

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 13.05.2016

+ **ITA 12/2003**

COMMISSIONER OF INCOME TAX

.....Appellant

versus

M/S SALORA INTERNATIONAL LTD.

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Ashok K. Manchanda, Senior Standing
counsel with Ms Vibhooti Malhotra, Junior
Standing counsel.

For the Respondent : Mr Salil Kapoor, Mr Sanat Kapoor, Ms Ananya
Kapoor and Mr Sumit Lal Chandani.

CORAM:

**JUSTICE S.MURALIDHAR
JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

1. The Revenue has preferred the present appeal under Section 260A of the Income Tax Act, 1961 (hereafter the ‘Act’) assailing an order dated 2nd August, 2002 passed by the Income Tax Appellate Tribunal (hereafter the ‘Tribunal’) in ITA No.1903/Del/2001. The aforesaid appeal (ITA No.1903/Del/2001) was preferred by the Assessee against an order dated 22nd February, 2001 passed by the Commissioner of Income Tax (Appeals) [CIT(A)] whereby the Assessee’s appeal against an assessment order dated

29th March, 2000 for AY 1997-98 was rejected.

2. The controversy involved in the present appeal relates to computation of capital gains arising from transfer of an undertaking by the Assessee to a new company, M/s Matsushita Television & Audio India Ltd., in terms of a scheme of arrangement sanctioned by this Court, under Section 391-394 of the Companies Act, 1956. Whilst the Assessee claims that it has incurred a short term capital loss of Rs.11,14,31,696/- on the sale of the said undertaking, the Assessing Officer (hereafter 'the AO') has assessed the said transaction as resulting in a short term capital gain of Rs.25,34,72,144/-. The principal dispute revolves around the quantum of consideration for the sale of the said undertaking; according to the Assessee, the consideration is Rs. 32,48,00,000/- but according to the AO, it is Rs.50,12,00,000/-. Further, the Assessee has computed the capital loss by taking the cost of the assets as Rs.59,94,36,171/- which according to the AO should have been Rs.41,09,32,331/- being the Written Down Value (hereafter 'WDV') of the assets. The Revenue has not pressed its challenge as to the cost of the assets for the purposes of calculation of capital gains. Therefore, the only issue surviving in this appeal is the dispute as to the quantum of consideration for the purposes of computation of capital gains

on transfer of the undertaking in question.

3. The present appeal was admitted on 10th July, 2003 and the following questions of law were framed:

- “(i) Whether on a correct interpretation of clauses 9 and 12 of the scheme of arrangement between the assessee and M/s. Matsushita Television & Audio India Ltd., the Tribunal was correct in law in holding that the full value of consideration for transfer of assets of the assessee was Rs. 32.48 crores and not Rs.50.12 crores ?
- (ii) Whether on the facts and in the circumstances of the case the Tribunal was correct in law in holding that Section 50 of the Income Tax Act, 1961 was not attracted in the case of the assessee?”

4. Since the second question was not pressed by the Revenue, we are called upon to consider only the first question as quoted herein above.

5. Briefly stated the facts necessary to address the aforesaid question are as under:

5.1 The Assessee is a Public Limited company and at the material time was, *inter alia*, engaged in manufacturing television sets, components, office automation equipment, etc. The Assessee states that it had five undertakings including one referred to as the “Panasonic Division”.

5.2 The Panasonic Division was set up during 1994 to manufacture colour televisions and audio systems under the brand name “Panasonic” in technical collaboration with a Japanese company, Matsushita Electric Industrial Company (hereafter ‘MEI’). MEI desired to participate financially in the Panasonic Division and, accordingly, it was decided to hive off the Panasonic Division to a new company – M/s Matsushita Television & Audio India Ltd. (hereafter ‘MTAIC’) in which MEI agreed to subscribe and hold 55% of the issued and paid-up equity capital.

