

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

TUESDAY, THE 23RD DAY OF AUGUST 2016/1ST BHADRA, 1938

WP(C).No. 25032 of 2009 (Y)

PETITIONER(S) :

**M/S CENTRAL ADVERTISING AGENCY,
POST BOX NO.51, ANAND THEATRE BUILDINGS,
KOTTAYAM-686 001, REPRESENTED BY ITS PARTNER-
MR.MATHEW GEORGE.**

**BY ADVS. SRI.JOSEPH KODIANTHARA
SRI. JOHN PRAKASH B.J.
SRI.TERRY V.JAMES**

RESPONDENT(S) :

- 1. UNION OF INDIA,
REPRESENTED BY THE SECRETARY TO GOVERNMENT,
MINISTRY OF FINANCE, DEPARTMENT OF REVENUE,
NORTH BLOCK, NEW DELHI-110 011.**
- 2. THE COMMISSIONER OF INCOME TAX,
CENTRAL REVENUE BUILDING, I.S.PRESS ROAD,
COCHIN-682 018.**
- 3. THE DEPUTY COMMISSIONER OF INCOME TAX(TDS),
OFFICE OF THE DEPUTY COMMISSIONER OF INCOME TAX (TDS),
PUBLIC LIBRARY BUILDING, SASTRI ROAD, KOTTAYAM-686 001.**
- 4. THE ASSISTANT COMMISSIONER OF INCOME TAX (CIRCLE I),
PUBLIC LIBRARY BUILDING, SASTRI ROAD, KOTTAYAM-686 001.**

**R1 BY SRI. N.NAGARESH, ASSISTANT SOLICITOR GENERAL
R2 TO R4 BY ADV. SRI.JOSE JOSEPH, S.C**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 23-08-2016, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

Msd.

APPENDIX

PETITIONER(S)' EXHIBITS :

- EXHIBIT P1: TRUE COPY OF AGREEMENT DATED 07.02.2009 EXECUTED BETWEEN M/S. YAVONNE ENTERTAINMENT COMPANY AND THE PETITIONER.**
- EXHIBIT P2: TRUE COPY OF AGREEMENT DATED 19.06.2009 EXECUTED BETWEEN THE PETITIONER AND M/S. ASIANET COMMUNICATIONS LIMITED.**
- EXHIBIT P3: TRUE COPY OF STATEMENT SHOWING THE DETAILS OF FILM PURCHASE AND SALE OF CINEMATOGRAPHIC FILMS DURING THE PERIOD FROM 01.04.2009.**
- EXHIBIT P4: TRUE COPY OF LETTER DATED 31.03.2009 FROM THE 3RD RESPONDENT TO THE PETITIONER.**
- EXHIBIT P5 COLLECTIVELY: TRUE COPY OF COMPLETE SET OF THE CORRESPONDENCE RELATING TO THE APPLICATION UNDER SECTION 197 SUBMITTED BY THE PETITIONER.**
- EXHIBIT P6: TRUE COPY OF LETTER DATED 04.04.2009 OF THE 3RD RESPONDENT REJECTING THE PETITIONER'S REQUEST FOR REDUCTION IN THE RATE OF TDS.**

RESPONDENT(S)' EXHIBITS :

NIL

//TRUE COPY//

PA.TO JUDGE.

Msd.

A.M.SHAFFIQUE, J

W.P.C.No.25032 of 2009

Dated this the 23rd day of August 2016

J U D G M E N T

This writ petition has been filed seeking the following reliefs:

“(i) To declare that no TDS need be reduced from the payments made by TV channels to the petitioner with respect to sale/distribution/exhibition of cinematographic films by the petitioner to such TV channels for exhibition by such TV channels.

(ii) call for the records leading to Exhibit P6 order of the 3rd respondent and quash the same, by the issuance of a writ of certiorari or other writ order or direction;

(iii) issue a writ of mandamus or such other writ or direction, directing the 3rd respondent to issue necessary certificate at reduced rate under Section 197(1) to the petitioner.

