* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 25.09.2012

\+ **ITR 112-13/1997**

CIT(DELHI-VI) ..... Petitioner
Through : Ms. Suruchi Aggarwal, Advocate

versus

M/S ANSAL PROPERTIES & INDUSTRIES LTD
.....Respondent
Through : Mr. Satyen Sethi and Mr. Arta Trana Panda, Advocates.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

%

ITR No.112/1997

1. The first question which arises in these appeals is as follows: -

"Whether in the circumstances the ITAT is correct in holding that expenses incurred on the maintenance of accommodation provided to its employees and Executives in Iraq is not disallowable?"

2. The assessee for the relevant accounting year had claimed a sum of ₹2,09,859/-. The Tribunal had this to say in respect of the above question: -

"*10. Regarding to the next issue pertaining to the deletion of the addition of ₹2,09,859/- made under section 37(4) of the Act on account of disallowance of expenses relating to workers in staff transit camp incurred in Iraq is concerned, both the parties before us did not dispute that the issue in question is*

squarely covered in favour of the assessee by the earlier order of the Tribunal contained at page 4 of the paper book vide Tribunal's order dated 25th January, 1994 for the assessment year 1986-87 in ITA No.343/Del/90 and order dated 23rd June, 1993 for the assessment year 1985-86 in ITA No.4002/Del/89. In view of such mutually accepted position, we sustain the order impugned in this regard by following our earlier order cited supra and reject the stand of the revenue."

3. The appellant Revenue contends that having regard to the phraseology of Section 37(4) and Section 37(5) of the Income Tax Act, 1961 ('Act', for short) as it stood at the relevant point of time, these expenses were clearly not deductible. It is submitted that the term "residence by whatever name called" would employ all the kinds of accommodation used for transit accommodation of the employees of a company, for the duration of their visit to the place concerned. Saying this clearly brought out the parliamentary intention to execute from the ambit of Section 37, the deduction as a business expense. Counsel for the Revenue relied upon the decision of the Karnataka High Court in *CIT & Anr. v. IBM, New Delhi Ltd.*, (2010) 326 ITR 170. Counsel for the respondent assessee, on the other hand, emphasised that the second proviso to Section 37(4), would be attracted and this aspect have not been gone into in the IBM's case. It was submitted that the second proviso is an exception to the provisions of Section 37(4) and consequently to Section 37(5) and Section 37(4) as it stood at the time before its omission w. e. f. 01.04.1998 by the Finance Act, 1997 that no allowance could be made on the expenses incurred by the assessee after 28th February, 1970 (as stated in sub-clause (i)) on the maintenance of any "*residential accommodation in the nature of guest*

house" or for the year commencing 01.04.1971 or subsequent year also depreciation of any building guest house or depreciation in a guest house were allowed. Section 37(5) followed the tenure and evading of sub-section (4) of Section 37 by highlighting that "*any accommodation by whatever name called, maintained hired, or reserved or otherwise arranged by the assessee for the purpose of providing, lodging or boarding and lodging to any person (including any employee or, where the assessee is a company, also any director of, or the holder of any other office in the company), on tour or visit to the place at which such accommodation is situated is accommodation in the nature of a guest house within the meaning of sub-section (4)*". It was submitted by the appellant that as to what constitute a guest house within Section 37(4) was sought to be defined by Section 37(5). In this the Court's opinion is that if the parliamentary intention was to execute every manner of accommodation maintained by the assessee, for the purposes of its employees, executives or guests, that would have subserve without mentioning the tour and accommodation to which the expenses are incurred. In other words if the intention was to ensure the deduction were not to be given in all the manner for lodging and boarding or accommodation maintained by the assessee there was no need to enact the occasion i.e., "tour" or "visit". This in the present case the latter i.e. words on "tour" or "visit" are crucial for the interpretation of the expression that accommodation which is deemed to be a guest house under Section 37(4). In the present case, the findings arrived at by the lower authorities are that the assessee had to execute a project in Iraq; it had contracted for supply of labour services especially providing for temporary accommodation to its workers and employees. These circumstances clearly demonstrate that the

intention of the assessee was not to provide "guest house" accommodation for those who visited the project site on "tour" or "visit". In other words, even though the accommodation provided in this case was for the entire duration of the project, what is sought by Section 37(4) and 37(5) is the type of accommodation provided to the employee who merely used them on transitory or temporary basis and not in the circumstances of the present case. Any other interpretation would do not only violence to the express term – having regard to the controlling expression of "tour" and "visit" but also undermine the object of the provision.

4. For these reasons this question is answered against the Revenue and in favour of the assessee.

5. The second question which is referred in this appeal is as follows :-

> "Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is correct in holding that the depreciation claimed on motor cars purchased and used in Iraq is allowable to the assessee ?"

The facts here are that for the relevant assessment years i.e, 1987-88 and 1988-89, the assessee claimed depreciation, in respect of the cars used by it outside India, for carrying on its business and commercial activities and project construction in Iraq. These were disallowed; the Income Tax Appellate Tribunal ('Tribunal', for short) directed the disallowance to be withdrawn. The Revenue is aggrieved. The Revenue relied upon the second proviso to Section 32(1)(ii) of the Income Tax Act, 1961 ('Act', for short) and contended that the parliamentary intention was to specifically deny the depreciation of the cars used outside India and that depreciation can be allowed only for one class of category of cases.

6. The assessee, on the other hand, contends that the parliamentary intention is to the contrary and relied upon the Finance Minister's speech as well as the Circular no. 621 dated 19th December, 1991. The relevant part of the Circular reads as follows :-

> *"Rationalisation of the provisions relating to depreciation:*
>
> *17. Under the existing provisions of section 32 of the Income Tax Act, depreciation of foreign motor cars is not allowed. Only one exception has been made, i.e, where foreign cars are used in a business of running them on hire for tourists, depreciation is allowed on them. It has been pointed out that Indian concerns, which are having foreign branches, have necessarily to use foreign cars in their business or profession carried outside India and that the denial of depreciation in such cases results in hardship. To remove this, it has now been provided that where a foreign motor car is used outside India in a business or profession carried on by the assessee in another country, depreciation shall be allowed on such a car."*

7. The second proviso to Section 32 (i)(ii) in question was amended with effect from 1st April, 1988 and subsequently, amended with effect from 1st April, 1992. The provision as existing clarifies that the benefit of depreciation can be given to the assessee. An identical question had arisen for consideration before the Punjab & Haryana High Court in ***Commissioner of Income Tax, Patiala Versus Punjab Chemicals Plants Limited,*** 2010 TIOL (602). The Court was also concerned that it was a similar claim under the very same depreciation for the years 1980-81 and 1981-82. After notification, the Finance Minister's speech and also considering the contentions, the High Court rejected the Revenue's contention stating as follows :-

> *"On consideration of rival submissions, we are unable to accept the view put forward by learned counsel for the revenue. The speech of the Finance Minister clearly shows the purpose of exclusion by way of proviso of claims for depreciation of imported cars incorporated by the second proviso to Section 32(1)(ii) of the Act was not to deny depreciation on foreign cars used in foreign countries for business abroad. It cannot be denied that cars used for business abroad at a foreign site is eligible for claiming depreciation, but for the proviso. There is no justification to read the proviso as excluding the said benefit which is otherwise a legitimate claim. In the facts and circumstances of the case, the claim of the assessee for depreciation on foreign cars used at foreign sites for its business is clearly admissible. We, accordingly, decide these questions against the revenue and in favour of the assessee."*

8. This Court is in agreement with the view taken by the Punjab & Haryana High Court. The Revenue urges that the phraseology in the Circular relied upon by the assesses indicates that it would apply after the amendment. However, we are of the view that the consideration which weighed with the Punjab & Haryana High Court interpret the terms of the statute in this case ought to be given primacy. There is and can be no dispute that the expenses incurred for the upkeep of the vehicles, were otherwise business expenses; the depreciation, therefore, was directly relatable to business rather than the use of foreign or luxury cars by executives of the assessee.

9. Having regard to the circumstances, the Court is of the opinion that the claim for depreciation was correctly upheld by the Tribunal. This question is accordingly answered against the Revenue and in favour of the assessee.

10. Regarding question no. 3, this Court is of the opinion that the above substantial question which has to be answered is covered by the judgment of the Supreme Court in ***CIT Versus Podar Cement Pvt. Ltd.*** reported in (1997) 226 ITR 625. The reference is therefore answered in favour of the assessee and against the Revenue.

11. The 4th question of law referred to as follows :-

> "Whether on the facts and in the circumstances of the case, the Learned ITAT is correct in holding that the expenses claimed by the assessee under the heads provisions for completed expenses and expenses incurred on completed project is allowable even though the Department has not accepted the system of accounting followed by the assessee?"

