

## The right of set-off of one-time non-refundable entry fee against the upfront fee payable for allotment of telecom licenses is not a 'capital asset' and therefore not taxable as capital gain

Recently, the Delhi Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Telenor (India) Communications Pvt Ltd<sup>1</sup> (the taxpayer) has dealt with the taxability of right to set-off a non-refundable entry fee against the upfront fee payable for allotment of telecom licenses. The Tribunal held that such right was not a 'capital asset'. Therefore, no capital gain arose on set-off of one-time non-refundable entry fee against the upfront fee payable for allotment of telecom licenses. The Tribunal observed that transferor of such right to set-off had no actual right, title, interest in the amount of non-refundable entry fee paid to the Department of Telecommunications (DoT). The transferor had exploited licenses from the year of acquisition till the date when said licenses were quashed. In such circumstances, one-time non-refundable entry fee, after the licenses were exploited left with no right, title or interest.

The Tribunal observed that it is not any and every 'right' which can be regarded as a capital asset. The 'right' must be such a right which is enforceable in law either under a statute or under a binding contractual agreement. Since transferor was left with no right, title, interest in the entry fee paid in respect of the licenses granted, there was no capital asset held by the transferor which could be said to have been acquired by the taxpayer under an actionable claim agreement.

The Tribunal also held that the set-off of such entry fee is not taxable as business income.

### Background

The taxpayer, an Indian company, incorporated in February 2012 is engaged in the business of providing telecommunication services. The taxpayer and Unitech wireless (Tamilnadu) Ltd (UW) were group companies of a foreign parent company. In the year 2008, UW had acquired telecom licenses from the Indian government on payment of one-time non-refundable entry fee INR16585 million. Subsequently, the Supreme Court quashed licenses allotted to UW in 2008. The Supreme Court issued directions to the government to make a fresh auction of licenses in a fair and transparent manner. It was communicated that UW would not participate in the fresh auction.

In November 2012, the taxpayer participated and was declared a successful bidder in a fresh auction in respect of six circles and thus became liable to pay INR40182 million as spectrum fee. Subsequently, in December 2012, the taxpayer acquired UW's business on a going concern basis and entered into business transfer agreement (BTA) and actionable claim agreement (ACA) whereby UW transferred all the rights, claims, other rights against the DoT including the payment of license fee for consideration of 50 per cent of the amount of set-off allowed to the taxpayer or INR1000 million whichever is less.

UW requested the government to consider set off of entry fee paid by it. Pursuant to several representations made, in March 2014, the government allowed the set-off of INR16585 million against the upfront fee of INR40182 million to the taxpayer without prejudice.

<sup>1</sup> Telenor (India) Communications Pvt Ltd v. ACIT (ITA No. 7541/Del/2017) – Taxsutra.com

The AO held that rights under the ACA which included a right of set-off of the entry fee constitutes a 'capital asset' within the meaning of Section 2(14) of the Act. Consequent to the set-off, capital asset acquired by the taxpayer was extinguished, and thus there was a 'transfer' of a capital asset within the meaning of Section 2(47) of the Act. The AO held that INR 16585 million was to be assessed as capital gain in the hands of the taxpayer. The Commissioner of Income-tax (Appeals) [CIT(A)] upheld the order of the AO on the issue of capital gains taxation. Alternatively, the CIT(A) held that the acquisition of a right to set off the license fee and subsequent set off allowed by the DoT against the license fee payable for fresh licenses, was an adventure in the nature of trade and commerce and it was taxable as 'business income' under Section 28 of the Act.

## **Tribunal's decision**

### ***Whether the 'right to set-off of entry fee' is a capital asset***

For taxability of capital gains under the provisions of Section 45 of the Act, there has to be an income derived by the taxpayer on the transfer of a 'capital asset'. However, in the instant case, the taxpayer had not acquired any capital asset from UW. There was no dispute that the right in a property is an asset under Section 2(14) of the Act. UW had exploited licenses from the year 2008 till the date when said licenses were quashed. In such circumstances, UW had not left with any right, title, interest in the license fee paid to DoT.

The Tribunal observed that it is not any and every 'right' which can be regarded as a capital asset. The 'right' must be such a right which is enforceable in law either under a statute or under a binding contractual agreement. Since UW had been left with no right, title, interest in the entry fee paid in respect of the licenses granted, it cannot be held that UW held any capital asset, which could be said to have been acquired by the taxpayer from UW under an actionable claim agreement. The mere fact that the taxpayer had paid INR 1000 million against such an alleged right will not be a decisive factor to determine the nature of the asset alleged to have been acquired by it. It cannot be held that the taxpayer had acquired any capital asset.

In the Comptroller and Auditor General of India (CAG) report, it was observed that UW had no right, title, interest to claim any set-off and also the taxpayer had no legal enforceable right to seek a set-off.

The intent and purpose of the parties to enter into two separate agreements was for the acquisition of a business as an ongoing concern for commercial consideration and such consideration had also been communicated to DoT much prior to its participation in the fresh auction. However, DoT had not formulated the regulations, procedures, and policies for transfer of business of quashed license holders. Thus only as an abundant caution, part of the DoT's claims over UW and UW's claim over DoT were kept under the agreement of actionable claims which were linked with overall business operations of UW which were acquired by the taxpayer as a going concern. The transaction of set off of entry fee was not an independent transaction but a composite transaction in respect of acquiring the business of UW with all assets and liabilities and was thus accepted.

Accordingly, it was held that the taxpayer had not acquired any capital asset and there was no taxable capital gain.

### ***Business income***

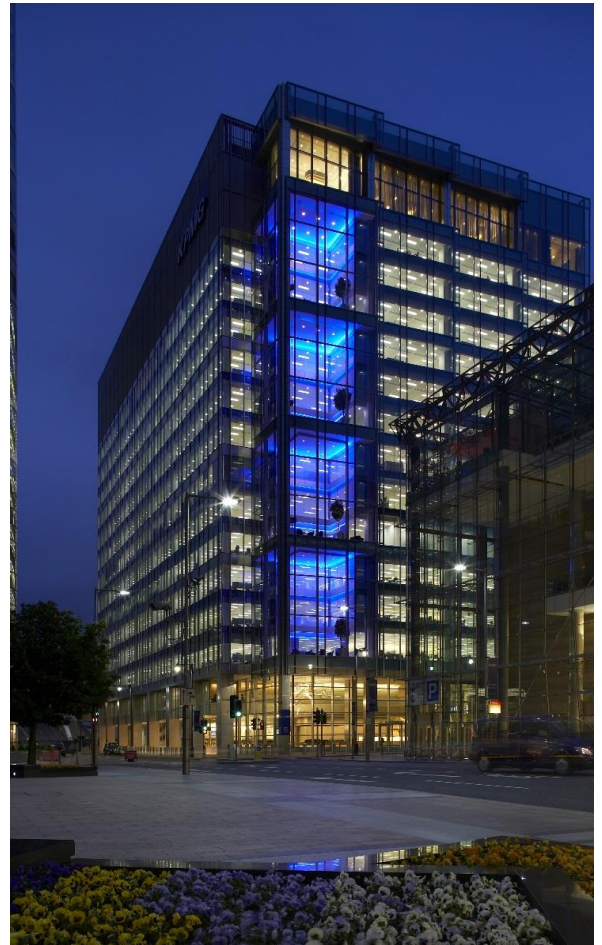
The amount allowed as set off was administrative and policy decision taken by the government unilaterally. It could not be held to be an adventure in the nature of trade and commerce. The set off had been granted from the license fee payable by it to DoT, and the said sum of set off had not resulted in any business transaction entered by it with DoT. Further, it was a mere waiver or concession from the license fee payable and cannot be held to be a business income. The taxpayer has not received the sum directly or indirectly. It had not entered into a business transaction or any transaction with DoT in respect of such amount so waived and such sum had been set-off by DoT on the principle of equal restitution. The taxpayer was not in the business of trading of unified access service licenses. Further, the DoT guidelines applicable at that time did not permit trading/sharing of spectrum. Thus, the set off against the spectrum fees cannot be construed in the revenue field or a sum chargeable to tax under the head profit and gains from business and profession.

## **Our comments**

The instant decision deals with a peculiar issue with respect to taxability of right to set-off non-refundable fees paid to the government on allotment of telecom licenses.

In the instant case, the Delhi Tribunal held that the right of set-off of one-time non-refundable entry fee does not constitute a 'capital asset'. Only right which is enforceable in law either under a statute or under the binding contractual agreement can be regarded as a capital asset. Since the taxpayer had not acquired any capital asset, transfer provisions were not applicable to it. The Tribunal also observed that set-off of fee was an administrative and policy decision of the government and hence the same cannot be treated as an adventure in the nature of trade. The set-off had been granted from fee payable to DoT, and it did not result into a business transaction entered into with DoT. The set off of the amount so allowed was in the nature of mere waiver or concession from the license fee payable and cannot be held to be a business income.

This decision may help the taxpayers in cases where there is a transfer of rights with respect to non-refundable entry fee paid for certain licenses which are fully exploited by such taxpayers. Further the observations with respect to the enforceability of rights are also very helpful.



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