

IN THE INCOME TAX APPELLATE TRIBUNAL "J" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI PAVAN KUMAR GADALE, JM

ITA No. 7299/Mum/2017
(Assessment Year 2013-14)

Reliance Industries Limited
3rd Floor, Maker Chamber-IV
222, Nariman Point,
Mumbai-400 021

(Appellant)

Vs.

Asst. Commissioner of Income
Tax,
Large Taxpayer Unit,
29th Floor, Center No.1, World
Trade Centre,
Cuffe Parade,
Mumbai-400 005

(Respondent)

PAN No. AAACR5055K

ITA No. 136/Mum/2018
(Assessment Year 2013-14)

Asst. Commissioner of Income
Tax,
Large Taxpayer Unit,
29th Floor, Center No.1, World
Trade Centre,
Cuffe Parade,
Mumbai-400 005

(Appellant)

Vs.

Reliance Industries Limited
3rd Floor, Maker Chamber-IV
222, Nariman Point,
Mumbai-400 021

(Respondent)

Assessee by : Shri Madhur Agrawal, Advocate
Shri Nimesh Vora &
Ms Moksha Mehta, CAs, ARs'
Revenue by : Shri Rajesh Damor, CIT DR

Date of hearing: 10-02-2023
Date of pronouncement : 20-04-2023

ORDER

PER PRASHANT MAHARISHI, AM:



01. ITA No. 7299/Mum/2017 & ITA No.136/Mum/2018 for A.Y. 2013-14 filed by the appellant/ assessee as well as the learned Assessing Officer respectively were decided on 10th November, 2020.
02. Subsequently, the co-ordinate Bench vide order dated 3 January 2022 disposed off Miscellaneous Application no. 113 & 114/Mum/2021 in both the above appeals.
03. MA No. 113/Mum/2021 was filed in ITA No. 136/Mum/2017, wherein it was found that ground no.36 was not adjudicated, wherein inclusion of comparable of Axis Integrated Systems Limited was challenged. Therefore, ground no.36 of Revenue's appeal was recalled for fresh adjudication.
04. In MA no.114/Mum/2021, is in ITA No 7299/ Mum/2017, the co-ordinate bench held that assessee has raised an additional ground no.6 that remains to be adjudicated. Accordingly, the co-ordinate Bench recalled the order for adjudicating the additional ground no.6.
05. Thus, In ITA No. 136/Mum/2017, only issue is to adjudicate ground no.36 of the appeal of learned Dy. Commissioner of Income Tax, large taxpayer unit-2, Mumbai in which is as under:-

"On the facts and circumstances of the case and law, the Ld. CIT(A) has erred in excluding the comparable M/s Axis Integrated Systems Limited without appreciating the fact that Business Support Services and Management Services are highly skill-based services and by no stretch of imagination BSS and MSS can be treated as low-end services."
06. At the time of hearing both the parties were heard and both the parties pointed out that this comparable was considered by



the co-ordinate Bench in earlier years in ITA No.1547/Mum/2016 for A.Y. 2010-11, ITA No.2733/Mum/2017 for A.Y. 2011-12 and ITA No.5842/Mum/2017 for A.Y. 2012-13 vide order dated 28th September, 2018, wherein at paragraph no.163, the above comparable company was considered as under:-

"163. With regard to Axis Integrated Systems Ltd, we notice that the said company is providing services in respect of regulatory and licensing requirements by liasioning with Government and regulatory authorities. On the other hand, the assessee is providing back office support services, which are mostly internal services. Accordingly, the learned CIT (A) has held that M/s Axis Integrated Systems Ltd is providing high end services and hence it cannot be taken as comparable, since the assessee is providing low end support services. Further, the Id AR contended that the Transfer Pricing Officer has selected this company on cherry picking basis, which is not in accordance with the intention/objective of Indian transfer pricing regulations. In view of the above, we agree with the view taken by Id CIT (A) that M/s Axis Integrated Systems Ltd should be excluded."

