

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 28.11.2016

Pronounced on : 12.04 .2017

Coram:

The Hon'ble Mr. Justice NOOTY. RAMAMOHANA RAO

AND

The Hon'ble Dr. Justice ANITA SUMANTH

TAX CASE APPEAL Nos.771 & 772 of 2007

Commissioner of Income Tax,
Chennai.

. . Appellant in both cases

Versus

Adyar Gate Hotel Ltd.,
132, TTK Road,
Chennai-18.

.. Respondent in both cases

Appeals filed under Section 260A of the Income Tax Act,
1961 to reverse the order of the Income Tax Appellate Tribunal,
Madras 'A' Bench, dated 31-05-2006 in Exp. Tax Nos.1 and 2
Mds/02.

For Appellant .. Mrs.Hema Muralikrishnan

For Respondent.. Mr.C.Natarajan
 Senior Counsel for
 Mr.C.Manishankar

COMMON JUDGMENT

(Judgment of this Court was delivered by ANITA SUMANTH, J.)

1. The substantial question of law raised by the Revenue in respect of assessment years 1995-96 and 1997-98 is as follows:

‘Whether on the facts and circumstances of the case, the Tribunal was right in deleting the addition made by the Assessing Officer under Section 7(4) and the interest charged thereon under Section 14 Expenditure Tax Act 1987 on bills not yet raised, although the expenditure had been incurred?’

2. The Assessee is in the business of running Hotels. Returns of Expenditure Tax were filed and orders of Assessment in terms of Section 9(2) of the Expenditure Tax Act 1987 (hereinafter referred to as 'Act') were issued by the Assessing Officer on 16.03.1998 and 31.03-2000 in respect of Assessment years 1995-

96 and 1997-98 respectively. In the course of Assessment, the Assessing Authority noted that the Assessee had offered to tax chargeable expenditure of an amount of Rs.31,35,18,224/- as against which a sum of Rs.3,28,82,659/- had been paid leaving a sum of Rs.26,02,331/- outstanding. A stand was taken by the assessee at the time of assessment to the effect that the outstanding amount represented expenditure that was yet to be 'incurred' by the guests who had stayed at the hotels and that, upon such incurrence by the guests and collection by the hotel, the same would be paid over to the Government.

3. In advancing this argument, the Assessee interpreted the provisions of Section 5 of the Act that defines 'Chargeable Expenditure' to mean such expenditure incurred that had been paid by the guests and duly received by the hotel. The stand of the Assessee was rejected by the Assessing Officer who was of the view that the mercantile system of accounting followed by the Assessee, necessitated all expenditure that had accrued, to be offered to tax.

4. The assessing officer also placed reliance on Section 7(4) of the Act that mandated any person responsible for collection of tax to pay over the same to the credit of the Central Government notwithstanding his failure to collect the tax in accordance with the provisions of the Expenditure Tax Act. The Assessing Authority was thus of the view that the Assessee was bound to pay tax on the entire expenditure, irrespective of whether the same had been collected from the customers. The Assessment was completed in the aforesaid terms.

5. Appeals filed by the assessee before the Commissioner of Income Tax (Appeals) that were dismissed vide order dated 30.05.2002 as against which second appeals were filed before the Income Tax Appellate Tribunal (hereinafter referred to as 'Tribunal'). The Assessee reiterated the stand that the liability to remit tax on expenditure would arise only when the expenditure was actually collected by it from the guests and not earlier. The appeals were allowed by the Tribunal which was of the view that

the incurrence of expenditure for the purpose of chargeability thereof, would arise as and when the amount due by the guests are quantified by the hotel and an invoice raised in that regard.

The Tribunal observes that in the case of those guests that are in occupation of rooms/use of hotel services as on the closing day of the year, the incurrence of expenditure cannot be quantified mid-stay and till the actual raising of the bill. Thus, the Tribunal concluded that till such time the bill was raised and the guest has had occasion to settle the same, the hotel cannot be held liable for payment of expenditure tax. The Income Tax Department challenges the aforesaid order in the present appeals.

6. The Expenditure Tax Act was enacted in 1987 to provide for the levy of a tax on expenditure incurred in certain hotels and restaurants and for the matters connected therewith. Section 3 dealing with the Application of the Act, states as follows:

‘3. Application of the Act:

This Act shall apply in relation to any chargeable expenditure

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(1) Incurred in a hotel wherein the room charges for any unit of residential accommodation at the time of incurring of such expenditure are two thousand rupees or more per day per individual and where, -

(a) A composite charge is payable in respect of such unit and food, the room charges included therein shall be determined in the prescribed manner;

(b) (i) A composite charge is payable in respect of such unit, food, drinks and other services or any of them and the case is not covered by the provisions of sub-clause (a) or

(ii) It appears to the Assessing Officer that the charges for such unit, food, drinks or other services are so arranged that the room charges are understated and the other charges are overstated, the Assessing Officer shall, for the purposes of this clause determine the room charges on such reasonable basis as he may deem fit; and

(2) Incurred in a restaurant before the 1st day of June, 1992.

7. The Section originally extended to chargeable expenditure incurred in a restaurant as well. Vide an amendment made to sub-section (2) of Section 3 of the Act by Finance Act 1992 with effect

from 01.06.1992, charges incurred in a restaurant housed within a hotel were excluded from the ambit of Expenditure Tax. The Act was thus made applicable only in the case of composite room charges as detailed above. Chargeable expenditure is defined in terms of Section 5 of the Act as follows:

'5.Meaning of Chargeable Expenditure

For the purposes of this Act, chargeable expenditure,

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(1)In relation to a hotel referred to in clause (1) of Section 3, means any expenditure incurred in or payments made to, the hotel in connection with the provision of -

(a)Any accomodation, residential or otherwise; or

(b)Food or drink by the hotel, whether at the hotel or outside or by any other person at the hotel; or

(c)Any accomodation in such hotel on hire or lease; or

(d)Any other services at the hotel, either by the hotel or by any other person, by way of beauty parlour, health club, swimming pool or other services,

But does not include-

(i)Any expenditure which is incurred, or the payment for which is made, in foreign exchange before the 1st day of October, 1992;

(ii) Any expenditure incurred by persons within the purview of the Vienna Convention on Diplomatic Relations, 1961 or the Vienna Convention on Consular Relations, 1963;

(iii) Any expenditure incurred in any shop or in any office which is not owned or managed by the person who carries on the business of a hotel;

(iv) Any expenditure by way of any tax, including tax under this Act.'

8. The scheme of the Act is to levy a tax on expenditure incurred in certain hotels or restaurants at a percentage stipulated from time to time. The quantum of expenditure is to be determined in accordance with Section 5 of the Act. It is a charge on the expenditure incurred and clearly the object of the levy as well as the incidence thereof is upon the 'incurrence' of such expenditure. This would be apparent from the provisions of Sub Section (4) of Section 7 of the Act which makes it mandatory upon the '*person responsible for collecting the tax*' to remit the same to the credit of the Central Government even if he has failed to collect the same in

accordance with the charging provisions of sub-section (1) or sub-section (2) or Section 7.

9. We have heard the detailed submissions advanced on behalf of the Income Tax department by Mrs.Hema Muralikrishnan, learned Standing Counsel and Mr.C.Natarajan, learned Senior Counsel for Mr. C.Manishankar on behalf of the Assessee/Respondent.

10. Section 5 defines chargeable expenditure to mean any expenditure incurred in or payment made to the hotel in connection with the provision of accommodation, food, drink or other services by way of beauty parlour, health club, swimming pool or similar services. We are called upon to determine the exact point of time of incurrence of expenditure upon which would Section 5 stand attracted.

11. Sub-section (1) of Section 5 addresses two situations, and refers to the '*incurrence of expenditure*' or the '*payments made*' in

or to a hotel. The two references are akin to the mercantile and cash system of accounting respectively. There is no difficulty with respect to the second component, that is, payments actually made. The first component presents some scope for debate in so far as the expenditure can be incurred either on a day to day basis over the period of stay, which is the view of the Revenue, or upon conclusion of stay, at the time of check-out, which is the view of the assessee.

12. The normal practice adopted by hotels in this regard would be of some relevance and bearing upon the issue. The expenditure incurred in a hotel is composite feature that takes into account the charges payable for accommodation, food, drink and other services that are offered along with the use of the room. Such composite charges can be quantified only upon conclusion of the stay of the guests though a day to day account may have been maintained thereof. We have noted earlier that the object of Section 5 read with Section 3 would not extend to individual services provided at a hotel but a composite charge only. Thus,

we find no support for the submission of the Revenue that chargeable expenditure is incurred on a day to day basis. While expenditure no doubt may be incurred by a guest frequently over a course of his stay, in order to constitute chargeable expenditure 'incurred' for the purposes of the Act, the charge would be a composite one raised at the time of check-out by the guests from the hotel. Thus, in a situation where at the close of the year a guest is still in occupation of a room in the hotel, the expenditure would not have been incurred and such event will only be triggered at the time of closure of stay by the guests in the hotel. In other words, it is the quantification of the expenditure at the time of raising of the composite bill that crystallizes and constitutes chargeable expenditure incurred for the levy of tax thereupon.

13. The counsel for the Revenue would raise a strong objection to the effect that the Tribunal has proceeded on a tangent while deciding the matter. It was the Assessee's contention throughout that liability for payment of expenditure tax would arise only upon collection of charges from the guests and the Tribunal has

proceeded to decide the matter on an issue not raised by the Assessee.

14. We reject this argument for the reason that the larger issue before the Tribunal was the interpretation of the provisions of Section 5 of the Act relating to incurrence of chargeable expenditure and we find, thus, no infirmity in the approach adopted.

15. A Division Bench of the Himachal Pradesh High Court in *Himachal Pradesh Tourism Development Corporation Vs. Union of India and others* (238 ITR 38) considered a challenge to the provisions of the Section 5 of the Act. The challenge was on the ground that the definition travelled beyond the ambit of the charging section, section 3, in so far as it brought within the scope of the act, expenses which would otherwise fall beyond the purview and applicability of the Act. While allowing the Writ Petitions, the Bench held as follows.

'Therefore, in our view, the Act though should be applicable to all hotels wherein the room charges for any unit of residential accommodation, at the time of incurring of such expenditure, are four hundred

rupees or more or one thousand two hundred rupees or more, per day per individual, as the case may be, for the relevant period under consideration, since the charge is levied upon and tax is payable by the customer who avails of any of the services enumerated in section 5 of the Act, it is the expenditure incurred by such person who occupies and the expenditure incurred during such time for all or any of the services rendered and which are enumerated in Section 5 that alone would constitute chargeable expenditure and it is only in respect of such chargeable expenditure, the assessee under the Act becomes responsible to collect the expenditure-tax at the rates specified in section 4 of the Act and remit the same in terms of the obligations cast upon him under section 8 of the Act. Therefore, the levy in all these cases on the total receipts of the hotelier, taking it to be the chargeable expenditure, cannot be sustained and the same is liable to be set aside.'

16. The Division Bench also noted the provisions of Section 3 of the Hotel Receipts Tax Act 1980 enacted for the purpose of imposing a special tax on gross receipts of certain hotels. In this context, it is stated as follows:

'Section 5 of the said Act, which is said to be a charging section stipulates that subject to the provision of the Act "there shall be charged on every person carrying on the business of a hotel in relation to which the Act applied for every assessment year commencing on or after April 1, 1981, a tax in respect of his chargeable receipts of the previous year at the

rates specified therein of such receipts". As to what constitute chargeable receipts, is specified in section 6 of the said Act by stating that the chargeable receipts of any previous year of an assessee shall be the total amount of all charges, by whatever name called, received by, or accruing or arising to, the assessee in connection with the provision of residential accommodation, food, drink and other services or any of them including such charges from even persons not provided with such accommodation. The exclusionary clause enacted needs no specific mention. The said provision makes it further clear that the chargeable receipts shall also include every amount collected by the assessee by way of tax under the said Act, sales tax, entertainment tax and tax on luxury. It is seen that the constitutional validity of this Act has also been challenged before the apex court and in the decision reported in *Elel Hotels and Investments Ltd. V. Union of India* (1989) 178 ITR 140, the apex court upheld the same'.

The sum and substance of the discussion is to the effect that the import of the word 'incurrence' stipulates the actual raising of the composite bill for settlement by a guest.

17. We may also refer in this regard to the judgment of the Supreme Court in the case of *Indian Molasses Company Private Limited vs Commissioner of Income Tax* (37 ITR 66) wherein the term 'expenditure' was explained by the Supreme Court in the following terms:

'Expenditure' is equal to 'expense' and 'expense' is money laid out by calculation and intention though in many uses of the word this element may not be present, as when we speak of a joke at another's expense. But the idea of 'spending' in the sense of 'paying out or away' money is the primary meaning and it is with the meaning that we are concerned. 'Expenditure' is thus what is 'paid out or away' and is something which is gone irretrievably."

(Emphasis played now)

18. In view of the above observations and bearing in mind the object and purpose of the Act, we hold that chargeable expenditure would be incurred only upon raising of a composite bill upon conclusion of hotel stay and not earlier. The substantial question of law is answered in favour of the Assessee and against the Revenue. The Department Appeal stands dismissed with no order as to costs.

(N.R.R.,J) (A.S.M.,J)

12.04.2017

Speaking order/Non-speaking order
Index: Yes/No
Vga/msr

NOOTY. RAMAMOHANA RAO, J
AND
Dr.ANITA SUMANTH,J

Vga/msr

**PRE DELIVERY JUDGMENT IN
TAX CASE APPEAL Nos.771 & 772 of 2007**

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