* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
\+ **ITA No. 41/2002**

**Reserved on: 21st August, 2014**
**% Date of Decision: 22nd December, 2014**

**The Commissioner of Income Tax, Delhi –IV** ... Appellant
Through Mr. Rohit Madan, Advocate with
Mr. Akash Vajpai and
Mr. P. Roychaudhury, Advocates.

Versus

**Shiv Raj Gupta** ... Respondent
Through Mr. Anoop Sharma, Advocate

**CORAM:**
**HON'BLE MR. JUSTICE SANJIV KHANNA**
**HON'BLE MR. JUSTICE V. KAMESWAR RAO**

**SANJIV KHANNA, J.**

The Revenue in this appeal under Section 260A of the Income Tax Act, 1961 (Act, for short), pertaining to assessment year 1995-96, impugns the majority decision of the Income Tax Appellate Tribunal (Tribunal, for short) in ITA No.4898/Del/98. The present appeal was admitted for hearing on 25th April, 2005, on the following substantial question of law:-

> "Whether, on the facts and in the circumstances of the case, the amount of Rs. 6.6 crores received by the assessee from SWC is on account of handing over management and control of CDBI* (which were earlier under the management and control of the assessee) to SWC as terminal benefit and is taxable u/s 28(ii) of the Income-tax Act or same is exempt as

> capital receipt being non competition fee by executing deed of covenant."

(*correcting the typographical error, may be read as "CDBL")

2. The respondent-assessee, an individual, was the Chairman-cum-Managing Director of M/s Central Distillery and Breweries Ltd. (CDBL, for short), a public company listed on the Delhi Stock Exchange and the Bombay Stock Exchange. During the period relevant to the assessment year and earlier, CDBL was engaged in the business of manufacturing and sale of Indian Made Foreign Liquor (IMFL, for short) and beer. The respondent-assessee along with his family members, i.e. wife, son, daughter in law and two daughters held 1,86,019 shares, constituting 57.29% of the paid-up equity share capital of CDBL.

3. M/s Shaw Wallace Company Group (SWC Group, for short), a giant in liquor business in comparison to CDBL, offered and purchased through their subsidiaries, shares held by the respondent assessee and his family members in CDBL at the rate of Rs.30/- per share for Rs.55,83,270/-. The deal for the sale of 1,86,019 shares was formalized by a Memorandum of Understanding (MOU, for short) dated 13th April, 1994. The respondent assessee who individually held

12% of the paid-up equity share capital of CDBL also entered into deed of covenant in his individual capacity with the SWC Group. On the same date, another MOU was executed between the SWC Group and the respondent-assessee as an individual with the restrictive covenant to the effect that he shall not either directly or indirectly carry on any manufacturing or marketing activities relating to IMFL for a period of 10 years. The respondent-assessee as per the MOU received a non-compete fee of Rs.6.60 crores out of which Rs.6 crores were paid upfront and balance was to be paid on 30th October, 1994.

4. In the return filed by the respondent assessee for the assessment year 1995-96, the entire non-compete fee of Rs.6.60 crores was treated as a capital receipt and hence, not exigible to tax. The Assessing Officer recorded statement of respondent assessee on oath under Section 131 of the Act. The Assessing Officer invoked Section 28(ii) of the Act and held that Rs.6.60 crores ostensibly paid as non-compete fee was nothing but a colourable device and the tax treatment should not be accepted. He referred to several other facets which we shall delve into later and to avoid prolixity are not being reproduced at this stage. Rs.6.60 crores were brought to tax.

5. In the first appeal, the Commissioner of Income Tax (Appeal ,, (CIT(A), for short) upheld the said addition, but he relied upon sub-section (iv) to Section 28 of the Act.

6. In the second appeal, the Accountant Member and the Judicial Member of the Tribunal differed on the taxability of Rs.6.60 crores. In view of the divergence, the matter was referred to a third member of the Tribunal who by his order dated 30th May, 2001, decided the issue in favour of the respondent-assessee.

7. At the outset, we note on record that Section 28(iv) of the Act would not be applicable and has not been pressed by the appellant-Revenue as the said Section applies when an assessee receives any benefit or perquisite arising from a business or in exercise of a profession. In such cases, value of the benefit or perquisite, whether convertible into money or not, is chargeable to tax as income under the head of 'Profits and gains of business or profession'. The present event would not be a case covered by clause (iv) to Section 28 of the Act as the provision does not apply when the payment is monetary. What is taxable under Section 28(iv) of the Act is the value of benefit or perquisite, whether convertible in money or not, and not the

monetary amount itself, which has been received. It is highly debateable whether the assessed was carrying on a profession.

8. Section 28(ii) of the Act, however, requires interpretation and examination, and the same is accordingly reproduced below:-

> **"28.** The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession",—
>
> xxx
>
> (*ii*) any compensation or other payment due to or received by
>
> (*a*) any person, by whatever name called, managing the whole or substantially the whole of the affairs of an Indian company, at or in connection with the termination of his management or the modification of the terms and conditions relating thereto;
>
> (*b*) any person, by whatever name called, managing the whole or substantially the whole of the affairs in India of any other company, at or in connection with the termination of his office or the modification of the terms and conditions relating thereto;
>
> (*c*) any person, by whatever name called, holding an agency in India for any part of the activities relating to the business of any other person, at or in connection with the termination of the agency or the modification of the terms and conditions relating thereto;
>
> *(d)* any person, for or in connection with the vesting in the Government, or in any corporation owned or controlled by the Government, under any law for the time being in force, of the management of any property or business;"

9. Before we interpret the Section, we would also like to quc Section 28(i), and note that Section 28 presently has as many as 13 clauses. Clause (i) of Section 28 of the Act reads as under:-

> **"28.** The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession",—
>
> (*i*) the profits and gains of any business or profession which was carried on by the assessee at any time during the previous year ;"

10. A reading of clause (i) of Section 28 of the Act would elucidate that profits and gains of business or profession, are to be taxed under the similarly worded "head" of income. Clause (i) states what is obvious and amply lucid. It does not explain the scope of income chargeable under the head 'Profit and gains of business and profession'. However, clauses (ii) to (vii) have a different effect and expand the scope of income chargeable under the head 'Profits and gains of business or profession'. In a way, they create a deeming fiction and when income falls under any of the specified clauses, it would be treated as income chargeable under the head 'Profits and gains of business or profession'. The sequitur and effect thereof would be that by the expressed mandate if an income falls within the category specified under clauses (ii) to (vii) of Section 28 of the Act, it would be necessarily treated as income falling under the head

'Profits and gains of business or profession'. To this extent the sa clauses will override and negate the contention that said income is capital or otherwise exempt. Of course, doubt whether clauses (ii) to (vii) or conflicting and contrary provision under any other head would apply, would require adjudication. In the absence of any conflicting or contradictory provision, clauses (ii) to (vii) of Section 28 of the Act, shall be given full effect, regardless of the common or general perception that the said income falls under another head. This reasoning however, presupposes that the conditions and stipulations mentioned in clauses (ii) to (vii) are applicable and the income can be categorized and taxed under these clauses. We need not dilate on the said aspect in view of the authoritative pronouncement of the Supreme Court in ***Guffic Chem P. Ltd. versus Commissioner of Income Tax, Belgaum and Anr.***, [2011] 332 ITR 602. In the said case, the assessee had received consideration of Rs.50 lacs as non-compete fee, under an agreement dated 31st March, 1997, i.e. assessment year 1997-98, consequent to transfer of a trademark. The seminal factual assertion that Rs.50 lacs were received by the assessee towards non-compete fee was not disputed by the Assessing Officer. There was no *lis* on the nature and character of the consideration paid.

The Supreme Court observed that there was a dichotomy betwe receipt of compensation by the assessee for loss of agency and receipt of compensation attributable to the negative/restrictive covenant. The former was treated as a revenue receipt, whereas the latter was a capital receipt. This dichotomy flowed from the earlier decision of the Supreme Court in ***Gillanders Arbuthnot and Co. Ltd. versus The Commissioner of Income Tax, Calcutta*** [1964] 53 ITR 283. Reversing the judgment of the Calcutta High Court in the aforesaid factual matrix, it was held that non-compete fee was a capital receipt, hence, not taxable. However, the Supreme Court highlighted another aspect. It was recorded that the non-compete fee under a negative covenant was always treated as a capital receipt till assessment year 2003-04. By Finance Act, 2002, with effect from 1st April, 2003, the said capital receipt is now taxable under Section 28(va) of the Act. The effect thereof, was that non-compete fee which was earlier treated as a capital receipt would now be taxable with effect from 1st April, 2003, under the head 'Profit and gains of business or profession'. Hence, with effect from 1st April, 2003, enactment of clause (va) to Section 28 of the Act, the payment made as non-

compete fee, would be taxable under the head 'Profit and gains business or profession'.

11. However, the aforesaid decision would not settle the matter in favour of the respondent assessee in the present case. The Supreme Court's decision in ***Guffic Chem P. Ltd.*** (supra) is premised on the fundamental and undisputed core fact that Rs.50 lacs were received towards non-compete fee. In other words, both the Revenue and the assessee were *ad idem* on the nature of the payment and the question was, whether unpretentious non-compete fee was a capital or a revenue receipt. ***Guffic Chem P. Ltd.*** (supra) closed the issue holding that non- compete fee would be a capital receipt as the assessment year in question was 1997-98.

12. As noted above, the issue of taxability remains unresolved as in the present case the appellant-Revenue has submitted and claimed that the nomenclature 'non-compete fee' was a smokescreen and a façade, for Rs.6.60 crores represent a part consideration for transfer of shares to the SWC Group and/or termination of management or modification of the terms and conditions relating thereto. On the alternative submissions made by the Revenue we would reproduce the

following paragraphs from the decision of the third member, whi read:-

> "15. ... The other plea of the learned D.R. was that amount in question was not for restrictive covenant as is alleged because business of CDBL was that of a company and it was not the business of the assessee. *The execution of restrictive covenant was nothing but a colourable device adopted by the assessee in collusion with SWC group to avoid payment of due tax.* The assessee executed two deeds on 13-4-1994 – one for transfer of shares of assessee and his family members and other in respect of restrictive covenant. *These two deeds, if read together, will go to show that amount in question was nothing but price paid by SWC group to assessee for handing over the management and control over CDBL that is why different clauses in the transfer deed of shares were mentioned by which the assessee and his family members agreed to hand over the management smoothly and to help in such smooth handing over.*
>
> xxx
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> 25. The assessee and his family members have shown in their returns of income for the year under consideration the amount of capital gain so earned on transfer of shares and AO has accepted the capital gain so shown by the assessee. It is not the case of the AO or the CIT(A) that there had been undervaluation of cost of shares. *Had it been the case as argued by the learned D.R. for the first time before the Bench the AO would have been justified to bring material on record to show that actual price of the shares was more than Rs. 30/- per share and assesssee in collusion with SWC group had under valued the price of shares and payment of actual price of the shares routed through this restrictive covenant. ...*"
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> (emphasis supplied)

As against this, the case of the respondent assessee was that th payment had nothing to do with handing over of management or transfer of shares, and the amount paid was on account of non-compete fee.

13. Thus the core issue is; whether the payment of Rs.6.60 crores, ostensibly stated to be non-compete fee under the MOU dated 13th April, 1994, can be treated and regarded as payment covered under sub-clause (a) to clause (ii) of Section 28 of the Act, or consideration paid for transfer of shares. The question raised to be answered is, whether the description of the payment as non-compete fee in the MOU dated 13th April, 1994 is unquestionable or can be challenged by the Revenue? In other words, whether, and when and in which cases, the Revenue can contest and dispute the character or nature of the purported transaction or event and the resultant tax consequence?

14. Before, we go into the aforesaid questions in detail, we would first like to interpret sub-clause (a) of Section 28(ii) of the Act. The words used in the sub-clause relate to "compensation", "other payment due" or "received". The phrase 'in connection with' gives the said sub-clause a wide and broad meaning. However, the payment must be for termination of management or modification of terms and

conditions of management to a person who is managing whole substantially the whole of the affairs of the Indian company. If the payment is on account of non-compete fee, it would not be covered under sub-clause (a) to clause (ii) to Section 28 of the Act. This is the binding ratio of ***Guffic Chem. P. Ltd*** (supra). Learned counsel for the respondent-assessee submits that the clause in question was originally enacted to deal with termination of agencies and to make payments received for termination taxable, but we do not agree that the sub-clause should be restricted and confined to such cases alone. Sub-clause (a) to clause (ii) of the said Section is clear, plain and unambiguous. It will have to be given full effect to, and it would be incorrect to restrict the said clause only to termination of agency or modification of terms and conditions of agency which was being undertaken by the earlier. The word 'agency' does not find mention in sub-clause (a) of clause (ii) to Section 28 of the Act. Sub-clause (c) of Clause (ii) to Section 28 of the Act relates to compensation or other payment received in connection with termination of agency or modification of the terms and conditions. Thus, sub-clause (a) of clause (ii) to Section 28 of the Act would be applicable if we hold that

the payment of Rs.6.60 crores was towards the termination management or modification of terms and conditions relating thereto.

15. The reasoning given by the third member of the Tribunal records that it was an undisputed position that respondent assessee was the Chairman cum Managing Director of CDBL since 1960 and had 35 years of experience. In paragraph 23, the third member has recorded that the first MOU dated 13th April, 1994 states that the respondent assessee and his family members had sold 1,66,102 (*sic*, 1,86,019) equity shares of Rs.10/- each, @ 30/- per share, and in this manner Rs.50 lacs was paid by the SWC group on 12th February, 1994 and the remainder Rs.5,83,270/- was paid subsequently, but before execution of the MOU. Thereafter, clause 4 of the said MOU recorded as under:-

> "4. *In consideration of the above payments made by SWC as enumerated in Clause 3 of this MOU, Mr. Gupta have irrevocably handed over the physical possession, management and control of the Brewery and Distillery of the Company referred to above, to the representatives of SWC on the 10th February, 1994* ( the receipt of the said possession and management control of the Brewery and Distillery of the Company at Meerut Cantt is also hereby confirmed, admitted and acknowledged by the SWC group."
>
> (emphasis supplied)

In terms of the aforesaid clause, the respondent assessee "handed over" management and control of the CDBL to the SWC Group. The same MOU records that the respondent-assessee and his family members would co-operate with the SWC Group in arranging for effective registration of transfer of shares etc. and the respondent-assessee had further agreed to resign as the Chairman cum Managing Director, and his son had agreed to resign as Joint Managing Director. Thus, the respondent assessee forfeited and gave up the control, charge and management to the SWC Group. There was complete change of management.

16. Thereafter, the third member of the Tribunal has made reference to the second MOU, also dated 13th April, 1994, in respect of payment of Rs.6.60 crores. Reference was made to the following clause:-

> "1. In consideration of the sum of Rs. 6,00,00,000 (Rupees six crores only) paid by SWC to Mr. Gupta as an advance against the aforesaid non-competition fee of Rs. 6,60,00,000 (the receipt whereof, Mr. Gupta hereby admits and acknowledges) Mr. Gupta hereby irrevocably agree, convenants and undertakes that with effect from the date of these presents, Mr. Gupta wi11 not start or engage himself directly or indirectly or provide any service, assistance or support of any nature, whatsoever, to or in relation to the manufacturing, dealing and supplying or marketing of

> Indian made foreign Liquor ( IMFL) and/or Beer. The balance amount of Rs.60,00,000/- (Rupees sixty lacs only) will be paid by SWC to Mr. Gupta on 31st of October, 1994."

The third member of the Tribunal opined:-

> "27. The perusal of the above clause shall show that it is self imposed restriction on assessee and such deed in legal parlance is treated as restrictive covenant. There had been plethora of law on the point as to what will be the nature of such amount as to whether it will be capital receipt or will be revenue receipt. Ordinarily as laid down by Their Lordships of Privy Council in the case of Shah Wallace & Co. (AIR 1932 P.C. 138) compensation for loss of office is to be recorded as a capital receipt. The legislation in its wisdom brought section 10(5A) w.e.f. 1-4-1955 wherein it was provided that payment received for termination of office would be the income from business and profession. It is undisputed fact that provision of Section 28(ii)(a) of the present Act are the same which were U/s 10(5A) of the Income-tax Act, 1922."

17. The aforesaid paragraph would indicate that this was not the real and quintessential controversy. Statements and wordings of the two MOUs were known but the central issue in controversy was whether description of Rs.6.60 crores as non compete fee was binding and unalterable, even if the description was in fact an adroit attempt at artificiality or to transmogrify a taxable event. Thereafter, the third member has referred to the case law on the subject i.e. non-compete

fee was not taxable which, as already been held above, is the corre position of law before 1st April, 2003. To elucidate and opine in favour of the respondent assessee on the nature and character payment of Rs.6.60 crores, the third member of the Tribunal in paragraph 33 onwards has observed:-

> "33. … Here we are having two separate deeds and language of both the deeds is free from any ambiguity. The first goes to reveal smooth transfer of control and management of CDBL from assessee and his family members to SWC group and that too is based on due considerations and deliberations. Admittedly the quoted price of share of CDBL was Rs. 3/- and SWC group came forward to offer it at Rs. 30/- per share and that too after open offer to member of the public to come forward and to pay more amount and when none responded, deal was struck and assessee paid the requisite amount to assessee and his family members:, and got physical possession and management of CDBL. This deed is complete.
>
> 34. Now comes the second deed. SWC group realised the importance of assessee who had been in the same business of liquor and beer for more than 35 years and acquired expertise, knowledge and specialization in the same. They evaluated the worth of assessee and agreed to pay Rs. 6.6 crores if assessee undertakes not to come in the business in any manner for a period of ten years. Learned A.M. rightly observed that it was the perception of a businessman and none else but concerned businessman can be the best judge. Business expediency some times requires harsh decisions to be taken and this was one of such decision that SWC group realised that in case assessee is allowed to remain free to carry on the business in

manufacturing and trading of IMFL and beer/ he may cause threat to their company particularly CDBL and that too when assessee was having another concern M/s Maltings Ltd. which was running in the same field. Assessee was at liberty to obtain licence in the same line. Keeping all these facts SWC group rightly took a decision to restrain the assessee from coming in their way in that, line of business for a period of ten years and agreed to part with that amount of Rs. 6.6 crores. To argue that this amount was quite big and not in consonance with the amount of salary and other remuneration being received by the assessee from CDBL and other concerns is no criteria to take it as exorbitant amount being paid as it is perception of SWC group. What-ever they thought fit they did and income-tax authorities have no business to challenge their perception unless they bring on record anything to show that SWC group and assessee were in collusion to defraud them. No such evidence or material came on record to show that there had been any collusion in between assessee and SWC group. All these facts completely go in favour of assessee and law also is towards the side of assessee. The above deal was completely a restrictive covenant executed by assessee for a consideration and that consideration is to be treated as capital receipt as laid down by Apex Court and other High Courts as well as by different benches of the tribunal.

35. It was also argued by the learned D.R. that there is no penalty clause in the alleged restrictive covenant as in case assessee indulges in the said business, .what was the remedy available to SWC, group and learned J.M. has also dealt this point in detail. In this connection, the learned counsel for the assessee has already pointed out that out of the amount received by assessee, Rs. 2 crores were to be deposited and in case there was any loss to SWC group, the loss so suffered shall stand adjusted and this was sufficient to be treated as penalty clause. Further, there is no

> substance in the argument of the learned D.R. that the alleged restrictive covenant is in violation of Article 16(g) [*sic*, Article 19(1)(g)] of the Constitution of India or the said agreement was against public policy because assessee himself had agreed to impose restrictions for not carrying on such trade and business and such restrictive covenant will not be in violation of the above nor opposed to the public policy."

18. The thrust and impose of the majority decision of the Tribunal on why Rs.6.60 crores was payment towards non-compete fee is for the following reasons:-

(1) The first MOU, relating to transfer of management and shares was a complete document or deed. The second MOU was a separate document with independent and distinct contractual obligation and consideration stipulated;

(2) Market or quoted price of a share of CDBL, was Rs.3/- whereas the payment received by respondent assessee was Rs.30/- per share;

(3) The respondent assessee was engaged in business of IMFL and beer for more than 35 years and had necessary proficiency and expertise;

(4) Inspite of transfer of shares, the respondent assessee was also in control and management of M/s. Malting Ltd., which was engaged in similar business;

(5) Quantum or reasonableness of non-compete fee should be b left to the perception of the two competing businessmen as they were the best judges on the question of business expediency;

(6) The contention that Rs.6.60 crores was substantial and huge and could not be correlated to the salary or other remuneration which the respondent assessee was receiving from CDBL should be rejected as the income tax authorities had no business to challenge the perception of the parties, unless it could be shown that the respondent assessee and the SWC group were in collusion and wanted to defraud the Revenue, but there was no such finding on record.

19. The last reason, is inaccurate and fallacious for the reason that the Assessing Officer and the CIT(A) had clearly recorded that "non-compete fee" payment was a sham and a façade to avoid payment of legitimate taxes. Thus, the Revenue had questioned and challenged reality of the taxable event as declared. Price per share quoted in the exchanges would not necessarily be the true price of a transaction for purchase of majority shares to acquire controlling interest in a company, which is your competitor. We have elaborated and tortuously commented on the said controversy later, but our comments at this place are necessary as question of deceit and

subterfuge when answered with reference to the wordings of t documents would in many a case be a decrepit and tutored finding. It would be a credulous and simplistic determination. This question has been again dealt with and examined below, but first we deem it appropriate to notice and record the findings of the assessing officer who disbelieved the taxable event as declared, i.e. non compete fee, recording the following reasons:-

(1) The respondent assessee in his letter dated 26th March, 1998, had stated that the SWC Group had gained substantial commercial advantage by sale of CDBL as their turnover increased from Rs.9.7 crores in accounting period ending 30th September, 1995 to Rs.45.17 crores for the accounting period ending 31st March, 1997.

(2) The first MOU mentions that CDBL had a factory with about 350 employees including 339 permanent workers, staff and officers.

(3) There was no rationale behind payment of Rs.6.60 crores, as it was neither linked with the earlier remuneration received by the respondent assessee from CDBL which was merely Rs.1,45,200/- and Rs.1,33,100/- annually for the financial years 1994 and 1993 respectively.

(4) The respondent assessee, an individual, consequent to t transfer of shares and management of CDBL, was not a probable or perceptible threat or competitor to the SWC Group.

(5) As per the balance sheet of M/s. Malting Ltd. for the year ending 31st March, 1993, the company had incurred a loss of Rs.73 lakhs and had a bottling unit in Jaipur and in no way was a threat or a competitor to the SWC group.

(6) There was no penalty clause for violation of the non-compete MOU. Rs.3 crores were to be deposited by the respondent assessee by inter corporate deposit with the SWC Group for two years but no evidence was filed regarding the said deposit though the respondent assessee was asked to produce material/evidence.(This last reason at first glance does not appear to be weighty, but deserves acknowledgement in view of the quantum difference between the consideration mentioned for sale of shares and purported non – compete fee).

20. The member of the Tribunal who agreed with the stand of the appellant-Revenue had held as under:-

(1) The respondent-assessee did not have any enterprise of his ov and did not possess licence to manufacture or for sale and purchase of IMFL or beer.

(2) As per the net worth declared by the respondent-assessee, he could not have set up a new venture to pose a threat to the SWC group.

(3) Two MOUs were executed simultaneously and this was indicative that non-compete fee was a colourable device used to maliciously avoid the incidence of tax.

(4) The SWC Group was a much larger and bigger group and it was inconceivable that the respondent assessee would be a threat to the SWC Group and, therefore, had received payment to ward off competition for a period of 10 years.

21. The learned counsel for the respondent assessee during the course of the arguments had relied upon the following decisions:-

a) ***Commissioner of Wealth Tax, Gujarat-II, Ahmedabad versus Arvind Narottam***, [1988] 173 ITR 479 (SC),

b) ***T.V. Sundaram Iyengar & Sons (P.) Ltd. versus Commissioner of Wealth Tax***, [1969] 72 ITR 607 (Mad.),

c) ***Union of India & Anr. versus Azadi Bachao Andolan & An***, [2003] 263 ITR 706 (SC),

d) ***Banyan and Berry versus Commissioner of Income Tax***, [1996] 222 ITR 831 (Guj.),

e) ***Vodafone International Holdings B.V. versus Union of India***, [2012] 341 ITR 1 (SC).

22. There is case law which holds that when the document is plain and clear, and when the legitimacy and genuineness of the document is not in question there is no scope to ignore the legal character of the transaction. The right of the assessed to choose a legitimate taxable event must be respected. However, in the present case, there are two MOUs which were executed on the same day and deception and maladroit trickery is alleged. The facts mandated a more comprehensive and thorough examination. The first MOU was for transfer of 57.29% of paid-up equity share capital in CDBL which was considerably large company having about 350 employees and manufacturing IMFL and beer. No doubt, market price of each share was only Rs.3/- per share and the purchase price under the MOU was Rs.30/-, but the total consideration received was merely about Rs.56 lacs. What was allegedly paid as non-compete fee was ten times

more, i.e. Rs.6.60 crores. The figure *per se* does not appear to be realistic payment made on account of non-compete fee, *dehors* and without reference to sale of shares, loss of management and control of CDBL. The assessee had attributed an astronomical sum as payment toward non-compete fee, unconnected with the sale of shares and hence not taxable. Noticeably, the price received for sale of shares, it is accepted was taxable as capital gain. The contention that quoted price of each share was mere Rs. 3 only, *viz*. price as declared of Rs. 30/- is fallacious and off beam. The argument of the assessee suffers from a basic and fundamental flaw which is conspicuous and evident. The primary emphasis in the assessee's contention as to character of payment of Rs.6.60 crores based upon euphonious documentation, ignores that the same logic and reasoning could ricochet and negate the justification to transfer controlling shares in CBDL for detritus amount of Rs.56 lacs. CBDL was a running public limited company manufacturing and selling beer and IMFL with 350 employees and with necessary infrastructure to market their production. It had requisite licenses, permissions and marketing network in place. By purchasing majority shares with controlling interests in CBDL, SWC Group was acquiring a company which was directly competing with

them. The price paid for acquiring the majority shareholding, wou include consideration paid to procure management rights as well as price paid for acquiring an effective competitor. The rights/ assets purchased by purchasing shares of CBDL were significantly more valuable, than securing "non compete" obligation from the assessed, an individual. Competition to the SWC Group from CBDL was actual, obvious and equivocal and, therefore, warding off and acquiring CBDL was a worthy and prized picking. Hence, expensive.

23. In cases of such nature, documentation is one aspect, but equally important are the surrounding and corroborating circumstances which must not be ignored. The Supreme Court in this context in ***Commissioner of Income Tax, West Bengal-II versus Durga Prasad More,*** [1971] 82 ITR 540 had observed:-

> "Now, we shall proceed to examine the validity of those grounds that appealed to the learned judges. It is true that the apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. In a case of the present kind a party who relies on a recital in a deed has to establish the truth of those recitals, otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his

> favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents."

24. The reasoning given by the Tribunal lays emphasis that there were two separate MOUs and the respondents being two competing businessmen were entitled to value the transactions on the principle of commercial expediency. However, reasoning or ratio overlooks the legal position that when there are several documents which form a part of one transaction and are contemporaneously executed, they have similar effect for similar purposes and as such are relevant to the case as if they are a one deed (See *Chitty on Contract*, 27th Edition at page 588). Similarly Kim Lewison Q.C., in *Interpretation of Contracts*, 2nd Edition at pages 25-29, has observed that a document executed contemporaneously or shortly after the primary document, has to be construed and may be relied upon as aid of construction as if the same forms part of the same transaction as the primary document. Treitel in *Law of Contracts*, 9th Edition, 1995, pages 175-176, has observed that a transaction such as a lease of immovable property can be made by more than one instrument and one single contract may be

incorporated in more than one contract. After referring to t aforesaid text, a Division Bench of the Delhi High Court in ***Mercury Travels (India) Ltd & Others versus Shri Mahabir Prasad and Anr.***, (2001) 89 DLT 440, had observed:-

> "27. Many transactions take place by the entry into a series of contracts, for example a sale of land involving an exchange of identical contracts, a sale and lease-back of property; an agreement of sale and a bill of sale and so on. In such cases, where the transaction is in truth one transaction all the contracts may be read together for the purpose of determining their legal effect. In Smith v. Chadwick, Jessel M.R. said:
>
> "…when documents are actually contemporaneous, that is two deeds executed at the same moment,… or within so short an interval that having regard to the nature of the transaction the Court comes to the conclusion that the series of deeds represents a single transaction between the same parties, it is then that they are treated as one deed; and of course one deed between the same parties may be read to show the meaning of a sentence and may be equally read, although not contained in one deed but in several parchments, if all the parchments together in the view of the Court make up one document for this purpose."
>
> 28. The rationale behind this principle was explained by Fletcher Moulton L.J. in Manks V. Whiteley as follows:
>
> "…where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is

> intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole. It is not open to third parties to treat each one of them as a deed representing a separate and independent transaction for the purpose of claiming rights which would only accrue to them if the transaction represented by the selected deed was operative separately. In other words, the principles of equity deal with the substance of things, which in such a case is the whole transaction, and not with unrealities such as the hypothetical operation of one of the deeds by itself without the others."

25. On the question of interpretation of documents, the opinion of Lord Hoffmann in ***Investors Compensation Scheme Ltd. versus West Bromwich Building Society*** [1998] 1 All ER 98 (HL), records the following five principles as the guiding rules:-

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the documents would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (*Mannai Investment Co. Ltd. v. Eagle Star Life Assurance Co. Ltd*. [1997] All ER 352 (HL).

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v. Salen Rederierna A. B.* [1984] 3 All ER 229 at 235; [1985] 1 AC 191 (HL) at page 201.

26. *Wigmore on Evidence*, 1981, Vol-9, para 2461, agrees th there is a paradigm shift in the interpretation principles relating to documents and that there is a progress from stiff and superstitious formalism to flexible rationalism. Contractual interpretation must ascertain the intention of the parties. The courts must try to ascertain this and not arrive at a meaning of the contract which is at variance with their actual intention. When contrive and camouflage is adopted, the Courts must aim and strive to find out the true intention by looking at the genesis of the agreement, the context and the surrounding circumstances as a whole. Common sense cannot be given a go by. The meaning and intent of the transaction cannot be at variance with the actual intent.

27. In ***Sundram Finance Ltd. versus State of Kerala & Anr.***, AIR 1966 SC 1178, it was held:-

> "24. The true effect of a transaction may be determined from the terms of the agreement considered in the light of the surrounding circumstances. In each case, the Court has, unless prohibited by statute, power to go behind the documents and to determine the nature of the transaction, whatever may be the form of the documents. An owner of goods who purports absolutely to convey or acknowledges to have conveyed goods and subsequently purports to hire them under a hire-purchase agreement is not estopped

from proving that the real bargain was a loan on the security of the goods. If there is a bona fide and completed sale of goods, evidenced by documents, anterior to and independent of a subsequent and distinct hiring to the vendor, the transaction may not be regarded as a loan transaction, even though the reason for which it was entered into was to raise money. If the real transaction is a loan of money secured by a right of seizure of the goods, the property ostensibly passes under the documents embodying the transaction, but subject to the terms of the hiring agreement, which become part of the buyer's title, and confer a licence to seize. When a person desiring to purchase goods and not having sufficient money on hand borrows the amount needed from a third person and pays it over to the vendor, the transaction between the customer and the lender will unquestionably be a loan transaction. The real character of the transaction would not be altered if the lender himself is the owner of the goods and the owner accepts the promise of the purchaser to pay the price or the balance remaining due against delivery of goods. But a hire-purchase agreement is a more complex transaction. The owner under the hire-purchase agreement enters into a transaction of hiring out goods on the terms and conditions set out in the agreement, and the option to purchase exercisable by the customer on payment of all the instalments of hire arises when the instalments are paid and not before. In such a hire-purchase agreement there is no agreement to buy goods; the hirer being under no legal obligation to buy has an option either to return the goods or to become its owner by payment in full of the stipulated hire and the price for exercising the option. This class of hire-purchase agreements must be distinguished from transactions in which the customer is the owner of the goods and with a view to finance his purchase he enters into an arrangement which is in the form of a hire-purchase agreement with the financier, but in substance evidences a loan transaction, subject to a

> hiring agreement under which the lender is given the license to seize the goods."

Thus, in ***Sundram Finance Ltd.*** (supra), a matter relating to sales tax, it was observed that true nature of the transaction or terms of the agreement may be determined from the surrounding circumstances and in each case, the court unless prohibited by the statute, has the power to go behind the document and determine the nature of the transaction whatever be the form of the document. The document must be looked at, as only a part of the evidence and the court should look at the other parts, i.e. surrounding circumstances to ascertain the actual truth. The reality must be ascertained to determine the nature of transaction. This would reveal the true nature and character.

28. In ***Lachminarain Madan Lal versus CIT, West Bengal*** (1972) 86 ITR 439 (SC), a matter relating to income tax, it was held that mere existence of an agreement between assessee and its agents and receipt of commission etc., would not bind the Assessing Officer to hold that the payment was exclusively and wholly for assessee's business for it is open to the Assessing Officer to consider relevant facts and determine whether the commission said to have been paid was deductible under the Act. The relevant facts can be taken into consideration. Similarly, in ***Sunil Sidhharthbhai versus CIT***

***Ahmedabad, Gujarat*** (1985) 156 ITR 509 (SC), the Supreme Cou while rejecting the contention of the Revenue that capital contribution distributed at the time of dissolution gives rise to capital gains tax as the expression 'transfer of property' connotes passing of rights in a property from one person to other, cautioned that the aforesaid dictum proceeds on the assumption that the partnership firm is genuine and not a result of sham or unreal transaction. If the transfer of the personal assets by the assessee to the partnership firm in which he is or becomes a partner, is merely a device or ruse of converting the assets without liability to pay income tax on capital gain, it is open for the authorities to go behind the transaction and when the transaction is illusory or a colourable device, the truth can be ascertained and consequences will follow.

29. The Supreme Court in ***Commissioner of Income Tax, Kerela, Ernakulum versus Travancore Sugar and Chemicals Ltd.***, [1973] 88 ITR 1 while referring to the substantial question of law raised, 'Whether, on the facts and in the circumstances of the case, the payment of Rs.42,480 by the assessee to the Travancore Government under the agreements dated June 18, 1937, and January 28, 1947, was allowable under section 10 of the Income-tax Act?', observed that not

only the documents but the surrounding circumstances have to be looked into to ascertain the real nature of the transaction from the commercial point of view. Here, Supreme Court decided the question in favour of the assessee by interpreting the two distantly dated agreements and inferring the intention of the parties from the agreements to opine that the expenditure was meant to be of revenue nature.

30. Reliance placed on ***Vodafone's*** case (supra) is misconceived. The ratio of the judgment authored by Hon'ble the Chief Justice S.H. Kapadia, with whom Swatantar Kumar J. concurred, on the question of tax avoidance and tax evasion and earlier judgments in the cases of ***McDowell and Co. Ltd. versus Commercial Tax Officer*** (1985) 154 ITR 148 (SC) and ***Union of India versus Azadi Bachao Andolan*** [2003] 263 ITR 706 (SC) was expressed in the following words:-

> "***Correctness of Azadi Bachao case — Re: Tax Avoidance/Evasion***
> 60. Before us, it was contended on behalf of the Revenue that *Union of India v. Azadi Bachao Andolan* [(2004) 10 SCC 1] needs to be overruled insofar as it departs from *McDowell and Co. Ltd. v. CTO* [(1985) 3 SCC 230] principle for the following:
>
> (i) Para 46 of McDowell judgment [(1985) 3 SCC 230] has been missed which reads as under: (SCC p. 255)

> "46. On this aspect … Chinnappa Reddy, J., has proposed a separate … opinion with which we agree."

(i.e. *Westminster* [*IRC v. Duke of Westminster*, 1936 AC 1 (HL)] principle is dead).

(ii) That, *Azadi Bachao* [(2004) 10 SCC 1] failed to read paras 41-46 of *McDowell* [(1985) 3 SCC 230] in entirety. If so read, the only conclusion one could draw is that the four learned Judges speaking through Misra, J. agreed with the observations of Chinnappa Reddy, J. as to how in certain circumstances tax avoidance should be brought within the tax net.

(iii) That, subsequent to McDowell [(1985) 3 SCC 230], another matter came before the Constitution Bench of five Judges in *Mathuram Agrawal v. State of M.P.* [(1999) 8 SCC 667], in which Westminster [1935 All ER Rep 259 (HL)] principle was quoted which has not been noticed by *Azadi Bachao* [(2004) 10 SCC 1].

***Our analysis***

61. Before coming to Indo-Mauritius Double Taxation Avoidance Agreement (DTAA), we need to clear the doubts raised on behalf of the Revenue regarding the correctness of *Azadi Bachao* [(2004) 10 SCC 1] for the simple reason that certain tests laid down in the judgments of the English Courts subsequent to *IRC v. Duke of Westminster* [1936 AC 1(HL)] and *Ramsay (W.T.) Ltd. v. IRC* [1982 AC 300 (HL)] help us to understand the scope of Indo-Mauritius DTAA.

62. It needs to be clarified that *McDowell* [(1985) 3 SCC 230] dealt with two aspects. First, regarding validity of the circular(s) issued by CBDT concerning Indo-Mauritius DTAA. Second, on the concept of tax avoidance/evasion. Before us, arguments were advanced on behalf of the Revenue only regarding the second aspect.

63. The *Westminster* [1935 All ER Rep 259 (HL)] principle states that: (Ramsay case [(1981) 1 All ER 865 (HL)])

> "Given that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance."

The said principle has been reiterated in subsequent English Courts judgments as "the cardinal principle".

64. Ramsay [(1981) 1 All ER 865 (HL)] was a case of sale-lease back transaction in which gain was sought to be counteracted, so as to avoid tax, by establishing an allowable loss. The method chosen was to buy from a company a readymade scheme, whose object was to create a neutral situation. The decreasing asset was to be sold so as to create an artificial loss and the increasing asset was to yield a gain which would be exempt from tax. The Crown challenged the whole scheme saying that it was an artificial scheme and, therefore, fiscally ineffective. It was held that *Westminster* [1935 All ER Rep 259 (HL)] did not compel the court to look at a document or a transaction, isolated from the context to which it properly belonged. It is the task of the 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. In the present case, the Revenue has adopted a dissecting approach at the Department level.

65. *Ramsay* [(1981) 1 All ER 865 (HL)] did not discard *Westminster* [1935 All ER Rep 259 (HL)] but read it in the proper context by which a "device" which was colourable in nature had to be ignored as fiscal nullity. Thus, *Ramsay* [(1981) 1 All ER 865 (HL)] lays down the principle of statutory interpretation rather than an over-arching anti-avoidance doctrine imposed upon tax laws.

66. *Furniss v. Dawson* [(1984) 1 All ER 530 (HL)] dealt with the case of interpositioning of a company to evade tax. On facts, it was held that the inserted step had no business purpose, except deferment of tax although it had a business effect. *Dawson* [(1984) 1 All ER 530 (HL)] went beyond *Ramsay* [(1981) 1 All ER 865 (HL)]. It reconstructed the transaction not on some fancied principle that anything done to defer the tax is to be ignored, but on the premise that the inserted transaction did not constitute "disposal" under the relevant Finance Act. Thus, *Dawson* [(1984) 1 All ER 530 (HL)] is an extension of *Ramsay* [(1981) 1 All ER 865 (HL)] principle.

67. After *Dawson* [(1984) 1 All ER 530 (HL)] , which empowered the Revenue to restructure the transaction in certain circumstances, the Revenue started rejecting every case of strategic investment/tax planning undertaken years before the event saying that the insertion of the entity was effected with the sole intention of tax avoidance. In *Craven v. White (Stephen)*[(1988) 3 All ER 495 (HL)] it was held that the Revenue cannot start with the question as to whether the transaction was a tax deferment/saving device but that the Revenue should apply the look at test to ascertain its true legal nature. It observed that genuine strategic planning had not been abandoned.

68. The majority judgment in *McDowell* [(1985) 3 SCC 230] held that: (p. 254, para 45)

> "45. Tax planning may be legitimate provided it is within the framework of law."

In the latter part of para 45, it held that: (pp. 254-55)

> "45. … Colourable devices cannot be [a] part of tax planning and it is wrong to encourage the belief that it is honourable to avoid payment of tax by resorting to dubious methods."

It is the obligation of every citizen to pay the taxes without resorting to subterfuges. The above observations should be read with para 46 where the

majority holds: (McDowell case [(1985) 3 SCC 230], p. 255)

> "46. On this aspect one of us, Chinnappa Reddy, J., has proposed a separate … opinion with which we agree."

The words "this aspect" express the majority's agreement with the judgment of Reddy, J. only in relation to tax evasion through the use of colourable devices and by resorting to dubious methods and subterfuges. Thus, it cannot be said that all tax planning is illegal/illegitimate/impermissible. Moreover, Reddy, J. himself says that he agrees with the majority.

69. In the judgment of Reddy, J. in *McDowell* [(1985) 3 SCC 230] there are repeated references to schemes and devices in contradistinction to "legitimate avoidance of tax liability" (paras 7-10, 17 & 18). In our view, although Chinnappa Reddy, J. makes a number of observations regarding the need to depart from *Westminster* [1935 All ER Rep 259 (HL)] and tax avoidance—these are clearly only in the context of artificial and colourable devices.

70. Reading *McDowell* [(1985) 3 SCC 230] , in the manner indicated hereinabove, in cases of treaty shopping and/or tax avoidance, there is no conflict between *McDowell* [(1985) 3 SCC 230] and *Azadi Bachao* [(2004) 10 SCC 1] or between *McDowell* [(1985) 3 SCC 230] and *Mathuram Agrawal* [(1999) 8 SCC 667]."

31. Hon'ble the Chief Justice S.H. Kapadia referred to ***Furniss (Inspector of Taxes) versus Dawson*** [1984] 1 All ER 530 (HL) and observed that the decision was an extension of ***Ramsay*** principle ***[Ramsay (W.T.) Ltd. versus IRC*** (1982 AC 300 (HL))] as it held that

on facts the inserted step had no business purpose other th deferment of tax and ***Dawson*** reconstructed the transaction not on the dictum that anything done to defer tax should be ignored but on the premise that inserted transaction did not constitute "disposal" under the relevant Finance Act. Hon'ble the Chief Justice thereafter had no hesitation in recording that the tax authorities in England started rejecting every case of strategic investment/tax planning on the pretext that it amounted to and was with the object of evading tax. Noticing this ill-disposed effect, in ***Craven (Inspector of Taxes) versus White (Stephen)*** [1988] 3 All ER 495, it was held that the Revenue cannot start with the question as to whether the transaction was tax deferment or saving device but can apply the *look at* test to ascertain its true nature. Genuine strategic planning is acceptable and not abandoned. Thus, the judgment elucidates and explains the English judgments and their ratio. The majority judgment in ***McDowell*'s** case (supra) was referred to hold that tax planning may be legitimate, provided it is within the framework of law, but colourable devices cannot be a part of tax planning and it was wrong to encourage and entertain the belief that it is honourable to avoid payment of tax by resorting to dubious methods. Further, the majority

decision agreed with the view expressed by Reddy, J. only in relati to tax evasion through colourable device by resorting to dubious methods and subterfuges. It did not hold that tax planning is illegitimate, illegal and impermissible. The opinion and view expressed by Reddy J. was only in the context of artificial and colourable devices. Thereafter, under the heading "international tax aspects of holding structures" reference was made to ***Ramsay*** principle and it was reiterated that *look at* principle as enunciated requires the Revenue or the Court to look at the document or transaction in the context to which it properly belonged, i.e. to understand the real nature of the transaction, one has to look at the entire transaction as a whole and not to adopt a dissecting approach. The *look at* test is to ascertain the true legal character of the transaction in a holistic manner. Genuine strategic planning with regard to the holding structure, business operations, issues relating to investment etc. undertaken for corporate business purpose should not be treated as artificial or colourable device. In the said case, it was held that the transactions were not a colourable device. Reference was made to '***Westminster*** principle' as expounded in ***The Commissioners of Inland Revenue versus His Grace the Duke of***

***Westminster*** 1935 All E.R. 259, that when the document a transaction is genuine, the court cannot go behind it to some supposedly underlying substance. It was observed that in ***Ramsay's*** case (supra), the House of Lords did not discard the said principle but read it in a proper context by holding that "device" which was colourable in nature has to be ignored as a fiscal nullity. Thus, ***Ramsay's*** case (supra) laid down a principle of statutory interpretation rather than imposing a tax avoidance doctrine on tax laws. It was elucidated that ***Westminster*** principle does not compel the court to look into the document or the transaction in isolation from the context to which it properly belonged. The task of the court was to ascertain the real nature of the transaction and while doing so, the court has to look at the entire transaction as a whole and not adopt a dissecting approach. The contention that we cannot look through and examine the real nature of the transaction in view of the authoritative pronouncement of the Supreme Court in ***Vodafone's*** case (supra) approving the view taken ***Azadi Bachao Andolan*** (supra) is not apposite and congruous.

32. In his concurrent judgment, K.S. Radhakrishnan, J. has elaborately examined the Indian and English decisions on the

question of tax avoidance and tax evasion. The following observations of Lord Tomlin in ***Westminster's*** case (supra) was quoted:-

> "Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax. This so-called doctrine of 'the substance' seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable."

33. Lord Atkin dissented stating "that the substance of the transaction was that what was being paid was remuneration." Thereafter, the principles which emerged from ***Westminster's*** case (supra) were stated as:-

> "(1) A legislation is to receive a strict or literal interpretation;
> (2) An arrangement is to be looked at not in by its economic or commercial substance but by its legal form; and
> (3) An arrangement is effective for tax purposes even if it has no business purpose and has been entered into to avoid tax."

34. Referring to the ***Ramsay*'s** case (supra), it was observed th during 1980's emphasis was attached to "purposive interpretation approach" and gradually to "economic substance doctrine". Reference was made to Lord Wilberforce's observations in ***Ramsay*'s** case (supra) that documents and transactions should not be looked at with blinkers, isolated from any context to which it properly belongs. The Court has to ascertain the legal nature of transaction sought to be taxed or tax consequence from a series or combination of transactions. It was observed that a taxpayer was entitled to manage his affairs so as to reduce tax and further even if the purpose or object of a transaction was to avoid tax, this would not invalidate a transaction unless anti-avoidance provision applied. If a document or transaction was genuine and not sham in the traditional sense, the Court had to adhere to the form of the transaction. Thereupon, reference was made to other decisions. The decision in ***Dawson*** (supra) it was held, elucidate the following principle:-

> "(1) Strategic tax planning undertaken for months or possible years before the event (of sale) in anticipation of which it was effected; (2) A series of transactions undertaken at the time of disposal/sale, including an intermediate transaction interposed into having no independent life, could under *Ramsay* principle be *looked at* and treated as a composite

> whole transaction to which the fiscal results of the single composite whole are to be applied, i.e., that an intermediate transfer which was, at the time when it was effected, so closely interconnected with the ultimate disposition, could properly be described as not, in itself, a real transaction at all, but merely an element in some different and larger whole without independent effect."

35. Referring to the subsequent decision in the case of ***Ensign Tankers (Leasing) Ltd. versus Stokes*** [1992] 1 AC 655, it was observed that unacceptable tax avoidance typically involves creation of complex artificial structures by which, as if by the wave of a magic wand, the taxpayer conjures out of thin air, a loss, or a gain, or expenditure, or whatever it may, which otherwise would never have existed. K.S. Radhakrishnan, J. observed that this led to a debate, what is acceptable and unacceptable tax avoidance. In the said judgment reference is then made to ***IRC versus McGuckian*** [1977] BTC 346, ***MacNiven (H.M. Inspector of Taxes) versus Westmoreland Investments Ltd.*** [2003] 1 AC 311, ***Mercantile Business Finance Ltd. versus Mawson (Inspector of Taxes)*** [2005] 1 AC 684 (HL) and ***IRC versus Scottish Provident Institution*** [2004] 1 WLR 3172 and finally observed:-

> "Above discussion would indicate that a clear-cut distinction between tax avoidance and tax evasion is

> still to emerge in England and in the absence of any legislative guidelines, there is bound to be uncertainty, but to say that the principle of Duke of Westminster has been exorcised in England is too tall a statement and not seen accepted even in England. The House of Lords in *McGuckian* and *MacNiven*, it may be noted, has emphasised that the Ramsay approach is a principle of statutory interpretation rather than an overarching anti-avoidance doctrine imposed upon tax laws. The Ramsay approach is ultimately concerned with the statutory interpretation of a tax avoidance scheme and the principles laid down in Duke of Westminster, it cannot be said, have been given a complete go-by in Ramsay, Dawson or other judgments of the House of Lords."

36. With regard to the position in India with reference to the two decisions in ***McDowell*** (supra) and ***Azadi Bachao Andolan*** (supra), it was held that Reddy J. had agreed with Mishra, J. in ***McDowell*** (supra) with whom other three Judges had concurred. Thus, what transpired in England is not the ratio of ***McDowell*** (supra) and cannot be and remains merely an opinion or view. It was further held by K.S. Radhakrishnan, J. as under:-

> "Confusion arose (see para 46 of the judgment) when Justice Mishra has stated after referring to the concept of tax planning as follows:
>
> > "On this aspect, one of us, Chinnappa Reddy, J. has proposed a separate and detailed opinion with which we agree."
>
> Justice Reddy, we have already indicated, himself has stated that he is entirely agreeing with Justice Mishra

and has only supplemented what Justice Mishra has stated on tax avoidance, therefore, we have to go by what Justice Mishra has spoken on tax avoidance.

Justice Reddy has depreciated the practice of setting up of tax avoidance projects, in our view, rightly because the same is/was the situation in England and *Ramsay* and other judgments had depreciated the tax avoidance schemes.

In our view, the ratio of the judgment is what is spoken by Justice Mishra for himself and on behalf of three other Judges, on which Justice Reddy has agreed. Justice Reddy has clearly stated that he is only supplementing what Justice Mishra has said on tax avoidance."

In the concluding portion, it was held by K.S. Radhakrishnan, J. as under:-

"A five-Judge Bench judgment of this Court in *Mathuram Agrawal v. State of M.P.* [1999] 8 SCC 667, after referring to the judgment in *B.C. Kharwar* (supra) as well as the opinion expressed by Lord Roskill on *Duke of Westminster* stated that the subject is not to be taxed by inference or analogy, but only by the plain words of a statute applicable to the facts and circumstances of each case.

The Revenue cannot tax a subject without a statute to support and in the course we also acknowledge that every taxpayer is entitled to arrange his affairs so that his taxes shall be as low as possible and that he is not bound to choose that pattern which will replenish the treasury. The Revenue's stand that the ratio laid down in *McDowell* is contrary to what has been laid down in *Azadi Bachao Andolan*, in our view, is unsustainable and, therefore, calls for no reconsideration by a larger Bench."

37. It is, therefore, clear from the aforesaid observations that the is a difference in approach and ratio as expounded by S.H. Kapadia, CJI, and the legal ratio elucidated in the judgment of K.S. Radhakrishnan, J. The said difference though slight but is perceptible. Noticeably, K.S. Radhakrishnan, J. has also referred to need for legislation after referring to general and specific anti-avoidance rules in Australia and their existence in South Africa, China, Japan etc.

38. Thus, in ***Vodafone's*** case (supra) earlier decisions in ***McDowell*** (supra) and ***Azadi Bachao Andolan*** (supra) stand explained and elucidated. Demanding and complicated question of tax avoidance and tax evasion, form over substance and what are the powers of the Revenue/income tax authorities stand explicated and unravelled. The issue is vexed but to our benefit examined and answered in ***Vodafone's*** case (supra) and we have applied the said tests.

**Vodafone tests**

39. Expressions "tax avoidance, tax evasion and tax mitigation" are often spoken about, but differently understood. Rule of law mandates and requires a measure of certainty in understanding the said terms.

Juristic explications on the subject are indicative of equivocating a divergent stand points. The distinction between the expressions; tax avoidance, tax evasion and tax mitigation has been a subject matter of several erudite articles with different perspectives like *Morality on Tax Avoidance* by Zoë Prebble and John Prebble; *Interpretation of Tax Statutes: tax avoidance and the intention of the Parliament* by Judith Freedman; *Tax Avoidance, Tax Evasion and Tax Mitigation* by Philip Baker; and, *Corporate Social Responsibility and Tax Avoidance: A comment and reflection* by John Hasseldine and Gregory Morris. We acknowledge benefit of exposition and analysis in these articles as we elaborate on the said distinction. Discussion even after ***Vodafone's*** case (supra) is reflective that penetrating and perfect clarity of the said terms is not easy to discern and determine. To us the determination and ratio in ***Vodafone's*** case is clear.

40. The aforesaid decision in ***Vodafone's*** case (supra) does not prescribe criterion simply predicated on preordained, circular or self cancelling transactions with a step or steps having no commercial or business purpose other than obtaining tax advantage. The decision does not exert the doctrine of economic substance. The ratio steers

clear from using the said tests or principles. The said propositions a premise as specific tests stands disapproved and rejected.

41. The precise test enunciated and prescribed as a tenet, negates and disqualifies colourable device, deceit and sham as a legitimate and acceptable tax event. These terms have some-what ethical and casuistical connotations and are the elective test for differentiating tax planning from abusive tax avoidance.

42. To appreciate the concept of abusive tax avoidance, it would be appropriate to first delineate with precision the expressions "tax mitigation" and "tax evasion" as their boundaries and confines would enable us to draw lines amongst the four concepts; tax mitigation, tax evasion, acceptable tax avoidance and abusive tax avoidance. Each of the said expressions involves an element of tax planning. It would be hard to conceive of a situation where the assessed does not indulge to some sort of tax planning, be it tax mitigation, acceptable tax avoidance, abusive tax avoidance or tax evasion. "Tax planning", being common to all situations, cannot be the distinguishing feature, but nature and character of the planning and its nexus with the transaction is decisive.

43. Tax mitigation in simple words would refer to a taxpay taking advantage or benefit of a beneficent provision under the tax code and complying with the requisites to his lower the tax liability. In the words of Lord Nolan in ***CIR versus Willoughby*** [1997] 4 All ER 65, it is:-

> "The hallmark of tax mitigation, on the other hand, is that the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option"

The aforesaid quote uses the expression "economic consequences that Parliament intended" which as per some, causes confusion and is self contradictory. However, the said criticism overlooks that if the intention of the Parliament is clear and unambiguous; taking advantage or benefit as envisaged by the provision is a case of tax mitigation. Even in case of debate, when the intention of the Parliament is favourable and adjudication decides the question in favour of the assessee, it would be a case of tax mitigation. Courts are trusted and given the power to determine as to what was the intent of the Parliament while enacting a particular provision. When the court decision interpreting the legislative intent is in favour of the assessee, there is no avoidance of tax because the conduct is consistent with the

taxing provision. If there is no tax avoidance, the question of abusi tax avoidance does not arise, for the latter refers to a particular category of transactions that are unacceptable being pejorative, i.e. sham, colourable device or deceitful and is distinct from tax mitigation. Albeit, where the Parliament's intention is to the contrary and the finding negates the assessed's submission, it would be a case of tax avoidance, whether acceptable or abusive is a different and another matter. Thus, the term "tax mitigation" is simple, intelligible and unequivocal. It is a positive term and refers to the assessed taking benefit or advantage of a provision which the tax code intends and wants to confer. Deductions under Chapter VIA, exemptions under Sections 10A, 10AA, 10B etc. of the Act are all provisions relating to tax mitigation. If an assessee takes benefit or advantage by complying with the stipulated conditions therein to reduce his tax liability, it would be a case of tax mitigation.

44. Tax evasion is illegal and consists of wilful violation or circumvention of applicable tax laws to minimise tax liability. The assessed breaches the relevant law and it involves contumacious behaviour or actual knowledge of wrong doing. This can happen when an assessee deliberately fails to report an item in the income tax

return, or knowingly claims a deduction which he is aware he is not entitled to, or consciously omits to supply information even when there is duty to furnish the said details. It can also apply to situations when the assessee fails to clarify a matter, which has been misunderstood by the income tax authorities, and keeps quiet. In these cases, there is element of wilfulness, dishonesty or contemptuous conduct or even absence of honest belief. If the taxpayer cannot show that he had an honest belief that he was not liable to tax or liable to a lower tax, then *prima facie* such conduct would fall within the ambit/scope of tax evasion.

45. Tax avoidance by elimination would mean the residual and surplus, after we exclude cases of tax mitigation and tax evasion. Tax mitigation and tax evasion are two end points. It is easier and more beneficial to follow this discernment to define tax avoidance, for the confines and bounds of tax mitigation and tax evasion are easier to decipher and define legally and also identify with some exactness in practice. (Refer *Tax Avoidance, Tax Evasion & Tax Mitigation* by Philip Baker.)

46. It is equally important to distinguish and differentia acceptable tax avoidance and abusive tax avoidance. The Supreme Court in ***CIT versus Raman (A.) & Co.*** [1968] 67 ITR 11, at p.17 had observed:-

> "Avoidance of tax liability by so arranging commercial affairs that charge of tax is distributed is not prohibited. A taxpayer may resort to a device to divert the income before it accrues or arises to him. Effectiveness of the device depends not upon considerations of morality, but on the operation of the Income-tax Act. Legislative injunction in taxing statutes may not, except on peril of penalty, be violated, but it may lawfully be circumvented."

47. In clear and categorical terms the aforesaid ratio was resonated and approved by the Supreme Court in the ***Vodafone's*** case (supra). Thus, the test of 'devoid of business purpose' or 'lack of economic substance' is not accepted and applied in India as it is too broad and unsatisfactory. The said test, if ardently applied, would contradict and would be irreconcilable with taxpayers' right to arrange once affairs within the confines of law, which is not prohibited or barred.

48. Naturally, the dividing line between acceptable and abusive tax avoidance cannot be deduced or inferred from lowering or elimination of the tax liability. Latter is the consequence and the tax effect. It is

the *post facto* consequence under the tax code of the event selected by the assessed. The test applied should not curtail the freedom of choice to adopt a particular transaction or combination of transactions to reduce or eliminate the tax liability.

49. At the same time, the dividing line as per the ratio in ***Vodafone's*** case (supra) is ethically principled and moralistic as tax avoidance is disapproved when the assessee adopts a colourable device, dubiousness and otherwise indulges in a sham arrangement or transaction. This would mean that pre-ordained, circular or self-cancelling transaction with a step or steps having no commercial purpose or lack of economic or business purpose could in a given case be, though not necessarily, a relevant fact, yet they are not the touchstone, yardstick or the final test. These could be circumstances or facts to infer and discern whether the taxable event selected was a colourable device, sham or deceit and not the tax event intended by the parties. Right to choice to select the most beneficial legal way and manner to execute a transaction is unquestionable and perennial. A fact is not the test; rather the corrupt and mendacious conduct, i.e. colourable device, sham or deceit, is the specified bright line, dividing acceptable tax avoidance from abusive tax avoidance.

50. The assessed is well within his right to choose any one eve between two or more events and select an event to minimize or reduce his tax liability. The Act, i.e. the Income Tax Act, 1961, imposes and saddles tax liability on the chosen tax event. The Act *per se*, unless a provision so stipulates, does not restrict or curtail the right of choice. Tax is determined and gets crystallized on the tax event adopted by the assessee. For example, in ***Vodafone's*** case (supra), the assessed had several options and therefore, right to choose a particular tax event. As long as the choice is within the framework of law, the Assessing Officer cannot disturb the tax effect or liability, which is the consequence of the event. The choice of the assessee is not abrogated or invalidated. For example, a company has several legal options, and therefore, right to choose how to dispose of a capital asset, as in ***Vodafone***'s case (supra). Similarly, an assessee can opt for and has multiple options for raising debt to finance business expansion plans. The assessed may have several legally permissible alternatives to effect and divide the assets on partition. Such examples are numerous. The choice might result in mitigation of tax liability, but the tax effect would not classify or help us differentiate between tax avoidance and abusive tax avoidance. Any attempt to minimize

or eliminate tax liability would not make the choice of the tax pay abusive tax avoidance. The foundation of the said principle is that the tax code by its nature differentiates between different types of actions, transactions, arrangements and activities and then identifies and stipulates the consequences. The tax code, i.e. the Income Tax Act, 1961 is rule based and complex. The Act is not entirely principle based. The provisions are read and applied. Principle of purposive interpretation both in favour of Revenue or assessed can be applied but within four corners of law. In fact, in some cases, the assessed may find themselves taxed at a higher liability for failure to choose a more tax friendly event. But the right of choice is hedged with one significant condition. The event selected, as noticed above and subsequently, should be real and not a colourable device, sham and deceit.

51. Tax reduction is not an evil if you do not do it evilly [***Murphy Logging Co. vs. US***, 378 F.2d 222 (1967)]. The assessee acts evilly when there is camouflage or dubiousity to mask and masquerade the real intent of the transaction which the parties intended and the document(s)/transaction(s), is at variance with the actual intent. The assessed in such cases does not choose the real event as one from the

multiple choices, but adopts a sham or colourable event. T assessed then acts fraudulently, deceitfully or in a corrupt manner. He does not choose an event which is useful, viable and tenable, but employs deception and visors to pretense a state of affair which is different from the actual or real state of affairs. The event propounded is contrary to his intention. When the event selected is artificial it can be treated as colourable, deceitful or sham. The artificial event is one which purports to be one thing but in fact is another. Thus, abusive tax avoidance is a matter of evil intention and a result of dishonest behaviour of the assessed.

52. In such cases, question of ignorance as to tax or administrative incompetence would arise for consideration, for abusive tax avoidance scheme requires a mind set and propensity to act evilly. It requires a degree of knowledge and absence of honest belief.

53. The aforesaid doctrine of abusive tax avoidance is a Judge made law or a judicial doctrine. The Parliament can legislate and has enacted provisions to negate and nullify specific anti-tax avoidance rules/provisions. Section 2(22)(e), i.e. the principle of deemed dividend, Section 94 relating to dividend stripping, clubbing of

income of minors, are few such provisions where the legislature h enacted specific anti-tax avoidance rules. It is the obligation and duty of the court/tribunal to apply the said provisions in terms of the legislative mandate. When a specific anti-tax avoidance section/rule is invoked, the court and the tribunal must look at and interpret the relevant provision to decipher whether the chosen tax event falls within the said provision and accordingly the tax consequences will apply.

54. A caveat, the aforesaid discussion does not examine and elucidate scope and ambit of Section 271(1)(c) of the Act.

**Conclusion and final findings.**

55. In the context of ***Vodafone's*** tests, we would paraphrase the words of Lord Nicholls in ***MacNiven (Inspector of Taxes) versus Wesmoreland Investments Ltd.*** (2002) 225 ITR 612; the decision in ***Ramsay's*** case (supra) had not enunciated a new legal principle but reiterated the courts' duty to determine the legal nature of the transaction and then relate the finding to the fiscal legislation. Thus, when there is one or a series or combination of transactions intended to operate as such, the courts are entitled to look the real scheme as

such or as a whole, even when a particular stage is only expectation without any contractual force. This does not mean that the transaction or any step in the transaction is treated as sham or given a legal effect different from the legal effect intended by the parties. Nor does it imply going behind the transaction or the series of transactions for some supposed underlying substance. It means looking at the document(s) or the act(s) in the context to which it properly belongs. ***Ramsay's*** approach promises ascertaining the legal nature of the transaction(s) and is a principle of interpretation applicable to taxing statutes.

56. In view of the aforesaid discussion and our findings on the true and real nature of the transaction camouflaged as 'non-compete fee', we have no hesitation and reservation that the respondent-assessee had indulged in abusive tax avoidance. The real and true nature of the transaction or event was the sale of shares and transfer of control and management of CDBL in favour of the SWC Group. The consideration of Rs.6.60 crores was not a fee paid towards non-compete (see paragraphs 22 and 60). It would not be exempt.

57. We have already adverted to and interpreted the provisions Section 28(ii)(a) of the Act. However, question still remains whether the said provision should be invoked or it would be appropriate and proper to treat consideration of Rs.6.60 crores as a part of the sale consideration paid by the SWC Group for acquisition of majority shares in CBDL. We would prefer the latter approach, but in the alternative. The reason is that transfer of majority shares holding would include consideration receivable towards the controlling interest. The price paid by the SWC Group and received by the respondent-assessee was for purchase of shares, including the controlling interest. The price paid would include the right to control and manage CBDL. Any division or bifurcation would result in the court or Revenue stepping into the arm chair of the assessee and the SWC Group for splitting the amounts between capital gains and Section 28(ii)(a) of the Act.

58. In ***Vodafone*** (supra) S.H. Kapadia, CJI, has eloquently crystallized the position, when a majority shareholder transfers the said shareholding to another party. Question arose, whether this transaction or transfer could be bifurcated into separate transactions for sale of shares, controlling interest or transfer of assets. It was

observed that intrinsic to transaction of transfer of shares in a giv case would include rights and entitlements which constitute and were themselves capital assets within the meaning of Section 2(14) of the Act. In the said case, as in the present one, the transaction was structured as a case of sale of shares and not an asset sale. Ownership of shares in such situations constitutes and partake character of a controlling interest. The said controlling incident is an incident of controlling shares which flows out from the said holding. Controlling interest, therefore, is not identifiable as a distinct asset independent of holding of shares. The control of the company resides in the voting power of the shareholders as the shares represent an interest of the shareholder and are made of various rights. Shares and the rights which emanate include the right of a shareholder in the character of controlling interest and cannot be dissected. Control and management is a facet of controlling shares [See ***IRC versus Crossman*** (1936) 1 All ER 762 (HL)].

59. Thus, the SWC Group had acquired by entering into an agreement for purchase of shares, also the controlling interest. It would, therefore, include the price paid for the same. More importantly, it also included the price paid for acquiring control of a

competitor, who henceforth would not be a competitor but a part the SWC Group. Such transaction, it was observed by S.H. Kapadia, CJI:

> "As a general rule, in a case where a transaction involves transfer of shares lock, stock and barrel, such a transaction cannot be broken up into separate individual components, assets or rights such as right to vote, right to participate in company meetings, management rights, controlling rights, control premium, brand licences and so on as shares constitute a bundle of rights. [See ***Charanjit Lal Chowdhury v. Union of India***, AIR 1951 SC 41, ***Venkatesh (minor) v. CIT*** [2000] 243 ITR 367 (Mad) and ***Smt. Maharani Ushadevi v. CIT***, [1981] 131 ITR 445 (MP)]. Further, the High Court has failed to examine the nature of the following items, namely, non-compete agreement, control premium, call and put options, consultancy support, customer base, brand licenses etc. On facts, we are of the view that the High Court, in the present case, ought to have examined the entire transaction holistically. VIH has rightly contended that the transaction in question should be looked at as an entire package. The items mentioned hereinabove, like, control premium, non-compete agreement, consultancy support, customer base, brand licenses, operating licenses etc. were all an integral part of the Holding Subsidiary Structure which existed for almost 13 years, generating huge revenues, as indicated above. Merely because at the time of exit capital gains tax becomes not payable or exigible to tax would not make the entire "share sale" (investment) a sham or a tax avoidant. The High Court has failed to appreciate that the payment of US$ 11.08 bn was for purchase of the entire investment made by HTIL in India. The payment was for the entire package. The parties to the transaction have not agreed upon a separate price for the CGP share and

> for what the High Court calls as "other rights and entitlements" (including options, right to non-compete, control premium, customer base etc.). Thus, it was not open to the Revenue to split the payment and consider a part of such payments for each of the above items. The essential character of the transaction as an alienation cannot be altered by the form of the consideration, the payment of the consideration in installments or on the basis that the payment is related to a contingency ('options', in this case), particularly when the transaction does not contemplate such a split up. Where the parties have agreed for a lump sum consideration without placing separate values for each of the above items which go to make up the entire investment in participation, merely because certain values are indicated in the correspondence with FIPB which had raised the query, would not mean that the parties had agreed for the price payable for each of the above items. The transaction remained a contract of outright sale of the entire investment for a lump sum consideration [see: Commentary on Model Tax Convention on Income and Capital dated January 28, 2003, as also the judgment of this Court in the case of **CIT (Central), Calcutta v. Mugneeram Bangur and Company (Land Deptt.),** (1965) 57 ITR 299 (SC)]. Thus, we need to "look at" the entire Ownership Structure set up by Hutchison as a single consolidated bargain and interpret the transactional documents, while examining the Offshore Transaction of the nature involved in this case, in that light."

60. Going back, the aforesaid paragraph reiterates and affirms the contention of the Revenue and is against the reasoning given by the Tribunal and the arguments raised by the assessee. It will be unintelligible, if not being gullible, if we accept that bundle of rights including non-compete right acquired on the sale of shares of a

thriving and running company would be and should be accepted Rs.56 lacs approximately but Rs.6.60 crores was not the consideration paid for the said transaction or not solely relatable to the purchase of shares. The respondent assessee, an individual did not even have a licence to manufacture alcohol. Thus, to hold the two agreements were independent, one related to sale of shares of CBDL and the other a 'non-compete' agreement, would be to ignore reality, insularize ourselves and treat sham and deceit as a true and real event.

61. In his concurrent judgment, K.S. Radhakrishnan, J. has elaborately examined the Indian and English decisions on the question of voting rights and controlling interest, which is an incident of holding majority shares, to observe that a shareholder holding controlling interest could command premium as they determine the nature of business, its management, enter into contracts, borrow money, have the right to buy, sell or merge the company. The Hon'ble Judge held that shares of a company could command a premium or discount depending upon whether they represent controlling or minority interest. Price would also depend upon whether the potential buyer believes that the purchase would enhance

the value for him. In this context, the following observations ha

been made:-

> "The House of Lords in IRC v. J. Bibby & Sons Ltd., Supp ITR at pp. 9-10, after examining the meaning of the expressions "control" and "interest", held that controlling interest did not depend upon the extent to which they had the power of controlling votes. The principle that emerges is that where shares in large numbers are transferred, which result in shifting of "controlling interest", it cannot be considered as two separate transactions, namely, transfer of shares and transfer of controlling interest. Controlling interest forms an inalienable part of the share itself and the same cannot be traded separately unless otherwise provided by the statute. Of course, the Indian company law does not explicitly throw light on whether control or controlling interest is a part of or inextricably linked with a share of a company or otherwise, so also the Income Tax Act. In the impugned judgment, the High Court has taken the stand that controlling interest and shares are distinct assets.
>
> Control, in our view, is an interest arising from holding a particular number of shares and the same cannot be separately acquired or transferred. Each share represents a vote in the management of the company and such a vote can be utilised to control the company. Controlling interest, therefore, is not an identifiable or distinct capital asset independent of holding of shares and the nature of the transaction has to be ascertained from the terms of the contract and the surrounding circumstances. Controlling interest is inherently contractual right and not property right and cannot be considered as transfer of property and hence a capital asset unless the statute stipulates otherwise. Acquisition of shares may carry the acquisition of controlling

> interest, which is purely a commercial concept; and tax is levied on the transaction, not on its effect."

62. The aforesaid observations are relevant when we deal with the question of capital gain under Section 48 of the Act, which states that capital gain shall be computed after deducting "full value" of the consideration received or accruing as a result of the transfer of the capital asset and expenditure incurred wholly and exclusively in connection with the said transfer on cost of acquisition of the said transfer and the cost of improvement thereto. Clearly, therefore, the capital gains tax on sale of shares where controlling interest has resulted in transfer of control of management would form part of the consideration received. It should not be segregated or bifurcated.

63. In view of the aforesaid discussion, we deem it appropriate and proper to treat Rs.6.60 crores as consideration paid for sale of shares, rather than a payment under Section 28(ii) of the Act. In doing so, we are following the ratio and the reasoning given in the decisions by S.H. Kapadia, CJI and Radhakrishnan J. in ***Vodafone's*** case (supra). It is clearly a case wherein the sale consideration for transfer of shares was artificially and deceitfully bifurcated under a sham agreement/

documentation, which was unreal and not a true record of t intention.

64. The last issue would be whether Rs.6.60 crores should be taxed in the hands of the assessee as an individual or should be bifurcated as per the shareholding between the respondent-assessee and his family members, i.e. wife, son, daughter-in-law and two daughters. It is not the case of the respondent-assessee that his family members had received any share or part of this payment; the entire payment was paid to the respondent-assessee. The assessee, having chosen the taxable event, i.e. to receive the entire sale consideration in his name, must therefore bear and face the tax consequence. Thus, the entire amount would be taxed in the hands of the respondent-assessee, and would be treated as part of the sale consideration received on transfer of the shares in CDBL, held by him.

65. The substantial question of law is accordingly answered in favour of the appellant-Revenue and against the respondent-assessee but holding that Rs.6.60 crores was taxable as capital gains in the hands of the respondent-assessee being a part of the full value sale

consideration paid for transfer of shares. The appellant-Revenue w

be entitled to costs as per the Delhi High Court Rules.

The appeal is disposed of.

**SANJIV KHANNA, J.**

**V. KAMESWAR RAO, J.**

**December 22nd, 2014**
**KKB/NA/VKR**