* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ ITA No. 394 of 2008

% *Decided on: October 29, 2009*

Commissioner of Income Tax – XVII . . . Appellant

through : Ms. Rashmi Chopra, Advocate

VERSUS

Gulf Air Company . . . Respondent

through : Mr. Percy Pardiwallah, Sr. Adv. with Ms. Neelam Rathore, Advocate

CORAM :-
THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

For orders, see ITA No. 391/2008.

(A.K. SIKRI)
JUDGE

(SIDDHARTH MRIDUL)
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nsk

2009:DHC:9315-DB

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1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
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A.K. SIKRI, J.

1. The assessee, namely Gulf Air Company, is a non-resident. Its operation extends to India in the sense that it operates many flights from Bahrain to Mumbai and Delhi and back. For the assessment year 2001-02, the assessee filed its return under Section 194-I of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'). The AO held that an amount of Rs.63,98,934/- was not deducted at source on the dates on which such a tax was deductible and, therefore, interest under Section 201(1A) of the Act was chargeable. The AO

2. Against this assessment order of the AO, the assessee preferred appeal before the CIT(A). Vide orders dated 2.4.2002, the CIT (A) allowed the appeal holding that the assessee was not in default in making deductions at source as no such deductions were required to be made.

3. The second appeal preferred by the Revenue before the Income Tax Appellate Tribunal (ITAT) has failed and the Tribunal has confirmed the order passed by the CIT(A). Feeling aggrieved against this order passed by the Tribunal on 22.6.2007, the Revenue has come up to this Court by means of these two appeals filed under Section 260A of the Act.

4. Before proceeding further, we may note at this stage that the AO was of the opinion that tax at source was to be deducted in respect of :-

(a) Rout Navigational Facility Charges (RNFC) paid by the assessee to the Airports Authority of India (for short, 'AAI')
(b) Termination Navigational Landing Charges (TNLC) paid to the AAI.
(c) Cargo Service Charges paid to the AAI.
(d) Hotel Stay Charges paid to Hotel Ashoka and Hotel Hyatt Regency.

According to the AO, the said composite payments paid by the assessee amounted to *'rent'* within the meaning of Section 194-I of the Act and, therefore, tax at source was to be deducted.

the AAI. RNFC and TNLC are in respect of navigation/guidance facilities provided to the aircrafts from the point of entering into air space through landing. Likewise, cargo services are held to be services in nature and cannot be construed as rental. By no stretchy of imagination, payments for these services can be termed as 'rent'. Therefore, we are of the opinion that the finding of fact arrived at by the CIT(A) as well as the Tribunal in respect of these three charges is correct. The learned counsel for the Revenue could not seriously dispute this position as well.

6. The real bone of contention is the payments made by the assessee to the aforesaid hotels. Learned counsel for the Revenue made a strenuous submission to the effect that going by the definition of *'rent'* as given in the explanation to Section 194-I of the Act, which was much wider in nature, payment made to the hotel even under an oral arrangement will qualify as *'rent'*. She has buttressed her submission by placing heavy reliance upon the judgment of the Andhra Pradesh High Court in the case of *Krishna Oberoi* v. *Union of India & Ors.*, 257 ITR 105.

7. Explanation (i) to Section 194-I of the Act reads as under :-

> "i) "rent" means any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of any land or any building (including factory building), together with furniture, fittings and the land appurtenant thereto, whether or not such building is owned by the payee;"

appearing in the Rent Laws, inasmuch as, the payment made can be treated as 'rent' even if it is in respect of movable properties like equipment, furniture or fittings etc. and is not confined to immovable properties. At the same time, one has also to bear in mind that such a payment has to be under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of things as mentioned therein. The expression *'other agreement* or *arrangement'* cannot be read in isolation and have to be read *ejusdem generis.*

