

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B', NEW DELHI**

Before Dr. B. R. R. Kumar, Accountant Member

Sh. Yogesh Kumar US, Judicial Member

ITA No. 4874/Del/2017 : Asstt. Year : 2014-15

ACIT, Central Circle-3, New Delhi-110055	Vs	Claridge Hotels Pvt. Ltd., 12, Aurangzeb Road, New Delhi-110011
(APPELLANT)		(RESPONDENT)
PAN No. AAACC0022B		

Assessee by : Sh. Gaurav Jain, Adv. &

Sh. Sanket Gupta, CA

Revenue by : Sh. Mahesh Shah, CIT DR

Date of Hearing: 26.05.2022

Date of Pronouncement: 27.06.2022

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the Revenue against the order of the Id. CIT(A)-23, New Delhi, dated 04.05.2017.

2. Following grounds have been raised by the Revenue:

"1. The order of Ld. CIT (A) is not correct in law and on facts.

2. On the facts and circumstances of the case, Ld. CIT(A) has erred in deleting the addition of Rs.6,24,37,375/- made by AO on account of addition on gross profit.

3. On the facts and circumstances of the case, the Ld. CIT(A) has erred in deleting the addition of Rs. 12,50,00,000/- made by AO on account of Deemed Dividend.

4. On the facts and Circumstances of the case, the Ld. CIT(A) has erred in holding that the rejection of the books of account u/s 145(3) of the Act by the AO is not based on facts relevant to determination of income brought out succinctly from the audited accounts."

Gross Profit:

3. During the course of assessment proceedings, the AO observed that the gross profit of the assessee has been significantly dropped for the year under consideration in comparison to the earlier Assessment Year's (2013-14) of 28.59% gross profit and net profit of 7.96%. The gross profit for the current year was 15.24% and net profit of 1.74%. The AO held that on deduction of income from other sources of Rs.14.46 Cr. the net profit would have been further steeped down. Before the AO, it was submitted that the fall in the profits was due to renovation that has been undertaken by the assessee during the year. Further, the AO observed that the complementary expenses was not shown in the P&L account but only reduced from the closing stock. The AO also observed that the service charges received are not shown in the P&L account. The AO observed that while the decrease in the turnover was 18.82%, the gross profit has fallen down to 46.69% which is not justifiable. After comparing the gross profit ratios of the Lalit Hotel, the Le Meridian, Shangri-la Eros and Taj Vivanta, the AO concluded that returned GP of the assessee of 15.24% is quite low compared to the average GP of the four above mentioned hotels of 28.25% and estimated the GP @ 28% and made an addition of Rs.6.24 Cr. to the income of the assessee.

4. Aggrieved the assessee filed appeal before the Id. CIT(A) who deleted the addition. Afflicted the revenue filed appeal before us.

5. Heard the arguments of both the parties and perused the material available on record.

6. As per letters dated 23.12.2016, 28.12.2016 and 29.12.2016, the reduction in the gross profit is primarily due to reduction in room revenue. During the assessment year, 29 rooms from the Cabana division were shut down for repair and renovation and 8 rooms from the other wing were also taken up for renovation. The spa was also under renovation. There were only 93 rooms in the inventory out of the total number of 130 rooms available. The room revenue has come down from Rs. 29.54 crores to Rs. 22.33 crores in the current assessment year. Spa, Pool and the star restaurant namely Sevilla was also under renovation. Revenue from food and beverages had also went down. A property which is older will require greater maintenance and will necessarily have to price itself a little below than the newer properties. It was further submitted that unlike other hotel chains, whenever there is a temporary stoppage due to repair and renovation in any one of the hotel in the chain, the staff can be moved to other hotels in the said chain. Claridges being a stand-alone hotel the staff has to be maintained irrespective of the number of rooms available for being let out. Hence, the fixed cost of running Claridges is higher and static. Also there are other fixed costs as well which have to be incurred irrespective of the occupancy.

7. With regard to allegation of the AO that the assessee was repeatedly asked to produce the bill and the internal audit report, but assessee failed to produce Internal Audit Report and proof of payment for internal audit, we find that same has been replied Vide letter dated 29.12.2016, details of provision made for internal audit fees were submitted to the AO.

8. With regard to the service charges, we agree with the Ld. CIT(A) that Service charge is collected from the customers and paid directly to the staff. The hotel is merely a trustee of the service charges collected from the customers for and on behalf of the employees and this is fully passed on to them. Accounting treatment of service charges in books of accounts is as under:

a. A memoranda account is prepared and a very strict and rigid control is exercised on the receipt and payment of service charge.

b. Service charge is not routed through profit and loss account but entry is passed in books of accounts.

c. Following entry is passed when service charges are collected:

d. Service charge collected from guests is credited to service charge payable account which is a liability account. On a monthly basis, the amount collected is used to disburse salaries of banquet FTCs, banquet casuals and to the Event Manager who provides casual banquet service staff and KST. Therefore, while making payment, the account is debited with salary and wages and Event Manager.

e. At the end of the year, the closing balance of the account is reported under other current liabilities (employee related payables) in the balance sheet and is utilized for payment in the subsequent financial year.

f. Even, if the entire service charges were to be made part of the profit and loss account, the effect thereof would be revenue neutral in as much as the entire service charges have been paid off to the employees and to others.

9. With regard to the service charges received from customers & claimed to be paid to staff ledger accounts of service charges, salary sheets of staff, IDS certificates, salary sheets of casual staff, bills of event manager etc. were filed during assessment proceedings. The service charge is recovered from the customers in respect of banquets and restaurants. The total service charge collected during the year was Rs. 1,27,95,272/-. The breakup of payment made is as under:

Sl. No.	Description	Amount
1.	F&B service charge in salary to staff	75,99,510
2.	Service charge to casual staff	12,71,855
3.	Service charge to Event Manager for casual banquet service staff and KST	34,38,44
Total		1,23,09,810

10. With regard to non-filing of complete books of accounts, the AO requisitioned the books of accounts on 27.12.2016 and the same were produced on 28.12.2016 in a digital form and the employees of the assessee company have duly explained the accounts & ledgers. Hence, the allegation that books of accounts have not been produced cannot be accepted.

11. With regard to non-accounting of complimentary and P&L account versus reduction in closing stock, it is found that complimentary are of various types like free water bottles in room, breakfast, fruits, tea, coffee served to staff and guests, lunch, dinner in MAP plan, welcome drinks etc. The sales team, general manager, and other department heads have to entertain clients to secure business. These expenses/charges directly go to reduce the corresponding stock in the entire inventory and the reduced inventory consequent to the charge to stock represent the expense. These expenses are necessary in the hospitality sector. The total costs of complimentaries was Rs. 1,63,46,173/-. Most of it was towards customers, clients, marketing etc. These are expenses which are wholly and exclusively incurred for the purposes of business. The cost of complimentaries being the raw material cost stands automatically reduced from the closing stock. The observation of the AO is factually correct but materially does not change the profits whether passed through P&L account or reduced from the closing stock.

12. With regard to the renovation and occupancy, the percentage of occupancy during the year under consideration is meager i.e. 48% as compared with an average 68% in the preceding and subsequent assessment years.

13. In nutshell, the AO rejected books of accounts books of account u/s 145(3) of the Act by observing that,

- (i) the **complementary expenses** in the form of entertainment, free gifts etc. was not routed through the P & L account and the appellant did not submit

- details of the complementary expenses and the details of the beneficiaries;
- (ii) the **service charges** received from customers and claimed to be paid to the staff are not shown in the books of account as income and no details of the same were filed and are not verifiable and therefore personal gains out of the same cannot be ruled out, and which is also the reason for the difference in total revenue receipts as per Service Tax Return;
 - (iii) the appellant did not **submit the bills** related to internal audit fees of Rs. 9.00 lakh and the internal audit report as well as the proof of payment of the internal audit fees;
 - (iv) the **decline** in turnover is only 18.87% while the GP declined by 46.69% though the GP of "the hotels of same category are in the range of 24% to 32%"; and,
 - (v) the appellant failed to produce complete books of account alongwith relevant bills.

14. From the record, it is observed that the entire details of **complimentary expenses** have been mentioned at para 4.2.4.3 page no. 26 to 31 of the order of the Id. CIT(A) giving the complete details of the particulars, designation, cost price of the complimentary and also the various divisions.

15. With regard to **service charges**, the entire details and the method of accounting charges, and the amount of the services charges paid of Rs.1.23 Cr. have been duly mentioned at para 31 & 32 of the order of the Id. CIT(A).

16. With regard to the **internal audit fees**, the details have been filed by letter dated 29.05.2016. Copy of the ledger has been submitted before the AO as verified by the Id. CIT(A). The reasons for declining the gross profit along with rooms available, rooms occupied, percentage of room rate, room revenue and F&B revenue [page 25 & 26 of the order of the Id. CIT(A)] has been duly furnished substantiating the **decline** in receipts, incurring expenses of direct receipts such as electricity, water, staff, music and entertainment which have been and to be provided irrespective of the percentage of occupancy.

17. Thus, having gone through the entire facts, we hereby decline to interfere with the reasoned order of the Id. CIT(A).

Deemed Dividend u/s 2(22)(e):

18. The assessee received advance of Rs. 7.5 crore from M/s Asian Infracon Pvt. Ltd. (AIPL) and Rs. 4.65 crore from Godavari Shilpakala Ltd. (GSL) for purchase of shares of M/s Excalibur Assets and Capital Management Private Limited (EACMPL) which were owned by the assessee in terms an agreement with them according to which the appellant company was to sell the shares of EACMPL for a consideration of Rs. 3,125/- per share.

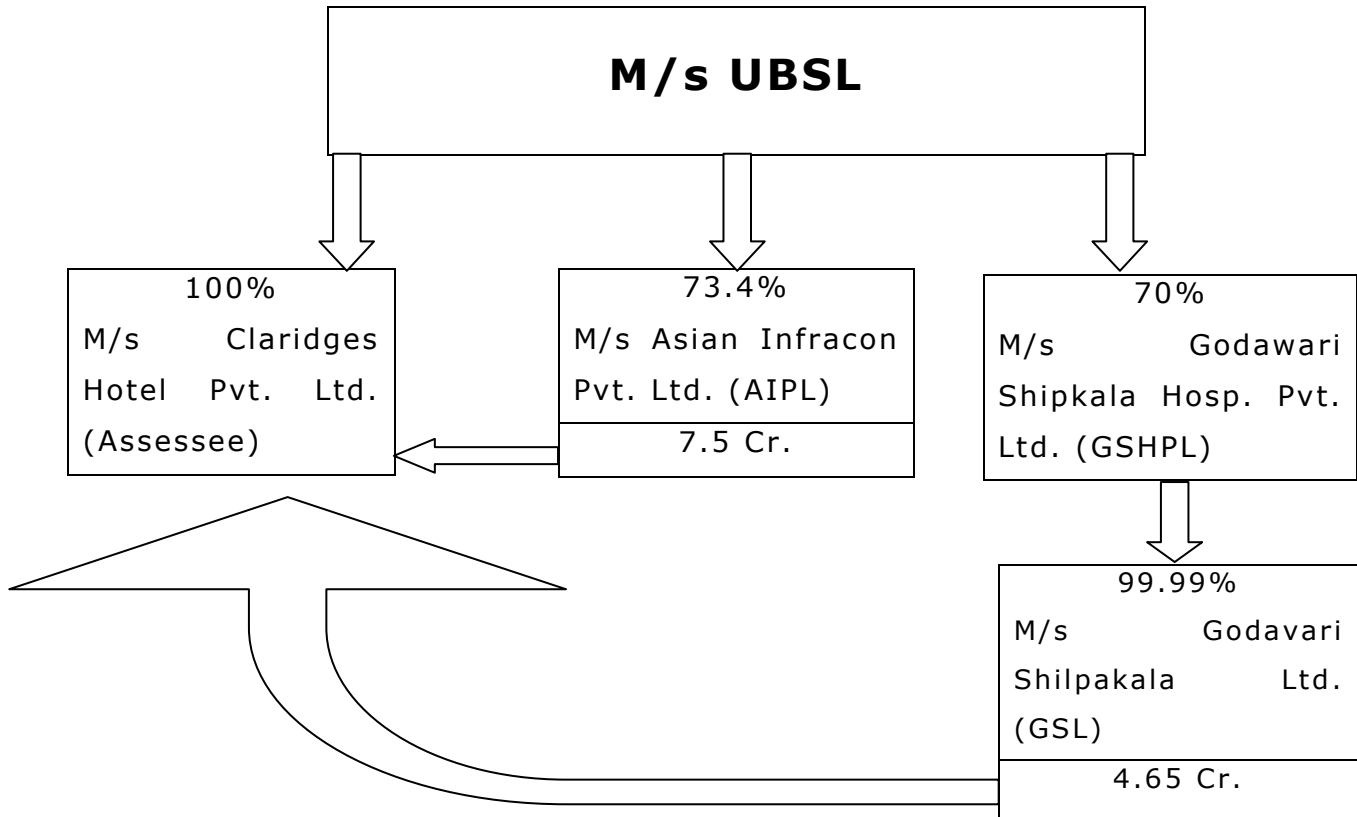
19. As per the MOU dated 29.08.2013 with AIPL and 06.12.2013 with GSL these companies were to purchase 3,20,000 and 1,60,000 shares of EACMPL from the appellant company for a consideration of Rs. 1.00 crore and 5.00 crore so however that the transfer of shares was subject to

approval/NOC from M/s Indian Hotel Company Ltd. (IHCL) since as per the Escrow agreement signed between IHCL, the appellant company and EACMPL, the shares in EACMPL could be sold and transferred only after getting approval from IHCL. However, the transaction could not materialize as the IHCL did not give their approval and the money was refunded by the appellant to AIPL and GSL in the subsequent assessment year.

20. It has been submitted that therefore the amount was merely an advance for sale of shares which was repaid without interest and the balance sheet also reflects the amount as "Advance against purchase of investment".

21. The AO asked for the details related to these transactions and held that the advances is to be considered as deemed dividend in the hands of M/s Universal Business Solutions Ltd. (UBSL) substantively holding that UBSL held more than 50% shares in AIEPL & GSL and UBSL was a 100% subsidiary of the appellant company, and made similar addition in the hand of the appellant company on a protective basis.

22. The aforesaid companies viz. M/s AIPL & M/s GSL were fellow subsidiaries of the assessee through the holding company of the assessee, viz. M/s Universal Business Solutions Limited (hereinafter referred to as "M/s UBSL"). The shareholding pattern of M/s UBSL in the Respondent, M/s AIPL and M/s GSL, is as under:



23. During the assessment proceedings, the Assessing Officer made protective additions amounting to Rs. 12.50 Crores in the hands of the assessee and substantive additions to be made in the hands of M/s Universal Business Solutions Limited (M/s UBSL), a 100% holding company of the Respondent on the ground that the transactions constituted deemed dividend in the hands of M/s UBSL as per the provisions of section 2(22)(e) of the Act.

24. On appeal, the Id. CIT(A) deleted the aforesaid addition and held that since the assessee is not a registered shareholder either in M/s AIPL or M/s GSL, the deeming provisions of section 2(22)(e) of the Act were not applicable in the case under consideration. The observations of the Id. CIT(A) are as under:

"Thus, while loan or advance to the appellant company, in my opinion, would be covered and considered as advance or loan to the shareholder of the appellant company, an advance or loan to shareholder of the company making such advance or loan could be considered as deemed dividend or any loan or advance to a 'concern' in which the shareholder is a member or a partner and in which he has a substantial interest, under the provisions of s. 2(22)(e) of the Act, is to be considered as deemed dividend only in the hands of the shareholder. In this case, without going into the nature of payment made by AIPL and GSL to the appellant but the appellant is not a shareholder in these companies, rather UBSL Mauritius and GSHPL are shareholders in AIPL and GSL respectively. Thus, in terms of the various judgments discussed herein earlier the amount of Rs.12.50 crore cannot be considered as deemed dividend in the hands of the appellant company. I hold accordingly. In any case, the addition in the hands of the appellant company has been made on a protective basis and in view of my findings herein above the addition made in the hands of the appellant on this account, on a protective basis, is deleted.

4.4 Further, the AO has made protective additions of Rs. 12,50,00,000/- in the hands of the assessee company and substantive addition in the hands of M/s Universal Business Solutions Ltd. (hereinafter referred to as "M/s UBSL"); a 100% holding company of the assessee on the ground that the transaction constitutes deemed dividend in the hands of the shareholder i.e. M/s UBSL. In this regard it has been submitted that UBSL is a Mauritius based company and as per the DTAA with Mauritius any dividend earned by a company resident in Mauritius is taxable in Mauritius and that the provisions of DTAA refers to moneys received directly as divided and not deemed income for which the Ld. AR has placed reliance on judgments in Rajeev Makhija ITA No. 3148/Del/2008

(ITAT Delhi), MSC Mediterranean Shipping Company S.A. 154 ITD 478 (ITAT Mumbai), Resource Connections (FZE) 42 SOT 23 and Union of India v. Azadi Bachao Andolan [2003] 263ITR 706. Even so this argument is not relevant for deciding the appeal in this case of the appellant company which has been already decided herein above and therefore this ground no. 7.1 is not considered for adjudication in this case and dismissed."

25. We find that the provisions of section 2(22)(e) of the Act are not applicable as the assessee is not a registered shareholder of the company from which advance has been received.

26. The provisions of section 2(22)(e) of the Act are not applicable in the present case as the assessee is not a shareholder in the companies from which advance has been received during the year. As evident from the aforesaid table showing shareholding pattern, the assessee is not a shareholder in M/s AIPL & M/s GSL. In case of GSL, viz., GSHPL do not hold shares in assessee company, clearly bringing it outside the scope of Section 2(22) (e) of the Act. The provisions of section 2(22)(e) of the Act states as under:

"(e) any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) made after the 31st day of May, 1987, by way of advance or loan to a shareholder, being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power, or to any concern in which such shareholder is a member or a partner and in which he [has a

substantial interest (hereafter in this clause referred to as the said concern) or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits.”

27. Therefore, both the advances could not have been added in the hands of assessee company, being not the registered shareholder of AIPL or GSL. Reliance, in this regard, is placed on the following judicial precedents:

- a. The Supreme Court in case of Commissioner of Income Tax. v. Madhur Housing & Development Co. reported in Civil Appeal Nos. 3961 of 2013 [401 ITR 152 (SC)] approved the decision of Delhi High Court in the case of CIT v. Ankitech Pvt. Ltd. reported in 340 ITR 14, wherein it has been held that an assessee who was not a shareholder of the company from which he received a loan or an advance cannot be treated as covered by the definition of the word 'dividend' as contained in section 2(22)(e).
- b. Judgment of the Hon'ble Delhi High Court in the case of MCC Marketing Pvt. Ltd. reported in 343 ITR 350 wherein the judgment of Ankitech (supra) has been followed and affirmed.
- c. Judgment of the Hon'ble Delhi High Court in the case of Bikaner Cuisine (P.) Ltd. reported in 45 taxmann.com 253.
- d. Judgment of the Hon'ble Delhi High Court in the case of Navyug Promoters (P.) Ltd. reported in 16 taxmann.com 292.

- e. Judgment of the Hon'ble Gujarat High Court in the case of Daisy Packers P. Ltd. reported in 220 Taxmann 331.
- f. Judgment of the Hon'ble Rajasthan High Court in the case of Suram Holding Pvt. Ltd. reported in 220 Taxmann 327.
- g. Judgment of the Hon'ble Karnataka High Court in the case of Sarva Equity (P.) Ltd. reported in 225 Taxmann 172
- h. Judgment of the Hon'ble ITAT Delhi in the case of ACIT vs. Jakson Limited: ITANO. 1140/Del/2017
- i. Judgment of the Hon'ble ITAT Delhi in the case of DC1T vs. Aakar Design Consultants Pvt. Ltd.: ITA No. 3712/Del/2016

28. In view of the above, we hereby affirm the order of the Id. CIT(A).

29. In the result, the appeal of the Revenue is dismissed.
Order Pronounced in the Open Court on 27/06/2022.

Sd/-

(Yogesh Kumar US)
Judicial Member

Dated: 27/06/2022

Subodh Kumar, Sr. PS

Copy forwarded to:

- 1. Appellant
- 2. Respondent
- 3. CIT
- 4. CIT(Appeals)
- 5. DR: ITAT

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

ASSISTANT REGISTRAR