

**IN THE INCOME TAX APPELLATE TRIBUNAL
 DELHI BENCH: 'F' NEW DELHI**

**BEFORE DR.B.R.R. KUMAR, ACCOUNTANT MEMBER
AND
 SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER**

I.T.A. No. 1782/DEL/2016 (A.Y 2012-13)

Shri Ashwini Kumar Bajaj, H. No. 56, Model Town, Ghaziabad PAN No. ACAPB9238K	Vs.	DCIT, Central Circle, Ghaziabad.
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AND

I.T.A. No. 1784/DEL/2016 (A.Y 2012-13)

Shri Vikram Kumar Bajaj, H. No. 56, Model Town, Ghaziabad PAN No. ACAPB9241Q	Vs.	DCIT, Central Circle, Ghaziabad.
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AND

I.T.A. No. 1785/DEL/2016 (A.Y 2012-13)

Shri Naresh Kumar Bajaj, H. No. 56, Model Town, Ghaziabad PAN No. AAQPB0007J (APPELLANTS)	Vs.	DCIT, Central Circle, Ghaziabad. (RESPONDENTS)
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Assessee by :	Sh. Rohit Jain, Adv.; & Ms. Somya Jain, C. A.;
Department by:	Ms. Meenakshi J. Goswami, [CIT] – D. R.;

Date of Hearing	26.07.2022
Date of Pronouncement	07.09.2022

ORDER

PER YOGESH KUMAR U.S., JM

These three appeals are filed by different assessee's for assessment year 2012-13 against the orders of the ld. Commissioner of Income Tax (Appeals)–IV, Kanpur, dated 07.03.2016.

2. The assessees have raised the following common (except for the amounts) grounds of appeal:-

“1. That the Commissioner of Income Tax (Appeals) [‘CIT(A)'] erred on facts and in law in directing the assessing officer to treat non-compete fees of Rs. 15 crores received by the appellant from M/s. Bunge India Private Limited as ‘income from business and profession’.

2. That the CIT(A) erred on facts and in law in not appreciating that above non-compete fees of Rs. 15 crores is liable to tax under the head ‘capital gains’ as against ‘income from other sources’ inadvertently declared by the appellant in the return of income.

The appellant craves leave to add, alter, amend or vary from the above grounds of appeal at or before the time of hearing.”

3. In the above three appeals filed by the different assessee's, the assessee has raised an identical grounds except differences in the amount involved in the assessee Appeals. In view of identical issues involved in the above appeals, the Appeals have been clubbed together and heard.

ITA No. 1782/Del/2016

4. Brief facts of the case are that, a search and seizure operation u/s 132 of the Income Tax Act (“Act” for short) was conducted on 04/05/2011 on the premises of assessee comprising Amit Group of cases in the case of the assessee, House No. 56, Model Town, Ghaziabad was searched, in view of search operation the group cases were centralized to Central Circle, Ghaziabad jurisdiction u/s 127 of the Act. Consequently, notice u/s 142(1) read with Section 153A was issued, the assessee has filed written submission along with copy of the acknowledgement for having filed return u/s 139(1) and submitted that the said return may be treated as return filed in pursuance to the above notice issued u/s 142(1) of the Act. Further, notice u/s 143(2) and 142(1) along with questionnaire were also issued. The Representative of the assessee has participated in the assessment proceedings. The Ld. A.O vide order dated 25/03/2014, passed an assessment order by computing the income of the assessee u/s 143(3) read with Section 153A of the Act at Rs. 16,30,95,630/- wherein an amount of Rs. 17 crore received by the assessee from Baunge India Pvt. Ltd. treated under the head of “income from other sources” and also charged u/s 234A, 234B & 234C of the Act.

5. As against the assessment order dated 25/03/2014, the assessee has preferred an appeal before the CIT(A). The Ld. CIT(A) vide order dated 07/03/2016 dismissed the Appeal filed by the assessee by confirming the assessment order.

6. Aggrieved by the order dated 07/03/2016 passed by Ld. CIT(A), the assessee has preferred the present Appeal on the grounds mentioned above.

