

ANALYTICAL STUDY OF TAX PLANNING, TAX AVOIDANCE, AND TAX EVASION IN INDIA

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BACKGROUND OF THE STUDY/ABSTRACT

In the present time of competition and globalization, the whole world has become a small village. The tendency to run a business at a lower cost and gain the advantages of efficiency can be earned from any part of the world instead of one specific part of the world. Focusing on the three major concepts under the Law of Taxation, namely Tax Planning, Tax Evasion, and Tax Avoidance, the present Research work makes a light attempt to analyze and examine these concepts of tax along with the major judicial decisions to date.

In the present time of business, the most important tasks of the organizations which are highly demanding are cost reduction and cost management. The organizations are forced to search for alternative methods of cost reduction which highlights the method of Tax Planning which mainly works in the Indirect Taxes.

This Research Paper deeply examines such concepts of Tax and also provides a clear and concise distinction between all three of them. To further support the explanatory areas of the paper, Direct and Indirect Taxes have been thoroughly discussed for a better understating of the reader.

INTRODUCTION

In any business, the cost is an outlook of the manufacturer who is providing the goods and services and it completely depends on their discretion, whereas the prices are governed by the market itself. This is the core reason why no one can charge any extra price from the customers in the name or on the grounds that the cost of provision or the cost of production of that particular service is more than that of others. In the present marketing system, no person can operate on the typical theory that the entire cost can be recovered by him from the customers.

And at the same time, he cannot sell his products below the actual costs of those products. The existence of his organization will be in brutal danger if the products are sold below cost. The equation of Sale price = Cost + Profit will be changed. By keeping the factors, the same and just changing their places, it can be said that presently, Sale Price – Cost = Profit. Today the sales price is tyrannized by the market. The profit is always under pressure as it is essential for survival.

There is due pressure on the costs, and the traditional methods of reducing cost have reached their saturation which is forcing the organizations to look for and search for unconventional and new avenues for the purpose of cost reduction. Since the indirect taxes are a parcel and part of the material services and costs, any reduction in the payment of the indirect taxes results in cost savings. Therefore, even though the unconventional ones, but Tax Planning in Indirect Taxes have become a major source of Cost Reduction Activities.

RESEARCH PROBLEM

The prominent method of Tax Planning is still consistent and smooth in this functioning. Issues such as scrambling for documents, overpaying, the new mandatory tax situations, and the confusion of application forms may come in front of the face. The paper addresses such issues and attempts to provide a better solution to the same with a proper analysis. Tax Evasion is a major problem in the field of tax, and it can either be deliberate or inadvertent. The standard measure of tax evasion is the “tax gap.” On the other hand, Tax Avoidance can be considered an ethical issue of business. It must be understood that ‘bending’ the rules and guidelines of the tax system to avoid tax cannot be held as illegal, but it has been seen as an operation within the letter rather than the spirit of the law. Such problems in all three concepts of tax have been brought to light, addressed, and deeply analyzed to provide a better suggestion and solution.

RESEARCH OBJECTIVES

- A. To find out and evaluate the grey areas and loopholes in the method of Tax Planning for the betterment of the business and accounting system of India.

- B. To analyze and suggest proper policies and procedures in the legislation which can provide laws and regulations which are strong enough to eradicate or reduce malpractices of Tax Evasion and Tax Avoidance.

RESEARCH QUESTIONS

- I. What are the key threats to Tax Planning caused by hindrance in the tax system?
- II. What can be done to reduce or remove the problem of Tax Avoidance from the tax system?

HYPOTHESIS

The clear point is that the method Tax Planning is carried out for the purpose of cost reduction but as far as Tax Evasion and Tax Avoidance are concerned, these are illegal and unethical practices to skip tax and any sort of liability relating to the tax system.

REVIEW OF LITERATURE

The concepts of Tax Planning, Evasion, and Avoidance is totally distinct from each other. This research paper provides an in-depth and analytical study of these three concepts. **“Tax Planning”** by **‘S. Rajratnam, B V Venkatramaiah’** is a book which elaborates the topic in a deep manner. Also, **“Tax Planning: Know What is Tax Planning and its Types”** published by **‘HSBC OBC’** is a good source to the topic. Also, the article titled **“The Theory of Tax Evasion: A Retrospective View”** authored by **‘Agnar Sandmo’** published by **JSTOR and Cambridge University Press** in their magazine is also a very good literature material for the topic. **“Tax Avoidance and Tax Evasion: The Indian Case”** authored by **‘Anil Kumar Jain’** published by **JSTOR**, and **“Income Tax Evasion: a theoretical analysis,”** by **‘Michael G. Allingham.** These articles and journal articles play a very important role in refining the topic.

METHODOLOGY ADOPTED

The present Research Paper is mainly 'Analytical' in nature with some 'Explanatory' aspects. The findings have been segregated into different chapters and each chapter consists of different sub-topics explaining and analyzing different concepts related to the topic this work revolves around.

TAX PLANNING: LEGAL AND LEGITIMATE OR ILLEGAL?

Is Tax Planning a legal and legitimate way of reducing Tax Liability?

The above question is extreme and essential at the same time. The affirmative courts have answered this question in a vast series of their decisions which made the researcher feel that it is essential to include in the study different and various avenues and aspects relating to Tax Planning in Indirect Taxes. Certain exemptions are granted through notifications and these exemptions operate and are shown under Service Tax, Central Excise, and Customs Law. The Cenvat Credit Rules help in the minimization of cascading effect of the taxes. That is why, an appropriate understating of various regulations and rules, and provisions, along with the procedures and exemptions in taxation and the applicability of the same in the operations of a business in one of the non-traditional areas for cost reduction.¹

The business and industry, to a great extent try to decrease the burden of Income Tax by using various methods and means. However, it is noticed that in the Indirect Taxes, specifically the Service Tax, Central Excise Duty, Customs Duty, Vat plays a very essential role in the production cost, stress is put on the compliance of provisions relating to tax law to prevent stringent interest and penalties. This is termed Tax Management.

¹Tax Planning is the art of reducing the tax liability of a person by making use of the various provisions of Law. The govt. in many cases provides various deductions and exemptions which can be used by a person to reduce his tax liability. Planning your incomes and expenses in such a manner so as to avail the various tax deductions and exemptions is called tax planning. In India, taxpayers commonly make use of Section 80C to reduce their tax liability. As per Section 80C, if certain specified investments are made for a specified period, they can avail tax deduction for the same up to a limit of Rs. 1,50,000. The most common tax saving instruments are investments in PPF Accounts, Tax Saving Fixed Deposit, National Savings Certificate, Provident Fund, Mutual Funds etc.

Indirect Tax has a very wide scope. Whereas the law for Customs and Service Tax, Central Excise Duty is one and operates solely for the whole nation, the Oetroi, VAT, Entry Tax, and LBT have separate provisions according to the states. Noticeably concentrated efforts have been made by the researcher with a purpose to clearly understand the provisions related to Service Tax, Excise Duty, and including to some extent the Customs and Foreign Trade Policy, and their application to various sectors and exemptions thereunder. Also, the provisions relating to Cenvat Credit which are common to the Service Tax and Central Excise and their effect on cost reduction.

Understanding the Concept of Tax Planning, Tax Avoidance, and Tax Evasion

There is always a struggle between the Government and Taxpayers whenever any tax is introduced. Both of them, operate and make attempts in two different folds of taxation. The taxpayer always tries and searches for methods through which he can reduce or minimize the liability arising out of tax by adopting measures, and these measures can be right as well as wrong. On the other hand, the Government tries to make amendments in the tax provisions in a manner that there are minimum chances for reducing the tax burden. Even after this, due to various social and economic reasons, certain exemptions are granted in Customs, Excise Duty or even in the Service Tax. There are certain abetments and deductions which are provided when certain conditions are fulfilled and to extend the benefits to certain sectors of the society. When the rules are drafted faulty, the taxpayers take advantage. The law is created from the decisions of the Supreme Court, High Court, and the Tribunals and the law is binding on the taxpayers as well as all the Government authorities. Sometimes, amendments are made in law with the purpose to overcome the decision of the Apex Court. In such scenarios, the method of Tax Management and Tax Planning becomes an essential task of the taxpayer.

The terms, Tax Management, Tax Planning, Tax Avoidance, and Tax Evasion are commonly used when a discussion regarding tax matters are going. The common goal of all such activities is to reduce tax liability but they are different concepts from ethical, legal as well as operational point of view.

TAX PLANNING

There is a mechanism of right and duty operating within every citizen of the country. It is a major duty of every citizen to pay a legitimate amount of tax and at the same time, it is his right not to pay those taxes which are not due. Tax Planning is a method by which the liability of tax can be decreased by taking the advantage of legitimate exemptions and concessions which are provided in the tax law. It consists of a fixed process that involves arranging business operations in such a manner that it reduces the liability related to tax. In a scenario where two methods achieve a common objective selecting the method which results in lower tax liability is a wise decision. There are various examples of tax planning in indirect tax. Some of them include Procurement from small-scale industries, correct classification of the goods and services, restructuring of the business, availing benefits of various exemption notifications, job work, setting up the plant area where tax for it is granted, claiming permissible deductions like discounts, freight, etc. from the assessable value.

