आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, के ,मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "K", MUMBAI

श्री अमित शुक्ला, न्यायिक सदस्य **एवं**

श्री अश्वनी तनेजा, लेखा सदस्य**,** के समक्ष

Before Shri Amit Shukla, Judicial Member, and
Shri Ashwani Taneja, Accountant Member

ITA NO.1061/Mum/2015
Assessment Year: 2010-11

KSS Ltd. (formerly Known As K Sera Sera Productions Ltd.) Unit No.101/102, IST Floor, Plot No.B17 Morya Landmark II, Andheri (W), Mumbai-400053	**बनाम**/ Vs.	DCIT RG 2(3)(1) R. No.556 Aayakar Bhavan, Mumbai-400020
(Assessee)		(Revenue)
P.A. No.AAACG5103D		

Appellant by	Shri Rajiv Khandelwal & Shri Neelkanth Khandelwal (AR)
Respondent by	Shri N.K. Chand (CIT-DR)

सुनवाई की तारीख/**Date of Hearing:**	**07/10/2015**
आदेश की तारीख /**Date of Order:**	**09/12/2015**

आदेश / O R D E R

Per Ashwani Taneja (Accountant Member):

This appeal is filed by the Assessee against the orders of Disputes Resolution Panel -I, Mumbai {in short, 'DRP'}, for the assessment year 2010-11.

2. During the course of hearing, arguments were made by Shri Rajiv Khandelwal & Shri Neelkanth Khandelwal Authorised Representative (Ld. Counsel) on behalf of the Assessee and by Shri N.K. Chand, Departmental Representative (Ld CIT-DR) on behalf of the Revenue.

3. **Ground No.1:** In this ground, the assessee has challenged the action of lower authorities in making disallowance of sum of Rs.19,189/- on account of film preview expenses of Rs.19,189/-. During the course of hearing it has been submitted by the Ld. Counsel of the assessee that similar issue arose in A.Y. 2009-10 which had reached up to Tribunal, and Tribunal decided the same in favour of the assessee by allowing these expenses. The reasons and the facts for the disallowance in A.Y.2010-11 are same in A.Y. 2010-11, and therefore, Tribunal's order should be followed and these expenses should be allowed.

3.1. On the other hand, Ld. CIT-DR has relied upon the orders of the lower authorities. We have gone through the facts of this case as well as order of the earlier year and also considered the submissions made by both the sides.

3.2. The brief facts as brought before are that KSS Ltd. (formerly K. Sera Sera Ltd. and even before that it was known as K. Sera Sera Production Ltd) is engaged in production and distribution of films. It has 100% subsidiary called K. Sera Sera Productions FZ-LLC which is incorporated in Dubai and engaged in preproduction, film/TV distribution, film/TV rights management and film/TV post-production in the sector of film entertainment/production and post-production.

In the assessment order, the AO has disallowed the film preview expenses amounting to Rs.19,189/- on the ground that these are not supported by any bills or third-party vouchers. The assessee has stated that it had submitted requisite details and ledger of Film Preview Expenses. The expenses were incurred for purchasing movie tickets for preview show of the movies and other expenses incurred for preview show. The DRP endorsed the observations of the AO. It is noted by us that in A.Y. 2009-10, this issue had reached up to Tribunal, wherein, vide order dated 10.06.2015 in ITA No.321/M/2014, these expenses have been allowed, the relevant para of the Tribunal's order is reproduced hereunder:

> *"We have considered the rival contentions as well as the material on record. There is no dispute that the assessee has released three new films during the year and prior to the release, it were exhibited for preview. Once the preview of the film is not doubted,*

then the normal expenditure on each preview is routine business expenses of the assessee. The Assessing Officer has not pointed out that the expenditure claimed by the assessee is excessive or abnormal in comparison to the normal expenditure being incurred on such exhibition of movie in the pre-release preview. The assessee produced complete details of the expenses though most or the expenses are incurred in cash, We find that keeping in view the nature of the expenses the payment in cash is inevitable for certain expenses which are on spot and for the purpose of snakes, refreshment, etc. The assessee has produced the vouchers which includes sell-made vouchers as well as the third party vouchers wherein the name of the movie is given. When the name of the movie and name of the theater is given, then the vouchers issued by the third party cannot be doubted. It is worth to be noted that the disallowance is restricted by the DRP is not based on the ground that it is excessive but for want of proper vouchers therefore, we find that the ad-hoc disallowance is not justified when the expenditure is not found to be excessive and the purpose and the occasion on which the expenditure was incurred is not disputed. Accordingly, we delete the disallowance confirmed by the DRP. Ground no.1, is allowed."

3.3. We find that the facts are similar in this year, and therefore respectfully following the orders of the earlier years, we allow the Film Preview Expenses of Rs.19,189/-. Thus, ground no.1 is allowed.

4. Ground No.2: In this ground, the assessee has challenged the action of lower authorities in disallowing legal expenses of Rs.2,62,457/- out of total expenses of Rs.5,24,915/- claimed by the assessee.

4.1. During the course of hearing, it has been brought to our notice by Ld. Counsel of the assessee that in A.Y. 2009-10, the Tribunal has sent back this issue to the file of the AO and requested that the facts and circumstances being the same, in this year also the issue can be sent back to the file of AO. On the other hand, Ld. CIT-DR has given objection if this issue is sent back to the file of the AO.

4.2. We have gone through the orders of the lower authorities and submissions of both the sides. The disallowance was made on the ground that the assessee was not able to substantiate these expenses with the help of complete evidences. It is noted that this issue has been sent back by the Tribunal in A.Y. 2009-10 to the file of the AO with some directions. We find it appropriate to send this issue back to the file of the AO in pursuance to the

order. We also direct the AO to follow the directions as given by the Tribunal in A.Y. 2009-10 as far as may be applicable on the facts of the case of this year. With these directions this issue is sent back to the file of the AO. Thus, ground no.2 is allowed for statistical purposes.

5. Ground No.3: In this ground, the assessee has challenged the action of AO in making disallowance of expenses of Rs.23,100/- incurred by the assessee on foreign travelling.

5.1. During the course of hearing it was fairly stated by the Ld. Counsel of the assessee that this issue has been decided against the assessee by the Tribunal in A.Y. 2009-10, and in this year also there is no change in facts.

5.2. We have gone through the orders of the lower authorities. It is noted by us that these expenses pertained to the foreign visit of Mr. Sanjay Gupta, director, of the company, on the ground that no evidence was submitted to establish business purpose for incurring these expenses. Before us also no such evidence has been produced and therefore, we have no option but to confirm the disallowance. Accordingly, disallowance is confirmed and Ground No.3 is dismissed.

6. Ground No.4: In this ground, the assessee has challenged the action of lower authorities in disallowing a

sum of Rs.38,56,553/- incurred on Travelling, Advertising and Printing & Stationery expenses @ 5% on ad hoc basis by treating the same as personal expenditure.

6.1. During the course of hearing it has been argued by the Ld. Counsel that no ad-hoc disallowance on the ground of personal nature is permitted under the law in the hands of the assessee who is a company. In support of his arguments he relied upon the judgments of Hon'ble Gujarat High Court in the case of M/s. Sayaji Iron and Engg. Co. 256 ITR 749.

6.2. We have gone through the orders of the lower authorities. It is noted from the orders of the lower authorities that during the course of assessment proceedings, the AO required the assessee to substantiate these expenses with evidences. In response, the assessee filed sample, vouchers and bills, from which the AO noted that the assessee has not maintained the vouchers and bills properly and therefore made disallowance of 5% of the expenditure, which worked out at an aggregate amount of Rs.38,56,553/- The disallowance was confirmed by the DRP. We find that the assessee has submitted bills/vouchers as were maintained by it in regular course of business. If the AO was not satisfied with any particular items of expenses, he could have pointed it out to the assessee for inviting its response. In case AO was not satisfied with response of the assessee, then the same could have been considered for the disallowance. There should not be a

practice of making an ad-hoc disallowance on the ground of personal expenditure, because there is no concept of personal expenditure in the case of a company. The company is a separate legal juristic person. In case any expenses are incurred on behalf of director or any other senior employees, then the same is liable to be taxed in the hands of the said person as part of perquisite/remuneration, as per law. In our considered view, disallowance had been made beyond the provision of law and therefore same is directed to be deleted. We find our support from the judgment of Hon'ble Gujarat High Court in the case of Sayaji Iron and Engg. Co. (supra). Thus ground no.4 is allowed.

7. Ground No.5: This ground deals with the action of the lower authorities in disallowing u/s 36(1)(iii), proportionate interest expenditure of Rs.9,62,071/- incurred by the assessee.

7.1. During the course of hearing, it has been submitted by the Ld. Counsel of the assessee that assessee had in its possession ample funds as compared to the interest free loan given by the assessee, and therefore, the disallowance has been wrongly made by the lower authorities. It has been further submitted by him that assessee has deep interest in the subsidiary company to which loan was given. Reliance has been placed on the judgment of Honble Supreme Court in the case of S.A. Builders vs CIT, **288 ITR 1**(SC).

7.2. On the other hand, Ld. CIT, CIT-DR has relied upon the order of the AO and submitted that proportionate disallowances should be made in the hands of the assessee on account of interest expenses.

7.3. We have gone through the orders of the lower authorities and considered submissions made by both the sides. Brief facts of the case are that the assessee had given interest-free advances to its three subsidiary companies in India, for aggregate amount of Rs.4,71,07,939/-. The AO observed that the assessee was having interest-bearing borrowed funds which were diverted to its subsidiaries. The assessee had claimed interest expenditure on borrowed funds at Rs.3,83,45,500/-. Therefore, the interest expenditure incurred to the extent of funds diverted to subsidiaries was held be not an allowable expenditure. The AO computed and disallowed such interest expenditure at Rs.9,62,071/-.

7.4. The assessee tried to make out a case before the DRP that funds were advanced to its subsidiaries for meeting its business expediency but DRP was not satisfied with the submissions to the assessee, on the ground that the assessee could not substantiate that advance/loans given to its subsidiaries for any commercial expediency or advancement of its business interest. The DRP refused to follow the case of S.A. Builders (supra), *inter alia*, on the ground that this decision has been referred by the Hon'ble Supreme Court to its

larger bench for review. According to the DRP, if the assessee has diverted its borrowed capital to grant interest free advances to its subsidiaries, then no business purpose can be said to have been served. Accordingly, disallowance made by the AO was confirmed. Being aggrieved, the assessee contested the issue before us. We have examined the first argument of the Ld. Counsel that the assessee had sufficient funds so as to enable it to advance the amount to its subsidiaries. It is noted from the balance sheet that assessee has paid up share capital of more than Rs. 205 crores and reserves of more than Rs. 2 crores, and aggregate of amount of loan given to the subsidiary companies amounted to Rs.4.71 crores only. Thus, there is a force in the arguments of the ld. Counsel that the own funds far exceeded the amount of interest free loan given to its subsidiary. Thus, we find that there being sufficient interest free own funds in possession of the assessee, no presumption should be drawn that the assessee has given the disallowance out of interest bearing funds only. Further, the amount has been invested with subsidiary of the assessee company and thus taking support from the judgment of Hon'ble Supreme Court in the case of S.A. Builders Ltd. (supra), it can be said that no disallowance would be made if the amount has been advanced for the strategic business needs. The assessee has submitted copy of resolution signifying its business necessity. Taking in to account all the aforesaid facts and circumstances of the case, we find that the said disallowance is not sustainable as per law and facts of the case and therefore, the same is directed to be deleted. Thus, ground no.5 is allowed.

