

Tax Hotline

September 18, 2020

MADRAS HIGH COURT HOLDS - BUSINESS TRANSFER FOR NON-MONETARY CONSIDERATION DOES NOT QUALIFY AS SLUMP SALE

- Madras High Court holds that monetary consideration is necessary for a transaction to qualify as a 'sale', and consequently for a transaction to be a 'slump sale'.
- Holds that mere use of the expression 'consideration for transfer' in the scheme of arrangement does not make the transaction a 'sale'.
- Holds that transfer of assets on amalgamation takes place by operation of law – by force of a court's order - and ceases to be a contractual or consensual transfer.
- Holds that there is no estoppel under Indian tax law, and an alternate plea can be raised if it is a question of law, even if the plea is mutually contradictory to an earlier plea.

In a recent decision,¹ the Madras High Court ("Madras HC") held that a transfer of business in lieu of issuance of shares by the transferee company as consideration does not amount to a 'sale' and accordingly, cannot be considered a 'slump sale' under the Income-tax Act, 1961 ("ITA").

BACKGROUND

Areva T&D India Limited ("Assessee") had transferred its non-transmission and distribution business on a going-concern basis to its subsidiary Alstom Industrial Products Limited ("AIPL" or "Transferee"), pursuant to a scheme of arrangement sanctioned by the Calcutta High Court under the Companies Act, 1956 ("Transaction"). The Assessee received INR 413 million in the form of fully paid up equity shares of AIPL as consideration for the Transaction basis valuation undertaken by an independent valuer.

The Assessee filed its income-tax return computing capital gains by characterizing the Transaction as a slump sale and did not pay capital gains tax since the entire capital gains were to be invested in tax saving bonds notified under section 54EC of the ITA. However, on account of an amendment in section 54EC,² during the assessment proceedings the Assessee raised an alternate argument without prejudice before the assessing officer ("AO") that the Transaction should not be subject to capital gains tax relying on the decision of the Mumbai Tribunal in case of *Avaya Global Connect Limited v. ACIT*.³

The AO disregarded the claim of the Assessee stating that the Assessee had itself agreed that the Transaction qualified as a slump sale and did not raise such a claim at the time of filing the original or revised return. On appeal, the Commissioner of Income Tax (Appeals) ("CIT (A)") upheld that AO's order, holding that the Assessee was estopped from raising the alternate plea that the Transaction was not a transfer by way of slump sale. On second appeal as well, the Income Tax Appellate Tribunal ("Tribunal") upheld the order of CIT(A) and opined that the Transaction was a transfer by way of slump sale as claimed by the Assessee themselves.

Before the Madras HC, the fundamental question to be considered was whether the transfer of business of the Assessee in exchange of issuance of shares of AIPL qualifies as 'slump sale' under section 50B of the ITA.

RULING BY MADRAS HC

• On the question of maintainability of the Assessee's alternate plea – i.e. the Transaction was not a slump sale – the Madras HC relied on the Delhi High Court's decision in *CIT v. Bharat General Reinsurance Co. Ltd.*,⁴ and held that there is no estoppel under Indian tax law and an alternate plea can be raised even if the plea is mutually contradictory to the earlier plea as it is question of law.

• On the merits, the Madras HC made some important observations:

- Acknowledging that the term 'sale' is not defined under the ITA, the Madras HC considered the definition of 'sale' under the Transfer of Property Act, 1882 ("TOPA"). It noted that the TOPA defines 'sale' to mean a transfer of ownership in exchange for a price paid or promised or part paid and part promised.
- It also noted that the term 'price' is not defined under the ITA or TOPA, and relied on the definition of 'price' under the Sale of Goods Act, 1930 ("SOGA")⁵ being money consideration for a sale of goods.
- On the basis of the definition of 'sale' under the TOPA and 'price' under the SOGA, the Madras HC concluded that in order for the Transaction to qualify as 'slump sale', the sale should be by way of transfer of ownership in exchange of a price paid or promised or part paid and part promised and the price should be a money consideration. It held that if there is no monetary consideration involved, then the Transaction could not be brought within the ambit of a 'slump sale' under the ITA.

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- The Madras HC also relied on the Bombay High Court's decision in *CIT v. Bharat Bijlee Limited*,⁶ wherein the Bombay High Court held that transfer of a business undertaking as a going concern against issuance of bonds or preference shares was not a sale, but an exchange. Accordingly, the Bombay High Court held that section 50B of the ITA relating to computation of capital gains in case of a slump sale was not applicable to such a transfer.

- Regarding the reliance placed by the Revenue on the decision of the Delhi High Court in *SREI Infrastructure Finance Ltd. v. ITSC*⁷, the Madras HC specifically noted that the Bombay High Court had distinguished the Delhi High Court decision on the basis that the consideration for transfer in that case was both in the form of cash and shares and thus there was some monetary consideration, which was not the case of the Assessee.

- Lastly, the Madras HC also considered the effect of approval of the scheme of arrangement by the High Court of Calcutta and held that when an amalgamation takes place, the transfer of assets takes place by operation of law and it ceases to be a contractual or a consensual transfer. On this basis and relying on the decision of Supreme Court in case of *State of Madras v. Gannon Dunkerley & Co.*,⁸ the Court held that a transfer pursuant to approval of a scheme of arrangement, is not a contractual transfer, but a statutorily approved transfer and cannot be brought within the definition of the word 'sale'. Accordingly, such transfer cannot be construed as a 'slump sale' under the ITA.

ANALYSIS

While the Madras HC has held that the Transaction does not qualify as a 'slump sale', the decision is silent on the manner of computation of capital gains. Prior to the insertion of section 50B, there was no machinery provision for computing the cost of acquisition ("COA") on transfer of business undertakings as going concerns. The Supreme Court's landmark ruling in *CIT v. B.C. Srinivasa Setty*,⁹ held that the charging provisions and the computation mechanism together formed an integrated code and that if the COA is unascertainable, then no capital gains tax liability could arise. The Supreme Court re-iterated this principle in *PNB Finance Ltd. v. CIT*.¹⁰ It is unclear in this case what the implication of the Transaction not qualifying as a 'slump sale' would be.

The Madras HC's decision is also at odds in some respects with the Delhi High Court's recent decision in *CIT v. Nalwa Investment Ltd.*¹¹ The Delhi High Court had categorically distinguished the Supreme Court's ruling in *CIT v. Rasiklal Manecklal*¹² wherein it was held that an exchange of shares could not be regarded as a transfer – on the basis that *Rasiklal Manecklal* was based on the capital gains taxation provisions in the 1922 version of the ITA, which did not include 'extinguishment of shares' within the meaning of 'transfer'. The Delhi High Court instead relied on *CIT v. Grace Collis*¹³ that considers the wide meaning of 'transfer' under the present ITA. The Madras HC in the present case, has gone back to place reliance on *Rasiklal Manecklal* – albeit in an oblique manner – for support for the proposition that allotment of shares does not amount to transfer.

The issue of whether transfer of an undertaking for non-monetary consideration (i.e. by way of issuance of shares or bonds etc.) qualifies as a 'slump sale' has been highly litigated, exacerbated by contrary rulings of various High Courts. The decision of the Madras HC is fairly comprehensive in that the Court has considered and addressed the contrary rulings and arrived at a conclusion that in the absence of any monetary consideration, a transfer should not be considered a 'slump sale'. To this extent, the decision of Madras HC brings some clarity for taxpayers. However, given that there still exist contrary rulings by different High Courts, and that Bharat Bijlee Limited (supra) is presently pending before the Supreme Court, the matter can attain finality only once the Supreme Court settles it.

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You can direct your queries or comments to the authors

¹ *Areva T&D India Ltd. v. CIT*, Tax Case Appeal No. 673 of 2018, decision dated 08.09.2020

² The Finance Act, 2007 inserted a proviso to section 54EC limiting the investment in long-term specified asset during a financial year to INR 5 million

³ [2008] 26 SOT 397 (Mumbai), The Mumbai Tribunal held that a transfer resulting from a scheme of amalgamation duly approved by the court, could not be regarded as a 'sale' of an undertaking, and consequently could not be a slump sale.

⁴ (1971) 81 ITR 303

⁵ Section 2(10), SOGA

⁶ (2014) 365 ITR 258

⁷ [2012] 251 CTR 129 (Delhi), The Delhi High Court had held that on transfer of business in exchange of another asset, there is indeed a monetary consideration which is being discharged in the form of shares. It would not be appropriate to construe and regard the word 'slump sale' to mean that it applies to 'sale' in a narrow sense and as an antithesis to the word 'transfer' as used in Section 2(47) of ITA

⁸ 1959 SCR 379

⁹ AIR 1981 SC 972

¹⁰ (2008) 307 ITR 75 (SC)

¹¹ ITA No. 822/2005, decision dated 07.08.2020

¹² [1989] 177 ITR 198 (SC)

¹³ [2001] 248 ITR 323 (SC)

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