

आयकर अपीलीय अधिकरण "G" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI
BEFORE SHRI JOGINDER SINGH, JUDICIAL MEMBER
AND SHRI R.C. SHARMA, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. Nos. 3245/Mum/2008
(निर्धारण वर्ष / Assessment Year: 2004-05)

Asstt. Commissioner of Income Tax – 12(3), Room No. 121, Aayakar Bhavan, M.K. Road, Mumbai – 400 020.	बनाम/ Vs.	M/s Lemuir Air Express, Oricon House, 2 nd floor, 12-K, Dubhash Marg, Fort, Mumbai 400 023.
स्थायी लेखा सं./		PAN : AAAFL2518C
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. Nos. 2430/Mum/2008
(निर्धारण वर्ष / Assessment Year : 2004-05)

M/s Lemuir Air Express, Oricon House, 2 nd floor, 12-K, Dubhash Marg, Fort, Mumbai 400 023.	बनाम/ Vs.	Asstt. Commissioner of Income Tax – 12(3), Room No. 121, Aayakar Bhavan, M.K. Road, Mumbai – 400 020.
स्थायी लेखा सं./		PAN : AAAFL2518C
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by	Shri Hiro Rai & Shri Laxmikant Kothari
Revenue by :	Shri Ajit Kumar Srivastava – CIT DR

सुनवाई की तारीख /**Date of Hearing** : 31-07-2015
घोषणा की तारीख /**Date of Pronouncement** : 9-10-2015

be said for transfer of business. The AO, thereafter, referred to clause 3.4 of the Deed of Transfer of Business dated May 29, 2003, which relates to terms and conditions of the transfer, and reads as under:

"3.4 On and after the date hereof the vendor will not carry on the Business."

In view of the above clause of the Deed of Transfer of Business, the AO held that there was a clear understanding between the two sides that assessee M/s. Lemuir Air Express will not carry on such a business, and therefore the amount is received against the agreement for non-compete which is covered by Section 28(va) of the Act and taxable under the head 'Profits and Gains of Business & Profession'.

5. By the impugned order, the Id. CIT(A) held that out of total consideration of Rs. 54.73 crores, an amount of Rs. 4.50 crores was on account of con-compete fees chargeable as business income and the balance amount was treated by him as capital receipt liable to tax under capital gains. Precise observation of the Id. CIT(A) was as under:-

"18. I have considered the contention of the Appellant and the AO and perused the material on record and the submission made by the Appellant. It is clear from the facts of the case that the Appellant has not transferred any tangible assets. But, it is not possible to accept a view that the appellant received something without transfer of anything. There has been a transfer. In this case, the transfer can be said to be intangible.

19. It is important to mention here that the Agreement to Sell dated May 24, 2003, vide Clause 8.1.1 clearly mandates that the name of the Appellant, which constitutes one of the component of goodwill of the Appellant, shall remain with the Appellant. However, the JV Company has been named as 'DHL Danzas Lemuir Pvt. Ltd.', which includes the name 'Lemuir', being the name of the Appellant. Further, in my view, the Appellant being in the service industry, the key components of the business are the clients, human resources and the market standing. All these components together with the name of the Appellant constituted 'Goodwill' of the Appellant and not rights. Further, the transferee company has debited the amount paid towards 'Goodwill' in its books of Accounts. Accordingly, drawing analogy from the decision of ACIT Vs.

Asea Brown Boveri Ltd. discussed supra, I am inclined to treat the consideration received by the Appellant for transfer of goodwill but subject to further discussion below.

20. *The contention of the Appellant for consideration to be treated as for transfer of right to carry on business does not hold merit as there is no alienation of the right of the Appellant. Also, the term 'Right to carry on business' has not been defined under the Act.*

21. *Accordingly, the consideration received by the Appellant, cannot be considered as received towards 'right to carry on business' but must be said to be for transfer of 'Goodwill'. It is important to mention here that the taxability in either case would be the same. The gains on transfer of 'Goodwill' or 'right to carry on business' would be able to tax under the head 'Capital Gains' and the cost of acquisition thereof, be determined as per Section 55(2)(a) of the Act, as amended with effect from April 1, 2003.*

22. *The agreement entered into by the appellant is a comprehensive agreement which includes the clause for stoppage of business (Clause 3.4 of Deed of Transfer of Business dated May 29, 2003) which states as under:*

"3.4 On and after the date hereof the vendor will not carry on the Business." Hence, in my considered opinion the receipt amount was:

- (i) For Goodwill; and*
- (ii) For stoppage of business*

Now the question to be considered is whether the entire amount is for transfer of goodwill or if the appellant is to be believed "right to business". The answer in my opinion is No. As the answer is No, I have to decide the mechanism as to how much of the receipt will constitute "non-compete fee".

23. *In this regards, I will rely on the decision of Hon'ble Chandigarh Tribunal in the case of JCIT Vs. Kwalitiy Cafe & Restaurant (P) ltd. 105 ITD 169. In this case, the assessee who was in the business of manufacturing ice-cream entered into an agreement, by virtue of which it had received consideration of Rs. 55 lakhs for giving away its rights in trademarks / trade name / goodwill, as well as right to manufacture ice-cream under the name 'Kwalitiy' in specified areas.*

In this case, the assessee offered Rs. 10 lakhs as Long Term Capital Gains and treated the balance 45 lakhs as capital receipt towards termination of business under that trademark, whereas, the AO considered the entire receipts towards transfer of capital asset and therefore chargeable to capital gains.

However, on appeal, the Hon'ble Tribunal confirmed the order of the CIT(A), and held that consideration received was on account of (i) surrender of goodwill etc. and (ii) for giving up right to manufacture ice-cream in the brand name 'Kwality', and therefore entire receipt is a 'Capital Receipt'.

However, the Tribunal considered it just and equitable to bifurcate the remuneration based on the facts of the case, and therefore apportioned Rs. 15 lakhs towards consideration for trademarks / trade name / goodwill and the balance amount towards surrender of right to manufacture.

Therefore, drawing an analogy for the decision of Chandigarh Tribunal supra, and considering the fact that the appellant is a service industry where customer go by quality of services rendered.

I am of the view that it would be logical for the transferee to enter into a non-compete for a period of one year, by which it would have established itself in the market and the threat of competition from the appellant would have ceased. Accordingly, I am of the considered opinion that the amount to be apportioned for non-compete fee will be average of last two years profit of international cargo division after taxation. The average of this comes to Rs.4.5 crores. I, therefore hold that this amount is to be treated as income falling u/s. 28(va) of the I.T. Act. The other amount of Rs.50,23,50,000/- is receipt taxable under the head Capital Gains. The appellant gets a relief of Rs, 50,33,50,000. The AO is therefore directed to recompute total income as directed above. The ground partly succeeds.”

6. It was argued by the ld. CIT - D.R., Shri A.K. Srivastava that no asset was transferred by the assessee and it was only non-compete rights for which the assessee was in receipt of Rs. 54.73 crores and the same was liable to tax as business income u/s 28(va) of the Act. As per the ld. CIT – DR, the assessee has not transferred its staff, only staff was given option to join new company. No premises were transferred, no fixed assets were transferred. As per the ld. CIT – DR, the assessee was in agency business and by entering into the agreement, the assessee has not transferred any physical/material asset. What has been transferred is intangible thing i.e. un-written business contracts. As per ld. CIT – DR, what has been transferred is not the whole business, staff or any other fixed assets. Accordingly the amount received was liable to tax as business income. As per the ld. CIT – DR any sum received or receivable under agreement for not carrying out any activity in

relation to business is chargeable to Income Tax under the head “profits and gains of business or profession.” Reliance was placed by the Id. DR on the decision of Hon’ble Punjab & Haryana High Court in the case of Sumeet Taneja vs. CIT 38 taxmann.com 149 (Punjab & Haryana) [2013]. Reliance was also placed on the decision of Mumbai ITAT in the case of Anurag Toshniwal vs. DCIT, 30 taxmann.com 383 (Mumbai – Trib) [2013] wherein it was held that non-compete fee is liable to be taxed under the head “profits and gains of business or profession”. Further reliance was placed on the decision of ITAT Chandigarh Bench in the case of Sumeet Taneja vs. ACIT, [2012] 23 taxmann.com 403 (Chandigarh) and ITAT Mumbai Bench in the case of Nayan C. Shah vs. DCIT [2011] 14 taxmann.com 155 (Mumbai) wherein it was held that amount received by the assessee under non-compete agreement was held to be liable to tax as business income u/s 28(va) of the Act.

7. On the other hand, Shri Hiro Rai, Ld. AR appearing on behalf of the assessee has contended that the assessee was engaged in the service industry in the form of custom house agent as well as air cargo agent. During the year the assessee has transferred air cargo business to a company wherein 51% stake was held by the partners of the assessee firm. The business was transferred for a sale consideration of Rs. 54.75 crores. The amount of consideration was received in for transfer of capital asset which means ‘property of any kind’, accordingly, when the item of transfer is a property, the gain arising there from were chargeable under the head ‘capital gain’. As per the Id. Counsel, the assessee offered the entire amount as a capital receipt which was wrongly treated by the A.O. as business income u/s 28(va) of the Act. As per the Id. Counsel, the transfer of business as a going concern is a capital asset. As per the Id. Counsel, the right to carry on business was transferred through an agreement to sale and the gain on such transfer of business /right to carry on business was gain on transfer of ‘capital asset’. In the sale consideration there was no component of non-compete amount

having been received by the assessee, therefore, the CIT(A) was not justified in treating Rs.4.5 crores out of sale consideration as amount received for not-competing. The ld. Counsel further contended that the A.O. has completely ignored the proviso to section 28(va) while treating the non-compete clause of the Deed of Transfer. As per the ld. Counsel, the amount was received on account of transfer of right to carry on business and “for not carrying on any activity of any business”, The ld. Counsel for the assessee placed reliance on the case of CIT vs. Mediworld Publications Pvt. Ltd. [2011] 337 ITR 178 (Delhi) in support of the proposition that the sale consideration received on transfer of rights of trade mark, brands, copyrights in journals and publications is a capital receipt and not a consideration arising out of business receipts u/s 28(va) of the Act. Further reliance was placed on the decision of ITAT Delhi Bench in the case of ACIT vs. Smt. Sangeeta Wij, [2012] 17 ITR (Trib) 162 (Delhi) wherein it was held that the proprietary concern of assessee taken over by company as going concern, consideration for transfer is taxable as long term capital gains and not as business income. Further reliance was placed on the decision of ITAT Special Bench in the case of ACIT vs. Dr. B.V. Raju, [2012] 135 ITD 1 (Hyd) wherein it was held that when certain amount is paid for giving up right to carry on business, it would be regarded as capital gain receipt, however, when compensation is paid for ,not carrying out any activity in relation to business., which transferor is not carrying on, the same would be chargeable u/s 28(va) of the Act.

8. We have considered the rival contentions, carefully gone through the orders of authorities below and also deliberated on the judicial pronouncements referred by lower authorities in their respective orders and also cited by ld. AR and ld. DR during the course of hearing before us. From the record we found that the assessee is a partnership firm engaged in the business of custom house agents as well as air cargo agents which consists of air freight and forwarding for export, domestic air freight as well as import

