

Corporate Restructuring - Tax Liability on Transfer of Shares of Indian Company Between Two Non-residents?



Transfer of shares of a listed Indian company without consideration by a non-resident to another non-resident in the course of corporate group restructuring is not liable to tax in India

In a recent ruling, the Authority of Advance Rulings (AAR) on an application made by Goodyear Tire and Rubber Company (GTRC 'transferor') & Goodyear Orient Company (Private) Limited, Singapore (GOCPL 'transferee') ruled that transfer of shares by GTRC to GOCPL of a Indian listed company [Goodyear India Limited (GIL)] without consideration, as part of corporate group restructuring, is not liable to tax in India. The Authority relied upon its earlier ruling in the case of Dana Corporation¹ and Amiantit International Holdings Ltd², in deciding the above case.

The AAR also ruled in the case of GOCPL that, shares of GIL received as a gift will not be considered as

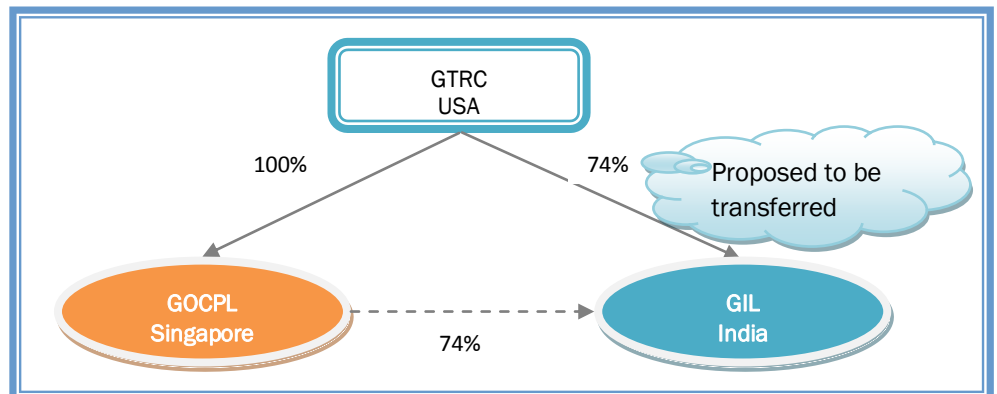
income from other sources as per the provisions of the Income Tax Act ('Act') as it was receipt of shares of an Indian company in which the public are substantially interested.

Facts of the case:

GTRC, incorporated under the laws of USA, holds 74% stake in GIL, an Indian Company listed on the Bombay Stock Exchange.

GOCPL is a wholly owned subsidiary of GTRC. GOCPL is an operating company and manages the worldwide operations of GTRC i.e. natural rubber purchasing, delivery, financing, treasury and quality.

As part of its global corporate strategy and to expand the role of GOCPL for the benefit of its other group entities within Asia-Pacific region, GTRC sought to transfer its entire stake of 74% in GIL to GOCPL **without any consideration.**



In the background of the above facts, an application was made to the AAR by GTRC as well as GOCPL seeking a ruling on the following questions–

1. Whether GTRC was liable to capital gains tax in India in relation to the proposed transfer of its shares in GIL to GOCPL, without any consideration?
2. Whether GOCPL will be liable to tax in India on receipt of shares of GIL from GTRC, without any consideration?
3. Whether the aforesaid transactions will attract the transfer pricing provisions in India?
4. Whether GTRC or GOCPL are required to withhold tax in India in respect of the aforesaid transactions under the provisions of section 195 of the Act?

Contentions of the Applicants:

- ◆ GTRC relied on the Honourable Supreme Court's decision in the case of B.C. Srinivasa Shetty³ and Sunil Siddharthabhai⁴ and argued that the computation mechanism to charge capital gains tax as provided in section 48 of the Act fails since the proposed transfer of shares of GIL to GOCPL was without any consideration in money or money's worth. Accordingly, there would be no capital gains tax liability in India.
- ◆ Moreover, transfer of shares by way of 'gift' would not amount to 'transfer' liable to capital gains tax in India. Accordingly, the aforesaid transaction would not be chargeable to capital gains tax in India in the hands of GTRC.
- ◆ As regards the taxability in the hands of GOCPL, it was argued that since GIL is a listed company in

which public were substantially interested, no income would accrue or arise in India as per the provisions of section 56(2)(viii)⁵.

Contentions of the Revenue:

- ◆ Since the transfer of shares was for creation of better business environment it would not amount to transfer by way of gift. The consideration for the said transfer of shares will be the value of creation of better business environment and hence GTRC would be liable to capital gains tax liability in India.
- ◆ The proposed transfer of shares was a case of 'Treaty Shopping' for avoiding capital gains tax at a future date as transfer of shares was taxable in India as per India-US Treaty whereas India-Singapore Treaty does not give India the right to tax capital gains arising out of transfer of shares. Hence, the AAR has power to reject the application.

The AAR... ruled that since the 'consideration' was incapable of being valued in definite terms or it would remain unascertainable on the date of occurrence of taxation, there arises no sale consideration on such transfer of shares.



AAR's Ruling:

- ◆ The AAR relying on the case of Dana Corporation (supra) and Amiantit International Holding Ltd (supra) ruled that since the 'consideration' was incapable of being valued in definite terms or it would remain unascertainable on the date of occurrence of taxation, there arises no sale consideration on such transfer of shares.
- ◆ Thus, relying on the Supreme Court's decision in the case of B.C. Srinivasa Shetty (supra) and Sunil Siddharthabhai (supra) it was ruled that when the computation provisions cannot be given effect to for any reason, the charging provision fails and hence, no capital gains tax would arise in the

hands of GTRC on transfer of shares without consideration.

- ◆ Further, it was ruled that it is not a case of 'Treaty Shopping' since any income arising from transfer of shares of listed company (being long term capital asset) are otherwise exempt from tax under the Act.
- ◆ As regards taxability of gift in the hands of GOCPL, since GIL was a company in which public were substantially interested, the provisions of section 56(2)(viiia) of the Act would not be attracted and hence, GOCPL would not be liable to tax in India.

- ◆ Further, it was also ruled that since there is no liability to pay tax in India, transfer pricing and withholding tax provisions will not be applicable.

Our Comments:

This ruling is useful for planning corporate group restructuring to transfer the investments within the group. However, the AAR has not considered the tax implications on sale of shares of GIL by GOCPL, while analyzing the 'Treaty Shopping', if on the sale no Securities Transaction Tax is paid ■

¹ Dana corporation (186 Taxman 187) (AAR)

² Amiantit International Holding Ltd (189 Taxman 149) (AAR)

³ B.C. Srinivasa Shetty (128 ITR 294) (SC)

⁴ Sunil Siddharthabhai (156 ITR 509) (SC)

⁵ Section 56(2)(viiia) deals with charging income in the hands of transferee where the transfer of shares is without consideration or for inadequate consideration.

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