

R.M. AMBERKAR  
(Private Secretary)

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
O.O.C.J.**

**INCOME TAX APPEAL NO. 835 OF 2016  
WITH  
INCOME TAX APPEAL NO. 836 OF 2016**

Pr. Commissioner of Income Tax – 3 .. Appellant

*Versus*

Tulip Hospitality Service Ltd .. Respondent

- .....
- Mr. Suresh Kumar for the Appellant
  - Mr. Percy Pardiwalla, Sr. Advocate with Mr. Atul Jasani for the Respondent
- .....

**CORAM : AKIL KURESHI &  
M.S. SANKLECHA, JJ.**

**DATE : DECEMBER 17, 2018.**

**P.C.:**

**1.** These two appeals under Section 260A of the Income Tax Act, 1961 (“**the Act**” for short) challenge the order dated 11.3.2015 passed by the Income Tax Appellate Tribunal, Mumbai (“**the Tribunal**” for short). The impugned order dated 11.3.2015 is a common order relating to A.Ys. 2004-05 and 2005-06. Thus, the two appeals.

**2.** The Revenue has urged the following common questions of law in regard of A.Ys. 2004-05 & 2005-06 for our

consideration:-

- “(1) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the disallowance of deputation and other cost by relying on the CIT(A) order, which in turn had relied upon the report of Special Auditors appointed u/S. 142(2A) of the Act?
- (2) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified deleting the disallowance of Hotel Management fees and sales & management fees by relying on the CIT(A) order, which in turn had relied upon the report of Special Auditors appointed u/S. 142(2A) of the Act?

And

- (3) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in deleting the disallowance of depreciation on intangible asset which was claimed by the assessee?

**3.** The Revenue has also urged this additional question of law in respect of A.Y. 2004-05 for our consideration:-

- (4) Whether on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was justified in deleting the addition made by AO on account of royalty of Rs. 10,00,000/- as income on accrual basis while the assessee company is following mercantile system of accounting?

**4.** As the facts and law involved in both the appeals are admittedly similar, for the purpose of this order, we shall refer to the facts from Income Tax Appeal No. 835 of 2016

relating to A.Y. 2004-05.

**5. Regarding Q. No. (1) :-**

(a). The respondent - assessee is engaged in the hotelling business. During the course of the assessment proceedings, a Special Auditor under Section 142(2A) of the Act was appointed. The Special Auditor's report held that the amount claimed as expenditure of Rs. 7.56 crores on account of deputation and other costs as reasonable, necessary and justified to run the business of the respondent. Thus, an admissible expenditure. However, the assessing officer did not accept the same on the ground that the same was in arrangement arrived at between the respondent - assessee and M/s. Cox & Kings (I) Pvt Ltd (CKIL). Thus, by assessment order dated 23.8.2007 under Section 143(3) of the Act, the expenditure of Rs. 7.56 crores was disallowed.

(b) On appeal, the Commissioner of Income Tax (Appeals) allowed the expenditure of Rs. 7.56 crores on account of deputation costs and other costs by relying upon its earlier order for A.Y. 2003-04 dated 22.1.2008 which was upheld by

the Tribunal on 5.10.2012.

(c) Being aggrieved, the Revenue challenged the issue in appeal before the Tribunal. The Tribunal after examining the Special Auditor's report held as under:-

“From the above report, we found that the Special Auditor has verified all the branch wise and month wise certificates of Motilal & Associates certifying expenses incurred by CKIL in the respective branches. The Auditor also observed that if the assessee had not incurred such expenses, the running of the hotel would have been an impossible task. Therefore, these expenses are incurred wholly for the purpose of business. Further, the Special Auditor was also satisfied with the nexus provided by the assessee between the expenditure and the business activities. The same report of the Special Auditor for A.Y. 2004-05 was relied by the CIT(A) while deleting the disallowance made by the AO. Accordingly, we do not find any reason to interfere in the order of the CIT(A) deleting disallowance of deputation and other costs.”

(d) From the above, it is clear that both the Commissioner of Income Tax (Appeals) as well as the Tribunal have come to the concurrent finding and noted that the expenditure incurred in both assessment years was held allowable by the Special Auditor. This was for the reason that the expenditure was incurred in running of hotel and therefore, incurred

wholly for the purpose of business. The Tribunal was satisfied that there was a nexus between the expenditure incurred of Rs. 7.56 crores and the business of running hotel of the respondent. Thus, dismissed the Revenue's appeal.

(e) We find that this issue is one of finding of the fact. Moreover, both the Commissioner of Income Tax (Appeals) and the Tribunal have concurrently found that the expenditure of Rs. 7.56 crores was necessary to run its business. This view also found support from Special Auditor's Report.

(f) In view of the above, the question as proposed does not give rise to any substantial question of law and thus, not entertained.

**6. Regarding Question No. (2):-**

(a). The respondent is engaged in hotelling business. It appointed Tulip Hotel (P) Ltd to manage its hotel. It claimed expenses of Rs. 79.93 lacs being the aggregate of Hotel Management Fees (Rs. 61.93 lacs) and sales and market

expenses (Rs. 18 lacs) paid to Tulip Hotel (P) Ltd. During the assessment proceedings, a Special Auditor under Section 142(2A) of the Act was appointed. The special auditor on investigation held that in terms of the agreement with Tulip Hotel (P) Ltd, 3% of the gross revenue to be paid as hotel management fees comes to Rs. 59.30 lacs and the same is allowable. It also held that sales and marketing expenses of Rs. 18 lacs is also allowable. However, the assessing officer had in scrutiny assessment proceedings disallowed the entire Rs. 79.93 lacs in the agreement of hotel management fees and sales & marketing fees claimed by the respondent - assessee. This by an order dated 23.8.2007 vide Section 143(3) of the Act.

(b) Being aggrieved, the respondent carried the issue in appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. By order dated The CIT(A), by its order, deleted disallowance of Rs. 77,30,425/, the CIT(A) found that the expenses on account of management fees and sales expenses were incurred to carry on the business. It accepted the disallowance as made to the Special Auditor's Report

holding that an amount of Rs. 59.30 Lacs out of Rs. 61.93 lacs incurred on account of hotel management fees and Rs. 18 lacs incurred on account of marketing fees has allowed. Thus, allowing the appeal partly by restricting the disallowance to as Rs. 2.62 lacs.

(c) Being aggrieved, the Revenue filed an appeal before the Tribunal. The impugned order of the Tribunal concurred the findings of the CIT(A) that the expenditure incurred on hotel management fees and sales & marketing fees were in fact incurred by the respondent for the purposes of its business. The impugned order further records the fact that the hotel management fees paid by the assessee for managing the hotel was correctly allowed to the extent of 3% of the gross revenue from the hotel business in terms of the management agreement arrived at between Tulip Hotels Pvt Ltd and the assessee i.e. Rs. 59.30 lacs and Rs. 18 lacs of sales and marketing expenses. Further, the Special Auditor under Section 142(2A) of the Act had also accepted that these expenses of Rs. 77.30 lacs (in the aggregate) on account of Hotel Management fees and Sales & Marketing

fees was allowable. Thus, dismissed the Revenue's appeal.

(d) We find that both the CIT(A) and the Tribunal have come to concurrent findings of the fact that the expenses of Rs. 77.30 lacs on account of hotel management fees and sales and marketing fees were allowable expenses having been incurred for the purpose of business. This was on the basis of examination of the record which was also duly supported by the Special Auditor's report holding that these expenses i.e aggregate of Rs. 77.30 lacs have been incurred for running of hotel business of the respondent - assessee. This, correct findings of fact is not shown to be perverse so as to warrant interference.

(e). In the above view, this question as proposed does not give rise to any substantial question of law as. Thus, not entertained.

## **7. Regarding Question No. 3:-**

(a). The respondent had claimed depreciation of Rs. 8.67 crores on intangible assets i.e permits and licenses obtained

to run its hotel business. The assessing officer disallowed the depreciation on intangible assets on the ground that the respondent-assessee could not establish that the intangible assets were used for the purpose of business. Therefore, holding that the respondent - assessee did not fulfill the requirement of Section 32 of the Act by assessment order dated 23.8.2007 passed under Section 143(3) of the Act.

(b) Being aggrieved, the respondent filed an appeal to the CIT(A). The claim for deprecation of intangible assets was allowed by the CIT(A). This was by following its earlier order in respect of the same assessee for the A.Y. 2003-04 where also that deprecation was allowed on intangible assets i.e permits and licenses. This as the facts and law in the subject assessment year was found to be the same as for A.Y. 2003-04. Thus, disallowance of deprecation of Rs. 8.67 crores done by the assessing officer was deleted while allowing the appeal by its order dated 15.3.2008.

(c) Being aggrieved by the order of CIT(A), the Revenue filed an appeal on this issue before the Tribunal. By the impugned

order, the Tribunal upheld the deletion of depreciation on intangible assets by upholding the finding of the CIT(A) that it is undisputed that the intangible assets were purchased as slump sale and fell under block of assets on which depreciation is allowable @ 25%. Thus, not possible to bifurcate between various assets. Further, it holds that even the assessing officer does not dispute that the business of the respondent could not be carried out without necessary licences, permits and approvals. Thus, disallowed the Revenue's appeal.

(d) We find that both the CIT (A) as well as the Tribunal found on facts that the hotel business cannot be carried out without necessary licenses, permits and approvals. Thus, the proposition canvassed by the Revenue that intangible assets in the nature of permits, licenses & approvals are not required for carrying on the business of hotel not found to be correct by both the CIT(A) and the Tribunal. It is not disputed that the intangible assets viz. permits, licenses and approvals fall within the meaning of intangible assets under Section 32 of the Act.

(e) Therefore, in view of the above, the question as proposed does not give rise to any substantial question of law Thus, not entertained.

**8. Regarding Question No. 4 (Only for A.Y. 2004-05):**

(a). Respondent – assessee had accounted for the receipt of royalty from M/s. Karan Decorators of Rs. 50 lacs and offered the same to tax. However, the assessing officer did not accept the same and treated further amount of Rs. 10 lakh which had not been received during the year as income of the assessee. This on the ground that the respondent was accounting on mercantile basis. Thus, the assessment order dated 23.8.2007 passed under Section 143(3) of the Act made an addition of Rs. 10 lakh to income.

(b) Being aggrieved, the respondent filed an appeal before the CIT(A). By an order dated 15.3.2008, the CIT(A) found on facts that during previous year relevant to AY 04-05, the assessee had received 50 Lacs from M/s. Karan Decorators and accounted for same as income. The balance amount of

Rs. 10 lakh as per the agreement was not received during the previous year relevant to AY 2004-05. Thus, the only amount of Rs. 50/- lakh was to be considered as income of the assessee and Rs. 10/- lakh was not admittedly received by the assessee. This it found was also accepted by the Special Auditor. Thus, it deleted the addition of Rs. 10 lakh being royalty as income for subject assessment year while allowing the appeal of the respondent.

(c) Being aggrieved, the Revenue filed an appeal on this issue to the Tribunal. The impugned order upheld the findings of the CIT(A) and in particular noted the fact that when the services were not rendered, there was no question of any accrual and / or receipt of royalty from M/s. Karan Decorators. Thus, the Revenue's appeal was dismissed.

(d) We find that both the CIT(A) and the Tribunal on examination of the records, found that there was no question of any accrual of Rs. 10 lakh as royalty during subject assessment year as the respondent had not rendered any services to claim the amount of Rs. 10 lakh during the

subject assessment year. The respondent had recorded services to the extent of Rs. 50 lakh during the year and accounted the same as income. The view of the CIT(A) and the Tribunal on the facts as existing is a very plausible view.

(e) Therefore, in the above view, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.

**9.** Accordingly, both the appeals are dismissed.

**[ M.S. SANKLECHA, J. ]**

**[ AKIL KURESHI, J ]**