

आयकर अपीलीय अधिकरण
मुंबई पीठ "बी", मुंबई पीठ
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री गगन गोयल, लेखाकार सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
आअसं.1800/मुं/ 2022 (नि.व.2020-21)
ITA NO. 1800/MUM/2022(A.Y. 2020-21)

Nippon Life Insurance Company,
C/o. Khaitan & Co., 13th Floor, Tower No.1,
One World Centre, 841, Senapati Bapat Marg,
Mumbai – 400 013
PAN: AADCN-5535-D

..... अपीलार्थी /Appellant

बनाम Vs.

Income Tax Officer, TDS Ward -2(3)(2),
MTNL Building, Cumballa Hill,
Mumbai 400 026.

..... प्रतिवादी/Respondent

आअसं.1917/मुं/ 2022 (नि.व.2020-21)
ITA NO. 1917/MUM/2022(A.Y. 2020-21)

DCIT(TDS)-2(3), Mumbai
MTNL Building, Cumballa Hill,
Mumbai 400 026.

बनाम Vs.

..... अपीलार्थी /Appellant

Nippon Life Insurance Company,
C/o. Khaitan & Co., 13th Floor, Tower No.1,
One World Centre, 841, Senapati Bapat Marg,
Mumbai – 400 013
PAN: AADCN-5535-D

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by: S/Shri Sanjay Sanghvi, Jimmy Bhatt & Ujval Gangwal
प्रतिवादी द्वारा/Respondent by : Shri Tejinder Pal Singh Anand

सुनवाई की तिथि/ Date of hearing : 13/01/2023
घोषणा की तिथि/ Date of pronouncement : 06/04/2023

आदेश/ ORDER**PER VIKAS AWASTHY, JM:**

These cross appeals by the assessee and the Revenue are directed against the order of Commissioner of Income Tax (Appeals)-57, Mumbai [in short 'the CIT(A)'] dated 12/05/2022 for the Assessment Year 2020-21 in proceedings arising u/s. 201(1)/201(1A) of the Income Tax Act, 1961 [in short 'the Act'].

2. Shri Sanjay Sanghvi appearing on behalf of the assessee submits that the assessee company is incorporated in Japan, hence, resident of Japan. The assessee is one of the Promoter of Reliance Nippon Life Asset Management Ltd. (in short "RNAM") having approximately 75% share holding in the said company. The assessee entered into a Share Purchase Agreement dated 23/05/2019 (in short 'SPA') with its Joint Venture partner Reliance Capital Ltd. (in short 'RCL'). Pursuant to SPA, the assessee purchased 13,18,17,943 equity shares from RCL @ Rs.230/- per share. The payment was made by assessee to RCL on 27/09/2019 and the shares were received on the same date. The Id.Counsel for the assessee submitted that the shares of "RNAM" are listed on Stock Exchange. The market rate of shares as on 23/05/2019 (date of execution of SPA) was Rs.234/- per share and the market rate of shares on the date of actual payment and delivery of shares i.e. 27/09/2019 was Rs.265/- per share. The Assistant Commissioner of Income Tax- TDS, Circle 2(3) Mumbai (in short 'the AO- TDS') issued notice dated 31/10/2019 asking the assessee to furnish details relating to the purchase of shares from RCL. In response to the notice the assessee furnished requisite details. The AO-TDS, thereafter issued showcause notice dated 04/11/2019 stating as to why the assessee should not be treated as 'assessee in default' in respect of share purchase transaction entered with RCL, as the assessee was required to deduct tax at source u/s. 194J(1)(d) of the Act on the payment made to RCL in respect of share purchase representing Non-compete clause in the SPA.

2.1 The AO-TDS vide order dated 11/12/2019 u/s.201/201(1A) of the Act held the assessee to be 'assessee in default' for non-deduction of TDS u/s. 194J @10% on the amount of Rs.10,40,70,26,599.85 i.e. the amount of alleged Non-compete Fee paid by the assessee to RCL. The Assessing Officer -TDS computed Non-compete Fee taking difference between Rs.230 the price paid by assessee per share and Rs.151.05 the Fair Market Value of shares determined in accordance with Rule 11UA of the Income Tax Rules, 1962 (in short "the Rules") Aggrieved by the order dated 11/12/2019 (supra), the assessee filed appeal before the CIT(A). The First Appellate Authority in principle accepted the order of Assessing Officer -TDS, however, granted part relief to the assessee by adopting market value per share at Rs.199.90 i.e. share valuation for the purpose of Foreign Exchange/Management Act, 1999 (in short 'FEMA').

2.2 The Id.Counsel for the assessee made two fold submissions assailing the findings of CIT(A). Firstly, he submitted that though there is a Non-compete clause in SPA but no payment was made towards Non-compete Fee. Non-compete clause in the SPA is for mutual understanding of the parties and no amount whatsoever was agreed to be paid towards non-compete restriction. He pointed that market price of the shares was always more than the price paid by the assessee per share. The Assessing Officer and the CIT(A) arbitrarily changed the share price. The Id. Counsel for the assessee asserted that SPA dated 23/05/2019 is not the first instance when the assessee had purchased share from RCL. The assessee had purchased shares in 2012 vide similar agreement dated 17/08/2012 (at page 239 to 296 of the paper book). The said agreement also contained non-compete clause. He referred to the agreement dated 17/08/2012 at page 277 of the paper book. No addition on account of non-compete clause was made at that time. Secondly, RCL (Seller) has offered income from sale of shares to tax. RCL has filed confirmation to this effect, the same is at page 299 of the paper book. The Id. Counsel for the assessee submits that since the recipient of the amount has reflected sale consideration in its books and has

offered the same to tax, the assessee cannot be held to be 'assessee in default'. To support his contention, he placed reliance on the case of Hindustan Coco Cola Beverages Pvt. Ltd., 293 ITR 226(SC). The Id. Counsel for the assessee further placed reliance on the submissions made before the CIT(A) at pages 1 to 25 of the paper book.

3. Per contra, Shri Tejinder Pal Singh Anand representing the Department supporting the order passed u/s.201/201(1A) of the Act submitted that there are two issues for the consideration: (i) valuation of Non-compete Fee; and (ii) valuation of shares. The Id. Departmental Representative submits that the Assessing Officer -TDS while passing the order u/s.201 computed the value of shares u/r.11UA of the Rules, and thereafter reduced the fair value of shares so determined from the cost of shares paid by the assessee to RCL i.e. Rs. 230 – Rs. 151.05. The difference between the two values was the value of Non-compete charges paid by the assessee to RCL. The stand of the assessee that no Non-compete Fee was paid by the assessee to RCL is contrary to the facts. The Id. Departmental Representative vehemently supporting the assessment order prayed for dismissing the appeal of assessee and modifying the order of CIT(A) so as to sustain the addition made by Assessing Officer u/s. 201/201(1A) of the Act.

4. We have heard the submissions made by rival sides and have examined the orders of authorities below. In so far as the facts narrated above, they are not in dispute. The issue in narrow in encompass before us is, Whether any Non-compete Fee was paid by the assessee to RCL? If 'Yes', value thereof.

5. The assessee had entered into SPA with RCL dated 23/05/2019 (at pages 35 to 167 of the paper book). As per the said agreement the assessee purchased 13,87,17,943 equity shares representing 21.538% share holding in "RNAM". The said shares were purchased at the agreed price of Rs.230/- per share. Thus, the total

consideration for purchase of shares paid by the assessee to RCL was Rs.30,33,98,04,686/- The aforesaid amount was paid by the assessee to RCL on 27/09/2019 and on the same date shares were received by assessee from RCL. Undisputedly, in the SPA there is a covenant (clause 12.2) with regard to Non-compete Fee. A perusal of the said clause shows that there is no mention of charges/fees to be paid by the assessee to seller of the shares to compensate for non-compete covenant in the agreement. As pointed earlier the assessee paid Rs.230/- per share to RCL. The shares of "RNAM" are listed on the Stock Exchange and the market rate of the shares as on 23/05/2019 was Rs.234/- per share and on the date of actual payment and transfer of shares on 27/09/2019 was Rs.265/- per share. This fact has not been disputed by the Revenue. Thus, on both the aforesaid dates the market price of the shares of "RNAM" was more than the cost of share paid by the assessee to RCL.

6. The Assessing Officer worked non-compete fee taking the difference between fair market value of shares determined u/r.11UA of the Rules and the cost of shares paid by the assessee to RCL at Rs 78.95 per share (i.e. Rs. 230 - Rs 151.05). The Assessing Officer has taken valuation date as 21/2/2019. Whereas, the date of SPA is 23/05/2019. No reason whatsoever is given by AO for selecting 21/02/2019 as the date of valuation .

7. In First Appellate proceedings, the CIT(A) rejected AO's valuation of non-compete fee/charges. The CIT(A) computed non-compete charges by adopting the share valuation determined for the purpose of Foreign Exchange Management Act 1999(FEMA) as per FEMA guidelines. The Id.Counsel for the assessee has referred to the letter of Chartered Accountants dated 28/06/2019 at pages 315 to 326 of the paper book wherein fair value of shares was determined on a going concern basis as on 23/05/2019 considering the average weekly high and low of VWAP of the equity shares quoted at NSE for the purpose of FEMA. It is relevant to mention here that

the price paid by the assessee for acquiring shares from RCL was lower than the market value of shares traded at the Stock Exchange on the date of execution of SPA i.e. 23/5/2019 or the date of actual payment of consideration & transfer of shares i.e. 27/09/2019. Thus, at no point of time, that is either at the time of execution of SPA or at the time of actual payment of consideration and transfer for shares the price paid by the assessee for purchase of shares exceeded the market value. Thus, there doesn't appear to be any element of cost paid by the assessee towards Non-compete charges.

8. The assessee has further brought to our notice that similar SPA was entered into between the parties in 2012. The share holders agreement dated 22/03/2012 is at pages 239 to 296 of the paper book. In the said agreement there is non-compete covenant similar to the one in the agreement dated 23/05/2019. Ostensibly, no addition on account of Non-compete clause was made in the relevant assessment year. We find that Non-compete clause in both the agreements is identical.

9. Be that as it may, from the facts emanate from the documents on record no cost towards Non-compete Fees is decipherable. Since, no cost is attributable towards Non-compete Fee, the provisions of section 194J are not triggered.

10. The assessee has taken an alternate plea that since, RCL(Seller) has disclosed the amount of purchase consideration in its books and has offered the same to tax the assessee cannot be held as 'an assessee in default' in the light of judgment rendered in the case of Hindustan Coco Cola Beverages Pvt. Ltd. vs. CIT(supra). The seller of the shares i.e. RCL has certified that the company has recorded entire amount of consideration for sale of shares i.e. Rs.3031,81,26,890/- in their books as sale of shares and has duly reported/offered the said consideration under the head 'Capital Gains' in the return of income for Financial Year 2019-20. Since, the seller had incurred loss for the year, there was no tax liability for the year under

consideration. The seller has also furnished acknowledgement of the Income Tax Return for the Assessment Year 2020-21 reflecting loss of Rs.4513,10,63,422/-.

11. Since, we have held that no amount was paid by the assessee towards Non-compete Fees, the assessee had no obligation to deduct tax at source u/s. 194J of the Act. The impugned order is set-aside and the appeal of the assessee is allowed.

12. Since, we have accepted appeal of the assessee, the appeal by the Revenue is liable to be dismissed as the Revenue had assailed the findings of CIT(A) in granting partial relief to the assessee on account of Non-compete charges. As a sequitur to our findings allowing appeal of assessee, appeal of the Revenue is dismissed.

13. In the result, appeal by the assessee is allowed and appeal by the revenue is dismissed.

Order pronounced in the open court on Thursday the 06th day of April, 2023.

Sd/-

(GAGAN GOYAL)

लेखाकार सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated 06/04/2023

Vm, Sr. PS(O/S)

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. The PCIT
- 4.. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar), ITAT, Mumbai