

Sum received on termination of agency's term is a capital receipt as it puts an end to income earning apparatus

Summary – The High Court of Calcutta in a recent case of J. L. Morrison (India) Ltd., (the Assessee) held that where Assessee entered into an agreement with a German company in India for producing and selling products of said foreign Company in India for a specific period and after expiry of period of agreement, foreign company made gratuitous payment to assessee for issuing a NOC for setting up its subsidiary company in India, said amount being capital receipt in hands of assessee, could not be brought to tax.

Facts

- The assessee entered into an agreement with a German company for producing and selling products of said foreign company in India for a specific period.
- After expiry of period of agreement, the German company paid Rs. 18 crore to assessee as one time settlement for termination of contracts of producing and selling of the products of the latter company in India as well as issuing a NOC for setting up a 100 per cent subsidiary by them in India.
- The Assessing Officer passed assessment order under section 143(3) accepting assessee's claim that said amount was to be treated as capital receipt.
- Subsequently, the Commissioner passed a revisional order setting aside assessment on four grounds, firstly amount received from as compensation was taxable under the head 'other source of income; secondly, there was excess debit of royalty for use of trademark of German Company, thirdly there was excess allowance of payment of royalty and finally there was excess debit on account of consumption of raw materials.
- The Tribunal, however, set aside revisional order holding that assessment order was passed after detailed examination of material on record and thus view taken by Assessing Officer was one of the possible views.
- On revenue's appeal:

Held

- The only question to be considered at this stage is as to whether the Assessing Officer in allowing the claim of the assessee with respect to the four questions raised by the Commissioner including the receipt of sum of Rs.18 crore from the German Concern took a possible view of the matter. There was absolutely no attempt on the part of revenue to demonstrate that the Assessing Officer did not take a possible view in accepting the contention of the assessee.
- The parent contract did not provide for payment of any compensation or any sum on any account whatsoever. Upon expiry of the contract, the assessee was liable to surrender the technical know-how and cease to manufacture the goods. The assessee was not entitled in any event, upon expiry

of the contract, to prevent the German Concern from setting up its 100 per cent subsidiary for the purpose of manufacturing and marketing its goods.

- In case the German Concern paid the aforesaid sum for the purpose of securing an NOC from the assessee, even if it was assumed that by agreeing to issue the NOC, assessee agreed to have its manufacturing and trading structure impaired resulting in loss of his source of income, the receipt in that case would be a capital receipt. If on the other hand it was a gratuitous payment the receipt would still be a capital receipt.
- The point as regards disallowance of 25 per cent of the royalty paid by the assessee is evidently based on omission on the part of the Commissioner to notice that the assessee was not entitled to use the technical know-how after expiry of the contract. The point as regards excess sum having been allowed to be debited on account of raw material consumed is obviously based on a misunderstanding of the nature and purpose of notes on accounts required under the Companies Act.
- Thus, the Tribunal was justified in holding that the Assessing Officer took a possible view.
- If the Assessing Officer has taken a possible view, it cannot be said that the view taken by him is erroneous nor the order of the Assessing Officer in that case can be set aside in revision. It has to be shown unmistakably that the order of the Assessing Officer is unsustainable. Anything short of that would not clothe the Commissioner with jurisdiction to exercise power under section 263.
- Whether the assessment order passed without application of mind is basically a question of fact. The Tribunal has held that the assessment order was not passed without application of mind. The records of the assessment including the order sheets go to show that appropriate enquiry was made and the assessee was heard from time to time
- There is evidence to show that the Assessing Officer had required the assessee to answer 17 questions and to file documents in regard thereto. It is difficult to proceed on the basis that the 17 questions raised by him did not require application of mind. Without application of mind the questions raised by him in the annexure to notice under section 142 (1) could not have been formulated.
- The Assessing Officer was required to examine the return filed by the assessee in order to ascertain his income and to levy appropriate tax on that basis. When the Assessing Officer was satisfied that the return filed by the assessee, was in accordance with law, he was under no obligation to justify as to why was he satisfied.
- The fact, that all requisite papers were summoned and thereafter the matter was heard from time to time coupled with the fact that the view taken by him is not shown by the revenue to be erroneous and was also considered by the Tribunal to be a possible view, strengthens the presumption under clause (e) of section 114 of the Evidence Act. A *prima facie* evidence, on the basis of the aforesaid presumption, is thus, converted into a conclusive proof of the fact the order was passed by the Assessing Officer after due application of mind.

- The Tribunal had before them the records of both the Assessing Officer and the Commissioner. After examining the records both of the Commissioner and the Assessing Officer, the Tribunal reached the conclusion that the order of the Assessing Officer was not passed without application of mind.
- In view of aforesaid, the Tribunal was justified in setting aside revisional order passed by the Commissioner. In the result, the revenue's appeal is dismissed.