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Indian Co. couldn't be treated as agent if its shares held by foreign co. were sold to another foreign Co.

Summary – The High Court of Madras in a recent case of WABCO India Ltd., (the Assessee) held that where certain shares of assessee, an Indian company, were held by a foreign company which were subsequently transferred to another non-resident company, in view of fact that transfer took place outside India and assessee had no role in such transfer, it could not be treated as agent of foreign company under sec. 163(1) (c) qua deemed capital gain purportedly earned by foreign company

Facts

- The assessee-company was engaged in the business of designing, manufacturing and marketing conventional braking products, advance braking systems and other related air assisted products and systems. 75 per cent of the shares of the assessee were held by a foreign company namely 'Clayton Dewandre' and balance 25 per cent held by the public.
- During relevant year, Clayton Dewandre transferred its entire shareholding to WABCO Singapore. The consideration for the transfer was settled by WABCO, Singapore, by issuance of its own shares to Clayton Dewandre by execution of a Share Transfer Agreement between Clayton Dewandre and WABCO, Singapore.
- A show-cause notice under section 163(1)(c) was issued to assessee wherein it was alleged that capital gains had directly arisen to Clayton Dewandre as a result of the consideration received from the assessee. The respondent, therefore, proposed to treat assessee as agent of Clayton Dewandre in respect of tax liability that might arise for assessment year in question, on account of capital gain tax.
- The assessee challenged aforesaid notice by filing a writ petition. The petition was dismissed by the Single Judge on the sole ground that the assessee had a right to give a reply to the impugned show-cause notice and as such, there was no merit in the petition.
- On writ appeal:

Held

- The short question in this appeal is whether the writ petition ought to have been dismissed on the sole ground that the appellant had a right of reply to the show-cause notice.
- A show-cause notice is not ordinarily interfered with in proceedings under article 226 of the Constitution of India. However, in exceptional cases, a show-cause notice might be interfered with in proceedings under article 226 of the Constitution of India, for example, when the show-cause notice is without jurisdiction and/or that conditions precedent for a show-cause notice are absent and/or the acts alleged in the show-cause notice do not disclose any case for action against the noticee called upon to show-cause, a show-cause notice under section 163(1)(c) of the IT Act would necessarily have to disclose a liability on the part of a noticee.

- It is well settled that the power to issue prerogative writs under article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. The High Court, having regard to the facts of the case, has the discretion to entertain or not to entertain a writ petition. However, the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But, the alternative remedy has been consistently held by the Supreme Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of a fundamental right; where there has been a violation of principle of natural justice; and where an order or alternatively proceedings are without jurisdiction or the constitutional vires of an Act is under challenge.
- It is true, as contended by the respondent, that quoting of a wrong provision in the impugned show-cause notice does not invalidate the show-cause notice. The question is whether the show-cause notice was at all without jurisdiction; whether respondent wrongly assumed jurisdiction by erroneously deciding jurisdictional facts; whether in the facts and circumstances of the case, the appellant at all had any liability in respect of the capital gain in question; and whether the appellant could be said to be an agent under section 163(1)(c).
- The Division Bench in *General Electric Co.* v. *Dy. DIT* [2011] 13 taxmann.com 26/201 Taxman 341/[2012] 347 ITR 60 (Delhi) held that no case was made out by the department that in respect of transfer of share to a third party, that too outside India, the Indian company could be taxed when the Indian company had no role in the transfer. Merely because those shares related to the Indian company, that would not make the Indian company as agent *qua* deemed capital gain purportedly earned by the foreign company.
- The issue in instant writ appeal is covered by the aforesaid judgment of the Delhi High Court. For the reasons discussed above, the writ appeal is allowed. The judgment and order under appeal is set aside and consequently, the impugned show-cause notice is also set aside.