consolidation and break bulk. For these activities, commission was received from air lines. During the year under consideration, in addition to the normal business income, the assessee had shown capital receipts amounting to Rs. 54.73 crores which was invested for exemption u/s 54EC of the Act and net capital gain of Rs. 15,000/- was offered for tax. It was submitted that during the year the assessee firm had transferred its business to M/s DHL Danzas Lemuir Pvt. Ltd. as a legal and beneficial owner of the business has assigned and transferred to the purchaser absolutely and free of any encumbrances business together with all contracts pertaining to the business at the price of Rs. 54.73 crores. As per the A.O., the amount of Rs. 54.75 crores was received by the assessee firm as a compensation for non-compete and the closure of the business. The A.O. observed that as per the Transfer of Property Act what can be transferred is something concrete or rights thereof. The A.O. further observed that the assessee has not transferred its staff, however, the staff was just given offer to join the new company and thus the staff who opted for it joined in the job and others were terminated. No premises or building were transferred, no fixed assets were transferred, there was no written business contracts transferred. The A.O. observed that what has been transferred is intangible thing, being in agency business, the only thing which was capable of being transferred was his unwritten business contracts. Though, as per the A.O., what has been transferred is not whole business or staff or premises or any other fixed assets, not even written contracts have been transferred. The only thing which has been transferred is “unwritten business contract”. As per the A.O. , the “unwritten business contract” does not amounts to capital asset. By referring to the Deed of Transfer of Business, clause 3.4 of the agreement dated 29-5-2003, according to which “on and after the date thereof, the vendor will not carry on the business”, the A.O. inferred that there was a clear cut understanding between the two sides that the assessee will not carry on such business. The A.O. inferred that any amount received against agreement not to compete is

chargeable to tax under the head profit and gains of business or profession. The A.O. observed that the assessee was in this line of business for more than 50 years and is a market leader in India, while the transferee company comprises a world leader. As per the A.O., since assessee is a market leader in India, there is a distinct possibility that unless he agrees not to compete with this assessee in this line of business, he could once again build up a customer base and start this business as he already knows the litigity of this business and he has been operating this business over last 50 years. No company would have agreed to take over the business for such a vast sum without a non-compete clause. During appellate proceedings, the Id. CIT(A) observed that the assessee company has not transferred any tangible asset. However, he observed that the assessee has transferred in-tangible asset. The Id. CIT(A) also found that a comprehensive agreement entered by the assessee under the name of 'Deed of Transfer of Business' dated May 29, 2003, clause 3.4 of the provides that assessee will not carry on business after the date of transfer. Accordingly, the Id. CIT(A) found that the amount was received by the assessee both for 'Goodwill' as well as 'for stoppage of business'. Accordingly, the CIT(A) concluded that out of the total amount of Rs. 54.73 crores, a sum of Rs. 4.5 crores was attributable to non-compete fee falling u/s 28(va) of the Act whereas the balance of Rs. 50.23 crores was capital receipt.

9. After going through the entire material placed on record, we found that only on the basis of clause No.3.4 of the agreement dated 29-5-2003, the AO inferred that entire amount was received by assessee on account of non-compete clause. We found that this clause is merely consequent to the transfer of the business. Obviously, the vendor cannot carry on the business because it has already been transferred major part of its business. The assessee group held major shareholding of 51% in the transferee company and after the transfer of contract, employees, customers, licence of premises,

market standing, goodwill, etc., there is very few possibility of competition. However, keeping in view the nature of assessee's business and the fact that assessee entered into a non-competitive agreement for a period of one year by which it would have established itself in the market and sort of production of the assessee would have ceased, the CIT(A) had very rationally attributed Rs.4.5 crores as non-competitive fees falling under Section 28(va) of the Act. The balance amount was for transfer of intangible assets and goodwill, therefore, treated by CIT(A) as capital receipt liable to tax under the head capital gains amounting to Rs.50.23 crores, we do not find any infirmity in the decision arrived at by CIT(A), which is based on material on record, therefore, do not require any interference on our part.

10. In the result, both appeals of the assessee and revenue are dismissed.
Order pronounced in the open court on 9th October, 2015.

आदेश की घोषणा खुले न्यायालय में दिनांक: 09/10/2015 को की गई ।

Sd/-
(JOGINDER SINGH)
JUDICIAL MEMBER

Sd/-
(R.C. SHARMA)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 09/10/2015

व.नि.स./ R.K., Sr. PS

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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