12. The Assessing Officer ('AO', for short) had questioned the assessee's manner of accounting. A word in the background of clarification of the same is necessary, which is best described in the following :-

> *"In order to understand the exact method of accounting it would be pertinent to state the facts briefly. The appellant company is a builder and promoter of multi-storey building and also sells the commercial flats and spaces there in to the public. In the course of its business the company enters into contracts/agreements for sale with the purchasers and according to the stipulations of such contracts, the purchaser of flats had to pay the amount of purchase price partly at the time of booking and the balance in installments. The duration of these projects ranges from 4 to 8 years and some times longer. It is the practice of the appellant company to account for the profits in respect of these projects on percentage completion basis instead of waiting for the completion of the project to account for the entire profitability of the project and the very same method has been consistently followed by the company*

and accepted by the Income tax department. The method employed by the appellant company is as under :-

a) No profit on construction of a multi-storeyed project is recognized and recorded unless the progress of the project reaches 30% in the terms of the expenditures incurred and the projected total expenditure.

b) When the progress reaches 30% or more, profit or loss is computed by taking on the debit side of the P&L account the costs incurred and on the credit side the same percentage of the sale values received/receivable as the cost actually incurred till the end of the year bears to the total estimated project cost. This percentage method continues to be employed every year till the progress of the project reaches 90% or more.

c) When the progress of the project reaches 90% or more, then the profit of the project is accounted for by taking on the credit side 100% completion i.e, the entire sales values received/receivable of the project and on debit side the total costs actually incurred till then and a further provision of the estimated expenditure for completing the same. Such further estimated expenditure is debited as "Provision for completion expenses.

d) In case the actual costs further incurred in the later years exceed the provision so made, the excess expenditure is debited in the profit and loss account under the head 'Expenses on completed Projects' and in case such expenditure is less than the provision, the excess is written back as income in the profit and loss account.

The reasons for which the above two items have been disallowed by the AO, could be summarised as under :-

a) That after the sale is accounted for at 10% and the provision for estimated expenditure is also made, there nothing remains to be further added towards these projects and the further expenditure was not the liability of the company. After the projects had been completed and handed over, the liability of the company was over.

b) That such further expenditure should have been recovered from the parties to whom the project was handed over.

c) That the company thus voluntarily incurred certain expenditure which was not really warranted since it was not its liability. No prudent businessman would met such heavy expenditure from its own pocket.

d) That the provision made is against a contingent liability by virtue of uncertainty of the quantum involved.

e) That it would have been more scientific and accurate system of accounting if the determination of profits of a project was postponed till the year of the final completion of the project.

f) That the said two amounts debited to the accounts was not only irrational, illogical but were unwarranted as it goes against the assessee's system of accounting."

13. The AO was of the opinion that once, the project is completed in the books of accounts and the question of expenditure is accounted for, the entries made subsequently would acquire the character of contingent liabilities. The AO was agreed by the fact that the assessee had admitted that the actual expenditure debited as against the provision made can be or cannot be the same and therefore concluded that such provision therefore was a contingent liability by virtue of uncertainty of the quantum involved.

14. The Tribunal affirmed the CIT (Appeals) order by placing reliance on certain judgments of the Calcutta and Bombay High Courts. The Revenue had relied upon the decision of the Supreme Court in ***Calcatta Company Ltd. Vs. CIT*** reported in (1959) 37 ITR 1. The Tribunal after going through these decisions held that the circumstances of this case showed that the (Appeal)'s Commissioner reasoning were sound and convincing and that in

the absence of any specific deviation from the accounting methods and practices by the assessee, the conclusion arrived at by the AO was not warranted.

15. This Court also recollects the decision of this very Court. The same is also covered by the decision of this Court in ***CIT Vs. Triveni Engineering and Industries Limited,*** reported in (2011) 336 ITR 374.

16. In view of the above, all the questions framed in this reference are answered in favour of the assessee and against the Revenue. The reference is therefore closed in above terms.

ITR 112/1997

In this reference, only one question i.e, the 4th question has been framed and answered by this Court by the above order (in ITR No. 112/1997).

In view of the said question, which is again answered in favour of the assessee and against the Revenue, the reference is accordingly answered in favour of the assessee. All questions are therefore answered in favour of the assessee. The reference is accordingly disposed of.

S. RAVINDRA BHAT
(JUDGE)

R.V.EASWAR
(JUDGE)

SEPTEMBER 25, 2012/p