THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 13.04.2010
Judgment Delivered on: 19.04.2010

\+ **ITA 484/2010**

M/S KAS MOVIE MAKERS PVT. LTD. ... Appellant

\- versus -

COMMISSIONER OF INCOME TAX-II. ... Respondent

Advocates who appeared in this case:
For the Appellant : Mr M.S.Syali, Sr.Advocate with Mr.M.P.Rastogi & Mr K.N.Ahuja
For the Respondent : Mr Sanjeev Sabharwal

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE V.K. JAIN

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

V.K. JAIN, J.

1. This appeal was filed against the order of the Income Tax Appellate Tribunal dated 23.3.2009 in ITA No. 159/Del/07 for the A.Y. 2003-2004 and ITA No.555/Del/06 for the A.Y.2002-2003, whereby the appeals filed by the Revenue were allowed and the orders passed by CIT(A) were set aside. We however have treated it as appeal against the order passed in ITA No. 155/Del/06/06 for the A.Y. 2002-03.

2. The appellant/assessee claims to be engaged in the business of manufacture of television film software, for which

professional services were provided by it to the foreign clients for shooting cinematograph films in India. For the assessment years in question, the appellant claimed deduction under Section 80 HHF on the ground that it was engaged in the business of transfer, by any means, out of India, of film software, television software, music software, television news software, including telecast rights. The appellant did not produce its agreement with the foreign party, for production of film, before the Assessing Officer. For the A.Y.2002-2003, the Assessing Officer, after considering the reply submitted by the appellant to the show-cause notice, found that the assessee was providing services such as arrangement of raw material, engaging technicians, hiring equipments, etc., the film was shot by foreigners who brought their own equipments such as camera, motion picture stock and took the same back while leaving India and, therefore, deduction under Section 80 HHF was not available to it. The Assessing Officer for the A.Y.2003-2004 also disallowed the benefit of Section 80 HHF to the appellant on the ground that the assessee was only a service provider and was not involved in the export of film software, nothing had been exported out of India by the assessee and it was not the producer of software, since shooting of the film

was done entirely by the foreign parties who produced the film with the aid and assistance of the assessee company and no ownership right in the film or its software vested in the assessee company.

3. In the appeal filed by the assessee/appellant, CIT(A) held that the assessee company was involved in producing and export/transfer of film to foreign countries for a consideration received in India in convertible of foreign exchange and, therefore, was entitled to the benefit of Section 80 HHF of the Act.

4. While allowing the appeals filed by the Revenue, the Tribunal, inter alia, held that it was neither a case of export nor of transfer by any means, out of India, of any film software, and that it was a case where certain services were rendered to the foreign clients for shooting films in India and the negatives were handed over to them in India, which did not involve any export or transfer of film software.

5. Section 80 HHF of the Act, to the extent it is relevant, provides that where an assessee is engaged in the business of export or transfer, by any means, out of India, of any film software, television software, music software, television news software, including telecast rights, the deductions specified in

the Section will be allowed, while computing the total income of the assessee. Therefore, the only question relevant to these appeals is as to whether the appellant company was engaged in the business of export or transfer, out of India, of any film software, television software, etc. during the assessment years in question. The export or transfer of prescribed software can, however, be by any means, so long as it constitutes export or transfer out of India.

6. A copy of the agreement of the assessee with Italgest Video SRL was filed before the Tribunal and it was stated that the agreements entered into by the assessee with the foreign clients are similar.

7. While returning a finding of fact in favour of the Revenue, the Tribunal, inter alia, noted as under:

> "8.2. The responsibility of the assessee was in respect of crewing and casting, production of equipment, negotiation with the personal etc. The foreign party has been termed to be the producer. These services did not confer any proprietary right on the assessee in the product, i.e., the film negatives, which were the sole property of the aforesaid Italgist Video. The assessee received production fees as per paragraph 6 of the agreement. It has already been mentioned that the film had to be handed over to the agent of Italgist in India, who would carry it to a place outside India and exhibit after receiving approval from the Indian Embassy. The agreement, to

our mind is one of providing assistance in shooting the films and ultimately does not lead to transfer of any film or software from the assessee to the Italgist Video. There was no provision that the assessee will be responsible for losses in case the negative was not found satisfactory by Italgist Video. Thus, the agreement cannot be said to be one for transfer of film software by any means outside India by the assessee to Italgist Video.

8.3. Coming to the agreement with Sign + Media Service Gm BH and Company, the obligations of the assessee are contained in paragraph 3, which reads as under:

> "***Article 3: Obligations of Kas***
> KAS as a party hereto commissions hereto CP as the other party hereto with the complete organization for this film production to theextent to such activities are carried out of India. Resposible Executive – Producer of these three documentaries in India is Ms. Aruna Har Prasad & Kalyan Mukherjee from KAS. Ms. Aruna Har Prasad & Kalyan Mukherjee will be in charge of the entire production coordination on location in association with the two Authors – Mrs. Thomas Uhlmann & Mrs. Anja Freyhoff as well as the line producer from CP, Mr.Georg Lise."

8.4. Under this agreement also, the assessee did not acquire any proprietary right in the film software as the agreement was for providing various services for production co-ordination at various places in India. The subject matter of the films was authored by foreigners and Mr.George Lise was the line producer. Therefore, we are of the view that it is neither a case of export or transfer by

any means out of India of any film sofrtware…………………………………………
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…………………………………………… In this case the assessee was rendering service for production of films, which were handed over to the agents of the customers in India. The expenses were incurred on behalf of the clients and no proprietary right got vested in the assessee. Although the assessee was required to render satisfactory services, the risk and reward remained with the clients. The handing over negatives in India neither involved export nor transfer by any means, outside India………………………………………………
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In the instant case there has been no sale of the film software off the shelf. That is also not the case of the assessee. It is a case where certain services were rendered to foreign clients for shooting films in India, and the negatives were handed over to them in India. The services may involve the use of assessee's expertise in the process of production. We have already seen that this activity neither involves export nor transfer of film software by any means outside India by the assessee and everything was handed to the clients in India…………………………………………………
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8.5. The invoices produced by the assessee show nil value. We are of the view that this fact goes against the assessee as it shows that there was no export etc. by the assessee and it was the case of sending or transmitting of the film software by the client from India to a place outside India with no transactional value. Further, mere allotment of IEC does not ipso-facto leads to the conclusion that

> the assessee transferred software outside India. This issue has to be decided on the basis of agreement between the assessee and the client……………………………………………………
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> 8.6. In a nut-shell, it is held that the instance case is one of rendering multi-farious services for production of films by foreign companies in India and handing over the negatives to them in India. This does not involve export or transfer outside India by any means of any film software by the assessee…………..”

8. We have examined the matter with reference to two agreements filed by the appellant and entered into between the appellant and the foreign clients.

9. The following facts emerge from a perusal of the agreement entered into between the appellant and Italgest Video SRL:

(i) It is Italgest Video SRL and not the appellant Kas Movie Makers which is the producer of the film.

(ii) The appellant was required to incur expenditure within the budget agreed between the parties and any expenditure exceeding the approved budget required approval of the producer Italgest Video SRL.

(iii) The producer Italgest Video SRL was responsible for all the expenses incurred outside India, the

responsibility of the appellant was confined to the expenses incurred in India.

(iv) The production of the film was financed by the producer Italgest Video SRL. Receipts, invoices, contracts and backup material were required to be provided by the appellant to the producer Italgest Video SRL.

(v) The payment to Robin Melville, the designated representative of the producer in India, was to be made by the producer Italgest Video SRL and not by the appellant.

(vi) The appellant was entitled to a fixed fee of 2 (two) million Indian rupees. In the event of the production of the film getting stopped for any reason other than breach on the part of the appellant company, it was entitled to keep the payment received by it prior to stoppage of the film.

(vii) It was the producer Italgest Video SRL and not the appellant who was entitled to all the results and proceeds derived from the production services, including the results and proceeds of the services rendered by the appellant.

(viii) It was the producer Italgest Video SRL who owned all rights, including proceeds, all insurance policies in respect of the film and the insurance policies were subject to approval by it.

10. We also note that, as pointed out to the Tribunal, the Profit and Loss Account of the assessee company did not show any purchase or sale and Schedule of its Assets did not contain any equipment for manufacture of a software.

11. The first pre-requisite condition, for export or transfer out of India, of the prescribed software by an assessee is that the ownership or title in the software claimed to have been exported or transferred out of India must necessarily have vested in him. There could not have been any export or transfer, by the assessee company unless the ownership rights in the software in question vested in it. In the present case, the film was produced by Italgest Video SRL and not by the appellant. In terms of clause 7 of the agreement, it was the foreign client and not the appellant which owned the software that came to be developed as a result of the services provided by the appellant and it had no right, title or authority to transfer it to any person. Thus, though the film was shot with the help of the assessee, it was not owned by it and, therefore,

there could be no export or transfer of the film by the appellant outside India, the ownership of the film being the sine qua non for its export or transfer by the appellant.

12. The terms and conditions of the agreement show that no sale price for the film in question was fixed. The insurance policies under clause 9 of the agreement were owned by Italgest Video SRL and in the event of any claim being made with the insurance company, it is that company and not the appellant which would have been entitled to the payment made by the insurance company. Yet another important term which shows that the ownership in the film vested in the foreign client and not in the appellant company is that the expenses to be incurred outside India were to be borne by the foreign client and not by the appellant company. As noted earlier, the entire expenses for the production of the film were to be borne by the foreign client and not by the appellant. A fixed fee in terms of clause 6 of the agreement was to be paid to the appellant. In fact, the term stipulating the payment of a fixed fee to the appellant company leaves no doubt that the ownership in the film vested in the foreign client which was paying a fixed fee to the appellant company for the production services rendered by it. The stipulation permitting the appellant to retain the money

received by it, in the event of the production getting stopped shows that no loss was to be incurred by the assessee in the event of the project remaining incomplete and the entire loss would have been of the foreign client. In fact, as pointed out to the Tribunal, the appellant company also did not show any sale or purchase in the Profit and Loss Account submitted by it. This is yet another indicator that the appellant company was paid a fixed fee for the services rendered by it and it was not engaged in the production of the software on its own account and, since it was not the owner, there is no question of it transferring any such software outside India.

13. A perusal of the agreement between the appellant and Cine + Media Services would show that the equipment for shooting the film was brought from Germany and the appellant company was made responsible for customs clearance for bringing the equipment in and taking it out. Under this agreement also, a fixed sum stated in terms of article 4 of the agreement was to be paid to the appellant and it was foreign client which was to bring the equipment to India for the purpose of shooting.

14. For the reasons given in the preceding paragraphs, we do not find any infinity in the factual findings returned by the

Tribunal. No perversity has been pointed out. The Tribunal has correctly appreciated the law and the terms of the agreements. Consequently, no substantial question of law arises for our consideration. The appeal is, hereby, dismissed.

(V.K. JAIN)
JUDGE

(BADAR DURREZ AHMED)
JUDGE

APRIL 19, 2010
RS/