

Income Tax Appellate Tribunal - Mumbai

Salman Khan, Mumbai vs Department Of Income Tax on 18 February, 2008

IN THE INCOME TAX APPELLATE TRIBUNAL

MUMBAI BENCHES " E ", MUMBAI

Before Shri D.Manmohan, Vice President and Shri T.R. Sood, AM

I.T.A. No.2836&2837/Mum/2008

Assessment Year : 2003-04 & 2004-05

Dy. Commissioner of Income Tax  
Central, Cir-24, Mumbai

Salman Khan  
3, Galaxy Apts, B.J. Road  
Band Stand, Bandra (W),

Vs.

Mumbai.

PAN No: AACPK8429P

(Appellant)

(Respondent)

Appellant by : Shri Hemantlal

Respondent by : Shri Prakash K. Jotwani

ORDER

Per T.R. Sood (AM) :

I.T.A. No.2836/Mum/2008

1. This appeal filed by the revenue is directed against the order dated 18/02/2008 of Commissioner of Income Tax (Appeals) - IV, Mumbai.

2. In this appeal the revenue has raised the following grounds:-

"1.a. On the facts and circumstances of the case and in law, the CIT(A) erred in law in allowing deduction u/s. 89RR without appreciating the fact that the income derived by the assessee was not in exercise of his profession as an actor from foreign sources.

b. On the facts and in the circumstances of the case and in law, the CIT(A) failed to take into account the decision of ItAT Mumbai in Harsha Bhogle 86 Income Tax Digest 714, while allowing deduction u/s.80RR of the I.T.Act, 1961.

c. On the facts and in the circumstances of the case and in law, the CIT(A) erred in deleting the addition of Rs.11,70,000/- made by the A.O. on account of legal expenses and professional charges without appreciating the fact that the criminal offence was committed by assessee in his personal capacity and not in his professional capacity as an actor. Hence, the same being personal in nature cannot be allowed under section 37(1) of the Act."

3. Gr.No.1a After hearing both the parties we find that assessee is a film actor and during the year assessee had claimed deduction u/s.80RR at the rate of 30% on professional remuneration of Rs.1,26,39,773/- for doing shows abroad. The A.O. asked the assessee to submit the copies of the agreement, passport and other details of the visit undertaken to perform the site show. A letter dated 25/04/2003 written by the assessee to Shri Vijay Taneja was produced, one more letter dated 10/06/2003 from Shri Vijay Taneja to assessee was also produced. From Form-10H A.O. noticed that all the payments for such shows have been received in the month of June, July and August, 2003. It was also noticed from the letter dated 25/04/2003 written by the assessee that the fee for each show was stated to be US \$ 28,000/- per show for 15 shows whereas, the letter from Shri Vijay Taneja depicted that, because of recession only 9 shows would take place but the fee was remaining same. However, none of these letters show that fee would be paid in advance. A.O. further noted that name of the remitter from the Dubai is not mentioned in the Form-10H and the assessee was confronted with these quires. In response to the queries, it was stated by the assessee that the sum of Rs.1,02,05,098/- was towards the show held from 21st May,2003 to 6th July,2003. It was further explained that assessee was following cash system of accounting and since payments have been received in advance that were being shown as receipts and claim for deduction u/s.80 RR was made accordingly. However, A.O observed that no where the letters written by the assessee or Shri Vijay Taneja show that payments to be made in advance, payments were required to be made on either during the performance of the show or soon thereafter. He also observed that assessee had not filed all the agreements in respect of the shows. It was also observed that place of residence of the remitters was also not incorporated in Form-10H. A.O. further observed that exemption provision u/s.80RR needs to be construed strictly and for which he relied on the decision of CIT Vs. Purshottam Das 247 ITR 516. He also made observations to the fact that assessee being an actor cannot be called strictly stage artist. In this background the deduction u/s.80 RR was not allowed.