8. Ground No.6: In this ground, the assessee has challenged the disallowance of Rs.1,02,71,832/- made u/s 14A, read with rule 8D. It has been submitted by the Ld. Counsel that no disallowance was made by the AO in draft assessment order. Disallowance has been made u/s 14A by the DRP by making enhancement of income. It has been further argued by the Ld. Counsel that since no disallowance was made by the Ld. AO, the DRP has no powers under the law to make any fresh disallowance. This disallowance is beyond the scope of law. It has been further submitted by him that even on merits, the disallowance was not sustainable. It is submitted that no exempt income has been received during the year, the assessee has ample surplus funds and investment has been made for strategic reasons in the subsidiary company. Thus, there was no case for any disallowance and the same has been wrongly made by the DRP and deserves to be deleted.

8.1. On the other hand, Ld. CIT-DR has submitted that the DRP has all the powers including the power of making enhancement of income. He placed reliance upon the explanation added to section 144C(8) for this purpose. On merits, he supported the disallowance made by the DRP. He placed reliance on the judgment of Maxopp Investment Ltd. v. CIT [2012] **347 ITR 272** (Del), and submitted that the disallowance can be made even if investment is made for strategic purposes. It was further submitted by him that concept of 'income' has always included 'loss'. There can be

'loss', 'nil' and positive income and therefore, if no income has been earned, even then provisions of section 14A are attracted.

8.2. We have gone through the orders of lower authorities and submissions made by both the sides. It is noted by us that in response to query raised by the DRP, the assessee submitted its detailed reply dated 15th October, 2014, and relevant portion of this reply is reproduced herein:

> *"It may be seen that in the current year, the TPO has applied the same methodology as was directed by the DRP in the preceding year to come to the arm's-length price of the international transaction. Since the facts in the current year are identical to those in the preceding year, we do not find any reason to differ from the DRP in the preceding year. Hence no interference is called for so far as the decision of the AO/TPO in this regard is concerned. This objection is rejected."*

8.3. It is noted by us that this issue was raised by the DRP for the first time, since no disallowance was made by the AO in the draft assessment order. It is further noted that various factual issues have been raised by the assessee in its reply e.g. Availability of interest free own funds in possession of the assessee for more than the amount of investment made in the subsidiaries, these investments have been made for strategic reasons and these were strategic investments and that no exempt income has been

earned by the assessee during the year. We find that all these issues go to the root of the matter. These have not been properly dealt with by the DRP. The mind of the AO could also not be applied on all these issues at all. The assessee also could not get proper opportunity to explain this issue with proper evidences. There has been lot of development in the legal position with respect to all the contentions raised by the Ld. Counsel. These judgments which have been relied upon by the Ld. Counsel were not available before the AO/DRP. Therefore, for thrashing out the facts properly, and to meet ends of justice and in all fairness, we deem it appropriate to send this issue back to the file of the AO who shall decide this issue afresh. Needless to add, the AO shall offer proper opportunity to the assessee to file requisite details and documents, as per law. The AO shall take into account complete factual material and shall also consider the judgments as may be available at the time of deciding this issue afresh. With these directions, this issue is sent back to the file of the AO. This ground is allowed for statistical purposes.

9. Ground No.7: In this ground, the assessee has challenged the action of lower authorities in adding a sum of Rs. 4,22,12,216/- as notional interest on the amount routed by the assessee company through its Dubai subsidiary for the purpose of its business.

9.1. During the course of hearing, it has been submitted by the Ld. Counsel of the assessee that similar issue was involved in assessment year 2009-10 which has been decided by the Tribunal in favour of the assessee and facts remaining the same, the said order may be followed. On the other hand, Ld. CIT-DR has relied upon the orders of the lower authorities.

9.2. We have gone through the orders of lower authorities as well as the order of the Tribunal for A.Y. 2009-10. The brief facts are that the AO made transfer pricing adjustment of Rs.4,22,12,216/- on account of Arm's Length interest, computed on notional basis, in respect of international transactions of advance given to the AE of the assessee i.e. K Sera Product FZ- LLC, Dubai. It is noted that addition was made by the TPO and confirmed by the DRP on the ground that similar addition was made in A.Y. 2009-10.

9.3. Further facts emerging from the orders of this year are that the assessee contended before the TPO that impugned advances were given mainly for acquiring film rights for its own use and hence the question of recovering any interest on the said advances did not arise. Further, the advance paid against share capital was ultimately towards the capital and shares were allotted on 03.10.2011. Accordingly no interest can be charged either on the advances against share capital or business advances.

9.4. The TPO however held that the above transaction is an international transaction, which is covered under Chapter X of the Act and hence the same should be at Arm's Length Price, as per these provisions. Accordingly, he applied 'Cost Plus Method' to benchmark the transaction. Since the cost of borrowing of the assessee was 10.19% and the average net margin rate of various banks was 2.3%, the TPO applied the mark-up rate of 12.49% and hence determined the Arm's Length Interest at Rs.4,22,12,216/- in respect of the loans given by the assessee to its AE, which the AO added in the draft assessment order.

9.5. The assessee contested the matter before DRP. But the TPO's order was confirmed by the DRP with the following observations:

> *"It may be seen that in the current year, the TPO has applied the same methodology as was directed by the DRP in the preceding year to come to the arm's length price of the international transaction. Since the facts in the current year are identical to those in the preceding year, we do not find any reason to differ from the DRP in the preceding year Hence no interference is called for so far as the decision of the AO/TPO in this regard is concerned. This objection is rejected."*

9.6. It may thus be noted from the orders of the lower authorities that order of A.Y.2009-10 has been simply followed

in this year while making this addition. Thus, this issue is entirely dependent upon the A.Y.2009-10 which has been disposed by the Tribunal. We have gone through the order of the Tribunal and find that the disallowance was made in the assessment year2009-10 on loan given to the same party. In this year, no fresh loan has been given rather amount of loan has been reduced on account of part payments received back from the said party. It is noted from the order of the DRP that opening balance due from the said party at the beginning of the year was Rs.106.52 crores which was reduced to Rs.73.96 crores at the end of the year. It is further noted that Hon'ble Tribunal in A.Y. 2009-10, after making detailed discussion held that the addition was illegal and therefore the same was deleted. The relevant part of the order of the Tribunal is reproduced below:

> *"Thus, to attract the provisions of Chapter-X of the Act, there must be a transaction or any arrangement between the two or more A.E. which gives rise to the income or benefit in the hands of at least one of the A.Es. In the present case, the advance was not given to the A.E. but to the third party and that too is for acquisition of rights and not as loan or finance. Therefore, when the amount is only routed through the A.E. and finally paid to the third party as an advance for purchase of films rights would not give rise to any benefit or income either to the assessee or to the A.E. of the*

assessee. We find that the assessee produced the bank statement of the A.E. wherein all the transaction of the advance given by the assessee are recorded. From the perusal of the bank statement, it is clear that the amount in question was not retained by the A.E. but was immediately transferred to the Citi. The receipt of the amount by the Citi from the A.E. of the assessee is also confirmed by the CITI GATE TRADE FZE. The statement of account in the books of Citi has been produced by the assessee along with the certificate to evidence that the said amount was received and refunded as shown in the statement. Accordingly, we are of the view that the transaction of advancing the money for acquisition of satellite rights of the Hollywood movies under the agreement entered into by the assessee with its A.E. as well as the agreement between the AE and the Citi does not fall within the purview of expression "international transaction" in terms of section 92B of the Act. Even otherwise, the transaction in question does not fulfill the mandatory of giving rise to any income of benefit either to the assessee or A.E. of the assessee. Accordingly, we set aside the orders of the authorities below qua this issue and delete the addition made on account of transfer pricing adjustment in respect of the notional interest

imputed on this transaction. This ground of the assessee is allowed."

9.7. Thus, respectfully following the order of the coordinate bench in assessee's own case, we direct the AO to follow the order of the Tribunal for A.Y.2009-10 and delete the addition of Rs.4,22,12,216/-. Thus, ground no.7 is allowed.

10. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 9th December, 2015.

Sd/-	Sd/-
(Amit Shukla)	(Ashwani Taneja)
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य** / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated :09 /12/2015
*Patel, P.S.*नि.स.

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**