
(1997) 10 MAD CK 0057
In the Madras High Court
Case No : TC No. 808 of 1983

Commissioner of Income Tax

APPELLANT

Vs

Carborandum Universal Ltd.

RESPONDENT

Date of Decision : 20-10-1997

Acts Referred:

Income Tax Act, 1961 — Section 28, 37, 37(2A), 37(3), 37(4)

Citation : (2000) 241 ITR 407

Hon'ble Judges : P. Thangavel, J; N.V. Balasubramanian, J

Bench : Division Bench

Advocate : Deokinandan, for the Appellant; K.M.L. Majele, for the Respondent

Judgement

N.V. Balasubramanian, J.—At the instance of the Revenue, the Tribunal has stated a case and referred the following questions of law for the

asst. yr. 1975-76 under s. 256(1) of the IT Act, 1961 (hereinafter referred to as "the Act").

1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the expenditure incurred on the maintenance of

the flat at Bombay and depreciation on the said building should be allowed as a deduction even though it is a guest house within the meaning of s.

37(3) of the IT Act, 1961 ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the provision for gratuity should be allowed as a

deduction even though there was no approved gratuity fund in existence during the previous year relevant for the asst. yr. 1975-76 ?

2. The answer to the second question need not detain us as the Tribunal has followed its earlier order for the asst. yr. 1973-74 in the assessee's

own case and by our judgment in Tax Case Nos. 220 and 221 of 1981 [reported as Carborandum Universal Ltd. vs. CIT of even date we have

upheld the order of the Tribunal for the asst. yr. 1973-74. Following the judgment in Tax Case Nos. 220 and 221 of 1981 of even date, we

answer the second question of law referred to us in the affirmative and against the Revenue.

3. In so far as the first question is concerned, it relates to the claim of the assessee for deduction of certain expenditure incurred on the maintenance

of a flat in Bombay and claim for depreciation on the said building. The ITO disallowed the claim of the assessee on the ground that the said flat

maintained by the assessee was guest house and under the provisions of s. 37(4) of the Act, the assessee was not eligible to get the allowance

towards the expenditure incurred on the maintenance of the guest house and also the depreciation on the said building. The AAC, on appeal by the

assessee, following an order of the Tribunal rendered in the assessee's own case for the asst. yrs. 1971-72, 1972-73, 1973-74 and 1974-75 held

that the expenditure should be allowed as deduction. The Revenue has preferred an appeal before the Tribunal. The Tribunal also following its

earlier order in ITA Nos. 1555/Mad/1976-77 dt. 21st December, 1978 for the asst. yr. 1973-74 held that the guest house was maintained by the

assessee for its employees who were on tour in connection with the assessee's business to Bombay and therefore, the said flat could not be

regarded as a guest house and the assessee would be entitled to the maintenance expenditure as well as the depreciation on the said flat.

4. It is now necessary to notice the order of the Tribunal in ITA No. 1555/Mad/76-77 dt. 21st December, 1978 rendered for the asst. yr. 1973-

74. In the said order, the Tribunal noticed the findings of the AAC for the asst. yrs. 1971-72 and 1972-73 dt. 13th February, 1978 and the

Tribunal found that the log book showed that some non-employers used the flat though the expenditure on such user was not substantial. It was

clarified before the Tribunal that the said non-employers were none other than the executives of the sister-companies of the assessee and the

assessee also charge from them. The Tribunal noticed that the guest house register clearly showed that only the assessee's employees occupied the

flat primarily and the assessee also collected charged from other persons who occupied and who were the employees of the associated companies

and sister-concerns. From the above factual position, the Tribunal came to the conclusion that the said flat or the apartment cannot be considered

as a guest house at all and the case is not hit by the provisions of s. 37(4) of the Act. The Revenue has come to this Court by way of reference for

the asst. yr. 1975-76.

5. Mr. C. V. Rajan, learned counsel for the Revenue, brought to our notice the provisions of s. 37(4) and 37(5) of the Act. He also brought to our

notice the decision of the Bombay High Court in the case of CIT vs. Ocean Carriers Pvt. Ltd. (1995) 211 ITR 357 : TC 17PS.62, and submitted

that though sub-s. (5) of s. 37 was inserted by the Finance Act, 1983 with retrospective effect from 1st April, 1979, the said amendment has

merely clarified the position and under the provision, any accommodation maintained by the assessee to provide lodging or boarding to any person

including an employee or a director is liable to be regarded as a guest house within the meaning of sub-s. (4) of s. 37 of the Act. According to the

learned counsel for the Revenue, sub-s. (5) of s. 37 of the Act was only retrospective in nature and would apply for the asst. yr. 1975-76. His

further submission is that the Tribunal overlooked the proviso to s. 37(4) of the Act and under the proviso, if the assessee maintained the guest

house as a holiday home and if the guest house is intended for the exclusive use or benefit of the employees while on leave only, that guest house

maintained as a holiday home will not be regarded as a guest house within the meaning of sub-s. (4) of s. 37 of the Act.

6. Mr. R. Balasubramanian, learned counsel for the assessee on the other hand submitted that the finding of the Tribunal is clear that the flat

maintained by the assessee cannot be regarded as a guest house and as it is not a guest house, the question of applicability of proviso to sub-s. (4)

of s. 37 of the Act does not arise. He also submitted that s. 37(5) of the Act by its nature cannot have full retrospective operation.

7. We have carefully considered the submissions of the learned counsel for the Revenue as well as the learned counsel for the assessee. It is no

doubt true that the decision of the Bombay High Court in Ocean Carriers Pvt. Ltd. case, cited supra, makes it clear that any accommodation

maintained by the assessee to provide lodging or boarding to any person including an employee or a director of a company or any holder of any

office of the company would be in the nature of the guest house and the amendment made by the Finance Act, 1985 to s. 37(5) of the Act is only

clarificatory in nature and would apply for the asst. yr. 1977-78 as well. But, the decision of the Bombay High Court, has to be read in the light of

the decision of this Court in the case of Commissioner of Income Tax Vs. Aruna Sugars Ltd., . This Court considered the expression, "guest

house" occurred in s. 37(3) of the Act and after considering the dictionary meaning and the relevant rules, came to the conclusion that where a

guest house is maintained, either in the principal place of business or in a place where the factory is located for the directors and other employees

of the company who have to visit it for the purpose of the company's business, then, any expenditure incurred for the maintenance of such

accommodation cannot be brought within the scope of s. 37(3) of the Act. This Court also held that the expression, "guest" did not comprehend

the employees and the employees could not be regarded as strangers so as to be regarded as guests. Finally, this Court held that unless a guest

house is intended for the use by a complete stranger, it cannot be called a guest house which falls within the scope of s. 37(3) of the Act.

8. We have already seen the finding of the Tribunal in the instant case that the apartment was made for assessee's employees and the said finding

was arrived at on the basis of the guest house register maintained by the assessee. In so far as other persons who have stayed in the said apartment

were concerned, it was found that the assessee levied charges from them. We are of the view that the decision of this Court in Aruna Sugars Ltd.

case, cited supra, though rendered under s. 37(3) of the Act would equally apply to the provisions of s. 37(4) of the Act to consider the meaning

of expression, "guest house" found in that sub-section. The expression, "guest house" is not specifically defined in sub-s. (4) of s. 37 of the Act as

in sub-s. (3) of s. 37 of the Act and it is not a term of art and we have to construe the expression, "guest house" found in sub-s. (4) of s. 37 of the

Act and give the same meaning that was given by this Court to the expression, "guest house" found in sub-s. (3) of s. 37 of the Act. It is clear,

applying the ratio of the Aruna Sugars Ltd. case, cited supra, the apartment maintained by the assessee at Bombay cannot be regarded as a guest

house at all and when it is not a guest house, the question of applicability of the proviso to sub-s. (4) of s. 37 of the Act also does not arise. The

proviso to sub-s. (4) of s. 37 of the Act will apply only if it is established that a particular apartment is a guest house within the meaning of the main

part of sub-s. (4) of s. 37 of the Act, and when the apartment is not a guest house, the necessity of considering the applicability of proviso to sub-

s. (4) of s. 37 of the Act does not arise.

9. In so far as the retrospective effect of sub-s. (5) of s. 37 of the Act is concerned, it is relevant to notice that the said sub-section was introduced

by the Finance Act, 1983 with retrospective effect from 1st April, 1979. It is no doubt true that the Bombay High Court in *Ocean Carriers Pvt.*

Ltd. case cited *supra*, came to the conclusion that the provisions of sub-s. (5) of s. 37 of the Act are retrospective in nature and would apply even

to the asst. yr. 1977-78. Sub-s. (5) of s. 37 provides that any accommodation by whatever name called, maintained, hired, reserved or otherwise

arranged by the assessee for the purpose of providing lodging or boarding to any person (including any employee or director of or any holder of

any other office in the company) would be regarded as an accommodation in the nature of a guest house within the meaning of sub-s. (4) of s. 37

of the Act. We have already noticed the decision of this Court in *Aruna Sugars Ltd.* case, cited *supra*, wherein this Court has taken a view that the

employees cannot be regarded as strangers and only if the accommodation is maintained for strangers, that place and accommodation would be

regarded as a guest house. The effect of the amendment made by the Finance Act, 1983 with retrospective effect from 1st April, 1979 is to alter

the law on the scope of the term, "guest house" and when there is an alteration in the law by the Finance Act, 1983, it cannot be said that the law

has clarified the position.

10. A similar question came up for consideration before the Supreme Court in the case of construction of the expression, "entertainment

expenditure" in s. 37(2A) of the Act in *CIT vs. Patel Bros. & Co. Ltd.* : [1995]215ITR165(SC) , wherein the Supreme Court found that

ordinarily "entertainment" connotes something which may be beneficial for mental or physical well-being but it is not essential or indispensable for

human existence, and that law existed prior to the amendment was sought to be modified by the Finance Act, 1983 w.e.f. 1st April, 1976 by

insertion of Expln. II to sub-s. (2A) of s. 37 of the Act. The Supreme Court found

that insertion of Expln. (2A) though began with the expression for the removal of a doubt, the same expression as found in sub-s. (5) of s. 37 of the Act, was not fully retrospective as the insertion was made with restricted retrospective operation w.e.f. 1st April, 1976. The apex Court, therefore, held that partial retrospective effect was given to indicate that its application prior to 1st April, 1976 was excluded. Applying the same ratio when the Finance Act, 1983 inserted sub-s. (5) of s. 37 of the Act with retrospective effect from 1st April, 1979, its operation prior to 1st April, 1979 would be excluded as, it was not necessary to restrict its retrospective operation. We have already held that by insertion of sub-s. (5) of s. 37, the law laid down by the decision in Aruna Sugars Ltd. case is altered and when there is an alteration in the law, it cannot be stated that sub-s. (5) of s. 37 of the Act was inserted to clarify the position. Therefore, we are of the view that the principles of the decision of the Supreme Court in Patel Bros. & Co. Ltd. case, cited supra, though rendered with reference to sub-s. (2A) of s. 37 of the Act, would apply to sub-s. (5) of s. 37 of the Act also. The language of the provision and the object sought to be achieved behind the provision also indicate that it was not given full retrospective effect. We have already seen that the flat was made only for the employees and not for strangers. The Tribunal has come to a correct conclusion by holding that the apartment maintained by the assessee in Bombay cannot be regarded as guest house. We do not find any infirmity in the order of the Tribunal. Accordingly, we answer the first question of law referred to us also in the affirmative and against the Revenue. There will be no order as to costs.