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IN THE HIGH COURT OF DELHI AT NEW DELHI

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INCOME TAX APPEAL NO. 20/2000**Reserved on: 1st August, 2013****Date of decision: 21st November, 2013****COMMISSIONER OF INCOME TAX Appellant****Through Mr. Abhishek Maratha, Sr. Standing
Counsel.****versus****M/S ASSOCIATE TECHNO PLASTICS P. LTD.****..... Respondent****Through Nemo.****INCOME TAX APPEAL NO. 95/2002****CIT****..... Appellant****Through Mr. Kamal Sawhney, Sr. Standing
Counsel.****versus****M/S HCL EMPLOYEES & INVEST. CO.LTD Respondent****Through Mr. Ajay Vohra, Ms. Kavita Jha &
Mr. Vaibhav Kulkarn, Advocates.****CORAM:****HON'BLE MR. JUSTICE SANJIV KHANNA****HON'BLE MR. JUSTICE SANJEEV SACHDEVA**



SANJIV KHANNA, J.:

Appeal by the Revenue being ITA No. 95/2002, which pertains to Assessment Year 1989-90, was admitted vide order dated 8th July, 2005 for determination of the following substantial question of law:-

“Whether ITAT was correct in deleting the addition of Rs.2,39,86,572/- being the difference between the sale price declared by the assessee and the market price of the shares quoted at the recognised stock exchange?”

2. ITA No. 20/2000 again by the Revenue relates to Assessment Year 1989-90 and was admitted for hearing vide order dated 27th August, 2001 for answering the following substantial question of law:-

“ Whether the Tribunal was justified in holding that Section 69B of the Income Tax Act has no application to the facts of the case?”

3. The respondent in ITA No. 95/2002 is HCL Employees and Investment Company Limited (HEICL), whereas the respondent in ITA No. 20/2000 is Associated Techno Plastics Private Limited (ATPPL). In ITA No. 95/2002, the order passed by the Income Tax Appellate Tribunal is dated 15th October, 2001 and in ITA No. 20/2000 the order passed by the tribunal is dated 4th May, 1999. We have heard the two ITAs together in view of the order dated 8th July, 2005 passed in ITA No. 95/2002. We record and notice that facts are inter-twined



and the questions raised relate to a transaction(s) in which both the assessee and the respondent-ATPPL were involved or connected. At this stage, we also record that no one has appeared for the respondent-ATPPL in ITA No.20/2000, though it is apparent that they are aware of the present proceedings and were earlier represented by a counsel. However, HEICL has been represented and have contested the present proceedings.

4. ATPPL, it is claimed, had purchased 77929 shares of HCL Limited, which were sold by HEICL. These shares were purportedly purchased at the price of Rs.6.02 per share though the market price on the date of sale, i.e., 16th December, 1988 was Rs.41/- per share, being the quoted price on the recognised stock exchange.

5. HEICL had originally filed a return of income on 26th March, 1991 disclosing income of Rs.35,220/-. The return was processed under Section 143(1)(a) of the Income Tax Act, 1961 (Act, for short) and subsequently the said assessee's involvement in question came to the knowledge of the department and proceedings under Section 148 of the Act were initiated. The Assessing Officer noticed that HEICL had transferred 12,70,000 shares of HCL to 62 different persons at prices varying between Rs.18.91 to Rs.6.02, between May, 1988 to November, 1988. The Assessing Officer taking into consideration the market price on different dates when the sale transactions were entered



into and made an addition of Rs.2,39,86,572/- by bringing to tax the difference between market price and the sale consideration as declared.

6. HEICL did not succeed in the first appeal but has succeeded before the tribunal. We shall subsequently refer to the order of the tribunal.

7. ATPPL for the Assessment year 1989-90 had filed its return of income on 17th November, 1989, declaring income of Rs.10,28,136/-.

8. In the regular assessment proceedings, it was noticed that investments of ATPPL had increased from Rs.13,85,359/- to Rs.61,71,068/-. On query, it was explained that assessee-ATPPL had purchased 3,90,181 equity shares of HCL Limited for Rs.41,26,362/-, from different persons by way of private arrangements and no share broker was involved in the said transactions. The Assessing Officer took notice of these transactions and brought to tax an amount of Rs.26,48,017/- on account of difference between the sale consideration paid by the assessee and the quoted market price on the date of purchase. The Assessing Officer invoked Section 69B of the Act. These details are mentioned and recorded in the assessment order in form of a chart, which is as under:-

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Date Of purchase	Number of shares	Rate at which purchased	Quoted price of Delhi	Amount	Name of seller



