

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'बी' मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

सर्वश्री नरेन्द्र कुमार बिल्लैय्या, लेखा सदस्य एवं अमित शुक्ला, न्यायिक सदस्य के समक्ष

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER AND

SHRI AMIT SHUKLA, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No. 3632/Mum/2012

(निर्धारण वर्ष / Assessment Year : 2008-09

B.R. Films, Anand Villa, Plot No. G-38, 15 th Road, Santacruz W), Mumbai-400 054	बनाम/ Vs.	The ACIT,-11(1), Mumbai
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आयकर अपील सं./I.T.A. No. 3839/Mum/2012

(निर्धारण वर्ष / Assessment Year : 2008-09

The ACIT,-11(1), Mumbai	बनाम/ Vs.	B.R. Films, Anand Villa, Plot No. G- 38, 15 th Road, Santacruz W), Mumbai-400 054
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स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AA AFB 1923B

(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
अपीलार्थी ओर से/ Assessee by:		Shri Hari S. Raheja
प्रत्यर्थी की ओर से/Revenue by:		Shri S.J. Singh

सुनवाई की तारीख / Date of Hearing :11.12.2014

घोषणा की तारीख /Date of Pronouncement :14.01.2015

आदेश / ORDER

PER N.K. BILLAIYA, AM:

These cross appeals by the assessee and the Revenue are preferred against the order of the Ld. CIT(A)-3, Mumbai dt. 26.3.2012 pertaining to

assessment year 2008-09. Both these appeals were heard together and are disposed of by this common order for the sake of convenience.

ITA No. 3632/Mum/2012-2008-09

2. The first grievance of the assessee is that the Ld. CIT(A) was not justified in holding that the 1/5th of the consideration amounting to Rs. 2.30 crores in respect of the agreement of home video rights and satellite rights with Moser Baer granting rights for various films for a period of 5 years was assessable in the year under appeal. The main contention of the assessee is that the rights of each film commenced on different dates and the assessee had rightly accounted for 1/5th of the same spread over a period of 5 years from the date of commencement of each film as per the terms of exploitation.

3. Inter related with this grievance the second grievance of the assessee is that the Ld. CIT(A) was not justified in retaining an addition of Rs. 1.30 crores for the year under appeal and also enhancing the income of the subsequent assessment years.

4. The assessee is in the business of film production. The return was electronically filed on 30.9.2009 declaring a loss of Rs. 1,11,64,360/-. The case was selected for scrutiny under CASS and statutory notices were issued and served accordingly.

4.1. During the year, the assessee has shown realizations from the movies Naya Daur, Fire and Earth and overflows from Baghban and Baabul apart from royalty receipts and hires income. On perusing the balance sheet of the assessee, the Assessing Officer found that the

assessee has shown on the liability side of the balance sheet an advance received of Rs. 36.87 crores. This advance inter alia included an advance of Rs. 5.5 crores received from Moser Baer (MBIL). The assessee was asked to explain this transaction with MBIL. The assessee was further asked to show cause why the advances so received be not treated as income. The assessee filed a copy of agreement dt. 1.8.2007 entered into between the assessee and MBIL for a consideration of Rs. 11.50 crores which pertains to the transfer of rights (home video rights and satellite rights) of various films from the assessee to MBIL for a period of 5 years. After considering the reply of the assessee vis-à-vis, the agreement between the assessee and MBIL, the AO was of the firm belief that the assessee has transferred to the assignee i.e. MBIL all rights irrevocably and assessee has got irrevocable rights to use the advances received against the rights sold. Therefore, the whole consideration as per the agreement should have been offered for taxation during the year itself. The AO further observed that the assessee is deferring revenue recognition by dividing the whole consideration over the period of the agreement. Drawing support from AS-9 issued by ICAI, the AO concluded by holding as under:

A key criterion for determining when to recognize revenue from transaction involving the sale of goods is that the seller has transferred the property in the goods to the buyer for a consideration. The transfer of property in goods, in most cases, results in or coincides with the transfer of significant risks and rewards of ownership to the buyer.

When the uncertainty relating to collectability arises subsequent to the time of sale or the rendering of the service, it is more appropriate to make a separate provision to reflect the uncertainty rather than to adjust the amount of revenue originally recorded.

In the case of retail sales offering a guarantee of “money back if not completely satisfied” it may be appropriate to recognize the sale but to make a suitable provision for returns based on previous experience.”