(iv) declare that the provisions of Rule 28AA are inconsistent and ultravires the Act and are therefore liable to be struck down.”

2. As far as vires of Rule 28AA of the Income Tax Rules, 1961 (hereinafter referred to as 'the Rules') is concerned, the Rule has already undergone substantial changes w.e.f 01/04/2011.

The present rule reads as under:

“28AA. Certificate for deduction at lower rates or no deduction of tax from income other than dividends

(1) Where the Assessing Officer, on an application made by a person under sub-rule (1) of rule 28 is satisfied that existing and estimated tax liability of a person justifies the deduction of tax at lower rate or no deduction of tax, as the case may be, the Assessing Officer shall issue a certificate in accordance with the provisions of sub-section (1) of section 197 for deduction of tax at such lower rate or no deduction of tax.

(2) The existing and estimated liability referred to in sub-rule (1) shall be determined by the Assessing Officer after taking into consideration the following:-

(i) tax payable on estimated income of the previous year relevant to the assessment year;

(ii) tax payable on the assessed or returned income, as the case may be, of the last three previous years;

(iii) existing liability under the Income-tax Act, 1961 and Wealth-tax Act, 1957;

(iv) *advance tax payment for the assessment year relevant to the previous year till the date of making application under sub-rule (1) of rule 28;*

(v) *tax deducted at source for the assessment year relevant to the previous year till the date of making application under sub-rule (1) of rule 28; and*

(vi) *tax collected at source for the assessment year relevant to the previous year till the date of making application under sub-rule (1) of rule 28.*

(3) *The certificate shall be valid for such period of the previous year as may be specified in the certificate, unless it is cancelled by the Assessing Officer at any time before the expiry of the specified period.*

(4) *The certificate for no deduction of tax shall be valid only with regard to the person responsible for deducting the tax and named therein.*

(5) *The certificate referred to in sub-rule (4) shall be issued direct to the person responsible for deducting the tax under advice to the person who made an application for issue of such certificate.*

(6) *The certificate for deduction of tax at lower rate shall be issued to the person who*

made an application for issue of such certificate, authorising him to receive income or sum after deduction of tax at lower rate."

Therefore, there is no necessity to consider the vires of the Rules

3. The petitioner claims to be engaged in the business of purchase of Satellite TV broadcast/exhibition right of cinematographic film. It is stated that they normally enter into agreements that TV channels for exhibiting the cinematography films. According to the petitioner, normally TV companies pays the petitioner an amount calculated at the rate mentioned in the agreement plus 7.5% which is supposed to be the petitioner's profit by way of royalty as a right holder. Petitioner submits that it is the practice in the industry to pay such royalty to the persons who acquire the rights to the exhibition of cinematographic films. It is stated that the person who pays royalty is liable to credit certain amount to the account of the payee or at the time of payment, in terms of Section 194J of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'). Royalty has been defined under Explanation 2 to Section 9(1) of the Act, which reads as under:

“Explanation 2.- For the purposes of this clause “royalty” means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head “Capital gains”) for-

(i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;

(ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property;

(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property;

(iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;

(iva) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in section 44BB;

(v) the transfer of all or any rights

(including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films; or

(vi) the rendering of any services in connection with the activities referred to in sub-clauses (i) to (iv), (iva) and (v)".

4. According to the petitioner, the provisions clearly indicates that no TDS is liable to be deducted with respect to the royalty paid to the petitioner which apparently is a consideration for sale/distribution of cinematographic films. Petitioner had approached the competent authority seeking for a direction that no such tax should be deducted. However, by Ext.P4 dated 31/03/2009, certificate has been issued under Section 197(1) of the Act read with Rule 28AA to the Asia Net Communications Ltd., to deduct income tax at the reduced rate of 3%. The certificate was for a period from 01/01/2009 to 31/03/2009. However, later when the petitioner submitted an application for exemption, by order dated 04/04/2009, the claim was rejected on

the ground that as per Rule 28AA and the clarification issued by the Central Board of Direct Taxes, the certificate under Section 197 for deduction of tax at lower rates cannot be issued and therefore petitioner's application for exemption is not sustainable. It is impugning the aforesaid order that this writ petition has been filed inter alia contending that the rule is ultra vires the Statute and that appropriate directions are to be issued quashing Ext.P6 and for a declaration that no TDS is liable to be deducted from the amount paid by the Satellite companies/television channels to the petitioner.

5. Statement has been filed on behalf of the 3rd respondent inter alia stating that as per Rule 28AA of the Rules, certificate under Section 197 can be obtained each year subject to the satisfaction of the conditions prescribed.

6. Learned counsel for the petitioner placed reliance on the judgment of the Madras High Court in **K.Bhagyalakshmi v. The Deputy Commissioner of Income Tax, Media Circle-I [(2014) 265 CTR(Mad) 545]** wherein while considering a similar factual situation regarding transfer deed executed by the copyright purchasers, the Madras High Court while considering

the question whether the payments made by the appellant would tantamount to royalty, held at paragraphs 14 and 15 as under:

“14. It has to be seen as to whether the transfer effected in favour of the assessee would fall within Section 9(1) r/w Explanation (2)(v) of the Act. Clause (vi) to Explanation (2) defines the “Royalty” to mean consideration (including any lump sum consideration, but excluding any consideration, which would be the income of the recipient chargeable under the Head capital Gains) and in terms of Clause (v) to Explanation 2 of Section 9(1) of the Act, the transfer of all or any rights (including the granting of a licence) in respect of any copy right, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films. Therefore, to fall within the exclusion, as defined under clause (v) to Explanation (2) to Section 9(1) of the Act, if the consideration received as for the sale, distribution or exhibition of a cinematography film, then it would fall outside the scope of “Royalty” as defined under Explanation (2) in the

proceedings.

15. In the preceding paragraphs, we have made an elaborate reference to the nature of transaction entered into by the assessee with the third parties. The sample transfer deed, clearly states that the transfer in favour of the assessee is for a perpetual period of 99 years. The party, who executed the agreement in favour of the assessee was desirous of disposing World Negative Rights, Satellite Television Rights and all other rights pertaining to the picture and the assessee enjoys the exclusive status, as the World Negative rights including theatrical rights owner. The assessee was also entitled to assign the said rights, which was transferred in their favour. Further the agreement was irrevocable and shall remain in force for a period of 99 years. In such a factual situation the nature of transaction, being a perpetual transfer for a period of 99 years, would undoubtedly fall within the scope of sale.”

7. Judgment in **K.Bhagyalakshmi** (supra) has been followed by another Division Bench in **S.P.Alaguvel v. The Deputy CIT, Media Circle-1, Chennai** as per judgment dated 21/07/2014. I do not think that this Court should delve into the

merits of the contentions urged especially on account of the fact that any exemption for the deductor not to deduct tax in terms of Rule 28AA has to be considered by the competent authority. As far as Ext.P6 is concerned, it is with reference to the application submitted by the petitioner for exemption of payment of tax for the year 2009. Substantial change has now been made in Rule 28AA so far as assessing officer is entitled to issue a certificate if the tax liability of person justify deduction of tax at lower rate and no deduction of tax could be made. The earlier restriction imposed under Rule 28AA has been taken away by the present amendment.

8. Under such circumstances, it is for the petitioner who is involved in such transactions to approach the assessing officer concerned and seek for necessary concession in terms of Rule 28AA. I do not think that any further direction is required to be issued as statutory provision is available to take care of such situations. An interim order had been passed by this Court permitting tax to be deducted by the respective deductors only at 3% in terms of Ext.P4. The said situation shall continue for a period of one month to enable the petitioner to approach the

assessing officer with a proper representation and on receipt of the said representation, the assessing officer shall consider the same and pass appropriate orders within a period of one month from the date of receipt of the representation.

This writ petition is hence disposed of with the above directions.

(sd/-)

(A.M.SHAFFIQUE, JUDGE)

jsr