5.3 In order to hive off the Panasonic Division as aforesaid, the Assessee proposed a scheme of arrangement entailing transfer of the Panasonic Division to MTAIC (hereafter referred to as ‘the Scheme’) as on 1st April 1996. The Scheme indicates that the total consideration for the transfer of the Panasonic Division was agreed at Rs.50,12,00,000/- . In consideration of the transfer of the Panasonic Division to MTAIC, the shareholders of the Assessee were issued fully paid-up shares of MTAIC in the ratio of two shares for every fully paid equity share held by them in the Assessee company. In addition, the Assessee was allotted 48,60,000 fully paid equity shares of Rs.10 each of MTAIC and was also entitled to receive the balance consideration of Rs.27,62,00,000/- within the period of 90 days

from the date of the Scheme becoming effective.

5.4 An application under Section 391-394 of the Companies Act, 1956 for, *inter alia*, convening of meetings of members and creditors of the Assessee for approving the Scheme was filed in this Court, pursuant to which the necessary meetings were convened under the directions of this Court. The requisite majority voted in favour of approving the Scheme and, thereafter a petition under Section 391-394 of the Companies Act, 1956 for sanctioning the Scheme was moved in this Court. After giving due notice to all concerned, this Court approved the Scheme by an order dated 20th September, 1996.

5.5 The Assessee filed its return of income for AY 1997-98 on 28th November 1997, disclosing a total income of 1,07,47,720/-. In its return, the Assessee declared that it had received a consideration of Rs.32,48,00,000/- being the sum of Rs.4,86,00,000/- (the paid-up value of 48,60,000 fully paid equity shares of MTAIC) and Rs.27,62,00,000/-. The Assessee declared the cost of acquisition of the fixed assets of the transferred division as Rs.59,94,36,171/- and computed the short term capital loss on the transfer of the Panasonic Division as under:

"Short-term capital loss

Consideration received on spin off of "Panasonic Division"

a. Cash received	Rs.27,62,00,000/-	
b. 48,60,000 shares @ 10 each recd.	<u>Rs.4,86,00,000/-</u>	32,48,00,000/-
<u>Less: Cost of acquisition of "Panasonic Division"</u>		
Cost of fixed assets	Rs.59,94,36,171/-	
Add: Current assets, Loans & Adv.	<u>Rs.42,29,63,886/-</u>	
	Rs.102,24,00,057/-	
Less: Liabilities taken over	<u>Rs.58,61,68,361/-</u>	<u>43,62,31,696/-</u>
Short-term capital loss		11,14,31,696/-"

5.6 The AO examined the Scheme and noticed that the full consideration for the Panasonic Division was fixed at Rs.50,12,00,000/- and further the WDV of the assets as per the depreciation chart furnished by the Assessee was Rs.41,09,32,331/-. He, accordingly, computed the short term capital gains on transfer of Panasonic Division as under:

"Total consideration as per para 12 of scheme of arrangement Rs. 50,12,00,000/-

Less:

WDV of fixed assets belonging to "Panasonic Division"

as per dep. chart filed as per IT Rules 41,09,32,331/-

Add:

Current assets, loans and advances 42,29,63,886/-
83,38,96,217/-

Less: liabilities taken over 58,61,68,361/- 24,77,27,856/-

Short-term capital gain 25,34,72,144/-"

5.7 The Assessee contended that it had received only Rs.32.48 crores in terms of the Scheme and the balance amount of Rs.17.64 crores was discharged by MTAIC by directly issuing fully paid shares to the shareholders of the Assessee; therefore, Rs.17.64 crores could not be considered as a part of the consideration accruing to or received by the Assessee for transfer of the Panasonic Division. And, consequently, the said amount of Rs.17.64 crores could not be taken into account for calculation of capital gains. This contention was rejected by the AO and he held that the sum of Rs.17.64 crores was Assessee's income which was diverted to its shareholders by allotment of shares by MTAIC to them. He held that such allotment of shares to the Assessee's shareholders was application of the Assessee's income and thus was a part of the consideration for transfer of the Panasonic Division. The AO further held that the cost of acquisition of the fixed assets for the purposes of computation of capital gains would be the WDV of the fixed assets, which as per the depreciation schedule submitted by the Assessee was Rs.41,09,32,331/-. He accordingly, computed the short term capital gains on transfer of the Panasonic Division at Rs.25,34,72,144/-.

5.8 Aggrieved by the aforesaid assessment order dated 29th March, 2000,

the Assessee preferred an appeal before the CIT(A). The CIT(A) concurred with the AO and rejected the appeal by an order dated 22nd February, 2001. The Assessee appealed against the CIT(A)'s order dated 22nd February, 2001 before the Tribunal which was allowed by an order dated 02nd August, 2002 (hereafter the 'impugned order').

Impugned Order

6. The Tribunal observed that the Scheme had been approved by this Court pursuant to a petition filed under Section 391-394 of the Companies Act, 1956. The said approval was granted after the requisite meetings of the shareholders as well as secured and unsecured creditors had been convened and all necessary parties had been heard. The Tribunal further observed that notice under Section 394A of the Companies Act, 1956 had also been issued to the Central Government to enable it to file its objections to the Scheme if the same was considered to be prejudicial to its interest. The Tribunal then referred to the decision of the Bombay High Court in **Sadanand S. Varde and Ors. V. State of Maharashtra and Ors.: (2001) 247 ITR 609 (Bom.)** and observed that after approval by a Company Court, a scheme of arrangement acquires statutory recognition.

7. The Tribunal noted that only Rs. 32.64 Crores had been received by the Assessee in terms of paragraph 12 of the Scheme and the amount of Rs. 17.64 crores was given to the Assessee's shareholders by MTAIC by allotment of its shares. The Tribunal noted that it was the Assessee's case that the same amounted to diversion of receipt at the very source and thus, could not be taken into account for computation of capital gains. The Tribunal then posed the question whether the amount of Rs.17.64 crores given to the Assessee's shareholders was a diversion at source or whether it was application of Assessee's income. The Tribunal, answered the aforesaid question by referring to the decision of the Supreme Court in **Commissioner of Income Tax v. Sitaldas Tirathdas: (1961) 41 ITR 367 (SC)** and **CIT v. Imperial Chemicals Industries (India) P. Ltd.: (1969) 74 ITR 17 (SC)** and held that under the Scheme, the amount given to shareholders was diversion at the very source and could not be considered to be application of income because sum of Rs.17.64 crores was not received by the Assessee at all.

8. The Tribunal rejected the Revenue's contention that the shareholders had no right to get any shares or any amount and were only entitled to dividends, if distributed, and a share in the assets of the company at the

time of liquidation. The Tribunal reasoned that the shareholders of the Assessee had acquired a right to receive shares of MTAIC at an aggregate value of Rs.17.64 crores by virtue of the Scheme which had a statutory binding effect; thus could not be considered as a part of the income of the Assessee as it stood "diverted at the source". The Tribunal also rejected the Revenue's contention that there was any collusion between the Assessee and MTAIC in devising a plan to reduce the incidence of tax.

9. The Tribunal accepted the contention that the WDV of the fixed assets could not be taken as the cost of acquisition for computing the short-term capital gains. The Tribunal noted the Assessee's contention that the sale consideration received for transfer of the Panasonic Division was not identifiable with individual assets and, therefore, Section 50 of the Act was inapplicable. The Tribunal also observed that the transfer of Panasonic Division was a case of slump sale where the division was transferred as a going concern, including the related intangible assets. And, concluded that, the transfer of Panasonic Division could not be considered as "a case of transfer of any depreciable asset only". The Tribunal referred to the decision of the Supreme Court in **CIT v. Mugneeram Bangur & Co. (Land Department)**: (1965) 57 ITR 299 (SC) and held that Section 50(1) of the

Act was inapplicable. The Tribunal also noticed the provisions of Section 50B of the Act - which were introduced in the Act with effect from 1st April, 2000 by virtue of the Finance Act, 1999 - and held that since Section 50B of the Act was introduced after AY 1997-98, the said provision could not be applied for computing the capital gains in the present case. The Tribunal referred to the provision of Section 48 of the Act and accepting the Assessee's contention that consideration diverted to its shareholders was neither received by nor accrued to the Assessee, concluded that the cost of acquisition of fixed assets as declared by the Assessee had to be accepted.