TAX AVOIDANCE²

Avoidance is a kind of malpractice carried out in the field of tax law. It means taking excessive advantage of the loopholes, lacunae or mistakes related to drafting to reduce liability of taxes which yields avoiding of tax payment which is legally payable under the law of taxation. In general scenarios tax avoidance is carried out by interpreting or twisting the provisions of law and avoiding the payment of tax. It considers the Gray areas and loopholes of the law. It is a legal

²Stiglitz (1985) distinguishes three basic principles of tax avoidance within an income tax: postponement of taxes, tax arbitrage across individuals facing different tax brackets (or the same individuals facing different marginal tax rates at different times), and tax arbitrage across income streams facing different tax treatment. Many tax avoidance devices involve a combination of these three principles. In an example used by Stiglitz, the basic feature of an Individual Retirement Account (IRA) is the postponement of tax liability until retirement; if the individual faces a lower tax rate at retirement than at the time the income is earned, then the IRA also features tax arbitrage between different rates. Finally, if the individual can borrow to deposit funds in an IRA and the interest incurred to finance the deposit is tax deductible, then the IRA is a tax arbitrage between two forms of capital, one of which is taxed, and the other of which is not taxed. Stiglitz argues that, with perfect capital markets, these three principles can be exploited to eliminate all taxes while leaving the individual's consumption and bequests unchanged relative to the zero-tax case and facing no more risk than in the original situation. But capital markets are not perfect, and therefore all tax liability is not eliminated by tax avoidance, and to reduce tax liabilities distorting actions (such as investment in sectors where it is easier to convert ordinary income into capital gains) are utilized. There is considerable empirical evidence testifying to the extent and tax sensitivity of these kinds of avoidance behavior.

activity and legal sanction, but it is unethical. It mainly means following the provisions of tax law only in letters but killing the spirit of the law.

TAX EVASION³

Text Evasion is an illegal activity forbidden by the law of taxation. It means avoiding tax by illegal means. It involves methods through which records are falsified, facts are suppressed, and there is collusion and fraud. It uses unfair means to evade tax liability. Tax Evasion is an illegal activity and method of escaping tax liability, and it can lead to punishments in the form of penalties, fines and sometimes even prosecution.

DIFFERENCE BETWEEN TAX PLANNING, TAX EVASION AND TAX AVOIDANCE ALONG WITH ILLUSTRATIONS

Notification No. 49/2003-CE, 50/2003 was issued by the Indian Government. This notification granted an exemption from the excise duty for 10 years if an industry has been set up in the specified areas namely, Uttarakhand, Himachal Pradesh, and Northeast India. The intent of the Government behind these notifications was the encouragement of industrialization in these areas. It will be considered as Tax Planning if a manufacturer of any good or service sets up his manufacturing unit in Himachal Pradesh.

Taking the same illustration into light, Tax Avoidance will take place if the same manufacturer sets up his manufacturing facility in another place and then brings the ready products to Himachal Pradesh just to give a finishing touch to the goods such as packaging, testing,

³Problems with tax avoidance and evasion are present in all studies of income inequality based on data from personal tax returns.³⁰Importantly, though, overall underreporting does not necessarily change income *shares*. If incomes are missing in equal proportion across the distribution and are also missing from the reference total, the shares are unaffected. If, however, income is missing in equal proportions in tax statistics but not from the reference total (as could be the case if we combine tax statistics and National Accounts statistics) then we will underestimate top shares (and overestimate the share of the rest of the population) because we simply allocate the income not observed for the top earners as being received by the rest of the population. If avoidance is more important in the top, then we will of course also underestimate their share, whereas the impact of underreporting being more prevalent in the rest of the population typically creates a bias in the opposite direction, but it also depends on the construction of the reference total.

repacking, etc. and he sells those goods in Himachal Pradesh. Here, Tax Avoidance takes place because the intention of the Government of increasing industrialization in Himachal Pradesh is defeated by such acts of the manufacturer. So, as a result the manufacturer undoubtedly follows the letter of law, but he defeats the purpose behind that law.

Taking this further, if, in any scenario, the manufacturer manufactures and dispatches the goods from another place and just raises sale invoices from Himachal Pradesh intending to show that those goods have been completely manufactured and sold from Himachal Pradesh only will lead to the act of Tax Evasion.

GIST AND ANALYSIS OF LANDMARK JUDICIAL DECISIONS ON THE TOPIC

The matters relating to Tax Planning, Tax Avoidance, and Tax Evasion imply the legality of the specific transaction, the aim behind it and the adopted methodology to reduce the tax burden, it is essential to study, discuss, and understand various decisions taken by the Courts and Tribunals on the subject. The below-mentioned case laws will highlight the significance of tax planning and lay down a list of do's and don'ts. A few of the decisions relate to direct taxes, but the law and principles set up by those decisions are also applicable to indirect taxes.

UNION OF INDIA V. AZADI BACHAO ANADOLAN 2003(132) Taxman 373 (SC)⁴

Facts

Through circular No. 682 dt. 30.03.1994 which was issued by the Central Board of Direct Taxes (CGDT) in the exercise of its power u/s 90 of the Income Tax Act, 1961, The Indian Government had clearly stated that the capital gains of any of the residents of Mauritius by making the shares alien of an Indian Company should be taxable only in Mauritius as the Taxation Law of Mauritius and they will not be liable to tax in the country of India. Lately, due to the issue of show-cause notices to some of the FIIs that are functioning in India but have been incorporated in Mauritius. This is why such FIIs should not be taxed on dividends and profits in

⁴<https://indiankanoon.org/docfragment/1960330/?formInput=azadi>

India, and this led to the birth of an issue and there was panic for the clarification of the position of the circular No. 789 dt. 13.04.2000 by the CGDT and they clarified that as FIIs etc. were the residents of Mauritius itself, they would not be liable for paying taxes in India on the income from capital gains that arise in India on the sale of shares. In the proceedings, the High Court had quashed and set aside the concerned circular and it accepted the contention that the mentioned circular is ultra vires the provisions of Section 90 and Section 119 of the act and along with that it also considered it as illegal and bad.

Decision

In the present case, it was observed and stated by the Hon'ble Supreme Court of India that "If the court finds that notwithstanding a series of legal steps taken by the assessed, the intended legal result has not been achieved, the court might be justified in overlooking the intermediate legal, but it would not be permissible for the court to treat the intervening legal steps as non-est based upon some hypothetical assessment of the real motive of the assesses.⁵ In our view, the court must deal with what is tangible in an objective manner cannot afford to chase a "will-o'-the-wisp." We are unable to agree with the submission that an act that is otherwise valid in law can be treated as non-est merely on some underlying motive supposedly resulting in some economic detriment or prejudice to the national interests, as perceived by the respondents. The law stated in Duke of Westminster's Case has remained in the same, despite hiccups of McDowell Case."

Thus, on a practical approach, the views of extreme nature which were expressed by Justice Chinnappa Reddy in the case of McDowell are no more considered as good law.

⁵ https://books.google.co.in/books?id=3Ew_EAAAQBAJ&redir_esc=y

McDowell & Co. Ltd. V. CTO, Reported in 1985 (3) SCC 230 (SC 5 Members Bench)⁶

The principle set in McDowell's case is always used as a reference when Tax Planning is being discussed. In this case the Hon. Court had set a principle that is universally allocable to all the taxes is that Tax Planning is permissible but not subterfuges.

Facts

The Appellant (McDowell & Co. Ltd) was a licensed manufacturer of liquor in India. People who wanted to buy liquor had to obtain passes to release the liquor after paying the excise duty. This payment was made directly to the excise authorities and the above-mentioned passes and the bill of sale was prepared by the appellant and it showed the price of liquor excluding the amount of excise duty. Also, the appellant paid the sales tax to the authorities of sales tax on a turnover basis but there too it excluded the excise duty. This method which the appellant followed resulted in the decrease of the amount of sales tax on the liquor. The issue in front of the Hon'ble Supreme Court [5 Member Bench] was, “Whether excise duty which was payable by the appellant but had been paid by the buyer was a part of the turnover of the appellant and was, therefore liable to be included for determining liability to sales tax. In the present case, such a method was followed by the appellant with an intention to reduce the burden of sales tax. At the time of removal of goods from the factory, the liability to pay excise duty was on the manufacturer, though it can be recovered from the customer. However, in the above-mentioned case, the burden of duty was directly transferred to the value of excise duty and the buyer, and these should have been the part of the value taxable for sales tax and was not included in the taxable value. On this issue, it was held by the House of Lords that the excise duty, which was payable by the appellant, but the buyer had paid it was a part of the turnover of the appellant's company and thus, it is liable to be included for the determination of liability of the sales tax.

On the other issue which stated that “Whether it is open to everyone to so arrange his affairs as to reduce the burden of taxation to a minimum and such a process does not constitute tax evasion, it was held by the Hon. Apex Court that the process will amount to tax evasion.

⁶<https://www.linkedin.com/pulse/practical-analysis-sec455a-income-tax-act-1961-dhawal-mohnot>

Decision

It was observed by the Hon'ble Supreme Court as obiter dicta that "Tax Planning may be legitimate if it is within the framework of law, but colourable devices cannot be part of tax planning. It is not right to say to say that it is acceptable to avoid tax payment by dubious methods. Every citizen must pay tax on history without resorting to subterfuges." _The highlighted view was expressed by a majority judgment which was delivered by Justice Rangnath Mishra.

DIRECT TAXES**CIT V. Walford Share & Stockbrokers P. Ltd. 2010 (192) Taxmann 211 (SC)⁷**

It was observed by the Hon'ble Supreme Court that any citizen is free to carry on a business that is within four corners of the law. Thus, mere Tax Planning in the absence of a motive to evade the taxes by colorable devices is not scowled upon even by the judgment of the present court in the McDowell & Co. Ltd. Case.⁸In the present case, it was held by the court that just the use of the provision of the act cannot be considered as 'abuse of law.' Even if it is assumed that the transaction was pre-planned, there is nothing to indict the candor of the transaction.

CGT V. SatyaNandMunjal- 2003 (128) Taxmann 892 (P & H HC DB)⁹

In the above-mentioned case, it was observed by the House of Lords that in the scenario of a lacuna in the law or in any other way, if the assessee can avoid tax payment within the letter of law, it cannot be stated that such action is void just because it was intended to save the payment meant for tax. This will be true as long as the law exists in its current state, the taxpayer is entitled or has the right to take its advantage.

⁷ CIT v. Walford Share & Stockbrokers P. Ltd. 2010 (192) Taxmann 211 (SC)

⁸ McDowell & Co. Ltd. V. CTO, Reported in 1985 (3) SCC 230 (SC 5 Members Bench)

⁹ CGT v. SatyaNandMunjal- 2003 (128) Taxmann 892 (P & H HC DB)

INDIRECT TAXES**Union of India V. Playworld Electronics Pvt. Ltd. 1989 (41) ELT368 (SC)**

In this case, the SC held the following:

Indeed, tax planning may not be legitimate provided it is within the framework of the law. Colourable devices cannot be part of tax planning and it is wrong to encourage to avoid the payment of tax but dubious methods. It is also true that to create the atmosphere of tax compliance taxes must be reasonably collected, should be utilised in proper expenditure, and not wasted.¹⁰

The Hon'ble Supreme Court in the judgment of CCE V. Guri Nanak Refrigeration Corporation 2003 (153) ELT 249 (SC) had deliberately upheld the decision of the CEGAT (3 Member Bench) wherein the decision was held that if there is an absence of an allegation of glowback of the money from the person who is buying to the assessee, and if the sole consideration is the price, and if the dealings between buyer and assessee are just at arm's length, then the Value Assessable will be decided on the bedrock of the selling price conversely it is below manufacturing cost.

BRILLOPEDIA

CONCLUSION & SUGGESTIONS

As a verdict extracted from the above extreme discussions, it can be clearly stated that Tax Planning is a legal activity but at the same time, it must be noted that the use of colourable devices cannot be included in Tax Planning. Along with this, it is also considered wrong to vitalize the optimism that it is acceptable and honourable to circumvent tax payment by utilizing dubious methods. Tax Planning as stated in the exercise which is carried out by a taxpayer with an intent to meet his legal obligations systematically and properly by making use of all licit benefits under the tax laws including the benefits arising from various notifications.

Planning in no way means a reduction in tax liability all the time but is done to avoid penalties and litigation. An efficient Tax Management includes planning relating to various statutory

¹⁰ <https://www.thehindubusinessline.com/business-laws/legitimate-tax-planning-not-taboo/article37048314.ece>

returns in the time frame, interest and unwanted litigations, compliance of provisions of law and keeping away from penalties.

On the other hand, Tax Evasion and Tax Avoidance can be extremely considered unethical and illegal under the lenses of law and society. It uses unfair and illegal means to skip tax payment and liability by taking advantage of the loopholes and grey areas present in the tax laws which is completely unacceptable and illegitimate in every form.

In final words, it must be understood that Tax planning has a much wider scope than expected. Its motive is to reduce liability arising from taxes to the minimum possible scenario. Nevertheless, it is an underway pursuit or activity, its approach is futuristic in nature, and it leads to considerable benefits over some time. Benefits such as reliefs permissible under the law and availing of concessions are included in it. It also arranges business activities in such a way that will minimize the incidence of any sort of tax.

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