4. Before CIT(Appeals) it was mainly submitted that copy of the agreement were furnished before the A.O. vide letter dated 11/03/2006, it was further submitted that reliance placed before A.O. in the case of Harsha Bhogle (86 ITD 714) is distinguishable, and reliance was also placed on the board circular no. 22 dated 17/07/69, No.31 dated 25/10/69, No. 675 dated 3/1/94. The learned CIT(Appeals) after examining the submissions allowed the deduction u/s. 80 RR vide para 19 of his order which is as under :

"19. I have carefully considered the submissions of the learned AR in this regard and find merit therein. A deduction u/s.80 RR in respect of professional income from foreign sources is permitted, if the following conditions are satisfied :-

1. The tax payer is a resident individual.
2. He is an author, playwright, artist, musician, actor or sportsman.
3. His income includes income from the exercise of the aforesaid profession from a foreign government or from a person not resident in India.
4. Such income may be directly received in India or it may be received outside India.

5. The taxpayer furnishes a certificate in Form No.10H alongwith his return of income, certifying that the deduction has been correctly claimed in accordance with the provisions of the section.

The appellant is a well known him artist and has received income from stage shows abroad, which is not doubted by the AO. All the relevant details in this regard too have been furnished by the appellant to the AO, which clearly evidence that the appellant has complied with the aforesaid conditions laid down in section 80 RR of the Act. The AO was given a copy of the agreement between Vijay Taneja, the show organisers and Salman Khan showing place of residence of remitter and date of performance of the stage show along with Xerox copy of the passport, which was evidence enough that Shri Salman Khan had performed. The AO's contention that there was no formal agreement with the remitters and the copy of the passport/visa were not submitted, falls flat in the face of overwhelming evidence to the contrary, which support the claim of the appellant in this regard that he was an artist performing stage shows, thereby complying with the provisions of section 80 RR. Also vide circular No.22 dt.17.07.1969 issued by CBDT, the appellant is an artist. The above said circular No.22 dt.17.07.1969 is reproduced hereunder:-

"48. The Finance Act, 1969, has inserted a new section 80 RR in the Income Tax Act with effect from 1st April, 1970 under which a resident individual being an author, playwright, artist, musician or actor who derives income in the exercise of his profession from foreign sources and receives such income in India or brings it into India in foreign exchange, will be entitled to deduct 25% of income so received or brought, in computing the total income. This provision is designed to encourage successful authors, playwrights, artist, musicians and actors in our country to project their activities outside India with a view to contributing to greater understanding of our country and its culture abroad and also augmenting our foreign exchange resources. Some of the professional activities coming within the scope of this section are : publication outside India of a book produced by the author, contribution of articles to foreign journals and magazines, exhibition of paintings, sculptures and other works of art in foreign countries, giving of music concerts to foreign audience and acting in dramatic performances, cinematograph films and television programmes in foreign countries".

Since the required evidence has been submitted to the AO and also in view of the appellant's compliance with the requirements of section 80RR, I hold that the appellant is entitled to claim deduction of u/s. 80RR of the Act and reject the disallowance made by A.O. However, while giving effect to this order, the AO should verify the correct figure allowable u/s. 80 RR".

5. Before us the learned DR carried us through the assessment order and pointed out that, shows were stated to have been held from 21st May, 2003 to 6th July, 2003. He argued that as per letter of the assessee dated 25/04/2003 the payments were to be received during the show. He also invited

our attention to the letter written by Shri Vijay Taneja on 10/06/2003 that payments would be made during the show or if the entire amount is not cleared then same would be paid within 3 days from the completion of the show. He submitted that, assessee has changed his stand later on and claimed that payments had been received in advance which is not correct. In any case deduction u/s.80 RR would not be allowed merely on the basis of advance because at the time of advance it is not sure whether assessee would do any shows or not. Therefore, even if assessee is following the cash basis of accounting, then advance amount is to be treated as receipt because of the method of accounting but deduction u/s. 80 RR cannot be allowed unless and until shows are performed. Further, he also pointed out that no agreement were filed before A.O. and in this regard quoted the following observations from assessment order:-

"It can also be observed that assessee has submitted a copy of letter purportedly an agreement with Shri Vijay Taneja only from whom a remittance of Rs.66,01,740,10 has been received. The assessee has not submitted any such agreements regarding balance remittance of Rs.60,36,782.59. Even form 10H submitted do not mention the name of the remitter for Rs.21,50,100/-.

