

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'बी', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM
&
SHRI SANDEEP GOSAIN, JM

आयकर अपील सं./ITA No.341/Mum/2014

(निर्धारण वर्ष / Assessment Year :2010-2011)

Aditya Birla Telecom Limited, 5 th Floor, Windsor, Off. CST Road, Near Vidya Nagri, Kalina, Santacruz(E), Mumbai-400020	Vs.	DCIT-10(1), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAFCA 5315 A		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : Shri Jehangir Mistri, Sr. Advocate

राजस्व की ओर से /Revenue by : Shri Suresh Kumar, Sp. Counsel

सुनवाई की तारीख / Date of Hearing : **09/08/2016**

घोषणा की तारीख/Date of Pronouncement **19/10/2016**

आदेश / O R D E R

PER R.C.SHARMA (A.M):

This is an appeal filed by the assessee against the order of CIT(A), Mumbai, dated 18-12-2013, for the assessment year 2010-2011, in the matter of order passed u/s.143(3) of I.T.Act, wherein following grounds have been taken by the assessee :-

The Appellant respectfully submits that based on the facts circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) - 21, Mumbai ['CIT(A)'] has:

Ground no. 1- Wrongly affirmed the order passed by the Deputy Commissioner of Income tax-10(1) ('AO')

1. erred in substantially confirming the order passed by the AO treating a sum of Rs 5261,28,25,486/- as liable to capital gains tax as a short term capital gain;

2. failed to appreciate that as a result of the demerger of the Appellant's telecom undertaking to Idea Cellular Limited ('ICL'), its

holding company, no liability arose under the Income-tax Act, 1961 ('Act');

Ground no. 2 - Demerger of telecom undertaking not chargeable to tax

3. failed to appreciate that in order to levy capital gains tax it is a condition precedent that the alleged profit! gain must arise from the transfer of a capital asset, which condition is not satisfied in the present case;

4. without prejudice to above grounds, erred in treating the demerger of telecom undertaking by the Appellant as a transfer chargeable to tax under the head 'Capital gains' under Section 45 of the Act, without appreciating the fact that

a. demerger of a telecom undertaking, without any consideration is a valid lawful business arrangement which is a gift for the purposes of the Section 47(iii) of the Act and hence, not a taxable transfer for the purposes of Section 45 of the Act, by virtue of specific exemption prescribed under Section 47(iii) of the Act;

b. without prejudice, transfer of the telecom undertaking being a transfer by a wholly owned subsidiary company to the Indian holding company is not a transfer for the purposes of Section 45 of the Act, by virtue of specific exemption prescribed under Section 47(v) of the Act;

c. without prejudice, demerger of telecom undertaking is compliant with conditions (iv) and (v) of Section 2(I9AA) of the Act and hence transfer of the telecom undertaking is not a transfer for the purposes of Section 45 of the Act, by virtue of specific exemption prescribed under Section 47(vib) of the Act;

Ground no. 3 - Imputing consideration in the hands of the Appellant

5. erred in affirming imputation of consideration in the hands of the Appellant, where in fact no consideration has been received by the Appellant on demerger of the telecom undertaking to ICL pursuant to a Scheme of Arrangement under Section 391 to Section 394 of the Companies Act, 1956 ('the said scheme') and thereby seeking to tax fictional and non-existent income in the hands of the Appellant, which is against the principles of law;

6. erred in upholding the AO's completely absurd conclusion that the Business Restructuring Reserve of Rs.7330,73,65,600/- created on revaluation of the balance investments which always belonged to the Appellant and which remained vested with the Appellant (one asset) as the consideration for the purposes of Section 2(42C) of the Act for the demerger of the telecom undertaking (an independent asset) for computing capital gains tax liability;

7. failed to appreciate that the Appellant had demerged its telecom undertaking under the Court approved scheme which clearly stated that the demerger of the said undertaking was for "Nil" consideration; hence characterization of the said Business Restructuring Reserve as a lumpsum consideration for transfer of the telecom undertaking is in complete disregard of the Court approval;

8. erred in concluding that revaluation of the investments retained by the Appellant is a benefit derived by the Appellant from transfer of the telecom undertaking to ICL and that the said benefit has accrued and would be subsequently recovered later by the Appellant;

9. failed to appreciate that the reserve was created on account of an unilateral act by the Appellant, pursuant to the Court approved scheme and independent of the telecom undertaking being demerged and the creation of the reserve represents a mere accounting entry passed by the Appellant and no consideration has accrued or received by the Appellant from ICL;

10. erred in proceeding on the totally incorrect fact that the Appellant has itself considered the revalued amount of retained asset, as full value of consideration for transfer of telecom

11. erred in proceeding on absurd/ irrelevant proposition that the said Scheme approved by the Hon'ble High Courts of Bombay and Gujarat is under the Companies Act, 1956, which is in clash with the Act;

12. without prejudice to the above, not appreciating the fact that the imputed consideration, if any, should be restricted to the value of the demerged undertaking and cannot be absurdly computed with reference to the fair value of an unrelated investment asset;

Ground no. 4 - Demerger of telecom undertaking not a slump sale under Section 2(42C) of the Act

13. erred in affirming that demerger of the telecom undertaking by the Appellant to ICL, pursuant to the said Scheme, without any consideration, constitutes slump sale under Section 2(42C) of the Act and consequently liable to tax under Section 50B of the Act;

14. failed to appreciate that transfer pursuant to a Court approved demerger scheme, which is without any consideration, does not qualify as a 'sale' and hence, is not in the nature of 'slump sale';

Ground no. 5 - No taxation under Section 50B of the Act as no consideration

15. erred in seeking to tax the said scheme in the hands of the Appellant when there exists no consideration at all under the said

scheme, in a manner that is directly contrary to the provisions of the Act and contrary to the orders of the Hon'ble Gujarat and Bombay High Court approving the said demerger scheme, which has force of law;

16. without prejudice to the above grounds, failed to appreciate that in the absence of any sale consideration, computation mechanism would fail and hence, no capital gains tax can be levied on such transfer under Section 50B of the Act;

Ground no. 6 - Amortization of telecom license fees under Section 35ABB(2) of the Act

17. erred in disallowing the amortization of telecom license fees of Rs 9,47,36,842 claimed by the Appellant under Section 35ABB(2) of the Act;

Ground no. 7 - Levy of interest under Section 234B of the Act

18. erred in affirming levy of interest under Section 234B of the et:

Ground No.8 - Initiation of penalty proceedings under Section 271(1)(c) of the Act

19. erred in dismissing the ground relating to the initiation of the penalty proceedings under Section 271(1)(c) of the Act.

Each of the above ground is independent and without prejudice to one another. The Appellant craves leave to add, to alter, to amend or to delete any or all of the above grounds of appeal, at or prior to hearing of the appeal.

2. Rival contentions have been heard and record perused. Facts in brief are that the assessee Aditya Birla Telecom Ltd. is a wholly owned subsidiary of Idea Cellular Limited (ICL) w.e.f.28th February, 2007. The assessee had obtained a Unified Access Services License in November 2006 for providing telecom services in Bihar (including Jharkhand) service area. During the subject FY, the assessee filed a Scheme of Arrangement under Section 391 to 394 of the Companies Act, 1956 with the Hon'ble High Courts of Gujarat and 'Mumbai for demerging its telecom undertaking to ICL. Under the said Scheme, the assessee had transferred

all the assets and liabilities of the telecom undertaking to Idea without any consideration. The said Scheme of arrangement was filed on 1st April 2009 and was approved by the Hon'ble High Courts on 2nd December 2009 and 22 January 2010 and became effective on 1st March 2010. In terms of scheme assessee also revalued its investment in Indus, an asset separate from demerged undertaking and business restructuring reserve was created. During the course of scrutiny assessment, the AO issued a notice asking the assessee to show cause as to Why the demerger under the said "Scheme should not be treated as a 'transfer' for the purposes of Section 45 of the Act and be taxed as 'capital gains'. In response to the above, the assessee made detailed submissions before the learned AO stating that there was no consideration for demerger of undertaking therefore, no capital gains accrued in the hands of assessee. However, not convinced with the submissions of the assessee A.O. held that demerger was a slump sale u/s.50B and computed the short term capital gain considering the revaluation of the investment in Indus as full value of the consideration and adopted the cost of acquisition u/s.50B and determined the short term capital gain in the hand of the assessee. Further A.O also disallowed deduction for the unamortized license fees of Rs.9.47 crores claimed by the assessee u/s.35ABB(2) of the Act on the ground that the same was already considered while computing the short term capital gains. In addition to the above A.O. disallowed the claim of deduction u/s.35D and also did not allow setting off the carried forward losses. On the above issues assessee had filed appeal before the CIT(A).

3. It transpires from the orders of authorities below that during the year under consideration the assessee has de-merged its telecom undertaking, being the business undertaking engaged in provision of telecom services in Bihar telecom service area to its holding company ICL, without any consideration, pursuant to the Scheme of Arrangement approved by the Hon'ble High Court of Gujarat and Bombay, In this regard, it was submitted before the lower authorities that once the Scheme of Arrangement, which specifically provides that no consideration shall be paid for the demerger of telecom undertaking by the assessee, has been approved by the High Courts without any modifications thereto, the learned AO does not have any right to substitute the consideration agreed in the Scheme of Arrangement or impute a notional and completely absurd consideration for such de-merger. Since no consideration accrues or is received by the assessee, no capital gains would arise in the hands of the assessee. It is a cardinal principle of law that the charging section and the computation provisions together constitute an integrated code and when there is a case to which the computation provisions cannot apply at all, it would imply that such case was not intended to fall within the scope of charging section.

4. Reliance was placed on the decision of Hon'ble Supreme Court in the case of B.C.Srinivasa Setty, 128 ITR 294 wherein it was held that where one of the ingredients for computation of capital gains is absent, no capital gains could be levied due to failure of the computation

mechanism. The precise observation of the Hon'ble Supreme Court was as under :-

".....Section 45 is a charging section. For the purpose of imposing the charge, Parliament has enacted detailed provisions in order to compute the profits or gains under that head. No existing principle or provision at variance with them can be applied for determining the chargeable profits and gains. All transactions encompassed by s. 45 must fall under the governance of its computation provisions. A transaction to which those provisions cannot be applied must be regarded as never intended by s. 45 to be the subject of the charge. This inference flows from the general arrangement of the provisions in the Income-tax Act, where under each head of income the charging provision is accompanied by a set of provisions for computing the income subject to that charge. The character of the computation provisions in each case bears a relationship to the nature of the charge. Thus the charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section. Otherwise one would be driven to conclude that while a certain income seems to fall within the charging section....."

5. Further reliance was placed on the decision of Hon'ble Supreme Court in the case of PNB Finance Ltd., 307 ITR 75, wherein it was held as under :-

17. As regards applicability of s. 45 is concerned, three tests are required to be applied. In this case, s. 45 applies. There is no dispute on that point. The first test is that the charging section and the computation provisions are inextricably linked. The charging section and the computation provisions together constituted an integrated code. Therefore, where the computation provisions cannot apply, it is evident that such a case was not intended to fall within the charging section, which, in the present case, is s. 45..... However, the cost of such items (intangibles) is not determinable. In the case of CIT vs. B.C. Srinivasa Setty (1981) 21 CTR (SC) 138 : (1981) 128 ITR 294 (SC), this Court held that s. 45 charges the profits or gains arising from the transfer of a capital asset to income-tax. In other words, it charges surplus which arises on the transfer of a capital asset in terms of appreciation of capital value of that asset. In the said judgment, this Court held that the "asset" must be one which falls within the contemplation of s. 45. It is further held that, the charging section and the computation provisions together constitute an integrated code and when in a case the computation provisions cannot apply, such a case would not fall within s. 45. In the present

case, the banking undertaking, inter alia, included intangible assets like, goodwill, tenancy rights, manpower and value of banking licence. On facts, we find that item-wise earmarking was not possible. On facts, we find that the compensation (sale consideration) of Rs. 10.20 crore was not allocable item-wise as was the case in Artex Manufacturing Co. (supra).

