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DIRECT TAX REVIEW
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and more…

Advertisement includes publicity and hence logo printing attracts withholding tax liability

Facts of the case

The Lucknow Income Tax Appellate Tribunal *{ITAT}* held that payment made by Sahara India Commercial Corporation *{the assessee}* to erstwhile Sahara Airlines for printing logo of assessee on boarding card, ticket, baggage tag, etc., amounts to 'advertisement', therefore, liable to withholding tax under section 194C of the Income Tax Act *{Act}*. However, the ITAT held that if it is established that Sahara Airlines has filed all its returns, provisions of section 201(1) cannot be invoked.

Contention of the assessee

The assessee contended that the payment was in the form of 'subsidy' against passenger's ticket sale in return of which Sahara Airlines was merely giving 'publicity' of logo, distinguishable from contract for 'advertisement' as contemplated in section 194C.

Tax authorities contention

The revenue contended that on perusal of the agreements between the parties, Circular #714 and #715 of the CBDT, definition of the terms 'advertisement' and 'publicity' from various dictionaries, narration on the general vouchers of the assessee, it is clear that the agreement was executed to promote their business and to have profits, hence the same amounts to 'advertisement' liable to witholding taxes under section 194C of the Act.

Tribunal's Ruling

The ITAT held as under:

- The ITAT held that no word like 'Subsidy' was ever used in the agreement between the assessee and Sahara Airlines;
- The ITAT referred Circular #714 and #715 of the CBDT; relied on the AAR ruling in Google Online India P Ltd; SC ruling in ICICI Bank Ltd and another vs Municipal Corporation of Greater Bombay and Others; referred the Black Law's and Chambers dictionary to hold that 'advertisement' and 'publicity' are synonymous and overlap each other and states 'whenever publicity of a brand or logo brings commercial benefit either apparent or hidden, it will assume the character of advertisement'.
- The ITAT further observed that assessee's intention was clear from the agreement terms that it was executed for purpose of 'advertisement' of assessee's logo, and held that assessee was liable to withold taxes under section 194C of the Act.

Conclusion

Advertisement includes publicity and hence logo printing attracts withholding tax liability, however, if it is established that Sahara Airlines has filed all its returns then the provisions of section 201(1) cannot be invoked in view of the apex court ruling in Hindustan Coca Cola Beverages P Ltd vs CIT and the Allahabad High Court ruling in Jagran Prakashan Ltd.

Source: ITA # 488-492, 517-521 and 540-544/ LKW/ 2009: DCIT vs M/s Sahara India Commercial Corporation Ltd

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Premium paid on premature redemption of debentures allowed as 'revenue expenditure'

Facts of the case

M/s Grindwell Norton Limited (taxpayer) paid a premium of INR 65.80 lacs on redemption of debentures for the assessment year 2003-2004. The AO as well as the CIT(A) disallowed this premium. The Mumbai Bench of the ITAT deleted the disallowance made by the lower authorities.

Contention of the assessee

The assessee company claimed that the prepayment premium cannot be said to be a discharge of liability of a capital nature merely because the debentures were redeemed prematurely so as to save the cost of interest.

Tax authorities contention

The AO and CIT(A) held that premium on redemption of debentures was in the nature of capital expenditure since the taxpayer derived the benefit by paying the sum on premature redemption in the form of savings of future interest cost on such debentures. The AO and CIT(A) placed reliance on the Supreme Court's decision in case of Madras Industrial Investment Corporation Ltd vs CIT 225 ITR 802, to support this disallowance.

High Court's ruling

The Supreme Court's decision in case of Madras Industrial Investment Corporation Ltd supra, relied upon by the tax department, was distinguishable from the facts of the present case since the former dealt with the treatment on discount on issue of debentures.

The Bombay High Court upheld the order of the Tribunal that if the debentures were redeemed by the taxpayer prior to the period for which they were issued and if there was a mutual arrangement for premature redemption thereof, then, the premature redemption premium cannot be said to be a capital expenditure and need not be spread over the entire period of debentures. The contract was brought to an end due to premature redemption, thus, the said premium need not be spread over the balance period.

The premium was paid on premature redemption of debentures and the expenditure was incurred in the previous year and thus, was held to be an allowable deduction.

Conclusion

The Bombay High Court dismissed the appeal of the Revenue since it did not raise any question of law and maintained the order of the ITAT.

Source: TS 784 HC 2014 (BOM): CIT vs M/s Grindwell Norton Limited

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Non-compete fees received by the taxpayer are re-characterized as sale consideration for transfer of shares

The Delhi High Court re-characterised the non-compete fees received by the taxpayer as sale consideration for transfer of shares and held that such consideration is taxable in the hands of the taxpayer. The High Court observed that the true nature of the transaction was the sale of shares and transfer of control and management of a company in favour of the other group entity.

Facts of the case

- The taxpayer, an individual, was the chairman-cum-managing director of M/s Central Distillery and Breweries Ltd (CDBL), a public company, listed on the Delhi Stock Exchange and the Bombay Stock Exchange.
- CDBL was engaged in the business of manufacturing and sale of Indian Made Foreign Liquor (IMFL) and beer.
- The taxpayer along with his family members held 186,019 shares, constituting 57.29% of the paid-up equity share capital of CDBL.
- M/s Shaw Wallace Company Group (SWC), a giant in liquor business in comparison to CDBL, offered and purchased through their subsidiaries, shares held by the taxpayer and his family members in CDBL at the rate of INR 30 per share for INR 5.5 million.
- The deal for the sale of 186,019 shares was formalized by a Memorandum of Understanding (MoU) dated 13 April 1994. The taxpayer who individually held 12% of the paid-up equity share capital of CDBL also entered into a deed of covenant in his individual capacity with SWC.
- On the same date, another MOU was executed between SWC and the taxpayer as an individual with the restrictive covenant to the effect that the taxpayer would not either directly or indirectly carry on any manufacturing or marketing activities relating to IMFL for a period of 10 years.
- As per the MOU, the taxpayer received a non-compete fees of INR 66 million out of which INR 60 million was paid upfront and balance was to be paid on 30 October 1994.
- In the return of income filed by the taxpayer for the Assessment Year 1995-1996, the entire non-compete fees of INR 66 million were treated as a capital receipt and hence, not liable to tax.
- The Assessing Officer invoked Section 28(ii) of the Act and held that INR 66 million ostensibly paid as non-compete fees were nothing but a colorable device and the tax treatment should not be accepted.

High Court's ruling

- The first MOU was for transfer of 57.29% of paid-up equity share capital in CDBL which was considerably a large company. The market price of the share was only INR 3 per share and the purchase price under the MOU was INR 30 per share but the total consideration received was merely INR 5.6 million.
- What was allegedly paid as non-compete fee was ten times more, i.e. INR 66 million. The amounts did not appear to be a realistic payment made on account of non-compete fee, *dehors* and without reference to sale of shares, loss of management and control of CDBL.
- CBDL was a running public limited company manufacturing and selling beer and IMFL with 350 employees and with necessary infrastructure to market their production, having a . It had requisite licenses, permissions and marketing network in place.
- By purchasing majority shares with controlling interests in CBDL, SWC was acquiring a company which was directly competing with them. The price paid for acquiring the majority shareholding, would include consideration paid to procure management rights as well as price paid for acquiring an effective competitor.

- The rights/assets acquired by purchasing shares of CBDL were significantly more valuable, than securing non-compete obligation from the taxpayer, an individual.
- A document executed contemporaneously or shortly after the primary document, has to be construed and may be relied upon as aid of construction as if the same forms part of the same transaction as the primary document.
- When contrive and camouflage is adopted, the Courts must aim and strive to find out the true intention by looking at the genesis of the agreement, the context and the surrounding circumstances as a whole. The meaning and intent of the transaction cannot be at variance with the actual intent.
- In the case of Sundaram Finance Ltd vs State of Kerala AIR 1966 SC 1178, the Supreme Court held that the document must be looked at, as only a part of the evidence and the Court should look at the other parts, i.e., surrounding circumstances to ascertain the actual truth. The reality must be ascertained to determine the nature of transaction.
- The contention that the High Court cannot look through and examine the real nature of the transaction in view of the authoritative pronouncement of the Supreme Court in the case of Vodafone Holdings International BV vs Union of India 2012 341 ITR 1 (SC) approving the view taken in the case of Union of India vs Azadi Bachao Andolan 2003 132 Taxman 373, was not apposite and congruous.
- In the context of decisions in the case of Vodafone Holdings International BV, the High Court paraphrased the words of Westmoreland Investments Ltd 2002 225 ITR 612 that the decision in WT Ramsay Ltd vs Inland Revenue Commissioners 1981 1 All ER 865 case had not enunciated a new legal principle but reiterated the court's duty to determine the legal nature of the transaction and then relate the finding to the fiscal legislation.
- Thus, when there is one or a series or combination of transactions intended to operate as such, the courts are entitled to look at the real scheme as such or as a whole, even when a particular stage is only an expectation without any contractual force. It means looking at the document or the act in the context to which it properly belongs. Ramsay's approach promises ascertaining the legal nature of the transaction and is a principle of interpretation applicable to taxing statutes.
- In view of the above and findings on the true and real nature of the transaction camouflaged as 'non-compete fee', it was held that the taxpayer had indulged in abusive tax avoidance. The real and true nature of the transaction or event was the sale of shares and transfer of control and management of CDBL in favor of SWC.
- The price paid by SWC was for purchase of shares, including the controlling interest. Any division would result in the court or the tax department stepping into the arm chair of the taxpayer and SWC for splitting the amounts between capital gains and business income under Section 28(ii) (a) of the Act.
- It was held that shares of a company could command a premium or discount depending upon whether they represent controlling or minority interest. Price would also depend upon whether the potential buyer believes that the purchase would enhance the value for him.
- The capital gains tax on sale of shares where controlling interest had resulted in transfer of control of management would form part of the consideration received and it should not be segregated.

- It was appropriate to treat INR 66 million as consideration paid for sale of shares, rather than a payment under Section 28(ii) of the Act. The High Court relied on the decisions pronounced in the case of Vodafone Holdings International BV.
- It was clearly a case wherein the sale consideration for transfer of shares was artificially and deceitfully bifurcated under sham agreement documentation, which was unreal.
- The taxpayer, having chosen the taxable event, i.e., to receive the entire sale consideration in his name, must therefore bear the tax consequence. The entire amount would be treated as part of the sale consideration received on transfer of shares in CDBL, held by the taxpayer. Accordingly, the entire amount should be taxable in the hands of the taxpayer.

Source: 2014 52 Taxmann 425 (Delhi): CIT vs Shiv Raj Gupta

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Whether inter-corporate deposits can be considered as part of loans and advances and same attracts provisions of Sec 2(22) (e)

Facts of the case

M/s IFB Agro Industries Ltd v JCIT (assessee) had taken inter-corporate deposits from its subsidiary company Ernst & Young Merchant Banking Services Pvt Ltd (EYMBSPL). The AO treated these deposits as loans and advances and held them as deemed dividend under section 2(22) (e) in the hands of the assessee received from its subsidiary.

The assessee contested that no income on account of deemed dividend was attracted in the instant case since there is a clear distinction between the inter-corporate deposits vis-à-vis loan/advance. The AO made an addition in the hands of the assessee by treating these deposits as loans and advances. On appeal, the CIT (A) deleted the addition. The Revenue filed this appeal.

Issue before the bench

• Whether inter-corporate deposits can be considered as a part of loans and advances?

• Whether section 2(22) (e) can be invoked when an assessee involved in financing business has taken such deposits from its subsidiary company?

Contention of the assessee

The counsel of the assessee argued that there is a clear distinction between deposits vis-à-vis loans or advances. He further submitted that the provisions of section 2(22) (e) of the Act is a deeming fiction, and such a deeming fiction should not be given a wider meaning than what it purports to do. The Counsel relied on the case law of Special Bench of this Tribunal in the case of Gujarat Gas Financial Services Ltd. Vs. ACIT wherein it was held that interest on inter corporate deposit and interest on loans or advances are different.

Tax authority's contention

The provisions of section 2(22) (e) of the Act does not apply to inter corporate deposits. The Special Bench of this Tribunal in the case of Gujarat Gas Financial Services Ltd. has considered the issue of

inter corporate deposits vis-à-vis the definition of interest as defined under section 2(7) of the Interest Tax Act. The Special Bench in turn relied on the decision in the case of Utkarsh Finance (P) Limited wherein it was held that interest on inter-corporate deposits are not chargeable to interest tax, as the deposits are in the nature of loan or advances.

Tribunal's Ruling

Looking at the main objects of the company wherein the company was to carry on the business of merchant banking i.e., financing, clearly reveals that the assessee is in the business of financing and once assessee is in the business of financing, the provisions of section 2(22)(e) of the Act will not apply to inter corporate deposits.

Conclusion

The verdict goes in favor of the assessee and against the Revenue.

Source: M/s IFB Agro Industries Ltd v JCIT (ITA # 114/ Kol/ 2013) (Kolkata ITAT)

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Order without reasons breaches the principle of natural justice and cannot be considered as valid

Facts of the case

During Assessment Year 2011-2012, NEO Path Limited (applicant), a tax resident of Mauritius, sold equity shares of an Indian company to Atos Origin (Singapore) Pte Ltd (the buyer company), a Singapore resident company, for a consideration of over USD75 million.

The applicant realized long term capital gains on such sale and thereby the buyer company deducted tax at source on the sale consideration and deposited the same to the account of the Indian Government.

Contention of the assessee

During January 2011, the applicant filed application before Authority for Advance Ruling (AAR) under section 245Q of the Act raising question on taxability of capital gains so arose. The applicant contended that in terms of Article 13(4) of the India- Mauritius Double Taxation Avoidance Agreement (DTAA), capital gain tax on sale of shares was not chargeable to tax in India.

Tax authorities contention

The tax department objected to applicant's application contending that the control and management of the applicant was in India and therefore the applicant could not claim the benefit of DTAA. Also, the entire sale transaction of the equity shares was designed to avoid tax and that the two Indian directors of the applicant were the ultimate beneficiaries of the sale transaction.

AAR's Ruling

The AAR, in terms of section 245R (2) (iii) of the Act declined applicant's application for the reason that the sale transaction was designed prima facie for tax avoidance. Against the ruling of the AAR, the applicant filed writ petition before the Bombay High Court.

High Court's Ruling

The High Court observed that the facts and point by point submissions made by the applicant were not considered by the AAR and that no reason was given by the AAR as to why the sale transaction was designed prima facie to avoid tax and why the applicant's application was not acceptable.

While holding so, the HC relied on Supreme Court rulings in Shukla Brothers 2010 4 SCC 785 and Kranti Associates (P) Ltd 2010 9 SCC 496, wherein it was held that 'recording of reasons is an essential feature of providing justice and in fact is the soul of orders'.

Therefore, the HC concluded that the ruling of the AAR suffered from the vice of being a ruling without reasons. Accordingly, the AAR ruling, being in breach of principle of natural justice was set aside by the HC and the matter restored back to the AAR for fresh disposal in accordance with the law.

Source: Writ petition # 2149 of 2014: NEO Path Limited vs Director of Income tax X 9(II) & others

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The Central Board of Direct Taxes (CBDT) issues draft Income Computation and Disclosure Standards and draft SOP for effective TDS administration

The CBDT had constituted a Committee comprising departmental officers and professionals in December 2010 to inter-alia suggest standards for the purposes of notification under section 145(2) of the Act. The Committee submitted its first interim report in August 2011. The Committee submitted its final report along with the draft of standards in August, 2012 which was placed in public domain for comments. On the basis of the suggestions received from the stakeholders and examination of the same by the CBDT, the draft standards submitted by the Committee have been revised. The new draft of 12 ICDS has been uploaded on the Finance Ministry website and Income-tax Department website for comments from stakeholders and general public by February 08, 2015.

The CBDT has also released draft Standard Operating Procedure (SOP) for effective TDS administration. The SOPs have been framed to address the various features in the re-engineered processes in TDS administration. The SOPs have been made on following issues:

- Matching the unconsumed challan;
- Top deductors paying less/ no tax with respect to previous financial years;
- Resolvable/ Collectible TDS demands;
- OLTAS reconciliation;
- Corporate connect for TDS compliance.

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