ORDER SHEET

ITA NO.20 OF 2009
IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION(INCOME-TAX)
ORIGINAL SIDE

NEW KENILWORTH HOTEL PVT. LTD.
Versus
COMMISSIONER OF INCOME TAX, KOL-III,KOL.

BEFORE:

The Hon'ble JUSTICE GIRISH CHANDRA GUPTA

The Hon'ble JUSTICE ASHA ARORA

Date : 23rd June, 2016.

MR.J.P.KHAITAN,SR.ADVOCATE, MR.SANJOY BHOWMIK,ADVOCATE FOR APPELLANT
MR.R.N.BANDYOPADHYAY, MS.SOMA CHATTERJEE,ADVOCATE FOR RESPONDENT

The Court : The appeal is directed against a judgment and order dated 12th September, 2008 passed by the learned Income Tax Appellate Tribunal "A" Bench, Kolkata in ITA No. 1083/Kol/2007, ITA No.1062/Kol/2007 and CO No.38/kol/2007 all pertaining to the assessment year 2003-04.

ITA No.1083 was an appeal preferred by the assessee whereas ITA No.1062 was an appeal preferred by the revenue and CO No.38 was a cross objection preferred by the assessee apropos the appeal preferred by the revenue. The learned Tribunal allowed the appeal of the

revenue and dismissed the cross objection filed by the assessee. The appeal preferred by the assessee was partly allowed. The assessee has come up in appeal. The following questions were formulated on 1st July, 2010 when the appeal was admitted by this Court:-

> *"(a) Whether on a true and proper interpretation of sub-section (4) of section 80HHD of the Income Tax Act, 1961, the Tribunal was justified in law in upholding the addition of Rs.44,68,966/- and its purported findings in that behalf are arbitrary, unreasonable and perverse ?*
>
> *(b) Whether the Tribunal was justified in law in upholding the addition of notional interest of Rs.40,89,045/- made by the Assessing Officer in respect of the appellant's balances with its subsidiaries and in proceeding on the assumption that the Assessing Officer had disallowed the said amount out of interest expenditure and its purported findings in that behalf are arbitrary, unreasonable and perverse ?*
>
> *(c) Whether the Tribunal was justified in law in holding that the rental income received from Spice Cell Ltd. was assessable as business income and not under the head 'house property' and in not following its orders for the assessment years 2001-02 and 2002-03 ?"*

The learned Tribunal upheld the addition of a sum of Rs.44,68,966/- for the following reasons.

> *"We have carefully considered the issue. It is seen from the details given at pages 36,37 of the Paper Book that the foreign exchange reserve was utilized by the assessee during financial year 1993-94 to 2002-03 for addition to plant and machinery, electric installations, kitchen facilities and computers. It has also been admitted by the assessee that*

during the financial year 2003-04 tourism has suffered and foreign visitors were not coming to India due to spread of terrorism and overall economic situation of the country. It has also been admitted that the assessee had suffered loss due to lack of business opportunity resulting in less tourists traffic in Eastern India which affected the hotel occupancy ratio and the overall performance of the hotel. It is also very clear from the minutes of the meeting of the Board of Directors of the Hospitality Resorts Ltd. held on 28-03-2003 that the assessee had subscribed for Rs.9.5 crore equity shares for Hospitality Resorts Ltd. allotted @ Rs.1 per share at a premium of Rs.1 each. It is very clear from the page one of the aforestated minutes of he meeting of Hospitality Resorts Ltd. that the funds were required by it for further diversification and expansion of the existing business as also for meeting the debt/obligation and strengthening the working capital of the company. Thus, it is very clear that not only the additions to the fixed assets were of routine nature and could not be said to be for expansion of existing facilities to foreign tourists but the investment in equity shares of Hospitality Resorts Ltd. was also not wholly or exclusively for the expansion of business. We, therefore, see no reason to interfere with the decision of the lower authorities. The grounds no.1 and 2 of the appeal of the assessee are rejected."

The learned Tribunal did not notice the fact that as on 1st April, 2002, the assessee had a credit balance with HRL for a sum of Rs.17.38 crores. Subsequent to 1st April, 2002, the assessee made payments on behalf of the HRL to the extent of Rs.2.15 crores. The total thus worked out to a sum of Rs.19.53 crores which was more or less adjusted by issuance of shares by HRL in favour of the assessee for Rs.19

crores. Therefore the credit balance as on 1st April, 2002 was more or less adjusted. Thereafter during the financial year 2002-03 immovable assets of the Goa unit of the assessee were sold to HRL at a sum of Rs.4.90 crores out of which a sum of Rs.2.34 crores were received. There was thus a total balance of a sum of Rs.3.09 crores receivable from HRL.

The investment of a sum of Rs.19 crores in the share capital of HRL, according to the assessee, included a sum of Rs.44,68,966/- conforming to the reserve or part thereof created by the assessee under sub-section 4 of Section 80HHD.

The question for consideration was whether the reserve amounting to a sum of Rs.44,68,966/- was properly utilized?

Under clause (a) to sub-section (4) of section 80HHD, the reserve has to be utilised in any of the six ways appearing in clauses (a) to (f) of sub-section (4). Clause (a) provides for construction of new hotels approved by the prescribed authority. Clause (f) provides for subscription to equity shares forming part of any eligible issue of capital made by a public company.

"Eligible issue of capital" has been defined in Explanation "e" of section 80HHD of the I.T. Act, which provides as follows:

> *"(e) "eligible issue of capital" means an issue made by a public company formed and registered in India and the entire proceeds of the issue is utilised wholly and exclusively for the purpose of carrying on the business of-*
>
> *(i) setting up and running of new hotels approved by the prescribed authority; or*

(ii) providing such new facility for the growth of tourism in India, as the Central Government may, by notification in the Official Gazette, specify."

It is not in dispute that the assessee has invested a sum of Rs.19 crores in the share capital of HRL. The assessee is seeking to take advantage only to the extent of Rs.44,68,966/-. The case of the assessee is that the aforesaid sum has been taken from the reserve created under sub-section (4) of section 80HHD which he utilised in contributing to the share capital of HRL. In other words, the sum of Rs.19 crores invested by the assessee includes the aforesaid sum of Rs.44,68,966/-.

Therefore, the question to be asked should be whether the proceeds of the issue were utilised by HRL in either of the two ways appearing from sub-clauses (i) and (ii) quoted above.

It is not in dispute that HRL has set up a new hotel which commenced business on April 1, 2002, i.e. to say in the same financial year in which the money was invested. It is also not in dispute that the prescribed authority has granted approval to HRL. The proceeds of the issue could be used for running of the new hotels under sub-clause (a) and could also have been used for the purpose of providing new facility for the growth of tourism in India.

The learned Tribunal did not record any finding that the money invested by the assessee or any part thereof to the share capital of HRL was utilised for any object which does not fall either within sub-clause (i) or sub-clause (ii). Unless such a finding is recorded, the benefit could not have been denied.

The minutes of the meeting of the Board of Directors of HRL, held on March 28, 2003, shows that the funds were required by HRL for further diversification and expansion of the existing business.

Expansion and diversification, according to us, are both activities pertaining to running of a hotel or any business for that matter. It could not, therefore, have been said that the reserve of a sum of Rs.44,68,966/- was utilised by the assessee for a purpose not authorised by the statute.

In that view of the matter, the addition was unwarranted altogether and the finding in that regard is arbitrary and perverse.

The second question formulated is as follows:

> *"(b) Whether the Tribunal was justified in law in upholding the addition of notional interest of Rs.40,89,045/- made by the Assessing Officer in respect of the appellant's balances with its subsidiaries and in proceeding on the assumption that the Assessing Officer had disallowed the said amount out of interest expenditure and its purported findings in that behalf are arbitrary, unreasonable and perverse?"*

The Assessing Officer was of the following opinion:

> *"In view of above, the assessee should have made provision for interest in the books of accounts minimum @12% on Rs.3,09,18,109/- and Rs.5,36,086/-. Accordingly, interest*

amounting to Rs.40,89,045/- @13% on the above amount is added back to the total income of the assessee for the year."