			Stock Exchange		
20.9.87	3500	20/-	20/-	70000/-	Mr. Y. C. Vaidya
20.9.87	4500	20/-	20/-	90000/-	Mrs. Prasanna Vaidya
15.4.88	500	18/50	18/-	9248/30	Mr. Gaurang Gandhi
15.4.88	200	19/89	18/-	3978/-	Mr. Rajiv Dhupar
15.4.88	300	17/57	18/-	5270/95	R. Kumar & Co.
8.9.88	30000	12/-	14/-	360000	Ashish Vaidya
8.9.88	30000	12/-	14/-	360000	Shyamlee Vaidya
8.9.88	143252	12/-	14/-	1719024/-	Mr. Y.C. Vaidya
8.9.88	80000	12/-	14/-	960000/-	Mrs. Prasanna Vaidya
8.9.88	20000	12/-	14/-	240000/-	Y.C. Vaidya (HUF)
16.12.88	77929	6/02	41/-	469143/-	HCL Employees Investment Co. Ltd.

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9. AIPPL, however, succeeded before the CIT (Appeals), who held that Section 69B of the Act was not applicable. Revenue preferred an appeal before the tribunal but did not succeed.

10. At this stage, we may notice that the tribunal in the case of ATPPL has not examined the factual aspect but has recorded a finding



that Section 69B cannot be applied as the Assessing Officer had not disputed that the actual sale consideration paid as disclosed by the assessee. In other words, it was not the case of the revenue that the assessee-ATPPL had paid higher sale consideration than one disclosed by them. Reliance was placed by the tribunal on the decision of the Supreme Court in ***K.P. Varghese versus Income Tax Officer***, (1981) 131 ITR 597 (SC).

11. Facts have been discussed in detail in the case of HEICL. We may note the facts as found by the tribunal. U.P. Electronics Corporation Limited (UPLC), a State Government undertaking, was a co-promoter of Hindustan Computers Limited alongwith Microcomp Ltd. The principal promoters of Microcomp Limited were S.S. Nadar, Arjun Malhotra and Y.C. Vaidya. At the time of incorporation of Hindustan Computers Limited, UPLC owned 4000 shares of Rs.100/- in Hindustan Computers Limited and the balance 36,000 shares of Rs.100/- each were owned/held by Microcomp Limited/principal promoters. Later on, Hindustan Computers Limited merged with three other companies namely, Hindustan Reprographics Ltd, Indian Computer Software Co. Ltd and Hindustan Instruments Ltd. to form a new company HCL Limited. UPLC, however, did not want to continue as a shareholder in the new company, HCL Limited. A tripartite agreement dated 29th January, 1987 was entered into between



UPLC, Microcomp Limited and Hindustan Computers Limited to t
effect that UPLC shall sell 4,000 shares of Rs.100/ each to Microcomp
Limited or their nominee for consideration of Rs.1.27 crores.

12. Subsequently and as per the tripartite agreement, SBI Capital Markets Limited paid Rs.1.27 crores to UPLC on or before 31st December, 1987. It appears that Microcomp Limited did not have sufficient funds to make the said payment and they entered into an agreement dated 28th February, 1987 with SBI Capital Markets Limited for payment of the said amount to UPLC. This agreement was between SBI Capital Markets Limited, Hindustan Computers Limited and the three principal promoters. 4,000 shares were transferred and registered in the name of SBI Capital Markets Limited.

13. In the meanwhile, Directors of HCL Limited, who were also Directors in Microcomp Limited, negotiated with Citi Bank to take over the loan granted by SBI Capital Markets Limited. Citi Bank made payment of Rs.1.31 crores to SBI Capital Markets Limited and discharged their dues/claims. SBI Capital Markets Limited, who were the registered shareholders, in turn executed blank transfer deeds of the shares of HCL Limited and gave the blank deeds and shares to Citi Bank.

14. We note that the originally allotted 4,000 shares of Hindustan Computers Limited pursuant to the scheme of merger/amalgamation



had increased to 12,70,000 shares of Rs.10/- each in HCL Limited.

15. HEICL claim that they acted as trustees pursuant to the oral trust and have sold these 12,70,000 shares on different dates to employees of HCL and others as per details given below:

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S L. N O.	NAME	Share Acce pted	Rate Rup ees	Consider ation	Date of accept ance of offer	Mar ket Rate as on date of contr act	Value as per Market Rate	Differen ce between value as per mkt rate and actual consider ation recd. vide cheque/ draft
1	MR. S. MIRTUNJA YAN	6000	12.0 0	72000.0 0	Sep-88	14.0 0	84000.0 0	12000.0 0
2	MR. A.K. DEY	2500	12.0 0	30000.0 0	1.11.8 8	24.0 0	60000.0 0	30000.0 0
3	MR. M.K. DEB	2500	12.0 0	30000.0 0	Sep-88	14.0 0	35000.0 0	5000.00
4	MR. J. VAIDYAN ATHAN	2500	12.0 0	30000.0 0	Sep-88	14.0 0	35000.0 0	5000.00
5	MR. P.K. BHALLA	2500	12.0 0	30000.0 0	Sep-88	14.0 0	35000.0 0	5000.00
6	MR. T.V. HOLEY	2000 0	12.0 0	240000. 00	Sep-88	14.0 0	280000. 00	40000.0 0
7	PROF. M.D.G. KORETH	1000 0	12.0 0	120000. 00	Sep-88	14.0 0	140000. 00	20000.0 0



8	MR. RAJ SIROHI	2500	12.0 0	30000.0 0	19.9.8 8	15.0 0	37500.0 0	7500.0 0
9	MR. YUVRAJ BAHADUR	5000	12.0 0	60000.0 0	Sep-88	14.0 0	70000.0 0	10000.0 0
10	MR. A. MOHAN RAO	5000	12.0 0	60000.0 0	29.8.8 6	14.0 0	70000.0 0	10000.0 0
11	MR. S.V. SRIRAM	2500	12.0 0	30000.0 0	Aug- 88	14.0 0	35000.0 0	5000.00
12	MR. C.R. SITARAMA N	2500	12.0 0	30000.0 0	13.5.8 8	12.0 0	30000.0 0	0.00
13	MR. ARUN DANG	5000	12.0 0	60000.0 0	12.07. 88	14.0 0	70000.0 0	10000.0 0
14	COL. P.S. PENTAL	2500	12.0 0	30000.0 0	31.10. 88	24.0 0	60000.0 0	30000.0 0
15	MR. N. RAMDAS	2500	12.0 0	30000.0 0	Oct-88	18.5 0	46250.0 0	16250.0 0
16	MR. ASHOK SYAL	2000 0	10.0 0	200000. 00	4.5.88	12.0 0	240000. 00	40000.0 0
17	MR. P.N. JAIN	5000	12.0 0	60000.0 0	Aug- 88	14.0 0	70000.0 0	10000.0 0
18	MR. ASHOK MALHOTR A	2500	12.0 0	30000.0 0	Oct.88	18.5 0	46250.0 0	16250.0 0
19	Mr. S.K. Khanna	2500	12.0 0	30000.0 0	28.11. 88	42.0 0	105000. 00	75000.0 00
20	Mr. T.S. Purushotham an	7500	12.0 0	90000.0 0	Oct-88	18.5 0	138750. 00	48750.0 0
21	Mr. Hari Bhaskaran	1000	12.0 0	12000.0 0	7.11.8 8	31.0 0	31000.0 0	19000.0 0
22	Mr. B.S. Chandramurt hy	7500	12.0 0	90000.0 0	Sep-88	14.0 0	105000. 00	15000.0 0
23	Mr. A.K. Jain	2500	12.0 0	30000.0 0	Sep-88	14.0 0	35000.0 0	5000.00
24	WG. CDR A.K. Verma	5000	12.0 0	60000.0 0	Sep-88	14.0 0	70000.0 0	10000.0 0
25	Mr. Ravi Thambooche tty	5000	12.0 0	60000.0 0	Oct-88	18.5 0	92500.0 0	32500.0 0
26	Mr. P.K. Asija	2000 0	12.0 0	240000. 00	Sep-88	14.0 0	280000. 00	40000.0 0
27	Mr. R.P. Singh	2500	12.0 0	30000.0 0	Sept- 88	14.0 0	35000.0 0	5000.00



28	Mr. Brijesh Khanna	2500	12.0 0	30000.0 0	17.11. 88	35.0 0	87500.0 0	57500 0
29	Mr. M.N. Diwaker	5000	12.0 0	60000.0 0	Sep-88	14.0 0	70000.0 0	10000.0 0
30	Mr. Yogesh Dayal	2500	12.0 0	30000.0 0	Sep-88	14.0 0	35000.0 0	5000.00
31	Mr. N.N. Khurana	5000	12.0 0	60000.0 0	Oct-88	18.5 0	92500.0 0	32500.0 0
32	Mr. Sugata Mitra	2500	12.0 0	30000.0 0	Oct-88	18.5 0	46250.0 0	16250.0 0
33	Mr. A.R. Subramaniam	2500	12.0 0	30000.0 0	13.10. 88	18.5 0	46250.0 0	16250.0 0
34	Mr. Ashok Jain	2000 0	12.0 0	240000. 00	Sep-88	14.0 0	280000. 00	40000.0 0
35	Mr. J.K. Talajia	5000	12.0 0	60000.0 0	Sept- 88	14.0 0	70000.0 00	10000.0 0
36	Mr. C.R. Ramesh	2500	12.0 0	30000.0 00	3.11.8 8	26.5 0	66250.0 0	36250.0 0
37	Mr. N.K. Bhatia	1000 0	12.0 0	120000. 00	Oct-88	18.5 0	185000. 00	65000.0 0
38	Mr. M.N. Shah	7500	12.0 0	90000.0 0	Oct-88	18.5 0	138750. 00	48750.0 0
39	Mr. P.R. Parasher	2500	12.0 0	30000.0 0	Oct-88	18.5 0	46250.0 0	16250.0 0
40	Mr. L.N. Vishwanathan	2500	12.0 0	30000.0 0	Sep-88	14.0 0	35000.0 0	5000.00
41	Mr. Rajinder Kumar	2500	12.0 0	30000.0 0	Sep-88	14.0 0	35000.0 0	5000.00
42	Mr. M.S. Mohod	2500	12.0 0	30000.0 0	Sep-88	14.0 0	35000.0 0	5000.00
43	Mr. S. Ramaswamy	2500	12.0 0	30000.0 0	Aug- 88	14.0 0	35000.0 0	5000.00
44	Mr. H.N. Shanker	5000	12.0 0	60000.0 0	Aug- 88	14.0 0	70000.0 0	10000.0 0
45	Mr. R. Vaidyanathan	2500	12.0 0	30000.0 0	Sept- 88	14.0 0	35000.0 0	5000.00
46	Mr. J. Vijay	5000	12.0 0	60000.0 0	Sept- 88	14.0 0	70000.0 0	10000.0 0
47	Mr. N. Gunaseelan	2500	12.0 0	30000.0 0	Sept- 88	14.0 0	35000.0 0	5000.00
48	Mr. M. Raghunandan	2000 0	10.0 0	200000. 00	Aug- 88	14.0 0	280000. 00	80000.0 0
49	Mr. Prasant Chatterji	2500	12.0 0	30000.0 0	16.11. 88	40.0 0	100000. 00	70000.0 0
50	Mr. M.M.	2000	14.0	28000.0	Oct-88	18.5	37000.0	9000.00



.	Khanna		0	0		0	0	
51	Mr. V.N. Kaura	2000	14.0	28000.0	Sep-88	14.0	28000.0	0.00
.			0	0		0	0	
52	Mr. Sat Saraf	1000	14.0	14000.0	Sep-88	14.0	14000.0	0.00
.			0	0		0	0	
53	CIFCO	2000	18.9	3782500	Sep-88	14.0	280000	-
.		00	1	.00		0	0.00	982500.00
54	Mr. P.S. Vishwanathan	1000	10.0	100000.	Sep-88	14.0	140000	400000.
.		00	0	00		0	0.00	00
55	Mr. T.C. Prabhu	1000	12.0	120000.	Sep-88	14.0	140000	200000.
.		00	0	00		0	0.00	00
56	Mr. S. S. Nadar	1558	6.02	938284.	Sep-88	14.0	218199	124371
.		57		00		0	8.00	4.00
57	Mr. Arjun Malhotra	1558	6.02	938284.	Sep-88	14.0	218199	124371
.		57		00		0	8.00	4.00
58	Mr. Y.C. Vaidya	7792	6.02	469143	Sep-88	14.0	109100	621863.
.		9				0	6.00	00
59	Mr. D.S. Puri	3896	6.02	234572.	Sep-88	14.0	545496.	310924.
.		4		00		0	00	00
60	Mr. S. Bhattacharya	5000	14.0	700000.	Sep-88	14.0	700000.	0.00
.		0	0	00		0	00	
61	Mr. Subhash Arora	7792	6.02	469143.	Sep-88	14.0	109100	621863.
.		9		00		0	6.00	00
62	Mr. Ajai Choudhary	3896	6.02	234572.	Sep-88	14.0	545496.	310924.
.		4		00		0	00	00
		1270		1319049			182460	505550
		000		8			00.00	2.00

16. The aforesaid chart also mentions the market value of the share on the date, what the HEICL calls/states was the date of acceptance of offer. This date of acceptance was not the date on which payment was received from the buyer by HEICL. The Assessing Officer has taken into consideration the date on which payment was received by HEICL as the relevant date and accordingly had made addition of Rs.2,39,86,572/-.

17. Sale consideration collected/received by HEICL of



Rs.1,31,90,498/- on the sale of shares, it was stated was paid to C Bank towards payment of the loan granted by them and their dues were satisfied. HEICL claims that they only received trusteeship fee of Rs.43,600/- for entering into these transactions. HEICL was neither the shareholder nor had any other interest in the shares. Their role was to solely sell the shares as trustees to the employees of HCL Limited, in accordance with the directions of the settlers, i.e., the principal promoters of Hindustan Computers Limited.

18. The Assessing Officer in the assessment order has held as under:-

1. HEICL had purchased 12,70,000 shares for Rs.1,31,46,898/- and sold them for Rs.1,31,90,498/-.
2. HEICL had sold 77,927/- shares to ATPPL @ Rs.6.02/- per share as against the market price of Rs.41/- per share as per data of the stock exchange.
3. The so-called oral trust in favour of HEICL was an afterthought for the following reasons:-
 - (i) Promoter directors of HEICL, Y.C. Vaidya, S.S. Nadar and Arjun Malhotra had resigned as directors of HEICL and had become directors of ATPPL, to whom the shares were sold.



- (ii) Ashim Kanth, attorney of Y.C. Vaidya and direct of ATPPL on oath was unable to state why shares were sold at less than the market price.
- (iii) The shares were sold to ATPPL on the directions of promoter directors of HEICL for their personal gains at prices much below the market price.
- (iv) Dues of Citi Bank were liquidated by HEICL through payments from their bank account on different occasions. HEICL had deliberately delayed filing of return for the assessment year in question till 26th March, 1991, though their accounts were purportedly audited in May, 1989. They also delayed furnishing of information and asked for repeated adjournments. Their books were finally impounded by the Assessing Officer, Circle-1(ii).
- (v) As shares were sold at less than the market price, this constitutes breach of trusteeship and also results in violation of the provisions of the Companies Act, 1956 as the transactions could have been entered into only for the benefit of the employees and not for the benefits of the promoter directors.

4. The Assessing Officer worked out the market price of the shares in the stock exchange as on 1st August, 1988, 6th December, 1988, 8th



December, 1988 and 16th December, 1988 and accordingly held under:-

“

S.No.	No of shares sold	Date of Sale	Rate of Sale	Total Amount
01	7500	1.8.88	14.00	105000
02	254500	6.12.88	18.91	4812595
03	412500	8.12.88	18.91	7800375
04	595500	16.12.88	41.00	24415500
1270000				
37133470				

The assessee has purchased these shares for a total consideration of Rs.1,31,46,898/-. The difference of the sale price and purchase price as discussed above is treated as assessee's income”

Thus, addition of Rs.2,39,86,572/- was made.

19. Commissioner (Appeals) while affirming the said order has noted additional facts. Employees of HEICL had not purchased the shares and the promoter directors had decided and allotted the shares to persons of their choice. The shares had to be allotted to employees of HCL Ltd. by 31st March, 1987, but no attempts were made till April, 1988, when for the first time S.S. Nadar wrote letters. Letters written to purported employees by S.S. Nadar did not have dates and number of shares offered to the said persons had not been disclosed. S.S. Nadar and Arjun Malhotra were allotted 1,55,857 shares each but the other promoter director Y.C. Vaidya



was allotted 77,929 shares. Two other persons were allotted 1,00,000 shares each. 50,000 and 38,964 shares allotted to two others. There was inconsistency in the sale price. S.S. Nadar, Arjun Malhotra, Y.C. Vaidya and one D.S. Puri were allotted shares @ Rs.6.02 per share, whereas another person Vishwanath was allotted shares at Rs.10/- per share, T.C Prabhu was allotted shares at Rs.12/- per share and S. Bhattacharya was allotted shares at Rs.14/- per share. 2,00,000 shares were sold to CIFCO on the same date at Rs.18.9/- per share.

20. Commissioner (Appeals) held that the substance and not form which was relevant and applying the test of human probabilities, the tax authorities were entitled to look at the surrounding circumstances and find out the reality. Addition of Rs.2,39,86,572/- was correctly made by the Assessing Officer and the addition was upheld in entirety.

21. Tribunal in the impugned order has held that HEICL was incorporated as a 'trustee' to sell or distribute the shares of HCL Ltd. which was earlier held by the principal promoters of Microcomp Ltd., to the employees of HCL Ltd. as per directions/instructions of the principal promoters of Microcomp Ltd. HEICL never acquired title or ownership of the shares. This was accepted and admitted by the Departmental Representative, who



accepted the said legal position but had argued that HEICL was the best person in whose hands addition could be sustained. This, as per the tribunal, cannot be a ground to justify addition by treating the difference between the market price and sale price as taxable income in the hands of HEICL. The transaction was not sham and the consideration mentioned was the actual sale consideration received and to that extent there was no dispute. Revenue had not pleaded or argued that any consideration over and above the declared consideration was received by HEICL. HEICL could not have acquired ownership title as no payment was made by them from their own resources or by way of raising loan. As title of the shares never vested with HEICL, they were mere custodian of the shares, who had to distribute the shares. The shares were not registered in the name of HEICL. The principal promoters had paid fee of 3.5% to SBI Capital Markets Limited. HCL Ltd. had raised a loan from Citi Bank against pledge of shares and on the basis of the guarantee, loan was granted. Interest on loan was debited to HCL Ltd.

22. We have considered the contentions of the Revenue in this appeal. In spite of certain gaps and doubts/suspicion, we do not think that there are sustainable reasons or grounds to hold that the impugned order passed by the tribunal in the case of HEICL is perverse and contrary to evidence on record. The primary



contention of the Revenue is that the so-called oral trust, under which the shares were sold, is sham. HEICL could not have sold or transferred the shares. The fact is that the shares were sold and transferred and HEICL had acted as a 'trustee'. The said transfers/sales were made between the period 1st August, 1988 to 16th December, 1988. The sales were made as many as to 62 parties as per the details mentioned in paragraph 15 above. The sales were duly recorded and there is no allegation that money or under table consideration was paid. There is no such finding by the Assessing Officer and the tribunal has categorically stated that there is no evidence or material to the said effect.

23. In fact there is contradiction between the contention and the argument of the Revenue. If we accept the contention that HEICL did not have any right to sell the shares or deal with them, then it is obvious that no addition or income can be made in their hands. They were not the beneficiaries. Further, once consideration received is accepted as the actual amount paid, there cannot be any notional addition to the income of HEICL on the ground that they could have and should have received the market price. It is obvious that the shares were not transferred and sold for commercial considerations but at the behest and at the interest of the promoter directors of Hindustan Computers Limited as well as Microcomp



Ltd. But there is no provision or mandate in law, under which concession or difference can be taxed as deemed or notional income in the hands of HEICL.

24. HEICL, which was incorporated on 29th December, 1987 as per the memorandum, had the following main objects:-

“To subscribe to or purchase as trustee shares, debentures, stocks, bonds and other securities or to act as a trustee of or for shares, debentures, stocks, bonds and other securities to be held by or for the benefit of any person or class of persons or to be held by or for the benefit of employees of any company including any directors holding a salaried office or employment in any company.”

25. Learned counsel for the respondent-assessee has also rightly drawn our attention to the tripartite agreement dated 28th February, 1987 between SBI Capital Markets Limited and the principal promoters and Hindustan Computers Limited in which it was stipulated as under:-

“(12) One of the conditions on which SBICAP agreed to purchase the said shares from UPLC at the request of the Principal Promoters is that the Principal Promoters shall arrange that the said shares of the Company or the shares of HCLL allotted to SBICAP on amalgamation in lieu thereof would be transferred to the said employees on payment of Rs.1,27,00,000/- on or before 31st December, 1987.

XXXXX



SBICAP shall acquire the said shares of the Company for the purpose of ultimately transferring the same or the Shares of HCLL allotted in lieu thereof (as the case may be) to the employees of HCLL or the Company as hereinafter provided on receipt inter alia of the sum of Rs.1,27,00,000/- (Rupees one crore Twenty Seven Lakhs only) for such transfer.

XXXXX

(c) That on SBICAP holding HCLL shares the employees of HCLL shall purchase the shares held by SBICAP at or for the price of Rs.1,27,00,000/- plus carrying cost on or before the 31st December, 1987;

(d) That if the said Scheme (with or without modifications) is not sanctioned, then the employees of the Company shall purchase the shares held by SBICAP of the Company at or for the price of Rs.1,27,00,000/- plus carrying cost;

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In consideration of SBICAP agreeing to enter into this arrangement and acquiring the shares of the aggregate value of Rs.1,27,00,000/- the Principal Promoters jointly and severally shall immediately on the execution of these presents pay to SBICAP a fee calculated at the rate of 3.5% of the purchase price of Rs.1,27,00,000/-.

6. In addition to the fee mentioned in Clause 5 above, the Principal Promoters shall jointly and severally pay to SBICAP a gross carrying cost of 18% per annum from the date hereof upto the date of realisation by SBICAP of the sum of Rs.1,27,00,000/- (Rupees one crore and twenty seven lakhs) payable by the said employees or the proposed trust as hereinafter mentioned as the case may be. The



said amount of carrying cost shall be reduced by the gross dividend that may be declared by either the Company or HCLL and paid to SBICAP on or before 31st December, 1987. The said sum shall be paid prior to the execution by SBICAP of the relevant Transfer Forms.

7. The Principal Promoters as the Promoters and Directors of HCLL guarantee to exchange and/or issue 12,70,000 Shares equivalent to 4000 equity Shares of the Company of SBICAP immediately on the Company, HRL, HIL and ICSCCL or the Company alone shall merge with HCLL.

8. The Principal Promoters hereby guarantee that the said Shares or the Shares of HCLL (as the case may be) shall be purchased by the said employees through the Principal Promoters on or before 31st December, 1987, time being of essence. If the same are not purchased by the employees represented by the Principal Promoters, the Principal Promoters guarantee to acquire the said Shares at or for the price of Rs.1,27,00,000/- in trust for and on behalf of and for the benefit of the employees of the Company or of HCLL as the case may be. SBICAP shall execute the Transfer Forms on receipt of the said sum of –Rs.1,27,00,000/- and other amounts as mentioned herein.

9. If the principal promoters fail to arrange for purchase of the Shares as mentioned in Clause 8 hereof on or before 31st December, 1987, as provided herein, it shall be at the option of SBICAP after giving one month's grace period to the Principal Promoters to sell the Shares at such price and to such persons or body corporate and/or to deal with the Shares in such manner as SBICAP in its sole discretion shall deem fit.”



26. The agreement with Citi Bank has not been placed on record and it appears was also not filed before the tribunal. The clauses therein are not known. The Assessing Officer also did not call for the said agreement and the same is not referred to in the assessment order. The date on which payment was made to SBI Capital Markets Limited is not indicated or stated in the Tribunal's order and is not on record.

27. It is an undisputed position that the processing fee of 3.5% paid to SBI Capital Markets Limited was paid by principal promoters. The interest paid to Citi Bank was paid by HCL Limited but the quantum thereof has not been indicated or mentioned in the order of the tribunal.

28. It was stated before us that shares of HCL Ltd. were listed in the stock exchange on 18th July, 1987 and it is apparent that share prices of HCL Ltd. had jumped or escalated between September and December, 1988. HCL Ltd. had declared dividend, it appears, in the Annual General Meeting held in November/December, 1988, but the details are not available and have not been ascertained by the Assessing Officer, Commissioner (Appeals) or were put to and agitated before the tribunal by the departmental representative. Relevance of these details was not argued even before us. Similarly, Y.C. Vaidya it has come on record was a non-resident living in the



United States. However, relevancy of these facts is not highlighted or stated. If there was something more than what was stated or was appearing on record, further investigation and inquiries were required on the said aspect, but these have not been undertaken and brought on record. On the aspect of transfer of 77929 shares to Y.C Vaidya or ATPPL however, there are enquiries and this aspect is being examined separately below while dealing with the case of ATPPL.

29. What is clearly discernible from the facts stated above is that the Revenue started inquiries but were not able to cut through and ascertain affirmatively and conclusively whether there was any clandestine objective and purpose in the entire transaction, whether there was any motive or intention to evade or even avoid payment of taxes, who was the actual beneficiary; the acquirers to whom the shares were sold, Microcomp Ltd. or the promoter company of Hindustan Computers Ltd. who had entered into an agreement with U.P. Electronics Cooperation Ltd. etc. In fact, there are several questions which remain unanswered and do raise needle of suspicion; that there could be possibly an element to avoid or even evade payment of tax or to lower the quantum of taxation etc. Possibly the scheme or the plan could be to avoid legal and technical problems as HCL Ltd. could not have acquired and dealt with the its



own shares or could not have ensured purchase of shares at a cheaper price by their promoter directors or the directors/officer in-charge of the said company. Possibly, a case of deemed dividend in the hands of the acquirers, who had procured shares at Rs.6.02/- per share instead of market value of Rs.41 per share. From the documents placed on record, it is evident that query with regard to gift was raised by the Assessing Officer but he did not dwell and go into the said aspect. (See reply dated 16th March, 1995 from R. Kumar Jain and Associates Chartered Accountants to the Assessing Officer). Yet there is another possibility that the HCL Ltd. had decided to declare dividend and the same had to be paid to the registered shareholders on the date of the closure of accounts and SBI Capital Markets Limited was the registered owner. The book transaction with regard to sale of shares in favour of ATPPL may have been backdated to avoid legal complications and to ensure that the dividend is paid and received by the said company. As Y.C. Vaidya was a non-resident Indian there may have been prohibition or requirement to obtain permissions etc. under the exchange regulations or the requirement that the payment should be made in convertible foreign currency. These aspects have remained unenquired for reasons best know to the Revenue but it would not be correct and proper to remand the case to the Assessing Officer stage.



The matters pertains to the assessment year 1989-90 and it was an obligation and duty of the Assessing Officer as an investigator to go deep and thoroughly.

30. At this stage on mere suspicion, the matter cannot be remitted to the Assessing Officer to conduct fresh inquiry without there being any concrete foundation justifying and asserting a firm apprehension. Even before us during the course of hearing, the standing counsel for the Revenue did not press or make any headway. The suspicions raised remained in the realm of conjectures and surmises and do not have a firm basis. Revenue should have ensured that investigations were conducted and undertaken at the initial stage in detailed and proper manner. They should not expect order of remand on mere suspicion without any foundation or basis for the lapses on the part of the Assessing officer, unless there is fraud, collusion or relevant facts have come to the knowledge of the Revenue subsequently.

31. We would also like to refer to statement of S. Shankar. He had stated that HEICL had purchased 12,70,000 shares of HCL Ltd. in January, 1988 from SBI Capital Markets Ltd., but he could not remember the exact date. He had stated that mode of payment was cheque and funds were arranged by way of pledge loan from Citi Bank. The said statement is factually incorrect and this is not the



stand of the Revenue before us or in the assessment order. This contention and our attention was not drawn to the said assertion during arguments. This portion of the statement was not highlighted and relied upon by the Revenue before the tribunal. Certainly Citi Bank had granted loan to pay dues of SBI Capital Markets Ltd. S. Shankar perhaps was not fully aware of the facts as he did not know how the loan was repaid to Citi Bank and could not also tell why the transfer of shares was not registered in the name of HEICL and the shares had continued to be in the name of SBI Capital Markets Ltd.

32. This brings us to the appeal in the case of ATPPL. The entire reasoning given by the tribunal to dismiss the appeal of the Revenue is as under:-

“11. We have heard rival submissions, perused the record, gone through the orders of authorities below. We have gone through the documentary evidence to which our attention was drawn. We have also looked into the case law as cited by the rival parties. The admitted position of fact that 77,929 shares of HCL Ltd. were purchased by the assessee company @ Rs.6.02 per share and seller company M/s. HCL Employees Investment Co. Ltd. has admitted to have sold these shares at the said price to the assessee company and the AO has not been able to establish that anything more than what has been admitted to have been paid and received has passed hands in order to invoke provisions of section 69-B. As nothing has been proved to show that any



other amount than admitted has been paid by the assessee in order to buy 77929 shares of HCL Ltd. therefore, in view of facts and circumstances, we are of the view that CIT(A) was justified in deleting the addition while applying the ratio of judgment in the case of K.P. Varghese as referred to supra. While confirming the order of CIT (A) we dismiss the appeal of the revenue. As a result, appeal of the revenue gets dismissed.”

33. We have noted above that 77,929 shares were allotted to Y.C. Vaidya. These shares have been registered in the name of ATPPL but without giving full details and particulars on how, the shares were transferred by Y.C. Vaidya to the said company ATPPL. The respondent-assessee in their letter dated 25th March, 1992 had stated that these shares were transferred in the records of HCL Ltd. in the name of ATPPL on 16th November, 1988 and they had also received dividend declared in the Annual General Meeting of HCL held in December, 1988, but they had recorded purchase of these shares in their books on 28th February, 1989 but had received telephonic information about registration of shares from HCL Ltd. on 24th March, 1992. Sale consideration of these shares was paid on 9th March, 1989 by way of cheque of Rs.4,69,143/- by ATPPL.

34. Ashim Kanth, attorney of Y.C. Vaidya could not answer several questions put to him in his statement recorded under Section 131 of the Act on the ground that only directors were aware about the



relevant information/facts and could answer. S.Shankar, principal officer and director of HEICL in his statement recorded on 24th March, 1992 had stated that 77,929 shares were transferred to ATPPL on 16th December, 1988 and they had received the consideration of Rs.4,67,574/- by way of cheque but he was not sure as to the date on which the payment was received.

35. To this limited extent, we remit the matter to the tribunal for fresh adjudication in the two appeals as facts in this regard are not clear and certainly have not been examined and gone into by the tribunal.

36. In view of what is being noted above, we have remanded the transaction relating to Associated Techno Plastics (P) Ltd. to the tribunal. To the extent permissible and proper, the tribunal can examine the said question provided that the facts and materials are on record.

37. In view of the aforesaid findings, the substantial question of law mentioned above in ITA No. 95/2002 has to be treated as partly answered in favour of the Revenue and against the respondent insofar as transfer of 77929 shares by HEICL to V.C. Vaidya or ATPPL is concerned, on which we have passed an order of remit to the tribunal. However, on other aspects/transactions of HEICL, the appeal is dismissed and the question of law is answered in favour of the respondent-assessee and against the appellant-Revenue.



38. In view of the aforesaid findings in ITA No. 95/2002, the question of law mentioned in ITA No. 20/2000 has to be treated as answered in favour of the appellant-Revenue and against the respondent-assessee, but with an order of remit to the tribunal for fresh decision. The tribunal will examine the issues/facts afresh without being influenced by the earlier order but while keeping in mind the observations made above. In the facts of the present case, there will be no order as to costs.

(SANJIV KHANNA)
JUDGE

(SANJEEV SACHDEVA)
JUDGE

November 21st, 2013
VKR/NA