

(2014) 07 DEL CK 0174

In the Delhi High Court

Case No : Income Tax Appeal 1616 and 1619/2010

Commissioner of Income Tax

APPELLANT

Vs

Siel Ltd.

RESPONDENT

Date of Decision : 24-07-2014

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 19(1)(a), 19(4), 29(1)(b)

Citation : (2015) 231 TAXMAN 619

Hon'ble Judges : V. Kameswar Rao, J; Sanjiv Khanna, J

Bench : Division Bench

Advocate : Sanjeev Sabharwal, Sr. Standing Counsel, Advocate for the Appellant; Mayank Nagi, Advocate for the Respondent

Judgement

Sanjiv Khanna, J.—These two appeals by the Revenue pertain to one assessment year 2000-01 and the challenge is to acceptance of book loss of Rs.10.12 crores/ indexed loss of Rs.13.62 crores on sale of shares @ Rs. 2.02 per share of Siel Tizit Ltd. on the ground that the sale was a colourable device. The said shares were sold by the respondent assessee to the joint venture partner Plansee Tizit Aktiengesellschaft, (Plansee, for short), an Austrian company.

2. Plansee and the assessee had entered into a joint venture agreement dated 20th June, 1994, followed by first amendatory agreement dated 6th August, 1996 for setting up and forming the company Siel Tizit Ltd. for carrying on business of manufacture, sale, distribution, export and other dealings in hard metals. The two joint venture partners equally acquired the paid up equity capital of 15000000 equity share of Rs.10/- each aggregating to Rs.1500 lakhs i.e., the two joint venture partners had 50% share holding.

3. In the previous year i.e., assessment year 1999-2000, the respondent-assessee renounced in favour of Plansee their entitlement to subscribe 3000000 equity shares of Rs.10/- each in the rights issue. Plansee's share holding increased to 58.3% and while respondent assessee's share holding got decreased to 41.7%. Thereupon, the respondent-assessee and Plansee had

entered into an agreement dated 31st March, 1999. The agreement records that Seil Tizit Ltd. had proposed to offer one crore fresh equity shares of Rs.10/- each for cash at par on rights basis, but the respondent assessee due to financial difficulties, was unable to subscribe to 40166667 shares which would be offered to them by way of rights offer and had decided to renounce the same in favour of Plansee. Further, Plansee on request agreed to buy the assessee's shareholding consisting of 12700000 equity shares for consideration of USD 600000, which on conversion, came to Rs.2.02 per share of face value of Rs.10/- each.

4. This, resulted in book loss of Rs.10.12 crores or indexed loss of Rs.13.62 crores on capital account. The Assessing Officer did not accept the said capital loss recording the following reasons:-

(1) There was a close connection between the two joint venture partners who shared between themselves the control over shares of STL in a ratio.

(2) Different rates - when the rights were renounced at cash at par the sales should have been made also at par. If the two parties "can agree for the buyback at mutually agreed prices then the prices at which the shares were sold also seem to be mutually agreed. upon. It is also a fact through self concession by the assessee that Rights were renounced without any price or payment of premium. It is more than clear that this arrangement finds echo in the low prices being paid" for by Plansee on the purchase of 1,27,00,000 shares from Siel Ltd. The premium pr the prices which Plansee would have been liable to pay has been built into the low costs it has incurred on the purchase of share from its JV partner.

(3) The dates of agreement (31.3.99) and state of valuation (signed-on 22nd April, 99) and the RBI approval received vide letter. dated 29th April, 1999 prove that this was part of an arrangement. It was already agreed in the agreement which was placed as evidence (as discussed above) that Plansee would buy 127 lakh shares held by Siel for US \$. 6,00,000/-. * The valuation is dated April, 1999. It more than proves that the valuation was an afterthought and only a ploy to get RBI's approval for remitting, the amount otherwise it was not possible for the two JV particulars to arrive at the value of \$ US 6,00,000 before the valuation.

(4) It is for reasons best known to the JAP partners that where the need for getting the valuation done was when the rate was already available. Rights renunciation and the sale of shares which have been done by Siel Ltd in favour of Plansee Tizit has taken place in such span of time where the rates could not have varied much. Rights renounced at Rs. 10 at cash at par was the ideal rate which would have formed the basis of sale of shares to Plansee tizit.

(5) The fact of the matter is that the assessee had retained with him the optimum to buy back shares but this time at prices mutually agreed. It is also corroborated that in the valuation that the shares were held only by the two JV partners and that it was not guided by market forces.

(6) It has been done on the pretext that Siel Tizit was in need of funds. The rationale behind infusing additional funds at low prices defies logic. If the company's fund crunch was, to be met by this sale it should have been done at higher prices or at least at par on which the rights have been renounced.

(7) No premium was received from Plansee Tizit. Its likely the premium was built into the low prices which were received by Siel Ltd.

(8) Through this arrangement the assessee has been able to pass off capital losses without parting with its funds. The option retained for buy back point to a scheme which would be effectuated later.

Going by the above it is established that the assessee has used the mutuality involved in the dealings between the two JV partners to sell shares at prices deliberately made lower than comparable prices at which the rights renunciation was offered. The sale should have been made at Rs. 10 per share at which the rights were renounced. If this was the case the assessee would not have incurred any loss on the sale of shares or Siel Tizit Limited to Plansee Tizit. It has been laid by the Honourable Supreme Court in the case of McDowell and Co. Ltd. Vs. Commercial Tax Officer, , that it is for the court to expose the real nature of the "device adapted by the tax payer, whether it is legitimate avoidance of tax or evasion of tax under cloud of avoidance. It has been further held that tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges.

5. The appellant did not succeed before the first appellate authority, but on further appeal, succeeded before the tribunal.

6. At the very outset, we first note that it is not the case of the Revenue that the transaction relating to sale of shares in question was bogus transaction having no commercial or business reasons. It is not disputed that shares were transferred by the assessee to Plansee. In these circumstances, we do not think that the principle of colourable device as a part of tax evasion plan would be applicable. It is not the case of the revenue that sale transaction was a cover up, a device and the de facto or real transaction was different. The real issue and question is whether the sale price received by the respondent assessee was the true and correct price or there was some undeclared consideration paid, which was not brought in the books.

7. The Assessing Officer primarily relies upon the fact that Plansee had acquired shares in Seil Tizit Ltd. in the assessment years 1999-2000 and 2000-01 at the face value of Rs.10/- each and not at the discounted price of Rs.2.02 per share. This, we do not think, can be a ground or reason to disregard and hold that sale of shares @ Rs.2.02 per share does not represent the true and correct price.

Rights issue was for the purpose of generating and augmenting the capital in the loss making company. The share application money paid, became paid up share capital. The price paid for acquiring rights shares, cannot be equated with the price paid to acquire shares from shareholders in the present case. Due to non-subscription of right shares by the respondent assessee, their share holding had come down from 50% to 41.7% in the last year. As further capital infusion was required in the loss making venture, one crore equity shares of the face value of Rs.10/- each for cash at par on rights basis were offered for subscription, which the respondent assessee did not want to subscribe because of their financial difficulties. On subscription of the fresh issue of one crore shares, the share holding of the assessee would have got reduced to mere 5% with Plansee becoming 95% shareholder.

8. In the assessment order, it is not recorded or stated that Siel Tizit Ltd. had not incurred substantial and huge losses. It was not contested that the respondent assessee was facing financial crunch. It is correct that the respondent assessee and Plansee were joint venture partners, but they were not controlled and under the same management. It is not a case of the Revenue that the two parties had common shareholders or common directors. In case of sale of this nature, the seller would like to get the best price and the buyer would like to purchase the shares on the depressed or lowest price, specially, when there were losses and further capital had to be inducted. It is, therefore, incorrect to hold that it was not a case of arms length transaction as such.

9. In the present case, the respondent assessee was required to obtain approval/permission of the Reserve Bank of India and Ministry of Industry, Department of Industrial Policy and Promotion to enable Plansee to purchase existing share holding of the respondent assessee. Ministry of Industry, Department of Industrial Policy and Promotion by their letter dated 20th April, 1999, examined the request made by Siel Tizit Ltd. by letter dated 31st March, 1999 and granted approval, subject to the following conditions:-

2. The approval is subject to the condition that no royalty would be payable and the Indian company will continue to have the option for purchasing such number of shares in the joint venture company in one or more tranches at a price to be mutually agreed between the parties within a period of 3 years from the date of acquisition of such shares by Plansee either from company or Siel, which will enable Siel to have 50% share holding in the joint venture company.

