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LEGAL IMPLICATIONS OF GIFTING OF PROPERTY AMONGST COMPANIES

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INTRODUCTION

Gifting an immovable property can be a strenuous and time-consuming process. Hence, it is pertinent to know the implications of such transactions and ensure that they are carried out in a compliant manner.

While gifting may be seen as a gesture of goodwill or appreciation, a number of factors need to be considered before entering into such a transaction. One such factor is consideration. Consideration is often regarded as a sine qua non for a valid contract. S. 25 Indian Contract Act, 1872 "ICA" explicitly states that an agreement without consideration is void.

S. 25(1) ICA also provides that an agreement without consideration will be void unless it is made on account of natural love and affection between parties. However, this gives rise to perplexity as to the application of this requirement of natural love and affection on a company that is considered an artificial person with no emotion such as natural love or affection.

Gift under Transfer of Property Act, 1882

S. 122 of the Transfer of Property Act, 1882 "TPA" defines a gift as "the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the **donor**, to another, called the **donee**, and accepted by or on behalf of the **donee**."

The Hon'ble Supreme Court has held that the essential elements of the aforementioned provision are the absence of consideration, the **donor**, the **donee**, the subject matter, the transfer, and the acceptance of such transfer.

Apart from these essentials, s. 124 TPA states the property must also be in existence as a gift of the future property has been held to be invalid, and the acceptance of the gift should be made during the lifetime of the **donee** as specified under s. 122 TPA. If any of these essentials are not met, then the gift may be void.

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Analysing s. 122 of the Transfer of Property Act, 1882 s. 25 of the Indian Contract Act, 1872 in light of the gifting of property by the company

To understand the applicability of s. 122 TPA and s. 25 ICA, it is pertinent to note that the u/s 5 TPA definition of a living person under TPA includes the companies as well.

A plain reading of s. 25(1) ICA gives us an understanding that for a contract to be valid without consideration it must be out of natural love and affection. However, the position with regard to the application of this provision on gifts made amongst the companies was unclear until the landmark case of DCIT v. KDA Enterprises Pvt. Ltd, where the Hon'ble Supreme Court opined that natural love and affection are not a requirement for a valid gift between companies. The only requirement for a valid gift is to be in accordance and in furtherance of the provisions of the MOA and AOA of the company.

The competency of gifts between companies has been reaffirmed by the Courts time and again. In one such case, the Hon'ble Apex Court did not question the validity of a corporate giving or receiving gifts. In another case, a subsidiary company had received a gift from its holding company and such gift was held to be non-taxable as it was in the nature of capital receipt.

Can a company misuse the gifting of property to another in order to avoid tax liability?

The Gift Tax Act "GTA" prevailed in India from 1958 till October 01, 1998, and was applicable to all kinds of transactions involving gifts in the '80s. Since GTA was already applicable in the nature of direct tax there was no need for any provision pertaining to such transactions in the Income Tax Act, 1961 "ITA".

Since the repeal of the GTA, gifts made between companies are not taxed in India except in certain cases.

The absence of any provision creating a tax liability for the companies gifting properties can be used as a colourable device to evade taxes hence it becomes crucial for the courts and tribunals to find out the exact nature and motive behind such a transaction. The companies refrain from tax implications in the guise of gifts. In one such case the assessee had received gifts but failed to establish the genuineness of the gift, the Hon'ble Court added the amount received to the income of the assessee under s. 68 of the ITA.

Tax liabilities of gifts under the Income Tax Act, 1961

S. 56 of the ITA allows for the taxation of certain gifts of both movable and immovable property without consideration beyond a specified limit. As per clause (x) of s. 56, gifts are not taxable up to a threshold of Rs. 50,000. Over and above the specified limit, gifts are taxable as ‘income from other sources’ except when the same qualifies as an exception under the proviso to the said clause.

Under s. 80G of the ITA, donations, and charities are made and allowed to companies, and the Hon’ble Income Tax Appellate Tribunal “ITAT”, Mumbai Bench has held that these donations and charities are nothing but gifts. Moreover, under s. 8 of the Companies Act, 2013, the companies are allowed to be registered for charitable purposes.

Any transfer of a capital asset under a gift or to an irrevocable trust is not taxable as capital gains u/s 47(iv). However, the Hon’ble Madras High Court ruled that a transfer of shares that was camouflaged as a gift to a subsidiary was actually an attempt at corporate restructuring and did not meet the necessary elements of a gift.

Moreover, in the case of D.P. World Pvt. Ltd. V. DCIT, the Hon’ble ITAT held that the companies are competent to make gifts and the gift of immovable property is neither taxable under the head of income from other sources nor under the head of business income u/s 28 (iv) ITA and held that the gift being a capital receipt is not taxable.

Trusts and organizations registered under s. 12A, 12AA or 12AB, or u/s 10(23C) ITA for charitable or religious purposes can avail of certain benefits. For example, they may be exempt from tax on gifts received for charitable purposes.

Stamp duty and registration charges

ICA provides that a contract without consideration is void unless it is in writing under the provisions of the Registration Act, 1908. Hence, if a company wishes to gift an immovable property, it must do in writing and the gift must be made voluntarily. A gift deed is a legal document that facilitates the transfer of property between two parties without consideration. The gift deed must be registered and along with the registration charges of the gift deed, stamp

duty is also applicable. The stamp duty charges vary from state to state and range from 2 percent to 7 percent of the value of the property.

Conclusion

To conclude, the gifting of property by companies in India is a complex issue with a number of legal and tax implications. While it is possible for companies to make gifts to other companies, there are a number of restrictions and conditions that must be met. In particular, gifts of shares in certain categories of companies are now taxable, and any gift made for the purpose of avoiding tax liability may be void. Any transfer of a capital asset under a gift or to an irrevocable trust is not taxable as capital gains. Companies that are considering making gifts of property should carefully consider the legal and tax implications before doing so. Company cannot evade payment of stamp duty and registration charges on gift deed.