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# TAXATION TIMES

October 2021

Taxation Times is a monthly newsletter published by UJA specifically with an intent and object to simplify and provide clarity on certain provisions of the Income Tax Act, discuss the implications of various amendments and circulars notified time and again, understand the judicial precedents as decided by various courts and interpret these.

The Taxation Times is an initiative to keep you abreast with the latest development in the realm of the Direct Taxes in India.

# Contents

# Introduction

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In the last few months, the Indian government increased it's speed of vaccination so much that on 21st October 2021, India completed the vaccination of over a 100 crore people. This in itself reflects India's scale of infrastructure. This mark certainly is a positive for India not only from the point of the fighting the COVID – 19 battle, but also a boost to the confidence to investors in India and it's infrastructure & it's capabilities.

Turning back to this edition Taxation Times, here's what we have :

- All about the taxation of Non – Compete Fees;
- Judicial precedents from the Tribunals and High Courts;
- Tax news from around the world;
- Upcoming compliances for November 2021;
- Circulars & notifications for October 2021.

We hope that you find this edition of the Taxation Times useful. In case you have any feedback or need us to include any information to make this issue more informative, please feel free to write to us at info@uja.in

Happy Reading!

Best Regards,
UJA Tax Team

# Taxation of Non – Compete Fees

In the era of globalization, corporates are looking to expand their footprint worldwide. As an aid to this, mergers and acquisitions are becoming are becoming increasingly popular and there has been a significant rise in the number of mergers and acquisitions in the last few years.

There are a large number of corporates who are willing to acquire smaller businesses in order to expand their global presence and similarly, there are several small family-owned business who are willing to sell their companies due to succession issues. Under such scenario's, the small business owners often have access to vital information such as intellectual property, customer details, knowhow or skills and in order to protect the interest of the acquiring company a non - compete obligation is imposed upon the selling entity. A non – compete obligation imposes restriction on the seller to refrain him from:

- Starting a similar line of trade or business;
- Solicit or canvas any clients of the business;
- Disclosure of any secret formula or process, technology, know – how etc.;
- Operating in a particular region/ segment

A non - compete obligation is generally fulfilled by the payment of a fee or compensation generally called as a non – compete fee.

The taxability of non – compete fee has always been a point of litigation. Prior to 2003, non – compete fee was always held to be a ***capital*** in nature and was exempt from tax as the same was paid for not carrying out of an activity in connection with business or profession. However, in 2003, the Income Tax Act 1961 introduced clause (va) to s. 28 whereby it was provided that

*any sum, whether received or receivable, in cash or kind, under an agreement for –*

a. *Not carrying out any activity in relation to any business or profession; or*

b. *Not sharing any know-how, patent, copyright, trade-mark, license, franchise or any other franchise or any other business or commercial rights of similar nature or information or technique likely to assist in the manufacture or processing of goods or provision for services*

Shall be taxable as **business income.**

However, the proviso to the said clause states that *any sum, whether received or receivable, in cash or in kind, on account of transfer of the right to manufacture, produce and article or thing or right to carry on business or profession will be chargeable as* **'capital gains'**.

Therefore, post the introduction of s. 28(va) of the ITA, non – compete fees is to be taxed as either capital gain or business income.

In order to determine, the taxability – courts have adopted various interpretations resulting in conflicting decisions.

In the following paragraphs are judicial precedents upheld by courts from time to time –

1. **Non – compete fees received by a non – resident, not taxable in absence of PE in India**

   The *Hon'ble Mumbai Tribunal in the case of ITO V/s Mr. Prabhakar Raghavendra Rao (ITA No. 3985/ Mum/2018)* has held that consideration received by a non – resident taxpayer for restraint of trade and not to undertake any competing business in India shall not be taxable in India in the absence of a PE/ business connection and that business connection/PE is not merely established on account of being a shareholder/promotor of an Indian company.

