IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.11.2024

CORAM :

THE HONOURABLE DR.JUSTICE ANITA SUMANTH
and
THE HONOURABLE MR.JUSTICE G. ARUL MURUGAN

T.C.A.No. 852 of 2010

M/s. Oriental Hotels Limited
37, M.G.Road, Nungambakkam
Chennai – 600 034. .. Appellant

vs

The Assistant Commissioner of Income Tax
Company Circle – V,
Chennai.
.. Respondent

Prayer: Appeal filed under Section 260A of the Income Tax Act, 1961 against order of the Income Tax Appellate Tribunal, Madras D Bench, dated 15.07.2009 in ITA No.417/Mds/2006 for assessment year 2002.03.

For Appellant :: Mr.R.Vijayaraghavan
for M/s.Subbaraya Aiyar Padmanabhan

For Respondent :: Ms.V. Pushpa
Senior Standing Counsel

JUDGMENT
(Delivered by Dr. ANITA SUMANTH.,J)

This Tax Case (Appeal) relates to assessment year (AY) 2002-03. The appellant/assessee, Oriental Hotels Limited (OHL), is in the business of hoteliering and catering. It had entered into a Share Sale Agreement (SSA) on 01.10.2001 with Indian Hotels Company Limited (IHCL), Singapore Airport Terminal Services Limited (SATSL), Taj Air Caterers Limited (TACL/purchaser) and Taj Madras Flight Kitchen Limited (TMFKL), the purpose of which was to enable IHCL and SATSL to form a joint venture to engage in the business of catering to airlines and to establish and operate restaurants and lounges in airports.

2. Under that SSA, business is defined as follows:

'Business' means the following areas of activity:
(a) the business of catering to airlines at various locations in the Territory; and
(b) the business of establishing and/or operating restaurants and lounges at various airports in the Territory;

3. To enable the business between IHCL and SATSL, the other entities, i.e., SATSL and OHL, covenanted to transfer to the purchaser, i.e.,

TACL, their shares free from all encumbrances, claims, charges and liens at closing rate. For the said purpose, OHL was to be paid a cash of an amount of Rs.2.75 crores, which the parties refer to as non-compete fee.

4. In consideration of such payment and subject to terms and conditions of the agreement, OHL agreed that it shall not perform any of the obligations created by, or arising under a Long Term Supply of Food Contract (LTSFC) that it had entered into with OHL. It also undertook to ensure that its affiliates shall not engage in a competing business in the demarcated territory for a period of 7 years.

5. Clause 2.3 of the SSA states as follows:

2.3 Subject to the terms and conditions of this Agreement, and in consideration for the payment of the OHL Non-compete Consideration, OHL hereby agrees and undertakes that it shall not, save and except as may be required to carry out, perform and discharge all obligations created by or arising under the OHL Long Term Supply Contract, and shall procure that each of its Affiliates shall not, for a period of seven (7) years from the expiry of the OHL Long Term Supply contract:
(a) directly or indirectly engage in a Competing Business anywhere in the Territory;
(b) either on its own account or in conjunction with or on behalf of any other Person:

(i) solicit, entice away or attempt to solicit or entice away from the Purchaser, any customer, client, representative or agent of the Business, or any employees of the Purchaser, whether or not such employee would commit a breach of contract by reason of leaving such employment; or

(ii) enter into negotiation or finalisation of a contract in relation to the Business or matters connected therewith; and

(c) divulge or disclose to any person any information (other than information available to the public or disclosed or divulged pursuant to an order of a court of competent jurisdiction) relating to the Business, the identity of its suppliers, its products, finance, contractual arrangements, business or methods.

6. The Long Term Supply of Food Contract (LTSFC) is also dated 01.10.2001, effective from that date, and has been executed between OHL as Purchaser and TMFKL as Supplier. The LTSFC states, at Clause (C) of the Recitals that the object is to enable the Purchaser to source food/meals, beverages and other items from the Supplier on the terms contained therein.

7. The consideration payable to the Supplier is set out at Clause 3 reading thus:

3. CONSIDERATION

3.1 In consideration for the Supplier providing the Supply Items for the Term, the Purchaser shall, on the basis of invoices to be raised for this purpose in the

manner provided in Clause 3.2, pay the Supplier the aggregate of:
(a) the Actual Cost of each of the Supply Items supplied by the Supplier to the Purchaser in the month preceding the invoice; and
(b) 28% of the Gross Margin, or such other percentage (x%) as may be agreed between the Parties from time to time in accordance with Clauso 3.3 (the "Deferred Consideration").

Provided that until the release of the Second Tranche (as defined in the subscription cum shareholders agreement dated September 25th, 2001 entered into between TACL. SATS and IHCL) shall be accrued for the benefit of the Supplier but shall not be paid till the release, of the said Second Tranche. For the avoidance of doubt, the Actual Cost referred to in Clause 3.1(a) shall be paid in accordance with Clause 3.2 from the date of this Agreement.

3.2 The invoices for the Supply Items shall be raised before the 8th (eighth) of every month for the Supply Items provided to the Purchaser in the preceding month. The Purchaser shall pay each invoice in full within 30 (thirty) days of the date of receipt thereof. Payment shall be made to the Supplier in the form of immediately available funds to a bank account designated by the Supplier or in such other manner as may be mutually agreed to by the Parties. In the event that the Purchaser fails to pay any invoice in full within the period specified herein, on or before its due date, the Purchaser shall pay interest at 9% per annum on the outstanding amount from such due date up to the date of payment in full of such outstanding amount to the Supplier. For the avoidance of any doubt, such late payment interest shall not in any way be taken into account in the calculation of the payment due to the Supplier by the Purchaser under Clause 3.1.

3.3 The Parties shall, by mutual agreement, on the basis of the costs incurred by the Purchaser in relation to the Restaurant in accordance with the books of the Purchaser, review every 3 (three) months during the Term, and revise, as necessary, the percentage (x%) of the Gross Margin payable to the Supplier under Clause 3.1 (b).

3.4 The Supplier may upon serving reasonable notice on the Purchaser examine/audit the books of the Purchaser in relation to the Restaurant to verify the Purchaser's computation of the Gross Margin. The Purchaser shall make available such books to the Supplier for its inspection and respond to all of the Supplier's reasonable queries and requests for clarification in relation thereto to the Supplier's reasonable satisfaction.

8. The LTSFC provides for exclusivity at Clause 5 thereof, stating that the Purchaser shall procure the Supply items exclusively from the Supplier for the term of the contract or upto early termination of the contract whichever is earlier.

9. On the same day, 01.10.2001, the arrangement under the LTSFC is communicated to SATSL by OHL and that communication is confirmed by TMFL. The same signatory has executed the aforesaid communication, in his capacity of Director of OHL and Chairman of TMFK. The communication dated 01.10.2001 is extracted in full below:

*Singapore Airport Terminal Services Limited
SATS Inflight Catering Centre 1,
20 Airport Boulevard,
Singapore Changi Airport,
Singapore 819659.*

*October 1, 2001
Dear Sirs,*

Re: Arrangements in relation to the Long Term Supply of Food Contract in relation to the Chennai Restaurant

1. Oriental Hotels Limited (OHL) is a part of the Taj group of of hotels. Taj Madras Flight Kitchen Limited ("TMFK") carries on the business of air catering in Chennai and is a joint venture company between OHL, The Indian Hotels Company Limited ("IHCL"), Singapore Airport Terminal Services Limited ("SATS') and Malaysian Airline System Berhad.

*2. IHCL and SATS have agreed to transfer the Taj Group's business of airline catering in India together with the entire profits from the airport lounge restaurant operations in India to a new joint venture company, Taj Air Caterers Limited ("TACL"). It is intended that SATS and IHCL will own 49% and 51% of the equity share capital respectively. As part of the joint venture arrangements, TACL proposes to purchase the shares of OHL, IHCL and SATS in TMFK such that TMFK becomes a subsidiary of TACL. Further, OHL, as part of the agreement for the sale of its shares in TMFK to TACL (**"Share Sale Agreement"**) has agreed to give a non-competition undertaking to TACL in the areas of airline catering and operating airport restaurants and lounges in India on the terms and conditions specified in the said agreement.*

*3. OHL manages a business center and operates the snack bar and restaurant at Kamraj Domestic Terminal, Chennai Airport, Chennai (the business center, snack bar and restaurant hereinafter collectively referred to as the **"Chennai Restaurant"**) pursuant to an agreement entered into between OHL and Airports Authority of India dated June 15, 2001 (the "**AAI License**"). As part of the arrangements for the transfer of the business/ profits by the Taj group to TACL and the Share Sale Agreement and the non-compete undertaking by OHL thereunder, it is agreed between the parties that where possible or practicable, the AAI License will be novated in favour of TACL or TMFK. Pending such novation, OHL has entered into a Long Term Supply of Food Contract in relation to the Chennai Restaurant (the "**Chennai Supply Agreement**") pursuant to which TMFK will supply food, beverages and other items to the Chennai Restaurant.*

*4. Under the Chennai Supply Agreement, TMFK shall, in consideration for the supply of the Supply Items (as defined in the Chennai Supply Agreement) be paid the Actual Cost (as defined in the Chennai Supply Agreement) of the Supply Items and 28% of the Gross Margin (as defined in the Chennai Supply Agreement), or such other percentage as may be agreed by OHL and TMFK from time to time. OHL agrees that, to comply with the principle that the net profits from the operation of the air catering business of the Taj group including the Chennai Restaurant should accrue to TACL, the net profits of thé Chennai Restaurant will be paid to and will accrue to the benefit of TMFK, and therefore to its holding company, TACL (the "**Principle**"). Therefore, OHL will pay to TMFK, for the food and other items supplied under the Chennai Supply Agreement, an amount equivalent to their cost of procurement and production by TMFK of such items plus x% of their Gross Margin (as defined in the Chennai Supply*

Agreement), where x% is determined such that the Principle is achieved.

