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

\+ **ITA No.310/2009**

% **Date of Reserve: May 12, 2011**
Date of Decision: July 27, 2011

COMMISSIONER OF INCOME TAX **… Appellant**
Through: Ms. Prem Lata Bansal, Sr. Advocate with Mr. Deepak Anand, Advocates

Versus

GAUTAM R. CHADHA **… RESPONDENT**
Through: Mr. A.N. Hakser, Sr. Advocate with Mr. Udyan Jain and Mr. Ashok Sikka, Advocates

AND

ITA No.358/2011

COMMISSIONER OF INCOME TAX **… Appellant**
Through: Ms. Prem Lata Bansal, Sr. Advocate with Mr. Deepak Anand, Advocates

Versus

GAUTAM R. CHADHA **… RESPONDENT**
Through: Mr. A.N. Hakser, Sr. Advocate with Mr. Udyan Jain and Mr. Ashok Sikka, Advocates

AND

ITA No.1115/2010

COMMISSIONER OF INCOME TAX **… Appellant**
Through: Ms. Prem Lata Bansal, Sr. Advocate with Mr. Deepak Anand, Advocates

Versus

GAUTAM R. CHADHA **… RESPONDENT**
Through: Mr. A.N. Hakser, Sr. Advocate with Mr. Udyan Jain and Mr. Ashok Sikka, Advocates

CORAM:
HON'BLE MR. JUSTICE A.K.SIKRI
HON'BLE MR. JUSTICE M.L.MEHTA

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

M.L.MEHTA, J.

1. These three appeals being ITA No. 310/09, 1115/10 and 358/11 are preferred against the orders passed by Income Tax Appellate Tribunal ('the Tribunal' for short) dated 22/08/08, 17/06/2009 and 16/07/2010 relating to assessment years 2003-04, 2005-06 and 2007-08 respectively. Since the substantial questions of law in ITA 1115/10 and ITA 358/11 is also there in ITA 310/09, we propose to dispose of these three appeals through this common order, taking ITA 310/09 as the lead case.

2. Brief facts of the case are that the assessee was engaged in the business of travel agency under the name and style of M/s Tirun Travel Marketing. It is the representative of M/s Royal Caribbean Cruise Limited (hereinafter, 'RCCL' for short), responsible for marketing and selling Royal Caribbean and Celebrity Cruise all over the world. The respondent/assessee filed the return for Assessment Year 2003-04 declaring income at Rs. 79,59,400/- on 20.11.2003.

3. On perusal of balance sheet as well as tax audit report, the AO noticed that assessee had disclosed a sum of Rs. 1,44,76,873/- as money received in advance against booking by customers in INR and USD. Though the said amount was received during the year, the same was not taken into account as income of the current year. The AO observed that the assessee was receiving booking amount in nominal percentage, substantial money was being received before the sailing of cruise and upon receipt of full amount, the money was being remitted to RCCL after deducting commission @ 25%. He also observed that if the person did not want to sail and cancel the trip then the entire advance would get forfeited. Accordingly, AO treated the entire amount of Rs. 1,44,76,873/- as the income of the assessee.

4. During the assessment proceedings, the Assessing Officer further noticed that the assessee had incurred loss of Rs. 17,41,940/- on account of share transaction and had transferred the loss to the Profit and Loss Account of M/s Tirun Travel Marketing. On being asked to explain, the assessee filed details of trading of various shares in 18 different securities. No documentary evidence, however, was filed. Accordingly, the AO treated the amount of Rs.1741940/- as capital loss and disallowed the claim.

5. Aggrieved by the order of AO, the assessee went in appeal before the CIT(A) who partly allowed the appeal and held that the aggregate advances received by the assessee from the customers cannot be treated as profits in their entirety, however, it cannot be

denied that the advances received may be inclusive of some element of profit which the appellant ultimately is entitled to receive. Accordingly, it directed the AO to treat 25% of the advances as income of the assessee and give credit of 10% on account of travel agents commission after ascertaining actual outgoings in this regard. CIT (A) also confirmed the order of the AO not allowing the adjustment of losses in share transaction business to be set off against income from the business of travel agency, holding that the accounts for each business have to be maintained separately and the loss from one activity cannot be set off against the income from the other.

6. Aggrieved by the order of CIT (A), the assessee again preferred appeal before the Tribunal. The Tribunal allowed the appeal and deleted the entire addition made by the AO holding that the receipt by itself does not result into the income unless corresponding service have been performed. Either under cash system of accounting or mercantile system of accounting, the receipt becomes income only when the customer boards the cruise and it departs. The Tribunal also allowed the assessee to adjust the loss from share transaction business against the profits of travel agency business holding that the assessee was carrying on two businesses concurrently as Proprietor and therefore, profits of one can be set off against loss of another in view of provisions of Section 70 of the Income Tax Act.

7. Against this order of the Tribunal, the revenue is in appeal before us. Following substantial questions of law arise in these appeals:

"(a) Whether the ITAT was correct in law in deleting the addition made by the Assessing Officer, which had been restricted by the CIT (A) to the extent of 15% of the advances, treating the same as income of the assessee?

(b) Whether the receipts on account of booking of cruise tickets assumed character of income in the hands of the assessee when the amount was received from the customers or when the cruise departed?

(c) Whether the ITAT was correct in law in allowing the assessee to adjust the losses incurred on share transactions against the profit of commission agency business under the name and style of M/s Tirun Travel Marketing?"

8. The learned counsel for the revenue contends that there was principal and agent relationship between RCCL and the assessee. It was RCCL who was liable to render the services and not the assessee. By booking the ticket, assessee created a legal relationship between RCCL and the customer who wanted to sail on cruise. As soon as the ticket was booked, agency came into existence and the assessee became entitled to commission. Assessee was liable to his principle only for booking of the tickets and to remit the entire amount of ticket.

Even in case were the ticket was cancelled, assessee was entitled to commission thereon. Hence, the order of CIT (A) that the assessee was entitled to commission @ 25% was justified. In this regard, reliance is placed on the judgments of ***CIT v. Shri Goverdhan Limited*** 69 ITR 675 wherein it was held that, "*It is well established that the income may accrue to an assessee without actual receipt of the same and if the assessee acquires a right to receive the same, the income can be said to have accrued to him though it may be received later on, on its being ascertained.*" and ***Morvi Industry Ltd v. CIT,*** 82 ITR 835 wherein it was observed that, *"...once the income accrued, the fact that payment was deferred till after the accounts had been passed in the meetings of the managed company, did not affect the accrual of the income. Income accrues when it becomes due*".

9. On the other hand, learned counsel for the assessee heavily relies on Section 5 Article 2 of the Agreement which defines the term "Qualified Bookings" and lays down that qualified bookings are all F.I.T. and group bookings which become sailed booking, which were made in accordance with RCCL's applicable policies and procedures, and for which full payment is received by RCCL. Learned counsel for the assessee contends that the commission for such bookings is available to the assessee only on qualified bookings. The assessee has no right to receive any commission on the advance amounts received for the bookings in case the cruise doesn't depart. The advance doesn't on its own become revenue for the assessee till the booking becomes a

sailed booking and full payment is received by the RCCL. Once the sail takes place and commission accrues to the assessee, he offers his income for taxes. Taxing the advance received considering it as income will also lead to double taxation since the assessee offers the final income for taxation in the subsequent years. In this regard, he relies upon the judgments of ***Raja Mohan Raja Bahadur v. CIT*** AIR 1968 SC 114***, State Bank of Travelcore v. CIT,*** (1986) 2 SCC 11***, Devsons Pvt. Ltd v. CIT,*** 329 ITR 483 (Delhi)***, Amiantit International Holding Ltd. IN Re*** 322 ITR 678 (AAR)***, CIT v. Dinesh Kumar Goel,*** 331 ITR 10 (Delhi).

10. Admittedly, the assessee is following mercantile system of accounting, where under, whenever the right to receive money in the course of a trading transaction accrues or arises, even though income is not realized, income embedded in the receipt is deemed to arise or accrue as held by the SC in ***Raja Mohan Raja Bahadur,*** (Supra). In ***State Bank of Travancore*** (Supra) also, the SC has held that it is the income which has really accrued or arisen which is taxable. Similar view has been expressed by this court in ***Devsons*** (Supra). It was observed as under:

> *"... Even in the mercantile system of accounting it is the real income which has accrued in a practical sense that is to be brought to tax. In* ***CIT* v *Shoorji Vallabhdas and Co****. [1959] 36 ITR 25, the Bombay High Court held that the question whether the income accrued or not is not a mere matter of cogency of the entries made in the account books of the assessee, but is essentially one of substance and of the real nature of what happened. A mere book*

entry is not conclusive of the question whether the assessee had become entitled to the sums or not and whether the income is accessable"

11. In ***Amiantit International*** (Supra), it was observed as under:

> "*We shall now look to the meaning of the expression" accrue or arise". The dicta of Mukherji, in* ***Rogers Pyatt SI llac and Co.*** **v** ***Secretary of State for India*** *[1925] 1 ITR 363 has been quoted with approval in a series of decisions of the Supreme Court (vide E.D. Sassoon and Co. Ltd.* v *CIT [1954] 26 ITR 27 (page 50):*
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> > *"Now what is income? The term is nowhere defined in the Act.... In the absence of a statutory definition we must take its ordinary dictionary meaning.... The word clearly implies the idea of receipt, actual or constructive. The Policy of the Act is to make the amount taxable when it is paid or received either actually or constructively. 'Accrues', 'arises' and 'is received' are three distinct items. So far as receiving of income is concerned, there can be no difficulty; it conveys a clear and definite meaning, and I can think of no expression which makes its meaning planner than the word 'receiving' itself. The words 'accrue' and 'arise' also are not defined in the Act. The ordinary dictionary meanings of these words have got to be taken as the meanings attaching to them. 'Accruing' is synonymous with 'arising' in the sense springing as a natural growth or result. The three expressions 'accrues', 'arises' and 'is received' having been used in the section, strictly speaking, 'accrues' should not be taken as synonymous with 'arises' but in the distinct sense of growing up by way of addition or increase or as a accession or advantage, while the word 'arises' means comes into existence or notice or presents itself. The former connotes the idea of growth or accumulation and the latter of the growth or accumulation with a tangible shape so as to be receivable."*

12. In ***Dinesh Kumar Goel*** (Supra), it was observed as under:

> *".....It is important, therefore, that receipt of a particular amount in the relevant year should be an "income' under the aforesaid provision. What is the relevant yardstick is the time of accrual or arisal for the purpose of its taxation, viz, in order to be chargeable, the income should accrue or arise to the assessee during the previous year. If income has accrued or arisen, even if actual receipt of the amount is not there, it would be chargeable to tax in the said year. Though the amount may be received later in the succeeding year, the income would be said to accrue or arise if there is a debt owned to the assessee by somebody at that moment. From this, it follows that there must be the " right to receive the income on a particular date". The court further explained that a right to receive a particular sum under the agreement would not be sufficient unless the right accrued by rendering of services and not by promoting for services and where the right to receive is anterior to rendering of service, the income, therefore, would accrue on rendering of services.... (para 13) "*

13. The question for our consideration is as to when the income can be said to be accrued to the assessee. It is when the ticket is booked by the assessee or when the customer boarded the cruise and it departed? We find force in the contention of the learned counsel for the revenue, that it was RCCL and not the assessee who was responsible to render all post booking services to the customers. As per Section 5 of Article (2) of 2002 International Representation Agreement as executed between the Assessee and RCCL, all bookings which become sailed which were made in accordance with RCCL's applicable policy and procedures and for which full payment is received by RCCL in accordance with this agreement are termed as qualified bookings. It also provides that bookings that are made by the

customers on the Cruise Line's website shall not be considered qualified bookings. As per Section 16 thereof, the assessee was required to remit for each booking to RCCL (a) quoted price or (b) the quoted prices minus the commission payable to the assessee pursuant to Section 6. Section 6 prescribed base commission which is payable by RCCL to the assessee on the bookings. It prescribes 25% as applicable base commission on individual and group bookings. From all this, it is seen that where full payment is received, the latter is to remit to RCCL the quoted booking price minus 25% base commission. Section 12 provides the payment to the travel agents. It states that all commission and other payments due and owing the travel agent, shall be the sole responsibility of the assessee and not RCCL. It also provides that assessee shall deduct and pay any such commissions and payments from the commission. That being so, as per the scheme of agreement, 10% commission payable by the assessee to the travel agent from 25% commission to be charged from RCCL. was the sole responsibility of the assessee, Thus, as and when the ticket is booked and full payment is received, the assessee becomes entitled to deduct the commission of 25% and remit the balance to RCCL. The commission accrues to the assessee with the booking of tickets and against full payment. This is notwithstanding that the customer may not board the cruise or cancel the trip.

14. There is a procedure prescribed for cancellation of bookings. Section 20 of the Agreement provides for cancellation charges. This section reads as under:

> *"Section 20. Cancellation Charges.*
>
> *IR acknowledges that RCCL suffers injury when (i) bookings are cancelled but RCCL does not receive proper notice, or (ii) bookings are cancelled close to the scheduled departure. IR shall be liable to RCCL for payment of cancellation charges in accordance with RCCL's applicable cancellation charge schedule as may be amended from time to time. The current cancellation charges for individual bookings are set forth in Exhibit B and for group bookings in Exhibit A. These cancellation charges are subject to the following rules:*
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> *(a) RCCL reserves the right to change cancellation charges and time frames upon written notice to IR.*
>
> *(b) RCCL does not take responsibility for cancellations due to visa denials, incorrect documents, incorrect immigration forms, or absence of insurance.*

15. As per this section, the assessee shall be liable to RCCL for payment of cancellation charges in accordance with the applicable cancellation charges schedule as may be amended from time to time. Assuming that in some cases, the assessee, in case of cancellation of trip, is liable to return the commission earned, it would be open for the

assessee to seek adjustment or claim a refund of tax from the Authorities. We therefore, hold that the stand taken by the CIT (A) in this regard was correct and 25% of the booking advances received should be treated as income of the assessee assuming that there are no cancellations. However, the assessee shall be entitled to 10% credit on account of travel agents commission after ascertaining actual outgoings in this regard.

16. The learned counsel for the revenue further contends that the AO had treated the loss from share trading business as “Capital Loss” since the assessee had not furnished any details i.e. contact notes, mode of payments, details of shares etc. No specific finding has been given by the CIT(A) as to whether loss incurred and claimed by the assessee was a business loss or a capital loss. ITAT could not have outrightly treated the loss as business loss, and the provisions of Section 70 could not have been applied.

17. In this regard learned counsel for the assessee contends that the disallowance was on the basis that the entire account of share business is in the name of Gautam Chaddha and not in the name of M/s Tirun Travel Marketing. The AO while doing so disregarded the provision of Section 70 of the Act and the fact that travel business is nothing but the proprietorship concern of Mr. Gautam Chadha. He further contends that the loss incurred from share transaction business was assessed under the head ‘Business Income’ by the AO and confirmed by the CIT (A) as well as by the Tribunal. Once it is held to

be business loss, provisions of Section 70 of the Act will apply. In this regard, he relies upon the judgment of ***CIT v. P K Muthuraman Chettiar***, 1962 ITR Vol. XLIV SC 710.

18. In ***P K Muthuraman Chettiar*** (Supra), the Hon'ble SC has observed as under:

> *".....It is wrorthy of note that though the profits of each distinct business may have to be computed separately, the tax is chargeable under section10, not on the separate income of every distinct business, but on the aggregate of the profits of all the businesses carried on by the assessee. It follows from this that where the assessee carried on several businesses, he is entitled under section 10, and not under section 24(1), to set off losses in one business against profits in another..... "*

19. Admittedly, the assessee was doing share trading business although in his own name and not in the name of M/s Titun Travel Market. The assessee was dealing in shares not for the purpose of investment but for the purpose of business. It is settled position of law that where shares are traded for the purpose of business, any loss arising therefrom will be considered as "Business Loss". (***CIT v. Ashoka Marketing Co***., 1971 (III) UJ 895). Hence, we are of the view that the Tribunal was right in holding that the assessee is entitled to set off the loss in share trading business from that of travel agency business. The case of the assessee comes within the purview of Section 70 of the Act. Accordingly, this issue is decided in favour of assessee and against the revenue.

20. In view of our foregoing discussion, we answer the Question (a) in negative in favour of revenue and against the assessee and Question (b) in affirmative in favour of the revenue and against the assessee. The Question (c) stands answered in affirmative in favour of the assessee and against the revenue.

21. All the above appeals stand disposed of.

M.L.MEHTA
(JUDGE)

A.K.SIKRI
(JUDGE)

July 27 , 2011
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