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

\+ **ITA No. 562 of 2008**

Reserved on: 24th May,2012
% Date of Decision: 1st June, 2012

Commissioner of Income Tax ....Petitioner
Through Mr. N.P. Sahni, Sr. Standing Counsel with
Mr. Ruchesh Sinha, Advocate.

Versus

Sunaero Limited ….Respondent
Through Dr. Rakesh Gupta with Ms. Rani Kiyala, Advs.

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

SANJIV KHANNA, J.

Revenue in this appeal under Section 260A of the Income Tax Act, 1961 (Act, for short) impugns order dated 26th October, 2007, passed by the Income Tax Appellate Tribunal (tribunal, for short) in the case of Sunaero Limited, the respondent assessee. The appeal arises from the block assessment order for the period 1st April, 1990 to 21st November, 2000, as the respondent assessee was subject to search and seizure operation on 21st November, 2000.

2. We are required to decide the following substantial questions of law, which were framed vide order dated 11th November, 2011:-

> "(i) Whether the Income Tax Appellate Tribunal was right in deleting the addition of Rs.21 crores made by

the Assessing Officer under Section 45 read with Section 47(v) of the Income Tax Act, 1961?

(ii) Whether the impugned order passed by the Income Tax Appellate Tribunal is perverse?"

3. Sunair Hotels Ltd. was granted the rights to develop a hotel at Bangla Sahib Road by the New Delhi Municipal Corporation (NDMC) in 1970. However, due to some differences that developed between the two, the development rights were cancelled. Sunair Hotels Ltd. incorporated another group company, the respondent assessee herein, and vide letter dated 16th September 1993, wrote to the NDMC to substitute its name with that of the respondent assessee. During the pendency of this request, in the year 1993- 94, Sunair Hotels Ltd. transferred its development rights to the respondent assessee for NIL consideration. However, the NDMC refused to transfer the licensee rights in the name of the respondent assessee. During the year 1994-95, the respondent assessee transferred the hotel development rights back to Sunair Hotels Ltd. for a consideration of 21 crores.

4. The respondent assessee in the return filed for the assessment year 1995-96, had shown capital gain of Rs.21 crores on transfer of hotel development rights to Sunair Hotels Ltd., but the same was claimed to be exempt from capital gains tax under Section 47(v) of the Act.

4A. Section 47(v) of the Act reads as under:-

> *"**47. Transactions not regarded as transfer**.—Nothing contained in Section 45 shall apply to the following transfers:—*
>
> *xxxx*
>
> *(v) any transfer of a capital asset by a subsidiary company to the holding company, if—*
> *(a) the whole of the share capital of the subsidiary company is held by the holding company, and*
> *(b) the holding company is an Indian company:*
>
> ***Provided** that nothing contained in clause (iv) or clause (v) shall apply to the transfer of a capital asset made after the 29th day of February, 1988, as stock-in-trade;"*

5. A reading of the said provision shows that it applies when a wholly owned subsidiary transfers its capital assets for consideration to the holding company. Consideration received by the wholly owned subsidiary company in such cases is not liable to capital gains tax. A subsidiary company has been defined in Section 4 of the Companies Act, 1956 (Companies Act, for short) as:-

> "***4. Meaning of "holding company" and "subsidiary"**.—*
>
> *(1) For the purposes of this Act, a company shall" subject to the provisions of sub-section (3), be deemed to be a subsidiary of another if, but only if,—*
> *(a) that other controls the composition of its Board of directors; or*
> *(b) that other—*
> *(i) where the first-mentioned company is an existing company in respect of which the holders of preference shares issued before the commencement of this Act have the same voting rights in all respects as the holders of equity shares, exercises or controls more than half of the total voting power of such company;*

(ii) where the first-mentioned company, is any other company, holds more than half in nominal value of its equity share capital; or]
(c) the first mentioned company is a subsidiary of any company which is that other's subsidiary.

Illustration
Company B is a subsidiary of Company A, and Company C is a subsidiary of Company B. Company C is a subsidiary of Company A, by virtue of clause (c) above. If Company D is a subsidiary of Company C, Company D will be a subsidiary of Company B and consequently also of Company A, by virtue of clause (c) above; and so on.

(2) For the purposes of sub-section (1), the composition of a company's Board of directors shall be deemed to be controlled by another company if, but only if, that other company by the exercise of some power exercisable by it at its discretion without the consent or concurrence of any other person, can appoint or remove the holders of all or a majority of the directorships; but for the purposes of this provision that other company shall be deemed to have power to appoint to a directorship with respect to which any of the following conditions is satisfied, that is to say—
(a) that a person cannot be appointed thereto without the exercise in his favour by that other company of such a power as aforesaid;
(b) that a person's appointment thereto follows necessarily from his appointment as director2 [* *] or manager of, or to any other office or employment in, that other company; or*
(c) that the directorship is held by an individual nominated by that other company or a subsidiary thereof.

(3) In determining whether one company, is a subsidiary of another—
(a) any shares held or power exercisable by that other company in a fiduciary capacity shall be treated as not held or exercisable by it;

(b) subject to the provisions of clauses (c) and (d), any shares held or power exercisable—
(i) by any person as a nominee for that other company (except where that other is concerned only in a fiduciary capacity); or
(ii) by, or by a nominee for, a subsidiary of that other company, not being a subsidiary which is concerned only in a fiduciary capacity;
shall be treated as held or exercisable by that other company;
(c) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first-mentioned company or of a trust deed for securing any issue of such debentures shall be disregarded;
(d) any shares held or power exercisable by, or by a nominee for, that other or its subsidiary [not being held or exercisable as mentioned in clause (c)] shall be treated as not held or exercisable by that other, if the ordinary business of that other or its subsidiary, as the case may be, includes the lending of money and the shares are held or the power is exercisable as aforesaid by way of security only for the purposes of a transaction entered into in the ordinary course of that business.

(4) For the purposes of this Act, a company shall be deemed to be the holding company of another if, but only if, that other is its subsidiary.

(5) In this section, the expression "company" includes any body-corporate, and the expression "equity share capital" has the same meaning as in sub-section (2) of Section 85.

(6) In the case of a body corporate which is incorporated in a country outside India, a subsidiary or holding company of the body corporate under the law of such country shall be deemed to be a subsidiary or holding company of the body corporate within the meaning and for the purposes of this Act also, whether the requirements of this section are fulfilled or not.

> *(7) A private company, being a subsidiary of a body corporate incorporated outside India, which, if incorporated in India, would be a public company within the meaning of this Act, shall be deemed for the purposes of this Act to be a subsidiary of a public company if the entire share capital in that private company is not held by that body corporate whether alone or together with one or more other bodies corporate incorporated outside India."*

6. The Assessing Officer in the block assessment order dated 29th November, 2002, held that the assessee was not a wholly owned subsidiary of Sunair Hotels Ltd. He observed that during the course of search operations, material/documents seized contradicted the claim of the respondent assessee, that it was a wholly owned subsidiary of Sunair Hotels Ltd. It was in fact a wrong claim. The respondent assessee had seven registered individuals as shareholders and Sunair Hotels Ltd. was not a holder of even a single share.

7. During the course of block assessment proceedings, the respondent assessee claimed that it was wholly owned subsidiary of Sunair Hotels Limited and that the seven shareholders were nominees of Sunair Hotels Limited and not shareholders in their individual right. The entire expenditure for incorporation of the company, as well as investment in the subscribed share capital of Rs.7,000/-, was made by the holding company in the names of the seven shareholders. The Assessing Officer rejected the said contention observing that material unearthed during the search operation under Section 132 of the Act, and

during the post search investigation, elucidated that the respo asssessee was not a wholly owned subsidiary of Sunair Hotels Limited as claimed. He specifically examined and rejected the two contentions of the respondent being (i) that the shareholders were nominees of Sunair Hotels Limited and were not shareholders in their individual capacity and (ii) that the entire investment in the share capital of Rs. 7,000/- was made by Sunair Hotels Limited, i.e. the holding company, recording the following reasons:-

(i) Share Certificate of 100 shares of Rs.10/- each, allotted on 23rd October, 1993, were in the names of the individual shareholders. The share certificates do not show that the shareholders were nominees of Sunair Hotels Limited.

(ii) The Memorandum and Articles of Association submitted by the respondent assessee, along with the reply dated 29th August, 2002 did not state that the respondent assessee was a wholly owned subsidiary of Sunair Hotels Ltd. and that the shares were subscribed by Sunair Hotels Limited.

(iii) No declaration was made under Section 187C of the Companies Act, that the seven shareholders were nominees of Sunair Hotels Limited. It is obligatory to file a declaration in the prescribed form under Section 187C of the Companies Act.

(iv) Prescribed forms under Section 187C of the Companies Act filed with the Registrar of Companies in January 2000 i.e. six and half years after incorporation of the respondent assessee. These forms purportedly signed and dated on 25th October, 1993, were forged and fabricated as per the Assessing Officer. The said forms were purchased from Jain Book Agency (Sales), Connaught Place, New Delhi and as per the statement of Nabhi Kumar Jain and Meenakshi Mathur of Jain Book Agency, dated 28th February, 2001 these forms were printed and sold after May-June, 1998. The statement made by Nabhi Kumar Jain and Meenakshi Mathur have been quoted in the assessment order.

(v) Two shareholders, i.e Robin Gupta and Radhika Prasad Dubey, in their statements had clearly stated that they had not signed the forms under Section 187C of the Companies Act. The statements of Robin Gupta and Radhika Prasad Dubey have been quoted in the assessment order.

(vi) The Government Examiner of Questioned Documents had affirmed that the forms submitted under Section 187C were not signed by Robin Gupta and Radhika Prasad Dubey.

(vii) Robin Gupta had denied that he was a nominee of Sunair Hotels Limited and stated that he was a shareholder in his individual capacity.

(viii) Radhika Prasad Dubey in his statement stated that he had worked with V.K. Bindal & Company, Chartered Accountant and had signed the

Memorandum and Articles of Association but had no association Sunair Hotels Limited. He had ascribed his signature on the Memorandum etc. on the asking of Vinod Bindal.

(ix) The inspection report of Mr. J.N. Tikku, Deputy Director (Inspection) dated 22nd November, 2000 under Section 209A of the Companies Act states that there were several irregularities/violations with regard to the issue of shares etc.

(x) The minutes of Board of Directors of the respondent assessee seized at the time of search show extensive use of fluid to change the dates of the meetings. Robin Gupta had categorically denied his attending the Board meeting on 23rd October, 1993 in which it was recorded that the individual shareholders were nominees of Sunair Hotels Limited. Minutes of the meeting of Board of Directors, seized as Annexure A-31 show that they have been written on the same date using the same pen and in the same writing. Annexure 31 was a false and forged document created by the respondent assessee to support the claim that it was a wholly owned subsidiary of Sunair Hotels Limited.

(xi) Sunair Hotels Limited had made a request to NDMC on 16th September, 1993 to substitute and transfer the license to the respondent assessee but the respondent assessee was incorporated subsequently on 22nd October, 1993.

(xii) Incurring of expenditure at the time of incorporation doe make the company, which incurs the expenditure, the holding company and the company incorporated a subsidiary. It certainly does not make the incorporated company, a wholly owned subsidiary.

8. Accordingly, it was held by the Assessing Officer that the respondent assessee was not a wholly owned subsidiary of Sunair Hotels Limited. Consequently, the entire amount of Rs.21 crores received by the respondent assessee was taxable and the benefit under Section 47(v) was not available.

9. The aforesaid findings made by the Assessing Officer and the denial of benefit under Section 47(v) of the Act was reversed by the first appellate authority. The Commissioner of Income Tax (Appeals) held that the statement of Robin Gupta was not reliable. Statement of Radhika Prasad Dubey was to the effect that he was acting as a dummy Director and was not a de facto Director. This was not sufficient and the Assessing Officer should have had made further enquiries. In these circumstances, it was necessary to find out and ascertain who had actually made investment in the share capital of the respondent assessee. This would determine the real ownership of the respondent assessee. The payment of share capital was made by cheque and the copy of the receipt issued by the Registrar of Companies had been filed. This aspect was not controverted and denied by the Assessing Officer, while

denying benefit under Section 47(v) of the Act. Section 187C c Companies Act is a procedural provision and the requirement of the Companies Act cannot be imported and considered for examining whether conditions under Section 47(v) of the Act were fulfilled or not. As far as forgery of signatures and discrepancy in the minutes books was concerned, it was for the authorities under the Companies Act to take notice and action. However, having regard to the provisions of Section 47(v), this aspect was immaterial. Investment in the shares was made by the holding company, Sunair Hotels Ltd., and this position was reflected in the books of both the respondent assessee and Sunair Hotels Limited. Robin Gupta had not stated that he had made payment for 100 shares out of his own funds and had not shown or claimed ownership of shares in his balance-sheet. Addition of Rs.21 crores was treated as unwarranted and the same was deleted.

10. Appeal filed by the Revenue, has been dismissed by the impugned order dated 26th October, 2007. We deem it appropriate to reproduce the entire reasoning given by the tribunal, as a question of perversity has been raised. Paragraphs 8 to 14 of the order passed by the tribunal read as under:-

> *"8. We have considered the rival submissions of both the parties, perused the record and carefully gone through the impugned order of the tax authorities below.*

9. In the instant case the ld. DR for the Revenue except placing reliance on the reasoning given in the order of AO was not able to controvert the factual observations made in the order of CIT(A) and the findings recorded on the basis of the conclusions drawn on the factual observations made by the CIT(A).

10. On the other hand the ld. AR for the assessee first reiterated submissions made before the CIT(A) and thereafter relying on the reasoning given in the order of CIT(A) submitted that the CIT(A) rightly deleted the impugned addition of Rs.21 crores made by the AO.

11. The first point required to be resolved by us is whether on the basis of statement of Shri Robin Gupta recorded on 8-3-2001 the AO was justified in concluding that Shri Robin Gupta held the shares in his own name and not as a nominee because except bald oral statement, he has not been able to substantiate the claim of investment in the shares in his personal capacity by providing any document/evidence when the case of the assessee is that the source of the investment in the share capital of Sunaero Ltd. is from the funds given by the Sunair Hotels Ltd. The payment towards the share capial was made through cheque and copy of the receipts issued by registrar of companies supports the claim of the assessee. The AO has not controverted this aspect of the assessee u/s 47(v) of the Act it is necessary that the holding company should hold the whole of the share capital of the subsidiary company and should also be an India Company. The assessee, in view of the payment towards share capital having been made by Sunair Hotels Ltd., has been able to show that these conditions have been met in the case of the assessee and therefore the assessee is entitled to the benefit allowed u/s 47(v) of the Act.

12. The undisputed facts in this case are that the assessee company M/s Sunaero Ltd. was incorporated on 22-10-93 with 7 subscribers to its share capital. During the year 1994-95 M/s Sunaero Ltd. transferred the hotel development rights back to M/s Sunair Hotels Ltd. for a consideration of Rs.21 crores. This amount was declared to be the profits in the annual financial statement of M/s Sunaero Ltd. for the year ending 31.3.95. However, this amount was claimed to be exempt from Capital Gains Tax u/s 47(v) of the I.T. Act in the return of its income filed for A.Y. 1995-96. Whereas, under the section any capital gains arising out of transfer of capital assets from a wholly subsidiary company to its holding company is not liable to gain tax. As discussed hereinabove, the assessee from the above mentioned evidence was able to show that the holding company was holding the whole of the share capital of the subsidiary company and the payments towards the share capital of the assessee too was made by M/s Sunair Hotels Ltd. The AO without examining other six subscribers to the share capital, simply on the basis of the statement of Shri Robin Gupta has tried to establish that the shars of the company were held in the name of the 7 subscribers and not as nominee. On analyzing the statement of Shri Robin Gupta we find firstly that Shri Robin Gupta states that the signatures appearing on form no. 1 prescribed under Rule3(1) of sec. 187C were not his. It is however to be noticed that in his statement Shri Robin Gupta has further stated that he was unable to recall the mode of payment of the share capital. Further, that the day to day affairs of the company were being looked by Shri S.P. Gupta, an another subscriber. We have already mentioned hereinabove that the AO has not made any enquiries from the other remaining sharesholders of the assessee company, so, in these facts the only satisfactory basis for arriving at a decision regarding capital gain u/s 47(v) could not be the examination of the other subscribers who could actually disclose as to

whether they had made the investment in the share capital of the assessee company. Only on this basis the real ownership of the shares in question could have been ascertained by the AO, but, in the instant case the AO has failed to do so by bringing on record any cogent evidence.

13. Now coming to the other point whether the assessee company has fulfilled the condition laid down in sec. 187C of the Companies Act and the effect thereof. In this regard we find that Income Tax Act, 1961 does not contain any reference to sec. 187C of the purpose of considering the taxability of capital gains u/s 74(v) (sic.) of the Act otherwise too it is simply a procedural section for the purpose of disclosure of benami holding of shares. So far as the alleged violation of Companies Act in terms of late submission of declaration u/s 187, forgery or mismatch or signatures and discrepancies in recording in minute books are concerned, it is for the concerned authorities under the relevant enactments to take note of and to take such punitive action as may be deemed fit. However, as regards the provisions of sec. 47(v) of I.T. Act it is clear from the facts of the instant case that investment in the shars of the assessee company has been made by M/s Sunair Hotels Ltd. which is reflected in the balance sheets of both the companies. Regarding the statement of Shri Robin Gupta we have already analyzed hereinabove that his statement is not worth placing any reliance as he failed to establish from cogent evidence that in the fact he made the payment of 100 shares out of his own funds because he neither furnished any detailed of such payment nor the same was shown by him in his balance sheet indicating the ownership of the same.

14. For the reasons stated above we are of the opinion that in the existing facts and circumstances, the assessee has been able to establish that the capital gains of Rs.21

> *croresarising out of transfer of the capital assets from a wholly-owned subsidiary company to its holding company was not liable to capital gains tax as per the provisions of sec. 47(v) of Income Tax Act, 1961. Accordingly, the order of CIT(A) in this regard is upheld and grounds of appeals taken by the Revenue are rejected."*

11. Before us, the Revenue has filed three paper books, Paper Book – I, Paper Book – II and Paper Book – III. The respondent assessee has also filed a paper book. We are only entitled to refer and have examined the documents filed and available to the tribunal, when we examine the question of perversity. Of course, the orders passed by the Assessing Officer and the CIT(A) can be referred to.

12. In order to decide the issue in question, we would like to point out the contentions raised on behalf of the Revenue, which are as under:-

(i) Sunair Hotels Limited was not a shareholder of the respondent assessee. It does not hold even a single share. The seven shareholders were individuals.

(ii) As per Section 49 of the Companies Act, all investments made by a company should be held in its own name. Sub-section (3) stipulates that a company may hold shares in the subsidiary company in its own name or in the name of its nominee, in so far as it is necessary to do so to ensure that the number of members of the subsidiary is not reduced to less than 7 (seven), in the case of public limited company, and in the case of private company the number should not fall below 2 (two).

(iii) There is a difference between a subsidiary company and a w owned subsidiary company. In the case of wholly owned subsidiary company, the entire shareholding must be held by the holding company or its nominees. This is not necessary in the case of a subsidiary company. (See Sections 4 and 49 of the Companies Act)

(iv) Respondent assessee was not set up or incorporated as a wholly owned subsidiary company of Sunair Hotels Limited. In the Memorandum of Understanding dated 17th June, 1993 or in subsequent correspondence with NDMC, it was not alleged or stated that the respondent assessee was a wholly owned subsidiary company. The letter indicated that the formation of separate company was for the purpose of a joint venture or as a subsidiary but it cannot be said that the respondent assessee was incorporated as a wholly owned subsidiary.

(v) The letter/correspondence exchange with the Secretariat for Industrial Approvals, Ministry of Industry of Foreign Investment and Technologies dated 30.9.1994 were self-serving documents and do not establish the claim and do not constitute an admission or a proof that the respondent assessee was a wholly owned subsidiary.

(vi) There is no contemporaneous record to show that the seven shareholders were nominees of Sunair Hotels Limited or that the investment towards share capital was made exclusively or only by Sunair Hotels Limited.

(vii) Members and Directors of the respondent assessee and S Hotels Limited were not the same.

(viii) Share certificates were issued in the various individuals' names and do not mention that the shareholders/ members were nominees of Sunair Hotels Ltd.

(ix) Statements of Robin Gupta, Radhika Prasad Dubey and the Director and Manager of Jain Book Depot and the forgery and the report of the Government Examiner of Questioned Documents, have been ignored and not given due credence.

(x) The declaration under Section 187C was not filed in time, and in at least two cases, signatures were forged on the form filed with the Registrar of Companies.

The reports and findings made by the Department of Company Affairs have been ignored.

(xi) On the date when the shares were issued, the respondent assessee did not have a bank account and the payments were made in cash. There is nothing to show that the payments towards share application money were made by Sunair Hotels Limited. The ledger account of the respondent assessee in the books of Sunair Hotels Limited, relied upon, does not support the contention that the Sunair Hotels Ltd. had made payment for the shares.

13. Learned counsel for the respondent assessee has submitted raised the following contentions:-

(i) Appeal under Section 260A is maintainable only on substantial questions of law. Findings of facts cannot be re-appreciated. In the present case, there are concurrent findings of both, CIT(Appeal) and the tribunal in favour of the assessee. Reliance is placed on ***Janardhana Rao (M) vs. Joint CIT,*** (2005) 273 ITR 50 (SC), ***CIT vs. P. Mohankala***, (2007) 291 ITR 278 (SC) and other decisions on similar lines of the Delhi High Court.

(ii) No evidence relating to undisclosed income was found during search and, therefore, block assessment proceedings are void. Block assessment proceedings are not a substitute for regular assessment proceedings. [See ***Commission of Income Tax vs. Ravi Kant Jain***, (2001) 250 ITR 141 (Del); ***CIT vs. V.B. Aggarwal,*** (2008) 296 ITR 750 (Del), ***CIT vs. Pramod Kumar Gupta,*** *(2010)* 320 ITR 408 (Del); ***CIT vs. Balaji Wire Private Limited,*** (2008) 304 ITR 393 (Delhi); ***N.R. Paper and Board Limited & ors. vs. DCIT,*** *(1998)* 234 ITR 733 (Guj.); ***Caltradeco Steel Sales (P) Ltd. vs. DCIT*** (2000) 243 ITR 643 (Cal.); ***CIT vs. Md. Rizwan*** (2009) 316 ITR 317 (Patna).]

(iii) In the regular assessment order under Section 143(3) in the case of assessee relating to the assessment year 1995-96, the Assessing Officer had held that factually no transaction had taken place between Sunair

Hotels Limited to transfer the hotel development rights in favour o respondent assessee and then by the respondent assessee in favour of Sunair Hotels Limited. He had held that these transactions were infructuous and had to be ignored. He had accordingly recast the balance-sheet. The said assessment order has become final and binding and, therefore, there is no question of capital gain on transfer of the hotel development rights by the respondent assessee in favour of Sunair Hotels Limited. Applicability of Section 47(v) is of academic interest and inconsequential.

