Sunderraj Srinivasan, Navi Mumbai vs Ito 36(2)(1), Mumbai on 13 January, 2020

IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI

BEFORE SHRI RAJESH KUMAR, AM AND SHRI AMARJIT SINGH, JM

/I.T.A. No.7243/Mum/2016

(/ Assessment Year: 2011-12)

Shri Sunderraj Srinivasan	/	ITO-35(3)(4)
Flat No.401/402, Sumeet		Income Tax Bldg, Bandra
	Vs.	
Chhaya, Plot No.A-213,		Kurla Complex, Bandra (E),
Sector-20, Nerul, Navi		Mumbai-400051.
Mumbai-400706.		

./ ./PAN/GIR No. :AMEPS3033R

(/Appellant) .. (/ Respondent)

Assessee by:	Shri Vipul Joshi
Revenue by:	Ms. Surabhi Sharma(Sr. AR)

/ Date of Hearing: 10/12/2019

/Date of Pronouncement: 13/01/2020

/ O R D E R

PER AMARJIT SINGH, JM:

The assessee has filed the present appeal against the order dated 04.10.2016 passed by the Commissioner of Income Tax (Appeals) -46, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2011-12.

2. The assessee has raised the following grounds: -

> ".1) On the facts and circumstances of the case and in law the Commissioner of Income-Tax (Appeals CIT (A)] erred on holding that the ad hoc compensation received from the employer by the Appellant on the alleged voluntary resignation is assessable to tax under the Income Tax Act, 1961 disregarding the fact that the receipt was for termination of source of income.
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> 2) Without prejudice to ground number one. on the facts and circumstances of the case and in law the 011(A) failed to appreciate the so called alleged voluntary resignation from employment is itself in dispute and the same is sub-judice before the Hon'ble Bombay High Court and therefore the nature and character of the compensation as well as the quantum has not been determined.

ITA. NO.7243/M/2016 A.Y.2011-12

3) On the facts and circumstances of the case the (011(A) failed to adjudicate on the additional grounds that "the right to employment is a capital right of the individual and hence a Capital Asset, within the meaning of Section 2(14)(read with its explanation" of the Income Tax Act, 1961. The ad hoc compensation received being a capital receipt, the same ought to be considered for taxation as a capital gain, if and when such right is extinguished and not earlier. Hence the receipt cannot be taxed as Income from salary as determined by AO".

4. Without prejudice the above grounds the appellant ought to be given deduction u/s 10(10C) or relief u/s 89 of the Income Tax Act, 1961 with respect to the compensation received by the appellant.

5. The appellant craves leave to add, amend and or delete any of the above grounds of appeal."

3. The brief facts of the case are that the assessee filed his return of income on 29.07.2011 declaring total income to the tune of Rs.63,081/-. The case was selected for scrutiny under CASS. Notices u/s 143(2) & 142(1) of the Act were issued and served upon the assessee. During the year under assessment, the assessee was earning the income from salary from M/s. Siemens Ltd. and other sources and capital gain. On verification, it was found that the assessee has shown the income from other sources, capital gain and income from house property of Rs.63,080/-. It was also noticed that the assessee received salary of Rs.60,39,750/- from M/s. Siemens Ltd. which was not offered in the return of income. A Form No.16 issued by employer M/s. Siemens Ltd. speaks that the TDS of Rs.16,83,340/- was deducted by the employer. The assessee claimed refund of Rs.17,02,973/- on the said TDS which was granted to him. Since the salary in sum of Rs.60,39,750/- was not shown as income, therefore, the same was added to the income of the assessee and accordingly taxed. The total income of the assessee was assessed to the tune of Rs.61,59,760/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who dismissed the appeal of the assessee, therefore, the assessee has filed the present appeal before us.

4. All the issues are in connection with the addition of Rs.60,00,000/- in view of the provisions u/s 17 (3)(iii) of the Act. The Ld. Representative of the assessee has argued that the assessee has received capital receipt, therefore, the same is not taxable, hence, the finding of the CIT(A) is not justifiable and is liable to be set aside. It is also argued that the assessee received an amount in question in pursuance of letter dated ITA. NO.7243/M/2016 A.Y.2011-12 26.02.2010 which is not taxable in view of the decision of Hon'ble ITAT bearing ITA. No.981/Bang/2010 dated 22.07.2016, hence, the same is liable to be allowed as capital receipt and the finding of the CIT(A) is not justifiable and is liable to be set aside. However, on the other hand, the Ld. Representative of the Department has strongly relied upon the order passed by the CIT(A) in question. We noticed that the assessee has resigned from the company on 26.02.2010 and in this regard, the document exhibit 63 is on record. The cheque dated 23.02.2010 for Rs.61,681/- was handed over to the assessee. Thereafter, the company paid the compensation to the assessee in sum of Rs.60,00,000/- which has been reflected at page no. 64 of the paper book. It is very necessary to advert the relevant terms and conditions to the nature of the receipt of Rs.60,00,000/- by assessee: -

"Dear Mr. Srinivasan, This has reference to your resignation dated 26.02.2010 and our discussions with you. Regarding voluntary separation from the services of the company. This is to inform you that we are agreeable to releasing you on early cessation of employment with effect from 1.03.2010 and your last day will be the close of working hours of 26.02.2010 based on the following terms and conditions.

1 Since you have been provided with a company accommodation. You will have to vacate the same on or before 31.05.2010 and hand over peaceful possession of the same on that date after removing all your personal belongings.

2. In view of your long service with the company, we agree to pay you a lump-sum sum of Rs.60,00,000/- only as one time compensation. This is subject to the following:-

a. The relevant tax liability is to be borne you you.

b. All your dues, including your legal dues will be settled on your handing over possession of the said flat to the company s representative Mr. Mohan Bhosale.

c. Your entering into a separate non-competing and non-disclosure agreement as per your present role and responsibility.

3. In addition to the above compensation, you will be paid all your other dues, these include.

a. Provident Find as per rules governing the employees Provident Funds b. Gratuity as per rules c. Earned leave encashment unclaimed LTA, if any.

c. Salary and allowances up to the last date of employment."

ITA. NO.7243/M/2016 A.Y.2011-12

5. On appraisal of the above mentioned letter, we find that the basic condition has been given column no.2 (a) The relevant tax liability is to be borne by you. (b) All your dues, including your legal dues will be settled on your handing over possession of the said flat to the company's representative Mr. Mohan Bhosale. (c) Your entering into a separate non-competing and non-disclosure agreement as per your present role and responsibility. It is quite clear that an amount received by assessee is not only the simple compensation. He has to be enter with agreement with the company on account of certain terms and conditions in which the condition of non-competing and non- disclosure of the agreement is also exist. In such type of case, the Hon'ble ITAT in the case of titled as M. G. Mohan Kumar Vs. DCIT in ITA. No.981/Bang/2010 dated 22.07.2016 has also given the finding. The relevant finding is hereby given as under.:

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"6. We have considered the rival submissions as well as the relevant material on record. Before proceeding to examine and analyse the facts as well as the rival contentions of the parties we make it clear that the Assessing Officer assessed the amount of Rs.2.5 Crores received by the assessee under non-compete fees agreement as business income under Section 28(va) of the Act however, the CIT (Appeals) held that the said amount is taxable under Section 17(3)(iii) and not 28(va) of the Act in para 3.11 and 3.12 as under :

"3.11 However, in my opinion, the Act covers suchpayments as profit in lieu of salary and to make it only abundant clear and to plug possible leakage of revenue clause (iii) was inserted under Section 17(3) of the Act with effect from 1.4.2002, which reads as under : "[(iii) any amount due to or received, whether in lump sum or otherwise, by any assessee from any person (A) Before his joining any employment with that person; or (B)After cessation of his employment with that person.]" 3.12 From a perusal of section 17(3)(iii), it is evident that this clause (iii) to section 17(3) was applicable for such payment for the assessment year 2002-03. Thus, I find that the amount of Rs.2,50,00,000 received by the appellant from DAL as non-compete fee is taxable under clause (iii) of section 17(3) and not under Section 28(va) of the I.T. Act."

The revenue has not challenged the order of the CIT (Appeals) and therefore the order of the Assessing Officer has merged with the impugned order of the CIT (Appeals). Accordingly, the only dispute before us in the present appeal is the taxability of the amount in question received by the assessee under Section 17(3)(iii) of the Act. Undisputedly the assessee is a C.A. by profession and joined DAL in March, 2005. The assessee resigned vide letter dt.24.1.2007 which was accepted by DAL vide Board Resolution dt.25.1.2007. Though the resignation of the assessee from employment was w.e.f. 31.1.2007 however the assessee decided to resign vide letter dt.24.1.2007 which was accepted by DAL vide Board Resolution dt.25.1.2007. Thereafter the assessee and DAL entered into an agreement dt.1.2.2007 whereby the parties agreed upon that the assessee would not share the secrets of the trade/business etc with any third party and particularly with the competitors. It is pertinent to note that there is a confidential clause 6(b) in the employment ITA. NO.7243/M/2016 A.Y.2011-12 agreement dt.1.3.2005 which reads as under : " 6 Noncompetition : Confidentiality :

Non-Solicitation and Ownership of Developments. 6(a) ..... 6(b) Confidentiality. Without the prior written consent of the Board, except to the extent required by law, rule, regulation or court order, Executive shall not disclose any trade secrets, customer lists, drawings, designs, information regarding product development, marketing plans, sales plans, manufacturing plans, management organization information (including data and other information relating to members of the Board or management), operating policies or manuals, business plans, financial records, packaging design or other financial, commercial, business or technical information relating to the company or any of its subsidiaries or information designated as confidential or proprietary that the company or any of its subsidiaries may received belonging to suppliers, customers or others who do business with the company or any

> of its subsidiaries (collectively, "Confidential Information") to any third person unless such Confidential Information has been previously disclosed to the public by the Company or is in the public domain [other than by reason or Executive s breach of this section 6(b)]" Therefore during the course of employment the interest of the company was protected by this clause of employment agreement. However post cesassion of employment this clause cannot be invoked being not unforceable after termination of employment. Therefore in order to protect the interest of DAL the parties entered into an agreement dt.1.2.2007 called Non-compete Agreement. Clauses 2 & 3 of the said agreement dt.1.2.2007 reads as under : "2. That for consideration stated herein, the Retiring Officer hereby agree and consent that for a period of next three years from the date hereof : (a) Shall not accept any employment on fulltime or part time basis relating to Airline Business. (b) Shall not accept holding of any office in the Board of Directors of any body corporate engaged in or propose to engage in the Airline Business; (c) Shall not provide any consultancy, advisory services or retainership to any person engaged or proposed to be engaged in the Airline Business; (d) Shall not get associated any form with any person to promote, setup, get interested in Airline Business. 3. DAL shall pay a sum of Rs.;2,50,00,000 (Rupees Two Crores Fifty lakhs only) Mr. S.N.Ladhani, one of the director of the company to hold it in trust and pay to Mr. M.G. Mohan Kumar immediately upon execution of this Agreement." It is clear from the plain reading of the above clauses that the assessee aggreed to the restrictive covenant of not accepting any employment including holding of office in the Board of Directors of anybody/company engaged in the airline business as well as providing any consultancy, advisory services to anybody or person engaged in the airline business or to aid or associate with anybody to promote, set up, get interest in airline business. The substance of the restrictive covenents of the agreement is to restrict the assessee to associate in any manner whatsoever with anybody or person engaged or proposed to engage in the airline business. Therefore this agreement in its plain reading cannot constitute to be related to termination of employment or to compensate the loss of salary due to termination of employment.

The payment made under this agreement clearly not in the nature of compensation for loss of the employment of the assessee with DAL but it is all about the future engagement of the assessee to provide its services of knowledge in the airlines business to third party and particularly to the competitor or prospective competitor. The Hon ble Delhi High Court in the case of Pritam Das Narang (supra) while analyzing the provisions of section 17(3)(iii) of the Act has observed in paras 13 to 15 as under :

> " 13. This Court is unable to agree with the above submissions on behalf of the Revenue. The Employment Agreement itself mentions that the employment shall commence „latest by 1st July, 2007 . Although it further states that the employee "shall endeavour to join the company as early as possible", the intention and expectation of the parties was that the employment would commence not earlier than ITA. NO.7243/M/2016 A.Y.2011-12 1st July 2007. This becomes evident from a

reading of the letter dated 1st May 2007 written by ACEE to the Assessee in which it stated that that it would not be possible to take the Assessee "on board from 1st July, 2007 as per employment contract."

That the employment did not commence from the date of the Employment Agreement is further evident from the fact that ACEE stated in its letter dated 25th August 2007 that it was making the payment of Rs. 1.95 crores as "a one-time payment to you for non-commencement of employment as proposed."

14. The Court is unable to accept the interpretation sought to be placed on the plain language of Section 17 (3) (iii) of the Act by the Revenue. The words "from any person" occurring therein have to be read together with the following words in sub- clause (A): "before his joining any employment with that person". In other words, Section 17 (3) (iii) (A) pre-supposes the existence of an employment, i.e., a relationship of employee and employer between the Assessee and the person who makes the payment of "any amount" in terms of Section 17 (3) (iii) of the Act. Likewise, Section 17 (3) (iii) (B) also pre-supposes the existence of the relationship of employer and employee between the person who makes the payment of the amount and the Assessee. It envisages the amount being received by the Assessee "after cessation of his employment". Therefore, the words in Section 17 (3) (iii) cannot be read disjunctively to overlook the essential facet of the provision, viz., the existence of „employment i.e. a relationship of employer and employee between the person who makes the payment of the amount and the Assessee. 15. The Court accordingly concurs with the concurrent view of the CIT (A) and the ITAT that this was a case where there was no commencement of the employment and that the offer by ACEE to the Assessee was withdrawn even prior to the commencement of such employment. The amount received by the Assessee was a capital receipt and could not be taxed under the head 'profits in lieu of salary'." The Hon'ble High Court has held that Section 17(3)(iii)(b) of the Act presuppose the existence of relationship of employer and employee between the assessee and the person who makes the payment of "any amount" in terms of section 17(3)(iii) of the Act. The amount received by the assessee after cessation of the employment therefore was held as capital receipt and could not be taxed under the head "Profits in lieu of salary". As it is clear from the surrounding fact as well as the terms and conditions of the agreement that the payment in question was made by DAL to the assessee for not sharing the assessee's knowledge of the business of airlines and particularly the secrets of the trade with third party in the business of airlines as well as any party who is going to set up the business of airlines. From the so called non-competent agreement dt.1.2.2007 it cannot be inferred that the said agreement in any way intended to compensate the assessee for loss of employment or in lieu of salary. Therefore in the absence of any contrary facts or material either brought on record by the Assessing Officer or by the CIT (Appeals) it cannot be held that the payment received by the assessee under the agreement dt.1.2.2007 is a profit in lieu of salary in terms of section 17(3)(iii) of the Act. A similar view has been taken by the co-ordinate bench of this Tribunal in the case of Satya Sheel Khosla (supra) in paras 15 & 16 as under : " 15. We have considered the arguments given by the I.T.O. in his assessment order and by the learned CIT (A) in his appellate order; the Opinion of Shri Bhardwaj; and the submissions made, and Synopsis provided, by the learned Senior Advocate; the arguments advanced in his reply by the Departmental Representative; and Shri Aggarwal s rejoinder. Two main issues need to be considered. The first and the principal issue is whether the sum of Rs.

1,32,00,000 received by the appellant from Suzuki India is taxable as "profits in lieu of salary" under section 17(3) of the Act. The second issue is that, if the answer to the first issue is in the negative, whether the said sum is taxable under section 28(va) of the Act. The question whether the sum of Rs. 1,32,00,000 is taxable as "profits in lieu of salary" hinges on the status of the appellant. Was the appellant an employee of Suzuki India or not? We hold that the ITA. NO.7243/M/2016 A.Y.2011-12 appellant was a joint venture partner in that company, and not an employee of the company 16.In Ram Prashad v. Commissioner of Income-tax, New Delhi (1972) 86 ITR 122, the Supreme Court has observed at page 126 that:

> "A servant acts under the direct control and supervision of his master. An agent, on the other hand, in the exercise of his work, is not subject to the direct control or supervision of the principal, though he is bound to exercise his authority in accordance with all lawful orders and instructions which may be given to him from time to time by his principal."

In the course of the assessment proceedings, the Assessing Officer had asked Suzuki India as to "What were the duties assigned to Mr. Satya Sheel Khosla as a Managing Director and what type of work he was looking after" to which Suzuki India replied that he was assigned the following duties:-

> "a. Managing all affairs of the company. b. Evolving business strategies and development. c. Advising management on various issues in relation to business of the company. d. Overlook the management of the company." The wide amplitude of the role assigned to the appellant clearly show that he was not subject to the direct control or supervision of Suzuki India, but was managing all affairs of the company; evolving business strategies; and advising the company. His role was clearly that of a joint venture partner in Suzuki India and not that of an employee of the company. In view of the foregoing and the submissions made by Shri Aggarwal, summarized in paragraphs 4 to 7 above, we are of Opinion that the appellant was not an employee of Suzuki India and, as such, the sum of Rs. 1,32,00,000 received by him from the company cannot be taxed as "profits in lieu of salary" under section 17(3) of the Act."

In view of the facts and circumstances of the case discussed above as well as the decisions cited above, we hold that the amount of Rs.2.5 Crores received by the assessee under the agreement dt.1.2.2007 cannot be assessed to tax being profit in lieu of salary under Section 17(3)(iii) of the Act. Accordingly, we set aside the impugned order of the CIT (Appeals) and delete the addition on this account. The appeal of the assessee is allowed."

6. On appraisal of the above mentioned finding, we find that the matter of controversy in the instant case is quite similar to the case M. G. Mohan Kumar (supra) discussed above, therefore, we are of the view that the said amount of Rs.60,00,000/- can not be assessed to tax being profit in lieu of salary u/s 17(3)(iii) of the Act. Accordingly, we set aside the finding of the CIT(A) on this issue and delete the addition on this count and allowed the claim of the assessee.

7. In the result, the appeal filed by the assessee is hereby ordered to be allowed.

Order pronounced in the open court on 13/01/2020.

Sd/- Sd/-
(RAJESH KUMAR) (AMARJIT SINGH)
/ ACCOUNTANT MEMBER /JUDICIAL MEMBE
Mumbai; Dated : 13/01/2020

ITA. NO.7243/M/
A.Y.2

Vijay Pal Singh/Sr. P.S.

¢ /Copy of the Order forwarded to :

1. / The Appellant

2. / The Respondent.

3. ( )/ The CIT(A)-

4. / CIT

5. £ ¢ , , / DR, ITAT, Mumbai

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