ 23,34,528 under section 14A r/w rule 8D.

38. Learned Authorised Representative submitted, in the impugned assessment year also, the assessee has not earned any exempt income, hence, no disallowance u/s 14A r/w rule 8D can be made.

39. After hearing both the parties, we find that this issue is also similar to the issue raised by the assessee in ground no.6, raised by the assessee in the appeal being ITA no.1577/Mum./2013, for assessment year 2009–10, wherein, vide Para–31, we have allowed the ground raised by the assessee for the reasons stated therein. Consistent with the view taken by us, this ground being identical, the same is also allowed. The Assessing Officer is also directed to verify and not to make any disallowance under section 14A r/w rule 8D in case it is found that assessee has not earned any exempt income during the relevant previous year.

40. In the result, assessee's appeal for A.Y. 2010–11 is allowed.

41. To sum up, both the appeals of the assessee are allowed.

Order pronounced in the open Court on 31.05.2016

Sd/-	**Sd/-**
RAJESH KUMAR	**SAKTIJIT DEY**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 31.05.2016

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The CIT(A);

(4) The CIT, Mumbai City concerned;

(5) The DR, ITAT, Mumbai;

(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

(Dy./Asstt. Registrar)
ITAT, Mumbai