

**IN THE INCOME TAX APPELLATE TRIBUNAL "I", BENCH
MUMBAI**

**BEFORE SHRI M.BALAGANESH, AM
&
SHRI AMARJIT SINGH, JM**

**ITA No.3985/Mum/2018
(Assessment Year :2014-15)**

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| Income Tax Officer (Intl. Tax) – 4(1)(1), 1729, Air India Building Nariman Point Mumbai – 400 021 | Vs. | Mr. Prabhakar Raghavendra Rao Flat No.602, Palm Paradise Palm Beach Road Sector-17, Sanpada, Navi Mumbai – 400 705 |
| PAN/GIR No. AAFPR3259K | | |
| (Appellant) | .. | (Respondent) |

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|------------------------------|-----------------------|
| Revenue by | Shri Kailash Kanojiya |
| Assessee by | Shri R.C.Modi |
| Date of Hearing | 16/10/2019 |
| Date of Pronouncement | 06/11/2019 |
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आदेश / O R D E R

PER M. BALAGANESH (A.M):

This appeal in ITA No.3985/Mum/2018 for A.Y.2014-15 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-24, Mumbai in appeal No.CIT(A)-24/DCIT-15(3)(2)/IT-626/2016-17 dated 09/03/2018 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 19/12/2016 by the Id. Dy. Commissioner of Income Tax-15(3)(1), Mumbai (hereinafter referred to as Id. AO).

2. The revenue has raised the following grounds of appeal.

- i. *On the facts and circumstances of the case and law, the Ld. CIT(A)'s order is contradictory to the provisions of section 119(2)(b) of the Income-tax Act by allowing the appeal of the assessee without appreciating the legal position that, if the return was not selected for the scrutiny assessment u/s. 143 of the Income tax Act, the possible remedy to make such a claim lied only with the CBDT.*
- ii. *On the facts and circumstances of the case and law, the CIT(A) has erred in applying the decision of the Hon'ble Gujarat High Court in the case of Gujarat Gas Ltd (245 ITR 84), since in the said case, the AO had concluded that the assessed income was lower than the returned income but he denied the refund to the assessee by relying on the CBDT circular 549 dated 31.10.1989;*
- iii. *On the facts and circumstances of the case and law, the CIT(A) has erred in applying the decision of Hon'ble Bombay High Court in the case of M/s. Pruthvi Brokers and shareholders P Ltd (349 ITR 336), since in the said case, the claim of deduction is otherwise allowable to the assessee u/s. 43B of the Act, but the same was denied by the AO as it was not made in the return of income;*
- iv. *On the facts and in the circumstances of the case and in law, the CIT(A) has erred in holding that the receipt of non-competition and non-solicitation fees of Rs.7,50,58,469/- was not taxable as the assessee was not having any permanent establishment in India under Article 5 read with Article 7 of India-Qatar DTAA.*
- v. *On the facts and in the circumstances of the case and in law, the CIT(A) has erred by holding that the receipt of non-competition and non-solicitation fees by the assessee was not taxable in India without taking into account that the assessee is a Promoter in the Indian company Sievert India Pvt Ltd (SIPL) and Recital C of the India Share Purchase Agreement mentions that he is in the management and control of SIPL and thus has a permanent establishment in India under Article 5 of the India-Qatar DTAA;*
- vi. *On the facts and in the circumstances of the case and in law, the CIT(A) has erred by holding that the receipt of non-competition and non-solicitation fees by the assessee was not taxable in India without taking into account that the assessee has a business presence in India and got his books of accounts for the business audited in India and thus has a permanent establishment in India under Article 5 of the India-Qatar DTAA;*

