IN THE HIGH COURT OF DELHI AT NEW DELHI

ITA 452/2008

THE COMMIISONER OF INCOME TAX,

DELHI-VII, NEW DELHI '.. Appellant

Through: Ms Prem Lata Bansal, Ms Anshul Sharma and Mr Sanjeev Rajpal, Advocates

Versus

M/S JAIPUR GOLDEN TRANSPORT CO. (REGD.) '.. Respondent

Through: Mr C.S. Aggarwal, Sr. Advocate with Mr Prakash Kumar, Advocate

CORAM

HON'BLE MR JUSTICE VIKRAMAJIT SEN

HON'BLE MR JUSTICE RAJIV SHAKDHER

O R D E R

18.03.2009

1. **This is an appeal preferred by the Revenue under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') against judgment dated 18.05.2007 passed by the Income Tax Appellate Tribunal (hereinafter referred to as the 'Tribunal') in ITA No. 195/Del/2005 pertaining to assessment year 2001- 02.**

2. **The only issue which has been raised before us is that the Tribunal misdirected itself in law in deleting an addition of a sum of Rs 2,34,30,000/- made by the Assessing Officer on the ground that the assessee had transferred its business to one Jaipur Golden Transport Company (Regd.) (hereinafter referred to as the 'Company' for an inadequate consideration. The other issue with respect to disallowance of consultancy charges amounting to Rs 9,76,350/- was not pressed before us. In order to dispose of this appeal the following facts require to be noticed:-**

2.1 **The assessee had been carrying on business of a franchisee of the company for last 30 years. The company, on the other hand, had been in the same trade since 1953.**

2.2 **The assessee entered into a franchisee agreement dated 02.04.1983 as modified on 30.05.1999 (in short the 'agreement') with the company for carrying on the transport business on the company's behalf. In return, the assessee was required to place an interest-free security deposit of a sum of Rs 50 lacs with the company, as also, pay to the company a franchisee fee equivalent to Rs 25 per 'bilty'.**

2.3 **The assessee, thus, under the agreement was a franchisee for business operations carried out in the States of; Uttar Pradesh, Rajasthan, Madhya Pradesh and Delhi.**

2.4 **This arrangement, however, was brought to an end by the company with respect to operations carried out under agreement for Delhi and Uttar Pradesh. The said agreement of 29.02.2000 was re-confirmed by the company issuing a letter dated 01.04.2000.**

2.5 **The background in which the business operations of the assessee were brought to an end were that the assessee-firm felt that its business had become un-remunerative in view of the fact that it was required to pay to the company a franchisee fee equivalent to Rs 25 per 'bilty'. Furthermore, the assessee-firm also and the company found to their discomfort that the Income Tax Authorities were of the view that the assessee-firm should have deducted tax at source in respect of gross booking amount shared by the assessee and other sister concerns of the company at the rate applicable to a contractor, that is, 2% as against that applicable to a sub-contractor, that is, 1% even though in appeal the demand raised on the assessee and other sister concerns was cancelled by the Commissioner of Income Tax (Appeals) [hereinafter referred to as the 'CIT(A)'] in July, 2000. The company took a decision that the**

assessee's agency with respect to Delhi and Uttar Pradesh ought not to be continued. Instead the company offered to pay to the assessee a commission of 15% of the bookings made from Delhi and Uttar Pradesh.

3. It is in this backdrop that the assessee filed a return of income on 30.10.2001 declaring an income of Rs 1,43,39,830/-. The return was processed on 30.01.2003 under Section 143(1) of the Act. The return was picked up for scrutiny and a notice was issued under Sections 143(2) and 141(2) of the Act, alongwith a questionnaire.

4. The Assessing Officer after giving due opportunity to the assessee came to the conclusion that the income received by the assessee in the previous three years, that is, financial years ending on 31.03.1998, 31.03.1999 and 31.03.2000; that the net profit ratio had dropped from 17.79% in the financial year 1997-98 to 4.57% in the financial year, under consideration, that is, 2000-01. He also noted that even though the net profit ratio for the financial year 2000-01 would perhaps improve to a figure of 9.53% if receipts on account of commission and bilty charges were shown at a figure of Rs 46.31 crores, nevertheless the drop in the net profit and profit in absolute terms was sharp.

4.1. The Assessing Officer was thus of the view that the assessee has transferred a 'profitable business' without adequate consideration only to reduce its tax liability. He did not accept the contention of the assessee that the relationship between the assessee and the company was that of principal and agent as the assessee was using the bilty book of the company. Thus the Assessing Officer by taking into account the previous three years came to a conclusion that the net profit earned by the assessee was around 42% of the gross receipts. Based on which the Assessing Officer concluded that since the gross receipts for the Delhi and Uttar Pradesh business for the year under consideration were Rs 15.20 crores, after adjusting, the agent's commission of approximately Rs 2.50 crores passed on by the assessee to its sister concern, the assessee ought to have earned a sum of Rs 5.33 crores (that is, 42% of

Rs 15.20 crores ' Rs 2.5 crores). Since the assessee had already received a sum of Rs 3.20 crores, the Assessing Officer added a sum of Rs 2.13 crores + 10% of Rs 2.31 crores to the income of the assessee, as potential future earnings. The total addition, therefore, made by the Assessing Officer as Rs 2,34,30,000/-

5. Aggrieved by the above the assessee preferred an appeal to the CIT(A). The CIT(A) after considering the contentions of the assessee, by an order dated 20.10.2004 deleted the addition made by the Assessing Officer. ***The CIT(A) noted that the assessee had been granted the right to carry on business of the transportation in the name of the company in the State of Uttar Pradesh, Rajasthan, Madhya Pradesh and Delhi vide agreement dated 02.04.1983. He noted that this agreement was modified by an agreement dated 30.05.1999. He also found as a fact that the company withdrew the franchisee business from the assessee with respect to Delhi and Uttar Pradesh w.e.f. 01.04.2000. In this fact situation the CIT(A) observed that the Assessing Officer had not brought on record any material to show that the assessee had concealed any income earned in view of the change brought about w.e.f 01.04.2000. He also returned finding that in consonance with the change brought about with effect from 01.04.2000 in the four quarters, that is, April to June 2000, June to September 2000,October to December 2000 and January to March, 2001, the assessee had earned a commission of Rs 3,20,19,533/- which was offered for tax by the assessee. He also observed that for the same assessment year, that is, assessment year 2001- 02 no addition had been made in the hands of the company on the ground of suppression of income earned against booking and delivery receipts, in respect of, business operation pertaining to Delhi and Uttar Pradesh. The CIT(A) rejected the basis on which the Assessing officer had arrived at the addition of Rs 2.34 crores based on what the Assessing Officer thought was the future income which the assessee had foregone for transfer of its business pertaining to Delhi and Uttar Pradesh. The rationale given by the CIT(A) was that the Assessing Officer could not have taxed as income that which did not accrue to the assessee but which could have been earned though as a matter of fact was not earned.*** **Taking into account the fact that the franchisee business with respect to Delhi and Uttar**

Pradesh had been withdrawn by the company which left the assessee with no choice but to accept what was offered, the addition was deleted. *The CIT(A) also observed that the Assessing Officer could not have decided what was expedient and in the interest of the business.*

6. The Revenue being aggrieved carried the matter in appeal to the Tribunal. The Tribunal by the impugned judgment sustained the order of the CIT(A). In doing so, the Tribunal observed that the assessee ceased to carry on the business of transportation in relation to Delhi and Uttar Pradesh under compelling circumstances. It also noted that the assessee earlier carried the business of a franchisee with respect to Delhi and Uttar Pradesh but now is acting only as a booking agent. Placing these facts in perspective the Tribunal was of the opinion that the Assessing Officer could not have made the addition on the ground that, had the assessee continued to carry on the business it would have earned an additional income and thus made addition on that basis ignoring the altered state of affairs.

7. As indicated above, the Revenue being aggrieved of the impugned judgment has preferred the present appeal before us. Having heard the learned counsel for the Revenue Ms Prem Lata Bansal and for the assessee Mr C.S. Aggarwal, Sr. Advocate we are of the view that the order of the Tribunal and the CIT(A) deserves to be sustained or the following reasons given hereinafter:-

(i) As noted by the Tribunal nothing has been brought on record to show that the franchisee agreement under which the assessee was conducting the business of transportation for the State of Delhi, Uttar Pradesh, Madhya Pradesh and Rajasthan had not been curtailed w.e.f. 01.04.2000. ***There is no evidence to show, once again, as found by the authorities below, that post 01.04.2000 the assessee has been earning income except by way of commission, from, bookings made with, respect to, Delhi and Uttar Pradesh.***

(ii) It is also found as a fact that in so far as the income from commission earned from bookings made in Delhi and Uttar Pradesh are concerned the assessee has offered the same for taxation.

(iii) There is nothing brought on record to show that in so far as the company is concerned there has been any addition made on account of suppression of income for the same assessment year, that is, assessment year 2001-02.

8. In view of the aforesaid findings returned by the authorities below we are of the opinion that the Assessing Officer could not have made the addition based on what he thought the assessee would have earned had the business of transportation with respect to Delhi and Uttar Pradesh not been 'transferred' to the company. Such a conclusion is erroneous for two reasons:

(i) it was not for the assessee to decide as to whether it should or should not give up the business of transportation with respect to Delhi and Uttar Pradesh, the decision was as found by the authorities below taken by the company;

(ii) unless it was demonstrated that this was a case of concealment of income there could not have been any addition made on a supposition that the assessee ought to have earned the income as quantified by the Assessing Officer. The Assessing Officer cannot determine what is expedient for the purposes of the conduct of business

9. In view of our discussion above and the findings of fact returned by the Tribunal and the CIT(A) we are of the opinion that the impugned judgment does not call for our interference.

10. No question of law, much less a substantial question of law arises for consideration of this Court. Resultantly, the appeal is dismissed.

VIKRAMAJIT SEN, J

RAJIV SHAKDHER, J
March 18, 2009
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