

Vishal International Vs. Inspecting Assistant

Vishal International Vs. Inspecting Assistant

SooperKanoon Citation : sooperkanoon.com/62236

Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Nov-10-1986

Reported in : (1987)20ITD273(Delhi)

Judge : K Srivastava, U Dhusia

Appellant : Vishal International

Respondent : inspecting Assistant

Judgement :

1. These are cross-appeals, one by the assessee and the other by the department directed against the order of the Commissioner (Appeals) and relates to the assessment year 1982-83. As the points involved in these two appeals are common, the appeals are disposed of by this common order.

2. In the assessee's appeal the first two grounds have not been pressed and they are, therefore, rejected.

3. Ground No. 3 and its various parts relate to an issue which is also covered by the ground in the departmental appeal. The assessee is a private limited company which derives income from exploitation and distribution rights acquired in certain films. The assessee-company was also a partner in the firm named VIP films of Bombay. The assessee had purchased distribution rights of the Hindi feature film 'Kranti' for Delhi and Uttar Pradesh Circuit for a consideration Rs. 90,01,000. The film had been produced by the firm VIP films of Bombay and they had gifted the

distribution rights in Delhi and UP to a charitable trust known as 'Satbaba Smirin Dass Charitable Trust'. It was from this trust that the assessee had purchased distribution rights on a perpetual basis. The right, title, and interest in the distribution, exhibition and exploitation of the film had been gifted through a deed dated 2-10-1978. The assessee-company purchased the rights on 20-9-1980 from the trust. The film was released in Delhi and UP Circuit sometime in February 1981 for commercial exhibition.

4. The assessee had claimed the total consideration of Rs. 90,01,000 as a deduction under Rule 9B of the Income-tax Rules, 1962 ('the Rules').

The assessing officer was, however, of the view that Rule 9B was not applicable to the present case as the assessee had not acquired the right under an agreement with a film producer. In the present case the film was acquired from the trust and not from the producer, who had gifted the right to the charitable trust. The assessing officer was of the view that the consideration was not reasonable and for this purpose he looked into the shareholdings of the various shareholders and found that the shareholders belonged to the Goswami family where father, M.K.Goswami, his son Shri H.L. Goswami, wife Smt. K.K. Goswami and the daughter-in-law Smt. Shashi Goswami as well as the minor grandsons were the shareholders. He pointed out that Smt Shashi Goswami was having 29.17 per cent of shares in the company and, therefore, she had substantial interest in the company. The other shareholders were also closely related to her. He was of the view that as Smt. Shashi Goswami was having a share of more than 20 per cent, she would be having substantial interest and provisions of Section 40A(2) of the Income-tax Act, 1961 ('the Act') would be applicable. In this connection, he referred to the provisions of Section 40A(2)(b)(iv) and (v). He pointed out that the trust from which the distribution rights had been purchased was having trustees who were the same persons as the shareholders or are closely related to them. In this connection, he also found that the distribution rights for the Bombay territory had been sold for Rs. 42,75,000 and considering that the payment of Rs. 90,01,000 for the rights in Delhi and UP Circuit appeared to be very high. He also found that the firm VIP films had shown the total cost of production of the film at Rs. 2,89,29,993. He was of the view that considering this also the consideration

for the distribution rights was very excessive. The IAC, who made the assessment, pointed out that by paying this excessive consideration to a closely-connected trust the income of the company was being reduced and even the income of the firm where the assessee-company was a partner was being reduced as the distribution rights had been gifted. It was also pointed out by him that the assessee being a partner in the producer firm would have more conveniently acquired the film from the producers and it was not necessary to receive it through the trust. The assessing officer further pointed out that the actual amount paid to the trust in the year was Rs. 20,01,000 and the balance was to be paid only later on. He also observed that the address of the trust and the assessee-company was the same and what had been purchased was the bare distribution rights excluding the cost of prints and trailers of the film which had been separately purchased for Rs. 17,26,400. This had been separately claimed by the assessee. Pointing out to the close relationship between the producer firm, the donee trust and the assessee-company, the assessing officer held that provisions of Section 40A(2) was clearly attracted.

