



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

+ ITA 968/2009 *with*
ITA 999/2009

Date of decision: 15th October, 2009

EMMPAC HOLDINGS PVT. LTD. Appellant
Through: Mr. Satyen Sethi with
Mr. Johnson Bara, Advs.

versus

COMMISSIONER OF INCOME TAX, DELHI-VIII & ANR.
..... Respondents

Through: Mr. Sanjeev Sabharwal,
Adv.

% **CORAM:**
HON'BLE MR. JUSTICE A.K.SIKRI
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

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 the Digest?

J U D G M E N T

A.K.SIKRI, J. (ORAL)

1. Appellant, who is engaged in the business of trading in music/video/audio cassettes, CD's, VCD's, DVD's etc. filed return for the assessment year 2002-03 and 2003-04 (out of which these two appeals arise), and in these returns he had shown payment of license fee in respect of premises at 42, Vasant Lok, Vasant Vihar, New Delhi taken on license. In addition to the license fee paid in respect of the aforesaid premises, the appellant had also claimed business expenses



paid @ Rs. 1,41,000/- per month to M/s Raas Consultants & Company for purported consultancy services in connection of running of aforesaid music shop. M/s Raas Consultants & Company is the sole proprietorship concern of Mrs. Hina Jetha. She is the wife of Mr. Vimal Jetha who is the landlord/owner of premises no. 42, Vasant Lok, Vasant Vihar, New Delhi.

2. The Assessing Officer, in order to ascertain as to whether any consultancy service was provided by Mrs. Hina Jetha, sent notice to her. However, she did not respond and did not appear before the Assessing Officer. On a questionnaire made to the Assessee itself about the nature of service being provided by the said consultants, the Assessee candidly admitted that no services were provided by M/s Raas Consultancy Company. The Assessee come out with the plea that the real motive of the licensor namely Mr. Vimal Jetha was that Assessee firm should not have complete control on the usages of the premises in question and with a view to accomplish the aforesaid objective the Assessee had no option but to accept the above condition of the licensor to enter into agreement with M/s Raas Consultants & Company. Finding that in fact no consultancy services were provided by the said consultants, the Assessing Officer disallowed the aforesaid expense.

3. The CIT(Appeal), however, reversed this finding holding that it was the Assessee's compulsion to incur such expenditure and even if Mrs. Hina Jetha had not provided any consultancy services, it was clear from the clauses of the agreement that this agreement was to run concurrently with the lease agreement for the premises and also co-terminus with the license dated 2nd July, 2001 executed



between Mr. Vimal Jetha and the Assessee. Therefore, for all practical purposes the payment of consultancy fee was nothing, but part of the rent so far as the Assessee was concerned and on this basis he allowed the expenditure accepting the appeal of the Assessee herein.

4. The ITAT, in the appeal filed by the Department has, however, reversed the aforesaid decision of the CIT(Appeal) and restored the orders of the Assessing Officer. The ITAT had observed that in the license agreement dated 2nd July, 2001 there is no stipulation that the said agreement will be subject to entering into an agreement with Mrs. Hina Jetha for consultancy services. Since, it is a fact that Mrs. Hina Jetha had not rendered any service to the Assessee, the expenditure incurred cannot be allowed as business expenditure. The following observations of the Tribunal in this respect are worth a note:

“Accordingly, in our considered view, the Id. CIT(Appeals) has wrongly concluded that the consultancy charges were in the nature of rent and the assessee was forced to enter into second agreement, but for which the assessee would not have got the premises from Shri Vimal Jetha. The payment has been made on account of consultancy services which were not rendered to the assessee. Therefore, the expenditure cannot be treated as incurred wholly and exclusively for the purposes of business. Even the initial onus cast on the assessee that the expenditure was incurred wholly and exclusively for the purpose of the business was not discharged. If the initial onus was discharged by the assessee and the same was not acceptable to assessing officer, the law required the assessing officer to bring contrary evidence on record to prove otherwise. The legal position is settled in this regard. It is an admitted fact as apparent from order of CIT (Appeals) was wrong in concluding that the assessing officer failed to bring any material on record to prove that the claim of payment was bogus or the funds were diverted back to the assessee. Since there is no clause in the deed of license compelling the assessee to make payment to Mrs. Hina Jetha nor any services having been rendered by Mrs. Hina Jetha to the assessee, the Id. CIT (Appeals) was not justified to concluded that the expenditure was incurred for acquisition of the premises and related to the business of



the assessee. Accordingly, we set aside the order of the Id. CIT (Appeals) and restore the order of the assessing officer.

5. Learned counsel for the Assessee submits that the Tribunal misdirected itself by not going into the real nature of the consultancy agreement entered into between the Assessee and M/s Raas Consultancy Services. He reiterated the submission made by the Assessee before the Tribunal as well as CIT (Appeal). Learned counsel further submits that CIT (Appeal) had rightly concluded that in reality it was an agreement for payment of rent which was clear from the terms of the agreement, inasmuch as this agreement was co-terminus with the license agreement and the Assessee was forced to enter into such an agreement with the purported consultants, at the instance of the licensor of the premises namely Mr. Vimal Jetha. He also relies upon the judgment of the Supreme Court in the case of ***Sassoon J. David and Co. P. Ltd. vs. Commissioner of Income Tax, Bombay, 118 ITR 261*** and ***Travancore Sugars and Chemicals Ltd. vs. Commissioner of Income-tax, Kerala, 62 ITR 566***, in support of the proposition that the authorities are bound to go into the real nature of the agreement and nomenclature of the agreement would not be of determinative effect.

6. While there is no quarrel with the aforesaid judgments, in the present case we find that the Tribunal was not influenced merely by the nomenclature of the agreement. We have gone into the various clauses of the agreement, which has been filed by the appellant as Annexure-A in these appeals. It is termed as "Consultancy Services Agreement". Further, in consideration of a sum of Rs.1,41,000/- per month payable by the Assessee to the said consultants, the agreement



stipulates that following kinds of services shall be provided by the consultants:

“1.2 “Services“ means consultancy services being provided by M/s Raas Consultants & Company in connection with the administration and management of the showroom to M/s Neo Planet.

.....

2. Appointment

M/s. Neo Planet hereby engages M/s Raas Consultants & Co. to provide Consultancy Services to M/s Neo Planet in connection with the running of the music shop, on the terms and conditions as set forth in this Agreement.

3. Management and Consultancy Fees.

3.1 In consideration of M/s Raas Consultants & Co. providing the Services to M/s Neo Planet. M/s Neo Planet company shall pay to M/s Raas Consultants & Co. a sum of Rs.1,41,000/- (Rupees One lac forty one thousand only) for each month, during the subsistence of the Agreement. The said consideration shall be paid to M/s Raas Consultants & Co. on or before the 7th day of each English calendar month.

3.2 All fees payable under this Agreement shall be made net of applicable withholding tax (s) and made at the times specified in this Agreement.”

7. On going through the agreement, it is clear that the consultants had agreed to provide consultancy services in connection with the administration and management of the showroom. The appointment was in connection with the running of the music shop on the terms and conditions as set out in the said agreement. Thus, the Assessee was required to make the payment for the services to be provided by the consultants as enumerated in the said agreement. Therefore, even when one has to go into the nature of the agreement, it is clearly a consultancy services agreement. Whether the Appellant-Assessee was forced to enter into such an agreement would be of no consequence. Apart from the claim of the Assessee that it was forced to enter into such agreement at the instance of Mr. Vimal Jetha, no



document or any other material has been produced to substantiate this contention. As pointed out above Mrs. Hina Jetha did not appear even when she was served with the notice. The Assessee could have obtained some letter or other documents from Mr. Vimal Jetha to buttress the aforesaid submissions. Even that was not done.

8. In the circumstances, this plea of the Assessee has rightly been rejected by the Tribunal. We thus find that no question of law arises and hence dismiss these appeals.

A.K. SIKRI, J.

SIDDHARTH MRIDUL, J.

October 15, 2009

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