2. **Non – compete fees paid to rival company for not establishing a similar business is revenue in nature**

   In the case of *CIT v/s Andhra Fuels (P) Ltd [(2016) 240 Taxman 280 (Andhra Pradesh)]* non - competition agreement was entered into by the assessee which is engaged in setting up power projects, to prevent rival company from establishing power plant in the State, for a period of three years is only a restrictive covenant and it was neither permanent nor advantage derived by the taxpayer was enduring in nature and as such the expenditure could not be held to be capital expenditure and the same was allowable as revenue expenditure.

   A similar view was also upheld by the *Hon'ble Delhi High Court* in the case of *CIT V/s Eicher Ltd* wherein the taxpayer had entered into a non – compete agreement with a third party which restrained the said party from carrying out any business with regard two wheelers. The taxpayers claim of the said expenditure as revenue was

upheld by the Hon'ble High Court which concurred with the views of the Tribunal that the payment is to protect the assessee's business interests, it's market position and profitability. The Hon'ble Supreme Court dismissed the SLP filed by the Department against the decision of the Hon'ble Delhi High Court. Thus, in view of the said discussion, if the non – compete fees does not result into bringing into existence of any capital asset or an advantage which is of enduring nature, then such payment would be revenue in nature.

The *Madras High Court* in the case of *Asianet Communications Ltd* has also upheld that above proposition.

**2. Part of sales consideration for Brand Acquisition attributed as non – compete fees & taxed as business profits.**

Chemech Laboratories Ltd ('the taxpayer') has entered into three separate agreements with Solvay Pharma (India) Ltd. (SIPL) for transfer of business & executed three different agreements and the consideration was payable in three different instalments.

- Brand Acquisition Agreement
- Consultancy Agreement
- Non – Compete Agreement

The Ld. Assessing Officer (AO) allocated the first installment towards the Non – Compete Covenant & taxed the same as business income. The Hon'ble CIT(A) agreed to the principle laid down by the AO but provided some relief to the taxpayer by reducing the quantum of such attribution. The Hon'ble ITAT reversed the orders of the AO & the CIT(A) and gave complete relief to the taxpayer stating that **the dominant purpose of the transaction was not to formulate a restrictive covenant, and such restrictive covenant was merely incidental to enjoyment of the brand.**

On further appeal, the Madras HC held that the three agreements depict a composite transaction in respect of which consideration has been paid and accordingly, part of the consideration would be attributable towards the activity of non – compete as well. With respect to the quantum of attribution, the taxpayer suggested the amount attributable towards non – compete fees which was accepted by the High Court.

**Conclusion & Analysis**

With the introduction of s. 28(va), it has been ascertained that non – compete fee is taxable. However, if the same needs to be treated as 'business income' or under the head 'capital gains' is still a matter interpretation. On the basis of the aforesaid decisions, one can reasonably conclude that no fixed formula can be applied to decide the head of taxability and every situation needs to be analyzed to determine the resultant tax liability.

# Case Law

Sale of land to be taxed as 'capital gains' and not as 'business income' where land sold after a period of six years & the same was reflected as an 'investments' in it's balance sheet.

## Facts

The taxpayer[1] is a Limited Liability Partnership ('LLP'). It had purchased an agricultural land which was shown as a part of 'investments' in the books of accounts. The taxpayer agreed to sell the land to Maharashtra Cricket Association (MCA) for a total consideration of INR 13,75,50,000/-. A Memorandum of Association ('MOU') was signed to the said effect. Of the said consideration, a sum of INR 9,62,85,000/- representing 70% of sale consideration was received. As per the agreed terms, the taxpayer had to perform the following obligations:

i. Has to obtain permission for non – agricultural use of the land

ii. Has to transfer the legal titles of the land in favor of the assessee

Only on fulfillment of the above conditions, the balance consideration of INR 4.13 crores was to be paid. It was also agreed that only on receipt of the entire consideration, the possession of land shall be handed over to MCA. After the land was converted into a non – agricultural land, the balance consideration was paid and a sale deed was executed in favour of MCA. In the return of income, the taxpayer offered the profit on sale of land as 'capital gains'.

The Ld. Assessing Officer ('AO') observed that the taxpayer was formed for the purpose of dealing in land and the source of acquisition of property was out of borrowed funds & therefore the sale should be assessed to tax as 'income from business'. The taxpayer before the Ld. AO explained that the said asset appeared as an 'investment' in the Balance Sheet & never formed a part of 'stock in trade' & no development activities on the said land were carried on and not engaged in continuous sale and purchase of land except this solitary transaction. The taxpayer further submitted that the land was purchased from own funds and not borrowed funds. Therefore, the transaction of sale does not fall in the category of "adventure in nature of trade". The taxpayer relied on the decision of the Hon'ble Bombay High Court in the case of *CIT V/s Baguio Investment (P) Ltd.*[2]

Being aggrieved by the order of the Ld. AO, the taxpayer filed an appeal before the Hon'ble CIT(A) wherein the contention of the taxpayer was upheld and the transaction of sale was treated as profit on sale of 'capital gains'.

## Issue

1. The Ld. Department Representative (DR) contended that the land was converted for non – agricultural purpose by the taxpayer itself & the taxpayer generated huge profits from the sale of land and the land was originally acquired out of the proceeds received on allotment of 8% redeemable non – cumulative preference shares and indeed reflect the fact that the land was acquired to resell for purpose of profit.

2. The Ld. Counsel for the taxpayer stated that there is no material on record to say that the land was originally purchased with an intent to resell for profit. The mere fact that the realization of capital investment and generation of huge profit would not amount to an adventure in the nature of trade. Having regard to the fact that the land was held for a period of 6 years reflecting as an investment in the books of the taxpayer, profits cannot be assessed to tax under 'business profits'. Reliance was placed on the decision of *Janki Ram Bahadur Ram V/s CIT,*[3] *Baguio Investment (P) Ltd, CIT V/s Nathuram Ramnarayan (P) Ltd,*[4] *CIT V/s Kasturi Estates (P) Ltd,*[5] *Pr. CIT V/s Jhon Poomkudy.*[6]

   He further submitted that the decision of Hon'ble Bombay High Court in the case of *CIT V/s Baguio Investment (P) Ltd.* is clearly applicable to the case on hand and the order of the Hon'ble CIT(A) is based on proper appreciation of the facts of the case.

3. The Hon'ble Income Tax Appellate Tribunal ('ITAT') observed that during the course of the assessment proceedings, the taxpayer had submitted that the proceeds of allotment of 8% redeemable non – cumulative preference shares do not come under 'borrowed funds' & this contention was upheld by the Hon'ble CIT(A) placing reliance on the decision of the Hon'ble Karnataka High Court in the case of

3 *Janki Ram Bahadur Ram* v. *CIT* [1965] 57 ITR 21 (SC)

4 *CIT* v. *Nathuram Ramnarayan (P.) Ltd*

5 *CIT* v. *Kasturi E-states (P.) Ltd*

6 *Pr. CIT* v. *Jhon Poomkudy* [2019] 101 taxmann.com 244/261 Taxman 56/[2018] 409 ITR 149 (Ker.)

Kirloskar Electric Co Ltd.[7] No contrary position has of law has been pointed out by the Sr. DR in this regard. Hence, it cannot be stated that the land was acquired out of borrowed funds. Another finding of the Ld. AO was that the taxpayer has realized a huge profit at the time of sale of land and hence because of this, the transaction is in the nature of adventure in trade. However, the Hon'ble Madras high Court in the case of CIT V/s Kasturi Estate (P) Ltd[8] has held that realization of investments or conversion of land into money does not tantamount to adventure in nature of trade.

The Department has not controverted to the contention of the taxpayer that it has not been engaged in any other transaction of purchase and sale of land. Hence, there is no material on record to prove that the taxpayer is a dealer in land. The taxpayer is entitled to maintain two portfolios i.e Stock in Trade as well as Investment. This is also accepted by the CBDT in the context of taxing profits in respect of sale transaction and shares and securities.

The Hon'ble ITAT has also stated that in order to determine whether a particular transaction is an adventure in the nature of trade or investment, the test to be applied is intention of the party at the time of acquisition of the property as held by the Hon'ble Supreme Court in the case of *G. Venkataswami Naidu & Co.*[9] This position was subsequently followed by the Hon'ble Supreme Court in the case of *CIT* v. *Sutlej Cotton Mills Supply Agency Ltd.*[10] and *Dalmia Cements Ltd.*[11]

4. It is a known fact that the land was recorded in the books of accounts as an 'investment' & it is a settled position that treatment given in the books of accounts is an indication of the taxpayer to hold the asset as an 'investment' or 'stock – in – trade'. In the present case, the fact that the said land was shown as part of investment in the books of accounts coupled with the fact that the land was sold after a gap of six years would *prima facie* go to show that the intention on the part of the taxpayer is to hold the said land as "investment". It is settled position of law that the onus lies upon the Department for bringing the relevant material on record to prove that the transaction is an adventure in nature of trade. In the present case, the inference drawn by the Assessing Officer that the subject transaction is in nature of trade is not based on any material on record.

5. Accordingly, the facts & circumstances of the present case are identical to the decision of *Baguio Investments (P.) Ltd* wherein the Hon'ble High Court has confirmed the findings of the Tribunal that the land forms a part of the investment & the land was held for a period of 10 years. The decision of the Ld. CIT(A) is based on proper appreciation of facts and in consonance with the settled position of law & therefore there is no reason to interfere with the findings of the Ld. CIT(A) that the profits arising from sale of land should be treated as 'Capital Gains'.

In a recent decision, the Hon'ble ITAT has held that when the taxpayer has submitted all documentary evidence in support of the unsecured loans received such as financial statement, bank statements, confirmation letters and all the transactions are routed through banking channels, the addition made to the income of the taxpayer on account of unsecured loan received by the taxpayer was not justified.

## Facts

The taxpayer[12]had received unsecured loans from three firms. The taxpayer made an addition under s. 68 of the Income Tax Act 1961 ('ITA' )towards the said unsecured loans stating that the loans were nothing but accommodation entries of the taxpayers own unaccounted income in the form of unsecured loans.

The Hon'ble CIT(A) upheld the decision of the Ld. AO ignoring all the evidences filed by the taxpayer without bringing on record any evidence to prove that unsecured loans received from above concerns are unaccounted income of the taxpayer.

Aggrieved by the order of the Ld. CIT(A) the taxpayer has preferred an appeal before the Hon'ble ITAT.

7 *Kirloskar Electric Co. Ltd. v. CIT [1997] 228 ITR 674 (Kar.)*

8 *CIT v. Kasturi Estate (P.) Ltd. [1966] 62 ITR 578 (Mad.)*

9 *G. Venkataswami Naidu & Co. v. CIT [1959] 35 ITR 594 (SC)*

10 *CIT v. Sutlej Cotton Mills Supply Agency Ltd.*

11 *Dalmia Cements Ltd. v. CIT [1976] 105 ITR 633 (SC)*

12 *KP Manish Global Ingredients (P.) Ltd V/s ACIT, Chennai [2021] 131 taxmann.com 158 (Chennai – Trib)*

**Issue**

Was the AO justified in making the addition in respect of unsecured loans received by the taxpayer under s. 68 of the ITA , despite the taxpayer providing all relevant documentary evidences to prove the genuineness of the loans.

**Decision**

1. The Ld. Assessing officer ('AO') during the course of the assessment proceedings had made additions to unsecured loans from three firms belonging to the taxpayers group opining that these loan entries were nothing but accommodation entries of the taxpayers own unaccounted income in the form of unsecured loans.

   The Hon'ble CIT(A) relying on the decision of the Hon'ble Supreme Court in the case of *Kachiwala Gems*[13] held that payment by account payee cheque is not sufficient to establish genuineness of transactions. What is relevant to see that transactions are passed the test of genuineness in the real sense of transactions, that means that the taxpayer should prove beyond doubt that the nature of credits and the source of such credits.