The aforesaid opinion was formed by the Assessing Officer because-

"During the year the assessee company has debited interest on loan (Secured & Unsecured) amounting to Rs.2,11,65,052/-. The rate of interest appears more or less 13%. On the other hand the assessee has shown a recoverable outstanding balance of advance to a subsidiary of the assessee company amounting to Rs.3,09,18,109/- for which no interest was charged."

We already have, while answering the question (a), summarised the account position between the assessee and HRL from which it would appear that the sum of Rs.3 crores approximately remained payable by HRL to the assessee on account of immovable assets of the Goa unit sold by the assessee to HRL. Question naturally will arise whether the assessee was entitled in law to charge interest for the aforesaid outstanding dues. Unless the assessee could have charged interest in law, the addition made by the Assessing Officer cannot be supported.

Mr. Khaitan, learned Senior Advocate, drew our attention to sub-section (4) of section 55 of the Transfer of Property Act, which provides as follows:

"(4) The seller is entitled-

(a) to the rents and profits of the property till the ownership thereof passes to the buyer;

(b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer, any transferee without consideration or any transferee with notice of the non-payment, for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part from the date on which possession has been delivered."

He submitted that the seller is entitled to charge interest for that part of the consideration which remained unpaid. But such entitlement is subject to a contract between the buyer and the seller as would appear from section 55 of the Transfer of Property Act, which provides as follows:

*"**55. Rights and liabilities of buyer and seller.**- In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold."*

He submitted that the Assessing Officer has not pointed out any contract between the buyer and the seller which entitled the seller

to charge interest or obliged the buyer to pay interest. In the absence of a right to claim interest and a corresponding obligation to pay interest on the part of the buyer, interest could not have been charged. The Assessing Officer did not consider that in the absence of a contract, obliging the buyer to pay interest, the same could not have been charged. He added that the transaction of sale was between the assessee and its subsidiary. The assessee is interested in the well being and development of its subsidiary. Even otherwise, consideration is fixed by taking into account all aspects of the matter. It is not that the assessee was not aware that the recovery of the sale proceeds is likely to take sometime. So, keeping that in view, the sale price was fixed. He submitted that it cannot in any event be contended that the assessee has suffered any loss.

Mr. Bandopadhyay, learned Advocate appearing for the revenue, has not disputed that neither the deed of conveyance nor the contract of sale of the immovable property between the assessee and the buyer HRL was taken into consideration either by the Assessing Officer or by the CIT(A) or by the learned Tribunal.

Unless the contract is taken into account and the terms and conditions of sale are examined, it cannot be said with any amount of certainty as to whether the contract between the parties provided for payment of interest or was silent as regards the liability of the buyer to pay interest or there was any stipulation not to pay interest. We cannot make any speculation either in that regard.

We may, therefore, not be inclined to rest our judgment only on this part of the submission of Mr. Khaitan. It can also be pointed out that liability to pay interest is there in the absence of a contract to the contrary. In other words, liability to pay interest is there unless the seller has agreed not to claim interest and the buyer has agreed not to pay interest.

The other part of the submission of Mr. Khaitan in this regard is that the income tax authorities are not entitled to compel a businessman to maximise his profits. This precisely is what the Assessing Officer, the CIT(A) and the learned Tribunal wanted the assessee to do. The Assessing Officer found fault with the assessee because it did not charge interest for the outstanding dues from HRL. The learned Tribunal has, however, misunderstood the question. The learned Tribunal proceeded on the basis as if the Assessing Officer had disallowed a part of the expenditure incurred by the assessee on account of interest. That was not the case. The case was that the Assessing Officer made an addition because the assessee had omitted to charge interest from HRL.

