IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: B: NEW DELHI

BEFORE SHRI R.S. SYAL, VICE PRESIDENT
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.3457/Del/2007
Assessment Year : 2004-05

Delhi Tourism and Transport Development Corporation Ltd., 18-A, Shopping cum Office Complex, Defence Colony, New Delhi. – 110 024. PAN: AAACD0169J	Vs.	DCIT, Circle-10(1), New Delhi.
(Appellant)		(Respondent)

ITA No.1505/Del/2009
Assessment Year : 2005-06

Delhi Tourism and Transport Development Corporation Ltd., 18-A, Shopping cum Office Complex, Defence Colony, New Delhi. – 110 024. PAN: AAACD0169J	Vs.	ACIT, Range-10, New Delhi.
(Appellant)		(Respondent)

ITA No.4877 /Del/2009
Assessment Year : 2006-07

Delhi Tourism and Transport	Vs.	DCIT,

Development Corporation Ltd., 18-A, Shopping cum Office Complex, Defence Colony, New Delhi. – 110 024. PAN: AAACD0169J		Circle-10(1), New Delhi.
(Appellant)		(Respondent)

ITA No.1903/Del/2011
Assessment Year : 2007-08

ACIT Circle-10(1)	Vs.	Delhi Tourism and Transport Development Corporation Ltd., 18-A, DDA, SCO Complex, Defence Colony, New Delhi PAN: AAACD0169J
(Appellant)		(Respondent)

ITA No.1634/Del/2011
Assessment Year : 2007-08

Delhi Tourism and Transport Development Corporation Ltd. 18-A, Shopping cum office Complex, Defence Colony, New Delhi	Vs.	Addl CIT Range-10 New Delhi

PAN: AAACD0169J

(Appellant) (Respondent)

ITA No.2687/Del/2012
Assessment Year : 2008-09

Delhi Tourism and Transport Development Corporation Ltd., 18-A, DDA, SCO Compels, Defence Colony, New Delhi	Vs.	Addl. CIT, Circle-10 New Delhi.

PAN: AAACD0169J

(Appellant) (Respondent)

ITA No.4910/Del/2012
Assessment Year : 2009-10

Delhi Tourism and Transport Development Corporation Ltd., 18-A, Shopping cum Office Complex, Defence Colony, New Delhi. – 110 024.	Vs.	DCIT, Circle-10(1), C.R. Building New Delhi.

PAN: AAACD0169J

(Appellant)		(Respondent)
Assessee By		Sh. H.P. Agrawal, CA, Sh. Pancham Selhi, CA and Sh. Prathani Aggarwal, CA
Department By	:	Ms. Rachna Singh, CIT DR and Ms. Ashima Neb, Sr. DR
Date of Hearing	:	26.03.2018
Date of Pronouncement	:	28.03.2018

ORDER

PER BENCH:

This batch of eight appeals, comprising of seven appeal filed by the assessee and one cross appeal by the Revenue, relate to the assessment years 2004-05 to 2009-10 and 2012-13. Since some of the issues raised in these appeals are common, we are, therefore, disposing them off by this consolidated order for the sake of convenience. It is pertinent to mention that some of the appeals are recalled matters inasmuch the earlier orders passed were subsequently recalled.

2. The assessee has raised two additional grounds, out of which first additional ground, that is relevant for the assessment years 2004-05 to 2007-08, reads as under:-

> "The assessee be allowed deduction of the amount utilized by it from TIUF towards construction of flyovers etc., as expenses allowable under section 37 of the Income-tax Act in pursuance of the order of Delhi High Court in the case of assessee company."

3. Briefly stated, the facts of the case for the assessment year 2004-05 are that the assessee is a wholly owned Government company of the

Government of NCT of Delhi. During the year under consideration, it was engaged in the business of tourism development, transportation, manufacturing and trading in Indian made foreign liquor and country liquor and civil engineering activities of construction on behalf of the Government of NCT of Delhi. The assessee debited a sum of Rs.26,62,23,175/- to its Profit & Loss Account towards transfer to Transportation and Infrastructure Utilisation Fund (TIUF). Interest of Rs.2,04,14,661/- , earned on surplus of this fund invested in banks etc., was directly credited to TIUF account. The assessee directly transferred a sum of Rs.6,63,82,520/- in the TIUF as contribution from other corporations. Such amounts were not included in its total income. On being called upon to explain the true character and allowability of these expenses shown to have been transferred to TIUF account and also the chargeability of the aforesaid interest etc., the assessee, relying on the Tribunal order for the assessment year 1996-97, argued that the surplus generated from the sale of country liquor and transferred to TIUF along with interest thereon etc., was not chargeable to tax on the ground of diversion of income by overriding title. The Assessing Officer did not

concur with the view taken by the assessee by noticing that the amount transferred to TIUF was in the nature of capital expenditure being construction of flyovers and pedestrian crossings. Following the view taken in earlier years, the Assessing Officer held that a sum of Rs.26.62 crore transferred to TIUF was application of income and, further, a sum of Rs.6.63 crore received from other corporations etc., credited directly to TIUF, was liable to be included in the total income. This is how, addition of Rs.33.26 crore was made on this account. The ld. CIT(A) followed his own decision taken in the assessee's case for earlier years by holding that neither deduction for such expenses could be allowed nor income on this account was chargeable to tax. Both the sides filed their respective appeals before the Tribunal. The Revenue's appeal in ITA No.3505/Del/2007 came to be dismissed by the Tribunal by relying on its own earlier years' orders holding that the amount received towards Transportation Infrastructure Utilization Fund (TIUF) stood diverted by overriding title and was, hence, not income in the hands of the assessee. Since the question of allowing deduction towards the amount utilized by the assessee from TIUF towards construction of

flyovers etc. was decided by the ld. CIT(A) in favour of the Revenue, no appeal on this issue was filed by it. It is further a matter of record that the Revenue's appeal against the order of the Tribunal for the instant year got dismissed by the Hon'ble High Court for non-receipt of approval from Committee on Disputes.

4. At this stage, it is pertinent to mention that the Revenue challenged the orders of the Tribunal for the assessment years 1990-91 to 1992-93, 1994-95 and 1996-97 before the Hon'ble Delhi High Court. The Hon'ble Delhi High Court vide its judgment dated 20.03.2012, overturned the order of the Tribunal by holding that the expenditure incurred by the assessee on construction of flyovers etc., was revenue expense and, hence, deductible u/s 37 of the Act. At the same time, the Hon'ble High Court also held that the amount standing in TIUF was not diverted at source by way of overriding title and was, therefore, liable to be included in the total income of the assessee. It is pursuant to this judgment of the Hon'ble Delhi High Court that the assessee has approached the Tribunal by means of the instant additional ground

urging that deduction should be allowed u/s 37 towards construction of flyovers etc. from the TIUF.

5. In view of the foregoing factual and legal discussion, it is clear that pursuant to the judgment of the Hon'ble High Court, the raising of the additional ground has become eminent. As a matter of fact, not admitting the additional ground would amount to violating the judgment of the Hon'ble jurisdictional High Court in assessee's own case, which is not possible. Since this ground raises a question of law arising from the facts which are already on record, we admit the additional ground for disposal on merits.

6. After considering the rival submissions and perusing the relevant material on record, it is noticed that the assessee transferred retail margin @ Rs.5 per bottle collected in the year out of retail sale proceeds of country liquor to TIUF. The amount was transferred to TIUF on the mandate of the State Government of Delhi, which amount was required to be spent by the assessee for construction of road infrastructure in Delhi etc. The Delhi Government, while granting the business of liquor retail trade to the assessee, mandated that the assessee shall be required

to spend Rs.5 per bottle collected from the sales proceeds of the liquor towards construction of road infrastructure. The assessee did not offer the said amount to tax considering the same as diversion by overriding title. In the same manner, the amount of construction expenses incurred by the assessee out of TIUF was also not claimed as deduction u/s 37 of the Act. This position flowed out of the Tribunal order dated 27.10.2000 for the assessment year 1996-97 in which the Tribunal held that neither the amount @ Rs.5 per bottle to be utilized for construction of flyovers etc., is income in the hands of the assessee nor the actual amount spent is deductible. The ld. CIT(A) followed the same view, which left the Revenue aggrieved in so far as the question of non-taxability of receipt on account of diversion by overriding title is concerned. The Revenue preferred appeal against the Tribunal orders for earlier years including 1996-97. The Hon'ble High Court overturned the view of the Tribunal by holding that the amount spent by the assessee is deductible and the amount earned by the assessee is chargeable to tax. This judgment was delivered by the Hon'ble High Court on 20.03.2012. Today, while

disposing off the present batch of appeals, we are duty bound to implement the judgment of the Hon'ble High Court.

7. The ld. AR argued that the additional ground be allowed by granting deduction u/s 37 of the Act in respect of the expenses incurred on construction of flyovers etc. He was fair enough to submit that at the same time, the Departmental grievance of excluding the amount received by the assessee from the net of tax by considering it as a diversion by overriding title, should also be redressed by restoring the issue to the file of Assessing Officer. The ld. DR also accepted this proposition.

8. Now, we are confronted with the judgment of the Hon'ble Delhi High Court in the assessee's own case, in which it has been held that the amount standing in TIUF and interest is not diverted at source by way of overriding title and has to be included in the taxable income of the assessee and, simultaneously, the expenditure incurred on construction of flyovers etc. is a revenue expenditure, which should be allowed as deduction. We cannot give effect to this judgment unless not only the question of allowing deduction as claimed through the additional ground

is allowed, but also the inclusion of the amount in the total income, being the stand point of the Revenue, is also upheld. Since both the sides are fairly accepting this position, we are of the considered opinion that the ends of justice would meet adequately if the impugned order on this issue is set aside and the matter is restored to the file of Assessing Officer for considering the taxability and deductibility in terms of the aforesaid judgment of the Hon'ble Delhi High Court in the assessee's own case.

9. Another additional ground has been raised by the assessee which is relevant for assessment year 2004-05. This additional ground reads as under:-

> "That under the facts and circumstances of the case, the provision for leave encashment amounting to Rs.48,30,282/- be allowed while computing total income irrespective of the actual payment made in respect thereof."

10. The factual matrix of this ground is that the assessee made a provision for leave encashment amounting to Rs.48,30,282/- in its books of account as per the actuarial valuation report for the A.Y. 2004-05 which was claimed as deduction only to the extent of leave encashment

actually paid. The remaining amount was offered for taxation. No claim was raised before the ld. CIT(A) for grant of deduction for the remaining amount, which was *suo motu* disallowed by the assessee. Now, it is through the above additional ground that the assessee has requested for grant of deduction in the light of the judgment in the case of *Exide Industries Ltd., and Anr vs. Union of India*, holding insertion of clause (f) to section 43B as constitutional and *ultra vires*. Since the issue raised through the additional ground does not require a fresh investigation of facts and the same involves a substantial question of law, we, therefore, admit the additional ground.

11. On merits, it is observed that the Hon'ble Supreme Court in *Bharat Earth Movers vs. CIT (2000) 245 ITR 428 (SC)* held that deduction on account of provision of leave salary is available. The legislature, in its wisdom, nullified the effect of this judgment by way of insertion of clause (f) to section 43B by the Finance Act 2001 w.e.f. 1.04.2002. The effect of this insertion is that any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee is deductible

only on actual payment. Per contra, a mere provision without actual payment is not eligible for deduction. Since this additional ground is in relation to the A.Y. 2004-05, the amendment by way of insertion of clause (f) w.e.f. A.Y. 2002-03 would squarely apply to the position obtaining before us.

12. The ld. AR contended that this amendment is unconstitutional and hence should not be acted upon. In support of this submission, he relied on the judgment of the Hon'ble Calcutta High Court in *Exide Industries Ltd. and another Vs. Union of India and Others 2007-TIOL-429-HC-Kol - IT*. In this judgment, the Hon'ble Calcutta High Court has declared the amendment to section 43B by way of insertion of clause (f), as unconstitutional. However, it is important to note that the Hon'ble Supreme Court vide its judgment dated 8.5.2009 in *CIT Vs. Exide Industries Ltd. and Another* has stayed the operation of the Hon'ble Calcutta High Court's judgment in Exide Industries. It has further been held by the Hon'ble Supreme Court that : `the assessee would, during the pendency of this Civil Appeal, pay tax as if Section 43B(f) is on the

Statute Book but at the same time it would be entitled to make a claim in its returns.' In view of the clear enunciation of law by the Hon'ble Supreme Court, we are of the considered opinion that the deduction cannot be allowed in terms of section 43B (f) on the making a mere provision unless the amount is actually paid. As the assessee has admittedly not made the payment of the amount in question and claimed deduction on the basis of provision, we are of the considered opinion that the assessee's contention cannot be accepted on this score. Similar view has been taken by the Delhi Tribunal in *DLF Home Developers Ltd. vs. ACIT* (ITA No. 2559/Del/2013) vide order dated 31.10.2013. In view of the foregoing discussion, we dismiss this additional ground raised by the assessee.

13. The only issue raised by the assessee in its Memorandum of Appeal for the A.Y. 2004-05 is against confirmation of addition of Rs.69,10,955/- on account of income from 'Dilli Haat.'

14. Briefly stated, the factual matrix is that the assessee disclosed a sum of Rs.2,36,15,290/- as Rental income/Fee for craft stalls. In

addition to that, revenue from Entry tickets amounting to Rs.1,56,99,815/- from 'Dilli Haat' was also disclosed. Gross revenue from the activity of 'Dilli Haat' was shown at Rs.4,30,39,511/-. After claiming total expenses of Rs.2,41,17,120/-, the assessee declared income from 'Dilli Haat' at Rs.1,89,22,390/- chargeable under the head 'Profits and gains of business or profession.' The Assessing Officer observed that the assessee constructed certain permanent structures as well as temporary constructions on the land leased from NDMC by 'Dilli Haat' and rented it to several organizations at different times and depreciation was claimed on such structures. As the assessee deducted tax at source u/s 194-I of the Act from the rental income, the Assessing Officer called upon the assessee to explain as to why such rental income be not assessed under the head 'Income from house property'. The assessee objected it by contending that the same is a part of its business income, being, from the marketing activity for overall development of tourism through interactive approach of tourists visiting 'Dilli Haat'. Not convinced with the assessee's submissions, the Assessing Officer treated income of Rs.2.36 crore (Rs.41,00,810 from space rented on

regular basis + Rs.12,99,600/- from Food courts and Bank etc. + Rs.1,82,14,880/- from Licence fee for use of craft stalls on 15 day basis) as falling under the head `Income from house property'. Consequently, he allowed statutory deduction @ 30% on such rental income towards expenses at Rs.70,84,587/-. He observed that total expenses relating to rental income activity, on proportionate basis, amounted to Rs.1,39,95,543/- and accordingly disallowed the balance expenses of Rs.69,10,956/- [Rs.1,39,95,543/- (-) Rs.70,84,587/-]. The ld. CIT(A) echoed the assessment order on this count, against which the assessee has come up in appeal before the Tribunal.

15. After considering the rival submissions and perusing the relevant material on record, we find from the Memorandum of Association of the assessee company that its main object include `Development of tourism'. Clause 1(d) of the Memorandum of Association provides that the main objects of the company are : `to develop tourism and to provide entertainment to tourists by way of cultural shows, tourist complexes, entertainment and amusement parks, dances, music concerts, ballets,

films, shows, sports and games, *son-et-lumiere* spectacles and others'. Thus, it is evident from the object clause of the assessee company that it was set up, *inter alia,* to develop tourism by providing entertainment to tourists by way of cultural shows etc. A copy of the brochure of 'Dilli Haat' has been placed on page 47 of the paper book, which shows that 'Dilli Haat' is like a village fair bustling in the heart of India's capital metropolis. It lists certain month-wise popular events/festivals at 'Dilli Haat', which include Lohri/Pongal in January, 'Dilli Haat' anniversary celebrations in March, Bihu/Baisakhi in April, Sharbat Mela in May so on and so forth. Here, it is significant to mention that the idea of 'Dilli Haat' was mooted by the Ministry of Tourism, Government of India in 1994 and land measuring about 6 acres was leased to the assessee from New Delhi Municipal Corporation, initially for ten years and, then, renewed from time to time. On such leased out land, the assessee constructed shops and stores, stalls, space for banks, restaurants and food courts along with open area earmarked for walkways, amphi-theatres and open theatres for entertainment, fashion shows and cultural programmes. As consideration to NDMC for lease of the land, the

assessee has to pay a sum of Rs.1,50,000/- per annum as licence fee plus 50% of sales of entry tickets of 'Dilli Haat' per annum, which amount for the instant year stands at Rs.1.56 crore. Coming back to the factual position relevant for the year under consideration, it is observed that the assessee organized various cultural activities throughout the year at 'Dilli Haat' with a view to attract tourists. We have noticed above that the assessee conducts cultural events/festivals at 'Dilli Haat' throughout the year. In order to attract tourists, various stalls are put up. Such stalls are allotted on a 15-days term to various craftsmen etc., called as `Participants', for exhibition of their products. Participants are selected only for a period of 15 days. Neither such participants nor their family members are allowed to participate in any programme at 'Dilli Haat' in a period of next three months. It is further relevant to mention that the selection of participants at 'Dilli Haat' is done by the Ministry of Textiles, Government of India. The participants are required to pay rent in cash @ Rs.200/- per day to the assessee towards rental charges. A copy of the agreement dated 20.10.2003 for selection of participants is available on page 21 of the paper book. The relevant parts of the

Selection letter by the Ministry of Textiles, Government of India, are as under:-

> "You have been selected for participation at Dilli Haat, New Delhi w.e.f. 1.11.2003 to 15.11.2003 opposite INA Market, Aurvindo Marg, New Delhi on the terms and conditions:-
>
> (i) You will not be paid any TA/DA/Transportation charges, etc., from this office for your participation.
> (ii) You have to pay rent in cash @ 200% per day to the Delhi Tourism Development Corporation towards rental charges.
> (iii) You have to be present in the stall for entire exhibition period. However Helper/Assistant, who is your spouse, son or daughter only is allowed. You are, therefore, suggested to contract this office on any working day between 4 PM to 6 PM and submit his/her bio-data (with the proof) with photograph name, age and father's/husband's name, relationship with you may be clearly indicated in the bio-data of the helper/assistant. No helper/assistant is allowed to assist you at Dilli Haat without attestation of his/her bio-data from this office.
> (iv) You must keep your identity card cum passbook in the stall during the entire exhibition period and must produce the same, whenever demanded by any officer/officials of the office of the Development Commissioner (Handicrafts) or inspection team.
> (v) Neither you nor any of your family members must have participated in any program at Dilli Haat during the last three months."

16. There are other selection letters for participants on the same terms and conditions as have been set out above. It is this rental income @ Rs.200/- per day per participant for a period of 15 days, which for the

year has swelled to Rs.1,82,14,880/-. The question is whether this amount of Rs.1.82 crore for use of craft stalls out of total rental income of Rs.2.36 crore is chargeable under the head 'Profits and gains of business or profession' as claimed by the assessee or 'Income from house property' as held by the authorities below? We have noticed above that 'Dilli Haat' was set up with the main object to promote tourism and to attract tourists. Various cultural shows organized during the year at 'Dilli Haat' are the means of attracting tourists. It goes without saying that no cultural show can be successfully organized unless stalls befitting the occasion are put up for offering craft products etc. to the tourists visiting 'Dilli Haat.' We have also noticed above that the rent @ Rs.200/- per day is charged for each craft stall for use of a designated area in 'Dilli Haat'. There can be no entry to the 'Dilli Haat' without payment of entry fee. It has been noticed above that the assessee is charging entry fee, which at the relevant time was Rs.10/- per adult and Rs.5/- per child. It is with the basic object of attending cultural events/festivals at 'Dilli Haat' that visitors pay entry fee and come to enjoy. Thus, it becomes necessary for the assessee to keep organizing

various festivals and cultural shows so as to attract the tourists. When we consider the main object clause of the assessee, which is to develop tourism and provide entertainment to the tourists by way of cultural shows, it becomes explicitly clear that such cultural shows are a necessary element of the assessee's core business activity, which obviously cannot be carried on unless appropriate stalls, matching with the concerned cultural event/show, are arranged. Considering a period of 15 days for which a particular space is allotted to participants for installing craft stalls on payment of Rs.200/- per day, which has to be necessarily vacated after such period and the background in which such craft stalls are organized, viewed in the light of the overall object of promoting tourism, income from such craft stalls, in our considered opinion, cannot be considered as anything other than `Business income'. We order accordingly.

17. The Hon'ble Andhra Pradesh High Court in *CIT vs. A.P. Small Scale Industrial Development Corporation (1989) 175 ITR 352 (AP),* considered almost similar facts in which the assessee in that case was

set up by a State Corporation whose primary object was to promote, assist, counsel and finance small-scale industries. As part of its obligations, it undertook different schemes under which certain sheds were constructed and space was hired out with infrastructure facilities to the entrepreneurs. The question arose whether income from such hiring out was assessable as 'Business income' or 'Income from house property.' The Hon'ble High Court held such income to be `Business income'.

18. Recently, the Hon'ble Supreme Court in *Chennai Properties and Investments Ltd. vs. CIT (2015) 373 ITR 673 (SC),* considered the case of a company whose main object was to acquire the properties and to let them out. The assessee rented out such properties and earned rental income therefrom, which was offered as income from business. The Assessing Officer treated the same as rental income. When the matter finally came up before the Hon'ble Supreme Court, their Lordships noticed that the main object of that assessee was to hold the properties and earn income by letting them out. Approving the stand of the

assessee, the Hon'ble Supreme Court held that the income from letting out of the property was `Business income'. It noted certain relevant facts for deciding whether income from letting out is a `Business income' or `Income from house property' as including nature of activities of the assessee and the objects of the company.

19. When we examine the facts of the instant case on the benchmark of the *ratio decidendi* in the above judgment from the Hon'ble Summit Court laying down the twin conditions of objects and nature of activity, it clearly emerges that both the tests are satisfied inasmuch as the object of the assessee company is to promote tourism by providing entertainment to tourists through cultural events etc. Further, the nature of the business activity of the assessee unmistakably deciphers that it cannot be carried out without letting out stalls on regular frequency to different craftsmen. In the above hue, we have absolutely no doubt in our mind that income of Rs.1.82 crore earned by the assessee from use of craft stalls on 15 days basis is `Business income' and has been

erroneously considered by the authorities below as 'Income from house property'. The impugned order is *pro tanto* vacated.

20. Though the ld. AR denied to have deducted any tax at source on such receipts of Rs.3,000/- per person (Rs.200/- per day x 15 days from each craftsman), we find that the deduction or non-deduction of tax at source under a particular provision does not alter the character of an income to be considered for taxation under a particular head. Explanation to section 194-I dealing with deduction of tax at source on rent defines 'rent' to mean 'any payment under any lease, sub-lease, tenancy, etc., for the use of land, building, machinery, plant and furniture, etc.' *whether or not any or all of the above are owned* by the payee. On the other hand, section 22 of the Act categorically provides that the annual value of property consisting of any building or land pertaining thereto *of which the assessee is the owner*, shall, in certain circumstances, be chargeable under the head 'Income from house property.' When we consider the instruction of section 194-I in juxtaposition to that of section 22 of the Act, there apparently arise

certain distinctions in both the provisions including the ownership or otherwise of property. To say that if tax is required to be deducted at source u/s 194-I and, hence, the income necessarily becomes chargeable under the head 'Income from house property', in our considered opinion, is not a universal proposition.

21. In view of our above decision in holding rental income from craftsmen as `Business income' on the first principles, we do not consider it expedient to discuss other issues raised by both the sides in support of their respective claims as to whether or not the assessee was owner of 'Dilli Haat', which is a mandatory condition for computing income under the head 'Income from house property' and rule of consistency etc.

22. Turning to the remaining amount of Rs.54.00 lac, we find that the same consists of Rs.41.00 lac, being, income from space rented on regular basis and Rs.12.99 lac, being, licence fee for allowing activities of food court, souvenir shops, bank and PCO. This amount of Rs.54 lac has been earned by the assessee from the letting out of its permanent

structures. The same cannot be equated with income of Rs.1.82 crore discussed above, being, licence fee for use of craft stalls on 15 day basis. The ld. AR was fair enough not to contest the taxability of Rs.54.00 lac as income held by the lower authorities to be falling under the head 'Income from house property.'

23. To sum up, we hold that income of Rs.1.82 crore be considered as 'Business income' and Rs.54.00 lac as 'Income from house property.' The Assessing Officer is directed to allow necessary deductions against these incomes as per law, after allowing a reasonable opportunity of being heard to the assessee.

24. In the result, appeal of the assessee for the A.Y. 2004-05 is partly allowed for statistical purposes.

Assessment Year-2005-06

25. The first additional ground taken by the assessee for the A.Y. 2004-05 regarding the diversion of income and the consequential stand of the Revenue for not allowing deduction of the expenses, raised for the

instant year as well, is hereby disposed off accordingly. The impugned order is set aside to this extent and the AO is directed to follow the mandate given above for the A.Y. 2004-05 and then decide the issue after allowing opportunity of hearing to the assessee.

26. The assessee is aggrieved against the confirmation of disallowance of Rs. 6,13,771/- under Section 40(a)(i) of the Act. Briefly stated the facts of this ground are that the tax audit report disclosed a sum of Rs. 6,13,771/- as inadmissible under Section 40(a)(i) of the Act . The Assessing Officer observed that the assessee failed to add back such amount in the computation of total income. He, therefore, made the disallowance, which came to be upheld in the first appeal.

27. We have considered the rival submissions and perused the relevant material on record. The ld. AR submitted that the said amount of Rs.6,13,771/- was never claimed as expenditure in the computation of total income. It is obvious that if no deduction is claimed, there can be no question of disallowance under Section 40 (a)(i) of the Act. We, therefore, set aside the impugned order on this score and remit the matter

to the file of the Assessing Officer for considering the assessee's claim about not having claimed any deduction for this sum in the computation of total income. If the assessee's claim turns out to be correct, then the disallowance has to be deleted. Otherwise, the AO will decide as per law.

28. Ground nos. 3 and 4 were not pressed by the learned AR. The same, therefore, stand dismissed.

29. The only other ground which survives in this appeal is against the addition of Rs.1,07,27,817/- on account of disallowance of expenses relating to "Dilli Haat".

30. Both the sides are in agreement that the facts and circumstances of this ground are similar to the ground raised by the assessee in its Memorandum of appeal for the A.Y. 2004-05. We have discussed this issue at length. Following the view taken hereinabove, we direct that the rental income from the use of craft stalls allotted to `Participants' be treated as `Business income' and the remaining rental income as falling under the head `Income from house property'. The Assessing Officer is

directed to allow deductions against the above incomes in consonance with our directions given for the A.Y. 2004-05 above.

31. In the result, the appeal is partly allowed for statistical purposes.

Assessment Year 2006-07

32. The first additional ground taken by the assessee for the A.Y. 2004-05 regarding the diversion of income and the consequential stand of the Revenue for not allowing deduction of the expenses, raised for the instant year as well, is hereby disposed off accordingly. The AO is directed to decide this issue afresh in terms of direction given above.

33. The next issue is against confirmation of disallowance of Rs.29,79,842/- under Section 40 (a) of the Act. Considering the tax audit report of the assessee, in which a sum of Rs. 29.79 lac was shown as inadmissible under Section 40 (a)(i) of the Act, the Assessing Officer made the disallowance. The learned CIT(A) sustained such disallowance.

34. We have heard both the sides and perused the relevant material on record. The ld. AR stated that that a sum of Rs. 27.27 lacs was *suo motu* added back by the assessee in its computation of total income and further no deduction was ever claimed in respect of the remaining amount of Rs.2.52 lac. Under these circumstances, we set aside the impugned order to this extent and remit the matter to the file of the Assessing Officer for verifying the assessee's claim of not having claimed deduction of Rs. 2.52 lac and also added back a sum of Rs. 27.27 lac in the computation of income and then decide as per law. The assessee will be allowed a reasonable opportunity to explain its position.

35. Next ground is against the addition of Rs. 1,38,29,677/- to the assessee's total income on account of income from "Dilli Haat".

36. Having heard both the sides and perused the relevant material on record, we find that the facts and circumstances of this ground are similar to those dealt with by us while disposing off the appeal for the A.Y. 2004-05. We follow the same and remit the matter to the file of Assessing Officer for deciding this issue of income as well as its

application afresh accordingly after allowing a reasonable opportunity of being heard to the assessee. The impugned order is set aside to this extent.

37. The next ground regarding disallowance of Rs. 21,296/- sustained under Section 40A(3) of the Act was not pressed by the learned AR. The same, therefore, stands dismissed.

38. The other grounds regarding charging interest are disposed off accordingly.

39. In the result, appeal is partly allowed for statistical purposes.

Assessment Year 2007-08

40. Cross appeals have been filed by the assessee as well as Revenue in relation to the assessment year 2007-08.

41. The first additional ground taken by the assessee for the A.Y. 2004-05 regarding the diversion of income is raised for the instant year as well. Ground no. 1 raised by the Revenue is against the deletion of addition of Rs.12,85,17,941/- made by the AO, being, surplus amount transferred to TIUF. Ground no. 2 of the Revenue's appeal is against the

deletion of Rs. 41,36,255/- made by the AO on account of income earned by the assessee towards bank interest on the amount transferred to TIOUF. As the facts are admitted similar to the earlier years, we set aside the impugned order on this issue and send the matter to the AO for following the mandate given on this issue in our order for the A.Y. 2004-05.

42. Ground no. 3 of the Revenue's appeal is against deletion of disallowance of Rs. 43,21,182/- out of disallowance of Rs. 44,54,806 made by Assessing Officer under Section 40(a)(i)/(ia) of the Act. Ground no. 2 of the assessee's appeal is related to the ground taken by the Revenue in which sustenance of part addition has been challenged.

43. Factual aspects of these grounds are that the Tax audit report indicated disallowance of Rs. 44,54,842/- under Section 40(a)(i) of the Act. On being called upon to explain as to why this disallowance was not made in the computation of total income, the assessee submitted that in most of the cases, the assessee either obtained TDS exemption certificates under Section 195 or the payments did not require deduction at source as these were made to the Government. Not convinced with the

assessee's submissions, the A.O. made an addition of Rs.44,54,842/- u/s 40(a) of the Act. The learned CIT(A) deleted the disallowance in respect of payments made to E4 Entertainment and M/s Brisc International in view of certificates obtained from income tax department not requiring any deduction from tax at source; Vivek Sadana in view of the fact that the tax was properly deducted at source by the assessee; and Airport Donijil Hotel for the same being a resident of Germany and not having any permanent establishment in India. The ld. CIT(A), however, sustained disallowance of Rs. 46,437/- and Rs. 87,187/-, being, payments made by the assessee to Sri Lanka Tourism Board and India Tourism. Both the sides have come up in appeal in support of their respective stands.

44. After considering the rival submissions and perusing the relevant material on record, we find that the learned CIT(A) has recorded a categorical finding that necessary certificates were obtained from income tax department whereby the assessee was authorized to make payments E4 Entertainment and M/s Brisc International without deduction of tax at source. This contention has not been controverted by

the ld. DR with any cogent material. Once the department has issued certificate for non deduction of tax at source, there can be no question of making any disallowance under Section 40(a)(i) of the Act.

45. Insofar as the payment of Vivek Sadana is concerned, the learned CIT(A) has specifically recorded that the assessee made deduction of tax at source from such payment. A copy of challan showing deposit of tax deducted at source was also filed before him. This finding has also not been controverted by the learned DR with any relevant material. Since the assessee has deducted tax at source on payment of Rs. 24,34,723/- made to Vivek Sadana, there can be no disallowance under Section 40(a)(ia) of the Act.

46. As regards payment of Rs. 13,22,159/- made to Airport Donijil Hotel, the learned CIT(A) has recorded that this recipient is a resident of Germany and the Double Taxation Avoidance Agreement between India and Germany does not provide for charging tax on the income of the resident of other country in India unless it has a permanent establishment in India. The learned DR has again not brought any material on record to controvert the finding recorded by the learned CIT(A) that the Airport

Donijil Hotel did have any PE in India. In the absence of there being any permanent establishment of a non resident enterprise in India, no business income computed under Article 7 can be brought within the taxation net in India. Once it is held that income of Airport Donijil Hotel is not chargeable to tax in India on the amount paid by the assessee, no disallowance under Section 40(a)(i) can be made.

47. In so far as the payment of Rs. 46,437/- made to Sri Lanka Tourism Board is concerned, we find that the assessee's contention of Sri Lanka Tourism Board being "the Government" and hence not requiring any deduction of tax at source in terms of Section 196 of the Act, is not substantiated. Section 196 of the Act clearly provides that notwithstanding anything contained in the earlier provision of this Chapter, no deduction of tax shall be made by any person from any sum payable, *inter alia,* to the "the Government". Sri Lanka Tourism Board is a separate Board constituted under the laws of Sri Lanka and hence cannot be considered as `the Government of Sri Lanka'. We, therefore, reject the contention raised by the learned AR on this score.

48. As regards, the nature of payment, the learned AR contended that this amount was paid for exhibition in Sri Lanka and hence no income can be said to have accrued in India requiring deduction for tax at source. We find that no contention in this regard was made before the authorities below. Since the Assessing Officer as well as CIT(A) have made/sustained the addition without discussing nature of income, we are unable to adjudicate on the taxability or otherwise of this amount in the hands of Sri Lanka Tourism Board and the consequential disallowance u/s 40(a)(i) of the Act. The impugned order on this score is set aside and the Assessing Officer is directed to examine the nature of this amount and then see its taxability in the hands of Sri Lanka Tourism Board and the consequential disallowance under Section 40 (a)(i) of the Act.

49. As regards payment of Rs. 87,187/- to India Tourism, the learned AR contended that this payment was made for allotment of space for exhibition outside India and hence no income can be said to have accrued in India. This contention is obviously devoid of any merit because even the income earned by a resident from other countries is

chargeable to tax. India Tourism, being, a resident of India is otherwise chargeable to tax in respect of its world income.

50. The contention of the learned AR regarding the same being, "the Government" and hence attraction of the provisions of section 196 of the Act requires verification at the end of the Assessing Officer in the absence of sufficient material available on record. We direct the Assessing Officer to examine the assessee's contention in this regard with reference to the necessary material to be placed on record by the assessee.

51. Ground no. 4 of the Revenue's appeal is against the deletion of disallowance of Rs. 4,60,183/- made by the AO on account of inadmissible amount under Section 40A(3) of the Act.

52. The facts of this ground are that the tax audit report showed a sum of Rs.4,60,183/- disallowable under Section 40A(3), being, the amount of payment made in foreign currency. On being called upon to explain the reasons for not offering the disallowance, the assessee stated that the above transactions related to the exchange of foreign currency under the RBI permission dealt with by Delhi Tourism as its business activity duly

authorized under the Licence. Not convinced, the Assessing Officer made disallowance of Rs. 4,60,183/-, which came to be deleted in the first appeal.

53. After considering the rival submissions and perusing the relevant material on record, it is found that Rule 6DD deals with cases and circumstances in which a payment or aggregate of payments exceeding the specified limit may be made to a person in a date otherwise by an account payee cheque or account bank draft. Clause (l) provides that "where the payment is made by an authorized dealer over a money changer against purchase of foreign currency or travellers cheque in the normal course of his business". Since the instant transaction is duly covered under Rule 6DD(l), we hold that the learned CIT(A) was justified in deleting this disallowance.

54. Ground no. 5 of the Revenue's appeal is against deletion of disallowance of Rs. 88,09,548/- made by Assessing Officer under Section 40(A)(7) of the Act on account of provision of gratuity.

55. The facts of this ground are that the assessee made a provision of gratuity amounting to Rs. 88.09 lac. The Assessing Officer held that the

amount was disallowable under Section 40A(7) as its payment was made after the close of the year. The learned CIT(A) held that Section 40A(7)(b) clearly provides that no disallowance will be made under this section if the provision is made towards an approved gratuity fund. Since the provision was made by the assessee towards an approved gratuity fund, the learned CIT(A) held that the provision of Section 40A(7) were not attracted. He further observed that disallowance under Section 43B can be made in respect of such amount only if it is paid after the due date of filing of return of income under Section 139(1) of the Act. As the assessee made such payment before the due date, the learned CIT(A) deleted the addition. The Revenue is aggrieved against the deletion of addition.

56. After going through the necessary material and the orders of the authorities below in the light of the contentions urged by both the sides, it is clear that learned CIT(A) has recorded that the assessee made payment towards approved gratuity fund before the due date of filing of return of income under Section 139(1) of the Act and thus the provisions of Section 43B are not attracted. This finding has not been controverted

by the ld. DR. We, therefore, approve the view taken of the learned CIT(A) of this issue.

57. Ground no. 6 of the Revenue's appeal is against the deletion of disallowance of Rs.27,08,242/- on account of late deposit of employer's contribution to the provident fund. In view of the fact that the assessee's tax audit report reported late payment of Rs. 27,08,242/-, the Assessing Officer made disallowance of the sum under Section 43B of the Act. The learned CIT(A) deleted the addition, against which the Revenue has come up in appeal before the tribunal.

58. The Assessing Officer also made disallowance of Rs. 74,72,660/-, being, delayed deposit of employees' contribution to PF under Section 43B of the Act. The learned CIT(A) noticed that a sum of Rs.14,82,105/- related to late deposit of employees contribution beyond the stipulated period. The remaining amount of Rs. 59,90,555/- was deposited within the grace period and hence allowed by the ld. CIT(A). The Revenue has not challenged the deletion of addition of Rs. 59,90,555/-. However, the assessee is aggrieved against the confirmation of addition of Rs. 14,82,105/- through ground no. 3 of its appeal, which amount was

admittedly deposited late but before the due date of filing of return of income.

59. We have heard the rival submissions and perused the relevant material on record. It is found that the issue raised here is no more *res integra.* The Hon'ble Supreme Court in the case of *CIT v. Alom Extrusions Limited [(2009) 319 ITR 306 (SC)]* has held that the amendment to first proviso and omission of the second proviso to section 43B by the Finance Act, 2003 is retrospective. The Hon'ble Delhi High Court in the case of *CIT v. Aimil Limited [(2010) 321 ITR 508 (Delhi)]* has allowed deduction in respect of employees' share when the amount was paid before the due date. When we consider these two judgments, it becomes patent that both the employer's and employees' contribution are allowable as deduction if the amount of provident fund etc., though belatedly, but is paid before the due date of filing of return u/s 139(1) of the Act.

60. Adverting to the facts of the instant case, it is seen as an admitted position that the assessee deposited the employees' contribution towards

EPF and ESIC before the due date u/s 139(1) of the Act. Respectfully following the aforenoted judgment of the Hon'ble jurisdictional High Court, we order for the deletion of the addition sustained in the first appeal on account of late deposit of employees' contribution to the Provident fund. Following the above judgments, we also uphold the impugned order on deleting the addition on account of late deposit of employer's contribution.

61. Ground no. 7 of the Revenue's appeal and ground no. 5 raised by the assessee are against disallowance under Section 43B on account of provision of the leave encashment. Tax auditor reported incurring of leave encashment liability amounting to Rs. 52,70,005/-. The Assessing Officer did not entertain the assessee's contention that sum of Rs. 12,27,122/- was paid during the year. He, therefore, made disallowance of Rs. 52,70,005/- under Section 43B(f). The learned CIT(A) deleted the disallowance of Rs.12,27,122/- by considering that this amount was paid by the assessee. The remaining amount was added. The Revenue is

aggrieved against the deletion of addition and the assessee has challenged the sustenance of the remaining amount.

62. In so far as the deletion of disallowance of Rs. 12,27,122/- is concerned, it is noticed that the learned CIT(A) has recorded a categorical finding that this amount was paid before the due date and hence the provision of Section 43B(f) are not attracted. We, therefore, uphold the impugned order to this extent.

63. As regards, the assessee's additional ground challenging the sustenance of remaining addition on the basis of decision of Hon'ble Calcutta High Court in the case of *Exide Battery (supra)*, we have elaborately dealt with such issue while dealing with second additional ground raised by the assessee for the A.Y. 2004-05 and dismissed the same. Following the same, we dismiss the ground raised by the assessee in this regard.

64. The only other ground which survives in the Revenue's appeal is against the deletion of addition of Rs. 46,21,175/- made by the AO on account of income from IITM, Delhi. During the course of assessment proceedings, the Assessing Officer noticed that the management of the

Delhi Chapter of the Institute of Tourism and Travel Management (affiliated to IITTM- Gwalior) was given to the assessee on 1.1.1993 initially for a period of five years. On perusal of the Tax Audit Report, it was noticed that the excess of income over expenditure of IITTM-D for the year was Rs. 18,33,132/- and accumulated profit carried over was Rs. 27,88,043/- , both totaling Rs. 46,21,175/-. Since the income of this entity was not included by the assessee in its total income, the Assessing Officer made this addition. The learned CIT(A) deleted the addition.

65. Having heard both the sides and perused the relevant material on record, it is observed that the assessee has claimed that income of IITTM-D was not liable to be included in the income of the assessee as has been set up by the Revenue. On the other hand, the learned DR submitted that the assessee has itself claimed deduction for loss of IITTM-D its return for the A.Y. 2012-13 on the premise that it was its own loss. On a specific query, the learned AR submitted that some change took place in the arrangement on 1.4.2009 as a result of which the income/loss of IITTM-D became that of the assessee. The Revenue is aggrieved in its appeal for the A.Y. 2012-13 against the allowability

of loss of IITTM-D against the assessee's income. Though the appeal for the A.Y. 2012-13 is also fixed before the Tribunal today itself, the learned AR was not prepared with the matter and sought an adjournment. In view of the fact that loss of IITTM Delhi has been incorporated in the assessee's profit and loss account for the A.Y. 2012-13, what transpired on 1.4.2009, in so far as a running of IITTM-D is concerned, is relevant. Necessary details about the changes made from 1.4.2009 are not readily available with leaned AR. We, therefore, set aside the impugned order on this issue and send the matter back to the file of the Assessing Officer for examining the assessee's contention about the change taking place from 1.4.2009 and then deciding the impact of such change on the income of the assessee before and after this change.

66. Ground no. 4 of the assessee's appeal is against confirmation of addition of Rs. 81,00,605/- on account of income from "Dilli Haat". Facts are admittedly similar to the earlier years. Following the view taken hereinabove for the A.Y. 2004-05, we set aside the impugned

order on this score and send the matter back to the AO for taking a fresh decision in the light of discussion made above.

67. Ground no. 6 of the assessee's appeal is against confirmation of addition of Rs. 13,41,536/- relating to payments made by the assessee to professional and contractors by treating the same as covered under Section 40(a)(ia). On perusal of the tax audit report, the Assessing Officer observed that the assessee failed to comply with the provisions regarding deduction of tax at source on payments made to contracts and professionals. He, therefore added Rs. 13,41,536/- under Section 40(a)(ia) of the Act. The learned CIT(A) upheld the assessment order on this issue.

68. We have heard both the sides and perused the relevant material on record. The learned AR submitted that the assessee made proper deduction of tax at source on payments made to the professionals and contractors. It was submitted that the addition has been made by making disallowance simply on the ground that the assessee failed to deduct and pay surcharge on the amount of tax deducted at source.

69. The Hon'ble Calcutta High Court in the case of *CIT vs. S.K. Tekriwal 2014 361 ITR (Calcutta)* has held that no disallowance under Section 40(a)(ia) can be made for short deduction of tax at source only for non deduction. Disallowance has been held to be called for only in case of no deduction of tax at source. Similar view has been reiterated by the Hon'ble Karnataka High Court in *CIT & Anr vs. Kisore Rao and Ors (HUF) 2016 387 ITR 196 (Karnataka)*. In view of these precedents, it is clear that the disallowance under Section 40(a)(ia) would be called for only if the assessee fails to deduct tax at source. If, however, deduction of tax at source is made but under a wrong section or there is some calculation mistake in the amount deduction of tax at source, the provision of Section 40(a)(ia) cannot be attracted. As the case of the assessee is that of short deduction of tax at source due to non charging of surcharge and not a case of non deduction of tax at source, we hold that the provision of Section 40(a)(ia) cannot be magnetized and consequently no disallowance is warranted. The impugned order is set aside to this extent. This ground is allowed.

70. In the result, both the appeals are partly allowed for statistical purposes.

Assessment Year 2008-09

71. The first issue raised in this appeal is against disallowance under Section 40(a)(ia) amounting to Rs. 96,761/- on account of short deduction of tax at source.

72. Facts of this ground are similar to those of last ground of the assessee's appeal for the A.Y. 2007-08. Here also, the assessee did deduct tax at source, but such tax withholding was without proper surcharge which resulted into overall short deduction of tax at source. Following the view taken hereinabove, we allow this ground of appeal.

73. Next ground is against addition of Rs.31,11,525/- made by Assessing Officer on account of income from "Dilli Haat".

74. Here again, we find that this issue has been dealt with by us elaborately in the assessee's appeal for the A.Y. 2004-05. We direct the Assessing Officer to decide it afresh in the light of our order rendered above for the A.Y. 2004-05.

75. Ground nos. 3 and 4 were not pressed by the learned AR. The same are, therefore, dismissed.

76. In the result, the appeal is partly allowed.

Assessment Year 2009-10

77. The only issue in this appeal is against disallowance of expenses amounting to Rs. 57,92,087/- against the income relating to "Dill Haat". Following the view taken for earlier years, we direct the Assessing Officer to decide it afresh in the light of our discussion for the A.Y. 2004-05.

78. In the result, appeal is allowed for statistical purposes.

The order pronounced in the open court on 28.03.2018.

Sd/-	Sd/-
[SUCHITRA KAMBLE]	[R.S. SYAL]
JUDICIAL MEMBER	VICE PRESIDENT

Dated, 28th March, 2018.

Dk/SH

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT (A)
5. DR, ITAT

AR, ITAT, NEW DELHI.