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

\+ ITA No. 936 of 2006

% Date Reserved: November 8, 2006
Date of Decision: December 7, 2006

\# COMMISSIONER OF INCOME TAX .. . APPELLANT
! Through Ms. Prem Lata Bansal, Advocate

versus

$ LOTUS TRANS TRAVELS PVT. LTD. .... .RESPONDENT
^ Through Mr. Ajay Vohra with
Ms Kavita Jha, Advocates

and
ITA No. 963 of 2006

\# COMMISSIONER OF INCOME TAX ... APPELLANT
! Through Ms. Prem Lata Bansal, Advocate

versus

$ LOTUS TRANS TRAVELS PVT. LTD. .... .RESPONDENT
^ Through Mr. Ajay Vohra with
Ms. Kavita Jha, Advocates

CORAM :-
* **HON'BLE MR. JUSTICE VIKRAMAJIT SEN**
HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the order? X

S. Muralidhar, J.

1. These appeals, under Section 260A of the Income Tax, 1961 (Act), are directed against the common judgment dated 30.11.2005 passed by the Income Tax Appellate Tribunal (ITAT) dismissing ITA Nos. 2159 and 2160 of 2002 filed by the appellant arising out of the assessment orders for the Assessment Years (AYs) 1996-97 and 1998-99 respectively.

2. We admit the Appeals and frame the following substantial questions of law for determination:

> (a) Whether ITAT was correct in law in holding that the payment made to the hotels are to be reduced from the amount received by the assessee for services rendered to the foreign tourists as well as from the total receipts of the business while computing deduction under Section 80 HHD of the Act?
>
> (b) Whether ITAT has correctly interpreted the provisions of Section 80HHD(3) of the Act when this sub-clause specifically provides for reducing payment made to the hotels out of receipts specified in sub-section 2 but does not provide for reducing the same out of total receipts of the business?

the background to the introduction of which requires to be noticed. Section 80 HHD was first introduced in the Act by the Direct Tax Laws (Amendment) Act, 1989. In his Budget Speech on 22.2.1989 the Union Finance Minister explained the rationale for the introduction of the said provision in the following words:

> "In order to provide encouragement to tourism for augmenting foreign exchange reserves, it is proposed to provide deduction of 50 per cent of exchange earnings derived from services rendered to foreign tourists by approved hotels or travel agents. The remaining 50% will also receive similar exemption if it is credited to reserve fund and utilized for the purpose of business of the assessee on the fulfilment of certain conditions. Further, in order that the 100 per cent exemption of foreign exchange earnings provided to exporters, approved hotels, travel agents, etc. is not subjected to the levy of minimum tax on companies, it is proposed to exclude such profits from tax liability under Section 115J."

4. The portion of Section 80HHD, relevant to the present controversy, as originally introduced, with effect from 1.4.1989, read as under:

> **"80-HHD Deduction in respect of earnings in convertible foreign exchange –**
>
> (1) Where an assessee, being an Indian company or a person (other than a company) resident in India, is engaged

provisions of this Section, be allowed, in computing the total income of the assessee, a deduction of a sum equal to the aggregate of -

(a) fifty per cent of the profits derived by him from services provided to foreign tourists ; and

(b) so much of the amount out of the remaining profits referred to in clause (a) as is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account to be utilized for the purposes of the business of the assessee in the manner laid down in sub-section (4).

(2) This section applies only to services provided to foreign tourists the receipts in relation to which are received by the assessee in convertible foreign exchange.

(3) For the purposes of sub-section (1), profits derived from services provided to foreign tourists shall be -

(a) in a case where the business carried on by the assessee consists exclusively of services provided to foreign tourists resulting in receipts in convertible foreign exchange, the profits of the business as computed under the head 'Profits and gains of business or profession";

(b) in a case where the business carried on by the assessee does not consist exclusively of services provided to foreign tourists resulting in receipts in convertible foreign exchange, the amount which bears to the profits of the business (as computed under the head 'Profits and gains of

assessee."

5. The scheme of the above provision, at the time of its introduction, as explained further in a Circular No. 559 dated 4.5.1990 issued by the Central Board of Direct Taxes (CBDT) was as under:

(i) The assessee had to be an Indian company or an Indian resident engaged in the business of a hotel, or of a tour operator approved by the prescribed authority in this behalf, or of a travel agent;

(ii) in computing the total income of such assessee a deduction would be allowed which deduction was a sum equal to:

(a) 50% of the total profits "derived by him from services provided to foreign tourists" plus

(b) so much of the remaining profit as is debited to the profit and loss account in the previous year and credited to a reserve account to be utilized by the assessee for the purposes of his business in the manner stipulated in sub-section (4).

assessee only in convertible foreign exchange and the reserve so created had to be utilised only for certain specific purposes;

(iv) Where only a part of the business of the assessee was providing services to foreign tourists, the following formula was to be applied for working out the profits derived from services to foreign tourists:

$$\text{Business Profits} \times \frac{\text{Foreign exchange receipts}}{\text{Total Receipts}}$$

6. Section 80 HHD underwent further changes in the years 1990, 1991, 1995 and 1999 as a result of which sub-sections (2), (2A) and (3) read as under:

> "(2) This section applies only to services provided to foreign tourists the receipts in relation to which are received in, or brought into India by the assessee in convertible foreign exchange within a period of six months from the end of the previous year or, within such further period as the competent authority may allow in this behalf.
>
> Explanation 1 – For the purposes of this sub-section, any payment received by an assessee, engaged in the

foreign exchange brought into India through an authorized dealer, from another hotelier, tour operator or travel agent, as the case may be, on behalf of a foreign tourist or group of foreign tourists, shall be deemed to have been received by the assessee in convertible foreign exchange if the person making the payment furnishes to the assessee a certificate specified in sub-section (2A).

Explanation 2 – .....

(2A) Every person making payment to an assessee referred to in the Explanation 1 to sub-section (2) out of Indian currency obtained by conversion of foreign exchange received from or on behalf of a foreign tourist or a group of foreign tourists shall furnish to that assessee a certificate in the prescribed form indicating the amount received in foreign exchange, its conversion into Indian currency and such other particulars as may be prescribed.

(3) For the purposes of sub-section (1), profits derived from services provided to foreign tourists shall be the amount which bears to the profits of the business (as computed under the head "Profits and gains of business or profession") the same proportion as the receipts specified in sub-section (2) as reduced by any payment referred to in sub-section (2A), made by the assessee bear to the total receipts of the business carried on by the assessee."

7.1 The rationale behind the changes brought about with effect from 1.4.1992 when sub-section (2A) of Section 80 HHD was introduced was

under:

"33.4 In many cases, the foreign tourists visit India on a package tour and make payment in foreign exchange, in one lump sum, to a tour operator in India. The Indian tour operator, thereafter, makes payments to the hotels where the tourist groups are lodged. Since the foreign exchange is received only by the tour operator, it is only he who can claim the tax concession under section 80HHD. The hotel owner is denied the benefit of section 80HHD, even though the payment for service to the foreign tourists rendered by the hotel may constitute the major part of the expenditure by the foreign tourist in India.

33.5 With a view to securing that the benefits under section 80HHD for all the three segments of the tourism industry, section 80HHD has been amended to provide that, in cases where payments for services to the foreign tourist provided by hotel, tour operator or a travel agent are received in Indian currency from another hotel, tour operator, travel agent or airline, the person providing the service to the foreign tourists will be eligible for deduction under section 80HHD in relation to profits derived therefrom, subject to the condition that the payment in Indian currency is made out of funds obtained by conversion of foreign exchange brought into India, through an authorised

income, a certificate obtained from the person making payment in Indian currency out of foreign exchange paid by the foreigner.

33.6 This amendment will take effect from 1st April, 1992, and will, accordingly, apply in relation to assessment year 1992-93 and subsequent years."

7.2 The above revised scheme of Section 80HHD accounts for a situation where an assessee engaged in the business of a hotel or of a tour operator or travel agent receives foreign exchange from a tourist for being made over to another hotelier, tour operator or travel agent, each of whom is also an assessee. In such event the foreign exchange so received by the first mentioned assessee shall be deemed to have been received in foreign exchange by the second mentioned assessee subject to the condition that the first mentioned assessee furnishes to the second mentioned assessee a certificate as mentioned in sub-section (2A) in the prescribed form (Form 10 CCAE). The idea behind this scheme appears to be that to the extent payments are received for being passed on to another hotel, tour operator or travel agent, it is the latter that are actually the cause for the receipt of the foreign exchange and should therefore get

receiving it in the converted form. To the extent that an assessee issues a certificate in From 10 CCAE, the foreign exchange so received cannot be the assessee's receipt. So, for the purposes of computation of the profits 'derived' from services provided to foreign tourists, such assessee will have to, under the revised Section 80 HHD (3), deduct such amount as is covered by the certificate in Form 10 CCAE from the total foreign exchange received. This is as far as the numerator of the multiplier as mentioned in para 5 (iv) above is concerned. However, the sub-section (3) is silent on whether such foreign exchange that is covered by the certificate in Form 10 CCAE should also be deducted from the total receipts that constitutes the denominator of the multiplier. And that is where the present controversy arises. But first, the facts of the case in brief.

8. The Respondent assessee is a travel agent and tour operator. It also has a hotel business under the name of Nikko Hotel. For the AY 1996-97, the assessee declared a total taxable income of Rs.18,00,350. In the computation of income, the assessee declared its 'Profits and gains

(i.e. Rs.6,72,89,350) included the FE receipts pertaining to other hotels (i.e. Rs.2,51,64,240) in respect of which the assessee issued Disclaimer Certificates (DCs) to such hotels in Form 10 CCAE. The assessee's total receipts for AY 1996-97 was Rs.7,35,98,820 and its rental income was Rs.6,73,029. It showed an amount of Rs.32,19,926 as the receipts of Nikko Hotel. The assessee submitted a separate computation of the business profits of Nikko Hotel as Rs. 23,39,122. The assessee also made a separate calculation for the Section 80 HHD (1) deduction for the Nikko Hotel. In order to avail of the benefit under Section 80 HHD (1) (b), the assessee transferred to the tax incentive reserve an amount of Rs.19,81,322 being the aggregate of the sum of Rs.11,09,446 pertaining to Nikko Hotel and Rs.8,71.876 pertaining to the travel business.

9. Applying the formula under Section 80HHD (3), the assessee computed the amount available for deduction under Section 80HHD (1), i.e. 'profits derived from services provided to foreign tourists', by subtracting the amount to the extent of the DCs issued by it to hotels from its total FE receipts. This was in terms of sub-section (2A) of

computed the profit qualifying for deduction under Section 80 HHD (1) as under:

Profit qualifying for Deduction u/s 80HHD (1) =

$$\textit{Business Profits} \times \frac{\textit{(F.E. Receipts – FE covered by the DCs issued to other hotels)}}{\textit{Total Receipts - Rental Income – Receipts of Nikko Hotel}}$$

i.e. $28,85,448 \times \frac{6,72,89,350 - 2,51,64,250}{(7,35,98,820 - 6,73,029 - 32,19,926)} = 17,43,752$

10. The Assessing Officer (AO), however, did not agree with the assessee's computation. He did not treat the Nikko Hotel business profits separately and added the two business profit figures i.e. 28,85,448 (the tour operator business) and 23,39,122 (the Nikko Hotel business) and arrived at an aggregate business profits figure of Rs. 52,24,570. While not making any change in the numerator of the multiplier, he disallowed the deduction of the figure of Rs.32,19,926 claimed to be the receipts of Nikko Hotel from the denominator. Thus, the AO re-worked the deduction under Section 80 HHD (1) as under:

$$\text{Total Business profits} \times \frac{\text{FE receipts – DCs issued to hotels}}{\text{------------------------------------}}$$

$$52,24,570 \times \frac{6,72,89,350 - 2,51,64,250}{7,35,98,820 - 6,73,029} = \text{Rs. } 30,17,935$$

Applying the formula in Section 80 HHD (1), after accounting for the tax incentive reserve created by the assessee, the AO by the assessment order dated 31.3.1999, arrived at the figure available for deduction as Rs. 30,17,938. Thereupon, the assessee appealed to the Commissioner of Income Tax (Appeals) [CIT (A)].

11. For the AY 1998-1999, the assessee computed the profits derived from services to foreign tourists on the same line as in AY 1996-97, with a slight difference in that in addition to deducting the receipts of Nikko Hotel from the total receipts, the assessee also deducted the FE receipts in respect of which DCs had been issued to other hotels. The AO by the assessment order dated 23.3.2001 again clubbed the business profits of the tour operator and hotel businesses. The AO, following the earlier pattern in AY 1996-97, permitted the assessee's formulation of the numerator (i.e. Total FE minus FE covered by DCs issued to other hotels) but disallowed the deduction of the Nikko Hotel receipts and the FE receipts in respect of which DCs had been issued to other hotels from

the assessee appealed to the CIT (A).

12. The CIT (A) by an order dated 11.2.2002 first disposed of the appeal pertaining to AY 1998-99. Accepting the assessee's contention in part, the CIT (A) reworked the profits derived from services to foreign tourists by permitting deduction of the FE receipts in respect of which DCs had been issued to other hotels from the total receipts (constituting the denominator of the multiplier). However, the CIT (A) did not permit the deduction of the Nikko Hotel receipts from the total receipts. After accounting for the tax incentive reserve created by the assessee, the CIT (A) determined the amount available for deduction under Section 80HHD(1) for the relevant AY 1998-99 as Rs. 79,45,173. Soon thereafter, on 27.2.2002, the CIT (A) took up the assessee's appeal for the earlier AY 1996-97. Following the same pattern as for AY 1998-99, the CIT (A) re-worked the amount available for deduction under Section 80HHD (1) [i.e. profits derived from services to foreign tourists] as Rs.42,85,325. In other words, the CIT (A) computed the profits derived form services to foreign tourists for AY 1996-97 as under:

$$52,24,570 \times \frac{6,72,89,350 - 2,51,64,250}{} = \text{Rs.}46,08,007$$

50% of the said sum worked out to Rs. 23,04,003. Since the tax incentive reserve created was Rs. 19,81,322, the total amount available for deduction was worked out as 23,04,003+19,81,322 = Rs.42,85,325.

13. The Revenue filed appeals for both AYs 1996-97 and 1998-99 before the ITAT. The assessee did not file any cross appeals. In other words, the assessee accepted the disallowance of the deduction of the Nikko Hotel receipts from the total receipts in the denominator of the multiplier. The only question that remained was whether the FE receipts on behalf of to other hotels could be permitted to be deducted from the total receipts in the denominator of the multiplier. By the impugned common order, the ITAT while dismissing both appeals held:

> "In the case of the assessee, being a tour operator, the amounts charged from tourists include the amounts payable to hotels for the boarding and lodging of the tourists. As per the provisions of sub-Section (2A) of Section 80 HHD, such receipts belong to the hotels and not to the tour operator. Accordingly, the same are reduced from gross receipts in convertible foreign exchange that the assessee is considered to be entitled to and deduction is granted only in respect of net receipts in foreign currency. That being so, it is difficult to understand as to how such amounts for which the assessee issued certificate under Section 10 CCEA should be treated as belonging to the assessee as a

well as denominator should be found out on a uniform basis. There is a detailed discussion in this respect in the decision of ITAT Calcutta in 53 ITD 180 (Cal). In our opinion, the legal position is more clear in the case of a tour operator because the exclusion of payments to hotels etc. is provided for in the statute itself by sub-section (2A) of Section 80HHD. We, therefore, do not find much room for a view other than that adopted by the learned CIT (Appeal). We uphold the same and dismiss these appeals filed by the revenue."

14. Ms. Prem Lata Bansal, the learned counsel appearing for the appellant submits that the express wording of sub-section (3) of Section 80HHD of the Act admits only of a strict and literal construction. According to her, the expression in sub-section (3) does not envisage the deduction of the payments made by the assessee of FE to other hotels [covered by the certificate under sub-section (2A)] from the total receipts of the business. If that were the intention of the legislature, the section would have expressly provided for such deduction. On the other hand, Mr. Ajay Vohra, the learned counsel for the Respondent submits that the intention of the legislature has to be gathered from a reading of the entire Section 80HHD and if so read it does not stand to reason that FE receipts collected by the assessee and made over to other hotels, which certainly

nevertheless regarded as forming part of its total receipts. He commends for our acceptance the concurrent findings of both the CIT (Appeals) and the ITAT.

15. The scheme governing Section 80 HHD has already been adverted to earlier in this judgment in some detail. The primary purpose that spurred the introduction of this provision in to the Act with effect from 1.4.1989 is the "encouragement to tourism for augmenting foreign exchange reserves." This purpose continued to inform the continuance of the provision thereafter, at least till the time of the AYs with which we are concerned. This therefore constitutes one useful aid to interpret the provisions of Section 80 HHD generally and sub-section (3) thereof in particular. We now turn to the concerned provision itself.

16. It is true that sub-section (3) while setting out the multiplier that is to be applied while determining the profits derived from services rendered to foreign tourists (where this is not the sole business of the assessee) expressly permits the deduction of the FE receipts in respect of

such deduction from the total receipts that constitute the denominator of such multiplier. However, a closer reading of sub-section (3) reveals that the profits derived from services provided to foreign tourists "shall be the amount which bears to the profits of the business (as computed under the head "Profits and gains of business or profession") the same proportion as the receipts specified in sub-section (2) as reduced by any payment referred to in sub-section (2A), made by the assessee bear to the total receipts **of the business carried on by the assessee.**" Therefore the words 'total receipts' are obviously qualified by the immediately succeeding words, viz., "of the business carried on by the assessee." In other words the total receipts are only those receipts that can be said to relate to the business of the assessee and not that of other hotels for whom the assessee may have collected from foreign tourists FE receipts and in respect of which the assessee has not only made over such FE receipts to the other hotels but has also issued the necessary certificate under sub-section (2A), i.e., in Form 10 CCAE. This interpretation, in our view, comports with the purpose for which the provision was introduced in the first place.

80 HHD has been brought to our notice, there are decisions in regard to a similar issue arising in the context of Section 80 HHC, which support this line of interpretation. In ***Commissioner of Income Tax v. Sudarshan Chemicals Industries Limited*** [2000] 245 ITR 769 (Bom), while explaining the expression "total turnover" in Explanation (ba) to Section 80 HHC, S.H. Kapadia J. (as His Lordship then was), speaking for the Bombay High Court explained that if sales tax and excise duty cannot form part of the export turnover [which constituted the numerator of the multiplier for the purposes of sub-section (3) of Section 80 HHC], they could also not the form part of the total turnover [which constituted the denominator of such multiplier]. It was held that if these two items were to be excluded from numerator but included in the denominator, then the formula would be unworkable. It may be recalled that the definition of 'total turnover' in explanation (ba) to Section 80 HHC does not expressly exclude sales tax and excise duty. There also the Revenue contended that in the absence of an express exclusion from total turnover, excise duty and sales tax could not be deducted to arrive at the 'total turnover'. The Bombay High Court agreed with the contention of

order to reduce the benefit which an assessee is entitled to. Ultimately, the object of Section 80HHC is required to be kept in mind in order to encourage exports." This decision of the Bombay High Court has been followed by the Calcutta High Court in *Commissioner of Income Tax v. Chloride India Limited* [2002] 256 ITR 625 (Cal.), the Madras High Court in *Commissioner of Income Tax v. Wheels India Limited* [2005] 197 CTR 284 (Mad.) and the Kerala High Court in *Commissioner of Income Tax v. K.Rajendranathan Nair* [2004] 265 ITR 35 (Ker).

18. Respectfully adapting the above exposition of Section 80 HHC by the Bombay High Court to the case on hand, we are of the view that the words "total receipts" in subsection (3) of Section 80 HHD have to be read along with the words "of the business carried on by the assessee" and can mean only such receipts that are exclusively from the business of the assessee. Therefore, the words "total receipts of the business of the assessee" appearing in sub-section (3) to Section 80 HHD, constituting the denominator of the multiplier, have to admit of the same construction as the 'FE receipts" of the assessee in the numerator. We accordingly

other hotels and in respect of which the assessee has issued DCs under Form 10 CCAE, the 'total receipts' in the denominator of the multiplier must also exclude the FE received on behalf of other hotels.

19. Returning to the case on hand, the CIT (A) has rightly computed the profits derived from services rendered by the assessee to foreign tourists by not permitting the deduction of the Nikko hotel receipts from the total receipts while at the same time permitting the FE receipts on behalf of other hotels (covered by certificates in Form 10 CCAE) to be so deducted. The concurrent views of both the CIT (A) and the ITAT in this regard require to be upheld.

20. Consequently questions (a) and (b) are answered in the affirmative and against the Revenue. These appeals are accordingly dismissed with no orders as to costs.

S. MURALIDHAR, J.