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

Reserved on: 7th July 2015
Decided on: 24th July, 2015

\+ **ITA 69/2000**

CIT ..... Appellant
Through: Mr. N.P.Sahni, Senior Standing counsel with Mr. Nitin Gulati, Junior standing counsel.

versus

M/S BHARAT HOTELS ..... Respondent
Through: Mr. Ajay Vohra, Senior Advocate with Mr Prakash Kumar and Ms Bhovita Kumar, Advocates.

With

ITA 70/2000

CIT ..... Appellant
Through: Mr. N.P.Sahni, Senior Standing counsel with Mr. Nitin Gulati, Junior standing counsel.

versus

M/S BHARAT HOTELS LTD. ..... Respondent
Through: Mr. Ajay Vohra, Senior Advocate with Mr Prakash Kumar and Ms Bhovita Kumar, Advocates.

With

ITA 71/2000

CIT ..... Appellant

Through: Mr. N.P.Sahni, Senior Standing counsel with Mr. Nitin Gulati, Junior standing counsel.

versus

M/S BHARAT HOTELS ..... Respondent

Through: Mr. Ajay Vohra, Senior Advocate with Mr Prakash Kumar and Ms Bhovita Kumar, Advocates.

With

ITA 72/2000

CIT ..... Appellant

Through: Mr. N.P.Sahni, Senior Standing counsel with Mr. Nitin Gulati, Junior standing counsel.

versus

M/S BHARAT HOTELS LTD. ..... Respondent

Through: Mr. Ajay Vohra, Senior Advocate with Mr Prakash Kumar and Ms Bhovita Kumar, Advocates.

And

ITA 73/2000

CIT ..... Appellant

Through: Mr. N.P.Sahni, Senior Standing counsel with Mr. Nitin Gulati, Junior standing counsel.

versus

M/S BHARAT HOTELS ..... Respondent

Through: Mr. Ajay Vohra, Senior Advocate with Mr Prakash Kumar and Ms Bhovita Kumar, Advocates.

CORAM:
HON'BLE DR. JUSTICE S.MURALIDHAR
HON'BLE MR. JUSTICE VIBHU BAKHRU

Dr. S. Muralidhar, J.

1. These appeals by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act') pertain to the Assessment Years ('AYs') 1989-90, 1990-91, 1991-92, 1992-93, 1993-94. They are directed against a common order dated 14th February 2000 passed by the Income Tax Appellate Tribunal ('ITAT') in the appeals and the cross-appeals filed by the Revenue and the Assessee for the said AYs.

2. The facts are that New Delhi Municipal Council ('NDMC') invited an offer in 1976 from Delhi Automobiles(P) Ltd. ('DAL') for the construction of a five star hotel in a land located at Barakhamba Road. DAL submitted an offer of paying Rs.28,11,000 per annum as licence fee to the NDMC. However, no agreement as such was executed at that stage. A suit was filed by DAL against NDMC for specific performance with an alternative prayer for damages. The suit ended in a compromise and this led to an agreement dated 11th March 1981 being executed between DAL and NDMC. The key features of this agreement were as under:

(i) The land was to be given to DAL on licence basis for a period of 99 years on payment of licence fee of Rs.1,45,00,000 pa.

(ii) DAL would form a public limited company within a period of twelve months and the licence of the land was to be transferred to the said company.

(iii) The building would be constructed on the land by DAL. Nevertheless, the land and the building were to vest in the NDMC. DAL would have the right to raise loans on the security of the structures/buildings/ fixtures and fittings etc. from any Indian or foreign licensed bank or from any financial corporation including ICICI and IDBI.

(iv) The plans for the hotel building together with drawings had to be approved in advance from NDMC and the Director General of Tourism, Government of India.

(v) Clause 12 of the said agreement stated that the licensee would not be at liberty to part with possession of the land or otherwise encumber or sublet the premises to any person directly or indirectly "without the previous written consent of the licensor". However, the "licensees shall have the right to sub-licence the licensed property as stipulated in Clause 30 of this licence agreement.

(vi) Clauses 14 and 15 made it clear that DAL was only "bare licensee only of the land subject to payment of licence fee" and that nothing

contained in the agreement should be construed as a demise of whole or part of the land so as to give DAL any legal title, right or interest therein.

(vii) The obligations of the licensee were further stipulated in Clause 16 of the agreement. *Inter alia*, it was provided in Clause 16 (xii) that DAL would pay all rates, taxes, charges in respect of the land and any building erected thereon during the entire period of licence except the house tax since the building was to vest in NDMC for "all intents and purpose".

(viii) Under Clause 16(xv) the building has to be kept insured by DAL in the joint names of itself and the NDMC against damage by fire, riots, civil commotion and earth quake etc. The premium was to be paid by DAL. The rights and the powers of the NDMC were set out in Clause 17 of the agreement.

(ix) Under Clause 25, the building to be constructed on the licensed space "shall at all time vest" in the NDMC together with all fittings, fixtures and other installations of the immovable types or of the types removal of which is likely to cause damage to the building. Clause 27 clarified that the allotment was to the made on the licence basis and the licensed premises including building would be a 'public premises' within the meaning of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971.

(x) Clause 30 of the agreement envisaged the induction of sub-licensees. The said clause reads as under:

> "The licensees shall run the Five Star Hotel themselves. However, the licensees may allow sub- licensees within the period of licence for running car parking, cycle-scooter stand for parking and shopping arcade, banks, offices (within the shopping arcade) etc. The licensees shall be further responsible for the conduct of various sub- licensees and observance of rules and regulations etc. The licensees shall be further responsible to answer that the sub- licensees shall not get any right over and above the rights and privileges of the licensees."

3. Pursuant to the above agreement, Bharat Hotels Ltd. ('BHL') came to be incorporated. On 18th June 1981 an agreement was entered into between BHL and DAL which anticipated the transfer of the licence in respect of the land from DAL to BHL. The obligations of DAL as incorporated in the agreement dated 11th March 1981 were set out as obligations of BHL in the agreement dated 18th June 1981. Clause 4 of this agreement permitted BHL to allow use of the shopping complex by way of a licence to one or more persons or their nominees with information to DAL. It was, *inter alia*, provided in Clause 4(a) that BHL would accept "interest-free-deposit from the user at an agreed rate per sq. ft. of the area to be licensed to any party". The deposit would vary from party to party and from time to time. Of the deposit, the DAL was permitted to retain 25% on the agreed terms and conditions and the balance 75% was to be retained by BHL. DAL was

bound to repay the deposit. It was further provided that BHL would be bound to repay the deposit of any licensee as and when the licensee becomes entitled to receive it.

4. Thereafter, a tripartite agreement was entered into between BHL, DAL and NDMC on 22nd April 1982 and the licence granted in favour of DAL was transferred to BHL. Apart from formalising such transfer the said agreement provided that the terms and conditions set out in the agreement between the DAL and the NDMC would also form part of the said tripartite agreement. While this agreement incorporated all the clauses in relation to the right to the land and building vesting in the NDMC, it also provided that the NDMC would have a pre-emptive right to purchase the building at the market price. Clause 18 read thus:

> "18. The licensor shall have a pre-emptive right to purchase the property built on the site after deducting the market value of the land at the market price then prevalent."

5. Clause 29 gave BHL the right to give out spaces in the building to sub-licencees. The said clause reads as under:

> "29. The licencees shall run the five Star Hotel themselves. However, the licencees may allow sub-licencees within the period of licence for running car parking, cycle scooter stand for parking and shopping arcade, banks offices (within the shopping arcade) etc. The licencees shall be further responsible for the conduct of various sub-licencees and observance of rules and regulations etc. The licencees shall be further responsible to answer that the sub-licencees shall not get any right over and above the rights and privileges of the licencees."

6. Under Clause 48, licence fee was to be enhanced after every thirty three years provided that the increase in the licence fee would not exceed 100% of that immediately before the enhancement is due.

7. One more fact that requires to be noticed is that apart from the hotel building that was constructed, two other buildings, namely the World Trade Tower ('WTT') and the World Trade Centre ('WTC') were also constructed in another portion of the plot of land adjoining the complex. In the WTT and WTC spaces were given out on licence basis to several sub-licensees by the Assessee for which separate sub-licence agreements were entered into. Deposits were accepted from the sub-licensees in terms of the sub-licence agreements.

8. The standard format of the sub-licence agreement, a copy of which is placed on record, incorporated the terms and conditions specified in the tripartite agreement. Relevant to the present appeals it should be noted that Clause 27 prohibits the sub-licensees from assigning their interest in the space allotted in any way without obtaining previous written consent of BHL. Clause 1 states that deposit "free of interest" shall remain with BHL "during the subsistence of this agreement". The licence fee is to be calculated at a rate per sq. ft. of the licence area. Under Clause 7(f), it is stated that the sub-licensee shall deposit a sum equal to three months charges calculated at the said rate and that the said security "shall be free of interest". Clause 30 states that after adjustment of the outstanding dues, the deposit, free of interest shall be repaid to the sub-licensee on termination or

determination of either BHL's licence under the original licence deed dated 22nd April 1982 or upon termination or determination of the sub-licence in terms of the agreement. Clause 31 clarifies that the allotted space remains under the overall control and supervision of Assessee. Clause 32 gives the Assessee right of entry to any of the allotted spaces without notice for any inspection. Clause 34clarifies that the sub-licensees do not have the right of tenancy/sub-tenancy. Clause 35(a) makes the Assessee responsible to pay all the fees, rates, taxes etc.

9. Arising out of the different orders of the Assessing Officer ('AO') under Section 143(3) of the Act for AYs 1989-90, 1990-91, 1991-92, 1992-93, 1993-94, the Assessee filed Appeals before the CIT (A). Against the orders of the CIT (A) both the Revenue and the Assessee filed appeals before the ITAT.

10. By the impugned common order dated 14th February 2000, ITAT disposed of the Assessee's appeals (ITA Nos. 542, 543, 544, 545 and 546/ DEL/98) and the Revenue's cross appeals (ITA Nos. 154,1155,1156,1632, 1633 and 1634/Del/98) for the aforementioned AYs. The questions that were considered by the ITAT were answered by it in favour of the Assessee as follows:

(i) The domain over the hotel property is of the Assessee. It was utilising the property and it was not the case of Revenue that the NDMC ever made a claim for depreciation. It is the Assessee who made the investment, utilised the property, met the expenses of

wear and tear and replacement of the property which would be entitled for depreciation.

(ii) The sub-licence agreements in respect of the spaces in the WTT and WTC showed that it as the Assessee which was made responsible to pay all fees, rates, taxes etc. The Assessee had not relinquished its right of domain over the property but had allotted spaces to different sub-licensees who had no right, title etc. except having right of sub-licence which assessee had been permitted by NDMC through the main agreement of licence. Therefore, the Assessee was entitled to depreciation in respect of the WTT and WTC buildings as well. Consequently, the Assessee was entitled to depreciation in respect of sanitary and plumbing also for the whole of the period.

(iii) The Special Bench of the ITAT was seized of the issue whether an Assessee who was running a hotel was entitled to investment allowance. Therefore the issue was remanded to the AO to abide by the decision of the Special Bench when available.

(iv) As regards the question whether the deposits collected from the sub-licensees were taxable in the hands of the Assessee, the view already expressed in favour of the ITAT for the previous AY 1987-88 would apply if any amount received as deposit out of instalment in relation to the said AY i.e. 1987-88 is received in AY 1988-89. As regards the instalments received under the new licence agreements during and after AY 1989-90 the AO would have to decide on their

taxability. The AO's order was not clear on this aspect and the matter required to be remanded

(v) As regards the issue of interest on deferred licence fee, the order of the CIT (A) remanding it to the AO was modified by directing the AO to decide the issue in accordance with law as and when the claim was made by the Assessee.

(vi) The decision of the CIT (A) directing the AO to allow the arrears of licence fees on actual payment basis was upheld.

(vii) The direction of the CIT (A) to the AO to allow depreciation on the increase in liability on account of exchange rate fluctuation on notional basis was also upheld.

11. In the present appeals by the Revenue, by the order dated 27th November 2000, the Court framed the following questions of law:

(i) Whether the assessee is entitled to depreciation in respect of the hotel building, under Section 32 of the Act?

(ii) Whether the assessee is entitled to depreciation in respect of WTT and WTC under Section 32 of the Act?

(iii) Whether the ITAT was justified in holding that assessee was the owner of the hotel building, WTC and WTT and whether its conclusion can be said to be perverse?

(iv) Whether the assessee is entitled to depreciation on sanitary and plumbing?

(v) Whether the ITAT was right in not deciding the issue relation to claim on investment allowance?

(vi) Whether the ITAT was right in holding that the amount received by the assessee from the allottees/sub-licencees is not taxable?

(vii) Whether the order of the ITAT holding that the amount received by the assessee is not a taxable receipt is perverse and contrary to fact and evidence of records and ignores reality and the contradictory stand of the assessee?

(viii) Whether cost of construction has to be deducted from the amount received from the sub-licencees/allottees to calculate income of the assessee?

(ix) Whether the ITAT was justified in deciding the issue relating to entitlement for deduction on account of deferred licence fee?

(x) Whether the ITAT was justified in directing that depreciation be calculated on basis exchange rate prevailing on the last date of the financial year?

(xi) Whether the ITAT was right in allowing depreciation to be calculated on the basis of notional exchange rate when no payment had been made and their exists possibility of change in the exchange

rate and the exchange rate prevailing on the date of payment may be different?

12. At the outset it was stated by Mr. Ajay Vohra, learned Senior counsel for the Respondent Assessee that question (v) relating to investment allowance need not be decided as it has to await the outcome of the Special Bench decision of the ITAT and the consequential decision of the AO thereafter. Consequently, the said question is not being decided.

13. As far as Question (ix) is concerned, it relates to the entitlement of the Assessee for deduction on account of deferred licence fee. The Court finds that this question has in fact been decided in favour of the Revenue and the Assessee is not in appeal. It is, therefore, not understood why the Revenue should be aggrieved by the said determination. The order of the ITAT in relation to question (ix) is affirmed.

Depreciation

14. Questions (i) to (iv) concern the aspect of claim of the Assessee to depreciation in respect of hotel building, WTT and WTC under Section 32 of the Act. Mr. Vohra submitted that the whole purpose of allowing the depreciation was to replace the value of an asset to the extent it is depreciated during the period of accounting relevant to the AYs in question and such valuation as to that extent will be diminished by the corresponding allowance of depreciation. He

referred to the decision of the Supreme Court in ***P.K. Badiani v. CIT (1976)105 ITR 642 (SC)***. He also referred to the later decision in ***Mysore Minerals Ltd. v. CIT (1999) 106 Taxman 166***, where it was held that the word 'owned' in Section 32(1) is provided with reference to the control exercised over the property by the person claiming relaxation. It is submitted that since the Assessee has made the investment in the capital assets and is still utilizing it, the Assessee would be entitled to claim the said depreciation in respect of the hotel building, the WTT and the WTC from the respective periods when they were begun to be utilised. With reference to various clauses of the Agreements in question Mr. Vohra contended that the Assessee had complete control over the buildings and was also given right to sub-licence them. Alternatively it was submitted that explanation (1) to Section 32 had been inserted in the Act with effect from 1st April, 1988 and it provided that if the Assessee was carrying on business in the building not owned by the Assessee but in respect of which the Assessee had right of occupancy, the Assessee would be able to claim depreciation as if it were the owner thereof.

15. The analysis of the agreements in question has been undertaken by the ITAT and prior thereto by the CIT (A). Certain features of the agreements which persuade the Court to concur with the conclusions of the CIT (A) and ITAT are as under:

(i) although the land and building vest in the NDMC notwithstanding that the licence granted in favour of DAL, the

entire cost of construction of the buildings was borne by the assessee.

(ii) This is acknowledged in Clause 19 of the first Agreement dated 11th March 1981which states that "the licensor shall have a pre-emptive right to purchase the property built on the site after deducting the market value of the land at the market price then prevalent."

(iii) Under Clause 16 (xv) of the same Agreement, the building has to be kept insured by DAL in the joint names of itself and the NDMC against damage by fire, riots, civil commotion and earthquake etc.

(iv) Under Clause 16 (xii) the licencee was to pay all rates, taxes, charges, claims and out-goings in respect of the land and building except the house tax "as building will vest in the licensor, i.e., NDMC for all intents and purpose".

(v) As rightly pointed out by Mr. Vohra, the essential purpose of the vesting of the property in the NDMC is to enable it to invoke the provisions of the Public Premises (Eviction of Unauthorized Occupants), Act, 1971 for eviction of the licencee. Otherwise for all practical purposes the entire control of the buildings was with the licensee.

(vi) The fact that it was for the licensee which had the control over the entire building is also acknowledged in Clause 6 where the licensee was given a right to raise loans on the security of the structures/buildings/fixtures and fittings etc.

16. According to Mr. Vohra, AY in which depreciation was first claimed for the WTC was 1987-88, for the WTT 1988-89 and the hotel building in the AY 1989-90. His alternative argument was, therefore, that for the period commencing 1st April 1988 the new Explanation (1) which was inserted in Section 32 of the Act, would apply.

17. Explanation (1) to Section 32 of the Act also acknowledges that depreciation would be claimed by assessee who carries on business "in a building not owned by him but in respect of which the assessee holds a lease or other right of occupancy and any capital expenditure is incurred by the assessee for the purposes of the business or profession on the construction of any structure or doing of any work or in relation to..... the building." In such event, Section 32 (1) would apply "as if the said structure or work is a building owned by the assessee.

18. In any event even for the period earlier than 1st April 1988, in view of the decision in Supreme Court in ***Commissioner of Income Tax v. Podar Cement Private Limited (1997) 226 ITR 625*** and ***Mysore Minerals v CIT*** (*supra*) the legal position is no longer *res integra*. In

Podar Cement Private Limited the Supreme Court was called upon to consider whether the income derived by the assessee on the flat or the building were income from other sources and not income from the house property. The Court in that context considered the words 'owner' and accepted that this would include "that person who can exercise the rights of the owner, and not on behalf of the owner but in his own right." In ***Mysore Minerals*** (*supra*), the Supreme Court explained that "the very concept of depreciation suggests that the tax benefit on account of depreciation legitimately belongs to one who has invested in the capital asset, is utilizing the capital asset and thereby loosing gradually investment caused by wear and tear, and would need to replace the same by having lost its value fully over a period of time." On the facts of the case, although the appellant-assessee had only paid part of the price of the buildings in question to the Housing Board, and although the document of title had not yet been executed in its favour, the Court was of the view that the assessee would be entitled to depreciation. The Court held:

> "14. It is well-settled that there cannot be two owners of the property simultaneously and in the same sense of the term. The intention of the Legislature in enacting section 32 would be best fulfilled by allowing deduction in respect of depreciation to the person in whom for the time-being vests the dominion over the building and who is entitled to use it in his own right and is using the same for the purposes of his business or profession. Assigning any different meaning would not subserve the legislative intent. To take the case at hand it is the appellant-assessee who having paid part of the price, has been placed in

possession of the houses as an owner and is using the buildings for the purpose of its business in its own right."

19. The Court is satisfied that the during the AYs in question Assessee was indeed in full control of the three buildings, viz., the hotel building, the WTT and WTC and that in any event, notwithstanding the clarificatory amendment inserted as Explanation No. 1 in Section 32 with effect from 1st April 1988, the Assessee would be entitled to claim depreciation in respect thereof, including depreciation on the plumbing and sanitary ware installed therein. Consequently, Questions 1 to 4 are answered in the affirmative, i.e., in favour of the Assessee and against the Revenue.

Amounts received from sub-licensees

20. The Court next turns to Questions (vi) and (vii) which concern the nature of receipt in the hands of the Assessee as far as the amounts received from the allottees is concerned. As noted both by the CIT (A) as well as ITAT, the essential fact in relation to these questions is that the Assessee accepted interest free refundable deposits from the allottees of the spaces. The sub-licence agreements which have been referred to earlier made this position explicit. For the AY 1987-88, the AO treated the deposits as trading receipts and this view was confirmed upto the ITAT. This was the view taken for AY 1988-89 as well.

21. Before the ITAT for the AYs in question, the Revenue tried to project an argument that since by an amendment to Explanation 1 to

Section 2 (47) (v), with effect from 1st April 1988 'transfer' in relation to an 'immovable property' was assigned the same meaning as in Clause (d) of Section 269 UA of the Act, the consideration in a transaction which resulted in the transferee acquiring the right of enjoyment of the immovable property would have to be treated as a capital receipt. The ITAT found that the AO had not examined if the amount received by the Assessee in the concerned AY pertained to a sub-licence agreement executed prior to the AY in question. If it did then it was not taxable in view of the earlier decision of the ITAT. However, if it related to an agreement executed in the year under consideration, then the AO had to decide the issue of taxability in light of the amended provisions.

22. Mr. N.P. Sahni, learned Senior Standing counsel for the Revenue, referred to the decision of the Bombay High Court in ***Shree Nirmal Commercial Limited v. Commissioner of Income Tax (1992) 193 ITR 694 (Bom)***. The facts there were that non- refundable deposits were taken from the shareholders of the Assessee company and they were allotted floor space area "which they were not only entitled to occupy but were also entitled to assign to others on payment of compensation and to transfer their occupancy rights by sale of shares." It was in those circumstances held that "the whole transaction was, in reality, a sale of floor space by the Assessee company to its shareholders." It was concluded that "the residuary rights of ownership which remained with the Assessee company were negligible and of dubious value." Consequently, the deposits had to be

treated as trading receipt. As far as the present case is concerned, the facts are different inasmuch as what has been transferred to the sub-licencee is only a right of occupancy for the purpose of licence and nothing more. Whatever benefit the Assessee derived from the deposits has already been reflected in its business income on which it has been taxed.

23. It was submitted by Mr. Sahni that the deposits in the hands of the Assessee should be construed to be a 'benefit' arising from the business in terms of Section 28 (iv) and should be treated to be a taxable receipt. This argument was considered by the CIT (A). A reference was made to the order of the ITAT for the earlier AYs 1987-88 and 1988-89. After reference to the clauses of the sub-licence agreement it was concluded that the benefit derived by the Assessee on received finances by way of interest pre-deposit 'stands merged with the income declared by the Assessee during business'. Accordingly, it was held that 'no separate addition on account of benefit derived by the Assessee out of the deposits is separate payment of taxes.' In view of the discussion hereinbefore of the clauses of the sub-licence agreements, the Court concurs with the view expressed by the ITAT.

24. Questions (vi) and (vii) are accordingly answered in the affirmative upholding the order of the ITAT.

Foreign exchange rate fluctuation

25. As regards Questions (x) and (xi) both sides agree that the

questions stand covered in favour of the Assessee and against the Revenue by the decision of the Division Bench of this Court in ***Commissioner of Income Tax v. Woodward Governor India P. Ltd. (2007) 294 ITR 451 (Del)*** which has been affirmed by the Supreme Court in ***Commissioner of Income Tax v. Woodward Governor India P. Ltd. (2009) 312 ITR 254***. Consequently, the questions are answered in favour of the Assessee and against the Revenue affirming the order of the ITAT.

26. The appeals are disposed of in the above terms with no order as to costs.

S. MURALIDHAR, J

VIBHU BAKHRU, J

JULY 24, 2015/mg/*b'nesh/rk*