The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

3. The brief facts of this issue are that the assessee is an individual and a Director and shareholder in M/s. Sievert India Pvt. Ltd.(SIPL). The assessee filed his original return of income on 26/09/2014 declaring total income of Rs.91,39,36,820/-, which was revised on 25/03/2016 declaring total income of Rs.91,41,56,500/-. The assessee offered long term capital gains of tax in the return of income of sale of shares of SIPL to Bureau Veritas Certification (Singapore) Pte. Ltd. (BVCPL) and /or to its nominees. The assessee originally offered to tax as business income in respect of amount received from BVCPL towards non-competition and non-solicitation fees of Rs.7,50,58,469/- for not carrying out the business pan India for a period of 10 years as per separate non-competition and non-solicitation agreement entered into. During the course of assessment proceedings, the assessee filed submissions dated 03/10/2016 stating that he is a non-resident in India and had not conducted any business activity in India during the assessment year under consideration and in subsequent years and therefore, he has no permanent establishment (PE) in India and accordingly the non-competition and non-solicitation fees of Rs.7,50,58,469/- received from BVCPL is not taxable in India in terms of Article 7 of India- Qatar treaty. Against this claim of the assessee, the Id. AO observed that assessee was shareholder of SIPL pursuant to having investment in India and accordingly has business connection by virtue of holding share in SIPL. He observed that therefore, by virtue of holding shares in SIPL and by virtue of provisions of Section 9(1) of the Act, the amount received towards non-competition and non-solicitation fees is deemed to accrue or arise in India and thus taxable in India. The Id. AO also observed in his order that in any case, this claim of exemption was not made by the assessee even in the revised return of income filed on 25/03/2016 and hence, the claim of the assessee could not be entertained.

3.1. The assessee before the Id. CIT(A) pleaded that since the time limit for filing the revised return of income had expired, the claim of non-taxability of non-compete and non-solicitation fees received from BVCPL was made by the assessee by filing a letter dated 03/10/2016 before the Id. AO during the course of assessment proceedings. The assessee placed reliance on the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Pruthvi Brokers and Shareholders Pvt. Ltd. reported in 349 ITR 336; the decision of Hon'ble Supreme Court in the case of National Thermal Power Corporation Ltd. vs. CIT reported in 229 ITR 383 (SC); and CBDT Circular No.14 (XL-35) dated 11/04/1955. The assessee also pleaded that the decision relied upon by the Id. AO in the case of Goetze India Ltd. vs. CIT reported in 284 ITR 323 (SC) does not apply to appellate authorities. The assessee had filed the Tax Residency Certificate of State of Qatar to prove the fact of it being a resident of that country. This fact is not in dispute. The assessee also submitted that first the shares of SIPL were transferred to BVCPL for certain consideration, on which, the eligible long term capital gains had been duly offered to tax in the return of income. Later, a separate Non-compete and Non-solicitation Fee Agreement was entered into by the assessee with BVCPL pursuant to which, the assessee received Non-compete fees of Rs.7,50,58,469/- from BVCPL for not carrying out the business in India for a period of 10 years. This non-compete fees admittedly is taxable as business income in terms of Section 28(va) of the Act. The assessee had offered the same to tax as such in the original return as well as in the revised return of income. But since the assessee is a non-resident in India and had not carried out any business activity in India during the year under consideration as well as in subsequent years and more particularly in view of the fact that assessee is restrained to carry out any business for a period of 10 years pursuant to the non-competition agreement, it could be safely concluded that

assessee had no business connection in India and consequently there is no PE in India. Pursuant to this explanation, assessee took shelter as per Section 90(2) of the Act for availing the treaty benefit as per Article 7 with Qatar, wherein, it says that business income is taxable in the country of residence if there is no permanent establishment in other country. Accordingly, the assessee pleaded that non-compete fees of Rs.7,50,58,469/- shall be taxed only in the state of Qatar and not in India.

4. The Id. CIT(A) appreciated the contentions of the assessee by observing as under:-

“DECISION:

5.1 *I have given my careful consideration to the rival submissions, perused the material on record and duly considered the factual matrix of the case as also the applicable legal position.*

5.2. ***In Ground No. 1***, the appellant has objected to the AO's action in not treating the amount received of Rs.7,50,58,469/- towards non-competition and non-solicitation fees as not taxable in India. The AO has observed that that appellant himself has offered this amount as business income in the return of income as well as revised return of income and only by way of letter in course of assessment proceedings, claim is made that the same is not taxable. The AO has held that the appellant was having business connection by virtue of holding shares in Sievert India P. Ltd. and therefore the amount received is deemed to accrue or arise in India in terms of sec.9(1) of the I.T. Act.

5.2.1 *The contention of the appellant is that he is an NRI and is resident of State of Qatar and in support of which Tax Residence Certificate (TRC) of State of Qatar is filed. The appellant was shareholder of Sievert India P. Ltd. and has sold the shares to Bureau Veritas Certification (Singapore) Re. Ltd. and has offered the Long Term Capital Gains on shares in the return of income and the same is also taxed by the AO and there is no dispute regarding the same. The appellant has submitted that initially while filing the return of income both original and revised, he has offered the amount received towards noncompetition and non-solicitation as business income as per provisions of sec.28(va) of the I.T. Act, 1961. Since the amount offered to tax was later realized to be not taxable in view of DTAA with State of Qatar and the appellant being NRI, letter was filed before the AO to treat*

the same as not taxable income and thereby reduce the returned income since by then, the time limit for filing revised return of income had expired.

5.2.2 Therefore the first issue to be considered is whether the appellant is justified in making a claim of exemption (non-taxability of income) by way of letter in course of assessment proceedings and not by way of revised return of income and whether the assessed income can be below the returned income. In this regard, the appellant has relied upon several decisions in the submission filed, which in effect concludes that new claim can be made and entertained by the appellate authorities since appellate authorities are vested with powers even though the AO does not possess such power and the AO can entertain new claim only if it is by way of revised return of income. In this regard, the decision of Hon'ble Supreme Court in Goetze India Ltd., supra, is diluted and decision of Hon'ble Bombay High Court in the case of Pruthvi Shareholders, supra, comes to the rescue of the appellant. The appellant has relied upon host of other decisions in support of his contention. Thus, relying upon the decision of Bombay High Court in Pruthvi Brokers & Shareholders, supra, I find that the appellant is justified in making the claim that the amount received towards non-competition and non-solicitation fees is not taxable in India. The connected issue in this regard as to whether the assessed income can be below the returned income, I find that the decision of Gujarat High Court in Gujarat Gas Ltd. v. JCIT (2000) 245 ITR 84 (Guj) has after considering the CBDT Circular No.549 dated 31.10.1989 held that the AO is bound to make the assessment as per directions of higher authorities and even if the assessed income is below the returned income, effect shall be given without considering the Board circular. Further, the Bombay HC in Pruthvi Brokers & Shareholders, supra, has also taken similar view and held that if the assessee is, otherwise, entitled to a claim of deduction but due to his ignorance or for some other reason could not claim the same in the return of income, but has raised his claim before the appellate authority, the appellate authority should have looked into the same. The assessee cannot be burdened with the taxes which he otherwise is not liable to pay under the law. Even a duty has also been cast upon the Income Tax Authorities to charge the legitimate tax from the tax payers. They are not there to punish the tax payers for their bonafide mistakes. Hence, in view of the above, I hold that the claim made by the appellant is justified and needs to be entertained.

5.2.3. Coming to the merits of the claim, it is an undisputed fact that the appellant herein is NRI and has also filed the return of income and computation of total income in the status of NRI. It is also not in dispute that the appellant is resident of State of Qatar and Tax Residence Certificate is duly filed to the AO as well as before me. The appellant was promoter and shareholder of Sievert India P. Ltd. and the said company was incorporated in the year January 2001 The appellant has in the year 2013 entered into

agreement with Bureau Veritas Certification (Singapore) Pte. Ltd. for sale of shares held in the company Sievert India P. Ltd. in tranches over a period of time. Similarly, all shareholders have agreed to sell their holdings in Sievert India P.Ltd to Bureau Veritas Certification (Singapore) Pte. Ltd. The appellant has entered into separate agreement with Bureau Veritas Certification (Singapore)Ltd. dated 14,03.2013 for non-competition and non-solicitation of business in India for a period of 10 years from the date when the majority of shares are transferred / purchased by Bureau Veritas Certification (Singapore) Re. Ltd. or its nominees as per the definition of 'Effective date' given in the agreement dated 14.03.2014. By virtue of this, the effective control and shareholding in the company Sievert India P. Ltd. will be with Bureau Veritas Certification (Singapore) Pte. Ltd. Since the appellant herein was having control over business activities, in order to curtail competition of same business and solicitation of the clients in India, Bureau Veritas Certification (Singapore) Pte. Ltd, entered into agreement dated 14.03.2014 to restrict the appellant from carrying out the same business in India for a period of 10 years and the relevant clause to this effect is clause 2 of the said agreement which restricts the appellant from carrying on similar business activities in India. For this restriction, the appellant is paid non-competition and non-solicitation fees of Rs.7,50,58,469/- (gross of tax) subject to TDS and the taxability of the same is in dispute.

5.2.4 The facts of the case as summarized in earlier para clearly reveal that the amount of non-competition and non-solicitation fees is taxable as business income as per the provisions of sec.28(va) of the IT. Act, 1961 and this is not disputed by the appellant also. However, since the appellant is NRI and is resident of State of Qatar, the appellant has pressed into the provisions of DTAA to contend that the provisions of DTAA with State of Qatar is beneficial to him according to which as per Article 7 of DTAA with State of Qatar, business income is to be taxed in country of residence unless the business is carried on in other country through permanent establishment situated therein and accordingly income attributable to that permanent establishment shall be taxed in that other country. The AO has observed in the assessment order that since the appellant was holding shares in Sievert India P. Ltd. and by virtue of holding the shares, there is business connection and therefore the income is deemed to accrue or arise in India as per provisions of sec.9(1) of the Income Tax Act has no force. The AO has not brought any evidence on record to even remotely suggest that the appellant was having any business connection in India or was having any permanent establishment in India vis-a-vis business activity or was carrying on any business activity in India after the effective date as per the agreement for non-competition and non-solicitation with Bureau Veritas Certification (Singapore) Re. Ltd. The AO has looked into only the provisions of Income tax Act without considering the provisions of sec. 90(2) of the Act and provisions contained in DTAA with the State of Qatar. It is also pertinent to

note here that the AQ has not disputed the fact that the appellant has sold the shares in the Indian Company i.e. Sievert India P. Ltd, and has thereafter entered into non-competition agreement with Bureau Veritas Certification (Singapore) Pte. Ltd. This fact proves that the appellant was not having control over the Indian company, which was by virtue of sale of shares taken over by Bureau Veritas Certification (Singapore) Pte. Ltd. It was natural for the foreign company thereafter to restrict the promoters including the appellant not to carry on similar business in India and therefore entered into non-competition and non-solicitation agreement restricting the appellant for a period of 10 years. As the appellant herein is NRI, he has pressed the provisions of sec. 90(2) of the I.T. Act and thereby Article 7 of DTAA with State of Qatar according to which, the business income is taxed in the country of residence, which in the present case is State of Qatar. In view of the same, the appellant is right in contesting that the amount received towards noncompetition and non-solicitation fees is not taxable in India. "

5. Aggrieved, the revenue is in appeal before us.

6. The Id. DR before us drew our attention to the non-competition and non-solicitation agreement and more particularly to certain recitals stated therein in page 2 of the said agreement as under:-

The Promoters acknowledge, that as a consequence of selling the Majority Sale Shares to BV or its Nominee(s) as of the Effective Date, the Promoters engaging in a Competing Business after the Effective Date in the Restricted Territory, and at any time, during the Non-compete period shall cause grave, irreversible and irreparable harm, loss, injury and damage to the Business, SIPL and BV Group as individual person's and as a whole.

The Parties acknowledge the vital need for and the reasonableness of such commitments in view of the following: (i)the substantial Consideration being paid to the Promoters collectively under this Agreement; (ii) the technical skill and expertise of the promoters and (iii) the fact that BV or its Nominee(s) would not have agreed to purchase the sale shares without the promoters joint and several commitments under this Agreement."

6.1. We find that the Id. DR vehemently argued that the consideration received towards non-compete fees was interlinked and intertwined with

the sale of shares of SIPL to BVCPL. Hence, he argued that the consideration received towards non-compete fees should be treated as part and parcel of sale share consideration and accordingly liable to tax in India. The Id. DR also placed reliance on the provisions of Section 9(1)(i) of the Act which uses the expression "All Income", accordingly, he argued that the non-compete fees received by the assessee shall be treated as income accruing or arising in India in terms of Section 9(1)(i) of the Act also.

7. Per contra, the Id. AR vehemently relied on the order of the Id. CIT(A) and relied on the Co-ordinate Bench decision of Kolkata Tribunal in the case of Trans Global PLC vs. Director of Income Tax International Taxation reported in 158 ITD 230 (KOL) wherein on the similar facts to that of assessee, the Tribunal had held that non-compete fees was business receipt assessable as such and since the assessee thereon was a non-resident company having no permanent establishment in India, the said non-compete fees was not liable to tax in India. The Id. AR also placed reliance on the decision of Authority of Advance Rulings, New Delhi in the case of HM Publishers Holdings Ltd. in AAR No.1238/Mum/2012 dated 06/06/2018 which in turn had placed reliance on the Co-ordinate Bench decision of Kolkata Tribunal supra.

8. We have heard rival submissions and perused the materials available on record. The primary facts stated hereinabove remain undisputed and hence, the same are not reiterated herein for the sake of brevity. We find that assessee had first transferred the shares held by him in SIPL to BVCPL and derived the long term capital gains thereon, which has been duly offered to tax in the return of income filed by the assessee on which fact there is absolutely no dispute. Subsequent to this sale of shares, the

assessee had independently entered into a separate non-compete and non-solicitation fees agreement with BVCPL and had received a consideration of Rs.7,50,58,469/- for not carrying on similar business for a period of 10 years in India. Hence, this consideration was received by the assessee for restraint of trade in order not to compete with BVCPL in India for a period of 10 years. Hence, this gets squarely taxed as business income u/s.28(va) of the Act. Since the assessee herein, is a non-resident and is eligible for treaty benefit in terms of Section 90(2) of the Act, (India Qatar DTAA), in terms of Article 7 of the said treaty, the business income could be taxed in the hands of the assessee in India only if it is established that there is a permanent establishment in India. From the perusal of the assessment order, we find that the Id. AO had merely alleged that since assessee was holding shares in SIPL earlier, the business connection of the assessee stood established. We find that the case of the Id. AO is that when a non-resident holds any shares in Indian Company, it would tantamount to having business connection in India and correspondingly having PE in India. We are afraid to appreciate this view of the Id. AO. A non-resident could make investments in shares in any Indian company for which there is no restriction provided in the law. However, when such shares are sold by the said non-resident, the said non-resident would certainly be liable to long term capital gains or short term capital gains tax, as the case may be, in India, which in the instant case had been duly satisfied by the assessee herein before us. Other than merely stating that holding of shares in India by non-resident would result in having business connection in India, thereby constitutes PE in India, the Id. AO had not brought any material on record to prove that assessee had any PE in India or had any business connection in India. It is well settled that the onus is on the revenue to prove that assessee has any business connection or any PE in India. In terms of Article 7 of India-

Qatar DTAA, the business income derived by a non-resident could be brought to tax only if it is established that the said non-resident assessee is having any business connection or has any PE in India.

8.1. From the aforesaid observations of Id. CIT(A)'s order, we find that the Id. AO had nowhere brought on record that there is any business connection in India for the assessee or any PE in India. Hence, the non-compete fee money received independently by the assessee pursuant to an independent agreement, which was admittedly entered into after the sale of shares in SIPL, shall not be taxable in India as there is no business connection or PE in India for the assessee. Our understanding of this law is also endorsed by the Co-ordinate Bench decision of Kolkata Tribunal in the case of Trans Global Trans Global PLC reported in 158 ITD 230 (KOL) wherein it was held as under:-

“6. We have Ld. Sr. counsel Shri R. N. Bajoria and gone through facts and circumstances of the case. Before us, the issue is limited whether the receipt of non-compete premium is taxable as capital gains u/s. 55(2)(a) read with proviso (1) of section 28(va) of the Act, when the assessee is a non-resident company of UK in term of Article-7 of Double Taxation Avoidance Agreement (DTAA) with UK. Admittedly, the assessee is a non-resident British Company liable to tax in UK only and does not have a permanent establishment in India. The assessee received non-compete premium during the relevant AY 2008-09 and claimed that the amount received on account of non-compete fee is not for transfer of any right to carry on any business or for transfer of any right to manufacture. According to assessee, this non-compete fee premium is a mere refraining from carrying on activity, which can be taxed u/s. 28(va) of the Act as amended by the Finance Act, 2002 w.e.f. 01.04.2003. The assessee also pleaded that this can be assessed as business income but assessee being a non-resident having no permanent establishment in India and accordingly, in term of Article-7 of DTAA with UK any business income arising to the enterprise of a contracting state is taxable only in that state unless the enterprise is carrying on business in the other contracting state through a permanent establishment situated therein. We find that it is not the case of the revenue that the assessee is having a permanent establishment in India and as such in term of Article-7 of DTAA, being non- compete premium received by assessee cannot be taxed in India.

The AO while framing assessment u/s. 143(3) of the Act, after considering the provisions has not taxed the non- compete premium in accordance with the provisions of the Act and the provisions of the DTAA. The DIT(IT) has relied on the case law of Hon'ble Supreme Court in the case Mangalore Electric Supply Co. Ltd. v. CIT [\[1978\] 113 ITR 655](#) wherein the transfer has been discussed and not the taxability in term of DTAA. The another precedent cited by Ld. DIT (IT) of Hon'ble Supreme Court in the case of CIT v. Narayan Dairy Products [\[1996\] 219 ITR 478/85 Taxman 375 \(SC\)](#) (SC) wherein the similar word transfer was interpreted. Further, he also referred to the decision of Hon'ble Kerala High Court in the case of Blue Bay Fisheries (P.) Ltd. v. CIT [\[1987\] 166 ITR 1/31 Taxman 393 \(Ker\)](#), wherein the same issue of transfer is discussed. According to DIT(IT), transfer of shares of Moran Tea Co. (I) Ltd., transferring the controlling interest in the business of the said company and accordingly, the resultant receipt is capital gains taxable u/s. 55(2)(a) of the Act.

7. In view of the above facts, we are of the view that a perusal of non-compete agreement clearly shows that by any stretch of imagination it cannot be held that there is a transfer within the meaning of section 2(47) of the Act resulting in assessment being erroneous and prejudicial to the interest of revenue for not assessing non-compete premium as capital gains. The assessee clearly accepted that the provisions of section 28(v)(a) of the Act will apply to this non-compete section 28(va) premium being business income but that will be taxed in UK being assessee a non-resident British Company having no permanent establishment in India in term of Article-7 of DTAA.

8. Before us, Ld. Counsel for the assessee having relied on the decision of Hon'ble Supreme Court in the case of Gufic Chem (P.) Ltd. v. CIT [\[2011\] 332 ITR 602/198 Taxman 78/10 taxmann.com 105](#), wherein it is held as under:

"7. Two questions arose for determination, namely, whether the amounts received by the appellant for loss of agency was in normal course of business and therefore whether they constituted revenue receipt? The second question which arose before this Court was whether the amount received by the assessee (compensation) on the condition not to carry on a competitive business was in the nature of capital receipt? It was held that the compensation received by the assessee for loss of agency was a revenue receipt whereas compensation received for refraining from carrying on competitive business was a capital receipt. This dichotomy has not been appreciated by the High Court in its impugned judgment. The High Court has misinterpreted the judgment of this Court in Gillanders' case (supra). In the present case, the Department has not impugned the genuineness of the transaction. In the present case, we are of the view that the High Court has erred in interfering with the concurrent findings of fact recorded by the CIT(A) and the Tribunal. One more aspect needs to be highlighted. Payment received as non-competition fee under a negative covenant was always

treated as a capital receipt till the assessment year 2003-04. It is only vide Finance Act, 2002 with effect from 1.4.2003 that the said capital receipt is now made taxable [See: Section 28(va)]. The Finance Act, 2002 itself indicates that during the relevant assessment year compensation received by the assessee under non- competition agreement was a capital receipt, not taxable under the 1961 Act. It became taxable only with effect from 1.4.2003. It is well settled that a liability cannot be created retrospectively. In the present case, compensation received under Non-Competition Agreement became taxable as a capital receipt and not as a revenue receipt by specific legislative mandate vide Section 28(va) and that too with effect from 1.4.2003. Hence, the said Section 28(va) is amendatory and not clarificatory. Lastly, in Commissioner of Income-Tax, Nagpur v. Rai Bahadur Jairam Valji reported in [35 ITR 148](#) it was held by this Court that if a contract is entered into in the ordinary course of business, any compensation received for its termination (loss of agency) would be a revenue receipt. In the present case, both CIT (A) as well as the Tribunal, came to the conclusion that the agreement entered into by the assessee with Ranbaxy led to loss of source of business; that payment was received under the negative covenant and therefore the receipt of Rs. 50 lakhs by the assessee from Ranbaxy was in the nature of capital receipt. In fact, in order to put an end to the litigation, Parliament stepped in to specifically tax such receipts under non-competition agreement with effect from 1.4.2003."

9. In view of the above facts and circumstances and case law of Hon'ble Supreme Court in the case of Guffic Chem (P.) Ltd., supra, we hold that the above said non-compete premium received by assessee is a business receipt assessable u/s. 28(va) of the Act but in term of Article- 7 of DTAA any business income arising to the enterprise of a contracting state is taxable only in that state, assessee being a non-resident company and does not have a permanent establishment in India, liable to tax in UK only. Accordingly, the assessment framed by AO is neither erroneous nor prejudicial to the interest of revenue and hence, the revision order passed by DIT(IT) is without any basis and quashed.

8.2. We find that the revenue had also raised the ground that the claim of the assessee seeking treaty benefit should not be entertained as assessee had not made any claim by way of valid return by placing reliance on the decision of the Hon'ble Supreme Court in the case of Goetze India Ltd. 284 ITR 323. We find that on perusal of decision of Goetze India, the Hon'ble Supreme Court in the last paragraph had categorically observed that the said restriction is applicable only to the Assessing Officer and not

to the appellate authorities. Moreover, we find that the decision of the Hon'ble Jurisdictional High Court in the case of Pruthvi Brokers and Shareholders Pvt. Ltd. reported in 349 ITR 336(Bom) had categorically held that any claim eligible to the assessee shall be made at any point in time which had been rightly appreciated by the Id. CIT(A) while entertaining the claim of the assessee in the instant case before us. Moreover, we find that though the claim of exemption from tax pursuant to Article 7 of DTAA was made by the assessee during the course of assessment proceedings, we find that the Id AO had duly adjudicated the same on merits in the assessment order itself and hence there is no question of said claim of assessee getting rejected for not claiming the same by way of a valid return. In view of the aforesaid observations and respectfully following the judicial precedents relied upon hereinabove, we do not find any infirmity in the said action of the Id. CIT(A) and accordingly, the grounds 1 – 3 raised by the revenue are dismissed.

8.3. In view of our detailed observations and respectfully following the co-ordinate bench decision of Kolkata Tribunal supra, we do not find any infirmity in the order of the Id. CIT(A) granting relief to the assessee. Accordingly, the grounds 4-6 raised by the revenue are dismissed.

9. In the result, appeal of the revenue is dismissed.

Order pronounced in the open court on this 06/11/2019

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 06/11/2019
KARUNA, sr.ps

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai