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**Transfer of a capital asset to a step-down wholly-owned subsidiary not taxable under section 47(iv), rules the Kolkata Bench of the Income-tax Appellate Tribunal\***

**\*Emami Infrastructure Ltd vs ITO  
[2018] 91 taxmann.com 62 (Kolkata - Trib.)**

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## Facts of the case

- The taxpayer, Emami Infrastructure Limited (EIL) had a wholly owned subsidiary - Emami Realty Limited (ERL), which in turn had a wholly owned subsidiary - Emami Rainbow Niketan Pvt Ltd (ERNPL).
- EIL also held shares of Zandu Realty Limited (ZRL), a listed company. During the year, EIL transferred the shares of ZRL in an off-market transaction to ERNPL, its step-down wholly-owned subsidiary (WOS) (the transaction), and claimed a capital loss of INR 25 crores in respect of the transaction in its Return of Income.
- The Assessing Officer (the AO) rejected the sale price of the shares of ZRL adopted by EIL on the basis that the transaction was not undertaken at the arm's length price with reference to the ruling market price of ZRL's shares, and accordingly, computed a capital gains in respect of this transaction at INR 29 crores<sup>1</sup>.
- Further, the AO also did not accept the alternative argument raised by EIL in the course of the assessment proceedings that the transfer of shares of ZRL by EIL to ERNPL is a transfer exempt from capital gains tax under section 47(iv) of the Income-tax Act, 1961 (the Act)<sup>2</sup>.
- The Commissioner (Appeals) rejected EIL's claim with the result that EIL filed an appeal to the Kolkata Bench of the Income-tax Appellate Tribunal (the Tribunal).

## Key issue under consideration

- Whether the transfer of shares of ZRL by EIL to ERNPL (i.e. its step-down WOS) is a transfer exempt from capital gains tax under section 47(iv) of the Act?

<sup>1</sup>This matter pertains to a year prior to introduction of section 50CA of the Act, and it is unclear as to under which provision of the Act the AO invoked the power to enhance the sale consideration in such a situation.

<sup>2</sup>Section 47 of the Act (*Transactions not regarded as transfer*)

*Nothing contained in section 45 shall apply to the following transfers:-*

...

*(iv) any transfer of a capital asset by a company to its subsidiary company, if—*

*(a) the parent company or its nominees hold the whole of the share capital of the subsidiary company, and*

*(b) the subsidiary company is an Indian company;*

...

## Ruling of the Tribunal

- The Bench referred to the ruling of the Bombay High Court in the case of ***Petrosil Oil Co. Ltd. vs CIT*** [1999] 236 ITR 220 (Bom), which was in the context of the erstwhile section 108 of the Act<sup>3</sup>. Section 108(b) of the Act excluded subsidiaries of widely-held companies from the application of the erstwhile section 104 of the Act (*Income-tax on undistributed income of certain companies*) provided that **the whole of the share capital of the subsidiary has been held by the parent company or its nominees** throughout the year (the underlined portion being analogous to the language used in to section 47(iv)(a) of the Act). The Bombay High Court noted that the term “subsidiary” is not defined in the Act, and therefore, relying on the principles emanating from the Supreme Court rulings in the case of *Howrah Trading Co. Ltd. vs CIT* [1959] 36 ITR 215 (SC) and *CIT vs Swadeshi Match Co.* [1983] 139 ITR 833 (SC), the Bombay High Court held that the meaning of “subsidiary” under the prevailing Company Law (which includes a step-down WOS) could be imported into the Act<sup>4</sup>.
- The Bench held that the transfer of a capital asset by a parent company to its step-down WOS is a transfer exempt from capital gains tax under section 47(iv) of the Act.
- The Bench further declined to adjudicate on the aspect as to whether the AO has the power to substitute the sale price of the shares of ZRL with a different value, as that aspect had become academic given the above ruling on the aspect of taxability of the transfer of shares of ZRL.

## Conclusion

This ruling of the Kolkata Bench of the Tribunal can be relied upon under similar situations.

<sup>3</sup>Section 108 of the Act (*Savings for company in which public are substantially interested*)

*Nothing contained in section 104 shall apply—*

*(a) to any company in which the public are substantially interested; or*

*(b) to a subsidiary company of such company if the whole of the share capital of such subsidiary company has been held by the parent company or by its nominees throughout the previous year.*

<sup>4</sup>In this case, the Bombay High Court held the shareholder of the step-down WOS (which was also a WOS of the parent company), to be a “nominee” of the parent company.

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