

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

+ **ITA No. 1874/2010**

% Date of Decision: 30.03.2011

COMMISSIONER OF INCOME TAX –VI **... Appellant**
Through: Mr. Sanjeev Rajpal, Advocate

Versus

M/s UNITED HOTELS LTD. **... Defendant**
Through: Mr. Ajay Vohra with Ms. Kavita
Jha & Mr. Somnath Shukla,
Advocates.

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

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | NO |
| 2. To be referred to Reporter or not? | NO |
| 3. Whether the judgment should be reported in the Digest? | NO |

A.K. SIKRI, J. (Oral)

1. The respondent/assessee is engaged in the business of running five star hotels. In the present case, we are concerned with the Ambassador Hotel situated at Sujan Singh Park, New Delhi which is also managed by the

respondent/assessee. This appeal pertains to the Assessment Year 2006-2007. In this year, the Assessing Officer has disallowed the expenditure of ₹91,70,962/- incurred by the assessee which was in the form of payment made to M/s Megapode Airlines Ltd. (Now known as Taj Airlines Ltd.) . As per the respondent/assessee, this payment was made under the agreement dated 29.12.1999 with the said company doing the business of air taxi operator. The agreement was arrived at between the assessee and the said air taxi operator as per which the assessee was entitled to utilize 35 hours on its aircraft with discounted charges for flying hours utilized by the assessee. The discounted charges were fixed at ₹ 65,000/- per flying hours normally as against ₹.25 lacs. The assessee had paid a sum of ₹ 153.3 lacs as annual fixed chargers and received a refund of ₹6.60 lacs for excess fixed cost recovered and for the use of part of entitlement by the taxi air operator which was not actually utilized by the assessee. It was in this manner balance amount of ₹91.71 lacs was shown as expenditure debited in the

profit and loss account. The Assessing Officer was of the opinion that the agreement did not contain any clause as per which the aircraft was to be utilized by the assessee for its guests and premier clients to avail of these facilities. Therefore, there was no commercial expediency in the said agreement. He was also of the opinion that the taxi operator was the subsidiary of the assessee and, therefore, this agreement was merely a device to make payment to the said taxi operator to reduce its tax liability. Therefore, according to the Assessing Officer, this expenditure was also not allowable under Section 40A(2)(b) of the Income tax Act. He thus passed the order disallowing the aforesaid expenditure. The assessee had challenged this order before the CIT(A) which set aside the order of the Assessing Officer and had deleted the aforesaid additions holding that the agreement entered into between the assessee and the said tax operator availing fixed flying hours for its guest and premier clients and therefore, it was incurred for the purposes of business. The view of the Assessing Officer that the expenditure was not liable under Section

40A(2)(b) of the Income Tax Act was also not accepted by the CIT(A). The ITAT has upheld the order of the CIT(A) and thereby dismissed the appeal of the Revenue. Against this order of the ITAT, the present appeal is preferred.

2. The facts appearing on the record reveal that in respect of Assessment Year 2001-2002 also the similar payments were made by the assessee under the same agreement to the taxi operator on identical grounds, the Assessing Officer had disallowed the expenditure. The Tribunal had set aside the order of the Assessing Officer observing as under:-

"5. From the above observations of the Assessing Officer, it appears that basically the Assessing Officer has declined deduction of payment firstly on the plea that there was no actual utilization of flying hours and secondly payment was made to associate concerns to reduce its income. So far as first grievance of the Assessing Officer is concerned, there is no force in the same, in so far as per clause 9 of the agreement, the assessee was liable to pay the annual fixed charges during the terms of this agreement irrespective of the hours actually utilized by it, on the jet air. The agreement so entered by the assessee was in the interest of its business and the same was duly explained before the lower authorities. We also found that assessee being

running a five star hotel, to give better facilities to its premier customers, it has added facility of charter flying. As the expenditure so incurred was in the course of carrying on of the business, the same cannot be disallowed. We also found that this agreement was entered into is a commercial expediency and the assessee has negotiated the flying rates at concessional price. The payment so made was not in the nature of capital expenditure nor personal in nature, and the same was laid out wholly and exclusively for the purpose of business is to be allowed while computing the income chargeable under the head "profit and gains of the business" under sec. 37(1) of the Income Tax Act, 1961.

6. With regard to the allegation that payment was made to the associate concerns, the disallowance can be made by invoking the provisions of sec. 40A(2) wherein burden lies on the revenue to prove that expenditure so incurred was excessive or unreasonable having regard to the fair market value of the goods, services or the facilities for which payment is made or the legitimate needs of the business of the assessee, or the benefit derived by or accruing from such services. In the instant case, no finding has been recorded by the Assessing Officer to show that similar facilities were available to the assessee at a lower price or that assessee has made any excessive payments. In the absence of such finding, the provisions of sec. 40A(2) cannot be invoked for making disallowance to associate concern falling under clause (b) of sec. 40(1)(2) of the Act."

3. An appeal was preferred by the Revenue against the aforesaid order of the ITAT which was also dismissed by this Court vide judgment dated 03.10.2008 which is reported as (2009) 177 TAXMAN 417(Delhi) while holding

that no substantial questions of law arise, this Court observed as under:-

"3. The Assessing Officer did not allow this amount as a deduction on the plea that there was no utilization of the flying hours and secondly, that the payment was made to MAL which was an associate concern of the assessee and the objective was to reduce the income of the assessee. The Tribunal considered these aspects and came to the conclusion that the assessee was liable to pay annual fixed charges as per the terms of the agreement irrespective of the hours actually utilized by it. The Tribunal also noted that the agreement was entered into by the assessee for its business purposes and it was in the interest of the assessee to have entered into such an agreement. It was observed that the assessee, being a five star hotel, in order to give better facilities to its premier customers had added the facility of charter flights. As such, the expenditure was incurred in the course of carrying on business. The Tribunal held that the same could not be allowed. The Tribunal also returned a finding that there was commercial expediency for entering into such an agreement and that the assessee had negotiated the flying rates at a concessional price. Consequently, it was held that the said expenditure was incurred wholly and fully for the purpose of business while computing the income chargeable under the head 'Profit and gains of business' under section 37(1) of the said Act.

4. With regard to the second aspect of the matter, the Tribunal observed that disallowance under section 40A(2) could only be made if the revenue had discharged its burden of proving that the expenditure so incurred was excessive or unreasonable having regard to the fair market value of the goods, services or the facilities for which the payment was made. Officer to show that similar facilities were available to the assessee at a lower price or that the assessee had made excessive

payments. Consequently, in the absence of the such findings the Tribunal concluded that the provision of section 40A(2) could not be invoked for disallowing the said expenditure.”

4. It would also be interested to note that the Revenue had preferred an SLP against the aforesaid decision of this Court. While the said SLP was pending, the Assessing Officer passed the orders under Section 254 of the Income Tax Act correcting its original assessment order on the ground inter alia, that the claim was made by the assessee for the use of the aforesaid airplane. This order was challenged by the assessee and the CIT(A) vide its order dated 30.11.2010 had set aside the aforesaid order. After passing of this order by the Assessing Officer, the SLP was dismissed on the ground that nothing survives therein.

5. The aforesaid events clearly demonstrate that under the same agreement the payments made earlier have been held to be genuine accepting the genuineness of the agreement and treating the same as incurred in connection of the business. This Court has also categorically held that the provisions of Section

40A(2)(b) of the Income tax Act are not attracted in the present case. In these circumstances, the fact also demonstrate that the earlier order passed by this Court in respect of the Assessment Year 2001-2002 had attained finality. Having regard to all these facts, we are of the opinion that this appeal is nothing but totally a frivolous and misuse of the process of law. No question of law arises.

6. We dismiss this appeal quantified at the cost of ₹20,000/-

A.K.SIKRI
(JUDGE)

M.L.MEHTA
(JUDGE)

MARCH 30, 2011
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