

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : D : NEW DELHI

BEFORE SHRI G.S. PANNU, HON'BLE VICE PRESIDENT
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.1066/Del/2023
Assessment Year: 2018-19

Firestone Industrial Products INC United States, 9 East Loockerman Street, City of Dover, Delaware, USA, Not Listed, 19901	Vs	ACIT, Circle 1(3)(1), New Delhi.
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(PAN: AADCF380L)

(Appellant)

(Respondent)

Assessee by	:	Shri Ved Jain, Adv. & Ms. Supriya Mehta, CA
Revenue by	:	Shri Vizay B. Vasanta, CIT-DR
Date of Hearing	:	16.04.2024
Date of Pronouncement	:	05.06.2024

ORDER

PER ANUBHAV SHARMA, JM:

This appeal is preferred by the assessee against the order of the Ld. CIT(A), Delhi-42, New Delhi dated 13.02.2023 relating to assessment year 2018-19.

2. The facts in brief are that the Assessee is a Foreign Company and admittedly tax resident of United States of America and does not carry out any business activity in India. During the year under consideration, assessee has

filed a return of income declaring taxable income of Rs. 12,12,72,460/- and claimed a refund of Rs. 1,31,15,980/- on account of long term capital gain on sale of unlisted equity shares in India. Assessee had acquired 51% shares of Firestone TVS Pvt. Ltd. which is a domestic company in two tranches i.e. 7.3.2008 and 30.7.2008 for a total consideration of Rs. 1,96,31,685/- and during the year these shares were sold to M/s Sundaram Industries Pvt. Ltd. who already held 49% shareholding in Firestone TVS Pvt. Ltd. for a consideration of Rs. 14,09,04,140/- thereby earning a Long Term Capital Gain which is subject of the disputed taxable income. As the case of the assessee was selected for scrutiny on account of large tax refund. AO after examining the matter concluded that the transfer of shares was not simpliciter transfer of unlisted shares. The assessee has transferred the entire business with assets, goodwill etc. therefore, the capital income is taxable arising out of the capital asset u/s. 112(1)(ii) of the Act @ 20% plus surcharge and cess, while the Assessee had claimed the tax liability @ 10% plus surcharge and cess as per section 112(1)(c)(iii) of the Act.

2.1 In appeal before the Ld. CIT(A), assessee had taken a plea that the company is a separate entity from its share holders/members and, with transfer of shares, assets of the company are not transferred, and the same continues to be held by the company. It was also explained that since the assessee did not have PAN at the time of sale of shares, buyer M/s Sundaram Industries Pvt. Ltd. deducted @20% plus surcharge and cess on such Long Term Capital Gain

earned by the assessee, which is reflected in Form 26AS and excess tax deducted @10% was claimed as a refund while filing the return of income. However, Ld. CIT(A) was not satisfied and sustained the order of the AO, aggrieved by which the assessee is in appeal before us, by raising the following grounds:-

1. On the facts and circumstances of the case, the order passed by learned Commissioner of Income Tax (Appeals) (CIT(A)) is bad both in the eye of law and on facts.

2. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the action of AO in computing the tax on the long term capital gain on sale of unlisted shares at the rate of 21.63% (including surcharge and cess) under section 112(1)(c) (i) of the Act, as against the tax computed by the assessee in the return of income at the rate of 10.815% (including surcharge and cess) under the provisions of section 112(1)(c) (i) of the Act.

3. (i) On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the action of AO in computing the tax at the rate of 21.63% (including surcharge and cess) under section 112(1) (c) (i) of the Act despite the fact that the provisions of section 112(1)(©) of the Act are not applicable to the transfer of capital assets, being unlisted securities and hence not applicable to the facts of the assessee.

(ii) That the ld CIT(A) has erred in rejecting the contention of the assessee that assessee has only transferred the unlisted shares and therefore, tax has been rightly computed and declared under the specific provisions of section 112(1)(c) (iii) of the Act by the assessee in the return of income.

4. (i) On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the action of AO holding that assessee has earned the long term capital gain not on transfer of unlisted shares but on transfer of entire business such as right, goodwill, business etc.

(ii) That the above observations are contrary to the facts on record which shows that assessee has only transferred the unlisted shares during the year and did not transfer any other capital asset.

5. On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law in confirming the action of AO and ignoring the various judicial pronouncements relied upon by the assessee wherein it has been held that sale of shares cannot be equated with the sale of any other capital assets.

6. (i) On the facts and circumstances of the case, the learned law in confirming the action of AO in solely relying on the material/information collected from Sundaram Industries Pvt. Ltd. (SIPL) under section 133(6) of the Act at the back of the assessee without confronting and providing the opportunity to cross examine those information/documents and thus violating the principles of natural justice.

(ii) That the learned CIT(A) has erred both on facts and in law in confirming the action of AO in relying upon Form 15CA/15CB filed by SIPL under section 133(6) of the Act and holding that the long term capital gain be taxed @21.63 (including surcharge and cess) without appreciating the fact that Form 15CA/15CB filed by the payer cannot determine the final liability of the payee.

(iii) That the learned CIT(A) has erred both on facts and in law in confirming the action of AO in relying upon Form 15CA/15CB and holding that "repatriation of foreign direct investment" made by the overseas investor in India in equity shares be taxed at the rate of 20% (plus surcharge and cess).

7. On the facts and circumstances of the case, the learned CIT(A) has grossly erred both on facts and in law in confirming the above action of the AO by indulging in surmises and conjectures and only on the basis of presumption and assumption without bringing any contrary material on record.

8. Without prejudice to the above, the AO has erred in not granting the benefit of first / second proviso to section 48 of the Income Tax Act while calculating the income under the head long term capital gain in the hands of the assessee.

9. On the facts and circumstances of the case, the learned CIT(A) has grossly erred both on facts and in law in confirming the action of the AO initiating the penalty proceedings under section 270A of the Act.

10. That the appellant craves leave to add, amend or alter any of the grounds of appeal.”

2.2 Assessee had also raised Additional Grounds vide application dated 5.10.2023 but the same were not pressed during the hearing.

3. We have heard the Ld. Representatives of both the sides and what comes up as an undisputed fact is that the investment in shares in Firestone TVS Pvt. Ltd. was made in the year 2008. The shares were held for more than 24 months. The shares have been transferred by way of Share Purchase Agreement, a copy of which is made available at Page No. 49-68 of the Paper Book. The assets and liabilities of Firestone TVS Pvt. Ltd. continue to remain in the name of Firestone TVS Pvt. Ltd., after the sale of shares by the assessee. The settled proposition of law is that the share holdings of a person does not determine the rights qua the assets of the company. The holding howsoever, big does not vest any rights in the shareholder with regard to the assets or even liabilities of the company which is a separate and distinct legal entity from its share holders and members. The reliance placed by the Ld. AR on the decision of the Hon'ble Bombay High Court in the case of PCIT-16 vs. UTV Software Communication Ltd. 2019 (2) TMI 419, dated. 29.1.2019 and the judgment of the Hon'ble Supreme Court of India in the case of Vodafone International

Holdings BV. Vs. UOI & Anr. 2012 (1) TMI 52, dated 20.1.2012 could not be disputed.

3.1 We consider it appropriate to reproduce the relevant extract of the Judgement of the Hon'ble Supreme Court of India in the case of Vodafone International Holdings BV. Vs. UOI & Anr. (Supra) as under:-

“74. Control, in our view, is an interest arising from holding a particular number of shares and the same cannot be separately acquired or transferred. Each share represents a vote in the management of the company and such a vote can be utilized to control the company. Controlling interest, therefore, is not an identifiable or distinct capital asset independent of holding of shares and the nature of the transaction has to be ascertained from the terms of the contract and the surrounding circumstances. Controlling interest is inherently contractual right and not property right and cannot be considered as transfer of property and hence a capital asset unless the Statute stipulates otherwise. Acquisition of shares may carry the acquisition of controlling interest, which is purely a commercial concept and tax is levied on the transaction, not on its effect.

88. We have to view the subject matter of the transaction, in this case, from a commercial and realistic perspective. The present case concerns an offshore transaction involving a structured investment.

This case concerns “ a share sale” and not an asset sale. It concerns sale of an entire investment. A “sale” may take various forms. Accordingly, tax consequences will vary. The tax consequences of a share sale would be different from the tax consequences of an asset sale. A slump sale would involve tax consequences which could be different from the tax consequences of sale of assets on itemized basis. “Control” is a mixed question of law and fact. Ownership of shares may, in certain situations, result in the assumption of an interest which has the character of a controlling interest in the management of the company. A controlling interest is an incident of ownership of shares in a company, something which flows out of the holding of shares. A controlling interest is, therefore, not an identifiable or distinct capital asset independent of the holding of shares. The control of a company resides in the voting power of its shareholders and shares represent an interest of a shareholder which is made up of various rights contained in the contract embedded in the Articles of Association. The right of a shareholder may assume the character of a controlling interest where the extent of the shareholding enables the shareholder to control the management. Shares, and the rights which emanate from them, flow together and cannot be dissected.

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As a general rule, in a case where a transaction involves transfer of shares lock, stock and barrel, such a transaction cannot be broken up into separate individual components, assets or rights such as right to vote, right to participate in company meetings, management rights, controlling rights, control premium, brand licences and so on as shares constitute a bundle of rights. (See CharanjitLal v. Union of India AIR 1951 SC 41, Venkatesh (minor) v CIT 243 ITR 367 (Mad) and Smt. Maharani Ushadevi v. CIT 131 ITR 445 (MP). Further, the High Court has failed to examine the nature of the following items, namely. non-compete agreement, control premium, call and put options, consultancy support, customer base, brand licences etc. On facts, we are of the view that the High Court, in the present case, ought to have examined the entire transaction holistically. VIH has rightly contended that the transaction in question should be looked at as an entire package. The items mentioned hereinabove, like, control premium, non-compete agreement, consultancy support, customer base, brand licences, operating licences etc. were all an integral part of the Holding Subsidiary Structure which existed for almost 13 years, generating huge revenues, as indicated above. Merely because at the time of exit capital gains tax becomes not payable or exigible to tax would not make the entire “share sale” (investment) a sham or a tax avoidant. The High Court has failed to appreciate that the payment of

US\$ 11.08 bn was for purchase of the entire investment made by HTIL in India. The payment was for the entire package. The parties to the transaction have not agreed upon a separate price for the CGP share and for what the High Court calls as "other rights and entitlements" (including options, right to non-compete, control premium, customer base etc.). Thus, it was not open to the Revenue to split the payment and consider a part of such payments for each of the above items. The essential character of the transaction as an alienation cannot be altered by the form of the consideration, the payment of the consideration in installments or on the basis that the payment is related to a contingency ('options', in this case), particularly when the transaction does not contemplate such a split up. Where the parties have agreed for a lump sum consideration without placing separate values for each of the above items which go to make up the entire investment in participation, merely because certain values are indicated in the correspondence with FIPB which had raised the query, would not mean that the parties had agreed for the price payable for each of the above items. The transaction remained a contract of outright sale of the entire investment for a lump sum consideration."

3.2 As we go across the Share Purchase Agreement dated 15.09.2017 between the assessee and Sundaram Industries Pvt. Ltd. it makes it very explicit

that it is a tripartite agreement between the Sundaram Industries Pvt. Ltd. (SIPL), the buyer of shares M/s Firestone Industrial Products INC US i.e. Assessee the seller and Firestone TVC Pvt. Ltd. whose shares are subject of transfer. The agreement shows that SIPL and the assessee had executed a Memorandum of Understanding on 28.05.2007 by which a Joint Venture Agreement was executed on 20.8.2007 and an investment was made in Firestone TVS Pvt. Ltd. wherein Sundaram Industries Pvt. Ltd. held 18,86,000 equity shares aggregating to 49% of the paid-up share capital of the company and Firestone held 19,63,000 equity shares aggregating to 51% of the paid-up share capital of the company. Subsequently, a Technical Collaboration Agreement dated 30.7.2008 as amended by the Agreement dated 15.9.2017 and a Trade Mark License Agreement dated 30.7.2008 was executed by virtue of which assessee provided certain technology to Firestone TVS Pvt Ltd., and was licensed to use the trade mark of assessee company. As we go across this agreement, it is more in the nature of dilution of share holding of the assessee company in the joint venture by way of exit from the joint venture and the consequences of the same is that the Firestone TVS Pvt. Ltd. was to stop using Firestone Mark and to use the name of Firestone from the name of the Company.

3.3 The Share Purchase Agreement in no way depict the transfer of assets individually or collectively. The tax authority below have not made any effort to examine the Share Purchase Agreement and for that reasons a very general

conclusion of consequences of transfer of shares considered it to be sale of capital assets of company, while it is a simple case of transfer of shares and there can be no attribution of any Long Term Capital Gain on account of transfer of shares for the purpose of Section 112(1)(c)(ii) taxing the income at 20% plus surcharge and cess. Assessee had reasonably explained the reasons for deduction of 20% of the TDS by Sundaram Industries Pvt. Ltd. and, even otherwise on the basis of deduction of excess TDS there cannot be any estoppel to change the nature of income with consequential effects, as to, at what rate the income is taxable.

4. In light of the aforesaid, we are inclined to allow the Grounds raised by the Assessee. The appeal is allowed and the impugned addition is deleted.

Order pronounced in the open court on 05.06.2024.

Sd/-

(G.S. PANNU)
VICE PRESIDENT

Dated: 05.06.2024.

SR BHATNAGAR

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Sd/-

(ANUBHAV SHARMA)
JUDICIAL MEMBER

Asstt. Registrar, ITAT, New Delhi