

(2011) 04 DEL CK 0284

Delhi High Court

Case No: ITA 549 of 2011

Commissioner of Income Tax

APPELLANT

Vs

Mediworld Publications Pvt. Ltd.

RESPONDENT

Date of Decision: April 5, 2011

Acts Referred:

- Income Tax Act, 1961 - Section 2(11), 2(14), 260A, 260A(1), 28

Citation: (2011) 5 AD 362 : (2011) 244 CTR 387 : (2011) 6 ILR Delhi 203 : (2011) 337 ITR 178

Hon'ble Judges: M.L. Mehta, J; A.K. Sikri, J

Bench: Division Bench

Advocate: N.P. Sahni, for the Appellant; C.S. Aggarwal and Prakash Kumar, for the Respondent

Final Decision: Dismissed

Judgement

A.K. Sikri, J.

Present appeal is filed u/s 260(A)(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), against the impugned order dated 2nd July, 2010 passed by the ITAT. The following substantial questions of law are being raised for our consideration:

(a) Whether ITAT was correct in law and on facts in deleting the additions/disallowance made by the AO amounting to Rs. 3,80, 02, 500/-in respect of the amount received by the Assessee company in pursuance of the Asset Transfer Agreement thereby treating the same to be assessed as "Business Income"?

(b) Whether income arising from Asset Transfer Agreement shall be taxable under the heads "Capital Gains"?

2. To recite the genesis of the instant appeal, following facts are concisely recapitulated herein under:

The Respondent/Assessee is a private limited company incorporated in the year 1995 vide certificate of incorporation issued by ROC, Delhi & Haryana and is engaged in the business of Healthcare, print media & electronic media communications. It would be pertinent to mention here, in order to portray the Assessee's work that the business of print media communications comprises of publication of regular journals and customized publications for the industries & professional groups; electronic media communication also includes production of customized audio video healthcare communications. On 10th March 2006, the Assessee company entered into a "Specified Assets Transfer Agreement" with one M/S CMP Medica India Private Limited, Bangalore, for the sale of all its rights, titles and interest in specified assets of its Healthcare Journals & Communications business. These assets, as narrated in the agreement, were (a) the periodicals (b) the products (c) the business intellectual property rights along with the goodwill and all rights (d) the customer database (e) the records (f) the editorial materials & (g) the contracts. Pursuant to aforesaid agreement, two separate deeds namely "Deed of Assignment of Copyrights" & "Deed of Assignment of Trademarks" were executed on the same date.. Furthermore, the Respondent company had also assigned the copyrights and trademarks pertaining to its Healthcare Journals & Communication business, which they had been running for ten years.

The Assessee by the aforementioned "Specified Asset Transfer Agreement" also relinquished for six years the right to carry on any business involving or relating to or competing with the transferred specified assets. While the entire assets were transferred as above, the Assessee retained a limited & non exclusive right to use the pharmaceuticals companies solely for the purpose of its clinical trials business and for no other purpose. In consideration of the above said transfer, the Assessee had received Rs. 3,80,02,500/- from CMP Medical India(P) Ltd.

The Assessee filed the return of income for the assessment year 2006-07 on 19.11.2006 declaring its income of Rs. 11,69,453. During the course of assessment proceedings, it was noticed by Assessing Officer that the Assessee had shown the income from Long Term Capital Gains @ Rs. 3,80,02,500/-. Moreover, AO observed that this income should be made taxable under the head "Business and Professions" vis-a-vis "Capital Gain" as taken by the Assessee. Thereafter, AO had taxed the same u/s 28(va) of the Income Tax Act, 1961 treating the same as business income and recomputed the taxable income of the Assessee company.

3. We may record that before taking the aforesaid view the AO asked the Assessee company as to why sale shown as long term capital gain be not treated as business income for the year in question. In the reply submitted by it, the Assessee explained that it was publishing the journals since 1995 onwards, but in all the journals published, the period of starting the journals was more than three years from the date of transfer of these assets. Further, all the journals were initiated by the company itself and were not in existence earlier. These journals are registered with

the Registrar of Newspapers of India (RNI), before registration, the brand name/titles of journals are approved by the RNI. Thus, the Assessee was the owner of brand name of these journals which were also registered/indexed with Indian National Scientific Documentation Centre, Govt. of India (hereinafter referred to as the INSDOC). Thus, the Assessee was exclusively holder of the copyrights in all the journals and was also the exclusive holder of Trade Marks of all the journals. These were, therefore, intangible assets within the meaning of Section 55(2)(a) of the Act. The cost of acquisition of these assets was "Nil" and the consideration received on the sale of these intangible assets therefore, should be treated as long term capital gain. The AO, however, did not accept the aforesaid contention of the Assessee. He examined the features of the agreement entered into between the Assessee and the transferee of the aforesaid assets on the basis of which he noticed as under:

a) The Assessee has not sold of whole of his business but only surrendered his right regarding publication of the journals.

b) As seen from the Clause (5) of above, in return CMP Medica has granted the Assessee a royalty free, non-exclusive license to use the data comprised of the advertisers and pharmaceutical companies which the Assessee shall use in respect of its clinical trials business.

4. On that basis, the AO formed an opinion that the amount received was business income within the meaning of Section 28(va) of the Act which had been notified w.e.f. assessment year 2003-04 and as per which any sum, received or receivable in cash or kind, under an agreement for not carrying out any activity in relation to any business or not sharing any know-how, patent etc. would be treated as business income since the Assessee had received the amount for carrying out any activity in relation to the business of the Assessee as publication of the journal was only a part of the business of the Assessee. The Assessee had also secured a royalty free, non-exclusive license from the transferee to use the data comprised of the advertisers and pharmaceutical companies its clinical trial business. The agreement also contained "non compete" clause. From all these, he concluded that the income received would be treated as business income as per the provisions of Section 28(va) of the Act and passed the assessment order accordingly. The Assessee preferred appeal against this action on the part of the Assessing Officer. The CIT (A) accepted the contention of the Assessee and held that the receipt in question was not business income but long term capital gain on transfer of the assets. This decision of the CIT (A) has been upheld by the ITAT also dismissing the appeal of the Revenue vide impugned order dated 19th December, 2009. The ITAT downrightly observed that Assessee seems to be the elite owner of the Trademark & Copyright of these publications. Also publications i.e. journals were undeniably capital assets of the assessee's business duly registered with the Trademark Authorities. It was also established by the ITAT that Assessee has sold all its intangible assets like trademarks, brands, copyrights & goodwill. By doing this exercise, the Assessee

company has deprived itself of any earnings in the subsequent years. It was also revealed by ITAT the Assessee company has wholly given up its right to carry on Healthcare Journals and Communications business for a specified period. The ITAT was of the clear view that there is no connection between the two businesses i.e. Business of Healthcare Journals & Communications was clearly a distinct and separate business as before sale of intangible like trademarks, brands, copyrights and goodwill. The ITAT further concluded that Assessee has lost the source of income and Section 28(va) does not apply.

5. It is under these circumstances, the Revenue has preferred the present appeal u/s 260A of the Act.

6. After hearing the counsel for the parties and going through the orders of the authorities below, we are of the opinion that the view taken by the CIT (A) as well as ITAT is without any blemish and in the facts of this case, it is rightly held by these two authorities that a sum of about Rs. 3.80 crores received as sale of the aforesaid intangible assets amounted to long term capital gain. It is to be borne in mind that vide agreement entered into by the Assessee in favour of M/s CMP Medica Pvt. Ltd, the Assessee had sold/transferred the rights of trade mark, brands, copyrights etc. in the journals and publications which the Assessee had. All the journals were registered with RNI. These publications were indexed by the INSDC and were also published as property of the Assessee. The Assessee also had copyrights therein.

7. It cannot be disputed that trademarks/brands, copyright and good will constitute assets of the business and are profit earning apparatus. Section 2(14) of the Act defines "Capital Asset" and Section 2(11)(b) of the Act defines "intangible asset". These provisions read as under:

Section 2(14): "capital asset" means property of any kind held by an Assessee, whether or not connected with his business or profession, but does not include-

(i) Any stock-in-trade, consumable stores or raw materials held for the purposes of his business or profession;

(ii) Personal effects, that is to say, movable property (including wearing apparel and furniture) held for personal use by the Assessee or any member of his family dependent on him, but excludes

(a) Jewellery;

(b) Archeological collections;

(c) Drawings;

(d) Paintings;

(e) Sculptures; or

(f) Any work of Art.

Explanation: For the purposes of this sub-clause, "Jewellery" includes -

(a) Ornaments made of gold, silver, platinum or any other precious metal or any alloy containing one or more of such precious metals, whether or not containing any precious or semi-precious stone, and whether or not worked or sewn into any wearing apparel;

(b) Precious or semi-precious stones, whether or not set in any furniture, utensil or other article or worked or sewn into any wearing apparel;

(iii) Agricultural land in India, not being land situate

(a) In any area which is comprised within the jurisdiction of a municipality (whether known as a municipality, municipal corporation, notified area committee, town area committee, town committee, or by any other name) or a cantonment board and which has a population of not less than ten thousand according to the last preceding census of which the relevant figures have been published before the 1st day of the previous year; or

(b) In any area within such distance, not being more than eight kilometres from the local limits of any municipality or cantonment board referred to in item (a), as the Central Government may, having regard to the extent of, and scope for, urbanization of that area and other relevant considerations, specify 20 in this behalf by notification in the Official Gazette;

(iv) 6 1/2 per cent Gold Bonds, 1977, issued by the Central Government;

(v) Special Bearer Bonds, 1991, issued by the Central Government;

(vi) Gold Deposit Bonds issued under the Gold Deposit Scheme, 1999 notified by the Central Government.

Section 2(11): "block of assets" means a group of assets falling within a class of assets comprising-

(a) ...

(b) Intangible assets, being know-how, patents, copyrights, trade-marks, licenses, franchises or any other business or commercial rights of similar nature, in respect of which the same percentage of depreciation is prescribed.

8. It can also be said that the "right to carry on any business" has been recognized by the legislature as capital asset for the purposes of assessing and computing the capital gains as is clear from the reading of Section 55(2)(a) of the Act, which is in the following terms:

(2) For the purposes of Sections 48 and 49, "cost of acquisition",

(a) In relation to a capital asset, being goodwill of a business, or a right to manufacture, produce or process any article or thing, tenancy rights, stage carriage

permits or loom hours,

(i) In the case of acquisition of such asset by the Assessee by purchase from a previous owner, means the amount of the purchase price; and

(ii) In any other case [not being a case falling under Sub-clauses (i) to (iv) of Sub-section (1) of Section 49], shall be taken to be nil.

9. This provision clearly provides determining the cost of any relation to a capital asset being the right to manufacture, produce or process any article or thing or right to carry on any business.

10. Once we accept the fact that the brand names, trademark, copyright and good will in the aforesaid journals sold/transferred by the Assessee to the transferee, it would clearly be a case of sale of capital asset and the gain there from would be computed as capital gain. In the present case, following facts are not in dispute which will clearly establish that it was a case of sale of capital assets resulting into capital gain:

(a) That the Assessee has sold and transferred permanently and forever all its existing assets and contracts of the Healthcare journals and Communication business in terms of an agreements dated 10th March, 2006.

(b) That the main part of the agreements was the transfer of all intangible assets being trademarks, brands, copyrights and the associated goodwill of its Healthcare Journals & Communication business.

(c) That the consideration of Rs. 3,80,02,500/-was not received only for giving up the right to carry on the Healthcare Journals & Communications business but was mainly for the transfer of all intangible assets being trademarks, brands, copyrights and the associated goodwill of the Healthcare journals & communications business.

(d) That the consideration for the transfer of intangible assets being trademarks, brands, copyrights and the associated goodwill of Healthcare journals& communications business was taxable as long term capital gain.

(e) That for the purposes of journals etc. published by the Appellant company it had to go through the following procedures which proves the authenticity of the Appellant's claim of the assets being in the nature of intangible capital assets of business:

(i) Statutory Title Clearance for all publications was obtained prior to the commencement of publication from the office of the Registrar of Newspapers for India.

(ii) All these publications were registered with the RNI.

(iii) The Appellant had also filed "from B" declaration before the DCP (Licensing), Delhi.

(iv) All publications were indexed by INSDOC.

(v) Publications have been published as property of the Appellant company in Trade Mark Journal No. 1328 Suppl. 4 (vi) All publications have a copyright declaration.

11. The CIT (A) as well as ITAT have rightly held that in this backdrop provisions of Section 28(va) would not apply to the instant case. In this behalf, it is to be borne in mind that the clinical trial business which the Assessee continues to carry on was distinct and separate from the business of Healthcare Journals and Communication. As far as Healthcare Journal and Communication business is concerned, it had been given up in entirety in favour of the transferee. Therefore, the Assessing Officer was wrong in holding that the Assessee had given up only one of the activities in relation to its business. In such circumstances, the proviso to Section 28(va) becomes applicable which stipulates that Section 28(va) was not applied to any sum received on account of transfer of right to carry on any business which is chargeable under the head "capital gains". Section 55(2)(a) of the Act has to be read in conjunction with this proviso. We are in agreement with the following analysis of the CIT (A) in this behalf: "5.2 It is also quite clear that giving up the right to carry on the Healthcare Journals & Communications Business was only one part of the agreements. The main part of the agreements was transfer of all intangible assets being trademarks, brands, copyrights and the associated goodwill of its Healthcare Journals & Communications business. It follows that the consideration of Rs. 3,80,02,500/- was not received; only for giving up the right to carry on the Healthcare Journals & communications business but was mainly for the transfer of all intangible assets being trademarks, brands, copyright and the associated goodwill of the Healthcare Journals & communications business. As per the law, the consideration for the transfer of intangible assets being trademarks, brands, copyrights and the associated good will of Healthcare Journals & Communications business is also taxable as long term capital gain by virtue of Section 55(2)(a) read with Clause (i) of the proviso to Section 28(va). The AR has also relied on the provisions of Section 45(1) read with 2(14), 2(11)(b), 48 and Section 55(2)(ii) of the Act. The combined reading of the above provisions and of Section 28(va) leaves no ambiguity that law makers specifically excluded the income from the purview of main Section 28(va)."

12. It would also be worthwhile to mention that the parties had entered into agreement dated 10th March, 2006 which was captioned as "Specified Asset Transfer Agreement". This agreement defines "Business" to mean the business of publishing, distributing and selling the periodical and products as carried on by the seller (Assessee). It also termed all these publications as "Business Intellectual Property Rights" which were treated as "Specified assets". As per Clause (2) of the agreement, all these specified assets were transferred in the following manner:

2. TRANSFER OF SPECIFIED ASSETS

2.1 The Seller shall sell or procure the sale with full right, title, interest and guarantee and CMP Medica shall purchase the following assets and with a view to CMP Medica carrying on the business pertaining to the Specified Assets as going concern from the seller with effect from the closing date:

(a) the Periodicals;

(b) the Products;

(c) the Business Intellectual Property Rights alongwith the Goodwill and all interests benefits attached and appurtenant to Business Intellectual Property Rights; and the

(d) the Customer Database;

(e) The Records;

(f) the Editorial Materials; and

(g) the Contracts.

2.2 The Seller as the beneficial owner, agrees to assign, transfer and convey to CMP Medica all is rights, title, and interests to the Specified Assets including other intangible benefits and, or, rights related to the Specified Assets to the end and intent the CMP Medica shall be the sole, full and undisputed owner of the Specified Assets effective as at the close of the business hours on the Closing Date and entitled as such effective as at the close of the business hours on the Closing Date and entitled as such to deal with the Specified Assets in the manner deemed fit by CMP Medica without any hindrance, interference or disturbance or objections from the seller and, or any person claiming on behalf of or in trust for the Seller in any manner whatsoever subject to CMP Medica fulfilling its obligations under Clause 3 hereunder.

13. So much so, the "Customer Data Base" held by the Assessee was also shared with the transferee. Thus, there was a clear transfer of the exclusive assets and on transfer it is the transferee who had become the sole and undisputed owner of these assets which were the business assets of the Assessee.

14. We, thus, find no merit in this appeal and dismiss the same as no substantial question of law arises.