5. OHL further agrees that as and when the AAI License expires or is terminated, it will not renew the AÂI License or tender for the new operating licences that may be granted for the Chennai Restaurant by the Airports Authority of India, and it will assist TAÇL or TMFK to secure the same.

6. OHL further agrees that notwithstanding anything contained in this letter or any other agreement in the Chennai Supply Agreement or elsewhere to the contrary, the Principle will continue to be maintained and payments will contmue to be made by OHL to TMFK, even if for whatever reason, TMFK does not continue to supply any or all food or other items under the Chennai Supply Agreement or where the Chennai Supply Agreement is terminated. In such a case, where appropriate, the Parlies will come to a mutual agreement to restructure their relationship to such other appropriate relationship for this purpose, and, if necessary, OHL shall enter into agreements with alternative suppliers.

7. The Chennai Supply Agreement shall be read in conjunction with this letter.

Sd/-
OHL
Name: Zubin Dubash
Designation: Director

Sd/-
TMFK
Name: Zubin Dubash
Designation: Chairman

10. In its return of income, the appellant had adopted the position that the amount of Rs.2.75 Crores was non-compete fee, not liable to tax. An order of assessment came to be passed on 28.02.2005 wherein the assessing authority rejected the claim of non-compete fee for several reasons.

11. Firstly, he noted that the LTFSC was valid upto 2008 and under that contract, the appellant had agreed to purchase food, beverages and other items from TMFKL. For the supply of those items, the appellant had agreed to reimburse actual cost along with profit margin. Secondly, on examination of the accounts of TMFKL, the assessing authority notes that Rs.0.29 crore had been received as profit and hence to that extent, there had been a loss of profits from air catering division which had continued to operate. Thus, he comes to the conclusion that the so called, non-compete fee was nothing but compensation for loss of profit suffered by the assessee in respect of the air catering division.

12. Thirdly, the appellant had entered into an agreement with Airports Authority of India (AAI) as licensee of the airport restaurant and Clause 5.a

of that license agreement provided that the licence shall not be sub-contracted without the written consent of the AAI. We have not been provided with a copy of that Agreement which however, finds mention in order of assessment at paragraph 5 (j) thereof despite specifically seeking the same. In any event, learned counsel for the for the Appellant confirms that there is no dispute on this factual position.

13. Hence, if at all the appellant intended that it would not to operate the airport restaurant/lounge, such act, amounting to novation of its contract with the AAI, would have to be with the consent of the AAI only and as a consequence, no other entity could operate the airport restaurant/lounge save the appellant. We had specifically sought a clarification as to whether such novation had transpired, recording under docket order dated 04.11.2024 as follows:

> *Heard.*
>
> *2. The appellant will produce a copy of the agreement with Airports Authority of India (AAI). They will also produce evidence, if any, having sought novation of the contract with AAI and whether such request has been accepted. A copy of the order in the case of Chemech Laboratories will be produced.*
>
> *3. List on 11.11.2024.*

14. Today, learned counsel for the appellant confirms that there has been no novation of the contract with AAI and the appellant continued to hold the licence till 2008.

15. Fourthly, the assessing officer notes that prior to LTFSC, the lounge/restaurant was being operated by the appellant using its own equipment and resources. Therefore, the profit from these receipts were being enjoyed by it. Post entering into an agreement, it was TMFKL that was being allowed to use and exploit the licence. The assessee had purchased food, beverages and other items from TMFKL, reimbursing the cost along with entire profit margin to TMFKL.

16. Thus, for the above reasons, the officer comes to the conclusion that the LTSFC is nothing but permission granted to TMFKL to operate the airport restaurant, and that the receipt of Rs.2.75 Crores was linked to the exploitation of licence of the airport catering licence by TMFKL. That apart, the receipt of Rs.2.75 crores was on 12.06.2002 whereas the Agreements inter se the parties stipulate that non-compete fee takes effect from 15.10.2008. Thus, if at all the amount of Rs.2.75 crores were to be

accepted as being a non-compete fee, it would operate only post 2008 when the licence itself would have expired.

17. The conclusions in the order of assessment are as follows:

m) From the above discussion, the following conclusions are made:

1) TSACL controls 75% Shareholding of TMFKL
2) Assessee received the alleged non compete fee from TSACL
3) Assessee is owner of the license to operate the Airport restaurant.
4) Assessee entered into long term supply contract with TMFKL, which resulted in assessee losing profits from Airport restaurant.
5) It is in lieu of the loss of profits, assessee received Rs 2.75 Cr
6) Though license is in the name of assessee, profits are received by TMFKL.
7) Assessee, for all practical purposes, permitted TMFKL to use and exploit the license to run the airport restaurant and for such permission only assessee received Rs 2.75 Cr.
8) There is no nexus between the non competition undertaking and receipt of Rs. 2.75 Cr.

18. In first appeal, the order of assessment stood confirmed by the Commissioner of Income Tax (Appeals), further confirmed in second appeal by the Income Tax Appellate Tribunal (Tribunal) vide order dated 15.07.2009, assailing which, the present appeal has been filed.

19. At the time of admission, the following substantial questions of law have been admitted:

"1. Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the amount received towards restrictive covenant for non-competing in future with the purchaser of the business is a revenue receipt and taxable?

2. Whether on the facts and in the circumstances of the case the amount received by the assessee is chargeable to tax though the provision treating the réceipt of compensation for restraining one's business as revenue receipt has been brought only with effect from 1.4.2003 vide amendment to Section 28 by the Finance Act, 2002?

3. Whether on the facts and in the circumstances of the case, the Tribunal was right in law holding that interest income earned on deposits, loans advanced to subsidiary companies and inter corporate dividends which were in the course of and for the purpose of business should be assessed as income from 'other sources' and not under the head profits and gains of the business?

4. Whether on the facts and in the circumstances of the case, the Tribunal was right in law holding that the amount received from British Airlines towards settlement of the bills of stay of their crew should not be included in the foreign exchange receipts of the appellant for the purpose of computation of deduction u/s.80HHD?

5. Whether the appellate Tribunal was right in law in holding that the appellant is not entitled to deduction under Section 35D and hotel industry cannot be regarded as an industrial undertaking without appreciating that hotel falls within the definition of "industry"?

6. Whether the appellate Tribunal was right in law in denying deduction under Section 35D when the same has been allowed in the initial assessment year 1995-96?

20. The facts as captured in the paragraphs supra, are admitted. On a careful perusal of the concurrent findings in orders of assessment, first and second appeals, we are of the considered view that the stand of the revenue is correct, and the orders in appeal concurrently adverse to the Assessee, have appreciated the facts in proper perspective.

21. The agreements, both dated 01.10.2001, i.e., SSA and LTSFC read together, present the clear picture that the appellant had received a sum of Rs.2.75 crores for enabling the contract for management of the airport restaurant by TMFKL. Even if one were to accept the assessee's argument that the aforesaid amount was towards non-compete fee, the assessee would still fail in the test requiring it to establish receipt of consideration from TMFKL for management of the airport lounges.

22. Though learned counsel for the appellant would repeatedly emphasize the fact that the business was being run by the appellant as an agent of TMFKL, it cannot be accepted that the appellant ran the business

gratis, as such a submission does not resonate with accepted commercial practice.

23. Hence it was incumbent that the appellant had established separately, receipt of consideration towards managing the airport lounge and restaurant catering business. This has not been done at any stage of the proceedings. Instead, the appellant has merely been relying upon the agreements.

24. In *Chemplant Engineers (P) Ltd. V. Commissioner of Income-tax* ((1998) 234 ITR 23), cited by the Appellant, the loss of business was for a period of one year and hence, the compensation received was admittedly towards loss of business. Since the period in question was only one year, the Court held that such compensation would be revenue in nature. This decision is not of any assistance to the assessee in light of the distinguishable facts and circumstances considered in that case.

25. The alternate plea taken is that there may be attribution of a portion of the consideration toward non-compete fee. However, as we in agreement with the revenue that the entirety of the consideration relates only

to sale of the in-flight catering business, the question of attribution does not arise. Reliance by the Appellant upon the decision in *Commissioner of Income Tax V. Chemech Laboratories Ltd.* (T.C.(A)No.1492 of 2007 dated 23.12.2016) is thus also of no avail.

26. For the aforesaid reasons, we answer the questions of law in favour of the revenue and adverse to the appellant/assessee. This Tax Case (Appeal) is dismissed. No costs.

[A.S.M., J] [G.A.M., J]
11.11.2024

sl
Index:Yes
Neutral Citation:Yes
speaking order

To
The Assistant Commissioner of Income Tax
Company Circle – V,
Chennai.

Dr.ANITA SUMANTH,J.
AND
G.ARUL MURUGAN,J.

Sl

T.C.A.No. 852 of 2010

11.11.2024