

R.M. AMBERKAR
(Private Secretary)

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.**

INCOME TAX APPEAL (IT) NO.476 OF 2016

Pr. Commissioner of Income Tax, Central 3 .. Appellant

Versus

KSS Limited (formerly known as K Sera
Sera Productions Ltd.) .. Respondent

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- Mr. N.C. Mohanty a/w Ms. Padma Divakar for the Appellant
 - Mr. Satish Mody a/w Ms. Aasifa Khan for the Respondent
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**CORAM : AKIL KURESHI &
M.S. SANKLECHA, JJ.**

DATE : NOVEMBER 26, 2018.

P.C.:

1. This appeal is filed by the Revenue challenging the judgment of the Income Tax Appellate Tribunal, Mumbai ("**the Tribunal**" for short) dated 10.6.2015.

2. Mr. Mohanty, the learned counsel for the Revenue, focussed on following questions presented in the Appeal:-

6.1 Whether on the facts and in the circumstances of the case and in law, the Tribunal was correct in holding that there was no international transaction between the assessee company and its AE on account of back to back agreements between the assessee company and its AE and in turn between its AE and a third party M/s

Citi Gate Trade FZE, even though the agreements were made for procurement of film rights and payment of advance for the same, which falls within the definition of International Taxation in the explanation given in Section 92B of the Act?

6.2 Whether on the facts and in the circumstances of the case and in Law, the Tribunal was correct in holding that the provisions of Chapter X were not attracted even though the assessee has interest bearing borrowed funds in its books and had given advance to AE, and further that foreign exchange gain or loss was likely to arise in the transaction to the assessee company, since advance was given in foreign currency, which would have a bearing on the profits, income, losses and assets of the assessee company?

3. The appeal relates to the Assessment Year 2009-10. The Revenue's objection to the order of the Tribunal is that the Tribunal erroneously came to the conclusion that in relation to the transaction entered into by the respondent – assessee with its associated enterprise (**“AE”** for short) machinery under Chapter X of the Income Tax Act (**“the Act”** for short) could not be invoked.

4. Briefly stated the case of the assessee is as under:-

4.1 The respondent – assessee is a registered company and is engaged in the business of production and distribution of films. The assessee desired to acquire rights for distribution of three Hollywood films in India. For such purpose, the

assessee contacted M/s. Citi Gate Trade FZE (“**Citi Gate**” for short). According to the assessee, Citi Gate would not deal with the assessee directly and required a foreign based entity. In order to formalize this arrangement of acquisition and distribution rights of the films, the assessee, therefore, used a UAE based company, its associated enterprise, as a conduit. The assessee first entered into an agreement with the said AE which envisaged the AE acquiring distribution rights for the assessee from Citi Gate. On the very next day, the AE entered into an agreement with Citi Gate. To operationalize said arrangement, the assessee advanced certain amounts to the AE. The AE, in turn, immediately paid up such amounts to Citi Gate. However, eventually, the arrangement did not work out. Citi Gate, thereupon, refunded the advance to the assessee through its AE. In the process, however, some time was consumed and the repayment was made over a period of time.

4.2 The Revenue contends that by making interest free advances to the AE, the assessee has transferred its profit and therefore, the transfer price regime would apply.

5. Learned counsel for the Revenue vehemently contended that the Tribunal has committed serious error in holding that the present is not a case giving rise to transfer pricing mechanism. He submitted that the assessee had made interest free advances to AE. Such amount was retained by AE for long time. The advances were made by the assessee out of its borrowed funds on which the assessee was paying considerable interest. The assessing officer, therefore, correctly invoked the transfer pricing mechanism. In this context, learned counsel drew our attention to the explanation to Section 92B of the Act.

6. On the other hand, learned counsel Mr. Mody for the assessee opposed the appeal contending that the entire transaction has to be seen as a whole. The Revenue cannot bifurcate different events for isolated consideration. He submitted that the genuineness of the transaction has never been in doubt. The assessee had paid the money to the AE only for the purpose of acquiring distributorship rights. When such arrangement did not work out, the money was repaid to

the assessee through the AE. At no point of time, the AE had retained such amounts for its own use or purpose.

7. The Tribunal, in the impugned order, has examined the entire transaction threadbare. Different clauses of the agreement have been taken into consideration. In the process, the Tribunal noted that the assessee had entered into an agreement with its AE specifically for the purpose of acquisition of distributorship rights of three films from Citi Gate. For such purpose, the AE was authorized to negotiate the price and other terms of the agreement with Citi Gate. Upon acquisition of such rights, the AE would transfer the same to the assessee at the price at which it had acquired such rights from Citi Gate.

8. The Tribunal noted that the AE had entered into back to back contracts with the assessee and Citi Gate which envisaged inter alia that Citi Gate would grant, sale, assign and transfer to the AE as well as to the assessee all rights for sale, absolute and exclusive rights of distributorship. The Tribunal, therefore, was of the opinion that there was no

ambiguity over the scope of such agreements. Under the arrangement, the AE of the assessee was under obligation to transfer the rights to the assessee. The assessee had, therefore, established that the transaction of giving advance to the AE was for no other purpose except for acquiring the rights in respect of the said Hollywood films.

9. The Tribunal also examined the bank statements of the assessee as well as its AE. From such statements, the Tribunal concluded that the amount in question never remained with the AE. The same was immediately transferred to Citi Gate. Similarly, whenever the amount was refunded by the Citi Gate, the same was also routed through the AE without any retention time by the AE.

10. On the basis of such findings, the Tribunal came to the conclusion that there was no diversion of income and therefore, the transfer pricing provisions would have no applicability. The Tribunal referred to and relied upon the Judgment of this Court in the case of **Vodafone Services Pvt Ltd Vs. Union of India** reported in **368 ITR 1 (Bom)**.

11. The Tribunal concluded that in order to attract the provisions of Chapter X of the Act, there must be transaction or arrangement between two or more associated enterprises which gives rise to the income or benefit in the hands of at least one of them. The Tribunal noted that in the present case, the advance was not given to the AE but to the third parties which was for the purpose of acquisition of rights of distributorship.

12. The findings of the facts of the Tribunal are not seriously in dispute before us. Even otherwise, in absence of any perversity being pointed out, the said findings are final at the stage of the Tribunal.

13. The relevant findings of the Tribunal, therefore, are that the assessee had released money in favour of the AE with a specific purpose of acquisition of distributorship of the films from Citi Gate. Two back to back contracts entered into between the assessee and the AE and the AE and the Citi Gate duly establish this. Further, the AE never retained any

amount either when the assessee released the same for payment to Citi Gate or when Citi Gate refunded the same to the assessee through AE.

14. Chapter X of the Act makes special provisions relating to avoidance of tax. Section 92 deals with computation of income from international transaction having regard to arm's length price. Section 92A pertains to meaning of associated enterprise. Section 92B pertains to meaning of international transaction.

15. Sub-section 1 of Section 92 provides that any income arising from an international transaction shall be computed having regard to the arm's length price. Sub-section 1 of Section 92B reads as under:-

“ (1) For the purposes of this section and sections 92, 92C, 92D and 92E “international transaction” means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other, transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with

a benefit, service or facility provided or to be provided to any one or more of such enterprises.

16. Explanation to Section 92B clarifies certain doubts. As per clause (c) of this explanation, capital financing including any type of long-term or short-term borrowings, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising in the course of business would be included within the expression “international transaction”. Learned counsel for the Revenue had heavily relied on this explanation. However, having regard to the nature of entire arrangement and the different transactions, noted above, in our opinion, the said explanation would not cover the present situation. As noted, the present case is a simple one where the money was routed through the AE by the assessee for the purpose of acquisition of distributorship. This is not a case of either financing or lending or advancing of any moneys. The back to back agreements, the contents thereof and most significantly, the fact that neither at the point of payment nor at the point of refund of money, the AE retained the same for any significant period of time, in our opinion, would be crucial. This transaction did not result into

diversion of income of the assessee to its AE. The Tribunal, therefore, committed no error. No question of law arises in this respect. Once we come to the conclusion that the transaction did not give rise to the international transaction, the rest of the issues would become academic.

17. In the result, the Income Tax Appeal is dismissed.

[M.S. SANKLECHA, J.]

[AKIL KURESHI, J]