

ITA/707/2008
IN THE HIGH COURT AT CALCUTTA
In appeal from its
SPECIAL JURISDICTION (INCOME TAX)
CIVIL APPELLATE JURISDICTION

Oberoi Hotels [P] Limited
Versus
Commissioner of Income Tax, Kolkata – III

Before:

The Hon'ble Justice I. P. MUKERJI

And

The Hon'ble Justice BISWAROOP CHOWDHURY

Date: 6th October, 2023

Appearance:

Mr. J. P. Khaitan, Sr. Advocate

Mr. Akhilesh Kr. Gupta, Advocate

Ms. Akshara Shukla, Advocate
for the appellant

Mr. Swarajit Roychoudhury, Advocate
for the respondent

The Court: The facts of this case are more or less identical to those in ITA/8/2008 [Oberoi Hotels Pvt. Ltd. vs. Commissioner of Income Tax, Kolkata-III & Anr.] decided by this court by its judgment and order dated 1st September, 2023. In that judgment and order we observed and held as follows :

“The Court :A very interesting question of law is involved in this appeal.

It arises out of the two agreements between the appellant and the Government of Iraq in the 1980s, each for running a hotel in that country by the appellant. The first one was entered into on 8th July 1981 to operate a hotel for eight years from 15th October 1984 to 14th October 1992. The second one executed on 25th June 1984 was to operate another hotel for ten years from 1st April 1986 to 31st March 1996. According to the terms and conditions of the agreements, the appellant was to get 8% of the profits.

In 1990-91 the Gulf War was broke out. By mutual consent the agreements were terminated. The appellant received around Rs.1,45,00,000/- as compensation from the Iraqi authorities for premature termination of the agreements, further to the United Nations' recommendation in the matter.

The Indian tax authorities treated this as a revenue receipt and wanted to tax it. According to the appellant, it was capital a receipt not liable to be taxed.

Mr. J. P. Khaitan, learned senior advocate, appearing for the appellant submits that the agreement to operate each of the hotels on a long term basis, although on profit sharing terms and conditions, was to be taken as resulting in capital creation and not an ordinary trading transaction. On termination of the agreements by mutual consent, the compensation received tantamounted to receiving compensation for loss of capital. This was to be treated as a capital receipt.

Mr. Roy Choudhury, learned advocate for the respondent, submits that the transaction between the parties was a pure and simple business adventure, out of which the appellant was earning 8% profit. Hence the compensation received was to be taxed as revenue receipt.

The leading judgment of the Supreme Court in this field is Oberoi Hotel Private Limited vs. Commissioner of Income Tax reported in 236 ITR 903. The following principles of law can be enunciated from this wonderfully written judgment.

What is received from loss of capital is capital receipt whereas profit in a trading transaction is taxable. Where compensation is received by a person for cancellation of a contract but does not affect the trading structure of the business or deprive him of source of income, the receipt is revenue. The termination of the contract is taken as a normal incident of business. Where the trading structure is affected or source of income is depleted which is sought to be compensated by paying an amount that amount is to be taken as a capital receipt.

We have considered the submissions of learned counsel for the parties.

On scrutiny of the impugned order of the tribunal we do not find that any inquiry or finding has been made by the tribunal in relation to the above essential facts. The above judgment of the Supreme Court was sought to be distinguished on facts. It has been stated by the tribunal that in the facts of the Supreme Court case there was an option to the appellant to buy the hotel, a capital asset which the appellant was deprived of. Here there was no such option.

The said premises on which the tribunal has proceeded is unfortunately flawed.

The main question to be answered was whether on a construction of the agreements, their execution, the conduct of the parties and so on the operation of the two hotels in Iraq by the appellant on a long term basis could be taken as creation of capital or a source of income? Whether on termination of these agreements, the compensation received by the appellant for not being able to carry out the agreements could be taken as one for loss of capital?

In those circumstances, we set aside that part of the impugned order of the tribunal dealing with above issue. We remand the matter to the tribunal with a direction upon it to decide the same upon hearing the parties preferably within a period of six months from date.

All points are kept open.

The appeal is accordingly disposed of. “

The difference between the impugned order of the tribunal in the other case and this case is that in this case the tribunal has substantially accepted the submission of the appellant that receipt of compensation was capital in nature. However, it proceeded to treat the cost of acquisition as nil and to direct computation of capital gains tax under section 45 of the Income Tax Act, 1961 accordingly.

Mr. Khaitan, learned senior advocate appearing for the appellant is aggrieved by this finding. He is also aggrieved by the recording of an alleged concession made by him or his client before the tribunal.

For those reasons, we set aside that part of the impugned judgment and order treating the cost of acquisition as nil for the purposes of calculation of capital gains and remit the matter to the tribunal to consider the issue afresh, without relying on any alleged concession within six months of communication of this order.

The appeal is disposed of.

(I. P. MUKERJI, J.)

(BISWAROOP CHOWDHURY, J.)