7. The Ld. Counsel for the assessee submitted that the Ld.CIT(A) has erred on facts and law and directing the Assessing Officer to treat non-compete fees of Rs. 15 crore received by the assessee from M/s Baunge India Pvt. Ltd. as 'income from business and profession'. The said non-compete fees of Rs. 15 crore is liable to tax under the head 'capital gain' as against the 'income from other sources' inadvertently declared by the assessee in the return of income. The Ld. Counsel further relied on the various judicial pronouncements to buttress his submissions.

8. Per contra, the Ld. DR has vehemently argued and relied on the orders of the Lower Authorities.

9. We have heard the parties perused the material on record and gave our thoughtful consideration.

10. We have gone through the non-compete and non-solicitation agreement dated 10/02/2012 entered in to between Sri. Ashwini, Sri. Vivek Kumar Bajaj and Naresh Kumar Bajaj (Promoters) along with Bunge India Private Limited (Bunge). The undertakings given by the Assessee in the said agreement are hereunder:

“2. NON-COMPETE AND.NON SOLICITATION UNDERTAKING

2.1 For and in consideration of the sums as stated in Schedule I paid to the Promoters by Bunge, the Promoters hereby irrevocably and unconditionally, agree and undertake that they shall not and shall procure that none of the Affiliates of the Promoters, shall either directly or indirectly, whether alone or jointly with any other Person and whether as' partner, shareholder, .principal, director,- officer, agent, manager, consultant, individual proprietor, joint venture investor, lender, affiliate or employee of, in or to any Person, or any manner whatsoever, for a period of o (rive; years from the Execution Date:

2.1.1 carry on or participate/or engage, into Or be involved in or. with or assist or invest in any business and/or activity (including production, manufacture. supply, trading, distribution retailing refining and-processing or otherwise dealing in edible oils, fats, and -bakery shortening) which is the same as or similar to, the Acquired Business. Provided however, the restrictions contained in this Section 2.1.1 shall not apply to: (A) bulk trading in edible oils except trading of cotton seed oil and sunflower oil in the states of Punjab, Haryana and Uttarakhand and (13) the business of manufacturing and marketing of butler oil and clarified butter;

2.1.2. solicit or -influence/or attempt to influence or entice away any client, 'customer, supplier, vendor, distributor, dealer, provider of service, of' or to the Acquired

Business as on the Execution bale to cease (supply, distribute, deal or provide services to Bunge or to restrict or vary the terms of supply, distribution, dealing or provision of service or otherwise interfere with the relationship between Bunge and such a supplier, client, customer, supplier, vendor, distributor, dealer or provider of service; or

2.1.3 solicit or influence or attempt, to influence or entice any Employee to terminate or otherwise cease. such employment or engagement with Bunge; or

2.1.4. save and except as required by applicable Law, make use of or disclose or divulge to any Person any information of a secret, proprietary or confidential nature relating to the Acquired Business; or

2.1.5 at anytime do or attempt to do anything to disparage or otherwise injure the reputation of the products of the Acquired Business or the manner in which the activities in relation to the products of the Acquired Business are conducted; or

2.1.6. Sell, transfer or otherwise dispose off, in any manner without obtaining prior consent in writing of Bunge, any equity shares held by the Promoters and/or their respective Affiliate(s) in the Seller excluding (a) inter se transfer of shares between Promoters and/or (b) any sale, transfer or disposal of any, equity shares held by the Promoters and/or ; . their respective Affiliate(s) in/ file-Seller provided that such sale, transfer or disposal does not

result in the Promoters and /or their respective Affiliate ceasing Control of the Seller, or;

2.1.7. engage in any activity that conflicts with its obligations in terns of this Agreement and the BTA.”

11. The consideration received by the Promoters in the said agreement reproduced hereunder:

Name of three partners	Non compete/Non Solicitation consideration
Mr. Ashwani Kumar Bajaj	INR 15 (fifteen) crores
Mr. Vikram Kumar Bajaj	INR 15 (Fifteen) crores
Mr. Naresh Kumar Bajaj	INR 17(seventeen) crores

12. Thus, it is evident that in consideration of a sum of Rs. 15 Crore received from Bunge India Private Limited, the Assessee herein along with 2 others (who have also received 15 Crore and 17 Crore each), irrevocably and unconditionally agreed that *“they will not carry on or engage or involve which is same as or similar to the acquired business, solicit or influence or attempt to influence ant client etc. of acquired business etc”*.

13. The moot question arises for consideration is that, whether the said non-compete fees of Rs. 15 crores received by the Assessee in lieu of not doing specific act enumerated in the agreement is amounts to ‘income from profit and gain of Business’ or not. To decide the said issue, it is handy to visit

Section 28(va) of the Act as inserted by the Finance Act 2002 w.e.f 01.04.2003 which reads as under:-

“ PROFIT AND GAIN OF BUSINSS OR PROFESSION.

“28. The following income shall be chargeable to income tax under the head “Profits ad gains of business or profession.”

[(va) Any sum whether received or receivable, in cash or kind, under an agreement for

a) not carrying out any activity in relation to any business ^{5S}[or profession]; or

(b) not sharing any know-how, patent,, copyright, trade-mark, license, franchise or any other business or commercial right of similar nature or information or technique likely to assist in the manufacture or processing of goods or provision for services:

Provided that sub-clause (a) shall not apply to—

(i) any sum, whether received or receivable, in cash or kind, on account of transfer of the right to manufacture, produce or process any article or thing or right to carry on any business ⁵⁸[or profession], which is chargeable under the head “Capital gains”;

(ii) any sum received as compensation, from the multilateral fund of the Montreal Protocol on Substances that Deplete the Ozone layer under the United Nations Environment Programme, in accordance with the terms of agreement

entered into with the Government of India.

Explanation.—For the purposes of this clause,—

(i) “agreement” includes any arrangement or understanding or action in concert,—

(A) whether or not such arrangement, understanding or action is formal or in writing; or {B) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;

(ii) “service” means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial nature such as accounting, banking, communication, conveying of news or information, advertising, entertainment, amusement, education, financing, insurance, chit funds, real estate, construction, transport, storage, processing, supply of electrical or other energy, boarding and lodging;]”

14. As per the above provision, any sum whether received or receivable in cash or kind under an agreement for not carrying out any activity in relation to any business or profession or not issuing any know how patent copy right trade mark license, franchise or any other business or commercial right of similar nature or information or technical likely to assist in the manufacture or processing of goods or provision of services, shall be chargeable to income tax under the head ‘profit and gains of business and profession’.

15. The identical question came for consideration before the Mumbai Bench of the Tribunal, reported in [2013] 30 taxmann.com 383 (Mumbai-Trib). In the case of Anurg Toshniwal Vs. DCIT-1(3), Mumbai, wherein it is held as under:-

“8. We have considered the rival submissions and carefully perused the orders of the lower authorities and the decision relied upon by the rival parties. The facts giving rise to the entire dispute show that the assessee is one of the Directors of a company called Chemito Technologies Pvt. Ltd. since 1.7.1983. The said Chemito Technologies Pvt. Ltd. is engaged in the manufacture and assembling of various types of elaborating equipment. The said company also owned a division called "Technologies and the Environmental Instrumentation Division". Vide agreement dt. 27.5.2008, the company sold this division to M/s. Thermo Electron LLS India Pvt. Ltd. for a consideration of Rs. 58 crores. In this agreement there were Non compete provisions by which the seller for an aggregate period of 4 years shall not , in India , without the prior written consent of purchaser directly or indirectly, whether through affiliates or otherwise :

(a) age in any business, whether for profit or otherwise, involving the production, manufacture, sale distribution of products that are the same as or similar to the products produced, manufactured, marketed sold or distributed by the acquired business as of date hereof and

{b) Assist third parties, whether a consultant, partner,

administrator, advisor or otherwise, in carry out the activities of the acquired business as of the date hereof

9. It is provided in the said agreement that for an aggregate period of four years for the entire period shall, without the prior written consent of the other party, directly or indirectly, solicit any employee of the other party to work in any way whatsoever for that party or its affiliates or to terminate an existing relations with the employee party.

10. Subsequent to this agreement on 2.6.2008, the purchaser company M/s. Thermo Electron LLS India Pvt. Ltd., entered into a separate Non compete and non Solicitation Agreement with the assessee and also with his some Mr. Anurag Technical and agreed to pay Rs. 5 crores to the assessee and Rs. 2 crores to his son. The entire dispute relates to this receipt of Rs. 5 crores by the assessee. Before proceeding further, let us first see the provisions of Sec. 28(va) as inserted by the Finance Act 2002 w.e.f. 1.4.2003.

Sec. 28[(va) any sum, whether received or receivable, in cash or kind, under an agreement for –

(a) not carrying out any activity in relation to any business; or

(b) Not sharing any know how patent, copyright, trade-mark, license, franchise or any other business or commercial right of similar nature or information or technique likely to assist in the manufacture or processing of goods or

provisions for services:

Provided that sub-clause (a) shall not apply to-

(i) any sum, whether received or receivable, in cash or kind, on account of transfer of the right to manufacture, produce or process any article or thing or right to carry on any business, which is chargeable under the head "Capital gains".

(ii) any sum received as compensation, from the multilateral fund of the Montreal Protocol on Substances that Deplete the Ozone layer under the United Nations Environment Programme, in accordance with the terms of agreement entered into with the Government of India.

Explanation. - For the purposes of this clause,—

- (i) "agreement" includes any arrangement or understanding or action in concert,—***
 - (A) whether or not such arrangement, understanding or action is formal or in writing; or***
 - (B) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings; ;***
- (ii) "service" means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial nature such as***

accounting, real estate, construction, transport, storage, processing, supply of electrical or other energy, boarding and lodging;] "

11. A perusal of the aforesaid provision clearly show that with this amendment any sum received in cash or kind under an agreement for not carrying out any activity in relation to any business shall be taxed, under the head Profits and gains of business. It is the say of the assessee that carrying on of the business is a must. Let us see what is provided u/s. 28(1) of the Act.

"The profits and gains of any business or profession which was carried on by the assessee at any time during the previous year."

12. A perusal of this provision clearly shows that for the applicability of Cl. (1), the profits and gains should arise from the business carried on by the assessee. However in Cl. (va) of Sec. 28, no such mandate as "carried on by the assessee" is provided. On the contrary, Cl. [Va] refers to "any business" which means not necessarily the business of the assessee. Moreover, it is the company, in which the assessee was only a Director, has transferred one of its divisions on a slump "sale basis! Assuming, yet denying, that carrying of business is a 'Necessity even on that note, it has to be kept in mind that the transferor company Chemito Technologies Pvt. Ltd. has only transferred one of its division to M/s. Thermo Electron LLS India Pvt. Ltd. and not the entire business which negates the submission of the Counsel for the assessee. The

ITAT Hyderabad Special Bench had the occasion to deal in similar issue in the case of Dr. B.V Raju (supra) wherein the Tribunal was seized with the situation which was prior to the amendment of Sec. 28. Therefore, the Tribunal has held that prior to the amendment, Non compete fee was regarded as capital receipt. However, the Tribunal at para-38 of its order has emphatically made it clear that w.e.f. 1.4.2003, a new sub-sec (va) is inserted in Sec. 28 to bring in the Non compete fees within the purview of Sec. 28 to make it taxable in the hands of the recipient of such income. Hon'ble Supreme Court in the case of Gaffic Chem. (P.) Ltd. (supra) held that payment received as Non Compete 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 w.e.f. April 2003 that receipt by way of Non compete fee was made taxable u/s. 28(va) of the Act. The Hon'ble Supreme Court was dealing with the situation wherein it was to be decided whether Non compete fees could be charged under the head profits and gains of business or profession prior to amendment brought w.e.f. 1.4.2003 to which the Hon'ble Supreme Court held that liability cannot be created retrospectively therefore the said section 28(va) is amendatory and not clarificatory, which observation fortifies our view that w.e.f. 1.4.2003 Non compete fees is taxable under the head "profits and gains of business or profession" as a revenue receipt.

13. Hon'ble Jurisdictional High Court of Bombay in the case of John D 'Souza (supra) has also held that any payment for not carrying out any activity or for refraining from

carrying out activity in relation to business which otherwise was being allowed to be carried out by the assessee, by the erstwhile owner was assessable u/s. 28(va), squarely applies. The Hon'ble Jurisdictional High Court further held that question of capital gains did not arise as the assessee was not owner of any asset in the first place and there is no transfer of such alleged capital asset during the previous year.