Thus, AS 9 also stipulates recognizing revenue and recording a sale and if need be make a suitable provision based on previous experience. Thus, when the uncertainty relating to collectability arises subsequent to the time of sale or the rendering of the service, it is more appropriate to make a separate provision to reflect the uncertainty rather than to adjust the amount of revenue originally recorded. In the present case the risks and rewards have been duly transferred which tantamount to a sale. Hence, the whole consideration of Rs. 11.50 crores should have been recognized as income for AY,2008-09

Based on the discussion made above the whole of the consideration as reflected in the agreement with Moser Baer i.e. Rs.11.50 crores is brought to tax for AY 08-09. Since out of the above Rs.1 crore has been offered to tax the balance amount of Rs.10.50 crores is added back to the income of the assessee. As the assessee has filed inaccurate particulars of its total income, with a view to willfully evading income tax, penalty proceedings u/s 271(i)(c) are hereby initiated”.

5. Aggrieved by this, the assessee carried the matter before the Ld. CIT(A) and explained the transaction with the relevant clauses of the agreement made with MBIL. It was brought to the notice of the Ld. CIT(A) that the period for the home video rights and the satellite broadcasting rights are both for a period of five years but at the same time their respective date of commencement is different, therefore the income in respect of these rights can accrue to the assessee only when the period commences and not before the commencement of the rights. It was further brought to the notice of the Ld. CIT(A) that the assessee has shown income in next year which has been taxed accordingly. The assessee strongly contended that if the department had any reason to hold that the entire income is assessable in the very first year itself then the

AO ought not to have accepted the income returned by the assessee in the subsequent assessment years.

5.1. After considering the facts and the submissions and carefully perusing the various clauses of the agreement, the Ld. CIT(A) was convinced that the total consideration of Rs. 11.50 crores in respect of video rights and satellite rights for a period cannot be assessed in the beginning of the first year when the agreement was for the period of five year. However, the Ld. CIT(A) held as under:

1.3.1. However the claim of the appellant that it has offered Rs.1 Crore in respect of rights of Naya Daur during the year under appeal is also not considered to be correct Appropriation of receipts as the appellant has received adv of Rs. 5.5 Crore during the year. I find that the appellant has transferred home video rights and satellite rights for a total consideration of Rs. 11.50 cores for the period of five years, therefore, it would be appropriate to apportioned the whole consideration of Rs. 11 .50 Crore in 5 years for the term of the contract of exploitation of rights in respect of various films and video rights. Accordingly, the apportionment for the AY under consideration would be at Rs. 2.30 Crore i.e. $[11.50/5=2.30]$. Therefore the AO is directed to tax the receipt of Rs. 2.30 Crore during the year as against the receipts of Rs. 1 Crore shown by the appellant and Rs. 10.50 Crore assessed by him. This view also supported by the decision of Honble jurisdiction High Court in the case of Prakash Picture 260 ITR 456(Bom) wherein the honorable High Court has held that the assessee had exploited the rights of he film for the period of 10 years therefore, writing of the entire cost in one year would result in distortion of profit, hence the AO was justified in apportioning the expenses over the period of the contract. On same analogy, the income o the appellant would be apportioned over the period of five years being the terms of the agreement dated 1/8/07 by which rights have been transferred to MBIL. This view is further strengthen by the decision of Del High Court in the case of Dinesh Kumar Goel 331 ITR 19 (Del) wherein it was held that coaching fees received from the students for preparing them to appear in entrance examinations was to be spread over for the period of

coaching imparted to them. Since in the case of appellant, the rights were to be exploited for the period of five years as per the terms of the contract, therefore, it would be appropriate to apportion the consideration received for transferring rights to MBIL for the period of five years. The AR has also brought to my notice that as per Schedule 18 of Notes on account in the case of the Zee Entertainment Enterprise Ltd the cost of movie rights are charged on a straight-line basis for the license's period for 60 months from the date of acquisition, whichever is shorter.

1.3.2. In the light of above facts and circumstances and decision of Hon'ble jurisdiction High Court in the case of Prakash Pictures (Supra), Mahindra Holidays Resorts India Limited (supra), Rotork Control India Pvt. Ltd. 314 TR 62(SC) and Shri K. K. Khullar 116 ITD 301 (Del) and other decision as discussed above, the AO is directed to tax the income of Rs. 2.30 cores for the year under consideration as against Rs. 10.50 Crore assessed by him. Accordingly the addition of Rs. 2.30 Crore is sustained (including Rs. 1 Crore shown by the appellant) is sustained and balance is deleted. In the light of above facts and circumstances, this ground of appeal is partly allowed."

6. Aggrieved by this, the assessee and the revenue are in cross appeals before us.

7. The Ld. Counsel for the assessee reiterated the facts as they were before the lower authorities. It is the say of the Ld. Counsel that once the Ld. CIT(A) was convinced that the entire income cannot be taxed in the beginning of the first year when the agreement was for the period of 5 years, there remains no reason for him to direct to tax the income of Rs. 2.30 crores for the year under consideration. The Ld. Counsel relied upon the decision of the Tribunal Mumbai Bench in the case of M/s. Yash Raj Films Pvt. Ltd., in ITA No. 6350/M/2010. The Ld. Counsel further drew our attention to exhibit 22, 23 & 24 of the Paper Book and claimed that this is how the income has been offered for tax, as and when

the assessee received the right on the same, therefore, if the same income is taxed in the first year, it will amount to double taxation of the same income.

8. Per contra, the Ld. Departmental Representative strongly supported the assessment order. The Ld. DR further relied upon the decision of the Tribunal in the case of *Star India (P) Ltd.* 103 ITD 73. The Ld. DR further relied upon the decision of the Tribunal Mumbai Bench in the case of *DDIT (International Taxation) Vs Toronto Dominion Bank Ltd.*, 26 taxmann. Com 125(Mum).

9. We have given a very thoughtful consideration to the rival submission. We have also perused the orders of the authorities below. The issue before us is whether accrual of income has taken place or not. Whether accrual of income has taken place or not has to be judged on the principles of the real income.

9.1. In *CIT Vs Birla Gwalior Pvt. Ltd.* 89 ITR 266, the Hon'ble Supreme Court had an occasion to consider the question of accrual and the effect of subsequent events thereon. In this case Hon'ble Supreme Court made a distinction between "Real Income" and "hypothetical income" and stated that it is the real accrual of income that has to be taken into consideration and not a hypothetical accrual of income.

9.2. In the case of *CIT Vs Shoorji Vallabhdas & Co* 46 ITR 144, the Hon'ble Supreme Court at page-148 held as under:

"Income –tax is a levy on income. No doubt, the Income-Tax Act takes into account two points of time at which the

liability to tax is attracted , viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book keeping, an entry is made about a 'hypothetical income', which does not materialize. Where income has, in fact, been received and subsequently given up in such circumstances that it remains the income of the recipient, even though given up, the tax may be payable". (emphasis supplied)"

10. Let us now consider the list of films whose rights have been given by the assessee to MBIL and let us also see the date of commencement of such right.

Sr. No.	List of Film	Date of commencement
1.	Afsana (1951)	17.5.2009
2.	Ek Hi Raasta (1956)	1.5.2008
3.	Naya Daur (1957)	1.5.2008
4.	Sadhna (1958)	1.5.2008
5.	Dhool Ka Phool (1960)	1.5.2008
6.	Kanoon (1961)	1.5.2008
7.	Dharmputra(1961)	1.5.2008
8.	Gumrah(1962)	1.5.2008
9.	Waqt(1965)	1.5.2008
10.	Hamraaz(1967)	1.5.2008
11.	Aadmi Aur Insaan (1969)	1.5.2008
12.	Ittefaq (1969)	1.5.2008
13.	Dastaan	1.5.2008
14.	Dhund (1973)	1.5.2008
15.	Zameer (1975)	1.5.2008

16.	Choti Si Baat(1975)	1.5.2008
17.	Karm (1977)	1.5.2008
18.	Pati Patni Aur Who (1978)	1.5.2008
19.	The Burning Train (1980)	1.5.2008
20.	Insaf Ka Tarazu (1980)	1.5.2008
21.	Agni Pareeksha (1981)	1.5.2008
22.	Nikaah (1982)	1.5.2008
23.	Mazdoor (1983)	1.5.2008
24.	Aaj Ki Awaz (1984)	1.5.2008
25.	Kirayaddar (1986)	1.5.2008
26.	Dahleez (1986)	1.5.2008
27.	Awam (1987)	1.5.2008
28.	Pratigyabadh (1991)	1.4.2011
29.	Kal Ki Awaz (1992)	1.5.2008
30.	Baghban (1992)	1.10.2010
31.	Naya Daur (1957)	

11. Thus it can be seen that the rights would commence in respect of each of the films on different dates and accordingly the assessee has offered the income in subsequent years as exhibited on page 22 to 24 of the paper book. These facts are so clear and it is difficult to hold or even to contend that there was accrual in the very first year. We, therefore, set aside the findings of the Ld. CIT(A) on this issue and direct the AO to delete the addition of Rs. 10.50 crores on account of revenue recognition. Ground No. 1 & 2 of assessee's appeal are allowed and the appeal filed by the Revenue is dismissed.

