

IT : Where assessee while computing long-term capital gain arising on sale of shares of its Indian subsidiary, claimed deduction of legal/professional fees paid to lawyers/accounting firms, in view of fact that services rendered by law firms were in relation to advise on sale of entire shareholding of Indian subsidiary and included preparation of share sale/purchase agreement, share transfer forms, etc., it could be concluded that expenditure was in relation to transfer of shares of Indian subsidiary and, thus, assessee's claim for deduction was to be allowed

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IN THE ITAT MUMBAI BENCH 'I'

AIG Offshore Systems Services Inc.

v.

Assistant Commissioner of Income tax International Taxation, Circle-1(1) Mumbai*

**SAKTIJIT DEY, JUDICIAL MEMBER
AND RAJESH KUMAR, ACCOUNTANT MEMBER
IT APPEAL NO. 6715 (MUM) OF 2014
[ASSESSMENT YEAR 2010-11]
JANUARY 18, 2019**

Section 48 of the Income-tax Act, 1961 - Capital gains - Computation of (Deductions) - Assessment year 2010-11 - Assessee, a foreign company, was carrying on activities in India as a Foreign Institutional Investor (FII) - In relevant assessment year, assessee sold shares held in its Indian subsidiary - In return of income, assessee offered long-term capital gain on account of sale of shares in Indian subsidiary - While computing long-term capital gain on sale of shares, assessee claimed deduction of legal/professional fees paid to lawyers/accounting firms for assisting in transfer of shares - Assessing Officer opined that expenditure claimed by assessee could not be considered to have been incurred wholly and exclusively in connection with transfer of shares - He thus rejected assessee's claim - It was noted that services rendered by law firms were in relation to advise on sale of entire shareholding of Indian subsidiary and included preparation of share sale/purchase agreement, rendering advise and preparing necessary closing documentation including board resolution, share transfer forms, etc. - Whether, on facts, it was apparent that expenditure was in relation to transfer of shares of Indian subsidiary and, thus, assessee's claim for deduction was to be allowed - Held, yes [Para 8] [In favour of assessee]

FACTS

- The assessee, a foreign company, was carrying on activities in India as a Foreign Institutional Investor (FII). In the relevant assessment year, the assessee sold shares held in its Indian subsidiary.
- In the return of income, the assessee offered long-term capital gain, on account of sale of shares in the Indian Subsidiary. While computing long-term capital gain on sale of shares, the assessee has claimed deduction of certain expenditure incurred

towards transfer of shares.

- The assessee submitted that the said expenditure represented legal/professional fees paid to lawyers/accounting firms for assisting in transfer of shares.
- The Assessing Officer opined that the expenditure claimed by the assessee could not be considered to have been incurred wholly and exclusively in connection with transfer of shares. He thus rejected assessee's claim.
- The Commissioner (Appeals) confirmed order passed by Assessing Officer.
- On second appeal:

HELD

- Clause (i) of section 48 provides for computation of capital gain after deducting expenditure incurred wholly and exclusively in connection with the transfer of capital asset from the full value of consideration received or accruing as a result of such transfer. Therefore, the condition precedent for claiming expenditure under the aforesaid clause is, it must have been incurred wholly and exclusively in connection with the transfer of the capital asset. The phraseology 'in connection with the transfer of capital asset' used in the aforesaid provision has been interpreted by the Jurisdictional High Court in *CIT v. Shakuntala Kantilal* [\[1991\] 190 ITR 56/58 Taxman 106 \(Bom.\)](#) to be wider in scope than the expression 'for the transfer'. The Jurisdictional High Court held that payment of any amount which is absolutely necessary to effect the transfer will be an expenditure covered by section 48(i). The Jurisdictional High Court held that if the assessee incurs certain expenditure for removing any encumbrance over the asset, it will qualify for deduction under section 48(i) of the Act, since, without removing such encumbrance sale or transfer could not be effected.
- Thus, the principle of law which emerges from the aforesaid decision is to the effect that any expenditure intrinsically connected to the transfer of the capital asset is allowable as deduction under section 48(i) of the Act. [Para 7]
- In the present case, undisputedly, in the relevant previous year, the assessee has transferred/sold shares of its Indian Subsidiary and has offered the income from such transfer as long-term capital gain. The Assessing Officer himself in the assessment order has mentioned that the transaction relating to transfer of shares in the Indian Subsidiary has been termed as Project Genesis. The correspondences between the assessee and the Advocates/Accounting Firms clearly demonstrates that the legal/professional services were rendered in connection with Project Genesis. The scope of work further clarifies that services to be rendered are in relation to advise on sale of entire shareholding of the Indian Subsidiary and included preparation of share sale/purchase agreement, rendering advise on and preparing necessary closing documentation including board resolution, share transfer forms, etc. Further, the invoices raised by the advocates/professionals clearly indicated that they were in connection with legal/professional services rendered for Project Genesis.
- Therefore, there cannot be any room for doubt that the expenditure was in relation to the transfer of shares of the India Subsidiary termed as 'Project Genesis'. As could be seen from the scope of work for which the services were rendered by the legal/professional firm, it is closely and intrinsically related to transfer of shares of the Indian Subsidiary. Therefore, the expenditure incurred is wholly and exclusively

in connection with the transfer of shares of the Indian Subsidiary and same qualifies for deduction under section 48(i). Non-disclosure/non-mentioning the name of the ultimate buyer of the shares in no way militates against the fact that the expenditure incurred by the assessee on account of legal and professional fees paid is in connection with transfer of shares.

- Thus, in view of the aforesaid, the assessee's claim of deduction is allowable under section 48(i) of the Act. [Para 8]
- In the result, assessee's appeal is allowed. [Para 9]

CASE REVIEW

CIT v. Shakuntala Kantilal [\[1991\] 58 Taxman 106 \(Bom.\)](#) and *V.A. Vasumathi v. CIT* [\[1980\] 4 Taxman 94 \(Ker.\)](#) (para 8) *followed*.

CASES REFERRED TO

CIT v. Shakuntala Kantilal [\[1991\] 190 ITR 56/58 Taxman 106 \(Bom.\)](#) (para 4), *V.A. Vasumathi v. CIT* [\[1980\] 123 ITR 94/4 Taxman 94 \(Ker.\)](#) (para 4), *Compagnie Financiers Hamon, In re* [\[2009\] 310 ITR 1/177 Taxman 511 \(AAR - New Delhi\)](#) (para 4), *GIC Housing Finance Ltd. v. Addl. CIT* [IT Appeal No. 22 (Mum.) of 2016, dated 21-8-2018] (para 4) and *Mateen Pyarali Dholkia v. Dy. CIT* [\[2018\] 17 ITD 294/94 taxmann.com 294 \(Mum.\)](#) (para 5).

P.J. Pardiwala and **Ms. Aarti Sathe** *for the Appellant*. **N. Padmanabhan** *for the Respondent*.

ORDER

Saktijit Dey, Judicial Member - Aforesaid appeal has been filed by the assessee challenging the order dated 30th June 2014, passed by the learned Commissioner of Income Tax (Appeals)-10, Mumbai, for the assessment year 2010-11.

2. The dispute in the present appeal is confined to disallowance of assessee's claim of deduction under section 48(i) of the Income Tax Act, 1961 (for short "*the Act*").

3. Brief facts are, the assessee, a foreign company, is carrying on activities in India as a Foreign Institutional Investor (FII). In the financial year relevant to the assessment year in dispute, the assessee had sold 23,10,498 shares held in its Indian Subsidiary viz. AIG Systems Solutions Pvt. Ltd. In the return of income filed for the impugned assessment year, on 15th August 2010, the assessee offered long term capital gain of Rs. 5,54,49,453, on account of sale of shares in the Indian Subsidiary. The return of income filed by the assessee was selected for scrutiny and in course of assessment proceedings, the Assessing Officer while examining the computation of total income filed by the assessee along with the return of income noticed that for computing long term capital gain on sale of shares, the assessee has claimed deduction of U.S. \$ 13,27,609, as expenditure incurred towards transfer of shares. Therefore, the Assessing Officer called upon the assessee to furnish necessary details relating to the expenditure claimed and also justify the allowability of such claim. In response, it was submitted by the assessee that the said expenditure represents legal/professional fees paid to lawyers/accounting firms for assisting in transfer of shares. In support of such claim the assessee also furnished supporting evidences indicating the payment made to different persons/entities. After verifying the details submitted by the assessee, the Assessing Officer noted that the invoices raised by different entities were on account of professional fees rendered in connection with "*Project Genesis*", relating to transfer of shares of the Indian subsidiary. After verifying the details, the Assessing Officer was of the view that the expenditure incurred did not relate to transfer as envisaged under section 48(i) of the Act. Accordingly, he issued a

show cause notice to the assessee to explain why the deduction claimed should not be disallowed. In response to the said show cause notice, the assessee filed a detailed submission justifying its claim of deduction by stating that the legal/professional fees paid is wholly and exclusively relating to the transfer of shares giving rise to capital gain. The Assessing Officer, however, did not find merit in the submissions of the assessee. Referring to certain judicial precedents, the Assessing Officer observed that the expenditure claimed by the assessee cannot be considered to have been incurred wholly and exclusively in connection with transfer of shares. He observed, the expenditure claimed by the assessee are not of such nature that without incurring those expenses the sale or transfer of shares could not have been done. The Assessing Officer observed, the objective behind incurring expenses is to optimise the economic value of the business and not for the purpose of transfer of shares. Further, he observed, the documentary evidences submitted by the assessee nowhere mentions the name of the buyer nor they indicate that these expenses have been incurred for transfer of shares to the ultimate buyer viz. Mphasis Ltd. Thus, ultimately, the Assessing Officer disallowed the expenditure claimed of U.S. \$ 13,27,609. Being aggrieved with such disallowance, the assessee preferred appeal before the first appellate authority. However, learned Commissioner (Appeals) upheld disallowance of assessee's claim by holding that the expenditure incurred by it is in the nature of business expenses.

4. Shri P.J. Pardiwala, learned Sr. Counsel appearing for the assessee submitted, the expenditure incurred by the assessee clearly qualifies as deduction under section 48(i) of the Act. Drawing our attention to the details of expenditure incurred as furnished in a Chart at Page-3 of the paper book, he submitted, U.S. \$ 7,96,955, was paid to Deloitte Corporate Finance LLP, U.S.A., who are the advisors for the sale of shares. He submitted, U.S. \$ 2,43,825 was paid to Dua Associates, who are the lawyers appointed for advising on the sale of shares. He submitted, the U.S. \$ 2,86,829, was paid to Milbank, Tweed, Hadley and McCloy LLP, Attorneys for advising on the sale of shares. He submitted, all these payments were in connection with professional and legal services rendered by the entities in relation to transfer of shares. In this connection he drew our attention to the sample copies of invoices placed in the paper book. He also drew our attention to certain e-mail correspondences placed in the paper book to emphasize upon the fact that the expenditure incurred was wholly and exclusively for the purpose of transfer of shares. The learned Sr. Counsel submitted, all these expenses were incurred only after the assessee decided to transfer the shares. The learned Sr. Counsel submitted, the Assessing Officer does not dispute that the Project Genesis relates to the transfer of shares of the Indian Subsidiary. He submitted, the invoices raised are clearly in respect of the Project Genesis. Therefore, it cannot be said that the expenditure incurred are not in connection with sale of shares. He submitted, only because the name of the buyer was not mentioned either in the correspondences or invoices, it cannot be assumed that the expenditure incurred is not in relation to the transfer of shares. In support of his contentions, the learned Sr. Counsel relied upon the following decisions:—

- (i) *CIT v. Shakuntala Kantilal* [\[1991\] 190 ITR 56/58 Taxman 106 \(Bom.\)](#);
- (ii) *V.A. Vasumathi v. CIT* [\[1980\] 123 ITR 94/4 Taxman 94/4 Taxman 94 \(Ker.\)](#)
- (iii) *Compagnie Financiers Hamon, In re* [\[2009\] 310 ITR 1/177 Taxman 511 \(ARR - New Delhi\)](#)
- (v) *GIC Housing Finance Ltd. v. Addl. CIT* ITA No. 22 (Mum.)/2016, dated 21-8-2018

5. Shri N. Padmanabhan, the learned Departmental Representative, strongly relying upon the observations of the Assessing Officer and learned Commissioner (Appeals) submitted, the assessee has failed to substantiate its claim that the expenditure incurred is in connection with the transfer of shares. The learned Departmental Representative submitted, none of the documents submitted before the Assessing Officer or the learned Commissioner (Appeals) disclosed the name of buyer. Therefore, it cannot be said that the expenditure incurred was on account of transfer of shares of the Indian

Subsidiary. The learned Departmental Representative submitted, even one of the invoice raised is in respect of Project Eagle and not in respect of Project Genesis. Therefore, assessee's claim that the expenditure incurred is in connection with transfer of shares of Indian Subsidiary is unsubstantiated. In this context, he drew our attention to the copy of invoice placed at Page-20 of the paper book. The learned Departmental Representative submitted, the e-mail correspondences submitted by the assessee do not specify in what context services were provided. Thus, he submitted, assessee having failed to establish that the expenditure was wholly and exclusively towards transfer of shares of Indian Subsidiary, deduction was rightly disallowed. The learned Departmental Representative submitted, the decisions relied upon by the learned Sr. Counsel for the assessee are distinguishable on facts and not applicable. In support of his submissions, the learned Departmental Representative relied upon a decision of the Tribunal, Mumbai Bench, in *Mateen Pyrali Dholkia v. Dy. CIT* [2018] 171 ITD 294/94 taxmann.com 294 (Mum.).

6. In rejoinder, the learned Sr. Counsel for the assessee submitted, mention of Project Eagle in the invoice placed at Page-20 of the paper book is a typographical error. To demonstrate the aforesaid fact, he drew our attention to the letter dated 28th July 2009, issued by Milbank, Tweed, Hadley and McCloy LLP, copy of which is at Page-90 of the paper book. The learned Sr. Counsel submitted, all the documentary evidences including the e-mail correspondences clearly establish that the expenditure incurred was towards transfer of share of the Indian Subsidiary. The learned Sr. Counsel submitted, the decisions relied upon by the learned Departmental Representative are not applicable to the facts of the present case as it relates to deduction claimed on account of payment of Portfolio Management Scheme (PMS) fee.

7. We have considered rival submissions and perused material on record. We have also applied our mind to the decisions relied upon. The dispute between the parties precisely is, whether the expenditure incurred of U.S. \$ 13,27,609, is wholly and exclusively in relation to the transfer of shares of the Indian subsidiary, hence, allowable as deduction under section 48(i) of the Act? Before we proceed to examine the factual aspect, it is necessary to look into the provisions of section 48 of the Act, which lays down the mode of computation of income chargeable under the head "*Capital Gain*". Clause (i) of section 48 of the Act provides for computation of capital gain after deducting expenditure incurred wholly and exclusively in connection with the transfer of capital asset from the full value of consideration received or accruing as a result of such transfer. Therefore, the condition precedent for claiming expenditure under the aforesaid clause is, it must have been incurred wholly and exclusively in connection with the transfer of the capital asset. The phraseology "*in connection with the transfer of capital asset*" used in the aforesaid provision has been interpreted by the Hon'ble Jurisdictional High Court in *Shakuntala Kantilal (supra)* to be wider in scope than the expression "*for the transfer*". The Hon'ble Jurisdictional High Court held that payment of any amount which is absolutely necessary to effect the transfer will be an expenditure covered by section 48(i) of the Act. The Hon'ble Jurisdictional High Court held that if the assessee incurs certain expenditure for removing any encumbrance over the asset, it will qualify for deduction under section 48(i) of the Act, since, without removing such encumbrance sale or transfer could not be effected.

The Hon'ble Kerala High Court in *V.A. Vasumathi (supra)* observed that the words "*in connection with such transfer*" would mean the expenditure which is intrinsically related to such transfer. In the facts of the said case, the Hon'ble High Court held that the litigation expenses incurred by the assessee in pursuance to a reference under section 20 of the Land Acquisition Act, is an expenditure coming within the purview of the section 48(i) of the Act. The ARR in *Compagnie Financiere Hamon, In. Re.*, held that the expenses incurred on legal proceedings preceding transfer of shares qualifies for deduction under section 48(i) of the Act. The Tribunal, Mumbai Bench, in *GIC Housing Finance Ltd.* held that expenditure incurred towards fees paid to professionals/advisors who provided services by way of

advise/assistance in connection with transfer of shares is allowable as expenditure under section 48(i) of the Act. Thus, the principle of law which emerges from the aforesaid decisions is to the effect that any expenditure intrinsically connected to the transfer of the capital asset is allowable as deduction under section 48(i) of the Act.

8. Keeping in view the aforesaid legal position, if we examine the facts of the present case, undisputedly, in the relevant previous year, the assessee has transferred/sold shares of its Indian Subsidiary and has offered the income from such transfer as long term capital gain. The Assessing Officer himself in the assessment order has mentioned that the transaction relating to transfer of shares in the Indian Subsidiary has been termed as Project Genesis. From the correspondences between the assessee and the Advocates/Accounting Firms as placed at Page-111 and 122 of the paperbook clearly demonstrate that the legal/professional services were rendered in connection with Project Genesis. The scope of work further clarifies that services to be rendered are in relation to advise on sale of entire shareholding of the Indian Subsidiary and includes preparation of share sale/purchase agreement, rendering advise on and preparing necessary closing documentation including board resolution, share transfer forms, etc. Further, the invoices raised by the advocates/professionals clearly indicate that they were in connection with legal/professional services rendered for Project Genesis. A single invoice referred to by the learned Departmental Representative mentioning Project Eagle, in our view, is a typographical error as contented by the learned Sr. Counsel for the assessee, since, the forwarding letter accompanying such invoice clearly mentions 'Project Genesis' and all other invoices raised by the concerned advocates clearly mention the name 'Project Genesis'. Therefore, there cannot be any room for doubt that the expenditures were in relation to the transfer of shares of the India Subsidiary termed as 'Project Genesis'. As could be seen from the scope of work for which the services were rendered by the legal/professional firm, it is closely and intrinsically related to transfer of shares of the Indian Subsidiary. Therefore, applying the ratio laid down in the decisions cited by the learned Sr. Counsel for the assessee, the expenditure incurred is wholly and exclusively in connection with the transfer of shares of the Indian Subsidiary. Hence, qualifies for deduction under section 48(i) of the Act. Non-disclosure/non-mentioning the name of the ultimate buyer of the shares in no way militates against the fact that the expenditure incurred by the assessee on account of legal and professional fees paid is in connection with transfer of shares. The decision relied upon by the learned Departmental Representative on the other hand, will not be applicable to the facts of the present case, since, it involves allowability of PMS fee which is not the issue in the present appeal. Thus, in view of the aforesaid, we hold that assessee's claim of deduction of U.S. \$ 13,27,609 is allowable under section 48(i) of the Act. Grounds raised are allowed.

9. In the result, assessee's appeal is allowed.

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*In favour of assessee.