

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA No.801 of 2009**

% Decision Delivered On: 25th October, 2010.

COMMISSIONER OF INCOME TAX . . . Appellant

through : Ms. Prem Lata Bansal, Advocate.

VERSUS

ASHOK MEHRA . . . Respondent

through: Mr. Sandeep Sapra, Advocate.

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J. (ORAL)

1. The assessee herein was appointed as Chief Executive Officer (CEO) by M/s. SEIL Limited with effect from 05.01.1998, though the appointment letter containing the terms and conditions was issued on 21.08.1998. Two years thereafter, the assessee left the services of the SIEL Limited with effect from 30.09.2000. Apart from his terminal dues, he was also given an amount of ₹42 lakhs as "non compete fee". The agreement dated 09.02.2001 was entered into in this behalf between M/s SIEL Limited and the

assessee as "Non Compete Fee Agreement". As per this Agreement, the assessee agreed not to undertake any employment directly or indirectly nor engage or provide any advisory or consultancy services to any entity whether overseas corporate body, domestic or joint venture company engaged in the business or manufacture and sale of sugar, edible oil and caustic soda for a period of three years from the date of this Agreement. However, while making the appointment, tax at source was also deducted by the erstwhile employer, viz., M/s. SIEL Limited. The assessee had claimed credit of TDS of ₹14,43,700 on the ground that the receipt of aforesaid amount of ₹42 lakhs, in the given circumstances, was to be treated as capital receipt, not chargeable to tax. This contention was not accepted by the AO on the ground that even his employer had treated the same as revenue receipt in the hands of assessee and had deducted tax at source. However, the CIT(A) deleted the addition holding that it was a capital receipt and not revenue receipt, which would be chargeable to tax. The said decision has been upheld by the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') vide its impugned judgment dated 24.10.2008.

2. The perusal of the order of the Tribunal would show that it has relied upon the judgment of this Court in the case of ***Rohitasava Chand Vs. Commissioner of Income Tax [171 Taxman 147]*** wherein position of law on the point has been discussed in much greater details by this Court wherein various judgments of the

Supreme Court including ***Commissioner of Income Tax Vs. Best and Co. (Pvt.) Ltd. [(1966) 60 ITR 11 (SC)]*** were relied upon as well.

3. Learned counsel for the Revenue submitted that the circumstances in which the aforesaid payment was made to the assessee casts a doubt about the nature of payment. In this behalf, her submission was that though the assessee left the services on 30.09.2000, Non Compete Fee Agreement was entered into much subsequently, i.e., on 19.02.2001 whereby the aforesaid payment was made. From this she wants this Court to interfere that this agreement was only an afterthought just to show the payment of ₹42 lacs made by the employer of the assessee as capital receipt. We are not in agreement with the submissions made by the learned counsel for the Revenue. In fact, this argument is self-contradictory. On the one hand, she argues that since the employer had deducted tax at source, and on this basis, the same should be treated as revenue receipt. On the other hand, it is argued that the employer sided with the respondent-assessee by entering into the agreement in order to give benefit to the assessee. Even if the assessee had left the company in September, 2000, such an agreement could have been entered into sometime thereafter if the erstwhile employer did not want the assessee to engage in any competitive business or lend his services to its competitor. A clear finding of fact is recorded by

the CIT (A), which are affirmed by the Tribunal in the following manner;

“5. We have considered the rival contentions, carefully gone through the order of authorities below as well as decisions referred to by the assessing officer and Commissioner (Appeals) in their order and the decision of ITAT Special Bench as placed by the learned Authorised Representative on record. With regard to non-compete fees received by the assessee, the Commissioner (Appeals) has categorically recorded finding after going through the terms of agreement entered with respect to no compete fee, wherein it was observed that assessee was very well in a commanding position to use his knowledge and experience which he had gained while working as CEO SIEL Ltd. to use for other competitors and if he had done so it would have adversely effect the interest of SIEL Ltd. Thus, it was not a question that even purely technical knowledge and the manufacturing of sugar, edible oil and caustic soda etc., it was the basic knowledge and basic information of SIEL Ltd. which was acquired by the assessee and the same was equally important as the technical knowledge, and it could be used by him elsewhere against interest of employer SIEL Ltd. and payment of non-compete fee. The Commissioner(Appeals) also found that no evidence was brought on record to prove that agreement executed was the sham agreement or that it was just for sake of benefit to the assessee by giving an amount of Rs. 42 lakhs in the garb of salary as per Section 17(3) of the Income Tax Act, 1961. It was not a compensation received by the assessee from SIEL Ltd. in question with the termination of his employment or modification of terms and conditions relating thereto nor it was any payment as per Section 17(3)(ii) of the Income Tax Act, 1961. With regard to assessing officers observation regarding extinguishments of receipt from an asset, the Commissioner (Appeals) found that by entering into such agreement, on receipt of assets were extinguished insofar as he would specifically prohibited not to undertake any employment directly or indirectly or to provide any advise and consultancy to any company whatsoever whether overseas corporate body, domestic and joint venture engaged in business of manufacture and sale of sugar, edible oil and caustic soda. These findings of the Commissioner (Appeals) have not been controverted by the department.

6. We also found that there was no ambiguity at all in the non-compete agreement entered into between the assessee and SIEL Ltd., dated 19-2-2001, wherein intention of both parties were not only clear but they had also acted upon it during the course of assessment also the assessing officer had duly confirmed non-compete fee agreement dated 19-2-2001 from SIEL Ltd. IT AT Special Bench in case of Saurabh

Srivastava (supra) had held that entering into a non-compete agreement for restrictive covenant could not be considered and treated as part of rendering services to employer company, therefore, non-compete fee was not taxable under head Salary under Section 17(3)(i)/ 17(2)(v). It was also held that non-compete fee did not authorize the assessee for carrying on the business or profession, it would also not be taxable under Section 28(iv) legislative intent for bringing it to tax net and non-compete fee was made taxable under Clause (va) of Section 28, vide Finance Act, 2002 with effect from 1-4-2004, the non-compete fee in question could not be brought to tax under the amended section also which are effective only from assessment year 2004-05. Hon'ble Delhi High Court in the case of Rohitasava Chand v. CIT (2008) 171 Taxman 147 has held such non-compete fee as capital receipt not liable to tax. It was observed that where assessee was a shareholder and a director in a software company entered into two agreements with a foreign company, by one agreement, he agreed to sell all his shares in a company to the foreign company and by the other agreement, i.e., non-compete agreement, he agreed not to take up any business activities relating to software development in companies/organizations in which he was a director or shareholder. The amount received towards non-compete fee was claimed as capital receipt. The Hon'ble Court held that since non-compete agreement incorporated a restrictive covenant on right of the assessee to carry on his activity of development of software, it certainly impaired carrying on of his activity, and to that extent, it was a loss of a source of income for him which was of an enduring nature and, hence, non-compete fee received by the assessee was certainly a capital receipt."

4. We are, therefore, of the opinion that no substantial question of law arises. This appeal is accordingly dismissed.

(A.K. SIKRI)
JUDGE

(SURESH KAIT)
JUDGE

OCTOBER 25, 2010

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