Submissions

10. Ms Malhotra, learned counsel appearing for the Revenue referred to the provisions of the Scheme and contended that it is admitted that consideration for sale of Panasonic Division was Rs.50,12,00,000/- and the fact that part of the consideration was paid by MTAIC directly to the shareholders of the Assessee would not absolve the Assessee from computing the capital gains on the basis of the said consideration.

11. Next, she referred to the decision of the Supreme Court in the case of **Miheer H. Mafatlal v. Mafatlal Industries Ltd.:** (1997) 1 SCC 579 and on

the strength of the said decision contended that the Court was not required to examine the merits of the Scheme or the commercial wisdom exercised by creditors and the members of the company. She earnestly contended that sanction of the Scheme by this Court was merely an approval of the arrangement already arrived at by the stakeholders. She further contended that the Director's report also indicated that the proposal for issue of shares by MTAIC to the Assessee's shareholders was made by the Board of Directors of the Assessee to directly benefit its shareholders. She urged that this clearly indicated that the arrangement was to divert part of the consideration by the Assessee to its shareholders.

12. Next, Ms Malhotra referred to the decision of the Supreme Court in **Sitaldas Tirathdas** (*supra*) and on the basis of the said decision contended that in the present case, the undertaking of Panasonic Division was held by the Assessee and the Assessee was entitled to receive the entire consideration for the same. However, the Board of Directors of the Assessee proposed to divert part of the consideration to its shareholders. In the circumstances, the consideration received by the shareholders could not be excluded from the income of the Assessee.

13. Countering Ms Malhotra's contention, Mr Salil Kapoor, learned counsel appearing for the Assessee contended that the arrangement in terms of which the Panasonic Division was transferred by the Assessee to MTAIC had been approved by this Court and in terms of the Scheme, the Assessee was entitled only to a sum of Rs.32.48 crores, partly by cash and partly by issue of shares. He referred to the decision of the Supreme Court in **Sadanand S. Varde** (*supra*) and drew the attention of this Court to the following paragraph:-

“Even if the scheme is approved by all concerned parties by consensus, merely because it is so agreed upon, the court is not obliged to put its imprimatur on it. The court has the discretion and power to reject a scheme even if all the shareholders and creditors have agreed to it. But, once the scheme is scrutinised by the company court and sanctioned by an order made by it under section 391 of the Companies Act, it ceases to retain the character of contract and operates by force of the statute.”

14. On the strength of the aforesaid observations, Mr Kapoor contended that the terms of the Scheme were binding and it could not be considered that Assessee had voluntarily diverted its income in favour of its shareholders. He argued that but for the consent of shareholders, the Scheme would not be sanctioned and since the shareholders had consented to the Scheme entailing issue of shares of paid-up value of Rs.17.64 crores

to them, the same could not form part of the consideration, as either received or accruing in favour of the Assessee.

15. Mr Salil Kapoor referred to Section 48 of the Act and submitted that for the purposes of computing capital gains, the value of consideration should be either "received or accruing". He contended that in the present case, the Assessee had neither received the consideration of Rs.17.64 crores nor the same had accrued in favour of the Assessee in terms of the Scheme. He also relied on the decision of the Supreme Court in ***Sitaldas Tirathdas*** (*supra*) in support of his contention that the part consideration in question did not form a part of the Assessee's income. Further, he referred to the decision of the Supreme Court in **Commissioner of Income Tax v. Excel Industries Ltd.**: (2013) 358 ITR 295 (SC) in support of his contention that income tax could not be levied on hypothetical income.

Reasoning and Conclusion

16. At the outset, it is necessary to notice that this Court is not called upon to consider the question whether any income chargeable under the head 'Capital Gains' could be computed under Section 48 of the Act (given that no separate asset had been transferred but the entire Panasonic Division

has been transferred as a going concern by the Assessee to MTAIC). Although the Tribunal had noted that Section 50B of the Act was not applicable for AY 1997-98, as it was enacted subsequently, it did not hold that in the present case income chargeable under the head 'Capital Gains' could not be computed. Further, it also does not appear that this proposition was canvassed by the Assessee. The Tribunal had proceeded to accept the Assessee's contention that the cost of acquisition of assets was Rs.59,94,36,171/-, that is, as reflected in its balance sheet. In any view, the Assessee is not in appeal against the impugned order. Ms Malhotra also expressly stated that the Revenue is not pressing the issue as to the cost of acquisition of the assets sold and, accordingly, has not pressed question no.2 framed by this Court. In the circumstances, we are not examining the question whether in a slump sale, income chargeable under the head 'Capital Gains' could be computed under Section 48 of the Act. We are also not called upon to determine any other controversy relating to the cost of acquisition of the Panasonic Division. The Assessee had itself claimed the cost of acquisition of the fixed assets of the Panasonic Division as Rs.59,94,36,171/-, which now stands accepted by the Revenue.

17. In the circumstances, the only question that needs to be addressed is whether the consideration for the transfer of Panasonic Division is Rs.50.12 crores or Rs. 32.48 crores.

18. An order passed by the Company Court sanctioning a scheme of arrangement under Section 391-394 of the Companies Act, 1956 is an order *in rem*. It is not in dispute that the Scheme is binding on all the persons including the Assessee. However, we are unable to appreciate any material difference, in so far as the incidence of tax is concerned, between a scheme of arrangement which has been approved by a Company Court under the provisions of the Companies Act, 1956 (or the Companies Act 2013) or any other binding arrangement/agreement. Mere sanctioning or approval under Section 391-394 of the Companies Act, 1956 would not alter the character of the scheme or the nature of transaction embodied therein for the purposes of levy of income tax under the Act. To illustrate the aforesaid, let us take an instance of a company which enters into an agreement for sale of one of its undertakings (substantial) and in terms of the agreement, a part of the consideration is payable directly to its shareholders. The company also obtains the necessary approvals of its shareholders as required under the provision of Section 180 of the Companies Act, 2013, which is *pari*

materia to Section 293 of the Companies Act, 1956. Another company which is identically situated enters into a similar arrangement, however, follows a different route and instead of directly approaching its shareholders, files a scheme of arrangement before the Company Court and makes an application for the requisite meetings to be convened. The Court gives directions for holding of the meetings and the entire transaction (the scheme) is placed before the members and creditors for obtaining their approval. After following the prescribed procedure, the Company Court sanctions the scheme. In either case, the nature of the transaction essentially remains the same. In the first case, it is effected by means of an agreement, which is binding and in the later case, it is effected under the scheme of arrangement which too is binding under the provisions of the Companies Act, 1956 (or the Companies Act 2013). In our view, there would be no difference as to the incidence of taxation on the sale effected through the two modes.

19. During the course of the arguments, we had also put this illustration to Mr Kapoor and enquired whether the Assessee claimed that incidence of taxation in the two cases would be any different. Mr Kapoor had responded in the negative and in our view, rightly so. However, he had further

contended that in either case, the part of the consideration paid directly to the shareholders would not be taxable for computation of income chargeable under the head 'Capital Gains' as the same would not be received or accruing to the company selling its undertaking. We shall address this a little later; but for now, it is clear- and not in dispute- that for the purposes of answering the question as to what is the consideration for transfer of Panasonic Division for computing the capital gains arising therefrom, we have to merely examine the transaction effected through the Scheme.

20. Now, if we consider the transaction as embodied under the Scheme, it is clear that the transaction is essentially of transfer of the Panasonic Division by the Assessee to MTAIC for the consideration as specified in Clause 9 of the Scheme. Panasonic Division is referred to as "Panasonic Division of SIL" under the Scheme which is defined as under:-

- “a) All assets, movable or immovable including plant, machinery, earnest money and security deposit paid by SIL in connection with or relating to Panasonic Division, the particulars of which are specified in Schedule A hereto as also the liabilities and debts pertaining to that division particulars of which are specified in Schedule B hereto.

- b) All privileges and benefits of contracts, agreements, deeds, bonds, insurance policies and other rights, licenses, powers and facilities of every kind, nature and description relating to the Panasonic Division as specified in Schedule C hereto.
- c) All legal or other proceedings by or against SIL and relating to the Panasonic Division of SIL specified in Schedule D hereto.
- d) All permanent employees of SIL primarily engaged in or in relation to PANASONIC DIVISION of SIL.
- e) Lease rights, tenancy rights, industrial licenses, trademarks and all other licenses, powers, facilities etc. of every kind, nature and description whatsoever pertaining to that Division.”

21. Part II of the Scheme expressly provides for the transfer to and vesting of the Panasonic Division in MTAIC.

22. Paragraph 9 of the Scheme provides for the total consideration for transfer of the Panasonic Division and reads as under:-

“9. The total consideration of the “Panasonic Division of SIL” as defined in 1(vi) herein above, being transferred to and vesting in MTAIC in accordance with this scheme, being a sum of Rs. 50,12,00,000 (Rupees fifty crores twelve lakhs only) has been fixed and agreed to by SIL and MTAIC through their respective Boards which shall be discharged in the manner hereinafter provided.”

23. Paragraph 12 of the Scheme provides for the manner in which the above consideration is to be discharged by MTAIC and reads as under:-

"12. In consideration of the transfer and vestment of the running business of Panasonic Division to MTAIC and upon this Scheme being effective:

a) Every member of SIL holding Equity Shares in SIL on the Effective Date or such other date as may be decided by the Board of Directors of SIL and MTAIC respectively (on the scheme becoming final and effective) shall in respect of every fully paid equity share of Rs. 10/- each held by him in SIL be entitled as of right to claim and receive from MTAIC an allotment of Two Equity Shares of Rs. 10/- each credited as fully paid up and that MTAIC shall so issue and allot two equity shares of Rs. 10/- each in its capital for one fully paid equity share of SIL ;

Provided that in case any member's shareholding in SIL is such that on the basis of the aforesaid ratio, he becomes entitled to a fraction of a share of MTAIC of a value not less than half share of MTAIC, such member shall be entitled as of right to claim and receive from MTAIC an allotment of one equity share of MTAIC of Rs. 10/- each credited as fully paid up. And if the shareholding of any member in SIL is such that he would consequent upon the aforesaid exchange ratio be entitled to a fraction of a share of MTAIC of a value of less than one half share of MTAIC then such fraction shall be ignored and such member shall not be entitled to receive any fraction of a share from MTAIC;

b) SIL itself shall be entitled as of right to claim and receive from MTAIC an allotment of 48,60,000 (forty eight lakhs sixty thousand only) Equity Shares of Rs. 10/- each credited as fully paid up and MTAIC shall issue and allot the same;

c) SIL shall, in addition, be paid by MTAIC, a sum of Rs. 27,62,00,000 (Rupees twenty seven crores sixty two lakhs only) within a period of 90 days from the effective date or on such date or dates as may be mutually agreed between the Board of Directors of SIL and MTAIC and in the meanwhile the said amount of Rs. 27,62,00,000 (Rupees twenty seven crores sixty two lakhs only) will stand credited to the account of SIL in the books of accounts of MTAIC."

24. It is also relevant to note, at this stage, that the identity of shareholders of a company is different from that of the company. The consideration as reflected under the Scheme is clearly for the transfer of title to the assets as well as assumption of obligations of the Panasonic Division. Undisputedly, the title to the assets of the Panasonic Division belonged to the Assessee, so as the obligation to discharge the liabilities of the said division. The Panasonic Division was an undertaking owned by the Assessee and not by its shareholders. Whilst shareholders own shares issued by a company, they have no interest in the assets held by the company. In **Bacha F. Guzdar v. CIT, Bombay: (1955) 27 ITR 1 (SC)** a Constitution Bench of the Supreme Court explained the above principle in the following words:

“That a shareholder acquires a right to participate in the profits of the company may be readily conceded but it is not possible

to accept the contention that the shareholder acquires any interest in the assets of the company. The use of the word "assets" in the passage quoted above cannot be exploited to warrant the inference that a shareholder, on investing money in the purchase of shares, becomes entitled to the assets of the company and has any share in the property of the company. A shareholder has got no interest in the property of the company though he has undoubtedly a right to participate in the profits if and when the company decides to divide them. The interest of a shareholder vis-a-vis the company was explained in the case of Chiranjitlal Chowdhuri v. The Union of India and Others [1950] S.C.R. 869, 904]. That judgment negatives the position taken up on behalf of the appellant that a shareholder has got a right in the property of the company. It is true that the shareholders of the company have the sole determining voice in administering the affairs of the company and are entitled, as provided by the Articles of Association, to declare that dividends should be distributed out of the profits of the company to the shareholders but the interest of the shareholder either individually or collectively does not amount to more than a right to participate in the profits of the company. The company is a juristic person and is distinct from the shareholders. It is the company which owns the property and not the shareholders.”

25. If the provisions of paragraph 9 and 12 of the Scheme are considered in the above context, it is at once clear that only the Assessee was entitled to receive the entire consideration for transfer of its assets; but it had agreed that the sale consideration for the Panasonic Division be discharged in the manner as specified under paragraph 12 of the Scheme which entailed issue of shares to its shareholders. The above position is also reflected in the Director's report of the Assessee. The AO had taken note of the same and

referred to the following passage from the Director's report in the assessment order:-

“In framing the said scheme, your Board had decided that in order to improve shareholders value and to benefit them directly, a portion of the consideration for the transfer of the said Panasonic Division should accrue to the shareholders of this Company by allotment to them of shares of the said MTAIC, the transferee Company, in the ratio of two shares of MTAIC for each share held in this Company. Accordingly, MTAIC has issued and allotted in the aggregate 17,62,500 Equity shares of Rs. 10/- each at par to the shareholders of this Company. The share certificates of the shares allotted were sent by the said MTAIC in January this year, and it is hoped that all of you have received your respective entitled share certificates.”

26. In **Vodafone International Holdings B.V. v. Union of India: [2012] 341 ITR 1 (SC)**, the Supreme Court held – *albeit* in a different context – that a transaction must be viewed holistically in its proper context. In that case the court applied the “look at” principle to consider whether the transaction in question was a device to evade taxes. Although the subject matter of the controversy in that case was different, the following extract from the said decision is relevant:

“In this connection, we may reiterate the "look at" principle enunciated in Ramsay (supra) in which it was held that the Revenue or the Court must look at a document or a transaction in a context to which it properly belongs to. It is the task of the

Revenue/Court to ascertain the legal nature of the transaction and while doing so it has to look at the entire transaction as a whole and not to adopt a dissecting approach. The Revenue cannot start with the question as to whether the impugned transaction is a tax deferment/saving device but that it should apply the "look at" test to ascertain its true legal nature."

27. In our view, if we look at the Scheme in the context in which it belongs, it would be plainly evident that it is an instrument for effecting sale of the Assessee's assets (the Panasonic Division) where the owner selling its assets (the Assessee) has called upon the buyer to pay a part of the consideration to a third party (its shareholders). Indisputably, the seller would be entitled to the entire consideration for the sale and the fact that at its instance a part of the consideration is diverted to a third party would not absolve the seller from recognizing the entire consideration. We are unable to accept Mr Kapoor's contention that merely because part of the consideration for the transfer of the Panasonic Division had been paid to the shareholders of the Assessee by issue of fully paid-up shares, the same could not be stated to have been "received or accruing" in favour of the Assessee. The expression "accruing" as used in Section 48 of the Act is synonymous to entitlement. If the Assessee is entitled to the consideration, then the same must be taken into account for the purposes of computation of capital gains in terms of Section 48 of the Act.

28. Both the learned counsels, Ms. Malhotra as well as Mr. Salil Kapoor, strongly relied on the decision of the Supreme Court in ***Sitaldas Tirathdas*** (*supra*). In that case, the Assessee was an individual and had several sources of income. He claimed a deduction for the sums that he was required to pay as maintenance to his wife and his children in terms of a decree suffered by him. He relied on the decision of the Privy Council in the case of **Raja Bejoy Singh Dudhuria v. CIT: (1933) 1 ITR 135 (PC)** in support of his claim. In ***Bejoy Singh Dudhuria*** (*supra*), the appellant (assessee) was a *Raja* whose stepmother had brought a suit for maintenance which culminated in a compromise decree under which the stepmother was to be paid a sum of Rs.1,100 per month which was declared as a charge on the properties in the hands of the assessee. The Court held that the decree of the Court had created a charge on the entire resources of the assessee for the specific payment to his stepmother and to that extent had diverted a portion of the income from the estate to his stepmother. The Court held that such income was diverted prior to it forming a part of the assessee's income and was an allocation of revenue before it became income in the hands of the assessee. However, in ***Sitaldas Tirathdas*** (*supra*), the Supreme Court allowed the appeal of the Revenue and did not accept the assessee's

contention that he was entitled to claim the amount of maintenance as a deduction from his income. The Supreme Court explained the legal principle in the following words:-

“In our opinion, the true test is whether the amount sought to be deducted, in truth, never reaches the assessee as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable.”

29. The Supreme Court distinguished the case of **Bejoy Singh Dudhuria** (*supra*), by noticing that in that case, the claim of stepmother had been made a charge on the resources and, thus, she had become entitled to the specified income, prior to it becoming an income in the hands of the assessee in that case.

30. As explained by the Supreme Court in **Sitaldas Tirathdas** (*supra*), it is the nature of the obligation which is the decisive fact. And as stated hereinbefore, the nature of the transaction embodied in the Scheme is indisputably one of transfer of an undertaking which belonged exclusively to the Assessee. Thus, no other person had any right to claim the sale consideration for transfer of the said undertaking. In the given facts, the only inescapable conclusion that can be drawn is that a part of the consideration to which the Assessee was entitled to, had with its consent been diverted to its shareholders. The Assessee cannot escape accounting for such part of the consideration merely on the ground that it did not receive it but was discharged by MTAIC by issuing fully paid shares to the shareholders of the Assessee in terms of the Scheme.

31. The reliance placed by Mr Kapoor on the decision in the case of **Excel Industries Ltd.** (*supra*) is entirely misplaced. This is not a case where the Revenue is seeking to compute capital gains on any hypothetical basis. The consideration for the transfer of Panasonic Division is real and not hypothetical. The fact that the Assessee had agreed for part of the same being directly received by its shareholders would not make the

consideration unreal in its hands; the income sought to be taxed cannot be stated to be hypothetical.

32. In view of the above, the question of law is answered in affirmative, that is, in favour of the Revenue and against the Assessee. The appeal is, accordingly, allowed. The parties are left to bear their own costs.

MAY 13, 2016
MK/RK



VIBHU BAKHRU, J

S.MURALIDHAR, J