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Transfer of a business undertaking as a going concern against share/ bond issue not '*slump sale*'

In brief

The Bombay High Court, in the case of Bharat Bijlee Limited[1] (taxpayer) upheld the decision of the Income-tax Appellate Tribunal (Tribunal) that the transfer of a business undertaking as a going concern against bonds/ preference shares issued was not a *sale*, but an *exchange*. Therefore, section 2(42C) and section 50B of the Income-tax Act, 1961 (the Act) relating to the computation of capital gains were not applicable to such a transfer. The Delhi High Court ruling of SREI Infrastructure Finance Limited[2] (SIFL) was distinguished as the consideration was in terms of money and shares, and the transfer could not therefore be termed as an *exchange*. No substantial question of law arose.

Facts

- The taxpayer transferred its lift division to Tiger Elevators Private Limited (TEPL) during assessment year (AY) 2005-2006 by way of a slump sale under a High Court (HC)-approved scheme of arrangement. As consideration for the transfer, preference shares and bonds were allotted by TEPL to the taxpayer.
- The taxpayer claimed that the transfer was an *'exchange'* and not a *'sale'*, and therefore, was not taxable as slump sale. However, this was not accepted by the Tax Officer (TO), who treated the transaction as a slump sale taxable under section 50B of the Act.
- As the TO's order was confirmed by the Commissioner of Income-tax (Appeals), the taxpayer filed an appeal before the Tribunal.

[1] CIT *v.* Bharat Bijlee Limited [TS-270-HC-2014(BOM)]
[2] SIFL *v.* Income Tax Settlement Commission, Writ Petition (Civil) No 1592 of 2012

- The Tribunal ruled in favour of the taxpayer, holding that the gains on the transfer of the lift division were not taxable as only a transfer by sale (and not exchange) could be construed as a slump sale. Thus, the transfer would not be liable to tax under section 50B of the Act. In addition to this, the cost of acquisition/ improvement of a going concern was unascertainable, and hence it was not possible to determine the capital gains on such transfer.

- Aggrieved by the Tribunal decision, the Revenue filed an appeal before the Bombay HC.

Issue before the High Court

Whether the transfer of the business undertaking in exchange for bonds/ preference shares was a taxable transaction, and whether it raised a substantial question of law?

Revenue's contentions

- Relying on the judgment of Delhi High Court in case of SIFL, the Revenue argued that the Tribunal's order was contrary to the law laid down by the said ruling.

- The mere fact that the consideration was the value of the shares/ bonds issued pursuant to such a transfer would not put such a transfer outside the purview of a slump sale.

- That the transfer was pursuant to a scheme filed before the HC would not mean that it was not a slump sale.

- Section 50B of the Act had been specifically enacted to cover such transfers of undertaking on a going concern basis.

Taxpayer's contentions

- The appeal did not raise any substantial question of law and the Tribunal's view was in agreement with the law and the facts of the case.

- For a slump sale, the transfer had to be by way of sale, i.e., a price in money should be paid and received. As there was no money consideration received for the transfer of Lift Division, it was a case of an exchange and not a sale (since the consideration was in the form of shares/ bonds).

- Once the scheme was sanctioned by the Court, and the undertaking was transferred not by way of sale, the Tribunal's view could not be said to be erroneous in law.

High Court Ruling

- The Bombay HC, while relying on the findings and observations of the Tribunal, held that the entire scheme of arrangement envisaged the transfer of the lift division not for any monetary consideration. Thus, it was a case of exchange and not sale.

- The Tribunal's finding that the transfer of the lift division came within the purview of transfer under section 2(47) of the Act but could not be said to be a slump sale under section 2(42C) of the Act, was correct, and the appeal did not raise any substantial question of law.

- The Tribunal had correctly rendered the decision by applying legal principles to the facts and circumstances of the case.

- There was no necessity to analyse the circumstances in which section 50B of the Act was inserted in the statute book, or the applicability of conclusions of SC's decision in *Motor & General Stores (Pvt) Ltd* [3] after the amendment to the Act.

- The HC reaffirmed the Tribunal's finding that in this case, the consideration was not determined and decided among the parties in terms of money, but its disbursement was to be in terms of allotment or issue of shares/ bonds.

[3] CIT *v.* Motor & General Stores Pvt Ltd [1967] 66 ITR 692 (SC)

- The Delhi HC ruling in the SIFL case relied on by the Revenue was distinguished, as under the scheme in that case, the transfer was in lieu of both, cash and shares. Accordingly, that transaction was by way of sale and not an exchange. The Delhi HC's ruling would apply if the transfer was by way of sale.

- The applicability of section 50B of the Act would have to be considered based on the facts and circumstances of each case.

PwC's observations

- The Bombay HC's ruling, while upholding the Mumbai Tribunal's decision, has reaffirmed the difference between a *slump sale* and *slump exchange*.

- It is pertinent to mention that the taxability on transfer of undertaking in exchange of shares, etc., would depend on the facts of each case.

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