07. In view of above facts, we do not have any hesitation in holding that, (i) in absence of any change in the facts and circumstances in the case, (ii) as well as functional profile of the assessee and the comparable company, i.e. Axis Integrated Systems Limited, remaining the same, respectfully following the decision of the co-ordinate Bench, we hold that Axis Integrated Systems Limited should be excluded from the



comparability analysis. Accordingly, we uphold the order of the learned CIT (A) in excluding the above comparable.

08. In the result, ground no.36 of the appeal of the learned Assessing Officer in ITA no 136/ Mum/2017 is dismissed.

09. Now, we come to the additional ground no.6, raised by the assessee in ITA no 7299/Mum/2017 of assessee.

010. Ground no.6 reads as under:-

"The appellant vide it's a letter dated 13/12/2018 and 18/3/2019 had raised 5 additional grounds of appeal in ITA number 7299/MUM/2017. The appellant now wishes to raise a further 6th ground of appeal w.r.t. assessment year 2013 - 14 in ITA number 7299/MUM/2017, which is as follows:-

"Additional ground no.6.

The learned Commissioner of Income-tax (Appeals-57) Mumbai, [hereinafter referred to as the CIT(A)] erred in not allowing long term capital loss arising on sale of equity and preference shares of M/s. Reliance Exploration and Production DMCC (REP DMCC), to its subsidiary company M/s. Reliance Industrial Investments and Holdings Ltd (RIIHL). which was inadvertently not claimed in the Return of Income on erroneous understanding that the said transaction was not a 'transfer' under section 47(iv) of the Income Tax Act 1961 (Act), though



relevant conditions specified in section 47(iv) were not fulfilled.

The appellant submits that the loss on sale of said shares was allowable under section 45 of the Act as the whole of share capital of its subsidiary company M/s. RIIHL was not held by the appellant and hence the sale of equity and preference shares was not covered by the exception under section 47(iv) of the Act.

Your Appellant reserves the right to add, amend, alter or vary all or any of the above grounds of appeal as they or their representatives may think fit."

011. According to ground no.6, the assessee claims and submits that
- i. Assessee has incurred long term capital loss arising on sale of equity and preference shares of M/s. Reliance Exploration and Production DMCC (REP DMCC), to its subsidiary company M/s. Reliance Industrial Investments and Holdings Ltd ('RIIHL), Which was claimed as exempt u/s 47 (iv) of the Act.
 - ii. It was erroneous understanding that the above said transactions is falling within the exception to definition of 'Transfer' u/s 47(iv) of the Income-tax Act, 1961 (the Act).
 - iii. Assessee does not hold whole of the share capital of its subsidiary company. It only holds 100 % equity shares capital of that company but does not hold any preference share of that company.

012. The brief facts of the case shows that assessee transferred a capital asset as under :-

- i. Reliance Exploration and Production DMCC is a Multi Commodity centre under the DMCC company regulation no. 1/03. It was incorporated on 6 December 2006. The company is engaged in the business of exploration and production of natural resources, primarily oil and gas from mineral properties. The company is wholly owned subsidiary of Reliance Industries Ltd., Assessee.
- ii. Assessee has acquired 1,76,200 equity shares having face value of AED 1000/- each fully paid of Reliance Exploration and Production DMCC at a total cost of ₹210,84,30,198/-in F.Y. 2006-07 as under :-

Date	Number of equity shares	Purchase value In Rs.	Purchase Price Per shares In Rs.
13/12/2006	200	24,42,000/-	12210/-
27/02/2007	26,000	31,29,64,600/-	12,037.10
28/03/2007	1,50,000	179,30,23,598/-	11952.49
Total	176,200	210,84,30,198/-	

- iii. Out of above 1,76,200 and equity shares, 26,200 equity shares were issued for cash and 1,50,000 equity shares were issued for consideration other than cash.
- iv. Assessee is the only equity and 5% non-cumulative compulsorily convertible preference shareholder Of Reliance Exploration and Production DMCC.
- v. Reliance exploration and production DMCC has also issued fully paid-up 5% noncumulative compulsorily convertible preference



shares having face value of AED 1000 each. These 5% noncumulative compulsorily convertible preference shares will have to be converted into equity shares at any time during the first 5 years at fair value of the equity shares at the conversion date and at any time after 5 years till 10 years at 10% discount on the fair value of the equity shares, at the conversion date.

- vi. Assessee acquired above 5% fully paid-up noncumulative compulsorily convertible preference shares as under:-

Date of purchase	Quantity of preference shares	Purchase value (In Rupees)	Purchase price per preference shares (In Rupees)
31/3/2008	4,99,089	552,65,15,382	11,073.21
31/3/2009	6,03,411	838,70,01,286	13,899.32
31/3/ 2009	52,816	73,41,06,372	13,899.32
31/3/2010	5,45,000	658,46,95,319	12,082.01
31/3/2011	3,62,000	439,65,58,448	12,145.19
25/9/2011	4,20,000	557,90,89,332	13,283.55
Total	24,82,316	3,120,79,66,139	

- vii. Thus, as on 31st March, 2012, assessee was holding
- 24,82,316 5% noncumulative compulsorily convertible preference shares at a total cost of ₹ 31,207,966,139/-, and
 - 176,200 equity shares at total cost of ₹210,84,30,198/-



- viii. Reliance exploration and production DMCC purchased and cancelled 11,02,500 5% noncumulative compulsorily convertible preference shares of AED 1000/- each at par aggregating US\$ 30 crores (AED 110,25,00,000) as per board resolution and shareholder resolution dated 17 July 2012.
- ix. Thus, assessee was left with 13,79,816 5% noncumulative compulsorily convertible preference shares as well as 1,76,200 equity shares of the above company.

013. On 28/3/2013 assessee sold all these preference and equity shares to Reliance Industrial Investments And Holdings Ltd. 13,79,816 preference shares were sold for 1,376,94,45,097/- and 1,76,200 equity shares were sold for 167,35,54,903/-. The assessee incurred long-term capital loss on sale of 5% noncumulative compulsorily convertible preference shares amounting to ₹ 7,505,778,350/- and on equity shares loss of ₹ 1,787,683,109 was incurred.

014. These shares i.e. capital assets were sold to Reliance industrial Investments and Holdings Limited which is Indian subsidiary company of the Assessee. However :-

- i. Assessee considered that Reliance Industrial Investments And Holdings Ltd is 100% subsidiary of the assessee company as it holds 14,75,04,400 equity shares out of 14,75,04,400 issued and subscribed equity shares of Reliance Industrial Investments And Holdings Ltd.
- ii. Reliance Industrial Investment and Holdings Ltd has also issued preference shares of different coupon rate, which were not held by the assessee but other companies.

- iii. Therefore, it was claimed that the above transaction is not chargeable to capital gain under section 45 of the act as it falls within the exception of clause (iv) of section 47 of the Act. Section 47(iv) of the Act provides as under:-

47. Nothing contained in [section 45](#) shall apply to the following transfers:—

- (iv) any transfer of a capital asset by a company to its subsidiary company, if—
- (a) the parent company or its nominees hold the whole of the share capital of the subsidiary company, and
 - (b) the subsidiary company is an Indian company;

- iv. Accordingly, the above capital loss arising on sale of equity shares as well as preference shares was held to be not chargeable to income tax. Accordingly, the long-term capital loss was claimed as exempt.

015. As per the order of the co-ordinate Bench in MA No. 114/Mum/2021, additional ground 6 was raised on 16 March 2019 and above loss was claimed as chargeable to tax, but same was left to be adjudicated in the original appellate order of the coordinate bench. As those grounds were not adjudicated, we are supposed to adjudicate the same.

016. Before us, the assessee has placed the annual accounts of Reliance Industrial Investment and Holding company as on 31 March 2013. It was shown that this company

- i. has 14,75,04,400 equity shares of ₹10 each fully paid up amounting to ₹14750 lacs held by Reliance Industries Ltd along with its six nominees. Each of the six nominees held 100 equity shares each and Reliance Industries Ltd held 14,75,03,800 equity share of the above company. Thus,



Reliance Industry Ltd along with its six nominees was holding 14,75,04,400 equity shares of Reliance industrial investments and Holdings Ltd. Thus, Reliance Industries Ltd. held 100% equity of this company i.e. Reliance Industrial Investment and Holdings Ltd.

- ii. It has issued two different types of preference shares.
- iii. As on 31st of March 2012, it had issued 14,57,250 9% noncumulative optional convertible preference shares. These were held by following entities as under:-

Preference Share Holding Pattern Of 9% Noncumulative
Optionally Convertible Preference Shares

serial number	Name of the shareholder	Number of shares held as at 31/3/2012	As at 31 three 2013
1	Reliance Petro investments Ltd	9,00,500	9,00,500
2	Reliance KG exploration and production is private limited	51,750	Nil
3	Reliance retail finance limited	5,05,000	5,05 ,000
	Total	14,57,250	14,05,500

- iv. has also issued 10% noncumulative optionally convertible preference shares of ₹ 10/- each which were as under:-

Serial number	Name of preference shareholder	Number of preference shares held as	As at 31/3/2013
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		at 31/3/2012	
1	Reliance Petro investments Ltd	1200	1200
2	Reliance polyolefin Ltd	1,49,020	1,49,020

- v. Thus, the issued subscribed and paid-up capital of Reliance Industrial Investments And Holdings Ltd as on 31 March 2012 and 31st of March 2013 is as under:-

Serial number	Type of share capital	Number of shares held as on 31/3/2013, 31/3/2012)	Share capital as at 31/3/2013 (In Lakh Rs)	Share capital as at 31/3/2012 (In Lakh Rs)
1	Equity share of ₹ 10 each fully paid	14,75,04,400	147,50	147,50
2	9% noncumulative optionally convertible preference shares of ₹ 10 each fully paid up	14,05,500 (14,57,250)	141 Lacs	146
3	10% noncumulative optionally convertible preference shares of ₹ 10 each fully paid up	149,020	15 lakhs	15
4	10% noncumulative optionally convertible preference shares of ₹ 10	1200	0.12	0.12



	each fully paid up			
	Total		149,06	149,11

017. Thus, it was submitted that 'whole of the share capital' which comprises of both the equity share capital and preferential capital of Reliance Industrial Investments Holdings Ltd was not held by the assessee company, Reliance Industries Ltd and therefore the benefit of provisions of section 47 (iv) of the act is not applicable to the above transaction. Therefore, profit or gain arising on the sale of above shares would be treated as per normal capital gain provisions.
018. The learned Departmental Representative submitted that no such claim was before the learned Assessing Officer or before the learned CIT (A) but Assessee raised it first time before the ITAT. The above claim should not be allowed. It was further stated that whole of the share capital shall only mean the equity share capital in the above company. The holding of preference share capital by other entities does not exclude the Reliance Investment and Holdings Ltd from the definition of subsidiary company.
019. We have carefully considered the rival contention and perused the details produced before us. According to section 47 of the income tax act, the provision of section 45 does not apply to certain specified transfer. According to clause (iv) of section 47 of The Act, it is provided that if there is a transfer of a capital asset by a company to its an Indian subsidiary company, and parent company along with its nominees, hold the whole of the share capital of the subsidiary company, then, transfer of such capital asset shall not be chargeable to tax under the head capital gain in terms of provisions of section 45 of The Income Tax Act.
020. Undisputedly, in case before us there is a transfer of a capital asset by assessee to its subsidiary company, which is also an Indian company. Thus, there is no dispute that Reliance industrial investments holding company Ltd is a subsidiary company of reliance



industries Ltd. The only dispute is that Reliance Industries Ltd, Assessee does not hold the whole of the share capital of Reliance Industrial Investments Holding Limited. Assessee holds only 100% of the equity share capital of its subsidiary. However, it does not hold any of the preference share capital of its subsidiary company.