12. The next grievance relates to the addition u/s. 68 of the Act amounting to Rs. 3.70 crores.

13. While scrutinizing the return of income, the AO observed that in the balance sheet, the assessee has unsecured loans. The assessee was asked to file loan confirmation and fulfill the criterion to justify the loans u/s. 68 of the Act. The assessee filed a detailed reply. On perusing the same, the AO observed that the assessee has filed only the statements which are ledger accounts and do not bear any sign, name, PAN of the lender. The AO further observed that the assessee has not filed any loan confirmations. The AO proceeded by making an addition of Rs. 10.73 crores u/s. 68 of the Act.

14. The assessee carried the matter before the Ld. CIT(A). Before the Ld. CIT(A), the assessee filed loan confirmation. The loan confirmations filed by the assessee were sent to the AO for comments and examination. The AO vide remand report dt. 10.2.2012 stated that confirmation received from 14 persons to whom notice u/s. 133(6) were issued and only difference of Rs. 50,00,000 is found in respect of Bhatia Combine of which ledger account filed by them shows closing balance at Rs. 4,20,00,000 whereas the books of accounts of the assessee shows closing balance at Rs. 3,50,00,000. The AO further stated that reply has been received from 3 parties i.e. Ashok Thawani, Devidas Thawani, Jay Thawani. In rejoinder to remand report, the AR stated that Bhatia Combine shows closing balance at Rs. 4,20,00,000 as against closing balance in the appellant books at Rs. 3,70,00,000 and thus there is difference of Rs. 50,00,000. The reason for difference is that the appellant has taken Rs. 1,75,00,000/- as opening balance whereas Bhatia

Combine has taken Rs. 2,25,00,000, hence, the amount of loan in fact is less by the amount of difference. Therefore, the loan has been confirmed.

14.1. In respect of non-compliance by three parties i.e. Ashok Thawani, Devidas Thawani and Jaya Thawani, it was brought to the notice of the Ld. CIT(A) that these persons have filed suit before the High Court for recovery. The suit itself proves that the assessee has borrowed money from these three parties. After considering the facts and the submissions and the remand report, the Ld. CIT(A) confirmed the addition in respect of three parties i.e. Ashok Thawani Rs. 2.25 crores, Devidas Thawani Rs. 1.25 crores and Jaya Thawani Rs. 20 lakhs holding that the assessee failed to furnish confirmation from these parties.

15. Before us, the Ld. Counsel for the assessee drew our attention to the recovery suit filed by various parties. The Ld. Counsel further brought to our notice the copy of cheque issued by the assessee and the subsequent recovery suit filed by various parties. The Ld. Counsel further drew our attention to the statement between the assessee and Jaya Thawani by which it has been confirmed by the lady of having received 21 lakhs.

16. The Ld. Departmental Representative strongly supported the assessment order.

17. We have carefully perused the orders of the authorities below and the relevant documentary evidences brought on record before us. Initially, the addition was made in respect of 7 parties totaling to Rs. 10.73 crores. The Ld. CIT(A) has restricted the addition to Rs. 3.70 crores in respect of 3 parties for want of confirmation of loan. The suit

for recovery filed by these parties before the Hon'ble High Court of Bombay speaks for itself. The loan was given by these persons to the assessee for which recovery proceedings are taken by the parties against the assessee, which proves beyond all doubts that the money was borrowed by the assessee. Subsequent payments by cheques on settlement also show that there remains no reason for making the impugned addition. We, accordingly, set aside the findings of the Ld. CIT(A) and direct the AO to delete the addition of Rs. 3.70 crores. Ground No. 3 & 4 are accordingly allowed.

18. The last grievance of the assessee is that the Ld. CIT(A) was not justified in confirming the disallowance of Rs. 4,63,110/-.

19. The AO while completing the assessment made an adhoc disallowance of 20% of motor car expenses, interest on car loan and depreciation.

20. The Ld. CIT(A) found that in A.Y. 2004-05 his predecessor in office has confirmed adhoc disallowance of Rs. 50,000/- which was accepted by both parties. The Ld. CIT(A) restricted the disallowance at 5% of the total claim of the expenses of car related and depreciation and accordingly disallowance of Rs. 4,63,110/- is sustained.

21. Before us, the Ld. Counsel for the assessee could not bring on record to show that the findings of the Ld. CIT(A) are erroneous. Considering that in A.Y. 2004-05 adhoc disallowance was accepted by both parties. We do not find any reason to interfere with the findings of the Ld. CIT(A). Ground No. 5 is dismissed.

22. In the result, the appeal filed by the assessee is partly allowed and the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 14th January, 2015

Sd/-

(AMIT SHUKLA)

न्यायिक सदस्य JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 14th January, 2015

व.नि.स./ RJ , Sr. PS

Sd/-

(N.K. BILLAIYA)

लेखा सदस्य / ACCOUNTANT MEMBER

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई
/ DR, ITAT, Mumbai
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आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

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आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai