

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

SHRI PRAMOD KUMAR, VICE PRESIDENT
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 385/MUM/2017
(ASSESSMENT YEAR: 2008-09)

Deputy Commissioner of Income Tax,
Circle-2(2)(1), Mumbai,
Room No. 545, Aayakar Bhavan,
M. K. Road,
Mumbai - 400020

..... Appellant

Vs

L & T Fincorp Ltd.,
(Formerly known as India Infrastructure
Developers Ltd.),
L & T House, N. M. Marg, Ballard Estate,
Mumbai - 400001
[PAN: AAACI4598Q]

..... Respondent

Appearances

For the Appellant/Department : Shri Mehul Jain
For the Respondent/ Assessee : Shri Soumen Adak

Date of conclusion of hearing : 23.02.2022
Date of pronouncement of order : 20.05.2022

ORDER

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Appellant/Department has challenged the order, dated 18.10.2016, passed by the Ld. Commissioner of Income Tax (Appeals)-5, Mumbai [hereinafter referred to as 'the CIT(A)'] under Section 250 of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'] in appeal [IT-285/15-16/151/16-17] for the Assessment Year 2008-09, whereby the CIT(A) had allowed the appeal filed by the Assessee against the Assessment Order, dated 29.01.2016, passed under Section 143(3) read with Section 147 of the Act.

2. Revenue has raised the following grounds of appeal:

“1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was right in directing to allow Long Term Capital Loss on sale of shares by the assessee company to M/s L & T Power Development Ltd. without appreciating the fact that such transfer is covered by the provisions of Sec 47(iv) of the I.T. Act, 1961 since the transfer amounts to transfer of shares by the assessee holding company L & T Ltd. to its subsidiary company L & T Power Development Ltd.”

3. Brief facts of the case are that the Assessee is a Non Banking Finance Company. The Assessee filed its return on 27.09.2008, assessment under Section 143(3) of the Act was framed on the Assessee vide order dated 30.11.2010. Thereafter, income of the Assessee for the Assessment Year 2008-09 was reassessed vide order dated 30.03.2013 passed under Section 147 read with Section 143(3) of the Act. Subsequently, the assessment was re-opened and notice dated 30.03.2015 was issued to the Assessee.

4. During the relevant previous year the Assessee had sold equity shares of the following three companies (hereinafter referred to as 'the Equity Shares') to M/s L&T Power Development Ltd. (LPDL) at book value of INR 31,04,99,940/-.

<u>Equity Shares</u>	<u>Amount (INR)</u>
(a) L&T Uttarchanchal Hydropower Ltd.	4,99,940/-
(b) Konaseema EPS Oakwell Power Ltd.	21,00,00,000/-
(c) Everest Power Pvt. Ltd.	<u>10,00,00,000/-</u>
	<u>31,04,99,940/-</u>

5. Since the Assessee had claimed the benefit of indexation, the above transaction resulted in aggregate Long Term Capital Loss (LTCL) of

INR 3,72,59,028/- which was claimed by the Assessee in the return of income.

6. During the course of reassessment proceedings, the Assessing Officer noted that (a) the Assessee was a wholly and subsidiary of L&T Finance Holding Ltd. which intern was a subsidiary of Larsen & Toubro Ltd., and (b) LPDL was wholly and subsidiary of Larsen & Toubro Ltd. The Assessing Officer denied the LTCL to the Assessee holding that transfer of the Equity Shares by the Assessee to LPDL does not constitute transfer in terms of Section 47(iv) and 47(v) of the Act as, both, the Assessee and LPDL were subsidiaries of the same holding company and the transaction has not taken place at arm's length.
7. Being aggrieved, the Assessee preferred appeal before CIT(A) who allowed the appeal of the Assessee holding that the transfer between two fellow subsidiaries cannot be considered as a transfer between a holding company and a subsidiary. The relevant observation of CIT(A) are as under:

"3.3 I have considered Assessing Officer's re-assessment order and appellant's submissions

According to the AO as appellant had transferred shares from L&T Power Development Ltd. which is also a subsidiary of L&T Ltd. so this transfer should be considered as transfer. The appellant company and M/s L&T Power Development Ltd. are wholly owned subsidiaries of a single entity namely M/s L&T Ltd. AO was of the view that the transfer of capital assets is within 2 subsidiaries and whether the transfer can be regarded as transfer giving rise to capital gain/loss in view of section 47(iv) and 47(v) where in the section 47(iv) and 47(v) it was provided that the transfer of capital assets by a company to its subsidiary company and a subsidiary company to a holding

company cannot be regarded as transfer. Hence, AO disallowed the LTCL of Rs.3,72,59,028/- which has arisen on transfer of shares and further AO is of the opinion that these were sold at book value and not at arm's length price. Now the issue that has to be considered here is here L & T Power Development Ltd. and appellant are wholly owned subsidiaries of L & T Ltd. Here transfer took place from appellant to L & T Power Development Ltd. In such a case it falls under the purview of section 47(iv) or 47(v) so that it cannot be considered as transfer in which capital gain/loss arises. This identical issue has arisen in the case of Gujarat High Court in Kalindi Investment P Ltd. v CIT, 256 ITR 713 (Guj).....

Here in the above case in Kalindi Investment P Ltd. it is held that it is only direct immediate subsidiary within section 47(iv) or 47(v) as application but not in indirect subsidiary, If we apply the facts of the above case to the present case, at the same book value the present case appellant had sold shares to 3 companies at the same book value to M/s L & T Power Development Ltd. though M/s L & T Power Development and appellant are subsidiaries of L & T Ltd. Here transfer took place between appellant, L & T Power Development Ltd. Both of them do not have any relationship of holding company or subsidiary. Only L & T Ltd. has a relationship with these companies as holding companies. Hence following the decision of Gujarat High Court in Kalindi Investment P Ltd. v CIT, 256 ITR 713(Guj), this section 47(iv) and 47(v) cannot be invoked here as transfer has not taken place from holding company to subsidiary company or subsidiary company to holding company. It is an indirect transfer between 2 subsidiary companies of holding company i.e. L & T Ltd. So this cannot be construed as a transfer between a holding company or subsidiary company in view of above Gujarat High Court decision. Hence, appellant's

claim for Long Term Capital loss for Rs. 3,72,59,028/- has to be allowed. This ground of appeal is allowed.” (Emphasis Supplied)

8. The Revenue is now in appeal before us against the order, dated 18.10.2016, passed by the CIT(A). The Ld. Departmental Representative relied upon the Assessment Order whereas the Ld. Authorised Representative for the Assessee referred to the provisions of Section 47(iv)/(v) of the Act and relied upon the order passed by CIT(A).
9. We have considered the rival submissions and perused the material on record. A plain reading of Section 47(iv) and 47(v) of the Act would show that the said provisions are triggered in case of transfer of a capital asset between holding and a subsidiary company. The CIT(A) has granted relief to the Assessee by relying upon the judgment of Hon’ble Gujarat High Court in the case of Kalindi Investment P Ltd. vs CIT, 256 ITR 713 (Guj) wherein It has been held that only transfer from/to immediate/direct subsidiary falls within the ambit of Section 47(iv)/(v) of the Act. In the aforesaid case, the Hon’ble High Court has, while pointing out the distinction between the definition of holding company under the Companies Act and the Income Tax Act, held as under:

“8. On the other hand, the Act is a taxing statute. Income under various heads is subjected to levy of tax. Capital gains is one such head. Section 45 provides that any profits or gains arising from the transfer of a capital asset effected in the previous year shall . . . be chargeable to income-tax under the head ‘Capital gains’ and shall be deemed to be the income of the previous year in which the transfer took place. Since there could be borderline transactions, the Legislature has taken care to provide in section 47 that certain transfers shall not be considered as transfers for the purpose of levy of capital gains. For instance, any distribution of capital assets on the total or partial partition of an HUF is not to be treated as a transfer for

the purpose of capital gains. So also, any distribution of capital assets on the dissolution of a firm, or an AOP is not to be treated as a transfer for the purpose of capital gains. Similarly, any transfer, in a scheme of amalgamation of a capital asset by the amalgamating company to the amalgamated company is also not be treated as a transfer for the purpose of capital gains, subject to compliance with certain conditions.

The same section provides that, transfer of a capital asset by a holding company to its Indian subsidiary company or by a subsidiary company to its Indian holding company is not to be treated as a transfer for the purposes of capital gains. The words 'any transfer of a capital asset by a company to its subsidiary company' would as per the ordinary grammatical construction contemplate only the immediate subsidiary company of the holding company as the holding company holds the share capital only of its immediate subsidiary company

9. If the Legislature while enacting the Act intended that the provisions of section 4 should apply to a holding or a subsidiary company, under section 47, there was nothing to prevent the Legislature from making such an express provision. The question is when that is not done, whether the provisions of section 4(1)(c) are required to be read into section 47(iv) and (v) by necessary implication.

10. As we have already indicated earlier, section 4 makes it clear that the expanded definition of 'holding company' is applicable for the purposes of the Act. The object of the Companies Act being to make the companies more accountable to the authorities, shareholders and creditors, the Legislature gave an expanded definition of 'holding company' for the purposes of the Companies Act. With emphasis on 'control' of one company over another, the definition of 'holding company' under the Companies Act clearly indicates control over the composition of the Board of Directors or holding more than half

in nominal value of equity share capital of the other company which is sufficient to treat the two companies in question as a holding company and a subsidiary company. On the other hand, the Legislature has provided different criteria for dealing with a holding company and a subsidiary company in the matter of tax in capital gains on transfer of assets between such companies. The Act has carved out a smaller number of holding and subsidiary companies for the purposes of section 47(iv) and (v). The wider definition of a 'holding company' with emphasis on 'control' as the guiding factor is not adopted in clauses (iv) and (v) of section 47. It is specifically provided that the parent company or its nominees must hold the whole of the share capital of the company. The Legislature while enacting the Act, therefore, made a clear departure from the definition of 'holding company' as contained in the Act. In this view of the matter, there is no justification for invoking clause (c) of sub-section (1) of section 4 while interpreting the provisions of clauses (iv) and (v) of section 47, which lay down two specific conditions for applicability of the said clauses and which are quite different from the criteria laid down in sub-section (1) of section 4 of the Companies Act, 1956, for giving a more expanded definition of a 'holding company' to subject more companies to regulatory control under the Companies Act. On the other hand, the object underlying section 47 is to lay down exceptions to the legal provision (section 45) for taxing gains on transfer of capital assets. The general rule is to construe the exceptions strictly and not to give them a wider meaning." (Emphasis Supplied)"

10. In the facts of the present case the Assessing Officer had erred in invoking provisions of Section 47(iv)/(v) of the Act in relation to a transaction of sale of shares carried out between two fellow subsidiaries. The CIT(A) granted relief to the Assessee following the judgment of Hon'ble Gujarat High Court in the case of Kalindi Investment P Ltd (supra).

11. In view of the above, we are not persuaded to interfere with the order passed by the CIT(A). Accordingly, the appeal filed by the Revenue is dismissed.

Order pronounced on 20.05.2022.

Sd/-
(Pramod Kumar)
Vice President

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 20.05.2022
Alindra, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
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