



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

+ **ITA NO.656/2009**

% Date of Decision: 03.02.2011

COMMISSIONER OF INCOME TAX **...APPELLANT**

Through: Ms.Prem Lata Bansal, Advcoate

Versus

ASIAN HOTELS LTD. **...RESPONDENTS**

Through: Mr.M.P. Rastogi and Mr.K.N. Ahuja,
Advocates.

CORAM:

HON'BLE MR. JUSTICE A.K.SIKRI

HON'BLE MR. JUSTICE M.L.MEHTA

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not? | No |
| 3. Whether the judgment should be reported in the Digest? | No |

A.K. SIKRI, J. (Oral)

1. The respondent-assessee is in the hotel business. It is not in dispute that respondent qualifies for benefit under Section 80HHD of the Income Tax Act (hereinafter referred to as "the Act") as it fulfills all the conditions for claiming that benefit.



The benefit is to be given on the earnings made by the assessee in convertible foreign exchange. In the assessment year 1998-99, the assessee had filed return declaring the income of Rs.20.44 crores under Section 115JA of the Act. This assessment was originally framed under Section 143(3) of the Act at an income of Rs.21.78 crores, however, this assessment was reopened by issuing notice under Section 148 of the Act as, according to the Assessing Officer, benefit under Section 80HHD was not correctly computed and in the process income had escaped assessment. It was included on the following grounds:

- (i) The Assessing Officer noticed that the assessee had not included a sum of Rs.1168.23 lakhs received in money-changing business in the total turnover.
 - (ii) Likewise, the assessee had not included sum of Rs.1433.28 lakhs on account of expenditure tax in the total turnover while computing deductions under Section 80HHD of the Act.
2. The deductions under Section 80HHD is to be computed on the basis of the following formula:

$$\frac{\text{Profit of Business} \times \text{Foreign Exchange Receipts}}{\text{Total Receipts of Business}}$$



3. The Assessing Officer included both the aforesaid components in the total receipts of the business and in this way as the figure of denominator increased, the deduction which became available to the assessee under Section 80HHD was reduced. Reassessment order was passed on that basis. The assessee challenged this order before the CIT(A) successfully. The CIT(A) excluded both the receipts from the denominator while computing deduction under Section 80HHD of the Act on the ground that when they were not to be included in the numerator, i.e., in foreign exchange receipts, they could not be included in total receipts of the business, i.e., “total turnover” of the assessee as well. The appeal of the Revenue assailing this order of CIT(A) has failed as the Income Tax Appellate Tribunal (hereinafter called as “the Tribunal”) has dismissed the same vide impugned order dated 14th November, 2008.
4. Insofar as non-inclusion of sum of Rs.1168.23 lakhs received by the assessee as money-changer activity, the Tribunal has noted that, right from the beginning, the assessee had provided this facility to its residents/guests on no-profit-no-loss basis. It is for this reason, the assessee was not even allowed deduction under Section 80HHD on the foreign



exchange receipts from its money-changing activity. We may also notice that the contention of the assessee in this behalf was that the money-changing exercise undertaken by the assessee for its guests/customers is only a facility for its guest/customers granted to them and it is for this reason that the assessee simply converts the money taken in foreign exchange from its customers by paying them equivalent money in Indian currency. For this reason, asserted the assessee, there was no element of profit in these receipts. It was argued that the assessee collects this amount in fiduciary capacity and in the interest of its main business by providing this additional facility to its customers. Otherwise, the amount so collected in fiduciary capacity is deposited with the Government. The Tribunal while holding that since the receipts with the money changer would not be eligible for computation of the deduction admissible under Section 80HHD and deserves to be excluded from the total turnover as a whole. The Tribunal has taken recourse to the judgment of the Supreme Court in **CIT v. LAKSHMI MACHINES WORKS**, 290 ITR 667 in support of its view. Learned counsel for the respondent also brought to our notice that not only in previous assessment years but even in subsequent assessment years, the Department itself has been acting in the same manner. Learned counsel has produced copies of



the assessment orders passed in respect of assessment years 1996-97, 1997-98 as well as 1999-2000 to bolster this submission. We find from the assessment order passed in respect of assessment year 1997-98 that while adopting the same approach, the Assessing Officer, in the rank of Joint Commissioner of Income Tax, has observed as under:

“From another point of view also, no deduction is allowable on this ground. On perusal of assessee’s computation of deduction u/s 80HHD, it is seen that the figure of total receipt of business has been taken at Rs.166,02,44,446/-. This figure does not include the figure of Rs.14,27,73,538/-, being foreign exchange receipts from the business of Money Changing. If one is to add this figure to the total receipts of business, the deduction claimed by the assessee would automatically stand reduced. Even otherwise, it is a common logic that the nominator and the denominator of a equation should have the same set of negotiation. If the assessee is including foreign exchange receipts in the nominator, it should also include this figure in the denominator for the correct answer.”

5. As mentioned above, even in the succeeding assessment year, i.e., 1999-2000, the Assessing Officer has not included the receipts in foreign exchange in money-changing activity.
6. Going by the aforesaid peculiar facts, it appears in this case that when there is a reasonable dispute as to whether this facility of money changer, which is provided on no-profit-no-loss basis, can even be treated as business activity of the assessee and thus find part of total turnover, we are of the



opinion that no interference in the order of the Tribunal is required.

7. As far as issue relating to expenditure tax is concerned, reading of the order of the Tribunal would demonstrate that the Tribunal has not even addressed this issue though it was specifically raised before the Tribunal. We, thus, are of the opinion that, in the first instance, the Tribunal should bestow its consideration on this aspect of the matter on merits. We accordingly remit this appeal to the Tribunal for its decision on that issue.
8. The appeal is disposed of.

A.K. SIKRI, J.

FEBRUARY 3, 2011

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M.L. MEHTA, J.