Mr. Khaitan cited a judgment in the case of ***S.A. Builders Ltd. –vs- CIT(Appeals) & Anr., reported in (2007) 288 ITR 1 (SC),*** wherein the following views were taken:

> *"We agree with the view taken by the Delhi High Court in CIT v. Dalmia Cement (B.) Ltd. [2002] 254 ITR 377 that once it is established that there was nexus between the expenditure and the purpose of the business (which need*

not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize his profit. The income-tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own view point but that of a prudent businessman. As already stated above, we have to see the transfer of the borrowed funds to a sister concern from the point of view of commercial expediency and not from the point of view whether the amount was advanced for earning profits.

We wish to make it clear that it is not our opinion that in every case interest on borrowed loan has to be allowed if the assessee advances it to a sister concern. It all depends on the facts and circumstances of the respective case. For instance, if the directors of the sister concern utilize the amount advanced to it by the assessee for their personal benefit, obviously it cannot be said that such money was advanced as a measure of commercial expediency. However, money can be said to be advanced to a sister

concern for commercial expediency in many other circumstances (which need not be enumerated here). However, where it is obvious that a holding company has a deep interest in its subsidiary, and hence if the holding company advances borrowed money to a subsidiary and the same is used by the subsidiary for some business purposes, the assessee would, in our opinion, ordinarily be entitled to deduction of interest on its borrowed loans."

Mr. Bandopadhyay has not been able to find out anything from any of the judgments of the Assessing Officer, the CIT(A) or the learned Tribunal to show that the subsidiary (HRL) did not use its funds for the running of the hotel or for the purpose of providing for facilities for the growth of tourism in India nor is there any evidence to show that any part of the money due and owing by HRL to the assessee was spent for any personal business of any of the directors.

In that view of the matter, we are of the opinion that the addition made by the Assessing Officer and upheld by the CIT(A) and the learned Tribunal are not sustainable. Therefore, the question no.[b] is answered in favour of the assessee and against the revenue.

The third and the last question formulated at the time of admission of the appeal is as follows:

"[c] *Whether the Tribunal was justified in law in holding that the rental income received from Spice Cell Ltd. was assessable as business income and not under the head*

'house property' and in not following its orders for the assessment years 2001-02 and 2002-03?"

The views expressed by the learned Tribunal which are under attack are as follows:

"All the decisions of the Hon'ble Apex Court, Hon'ble jurisdictional High Court and the decision of the Hon'ble A.P. and Hon'ble Madras High Court referred to above have not been considered by the ld. Coordinate bench in their decisions dated 13-4-2007 and 16-6-2006 in the case of the assessee for assessment years 2001-02 and 2002-03 (supra). We, therefore, respectfully following the aforestated decisions of the Hon'ble Apex Court and Hon'ble High Courts, not distinguished by the assessee hold that the income of the assessee from the exploitation of its depreciable commercial asset i.e. the terrace of the hotel building by giving it to Airtel for installing its transmission tower, is liable to be assessed as business income and not as income from house property. This ground of appeal is, therefore, allowed. "

Mr. Khaitan, learned senior advocate, has not been able to find any fault with the views taken by the learned Tribunal except that previously different view was taken. Hotel is obviously a business of the assessee. Terrace of that hotel was utilised for the purpose of installing a tower and the income arose out of the rental of the terrace. The business of the assessee is, in a sense, to let out the rooms to the guests for consideration, though strictly speaking in law it is not a case of letting out. It may be a case of licensing. Then can it be said that letting out of the

terrace is not the business of the assessee? If the rental arising out of letting out of the terrace is to be treated as an income arising out of house property, the income arising out of letting out rooms of the hotel should also be similarly treated. The assessee is not prepared to have his income from hotel assessed as income arising out of house property. Therefore, the view taken by the learned Tribunal is a correct view.

Therefore, the question no.[c] is answered in the affirmative and in favour of the revenue.

The appeal is, thus, partly allowed.

(GIRISH CHANDRA GUPTA, J.)

(ASHA ARORA, J.)

sb/tk/sm