

Oriental Hotels Ltd. Vs. Inspecting Assistant

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Court : Income Tax Appellate Tribunal ITAT Madras

Decided On : Apr-27-1993

Judge : G Krishnamurthy, S Kannan, S A Reddy

Appellant : Oriental Hotels Ltd.

Respondent : inspecting Assistant

Judgement :

1. This appeal by the assessee is directed against the order in revision passed by the Commissioner of Income-tax, Tamil Nadu-III, Madras, on January 15, 1987, in relation to the assessment year 1983-84. Two issues arise for consideration in this appeal and they are : (a) whether the assessee-hotel is entitled to extra depreciation under Appendix I, Part I, item No. III(iii) to the Income-tax Rules, 1962, and (b) whether the assessee is entitled to extra shift allowance in respect of plant and machinery.

2. When this appeal came up earlier for hearing before a Division Bench, the learned Members of that Bench were of the opinion that the appeal is a fit and proper appeal which should be heard by a Special Bench consisting of three Members of the Tribunal, in view of the fact that the decision of the Income-tax Appellate Tribunal, Madras Bench-C, in the case of M/s. Covelong Beach Hotel (India) Ltd., Madras (vide order dated July 17, 1986, in I.T.A. No. 1871/Mds/85 : assessment year 1982-83), to the effect that the assessee-hotel therein was not entitled to extra depreciation, required reconsideration. They, therefore, placed this appeal before the President of the Income-tax Appellate Tribunal with a request to

constitute a larger Bench. It is in these circumstances that this appeal has come up before this Bench of three Members.

3. The assessee, a company in which public are substantially interested, runs a hotel called " Hotel Taj Coromandel" at Madras. The assessment year is 1983-84, the year of account ending on June 30, 1982, being the relevant previous year.

4. For the said assessment year, the assessee originally filed a return of income on June 28, 1983, declaring an income of Rs. 73,70,688 "subject to carry forward of unabsorbed losses, depreciation and development rebate and investment allowance". Some time in September, 1983, the assessee filed a revised return of income, disclosing this time an income of Rs. 64,18,931, subject to set off of past losses, depreciation, etc.

5. In the said revised return, the assessee had claimed depreciation allowance in an aggregate sum of Rs. 34,04,032, as detailed below : 6. In the assessment order passed by him on January 20, 1986, it is a matter of record, the assessee's claim for both extra depreciation and extra shift allowance was allowed by the Assessing Officer.

7. Subsequently, invoking the powers vested in him by and under Section 263 of the Income-tax Act, 1961, the Commissioner of Income-tax called for and examined the assessment records of the assessee. On such an examination, he considered that the impugned assessment order was erroneous in that it was prejudicial to the interests of the Revenue, inasmuch as the Assessing Officer had allowed the assessee's claim for (i) extra depreciation, and (ii) extra shift allowance. He, therefore, put the assessee on notice of his intention to pass a suitable order under revision under Section 263. This was on August 5, 1986.

8. Responding to the said notice, the assessee, through its letter dated August 25, 1986, made the following points in support of its contention that both extra depreciation and extra shift allowance had been rightly allowed by the Assessing Officer.

(ii) Extra depreciation is available to approved hotels under Appendix I, Part I, item No. III(iii) to the Income-tax Rules, 1962.

And the assessee had long back been approved by the Government of India in the Department of Tourism for purposes of Section 32(1)(v) and Section 33(1)(b)(B)(ii) of the Income-tax Act.

(iii) Reference to Section 33 in the said sub-item of Appendix I to the Income-tax Rules is for the limited purpose of identifying the hotels which are eligible to extra depreciation, (iv) Development rebate under Section 33 and extra depreciation under Section 32 are two different allowances. Hence, they should not be linked together so as to deny the assessee extra depreciation available to it under the said sub-item of Appendix I to the Income-tax Rules, 1962.

(v) On November 22, 1985, the Minister of Parliamentary Affairs and Tourism, while answering the Lok Sabha question No. 87 (which elicited the details of the incentives offered by the Government to the private sector to attract private sector investment in tourism infrastructure) had listed extra depreciation as one of the incentives offered.

(vi) The Central Board of Direct Taxes has not issued any circular authorising the withdrawal of extra depreciation allowance to authorised hotels on the ground that development rebate was withdrawn.

Extra shift allowance. -- The plant and machinery was put to use round the clock and, therefore, under Appendix I, Part I, item No. III(iv), the assessee was entitled to triple shift allowance.

9. In the short order in revision passed by him, the Commissioner of Income-tax rejected both the claims of the assessee in the following words : " 3. ... It is well established in law that merely because a hotel has been approved by the Department of Tourism, it should be entitled (sic) to extra depreciation. The approval is not for allowance of extra depreciation under Section 33 since the allowance of development rebate itself has been abolished with effect from June 1, 1974, and the approval given in that connection cannot be projected to extra

depreciation.

4. The very same point has been held by the Income-tax Appellate Tribunal in favour of the Department in a number of cases.

5. I am, therefore, satisfied that the Inspecting Assistant Commissioner's action in allowing the expenses (sic) detailed above is prejudicial to the interests of the Revenue and the allowance should, therefore, be withdrawn by modifying the assessment already made.

6. Under the powers vested in me under Section 263 of the Act, I am, therefore, directing the Inspecting Assistant Commissioner to withdraw the extra depreciation and the extra shift allowance granted to the assessee by modifying the assessment already made." 11. Sri Ramamani, learned counsel for the assessee, took us through the facts and circumstances of the case and reiterated the arguments that had earlier been advanced, unsuccessfully, before the Commissioner of Income-tax. In this regard, he drew our pointed attention first to the fact that the Hotel Taj Coromandel run by the assessee-company has been approved by the Department of Tourism, vide Government of India, Department of Tourism, letter No. 7-TH-I(22)/80-3 of August 19, 1983 (see page 15 of the paper-book filed on behalf of the assessee).

Further, in their letter No. 7-TH-I(22)/80-Vol. 3 of April 3, 1984 (see page 16 of the paper-book filed on behalf of the assessee), the said Department had clarified that what was contemplated was a one time approval. It was not necessary to get approval year after year.

12. Secondly, Appendix I, Part I, item No. III(iii) to the Income-tax Rules, 1962, gives the benefit of extra depreciation allowance to approved hotels. Since the hotel run by the assessee is an approved hotel, the assessee is entitled to extra depreciation.

13. Thirdly, the reference to Section 33 of the Act in the said item of Appendix I, Part I to the Income-tax Rules, 1962, is designed to identify the cases in which extra depreciation is admissible. According to Shri Ramamani, we have before us

a case of referential legislation.

Therefore, the phrase " for purposes of Section 33 of the Act" occurring in the said item No. III(iii) cannot be so interpreted as to deny the assessee the benefit of extra depreciation allowance.

14. According to Shri Ramamani, again, the fact that development rebate available under Section 33 of the Act was withdrawn from a particular date does not ipso facto mean that extra depreciation allowance also simultaneously stood withdrawn automatically. Under the Scheme of the Act, it is Section 32 which grants depreciation allowance including extra depreciation allowance. Development rebate, however, is granted under a different section, namely, Section 33 of the Income-tax Act, 1961. Therefore, the grant of extra depreciation allowance does not depend upon the grant of development rebate.

15. For a fact, even as late as in November, 1985, the stand of the Government was that extra depreciation allowance was one of the incentives offered by it to the private sector to attract private sector investment in tourism infrastructure -- see reply to Lok Sabha question No. 37 (pages .11 to 14 of the paper-book filed on behalf of the assessee).

16. To a specific query in this regard from the Bench, Sri Ramamani stated that the Government of India, Ministry of Finance (Department of Revenue and Insurance), Notification No. S.O. 2167 of May 28, 1971 (see [1971] 81 ITR (St.) 45), which came to be issued under the provisions of Section 33(5) and which withdrew development rebate from a specified date, did not amount to the deletion, in toto, of Section 33 itself.

That section was allowed to remain on the statute book for such purposes as withdrawing development rebate earlier granted, in the event of the assessee's contravening the conditions on which development rebate came to be granted originally.

17. Sri Ramamani next contended that the Central Board of Direct Taxes had at no point of time issued any circular to the effect that with the withdrawal of

development rebate, extra depreciation allowance also stood withdrawn simultaneously.

18. In view of the foregoing, therefore, contended Sri Ramamani, the assessee is entitled to succeed on its claim for extra depreciation allowance.

19. Turning next to the assessee's claim for triple shift allowance, Shri Ramamani contended that under item No. III(iv) of Part I of Appendix I to the Income-tax Rules, 1962, the assessee is entitled to extra shift allowance. In this regard, he highlighted the fact that a five star hotel of the type run by the assessee works round the clock.

In other words, the plant and machinery necessary to run the hotel are put to use round the clock. Therefore, the Commissioner of Income-tax was not justified in holding that the assessee was not entitled to triple shift allowance on the plant and machinery in question, particularly when in the earlier years extra shift allowance was granted to the assessee.

20. On his part, Shri Argal, the learned Departmental Representative strongly supported the impugned order in revision. He also referred to and relied upon the decision of the Income-tax Appellate Tribunal, Madras Bench-C, in the case of M/s. Covelong Beach Hotel (India) Ltd. Madras.

21. Laying particular emphasis on the phrase " for the purposes of Section 33 of the Act" occurring in the said item No. III(iii), Sri Argal vehemently argued that when development rebate admissible to the assessee under Section 33 stood withdrawn, extra depreciation also stood withdrawn automatically. In this regard, he sought to draw support for the said proposition also from the clause "for the time being approved by the Central Government" occurring in the said item No. III(iii).

22. Sri Argal also contended that the Commissioner of Income-tax was justified in holding that the assessee was not entitled to extra shift allowance.

23. We have looked into the facts of the case. We have considered the rival submissions.

24. To take up first the assessee's claim for extra depreciation allowance. It is a matter of record that the assessee is running a hotel. There is also no dispute that the hotel had been approved by the Government of India, Department of Tourism. Given these facts, one would have thought that the assessee was entitled to extra depreciation allowance under item No. III(iii) of Part I of Appendix I to the Income-tax Rules, 1962. However, the Commissioner of Income-tax has taken the line that, with the withdrawal of development rebate, extra depreciation allowance also stood withdrawn simultaneously. It is the validity of the said conclusion that falls to be considered in this case.

25. Now, development rebate was introduced by the Finance Act, 1955, with effect from April 1, 1955 ; that is to say, even under the old Act, development rebate was being granted. The scheme of granting development rebate was continued in the new Act also.

26. The Finance Act, 1964, inserted Sub-section (5) of Section 33 with effect from April 1, 1964, By the said sub-section, the Central Government assumed powers to withdraw the development rebate by giving a clear three-year notice of its intention to withdraw the development rebate.

27. The Finance Act, 1965, inserted Sub-section (6) of Section 33. The effect of this sub-section was that no deduction by way of development rebate shall be allowed in respect of any plant or machinery installed after March 31, 1965, in any office premises or any residential accommodation, including any accommodation in the nature of a guest house.

28. We then have the Finance (No. 2) Act, 1967, which gave a package of tax concessions to hotels as an integral part of the larger policy of promoting tourism in the country. As pointed out supra, Section 33(6) debarred the deduction on account of development rebate in respect of machinery or plant installed after March 31, 1965. The Finance (No. 2) Act, 1967, introduced a new proviso to Section 33(6) so as to make the provisions of that section inapplicable to approved hotels.

29. We then have the Government of India Notification No. S.O. 2167 of May 28, 1971 (see [1971] 81 ITR (St.) 45), which makes it clear that development rebate under Section 33 of the Income-tax Act shall not be allowed in respect of a ship acquired or machinery or plant installed after May 31, 1974. The said cut off-date May 31, 1974, was extended to June 1, 1975, in certain cases, by the Finance Act, 1974. This continuance of development rebate for a limited period in certain cases was obviously designed to remove hardships in certain cases.

30. Relying only on the fact of withdrawal of development rebate, the Commissioner of Income-tax has concluded that extra depreciation allowance admissible to approved hotels also stood withdrawn automatically. We are unable to agree for more than one reason. First, under the scheme of the Act, development rebate and depreciation allowance (including extra depreciation allowance) are two separate and distinct allowances, governed by two separate and distinct sections, viz., Section 32 and Section 33, respectively. Neither the Act nor the Rules made thereunder contain any provision even remotely suggesting that the grant of extra depreciation allowance was conditional upon the grant of development rebate. Had that been the intention of Parliament, the relevant provisions of the Act/Rules would have been drafted differently.

31. Item No. III(iii) of Part I of Appendix I to the Income-tax Rules, 1962, states that extra depreciation allowance will be admissible to hotels where such hotels are for the time being approved by the Central Government for purposes of Section 33 of the Act. As we see it, the said reference to Section 33 has a limited role and rationale, namely, to identify the conditions which a hotel must satisfy in order to be eligible to the benefit of extra depreciation allowance. The reference to Section 33 contained in item No. III(iii) means nothing more than that in order to be eligible to extra depreciation allowance, the hotel must fulfil the same conditions which it will have to fulfil in order to be able to get the benefit of development rebate. In other words, the eligibility conditions for the grant of development rebate on the one hand, and of extra depreciation allowance on the other, are identical. This fact alone, without anything more, cannot lead to the conclusion that the withdrawal of development rebate will necessarily mean the simultaneous and automatic withdrawal of extra depreciation allowance also. Both in law and in logic we would

be justified in holding that the assessee was earlier entitled both to development rebate and extra depreciation allowance, because it satisfied the common eligibility conditions ; that even after the withdrawal of development rebate, the assessee continued to satisfy the common eligibility conditions ; and that, therefore, it was entitled to extra depreciation allowance, the withdrawal of development rebate notwithstanding.

32. There is yet another point that is noteworthy. The commonality of the conditions noticed in relation to development rebate (Section 33(1)(b)(B)(ii)) and extra depreciation allowance (Appendix I, Part I, item No. III(iii) to the Income-tax Rules, 1962) is not restricted to these two allowances alone. As one scans the scheme of the Act particularly as respects the tax concessions available to the hotel industry, one finds that the said commonality of conditions extends to Section 32(1)(v), Section 80-1, read with Section 80B(7), and Section 80J(6).

33. As already pointed out, the Finance (No. 2) Act, 1967, gave a package of tax concessions to hotels as an integral part of the larger policy of promoting tourism in the country. The following are the details of the tax concessions : (a) The new Clause (v) of Section 32(1), which came into force with effect from April 1, 1968, granted initial depreciation allowance on newly constructed hotel buildings.

(b) The business of running hotels was accorded priority industry status for purposes of the Income-tax Act (see Section 80B(7)) and an Indian company engaged in hotel business came to be entitled to the following tax concessions : (i) Development rebate at a higher rate (Section 33(1)(b)(B)(ii) as substituted).

(ii) Deduction under the newly introduced Section 80-1 read with the newly introduced Section 80B(7) referred to supra.

(iii) Deduction under the newly introduced Section 80J(6). It is significant to note that the grant of the aforesaid tax concessions was subject to the common condition that the hotel in question was for the time being approved by the Central Government.

34. That the perception of the Central Board of Direct Taxes is the same as ours will be clear from Central Board ,of Direct Taxes Circular No. 383 of June 22, 1984 ([1984] 148 ITR (St.) 13).

35. The foregoing analysis will indicate that the granting of approval to the hotel by the Government of India in the Department of Tourism is a single act. Once a hotel is approved by the said Department, the hotel becomes entitled to one or more of the aforesaid concessions.

36. In the case before us, the hotel in question has been approved by the Department of Tourism for purposes of Section 32(1)(v), Section 33(1)(b)(B)(ii) and Section 80J(6). It should, therefore, follow that the assessee cannot be denied the benefit of extra depreciation allowance on the only ground that development rebate admissible to it under Section 33(1)(b)(B)(ii) stood withdrawn from a certain date.

37. In view of the foregoing, therefore, we hold that the Commissioner of Income-tax was not justified in directing the Assessing Officer to withdraw extra depreciation allowance granted to the assessee-company earlier by the Assessing Officer. We, accordingly, set aside the impugned order in revision on this issue and restore that of the Assessing Officer.

38. That leaves for consideration the question whether the assessee is entitled to extra shift allowance. From the short order in revision, it is seen that the Commissioner of Income-tax concluded that the assessee was not entitled to extra shift allowance simply because he had held that the assessee was not entitled to extra depreciation. In fact, the Commissioner of Income-tax has not discussed this aspect of the matter at all. Be that as it may, the fact of the matter is that all along the assessee was allowed the benefit of extra shift allowance. We, therefore, hold that the assessee is entitled to extra shift allowance to the extent admissible under Appendix I, Part I, item No. III(iv) to the Income-tax Rules, 1962. The Assessing Officer may look into this aspect of the matter.

39. In the result, for statistical purposes, the assessee's appeal is treated as allowed.