6. He also referred to copy of the Form - 10H, which is annexed to the assessment order and pointed out that against the column of place of residence no details have been furnished.

7. On the other hand, learned counsel of the assessee submitted that since he had applied for adjournment which had been rejected by Tribunal and therefore he could not file the paper book. He then referred to the ground of appeal and submitted that issue regarding advance payments etc. is not raised in the grounds, and only objection raised to the order of CIT(Appeal) is that CIT (Appeal) has failed to take into the account the decision in case of Harsha Bhogle (Supra).

8. He also submitted that A.O. has already taxed the receipts because same were accounted for on cash basis, then A.O. could not have denied to allow the deduction which is a consequence. He referred to page 5 of the assessment order where in the reply of the assessee has been extracted which is as under :-

"The assessee was asked to substantiate its claim vide letter dated 20.03.2006 to which it has replied vide letter dated 22.03.2006 as under :

As regards deduction u/s.80 RR, I would like to inform you that I have received advance of Rs.1,02,05,098/- towards the show held from 21st May, 2003 to 6th July, 2003 in which I have performed as an artist. Agreements have already been submitted to you vide my letter dated 11.03.2006. since I am following cash basis of accounting, this has to be shown as an income in the year in which I have received. Had I not followed cash basis of accounting the said advance of Rs.1,02,05,098/- would have been shown as advance received in the liabilities side of Balance sheet as on 31.03.2003 and not the income from other sources. Since, I am following cash basis of accounting and performed as an artist next year, deduction u/s.80 RR should be allowed". "It can also be observed that assessee has submitted a copy of letter

10. In the rejoinder, the learned DR submitted that ground no. 1a would cover the issue generally which talks of deduction u/s.80 RR.

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12. It was seen from the records that this matter earlier also came up for hearing on following dates:-

13. Out of the above, bench did not function on 22/2/2009, 05/01/2010 and 12/03/2010. Out of the rest 5 dates, on 4 dates the adjournment was sought on behalf of the assessee. It is seen that on earlier occasion the adjournment was sought on vide letter dated 2/06/2009 with the same reason that relevant papers are not ready. The adjournment cannot be treated as a matter of right, when the assessee was aware of the hearing of appeal right from January, 2009 and wanted to file a paper book a reasonable steps should have been taken in last one year. The adjournment was rejected in this background.

5

"11. The appellant shall not, except by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal, but the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the tribunal under this rule:

Provided that the Tribunal shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground".

15. The above rule clearly shows that Tribunal has power to consider the matters which arise out of the orders of the lower authorities and is not strictly required to confine only to the grounds of appeal as long the other party is given sufficient opportunity of being heard. Since, learned counsel of the assessee was given full opportunity and therefore this objection is rejected.

16. We find that in respect of the shows in response to the request for filling of the agreement the following 2 letters have been furnished before the A.O.:-

"1. First letter dt.25.4.2003 written by Shri Salman Khan to Shri Vijay Taneja which interalia reads as under:- "This is to confirm that I have agreed to perform as an "Artiste" in the above-mentioned shows to be held in USA/Canada and UK, on the following terms and conditions:

i) You agree to pay me a remuneration of USD Twenty eight thousand (USD 28,000) per show, for fifteen (15) shows payable during the tenure of the shows.

ii) Air Tickets: One (1) First class, One (1) Business Class and One (1) Economy tickets to be provided and paid b you.

iii) You will provide me at your own expense a suite with room service in a five star hotel and twin sharing rooms and allowance or meals for my staff.

iv) You will provide me with a chauffer driven luxury car, the expenses for which will be borne by you from Airport to Hotel and Venue and back to Airport.

v) It shall be your responsibility to arrange and obtain and provide to me at your cost all visas required for my entry in USA/Canada and UK as also work permits and other necessary permission for enabling me to perform and participate in the said shows in the said countries and the venue where the said show is to be performed. I agree to provide all information required by you to obtain the visas and work permits.

vi) It is agreed that if you commit a material breach of any of this obligations under or terms and conditions of, this agreement to include any failure to make payment of the fee the same will entitle me to cancel this agreement in which even (a) I shall not be bound to perform in the said shows;

(b) the remuneration already paid to me by you, shall not be refundable by me; (c) all your rights under this agreement shall come to an end; and (d) I along with my companion and staff shall be entitled to forthwith return to India at your cost and consequence.

vii) It is also agreed that if under some circumstances I am not able to perform in the said show, then I shall refund the full amount paid to me. Or we shall mutually agree upon a convenient rescheduled date for the same.

viii) I will bear the cost of our own costumes.

ix) I will do a minimum of three entries along with the finale.

x) The laws of India shall govern this agreement and it is agreed that the proper courts in Mumbai will have jurisdiction in respect of any matters arising under this agreement".

2. Second letter dated. 10.06.2003 from Shri Vijay Taneja to Shri Salman Khan and it reads as under :-

"This has reference to the above-mentioned shows that were to take place in USA Canada and UK from May, 21st 2003 to July 6th 2003.

As our mutual talk and you seeing the circumstances and the end results of the shows due to the declining economic conditions in US/Canada and UK, our scheduled planning of 15 shows has not been possible.

Therefore now only 9 shows will take place instead of 15. However, your remuneration per show i.e. USD Twenty eight thousand will remain the same. These payments will be paid either by me or by the local promoters on my behalf by way of Cashiers cheque/drafts or wire transfer into your bank account. However if the entire amount is not cleared during the tenure of the shows then the balance will be paid within three days of the completion of the shows.

All other terms and conditions with regards to the air tickets/ground transportation /accommodation etc. will remain the same.

17. Firstly it is interesting to note that assessee had agreed to perform in the show on 25/04/2003 and clauses of this letter very clearly states that payment at the rate of US \$ 28,000/- per show is payable during the tenure of the show. When first agreement itself was reached on 25/04/2003 and payment is to be received during the performance of the shows the question of receiving the payment before the date of this letter that is during financial year 01/04/2002 to 31/03/2003 would not arise. It is further interesting to note that Shri Vijay Taneja has also written letter on 10/06/2003 which we have reproduced above and in that letter in 2nd para it is clearly stated that

payments will be made either during the tenure of the show or within 3 days from the completion of the shows which means till that date there was no talk of advance payment. Still later on assessee has preferred to make the claim by stating that assessee had received payments in advance. We therefore, find that A.O. has clearly noted that assessee has filed a letter from Shri Vijay Taneja and has not submitted any such agreements. Further in the Form-10H Annexed with the assessment order in the column of place of residence in respect of all items the particular filled are "not available".

18. This clearly shows that assessee has not furnished proper certificate. Despite of these glaring inconsistencies the learned CIT(Appeal) has observed that A.O. was given copy of the agreement between Shri Vijay Taneja and had also shown place of the residence of the remitter which seems to be totally wrong.

19. However, since assessee has been deprived from filing of the papers before us because of the fault of on behalf of assessee only, we are of the view that in the interest of justice this matter should go back to A.O. to be re- examined in the light of observations made by us. Therefore, we set aside the order of learned CIT(Appeal) and remit this matter back to the file of A.O. for re-examination of the issue needlessness to say that assessee should be given adequate opportunity to explain his case, at the same time assessee is also directed to co-operate with the assessments proceedings and furnish all particulars to support his case at the earliest.

20. Gr.No.2 After hearing both the parties we find that during assessment proceedings A.O. noticed that assessee has incurred a sum of Rs.12,90,000/- towards legal expenses, out of which sum of Rs.1,20,000/- paid to M/s. S.G. Kabra and Co., all other expenses have been paid to lawyers, defending the assessee in various criminal proceedings pending in the courts. This was treated as personal expenses and accordingly sum of Rs.11,70,000/- was disallowed. Before CIT(Appeal) it was mainly submitted that assessee was shooting for a film "HUM SAATH SAATH HAI" where he was implicated in some criminal proceedings, expenses were incurred for exemption from the personal appearance in the court and also to defend the assessee to prove his innocence. Therefore, the expenditure was incurred to defend assessee which has arisen out of professional activity and accordingly, same should be allowed. Reliance was placed on the decision of Hon'ble Supreme Court in the following cases :

CIT Vs. Birla Cotton Spinning & Wv. Mills (82 ITR 166) CIT Vs. Dharajgiri Raja Narasingirji (91 ITR 544 ) The learned CIT(Appeal) agreed with the submission. The learned CIT(Appeal) observed that these expenditure cannot be treated as personal expenses and therefore allowed the same.

21. Before us learned DR submitted that it was alleged that in Rajasthan that assessee was shooting a black duck which is prohibited under the law and the expenses incurred in that connection are purely of personal nature. This has nothing to do with the shooting of the film. He also submitted that learned CIT(Appeal) has wrongly relied on the decision of the CIT Vs. Birla Cotton Spinning & Wv. Mills in that case certain enquires and investigations were being conducted by investigation wing against the company in respect of incidence of taxation of income that means the law charges were paid by defendant in respect of issues of business allegations and therefore it can be said that



company itself was being defended and thus the decision is totally distinguishable. Similarly, in case of CIT Vs. Dhanrajgirji Raja Narasingirji the expenditure was incurred for the purpose of business and therefore that ratio cannot be compiled.

22. On the other hand learned counsel of the assessee strongly supported the order of first appellate authority and also relied on the decision of CIT vs. Birla Cotton Spinning & Wv. Mills (supra) as well as Dhanrajgirji Raja Narasingirji (supra). He further submitted that certain criminal complaints were lodged against the assessee and assessee has to defend himself, otherwise assessee was required to attend criminal proceedings personally which would cause the business loss because assessee is an actor and if he is away from the profession he would lose the income. Therefore, by acting in the profession he could generate income and pay more tax also. He also relied on the decision of Mumbai Bench of Tribunal incase of Ajay Singh Deol Vs. JCIT 91 ITD 196 where even expenditure incurred for the treatment of the wife of a employee was held to be expenditure for the purpose of business.

23. We have considered the rival submission carefully and find that admittedly the expenditure on legal charges which has been disallowed by A.O. have been incurred for making the payments to eminent criminal lawyers for defending the assessee from criminal proceedings. Though learned DR has mentioned that it was a basically case of shooting of prohibitory category of the bird but this is based on the media reports. At the same time no evidence have been filed before A.O. or even CIT(Appeal) to show that criminal complaint arise out of the film shooting. Before us the learned counsel simply gave evasive reply when confronted with the question that whether criminal proceedings arise out of any incident during the shooting of film. The criminal proceedings are always filed against individual. This has got nothing to do with assessee's profession. Therefore, we are of the humble view that the expenditure is purely of the personal nature.

24. The decision relied by counsel of the assessee are clearly distinguishable because incase of CIT Vs. Birla Cotton Spinning & Wv. Mills the investigation proceedings were being conducted by the Investigation commission against the affairs of the company and thus the assessee's company was trying to defend itself out of the business issues. Similarly, in case of CIT Vs. Dhanrajgirji Raja Narasingirji the following facts were involved:-

"The assessee was the managing agent of a public company promoted by him in 1935 and was also the chairman of its board of directors. In 1937, the company got into financial difficulties and a tripartite agreement between the assessee, the company and one G, who agreed to bring the necessary finance, was entered into pursuant to which the assessee gave up the managing agency in favour of G. Under another agreement G was also given the selling agency. The assessee was to be paid an office allowance and a share in the managing agency commission and the selling agency commission, and, on the termination of either the selling agency or the managing agency, the assessee was entitled to résumé both the agencies. In 1943, the selling agency and managing agency were assigned to two private companies. At the instance of G. the assessee was removed from the office as chairman in 1946. The selling agency was surrendered by the private company to G in 1947, but it did not revert to the assessee as agreed. Thereupon, the assessee instituted a civil suit seeking reinstatement as chairman and also to establish his right to the selling agency. Pending that suit the

assessee lodged a criminal complaint against G alleging misappropriation of the company's funds and other fraudulent acts. Pursuant to that complaint, Government instituted a criminal case against G, in which after obtaining the permission of the court and with the consent of the Government, the assessee employed his own lawyers to prosecute that criminal case. The prosecution ended in G's conviction. Pending the civil and criminal cases the assessee and G arrived at a settlement whereby G gave up the managing agency and also affirmed the assessee's right to the selling agency. The question was whether the amounts spent by the assessee for the criminal litigation was allowable as business expenditure under section 10(2) (xv) of the Indian Income tax Act, 1922. The Appellate Tribunal found that the criminal case was instrumental in bringing about the compromise and that the expenditure was bonafide incurred by the assessee for the purpose of his business. The Tribunal, however, held, on an estimate, that only one-third of the amounts spent by the assessee had been expended wholly and exclusively for the purpose of the business and the assessee did not challenge that finding. On a reference at the instance of the department, the High Court, while accepting the conclusion that the expenditure was incurred for the purpose of the business and holding that the entire expenditure was deductible, directed the Tribunal to re-examine the exact amount expended in connection with the criminal litigation. On appeal to the Supreme Court".

25. From the above it is clear that criminal acts related to the business transactions and business issues and therefore the purpose was for clearly business and thus these both decisions are clearly distinguishable. As far as the decision in case of Ajay Singh Deol Vs. JCIT (supra) is concerned the expenditure was incurred for the purpose of treatments of the wife of one of the employee Shri Ravat who fell seriously ill. Therefore, just to encourage moral of the employees this kind of expenditure are generally incurred by the employers which is a normal practice with all good employers and therefore these facts are also quite distinguishable. In the case before us the fact remains that some personal complaints have been lodged against the assessee which has nothing to do with professional activities and therefore expenditure incurred in defending against these allegation is definitely of personal nature and such expenditure cannot be allowed against the income from business and profession. Therefore, we set aside the order of learned CIT(Appeal) in this respect and restore the order of A.O.

26. In the result revenues appeal is partly allowed for statistical purpose.

I.T.A. No.2837/Mum/2008

27. In this appeal the following grounds have been raised :-

"1.a. On the facts and circumstances of the case and in law, the CIT(A) erred in law in allowing deduction u/s.80RR without appreciating the fact that the income derived by the assessee was not in exercise of his profession as an actor from foreign sources.

b. On the facts and in the circumstances of the case and in law, the CIT(A) failed to take into account the decision of ITAT, Mumbai in Harsha Bhogle 86 Income Tax

Digest 714, while allowing deduction u/s.80RR of the I.T.Act, 1961.

c. On the facts and in the circumstances of the case and in law, the CIT(A) erred in deleting the addition of Rs.31,05,000/- made by the A.O. on account of legal expenses and professional charges without appreciating the fact that the criminal offence was committed by assessee in the personal capacity and not in his professional capacity as an actor. Hence, the same being personal in nature cannot be allowed under section 37(1) of the Act."

28. Both the parties made identical arguments as were made in case of ITA 2836/M/2008 and submitted that since issues are identical, the same view may be taken in this case also.

29. After considering the rival submission carefully we find that in this appeal also issues are identical, which we have adjudicated in above noted para while adjudicating ITA/2836/M/2008. Following these orders the issues raised in Gr.No.1a & 1b are set aside to the file of A.O. with the same directions as contained in para 19. As far as 2nd issue is concerned, this was decided in favour of the revenue in earlier order in ITA/2836/M/2008 and therefore following that order appeal is decided in favour of the revenue and against the assessee.

30. In the result, the appeal is partly allowed for statistical purpose.

31. Thus, both the appeals are partly allowed for statistical purpose.

Order pronounced on this 13th day of October., 2010.

Sd/-

(D. Manmohan)  
VICE PRESIDENT

Sd/-

(T. R. Sood)  
ACCOUNTANT MEMBER

MUMBAI, Dt: 13th October, 2010.

Copy forwarded to :

1. The Appellant,
2. The Respondent,
3. The C.I.T.
4. CIT (A)
5. The DR, E - Bench, ITAT, Mumbai

//True Copy//

BY ORDER

ASSISTANT REGISTRAR  
ITAT, Mumbai Benches, Mumbai

Roshani