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## News Alert 26 December, 2012



### **No addition for difference in income as per profit and loss account and tax withholding certificate**

### **Credit of tax withheld allowable ones withholding tax certificate is issued irrespective of income reported in the financial statements**

#### **Background**

In a recent ruling in the case of SABMiller India Ltd<sup>1</sup> (the assessee), the Delhi bench of the Income-tax Appellate Tribunal (the Tribunal) held that no addition can be made on account of difference between the income reported in the withholding tax (WHT) certificate and income reported in the profit and loss account. Further, the Tribunal held that the taxpayer is eligible for credit of tax wrongly withheld by the deductor even if the same was not reported as income in the profit and loss account.

#### **Facts**

- The assessee is engaged in the business of making investments in India in the brewery sector.
- The assessee, being the holding company, had executed a cost sharing agreement with its subsidiaries in order to provide services such as human resource and back-up support on accounting and financial matters, etc. to its subsidiaries.

<sup>1</sup> ITO v. SABMiller India Ltd. (ITA No. 1011/Del/2012)

- The cost incurred by the assessee was allocated to various subsidiaries through debit notes which were raised every month on an estimated basis. The subsidiaries were withholding tax on the debit notes received by them from the assessee and were issuing WHT certificates to the assessee on a monthly basis.
- For the relevant year, the assessee raised debit notes for INR 33.58 million to one of its subsidiaries, namely Mysore Breweries Ltd. However, the auditors, during the course of completion of statutory audit, identified that the assessee had raised excess debit notes of INR 8.09 million. Consequently, the assessee issued a credit note amounting to INR 8.09 million to Mysore Breweries Ltd as on 31 March, 2003.
- However, Mysore Breweries Ltd while issuing the WHT certificates in respect to the above payment did not consider the credit note for INR 8.09 million and withheld tax on the entire amount of INR 33.58 million instead of on INR 25.5 million (i.e. INR 33.58 million less INR 8.09 million) and issued a WHT certificate depicting income of INR 33.58 million. Such excess tax withheld by the subsidiary was claimed as prepaid tax in the tax return of the assessee.
- The assessing officer (AO), during the assessment proceedings under section 143(3) of the Income-tax Act, 1961 (the Act), required the assessee to prepare a reconciliation of the income reported in the WHT certificates and the income reported in the profit and loss account. The AO observed that income reported in the WHT certificates was higher by INR 8.09 million than the income reported in the profit and loss account and thus made an addition of INR 8.09 million of the income not reported by the assessee. The AO also denied the credit of excess tax withheld on INR 8.09 million on the ground that such income was not reported in the profit and loss account.
- The assessee filed an appeal before the Commissioner of Income-tax (Appeals), who deleted the addition of INR 8.09 million and allowed the credit of excess tax withheld by the subsidiary.

## Issues before the Tribunal

The issues under consideration before the Tribunal were whether-

1. addition can be made on account of difference between the income reported in the WHT certificate and the income reported in the profit and loss account
2. the assessee is eligible for credit of tax wrongly withheld by the deductor on the income not reported in the profit and loss account under the provisions of section 199 of the Act.

## Assessee's contentions

- The subsidiary company had committed a clerical mistake by not considering the credit note of INR 8.09 million and withholding tax on the entire amount of INR 33.58 million instead on INR 25.50 million.
- Mysore Breweries Ltd filed a confirmation with the AO that it had committed a clerical error at the time of issue of WHT certificate and had inadvertently withheld tax on INR 33.58 million instead of on INR 25.50 million without considering the credit note issued by the assessee.
- There was no provision under the Act to issue a revised WHT certificate after rectifying the mistake as aforesaid.
- The assessee relied on the decision of the Delhi High Court (HC) in the case of Sudhir Sekri <sup>2</sup>, where it was held that, where the issuer of the certificate had certified that the mistake had crept due to the pre-fed computer program and certified that no other charges other than what was reflected in the books of account of the assessee had been paid to the assessee, the addition was not justified merely on the basis of difference in the income reported in the WHT certificate and the income recorded in the books of account.

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<sup>2</sup> Sudhir Sekri v. ACIT [2010-TIOL-277-HC-DEL-IT]

- The assessee relied on the Circular No. 2 of 2011 dated 27 April, 2011 where the Central Board of Direct Taxes (CBDT) had clarified that once the WHT certificate has been issued by deductor, then deductor cannot claim refund of the amount inadvertently withheld as only the deductee can claim refund of such amount.
- The assessee also relied on the decision of the Delhi HC in the case of Lear Automotive India Ltd<sup>3</sup>, where it was held that credit is to be allowed to the deductee in respect of WHT made on the higher amount of reimbursement than the income that was actually offered to income.

### Revenue's contentions

- The assessee, in its tax return, had claimed credit of the WHT on the entire sum of income of INR 33.58 million while the income shown from Mysore Breweries Ltd was to the tune of INR 25.50 million.
- As per section 199 of the Act, credit for WHT had to be given in respect of the income offered to income tax for the relevant assessment year. As the assessee has claimed the entire WHT for the relevant year, the sum of INR 8.09 million would be taxable in that year.
- The confirmation filed by the assessee from Mysore Breweries Ltd. was only an internal arrangement and does not deserve to be relied upon as concrete evidence in its favour of the assessee.

### Tribunal ruling

- The Tribunal held that the difference of income arose on account of a clerical mistake of the subsidiary Mysore Breweries Ltd, which was confirmed by Mysore Breweries Ltd.

- The decision of the Delhi HC in the case of Sudhir Sekri (above) is squarely applicable to the facts of the case and therefore, the addition of INR 8.09 million was wholly unwarranted in the hands of the assessee. The Tribunal, while pronouncing the aforesaid decision iterated that where the credit note was issued to the subsidiary, the net payment stands reduced by INR 8.09 million and where its subsidiary had confirmed that the above mistake was due to a clerical error, the addition would be an unjustified addition.
- That the decision of the HC in the case of Lear Automotive India Ltd (above) is squarely applicable to the facts of the case, and therefore, the credit of tax withheld on excess amount of INR 8.09 million shall be available to the assessee.
- The Tribunal further held that the refund shall not be available to the deductor in light of the CBDT Circular (above) as the WHT certificate was already issued to the assessee and the circular cannot take away the deductee's right to claim the refund of excess tax withheld from its income.

### Conclusion

The Tribunal ruling highlights the importance that real income can be taxed in the hands of any taxpayer. It upholds the principle that till the time taxpayers are able to justify the difference of income reported in the WHT certificates and income reported in the tax return, no addition can be made in the hands of the taxpayers on that count.

Further, the tax authorities cannot retain any payment by way of tax, beyond what is the liability of any taxpayer and any action to the contrary will be against the fundamental principle that the revenue cannot retain taxes that are not lawfully due to it.

The decision in this case would provide a helpful defence against any such addition made to income due to difference of income reported in WHT certificates with income offered in the tax return. Also, the decision may be helpful to take credit of the tax inadvertently withheld on amount which is not the income of the tax payer.

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<sup>3</sup> CIT v. Lear Automotive India Ltd. [ITA No. 110/Del/2010]

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