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

% Judgment delivered on: 03.10.2008

\+ **ITA No. 1147/2008**

COMMISSIONER OF INCOME TAX
DELHI-VI ...... **Appellant**

-versus-

UNITED HOTELS LTD ..... **Respondent**

Advocates who appeared in this case:

For the Appellant : Mr R. D. Jolly
For the Respondent : Mr Ajay Vohra, Ms Kavita Jha & Mr Sriram Krishna

CORAM :-

HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether the Reporters of local papers may be allowed to see the judgment ?

2. To be referred to Reporters or not ?

3. Whether the judgment should be reported in the Digest ?

BADAR DURREZ AHMED, J (ORAL)

1. This appeal under Section 260A of the Income Tax Act, 1961 is directed against the order dated 30.01.2008 passed by the Income

Tax Appellate Tribunal in ITA No. 996/Del/2005 pertaining to the assessment year 2001-02.

2. The assessee runs a hotel business. It paid an amount of Rs 1.19 crores to Megapode Airlines Limited (MAL) towards annual entitlement fee in terms of the agreement executed between them on 29.12.1999. The said agreement was for the purpose of availing certain fixed flying hours annually at discounted rates on charter hire basis of a Jet Aircraft for use by the assessee's directors, executives, hotel guests and employees. Under the agreement the assessee was entitled to avail of a maximum of 35 flying hours in a year to be provided by the jet belonging to MAL for an annual fixed charge of Rs 1.19 crores plus variable costs at the rate of Rs 65,000/- per flying hour as against the market rate of Rs 1.25 lacs per hour. The assessee was committed to the payment of fixed charges as indicated above irrespective of the fact as to whether the assessee utilized any of the flying hours or not. In the present case, the assessee was not able to utilize the flying hours, however the said sum of Rs 1.19 crores became due to MAL from the assessee on account of the

annual fixed charges. The said sum was paid by the assessee to the MAL.

3. The Assessing Officer did not allow this amount as a deduction on the plea that there was no utilization of the flying hours and secondly, that the payment was made to MAL which was an associate concern of the assessee and the objective was to reduce the income of the assessee. The Tribunal considered both these aspects and came to the conclusion that the assessee was liable to pay annual fixed charges as per the terms of the agreement irrespective of the hours actually utilized by it. The Tribunal also noted that the agreement was entered into by the assessee for its business purposes and it was in the interest of the assessee to have entered into such an agreement. It was observed that the assessee, being a five star hotel, in order to give better facilities to its premier customers had added the facility of charter flights. As such, the expenditure was incurred in the course of carrying on business. The Tribunal held that the same could not be disallowed. The Tribunal also returned a finding that there was commercial expediency for entering into such an agreement and that the assessee had negotiated the flying rates at a

concessional price. Consequently, it was held that the said expenditure was incurred wholly and fully for the purpose of business while computing the income chargeable under the head 'profit and gains of business' under Section 37 (1) of the said Act.

4. With regard to the second aspect of the matter, the Tribunal observed that disallowance under Section 40 A (2) could only be made if the revenue had discharged its burden of proving that the expenditure so incurred was excessive or unreasonable having regard to the fair market value of the goods, services or the facilities for which the payment was made. The Tribunal noted that no finding has been recorded by the Assessing Officer to show that similar facilities were available to the assessee at a lower price or that the assessee had made excessive payments. Consequently, in the absence of the such findings the Tribunal concluded that the provision of Section 40 A (2) could not be invoked for disallowing the said expenditure.

5. We note that although the two findings are in favour of the assessee, the Tribunal has remanded the matter to the Assessing Officer with certain directions, in as much as, the break-up of the

expenditure of Rs 1.19 crores had not been furnished during the course of the assessment proceedings.

6. In these circumstances, we do not see any reason to interfere with the impugned order passed by the Tribunal. In any event, no substantial question of law arises for our consideration. The appeal is dismissed.

BADAR DURREZ AHMED, J

RAJIV SHAKDHER, J

October 03, 2008
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