



* **HIGH COURT OF DELHI : NEW DELHI**
ITA No.141/2008

% Judgment reserved on: 29th February, 2008

Judgment delivered on: 10th March, 2008

M/s L.P.Hospitality Pvt. Ltd.
A-1/21, Safdarjung Enclave,
New Delhi.

... Appellant

Through:Mr.Yogesh Kumar Jagia, Adv.

Vs.

The Assistant Commissioner of
Income Tax,
Circle-4(1), New Delhi

....Respondent

Through: Mrs. P.L.Bansal, Adv.

Coram:

HON'BLE MR. JUSTICE V.B. GUPTA

HON'BLE MR. JUSTICE MADAN B. LOKUR

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

V.B. GUPTA, J.

Present appeal has been filed under Section 260(A) of the Income Tax Act, 1961 challenging the



order dated 17th August, 2007 passed by the Income Tax Appellate Tribunal Delhi Bench 'F' in ITA No.3032/D/2004 relevant for the assessment year 2001-02, vide which the appeal filed by the Assessee was dismissed.

2. The brief facts of this case are that the Assessee company during the assessment year in question has entered into an agreement with Moet's Kababs by virtue of which, it transferred 85% of its daily restaurant and bar sales to Moet's Kababs in lieu of materials and labour supplied by it. No written agreement to this effect has been executed between the parties. The Assessee's stand was that it was prudent business arrangement.

3. The Assessing Officer in his assessment order has observed that the Assessee did not run the business of bar and restaurant during the year; that it had made



no purchases of raw material and had not deployed any man power to run the bar and the restaurant; that it was Moet's who did everything; that even the bar licence fee had not been paid by the Assessee, without which the bar could not be legally run; that the sale bills showed the names of Moet's restaurant and Moet's Kababs, which proved that the bar and the restaurant were being run by M/s Moet's, in the Assessee's premises; that there was no written agreement to prove that the Assessee had only hired a caterer to improve its business prospects; that the Assessee had no control on the business at all, there being no mechanism to prevent Moet's from arbitrarily withdrawing from the said arrangement; that no prudent business man would shoulder such a huge business risk; that the Assessee was assured of 15% share of the total sales, which was in the nature of rental receipt, for allowing Moet's to use its premises;



that Section 38(2) of the Income Tax Act, 1961 (for short as 'Act') was applicable and, therefore, the Assessee's claim of depreciation had to be restricted and the Assessing Officer, thus, allowed only 18% of the depreciation claimed by the Assessee.

4. Aggrieved with the order passed by the Assessing Officer, the Assessee filed an appeal before Commissioner of Income Tax (Appeals) {for short as CIT(A)}. The CIT(A) allowed the appeal filed by the Assessee.

5. Thereafter Revenue challenged the order of CIT(A) before the Tribunal and the Tribunal vide its impugned order accepted the appeal filed by the Revenue holding that Assessing Officer rightly invoked the provisions of Section 38(2) of the Act, since the Assessee did not use its fixed assets exclusively for its own business purposes. Dissatisfied with the order



passed by the Tribunal, the Assessee has filed the present appeal.

6. It has been contended by learned counsel for the Petitioner that the order passed by the Tribunal is wrong in law since the assets are owned by the Assessee and have been utilized for the purpose of business. M/s Moet's Kababs acted as a caterer for supplying and servicing all the food without bringing any assets including furniture fixture and the assets of the Assessee had been used in carrying out the business activity of operating bar and restaurant etc. It is further contended that all the licences, registrations were obtained by the Assessee and the claim of depreciation has been disallowed even on bar sale despite finding of fact that undisputedly the bar was being run by the Assessee. Lastly, it is contended that the entire turnover including turnover from bar



and restaurant has been assessed in the hands of Assessee under Haryana General Sales Tax Act, which is not disputed by the Revenue.

7. Section 32(1) and 38(2) of the Act are relevant for the purposes of resolving controversy in the present case and the relevant provisions of these Sections read as under:-

“32.Depreciation:-

(1) in respect of depreciation of-

(i) buildings, machinery, plant or furniture, being tangible assets;

(ii) xxx xxx xxx xxx xxx

Owned, wholly or partly, by the Assessee and used for the purposes of therefore, business or profession, the following deductions shall be allowed-

(i)xxx xxx xxx xxx xxx

(iii) in the case of any block of assets, such percentage on the written down value thereof as may be prescribed.”

“38 Building etc. partly used for business, etc., or not exclusively so used.



(2)Where any building, machinery, plant or furniture is not exclusively used for the purposes of the business or profession, the deductions under sub-clause (ii) of clause (a) and clause (c) of section 30, clauses (i) and (ii) of section 31 and clause (ii) of sub-section (1) of section 32 shall be restricted to a fair proportionate part thereof which the Assessing Officer may determine, having regard to the user of such building, machinery, plant or furniture for the purposes of the business or profession.”

8. Section 32(1) of the Act thus provides that where the asset is owned wholly or partly, by the Assessee and used for the purposes of Assessee’s business, deduction in respect of depreciation, thereof shall be allowed, as provided under Section 32(1)(ii).

9. Whereas, Section 38(2) of the Act expressly provides that deduction under Section 32(1)(ii) shall be restricted, where the asset is not exclusively used for the Assessee’s business purposes, to a fair proportionate part thereof, as laid down in Section



38(2) of the Act.

10. It is the case of the Assessee that Moet's was taking away 85% of the total receipts from the bar as well as from the restaurant of the Assessee. Thus, it is clear that the fixed assets of the Assessee were not being utilized by him exclusively for its business purposes, thereby attracting the provisions of Section 38(2) of the Act. This contention of the Assessee that it was only using the brand name of Moet's and Moet's was only catering at the Assessee's premises in lieu of 85% of the gross receipts from the Assessee, contradicts the Assessee's claim that its fixed assets were not being shared by M/s Moet's. The Assessing Officer in his assessment order has observed that the Assessee has not been able to prove any control over the business and there was no mechanism for Assessee to prevent Moet's from arbitrarily withdrawing from



the alleged arrangement.

11. As Moet's was carrying away 85% of the gross receipts of the Assessee, that clearly shows that the Assessee did not use its fixed assets exclusively for its own business purposes. Thus, no fault can be found with the order passed by the Tribunal since it is a finding of fact given by the Assessing Officer, there is no infirmity in the impugned order. Thus no substantial question of law arises for our consideration.

12. Accordingly, the appeal is dismissed.

V.B. GUPTA, J

MARCH 10, 2008
Bisht

MADAN B. LOKUR, J