(iv) The findings recorded by the Assessing Officer in the assessment order under Section 143(3) for the assessment year 1995-96 dated 9th February, 1998, could not have been examined in the block assessment proceedings. This aspect was specifically raised by the respondent assessee in the appeal before the CIT (Appeals) and accepted by the Assessing Officer in the remand report.

(v) The respondent assessee is entitled to raise this issue and question before the High Court as one of the facets of the issue or a part of the subject matter of the appeal. (See ***CIT vs. Indian Molasses Co. (P) Ltd.*** (1970) 78 ITR 474 (SC), ***Sundarama and Co. (P) Ltd. vs. CIT*** (1967) 66 ITR 604 (SC), ***Raja Sharda Narain Singh vs. CIT*** (1968) 68 ITR 209 (SC).

(vi) Correspondence of Sunair Hotels Limited with NDMC in letters dated 12th August, 1993 and 16th September, 1993, shows that Sunair Hotels Ltd. wanted to incorporate its subsidiary. The agreement dated 17th June, 1993, between Sunair Hotels Ltd. and Aeroflot also discloses the intention to create a subsidiary. Letters dated 2nd May, 1995 and 31st May, 1995 written by Sunair Hotels Ltd. and the assessee to Ministry of Industries affirms and admits that the respondent assessee was a wholly owned subsidiary of Sunair Hotels Ltd.

(vii) Ministry of Industry's letter dated 27th June, 1995, acknowledges that Sunair Hotels Ltd. was the holding company of the respondent assessee. This was also acknowledged in the Ministry of Industry's letter dated 24th May, 1995. Internal note of Law Department of NDMC also records that the respondent assessee was to be established as a subsidiary of Sunair Hotels Ltd.

(viii) The entire fund for establishment and incorporation of the respondent assessee was provided/incurred by Sunair Hotels Ltd. Share application money of Rs.7,000/- was also recorded and shown in the balance sheet and books of accounts of Sunair Hotels Ltd.

(ix) In the balance sheet of Sunair Hotels Ltd. as on 31st March, 1995 and 31st March, 1994, the assessee was shown as a wholly owned subsidiary. These balance-sheets were filed with the Registrar of Companies in 1995.

(x) The register of members records that the seven shareholders nominees of the holding company i.e. Sunair Hotels Ltd.

(xi) The respondent assessee and the holding company were operating from the same premises. The transaction of Rs.21 crores was duly disclosed in the balance sheet/ computation of assessable income for the assessment year 1995-96.

(xii) Statement of Robin Gupta was not credible and an afterthought. There were differences between Robin Gupta and other shareholders. Robin Gupta is related to S.P. Gupta and because of differences, their relationship had taken an ugly turn. He had wrongly answered and claimed that he was not a nominee of Sunair Hotels Ltd. Robin Gupta had executed a power of attorney in favour of V.K. Bindal. Being a well educated person holding degree in MBA (Finance), he was aware of the papers signed by him. Robin Gupta had not disclosed and declared the shares, held by him in the respondent assessee, in the balance-sheet and documents filed with his income tax returns. He was not the de facto shareholder and Sunair Hotels Ltd. was the beneficial and the de facto shareholder.

(xiii) Even otherwise, there were gaps between statements of Robin Gupta on different aspects and his claims/assertions are not substantiated by facts.

(xiv) Robin Gupta did not recall and explain the source of payme Rs.1000/- for subscribing to the shares of the respondent assessee.

(xv) Sunaero Ltd. had furnished and given replies to the Department of Company Affairs, Economic Offences Wing, Crime Cell, Delhi and they were satisfied and no further action has been taken.

(xvi) Law does not require that the Articles and Memorandum of Association of the subsidiary or holding company should mention/record beneficial ownership or whether the company in question is a wholly owned subsidiary.

(xvii) Opinion of Government Examiner of Questioned Document, Simla is debatable and not a fair and clear opinion. The opinion rendered by them relate to signature of Radhika Prasad Dubey and as regards Robin Gupta, they had asked for more specimen signatures.

(xviii) Section 187C of the Companies Act requires filing of forms but this is for the purpose of reporting. This is a formality and does not affect the rights of the beneficial shareholder.

(xix) The delay in filing the forms has been condoned. The forms purchased from Jain Book Agency were filled up on the basis of earlier declarations taken on plain paper dated 23rd October, 1993. Thus, the aforesaid date was mentioned on the forms. This aspect, therefore, does not negate the respondent assessee's claim that it was a wholly owned subsidiary.

(xx) Statement of Radhika Prasad Dubey does not support department's case.

14. At the very outset, we may record that several issues and contentions raised by the appellant/Revenue and the respondent/assessee have not been recorded or dealt with by the CIT(Appeals) or the tribunal. These remain unnoticed and have not been adverted to, considered and evaluated. The tribunal has also not dealt with various legal issues and contentions raised by both sides. A reading of the order passed by the tribunal shows that same is cryptic as also factually wrong and incorrect on factual conclusions/findings recorded.

15. We have quoted Section 47(v) of the Act. To claim benefit under the said Section respondent assessee must be a wholly owned subsidiary of the holding company. Merely because the respondent assessee was a subsidiary of Sunair Hotels Ltd., benefit under Section 47(v) cannot be claimed. The requirement is more stringent.

16. In paragraph 11 of the order, it is stated that the Assessing Officer was not justified in concluding that Robin Gupta was holding shares in his own name and not as a nominee because of the bald oral statement, as there was no other material/evidence. He has not been able to substantiate the claim that investment in the shares was in his personal capacity. He did not prove and establish the said fact from any document/ evidence, when the case of the respondent assessee was that

the source and payment in fact was made by Sunair Hotels Ltd. Fo sake of convenience, we are reproducing paragraph 11 once again:-

> *"11. The first point required to be resolved by us is whether on the basis of statement of Shri Robin Gupta recorded on 8-3-2001 the AO was justified in concluding that Shri Robin Gupta held the shares in his own name and not as a nominee because except bald oral statement, he has not been able to substantiate the claim of investment in the shares in his personal capacity by providing any document/evidence when the case of the assessee is that the source of the investment in the share capital of Sunaero Ltd. is from the funds given by the Sunair Hotels Ltd. The payment towards the share capial was made through cheque and copy of the receipts issued by registrar of companies supports the claim of the assessee. The AO has not controverted this aspect of the assessee u/s 47(v) of the Act it is necessary that the holding company should hold the whole of the share capital of the subsidiary company and should also be an India Company. The assessee, in view of the payment towards share capital having been made by Sunair Hotels Ltd., has been able to show that these conditions have been met in the case of the assessee and therefore the assessee is entitled to the benefit allowed u/s 47(v) of the Act."*

17. We have examined the said reasoning but find that it is substantially, and for a large part, factually incorrect and wrong. The respondent assessee has placed on record a copy of the ledger account of respondent assessee in the books of Sunair Hotels Limited. The same, as per the date mentioned thereon, was printed on 23rd December, 1994 and the ledger account reads:-

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L E D G E R AS ON ……. 23/12/94 TIME 14.54.49 Pg. No. 29

Voucher No.	Date	Narration	Bill No.	Bill Dt.	Cheque No.	Cheque Date	Debit	Credit	Balance
65	15/10/93	DD FVR ROC P&H FOR SUN AERO LTD.					38020.00		38020.00
66	17/10/93	PRDF CGHS TO VKB & CO. FR REGIN OF SUNAERO LTD.					19480.00		57500.00
83	30/11/93	CHQ PD FR MOA PTG FR SUN AERO THRU TRANSASTA			832037	30/11/93	17500.00		75000.00
149	31/03/94	RECT FR ALLOT. OF 700 SH @ 10/- SUN AERO LTD.						7000.00	68000.00"

18. The said ledger account would reveal that on 15th & 17th October, 1993, two debit entries of Rs.38,020/- and Rs.19480/- were made as payments forwarded to the Registrar of Company for registration of the respondent assessee. The next entry of Rs.17,500/- is made on 30th November, 1993, as Cheque paid on behalf of the respondent assessee. The aforesaid payments would only show that the respondent assessee was liable to pay Rs. 75,000/- to Sunair Hotels Ltd. who had made the said payments or had provided funds or was a creditor. The last entry on 31.3.1994 relates to Rs.7,000/- and is on the credit side. As per the said entry, the same was made for allotment of 700 shares @ Rs.10/- each in the respondent assessee to Sunair Hotels Ltd. The said entry is an adjustment entry and no payment either by cheque or cash has been made. The respondent assessee was admittedly incorporated on 22nd October, 1993. The Articles and Memorandum of Association record the initial shareholding in the name of 7 persons. These shareholdings were issued on or before the date of incorporation. For issue of shares, payment for the shares has to be made. It is not the case of the

respondent assessee that these were partly paid up shares. Sequi that the payments for the issue of share capital should have been made on or before the date of incorporation i.e. 22nd October, 1993. Obviously the entry dated 31st March, 1994, that too an adjustment entry made in the books of Sunair Hotels Ltd. would not show and establish that the payment of the shares was made by Sunair Hotels Limited. It is accepted and admitted that other than this document i.e. the ledger account of Sunair Hotels Ltd., no other paper or document was produced or filed before the tribunal and in fact there is no other paper or document produced or filed before us to justify and state that payment for shares in question was made by Sunair Hotels Ltd. The payment was certainly not by cheque as recorded and held by both CIT (Appeals) and the tribunal.

19. It is an accepted position that shares were issued and held in the name of Robin Gupta. The amount of Rs.1,000/-, is not a big or princely sum. It is not understood and stated what document or evidence was required to be given/ furnished by Robin Gupta, when the two appellate forums recorded that Robin Gupta had failed to substantiate the claim of investment in the shares and that the source was his own personal fund. Apparently what had weighed and mattered was the finding that the source of payment for purchase of the shares was the

cheque issued by Sunair Hotels Limited. It is apparent from the l[illegible] account that it was never the claim of the respondent assessee that Sunair Hotels Ltd. had paid for the share capital by cheque.

20. Revenue has submitted that the respondent assessee has not denied but has accepted that Robin Gupta was the recorded shareholder. In his returns, Robin Gupta has not claimed or stated that he was a nominee of Sunair Hotels Ltd. Failure to mention the shares recorded/ standing in his name was a lapse and an error on the part of Robin Gupta. The Revenue submits that at best this is a neutral factor. But from the said factum, no inference or legal conclusion can be drawn that Sunair Hotels Ltd. was the beneficial shareholder. This was and would be an erroneous conclusion.

21. Normal presumption in law is that the registered shareholder holds the share in his own right and in his individual/ personal capacity. He does not hold shares as a nominee of a third person. It is the contrary which has to be proved by the party who claims or asserts that the recorded shareholder is a nominee. The onus is, therefore, on the party who claims to the contrary. The said party has to lead evidence sufficient in law to enable the authorities/tribunal to come to the conclusion that it/she/he has discharged the onus. The evidence should be such that it can be held that the shares were not held by the shareholder in his

individual/ personal capacity but as a nominee of the third person. ***In Re: Dinshaw Maneckjee Petit Bart***, AIR 1927 Bom 371]

22. It was recorded that the receipts were issued by Registrar of Companies. This is again factually incorrect. It is not case of the respondent assessee that the Registrar of Companies had issued any receipts for issue of share capital in the name of the respondent assessee. The further finding recorded is that the Assessing Officer had not controverted these facts. This is wrong and incorrect as per the findings recorded in the assessment order. The last finding in the said paragraph that the payment towards share capital by Sunair Hotels Ltd. has been established beyond doubt, is a presumptuous statement without reference to any other material/evidence which forms the basis/foundation.

23. Thereafter, the tribunal has stated that the statement of Robin Gupta, that he had not signed form I prescribed under Rule 3 relating to declaration under Section 187C, should be ignored for the reason that he was unable to recall the mode of payment of share capital and it was stated that day to day affairs of respondent assessee was looked after by S.P. Gupta - another subscriber. It is not necessary for the shareholder to be involved in day to day working. Neither does the shareholder become a nominee shareholder if he is not involved in day to day working. Further, the shares were issued in the name of Robin Gupta.

The amount involved was only Rs.1,000/- which was not big substantial amount. We have already referred to the findings recorded by the tribunal that the payment of share capital was made by Sunair Hotels Ltd. by cheque is factually incorrect.

24. Paragraph 12 of the order of the tribunal, states that the respondent assessee was incorporated on 22nd October, 1993 with seven subscribers to the share capital. Hotel development rights were transferred back to Sunair Hotels Ltd. for consideration of Rs.21 crores in the year 1994-95. This amount was claimed as exempt from capital gain under Section 47(v). The respondent assessee in view of the evidence discussed in paragraph 11 above, was able to show that the respondent assessee was wholly owned subsidiary and the payments towards share capital were made by Sunair Hotels Ltd. The aforesaid findings as recorded by the tribunal are contrary to the contention and plea raised by the respondent assessee before us relying upon the assessment order dated 2nd September, 1998, under Section 143(3). In view of the said factual finding, the respondent assessee cannot urge and argue that the transaction relating to transfer of hotel development right should be ignored and treated as non-existent/void. The finding of the tribunal is to the contrary. The tribunal has further recorded that the Assessing Officer did not examine the six other subscribers to the share capital.

This is factually incorrect. The Assessing Officer had examined even quoted, the statement made by one more subscriber namely Radhika Prasad Dubey. The tribunal has probably not examined and not gone through the statement of Radhika Prasad Dubey, which has been quoted in the assessment order itself. For benefit under Section 47(v), the subsidiary must be wholly owned subsidiary. Being a subsidiary is not sufficient. Thus even if one of the shareholders was not a nominee of the holding company, benefit under Section 47(v) has to be denied.

25. Thereafter, the tribunal has recorded that the question of real ownership of shares should have been ascertained by the Assessing Officer but he has failed to do so. As noticed and held above, there is no presumption that the registered shareholder is a nominee of a third person. In case of a dispute, the person who claims to the contrary has to establish and show that the person mentioned in the register of shareholders was his nominee. The onus is on the person who states and claims that what is apparent is not real. It was not for the Assessing Officer to establish to the contrary but for the assessee to show and establish that it was a wholly owned subsidiary of the holding company and the shareholders were merely the nominees of the holding company. There is no presumption that the shareholders were nominees.

26. In paragraph 13, the tribunal has referred to requireme Section 187C of the Companies Act and effect thereof. It is stated that the violation of Companies Act, mismatch of signature, discrepancies in recording of the minutes books were aspects which the authorities under the Companies Act could take note of and also take punitive action. As far as provisions of Section 47(v) are concerned, the investment in the shares was made by Sunair Hotels Ltd. and the same was reflected in balance-sheet of both companies i.e. Sunair Hotels Ltd. and the respondent assessee.

27. With regard to the aforesaid observations, we may note that Section 187C or Section 49 of the Companies Act and violation thereof and penalty prescribed is one aspect. But, the effect of the said violation has to be examined and considered. It has to be also examined and considered whether violation of the said provisions would prevent and bar the respondent assessee from claiming that it was wholly owned subsidiary and the recorded shareholders were mere nominees. We would have examined the said aspect but refrain from doing so as we are passing an order of remit. Therefore, it may not be appropriate and proper for us to decide the said aspect and it may cause prejudice to the parties. This aspect/question is not examined and elucidated in the impugned order. However, another contention of the Revenue may be

noted that de hors provisions of Section 49 and 187 of the Comp Act, the Benami Prohibition Act, 1988, may have to be also examined. We are not stating anything in this regard as there are exceptions carved out in the Benami Act itself. Examination of exceptions may require factual elucidation and findings. This legal aspect may be raised by the Revenue on remand.

28. However, we do not agree with the observations of the tribunal that the question whether or not the respondent is a 100% subsidiary of Sunair Hotels Ltd., can be examined without reference to the provisions of the Companies Act or other enactments. The Act, i.e. Income Tax Act, 1961, deals with and relates to taxation of income. For the purpose of determining taxable income, provisions and parameters/stipulations have been made/prescribed in the Act. In a given case, however, the authorities under the Act (i.e. Income Tax Act) may have to examine provisions of other enactments, when required and necessary. The term "subsidiary" or "wholly owned subsidiary" have not been be defined in the Act i.e. the Income Tax Act. Therefore, reference is to be made to the other Acts and in this case, the Companies Act. Effect of the violation of Section 49 and 187C of the Companies Act is one aspect but the other issue, which has to be examined, is the evidentiary value and the effect when no such declaration was initially made and the subsequent filing of the declaration is disputed and contested. It is

claimed that the signatures on the forms/declarations made were f[illegible] and fabricated. The tribunal is required to examine and consider whether the said conduct, reflects and is of relevance.

29. The last part of paragraph 13 refers to the statement of Robin Gupta and states that the tribunal had analyzed the statement and it cannot be relied upon as he has failed to establish that he had made payment of Rs.1000/- from his own funds as this amount was not shown in his balance sheet. We have already commented about this aspect above.

30. At this stage, we may notice two contentions of the respondent. The first contention is that block assessment proceeding are bad as no material or evidence was found in the search. This aspect has not been examined and dealt with by the tribunal. A reading of the order passed by the Assessing Officer would show that he has referred to the evidence and material which was found during the search and thereafter, he has referred to the post search investigation and verification. As per the assessment order, the evidence/material found during the search and post search investigation had revealed that the respondent assessee was not 100% subsidiary of Sunair Hotels Ltd. As we are passing order or remit, this question, if raised, will be examined and considered by the tribunal. The second contention of the respondent relying upon the

assessment order dated 9th February, 1998, does not help or assis respondent for the said order has proceeded on the assumption that the respondent assessee was 100% subsidiary of Sunair Hotels Ltd. However, as per the case of the appellant, material and evidence found during the search and subsequent enquiries had revealed that the respondent assessee was not a 100% subsidiary of Sunair Hotels Ltd. It is, therefore, the contention of the appellant that the assessment order dated 9th February, 1998 does not help or protect the respondent assessee as the said order had proceeded on the basis of premise and assumption that the respondent assessee was not a 100% subsidiary of Sunair Hotels Ltd. This aspect will be examined by the tribunal. We refrain from deciding this aspect/question. Order of the tribunal we record is silent on this question.

31. In ***Sree Meenakshi Mills Limited versus CIT***, (1957) 31 ITR 28 (SC), the Supreme Court had propounded the following principles:

> *"**25.** We have discussed the authorities at great length, as some of the observations contained therein appear, at first sight, to render plausible the contention of the appellant, and it seems desirable that the true meaning of those observations should be clarified, lest error and misconception should embarrass and fog the administration of law. The position that emerges on the authorities may thus be summed up:*
>
> *(1) When the point for determination is a pure question of law such as construction of a statute or document of title, the decision of the Tribunal is open to reference to the court under Section 66(1).*

> *(2) When the point for determination is a mixed question of law and fact; while the finding of the Tribunal on the facts found is final its decision as to the legal effect of those finding is a question of law which can be reviewed by the court.*
>
> *(3) A finding on a question of fact is open to attack, under Section 66(1) as erroneous in law when there is no evidence to support it or if it is perverse.*
>
> *(4) When the finding is one of fact, the fact that it is itself in inference from other basic facts will not alter its character as one of fact."*

32. In case of pure question of facts, inference from proved facts is a question of fact. However, as observed in ***Bomford versus Osborne***, (1942) 10 ITR [E.C.] 27 there can be cases where inferences drawn from proved or admitted facts, can give rise to question of law when facts proved or admitted, do not provide and do not support, the conclusions of fact. A finding of fact can be challenged on the ground that it is perverse. Way back in 1954, the Supreme Court in ***Dhirajlal Girdharilal versus CIT***, (1954) 26 ITR 736 (SC) had observed:

> *"….if the court of fact, whose decision on a question of fact is final, arrives at this decision by considering material which is irrelevant to the enquiry, or by considering material which is partly relevant and partly irrelevant, or bases its decision partly on conjectures, surmises and suspicions, and partly on evidence, then in such a situation clearly an issue of law arise….*
>
> *.....It is well established that when a court of fact acts on material, partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the court*

> *was affected by the irrelevant material used by it in arriving at its finding. Such a finding is vitiated because of the use of inadmissible material and thereby an issue of law arises."*

33. In ***CIT versus Daulat Ram Rawat Mull***, (1973) 87 ITR 349, the Supreme Court held that onus of proving what was apparent is not real is on the party who claims it to be so. There should be some direct nexus between the conclusions of fact arrived at by the authorities concerned and the primary facts upon which the conclusion is based. Use of extraneous or irrelevant material in arriving at the conclusion would vitiate the conclusion of fact, because it is difficult to predicate to what extent, the extraneous and irrelevant material has influenced the authority in arriving at the conclusion of fact.

34. Therefore, if a decision excludes or ignores admissible or relevant evidence, takes into account inadmissible evidence, irrelevant consideration or extraneous materials, a substantial question of law arises. Similarly, when an authority has proceeded on an assumption, which is erroneous in law, a question of law can arise.

35. A factual decision is perverse if the authority has acted without any evidence or on view of facts, which cannot be reasonably entertained. A perverse finding is one, if it is arrived at without any material or if it is arrived at or inference is made on material, which would not have been accepted or relied upon by a reasonable person conversant with the law. If

the finding is based upon surmises, conjectures or suspicion and i rationally possible. A factual conclusion is regarded as perverse when no person duly instructed or acting judicially could act upon the record before him, have reached the conclusion arrived at by the tribunal/authority [see ***CIT versus S.P. Jain***, (1973) 87 ITR 370 (SC)].

36. We are conscious that it has been observed that the order must be read as a whole to see whether the test of perversity is satisfied but in the present case when we apply the test expounded in ***Dhirajlal Girdharilal*** (supra) and ***Daulat Ram Rawat Mull*** (supra) and also read the order as a whole, we reach the affirmative opinion in favour of the appellant-Revenue. It is the aforesaid test, which has been applied by us in our conclusion recorded above.

37. In view of the aforesaid discussion, we answer the second question of law in affirmative, i.e., in favour of the appellant-Revenue and against the respondent-assessee. The first question is answered with the order of remit as it would be better and appropriate if the entire issue is examined threadbare by the tribunal. It would not be proper for us to decide the said question without elucidation and finding of facts being firmly recorded by the tribunal. We refrain from carrying out the said exercise as the tribunal is the final fact finding authority. They should record findings of facts and then apply the law.

38. To cut short the delay, the parties are directed to appear before Assistant Registrar of Tribunal on 6th July, 2012, when a date of hearing will be fixed.

The appeal is accordingly disposed of. No costs.

-sd-
(SANJIV KHANNA)
JUDGE

-sd-
(R.V. EASWAR)
JUDGE

June 1, 2012
Kkb/VKR