

आयकर अपीलीय अधिकरण "F" न्यायपीठ मुंबई में।

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

**BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.6272/Mum/2017

(निर्धारण वर्ष / Assessment Year: 2013-14)

Shri Vipul Amrutlal Shah, 101/102, A-Wing, Bharat Ark, Azad Nagar, Veera Desai Road, Andheri (W), Mumbai-400053	बनाम/ v.	ACIT-16(1) R. No. 467, Aayakar Bhavan, M.K Marg, Mumbai-400020
स्थायी लेखा सं./PAN: AECPS3110H		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Dr. K. Shivaram & Shri Rahul K. Hakani	
Revenue by:	Shri S.K. Poddar (CIT-DR)	

सुनवाई की तारीख /**Date of Hearing** : 03.04.2019

घोषणा की तारीख /**Date of Pronouncement** : 01.07.2019

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member:

This appeal, filed by assessee, being ITA No. 6272/Mum/2017, is directed against appellate order passed by learned Commissioner of Income Tax (Appeals)-4, Mumbai (hereinafter called "the CIT(A)"), for assessment year 2013-14 in appeal No.CIT(A)-4/IT-48/ACIT-16(1)/2016-17 dated 28.07.2017, the appellate proceedings had arisen before learned CIT(A) from an assessment order dated 14.03.2016 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income-tax Act, 1961 (hereinafter called "the Act") for AY 2013-14.

2. The grounds of appeal raised by assessee in memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called “the tribunal”) , read as under:-

“1. The learned CIT(A) erred in confirming order of A.O. disallowing Rs. 14,73,75,000/- paid to Mr. Akshay Kumar without affording proper opportunity of hearing as he relied upon various agreements not referred by A.O. in his order, without confronting the same to the Appellant and hence order of CIT(A) may be quashed.

2. Without prejudice to above, the learned CIT(A) erred in confirming order of A.O. disallowing Rs. 14,73,75,000/- paid to Mr. Akshay Kumar without appreciating that the expenditure of Rs. 14,73,75,000/- was not a prior period expenditure and the liability to pay Rs. 14,73,75,000/- had crystallized during A.Y. 2013-14 and genuineness and allowability of the same is not in doubt and same being expended wholly and exclusively for business, the deduction of Rs. 14,73,75,000/- ought to be allowed.

3. Without prejudice to above, the learned CIT(A) failed to appreciate that even if the impugned payment was a prior period item, the same is allowable in computing the income of the Appellant for the year under consideration since tax was deducted at source during the year under consideration.

3. Without prejudiced to above, the learned CIT(A) failed to appreciate that the liability to pay Rs. 14,73,75,000/- was a business loss and was allowable as such under section 28(i) /37(1) of the Act and Rule 9A of the Income tax Rules is not applicable. Therefore, the loss of Rs. 14,73,75,000/- may be allowed.

4. The Appellant craves leave to add to, amend or alter the above ground of appeal.”

3. The assessee is a writer, director, play actor and producer of film, television shows and plays. During the course of assessment proceedings conducted by AO u/s. 143(3) r.w.s. 143(2) of the 1961 Act, it was observed by AO that the assessee has claimed an expenditure of Rs. 14,73,75,000/- which was debited by assessee to P&L account as an artist remuneration for film “Action Replay”. The assessee was asked by AO to explain justification for this claim of deduction of expenses. The assessee submitted before the AO that even during the course of production of the film “Action Replay”, the assessee was asking the artist ‘Akshay Kumar’ (hereinafter called “AK”) for reducing agreed remuneration for said film owing to tight financial position vide letter dated 02.08.2010, wherein the assessee had requested said artist AK to complete the said film “Action Replay”

without seeking further consideration and also permit the release of the film on commission basis through PVR Pictures . The assessee explained before the AO that it was done by the assessee as there were no buyers of the films distribution rights on a minimum guaranteed basis . It was submitted by the assessee before the AO that vide letter dated 16.08.2010, the said artist AK agreed to complete the film and also permit the release of the film on commission basis through PVR Pictures Ltd.. The said AK also agreed to consider waiver in respect of his fees. The assessee explained that he made last payment to said AK on 08.02.2009 and the film was released on 05.11.2010 which did very poorly at the box office. The assessee explained that he was having a firm belief and clear impression to get waiver of balance artist fee from AK of Rs. 19,47,50,000/-. Thus , it was claimed that on this bonafide belief and good reasons , the assessee did not made any provision for the balance consideration towards remuneration for film 'Action Replay' of Rs. 19,47,50,000/- payable to AK as an expense in its books of accounts for the year ended 31.03.2011. The assessee explained that later the assessee owing to commercial expediency in order to survive in film business in Mumbai , in order to maintain good relations with the Artist AK and with a view to send clear signals to other well known artists as to assessee's integrity in fulfilling its obligations, the assessee settled the claim of the artist AK, which crystallised during the AY 2013-14 with a waiver of Rs. 4,73,75,000/- by AK in favour of the assessee. It was explained by assessee that it brought further benefits to the assessee as the artist AK agreed to work for the film "Holiday" produced by Sunshine Picture Private Ltd., in which assessee holds more than 70% share. The said film "Holiday" released on 06.06.2014 was successful at the box office and brought revenue to Sunshine Pictures Private Ltd. of more than Rs. 6.5 crores during AY 2015-16 and also further revenue's will also flow in during the subsequent years. The satellite rights of the film "Action Replay" were resold for Rs. 2.5 crores on 01.06.2015. The assessee has also written back in March 2015 i.e. AY 2015-16 , liability of Rs. 2.67

crores payable to Sunshine Pictures Private Ltd., against claim raised by them for film "Action Replay". Thus the assessee claimed that these expenses of Rs. 14,73,75,000/- has crystallised during the previous year relevant to impugned assessment year under consideration and the same should be allowed as Revenue Expenses u/s. 37 of the 1961 Act.

3.2 The AO asked assessee to explain as to how this payment made to artist AK, being prior period expenses and also against which no revenue has been offered for taxation in the previous year relevant to impugned assessment year be allowed as deduction against income of the assessee. The assessee made elaborate explanations before the AO by submitting that assessee has entered into a Celebrity Engagement Agreement dated 27.02.2009 and an Additional Agreement with artist AK in connection with film titled "Action Replay" for a consideration of Rs. 33,45,30,000/-. The assessee explained that he had already paid Rs. 13,97,80,000/- to the artist AK in prior years , while Rs. 19,47,50,000/- were remaining to be outstanding after completion and release of the said film "Action Replay". The assessee submitted before the AO that balance remuneration of Rs. 19,47,50,000/- was neither paid to Artist AK nor provided for in the books of accounts of the assessee because assessee was making continuous request to the artist AK, to waive his fees/remuneration. It was submitted by the assessee before the AO that assessee's financial resources were seriously constrained in view of the losses on release of the film by key distributors. The assessee submitted that pursuant to several discussions with AK, the assessee agreed to give an option to AK, described in option agreement dated 26.09.2011 and bought time to pay AK his outstanding dues by 30.06.2012 . It was explained that in case if the assessee did not pay AK by 30.06.2012 and default still persists , the said AK could exercise option to sell to a third party or personally purchase the assessee's office premises situated at 101 and 102, Bharat Ark along with 10 parking lots and recover his dues

subject to terms and conditions stated in agreement dated 26.09.2011. It was submitted that assessee defaulted in payment to AK and was seeking a waiver from the artist AK for the payment of his dues. The assessee submitted that it arrived at an oral compromise with AK wherein the assessee paid Rs. 5 crores in three cheques in the months of May-July 2012 and on 23.11.2012, the assessee sold his office premises bearing no. 101, admeasuring 498 sq mts. on the 1st floor in A-wing of the building known as Bharat Ark along with 5 car parkings and all the rights attached thereto for total consideration of Rs. 9,73,75,000/- to AK in settlement of his balance entire dues wherein AO agreed to waive balance outstanding amount of Rs. 4,73,75,000/- subject to assessee obtaining the removal of lien of the bankers/lenders on the said property. It was explained that it took almost 2 years to get bankers/lenders lien removed from said property and the final waiver was given by AK on 31.01.2015 waiving an amount of Rs. 4,73,75,000/- . The assessee filed copy of final waiver letter dated 31.01.2015 issued by AK waiving outstanding balance amount of Rs. 4,73,75,000/-. The assessee had deducted income tax at source under the provisions of Chapter XVII-B of the 1961 Act while making aforesaid payments to AK. The assessee explained that no distributor was willing to buy the film 'Action Replay'. It was submitted that on 30.08.2010 PVR Pictures Limited came forward to release the film on commission basis and agreed to give recoupable and recoverable advance of Rs. 25 crores. It was explained that the film was completed and censor certificate was obtained on 31.10.2010 and the artist AK agreed to release film without taking his full consideration. It was explained by assessee before the AO that before the release of film 'Action Replay', PVR Pictures Limited had released an advance of Rs. 22 crores to the assessee. The assessee explained that film did poorly at box office and said PVR Pictures Ltd. refused to release balance amount payable of Rs. 3 crore of the committed amount to the assessee. The assessee had enclosed before the AO copy of Film Distribution Agreement and Amendment Agreement

