

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

Dated this the 24th day of March, 2011

Before

THE HON'BLE MR JUSTICE HULUVADI G. RAMESH

Writ Petition 7716 / 2011 (T IT)

Between

M/s Richter Holding Ltd
(a non-resident company)
66, Ippocratous Street
PC 1015 Nicosia, Cyprus
By its Lawful Attorney
Sri Deepak Kumar, 35 yrs
S/o Badri Prasad Tibrewal

Petitioner

(By Sri Debi Prasad Bai, Sr. Adv. for
Sri Parthasarathi, Adv.)

And

- 1 Assistant Director of Income Tax
International Taxation, Circle II (1)
Rashthrothana Bhavan, 6th Floor
14/3, Nrupathunga Road, Bangalore 1
- 2 Deputy Director of Income Tax
International Taxation, Circle I(1)
Rashthrothana Bhavan, 6th Floor
14/3, Nrupathunga Road, Bangalore 1
- 3 Union of India – by its Secretary
Department of Revenue
Ministry of Finance, North Block
New Delhi 110 001

Respondents

(By Sri M V Seshachala, Adv.)

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The Writ Petition is filed under Art.226/227 of the Constitution praying to quash/set aside the show cause notice dated 12.10.2009 – annexure B issued by the 1st respondent, etc.

The Writ Petition having been reserved for Orders on 22nd February, 2011, the Court made the following:

ORDER

Petitioner is a company incorporated under the laws of Cyprus. It holds 60% of the shares in Finsider International Company Ltd registered in UK. Petitioner purchased shares in Finsider International Company Ltd from another company registered in UK called Early Guard Limited. This Finsider International Company was holding 51% shares of Sesa Goa Ltd, an Indian Company. Petitioner and West Globe Ltd., a company incorporated under the laws of Mauritius having entered into an agreement purchased and acquired all the shares of the Finsider International Company Ltd on 23.4.2007 from Early Guard Ltd for a consideration of US \$ 981 million. On 13.3.2009, a writ petition was filed by Sesa Goa Ltd against notice issued by the Revenue to treat it as an Agent under S.163 of the Income Tax Act proposing to tax the proceeds on sale of shares of Finsider International Company Ltd by Early Guard Ltd to the petitioner's company and West Globe Ltd under the head 'Income from Capital Gains'. Since the Revenue intended to

withdraw the notice issued against Sesa Goa Ltd, this Court disposed of the said writ petition as withdrawn.

The 1st respondent issued a notice on 12.10.2009 to proceed under S.201(1) and 201 (1A) alleging indirect acquisition of 51% shares in Sesa Goa Ltd without deduction of tax at source. Thereafter, 1st respondent granted time for the petitioner to furnish reply to the show cause notice up to 18.11.2009 and further time till 1.2.2010. However, on 21.7.2010, petitioner filed reply to the show cause notice declining the obligation to deduct tax at source in respect of the transaction. According to the argument of the petitioner's counsel, it is only an acquisition of shares and does not amount to acquisition of immovable property as such, question of treating the same as capital gains and to deduct income from capital gains does not arise. However, the 2nd respondent sought for further information from the petitioner and granted time to file reply on 7.12.2010. Petitioner furnished the reply to the letter dated 22.11.2010 regretting its inability to provide information pertaining to Early Guard Ltd. Hence, this petition being aggrieved by the notice dated 12.10.2009 – annexure B.

Heard the counsel representing the parties.



According to the learned Sr. counsel for the petitioner, petitioner has produced the agreement entered into between Finsider International Company Ltd, UK and all details are available and acquisition of shares does not amount to acquisition of capital gains. The demand notices issued for initiating proceedings under S.201 of the Act is bad in law. Accordingly, learned counsel tried to rely upon the judgment of the Apex Court in the case of *Vodafone International Holdings B V Vs Union of India & Anr - (2010) 329 ITR 126 (Bom)* to contend that the transfer of share in non-resident company from one non-resident company to another non-resident company does not amount to acquisition of immovable property or controlling the management and it is only an incident of ownership of the shares in a company which flows out of the holding of shares. As such, controlling interest therefore, is not an identifiable or distinct capital asset independent of the holding of shares and the nature of the transaction has to be ascertained from the covenants of the contract and from the surrounding circumstances.

Counsel for the petitioner has also relied upon the decision of the Apex Court in the case of *Vania Silk Mills Pvt Ltd Vs Commissioner of Income Tax - 191 ITR 647 (SC)* and also the decision in the case of



1997 ITR 323; and the decision in the case of *Rustom Cavasjee Cooper Vs Union of India - (1970) SCC 248* and *223 ITR 379 (AAR)*; *Arun Kumar & Ors Vs Union of India & Ors - (2006) 286 ITR 89 (SC)*.

The argument of the counsel representing the Revenue is that in the show cause notice issued under S.201 read with S.201 (1A), the shares held by Finsider International Company Ltd, UK in M/s Sesa Goa Ltd constituted a capital asset as per S.2(14) of the Income Tax Act. When the shares of Finsider International Company Ltd., UK was purchased by the Richter Holding Ltd and West Globe Ltd, the same amounted to a transfer of a capital asset of 51% shares of M/s Sesa Goa Ltd as per S.45 r/w S.2(47) r/w S.9 of the Income Tax Act.

Further, according to the stand of the Revenue, as per S.195 of the Act, any person paying to a non-resident is liable to tax at source. Thus, according to the Revenue, Richter Holding Ltd falls within the definition read with S.9 of the Act and was liable to deduct tax in respect of payments made for purchase of capital asset i.e., 51% shares of M/s Sesa Goa Ltd. Accordingly, learned counsel for the Revenue relied upon the decision in the case of *Vodafone International Holdings B V Vs Union*

of India & Anr - (2009) 179 Taxman 129 where a non-resident company acquired shares of another non-resident company which held 67% shares in an Indian company, show cause notice was issued to the assessee in default for failure to deduct tax at source while making payment, and it is held therein, it is for the petitioner assessee to go before the assessing authority for clarification for default in not deducting tax at source while making payment.

As it transpires, petitioner has purchased the shares in Finsider International Company Ltd. Petitioner is a company incorporated under the laws of Cyprus and has purchased 60% of the shares of Finsider International Company from another company, Early Guard Ltd, UK. This Finsider International Company Ltd was holding 51% shares of Sesa Goa Company Ltd., an Indian Company. The entire shares of Finsider International Company was purchased by the petitioner and West Globe Ltd., at Mauritius under the agreement dated 23.4.2007 from Early Guard Ltd, UK i.e., all the shares of Finsider International Company. Ltd and there was also an offer by the petitioner to buy additional 15% shares of M/s Sesa Goa Ltd. at Rs.2036.30 crores. According to the Revenue, the shares held by Finsider International

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Company Ltd. UK in M/s Sesa Goa Company constituted a capital asset as per S.2(14a) of the Income Tax Act. Since the petitioner purchased the shares of Finsider International Company Ltd along with West Globe Ltd, it is opined that the same amounted to a transfer of capital asset of 51% shares of M/s Sesa Goa Ltd., as per S.45 r/w S.2(47) r/w S.9 of the Act.

What is under challenge is only the show cause notice issued as per S.195 of the Act. It is for the petitioner to urge all contentions before the respondent authority pursuant to such show cause notice issued to contend that the purchase of 51% shares does not amount to transfer of capital asset. Though the petitioner contends that the agreement entered into is produced, that itself is not sufficient to know as to the nature of transaction between Finsider International Company Ltd and Sesa Goa Ltd which is an Indian company. The agreement produced is said to be between the petitioner and Early Guard Ltd on the one hand and Mitsui Company Ltd, Japan. That may not be sufficient to know what is the transaction between Finsider International Company Ltd and Sesa Goa Ltd, an Indian company since it is premature at this stage to arrive at a conclusion that there is no avoidance of tax obligations and petitioner is

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not liable to tax on capital gains as the transfer of shares does not amount to transfer of capital assets. It may be necessary for the fact finding authority to lift the corporate veil to look into the real nature of transaction to ascertain virtual facts. It is also to be ascertained whether petitioner, as a majority share holder, enjoys the power by way of interest and capital gains in the assets of the company and whether transfer of shares in the case on hand includes indirect transfer of assets and interest in the company.

It is for the petitioner to appear before the respondent authority pursuant to the show cause notice issued who shall consider the case of the petitioner and pass appropriate orders in accordance with law. Petitioner to appear before the respondent authority on *25th April, 2011*.

Petition is disposed of accordingly.

Sd/-
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