

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1027 OF 2013

The Commissioner of Income Tax } Appellant

versus

K. Sera Sera Productions Limited } Respondent

Mr. Nirmal Chandra Mohanty for the Appellant.

Mr. J. D. Mistri-Senior Advocate with
Mr.Satish Mody and Ms. Aasifa Khan for the
Respondent.

**CORAM :- S. C. DHARMADHIKARI &
A. K. MENON, JJ.**

DATED :- MARCH 18, 2015

P.C. :-

This Appeal of the Revenue challenges the order passed by the Income Tax Appellate Tribunal, Mumbai Bench, Mumbai on 14th September, 2012 in Income Tax Appeal No. 3024/Mum/2012.

2) The order was passed by the Tribunal on Assessee's Appeal, which was directed against the order of the Commissioner of Income Tax dated 29th March, 2012. The said Commissioner exercised power under section 263 of the Income Tax Act, 1961 and the correctness of that exercise was put in issue by the Assessee before the Tribunal.

3) Mr. Mohanty appearing for the Revenue, after inviting our attention to section 263 of the Income Tax Act, 1961 and particularly *Explanation*-(c) to sub-section (1) of the said section, submitted that clause (c) of the said *Explanation* to sub-section (1) will not be attracted, as the Commissioner sought to revise the order of the Assessing Officer on matters which had not been considered and decided in the Appeal against the order of the Assessing Officer. In other words, though the order of the Assessing Officer was challenged in Appeal before the Commissioner of Income Tax (Appeals), that appellate authority did not consider the matters which are subject of the revisional exercise. In such circumstances, the Tribunal's order, holding that there was a merger, raises substantial questions of law. Mr. Mohanty also invited our attention to Rule 9A of the Income Tax Rules to submit that the applicability of this Rule and to the given facts and circumstances was not subject matter of the appellate exercise. In such circumstances, he submits that the Appeal deserves to be admitted.

4) Mr. Mistri-learned Senior Counsel appearing for the Assessee/Respondent, on the other hand, submits that there is no merit in this Appeal. Once there is a finding of fact by the Tribunal that clause (c) of the *Explanation* below sub-section (1) does not apply, then, the principle of merger is attracted. After the order passed by the

Assessing Officer merges with that of the Commissioner of Income Tax (Appeals), then, the power under section 263 of the Income Tax Act, 1961 cannot be exercised. That power also cannot be exercised because the Commissioner, while seeking to revise the order of the Assessing Officer, failed to note that the order of the Assessing Officer was challenged in Appeal. That Appeal was decided on 12th October, 2011. The Assessing Officer has given effect to the direction in the appellate authority's order. It is that order, whereby the Assessing Officer gives effect to the above direction, which is sought to be revised by the Commissioner under section 263 of the Income Tax Act, 1961. That was plainly and clearly impermissible given the above doctrine. Thirdly, the Commissioner did not put the Assessee to notice on certain aspects which he took into consideration, inasmuch as he directed by the order passed on 29th March, 2012 that the Assessing Officer must inquire into an issue as to whether the Assessee had sold its share of theatrical rights in the film "*Darna Zaroori Hai*" to M/s. RGV Enterprises for 25 lacs as is claimed by it. The Assessing Officer must give specific finding whether this claim is acceptable or not. Mr. Mistri submits that the Tribunal also set aside the order of the revisional authority because the show cause notice purporting to revise the order of the assessment dated 31st December, 2009 did not mention this sale of share of theatrical rights to M/s. RGV Enterprises. If the Assessee was not put to notice of this

issue, then, the final order of the Commissioner revising the Assessing Officer's order takes into consideration something which is not part of the show cause notice. On that ground also the Tribunal rightly interfered with the revisional authority's order. Consequently, this Appeal does not raise any substantial question of law. More so, when the Revenue has put in issue the correctness of the order passed on 12th October, 2011 by the first appellate authority and the Appeal before the Tribunal is pending.

5) With the assistance of both Counsel, we have perused the Appeal paper book including all the orders.

6) On the own showing of the Revenue, the Revisional Authority issued a notice to show cause by invoking powers under section 263 of the Income Tax Act, 1961. That was because the Assessee who was engaged in the business of production, financing and distribution of cinematographic films, filed return of income on 10th September, 2009 declaring income at Rs.87,64,620/-. The assessment order under section 143(3) read with 153A of the Income Tax Act, 1961 was passed by the Assessing Officer on 31st December, 2009 assessing income of the Assessee at Rs.14,37,20,890/-.

7) The order passed by the revisional authority, copy of which is at Annexure 'C', in para 2 makes specific reference to the Assessee's production of films in the year under consideration, namely, assessment year 2006-07 and one of the film "*Darna Zaroori Hai*". The Assessee claimed to have incurred expenses of Rs.6,99,73,052/- for production of this film. During the course of assessment proceedings, the Assessee furnished, before the Assessing Officer, details of its income from operations, vide letter dated 7th September, 2009. As per these details, the Assessee claimed that it has earned income of Rs.11,25,00,000/- from this film. Later on, however, the Assessee claimed before the Assessing Officer that this was not income from the production of the film, but this was a sum received as share application money from various persons. The breakup of the receipt and to the tune of Rs.11 crores was provided by the Assessee to the Assessing Officer. The Assessing Officer, therefore, had before him explanation of the Assessee that this amount of Rs.11,25,00,000/- could not be considered as income from film "*Darna Zaroori Hai*". The income was only Rs.25 lacs. The Assessing Officer did not accept this claim of the Assessee and took the income at Rs.11,25,00,000/-. He, therefore, took into consideration this sum while passing the assessment order. Then, the Assessee had, before the Assessing Officer, pointed out that if this sum and as computed above can be termed as the income from the film, then, in

terms of Rule 9A of the Income Tax Rules, when the film is released for exhibition on a commercial basis at least ninety days before the end of previous year, then, the cost of production of the film is to be allowed as deduction and that is restricted to the extent of income earned and the balance part of cost of production expenses are to be allowed as income of the previous year. Film “*Darna Zaroori Hai*” was released on promotional basis on 22nd February, 2006 and its commercial release was on 28th April, 2006. The computation of the expenses was also provided, but the Assessing Officer, in his order, came to the conclusion that the details as provided are not reflecting the cost of production. He therefore, in his detailed order and after going through the application, granted deduction to the extent of sum debited to the P&L account and to the extent of Rs.24,84,34,124/-. He disallowed the balance of Rs.2,34,91,380/-.

8) The revisional authority was aware of the fact that against such an order of the Assessing Officer, the Assessee has preferred an Appeal to the Commissioner of Income Tax (Appeals). Ground No. 1 of that Appeal was whether on the facts and circumstances and in law, the Assessing Officer erred in addition of alleged suppressed business profit aggregating to Rs.11 crores as per the order dated 31st December, 2009 (para 9.2). The first appellate authority, in dealing with this ground, in

its order dated 12th October, 2011, concluded that after that consideration of the submissions of the Assessee, in the backdrop of the facts of this case, it is evident that the addition made by the Assessing Officer cannot be sustained. In para 1.6 of the order passed by the first appellate authority on 12th October, 2011, this conclusion is reached.

9) Then, ground No. 2 in that Appeal was whether in the facts and circumstances and in law the Assessing Officer erred in disallowing the alleged cost of production claimed amounting to Rs.2,34,91,380/- as per para 10 of the impugned order. In other words, if the amount of Rs.11,25,00,000/- is not taken to be the income of the Assessee from film "*Darna Zaroori Hai*", then, by applying Rule 9A, the cost of production of this film deserves to be deducted and in full as claimed by the Assessee. From para 2.1 onwards in the appellate order, this aspect has been dealt with. When this aspect was considered by the first appellate authority, not only did he have before him the record pertaining to the Assessing Officer's order dated 31st December, 2009, but he called for a remand report from the Assessing Officer. The gist of that remand report is reproduced in para 2.3 of the first appellate authority's order. Once the copy of the remand report was given to the Assessee for his comments and the Assessee agreed with the remand report, then, barring the addition of Rs.4,01,467/-, the balance addition

made by the Assessing Officer came to be deleted. Thus, as against the expenses or cost of production to the tune of Rs.27,19,28,504/- only a sum of Rs.4,01,467/- was deleted.

10) We find that despite this position emerging from the record and being undisputed, the order under section 263 of the Income Tax Act makes detailed reference to the show cause notice. The show cause notice as also this order passed under section 263 make detailed reference to the claims of the Assessee and which were part of the Appeal before the Commissioner and dealt with by him in his order dated 12th October, 2011. The order of the Commissioner under section 263 dated 29th March, 2012, from paras 8 onwards, makes extensive reference to these aspects. In the circumstances, what further emerges is that not only did the revisional authority purport to revise the Assessing Officer's order, but he purported to deal with the same direction which was issued in the order of the first appellate authority and which was given effect to by the Assessing Officer. Meaning thereby, the contents of the remand report, giving effect to the order of the first appellate authority, as submitted by the Assessing Officer, came to be reconsidered and revisited. In addition thereto, one more aspect of sale of theatrical rights of "*Darna Zaroori Hai*" to M/s. RGV Enterprises was considered. Naturally, therefore, the doctrine of merger

was invoked by the Assessee and it was applied by the Tribunal to uphold the objection raised by the Assessee.

11) In the above factual circumstances, we do not find that the Tribunal erred in holding that clause (c) of the *Explanation* to sub-section (1) of section 263 of the Income Tax Act, 1961 cannot be applied. In the present case, that has no application because the matters which have been considered and decided in the Appeal by the first appellate authority are being made subject matter of the revisional authority's order. In other words, the power to revise, as conferred by section 263, is sought to be exercised so as to deal with the same matters which have been considered and decided in the Appeal. We do not find any merit in Mr. Mohanty's submission because detailed references have been made in the foregoing paragraphs to the case of the Assessee before the Assessing Officer, his initial order, the order of the first appellate authority, the direction issued by the first appellate authority and which was given effect to by the Assessing Officer. All these would denote that something which was very much part and parcel of the appellate authority's order and dealt with extensively therein is now sought to be revised and revisited. Firstly, if the income of the Assessee from the film is Rs.11,25,00,000/-, then, whether the explanation of the Assessee that it is not so deserves to be considered or

not by the Assessing Officer is grievance No. 1/ground No. 1 before the first appellate authority. Secondly, if that is taken to be the income of the Assessee and without admitting it to be so the cost of production of the film needs to be deducted by applying Rule 9A of the Income Tax Rules. Thus, that is ground No. 2 in the memo of Appeal before the first appellate authority and in his order dated 12th October, 2011. Both these matters are very much part of the revisional authority's order dated 29th March, 2012. The attempt to reopen them cannot be saved as clause (c) of *Explanation* below sub-section (1) of section 263 of the Income Tax Act, 1961 had no application.

12) This conclusion of the Tribunal being sustained and in consonance with the factual material placed cannot be termed as either perverse or vitiated by any error of law apparent on the face of the record. We fully agree with the Tribunal when it concluded in para 14 that it is evident from the order of the Commissioner (Appeals) that the claim of cost of production of film was a subject matter of Appeal before him and after consideration of remand report of the Assessing Officer he gave his findings. Therefore, this order of the Assessing Officer dated 31st December, 2009 undisputedly had merged with the order of the first appellate authority dated 12th October, 2011 as far as the claim of cost of production of the film is concerned. Similarly, the other

argument that applicability of Rule 9A has not been considered by the Commissioner, the Tribunal in para 15 found that this was also very much before the authorities and hence, even in relation thereto, it cannot be said that the Assessing Officer at the time of making the assessment order did not consider the applicability of Rule 9A vis a vis the claim of the Assessee on the aspect of cost of production of the film. Therefore, on both grounds, we do not find that the Appeal raises any substantial question of law. It is therefore dismissed. There would be no order as to costs.

(A.K.MENON, J.)

(S.C.DHARMADHIKARI, J.)