www.pwc.com/in

Sharing insights

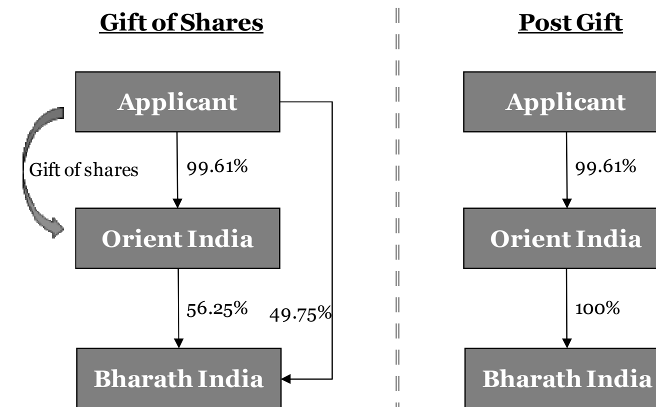
News Alert
17 August, 2012

AAR doubts genuineness of inter-corporate gifts, calls it a strange transaction

In brief

The Authority for Advance Rulings (AAR), in a recent case of Orient Green Power Pte Ltd. [1] (the assessee), has observed that inter-corporate gifts would not be covered within the meaning of the term 'gift' contemplated under section 47(iii) of the Income-tax Act, 1961 (the Act). The AAR further observed that an oral gift between two corporations is strange. However, the AAR declined to give a final ruling on this matter, as it remanded the matter to the assessing authorities for further examination.

Schematic representation



[1] Orient Green Power Pte Ltd., *In re* [TS-608-AAR-2012]

Facts

- The assessee is an investment company incorporated in Singapore.
- Among others, the assessee has investments in the following two companies in India:
  - 99.61% in Orient Green Power Ltd. (Orient India); and
  - 49.75% in Bharath Wind Farm Ltd. (Bharath India). The balance stake in Bharath India is held by Orient India.
- The assessee transferred its 49.75% stake in Bharath India to Orient India, without consideration, as a 'gift' by executing a gift deed on 30 January, 2010.

Issues before the AAR

Amongst several other issues, the key issue that was raised for the consideration of the AAR was whether transfer of shares in Bharath India by the assessee to Orient India without consideration would qualify for exemption under section 47(iii) of the Act?

Assessee's contentions

- The transfer of shares in Bharath India is not subject to taxation as capital gains as the transfer of the capital asset is without any consideration. Accordingly, the transfer does not give rise to any income in the hands of the assessee.
- The principles of the decision of the Supreme Court in the case of B. C. Srinivasa Setty[2] and other judgements were relied upon.

[2] CIT *v.* B. C. Srinivasa Setty [1981] 128 ITR 294 (SC)

- The transaction was part of business reorganisation and was not a sham.
- The assessee's Board had approved the gift of shares and also executed a gift deed to give effect to the resolution. Furthermore, the gift deed, share certificates and share transfer forms were physically delivered to Orient India.

Revenues contentions

- The assessee is a channel to transfer money between group companies in India. The transaction should not be viewed as an isolated transaction and should be seen as part of the larger restructuring.
- The transaction is structured as a gift to eliminate tax implications in India. Furthermore, the documents were pre-dated to avoid tax implications arising out of an amendment to the Act, introducing taxability of shares received for inadequate consideration.
- The gift of shares has to be according to the Articles of association (AOA)[3] of Bharath India. The provisions of the AOA relating to transfer of shares have not been clarified by the assessee.
- Furthermore, the provisions of section 108 of the Companies Act, 1956 have to be complied with, requiring that all transfers should be given effect to only on receipt of an instrument of transfer alongwith the share certificate(s).

AAR Ruling

The AAR held that:

- The AAR is duty bound to consider the validity and genuineness of the transaction. The assessee has to establish the *bona fide* nature of a transaction before the AAR when this has been challenged by the Revenue.

[3] Section 82 of the Companies Act, 1956

- The assessee has not been able to establish the *bona fide* nature of the transfer and that the transfer has been made according to the provisions of the AOA and the Companies Act, 1956.

