Reserved/A.F.R./Court No. - 37

Case :- INCOME TAX APPEAL No. - 25 of 1999
Petitioner :- The Commissioner Of Income Tax Varanasi & Another
Respondent :- M/S Banaras Hotel Ltd.Nadesar Palace Compound Varanasi
Petitioner Counsel :- A.N.Mahajan,B. Agarwal
Respondent Counsel :- Ashok Trivedi,Arvind Shukla

Connected with

1. **Case :-** INCOME TAX APPEAL No. - 174 of 2004

Petitioner :- The Commissioner Of Income Tax-Ii, Varanasi And Another
Respondent :- M/S Banaras Hotels Ltd. Nadesar, Varanasi
Petitioner Counsel :- A.N. Mahajan,Ashok Kumar,Bharatji Agarwal,D. Awasthi,G.Krishna,R.K. Upadhaya,S Chopra

2. **Case :-** INCOME TAX APPEAL No. - (47) of 2004

Petitioner :- Commissioner Of Income Tax Varanasi And Another
Respondent :- M/S Banaras Hotels Limited, Nadesar, Varanasi
Petitioner Counsel :- A.N. Mahajan,Ashok Kumar,Bharatji Agarwal,D. Awasthi,G.Krishna,R.K. Upadhaya,S Chopra
Respondent Counsel :- Ashok Trivedi

3. **Case :-** INCOME TAX APPEAL No. - 431 of 2007

Petitioner :- Commissioner Of Income Tax-I Varanasi & Others
Respondent :- M/S Banaras Hotels Ltd.
Petitioner Counsel :- S.C.
Respondent Counsel :- Ashok Trivedi

Hon'ble Prakash Krishna,J.
Hon'ble Subhash Chandra Nigam,J.

(Delivered by Prakash Krishna, J.)

All these appeals have been filed by the department under Section 260 A of the Income Tax Act. The Income Tax Appeal No.25 of 1999 relating to the assessment year 1990-91 was considered as a leading case by the learned counsel for the

parties, therefore, the facts from the said appeal are taken into consideration. It was stated at the bar that in the remaining appeals, except the assessment year, the relevant facts are identical.

The facts of the case may be noticed in brief. The respondent herein is a company registered under the Indian Companies Act and is running a five star hotel in the name and style of "Taj Ganges". In the course of assessment proceedings, the assessee respondent claimed deduction under Section 80 HHD of Rs.35,28,323/-, under the Income Tax Act. The Assessing Officer found that the assessee has claimed the deduction under Section 80 HHD on room rent also, which according to him, is not permissible under the said Section. He was of the view that under Section 80 HHD, only such deductions will be admissible which relate to the service provided to the foreign tourists. He was of the view that since the assessee has charged the room rent separately for a particular room and for particular period, the charging of such room rent is not service provided to foreign tourists. The claim of the assessee that the room rent was charged at the rate of Rs.1,000/- per day mainly for the luxuries provided in the form of various facilities, such as air-conditioning, T.V. and video facilities, highly comfortable furnitures and fixtures, telephone and room service and many more luxuries, was not accepted. The case of the assessee was that a simple room with the same dimension would merely fetch 1/100 of the room tariff if acquired in the open market. The Assessing Officer was of the view that on true and correct interpretation of the sub-clause B of sub-section 3 of Section 80 HHD an assessee is not entitled to claim deduction on room rent. Consequently, it allowed only 20 per cent of the receipt in respect of room rent under the said section. The assessment order was successfully challenged in appeal before

the Commissioner of Income Tax (Appeals), Varanasi and the order of the First Appellate Authority has been confirmed by the Tribunal, in second appeal filed by the department. The order of the Tribunal is under appeal. In the memo of the appeal, the following question of law has been sought to be raised:-

> *"Whether on the facts and in the circumstances of the case, the Tribunal was right in law, in holding that room rent charged by the hotel should also be taken in consideration for granting deduction u/s 80 HHD of the Income Tax Act, 1961?"*

Heard Sri A.N. Mahajan, learned standing counsel for the department and Sri Ashok Trivedi, the learned counsel for the respondent assessee. The controversy involved in the present appeal centres round the interpretation of Section 80 HHD of the Income Tax Act. The said section for the sake of convenience as it stood in the relevant point of time and produced in the assessment order, is being reproduced below:-

> "80 HHD. (1) Where the assessee, being an Indian Company or a person (Other than a company) resident in India, is engaged in the business of hotel or of a tour operator, approved by the prescribed authority in this behalf or a travel agent, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of a sum equal to the aggregate of -
>
> (a) fifty per cent of the profits derived by him from services provided to foreign tourists; and
>
> (b) so much of the amount out of the remaining profits referred to in clause (a) as is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account to be utilized for the purposes of the business of the assessee in the manner laid down in sub- section (4).

(2) This section applies only to services provided to foreign tourists the receipts in relation to which are received in or brought into, India by the assessee in convertible foreign exchange within a period of six months from the end of the previous year or, there the Chief Commissioner or Commissioner is satisfied (for reasons to be recorded in writing) that the assessee is, for reasons beyond his control, unable to do so within the said period of six months, within such further period as the Chief Commissioner or Commissioner may allow in this behalf.

(3) For the purposes of sub-section (1), profits derived from services provided to foreign tourists shall be -

(a) in a case where the business carried on by the assessee consists exclusively of services provided to foreign tourists resulting in receipt in convertible foreign exchange, the profit of the business as computed under the head "Profit and gains of business or profession";

(b) in a case where the business carried on by the assessee does not consist exclusively of services provided to foreign tourists resulting in receipt in convertible foreign exchange, the amount which bears to the profit of the business (as computed under the head "Profit and gains of business or profession") the same proportion as the receipts in convertible foreign exchange bears to the total receipt of the business carried on by the assessee.

(4) The amount credited to the reserve account under clause (b) of sub-section (1), shall be utilized by the assessee before the expiry of a period of five years next following the previous year in which the amount was credited for the following purposes, namely:-

(a) construction of new hotels approved by the prescribed authority in this behalf or expansion of facilities in existing hotels already so approved;

(b) purchase of new cars and new coaches by tour operators already so approved or by travel agents;

(c) purchase of sports equipments for mountaineering, trekking , golf, river-rafting and other sports in or on water;

(d) construction of conference or convention centres;

(e) provision of such new facilities for the growth of Indian tourism as the Central Government may, by notification in the official Gazette, specify in this behalf;

Provided that where any of the activities referred to in clauses (a) to (c) would result in creation of any asset owned by the assessee outside India, such asset should be created only after obtaining prior approval of the prescribed authority.

(5) Where any amount credited to the reserve account under clause (b) of sub-section (1), -

(a) has been utilised for any purpose other than those referred to in sub-section (4), the amount so utilised; or

(b) has not been utilised in the manner specified in sub-section (4), the amount not so utilised, shall be deemed to be the profits, -

(i) in a case referred to in clause (a), in the year in which the amount was so utilised; or

(ii) in a case referred to in clause (b), in the year immediately following the period of five years specified in sub-section (4),

and shall be charged to tax accordingly.

(6) The deduction under sub-section (1) shall not be admissible unless the assessee furnishes in the prescribed form, along with the return of income, the report of an accountant, as defined in the Explanation below sub-section (2) of section 288, certifying that the deduction has been correctly claimed on the basis of the amount of convertible foreign exchange received by the assessee for services provided by him to the foreign tourists.

Explanation: For the purposes of this section :-

(a) "travel agent" means a travel agent or other person (not being an airline or a shipping company) who holds a valid licence granted by the Reserve Bank of India under section 32 of the

Foreign Exchange Regulation Act, 1973 (46 of 1973) ;

(b) "convertible foreign exchange" shall have the meaning assigned to it in clause (a) of the Explanation to section 80HHC.