14. Considering the facts of the case in totality in the light of the judicial decisions discussed hereinabove, in our considerate view, post amendment in Sec. 28 with the insertion of Cl (va), the Non compete fee of Rs. 5 crores received by the assessee is liable to be taxed under the head profits and gains of business or profession . On that note we do not find any error or infirmity in the findings of the Ld. CIT(A)”

16. The Hon'ble High Court of Bombay in the case of John D'souza V. CIT in Writ Petition No. 321 of 2009, vide order dated 13-08-2009, held as under:

“In the case at hand, agreement has been entered into by the assessee and M/s Goa Intentional School Pvt. Ltd. is on record. There is a passing of consideration and/or passing of a definite sum of Rs. 25 Lakhs from M/s Goa International School Pvt., Ltd. to the Assesses. This sum of Rs. 25 Lakhs has been received by the Assesses for not carrying out any activity in relation to fish fanning. Thus, in other words, it can be said that by this agreement the assessee is paid Rs. 25 Lakhs by M/s Goa International School Pvt., Ltd. and this payment is for not carrying out any activity or for refraining

from carrying out activity in or for referring to fish forming business which otherwise was being allowed to be carried out by the petitioner. by the erstwhile owner Mr. Yasanf Manohar Wagle in our view, in the facts and circumstances of the case at hand, this Section 2S(ya)(a) squarely applies. Assessing Officer, therefore; was justified in holding that the amount of Rs. 25 Lakhs was received by the Assessee by way of compensation and/or a sum for not carrying out any activity in relation to business and was die income of the Assessee chargeable to income-tax under the head at "profits and gains of business or profession."

17. In the present case, as per Clause 2.1, 2.1.1 and 2.1.2 of the said agreement, the promoter shall not carry on or participate or engage into or be involved in or with or assist or invest in any business/or activity in production, manufacture, supply, trading processing etc. in edible oil, fats etc. the promoter shall not solicit or influence any client, supplier etc. relating to the said business. In view of the above judicial pronouncements and also by collective reading of the clause No. 2.1 to 2.1.7 of the agreement and the Section 28(va) of the Act, there is no iota of doubt that the non-compete/non-solicitation consideration fee received by the assessee for not carrying out any activity in relation to any business, shall be taxed under the head of 'profit and gains of business'. Accordingly, we dismiss Assessee's grounds of appeal No. 1.

18. The assessee has raised another ground that the Ld. CIT(A) has not appreciated the fact that the said non compete fees of Rs. 15 crore treated as income from business and profession by the A.O which was confirmed by the CIT(A) is due to "inadvertently declared by the assessee in the return of income". But on going through the assessment order, order of the CIT(A) and

other materials on record, we do not find any merit in the said contention of the assessee. The non compete fees has been treated 'as income from business' based on the merit of the case and not due to "inadvertently declared by the assessee in the return of income" as claimed by the assessee. Therefore, the Ground No. 2 of the Assessee deserves to be dismissed.

19. Considering the above facts and circumstances of the case and in view of the above discussed judicial pronouncements, we are of the considered opinion, the non-compete fee of Rs. 15 Crores received by the assessee is liable to be taxed under the head of 'profit and gains of business or profession'. Thus, we do not find error or legal infirmity in the Order of Ld. CIT(A), accordingly the Grounds of Appeal of the Assessee fails.

20. In the result Appeal of the Assessee in ITA No. 1782/Del/2016 is dismissed.

ITA No. 1784 & 1785/Del/2016

21. In view of deciding the Appeal in ITA No. 1782/Del/2016, since the similar facts and circumstances involved in the present appeals and the issue involved in the present appeal is also identical that of the ITA No. 1782/Del/2016, for the discussion and reasons recorded in the said appeal, we hold that the non-complete fee of Rs. 15 Crores received by the assessee in ITA No. 1784/Del/2016 (Vikram Kumar Bajaj) and Rs. 17 Crore received by the assessee in ITA No. 1785/Del/2016 (Sh. Naresh Kumar Bajaj) are liable to be taxed under the head of 'profit and gains of business or profession'. Thus, we do not find error or legal infirmity in the Order of Ld. CIT(A), accordingly assessee's Grounds of Appeal in the above appeals fails.

22. In the result, Assessee's Appeal in ITA No. 1784 & 1785/Del/2016 are dismissed.

Order pronounced in the open court on : **07/09/2022.**

Sd/-
(B.R.R. KUMAR)
ACCOUNTANT MEMBER
Dated: 07/09/2022

Sd/-
(YOGESH KUMAR U.S.)
JUDICIAL MEMBER

**R.N, Sr. PS*

Copy forwarded to:

1. Appellants
2. Respondents
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI