

आयकर अपीलिय अधिकरण
दिल्ली पीठ "डी", दिल्ली
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री नवीन चंद्र, लेखाकार सदस्य के समक्ष

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D", DELHI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI NAVEEN CHANDRA, ACCOUNTANT MEMBER

आअसं. 2532/दिल्ली/2023 (नि. व. 2016-17)
ITA No.2532/DEL/2023 (A.Y.2016-17)

Income Tax Officer,
International Taxation Ward-3(1)(1),
Delhi 110002

..... अपीलार्थी/ Appellant

बनाम Vs.

M/s Toshiba Corporation
3rd Floor Building 10B, DLF Cyber City Phase-II,
Gurgaon, Haryana 122002
PAN: AACCT-4821-F

..... प्रतिवादी/ Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Vijay B Vasanta, CIT-DR
प्रतिवादीद्वारा/ Respondent by : S/Shri Deepak Chopra, and
Ankul Goyal, Advocates

सुनवाई की तिथि/ Date of hearing : 18/07/2024
घोषणा की तिथि/ Date of pronouncement : 26/07/2024

आदेश/ORDER

PER VIKAS AWASTHY, JM:

This appeal by the Department is directed against the order of Commissioner of Income Tax (Appeals)-43, New Delhi [in short 'the CIT(A)'] dated 22.06.2023, for assessment year 2016-17 passed under section 201 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act')

2. The department has assailed the order of CIT(A) by raising following grounds of appeal:-

(i) *"Whether on the facts and circumstances of the case the Ld.CIT(A) has erred in allowing the appeal of the assessee by holding that the assessee is not 'assessee in default' as it had rightly effected the applicable TDS on the long term capital gain arising in the hands of the sellers of the shares without appreciating the fact that valuation of shares by applying DCF method based on the premise of going concern of the company whose shares have been transacted in this case i.e. UEM India Pvt. Ltd. is in contradiction to the financials of the company as independent auditors had also raised serious doubts about the company's ability to continue as a going concern on account of the fact that it incurred recurring losses from year after year and there is no commercial rationale to assign the fair market value of the share at such a high price whose Net Asset Value (NAV) is in negative."*

(ii) *"Whether on the facts and circumstances of the case the Ld.CIT(A) has erred in allowing the appeal of the assessee by holding that re-characterization of nature of income by the AO is incorrect without appreciating the fact that transactions in the garb of shares is actually the transfer of proportionate value of underlying assets as Net Asset Value of company whose shares have been transacted is negative and there exists no commercial rationale to attribute the value of shares of the said company at such a high price."*

(iii) *"Whether on the facts and circumstances of the case the Ld. CIT(A) has erred in allowing the appeal of the assessee by holding that the assessee is not 'assessee in default' as it had rightly effected the applicable TDS on the long term capital gain arising in the hands of the sellers of the shares without appreciating the fact that valuation report for application of DCF method to arrive at fair price of shares had adopted several variables such as return on cost of capital, projected revenue in future years, projected profit margin etc and the assessee failed to substantiate the basis for these variables during the proceedings before the AO."*

3. The facts of the case in brief as emanating records are; the assessee is a non-resident multinational conglomerate with its headquarters in Japan. In Financial Year 2015-16 relevant to the assessment year under appeal, the assessee had purchased 12,70,276 unlisted equity shares of UEM India P. Ltd.

from its non-resident individual shareholders. The details of said shareholders, consideration paid, TDS, etc. are as under:-

| Sellers | No. of shares purchases | Purchase price pershare | Total consideration | Capital gain | TDS @ 11.536% (including surcharge & cess) |
|-----------------|-------------------------|-------------------------|---------------------|--------------|--|
| Sangita Kshetry | 5,74,418 | 248.12 | 142,524,594 | 123,001,903 | 14,189,500 |
| Hersh Kshetry | 6,27,218 | 248.12 | 155,625,330 | 151,965,755 | 17,530,770 |
| Nina Kshetry | 68,640 | 248.12 | 17,030,957 | 16,712,469 | 1,927,950 |

4. The assessee at the time of payment of consideration for purchase of shares deducted tax at source@10% plus applicable surcharge and education cess on total consideration paid. The Assessing Officer (AO) initiated proceedings u/s. 201(1)/201(1)(A) of the Act. The AO issued show cause notice dated 03.08.2021 to the assessee alleging that the transaction of purchases of share is actually a transaction of purchase of assets of UME India Pvt. Ltd. and asked the assessee to show cause as to why the capital gains should not be taxed as short term capital gains. The AO vide order dated 12.11.2021 passed u/s. 201(1)/201(1)(A) of the Act held the assessee as “assessee in default” for non deduction of tax at source.

5. Aggrieved by the aforesaid assessment order, the assessee carried the issue in appeal before the CIT(A). The CIT(A) vide impugned order deleted the addition holding that the action of the TDS Officer is not correct in re-characterizing the

nature of transaction from 'sale of shares' to 'sale of assets'. The CIT(A) has further recorded a finding of fact that the assessee has deducted and deposited TDS @11.53% on the consideration paid to non-resident sellers of the shares. Against the aforesaid findings of the CIT(A), the department is in appeal before the Tribunal.

6. Shri Vijay B Vasanta representing the department vehemently defending the assessment order prayed for reversing findings of the CIT(A).

7. Per contra, Shri Deepak Chopra appearing on behalf of the assessee strongly supporting the impugned order prayed for up-holding the same. The Id. Counsel for assessee stated that the Assessing Officer has exceeded his jurisdiction in changing the nature of transaction in proceedings u/s. 201 of the Act. He further contended that the assessee had deducted tax at source on the payments made for purchase of shares. Once the assessee has deducted tax at source and has deposited the same to Govt. exchequer, the assessee cannot be held to be "assessee in default".

8. We have heard the submissions made by rival sides and have examined the orders of authorities below. It is an undisputed fact that the assessee has deducted tax at source on the payments made for purchase of shares from the non-resident sellers namely; Sangista Kshetry, Hersh Kshetry & Nina Kshetry.

9. A perusal of order passed u/s. 201(1)/201(1A) of the Act shows that the Assessing Officer has passed an order purely on surmises and conjectures changing the nature of transaction of 'sale of shares' to 'sale of assets'. The AO in proceedings u/s. 201 of the Act has gone beyond his jurisdiction in re-

characterizing nature of transaction. Further it is an undisputed fact that the assessee has deducted tax at source @10% plus surcharge on consideration paid for purchase of shares and has deposited the TDS to the Government exchequer. Thus, in light of undisputed facts the assessee cannot be held as “assessee in default”. We find no infirmity in the impugned order; hence, the same is upheld.

10. In the result, appeal of the Revenue is dismissed, being devoid of any merit.

Order pronounced in the open court on Friday the 26th day of July, 2024.

Sd/-

(NAVEEN CHANDRA)

लेखाकार सदस्य/ACCOUNTANT MEMBER

दिल्ली/Delhi, दिनांक/Dated 26/07/2024

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

NV/-

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

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

BY ORDER,

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(Dy./Asstt. Registrar) ITAT, DELHI