(c) services provided to "foreign tourists" shall not include services by way of sale in any shop owned or managed by the person who carries on the business of hotel or of a tour operator or of a travel agent."

The said section was inserted by clause -16 of the Direct Tax Laws Amendment Bill, 1988 w.e.f. 1st of April, 1989.

The sole point mooted in the appeal is whether the charges for room rent, fall in the ambit of "Services provided to foreign tourists or not, within the meaning of Section 80HHD".

A plain reading of the said section would show that all assessees are not eligible for deduction therein. Only such assessee who is either an Indian Company or a person other than a company resident in India, is eligible for deduction provided such an assessee is engaged in the business either of a hotel or of a tour operator, or a travel agent approved by the Prescribed Authority in this behalf . Sub-section (2) provides that the receipts by such assessee in convertible foreign exchange in respect of services provided to foreign tourists would make him entitled to claim for deduction. An Explanation is there at the bottom of the section which explains, for the purposes of Section 80 HHD, the phrase "travel agent" vide clause (a), convertible foreign exchange vide clause (b), "services provided to foreign tourists vide clause (c) and "authorized dealer " vide clause (d) thereof. In the case on hand we are concerned with the import of the phrase "services provides to foreign tourists".

As per clause (c) "services provided to foreign tourists"

shall not include "services by way of sale" in any shop owned or managed by the person who carries on the business of a hotel or of tour operator or of travel agent. The said clause is exclusionary in nature and excludes the certain services from the ambit of "services provided to foreign tourists". The argument of the assessee is that the room rent charges having not been excluded by the said clause, cannot be excluded for the purposes of deduction under Section 80 HHD. The department, on the other hand, contends that providing a room to a tourist does not amount to "service" and therefore, it is liable to be excluded. To us the answer is simple. The said Explanation has to be read conjointly with Sub-section (1) of the said section. The title of Section 80 HHD is — **"Deduction In Respect of Earnings In Convertible Foreign Exchange".** The said deduction, as has been noticed herein above, subject to fulfillment of the other conditions specified in section, is available only to an assessee who is engaged in the business of a hotel or ..... . The object of granting deduction is to an assessee whose earnings is in convertible foreign exchange and who is engaged in the business of hotel. The use of words "engaged in the business of hotel" implies that the assessee is carrying on the business of a hotel and the hotel without letting an accommodation is unthinkable. The very idea of the hotel is to permit tourists to occupy accommodation as licensee. The Apex Court in the case of **M/s. Northern India Caterers (India Limited) Vs. LT. Governor of Delhi, 1979, U.P.T.C. 826,** though in a slightly different context, has noticed the origin and historical development of hotel business. It was a case under the Bengal Finance (Sales Tax Act, 1941. The controversy involved therein was as to whether the tax is payable by a dealer under Section 4 of the

aforestated Act for the service of meals by the appellant therein in the restaurant. In other words, whether such a service constitutes a sale of food stuff or not. In this background, in para 4 of the report, the Apex Court has observed that a hotelier is like an inn-keeper. It noticed that it is a common law that an inn-keeper was a person who received travelers and provided lodging and necessaries for them and the attendants and employed servants for this purpose and for the protection of the travelers' lodging in his inn and of their goods. It noticed paragraph 932 from Halsbury's Laws of England and proceeded to consider certain decisions of English Courts and reproduced the following paragraph in the judgment from " Inn-keepers and Hotels" by Professor Beale;

"An inn-keeper does not lease his rooms, so he does not sell the food he supplies to the guest. It is his duty to supply such food as the guest needs, and the corresponding right of guest is to consume the food he needs, and to take no more. Having finished his meal, he has no right to take food from the table, even the uneaten portion of food supplied to him, nor can he claim a certain portion of food as his own to be handed over to another in case he chooses not to consume it himself. The title to food never passes as a result of an ordinary transaction of supplying food to guest."

Thereafter in para 6 it has observed that like the hotelier, a restaurateur provides many services in addition to the supply of food. He provides furniture and furnishings, linen, crockeries and luxuries and in the eating places of today he may add music and specially provided area for floor dancing and in some cases a floor show. It ultimately concluded that serving of food to the lodgers by a hotel does not amount to "sale" but it amounts to "service".

On a review application filed in the above case, while dismissing it, the following remarks by Justice Krishna Iyer's following remark has bearing to the concept of hotel which is reproduced below:-

"16. It sometimes that high-style restaurants or residential hotels render a bungle of special services like ball dance, rare music, hot drinks, viands of high regale, glittering crockery, regal attention or 'bikini' service and even sight-seeing transport or round the city visits, shoe-shining, air-conditioning massage in the room etc., on a consolidated sum. You cannot dissect the items or decode the bill to discover separately the component of goods sold. This situation may obtain even in India with throng of foreign tourists who want to be taken care of and pay all-inclusively. This may happen in some fashionable restaurants where you cannot, as of right, remove from the table what is left over. In these cases the decision under review squarely applies. My learned brother has clarified and confined that the ratio to the contours so set out. He has also pointed out that counsel, at the earlier hearing, did not contest this factual matrix. A review in counsel's mention cannot repair the verdict once given. So the law laid down must rest in peace."

The said judgment is reported in **1980 U.P.T.C. 327 : M/s. Northern India Caterers Vs. LT. Governor of Delhi.**

On facts the assesses has also pleaded herein and which has not been disputed even by the Assessing Officer, that the assessee is running a five star hotel and is providing various services to foreign tourists who stay in the hotel. The room rent charged from foreign tourists is not room rent alone. Rather it is services attached with room. It is a matter of common knowledge and experience that the services provided by the

hotelier have a major role to place with regard to the tariff/room rent. The dimensions of a room is not so important. Its location, the view from the room, quality of furniture and fixtures, facilities such as air conditioning, T.V., video conferencing, telephone and the other luxuries are important factors. In the present day, hotels also provide swimming pool, bar facility, conference room, indoor and out-door game facilities etc.. These services provided by the hotelier are included in the room rent and are not charged separately. It may be noted that by Explanation to clause (c) thereof, services by way of sale in any shop owned or managed by the person who carries on the business of hotel has been excluded. In other words, it follows that all other services including providing of room facility to a foreign tourist are liable to be taken into consideration for the purposes of profits derived from the services for the purposes of Sub-section (1) where an assessee receives convertible foreign exchange as per Sub-section (3) of Section 80HHD. The purpose and idea of enacting of Section 80HHD is to earn convertible foreign exchange from the foreign tourists. The said section finds place in Chapter VI A of the Income Tax Act with the heading **"Deductions to be made in computing total income".**

There is yet another angle to examine the stand of the department that the room rent by such an assessee is to be excluded for the purposes of deduction under Section 80HHD. Interestingly, the Assessing Officer noted that the receipts in respect of room rent comes to Rs.1,65,06,766/-. He thereafter allowed 20 per cent as rebate and deducted 20 per cent from the room rent presumably towards the services rendered by the assessee to the foreign tourists. On what basis rebate of 20 per cent was granted, is difficult to understand. This is indicative

of the fact that the Assessing Officer himself was conscious to the fact that in such hotels, the services are rendered to the inmates by hotelier. There being no express provision either in the body of the Section or Explanation attached to it, there was absolutely no justification to exclude the room rent for the purposes of Section 80 HHD.

As said, an Explanation is at times appended to a Section to explain the meaning of words contained in the Section. It is a part and parcel of an enactment. The meaning to be given to an Explanation depends upon its terms. An Explanation should be interpreted and construed in the light of the language used in the Section. An Explanation may be added something within or to exclude something from the ambit of the main enactment or the connotation of some word occurring in it. **(See Patel Roadways Limited Vs. Prasad Trading Co. AIR 1992 SC 1514.** An Explanation, normally should be so read as to harmonize with and clear up any ambiguity in the main Section and should not be so construed as to widen the ambit of the section. In **Sundaram Pillai Vs. Pattabiraman: AIR 1985 SC 582,** the Apex Court has culled out from the earlier cases the following as objects of an Explanation to a statutory provision:-

(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming a hindrance in the interpretation of the same.

Keeping the above principle of interpretation relating to interpretation of Explanation, the case on hand clearly falls under the clauses (c) and (d). Dominant object of Section 80HHD is to provide certain deductions from the profits of an assessee specified therein including an assessee who is a hotelier. If the room rent is excluded from the consideration for the purposes of Section 80HHD, the object of enactment of Section 80HHD would become meaningless and it will fail to achieve its purpose.

In addition, a contemporaneous exposition of the purport of Section 80 HHD is contained in the Circular No.559 dated 4th of May, 1989 issued by the CBDT. The Circular clarifies the purport, scope and object of clause (c) of the Explanation in the following manner:-

"Clause (c) of the Explanation also clarifies that "services provided to foreign tourists" shall not include services by way of sale in any shop owned or managed by the person who carries on the business of a hotel or a tour operator or a travel agent. It may further be clarified that the intention

is to exclude only the sale of any goods or merchandise in any such shop from the benefit of exemption under this section. Therefore, services provided at health clubs, beauty parlours, barber's shops, etc., owned or managed by persons who are entitled to deduction under the section will be included in the term "services provided to foreign tourists" and will be entitled to deduction under this section. However, if such health clubs, beauty parlours, etc., also sell any goods or merchandise to the foreign tourists, such sale cannot be included in the term "services provided to foreign tourists" and, therefore, shall not be entitled to the benefit of deduction under the section."

In **C.A.I.T. Vs. Plantation Corporation of Kerala Ltd. (2001) 247 ITR 155** the Apex Court has held that need for interpretation there is only when the words in Statute are in their own terms ambivalent and did not manifest the intention of the legislature. With apart an Explanation is intended to either explain the meaning of certain phrases and expressions contained in statutory provision or depending upon its language it might supply or take away something from the contents of the provision and at times even, by way of abandon caution, to clear any mental cobwebs surrounding the meanings of statutory provision spun by interpretative process to make the position beyond controversy or doubt.

There is another aspect of the case. It has been held repeatedly that the provisions dealing with the deduction of exemption and relief in fiscal statute should be construed reasonably and in favour of the assessee vide **CIT Vs. Gwaliar Rayon Silk Manufacturing Company Limited (1992) 196 ITR 149 S.C..**

The upshot of the above discussion is that Section 80

HHD does not admit an ambiguity and on its plain language it is but obvious that for the purposes of deduction under Section 80HHD receipts of room rent from foreign tourists in the convertible foreign exchange, subject to the fulfillment of other conditions is to be taken into consideration for the purposes of deduction. Neither the main section nor the Explanation supports the view point as canvassed by the Revenue. The Income Tax Appellate Tribunal has rightly reached to the conclusion that the provisions for amenity in the nature of rooms is an integral part of hotel business and if someone prefers to enjoy this amenity, then, he is said to have availed the services of nature as envisaged in the provisions of Section 80 HHD. Resultantly, we do not find any error in the order of the Tribunal and the Tribunal was right in law in holding that the room rent charged by the hotel should also be taken into consideration for granting deduction under Section 80 HHD of the Income Tax Act, 1961. There is no merit in the appeal. The appeals are hereby dismissed with costs.

Order Date :- 28.10.2009
LBY

(Prakash Krishna, J.)

(Subhash Chandra Nigam, J.)