

CASE NO.:
Appeal (civil) 7750 of 2002

PETITIONER:
Commissioner of Income Tax, Thiruvananthapuram

RESPONDENT:
Joseph Valakuzhy

DATE OF JUDGMENT: 06/05/2008

BENCH:
ASHOK BHAN & DALVEER BHANDARI

JUDGMENT:
J U D G M E N T
REPORTABLE

CIVIL APPEAL NO. 7750 OF 2002

BHAN, J.

1. With the leave of the Court the Revenue has filed the present appeal, against the judgment and order dated 27th November, 2001 of the High Court of Kerala in ITA No. 105/1999, rejecting the appeal filed by the appellant under Section 260 of the Income Tax Act, 1961 (for short "the Act").

2. The respondent-assessee (for short "the assessee") is a film producer. In his income tax return for the assessment year 1992-93, the assessee claimed the benefit of carry forward of Rs.39,43,830/- as amortization expenses. The Assessing Officer allowed the claim of amortization. On appeal, the Commissioner of Income Tax, in exercise of his jurisdiction under Section 263 of the Act, set aside the assessment and directed the Assessing Officer to withdraw the benefit of carry forward granted to the Assessee on the ground that, as the provisions of Section 80 of the Act are applicable, the benefit of carry forward of the expenses was not admissible to the assessee as the assessee had failed to file the income tax return in accordance with Section 139(3) of the Act. Appeal filed against the aforesaid order before the Income Tax Appellate Tribunal (for short "the Tribunal") was dismissed.

3. Thereafter, the Assessing Officer implemented the directions issued by the Commissioner of Income Tax by passing a fresh order under Section 143(3) withdrawing the benefit of carry forward of amortization expenses granted to the assessee. The assessee being aggrieved filed an appeal before the CIT (Appeals). CIT (Appeals) accepted the appeal. It was found that the computation of the amortization expenses to be carried forward, as shown by the assessee, was not correct. The assessee had claimed amortization expenses in respect of the two films, namely, (i) Ex Kannikodi and (ii) Santhwanam. It appears that in the first film the assessee incurred heavy loss and to make up that loss the assessee ventured to produce the second film. Rule 9A of the Income Tax Rules (for short "the Rules") provides for deduction in respect of the expenditure incurred on production of feature films. Having found that the computation of amortization expenses to be carried forward as shown by the assessee was not

correct, CIT (Appeals) gave directions to the Assessing Officer to obtain separate accounts in respect of the different films produced by the assessee and determine the claim of the amortization in accordance with rule 9A of the Rules. It was clarified that in case there was loss in respect of the old film on such computation, that would have to be subject to the provisions of Sections 139(3) and 80 of the Act. In other words, it was held that in respect of old films if there was loss, the same would be eligible for carrying forward only if the return of income was filed within the statutory period. In regard to the second film, it was held that the amortization allowance for the next year was not subject to the provisions of Section 80 and Section 139(3) of the Act. It was the finding of the appellate authority that the amortization expenses relating to the second year would have to be allowed separately while computing the income for the next year and not at the time of computation of the income for the current year. Being aggrieved against the order passed by the CIT (Appeals), Revenue filed an appeal before the Tribunal, which was dismissed with certain clarifications.

4. The revenue thereafter filed an appeal under Section 260 of the Act in the High Court. The High Court framed the following substantial question of law in the said appeal for its consideration:

"Whether on the facts and in the circumstances of the case the amortization loss computed under Rule 9A is subject to or not subject to the provisions of section 80 and section 139 of the Income Tax Act?"

5. Making a distinction between the carrying forward of the business loss, as provided under Section 80 of the Act, and carrying forward of the expenditure over the income for the relevant assessment year in which the film was not exhibited for more than 180 days as provided under rule 9A(3) of the Rules, it was held that the present case would be governed by the provisions of Rule 9A(3) of the Rules and not by Section 80 of the Act. It was found that the second film produced by the assessee was not exhibited for 180 days during the previous year, therefore the assessee was entitled to carry forward the business expenditure over the next assessment year.

6. Section 80 finds its place in Chapter VI dealing with Aggregation of Income and Set off by carry forward of loss which, prevalent during at the relevant assessment year, read as under:

"Section 80
SUBMISSION OF RETURN FOR LOSSES.
Notwithstanding anything contained in this Chapter, no loss which has not been determined in pursuance of a return filed in accordance with the provisions of sub-section (3) of section 139, shall be carried forward and set off under sub-section (1) of section 72 or sub-section (2) of section 73 or sub-section (1) or sub-section (3) of section 74 or sub-section (3) of section 74A."

7. Section 80 at the relevant time provided that no loss

which has not been determined in pursuance of a return filed under sub-section (3) of Section 139, can be carried forward and set off under sub-section (1) of Section 72 or sub-section (2) of section 73 or sub-section (1) or sub-section (3) of Section 74 or sub-section (3) of Section 74A.

8. Evidently, Chapter VI deals with carry forward of business losses.

9. Rule 9A of the Rules, which deals with deduction of expenditure on production of feature films (which is a special provision) at the relevant time, read as under:

"9A. Deduction in respect of expenditure on production of feature films.

(1) In computing the profits and gains of the business of production of feature films carried on by a person (the person carrying on such business hereafter in this rule referred to as film producer), the deduction in respect of the cost of production of a feature film certified for release by the Board of Film Censors in a previous year shall be allowed in accordance with the provisions of sub-rule (2) to sub-rule (4),
Explanation : In this rule,--

(i) "Board of Film Censors" means the Board of Film Censors constituted under the Cinematograph Act, 1952 (37 of 1952);

(ii) "cost of production", in relation to a feature film, means the expenditure incurred on the

production of the film, not being--
(a) the expenditure incurred for the preparation of the positive prints of the film; and

(b) the expenditure incurred in connection with the advertisement of the film after it is certified for release by the Board of Film Censors:
Provided that the cost of production of a feature film, shall be reduced by the subsidy received by the film producer under any scheme framed by the Government, where such amount of subsidy has not been included in computing the total income of the assessee for any assessment year.

(2) Where a feature film is certified for release by the Board of Film Censors in any previous year and in such previous year,--

(a) the film producer sells all rights of exhibition of the film, the entire cost of production of the film shall be allowed as a deduction in computing the profits and gains of such previous year; or

(b) the film producer--
(i) himself exhibits the film on a commercial basis in all or some of the areas; or

(ii) sells the rights of exhibition of the film in respect of some of the areas; or

(iii) himself exhibits the film on a commercial basis in certain areas and

sells the rights of exhibition of the film in respect of all or some of the remaining areas, and the film is released for exhibition on a commercial basis at least one hundred and eighty days before the end of such previous year, the entire cost of production of the film shall be allowed as a deduction in computing the profits and gains of such previous year.

(3) Where a feature film is certified for release by the Board of Film Censors in any previous year and in such previous year, the film producer\027

(a) himself exhibits the film on a commercial basis in all or some of the areas; or

(b) sells the rights of exhibition of the film in respect of some of the areas; or

(c) himself exhibits the film on a commercial basis in certain areas and sells the rights of exhibition of the film in respect of all or some of the remaining areas,

and the film is not released for exhibition on a commercial basis at least one hundred and eighty days before the end of such previous year, the cost of production of the film in so far as it does not exceed the amount realised by the film producer by exhibiting the film on a commercial basis or the amount for which the rights of exhibition are sold or, as the case may be, the aggregate of the amounts realised by the film producer by exhibiting the film and by the sale of the rights of exhibition, shall be allowed as a deduction in computing the profits and gains of such previous year; and the balance, if any, shall be carried forward to the next following previous year and allowed as a deduction in that year.

(4) \005\005\005\005.."

10. Counsel for the parties have been heard.

11. It is not disputed before us that a film is a capital asset in the hands of a film producer and the subsidy given by the State Government to a film producer is a capital receipt. Section 80 falls under Chapter VI, which deals with aggregation of income and set off or carry forward of loss.

12. Rule 9A provides for deduction of expenditure incurred on production of feature films. Rule 9A would appropriately be applicable to the present case, as the respondent is doing the business of producing feature films. The deduction for expenditure incurred on production of feature films is appropriately governed by rule 9A of the Rules.

13. The rule, as it now stands, provides that in such cases, deduction of the cost of production of the film is to be allowed to the extent of the amount realized during the number of days of commercial exhibition in that year and the balance has to be allowed in the next year. Rule 9A(2) provides that where a feature film is certified by the Board of Film Censors for

release in any previous year, and in that previous year the film is released for exhibition for at least 180 days, before the end of that previous year, the entire cost of production of the film shall be allowed as a deduction in computing the profits and gains of such previous year. Rule 9A(3) provides that where the film is not released for exhibition for 180 days in the previous year, deduction of the cost of production is to be allowed to the extent of the amount realized during the period of commercial exhibition in that year and the balance shall be allowed in the next year.

14. Admittedly, in the present case, the second film namely, "Santhwanam" had not been exhibited for more than 180 days in the previous year. While computing the income or loss for the relevant assessment year 1992-93, the assessing officer had to take into account the number of days on which the film was commercially exhibited and then allow the deduction for cost of production of the film to the extent of the collections made during the period of exhibition only. The balance cost of production will be amortized under Rule 9A(2) and then that will be allowed as deduction for the next year. It is not a business loss. That if a film is not released for exhibition on a commercial basis at least 180 days before the end of such previous year, the cost of production of the film insofar as it does not exceed the amount realized by the film producer by exhibiting the film on a commercial basis, is to be allowed as a deduction in computing the profits and gains of such previous year and the balance, if any, is to be carried forward to the next following previous year and allowed as a deduction in that year. Admittedly, in the present case, as stated above, second film "Santhwanam" was not exhibited for a period of 180 days in the previous year, and, had not covered the cost of production of the film, the assessee was entitled to carry forward the balance of the cost of production to the next following previous year and claim deduction of the same in that year.

15. For the reasons stated above, we do not find any merit in the present appeal and dismiss the same leaving the parties to bear their own costs.