entered into between PVR Pictures Ltd. and Sunshine Pictures Private Ltd.. The assessee explained that it had not provided in its books of account balance outstanding dues payable to AK of Rs. 19,47,50,000/- till 31.03.2011. It was explained that no formal demand was made by artist AK of this balance amount due to him till close of financial year ended 31.03.2011. The assessee also explained that it had planned by the middle of financial year 2011-12, a new film to be directed by Mr. A.R Murgados being produced by Sunshine Pictures Private Ltd., for which Mr. Vipul Shah i.e. the assessee started discussions with artist AK to play lead role. It was explained that no headway could be made with the artist AK as he was not willing to settle the financial matter relating to film 'Action Replay'. It was explained that is how option agreement dated 26.09.2011 was signed with AK and the assessee bought time to pay its dues by 30.06.2012 to AK . It was submitted that it is common in the film world to seek waivers by the film producers from artist on distribution of the film in case the film does not do well. The assessee also claimed that the artist AK has done number of films for assessee which had been great hits such as Waqt, Aakhein, Namaste London and Singh is King. It was submitted that the assessee did had a strong belief that the artist AK would oblige by granting wavier which was the main reasons due to which the assessee never claimed balance artist fee as an expense and it is only in AY 2013-14 when the amount payable as artist remuneration to AK was finally crystallised, the assessee claimed that the said expenses of Rs. 14,73,75,000/- was debited in its books of accounts for Financial Year 2012-13 and claimed as deduction while computing income for AY 2013-14 which should be allowed as deduction as expenses while computing income of the assessee u/s 37(1) of the 1961 Act.

3.3 The AO after considering the submissions of the assessee was of the view that the assessee is not entitled for these expenses as deduction from income as these expenses are prior paid expenses and

cannot be allowed in AY 2013-14. It was also observed by the AO that Rule 9A of the 1962 Rules is applicable to the assessee. The AO referred to clauses of Agreement dated 27.02.2009, Additional Agreement dated 27.02.2009, Agreement dated 26.09.2011 and waiver letter dated 31.01.2015, to come to conclusion that this claim of deduction for expenses is not a liability for the year under consideration but the said expenses ought to have been claimed in AY 2009-10, thus expenditure of Rs. 14,73,75,000/- claimed by the assessee are prior period expenses which cannot be allowed as deduction from income of the assessee for year under consideration. The AO also held that these expenses are hit by Rule 9A of the 1962 Rules. The AO also noted from waiver letter dated 31.01.2015 that the waiver effectively happened in AY 2015-16 which is much later than the year under consideration i.e. AY 2013-14. The AO was also of the view that the assessee has not followed prescribed method of accounting as provided u/s 145 of the 1961 Act. Thus, the AO was of the view that the assessee has wrongly claimed deduction of these expenses in the impugned assessment year i.e. AY 2013-14 which stood disallowed by the AO vide assessment order dated 14.03.2016 passed u/s 143(3) of the 1961 Act.

4. Aggrieved by an assessment framed by the AO u/s 143(3) vide orders dated 4.03.2016, the assessee filed first appeal with learned CIT(A) and made detailed submissions. The Ld. CIT(A) was pleased to dismiss the appeal of the assessee vide appellate order dated 28.07.2017, by holding as under:-

“ 3.2. I have circumspected the spectrum of facts & circumstances of the case and have carefully considered the finding of the Assessing Officer and rival submission of the Appellant and evidences on record given by the Appellant in paper book containing 174 pages. I find that as per the agreement dated 27.02.2009, the Appellant was to pay the Actor an amount of Rs.33,45,30,000/- for rendering of services. As per the agreement cost of film was of Rs.75 crores and the Appellant was to pay entire amount of remuneration to Mr. Akshay Kumar as under :-

Sl.No.	Amount (Rs.)	Date
1	4,50,00,000/-	On or before 27.02.2009

		(date of execution of agreement)
2	5,47,80,000/-	01.04.2009
3	8,17,50,000/-	On or before 01.06.2009
4	15,30,00,000/-	On or before 01.09.2009

As per the Clause 3.5, the entire amount was to be paid as per Clause 3.3 as mentioned above. According to the commitment and agreement, Shri Akshay Kumar was to give services of 60 days and not more than that for Film "Action Reply". According to Clause 2.5 of the Agreement, this Film was to be completed on or before December, 2009. Thus, it is very evident that the financial issue related to production of Film was completed in F.Y.2009-10 itself. Further, as per the admission of the Appellant, Film was produced and was released on 05.11.2010 hence, all the expenditures related to production of Film and rendering of services were completed in that F.Y. itself. Therefore, in such payment made in subsequent year is definitely a Prior Period Expenditure. It is a fact that the Assessee has not made any provision of such expenditure because according to him there was a possibility of waiver of balance remuneration of Rs.19,47,50,000/-,

3.3. Further, some peculiar facts are also there which gives new dimension to the issue under consideration. In pursuant to the Agreement, the Appellant has paid an amount of Rs.13,97,80,000/- on 08.07.2009 and balance amount was not paid. According to the Appellant, balance payment was not made for want of money or distributor to acquire the distribution rights on minimum guarantee basis. On 30.10.2010, Film Censor Board Certificate was obtained. Thus, ail the expenditures related to this Film was crystallized in earlier year and not in F.Y.2012-13, A.Y.2013-14. Further, it is very important to pointed out that the Appellant has produced this Film in Proprietary Concern namely; "Block Buster Movie Entertainers" whereas subsequently, Film was given to the Company of the Proprietor namely; "Sunshine Pictures Pvt. Ltd." for further license, and accordingly, Sunshine Pictures Pvt. Ltd, had given license and distribution rights to PVR Pictures Pvt. Ltd. by Distribution Agreement dated 30.08.2010. It is worth noting that the Appellant has not explained as to how such Film Right was given to Pvt. Ltd. Co. namely; Sunshine Pictures Pvt. Ltd. and what was the charge for giving all the rights to this Company, Further, it is not understood as to how before having certificate from Censor Board, the Appellant has given all the rights to Sunshine Pictures Pvt. Ltd. on 30.08.2010 without any remuneration or consideration.

3.4. Further a new fact is noticed that picture was given to PVR Pictures Ltd. for consideration of Rs.25 crores. There was also provision in recouping the distribution fees @ 9.5% on Net receipts. Further, there was an agreement dated 09.11.2010 for reduction of refundable advance of Rs.25 crores to 22 cores. Subsequently, the Appellant has entered into an agreement with Mr. Akshay Kumar on 26.09.2011 for giving 2 office premises No.101 & 102, Azad Nagar, Jeevan Sandhya C.H.S. Ltd., admeasuring 996 sq.ft. on 1st floor, "A" Bldg. known as "Bharat Ark", Azad Nagar Andheri(W), with 10 car parking, admeasuring 1800 sq.ft. in the books of accounts. Because of which, agreement of sale of these 2 properties balance amount was not to be received in cash. Thus, according to the Agreement, Assessee has sold out his property against the balance remuneration of Rs, 19,47,50.000/-. However, according to the explanation of the

Assessee, Shri Akshay Kumar has waived an amount of Rs.4,73,75,000/- and rest of the amount was not waived by Mr. Akshya Kumar. According to a letter/agreement dated 31.01.2015, relevant to A.Y.2015-16, the entire amount of Rs. 19,47,50,000/- was adjusted with transfer of office premise No, 101 which value of Rs.9,73,75,000/-. It means that actual expenditure incurred in subsequent year was of Rs.9,73,75,000/- and not of Rs. 14,73,75,000/-. Further, as admitted by the Assessee that Mr. Akshay Kumar has waived the balance amount of Rs. 14,73,75,000/- then the Assessee cannot claim the expenditure of Rs. 14,73,75,000/-.

3.5. As regard balance amount of Rs.9,73,75,000/-, the Appellant cannot claim this expenditure because Film Right was given to the Company namely; Sunshine Pictures Pvt, Ltd. who had subsequently given all the rights of distribution to PVR Pictures Pvt. Ltd. Secondly, as per the original agreement dated 27.02.2009, a service was rendered by the Actor on time and Film was completed before 30.10.2010, hence, such liability under reference was 100% crystallized before that completion of Film or after completion of Film hence, definitely such expenditure of Rs.9,73,75,000/- as a Prior Period Expenditure. It cannot be allowed in this year. Further, as mentioned hereinabove, that no provision has been made, office premises have been transferred subsequently, it has not been disclosed the fact that how much further earning was there for giving other licenses like Satellite Rights, CD Rights, Video Rights and the Rights mentioned in Clause 1.1.4 of the Agreement dated 27.02.2009. Therefore, in such circumstances, such expenditure cannot be allowed.

3.6. The Ground No.1 is therefore, deserves dismissal because no such liability of Rs. 14,73,75,000/- was crystallised in A. Y. 2013-14. Therefore, none of the case laws mentioned in Para 4.4 in submission is applicable to the facts of the case.

3.7. Further Ground No. 2 is not allowable because merely on the basis of TDS Prior Period Expenditure cannot be allowed this year because such TDS is refundable to the deductee.

3.8. In Ground No.3, it is claimed that expenditure is a business loss hence, is allowable, is not tenable argument because as per Rule 9A of Income-Tax Rule 1962 in computing the profits & gains of business of production of feature films, the cost of production is to be allowed in accordance with sub-rule 2 to 4. Obviously, according to this sub-rule, such expenditure is to be allowed in the year of release of film and not subsequently. Since there is a specific provision of Rule assessment of production of feature Film is made accordingly, hence, the Appellant cannot be permitted to claim any such expenditure subsequently. The argument that such expenditure is a business expenditure is not acceptable because of the fact that no provision was made in F.Y.2010-11 and according to this logic of the Appellant, Prior Period Expenditure is to be allowed in this year, is not legally tenable. Therefore, in the light of above factual references and judicial propositions, the claim of such expenditure of Rs.14,73,75,000/- (Rs.9,73,75,000/-) is not at all allowable expenditure hence, the finding of the Assessing Officer is approved and disallowance of claim of expenditure of Rs. 14,73,75,000/- is sustained.”

5. Being aggrieved by appellate order dated 28.07.2017 passed by learned CIT(A), the assessee has filed second appeal with tribunal. It was submitted by Ld. Counsel for the assessee that the controversy in this appeal is with regard to an amount of Rs. 14,73,75,000/- paid to artist AK as to in which year these expenses are to be allowed as deduction against income from business. The learned counsel for the assessee drew our attention to assessment order passed by the AO . it was submitted that AO had held that these are prior period expenses and cannot be allowed as deduction from income in the impugned assessment year under consideration viz. AY 2013-14. It was submitted by learned counsel for the assessee that further AO had held that Rule 9A of the 1962 Rules is applicable and hence assessee ought to have claimed entire deduction towards production expenses in accordance with Rule 9A of the 1962 Rules i.e. in AY 2011-12, which was not done by the assessee as the assessee is claiming these expenses in AY 2013-14. The learned counsel for the assessee further submitted that while making payments in AY 2013-14, income-tax was duly deducted at source under Chapter XVII-B of the 1961 Act from these payments made by the assessee to AK. Our attention was drawn to appellate order passed by learned CIT(A) /para 3.2 at page 5 and the assessee ought to have claimed these expenses in AY 2011-12 , when the film 'Action Replay' was completed and released. Our attention was also drawn by learned counsel for the assessee to page no. 65 of the paper book wherein agreement dated 30.08.2010 between Sunshine Pictures Private Ltd. and PVR Pictures Ltd. is placed for releasing the film 'Action Replay'.

5.2 The Ld. CIT-DR on the other hand submitted that revenue is not concerned with this agreement between Sunshine Pictures Private Ltd. and PVR Pictures Ltd. as the film was produced by the assessee while the agreement for release of film has been entered into by a Private Limited company namely Sunshine Pictures Private Ltd. with PVR Pictures Limited. It was submitted that the assessee might be holding

majority shareholding in Sunshine Pictures Private Limited but the fact remains that the said entity is a different person separately assessed to tax than the assessee itself. Our attention was drawn by learned CIT-DR to page no. 62 and 63 of the paper book filed by the assessee, wherein letter dated 02.08.2010 is placed which was written by proprietary concern of the assessee M/s. Block Buster Movie Entertainers to AK , wherein the assessee has asked AK permission to release the film without making complete payment due to AK. Our attention was also drawn by learned CIT DR to paper book / page no. 63 wherein letter dated 16.08.2010 written by AK to Block Buster Movie Entertainers is placed regarding permission to release film to PVR Pictures Limited wherein it was suggested by AK that he will consider waiver for balance consideration payable to him. It was submitted by Ld. CIT-DR that Rule 9A of the 1962 Rules is applicable and these expenses can be allowed as deduction under Rule 9A in AY 2011-12 only. The learned CIT-DR has filed written submissions . The learned CIT DR has made strong pitch for upholding appellate order passed by learned CIT(A).

5.3 On being asked by the Bench from learned counsel for the assessee as to how assessee is claiming commercial expediency in releasing the film "Action Replay" for which costs are borne by assessee, while the recoveries are made by a third party namely Sunshine Pictures Private Ltd. . The learned counsel for assessee submitted that said proprietary concern of the assessee namely Block Buster Movie Entertainers has entered into agreement(s) with Energetic Films Private Ltd., (later renamed as Sunshine Pictures Private Ltd.) and these agreements were not placed before the authorities below during assessment as well first appellate proceedings before learned CIT(A) . The learned counsel for the assessee submitted that assessee is now in a position to file these agreement before the bench which will prove the entire chain of events and commercial expediency in making these payments to AK. It was contended by

learned counsel for the assessee that these additional evidences goes to the root of the matter and prayers are made by Ld. Counsel for the assessee to admit these additional evidences filed by the assessee for the first time before the tribunal. The learned counsel for the assessee made prayers to restore the matter back to the file of AO for necessary verification of these evidences/agreements , which are filed before the Bench as an additional evidences for the first time. These additional evidences are placed in file. The additional evidences/agreements now filed by the assessee before the Bench for the first time as an additional evidences are as under:-