2. The Ld. Authorized Representative ('AR') for the taxpayer submitted that the Ld. CIT(A) had erred in confirming additions made towards unsecured loans without appreciating the fact that unsecured loans are genuine which are supported by necessary evidences. The AR for the taxpayer referring to paper book filed by the taxpayer submitted that the taxpayer has filed ledger account copies of loan creditors along with bank statements and established that all transactions are routed through proper banking channel. The taxpayer has also explained source of income for unsecured loans.

   The Ld. Departmental Representative ('DR'), on the other hand, strongly supporting the order of the learned CIT(A) submitted that entire transactions of unsecured loans amongst group companies are sham transactions, which is evidenced from facts brought out by the AO that the taxpayer has routed its unaccounted income in form of unsecured loans through group companies.

3. Considering the findings by the lower authorities & the submissions placed on record, the Hon'ble ITAT has stated that in order to ascertain whether transactions of unsecured loans received from three companies are genuine transactions which pass test of ingredients provided u/s.68 of the Act or not, one has to understand provisions of section 68 of the Act. The provisions of section 68 of the Act deals with cases where any sum found credited in books of account of the assessee for any previous year for which the assessee fails to establish identity, genuineness of transactions and creditworthiness of parties, then said sum found in the books of account of the assessee shall be treated as income of that year. Therefore, to come out of shadow of provisions of section 68 of the Act, one has to prove identity of the creditor, genuineness of transaction and creditworthiness of parties. Once initial burden of proving all three ingredients are discharged, then burden shifts to the Revenue to prove otherwise that the said unsecured loans are unaccounted income of the taxpayer.

   The Hon'ble ITAT observed that all the transactions are routed through proper banking channel. The taxpayer has also proved source of income for said amount, which is out of commission received by those creditors from various companies. Therefore, from the above details, it is very clear that the assessee has proved identity, genuineness of transaction and creditworthiness of loan creditors. Therefore, it is incorrect on the part of the Assessing Officer to allege that unsecured loans received by the taxpayer was not explained with necessary evidences. Therefore, the taxpayer has discharged its burden caste upon under section 68 by filing various details including financial statement of creditors, their bank statements and confirmation letters to prove transactions. Once a taxpayer discharged its burden, then burden shifts to AO to prove otherwise that said transaction was nothing but undisclosed income of the taxpayer. In the instant case, the AO has not brought on record any evidence to prove that said amount was undisclosed income of the taxpayer. Therefore, the Ld. AO completely erred in making additions towards unsecured loans received from three companies of the taxpayers group.

3. Accordingly, the order of the CIT(A) was set aside & the Ld. AO was directed to delete the additions made towards the unsecured loans.

13 *Kachwala Gems v. Jt. CIT [2007] 158 Taxman 71/288 ITR 10 (SC)*

# Tax in the News

The Global Tax Revolution

https://www.thehindu.com/opinion/op-ed/the-global-tax-revolution/article37099097.ece

France amends rules regarding withholding tax calculation for dividends

https://mnetax.com/france-amends-rules-regarding-withholding-tax-calculation-for-dividends-45971

Global Tax Deal to hurt Indians who moved trusts to UAE

https://economictimes.indiatimes.com/news/international/uae/global-tax-deal-to-hurt-indians-who-moved-trusts-to-the-uae/articleshow/87125629.cms

Country-by-country reporting adopted in more than 100 jurisdictions, OECD reports

https://mnetax.com/country-by-country-reporting-adopted-in-more-than-100-jurisdictions-oecd-reports-45963

Tesla Goes To PM's Office, Requests Tax Cut On Electric Vehicles: Report

https://www.ndtv.com/india-news/tesla-goes-to-pm-narendra-modis-office-requests-tax-cut-on-electric-vehicles-report-2582550

Global tax deal: Striking consensus on accounting biggest implementation hurdle

https://cfo.economictimes.indiatimes.com/news/global-tax-deal-striking-consensus-on-accounting-biggest-implementation-hurdle-experts-say/87098297

Platform for Collaboration on Tax shifts priorities in response to global tax deal

https://mnetax.com/platform-for-collaboration-on-tax-shifts-priorities-in-response-to-global-tax-deal-45993

# Circulars, Notifications & Press Release

## Notifications

The CDBT inserts Rule 11UE of Income-tax Rules, 1961 called as the Income tax Amendment (31st Amendment) Rules), 2021 in respect to Explanation 5 to clause (i) to section 9(1) Income Tax Act, 1961.

https://incometaxindia.gov.in/communications/notification/notification_no_118_2021.pdf

The Central Government exempts certain class of person mentioned in the table in the notification from the requirement of furnishing a return of income under section 139(1) of the Income Tax Act from AY 2021-22 onwards.

https://incometaxindia.gov.in/communications/notification/notification-119-2021.pdf

The Central Government notify for the purpose of clause 10(46) of the Income Tax Act, 1961, 'Punjab State Electricity Regulatory Commission', Chandigarh (PAN- AAAGT0052L), an commission established by state government of Punjab.

https://incometaxindia.gov.in/communications/notification/notification-121-2021.pdf

## Press Release

CBDT notifies Rules for implementing the amendments made by the Taxation Laws (Amendment) Act, 2021. The 2021 Act also provides that the demand raised for offshore indirect transfer of Indian assets made before 28th May, 2012 (including the validation of demand provided under Section 119 of the Finance Act 2012) shall be nullified on fulfillment of specified conditions such as withdrawal or furnishing of undertaking for withdrawal of pending litigation and furnishing of an undertaking to the effect that no claim for cost, damages, interest, etc. shall be filed and such other conditions are fulfilled as may be prescribed. The amount paid/collected in these cases shall be refunded, without any interest, on fulfillment of the said conditions.

https://pib.gov.in/PressReleasePage.aspx?PRID=1760291

# Upcoming Compliances for October 2021

## 7 October 2021

Due date for deposit of tax deducted/ collected for the month of September, 2021

Due date for deposit of TDS for the period July 2021 to September 2021 when Assessing Officer has permitted quarterly deposit of TDS under section 192, 194A, 194D or 194H

## 15 October 2021

Due date for furnishing of Form 24G by an office of the Government where TDS/TCS for the month of September, 2021 has been paid without the production of a challan

Due date for issue of TDS Certificate for tax deducted under section 194-IB, 194-IA and 194M in the month of August, 2021

Quarterly statement in respect of foreign remittances (to be furnished by authorized dealers) in Form No. 15CC for quarter ending September, 2021

The due date for furnishing of quarterly statement of foreign remittances for Quarter ending September, 2021 has been extended from October15, 2021 to December31, 2021 vide Circular no. 16/2021, dated 29-08-2021

Quarterly statement of TCS deposited for the quarter ending September 30, 2021

Upload declarations received from recipients in Form No. 15G/15H during the quarter ending September, 2021

The due date for uploading declarations has been further extended from October15, 2021 to December31, 2021 vide Circular no. 16/2021, dated 29-08-2021

## 30 October 2021

Due date for furnishing of challan-cum-statement in respect of tax deducted under section 194-IA, 194-IB and 194M in the month of September, 2021

Quarterly TCS certificate (in respect of tax collected by any person) for the quarter ending September 30, 2021

## 31 October 2021

Intimation by a designated constituent entity, resident in India, of an international group in Form no. 3CEAB for the accounting year 2020-21

Quarterly statement of TDS deposited for the quarter ending September 30, 2021

Due date for furnishing of Annual audited accounts for each approved programmes under section 35(2AA)

Copies of declaration received in Form No. 60 during April 1, 2021 to September 30, 2021 to the concerned Director/Joint Director

Due date for filing of return of income for the assessment year 2021-22 if the assessee (not having any international or specified domestic transaction) is (a) corporate-assessee or (b) non-corporate assessee (whose books of account are required to be audited) or (c)partner of a firm whose accounts are required to be audited or the spouse of such partner if the provisions of section 5A applies

The due date for furnishing of return of income for Assessment Year 2021-22 has been extended from October 31, 2021 to November 30, 2021 vide Circular no. 9/2021, dated 20-05-2021 and further extended from November 30, 2021 to February 28, 2022 vide Circular no. 17/2021, dated 09-09-2021

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