- Based on the material presented, it would not be possible to decide on the *bona fide* nature of the transaction and the AO would be in a better position to decide this.

- An inter-corporate gift is a strange transaction. A gift through an oral arrangement could only be aiding tax avoidance. This position is substantiated by the fact that the Act specifically provides exemptions for transactions between a parent and subsidiary, in the case of amalgamations, etc.

- The applicability of the provisions of section 47(iii) of the Act, dealing with 'gifts' are as follows:

  - The gift should be given by an individual, joint Hindu family, etc;

  - It involves transfer of a capital asset through a gift or through a will or an irrevocable trust – only a human agency can exercise a will. A gift should also be read in the context of a will in the given scenario and therefore should involve a human agency.

- *Prima facie*, such transactions may not be eligible for exemption under section 47(iii) of the Act.

- Transactions between corporations are specifically covered by sections 47(iv) and 47(v) of the Act, dealing with transactions between a holding company and its subsidiary.

- A ruling can be pronounced only after all the necessary facts, information and material has been submitted. Accordingly, a ruling in the matter raised is declined.

Conclusion

- The AAR was of the view that a gift of shares by companies should not be covered within the ambit of section 47(iii) of the Act, which provides for exemption.

- In the view of the AAR, gifts should involve an individual, joint Hindu family or any other human agency since section 47(iii) of the Act specifically provides for cases of 'any transfer of a capital asset through a gift, or a will or an irrecoverable trust'.

- This ruling places a question over corporate re-organisations through the gift route.

Our Offices

For private circulation only

Ahmedabad	Bangalore	Bhubaneswar	Chennai	Hyderabad
President Plaza, 1st Floor Plot No 36 Opp Muktidham Derasar Thaltej Cross Road, SG Highway Ahmedabad, Gujarat 380054 Phone +91-79 3091 7000	6th Floor, Millenia Tower 'D' 1 & 2, Murphy Road, Ulsoor, Bangalore 560 008 Phone +91-80 4079 7000	IDCOL House, Sardar Patel Bhawan Block III, Ground Floor, Unit 2 Bhubaneswar 751009 Phone +91-674 253 2279 / 2296	8th Floor, Prestige Palladium Bayan 129-140 Greams Road, Chennai 600 006 Phone +91-44 4228 5000	#8-2-293/82/A/113A Road no. 36, Jubilee Hills, Hyderabad 500 034, Andhra Pradesh Phone +91-40 6624 6600
Kolkata 56 & 57, Block DN. Ground Floor, A- Wing Sector - V, Salt Lake. Kolkata - 700 091, West Bengal, India Telephone: +91-33 2357 9101 / 4400 1111 Fax: (91) 033 2357 2754	**Mumbai** PwC House, Plot No. 18A, Guru Nanak Road - (Station Road), Bandra (West), Mumbai - 400 050 Phone +91-22 6689 1000	**Gurgaon** Building No. 10, Tower - C 17th & 18th Floor, DLF Cyber City, Gurgaon Haryana -122002 Phone : +91-124 330 6000	**Pune** GF-02, Tower C, Panchshil Tech Park, Don Bosco School Road, Yerwada, Pune - 411 006 Phone +91-20 4100 4444	For more information contact us at, pwctrs.knowledgemanagement@in.pwc.com

The above information is a summary of recent developments and is not intended to be advice on any particular matter. PricewaterhouseCoopers expressly disclaims liability to any person in respect of anything done in reliance of the contents of these publications. Professional advice should be sought before taking action on any of the information contained in it. Without prior permission of PricewaterhouseCoopers, this Alert may not be quoted in whole or in part or otherwise referred to in any documents

©2012 PricewaterhouseCoopers. All rights reserved. "PwC", a registered trademark, refers to PricewaterhouseCoopers Private Limited (a limited company in India) or, as the context requires, other member firms of PricewaterhouseCoopers International Limited, each of which is a separate and independent legal entity.