3. Further, the above approval is also subject to the condition that issue/transfer/pricing of shares shall strictly be as per SEBI/RBI Guidelines.

10. Thereafter, Reserve Bank of India by their letter dated 29th April, 1999, accorded approval in the following words:-

2. We note that the Department of Industrial Policy and Promotion, Ministry of Industry, Government of India, Foreign Collaboration Section-II have vide their letter No.FC II 833(96)/837(96)-Amend dt. 20th April, 99 approved increase in

the foreign equity participation in the paid up capital of Seil Tizit Ltd. New Delhi (STL) by Plansee Tizit Aktiengesellschaft, Austria (Plansee) from 58.3% to 95%. Having regard to the above, we advise that we have no objection u/s 29(1)(b) of Foreign Exchange Regulation Act, 1973 to Plansee acquiring 1,27,00,000 eq. Shares of Rs.10 each (35.28%) of STL from Siel Ltd. New Delhi (SL) for an aggregate consideration of US\$ 600,000.

11. The aforesaid said letter also mentions that the conditions, which had been imposed including the conditions contained in the letter dated 20th April, 1999 of Ministry of Industry, Department of Industrial Policy and Promotion would apply.

12. Thereafter, Reserve Bank of India, Exchange Control Department by their letter dated 16th June, 1999 gave their no objection to the transaction in question under the provisions of the Foreign Exchange Regulation Act permitting Plansee to acquire shares in Seil Tizit Ltd. from the respondent assessee for US\$ 600000. The relevant portion of the said letter reads as under:-

2. We advise that we have no objection to Siel Ltd. New Delhi (SL), the resident shareholders Siel Tizit Ltd. New Delhi (STL) transferring 1,27,00,000 shares of Rs.10 each of STL in favour of Tizit Aktiengesellschaft, Austria (Plansee) for an aggregate consideration of US\$ 600,000.

3. This permission may also be treated as Reserve Bank's permission u/s 29(1) (b) of FERA 1973 to Plansee for acquiring the above shares STL from SL, the above resident shareholders of STL.

4. This permission may also be treated as our permission of STL u/s 19(4) for effecting consequential changes in its Register and u/s 19(1)(a) of the FERA 1973 for the export of relevant share certificates of Plansee.

5. Please note that his permission shall remain valid for 3 months during which period all transfer formalities in respect of the above shares shall be completed.

13. The assessee had relied upon the valuation report, which was accepted by the Reserve Bank of India, Exchange Control Department when they granted express permission vide letter dated 16th June, 1999. Learned counsel for the Revenue submitted that the valuation report was ambiguous and mentions that the Seil Tizit Ltd. was not a listed company and the market price was not available. We do not think that on this basis we can hold that the consideration declared and paid was sham and not the correct amount, which was paid. It was open to the Assessing Officer to go into the books of account and balance sheet and, if required and necessary, make his own valuation. It is not the case of the Revenue that there was secondary or additional evidence to show or corroborate the finding that the sale consideration mentioned was not the genuine or true consideration.

14. Criticising the valuation report, it was submitted that the valuers had specifically stated that they had relied upon the data/information supplied without verification. It was also stated that the valuers did not take into account

revaluation of reserves. This means that the valuers had not examined veracity and audited the books of accounts. Valuers do not normally undertake the said exercise and valuation are made accepting and on the basis of audited accounts. It was open for the Assessing Officer to point out and state why and for what reason the figures in the books of account were false and incorrect and, therefore, the data/information was unreliable and should not have been the basis of the valuation. Valuation was undertaken, report made as was required to get requisite approval under the exchange control regulations. In the facts of this case, it cannot be assumed that underhand or undeclared sale consideration was paid.

15. In view of the aforesaid factual position, we are not inclined to frame any question of law in the present appeals and the same are dismissed.