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

+ ITA 199/2010

MIRA KULKARNI Appellant
Through Mr. Bharat Beriwal, Advocate.

versus

ASSISTANT COMMISSIONER OF INCOME TAX
..... Respondent
Through Mr. Sanjeev Sabharwal, Sr.
Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V.EASWAR

% **ORDER**
16.12.2011

CM No. 9755/2011

This is an application for placing on record additional documents. The appellant wants to place on record two pages of the brochure of Neemrana Hotels Private Limited. We are not inclined to accept the prayer made in the application for several reasons. This alleged brochure is taken out by Neemrana Hotels Private Limited and what is stated therein has not been verified by the Revenue. There was correspondence between the Assessing Officer and Neemrana Hotels Private Limited, which has been referred to in our order below. In case the



appellant wanted to rely upon the said document, he should have filed it before the Assessing Officer and the Assessing Officer would have verified the correctness of the averments or statement made and the effect thereof. Lastly, requirements of Order XLI, Rule 27 are not satisfied.

The application is dismissed.

ITA 199/2010

On 28th February, 2011 while admitting the present appeal under Section 260A of the Income Tax Act, 1961 (Act, for short) in the case of Mira Kulkarni, the appellant, the following substantial question of law was framed:

“Whether the Tribunal was correct in law and on facts in holding that expenses incurred by the appellant wholly and exclusively for the purposes of the hotel business and allowable under section 37(1) of the Income Tax Act, 1961 were not allowable solely for the reason that the agreement between the parties did not contain a stipulation for the incurring of the same by the appellant?”

2. The appeal pertains to the assessment year 2003-04.
3. The appellant is an individual and a part owner of property situated at Anand Kashi Farms, Post Office Gular Dogi, Zila Tehri Garwal, Uttaranchal. A portion of the property, pursuant to an agreement dated 1st April, 1999 with Neemrana Hotels Private Limited, is being used as a hotel. The appellant-



assessee is entitled to minimum guaranteed amount of Rs.9 ,
000/- per quarter or 30% of the gross operating profits whichever
is higher. The gross operating profits are calculated for every
quarter in terms of the said agreement.

4. The appellant had declared the income earned under an
agreement dated 1st April, 1999 as “income from business” and
not under the head “income from house property”. However, the
said question and aspect is not relevant and does not arise for
consideration in the present appeal as the Assessing Officer has
accepted the stand of the appellant that the income earned
under the agreement was taxable under the head “income from
business”.

5. The appellant had claimed the following expenses under
section 37 of the Act on the ground that they were incurred
wholly and exclusively for the purpose of business:

- (i) Foreign travel expenditure of Rs.76,032/-
- (ii) Repair and maintenance expenses of Rs.4,83,221/-
- (iii) Salary and local conveyance of Rs.2, 50, 0576.

6. Some other expenses were also disallowed by the Assessing
Officer but the learned counsel for the appellant has not
questioned the said disallowance as the amounts involved are
very small or minimal. It may be noted that as per the profit and



loss account, the appellant had showed net profit of Rs. 99,036/- under the agreement dated 1st April, 1999. The gross receipts of the appellant were Rs. 22,69,711/-, but a substantial amount was shown as expenditure.

7. In the first appeal, the appellant partly succeeded and the aforesaid expenses of Rs.4, 83,221/- and Rs.2, 50,057/- were allowed. Disallowance of foreign travel expenses of Rs.76, 032/- was sustained by the CIT (Appeals). The appellant and the Revenue filed cross appeals, which have been disposed of by the tribunal by their impugned order of the Income Tax Appellate Tribunal, dated 30th June, 2009.

8. Learned counsel for the appellant submits that the property jointly owned by the appellant is about 1 ½ acres and a small portion thereof is subject matter of the agreement dated 1st April, 1999. He submits that the appellant is required to maintain and carry out repair and maintenance of the property in order to ensure that the agreement dated 1st April, 1999 is adhered to and business income accrues and is enjoyed. He has drawn our attention to Annexure-A, which is the site plan annexed to the agreement dated 1st April, 1999. It is stated that the appellant had carried out repairs of the staircase in the property leading to the banks of the river Ganges and the



expenditure incurred was business expenditure and, therefore, was rightly allowed by the CIT (Appeals). It is further submitted that the maintenance of the staircase was not the responsibility and was not undertaken by the second party, i.e., Neemrana Hotels Pvt. Limited, to the agreement dated 1st April, 1999.

9. Section 37(1) of the Act reads as follows:-

“(1) Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession.”

Section 37 (1) postulates that the expenditure should be laid out or expended wholly or exclusively for the purpose of business. The two conditions, wholly or exclusively are conjoint and not disjunctive. This means that the expenditure should have been incurred for the purpose of business. It should be really incidentally connected with the business. The intention behind incurring the expense is relevant and it should be connected with the trade or business activity. It should be to enable a person to carry on and earn profits in



the trade. The revenue's objection, unless permitted by law, ... normally confined to deciding the reality of the expenditure which means; whether the expenditure was actually incurred and secondly; whether it was incurred wholly and exclusively for the purpose of business. Personal expenses can not be allowed as an expense and have to be specifically excluded as they are not deductible.

10. The question raised is whether the aforesaid expenses can be allowed under Section 37(1) of the Act. This necessarily requires reference to the facts ascertained and recorded by the tribunal. The tribunal has taken into consideration and relied on the agreement dated 1st April, 1999 and the relevant clauses thereof. The aforesaid agreement has been place on record as Annexure-1 to the paper book. Article 1.1 of the agreement reads as under:

"1.1 "The Party of the First Part" hereby confirms and grants to "The Party of the Second Part" and "The Party of the Second Part" hereby confirms acceptance of the permission to run, conduct, operate, manage, market, direct control and supervise the operations of the said hotel. It is also agreed to between the parties that "The Party of the Second Part" shall maintain all related facilities and amenities and business activities for the furtherance and development of tourism in India. The said hotel' and the land Appurtenant thereto



are more particularly described in Annexure “A” to this Agreement.” (emphasis supplied)

11. Some of the other clauses of the agreement to which our attention has been drawn are as under:

“4.3 “The Party of the Second Part” in consultation with “The party of the First Part” may renovate and/or alter and/or modernize at its cost any section or areas of the said hotel, However, if such a renovation involves structural alterations to the building then “The Party of the Second Part” shall seek the written consent of “The Party of the First part”. Any expenditure incurred by “The Party of the Second Part” for renovation and/or alteration and/or upgradation and/or modernization of the said hotel and any moveable assets created during the currency of this agreement be the property of and belong to “The Party of the Second Part”. If the assets so created be immovable property/assets or any alteration to them, in that event at the expiry or termination of the agreement they shall become the property of “The Party of the First Part”. If the assets so created, be moveable assets then in that event these shall belong at all times to “The Party of the Second part” and on the expiry/termination of the agreement “The Party of the Second Part” shall have the right to remove the same subject to the prior right of “The Party of the First Part” to purchase the same at a mutually agreed price, provided however that “The Party of the Second Part” shall not be entitled to remove or take away the assets in the nature of fixed fittings and other installations, the removal of which is likely to cause irreparable or heavy damage to the buildings. The Party of the Second Part” shall at its costs, repair any



and all damages that may be caused to the building in the process of the removing of the assets.”

5.2 THE PARTY OF THE SECOND PART'S COVENANT

a. All charges or taxes with regard to the running of the business of the said hotel including the charges for the salaries, telephone, electricity, food provisions water bills license fee, advertising, marketing shall be borne and paid by “The Party of the Second Part” after the appointed date till the expiry of this agreement.

b. “The party of the Second Part” shall run, conduct, manage, market, direct control and supervise the operation of the said hotel and maintain at its cost the hotel in accordance with acceptable standards. “The Party of the Second part” would also make available to the said hotel all its professional expertise and related technology as may be required.

c. “The party of the Second Part” along with “The Party of the First Part” shall be responsible to secure/renew from time to time the necessary permissions or licenses or permits as may be required from the authorities concerned in order to carry on the business of the hotel at acceptable standards in he said hotel.

d. “The Party of the First Part” shall get the hotel together with the assets and belonging to “The Party of the First Part” as detailed in this agreement, fully insured at his own cost, against risk such as fire floods, earthquakes, riots, civil commotion, wars etc. “The Party of the Second Part” shall adequately insure to cover its assets from third party risk, cash loss, accidents and



other such hazards.

e. All the movable assets created by “The Party of the Second Part” as a result of the said expansion and development work at the said hotel shall for the duration of the agreement, be the property and belong to “The Party of the Second Part”.

f. All regular maintenance charges, including but not limited to general up keep, such as waterproofing, painting and other repairs during the continuance of the agreement are to be borne by “The Party of the Second part”.” (emphasis supplied)

12. Learned counsel for the appellant, however, relied upon clause 17.1, which reads as under:

“17. MATTERS NOT PROVIDED IN THE AGREEMENT

17.1 If any doubt arises as to the interpretation of the provisions of this agreement or as to matters not provided therein, the parties to this agreement shall consult with each other for each instance and. resolve such doubts in good faith.”

13. During the course of assessment proceedings, the Assessing Officer had written a letter to the second party, namely, M/s Neemrana Hotels Private Limited to examine the question whether expenditure of Rs.4,83,221/-, was incurred wholly and exclusively for purpose of business and to find out why the said expenditure was incurred. M/s Neemrana Hotels Private Limited in their reply stated that as per the agreement,



they were liable to carry out repair and maintenance of the property used for the hotel. They had further stated that the property was jointly used by both parties as per the enclosed map and open spaces were used by the appellant to grow agricultural produce. A double storeyed structure was under the appellant's occupation for her residence and office. It was further stated that no new construction was carried out during the financial year 2002-03, which is relevant to the assessment in question.

14. Keeping in view the aforesaid factual matrix, the tribunal after examining the relevant clauses of the agreement and the reply given by M/s Neemrana Hotels private Limited has upheld the addition made by the Assessing Officer and reversed the order passed by the CIT (Appeals) in respect of Rs 4,83,221/-.

15. Article 1.1 of the agreement not only refers to the constructed hotel portion but states that all related facilities, amenities and business activities shall be maintained by M/s Neemrana Hotels Private Limited. This is not confined to the hotel building only but also extended to the land appurtenant thereto. A hotel may not be restricted or consist of a constructed building and garden, precincts and land appurtenant thereto, may have to be developed and maintained. The clauses of the



agreement referred to above indicate that this development and maintenance was the responsibility and liability of M/s Neemrana Hotels Pvt. Ltd. Learned counsel for the appellant has relied upon Clause 17.1 of the agreement, which has been quoted above and refers to mutual consent. The reliance would have been relevant in case the appellant had lead evidence or placed material on record in form of any communication or confirmation by M/s Neemrana Hotels Private Limited that she had incurred expenditure, which was relevant for maintenance and running of the said hotel. Even otherwise the appellant could not produce evidence and material to substantiate her claim. We may also record that the tribunal has specifically recorded that 75% of the property was in personal use of the appellant. Obviously the expenditure incurred on maintenance and repair on the personal property cannot be set off and allowed as business expenditure under section 37 of the Act. We wish, however, to clarify that in case the assessee had been able to produce evidence and show that she had incurred any expenses to earn and for purpose of business, she might have succeeded. Our findings are on the basis of the factual matrix ascertained and recorded by the tribunal in this year. In the factual background of the present case the appellant has not



been able to show and establish her claim for deduction under

Section 37(1). Further, the reply given by M/s Neemrana Hotels Private Limited is clear and categorical. In case the appellant wanted to take a contrary stand and explain the said reply, it could have obtained necessary clarification from M/s Neemrana Hotels Private Limited and filed it before the authorities. M/s Neemrana Hotels Private Limited is the business partner of the appellant. Therefore, we do not think the aforesaid conclusion arrived at by the tribunal is perverse or which requires interference by this Court in an appeal under Section 260A of the Act.

Foreign travel and Salary etc.

16. With regard to the foreign air travel, again the findings recorded by the tribunal are findings of fact. It was noticed that the assessee had travelled to Paris and London on a personal visit and it has been held that the expenditure was not business expense. We do not find any reason to interfere with the said finding. We may note that as per the agreement, marketing, advertisement and reservations etc. were to be undertaken by and was the responsibility of Neemrana Hotels Private Limited. There is no evidence or material placed on record as to how the said expense was connected with or for the purpose of business



income. The last expense claimed is on account of salary and local conveyance. The tribunal in this regard has referred to the clauses of the agreement and observed that the running of the hotel, including salary to the hotel staff etc. was the responsibility of M/s Neemrana Hotels Private Limited. To verify the claim made by the appellant that as an owner and party to the agreement she was incurring the said expenses, M/s Neemrana Hotels Private Limited was asked to provide details of duration, nature and frequency of supervision/inspection carried by the appellant. M/s Neemrana Hotels Private Limited was specifically asked whether any representatives were employed by the appellant for being involved in day-to-day operations and running of the hotel. In the reply dated 25th November, 2005, M/s Neemrana Hotels Private Limited had stated that the appellant had regularly visited the property and conducted activities such as quality control of food but no specific details or particulars were elucidated. It is the appellant's case that she had carried out agricultural operations in the said property and grown agricultural produce. On the basis of material on record, the tribunal has recorded a finding of fact that the salary account and the local conveyance expenses claimed by the appellant did not pertain to running or operation of the hotel. The operational



expenses etc. were incurred by M/s Neemrana Hotels Private Limited. The said expense was not for the purpose of business. The aforesaid findings cannot again be categorized as perverse and which require interference by this Court under Section 260A of the Act.

The question of law is accordingly answered against the appellant and in favour of the respondent-Revenue.

The appeal is disposed of. No costs.

SANJIV KHANNA, J.

R.V. EASWAR, J.

**DECEMBER 16, 2011
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