Records Show Moore as More Than Transition Tax Small Shareholder

Posted on Sep. 25, 2023

By Andrew Velarde

Charles Moore appears to have been far more involved in the company at the center of the transition tax Supreme Court constitutional challenge than was previously revealed, according to Indian financial filings.

Tax Notes obtained the financial and annual statements of KisanKraft Machine Tools Pvt. Ltd., an Indian farming supply company, for the years between 2012 and 2020 (fiscal 2013, fiscal 2014, fiscal 2015, fiscal 2016, fiscal 2018, 2017 annual return, 2019 annual return, 2020 annual return, director designation). These documents show that Moore was not only a director of the company from 2012 to 2017 but that he also received the equivalent of thousands of dollars in travel expense reimbursements and apparently temporarily provided the company with a large infusion of cash in the form of share application money.

Moore and his wife Kathleen's dispute over the constitutionality of the section 965 transition tax is awaiting the government's brief before the Supreme Court. The Moores are seeking a refund of $15,000 in taxes they paid, as minority shareholders, on undistributed earnings from KisanKraft. They have challenged the transition tax imposed on a taxpayer's post-1986 accumulated foreign earnings, arguing that it is a direct tax and not a tax on income and therefore is unconstitutional because it is not subject to the 16th Amendment's exemption from apportionment. A realization requirement for income has become the center point of litigation.

Throughout the litigation, Moore has painted a picture of himself as a minority shareholder in KisanKraft who had no control over the company's ability to make distributions and no involvement in its management. In a March 2020 district court declaration, Moore stated that he visited India five times between 2011 and 2016 as he toured KisanKraft and met its employees. The declaration also sheds light on the close, decadeslong personal and business relationship Moore had with Ravindra Kumar Agrawal, who formed KisanKraft, was its majority shareholder, and was in charge of its day-to-day operations. Agrawal owned 80 percent of KisanKraft through a holding company, Washington Agrotech Ltd. Moore stated in his declaration that he and his wife made an initial investment of $40,000, which "was a lot of money for us, but we believed in Ravi's idea and wanted to support him and see it to fruition."

That declaration does not mention Moore's travel reimbursement, share application money, or directorship. Moore declared that he had "never received a distribution, dividend, or other payment" from the company. The company reinvested its earnings and did not have cash on hand to distribute to its shareholders, the declaration states.

In a July filing with the Court, the government agreed with the Moores that a joint appendix was not necessary in the case. However, Moore's declaration was reproduced in the appendix to the petition for the writ of certiorari.

According to a declaration from Agrawal filed in district court at the same time as Moore's declaration, KisanKraft had grown every year through reinvested earnings, additional shareholder investment, short-term borrowings, and a bank credit facility. That declaration likewise does not mention Moore's directorship, travel expense reimbursement, or the share application money. It states Moore did not participate in the management of KisanKraft.

The financial statements show that, during the time of his directorship, Moore received in total more than INR 900,000 for his travel expenses from 2014 to 2017, which equated to approximately $14,000 at the end of his time as director.

The share application money is a less straightforward financial statement entry to untangle than the travel expense reimbursement. According to the fiscal 2015 financial statements, KisanKraft received INR 15,163,000 from Moore in 2014 and repaid him INR 15,338,000 in 2015. That amounts to approximately $245,000. Agrawal put up a similar amount in 2014 and was likewise repaid in 2015. Together, almost $500,000 was provided to the company for a possible share allotment.

Under India's Companies Act, 2013, share application money pending allotment includes an advance on allotment of share capital. Shares must be allotted within a certain period or else the money is to be refunded with 12 percent interest.

In the same financial statements, the company discloses that it availed a short-term working capital loan that was secured in part by Agarwal's personal guaranty and a $3.5 million standby letter of credit arranged by Washington Agrotech and issued by Wells Fargo Bank NA.

According to a former senior U.S. Treasury official, the public documents make it clear that Moore was far more involved in the company than he articulated to the courts and that he and Agrawal appeared to be "joined at the hip in supporting the company." If Moore needed the favor of a small dividend to pay the transition tax, Agrawal could have found it, he speculated.

"The facts show that Moore, as the second-largest shareholder, was part of the control group. Was he a hapless minority shareholder? It looks to me like he was in the in-crowd, with Agrawal," the former official said. He also speculated that the share application money from Moore may have been given to help prop up the company and protect Agrawal's interests.

Moore's declaration states that he and his wife held 12.9 percent of KisanKraft at the end of 2017. Although it is not mentioned in the declaration, the 2020 annual statement shows that in August and September of 2019, Moore reduced his interest to 9.91 percent through three share sales. On the third sale date in September, Agrawal and his wife combined to purchase the same number of shares Moore sold. Other purchases were made on the same dates as Moore's two other sales by board members and key managerial personnel or a handful of other individuals.

At an ownership level below 10 percent of the foreign corporation, Moore would no longer be considered a U.S. shareholder subject to tax under the subpart F regime.

Given that Moore said his last trip to India was in 2016, the former official said it is clear that the sales to acceptable individuals were arranged for Moore by Agrawal or his colleagues and that Moore accomplished his goal to reduce his holdings to below 10 percent.

“That is what friends are for,” the former official said.

The Moores have tried to characterize the dispute as a limited one in their brief to the Supreme Court, arguing that the transition tax is a uniquely unconstitutional one under the current code. Other experts, however, have speculated that a taxpayer-favorable decision in the case could have seismic implications on other parts of the code, including subpart F; the global intangible low-taxed income provision; passthrough treatment applicable to limited liability companies, partnerships, and S corporations; mark-to-market regimes; and yet-to-be enacted wealth taxes.

Moore’s counsel did not respond to a request for comment.