6. Furthermore, the authority of Advance Ruling in the case of Amiantit International Holdings Ltd., 322 ITR 678, while examining the issue of transfer of shares without consideration, held that in the absence of any definite value of consideration, the question of applicability of provisions of section 45 read with Section 48 cannot arise :

“.....we have no hesitation in holding that no consideration would accrue or arise to the applicant by the transfer of shares and the applicant cannot be said to have derived any profit or gain from the transaction. We may add that if the 'consideration' is such that it is incapable of being valued in definite terms or it remains unascertainable on the date of occurrence of taxable event, the question of applying section 45 read with section 48 of the Income-tax Act does not arise :”

7. In the case of Bajnath Chaturbhuj, 31 ITR 643, the Hon'ble Bombay High Court held that the full value must be the true value, not any artificial value which parties for any purpose may assign to a particular capital asset. A hypothetical benefit cannot be taxed under sec. 45 of the IT Act.

8. The Authority of Advance Ruling in the case of Amiantit International Holding Ltd., 322 ITR 678, has also held as under :-

“It is not possible to identify or pinpoint anything which has the characteristics of profit or gain or any consideration which is capable of being valued in praesenti. The income in the sense of profit and gain should be real but not hypothetical income. The income may be in cash or in kind and need not necessarily be pecuniary in nature. Even then, the alleged consideration for which the shares are to be transferred should be capable of being evaluated on commercial and accounting principles. The possibility of applicant-transferor improving its overall business by virtue of re-organization and the mere possibility or chance of the applicant making better returns in the near or distant future as a consequence

of reorganization can hardly be regarded as a consideration accruing or arising to the transferor when it has no right to receive a definite or an ascertainable amount or benefit from the transferee. A capital gain cannot arise on the basis of uncertain and indefinite future contingencies or hypothetical and imaginary estimations. There is really no effective answer from the revenue's side to the question as to what is the valuable consideration that has accrued or arisen to the transferor and how it can be converted into money's worth for the purpose of computing the alleged capital gain. The full value of consideration for the transfer of shares is sought to be deduced from the overall objectives of reorganization and the resultant changes in investment. It is not explained how they can be evaluated in terms of money or how they are capable of being turned to pecuniary account. Viewed from another angle, the transferor has not acquired any right to receive an identifiable and monetarily convertible benefit, though not money from the transferee. There is nothing concrete or definite which the transferee gives or makes over to the transferor as a quid pro quo for the receipt of shares. One has to grope in darkness to find valuable consideration for the transfer. By transferring the Indian company's shares to its 100 per cent subsidiary, the applicant will derive no profit and make no gain. Nothing in the form of money or money's worth or nothing capable of being turned into money will accrue or arise to the applicant on the date of transfer. Therefore, the contention of the revenue has to be rejected. [Para 7]

9. The authority of Advance Ruling in the case of Dana Corporation, 321 ITR 178, has also held that the profit or gain or the full value of the consideration, cannot be arrived at on notional or hypothetical basis. The profit or gain to the transferor must be a distinctly and clearly identifiable component of the transaction. The consideration for the transfer of shares in terms of money or money's worth is not something which can be implied or assumed. No profit or gain in the form of consideration for transfer can be inferred by a process of deeming or on presumptive basis and there must be a causal nexus between the transfer of capital asset and the profit or gain accruing to or received by the assessee and that hypothetical benefit cannot be taxed under Section 45 and held that

"7.2..... On the basis of these statements in the Annual Report, the revenue seeks to contend that the value of

individual assets including transferred shares which forms part of the total enterprise i.e., \$ 3563 (millions) constitutes consideration for the transfer. I am unable to accept this extreme contention. These statements in the Annual Report of DHC do not in any way support the proposition that a definite or agreed consideration has been received by the applicant in transferring the shares of the Indian companies to its subsidiaries and thereby the applicant made a profit or gain by transferring the shares. Shares may have been notionally valued for the purpose of preparing the financial statements or to facilitate the reorganization process. For that reason, it cannot be reasonably said that the book value or the market value of the shares really represents the consideration for the transfer or the profit arising from the transfer. In this context, it is clarified by the applicant (vide written submissions dated 10-8-2009) that the sum of \$3563 (millions) represents the value of reorganized entity, namely, DHC and has nothing to do with the value of assets and liabilities of the entity under reorganization i.e., DC and that the reorganization value has been determined in view of the statutory requirement so that the creditors and other stakeholders can take an informed business decision. As stated by the applicant, the objective behind the determination of such value is not to determine the consideration for the transfers effected on the sidelines of reorganization.

7.3 *I am, therefore, of the view that the facts on record judged in the light of reorganization plan lead to a reasonable inference that there was no consideration for the transfer or at any rate the consideration is indeterminable and, therefore, the charging provision - Section 45 becomes inapplicable.”*

10. Hon’ble Supreme Court in the case of Shivakami Company P. Ltd.,

159 ITR 71, held that :-

“..... since the Tribunal had found that the consideration was not understated and there was no evidence direct or inferential to show that the consideration, actually received by the respondent was more than what was disclosed or declared by the respondent, the proviso to section 12B(2) (corresponding to section 48 & erstwhile section 52 of the Act) could not be invoked. Unless there is evidence that more than what was stated was received, no higher price can be taken to be the basis for computation of capital gains. Capital gains tax was intended to tax the gains of an assessee, not what an assessee might have gained. What is not gained cannot be computed as gained. All laws, fiscal or otherwise, must be both reasonably and justly interpreted whenever possible. Capital gains tax is not a tax on what might have been received or could have been taxed.”

11. In view of the above judicial pronouncements, it was contended before lower authorities that in case of transfer of a capital asset, what can be taxed in the hands of the seller under the Act is real or actual gain that accrues/arises from transfer of the assets and hence, in absence of any sale consideration (and resultant profit from the transfer) no notional gain can be imputed in the hands of the seller to tax such transfer. Further, it would be pertinent to note that even under the erstwhile section 52 of the Act, which provided power to the assessing officer to consider fair market value of the asset as full value of consideration in case of understatement of the consideration, various Courts, inter-alia including the decision of Hon'ble Supreme Court in the case of K.P.Varghese, 131 ITR 597, have broadly laid down the following principles for invoking of provisions of the erstwhile section 52 of the Act. As per the principles so laid down if the shares are sold at a value lower than the market price and there is no evidence direct or inferential, that the assessee had received the difference between the value actually received and market value of shares sold, then actual price received for the sale should be considered as full value of consideration. The capital gains tax is not a tax on what might have been received. The actual price received by the assessee may be less than the fair market value. Capital gains tax was intended to tax the gain of the assessee, not what the assessee might have gained. Unless there is evidence that more than what was stated was received, no higher price can be taken to be the basis for computation of capital gains. Thus, even under the erstwhile Section 52 of the Act, which

provided power to the assessing officer to consider the fair market value in those cases where consideration is understated, only the price agreed between the parties i.e. the actual price at which the shares are sold and not the fair market value of the asset as on the date of sale would be considered as the real income of the assessee. In the instant case, there is no understatement of income by the assessee, given the fact that no consideration has been received by it in respect of demerger of its telecom undertaking. Thus, no consideration could be imputed in the hands of the assessee. Accordingly, no capital gains can be said to accrue or arise in its hands. It may also be pertinent to highlight here that the other two only Sections (i.e. Section 50C and Section 50D of the Act), which provide for imputation of consideration are also not applicable to the present case and hence, no consideration can be imputed in the instant case. Section 50C of the Act provides that where consideration received/accruing as a result of transfer of capital asset, being land or building or both, is less than the value adopted for stamp duty purposes, the stamp duty value shall be deemed to be the sale consideration for the purposes of Section 48 of the Act. In the assessee's case, there has been a transfer of the business undertaking and not of any land/ building owned by the assessee. Hence, provisions of section 50C of the Act cannot be applied to the present case. Section 50D of the Act provides for assumption of fair value of an asset as its sale consideration in cases where sale consideration accruing/ received as a result of transfer is indeterminate or not ascertainable. In the assessee's case, the Scheme of

Arrangement categorically stated that the de-merger of the telecom undertaking of the assessee to ICL would be without any consideration and hence, it cannot be said that the consideration was indeterminate or not ascertainable, but it is a case of no consideration. Thus the provisions of Section 50D of the Act cannot be held applicable to the present case. Moreover the provision of Section 50D of the Act has been inserted by Finance Act 2012, with effect from April 2013 and accordingly cannot be applied in the subject AY 2010-11 under consideration.

13. In view of the above discussion it was contended that wherever considered appropriate, the legislature has inserted specific provisions for assumption of sale consideration for transfer of assets in specified cases. It is therefore unjust and unwarranted to impute/assume consideration in cases which clearly do not fall within the ambit of such specified provisions.

14. Reliance was placed on the decision of Dev Kumar Jain, 309 ITR 240, wherein the Hon'ble Delhi High Court had an occasion to consider the scope of the full value of consideration and ruled that the full value of consideration and fair market value under Section 55A of the Act are two different concepts and the assessing officer cannot substitute full value of consideration by fair market value on his own. The Hon'ble Court held as under :-

"7. We find that a Division Bench of this Court in the case of CIT Vs. Smt. Nilofer I. Singh, 309 ITR 233(Delhi) dated August 27, 2008, in ITA No.154/2008 has held that the provisions of section 55A of the Act apply only where the Assessing Officer is required to ascertain the fair market value of a capital asset. In a case where

capital gains have to be brought to tax the provisions of sections 45 and 48 of the Act come into play. Section 45(IA) of the Act provides that any profit or gains arising from the transfer of asset affected in the previous year shall be chargeable to income tax under the head "Capital gains". It stipulates that capital gains shall be computed by deducting from the full value of consideration received or accruing as a result of the transfer of the capital asset, the amount of expenditure incurred wholly and exclusively in connection with such transfer as also the cost of acquisition of the asset and the cost of any improvement thereto. The Division Bench went on to hold that a combined reading of section 45(IA) and section 48 of the Act would show that it is apparent that when a sale of property takes place, the capital gains arising out of such a transfer has to be computed by looking at the full value of the consideration received or accruing as a result of such transfer. It went on to hold that the expression full value of sale consideration is not the same as fair market value as appearing in Section 55A of the Act. In coming to this conclusion the Division Bench of this court relied upon the Supreme Court judgment in the case of CIT vs. George Henderson and Co. Ltd. 66 ITR 622 as also the judgment of the Supreme Court in the case of CIT Vs. Gillanders Arbuthnot and Co. 87 ITR 407 wherein the expression full value of consideration was interpreted in the context of pari materia provisions found in the income-tax Act, 1922. Based on these decisions the Division Bench concluded that for the purpose of computing capital gains there is no necessity for computing the fair market value and therefore the Assessing Officer could not have referred the matter to the Valuation Officer.

The Hon'ble Court further went to hold :-

We are not in agreement with the submission made by the learned counsel for the Revenue for the reasons that there is nothing on record to show that the assessee received a consideration for the sale of the said property in excess of that which was shown in the agreement to sell. That being the case the decision in the case of Smt. Nilofer I. Singh (2009) 309 ITR 233(Delhi) would bind the Revenue that actual sale consideration recorded in the agreement to sell would be substituted by the value arrived at by the DVO under section 55A of the Act."

15. Our attention was invited to the scheme of arrangement under which the existing investment of the assessee in Indus, an asset separate from the de-merged telecom undertaking, which continued to remain vested in the assessee post de-merger was revalued at its fair value and the difference between the fair value and book value of the investment were recognised in the Business Restructuring Reserve. This fact is

evident from clause 11.3 of the Court approved scheme of Arrangement becoming effective the assessee would revalue its investments in Indus and create the Business Restructuring Reserve. Hence, creation of such a reserve is a result of a unilateral action by the assessee. Further, as is evident from Scheme of Arrangement, the AO has misinterpreted in the intent of clause 11.3 and ignored the fact that no consideration was paid by ICL to the assessee towards de-merger of its telecom undertaking. The AO has failed to understand that the Business Restructuring Reserve created in the books of the assessee was merely an accounting entry passed in the books of assessee on account of revaluation of its investment and that, the amount representing an accounting entry could not be deemed to be the value of consideration for transfer of the telecom undertaking by the assessee. We found that the fair valuation of the investments by the assessee in its books cannot by any stretch of imagination be considered as a consideration received by the assessee from ICL for de-merger of its telecom undertaking.

16. In view of the above, it was contended before lower authorities that creation of such a reserve only represents an accounting entry passed by the assessee in its books of accounts and does not represent any consideration whatsoever received from ICL or any third person towards transfer of the telecom undertaking to ICL. The reserve was created on account of a unilateral action by the assessee, the same cannot be treated as a consideration. It is unimaginable to assume that creation of reserve in the books of the assessee on account of revaluation of its own

investments is the consideration paid by ICL, a third party, for transfer of telecom undertaking. However, the AO has completely disregarded the fact that the said de-merger scheme specifically states that no consideration whatsoever would be paid by ICL to the assessee. Further, the action of the AO completely disregards the approval of the Hon'ble high Courts sanctioning the Scheme which explicitly provides that no consideration shall be paid by ICL to the assessee for the transfer of the telecom undertaking.

17. It was further submitted before lower authorities that there has been no value accretion to the assessee on account of revaluation of investment held in Indus since there was no change in the equity stake held by the assessee in Indus. The Business Restructuring Reserve merely represented a notional reserve created to bring the value of the investments held in Indus to its fair value and does not in any manner represent any consideration received by the assessee.

18. He further contended that consideration/receipts should accrue as a result of transfer for a transfer to be liable to capital gains tax. In this regard, it is pertinent to note that Section 45 of the Act reads as Any profits or gains arising from the transfer of a capital asset...". In other words consideration should have a nexus with the transfer. It should not arise out of independent transactions wherefrom independent rights are emanating. In the case of CIT Vs. Vania Silk Mills Pvt. Ltd. 107 ITR 300, the Hon'ble Court while interpreting the sentence "any profits or gains arising from the transfer of the capital asset..." in section 45 of the Act,

held that in order to subject any profit or gain received by or accruing to the assessee to the charge of capital gains, the sine qua non is that the receipt or accrual must have originated in a transfer within the meaning of section 45 read with section 2(47).

19. It was also contention of assessee before lower authorities that there is no nexus between transfer of telecom undertaking by the assessee and revaluation of the investment in Indus except that both the transactions are independent transactions arising from the Scheme of Arrangement. Hence, as no consideration has accrued to the assessee on account of the said de-merger no profit or gain can be said to have accrued or received by the assessee.

20. In view of the above discussion, the said Business Restructuring Reserve so created by assessee on account of revaluation of investment in entity, cannot be treated as consideration in the hands of the assessee for transfer of Bihar Telecom Undertaking from assessee to ICL. In absence of any consideration for de-merger of the telecom undertaking i.e. transfer of capital asset, the machinery provisions under section 48 of the Act would fail, and thus, no capital gains would be applicable on such transfer. Capital gains tax liability is to be determined with reference to the full value of consideration accruing to or received by the transferor. In the present case, since no consideration had accrued to or was received by the assessee for de-merger of its telecom undertaking, no such consideration can be imputed in the hands of the assessee and hence, no capital gains tax liability can be levied upon the assessee.

21. Creation of Business Restructuring Reserve in the books of the assessee was a result revaluation of the existing investments of the assessee in Indus, an asset separate and completely independent from the de-merged telecom undertaking, and hence, such reserve cannot be construed as consideration for de-merger of the telecom undertaking.

22. In the assessment order so framed the AO held that there was no de-merger as per the IT Rules and assessee is also not eligible for any exemption of capital gains u/s.47(iii), 47(v) and 47(vib) and held that transfer of capital gains are to be computed. In computing this capital gains AO had considered the revalued assets of the retained assets as full value of the consideration. While holding this as full value consideration AO held that as there is no demerger as per I.T.Act and also assessee is not eligible for any exemption of the capital gains u/s.47(iii), 47(v) and 47(vib). There is a transfer of assets from ABTL to ICL and it is taxable to capital gain u/s.45. As per the AO the Value which assessee had valued the retained assets has to be considered as full value of the consideration. Further AO stated that assessee has received benefit of these amounts, hence, this full value of the consideration has to be accrued to the assessee as it is to be received later by the assessee. Hence, the AO had taken the revalued assets as accrued consideration and computed the capital gain.

23. By the impugned order the CIT(A) confirmed the action of the AO by observing that revalued assets amount to full value of consideration for the transfer of undertaking to ICL. AS per CIT(A) the revalued amount of

assets is a full value of consideration hence, computation mechanism is not failed. Against the order of CIT(A) assessee is in further appeal before us.

24. It was argued by learned AR that Assessing Officer cannot challenge a scheme of arrangement approved by the High Court and the impute consideration. Reliance placed on *Sadanand S. Varde and Others vs. State of Maharashtra* (247 IT 609) (Bombay High Court).

25. It was further contended that telecom undertaking was transferred without any consideration pursuant to a Scheme of Arrangement ('Scheme') u/s 391 to 394 of the Companies Act, 1956 approved by the Hon'ble Gujarat High Court and Hon'ble Bombay High Court. Since there is no consideration for transfer of a capital asset, the capital gains computation mechanism fails and thus, no capital gains tax can be levied on such transfer and the same cannot be termed as 'Sale'. Reliance was placed on

- (i) *B.C.Srinivasa Setty* (1981) (128 ITR 294) (SC);
- (ii) *Amiantit International Holdings Ltd., In Re* (2010) (322 ITR 678) (AAR)
- (iii) *PNB Finance Ltd vs CIT* (307 ITR 75) (SC)
- (iv) *Dana Corporation vs DIT* (321 ITR 178) (AAR)
- (v) *Goodyear Tire and Rubber Co. In Re* (2010) (334 ITR 69) (AAR) and
- (vi) *Avaya Global Connect* (122 TTJ 300)

26. As per learned AR, capital gains are to be computed having regard to the full value of consideration received / accrued to the assessee i.e.,

price agreed between parties and not on the national or fictional income or fair market value of the asset on the date of transfer.

Reliance placed on

- (i) KP Varghese vs ITO (131 ITR 597) (SC)
- (ii) CIT vs George Henderson & Co., (66 ITR 622)
- (iii) Gillianders Arbuthnot (SC) (87 ITR 407)
- (iv) Rupee Finance & Management (P) Ltd., vs ACIT (22 SOT 174) as approved by Bombay HC.

27. Learned AR further contended that deemed consideration is only applicable under section 50C and section 50D which is not the case in the matter.

28. As per learned AR demerger of telecom undertaking is not a slump sale. Pre-requisite condition of slump sale i.e., 'sale' is missing. Transfer of property consequent to Scheme of arrangement approved by High Court cannot be considered as sale.

29. For this purpose, reliance was placed on the decision in case of Standard S. Varde vs State of Maharashtra (247 ITR 609), Avaya Global Connect (122 TTJ 300).

30. Learned AR vehemently argued that sale presupposes payment of 'lumpsum monetary consideration'. Transfer without monetary consideration is not a sale, for this purpose reliance was placed on Motor & General Stores Private Limited (66 ITR 692) (SC), Bharat Bijlee Ltd., (54 SOT 571), Avaya Global Connect (122 TTJ 300) and ITO vs. M/s. Zinger Investments (P) Ltd., (ITA No.275/Hyd/2013).

31. Learned AR also argued that voluntary transfer of property by any person without any consideration is regarded as 'gift. No requirement that gift should be made only between two natural persons. In fact, the term living persons under section 5 of the Transfer of Property Act includes a company. Section 56(2) (viiia) of the Act also recognises the concept of gift by one corporate to another.

32. Our attention was also invited to Clause 27 of the Memorandum of Association of the assessee which permits it to grant gift. Reliance placed on DP World Private Ltd vs DCIT (ITA No.3627/Mum/2012); KDA Enterprise (57 taxmann.com 284 (Mum Tribunal); Redington India Ltd., vs JCIT (TS-419-ITAT-2014) (Chennai Tribunal) and Vodafone Essar Gujarat (Guj HC). As per learned AR, Supreme Court in the case of Laksmanaswami Mudaliar had held that a company can do such acts which are permitted under the Memorandum of Association.

33. As per learned AR, de-merger of telecom undertaking is not chargeable to tax under Section 47(vib). As per learned AR since Idea held the entire equity share capital in the Assessee, there was no requirement and it was also impossible for Idea to issue any shares to itself. Reliance placed on the AAR ruling in the case of Hoechst GmbH (289 ITR 312)

34. Learned AR invited our attention to the consent given by the preference share holders to the scheme of de-merger and for which no shares were required to be issued to them.

35. Learned AR also vehemently argued that de-merger is also not chargeable under Section 47 (v). Since in the instant case, transfer was by a wholly owned subsidiary company to the Indian holding company, the same cannot be recorded as transfer by virtue of specific exemption prescribed under Section 47 (v) of the Act. Attention was invited to the fact that the entire equity share capital of the assessee is held by Idea, which is an Indian company.

36. Our attention was also invited to the scheme of arrangement and Financial Statements for the year ended 31 March 2010 amply demonstrated that no consideration was received by the assessee or any person on account of the transfer of the telecom undertaking. The said transfer is not a 'slump sale' and hence, not chargeable to tax under Section 50B of the Act. In this context, reliance was placed on the decision of Hon'ble Bombay High Court in the case of Bharat Bijlee, wherein it was held that presence of a monetary consideration / price is a pre-requisite for a transfer to be treated as a 'sale'. Thus, in absence of any consideration in the present case, the transfer could not be considered as a 'slump sale' and hence, not liable to tax.

37. On the other hand, it was argued by learned DR that the assessee has de-merged the business of the telecom license in Bihar to Idea Cellular Ltd.,(ICL). Under scheme of arrangement between ICL and ABTL u/s. 391 to 394 of Companies Act, 1956 which was filed before Hon'ble High Court of Gujarat and Bombay for de-merger of ABTL undertaking. After the de-merger the retained assets of ABTL was to be revalued. This

scheme was approved by Hon'ble High Court of Gujarat and Bombay on 02.12.2009 with appointed date of 01.04.2009. The assessee had demerged the telecom undertaking and revalued the retained assets of business. The revaluation reserve so created was sale consideration for demerger of undertaking to ICL.

38. As per learned DR, the AO after verifying the submissions of the assessee, during assessment proceedings held that there was no de-merger as per the IT Rules and assessee is also not eligible for any exemption of capital gains u/s. 47 (iii), 47 (v) and 47 (vib) and held transfer of capital gains are to be computed. In computing this capital gains A.O. had considered the revalued assets of the retained assets as full value of the consideration. As per learned D.R. there is no de-merger as per I.T.Act and also assessee is not eligible for any exemption of the capital gains u/s. 47(iii), 47(v), and 47 (vib). There is a transfer of assets from ABTL to ICI and it is taxable to capital gain u/s. 45. The retained valuation of the asset is full value of the consideration for transfer of telecom undertaking from ABTL to ICL. As per learned D.R. assessee has received benefit of revaluation of investment in Indus, hence, the consideration has accrued to the assessee as it is to be received later by the assessee. Accordingly, the AO has correctly taken the revalued assets as accrued consideration and computed the capital gains taking this as full value consideration capital gain has been correctly computed by the AO and upheld by the CIT(A) after giving due reasoning in their respective orders.

