(2010) 11 DEL CK 0293

Delhi High Court

Case No: ITA No''s. 42, 62, 536, 539, 540, 1254, 1255, 1685 and 1756 of 2009

Commissioner of Income Tax	APPELLANT
Vs	
C.J. International Hotels Ltd.	RESPONDENT

Date of Decision: Nov. 18, 2010

Acts Referred:

- Income Tax Act, 1961 - Section 143(2), 147, 22, 23, 27

Citation: (2011) 197 TAXMAN 230

Hon'ble Judges: Suresh Kait, J; A.K. Sikri, J

Bench: Division Bench

Advocate: P.L. Bansal, in All Appeals, for the Appellant; M.S. Syali Husnal Syali and Mahua, Karla, in All Appeals, for the Respondent

Final Decision: Dismissed

Judgement

A.K. Sikri, J.
CM No. 15140/2010 in ITA No. 1254/2010 & CM No. 15142/2010 in ITA No. 1255/2010

Exemption is allowed, subject to just exceptions.

CM stands disposed of.

2. ITA Nos. 42, 62, 536, 539, 540 of 2009, ITA Nos. 1254, 1255, 1685 and 1756 of 2010

For the reasons stated in these applications, delay in refilling the appeals is condoned.

Applications stand disposed of.

ITA Nos.42, 62, 536, 539, 540 of 2009, ITA Nos.1254, 1255, 1685 and 1756 of 2010

3. Admit on the following substantial questions of law, which arises for consideration in all these cases.

Whether the ITAT has not erred on facts and in law in directing the Assessing Officer not to charge the annual letting value of the West Tower under the head income from house property since the principle of res-judicata does not apply in income tax proceedings?

4. With the consent of the learned Counsel for the parties, we have heard the matter finally at this stage itself. The facts in brief leading to the aforesaid question of law may be recapitulated first. The Asses see company is running a five star hotel known as Hotel Le-Meridian Windsor Place, New Delhi. The lawn on which the hotel is constructed belongs to NDMC and NDMC has executed a license deed in favour of the Assessee granting licence for a period of 99 years for the running of the aforesaid hotel. After taking the said lawn on licence on the terms executed in the licence deed, the Assessee had constructed the said hotel. Adjacent to the hotel, there is another building constructed on this very lawn, which is known as West Tower. This building is located in the same compound in which the Hotel building is located. Admittedly, this building is not used for hotel business of the ITA Nos. 42, 62, 536, 539, 540, 1685/2009, 1254, 1255, 1756/2010 Page 4 of 10 Assessee, but the apartments of this building were given on sub-licence basis to different parties for carrying on business as specified on the sub-licence agreements. The licence agreement which was entered into between the Assessee and the NDMC permits the Assessee to sub-licence the portion of the premises. It is on the basis of this authorization given in the licence deed that the Assessee has sub-licenced offices and apartments in the West Tower to the various parties. The sub-licences given to these parties are for a period of 9 years and 11 months, which is renewable at the request for the sub-licensees. The Assessee is not charging any rent lease or licence fee from these parties instead, the Assessee has received interest free security deposits in the year of original sub-licence, which receipt was shown by the Assessee company as unsecured loan in its balance sheet. The sub-licence deeds, which are executed by the Assessee with the sub-licensees also permit the sub-licensees to transfer the same to any other person on payment of transfer charges to the Assessee company. Thus, the sub-licensee is entitled to transfer the said sub-licence to third party as well. However, at the time of transfer of the said sub-licence, certain transfer charges are payable to the Assessee company. It is not in dispute that whenever these transfer charges are received by the Assessee on transfer of sub-licence by the sub-licensee in favour of the third party, the Assessee is showing these transfer charges as its income and is offering the same for tax.

5.he Assessing Officer (AO) found that almost all the sub-licensees had transferred their sub-licenses and various other persons were, thus, occupying these premises. Those persons have entered into the agreement with the sub-licensees as per which they were paying rents to the sub-licensees. It is also an admitted fact that the rents/licence fees received by the sub-licensees on these transfers to the occupiers has been shown as rental income and taxed at the hands of sub-licensees under the head ''income from house property''.

6. e AO, however, asked the Assessee to explain why property known as West Tower be not fixed on its annual letting value as per which Section 23 of the Income Tax Act (hereinafter referred to as ''the Act''). To put it otherwise, the AO wanted to fix annual letting value in respect of the said West Tower sub-licensed by the Assessee by fixing its notional value and charging the tax thereupon under the head ''income from house property''. It is for this reason that the aforesaid show cause notice was issued. The Assessee in reply to the said notice raised various objections to the aforesaid proposed move of the AO. Some of these objections included:

a) The Assessee was only a licensee in respect of the aforesaid premises and the actual owner was NDMC. Thus, the Assessee was not the ''owner'' of the premises. Therefore, provisions of Section 23 of the Act are not applicable.

b) It was also highlighted that in the previous years, the aforesaid arrangement as disclosed by the Assessee was accepted by the AO and therefore, on the principle of consistency, such a move on the part of the AO in fixing the annual letting value of the West Tower, when no actual rent/licence fee was received by the Assessee, was not proper.

c) The Assessee had entered into sub-licence deeds in respect of those portions and it could not be deemed as ''letting'' of the property and for this reason also provisions of Section 22 of the Act would not be applicable, as the Assessee continued to be in the legal occupation and possession.

d) The use of the premises by the sub-licensees was to assist the Assessee company in getting hotel accommodation booked for the guests, delegates of the sub-licensees, apart from the increase in catering and restaurants'' activities used by the sub-licensees. Therefore, the use of certain portion by the sub-licensees was not for the purpose of or for the benefit of the business of the Assessee company.

7. The AO, however, did not accept the aforesaid explanation furnished by the Assessee. He was of the view that the license agreement with the NDMC was for a period of 99 years with the right of constructing and developing the property which makes the Assessee company owner of the property. He also opined that the ITA Nos. 42, 62, 536, 539, 540, 1685/2009, 1254, 1255, 1756/2010 Page 7 of 10 Assessee company had sub-licensed the offices and apartments to various persons, some of whom had further sub-licensed the same; the Assessee was not charging any rent, fees etc. on the sub-licensing of these properties, except interest free security deposits which were taken by the Assessee at the time of sub-licence agreement. Therefore, it was proper, in such circumstances, to fix notional annual letting value of the premises and to charge tax thereupon insofar as the Assessee is concerned.

8. We May also point out that in ITA No. 1254 of 2010, which pertains to the Assessment Year 1999-2000 originally no such addition was made. However, reassessment proceedings were started by issuance of notice u/s 143(2) read with Section 147 of the Act and the Tribunal quashed those reassessment proceedings. It

is not necessary to go into the question as to whether reassessment proceedings were initiated or not inasmuch as on merit itself we have decided that such an addition was not proper.

9. The AO thereafter took into consideration the rent/licence fee, which was paid by the occupiers to the sub-licensees to whom the Assessee had sub-licensed the premises. The AO on that basis calculated first care fee average and treated the same as annual letting value of the said West Tower and added the same under the head "income from house property".

10. The Assessee preferred appeal against this order before the CIT (A). In this appeal, the Assessee took an additional ground predicated on the provisions of Section 27(iii) read with 269 UA (f) (ii) of the Act and submitted that under those provisions, it would be a sub-licensee as deemed owner would be charged to tax in his hands. The CIT(A) considered this argument, which was purely a legal argument based on the interpretation of the aforesaid Sections on admitted facts on record, but did not accept the aforesaid pled. After considering other submissions of the Appellant, which were raised before the AO, the CIT(A) upheld the order of the AO on this ground. In this scenario, the Assessee preferred further appeal before the Income Tax Appellate Tribunal (hereinafter referred to as ''the Tribunal''). This time, before the Tribunal, the Assessee succeeded in its attempt to demonstrate that the Assessee could not be liable to pay any such tax fixing letting value on notional basis when, in fact, no such amount of rent/licence fee was received by the Assessee. The Tribunal examined the licence agreement entered into between the NDMC and the Assessee on the basis of which it has come to the conclusion that it is the NDMC, which is the "owner of the premises and remains to be the owner of the premises in question". The Tribunal has further accepted the submissions of the Assessee that in view of the provisions of Section 27(iii) of the Act, it is the sub-licensee who would be "deemed owner" of those premises which the sub-licensees whereof transferred to the present occupiers and those occupiers are paying rent/licence fee to the sub-licensees. On that basis, the Tribunal has set aside the ITA Nos. 42, 62, 536, 539, 540, 1685/2009, 1254, 1255, 1756/2010 Page 9 of 10 addition made by the AO and deleted this component of income holding that the same would not be chargeable to tax.

11. This is how the Department has filed the appeals pertaining to different assessment years. As pointed out above, though the issues before the AO, CIT (A) as well as the Tribunal were numerous, in these appeals primarily one question of law which is formulated and reproduced above has been pressed by the Department.

12. For the aforesaid reasons, we are of the view that the approach of the Tribunal in deciding the aforesaid issue is perfectly justified. There is no reason to interfere with the same. We clarify that the Assessee would not be entitled to depreciation on this purpose. We, thus, answer the question of law in favour of the Assessee and against the Revenue, as a result thereof all these appeals are dismissed.