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IN THE HIGH COURT OF DELHI AT NEW DELHI**Date of Decision: 29.01.2018**

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ITA 289/2016

PR. COMMISSIONER OF INCOME TAX-11 Appellant
Through: Mr. Rahul Chaudhary, Sr. Standing
Counsel for Income Tax Department.

versus

SATYA SHEEL KHOSLA Respondent
Through: Mr. C.S. Aggarwal, Sr. Adv. with
Ms. Mohna M. Lal, Mr. Madhur Aggarwal &
Mr. Uma Shankar, Advs.

CORAM:**HON'BLE MR. JUSTICE S. RAVINDRA BHAT****HON'BLE MR. JUSTICE A. K. CHAWLA****S. RAVINDRA BHAT, J.(ORAL)**

1. The sole question of law urged by the Revenue in its appeal under Section 260A of the Income Tax Act, 1961 (hereafter referred to as "the Act") was whether the amount of ₹1,32,00,000/- per annum received by the assessee/respondent for two years was more of a revenue character and was therefore taxable by virtue of Section 17(3) or under Section 28(va) of the Act.

2. The facts are that the assessee was promoter and Director of Integra Overseas Pvt. Ltd. (hereafter referred to as "Integra") established to manufacture two-wheelers in India. On account of shareholding transfer, he was appointed as Managing Director of



Integra; M/s Suzuki Motor Corporation became a major shareholder in Integra and eventually that company's name was changed to M/s Suzuki Motorcycle India Pvt. Ltd. The assessee terminated his relationship as a joint venture partner in M/s Suzuki Motorcycle India Pvt. Ltd. and stepped down as Managing Director of that company. He entered into an agreement whereby Suzuki India agreed to pay ₹1.32 crores to him for not providing "the benefit of his knowledge of regulatory matters, negotiating skills and strategic planning expertise to any other person in India in the two wheeler segment for a period of two years from the date of the Agreement". The assessee claimed that this amount received was exempt on the basis of an opinion by a lawyer. He also placed on record the agreement between himself and Suzuki India. The recitals of that agreement read as follows:

"WHEREAS Suzuki Motor Corporation, Japan ("SMC") and Mr. Sheel have been joint venture partners in the Company;

AND WHEREAS pursuant to a joint venture agreement between Mr. Sheel and SMC, Mr. Sheel was appointed as the managing director of the Company by virtue of his being the Indian joint venture partner;

AND WHEREAS Mr. Sheel wishes to step down as managing director of the Company as he is no longer the joint venture partner of SMC:"

3. The AO was of the opinion that the amounts received were revenue in character and therefore brought them to tax.



The CIT(A) rejected the contentions of the assessee and upheld the Revenue's arguments. The ITAT relied upon *Ram Pershad v. Commissioner of Income Tax* (1972) 86 ITR 122 and also *Guffic Chem. P. Ltd. v. Commissioner of Income Tax* (2011) 332 ITR 602. It thereafter held as follows:

"We agree with Shri Aggarwal that as the sum of Rs. 1,32,00,000 was paid by Suzuki India to the appellant in consideration of not providing "the benefit of his knowledge of regulatory matters, negotiating skills and strategic planning expertise to any other person in India in the two wheeler segment" it cannot be regarded as non-competition fee because it has not been paid for not competing with the payer, but for not providing the benefit of his knowledge, expertise, skills etc. to any other person in the two wheeler segment. The views expressed by Shri Bhardwaj in his opinion and the contention by Shri Aggarwal that section 28(va) taxes a sum received for a restrictive covenant in relation to a business, but not a profession is also supported by the observations in paragraph 28 on page 692 of Kanga and Palkhivala's "Law and Practice of Income-tax" that clause (va) of section 28 of the Income-tax Act "taxes a sum received for a restrictive covenant in relation to a business, but not a profession"; and, therefore, does not fall within the ambit of section 28(va). We may add that in the case of Guffic Chem. P. Ltd. vs. Commissioner of Income-tax (ibid) at page 606 the Hon'ble Supreme Court of India has observed that compensation attributable to a negative/restrictive covenant is a capital receipt. Hence, as the sum received by the appellant does not fall within the ambit of section 28(va), it is not chargeable to tax as it constitutes a capital receipt."



4. Counsel for the Revenue urges that the ITAT fell into error in holding that the amounts essentially received as non-compete fee, were capital and not income. He expressly referred to Section 28(va) and submitted that even prior to this amendment through Finance Act of 2016 (effective from 01.04.2017), amounts received towards restraining the recipient for carrying on any business or commercial activity were covered. He highlighted that the amendment bringing to tax such amounts was made with effect from 2002 in view of the previous decisions of the Supreme Court. It was contended that regardless of the insertion of the expression “profession”, to the Act in 2017, the object of the nature of activity carried on by the payer of the assessee was relevant. Learned senior counsel for the assessee submitted that this Court should not interfere with the findings of the ITAT. It was submitted that the law as it stood and it was interpreted by the Supreme Court in *Guffic Chem. P. Ltd. (supra)* was applied and there is no infirmity to the impugned order.

5. In the present case, it is apparent that the assessee received ₹1.32 crores for only 2 years. Concededly, there can be two ways of looking at such receipts. In all such cases, there cannot be a straight jacket black and white formula; the analysis to be conducted by the tax authorities or administration has to be a fact dependent one. The assessee had a dual role – both as shareholder and as Managing Director. As Managing Director, he received only the non-compete amounts for two years. It is quite possible that he could have been given this amount as a capital receipt at



one go for whatever reasons and that the amount be spread over two years. Undoubtedly, the Parliament has intervened and deemed that such amounts – so far as they relate to consideration for professionals should be treated as income by virtue of the amendment of 2017. However, with respect to the Revenue's contention that regardless of that amendment even in the pre-existing law, this amount had to be treated as receipts and therefore taxable as income, cannot be accepted. Recently, the Gujarat High Court in *Commissioner of Income Tax v. Anjum G. Balakhia* (2017) 393 ITR 320 analyzed the relevant provisions of Section 28 – and also noticed any subsequent amendments. The Court took note of *Guffic Chem. P. Ltd. (supra)*. It also noted *Commissioner of Income Tax v. Sapthagiri Distilleries Ltd.* (2015) 53 Taxmann.com 218 (SC), where the Supreme Court had held that compensation received towards loss of source of income and non-competition fee would be treated only as capital receipts and not liable to tax. Having regard to these decisions and the fact that the view of the ITAT is a plausible one, no question of law arises. The appeal is, therefore, dismissed.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

JANUARY 29, 2018
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