IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : I-1 : NEW DELHI

BEFORE SHRI R.S. SYAL, AM AND SHRI C.M. GARG, JM

ITA No.411/Del/2014
Assessment Year : 2010-11

DDIT, Circle-3(1), New Delhi.	Vs.	Mitsubishi Motors Corporation, 33-8, Shiba 5-Chome, Minatu-Ku, Tokyo, Japan. PAN: AAGCM4729H
(Appellant)		(Respondent)

Assessee By	:	None
Department By	:	Shri Amrendra Kumar, CIT, DR

Date of Hearing	:	21.04.2016
Date of Pronouncement	:	28.04.2016

ORDER

PER R.S. SYAL, AM:

This appeal by the Revenue is directed against the final assessment order passed by the Assessing Officer (AO) on 26.11.2013 u/s 143(3) read with section 144C(15) of the Income-tax Act, 1961 (hereinafter also called 'the Act') in relation to the assessment year 2010-11.

2. The following effective grounds have been raised in this appeal:-

> "1. The assessee had applied tax rate of 10% in the terms of the proviso to section 112(1) of the Income Tax Act. However, the AO has applied tax rate of 20% as the proviso below section 112(1)(c) was not applicable in the case of non-residents.
>
> 2. Whether on the facts stated and in laws the Hon'ble DRP has erred in holding the assessee entitled to the benefit of proviso to section 112(1) of the Act on sale of the equity shares in question."

3. Briefly stated, the facts of the case are that the assessee is a company incorporated under the laws of Japan with its head office in Tokyo. It is engaged in the business of development, design, manufacture, assembly, sales and purchase, importing and other transactions relating to automobiles and to component parts and replacement parts of said automobiles. During the year under consideration, the assessee reported income from three streams, viz., capital gains, royalty and fees for technical services. However, only income under the head 'Capital gains' was offered for tax. The dispute in the instant appeal is only *qua* the application of tax rate on the amount of such capital gain alone. Such capital gains arose from the sale of shares of Eicher Motors Ltd. to Eicher Motors Ltd. (as a part of buy back of shares), Mr. Sidharth Lal, Mr. Simran

Lal and Mrs. Tara Lal for a consideration of Rs.27.96 crore. Cost of acquisition of these shares in Indian currency worked out at Rs.9.94 crore, yielding long-term capital gain of Rs.18.01 crore. Since the shares were acquired and held for more than one year, the assessee offered income under this head @ 10% in terms of proviso to section 112(1) of the Act. The AO opined that the proviso below section 112(1) was not applicable and, hence, tax rate of 20% should be applied. The assessee raised objection before the Dispute Resolution Panel (DRP) against the draft order charging tax @ 20% as against 10% offered by the assessee. The DRP found the facts of the instant case similar to those considered by the Hon'ble Delhi High Court in *Cairn UK Holdings Ltd. vs. Director of Income-tax (2013) 359 ITR 268 (Del).* Following the *ratio* of this judgment, the DRP accepted the assessee's claim. The AO in the final order gave effect to the direction of the DRP in applying tax rate of 10%. The instant appeal has been filed by the Revenue on such application of 10% tax rate as against its claim of correct tax rate of 20%.

4. We have heard the ld. DR and perused the relevant material on record. There is no appearance from the side of the assessee despite notice. The short controversy before us is to decide the rate at which income from transfer of shares held as long-term capital assets, be taxed. The case of the assessee is that it is covered by the proviso below section 112(1), whereas the AO has held that such proviso is not applicable and going by the mandate of sub-section (1), tax rate of 20% is chargeable. In order to appreciate these conflicting view points, it would be apt to note down the relevant parts of section 112(1), applicable at the material time, as under :-

> "112. (1) Where the total income of an assessee includes any income, arising from the transfer of a long-term capital asset, which is chargeable under the head "Capital gains", the tax payable by the assessee on the total income shall be the aggregate of,—
>
> (a)….
>
> (b)….
>
> (*c*) in the case of a non-resident (not being a company) or a foreign company,—
>
> (*i*) the amount of income-tax payable on the total income as reduced by the amount of such long-term capital gains, had the total income as so reduced been its total income ; and

(*ii*) the amount of income-tax calculated on such long-term capital gains at the rate of twenty per cent ;

(*d*)….

Provided that where the tax payable in respect of any income arising from the transfer of a long-term capital asset exceeds ten per cent of the amount of capital gains before giving effect to the provisions of the second proviso to section 48, then, such excess shall be ignored for the purpose of computing the tax payable by the assessee.

………………………..”

5. The assessee, a foreign company, being a resident of Japan, satisfies the condition of applicability of special rate as given under clause (c). Further the capital gain has arisen from the transfer of shares, which are long term capital asset of the assessee, which fulfills the condition set out in the opening part of sub-section (1). As these pre-requisites are satisfied, sub-clause (ii) of section 112(1)(c) comes into play, which provides that the amount of income-tax calculated on such long-term capital gain shall be charged @ 20%. It is not the end of the matter. Proviso at the end of sub-section (1) of section 112 states that where the tax payable in respect of any income arising from the transfer of a long-term capital asset exceeds ten per cent of the amount of capital gains before giving effect to the provisions of the second proviso to section 48, then, such excess shall be

ignored for the purpose of computing the tax payable by the assessee. When we read clause c(ii) in juxtaposition to the proviso to section 112(1), the position which emerges is that if a case falls under the proviso, then, the tax rate will be 10% and in the otherwise situation, the command of section 112(1)(c)(ii) will apply and accordingly tax at the rate of 20% shall be charged. Whereas the claim of the assessee *ab initio* has been that it is covered by the proviso, the AO has negated such a claim and put the case under clause c(ii) of section 112(1). Now we have to ascertain whether or not the case is covered under the proviso to section 112(1)(c).

6. As per the mandate of this proviso, where the tax payable in respect of long term capital gain exceeds 10% of the amount of capital gain computed before giving effect to the provisions of second proviso to section 48, then, such excess shall be ignored and the tax rate shall be restricted to 10%. Now we have to determine if the amount of long term capital gain has been computed before or after giving effect to the provisions of 2nd proviso to section 48. For that purpose, we need to have a look at the relevant parts of section 48, which are as under : -

"Mode of computation.

48. The income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely :—

(*i*) expenditure incurred wholly and exclusively in connection with such transfer;

(*ii*) the cost of acquisition of the asset and the cost of any improvement thereto:

Provided that in the case of an assessee, who is a non-resident, capital gains arising from the transfer of a capital asset being shares in, or debentures of, an Indian company shall be computed by converting the cost of acquisition, expenditure incurred wholly and exclusively in connection with such transfer and the full value of the consideration received or accruing as a result of the transfer of the capital asset into the same foreign currency as was initially utilised in the purchase of the shares or debentures, and the capital gains so computed in such foreign currency shall be reconverted into Indian currency, so, however, that the aforesaid manner of computation of capital gains shall be applicable in respect of capital gains accruing or arising from every reinvestment thereafter in, and sale of, shares in, or debentures of, an Indian company :

Provided further that where long-term capital gain arises from the transfer of a long-term capital asset, **other than capital gain arising to a non-resident from the transfer of shares in,** or debentures of, an Indian company referred to in the first proviso, the provisions of clause (*ii*) shall have effect as if for the words "cost of acquisition" and "cost of any improvement", the words "indexed cost of acquisition" and "indexed cost of any improvement" had respectively been substituted:

……………………."

7. Section 48 contains the mode of computation of income under the head 'Capital gains' by providing that the cost of acquisition of the asset

and the cost of any improvement thereto along with the expenditure incurred wholly and exclusively in connection with such transfer shall be deducted from the full value of the consideration for determining the amount of capital gain. First proviso to section 48 states that in the case of an assessee who is a non-resident, capital gain arising from the transfer of shares in an Indian company, shall be computed by converting the cost of acquisition, expenditure incurred and sale consideration into the same foreign currency. It is not the case of the Revenue that the assessee did not compute capital gain in terms of the first proviso. Second proviso, which is material for our purpose, provides that where long-term capital gain arises from the transfer of a long-term capital asset, `*other than capital gain arising to a non-resident from the transfer of shares in an Indian company referred to in the first proviso'* , then the provisions of clause (ii) shall have effect as if for the words "cost of acquisition" and "cost of any improvement", the words "indexed cost of acquisition" and "indexed cost of any improvement" had respectively been substituted. As capital gain in the instant case has arisen to a non-resident from transfer of shares in an Indian company, it is clear that the mandate of second proviso becomes inapplicable and the case gets restricted in the first proviso to section 48 alone.

8. Again reverting to the main issue of the applicability or otherwise of the proviso below section 112(1)(c), we find that tax is payable in respect of income arising from transfer of a long-term capital asset which is before giving effect to the provisions of second proviso to section 48. In such circumstances, the case gets covered under the proviso and consequently, it is the tax rate of 10% which should be correctly applied.

9. Our view is fortified by the judgment of the Hon'ble jurisdictional High Court in *Cairn UK Holdings Ltd. (supra)* in which it has been held that the long-term capital gain earned by the assessee non-resident on off market sale of shares of listed Indian company is taxable @ 10% under the proviso to section 112 and proviso to section 112(1) does not state that an assessee, who avails benefit of the first proviso to section 48, is not entitled to the benefit of lower rate of tax at 10%. As the view taken by the DRP is in consonance with that of the Hon'ble High Court, we ergo countenance the same.

10. In the result, the appeal is dismissed.

The order pronounced in the open court on 28.04.2016.

Sd/-	Sd/-
[C.M. GARG] JUDICIAL MEMBER	[R.S. SYAL] ACCOUNTANT MEMBER

Dated, 28th April, 2016.

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Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT (A)
5. DR, ITAT

AR, ITAT, NEW DELHI.