021. Apparently Reliance Industries Ltd, does not hold any of the 2 types of preference shares issued by Reliance industrial investments and Holdings Ltd i.e. (1) 9% non-cumulative optional convertible preference shares of ₹ 10 each and (2) 10% noncumulative optionally convertible preference shares of ₹ 10 each.
022. Assessee submitted shareholding pattern of the subsidiary company as on 31/3/2012 and 31/3/2013 of equity share and preference share holding by submitting the duly certified Annual Return Of the company furnished before the Ministry of corporate affairs. Audited annual accounts of the subsidiary company as on 31/3/2013 filed, shows capital structure of the company as per 'note number (1) share capital' that assessee is only holding 100 % equity share capital of Reliance Industrial Investments And Holdings Ltd.
023. Two different companies hold 9% noncumulative optionally convertible preference shares of ₹ 10 each fully paid in the ratio of (1) Reliance Retail Finance Limited- 35.93%, (2) Reliance Petro Investments Ltd -64.07%. Further, 1200 10% noncumulative optionally convertible preference shares of ₹ 10 each fully paid are held by Reliance Petro Investments Ltd. In addition, 1,49,020 10 % noncumulative optionally convertible preference shares of ₹ 10 each fully paid are held by Reliance Polyolefin's Ltd.
024. Undoubtedly, the shareholders holding preference share capital are the fellow subsidiary companies.
025. These fellow subsidiary companies are not the nominees of the assessee but are holding shares on their own account.



026. Section 47(iv) of the Act provides that, Provisions 45 of the Act does not apply to the transfer of capital asset by a company to its subsidiary company. This is subject to the condition that subsidiary company is an Indian company and the holding company along with its nominees, hold the whole of the share capital of the subsidiary company.
027. Assessee has sold equity shares and preference shares, which are the capital asset of the assessee company to its wholly owned subsidiary company namely Reliance Industrial Investment and Holdings Ltd.
028. Reliance Industrial Investment and Holdings Ltd is an Indian company as provided under Section 2(26) of the Act, as it was formed and registered under the Companies Act 1956 of the Act.
029. Reliance Industries Ltd, assessee, holds undisputedly 100% equity share capital of Reliance Industrial Investment And Holdings Ltd. However, Reliance Industrial Investment and Holdings Ltd has issued two different types of non-cumulative optionally convertible preference shares of ₹10 each fully paid up. Balance sheet of the Reliance Industrial Investment and Holdings Ltd. was produced and it was shown that it has 14,57,250, 9% non cumulative optional convertible preference shares of ₹10 each fully paid up which are redeemable at the end of 7 years from the date of allotment at a price of ₹2,000/- per share. It was submitted that 96.55% of the shares as on 31st march, two different companies namely Reliance Retail Finance Ltd and Reliance Petro Investments Ltd. hold those shares. Further, Reliance Industrial Investment and holdings Ltd has issued 1,49,020/-, 10% non-cumulative convertible preference shares of ₹10 each fully paid up which are held by Reliance polyolefin Limited. It has also issued 1200, 10% non-cumulative optional convertible preference shares of ₹10 each fully paid up were also held by Reliance Petro Investments Ltd. Thus, though Reliance Industries Ltd. Assessee holds 100% equity share capital of



Reliance Industrial Investment and Holdings Ltd but it does not hold preference share capital of the Reliance Industrial Investment and Holdings Ltd. Thus, it does not hold the "whole of the share capital" of the subsidiary company. Accordingly, conditions prescribed under Section 47(iv) (a) of the Act is not satisfied. Therefore, Provisions of Section 45 are triggered and, any profit or gain arising on the sale of the shares of Reliance Exploration and Production DMCC to Reliance Industrial and Holdings Ltd is chargeable to tax under the head capital gains.

030. Though in the return of income, it was submitted that as the Provisions of Section 47(iv) of the Act are triggered the capital gain or loss is not chargeable under Section 45 of the Act; hence, it was not treated as chargeable but claimed as exempt loss. However, the claim is made that as Reliance Industries does not hold 'whole of the share capital of the subsidiary company', the Provisions of Section 47(iv) of the Act are not satisfied and hence, the capital loss arising to the assessee on this transaction is not exempt loss.
031. Share capital includes 'equity and preference share capital' both. There is no reference of holding of only equity share capital in that section. Therefore, the capital loss arising to the assessee on sale of shares by assessee to its subsidiary company are eligible capital loss of the assessee. Wherever the statute wanted to include each clause of the capital or type of the capital, or any condition attached such shareholding it has provided accordingly. Provisions of Section 86 of the Companies Act 2013 provides that share capital of the company limited by shares shall be of two kinds only i.e. Equity share capital and preference share capital and the 'whole of the share capital' should include holding of equity share capital and preference share capital both.
032. Provisions of section 47 (iv) of the Act, exempts the capital gain on transfer of capital asset by holding company to its Indian subsidiary company only if the holding company along with its nominees holds



the whole of the share capital of the subsidiary company. Income tax Act does not contain any definition of share capital. The Companies Act 2013 also does not define it. The Companies Act, 2013 as per section 2 (84) defines 'share' means a share in the share capital of a company and includes stock. Chapter IV of The Companies Act, 2013 deals with the provisions of 'Share capital' of the company. Section 42 of The Companies Act, 2013 provides that share capital of a company limited by shares shall be of two kinds (1) equity share capital with voting rights or with differential rights as to dividend, voting or otherwise in accordance with such rules as may be prescribed, (2) preference share capital. The explanation (i) and (ii) to that section defines what is equity share capital and what is preference share capital. The companies (share capital and debentures) Rules, 2014 provides for conditions for issue of certain shares. Thus, it is apparent that the equity share capital could be with voting rights or with differential rights as to dividend, voting or otherwise as provided under rule 4 of the rules. Similarly, preferential share capital carries a preferential right with respect to payment of dividend and for prepayment of capital at the time of winding up. Thus, assessee company is not holding even a single preference shares of (1) 9% noncumulative optionally convertible preference shares of ₹ 10 each fully paid up, and (2) 10% noncumulative optionally convertible preference shares of ₹ 10 each fully paid up, but it holds 100 % equity shares of ₹ 10 each fully paid up. In these circumstances, only question is that can an assessee company be said to be holding the 'whole of share capital' of the subsidiary company to which capital assets are transferred.

033. According to us, the 'share capital' includes equity as well as preference shares both. Because, the share capital is deriving its meaning from The Companies Act which includes equity and preference capital both. It is also because wherever legislature wanted particular percentage of particular share capital qua voting right, etc same is provided in those sections, such as Section 47



- (xiii) and (xiv) of the Act. Similarly section 2(22) and section 40 A of the Income tax Act provides for beneficial ownership of shares.
034. Section 47 (iv) exempts transfer of capital assets from Holding company to subsidiary company only where share capital in its entirety is held by holding company. Plain meaning of the words of the section clearly suggest so. Therefore, we find that the requirement of holding the whole of the share capital applies to both the types of share capital i.e. equity share capital and preference share capital. Thus, it is apparent that entire issued and paid-up share capital of the subsidiary company should be held by holding company or its nominees for claiming exemption from capital gains under this clause.
035. In the present case before us, there are different shareholders of preference share capital other than the holding company and holding company only holds along with its nominees, 100 % equity shares of the transferee company. Therefore, according to us the conditions of section 47 (iv) of the act are not satisfied and if any capital gain or loss arising on transfer of a capital asset by the assessee company to its subsidiary company, is chargeable to tax under the provisions of section 45 of the act.
036. In nutshell, assessee is not eligible for exemption of section 47 (iv) of the act as we hold that transactions of the transfer of capital asset by the holding company to its subsidiary company is to be regarded as 'transfer'. Therefore we direct the learned assessing officer to hold that capital gain or loss arising to the assessee on transfer of shares to its subsidiary company is not tax-exempt under section 47 (iv) of the act.
037. We also find that before the learned assessing officer there is no occasion to compute the capital gain or loss arising on the transfer of the above shares. Accordingly, we direct the assessee to substantiate sale consideration, cost of acquisition and indexed cost of acquisition before the learned assessing officer and its computation of capital



gain/loss. The learned assessing officer is directed to verify the computation and accordingly decide the quantum of such gain or loss.

038. In the result, additional ground number 6 raised by the assessee which is held by the coordinate bench in miscellaneous application order as not decided is now adjudicated and allowed.

039. Accordingly, appeal of the learned assessing officer to the extent of ground restored by the miscellaneous application is dismissed and appeal of the assessee to the extent of additional ground no 6 restored by the coordinate bench, is allowed.

Order pronounced in the open court on 20.04.2023.

Sd/-
(PAVAN KUMAR GADALE)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 20.04.2023

Sudip Sarkar, Sr.PS / Dragon

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai