IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1406 OF 1994

Satish Yashwant Kulkarni … Petitioner

Vs

Union of India and Ors. … Respondents

Mr.Mihir Naniwadekar i/b Mr. S.N.Inamdar and G. Krishnan for the Petitioner.

Mr.Sham Walve for the Respondents.

CORAM : S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.

MONDAY, 22nd OCTOBER, 2018

P.C. :

1 We have heard Mr.Mihir Naniwadekar appearing for the petitioner.

2 By this Writ Petition under Article 226 of the Constitution of India, the petitioner challenges the proviso to Rule 9A of the Income Tax Rules, 1962 as *ultra vires* the main provisions of the Act and

particularly the power to make Rules conferred by Section 295, Sections 4 and 37 as well. Mr. Mihir Naniwadekar would urge that what is not chargeable to tax is brought to tax by relying on this proviso. That is to nullify the effect of the judgment of this Court that these subsidies are in the nature of capital receipts. Now the language of the proviso is relied upon and to the detriment of the petitioner.

3 Ordinarily, we are reluctant to examine the constitutional validity of any provision unless it is really necessary and in the facts and circumstances to render any decision on that question or issue. Further, where interest of justice demands any adjudication to that issue. The third and more relevant aspect is, if justice can be rendered without examining any larger issue or wider question, essentially on facts, then, the Court must refrain from expressing any opinion. That would be purely academic.

4 In the instant case, it is pointed out that the petitioner claims to be a producer of Marathi feature films. The State of Maharashtra introduced the scheme for grant of subsidy to Marathi feature films. The main object and salient features of this scheme are

pointed out in the affidavit of respondent No.4 in reply to this Petition. Further, the deponent points out that on receipt of such subsidy by the petitioner, the authorities under the Income Tax Act, 1961 had passed certain orders. However, for the relevant Assessment Year 1991-1992, the petitioner released a feature film. The Assessment Order under Section 143(3) of the Income Tax Act, 1961 was passed on 25th January, 1993. The order of assessment was served on the petitioner on 3rd May, 1993. The view taken by the Assessing Officer was that the subsidy amount received by the petitioner from the State of Maharashtra needs to be reduced from the cost of production while computing the cost under Rule IX-A. Thus the Assessment Order passed by the Assessing Officer to this effect has been challenged in Appeal on 18th May, 1993. However, that Appeal has been disposed of without dealing with the issue relating to treatment of the subsidy.

5 Mr.Mihir Naniwadekar appearing for the petitioner would submit that the petitioner is not averse to argue the issue if at all it arises before the Commissioner and it is not the petitioner/assessee, who is responsible for the Commissioner not examining the issue. Despite the pendency of this Petition, the petitioner was ready and

willing to cooperate and render assistance to the First Appellate Authority. However, the First Appellate Authority decided to await the decision of this Court and that is how the matter remained pending.

6 In the light of the above submissions of Mr.Naniwadekar and the position in law emerging from the discussion in the foregoing paragraphs, we are of the view that interest of justice would be served by not examining presently the issue of constitutional validity and legality of the provisio to Rule 9A. In the event, the Commissioner passes an order which is adverse to the interest of the petitioner, then, while challenging it in Appeal before the Tribunal, the petitioner can rely upon the view taken by the Tribunal in several cases after introduction of the proviso. The petitioner can persuade the Tribunal to pass an order consistent with its earlier views and, in the event, the facts and circumstances are found to be identical, we have no doubt in our mind that the Tribunal will render a judgment in accordance with law. While rendering such a judgment, it will note the rival contentions and equally make reference to the earlier views of the Tribunal. All this would emerge in the speaking order.

7 Apart therefrom, when the Appeal of the petitioner is pending before the First Appellate Authority, the petitioner has enough time at his disposal to convince the First Appellate Authority that the views taken by the Tribunal after the proviso was introduced, enables the assessee to successfully challenge the Assessment Order. The Assessment Order should be set aside in that view of the matter. The First Appellate Authority will examine the records and deal with such contentions of the assessee in its speaking order. We cannot speculate or guess as to what will be the ultimate outcome. But,the First Appellate Authority is bound to consider the contentions of the petitioner and while passing the speaking order. The Commissioner has a choice and by not examining a larger question, he can grant the relief on the basis of the view taken by the Tribunal or the higher Courts. In the event, the Commissioner accepts the view point of the petitioner, then, nothing would survive for consideration. It is then for the Revenue to challenge the Commissioner's order, if it feels aggrieved, before the higher Court. Equally, if the order of the Commissioner is adverse to the petitioner, the petitioner can approach the Tribunal and impugn and challenge it also on the grounds set out in the Writ Petition. In the event, any necessity arises of examining the legality and validity of proviso to

Rule 9A in future, we have no doubt in our mind that merely because this Writ Petition is disposed of by us does not prevent or preclude the petitioner from pressing this issue again. All contentions of the petitioner in relation thereto are kept open.

8 The Rule is made absolute in above terms. We clarify that we have not expressed any opinion on the rival contentions. The interim order does not survive once the Petition is disposed of. There will be no order as to costs.

9 Needless to clarify that when we vacate the interim order or it does not survive in view of the disposal of the Writ Petition, we expect the Revenue Officials not to precipitate the matter by initiating the process of recovery of the amount determined as tax by coercive means. Let that process be kept in abeyance till the decision of the First Appellate Authority.

[B.P. COLABAWALLA, J.] **[S.C. DHARMADHIKARI, J.]**