

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH: CHENNAI

श्री अब्राहम पी. जॉर्ज, लेखासदस्य एवं
श्री जॉर्ज माथन, न्यायिक सदस्य के समक्ष

BEFORE SHRI ABRAHAM P.GEORGE, ACCOUNTANT MEMBER AND
SHRI GEORGE MATHAN, JUDICIAL MEMBER

आयकर अपील सं./ITA Nos.1227, 1228 & 1229/Mds/2017

निर्धारण वर्ष /Assessment Years: 2005-06, 2006-07 & 2012-13

M/s.Oriental Hotels Ltd.,
No.37, M.G.Road,
Nungambakkam,
Chennai-600 034.

Vs. The Dy. Commissioner of
Income Tax,
Corporate Circle-5(1),
Chennai-600 034.

[PAN:AAACO 0728 N]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by

: Mr.R.Vijayaraghavan, Adv.

प्रत्यर्थी की ओर से /Respondent by

: Mr.B.Srinivasa Rao, CIT

सुनवाई की तारीख/Date of Hearing

: 31.01.2018

घोषणा की तारीख /Date of Pronouncement

: 31.01.2018

आदेश / O R D E R

PER GEORGE MATHAN, JUDICIAL MEMBER:

ITA No.1227/Mds/2017 is an appeal filed by the assessee against the Order passed u/s.263 of the IT Act, 1961, by the Principal Commissioner of Income Tax-5 in C.No.2(34)/PCIT-5/263/2016-17/AY 2005-06 dated 20.03.2017 for the AY 2005-06. ITA No.1228/Mds/2017 is an appeal filed by the assessee against the Order passed u/s.263 of the IT Act, 1961, by the Principal Commissioner of Income Tax-5 in C.No.2(34)/PCIT-5/263/2016-17/AY 2006-07 dated 20.03.2017 for the AY 2006-07 and ITA No.1229/Mds/2017 is an appeal filed by the assessee

against the Order passed u/s.263 of the IT Act, 1961, by the Principal Commissioner of Income Tax-5 in C.No.2(34)/PCIT-5/263/2016-17/AY 2012-13 dated 20.03.2017 for the AY 2012-13.

2. Shri B.Srinivasa Rao, CIT, represented on behalf of the Revenue and Shri R.Vijayaraghavan, Adv., represented on behalf of the assessee.

3. As all the three appeals are related to the same assessee and involved identical issues, they are being disposed off by this common order.

4. It was submitted by the Ld.AR that the assessee is in the business of running hotel. The assessee had a Wholly Owned Subsidiary at Hongkong named M/s.OHL International (HK) Ltd., (in short 'M/s.OIHK') incorporated in Hongkong. M/s.OIHK does not have any business relationship with the assessee. M/s.OIHK had made investments in M/s.St. James Court Hotel Ltd., London. M/s.OIHK had declared dividends which were offered to tax by the assessee in its Return. The assessee had also given loans to M/s.OIHK and it had received interest on the same which had also been offered to tax in India. On the ground that the M/s.OIHK was 100% subsidiary of the assessee for the AYs 2003-04, 2004-05 & 2005-06, the assessment had originally been re-opened to bring to club the income of M/s.OIHK, the company incorporated in Hongkong with the income of the assessee. The same was subject matter of the appeal before the Tribunal

and for the AYs 2003-04 & 2004-05, the assessments had been quashed vide ITA Nos.1232 to 1236/Mds/2013 dated 23.01.2014. For the AYs 2005-06 & 2006-07, the issues were restored to the file of the AO to verify the issue of permanent establishment after detailed investigation and enquiry and for passing detailed order in accordance with the law. The AO had given effect to the order of the Tribunal and had passed the Assessment Order dated 27.03.2015 for the AYs 2005-06 & 2006-07 and regular assessment for the AY 2012-13 u/s.143(3) wherein the AO had categorically given the following findings:

Though there was no active involvement by the company after the investment made, but the income earned by OIHK is nothing but the income out of investment made in London Hotel and all the directors are also from India. There is no other responsible person in Hong Kong to look after the day to day affairs of the company and the assessee also could not substantiate it. So, it can be easily concluded that, during the year the subsidiary company OIHK was legally and economically controlled by the assessee only. As per section 6 (3) (ii) of the Income Tax Act, it becomes the resident of India as the control and management of its affairs is situated wholly in India.

Though OIHK, the WOS Company becomes a resident as per section 6 (3) (ii) of the Act, now the question arises whether the income of OIHK can be assessed in the hands of the assessee.

1. *Even though, the assessee is holding 100% shares of subsidiary company, and the WOS is effectively controlled by the assessee the income of the WOS cannot be assessed in the hands of the assessee as both are separate legal entities and were incorporated in different countries and are assessed tax in respective countries.*
2. *If there is Double Taxation Avoidance Agreement exists between India and Hong Kong, then the WOS could have been treated as permanent establishment of the assessee and the income also may be assessed in assessee's hands. Otherwise as per IT Act, 1961, there is no provision exists to assess the income of the WOS.*
3. *For the reason that in respect of the income, received by OIHK taxes were not paid in Hong Kong, that Income can't be assessed in India, in the hands of the assessee.*
4. *And also, it is to be noted that if the WOS is held to be resident of India, it is relevant only for making an assessment on the Hong Kong company and the income of WOS can't be clubbed with the assessee's income.*
5. *Further, from the investments made, the assessee also receive dividend every year from OIHK and that also is subjected to tax.*

In view of the above, the income of OIHK the WOS of the assessee cannot be assessed in the hands of the assessee.

5. Against the Assessment Order passed for the AYs 2005-06 & 2006-07 giving effect to the order of the Tribunal and for the AY 2012-13 being

the regular assessment, where, categorically, the AO has held that the M/s.OIHK is controlled from India and therefore, as per the provisions of Sec.6(3)(ii) of IT Act, it becomes the resident of India as control and management of its affairs is situated wholly in India, the AO further proceeded to hold that even though the assessee is holding 100% shares of the subsidiary company and there is an effective control by the assessee, the income of M/s.OIHK cannot be assessed in the hands of the assessee as both are separate legal entities and were incorporated in different countries and are assessed to tax in the respective countries. Consequent to these findings in the Assessment Order, the Ld. Principal CIT-5 has invoked his powers u/s.263 for the AYs 2005-06 & 2006-07 to set-aside the Assessment Order passed on 27.03.2015 to make appropriate enquires in line with the directions of the Hon'ble ITAT and to conclude the assessment as per the provisions of law. For the AY 2012-13, the Ld. Principal CIT-5 has invoked his powers u/s.263 to set-aside the Assessment Order with a direction to the AO to make enquiry with regard to location, control and management of the affairs of the WOS M/s.OIHK and to conclude the assessment as per the provisions of law. It was submitted by the Ld.AR that the AO has effectively complied giving effect to the order of the Tribunal and has given his findings in regard to the control and management of M/s.OIHK but has held that the income of the said subsidiary cannot be clubbed in the hands of the assessee. It was a submission that at the outset, whether M/s.OIHK is a resident of India or not and whether the provisions of Sec.6(3)(ii) of IT Act would

apply to the said company. It is not an issue which can be finalized in the assessment of the assessee company, especially when it has been recognized by the AO that M/s.OIHK is incorporated in a different country and it is a separate legal entity and is liable to tax in the respective countries. It was a submission that the order passed u/s.263 is unsustainable in so far as no error much less an error prejudicial to the interest of the Revenue has been pointed out in respect of the Assessment Orders passed for the AYs 2005-06 & 2006-07 & 2012-13 dated 27.03.2015.

6. In reply, Ld.DR vehemently supported the order of the Ld. Principal CIT. It was a submission that in view of the provisions of Sec.6(3)(ii) of IT Act, the 100% subsidiary company M/s.OIHK is to be treated as a resident of India, especially in view of the fact that the management of the subsidiary was wholly in India.

7. In reply to a specific query, as to whether, as per the provisions of Sec.6(3)(ii) of IT Act, 1961, the income of 100% subsidiary company M/s.OIHK could be clubbed in the hands of the assessee which is a separate legal entity. The Ld.DR was unable to give a reply. It was a submission that in view of the provisions of Sec.6(3)(ii) of IT Act , M/s.OIHK has to be treated as a resident of India.

8. We have considered the rival submissions.

9. A perusal of the Assessment Orders for the AYs 2005-06 & 2006-07 clearly shows that the AO has given categorical findings on the basis of the evidences assimilated by him that M/s.OIHK is to be treated as a resident of India in view of the provisions of Sec.6(3)(ii) of IT Act, 1961. Though, we are unable to fathom, as to how, the residential status of another assessee being M/s.OIHK can be considered or questioned or decided in the assessment proceedings of the present assessee, even though it is a wholly 100% shares of M/s.OIHK, especially, that too without putting the said separate legal entity M/s.OIHK to notice. In any case, the residency of M/s.OIHK is not the issue before us. The question only remains as to whether the AO has given effect to the order of the Tribunal for the AYs 2005-06 & 2006-07 and as to whether the income of M/s.OIHK should be clubbed in the hands of the assessee for the AYs 2005-06 & 2006-07 & 2012-13. A perusal of the Assessment Orders for the AYs 2005-06 & 2006-07 clearly shows that the AO has complied with the order of the Tribunal and has passed a Speaking Order so also for the AY 2012-13. Coming to the issue, whether the income of M/s.OIHK can be clubbed in the hands of the assessee, it is absolutely clear that the assessee and M/s.OIHK are two separate legal entities incorporated in two different countries and to whom the different taxation laws would apply relating to the respective countries in which they are incorporated. The Revenue has also not been able to point out either in the order u/s.263 or in the submissions before us as to the provisions under the IT Act, 1961,

by which the income of M/s.OIHK can be clubbed in the hands of the assessee. A perusal of the Assessment Order also clearly shows that the assessee has included dividend income received by it from M/s.OIHK as also the interest on the loan given to M/s.OIHK. This being so, we are of the view that as the Ld. Principal CIT-5 has not been able to point out a specific error in the order of the AO which has caused prejudices to the Revenue, the order passed u/s.263 is unsustainable and consequently, quashed.

10. In the result, the appeals filed by the assessee are allowed.

Order pronounced in the Open Court on January 31, 2018, at Chennai.

Sd/-

(अब्राहम पी. जॉर्ज)

(ABRAHAM P.GEORGE)

लेखा सदस्य/**ACCOUNTANT MEMBER**

Sd/-

(जॉर्ज माथन)

(GEORGE MATHAN)

न्यायिक सदस्य/**JUDICIAL MEMBER**

चेन्नई/Chennai,

दिनांक/Dated: January 31, 2018.

TLN

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF