आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "एल" मुंबई

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

BEFORE S/SHRI B.R.BASKARAN, AM AND PAWAN SINGH, JM

आयकर अपील सं./I.T.A. No.4688/Mum/2010

(निर्धारण वर्ष / Assessment Year:2006-07)

M/s Accordis Beheer B V (As successors to M/s Accordis Overseas Investment B V), C/o Bansi S Mehta and Co., 11/13, Bootawala Building, 2nd floor, Hornimum Circle, Mumbai-400001	**बनाम**/ Vs.	Director of Income Tax Officer (International Taxation)-1(1), Scindia House, Ballard Pier, Mumbai-400038
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No.5025/Mum/2010

(निर्धारण वर्ष / Assessment Year:2006-07)

Director of Income Tax Officer (International Taxation)-1(1), 117, 1st floor, Scindia House Ballard Pier, Mumbai-400038	**बनाम**/ Vs	M/s Accordis Beheer B V C/of Bansi S Mehta and Co., 11/13, Bootawala Building, 2nd floor, Hornimum Circle, Mumbai-400001
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं /जीआइआर सं./PAN. :AAMFA4761E

अपीलार्थी ओर से / Assessee by	Shri Yogesh Thar
प्रत्यर्थी की ओर से/Respondent by	Shri Jasbir Chauhan

सुनवाई की तारीख / Date of Hearing :4.11.2016

घोषणा की तारीख /Date of Pronouncement: 13.01.2016

आदेश / O R D E R

Per B R Baskaran, AM:

These cross appeals are directed against the order dated 26-03-2010 passed by Ld CIT(A)-10, Mumbai for the assessment year 2006-07.

2. The assessee is aggrieved by the decision of Ld CIT(A) in affirming the order of the AO in holding that the capital gain arising on transfer of shares of M/s Century Enka Ltd is taxable in India, since the exception given in Article 13(5) of the India Netherland DTAA is not applicable to the said transaction.

3. The revenue is aggrieved by the decision of Ld CIT(A) in holding that the assessee is entitled to concessional rate of tax provided in the second proviso to sec. 112 of the Tax.

4. The facts relating to the issue are stated in brief. The assessee is a resident of Netherlands. It held 38.24% of shares comprising of 1,09,52,280 shares in the paid capital of M/s Century Enka Ltd, an Indian public listed company. During the year under consideration, the assessee tendered 85,93,109 equity shares having face value of Rs.10/- each to M/s Century Enka Ltd at Rs.122/- per shares under a scheme of arrangement, by way of buy back of own shares, as per the approval given by Hon'ble High Court of Calcutta u/s 391 of the Companies Act. The said tendering of shares resulted in a capital gain of Rs.58.64 crores. The assessee placed reliance on paragraph 5 of Article 13 of India Netherlands DTAA in order to contend that the capital gain referred above is not taxable in India. The same was not acceptable to both the AO and Ld CIT(A). Aggrieved by this decision of Ld CIT(A), the assessee has filed appeal before us.

5. With regard to the rate at which the capital gain is taxable, the assessing officer held that the concessional rate of taxation @ 10% provided in the second proviso to sec. 112 of the Act is not applicable to the assessee. Accordingly he levied tax @ 20%. However, the Ld CIT(A)

decided this issue in favour of the assessee and hence the revenue has filed appeal before us.

6. With regard to the issue relating to taxation of capital gains, the assessee has placed reliance on Article 13(5) of the DTAA entered between India and Netherlands, which reads as under:-

> "Gains from the alienation of any property other than that referrred to in paragraphs 1,2,3 and 4 shall be taxable only in the state of which the alienator is a resident. **However, gains from the alienation of shares issued by a company resident in other state of which, shares form part of at least 10 percent interest in the capital stock of the company may be taxed in that other State if the alienation takes place to a resident of that other state.** However, such gains shall remain taxable only in the State of which the alienator is a resident if such gains are realized in the course of a corporate organization, reorganization, amalgamation, division or similar transaction and the buyer or the seller owns at least 10 percent of the capital of the other."

While the tax authorities have held that the condition highlighted by us in bold letters shall be applicable to this transaction, the assessee is contending that the condition highlighted by us by under scoring shall be applicable.

7. The AO has interpreted the provisions highlighted in bold letters as under:-

> "....the gains arising from the alienation of shares issued by a company resident in other state (Century Enka Ltd, in the case under consideration) of which, shares form part of at least 10 percent interest in the capital stock of that company (30% in the case under consideration) may be taxed in that other state (i.e., in India), if the alienation takes place to a resident of that other state (i.e. Indian Company in this case)".

Accordingly, the AO held that the capital gains is taxable in India as per Article 13(5), referred above. Besides the above, the AO noted that the

assessee has not paid tax on the impugned capital gains in Netherlands also, since the same was exempt under the tax provisions of that country. Accordingly, the AO observed that the basic purpose of DTAA as well as section 90 of the Act is that the assessee should not be liable for double taxation whereas in the case of the assessee, it is trying to claim double benefit by taking recourse to DTAA.

8. Before Ld CIT(A), the assessee claimed that the shares were tendered in a scheme of reorganization contemplated in the Treaty and accordingly contended that the capital gains is not taxable in India. The Ld CIT(A) upheld both the views taken by the AO by making following observations:-

> "1.3.1 The perusal of the above Article shows that gains from alienation of shares issued by a company resident in other state i.e. CE of which shares form part of atleast 10% interest in the capital stock of that company may be taxed in other state if the alienation takes place to the resident of that other state. Therefore, since the assessee has earned capital gain of alienation of 30%shares of CE (Indian Company) and also shares were tendered to a resident of India, the case of the assessee is covered under Article 13(5) of Indo - Netherlands DTAA. It is also noticed that the capital gains on sale of shares is exempt in Netherlands as per Corporate Income Tax Act, 1961 of Netherlands. Therefore, the capital gain cannot be treated as taxable in Netherlands. Further, the appellant has not paid any taxes in Netherlands on the capital gain arising from alienation of shares of Century Enka Ltd. The basic purpose of DTAA as well as section 90 of the Act is that the assessee should not be liable for double taxation whereas in the case of the appellant, it is trying to claim double benefit by taking recourse to DTAA.
>
> 1.3.2 The claim of assessee that there is no transfer of shares is not tenable in law. It is seen that the assessee has tendered the shares, thus tendering of shares to transfer of share. It is immaterial what does the CE do of that shares. Further, the shares were tendered on account of buy back scheme u/s 77A of the Companies Act, 1956. Thus there was transfer of shares. The appellant has transferred its share to CE and in lieu of that reconsideration. It was

a scheme only for non resident share holders of the CE. The objective of scheme was to enable the assessee to transfer its share holding. Therefore, the intention of the buy back is more important. Therefore, the facts of Vania Silk Mills Pvt. Ltd. (Supra) are not applicable to present case.

1.3.3 It is further noticed that the capital gains were not realized by the assessee in the case of corporate organization, reorganization, amalgamation or division of the Century Enka Ltd. as contemplated by the treaty. The assessee has tendered shares of CE under buy back Scheme of 77A of Companies Act and CE bought back 8593109 shares held by the assessee. The CE has cancelled the shares is nothing to do with transfer even though it led to a reduction of CE's paid-Up shares capital. It is also noticed that prior to such buy back, the assessee held 38.24% of the total paid-up shares capital of CE and the Indian Promoters, i.e. B.K. Birla Group held 13.91% of such capital. The assessee was one of the collaborators of CE along with the B.K. Birla Group. It is also seen that the objective of the scheme was to unable the assessee to transfer its shareholding. The only purpose of the scheme was go give exist route to the assessee which cannot be compared or classified with corporate, organization, re-organisation amalgamation or division of Century Enka Ltd. (CE) contemplated by the treaty. Further, the AO has every right to lift the corporate veil which is also supported by the landmark case of Hon'ble Supreme Court in the case of McDowell & Co. v. CTO (1985) (154 ITR 148)(SC) wherein it was held that tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid payment to tax by resorting to dubious methods. It is the obligation of every citizen to pay tax honestly without resorting to subterfuge and in the case of Juggilal Kamlapat vs. CIT (1969) (73 ITR 702)(SC) wherein it was held that the Income-tax authorities were entitled to pierce the veil of corporate personality and look at the reality of the transaction. The court could go behind the legal form and find out its substance having regard to the economic realities behind the legal facade. The court had power to disregard corporate entity if it were used for tax evasion or to circumvent tax obligation or to perpetuate fraud. The following observations of Lord Green in the case of Lord Howard De Welder vs. Commissioner of Inland Revenue (1941) 25 TC 134 were quoted with approval. "For years a battle of maneuver has been waged between the Legislature and those who are minded to throw the burden of taxation off their

> own shoulders on those of their fellow subjects. In that battle, the Legislature has often been worsted by the skill, determination and resourcefulness of its opponents. It scarcely lies in the mouth of the tax plays with fire to complain of burnt fingers". Therefore, alienation of share is covered under Article 3(5) of DTAA. The case laws of Vania Silk Mills P. Ltd relied by the appellant is also not applicable to the present facts of the case. The AR relied in case of Oudh Sagar Mill vs. ITO(35 ITD 76) (Mum) wherein the Hon'ble Tribunal was dealing a case where sale or exchange was being considered in the context of Section 41 (2). In that reference, the reference of reorganisation word was made. However, in the case of appellant, it is the case of alienation of shares under the buy back scheme. Hence, capital gain earned on such transfer is taxable as per Article 13(5) of the DTAA. I, therefore, of the opinion that the AO was right in taxing the capital gain arising on account of buy back of shares of CE Group. I, therefore, uphold the action of the AO on the reasons advanced by him. Accordingly, the findings of the AO are hereby upheld. ″

9. The Ld A.R submitted that the tax authorities are not justified in rejecting the claim of the assessee on the ground that the assessee did not pay tax on the same in Netherlands. He submitted that taxability in one country is not a sine qua non for availing relief under the treaty in the other country. In this regard, he placed reliance on the decision of Hon′ble Bombay High Court rendered in the case of DIT Vs. ICICI Bank Ltd (370 ITR 17)(Bom) and also upon the decision rendered by the Mumbai bench of Tribunal in the case of Asst. DIT Vs. Green Emirate Shipping & Travels (2006)(100 ITD 203). In view of the decisions relied upon by the assessee, we agree with the contentions of the assessee that payment of tax on the capital gains in Netherlands may not be a condition for availing DTAA benefits in India.

10. The Ld CIT(A), in paragraph 1.3.3., has observed that the Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid payment of

tax by resorting to dubious methods. In this regard, the Ld CIT(A) has referred to the decision of Hon'ble Supreme Court rendered in the case of McDowell & Co. (1985)(154 ITR 148). The assessee takes objection to this observation of the Ld CIT(A) by placing reliance on the decision of Hon'ble Supreme Court rendered in the case of Union of India Vs. Azadi Bachao Andolan (2003)(263 ITR 706). We notice that the assessee, in the instant case, is pleading for relief on the basis of its own interpretation of Article 13(5) of the DTAA. The fact that it has tendered the shares to the M/s Century Enka Ltd under a scheme of arrangement approved by Hon'ble Calcutta High Court is not disputed. Hence we do not see any colourable device in the claim made by the assessee and accordingly we are of the view that the observations made by Ld CIT(A) may not be relevant to the facts prevailing in the instant case.

11. The Ld A.R contended before us that the assessee has transferred the shares under a scheme of arrangement approved by the Hon'ble High Court of Calcutta and the same falls in the category of "reorganization" specified in Article 13(5) of the DTAA entered between India and Netherlands. There should not be any dispute that the contention of the assessee, if found o be correct, then the impugned capital gains is not taxable in India. Hence, we have to examine whether the transfer of shares by the assessee to the company would fall in the category of "re-organization" mentioned in Article 13(5).

12. The Ld A.R invited our attention to the meaning of "reorganization" given in the Dictionary titled as "Dictionary for Accountants" by Eric L Kohler, wherein the term "reorganization" is defined as under:-

> **"reorganization** 1. A major change in the financial structure of a corporation or a group of associated corporations *resulting in alterations in the rights and interests of security holders*; a recapitalization, merger or consolidation."

We notice that the assessee has transferred a part of shares held by it to the company, M/s Century Enka Ltd and accordingly earned Capital gain. Subsequently, the above said company has reduced its paid up capital and reserves by cancelling the shares bought by it. As per the definition given above, there should be a major change in the financial structure and the same should result in alteration in the rights and interest of security holders. However, in the instant case, there is reduction in share capital and in our view, the same cannot be considered as a major change in financial structure. Further, the security holders continue to enjoy the same type of rights and interests even after the reduction of share capital and hence there is no alteration in the rights and interests of security holders. Accordingly, we are of the view that arrangement entered by the assessee in selling part of its share holding to the company in the scheme of buy back does not fall under the definition of "reorganization" given in the dictionary cited above.

13. The Ld A.R also placed reliance on a study material titled as "Strategic Financial Management" issued by the Board of Studies of the Institute of Chartered Accountants of India, especially following observations made therein:-

> "On the other hand, the term 'arrangement' means and includes all modes of reorganizing the share capital, take over of shares of one company by another including interference with preferential and other special rights attached to shares".....
>
> "Generally where only one company is involved in a scheme and the rights of the shareholders and creditors are varied, it amounts to reconstruction or reorganization or scheme of arrangement"...
>
> "The aspects relating to expansion or contraction of a firm's operations or changes in its assets or financial or ownership structure are known as corporate re-structuring. While there are many forms or corporate restructuring, mergers, acquisitions and

> takeovers, financial restructuring and re-organisation, divestitures de-mergers and spin-offs, leveraged buyouts and management buyouts are some of the most common forms of corporate restructuring."....

In our view, these discussions made by the ICAI only explains various forms of financial management. We have already noticed that there is no change in the rights and interests of the shareholders. Only change that occurred on reduction of share capital through writing off of the shares purchased from the assessee is the change in the shareholding pattern of the promoter groups, i.e., the percentage of shareholding of the promoter group has gone up. The same, in our view, cannot be considered as the change in the rights and interests of shareholders Before and even after the reduction of share capital, the promoter groups continued and continues to remain as promoter groups with the same rights and interests. At this stage, we feel it pertinent to refer to the definition of the term "arrangement" given under sec. 390 of the Companies Act:-

> "390 (a)....
> (b) the expression "arrangement" includes a reorganisation of the share capital of the company by consolidation of shares of different classes, or by the division of shares into shares of different classes or by both those methods."

So the reorganization contemplated in sec. 390 consists of either consolidation of shares of different classes or division of the shares into different classes or both.

14. The Ld A.R also relied upon the decision rendered by the Hon'ble Bombay High Court in the case of Securities and Exchange Board of India & Union of India Vs. Sterlite Industries (India) Ltd (Order dated 15-07-2002 given in Appeal Lodging No. 520 of 2002 in Company petition No.203 of 2002 in Company Application No. 18 of 2002 & other)(113 Company cases 273) rendered under the Companies Act. We have gone through

the said decision and we notice that the issue considered therein was whether the Court can sanction buy back of its shares under a scheme of arrangement prescribed in sec. 391 of the Companies Act, when a specific section 77A is available for that purpose. Thus, we notice that the emphasis was given by the Hon'ble High Court with regard to the scope of sec. 391 of the Act and it was not a case of finding out the meaning of the term "reorganization". Hence, we are of the view that the above said decision may not help to support the contentions of the assessee.

15. From the decision taken by Ld CIT(A), it can be noticed that the Ld CIT(A) has observed that the scheme of arrangement framed by M/s Century Enka Ltd was only with the purpose of p oviding an exit route to the non-resident share holders. Thus, the objective of the scheme was to enable the assessee to transfer its shareholding. Further the Ld CIT(A) has observed that the subsequent cancellation or writing off the shares is nothing to do with the transfer made by the assessee, even though the same has resulted in reduction of paid up share capital of the company, M/s Century Enka Ltd. We agree with the above said observations made by Ld CIT(A). As observed by him, two different activities have been combined with the scheme of arrangement. The first one was to buy back shares belonging to non-resident share holders and the second one was to cancel the shares so purchased. We agree with the view taken by Ld CIT(A) that they are two different actions and both should not be clubbed together, even though M/s Century Enka Ltd has combined the same, for the sake of its convenience, in the scheme of arrangement. The assessee herein, in our view, should in no way concerned by the action of cancellation of share resulting in reduction of share capital. Accordingly, we are of the view that the attempt of the assessee to bring the transferring of shares within the ambit of the term "reorganisation" may

not be correct, since the object of the arrangement was not financial restructuring, but to provide an exit route to the non-resident shareholders.

16. In view of the above, we are of the view that the Ld CIT(A) was justified in upholding the view taken by the AO on this issue. Accordingly we uphold his order on this issue.

17. The only contested in the appeal filed by the revenue relates to the rate at which the capital gains is taxable. The Ld A.R submitted that this issue is covered in favour of the assessee by the decision rendered by Hon'ble Delhi High Court in the case of Cairn U.K. Holdings Ltd (2013)(359 ITR 268), which was followed by the co-ordinate bench of Tribunal in the case of ADIT Vs. Abbott Capital India Ltd (65 SOT 121)(Mum). Hence, we are of the view that the Ld CIT(A) was justified in holding that the assessee is entitled to concessional rate of tax @ 10% on the impugned Capital gains.

18. In the result, the appeal of the assessee and the appeal of the revenue are dismissed.

Pronounced accordingly on 13.01.2016.

घोषणा खुले न्यायालय में दिनांकः 13.01. 2016 को की गई ।

Sd	**sd**
(PAWAN SINGH)	**(B.R. BASKARAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

मुंबई Mumbai:13th Jan , 2016.
व.नि.स./ SRL , Sr. PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned
4. आयकर आयुक्त / CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai concerned
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai