IN THE HIGH COURT AT CALCUTTA

I.T.A. No.3 of 2001

Commissioner of Income-tax, West Bengal-III, Calcutta

Versus

M/s. E.I.H. Limited

For the Appellant: Md. Nizamuddin.
For the Respondent: Mr. R. N. Bajoria.

Coram: Mr. Justice Bhaskar Bhattacharya and Mr. Justice Sambuddha Chakrabarti

Heard on. 22.03.2011
Judgment on: 31st March, 2011.

J U D G M E N T

Bhaskar Bhattacharya, J.:

1.This appeal under Section 260A of the Income-tax Act, 1961 is at the instance of the Revenue and is directed against an order dated 28th July, 2000, passed by the Income-tax Appellate Tribunal, "E" Bench, Kolkata, in ITA No.1760 (Cal) of 1999 for the Assessment Year 1996-97.

2.Although a Division Bench of this Court while admitting the present appeal, formulated nine different questions, Mr. Nizamuddin, the learned Advocate appearing on behalf of the Revenue, after taking instruction from his client, has fairly restricted his submission to the following three questions of law:

> "1. Whether on the facts and in the circumstances of the case the Ld. Tribunal has erred in law in confirming the deletion of disallowance of Rs.1,54,875/- on account of gifts when the tax audit report of the assessee has stated that the same is disallowable under Rule 6B of the I.T. Rules and that it is clearly covered by Section 37(2) of the I.T. Act, 1961."
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> "2. Whether on the facts and in the circumstances of the case the Ld. Tribunal has erred in law in confirming the deletion of disallowance of Rs.3,04,89,602/- on account of depreciation of new aircraft when it was not put to use in contravention to provisions of Section 32 of the I.T. Act, 1961."
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> "3. Whether on the facts and in the circumstances of the case the Ld. Tribunal has erred in law by erroneously re-computing deduction under Section 80HHD of the

I.T. Act, 1961, at Rs.77,62,17,303/- in contravention to provisions laid down in Section 80HHD of the I.T. Act, 1961, by not including "receivables" in its computation although receipt includes receivable as per mercantile system of accounting."

3.The facts giving rise to filing of this appeal may be summed up thus:

a) In the return submitted by the assessee, an amount of Rs.1,54,875/- was claimed as deduction under Rule 6B as per Tax Audit Report. The aforesaid amount represented the cost of gift/presentation items to various patrons of the assessee-company which was engaged in hotel business. According to the assessee, it was customary for it to make such presentation to the guests of the hotel on festive occasions and that the articles meant for presentation did not contain the name or logo of the company and as such, those presentations did not amount to advertisement of the name or products of the assessee-company for the purpose of Section 37(3) of the Act. Such claim was, however, disallowed by the assessee. On an appeal being preferred, the CIT (A), however, deleted the said addition and granted benefit of Rule 6B of the Act.

b) Being dissatisfied, the Revenue preferred appeal before the Tribunal and the learned Tribunal upheld the order of the CIT (A) thereby holding that the cost of presentation of the article should be deleted as business expenditure in terms of Section 37 of the Act.

c) It further appears from the return submitted by the assessee that it claimed a sum of Rs.3,04,89,602/- as depreciation on the 'imported new aircraft' acquired by it during the year under consideration. The aircraft was purchased by the assessee from M/s. Jet Sales Ltd., U.K. and the physical possession of the aircraft was taken by the representative of the assessee on 11th March, 1996 at the Essendon Airport, Victoria, Australia. Copies of the relevant documents were filed on the record of the Assessing Officer. The Assessing Officer, however, stated that in absence of documentary evidence as to when the impugned aircraft was brought to India from Australia and put to business use, the claim of depreciation could not be allowed.

d) On an appeal being preferred, the CIT (A) accepted the contention of the assessee that the aircraft had actually been flown to India from Australia on 12th March, 1996 immediately after taking delivery of the aircraft. Copy of the bill of entry for home consumption in respect of the said aircraft expressly provided that the aircraft was received by the New Delhi International Airport on 12th March, 1996. The CIT (A) also took into consideration the insurance certificate dated 11th March, 1996 issued by the Insurer Company, namely, M/s. Willis Faber & Durns Ltd. The CIT (A) after taking into consideration various decisions on the question of depreciation held that depreciation @ 50% of the rate prescribed should be allowed on the aircraft. On an appeal by Revenue, the Tribunal accepted the aforesaid finding of the CIT (A).

