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

% **Date of Decision : 14th February, 2012.**

+ ITA 504/2010
+ ITA 545/2010

COMMISSIONER OF INCOME TAX Appellant
Through Ms. Rashmi Chopra, sr. standing
counsel

versus

ELEL HOTELS & INVESTMENT LTD Respondent
Through Mr. M S Syali, Sr. Adv. with Mr.
Rahul Sateeja, Adv.

+ ITA 99/2011
+ ITA 354/2011

CIT Appellant
Through Ms. Rashmi Chopra, sr. standing
counsel

versus

ELEL HOTELS Respondent
Through Mr. M S Syali, Sr. Adv. with Mr.
Rahul Sateeja, Adv.

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

SANJIV KHANNA,J: (ORAL)



Heard.

2. Admit.

3. The following substantial question of law is framed :

“Whether the Income Tax Appellate Tribunal was right in holding that no addition can be made on account of license fee in respect of Sea Rock Hotel?”

4. We have heard the counsel for the parties and proceed to pronounce the decision on the aforesaid question.

5. The assessee is the owner of land and building known as Sea Rock Hotel. In November, 1978, the assessee entered into a lease contract agreement with ITC Ltd. As per the terms of the agreement, it was entitled to license fee @ 23% of the turnover. There is no dispute that the license fee received by the assessee was offered to tax and was taxed under the head “income from business” till 12th March, 1993. On the said date, the property got affected in serial bomb blast. It appears that thereafter disputes arose between ITC Ltd. and the assessee, on who was liable to carry out the repairs of the damaged portion of the structure and on other related issues.

6. In the returns filed for the year 1995-96 onwards the assessee did not disclose and include the license fee as income. The stand taken by the respondent-assessee was that the agreement between them and ITC Ltd. was unilaterally terminated by them and therefore no amount was due, accrued and payable to them.



7. The Assessing Officer did not accept the contention of the assessee and made an addition of 23% of the gross turnover as income accrued and payable to the assessee.

8. Similar controversy also arose in the year 1997-98. The appeals being ITA Nos.3806/Mum/01 & 2369/Mum/99 filed for the assessment years 1995-96 and 1997-98 were disposed of, by the tribunal on aforesaid issues vide order dated 23rd July, 2007. The relevant and reasoning portion of the order reads as under :

“8. Ground No.6 for the assessment year 1995-96 and ground Nos.5, 6 & 7 for the assessment year 1997-98 pertain to recognition of income of licence fee on account of accrual from ITC Ltd. The brief facts are as follows: -

The assessee owns a hotel called Sea Rock. The hotel property was given on lease operating lease to ITC Ltd. In November, 1978. This property got affected in serial bomb blasts, which took place in Mumbai on 12th March, 1993. The operations of this hotel came to a halt and a dispute arose between the assessee company and ITC Ltd. with regard to onus and responsibility to repair the damaged portion of the structure and other related issues. Ultimately, a settlement agreement was executed on 1.5.2005 and the consent agreement between the assessee and ITC Ltd. was filed before Sole Arbitrator Justice H. Suresh and a consent award was passed on 24th May, 2005. The relevant part of the agreement relevant to the issue in hand is that ITC Ltd. need not make payment of hotel operator fees to the assessee for the legal dispute period of 13 years. The award does not provide any payment by M/s. ITC Ltd. to the assessee company including hotel operatorship fees under the hotel operatorship agreement dated 3.5.1996.



Further, as per clauses 11 and 14, it is clear that the assessee company is/shall not be entitled to any further amount towards hotel operatorship agreement.

9. From the above facts, it is clear that the assessee's right to receive licence fee from M/s. ITC Ltd. in terms of the agreement, which was in dispute, was ultimately settled. The agreement which gave rise to such right was itself a subject matter of dispute, due to unforeseen circumstances that has occurred in this case i.e. serial bomb blasts. The ITC Ltd. has not paid the assessee such licence fee and has been disputing the payment of the same. In these circumstances, we are of the considered opinion that no income accrued to the assessee in the form of licence fee for these impugned assessment years. Thus, we allow the grounds of appeal of the assessee for both the assessment years on this issue and delete the addition of licence fee in question.”

9. We may note that appeals have been preferred by the Revenue against the said decision before the High Court of Bombay and the same are stated to be pending. However, counsel for the parties are not able to state and inform us about the present status of the said appeals.

10. Similar additions have been also made for the assessment years 2002-03, 2003-04 and 2004-05 in the regular assessment proceedings under Section 143(3). The Assessing Officer in the three years held that 23% of the turnover of the hotel should be included in the income of the assessee.

11. As far as assessment year 2002-03 is concerned, the assessee has accepted the said addition and did not question the same in the first



appellate proceedings. Ld. counsel for the assessee has however, submitted that this was on account of the fact that the assessee was allowed depreciation on the hotel building and in view of the said position the tax effect was negligible.

12. With regard to the assessment year 2003-04 and 2004-05, the assessee succeeded before the first appellate authority. The Revenue preferred appeals before the tribunal but have not succeeded and have accordingly filed ITA Nos.504/2010 and 545/2010 which relate to assessment years 2004-05 and 2003-04.

13. On 28th February, 2007, the Revenue had conducted search under Section 132 of the Act on the assessee. As a consequence of the said search, proceedings under Section 153A of the Act were initiated. In the assessment order passed under Section 153A, similar additions on account of license fee @ 23% of the turnover were made. The said additions were made subject matter of the challenge before the appellate authorities. The tribunal has deleted the aforesaid additions for the assessment years 2003-04 and 2004-05, accepting the contention of the assessee. These orders passed by the tribunal are made subject matter of appeal in ITA Nos.354/2011 which pertains to assessment year 2003-04 and ITA 99/2011 which pertains to assessment year 2004-05.

14. We may notice here that the tribunal while accepting the claim of the assessee in the impugned orders which are subject matter of challenge



in ITA Nos.545/2010, 504/2010, 99/2011 and 354/2011 has not referred to the factual matrix, the legal issue involved or discussed and elucidated thereon. The tribunal has merely followed their earlier orders for the assessment year 1995-96/1997-98. We have quoted the aforesaid order of the tribunal above.

15. During the course of the hearing before this Court, the Revenue has filed a paper book consisting of the agreement between assessee and ITC Ltd. and also the settlement agreement between the assessee and ITC Ltd. We may note that the Revenue was directed to file the aforesaid documents vide order dated 17th May, 2010 passed in ITA No.504/2010 and 545/2010. We have examined the said agreements.

16. The tribunal in the impugned orders has not discussed the effect of the aforesaid agreement and the settlement agreement. It has not been examined what is the effect of the alleged unilateral termination of the agreement by the assessee. The date on which the so-called unilateral termination was affected has also not been stated. There is no discussion on these aspects and whether or not any amount was received or paid to by the respondent-assessee during this period. We cannot as an appellate court under Section 260A for the first time go into the said factual aspects. It is apparent that there are contentious and counter-submissions on the factual matrix, which have to be examined and gone into by the tribunal itself. It is for the tribunal to examine and go into the said factual matrix, examine the relevant clauses of the agreement between the assessee and



the ITC Ltd., consider the claim regarding unilateral termination, the legal effect thereof and the subsequent settlement agreement between the assessee and ITC Ltd. and the legal effect thereof. We may also note the contention of the Revenue that the alleged unilateral termination of the agreement was not raised by the assessee at the time of original assessment proceedings. This is disputed by the counsel for the assessee. This factual aspect again has to be examined and gone into and examined by the tribunal.

17. Keeping in view the aforesaid position, we answer the aforesaid substantial question of law in negative and in favour of the Revenue and against the assessee. It is, however, clarified that we have not examined the claim or the addition on merits. We have answered the question in favour of the Revenue and against the assessee as the tribunal has not discussed and gone into the factual matrix and the legal issues involved. The tribunal will re-examine, the entire aspect and questions afresh without being influenced by their earlier order. It will be open to the tribunal to allow parties to place documents on record as per law.

18. The appeals are accordingly disposed of. No order as to costs.

SANJIV KHANNA, J

R.V.EASWAR, J

FEBRUARY 14, 2012/vld