

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

+ **[ITA 1859 OF 2010]**

% **RESERVED ON: 05.4.2011**
PRONOUNCED ON: 08.4.2011

COMMISSIONER OF INCOME TAX . . . APPELLANT

Through : Mr. Sanjeev Sabharwal,
Sr. Standing Counsel

VERSUS

LE PASSAGE TO INDIA TOUR . . .RESPONDENT
& TRAVELS PVT. LTD.

Through: Mr. Ajay Vohra, Advocate
with Ms. Kavita Jha and Mr.
Somnath Shukla,
Advocates.

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

1. Whether Reporters of Local newspapers 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?

A.K. SIKRI, J.

1. The assessee company is engaged in the business of tours and travels arrangement for foreign tourists visiting India. The assessee company in addition to making the arrangements for transport, boarding and lodging, hotels, stay, site seeing, providing guides and escorts had also taken tourists for shopping. For the

said purposes, the assessee company had entered into arrangement with various shops to sell merchandise to the foreign tourists and in turn received commission from them for sending foreign tourists to their shops to buy the goods. During the year under consideration, the assessee company received a total amount of shopping commission of ₹ 1,31,34,402/- from different shops and considered it as part of business receipts in its profit and loss account. At the same time, on this amount, the assessee also claimed deduction under Section 80 HHD of the Income Tax Act, (hereinafter referred to as 'the Act').

2. After considering the aforesaid facts, the Assessing Officer excluded the shopping commission from the business profit and also from the total business receipts on the ground that under the provisions of Section 80 HHD of the Act only the profit derived by the assessee from services provided to the foreign tourists was eligible for deduction. According to the Assessing Officer, such profit cannot include components which were not related to the services rendered to the foreign tourist. In the case of the assessee, shopping commission earned was an amount which was not related to the services rendered to the foreign tourist. In view of the aforesaid, the Assessing Officer excluded shopping commission and interest income from the total business receipts

and business profit for allowing deduction under Section 80 HHD of the Act.

3. The CIT (A), however, reversed the aforesaid order of the Assessing Officer and allowed the appeal filed by the assessee against the AO's order holding that the aforesaid shopping commission received by the assessee shall also be eligible for deduction under Section 80 HHD of the Act. The interest income was treated as income from other sources and not a part of business receipt and business income eligible for deduction under Section 80 HHD of the Act (we are not concerned with this in the present appeal).

4. In so far as the shopping commission is concerned, the CIT (A) took note of the contention of the assessee in detail, though did not give his own reasons but at the same time, agreed with the contention of the assessee in the following terms:-

“As far as the shopping commission is concerned, I am of the view that the same is a business receipts only because it is incidental to tour and travel arrangements made for foreign tourists. The appellant company has not only made arrangements for transport, boarding and lodging, side seeing, provided guides and escorts but also taking them for shopping. In that process the

assessee company is receiving commission from the shops to which these foreign tourists are taken. Therefore, such an income is part and parcel of business receipts only. However, since it has not been received in the convertible foreign exchange same has to be netted for the purpose of receipts from services provided to foreign tourists for the purpose of deduction u/s 80 HHD. The proportionate profit out of this activity has to be excluded for the deduction u/s 80 HHD as per formula given u/s 80 HHD (3) for the purpose I agree with the contention of the learned AR of the assessee that the eligible profit for the purpose of deduction u/s 80 HHD has to be worked out after excluding the commission income from the total receipt of the business for working out receipts from sources provided to foreign tourists as a numerator of the formula. The total receipts of the business will form the denominator of the formula.”

5. The ITAT has concurred with the aforesaid view of the CIT (A) and in the process, furnished the following basis:-

‘Thus, for computing eligible amount of deduction u/s 80 HHD, we have to find out three things (i) profit of the business of foreign tourists (ii) receipts in convertible

exchange & (iii) total receipts of business which includes business receipts in Indian currency as well as business receipts in convertible foreign exchange. It is pertinent to mention here that unlike the provisions of Section 80 HHC which specifically defines “profits of the business” under Explanation (baa), according to which 90% of receipts in the nature of brokerage, commission, interest, rent etc. is to be excluded from the profits and gains of the business profession, there is no such pari-materia provision in Section 80 HHD which provides for such exclusion of commission income which is a business receipt. In the instant case, the commission income so earned by the assessee in respect of the purchases affected by foreign tourists is undisputedly its business receipts. Thus, the commission income so earned was assessee’s business income and it cannot be excluded from the “profits of the business”, while computing eligible deduction u/s 80 HHD. Since such commission income was not received in convertible foreign exchange, therefore, while computing deduction u/s 80 HHD, such amount of commission is not liable to be included in receipts of income in convertible foreign exchange.”

6. Challenging this order of the Tribunal, the present appeal is preferred by the Revenue under Section 260A of the Act which was admitted on the following substantial question of law:-

“Whether learned ITAT/CIT(A) erred in holding that commission earned on purchases made by the tourists from the shops as a part of the business receipts which would qualify for deduction under Section 80 HHD?”

7. The entire issue depends upon the interpretation which is to be given to the aforesaid provision. Relevant portion of Section 80 HHD of the Act with which we are concerned reads as under:-

“-Deduction in respect of earnings in convertible foreign exchange.

80HHD(1) Where an assessee, being an Indian company or a person (other than a company) resident in India, is engaged in the business of a hotel, or of a tour operator, approved by the prescribed authority in this behalf, or of 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) For an assessment year beginning on the 1st day of April, 2001 a deduction of a sum equal to the aggregate of-

(i) Forty per cent of the profits derived by him from services provided to foreign tourists; and

(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, within such further period as the competent authority may allow in this behalf.

Explanation 1 : For the purposes of this sub-section, any payment received by an assessee, engaged in the business of a hotel or of a tour operator or of a travel agent, in Indian currency obtained by conversion of foreign exchange brought into India through an authorised dealer, from another hotelier, tour operator or travel agent, as the case may be, on behalf of a foreign tourist or group of foreign tourists, shall be deemed to have been received by the assessee in convertible foreign exchange if the person making the payment furnishes to the assessee a certificate specified in sub-section (2A).

Explanation 2 : For the purposes of this sub-section, the expression "competent authority" means the Reserve Bank of India or such other authority as is authorised under any law for the time being in force for regulating payments and dealings in foreign exchange.

(3) For the purposes of sub-section (1), profits derived from services provided to foreign tourists shall be the amount which bears to the profits of the business (as computed under the head "Profits and gains of business or profession") the same proportion as the receipts specified in sub-section (2) as reduced by any payment, referred to in sub-section (2A), made by the assessee bear to the total receipts of the business carried on by the assessee."

8. It is clear from the bare reading of the aforesaid provision that the income which is “derived from the services rendered from foreign tourists” would qualify for deduction under Section 80 HHD of the Act. However, Mr. Sanjiv Sabharwal, learned counsel appearing for the Revenue submitted that two more conditions need to be fulfilled i.e.

- (i) Income is to be received by the assessee directly from the foreign tourists which according to him was not satisfied in the instant case as the income was received by the assessee from the shops from where foreign tourists made purchases.
- (ii) Further, such income should be unconvertible foreign exchange income.

9. Mr. Sabharwal relied on the judgment of this Court in ***M/s Lotus Trans Travels P. Ltd. Vs. Commissioner of Income Tax*** (ITA 241/2004 & other connected matters, decided on 24th December, 2010). In the said case which was also concerned with Section 80 HHD of the Act, this Court (of which one of us (A.K.Sikri,J. was a member of the Bench) has held as under:-

“10. Section 80 HHD of the Act gives certain benefits to those engaged in the business of

hotel or tour operator. If such assessee makes earnings in convertible foreign exchange then to the extent of those earnings deduction is allowed in computing the total income of the assessee in the manner specified in said provision. To qualify for this deduction it is the pre-condition that the profits derived by such assessee are “from services provided to foreign tourists”. As mentioned above, the assessee is a Tour Operator. Its earnings are from Japanese tourists visiting the Buddhist circuit in India. Those earnings are in convertible foreign exchange. It is not in dispute that the assessee is entitled to deduction on such income. However, the assessee also wants interest earned on advances received in foreign exchange by making deposits in banks in India as short term deposits. Whether this interest would qualify as “profits derived from services provided to foreign tourists”, is the question. The entire matter has to be examined from this angle leaving aside the technical jargons and legal nuances.

11. The expression “derived from” has come up for interpretation in the case of ***Commissioner of Income Tax Vs. Sterling Foods, Bangalore***, 237 ITR 579. In that case,

it was authoritatively pronounced by the Supreme Court that there has to be a direct nexus between the profits and gains and the industrial undertaking. This view was reiterated by the Apex Court in ***Hindustan Liver Ltd. Vs. CIT***, 239 ITR 297. In a recent judgment pronounced by the Supreme court in the case of ***Liberty India Vs. Commissioner of Income Tax*** [317 ITR 218], the principle is revisited in a more lucid manner. The Court reiterated the distinction between the expression “derived from” and considered the expression “derived from” in contra distinction the term “attributable to” and held that the connotation of the words “derived from “ is narrower as compared to that of the words “attributable to”. By using the expression “derived from”, Parliament intended to cover sources not beyond the first degree. The Apex Court further opined that on analysis of Sections 80IA and 80IB, it becomes clear that any industrial undertaking which becomes eligible on satisfying sub-Section (2) would be entitled to deduction under sub-section (1) only to the extent of profits derived from such industrial undertaking after the specified date. Apart from eligibility, sub-section (1) purports to restrict the quantum of deduction to a specified percentage of the

profits. This is the importance of the words “derived from an industrial undertaking” as against “profits attributable to an industrial undertaking”. On this principle, the Court held that DEPB/Duty drawback incentives which flow from the scheme framed by the Central Government or from the provisions of Customs Act, 1962 cannot be treated as incentive profits from eligible business under Section 80IB of the Act.

12. If one has regard to the aforesaid pronouncement of the Apex Court, attributing the restricted meaning to the word “derived from”, the answer to the question before us becomes too obvious. The interest income is not derived from the foreign tourists. It is the deposit which is made of the advances received from those foreign tourists which is kept in the bank account and interest is received there from. Such an interest cannot be treated to be derived from the services provided to the foreign tourists. This interest income is not the result of services provided to those foreign tourists. Rather, further income is earned from the income generated from the services provided to those foreign tourists which source obviously becomes beyond the first degree. There is another difficulty in the way of the assessee. Such profit derived from “services provided

to foreign tourists” should be in convertible foreign exchange income in question is received from banks in India in Indian currency and not in foreign exchange. By no stretch of imagination, the assessee can take benefit thereof for the purpose of Section 80HHD of the Act.”

10. It is clear from the above that the expression “derived from” as occurring in Section 80HHD of the Act has been interpreted to mean that such an income should be the result of services provided to foreign tourists. To put it otherwise, the source of income should be generated directly from the foreign tourists. That is the first degree and not beyond that. Admittedly, the assessee was receiving the commission from shopkeepers and not in foreign exchange from the tourists directly. Obviously, these ingredients are not satisfied in the present case.

11. Mr. Ajay Vohra, learned counsel appearing for the assessee was candid in admitting that the aforesaid judgment would cover the instant case against the assessee. It was for this reason that he made a fervent plea to this court to reconsider the view taken in the said judgment, as according to him Section 80 HHD of the Act was a complete code in itself. Sub Section (3) thereof provides formula for calculating the deduction and as per which only

requirement was to see as to whether the income was business income or not even if receipts were not in foreign exchange. He further submitted that the provisions of Section 80 HHC or 80-I of the Act were totally different as relied upon the portion extracted above by the Tribunal. We are, however, not persuaded to take a different view than the view taken in ***M/s Lotus Trans Travels P. Ltd.(supra)***. Sub Section (3) of Section 80 HHD provides for the formula for calculating the deduction. However, the said formula is a pre-requisite condition in sub Section (1) thereof and is to be satisfied. Sub clause (i) of the clause (a) of sub Section (1) permits deduction of “the profits derived from the services provided to foreign tourists”. Thus, it is essentially for the assessee to show that the profits earned by him are derived from services provided to foreign tourist. Sub Section (2) makes the position beyond pale of any doubt which not only stipulates that the Section applies to services provided to foreign tourists but also puts a condition to the effect that receipts in relation thereto are received in, or brought into, India by the assessee in convertible foreign exchange. Caption of Section 80 HHD of the Act is ‘deduction in respect of earnings in convertible foreign exchange’. Obviously, this provision is made to encourage those engaged in the hotel business or tour operators who are earning in convertible foreign exchange by rendering services to foreign tourists. There is no

direct nexus of the income earned by the assessee from services provided to these foreign tourists.

12. As mentioned above, the assessee earned from the shop keepers in India who in turn may be earning from the foreign tourists in selling their merchandise. As far as assessee is concerned, he is receiving the shopping commission in Indian currency, that too, from Indian businessmen namely the shopkeepers. The pre-condition stipulated in 80 HHD of the Act is, therefore, not satisfied. We, thus, answer the question in favour of the Revenue and against the assessee. In consequence, the order of the Tribunal and CIT (A) is set aside and that of the AO is restored.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

APRIL 8,2011
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