39. As per learned DR, there was a consideration for transfer of undertaking, hence exemption under Clause 47(iii) cannot be allowed. Accordingly, he supported AO's treatment of revaluation of assets as full value of consideration, for transfer of undertaking. Since, there was a consideration, transfer of undertaking cannot be treated as a 'gift'.

40. As per learned DR, assessee had not satisfied the conditions of demerger, hence, it is not eligible for capital gains u/s. 47(vib).

41. We have considered rival contentions and carefully gone through the orders of the authorities below and the documents placed on record to which our attention was invited during the course of hearing. We had also deliberated on the judicial pronouncements referred by lower authorities in their respective orders as well as cited by learned AR and DR during the course of hearing before us in the context of factual matrix of the case. From the record we found that during relevant Assessment Year, the assessee filed a Scheme of Arrangement under Section 391 to 394 of the Companies Act, 1956, with the Hon'ble High Courts of Gujarat and Bombay for de-merger of its telecom undertaking, being the business undertaking engaged in provision of telecom services in Bihar telecom service area, to its holding company ICL., Under the Scheme of Arrangement, the assessee transferred all the assets and liabilities of the telecom undertaking to ICL without any consideration. The Scheme of Arrangement also provided that upon the Scheme of Arrangement becoming effective, the assessee shall revalue the investments retained by the assessee, as it considers relevant and appropriate, including in

particular the investments held in Indus Towers Limited ('Indus'). In the instant case, as a part of the Scheme of Arrangement, the existing investment of the assessee in Indus, an asset separate from the de-merged telecom undertaking, which continued to remain vested in the assessee post de-merger, was revalued at its fair value and the difference between the fair value and book value of the investment were recognised in the Business Restructuring Reserve. This fact is evident from clause 11.3 of the Court approved Scheme of Arrangement wherein it has been stated that only on the Scheme of Arrangement becoming effective would the assessee revalue its investments in Indus and create the Business Restructuring Reserve. Hence, creation of such a reserve is a result of a unilateral action by the assessee. The revalued amount was treated by AO as the consideration for transfer of telecom undertaking to its holding company ICL. However, the assessee has de-merged its telecom undertaking to ICL, without any consideration, pursuant to the Scheme of Arrangement approved by the Hon'ble High Court of Gujarat and Bombay.

42. We found that the Scheme of Arrangement, specifically provided that no consideration shall be paid by ICL for the de-merger of its telecom undertaking by the assessee. Since no consideration accrues or is received by the assessee, no capital gains would arise in the hands of the assessee. It is a cardinal principle of law that the charging section and the computation provisions together constitute an integrated code and

when there is a case to which the computation provisions cannot apply at all, it would imply that such case was not intended to fall within the scope of charging section. This Principle has been upheld in various judicial precedents, inter-alia, including the decision of Hon'ble Supreme Court in case of B.C.Srinivasa Setty (128 ITR 294) wherein particularly in the context of Section 45 and Section 48 of the Act, held that where one of the ingredients for computation of capital gains is absent, no capital gains could be levied due to failure of the computation mechanism.

43. In case of B.C.Srinivasa Setty (supra) Hon'ble Supreme Court observed as under:-

Section 45 is a charging section. For the purpose of imposing the charge, Parliament has enacted detailed provisions in order to compute the profits or gains under that head. No existing principle or provision at variance with them can be applied for determining the chargeable profits and gains. All transactions encompassed by section 45 must fall under the governance of its computation provisions. A transaction to which those provisions cannot be applied must be regarded as never intended by section 45 to be the subject of the charge. This inference flows from the general arrangement of the provisions in the Income-tax Act, where under each head of income the charging provision is accompanied by a set of provisions for computing the income subject to that charge. The character of the computation provisions in each case bears a relationship to the nature of the charge. Thus, the charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section"

44. In support of the proposition that one of the ingredients for computation for capital gain is absent, no capital gains could be levied due to failure of computation mechanism, reliance can be placed on the following judicial pronouncements.

(i) PNB Finance Ltd. vs CIT. (3071TR 75)(SC)

(ii) Amiantit International Holdings Ltd, In Re [2010J (322 ITR 678)(AAR)

(iii) Dana Corporation vs DIT (321 ITR 178)(AAR)

(iv) Goodyear Tire and Rubber Co, In Re [2010J (334 ITR 69) (AAR)

45. In the absence of any sale consideration for transfer of a capital asset, the capital gains computation mechanism fails and thus, no capital gains tax can be levied on such transfer. In this context, the decision of the Hon'ble jurisdictional Mumbai Tribunal in the case of Avaya Global Connect Ltd v ACIT (122 TTJ 300), is squarely applicable to the assessee's facts. In that case also, the assessee transferred one of its undertakings to another company without consideration. The Hon'ble Tribunal, having regard to various judicial precedents, held that as the transfer was that of an undertaking, which is a capital asset, capital gains arising from the transfer were not ascertainable and hence, provisions of Section 45 read with Section 48, were not applicable. Further, as per the provisions of Section 48 of the Act, income chargeable under the head "capital gains" shall be computed having regard to the full value of consideration received or accruing as a result of transfer of the capital asset. Thus, capital gains tax liability is to be determined with reference to the full value of consideration accruing to or received to the transferor. In the present case, since no consideration had accrued to or was received by the assessee for de-merger of its telecom undertaking, no such consideration can be imputed in the hands of the assessee and hence, no capital gains tax liability can be levied upon the assessee. For this

purpose reliance can be placed on the decision of Hon'ble Supreme Court in the case of CIT vs George Henderson & Co, (66 ITR 622), wherein full value of consideration was interpreted to mean the price bargained for by the parties to the sale. The Supreme Court further observed that the expression "full value" means the whole price without any deduction whatsoever and it cannot refer to the adequacy or inadequacy of the price bargained for between the parties. Similar view has been taken by Hon'ble jurisdictional Mumbai Tribunal in the case of Rupee Finance & Management Ltd vs ACIT 22 SOT 174 , wherein the Tribunal has held that in absence of a specific enabling provision in the Act, there can be no notional taxation w.r.t fair market value. The said decision has been approved by Hon'ble Bombay High court.

46. In view of the above, it is amply clear that the full value of consideration has to be taken based on the price that has been commercially agreed between the parties and cannot be imputed on a notional basis.

47. Following decisions also support our view.

(i) Baijnath Chaturbhui vs CIT (31 ITR 643)(Bom HC)

(ii) Goodyear Tire and Rubber Co. (334 ITR 69)(AAR)

(iii) Poona Electricity Co. Ltd. vs CIT (57 ITR 521) The same idea was expressed in different words in CIT vs Shoorji Vallabhdas & Co Ltd. (46 ITR 144)(SC)

(iv) Amiantit International Holding Ltd (322 ITR 678)(AAR)

(v) Dana Corporation (321 ITR 178)(AAR)

(vi) KP Varghese vs ITO (1311TR 597)(SC)

(vii) CIT v Shivakami Company P. Ltd. [1986] (159 ITR 71) (SC)

(viii) Ruling of the Gujarat High Court in the case of Mohanbhai Pamabhai [1997] (91 ITR 393)]

48. Applying judicial pronouncements as laid down in the above decision, we can safely conclude that in case of transfer of a capital asset, what can be taxed in the hands of the seller under the Act is real or actual gain that accrues/ arises from transfer of the assets and hence, in absence of any sale consideration (and resultant profit from such transfer) no notional gain can be imputed in the hands of the seller to tax such transfer.

49. The other two only Sections (Le. Section 50C and Section 50D of the Act), which provide for imputation of consideration are also not applicable to the present case and hence, no consideration can be imputed in the instant case:

- Section 50C of the Act provides that where consideration received/ accruing as a result of transfer of capital asset, being land or building or both, is less than the value adopted for stamp duty purposes, the stamp duty value shall be deemed to be the sale consideration for the purposes of Section 48 of the Act. In the assessee's case, there has been a transfer of the business undertaking and not of any land/ building owned by the assessee. Hence, provisions of Section 50C of the Act cannot be applied to the present case.

- (iv) Section 50D of the Act provides for assumption of fair value of an asset as its sale consideration in cases where sale consideration accruing/ received as a result of transfer is indeterminate or not ascertainable. The provision of Section 50D of the Act has been inserted by Finance Act 2012, with effect from Assessment Year 2013-2014 accordingly cannot be applied in the subject AY under consideration i.e., A.Y.2010-11.

50. In view of the above discussion, we can safely conclude that wherever considered appropriate, the legislature has inserted specific provisions for assumption of sale consideration for transfer of assets in specified cases. It is therefore unjust and unwarranted to impute/ assume consideration in cases which clearly do not fall within the ambit of such specified Provisions.

51. Now, coming to the allegation of AO for taking the revaluation of assets as a consideration for transfer of undertaking, the learned AO has failed to understand that the Business Restructuring Reserve created in the books of the assessee was merely an accounting entry passed in the books of the Appellant on account of revaluation of its investment and that, the amount representing an accounting entry could not be deemed to be the value of consideration for transfer of the telecom undertaking by the assessee. The fair valuation of the investments by the assessee in its books cannot by any stretch of imagination be considered as a consideration received by the assessee from ICL for de-merger of its telecom undertaking. The creation of such a reserve only represents an

accounting entry passed by the assessee in its books of account and does not represent any consideration whatsoever received from ICL or any third person towards transfer of the telecom undertaking to ICL. Further, in case of any consideration being received or paid, there have to be atleast two parties and given that in the instant case the reserve was created on account of a unilateral action by the assessee, the same cannot be treated as a consideration received from ICL. It is unimaginable to assume that creation of reserve in the books of the assessee on account of revaluation of its own investments is the consideration paid by ICL. The Business Restructuring Reserve merely represented a notional reserve created to bring the value of the investment held in Indus to its fair value and does not in any manner represent any consideration received by the assessee.

52. Further more for bringing to tax net, the capital gain consideration/ receipts should accrue as a result of transfer for a transfer to be liable to capital gains tax. In this regard, it is pertinent to note that Section 45 of the Act reads as "Any profits or gains arising from the transfer of a capital asset.. ..". In other words consideration should have a nexus with the transfer. It should not arise out of independent transactions wherefrom independent rights are emanating. In the case of CIT v Vania Silk Mills Pvt. Ltd. (107 ITR 300), the Hon'ble Gujarat Court, while interpreting the sentence "any profits or gains arising from the transfer of the capital asset.." in Section 45 of the Act, held that in order to subject any profit or gain received by or accruing to the assessee to the charge of "capital

gains", the sine qua non is that the receipt or accrual must have originated in a "transfer" within the meaning of Section 45 read with Section 2(47). It further held that there must be a causal nexus between the "transfer" of the capital asset and the profit or gain accruing to or received by the assessee. In the instant case, there is no nexus between transfer of telecom undertaking by the assessee and revaluation of the investment in Indus except that both the transactions are independent transactions arising from the same Scheme of Arrangement. Hence, as no consideration has accrued to the assessee on account of the said de-merger, no profit or gain can be said to have accrued or received by the assessee. Accordingly, on the short ground of no consideration having been accrued or received by assessee, AO was not justified in computing capital gain on the transfer of undertaking. We therefore, set aside the order of AO on this issue.

53. As we are going to allow this ground of assessee's appeal regarding no capital gains in absence of any consideration for de-merger of the telecom undertaking, we are not going to deal with the other arguments of learned AR.

54. Ground taken by assessee regarding denial of amortization of telecom licence fees under section 35 ABB (2) amounting to Rs.9,47,36,842 is restored back to the file of AO for deciding afresh keeping in view our above observation of no capital gains on demerger of telecom undertaking to ICL. We direct accordingly.

66. In the result appeal of the assessee is allowed in part in terms indicated hereinabove.

Order pronounced in the open court on this 19/10/2016.

Sd/-

SANDEEP GOSAIN

न्यायिक सदस्य / JUDICIAL MEMBER

sd/-

R.C.SHARMA

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 19/10/2016

प्र.कु.मि/pkm, नि.स/ 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), Mumbai.
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

(Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai