



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
 + **INCOME TAX APPEAL NO. 35/2002**

Reserved on: 8th September, 2014
 Date of decision: 23rd December, 2014

THE COMMISSIONER OF INCOME TAX, DELHI-IV.. Appellant

Through Mr. Rohit Madan, Sr. Standing Counsel.

versus

M/S D.C.M. LIMITED

..... Respondent

Through Mr. S. Ganesh, Sr. Advocate with
 Mr. V.P. Gupta & Mr. Anunav Kumar, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J.:

This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 (Act, for short) stands admitted for adjudication on the following substantial question of law:-

“Whether the Tribunal was right in holding that there was no transfer within the meaning of S.32A(5) of the Act under the Scheme of Arrangement of the assessee company and, therefore, the Assessing Officer erred in withdrawing the investment allowance granted earlier under Section 155 (4A) of the Act?”

2. The respondent-assessee is a company and during the period 1983-84 to 1990-91 had availed of and was granted benefit of investment allowance or carried forward of investment allowance under Section 32A of the Act.

3. Under a scheme of arrangement under Sections 391 and 394 of the Companies Act, 1956 which came into effect on 1st April, 1990, 9 out of 13 industrial units held by the respondent company were transferred to three



newly formed companies, namely, M/s DCM Shriram Industries Limited, M/s DCM Shriram Consolidated Limited and M/s DCM Shriram Industrial Enterprises Limited. Relying upon sub-section (5) to Section 32A and treating transfer of assets and liabilities, including plant and machinery as “sale or otherwise transfer”, the Assessing Officer passed an order under Section 32A(5) read with Section 155(4A) and 154 of the Act withdrawing benefit of investment allowance or carried forward of investment allowance. First appeals were dismissed by two separate orders, passed by the Commissioner of Income Tax (Appeals) dated 19th September, 1994 in relation to Assessment Years 1987-88, 1988-89, 1989-99 and 1990-91 and order dated 21st October, 1994 in respect of Assessment Years 1983-84, 1984-85 and 1985-86. The assessee, however, succeeded by the impugned order passed by the Income Tax Appellate Tribunal (‘Tribunal’, for short) dated 1st August, 2001, *inter alia*, holding that scheme of arrangement did not result in ‘transfer’ under sub-section (5) to Section 35A. The Tribunal preferred to give purposive interpretation to the expression ‘otherwise transfer’ used in Section 32A(5) of the Act. Scheme of arrangement it stands observed should not be construed as violating the negative mandate which prohibits transfer. Sub-section (5) to Section 32A of the Act was not enacted to bar such schemes as the purpose behind Section 32A was to promote industrial growth and production, which was not adversely effected.

4. In order to appreciate the controversy, we would like to first reproduce relevant portions of Section 32A, i.e., sub-section (1), (5), (6) and (7) of Section 32A of the Act, which read:-

“32A. (1) In respect of a ship or an aircraft or machinery or plant specified in sub-section (2), which is owned by the assessee and is wholly used for the purposes of the business carried on by him, there shall, in accordance with and subject to the provisions of this section, be allowed a deduction, in



respect of the previous year in which the ship or aircraft was acquired or the machinery or plant was installed or, if the ship, aircraft, machinery or plant is first put to use in the immediately succeeding previous year, then, in respect of that previous year, of a sum by way of investment, allowance equal to twenty-five per cent of the actual cost of the ship, aircraft, machinery or plant to the assessee:

Provided that in respect of a ship or an aircraft or machinery or plant specified in sub-section (8B), this sub-section shall have effect as if for the words "twenty-five per cent", the words "twenty per cent" had been substituted :

Provided further that no deduction shall be allowed under this section in respect of—

(a) any machinery or plant installed in any office premises or any residential accommodation, including any accommodation in the nature of a guest house;

(b) any office appliances or road transport vehicles;

(c) any ship, machinery or plant in respect of which the deduction by way of development rebate is allowable under section 33; and

(d) any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "Profits and gains of business or profession" of any previous year.

Explanation : For the purposes of this sub-section, "actual cost" means the actual cost of the ship, aircraft, machinery or plant to the assessee as reduced by that part of such cost which has been met out of the amount released to the assessee under sub-section (6) of section 32AB.

