

B.D. Barucha Vs. Commissioner of Income-tax, Central, Bombay

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Court : Mumbai

Decided On : Aug-27-1962

Reported in : [1963]49ITR135(Bom)

Judge : V.S. Desai and ;Y.S. Tambe, JJ.

Acts : [Income Tax Act, 1922](#) - Sections 33(4)

Appeal No. : Income-tax Reference No. 18 of 1961

Appellant : B.D. Barucha

Respondent : Commissioner of Income-tax, Central, Bombay

Advocate for Def. : G.N. Joshi, Adv.

Advocate for Pet/Ap. : S.P. Mehta, Adv.

Judgement :

V.S. Desai, J.

1. The assessee is an individual having several sources of income, one of which is financing film producers and distributors for interest, royalty or a share of profit.

2. Between 3rd March, 1952, and 5th November, 1952 the assessee had advanced a sum of Rs. 40,000 to a firm of film distributors known as Messrs. Tarachand Pictures. On the 5th January, 1953, the assessee entered into an

agreement with Messrs. Tarachand Pictures. This agreement was in connection with the sum of Rs. 40,000 which was already advanced, and further sum of Rs. 60,000 which was to be advanced in respect of distribution, exploitation and exhibition of certain motion pictures. Under the terms of this agreement, it was agreed between the parties that by way of interest on the initial advance of Rs. 40,000 up to the date of the agreement a lump sum of Rs. 1,750 was to be paid in five monthly instalments. That interest was to cease to run on the said initial advance of Rs. 40,000 thenceforth, and no further interest was to be paid on the said sum as also on the further advance of Rs. 60,000 under the agreement; but that, in lieu of interest, Messrs. Tarachand Pictures were to share that the assessee profit and loss of the distribution, exploitation and exhibition of the picture, Shabab, in the Bombay circuit, 2/3rd going to the assessee and 1/3rd going to Messrs. Tarachand Pictures. Further, the terms of the agreement provided, so far as they are material, that in case the picture was not released within the time stipulated in the agreement, the moneys advanced were to be returned to the assessee with interest at 9 per cent. per annum, and that if there was a breach of the agreement committed by Messrs. Tarachand Pictures the assessee had a right to terminate the agreement and demand moneys at once with interest at 9 per cent. per annum. It appears that Messrs. Tarachand Pictures were not in a position to exhibit the film in Bombay within the stipulated time, and when subsequently they released it for exhibition, it proved to be a failure. It also appears that Messrs. Tarachand Pictures had also acted contrary to some of the terms of the agreement. The matter was taken to court and, ultimately, a consent decree was obtained in Suit No. 2061 of 1954 in the Bombay City Civil Court. In the end, the assessee found that there was a balance of Rs. 80,759 which was irrecoverable, and he accordingly wrote it off as a bad debt on 31st December, 1955, in the ledger account. In the assessment for the assessment year 1956-57, for which the assessee's previous year was the calendar year 1955, the assessee claimed a loss of Rs. 80,759 which he had written off, as a deduction under section 12, but in a subsequent revised return submitted by him, he claimed it under section 10. The claim under section 10 was made alternatively under section 10(1) or under section 10(2) (xi). The claim was disallowed by the Income-tax Officer, who took the view that the moneys advanced under the agreement by

the assessee to Messrs. Tarachand Pictures could not be regarded as a dealing in the course of his financing business, but the true nature of the transaction evidenced by the said agreement was a venture in the nature of a trade, and the assessee's investment was akin to the moneys brought in by the financing partner in a firm. The loss suffered by the assessee, according to the Income-tax Officer, therefore was a loss of capital and it could not, therefore, be allowed as a bad debt under section 10(2) (xi) or as a business loss arising in the course of business of film financing or distribution. In the appeal filed by the assessee, the Appellate Assistant Commissioner agreed with the view which the Income-tax Officer had taken, and dismissed the appeal. The Appellate Assistant Commissioner found that clause (3) of the agreement clearly denoted that the real nature of the transaction was investment of capital rather than loan or advance since the appellant had entered into an agreement of sharing profit or loss in the ratio of 2/3rd and 1/3rd respectively, and hence, the resultant loss was capital loss which could not be allowed either under section 10(2) (xi) or section 10(1). When the matter came up before the Tribunal agreed with the conclusion arrived at by the department that the loss of Rs. 80,759 was a loss of capital and not a loss of stock-in-trade. The Tribunal's view was that the transaction entered into by the assessee under the agreement was not a joint venture with Messrs. Tarachand Pictures or any partnership business with them; it was not, however, a mere financing deal or a part of the money-lending activities of the assessee. The true nature of the transaction, according to the Tribunal, therefore, it was unnecessary to discuss further whether the said loss would fall under section 10(2) (xi) or section 10(1). The assessee applied to the Tribunal under section 66(1) and asked for three questions to be referred to this court. On the said application, though the Tribunal did not raise the questions as suggested by the assessee, it raised the following question, which it thought arose out of its decision and order, viz. :

'Whether the aforesaid loss of Rs. 80,759 is deductible under any of the provisions of the Ac ?'

3. Now the questions which the assessee had asked the Tribunal to raise were as follows :

'(1) The Tribunal having held that the agreement dated January 5, 1953, cannot be construed as a partnership, was the Tribunal justified in law under section 33(4) of the Act in upholding the conclusion of the income-tax authorities on an altogether new ground not pleaded by either party viz., that the assessee intended to make an investment in the business of Tarachand Pictures, or whether the finding of the Tribunal, viz., the assessee intended to make an investment in the business of Tarachand Pictures and not merely to lend money at interest as a money-lender, is in excess of its powers under section 33(4) of the Ac

(2) Whether on a proper construction of the deed dated January 5, 1953, between the applicant and Tarachand Pictures, was the Tribunal right in holding that the applicant intended to make an investment in the business of Tarachand Pictures and not merely to lend moneys at interest as a money-lender would do and that accordingly the loss of Rs. 80,759 was a loss of capital and not a loss of stock-in-trade

(3) Whether, on the facts and in the circumstances of the case, the applicant was entitled to claim a deduction in respect of the sum of Rs. 80,759 under section 10(1) or section 10(2)(xi) of the Act.'

4. As we have already stated, these questions were not allowed by the Tribunal, and the assessee, therefore, has taken up a notice of motion praying that the Tribunal should be called upon to make a supplementary statement incorporating the said three questions, or that this court should record the said three questions as incorporated in the statement already made by the Tribunal, and read them as a part thereof. We have heard Mr. Mehta, learned counsel for the assessee, on the notice of motion, and, in our opinion, the motion must be disallowed.

5. It is argued by Mr. Mehta that the Tribunal not having agreed with the Income-tax Officer and the Appellate Assistant Commissioner that the assessee's transaction was in the nature of a joint venture or a partnership transaction with Messrs. Tarachand Pictures, the Tribunal was not entitled to proceed on a new basis that the assessee intended to make an investment in the business of Messrs. Tarachand Pictures with a view to earning a share of profit. He has urged that this was not the case of the Income-tax Officer and the Tribunal had no

jurisdiction or power under section 33(4) to make out a new case, not made out by the department before the income-tax authorities. In our opinion, there is no substance in this contention of Mr. Mehta. Before the Income-tax Officer, the assessee had claimed the amount of Rs. 80,759 as a bad debt under section 10(2) (xi) or alternatively as a business loss arising in the course of his business of film financing or distribution. The claim has to be determined on the basis of the real nature of the transaction which the assessee had entered into with Messrs. Tarachand Pictures under the agreement, dated 5th January, 1953. On construction of the said agreement, the Income-tax Officer took the view that it was not a money-lending transaction, nor was it one of the usual financing deals, which the assessee was carrying on in the course of his business of financing deals, which the assessee was carrying on in the course of his business of financing film producers and distributors for interest, royalty or share of profit. Accordingly to the Income-tax Officer, the transaction was in the nature of a joint venture and the assessee's position was akin to that of a financing partner bringing the capital to the firm. In this view of the matter, the conclusion of the Income-tax Officer, was that the loss was loss of capital, and not a revenue loss. The same was also the decision of the Appellate Commissioner in appeal. The question agitated before the Tribunal was the same, as to whether it was a capital loss. In coming to that conclusion, the Tribunal also proceeded to determine the real nature of the transaction on the construction of the agreement and its conclusion on the construction of the agreement was that the transaction represented an investment by the assessee in the business of Messrs. Tarachand Pictures with a view to obtain a share in the profits. It pointed out, however, that although the lower authorities had used the term 'partnership' or 'joint venture', the true legal nature of the transaction would neither be a partnership transaction nor a joint venture of the assessee with Messrs. Tarachand Pictures. In taking the view which the Tribunal has taken, we do not think the Tribunal was making out a new case for the first time. The question before the income-tax authorities as well as before the Tribunal was the same, whether the loss claimed was a capital or a revenue loss, and the question had to be determined on legal inferences to be drawn from the construction of the document. The Income-tax Officer and the Appellate Assistant Commissioner had drawn one legal inference, and the Tribunal did not

agree with that legal inference, but drew another inference. That, we do not think, was making out a new case, nor do we think that the Tribunal was under section 33(4) precluded from drawing any other legal inference on the construction of the document than what the Income-tax Officer or the Appellate Assistant Commissioner had drawn. No question such as is sought to be raised by the first of the questions suggested by the assessee, therefore, can be said to arise in the present case and the Tribunal, therefore, was right in not allowing it. The second question sought to be raised by the assessee relates to the proper legal inference to be drawn from the agreement in question, and that is involved in the question which is already framed by the Tribunal, because in answering the said question, we will have to consider whether the Tribunal's construction of the agreement in question is correct or not. As to the third question, that is undoubtedly involved in the question. In our opinion, therefore, the notice of motion taken out by the assessee must be disallowed. We accordingly disallow it with costs.

6. Coming now to the question on merits, there can be no doubt whatever that the transaction entered into by the assessee with Messrs. Tarachand Pictures under the agreement dated 5th January, 1953, was neither a money-lending transaction or a transaction of the kind of a financing deal usually entered into by the assessee for financing film producer and distributors. Under clause (3) of the said agreement, the assessee has advanced a sum of Rs. 1,00,000 on terms to share the profit and loss arising out of the distribution, exploitation and exhibition of the picture, Shabab, in the Bombay circuit on 2/3rd and 1/3rd basis. This term unmistakably and almost conclusively makes it a transaction of investment of capital. No money-lending transaction can have the attribute of the money-lender sharing the loss of the business for which money is lent, nor could it be a feature of any financing deal. Mr. Mehta has urged that financing the film producers and distributors was a usual feature of the assessee's business and on what terms the financing was to be done was entirely for the assessee to determine and if in a particular transaction the assessee chose to run the risk of even sharing the loss it would not be sufficient to take the transaction out of his business of financing film producers and distributors. According to Mr. Mehta, if we accept his contention that this was an item of usual financial deal, then the loss suffered by him, financing being his stock-in-trade, would be a revenue loss. We find it difficult to

accept the contention of Mr. Mehta, because, in our opinion, the terms on which this transaction has been entered into by the assessee, and particularly the term under which the assessee undertook to share the losses, takes the transaction completely out of the category of financing transactions. There can be no doubt that the intention of the assessee in entering into this transaction was to invest his moneys in the business of another with a view to earn the share of profit therein. The loss suffered by the assessee, therefore, was clearly a capital loss and not a revenue loss which would be deductible under section 10(2)(xi) or section 10(1) of the Act.

7. Our answer therefore to the question referred to us is in the negative. The assessee will pay the costs of the department.

8. Question answered in the negative.

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