5. It had been pointed out before the IAC that the distribution rights had been purchased not from the trustees but from the trust itself and such a purchase was not under the minimum guarantee basis but on a perpetual basis. It was also pointed out that the realisation from the film during the short period after its release in this year was Rs. 98,92,614 and the amount realised up to the assessment year 1985-86 was Rs. 1,24,50,566. On the basis of these materials it was submitted that the consideration paid was not excessive at all.

6. The assessing officer pointed out to the vast powers given to the trustees under the trust deed and the trust was also created by the members of the family. After referring to certain case laws it was pointed out that the substance of the transaction should be looked into by the assessing officer. From this he inferred that the payment claimed was excessive and could not be allowed in view of the provisions of Section 40A(2).

7. The IAC then proceeded to decide the market value of the distribution rights on the date when it was acquired. The rights had been gifted to the trust on 2-10-

1978 and the same was purchased by the assessee on 20-9-1980, almost after two years of the acquisition of those rights by the trust. The film 'Kranti' received certificate from the Central Board of Film Censors on 28-1-1981, and thus it was immediately available after the purchase of the distribution rights by the assessee. It was pointed out before the assessing officer that at the time of sale of the rights a very favourable market had been created for the film as a result of advertisements and writing in the film journals. In view of this and the overall realisation in the first four years the IAC accepted the plea of the assessee that the cost could not be determined at the same figure as was paid for the Bombay area at Rs. 42,72,000. He took note of the fact that the sale in the case of the assessee was on a perpetual basis. He also noted the fact that after a period of 11 years a film loses its value for further exploitation. Considering all these facts, the assessing officer determined the reasonable price of the distribution rights at Rs. 50 lakhs as against Rs. 90,01,000 claimed by the assessee in accordance with the agreement with the trust on this basis the excess claim of Rs. 40,01,000 was disallowed by the IAC.⁸ When the matter came before the Commissioner (Appeals), it was submitted that the assessing officer had confused the position of the trustees in their capacity as the trustees of the trust and individuals owning the shares of the company in their personal capacity. It was pointed out that they were no shareholders in their capacity as trustees and they were not the beneficiaries of the trust. It was also contended that the trustees could not be considered as members of an AOP within the meaning of Section 40A(2) and the trustees were not interested in the assessee-company in their capacity as trustees.

9. It was pointed out that whereas the sale of distribution rights on minimum guarantee basis for the Bombay region was 1978 when the film was still under production. The agreement for purchase by the assessee-company was only in 1980 when the film was ready and it had even been passed by the film censors within a period of four months and the film had been released. It was, therefore, pointed out that by that time a market rate of the distribution rights had gone up considerably.

It was further argued that the cost of production of a film was no index of the price of the distribution rights. It was also pointed out that the film was bound to be more

popular in UP and Delhi where the films having Manoj Kumar as the hero was bound to attract more crowd considering the earlier history of his films. It was further contended that the observations of the assessing officer regarding the trust and the powers of the trustees were irrelevant and when the gift had been made to the trust the trust did not proceed to exploit the film but sold the rights for a consideration. It was further pointed out that the assessee-company could acquire the distribution rights of the film for UP and Delhi Circuit only from the trust as by that time that right had already been gifted to the trust. It was further pointed out that the assessee-company did not show any favour to the trust when he paid to the trust an amount which was slightly less than what was agreed upon in this year. But the amount was paid later on. Regarding the sale of mere distribution rights without the sale of prints and trailers, it was contended that the trust could transfer only what it possessed and normally separate consideration is paid for these items even in the case of a normal distribution rights agreement. It was further contended that the assessing officer had wrongly gone into the question of genuineness of the trust which had been recognised as a charitable trust by the department. Referring to the case laws relied on by the assessing authorities, it was pointed out that what was the dispute in this case was the quantum, the consideration which was to be held to be reasonable for the distribution rights and the genuineness of anything was not in dispute.

10. Before the Commissioner (Appeals) it was also contended that the provisions of Section 40A(2) were not applicable at all. It was pointed out that the provisions should be construed strictly and benefit should be given to the assessee and the provisions were not attracted in this case as the payment had been made to the trust and not to any individual. It was further contended that the value of the distribution rights had wrongly been fixed at Rs. 50 lakhs as several other factors were not taken into consideration by the assessing officer. Those factors related to the nature of the sale for Bombay area as compared to the nature of the present sale. The difference between the two territories the question of difference in periods resulting in consideration of interest which would be substantial to the consideration paid was stated to be reasonable. It was also pointed out that in case the trust had exploited the distribution rights itself it could have realised a sum of Rs. 1,25,00,000 instead of merely Rs. 90 lakhs for which the rights were

sold. It was further contended that reasonableness should be considered from the point of business.

11. The Commissioner (Appeals) held that the provisions of Section 40A(2) were not applicable in terms. He was, however, of the view that the amount of Rs. 90,01,000 was also not sacrosanct. According to him, this figure had no basis. According to the Commissioner (Appeals), the collections made later could not be the basis for fixing the consideration at such high figure. Keeping in view the fact that directors and shareholders of the company and the trustees of the trust were identical and closely related the sum of the money fixed as purchase price was held to be excessive. It was further observed that the Bombay firm having gifted the distribution rights to the trust, the assessee-company was trying to make a gift by making a payment which was much higher than the normal commercial value of the distribution rights. At the same time the Commissioner (Appeals) held that Rs. 50 lakhs could not be considered as the reasonable value of the distribution rights. Having regard to the various factors including the popularity of the film in Delhi and UP region the rise in the market conditions in the period of two years and other factors available on record, the market value of this right was taken by him at Rs. 70,01,000 and in this manner he reduced the addition made by the IAC by Rs. 20,01,000.

12. Whereas the department has filed an appeal against the reduction allowed to the assessee, the assessee-company has challenged the maintenance of any addition on this account.

13. The departmental representative has submitted before us that the IAC has brought out very clearly the closeness between the producers to the trust and the assessee-company. He pointed out that the trust had been used for reducing the incidence of tax on the Bombay firm as well as the assessee-company. He contended that the assessee-company itself was a partner in the Bombay firm and the partners in the firm and the shareholders of the company belonged to the same family. It was further contended that there was no basis for increasing the value of Rs. 70 lakhs as the IAC had determined a reasonable value at Rs. 50 lakhs after giving the necessary weightage to the special circumstances which

differentiated this agreement with the agreement relating to Bombay region. The departmental representative further challenged the finding of the Commissioner (Appeals) that provisions of Section 40A(2) were not applicable. It was, therefore, submitted that the order of the Commissioner (Appeals) should be set aside and the order of the IAC should be restored.

14. The learned Counsel for the assessee, on the other hand, submitted that these submissions were two-fold. Firstly, it was submitted that the provisions of Section 40A(2) were not applicable at all to the facts of the present case and secondly the finding that the purchase price paid for the distribution rights was excessive was not correct.

It was pointed out that there was no justification for comparing this agreement with the agreement for Bombay region which had been finalised two years prior to the present agreement. It was contended that when the agreement was signed for the Bombay region, the making of the film had just started and it was not actually known as to when it would be ready for release. The popularity of the movie was also very uncertain at that time. On the other hand, when the present agreement was entered into for the purchase of the rights for UP and Delhi, the film was almost ready and due to popularity and publicity in the film publications a very favourable atmosphere had been created to ensure the box office possibilities of the film. It was also contended that whereas the distribution rights for the Bombay region was on minimum guarantee basis. The agreement under consideration was for perpetual outright purchase. It was also submitted by the learned Counsel for the assessee that from experience it was known that by such films with the film star Manoj Kumar as the main actor, the market in UP and Delhi was very favourable. The earlier films of this actor had done very well in this region as compared to the Bombay region. It was also pointed out that the difference of almost two years between the two agreements made a very substantial difference not only from the angle of interest which would accrue on the payments which had already been made by the Bombay distributor in 1978-79 but also from the other fact that the investment will start after a few years of the payment.

15. The learned Counsel for the assessee criticised the order of the Commissioner (Appeals) in disallowing a part of the consideration after holding the provisions of Section 40A(2) were not applicable in terms.

He asked how any part of the payment could be disallowed. He submitted that the payment itself was not doubted and in such circumstances ad hoc disallowance was wholly unjustified. For this reliance was placed on the decision in the case of *Godavari Sugar Mills Ltd. v. CIT* [1985] 155 ITR 306 (Bom.), where it was held that the ITO cannot disallow expenditure which has been in fact incurred by the assessee for the purposes of business upon the ground that such expenditure is excessive or unreasonable. It was further held that for such disallowance it was necessary to show that the transaction in question is a sham one or not a bona fide transaction. In that case the entire amount paid for the purchase of sugarcane was held to be allowable as it had not been shown that the transaction of sale was non-bona fide or that the price was different from that shown in the books.

16. The learned Counsel for the assessee then submitted that provisions of Section 40A(2) were special provisions and unless it clearly applied to the case before us no disallowance could be made under that provision. He pointed out that Section 40A(2) provides for the disallowance of any payment if the ITO is of the opinion that the expenditure was excessive or unreasonable having regard to the fair market value of the goods for which the payment is made or the legitimate needs of the business or profession of the assessee. The payments which are covered by Section 40A(2)(b) applies to the persons given in Clause (b). In the case of a company such person has to be the director of the company or a relative of such director. He specifically drew our attention to Sub-clauses (iv) and (v) of Section 40A(2)(b) which are as under : (2)(b) The persons referred to in Clause (a) are the following, namely :--(ii) where the assessee is a company, any director of the company, firm, association of persons or partner of the firm, or Hindu undivided family member of the association or family, or any relative of su (iv) a company, firm, association of persons or Hindu undivided family having a substantial interest in the business or profession of the assessee or any director, partner or member of such company, firm, association or family, or any relative of such director, partner or member ; (v) a company, firm, association of persons or

Hindu undivided family of which a director, partner or member, as the case may be, has a substantial interest in the business or profession of the assessee ; or any director, partner or member of such company, firm, association or family or any relative of such director, partner or member ; It was submitted that the assessee-company has not made this payment to any director of a company or to a relative of such a director but to a trust. He further submitted that the trust is managed by the trustees but it cannot be considered to be an AOP having trustees as its members. He contended that the trustees do not join for the purpose of earning income. For this he relied on the ratio of the decision of the Supreme Court in the case of CIT v. Indira Balkrishna [1960] 39 ITR 546. The learned Counsel further relied on the decision of the Bombay High Court in the case of CIT v. Y.S. Desale [1982] 137 ITR 117. In this case their Lordships have observed that for the purpose of becoming an AOP, some persons must join in a common action for producing income. In the present case the trustees had not joined hands with each other but had been appointed by the settlers. Trustees are individuals and the trust itself is also an individual. In view of this, it was contended that the IAC was wrong in considering the trust to be an AOP and the trustees to its members. In view of this, it was contended that the above sub-clauses would not be applicable. It was also submitted that the trustees or some of the trustees or one of the trustees may have substantial interest in the company in their individual capacity but it was not enough. Unless it was shown that the trustees were having substantial interest in the business of the company in their capacity as trustees, the above provisions could not be applied. It was pointed out that the trust as such does not own shares of the company though some trustees do own such shares. The learned Counsel argued that unless the case of the assessee was clearly brought under the provisions of Section 40A(2) it was not open to the department to apply the above provisions for the purpose of disallowing any part of the purchase consideration. The learned Counsel submitted that the confusion has arisen as a result of not distinguishing between the individuals and their capacity as trustees.

17. On the merits of the case the learned counsel submitted that the consideration was not at all excessive. The basis for holding that the consideration was excessive was the agreement for the Bombay area entered two years prior to the

release of the film and that could not be a reasonable basis for comparison. Apart from the time factor, the other important factor is the risk factor which has not been taken into consideration by the IAC or even by the Commissioner (Appeals). He pointed out that in the making of a film there are various uncertain factors and, therefore, where a person is purchasing a right of a film, which was still in the initial stages of making and it may take a long period for the film to be made, consideration is bound to be lower. It may be that the film is not made within a short period or may not be made at all. There can be difficulties regarding the various actors, actresses and other important persons involved in the making of a film.

As against that when a film is ready and is in a position to be released the consideration for sale has to be much higher. The other factor about the area in question for a particular type of film has not been properly evaluated. He contended that if this area had been sold in 1978 the consideration could have been much less as the money would have become payable as early as 1978-79 whereas in this case the payment had to be made for a period of several months after the actual release of the film.

18. Referring to the objections of the IAC about the trust, the learned Counsel submitted that the objections were misconceived and the trust is accepted as a charitable trust by the department. The trust itself has not carried on any business and when a donation was made to it, it has sold it at an appropriate time making a substantial amount which would be available to the trust for fulfilling its objects. He contended that if the factors of the minimum guarantee agreement as compared to the perpetual lease purchase, the factor of period of two years and the factor of the area, namely, Bombay as compared to UP and Delhi was taken into consideration, the bridge of difference can be filled up. He also contended that nobody can calculate several years prior to the release of the film accurately the various factors and, therefore, a small difference in the consideration could not result in invoking the provisions of Section 40A(2). In this connection, he pointed out that the collections made by the assessee-company within a few months of the release of the film would show that the payment of consideration was not excessive. In a period of six months the realisation was about Rs. 98 lakhs. This

amount could leave to the assessee a margin and the loss which is shown by the assessee is due to the allowance of the whole consideration in the year of agreement itself. Our attention was drawn to the observations of the Hon'ble Gujarat High Court in the case of *Mehta Parikh & Co. Ltd. v. CIT* [1980] 124 ITR 448. That was a case where the question considered was the provisions of Section 40(c) of the Act. Their Lordships observed :However, it must be borne in mind that the whole approach of the revenue authorities should be from the point of view of commercial exigencies and commercial concerns who are incurring this expenditure and not hypertechnical or technical point of view . . .

19. We have carefully considered the rival arguments with reference to the facts of the present case. The questions which arise for our consideration are whether the provisions of Section 40A(2) are applicable to the purchase consideration paid by the assessee-company to the trust and also whether the fair market value of the distribution rights for UP and Delhi area was excessive or unreasonable having regard to the legitimate needs of the business or the benefit derived by the assessee from such expenditure. As already stated the assessee is a private limited company. It is also not in dispute that the shares of this company are held by the members of one family. The assessee-company is a partner in the firm which has produced the film.

It is also not in dispute that a charitable trust was created by some of those persons who were having interest in the assessee-company and its business. Some of those persons were also made trustees. For example, Smt. Krishna Kumari Goswami was one of the settlers and also a trustee and she in her individual capacity was a substantial shareholder in the assessee-company. The gift deed gifting the distribution rights on behalf of VIP films in favour of the charitable trust was also executed by Smt. Shashi Goswami. Thus, independent of the provisions of Section 40A(2) it can be seen that the firm which produced the film, the trust to which the distribution rights were gifted, and the limited company which has purchased the distribution rights are all manned by the members of the same family and it can very well be stated that the transactions between them could have consideration other than business partly or wholly. While we make these observations, we find that the provisions of Section 40A(2) are specific and

they can be applied only if the requirements given there are satisfied. Now, generally in law transactions with relatives or sister concerns cannot be discarded or disregarded unless it could be shown that the transaction was sham or the value shown for goods or services was not the value really paid or the transaction which was not a bona fide one. In such matters the onus is on the department. The provisions of Section 40A(2) have been introduced to stop excessive payments where the parties concerned are related to each other in the manner laid down in that section. Where the assessee is a company, which is the case before us, the payment in question should either be to the director of the company or to a person having a substantial interest in the company or any person of which a director, partner, or member has a substantial interest in the company or any relative of any such director or person. The payment in the present case has been made to the trust and we have no material on the basis of which it could even be argued that the trust was not a genuine one. We find that the department has recognised it as a charitable trust having certain objects of public utility. The case of a trust could be brought under the provisions of Section 40A(2) only if we can hold that the trust was an AOP and/or the trustees are members of such association. It is not possible to accept the plea of the assessing officer that the trust is an AOP where the trustees have combined to carry on any activity of profit. The trustees cannot be considered as members of that association though they are in a way administrators of the trust in a representative capacity. When once a genuine and valid trust is created, the trustees have an independent status as trustees and it cannot be confused with their individual capacity or individual transaction. It is true that in the present case, some of the trustees have shares in the assessee-company in their individual capacity and those shares are more than 20 per cent which would make them having substantial interest in the company. However, where we are considering the question of the trustees it has to be the trustees in their capacity as trustees and not in their separate individual capacity. The assessing officer has given the example of Smt. Goswami who was a trustee and a director of the assessee-company and was a substantial shareholder. If the payment is made to Smt. Shashi Goswami, the payment would certainly be hit by the provisions of Section 40A(2). However, in the present case, the payment is being made to the trustees which is represented among other by Smt. Goswami.

This, in our opinion, could not bring the transaction under Section 40A(2). It may lead to a lot of confusions if the representative capacity of the person is ignored and confused with the individual capacity of that person. Thus, as far as the language of provisions of Section 40A(2) are concerned, it does not appear to be applicable to the transactions in question. There is no justification for ignoring the position of trust which is a peculiar one under law. As the payment is admittedly made to the trust, we cannot hold that it is being made to any trustee in his individual capacity as the trustees are obliged to utilise the income and corpus of the trust or the objects of the trust. The argument regarding the trustee being a member of an AOP is also not appropriate as the trustees cannot be considered as an AOP within the meaning of that term as interpreted under the Act. We have already referred to the decision of the Supreme Court in the case of Indira Balkrishna (*supra*). We cannot also ignore the provisions of the Indian Trust Act, 1882, and the duties and capacities of the trustees. We are, therefore, in argument with the Commissioner (Appeals) that though the parties who are concerned with a transaction, are very close to each other, the provisions of Section 40A(2) in terms is not applicable.

20. The second question which arises is whether without applying the provisions of Section 40A(2) any payment can be held to be excessive or unreasonable and disallowed. We have already indicated above, the decisions of the Courts where it had been clearly laid down that any such disallowance can be made if there is material on record to show that the transaction is sham and not bona fide or it is established that the consideration which has been paid is partly or wholly for a consideration other than business. For establishing such a situation the onus will be entirely on the revenue. On the basis of the records, we have to give a finding whether any such inference can be drawn. As already stated above, all the parties are very close to each other and it may also be accepted that they were in a position to influence the decision of the other parties and if there is any material to show that a highly excessive payment had been made, which could not be justified from the commercial angle and the consideration is due to some other reasons, a disallowance can be made in an exceptional case. As already observed by the Gujarat High Court, the approach of the revenue authorities in these matters should be from the point of view of commercial concerns and not a hypertechnical

or technical point of view. We, therefore, proceed to consider the basic question whether the consideration paid by the assessee for the distribution rights was excessive and unreasonable having regard to the various circumstances which prevailed in this case. The payment which has been made by the assessee-company has to be scrutinised from the business needs of the assessee-company and what it would be required to pay in the circumstances which were available.

21. As already stated above, the IAC has proceeded to make the agreement for the Bombay region as the basis for comparing the reasonableness of the present transaction. It has already been pointed out that the agreement for Bombay area was entered into about two years earlier when the film was still in the earlier stages of production.

Considering the uncertainties of the film line and the various other factors, the consideration which is attracted at such an early date is bound to be lower than the consideration which is contracted immediately before the pending release of the film when it is known that the film was likely to be a hit in the region for which the purchase was being made. The payments which were made under the Bombay contract was to be substantially paid in the year 1978-79 though the film was released only in 1981. For this period the money was already paid and the consideration of interest has also to be kept in view. It may also be seen that the agreement in Bombay was on minimum guarantee basis. As against this the payments which were being made under the present agreement were made in 1980-81 and the most of the payments have come after the release of the film and the money earned could itself be diverted towards payment. All these are very important business considerations and in such a situation a higher payment is always demanded. There is also material on record to show that the films in which Manoj Kumar is the leading actor have been very successful in Delhi and UP Circuit and his earlier films had grossed up much more in this region than in the Bombay region. There has been no effort on the part of the assessing officer to take all these factors into consideration and he has merely fixed consideration at Rs. 50 lakhs. The expectation about the potential of the film was very much correct as the receipts which were earned in Delhi and UP area were enough to cover the cost of purchase within a period of six months. It cannot also be forgotten that after

the purchase of the film for distribution in these years the assessee-company could exploit it in any manner it liked including its release on TV Circuit and the production for the purpose of video shows. If all these considerations are kept in view, it cannot be said that the consideration put in the agreement was excessive and was fixed with some other consideration in view. The learned Commissioner (Appeals) has discarded the evaluation made by the IAC and preceded to fix his own value of the distribution rights on the ground that the amount fixed in the agreement was not sacrosanct. In our opinion, apart from the close connections and close relations, there should have been some specific material to indicate the gross excessiveness of the consideration to hold that the consideration given in the agreement could be discarded.

22. In the present case, we are not concerned with a case where the transaction is held to be sham or bogus. Here again, we are not concerned with a case where the payment is shown to be for other considerations. The suggestion of the department that by taking the excessive payment the assessee-company was trying to donate an amount to the trust and at the same time getting full deduction in its assessment, is merely an expression of suspicion for which there is no factual basis. It is already pointed out before the Commissioner (Appeals) that under the minimum guarantee agreement a further payment would have flowed to the assessee on the actual release of the film.

This together with the interest which would also calculate to about Rs. 15 lakhs and other considerations justify the price of the distribution right. There is not much in the argument of the IAC that separate payments were made for trailers and prints as similar payments were made for the distribution in Bombay as well. They have also noted that the overall receipts from this film could also justify the consideration paid and yet issue a margin to the assessee. In these matters, we cannot calculate the market value to the nearest rupee and one has to take a broad view of the matter and only if the consideration is found to be substantially excessive, one can proceed to find out the motives. We are of the view that the fair market value of the distribution rights had rightly been fixed in the agreement and there was no material to hold it to be excessive or unreasonable having regard to the business needs of the assessee. We, therefore, held that the Commissioner

(Appeals) was not justified in disallowing Rs. 20 lakhs as a part of the price of the distribution rights. We accept the assessee's ground and dismiss the departmental appeal on this issue.

23. There is one more ground in the assessee's appeal and that relates to the claim of the assessee for being treated as an industrial company. In the earlier years the assessee-company was engaged in production of films. In this year there was no such production.

However, the assessee claims that the company received income from the production of films in earlier years and according to the assessee, the income of the company from production was more than the other incomes of the company. We find that this issue has not been considered and facts have not been ascertained. The Commissioner (Appeals) has rejected the assessee's claim merely on the ground that there was no production in this year. Full facts have not been brought on record to show that the component of incomes and the major activities in this year so that the question could be decided. We are, therefore, of the view that this issue should be set aside to the Commissioner (Appeals), who should rehear the matter after ascertaining the full facts about the nature of income and its various sources. The matter should be decided in accordance with law. The ground regarding interest under Section 215 of the Act is stated to be purely consequential and, therefore, no specific directions are necessary. The departmental appeal is dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com