- A) *Agreement dated 14.06.2009 for grant of exploitation rights for film "Action Replay" entered into between Block Buster Movie Entertainers and Energetic Films Private Ltd.,*
- B) *Addendum agreement dated 05.05.2010 for grant of exploitation right for film "Action Reply" between Block Buster Movie Entertainer and Sunshine Pictures Private Ltd.,*
- C) *Addendum No. 2 dated 05.10.2010 to agreement for grant of exploitation right for film " Action Replay" between Block Buster Movie Entertainer and Sunshine Pictures Private Ltd.,*
- D) *Minutes dated 26.04.2010 of the meeting of Board of Directors of Energetic Films Private Ltd., (later renamed as Sunshine Pictures Private Ltd.)*

6. We have considered rival contentions and perused the material on record. We have observed that the assessee is a writer, director, play actor and producer of film, television shows and plays. The assessee has claimed an expenditure of Rs. 14,73,75,000/- which was debited by assessee to P&L account as artist remuneration for film "Action Replay" during the impugned year under consideration . The assessee had entered into a Celebrity Engagement Agreement dated 27.02.2009 and an Additional Agreement with artist AK in connection with film titled "Action Replay" for a consideration of Rs.

33,45,30,000/-. There was an additional amount payable to AK computed @18% of surplus vide additional agreement dated 27.02.2009. The assessee had already paid Rs. 13,97,80,000/- to the artist AK in prior years , while Rs. 19,47,50,000/- were remaining to be outstanding after completion and release of the said film “Action Replay”. The assessee did not provided for in its books of accounts even until AY 2011-12 (film ‘Action Replay’ released on 05.11.2010) , this balance consideration payable by him to AK towards his remuneration for film ‘Action Replay’ . The genuineness and bonafide of these expenses is never doubted by Revenue and thus is not a question before us. The assessee had claimed that even during the course of production of the film “Action Replay”, the assessee was asking the artist AK for reducing agreed remuneration for said film owing to tight financial position vide letter dated 02.08.2010, wherein the assessee had requested said artist AK to complete the said film “Action Replay” without seeking further consideration and also permit the release of the film on commission basis through PVR Pictures . The assessee had claimed that it was done by the assessee as there were no buyers of the films distribution rights on a minimum guaranteed basis . It is claimed by the assessee that vide letter dated 16.08.2010, the said artist AK agreed to complete the film and also permit the release of the film on commission basis though PVR Pictures Ltd.. The said AK also agreed to consider waiver in respect of his balance consideration towards fees payable by assessee with respect to film ‘Action Replay’. It was claimed that on 30.08.2010 PVR Pictures Limited came forward to release the film on commission basis and agreed to give recoupable and recoverable advance of Rs. 25 crores. It was claimed that the film was completed and censor certificate was obtained on 31.10.2010 and the artist AK agreed to release film without taking his full consideration. It was claimed by assessee before the AO that before the release of film ‘Action Replay’, PVR Pictures Limited had released an advance of Rs. 22 crores .The film ‘Action Replay’ was finally released on 05.11.2010 . The assessee

claimed that film did poorly at box office and said PVR Pictures Ltd. refused to release balance amount payable of Rs. 3 crores of the committed amount as per agreement dated 30.08.2010. The assessee has also claimed that he made last payment to said AK on 08.02.2009. The assessee had claimed that it had not provided in its books of account balance outstanding dues payable to AK of Rs. 19,47,50,000/- till 31.03.2011. It was claimed by the assessee that no formal demand was made by artist AK of this balance amount due to him till close of financial year ended 31.03.2011. The assessee had also claimed that it had planned by the middle of financial year 2011-12, a new film to be directed by Mr. A.R Murgados being produced by Sunshine Pictures Private Ltd.(claim is made that assessee holds 70% shares in this company- formerly known as Energetic Films Private Ltd.) , for which Mr. Vipul Shah i.e. the assessee started discussions with artist AK to play lead role. It was claimed that no headway could be made with the artist AK as he was not willing to settle the financial matter relating to film 'Action Replay'. It was claimed that is how option agreement dated 26.09.2011 was signed with AK and the assessee bought the time to pay its dues by 30.06.2012 to AK . The assessee had claimed that pursuant to several discussions held with AK, the assessee agreed to give an option to AK, described in option agreement dated 26.09.2011 and bought time to pay AK his outstanding dues by 30.06.2012. It was claimed that in case if the assessee did not pay AK by 30.06.2012 and default still persists , the said AK could exercise option to sell to a third party or personally purchase the assessee's office premises situated at 101 and 102, Bharat Ark along with 10 parking lots and recover his dues subject to terms and conditions stated in agreement dated 26.09.2011. The assessee claimed that he defaulted in payment to AK and was seeking a waiver from the artist AK for the payment of his dues. The assessee had claimed that he arrived at an oral compromise with AK wherein the assessee paid Rs. 5 crores in three cheques spread in the months of May-July 2012 and on 23.11.2012,

the assessee sold his office premises bearing no. 101, admeasuring 498 sq mts. on the 1st floor in A-wing of the building known as Bharat Ark along with 5 car parkings and all the rights attached thereto for total consideration of Rs. 9,73,75,000/- to AK in settlement of his balance entire dues wherein AO agreed to waive balance outstanding amount of Rs. 4,73,75,000/- subject to assessee obtaining the removal of lien of the bankers/lenders on the said property. It was explained that it took almost 2 years to get bankers/lenders lien removed from said property and the final waiver was given by AK on 31.01.2015 waiving an amount of Rs. 4,73,75,0000/- . The assessee had filed copy of final waiver letter dated 31.01.2015 issued by AK waiving outstanding balance amount of Rs. 4,73,75,000/-. The assessee had claimed to have deducted income tax at source under the provisions of Chapter XVII-B of the 1961 Act while making aforesaid payments to AK. It is also claimed that the said AK did declared the said income received from assessee vide monetary consideration of Rs. 5 crores and balance through transfer of aforesaid office in his favour, in the return of income filed with Revenue for AY 2013-14. It was claimed that it is common in the film world to seek waivers by the film producers from artist on distribution of the film in case the film does not do well. The assessee also claimed that the artist AK has done number of films for assessee which had been great hits such as Waqt, Aakhein, Namaste London and Singh is King. It was submitted that the assessee did had a strong belief that the artist AK would oblige by granting wavier which was the main reasons due to which the assessee never claimed balance artist fee as an expense and it is only in AY 2013-14 when the amount payable as artist remuneration to AK was finally crystallised, the assessee claimed that the said expenses of Rs. 14,73,75,000/- was debited in its books of accounts for Financial Year 2012-13 and claimed as deduction while computing income for AY 2013-14 which should be allowed as deduction as expenses while computing income of the assessee u/s 37(1) of the 1961 Act. Thus, the assessee had claimed to be under a

firm and bonafide belief to get waiver of balance artist fee from AK of Rs. 19,47,50,000/-. The assessee did not made any provision for the balance consideration of Rs. 19,47,50,000/- payable to AK as an expense in its books of accounts for the year ended 31.03.2011. The assessee has claimed that AK did not finally agree for the complete waiver of his balance consideration due to him towards remuneration for film 'Action Replay'. The assessee has claimed that owing to commercial expediency in order to survive in film business in Mumbai, in order to maintain good relations with the Artist AK and with a to send clear signals to other well known artists as to assessee's integrity in fulfilling its obligations, the assessee had settled the claim of the artist AK, which crystallised during the impugned assessment year viz. AY 2013-14 with a waiver of Rs. 4,73,75,000/- by AK in favour of the assessee. It is also claimed by assessee that it brought further benefits to the assessee as the artist AK agreed to work for the film "Holiday" produced by Sunshine Pictures Private Ltd. (earlier known as Energetic Films Private Ltd.), in which assessee claimed to hold more than 70% share. The said film "Holiday" released on 06.06.2014 was claimed to be successful at the box office and brought revenue to Sunshine Pictures Private Ltd. of more than Rs. 6.5 crores during AY 2015-16 and it is claimed that further revenue's will also flow in during subsequent years. The assessee has claimed that satellite rights of the film "Action Replay" were resold for Rs. 2.5 crore on 01.06.2015. The assessee had also claimed to have written back in March 2015 i.e. AY 2015-16 , liability of Rs. 2.67 crores payable to Sunshine Pictures P. Ltd., against claim raised by it for film "Action Replay".

6.2 The AO did not agree with contentions of the assessee, firstly as these are prior period expenses, secondly books of accounts are not maintained as provided u/s 145 of the 1961 Act and thirdly , the assessee has infringed Rule 9A. The learned CIT(A) has also dismissed the appeal of the assessee and while holding against the assessee , the

learned CIT(A) has , inter-alia, noted in para 3.3 of its order that while expenses of the film ‘Action Replay’ are incurred/booked in the books of accounts of the proprietary concern of the assessee namely ‘Block Buster Movie Entertainers’ but the film was released through PVR Pictures Limited vide agreement dated 30.08.2010 entered into by Sunshine Pictures Private Limited , which is a different entity, by holding as under:

“3.3.....Further, it is very important to pointed out that the Appellant has produced this Film in Proprietary Concern namely; "Block Buster Movie Entertainers" whereas subsequently, Film was given to the Company of the Proprietor namely; "Sunshine Pictures Pvt. Ltd." for further license, and accordingly, Sunshine Pictures Pvt. Ltd, had given license and distribution rights to PVR Pictures Pvt. Ltd. by Distribution Agreement dated 30.08.2010. It is worth noting that the Appellant has not explained as to how such Film Right was given to Pvt. Ltd. Co. namely; Sunshine Pictures Pvt. Ltd. and what was the charge for giving all the rights to this Company, Further, it is not understood as to how before having certificate from Censor Board, the Appellant has given all the rights to Sunshine Pictures Pvt. Ltd. on 30.08.2010 without any remuneration or consideration.”

6.3 Thus, the assessee could not prove before learned CIT(A) as to the commercial expediency in making the balance payment to AK in impugned assessment year because revenue stream from the film ‘Action Replay’ was flowing into Sunshine Pictures Private Limited while the expenses are booked in proprietary concern of the assessee namely ‘Block Buster Movie Entertainers’ . The assessee submitted that learned CIT(A) had relied upon certain material which was obtained at the back of the assessee to arrive at aforesaid conclusion in para 3.3 and the said material was not confronted to the assessee for rebuttal. The assessee has on its part infact not brought on record the agreements it entered into with Sunshine Pictures Private Limited (earlier known as Energetic Films Private Ltd.) before the AO as well before learned CIT(A). Now at this stage before the tribunal during the course of hearing on 03.04.2019, the assessee has filed for the first time following agreements as an additional evidences with prayers to admit the same as it has been claimed by learned counsel for the assessee that these agreements goes to the root of the matter and should be admitted in the interest of justice, which could enable

assessee to prove commercial expediency and to prove that there was no diversion of Revenue to defraud Revenue. The agreements filed for the first time before tribunal are as under :

- A) *Agreement dated 14.06.2009 for grant of exploitation rights for film "Action Replay" entered into between Block Buster Movie Entertainers and Energetic Films Private Ltd.,*
- B) *Addendum agreement dated 05.05.2010 for grant of exploitation right for film "Action Reply" between Block Buster Movie Entertainer and Sunshine Pictures Private Ltd.,*
- C) *Addendum No. 2 dated 05.10.2010 to agreement for grant of exploitation right for film " Action Replay" between Block Buster Movie Entertainer and Sunshine Pictures Private Ltd.,*
- D) *Minutes dated 26.04.2010 of the meeting of Board of Directors of Energetic Films Private Ltd., (later renamed as Sunshine Pictures Private Ltd.)*

Since, these documents are relevant and vital to resolve controversy between rival parties and goes to root of the matter to prove commercial expediency, we direct admission of these documents/evidences in the interest of justice. We have also noted that the assessee is claiming as to producing of new film 'Holiday' with artist AK which was signed with a company Sunshine Pictures Private Limited and not with the assessee and as such is a separate entity albeit claim is made that 70% shares in Sunshine Pictures Private Limited are held by assessee. The learned CIT(A) has also held against assessee by citing other reasons and justifications such as the expenses being prior period, infringement of Rule 9A of the 1962 Rules etc.. We will be failing in our duties , if at this stage we donot refer to recent decision of Hon'ble Bombay High Court in the case of CIT v. Dharma Productions Private Limited reported in (2019) 104 taxmann.com 211(Bom.) and decision of Mumbai-tribunal in the case of Mukta Arts Private Limited v. ACIT reported in (2007) 105 ITD 533(Mum.). In fairness to both the parties and in the interest of

substantial justice, we are inclined to set aside and restore this matter back to the file of the AO for fresh adjudication denovo of this issue on merits in accordance with law after considering additional evidences and making such enquiries/verifications as is considered appropriate .We clarify that all contentions/grounds with respect to this issue are kept open and the AO shall be free to adjudicate the issue on merits in accordance with law unhindered by any of our observations , including applicability of Rule 9A of the 1962 Rules and/or whether these expenses are prior period expenses not allowable within parameters of the 1961 Act and/or allowability of these expenses as business loss of the assessee etc.. The AO is directed to admit all relevant evidences and explanation filed by assessee in its defence during the course of set aside proceedings, which then shall be adjudicated by the AO on merits in accordance with law after making such enquiries/verifications as the AO may deem fit. In case if the AO wants to rely on some material/evidences which is independently obtained by the AO , then copy of the same shall be furnished to the assessee for rebuttal. Needless to say that the AO shall provide proper and adequate opportunity of being heard to the assessee in accordance with principals of natural justice in accordance with law. The assessee succeeds in this appeal for statistical purposes. We order accordingly.

7. In the result, the appeal of the assessee in ITA no. 6272/Mum/2017 for AY 2013-14 is allowed for statistical purposes.

Order pronounced in the open court on 01.07.2019.

आदेश की घोषणा खुले न्यायालय में दिनांक: 01.07.2019 को की गई

Sd/-

(PAWAN SINGH)

JUDICIAL MEMBER

Sd/-

(RAMIT KOCHAR)

ACCOUNTANT MEMBER

Mumbai, dated: 01.07.2019

Nishant Verma
Sr. Private Secretary

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

// Tue copy//

BY ORDER

DY/ASST. REGISTRAR
ITAT, MUMBAI