

Dy. Cit Vs. Vikram S. Agarwal

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Feb-26-2007

Judge : R Gupta, A Garodia

Appellant : Dy. Cit

Respondent : Vikram S. Agarwal

Judgement :

1. Out of this bunch of three appeals, two are revenue's appeals directed against the order of the learned Commissioner (Appeals)-XXXVI, Mumbai dated 4-10-2000 in the case of Shri Vikram S. Agarwal and against the order learned Commissioner (Appeals)-XIX, Mumbai dated 21-4-1999 in the case of Smt. Vanita Bhandari and remaining one appeal is of the assessee i.e., Mrs. P.S. Aggarwal against the order of learned Commissioner (Appeals)-IX, Mumbai dated 30-4-1997. Since, common issue is involved in all these three appeals, these three appeals are being disposed of by this common order for the sake of convenience.

2. Briefly stated, the facts are that all these three assessees were the Directors in Diners Club India Ltd. now know as DBS Financial Services F Pvt. Ltd. (DBS). The said company entered into an agreement with Citi bank and has actually sold its business of credit card to Citi bank Ltd. As a part of such deal, with Citi bank required the Diners to get restrictive covenant severally executed between Citi bank and the four directors of the said company Le., DBS. As per the contents of such restrictive covenant, company, Le., DBS and 4 directors thereof were paid Rs. 90 lakhs together out of which Rs. 45 lakhs was received by DBS and the

remaining Rs. 45 lakhs were jointly receivable by the directors. Mrs. P.S. Aggarwal received Rs. 15 lakhs.

Shri Vikram S. Agrawal had received A Rs. 5 lakhs and Mrs. Vanita Bhandari had received Rs. 10 lakhs and remaining Rs. 15 lakhs was received by Shri S.S. Agarwal. There is no dispute regarding amount of Rs. 45 lakhs received by DBS and Rs. 15 lakhs received by Shri S.S.Agarwal.

In the case of Mrs. Vanita Bhandari and Mr. Vikram S. Agarwal, learned Commissioner (Appeals) has deleted the addition; and hence, revenue is in appeal in these two cases; whereas, in the case of Shri P.S.Aggarwal, learned Commissioner (Appeals) g upheld the addition made by the assessing officer; and hence, the assessee is in appeal before the Tribunal.

In the case of Shri P.S. Aggarwal, it has been held by learned Commissioner (Appeals) that the amount received by the assessee is necessarily related to a specific source of income. It is also noted by him that this payment : to the assessee and covenant do not terminate the vocation of assessee and the payment is received by the assessee as a revenue receipt in the normal course of carrying on the vocation and therefore it is chargeable to tax as income ^ within the meaning of Section 2(24)(iv) read with Section 15(b) of the Income Tax Act. It is also held by him that this income alternatively can be charged to tax as income from profession/business or even under Section 56 of the Income Tax Act considering the facts that it represents receipt of a director of the company for carrying on vocation as director. It is further submitted by him that since in the case of Shri P.S. Aggarwal, the assessee has been consistently offering the receipts from company, under the head 'Income ^ from salary' and since the same is consistently being charged to tax under the head 'Salary', it will be pertinent to do so even in respect of the impugned receipt in this year.

In the case of Mrs. Vanita Bhandari, it has been held by learned Commissioner (Appeals) that decision of the City bank to enforce restrictive covenant against the Diners as well as its four directors cannot be considered unwarranted or sham arrangement. The restrictive covenant against the directors includ ing the assessee was thus valid not only in the technical legal sense but also as a normal

commercial agreement governed by the requirements of business expediency. It is also noted that compensation received towards such a restrictive covenant which results in the loss of a source of income whether directly or indirectly has been held to be in the nature of a capital receipt not liable to capital gains tax as per the decision of the Mumbai Bench of the Tribunal in the case of M.N. Karani v. Asstt. CIT (1998) 64 ITD 119 and also by the Madras Bench of the Tribunal in the case of K.S.S. Mani v. Income Tax Officer (1995) 54 ITD 76. It is held by learned Commissioner (Appeals) in the case of Smt. Vanita Bhandari that the facts involved in these two judgments were substantially similar to the assessee's case. It is also held by learned Commissioner (Appeals) that decision of Hon'ble Apex court dated 10-3-1999 in the case of Oberoi Hotels (P.) Ltd. v. GT(1999) 33 CLA 8 also supports in the case of the assessee. In this case, learned Commissioner (Appeals) deleted the impugned addition of Rs. 10 lakhs on account of compensation received towards restrictive covenant.

In the case of Shri Vikram S. Agarwal, learned Commissioner (Appeals) has followed order of learned Commissioner (Appeals) in the case of Mrs. Vanita Bhandari and DBS and this issue has been decided by him in favour of the assessee by holding that compensation received by the assessee cannot be brought to charge as income, it being a capital receipt. The revenue is in appeal before us in these two cases; whereas, the assessee is in appeal in the case of Shri P.S. Aggarwal.

3. It is submitted by learned DR of the revenue that the present assesseees were only the directors and shareholders of DBS; and it was the company i.e., DBS which was doing the business of credit cards in India and Nepal till 15-6-1990 under franchise agreement with M/s.

Diners Club International. It is also submitted that Citi bank has taken over the business of Diners Club International in India and Nepal i.e., the business of Diners Club India Ltd. vide MOU dated 6-9-1989 for Rs. 675.59 lakhs and said agreement was executed on 26-10-1989 and final deed of transfer was made on 16-2-1990. Present assesseees were paid Rs. 15 lakhs in the case of Shri P.S. Aggarwal, Rs. 10 lakhs in the case of Mrs. Vanita S. Bhandari and Rs. 5 lakhs in

the case of Shri Vikram Agarwal for refraining from divulging information or carrying out of business competing with credit card business of Citi bank till 15-6-1992. It was also submitted that this amount of Rs. 10 lakhs was a part of Rs. 90 lakhs paid to five persons i.e., DBS and its four directors and was included in total consideration of Rs. 675.59 lakhs.

It is submitted by him that the company i.e., DBS has distinct entity and it was the company which was doing business and not its individual employee, shareholders or directors. It is also submitted that goodwill or any other intangible asset, if any belonged to the company; and hence nature of receipts in the hands of the company has no bearing on the nature of receipts in the hands of these assesseees. It is also submitted by him that receipts in the hands of the director can only be in the nature of salary. He also contends that in the hands of shareholders, it can only have the nature of dividend. It is also contended by him that there was no reason to enter into such contracts with employees or directors of DBS; and hence, payment received by employees or directors is only in view of services rendered by them over the years and therefore the amounts received by these assesseees was merely compensation for premature termination of employment as director and hence, the same is taxable under Section 17(3)(i) of the Income Tax Act.

Reliance was placed by him on the judgment of Hon'ble Madras High Court rendered in the case of A.P. Arunachalam v. Assistant Commissioner ; wherein it was held that compensation received by an employee from his employer in connection with premature termination of his employment is liable to be treated as a profit in lieu of salary and is liable to be taxed under Section 17(3)(i).

Reliance was also placed on another judgment of Hon'ble Madras High Court rendered in the case of G.N. Badami v. CIT in support of this contention. An alternative contention was raised by him A that if this amount is not taxable as salary, the same is taxable under Section 28(z'z). In support of this contention, reliance was placed on the judgment of Hon'ble Delhi High Court rendered in the case of CIT v. D.R. Sondhi ; wherein it was held that lump-sum amount paid by a company as compensation to the Managing Director in lieu of his prematured

retirement and for parting with the shareholding (majority interest) in the company held by his group is assessable under Section 28(z'z). Reliance was also placed by him on the assessment orders in all the three cases and on the order of learned Commissioner (Appeals) in the case of Mrs. P.S. Aggarwal.

4. As against this, it is submitted by learned AR of the assessee that the issue has become final in the case of company i.e., DBS and one of its directors i.e., Shri S.S. Agarwal. It is further submitted by him that the directorship of all the four directors has continued and the same was not terminated. It is submitted by him that the amount received for non-C compete agreement is capital receipt and not chargeable to tax and it is submitted by him that this issue is covered in favour of the assessee by the Tribunal judgment rendered in the case of Addl. CIT v. Duphar Interfran Ltd. as per ITA No. 3385/Mum./03 dated 6-11-2006; copy of which was submitted and kept on record. Our attention was drawn to Para No. 10 of this Tribunal judgment, as per which, this issue has been decided by the Tribunal in favour of the assessee by following various judgments of Hon'ble Calcutta High Court and various Benches of the Tribunal. Reliance was also placed on the judgment of the Tribunal rendered in the case of M/s.

Duphar Interfran Ltd. v. Joint CIT as per ITA No. 5739/Mum./03 dated 7-11-2006; in which also, similar issue was decided by the Tribunal in favour of the assessee. Reliance was also placed on the judgment of the Tribunal rendered in the case of D.S. Purbhoodas & Co. v. Dy. CIT as per ITA No. 138/Mum./2000 dated 23-7-2004; and our attention was also drawn to Para Nos. 7 to 9 of this Tribunal judgment, as per which, similar issue has been decided by the Tribunal in favour of the assessee. Reliance was placed on the judgment of Hon'ble Calcutta High Court rendered in the case of CIT v. AS. Wardekar and on the Tribunal judgment rendered in the case of ITO v. Smt. Sarojben V. Gandhi Assistant Commissioner v. Ashit M. Patel (2005) 96 TTJ (Mum.) 439. It was also submitted that Section 28(va) has been inserted by the Finance Act, 2002 with effect from 1-4-2003 and as per this, any sum received under an agreement for not carrying out any activity in relation to any business : or for not sharing any know-how, patent, copyright, trademark, license, franchise or any other business or commercial right of similar nature or information or technique likely to assist in the manufacture or processing

of goods or provision for services is assessable as 'business income'. It is submitted that this provision has been inserted with effect from 1-4-2003; but year involved in present cases is assessment year 1993-94; and hence, this provision is not applicable in the present cases. It is also submitted that in view of this provision of Section 28(va) inserted with effect from 1-4-2003, it is clear that similar provision was not there in the Statute before this amendment.

Regarding various judgments relied upon by learned DR of the revenue, it is submitted by him that the facts are different because in these cases, service was terminated; but in the present cases, service was not terminated; and hence, these judgments are not applicable in the present cases.

5. In the rejoinder, it is submitted by learned DR of the revenue that the fact that these assessee continued to be employed, further supports the case of the revenue that these receipts in the hands of these assessee are assessable as 'salary income'.

6. We have considered the rival submissions, perused the materials on record and have gone through the orders of authorities below and also gone through various Judicial pronouncements relied upon by both sides.

We find that in the case of Mrs. P.S. Aggarwal, learned Commissioner (Appeals) has come to the conclusion that payment received by the assessee i.e., Mrs. P.S. Aggarwal is necessarily related to a specific source of income i.e., for carrying on the vocation as a director; and therefore, it is chargeable to tax as 'income' within the meaning of Section 2(24)(zv) read with Section 15(b) of the Income Tax Act.

Whereas, in other two cases, learned Commissioner (Appeals) has come to the conclusion that compensation received by these two assessee cannot be brought to tax as income because the same is a capital receipt. At this stage, we think that the MOU dated 6-9-1989 between DBS and Citi bank N.A. as appearing on page Nos. 8 to 37 of the paper book should be considered. We find that as per Para No. 17 of this MOU, it has been specified that out of aggregate consideration of Rs. 675.59 lakhs, Rs. 15 lakhs is to be paid to Shri S.S. Aggarwal in consideration of a covenant similar to the covenant given by Diners and it is also stated that this

covenant has to be obtained by Diners from Mr. S.S. Aggarwal.

Similarly, Rs. 10 lakhs to Mrs. Vanita S. Bhandari and Rs. 5 lakhs to Shri Vikram S. Aggarwal for the same consideration; and only balance amount of Rs. 630.59 lakhs was paid to Diners towards purchase price for the business and in consideration of covenant.

In the light of these facts, we are of the considered opinion that the impugned amounts were received by the present three assesseees from Citi bank in consideration of restrictive covenant for two years as required by them and the same amount was not received by the present assesseees from DBS. Once, we come to this conclusion on the fact that the impugned amounts were received by present three assesseees from Citi bank and not G from DBS, we find no merit in this contention of the assessing officer in these cases that this amount is taxable in the hands of these assesseees either as 'income from salary' or 'income from business' or as 'income from other sources; because this is a settled legal position now that the amount received in consideration of restrictive covenant is a 'capital receipt' not liable to tax.

Amendment was made in the Statute by introduction of Section 28(va) with effect from 1-4-2003; but the year involved before us is assessment year 1993-94; and hence, this Section 28(va) is not applicable in the present cases.

In the light of this factual finding that the impugned amounts were received by these assesseees from Citi bank in consideration of restrictive covenant, we find that various judgments cited by learned DR of the revenue are not applicable in the present cases because in those cases, issue involved was regarding receipt of amount from employer at the time of termination of services. Whereas, in the present cases, the impugned amounts were received by these assesseees from Citi bank in consideration of restrictive covenant. In view of this fact, we are of the considered opinion that learned Commissioner (Appeals) in the case of Mrs. P.S. Aggarwal was not correct in holding that the amount of Rs. 15 lakhs was received by that assessee from DBS; and hence, is assessable as 'income' in her hands within the meaning of Section 2(24)(z'v) read with Section 15(b) or can alternatively be charged to tax as income from profession/business or even under

Section 56 of the Income Tax Act. We reverse the order of learned Commissioner (Appeals) in this case and hold that the impugned receipt of Rs. 15 lakhs in that case was 'capital receipt' not chargeable to tax. On the same line, we uphold the order of learned Commissioner (Appeals) in the remaining two cases ie., in the case of Shri Vikram S. Aggarwal and in the case of Mrs. Vanita Bhandari because we find that this issue that the amount received in consideration of restrictive covenant is a 'capital receipt' is decided in favour of the assessee by Hon'ble Calcutta High Court in the case of AS. Wardekar (supra) and by the Tribunal in the case of Smt. Sarojben V. Gandhi (supra) and also in the case of Ashit M. Patel (supra). Respectfully following these judicial pronouncements, we decide this issue in favour of the assessee in all the three cases.

7. In the result, two appeals of the revenue are dismissed and one appeal of the assessee is allowed.

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