

Negative lien is not the same as Corporate Guarantee ... No transfer Pricing impact thereon

By: Team Tax Connect

Consider a 100% subsidiary Co. B provides a corporate guarantee to Bank C for Holding Co. A. This means that incase Co. A defaults, then Co. B would make good the borrowed amount to Bank C. A "negative lien" on the other hand means an undertaking by the owner of assets to a lender not to sell these assets on which a charge or a lien without the prior permission of the lender. It is an undertaking of convenience for not to sell the encumbered assets. It does not create any liability on the assessee.

In our example, the owner of assets i.e. Co. A (which is the owner of all the assets of Co.B) gives an assurance to Bank C to not sell these assets on which a charge or a lien without the prior permission of Bank C. It is an undertaking of convenience by Co.A to not sell the encumbered assets. It does not create any liability on Co. B.

Negative lien, is thus is a negative covenant which restricts a person from creating any kind of encumbrance over his assets or otherwise disposing them without the prior consent of the other person in whose favor he has given such an undertaking. Accordingly, the negative lien by an assessee does not provide any financial benefit / service to the other party. Even if the borrowers default in payment of loan, there will be no liability on assessee for paying any amount since assessee is not a guarantor.

Taking into consideration theforesaid position, the ITAT Delhi in the case of JOGPL PVT LTD Vs DCIT, CIRCLE-13(1), DELHI [2025-VIL-1473-ITAT-DEL] held that

certainly once the international transaction arising out of the guarantee given for the benefit of AE (i.e. guarantee by Co.B for Co.A) goes, then what is left is a transaction between the assessee (Co. B) and the Lender Bank (Bank C) only, which are unrelated parties. The vital constituent of an international transaction is that the same should be between associated enterprises. However, Section 92B(2) of the Income Tax Act outlines the circumstances under which a transaction between two persons would be deemed to be between the associated enterprises.

LET'S DISCUSS FURTHER!

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