

(2014) 01 KAR CK 0266
In the Karnataka High Court
Case No : I.T.A. No. 529 of 2007

Commissioner of Income Tax and Another

APPELLANT

Vs

ITC Hotels

RESPONDENT

Date of Decision : 31-01-2014

Acts Referred:

Income Tax Act, 1961 — Section 143(3), 37, 80HHD, 80-IA

Citation : (2014) 269 CTR 308 : (2014) 363 ITR 254 : (2014) 225 TAXMAN 73

Hon'ble Judges : Dilip B. Bhosale, J;B. Manohar, J

Bench : Division Bench

Advocate : K.V. Aravind, Advocate for the Appellant; Roopesh Jain, Advocate for Anandramaprashanth and Vikram, Advocate for the Respondent

Judgement

Dilip B. Bhosale, J.—This income tax appeal is against the order dated February 12, 2007, rendered by the income tax Appellate Tribunal, Bangalore Bench "A" (for short "the Tribunal") in I.T.A. No. 365/Bang/2005, pertaining to the assessment year 1998-99, whereby the Tribunal allowed the appeal in part to the extent indicated therein. The appeal before the Tribunal was directed against the order dated December 10, 2004, passed by the Commissioner of income tax (Appeals)-I, (for short "the first appellate authority or FAA"). The Tribunal by its order dated February 12, 2007, disposed of two income tax appeals, bearing Nos. I.T.A. Nos. 364 and 365/2005, pertaining to the assessment years 1995-96 and 1998-99. In the present appeal, we are concerned only with the order of the Tribunal in I.T.A. No. 365 of 2005. The first appellate authority, vide his order dated December 10, 2004, dismissed the appeal filed by the respondent-assessee bearing I.T.A. No. 481/AC-11(2)/CIT(A)I/01-02. The appeal before the first appellate authority was directed against the order dated April 20, 2001, passed by the Joint Commissioner of income tax, Special Range-5, Bangalore (for short "the Assessing Officer" or "the AO") u/s 143(3) of the income tax Act, 1961 (for short "the Act").

2. This court, vide its order dated January 8, 2008, had passed the following

order:

Heard Sri M.V. Seshachala for the appellant on admission.

Questions Nos. 4 and 5 stand answered by an order dated July 3, 2007, passed by a Division Bench in I.T.A. No. 1088 of 2006. There is no need to frame any substantial question of law as reflected in paragraphs 4 and 5.

Appeal is admitted on the substantial questions of law as formulated in paragraphs 6, 7 and 8.

3. Thus, the appeal was admitted to consider the following substantial questions of law:

1. Whether the Tribunal was correct in holding that the payment made for the right to use central court yard along with the marble installed therein to carry on its hotel business is a revenue expenditure allowable u/s 37 of the Act and not a capital expenditure as held by the Assessing Officer?

2. Whether the Tribunal was correct in holding that for the purpose of computation of deduction u/s 80-IA of the Act income from foreign exchange fluctuations, income from insurance claim, interest on KEB deposits, income from scrap sales, should be treated as profits and gains of an industrial undertaking?

3. Whether the Tribunal was correct in holding that deduction u/s 80HHD of the Act cannot be allowed on the entire business as a whole as computed by the Assessing Officer but in respect of each eligible unit?

4. By consent and with the assistance of the learned counsel for the parties, we have reformulated the substantial question of law No. 2 as follows:

2. Whether the Tribunal was correct in holding that for the purpose of computation of deduction u/s 80-IA of the Act income from interest on KEB and NSC deposits should be treated as profits and gains of an industrial undertaking?

5. The first substantial question of law relates to a sum of Rs. 10 lakhs, which were paid by the assessee as a licence fee for the use of central court yard, having marble, (for short "court yard") in Lallgarh Palace (for short "palace"). It appears that there was a memorandum of understanding (for short "MOU") between the assessee and Maharaja Ganga Sinhji Charitable Trust (for short the "trust"). The assessee, as per the memorandum of understanding, had acquired a right to use the court yard for their business of hotel, being run in the palace, more efficiently and profitably. The question is whether the expenditure of Rs. 10 lakhs resulted in any addition to the fixed capital of the assessee. According to the Revenue, the assessee had acquired right to use the court yard apart from the palace, and, thus, had acquired an advantage of enduring benefit of a trade. In other words, the expenditure incurred by the assessee for the use of the court yard is in the capital field and it cannot be said to have been incurred to facilitate the trading operation of the assessee.

6. Learned counsel appearing for both the sides placed reliance upon the judgment of the Supreme Court in the case of *Empire Jute Co. Ltd. Vs. Commissioner of Income Tax*, , in support of their contentions. Mr. Aravind, learned counsel for the Revenue, tried to distinguish the ratio laid down by the Supreme Court in this case on the basis of the factual matrix involved therein. As against this, learned counsel appearing for the respondent-assessee placed reliance upon the principle laid down by the Supreme Court in the said judgment.

7. We have perused the judgment. We find ourselves in agreement with the learned counsel appearing for the respondent-assessee. It would be relevant to reproduce the relevant observation made by the Supreme Court, in the said judgment, which, in our opinion, support the case of the respondent-assessee to contend that the expenditure of Rs. 10 lakhs would be on revenue account. The relevant observation in the case of *Empire Jute Co. Ltd.* reads thus (page 10):

The decided cases have, from time to time, evolved various tests for distinguishing between capital and revenue expenditure but no test is paramount or conclusive. There is no all-embracing formula which can provide a ready solution to the problem; no touchstone has been devised. Every case has to be decided on its own facts, keeping in mind the broad picture of the whole operation in respect of which the expenditure has been incurred. But a few tests formulated by the courts may be referred to as they might help to arrive at a correct decision of the controversy between the parties. One celebrated test is that laid down by Lord Cave L.C. in *Atherton v. British Insulated and Helsby Cables Ltd.* [1925] 10 TC 155 (HL), where the learned Law Lord stated:

... when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite condition) for treating such an expenditure as properly attributable not to revenue but to capital.

This test, as the parenthetical clause shows, must yield where there are special circumstances leading to a contrary conclusion and, as pointed out by Lord Radcliffe in *Commissioner of Taxes v. Nchanga Consolidated Copper Mines Ltd.* [1965] 58 ITR 241 (PC), it would be misleading to suppose that in all cases, securing a benefit for the business would be, *prima facie*, capital expenditure "so long as the benefit is not so transitory as to have no endurance at all". There may be cases where expenditure, even if incurred for obtaining advantage of enduring benefit may, none the less, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by an assessee that brings the case within the principle laid down in this test. What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be dis-allowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried

on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The test of enduring benefit is, therefore, not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case.

8. It is clear that if the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. In the present case, except the right to use the court yard, no other rights were created in favour of assessee. In other words, the amount paid to the trust was for the use of the court yard under the memorandum of understanding for an indefinite future, and, therefore, it would be on revenue account. In other words, merely because the advantage may endure for an indefinite future would not mean that the expenditure would be on capital account and not revenue. The advance of Rs. 10,00,000, in the present case, consists merely in facilitating the assessee's business operations, enabling the management to conduct their hotel business more efficiently and profitably. We are, therefore, satisfied that the view taken by the Tribunal in answering this question in favour of the assessee and against the Revenue is correct and deserves no interference by this court.

9. In so far as the second question is concerned, Mr. Aravind, learned counsel appearing for the appellant-Revenue, at the outset invited our attention to the judgments of the Supreme Court in *Liberty India Vs. Commissioner of Income Tax*, and in *Pandian Chemicals Ltd. Vs. Commissioner of Income Tax*, and submitted that the question is squarely covered by these judgments. Learned counsel appearing for the respondent-assessee also fairly submitted that this question is covered by these judgments. Hence, we answer the second question in favour of the Revenue and against the assessee.

10. Mr. Roopesh Jain, learned counsel appearing for the respondent-assessee, in so far as the third question is concerned, submitted that an identical question was raised in I.T.A. No. 144 of 2002, decided on September 7, 2009, (*The Commissioner of Income Tax, C.R. Building, Queens Road, Bangalore and The Joint Commissioner Of Income Tax (Asst), Special Range-5, C.R. Building, Queens Road, Bangalore Vs. M/s. ITC Hotels, Ltd., No. 25, Sankey road, Bangalore,)* and it was answered by this court in favour of the Revenue and against the assessee.

11. Mr. Aravind, learned counsel appearing for the Revenue, does not dispute the submission made by learned counsel for the respondent-assessee. Learned counsel for the respondent-assessee, however, submits that the assessee has carried the judgment of this court dated September 7, 2009, in I.T.A. No. 144 of 2002 *The Commissioner of Income Tax, C.R. Building, Queens Road, Bangalore and The Joint Commissioner Of Income Tax (Asst), Special Range-5, C.R.*

Building, Queens Road, Bangalore Vs. M/s. ITC Hotels, Ltd., No. 25, Sankey road, Bangalore, to the Supreme Court in SLP and that the SLP has been admitted and now the civil appeal is pending for final hearing. He, therefore, submits that the third question may also be answered against the respondent-assessee with the observation that the Assessing Officer may be directed to pass consequential order only after disposal of the SLP (civil) filed by the respondent-assessee. Mr. Aravind, learned counsel, appearing for the Revenue, has no objection for passing such an order. In the circumstances, we dispose of this appeal by the following:

ORDER

(a) The first question is answered against the Revenue and in favour of the assessee;

(b) The second question as re-formulated by us is answered in favour of the Revenue and against the assessee;

(c) The third question is answered in favour of the Revenue and against the assessee subject to outcome of the SLP (civil) pending in the Supreme Court. The Assessing Officer shall pass consequential order only after the SLP (civil) is disposed of by the Supreme Court. The assessee is directed to communicate the order of the Supreme Court to the Assessing Officer within a period of 12 weeks from the date of disposal of the SLP (civil).

With these observations, the appeal is disposed of. There shall be no order as to costs.