e) The assessee also claimed benefit of Section 80HHD of the Act according to which an Indian company engaged in the business of hotel should be allowed in computing the total income, a deduction of a sum equal to two components, the first of which is 50% of the profits derived by the assessee from services provided to foreign tourists. According to sub-section (3) of the said Section, profits derived from services provided to foreign tourists should be the amount which bears to the profit of the business as computed under the head 'profits and gains of business or profession'. The same proportion as the receipts specified in sub-section (2) as reduced by any payment referred to in sub-section (2A) made by the assessee bears to the total receipts of the business carried on by the assessee. While computing the amount of deduction under this Section, the Assessing Officer took into consideration the figure of date turnover of the assessee's business as per the audited final account being Rs.3,95,62,34,559/- in the denominator in place of the total receipts of business carried on by the assessee. The amount of deduction under this Section had come out to Rs.77,53,50,473/-.

f) On an appeal being preferred, the CIT (A) held that the Auditor had certified that total amount of Rs.3,90,93,27,318/- was the total receipts of the business and by relying upon such figure, it had arrived at the amount of deduction available to the assessee under Section 80HHD at Rs.77,62,17,303/- and directed the Assessing Officer to correct that amount of deduction.

g) Being dissatisfied, the Revenue has come up with the present appeal. Therefore, the first question that falls for determination before us is whether the learned Tribunal below committed substantial error of law in confirming the deletion of disallowance of Rs.1,54,875/- on account of gifts when the tax audit report of the assessee itself stated that the same is disallowable under Rule 6B of the I.T. Rule and whether the same is covered by Section 37(2) of the Act.

4.In order to appreciate the aforesaid question, it will be profitable to refer to the provision contained in Section 37 of the Act and Rule 6B as it stood at the relevant point of time:

"**S. 37.** (1) Any expenditure not being expenditure of the nature described in Sections 30 to 36 and not being in the nature of capital expenditure of personal expenses of the assessee, laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession".

(2) Notwithstanding anything contained in sub-section (1), any expenditure in the nature of entertainment expenditure incurred by any assessee during any previous year commencing on or after the 1st day of April, 1992 shall be allowed as follows:

(a) where the amount of such expenditure does not exceed ten thousand rupees, the whole of such amount;

(b) in any other case, ten thousand rupees as increased by a sum equal to fifty per cent of such expenditure in excess of ten thousand rupees.

Explanation. – For the purposes of this sub-section, "entertainment expenditure" includes–

(i) the amount of any allowance in the nature of entertainment allowance paid by the assessee to any employee or other person;

(ii) the amount of any expenditure in the nature of entertainment expenditure not being expenditure incurred out of an allowance of the nature referred to in clause (i) incurred for the purposes of the business or profession of the assessee by any employee or other person;

(iii) expenditure on provision of hospitality of every kind by the assessee to any person, whether by way of provision of food or beverages or in any other manner whatsoever and whether or not such provision is made by reason of any express or implied contract or custom or usage of trade, but does not include expenditure on food or beverages provided by the assessee to his employees in office, factory or other place of their work.

(2B) Notwithstanding anything contained in sub-section (1), no allowance shall be made in respect of expenditure incurred by an assessee on advertisement in any souvenir, brochure, tract, pamphlet or the like published by a political party.

(3) Notwithstanding anything contained in sub-section (1), any expenditure incurred by an assessee after the 31st day of March, 1964, on advertisement or on maintenance of any residential accommodation including any accommodation in the nature of a guesthouse or in connection with travelling by an employee or any other person (including hotel expenses or allowances paid in connection with such travelling) shall be allowed only to the extent, and subject to such conditions, if any, as may be prescribed."

"**R. 6B.** (1) The allowance in respect of expenditure on advertisement shall not in the following cases exceed–

(a) in respect of articles intended for presentation, –

(i) where the amount of such expenditure does not exceed Rs.1,000 on each such article, the whole of such amount;

(ii) in any other case, Rs.1,000 on each such article as increased by a sum equal to fifty per cent of the expenditure in excess of Rs.1,000 on such article;

(b) in respect of any advertisement outside India involving payment in foreign currency, the amount covered by foreign exchange granted to, or permitted to be acquired by, the assessee for this purpose under the law relating to the foreign exchange for the time being in force.

(2)(i) Where the Assessing Officer is of opinion that any expenditure on advertisement of the nature described in clause (ii) is excessive or unreasonable having regard to the legitimate business needs of the assessee and the benefit derived by or accruing to him therefrom, that portion of the expenditure which is so considered by him to be excessive or unreasonable shall not be allowed as a deduction in computing the total income;

(ii) the expenditure referred to in clause (i) is that incurred on advertisement involving payment –

(A) to a person (including in the case of a company, firm, an association of persons or a Hindu undivided family, a director, partner or member, as the case may be, of such company, firm, association or family) who has a substantial interest in the business of the assessee, or to a relative of such person; or

(B) to a person who carries on the business of, or profession as, a publicity or advertising agent, where the assessee, or in a case where the assessee is a company, firm, as association of persons or a Hindu undivided family, any director, partner or member, as the case may be, of such company, firm, association or family, or any relative of such assessee or such director, partner or member, has a substantial interest in the business or profession of that person.

(3) Any expenditure on advertisement for which payment has been made in a sum exceeding Rs.10,000 shall not be allowed as a deduction in computing the total income unless such payment is made by a crossed cheque drawn on a bank or by a crossed bank draft:

Provided that where an allowance has been made in the assessment for any year in respect of any liability incurred by the assessee for expenditure on advertisement exceeding Rs.10,000 and subsequently during any previous year the assessee makes payment in respect thereof otherwise than in accordance with the provisions of the clause, the allowance originally made shall be deemed to have been wrongly made and the Assessing Officer may recompute the total income of the assessee for the previous year in which such liability was incurred and make the necessary amendment; and the provisions of section 154 shall, so far as may be, apply thereto, the period of four years specified in sub-section (7) of that section being reckoned from the end of the assessment year next following the previous year in which the payment was so made.

Explanation : For the purposes of this rule, -

(i) “relative” shall have the meaning assigned to it in clause (41) of section 2;

(ii) a person shall be deemed to have a substantial interest in a business or profession, if –

(a) in a case where a business or profession is carried on by a company, such person is the beneficial owner of shares, not being shares entitled to a fixed rate of dividend whether with or without a further right to participate in profits, carrying not less than twenty per cent of the voting power; and

(b) in any other case, such person is beneficially entitled to not less than twenty per cent of the profits of such business or profession.”

5.After hearing the learned counsel for the parties and after going through the aforesaid provision, we find that an assessee can get the benefit of deduction as business expenditure for the amount spent on any of the items as provided and to the extent as stated in Sections 30 to 36 of the Act. If any expenditure made is not of the nature described in Sections 30 to 36 of the Act an assessee can nevertheless get benefit of deduction by the residuary Section 37 provided that such expenditure is not in the nature of capital expenditure or personal expenses of the assessee with further condition that the same must not be under other exceptions pointed out in various sub-sections of Section 37 of the Act.

6.Although Mr. Nizamuddin, the learned Advocate appearing on behalf of the Revenue, tried to convince us that the expenditure for presentation of gift, as made by the assessee in this case, comes within the purview of hospitality as provided in clause (iii) of Section 37(2), we are not at all impressed by such submission for the simple reason that in the case before us the assessee is running the business of hotel whose object is to provide hospitality to its clients.

7.In our opinion, the assessee being engaged in a business of offering hospitality to its clients, for the hospitality so offered to its clients, as it charges them and makes profit out of it, any amount of money spent for offering any part of the hospitality to its clients should be deducted from the gross income received by the assessee and the balance income should be treated to be the real net income from the business. Thus, the assessee having spent the sum of Rs.1,54,875/- for the purpose of purchasing gifts which have been given to its customers as a part of offering hospitality on ceremonial occasions, the same must be held to be business expenditure as the same is neither in the nature of private expenses nor is a capital expenditure and at the same time, such expenses does not come any of the exceptions provided in Section 37 of the Act.

8.For instance, if an assessee, who runs a hotel business, decides to offer to its boarders on a festive occasion a special complimentary item at the breakfast (in the form of a complimentary dish) and for that reason does not charge any additional amount of money to the one fixed for offering breakfast, the additional sum spent for serving the

complimentary dish/item to its guests should be deducted as business expenditure although such amount is spent for providing hospitality to its guests. Even we can give the example of the cases of competition in the market among the hotel owners where one of them decides to improve the quality of hospitality similarly offered by his competitors in the field by offering additional items of hospitality for the purpose of attracting more guests. In such a case apparently, he is spending additional sum for business expenditure by conceding less profit with an eye to earning higher future profit by attracting more guests than the ones entertained by his competitors in the market.

9.Therefore, the expression "any expenditure in the nature of entertainment expenditure incurred by any assessee" appearing in Section 37(2) of the Act is not attracted to the case of the assessee whose business is to offer hospitality on payment of money. In this connection, we may appropriately apply the wellsettled rule of interpretation as approved by the Supreme Court in the case of K.P. Varghese vs. Income-Tax Officer, Ernakulam & Anr., reported in (1981) 131 ITR 597 that a statutory provision must be so construed, if possible, that absurdity and mischief may be avoided. Where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the legislature, the court may modify the language used by the legislature or even do some violence to it, so as to achieve the obvious intention of the legislature and produce a rational construction.

10.Rule 6B of the Income-Tax Rules deals with the 'expenditure on advertisement' and undisputedly on those gifts the name or logo of the assessee was not used and, therefore, in our view, the Commissioner of Income-Tax (Appeals) and the Tribunal rightly gave deduction of the said amount as business expenditure within the meaning of Section 37 of the Act.

11.The first question formulated by us is, thus, answered in favour of the assessee and in the negative.

12.The next question that arises for determination is whether the Tribunal below and the Commissioner of Income-tax (Appeals) committed any error inallowing depreciation in terms of Section 32 of the Act on new aircraft purchased by the assessee to the extent of 50%.

13.Mr. Nizamuddin, in this connection, strenuously contended before us that although the assessee was no doubt the owner of the said aircraft yet there was no evidence to indicate that the same was actually used by the assessee so as to get depreciation in terms of Section 32 of the Act.

14.After hearing the learned counsel for the parties and after going through the materials on record, we find that the phrase "used for the purpose of business" should be interpreted to mean that such plant or machinery must be "open to use" for business and the proof of actual user is not necessary. For instance, if a person starts business and purchases various types of machinery for the purpose of the said business with a plan for manufacturing different types of articles but for want of demand from its customers for

manufacture of a particular type of articles in a particular Assessment Year, if any particular machinery which is utilized for manufacture of that particular type of article is not actually used, the assessee should nevertheless be entitled to the benefit of depreciation notwithstanding the fact that such particular machinery was not at all used for the simple reason that the assessee made it ready for use but could not use for no fault on his part and over which he had no control. In the case before us, it has been established that the said aircraft was purchased for the business in the latter half of the Assessment Year and thus, the assessee became the owner and it was actually delivered to the assessee and landed at the New Delhi Airport Authority and the same was also made ready for use by insuring the same by the concerned insurance company. Thus, the assessee has proved that it was made ready for the use of business. In such a case, the authority below rightly granted depreciation @ 50% for the part use of the said aircraft in accordance with law.

15.We, thus, answer the said above question in the negative and in favour of the assessee.

16.The last question before us is whether the Tribunal below committed substantial error of law in re-computing deduction under Section 80HHD of the Act at Rs.77,62,17,303/- by not including "receivables" in its computation although the receipt includes receivables as per mercantile system of accounting.

17.In order to appreciate the question involved herein, it will be profitable to refer to the provision contained in sub-section (3) of Section 80HHD of the Act which is quoted below:

> "for the purpose of Sub-section (1A) profits derived from services provided to foreign tourists shall be the amount which bears to the profit of the business (as computed under the head profits and gains of business or profession) the same proportion as the receipt specified in Sub-section (2) as reduced by any payment referred to sub-section (2A) made by the assessee bearing to take receipts of the business carried on by the assessee."

18.A plain reading of the aforesaid provision makes it clear that for computation of the relief under Section 80HHD, the total turnover alone is inconsequential but the Assessing Officer has relied upon it. In our opinion, for computation of gross total receipt in business, the opening Sundry Debtor should be added to the total turnover and from that the closing Sundry Debtor should be deducted in order to arrive at the correct figure and that has been followed by the Auditor who has certified the entitlement of 61.07% of the business profit. Our aforesaid view finds support from the decision of the Supreme Court in the case of CIT vs. Lakshmi Machine Works, reported in (2007) 290 ITR 667 while interpreting the similar provision of Section 80 HHC(3) of the Act. It further appears that copy of the Accountant's certificate in Form-10CCAD has also been produced. Therefore, the Assessing Officer wrongly considered the total turnover of Rs.395,62,34,559/- instead of gross receipt in business amounting to Rs.390,93,27,318/- certified by the Auditor and accordingly, the relief allowed under Section 80HHD should

be enhanced to Rs.77,62,17,303/- instead of Rs.77,53,58,47/- allowed by the Assessing Officer.

19.We, therefore, find that the Commissioner of Income-tax (Appeals) and the Tribunal below rightly set aside the order of the Assessing Officer.

20.We, thus, answer the third question in the negative and against the Revenue.

21.The appeal is, thus, dismissed.

22.In the facts and circumstances, there will be, however, no order as to costs.