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The transaction couldn't be deemed as international transaction due to its inadvertently disclosure in Form 3CEB

Summary – The Delhi ITAT in a recent case of DLF Hotel Holdings Ltd., (the Assessee) held that where assessee-company gave certain advance to its AE for expansion of its business abroad which was converted into equity within three months, it could not be regarded as international transaction of interest free loan merely on ground that same was reflected in that way by assessee inadvertently in Form 3CEB

Facts

- The assessee-company had aim towards building its portfolio in premium segment hotels, resorts, serviced apartments, family recreational clubs in major cities and tourist destination. The decisions so taken had been guided by a vision to make its mark globally in countries like Sri Lanka, Thailand, Morocco, Bhutan, France, USA, Indonesia etc.
- During relevant year, assessee-company advanced certain loans to its AEs, DLF Global Hospitality Limited Cyprus (DGHL)/DLF Cyprus. The loan was shown as an interest free loan in Form No. 3 CEB.
- In transfer pricing proceedings, assessee claimed that the loan was advanced with the intention of converting it into equity and it was in fact converted into equity within 3 months. The assessee explained that the loan was so structured as the assessee was not sure of the subsidiary company's capacity to utilize the funds for the intended purposes. It was also contended that on the utilization of the funds it was capitalized as equity and, hence, it was never a loan and was always a quasi debt.
- The TPO rejected assessee's explanation and considered transaction in question as one of interest free loan granted to AE. On basis of information received from CRISIL, the TPO was of the view that 17.26 per cent rate of interest appeared to be most reasonable and appropriate which was proposed to be applied on monthly closing balances from the period 1-4-2007 to 31-3-2008.
- The DRP confirmed action taken by the TPO.
- On appeal:

Held

- In the facts of case, the question arises for consideration is whether it is a case of an international transaction or not. The revenue claims that the fact of showing the interest free loan as an international transaction to its subsidiary AE in Form 3CEB ipse dixit as considered in *Perot Systems TSI (India) Ltd.* v. *Dy. CIT* [2010] 37 SOT 358 (Delhi) attracts the provisions of Chapter X of the Act. The consistent objections posed by the tax payer though have been acknowledged by way of reproduction in the orders have not been considered necessary to address whether adjustment under Chapter X is warranted. The specious and facile reasoning that international transaction is acknowledged in Form 3CEB by the assessee itself cannot form the basis of the conclusion.

- At best it can form the starting point of the enquiry. In the light of the evidences on record and considering the arguments, it can be said that mere disclosure of the interest free loan as an international transaction by the tax payer in Form 3CEB would neither act as an estoppel nor foreclose the tax payer from claiming the same as not being an international transaction. The transaction will become international transaction necessitating arm's length adjustment if the ingredients of the transaction bring it within the purview of Chapter X.
- The disclosure made by way of abundant caution or due to ignorance of law on facts cannot be the basis of the decision of the tax authorities more so if the assessee raises objections questioning the same. The decision of the tax authorities has to be based on facts supporting the conclusion. The tax authorities cannot shy away from addressing the arguments that it was a shareholder activity necessitating immediate availability of funds in the hands of the AE in order to attain the aims and vision of the holding company.
- The law does not permit or contemplate an Appellate forum or an Authority any justification for ignoring the arguments of the tax payer based on facts made available to them. The consistent fact on record is that the tax payer was the sole shareholder in its newly created subsidiary AE whose success in the venture of increasing its portfolio directly impacted the business interests. The fact that incapability to generate resources and experience was clearly lacking is not in doubt. Though the commercial expediency by way of need or necessity of the same cannot be questioned by the revenue however facts leading to and justifying the argument need to be addressed.
- It is well settled that the tax assessors cannot sit in the arm chair of the businessman. It is not within the domain of the tax authorities to insist that the aim of enhancing the global reach of the portfolio should be attained through a pure loan and not by way of shareholding activity. Further, there was nothing on record to disbelieve the explanation that the AE did not demonstrate capability to fully utilize the funds for the intended purpose in a new area being a new territory. Thus the argument that in order to maintain control and command over the funds advanced fulfiling regulatory conditions at Cyprus etc. were required to be given due consideration. The stated intent of the tax payer that when the funds were fully utilized and exhausted by applying towards the intended purposes it was to be converted into equity which has been done.
- Thus, the arguments that the funds advanced till then as an interest free loan, if it has to be disbelieved, has to be shown as sham or bogus transaction. The facts are not so. In the face of the above consistent claim demonstrated by the assessee by way of facts and supporting evidences which stand unassailed by the revenue on record, no justification was found either in fact or law to uphold the revenue's stand that the tax payer must necessarily be bound by the disclosure made in Form No. 3CEB.
- There is nothing on record to support the conclusion that the interest free loan must necessarily be deemed to be an interest earning activity and not an activity to capitalize the opportunity cost for investing in new territories. In the facts of the present case there is not even a whisper of a suggestion that it was a bogus transaction, as admittedly shares have been allotted. There is nothing

in the provisions of the Act which empowers the tax authorities to insist that the interest free loan towards its AE for capitalization of opportunity cost of entering in new territories must necessarily by modified and re-characterized into a loan simplicitor and considered to be an activity for earning interest.

- The tax authorities must bring on record facts and evidences impacting the veracity of the claim of the assessee and demonstrate the hollowness of the assessee's claim. No such exercise has been done to counter the consistent claim of the assessee demonstrated by facts on record that the intention was to capitalize the opportunity cost and not to encash the opportunity to best utilize the available funds. In the facts as they stand, the claim of the assessee has to be allowed.
- Nothing has been brought on record by the revenue to justify re-characterization of the financial arrangement explained as "quasi equity" and treat it as a loan simplicitor. The commercial expediency and business strategy of the assessee explained consistently on record found to be factually supported stands unassailed on record. The documentary evidence and arguments cannot be brushed aside or ignored as a meaningless rhetoric, merely to be reproduced in the orders but in reality discarded for all practical purposes without assigning any reason. Addressing the facts and evidences is imperative and the inherent strength of justice dispensation system lies in the unbiased and fair consideration of every case by the dispensers of justice. Faith in their wisdom and fairness should not be allowed to be eroded.
- A mechanical approach erring in favour of the revenue is neither expected nor acceptable as it would erode the very bed rock of the trust reposed in the system and would lead to a breeding ground for skeptism and cynicism in the public towards the justice dispensers. This dangerous trend should be nipped in the bud. No doubt the justice dispenser is not expected to be careless in allowing relief but to deny where it ought to be given will only encourage the classical biblical dislike of a 'tax collector'.
- No doubt, the tax authorities are expected to address contradictions in facts pleaded and wherever evidences are found to be not relevant or reliable then they must be rebutted/disproved by evidences. No authority need be cited to hold that the explanation of the assessee is to be accepted or rejected by the tax authorities by addressing the facts and not avoiding to address the same. The tax authorities are not expected to reproduce the explanation as a mere meaningless rhetoric and arrive at a conclusion without addressing and meeting the explanation and evidences relied upon by the assessee. If the tax payer claims it is an interest free loan as a share holding activity, to be utilized by the AE for acquiring and increasing its portfolio and on utilization and fulfilling the internal and external requirements by way of permissions and procedures of the regulatory authority etc. it is to be converted into equity and that too at a premium then it is the correctness of this claim which is to be specifically addressed and decided. Merely because it is shown as an international transaction itself will not decide the claim.
- Thus on a consideration of the above gamut of facts, circumstances, arguments, judicial precedent, the ground raised by assessee is allowed.