9. We are not even required to labour much on this issue inasmuch as these aspects have been clarified by the Central Board of Direct Taxes (CBDT) itself by means of two circulars. The first one is Circular No. 715 dated 8.8.1995. In this circular, various clarifications on various provisions relating to tax deduction at source regarding charges introduced by the Finance Act, 1995 were issued by the Board. Relevant clarification for our purpose relates to Question No. 20 and answer given thereto, which reads as under :-

> "Q. 20 Whether payment made to a hotel for rooms hired during the year would be of the nature of rent?
>
> Ans. Payments made by persons other than individuals and HUFs for hotel accommodation taken on regular basis will be in the nature of rent subject to TDS u/s 194-I (emphasis provided)"

What is clarified is that tax at source would be deducted in respect of hotel accommodation only if it is taken (emphasis

the cases. Payment against such a stay, by no stretch of imagination, can be termed as *'rent'*. That is only *'licence'*.

10. In the second Circular No. 5/2002 dated 30.9.2002, the Board even clarified as to what would constitute taking hotel accommodation on 'regular basis'. In this circular, after referring to Question No.20 and answer provided as per earlier Circular No. 715, the Board has reiterated that the payment would qualify as rent when such an accommodation has been taken on regular basis. Thereafter, the term *'regular basis'* is explained in the following manner :-

> "2.....Where earmarked rooms are let out for a specified rate and specified period, they would be construed to be accommodation made available on "regular basis". Similar would be the case, where a room or set of rooms are not earmarked, but the hotel has a legal obligation to provide such types of rooms during the currency of the agreement.
>
> 3. However, often, there are instances, where corporate employees, tour operators and travel agents enter into agreement with hotels with a view to merely fix the room tariffs of hotel rooms for their executives/guests/customers. Such arrangements, usually entered into for lower tariff rates, are in the nature of rate contract agreements. A rate-contract, therefore, may be said to be a contract for providing specified types of hotel rooms at pre-determined rates during an agreed period.
>
> Where an agreement is merely in the nature of a rate contract, it cannot be said to be accommodation 'taken on regular basis', as there is no obligation on the part of the hotel to provide a room or specified set of rooms. The occupancy in such cases would be occasional or casual. In other word, a rate-contract is different for this reason from other agreements, where rooms are taken on regular basis. Consequently, the provisions of section 194-I while applying to hotel accommodation taken on regular basis would not apply to rate contract agreements."

conclusion arrived by the CIT(A) and accepted by the Tribuna flawless and no interference is called for. In the first instance, it is to be borne in mind that there is no written agreement or arrangement between the assessee airlines and the aforesaid hotels. Secondly, the oral arrangements by the airlines with those hotels is not for the stay of its crew members, as was the position in *Krishna Oberoi* (supra). Significantly, in the present case, the arrangement made, as accepted even by the AO also, was for the lay off passengers who were to be accommodated in hotels till the availability of next flight. As per the arrangement, it was further agreed upon that the hotels would provide the rooms only when they are available. These rooms are not booked on permanent or regular basis. The contingency for providing accommodation to lay off passengers would depend upon cancellation of a particular flight or abnormal delay in taking off. This is a phenomena which is not fixed or predetermined and such a contingency may not occur for days or months together. On the basis of this kind of arrangement between the assessee and the hotels, the Tribunal observed that the rooms are not booked by the assessee on regular basis nor the same were kept available and vacant for the assessee on payment of certain amounts for certain periods. On the contrary, whenever the assessee needed them and if they were available in the hotel at that time, those were provided by the hotel to the assessee. It would mean that neither these rooms were kept

on regular basis. This is manifest from the bookings of thes with the hotel as per the statement provided by the assessee. Need to have rooms was sporadic, the contingency occurring once in a two weeks or once in a month.

12. In these circumstances, it cannot be said that the payments made by the assessee to these hotels would constitute *'rent'* under Section 194-I of the Act. We are, therefore, of the opinion that no question of law, much less substantial question of law, arises for consideration.

13. These appeals are, accordingly, dismissed.

(A.K. SIKRI)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

October 29, 2009
nsk