THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 22.10.2008

+ ITA 1241/2008 & ITA 1245/2008

DIRECTOR OF INCOME TAX, NEW DELHI ... Appellant

- versus –

KLM ROYAL DUTCH AIRLINES ... Respondent

Advocates who appeared in this case:
For the Appellant : Mr Sanjeev Sabharwal
For the Respondent : Mr Prakash Kumar

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE RAJIV SHAKDHER

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

2. To be referred to the Reporter or not ?

3. Whether the judgment should be reported in Digest ?

BADAR DURREZ AHMED, J (ORAL)

CM No. 14909/2008 in ITA 1241/2008

Allowed subject to all just exceptions.

ITA 1241/2008 & ITA 1245/2008

1. These appeals under Section 260A of the Income Tax Act, 1961 arise out of the common order dated 31.03.2008 passed by the Income Tax Appellate Tribunal in ITA Nos. 96-97/Del/2002 relating to

2. The limited question that arose for consideration before the Tribunal was whether the recovery/ adjustment of rent from CSC Private Limited by the assessee (KLM) was an income chargeable to tax in India. This question arose in the backdrop of Articles 6 and 8 of the Double Taxation Avoidance Agreement between India and the Netherlands. There is no dispute that the assessee is a company incorporated in the Netherlands and its main activity is operation of aircrafts in international traffic both for transport of passengers as well as of cargo handling. There is also no dispute that the profits from the international traffic would be taxable in the Netherlands, being the place of effective management of the assessee.

3. In respect of the cargo business, the assessee had obtained a licence to use certain premises situated in Bombay from the Airport Authority of India. The licence was specifically granted for the purpose of cargo handling and the licensee, that is, the assessee was not to use the premises for any other purpose other than for which the licence had been granted. The assessee entered into an agreement with CSC Private Limited for handling the cargo in India on its behalf. Under the agreement the assessee was liable to pay CSC for management, supervision, document handling, physical handling and tracking and tracing export and import cargo at Bombay. For these

services the assessee was liable to pay CSC a sum at the rate of Rs 9 per ton of the cargo handled.

4. Since the assessee was taxable in the Netherlands, it had not filed any returns. However, the Assessing Officer, while conducting the assessment proceedings with regard to CSC, came to learn that as per the accounts between the parties, the assessee had received certain amounts from CSC under the head "expenses payable being warehouse rent adjusted against revenue received".

5. The exact nature of the transaction was that the assessee was required to pay licence fee / rent to Airport Authority of India for use of the space for cargo handling. The assessee had entered into an agreement with CSC for handling its cargo at Bombay. The payment made by the assessee to CSC was after adjustment of the licence fee / rent paid by KLM to Airport Authority of India. This adjustment was treated by the department as income of the assessee chargeable to tax in India under Article 6 of the said Double Taxation Avoidance Agreement.

6. The Commissioner of Income Tax (Appeals) also confirmed the view taken by the Assessing Officer.

7. However, the Income Tax Appellate Tribunal, after examining the entire matter, came to the conclusion that the arrangement between the assessee and the CSC was that the rent payable to Airport Authority of India, though payable by the assessee in the first instance, was recovered from the charges payable by the assessee to CSC. From this, the Tribunal concluded that the recovery of the said charges towards licence fee/ rent did not arise from any activity outside the activity of cargo handling in international traffic. The Tribunal concluded that such adjustment was directly and inextricably linked to the cargo handling business of the assessee. The only effect was that the ultimate expense payable by the assessee to CSC got reduced and that the recovery of licence fee / rent was not in the course of a separate business of renting out the premises. The Tribunal also noted that at no point of time was it ever alleged that the premises were used for any purpose other than for which the licence had been granted by the Airport Authority of India.

8. The Tribunal, therefore, came to the conclusion that all the activities were linked to each other and there was no scope for dissecting the activities by excluding the recovery of rent from CSC as a separate source of income for the assessee in India. The Tribunal also

by letting out the premises on lease or by subletting the same. Consequently, the Tribunal concluded that the provisions of Article 6 of the Double Taxation Avoidance Agreement were not applicable. The Tribunal ultimately held that the assessee did not derive any income other than the profits from the operation of aircrafts in international traffic and, hence, in terms of Article 8, the same was not subject to tax in India but was subject to tax in the Netherlands as, admittedly, the effective management of the assessee was situated outside India and in the Netherlands. The additions made by the Assessing Officer and the Commissioner of Income Tax (Appeals) were consequently deleted.

9. The Tribunal also accepted the alternative contention raised on behalf of the assessee that even if the recovery of rent was to be treated as an income from other sources at the hands of the assessee, since an identical amount was paid to the Airport Authority of India, the same would be entirely offset against each other because there was a direct nexus between the receipt and the payment. The Tribunal concluded that in such a situation, the assessee would be entitled to deduction under Section 57 (iii) of the said Act being expenditure wholly and exclusively for the purpose of making or earning such income. Thus, even on the alternative plea, the Tribunal decided in

10. We have heard the learned counsel for the appellant, who argued to the contrary and supported the view taken by the Assessing Officer as well as the Commissioner of Income Tax (Appeals). We are unable to agree with the submissions made by the learned counsel for the appellant. The Tribunal has correctly appreciated the law on the issue and has also determined the facts. We find no perversity in the factual conclusions. No substantial question of law arises for our consideration.

The appeals are dismissed.

BADAR DURREZ AHMED, J

RAJIV SHAKDHER, J

October 22, 2008
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