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(5) Any allowance made under this section in respect of any ship, aircraft, machinery or plant shall be deemed to have been wrongly made for the purposes of this Act—

(a) if the ship, aircraft, machinery or plant is sold or otherwise transferred by the assessee to any person at any time before the expiry of eight years from the end of the previous year in which it was acquired or installed; or

(b) if at any time before the expiry of ten years from the end of the previous year in which the ship or aircraft was acquired or the machinery or plant as installed, the assessee does not utilise the amount credited to the reserve account under sub-section (4) for the purposes of acquiring a new ship or a new aircraft or new machinery or plant [other than machinery or plant of the nature referred to in clauses (a), (b) and (d) of



the second proviso to sub-section (1)] for the purposes of the business of the undertaking; or

(c) if at any time before the expiry of the ten years aforesaid, the assessee utilises the amount credited to the reserve account under sub-section (4) for distribution by way of dividends or profits or for remittance outside India as profits or for the creation of any assets outside India or for any other purpose which is not a purpose of the business of the undertaking, and the provisions of sub-section (4A) of section 155 shall apply accordingly :

Provided that nothing in clause (a) shall apply—

(i) where the ship, aircraft, machinery or plant is sold or otherwise transferred by the assessee to the Government, a local authority, a corporation established by a Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956); or

(ii) where the sale or transfer of the ship, aircraft, machinery or plant is made in connection with the amalgamation or succession, referred to in sub-section (6) or sub-section (7).

(6) Where in a scheme of amalgamation, the amalgamating company sells or otherwise transfers to the amalgamated company any ship, aircraft, machinery or plant, in respect of which investment allowance has been allowed to the amalgamating company under sub-section (1),—

(a) the amalgamated company shall continue to fulfil the conditions mentioned in sub-section (4) in respect of the reserve created by the amalgamating company and in respect of the period within which such ship, aircraft, machinery or plant shall not be sold or otherwise transferred and in default of any of these conditions, the provisions of sub-section (4A) of section 155 shall apply to the amalgamated company as they would have applied to the amalgamating company had it committed the default; and

(b) the balance of investment allowance, if any, still outstanding to the amalgamating company in respect of such ship, aircraft, machinery or plant, shall be allowed to the amalgamated company in accordance with the provisions of sub-section (3), so, however, that the total period for which the balance of investment allowance shall be carried forward in the assessments of the amalgamating company and the amalgamated company shall not exceed the period of eight years, specified in sub-section (3) and the amalgamated company shall be treated as the assessee in respect of such ship, aircraft, machinery or plant for the purposes of this section.

(7) Where a firm is succeeded to by a company in the business carried on by it as a result of which the firm sells or otherwise transfers to the company any ship, aircraft, machinery or plant, the provisions of clauses (a) and (b) of sub-section (6) shall, so far as may be, apply to the firm and the company.



Explanation : The provisions of this sub-section shall apply only where—

(i) all the property of the firm relating to the business immediately before the succession becomes the property of the company;

(ii) all the liabilities of the firm relating to the business immediately before the succession become the liabilities of the company; and

(iii) all the shareholders of the company were partners of the firm immediately before the succession.

xxx”

5. At this stage, we would also like to reproduce the definition of the term ‘transfer’ in Section 2(47) of the Act. The said clause, it must be noted, is in relation to capital asset and reads:-

“2. In this Act, unless the context otherwise requires,—

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(47) "transfer", in relation to a capital asset, includes,—

(i) the sale, exchange or relinquishment of the asset; or

(ii) the extinguishment of any rights therein; or

(iii) the compulsory acquisition thereof under any law; or

(iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment; or

(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882); or

(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

Explanation : For the purposes of sub-clauses(v) and (vi), "immovable property" shall have the same meaning as in clause (d) of section 269UA

(48) xxx”



(The provisions reproduced in paragraph Nos.4 and 5 are as they existed on 1st April, 1990, i.e., the date on which the scheme of arrangement became effective and 9 out of 13 units owned by the respondent-assessee were transferred to the three newly incorporated companies.)

6. Sub-section (5) uses two expressions “sold or is otherwise transferred”. Scheme of amalgamation or reconstruction under Sections 391 and 394 of the Act whereby assets or units/undertakings were transferred would be covered by the expression ‘otherwise transferred’ in sub-section (5). We do not think by adopting purposive or applying the said principle of interpretation, it can be held that the scheme did not result in transfer of the assets. The decision of the Tribunal to this extent should not be accepted. If the reasoning given by the Tribunal is to be accepted, then sub-section (6) to Section 35A of the Act would become redundant and otiose. It will stand erased. The said sub-section carves out an exception to sub-section (5) and states that sub-section (5) would not apply to cases of amalgamation provided the two conditions stipulated therein are satisfied. On reading of sub-section (6), it is clear that scheme of amalgamation is treated and would constitute transfer under sub-section (5) of Section 32A of the Act. The two provisions have to be read harmoniously. Any other interpretation would be clearly contrary to the express language and stipulations of the Section itself and, therefore, would be unacceptable.

7. The word “transfer” and its purport was examined by the Supreme Court in the *Commissioner of Income Tax, Lucknow versus Narang Dairy Products, Lucknow*, [1996] 219 ITR 478 (SC) with reference to Sections 33 and 34 of the Act in the following words:-

“Even assuming that the transaction may not be a “transfer” as defined under Section 2(47) of the Act, in our view, the definition section is an inclusive one and does not exclude the contextual or the ordinary meaning



of the word, “transfer”. There are different shades of meaning to the word “transfer”, vis-., “to make over possession of to another”, “a delivery of title or property from one person to another”, “to displace from one surface to another”, “removal”, “handover”, “make over possession of property to another”, “change”, “displace”, etc.”

In the said case, the assessee, a partnership firm had transferred by way of lease, possession and enjoyment of machinery or plant to a third person. It was held that the grant of lease by itself would be covered by the expression “otherwise transferred for the purpose of Sections 33 and 34 of the Act”. The said decision, however, did not examine or answer whether a scheme of amalgamation or arrangement, has the effect of alienation of assets and can be treated as a transfer in the eyes of law. However, the said aspect is not *res integra* as per the affirmative pronouncements of the Supreme Court. Whether amalgamation results or constitutes transfer of assets was examined in some detail by this Court in *The Commissioner of Income Tax-II, New Delhi vs. Mira Exim Ltd.* (2013) 359 ITR 70 (Del), in the following manner:-

“9. ... Thus, we do not agree with the findings recorded by the tribunal that it is not a case of amalgamation; or merger and amalgamation are different or it is a case of purchase of business as a going concern and, therefore, different principles apply. In the present case, there was transfer, as merger or amalgamation results in transfer.

10. Term “merger or amalgamation” has no precise legal meaning but it involves blending of two or more existing undertaking into one. In case of merger, there is complete blending of the merged undertaking into the other company, but this does result in the transfer of the assets from the merged undertaking. Assets are acquired by the other undertaking. Upon merger, the earlier concern or undertaking loses its identity and the ownership in the asset. (see *Saraswati Industrial Syndicate Limited versus Commissioner of Income Tax*, [(1990) 186 ITR (SC)]. In *Hindustan Lever versus State of Maharashtra*, (2004) 9 SCC 438 expounding on the concept of amalgamation and whether it amounts to transfer, it was held as under:-



“9. Section 394 provides that application and order of amalgamation under Section 394 is based on compromise or arrangement which has been proposed for the purpose of amalgamation of two or more companies. The amalgamation scheme, which is an agreement between the companies is presented before the court and the court passes an appropriate order sanctioning the compromise or arrangement. The foundation or the basis for passing an order of amalgamation is agreement between two or more companies. Under the scheme of amalgamation, the whole or any part of the undertaking, properties or liability of any company concerned in the scheme is to be transferred to the other company. The company whose property is transferred would be the transferor company and the company to whom property is transferred would be considered as the transferee company. The scheme of amalgamation has its genesis in an agreement between the prescribed majority of shareholders and creditors of the transferor company with the prescribed majority of shareholders and creditors of the transferee company. The intended transfer is a voluntary act of the contracting parties. The transfer has all the trappings of a sale. The transfer is effected by an order of the court. The proposed compromise or arrangement is subject to verification by the court as provided therein. First is that the scheme of compromise or arrangement proposed for the purposes of amalgamation or in connection therewith, shall not be sanctioned unless the court has received a report from the Company Law Board or the Registrar that the affairs of the company have not been conducted in a manner prejudicial to the interest of its members or to public interest; and secondly, that the order of resolution of transfer of the company shall not be made unless official liquidator on scrutiny of the books and papers of the company makes a report to the court that the affairs of the company had not been conducted in a manner prejudicial to the interest of its members or to public interest.”

11. Similar view was taken earlier in the case of *Singer India Limited versus Chander Mohan Chadha*, (2004) 7 SCC 1 wherein the following extract from *Halsbury's Laws of England (4th Edn., Vol. 7) paragraph 1539* was quoted:-

“Amalgamation is a blending of two or more existing undertakings into one undertaking, the shareholders of each blending company becoming substantially the shareholders in the company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. Strictly



‘amalgamation’ does not, it seems, cover the mere acquisition by a company of the share capital of other companies which remain in existence and continue their undertakings, but the context to which the term is used may show that it is intended to include such an acquisition.

The question whether a winding up is for the purposes of reconstruction or amalgamation depends upon the whole of the circumstances of the winding up.”

12. In the case of *Singer India Limited* (supra), question arose whether upon amalgamation the tenancy rights were transferred and whether there was subletting. It was held that there was transfer and the tenancy or right to occupation of the transferor company got vested in the transferee company. Thus, there was subletting. The law on subletting under the Delhi Rent Control Act, 1958 did not make any exception in favour of a lessee, who may have adopted a course of action of amalgamation. Similar view has been taken in *Speedline Agencies versus T. Stanes & Company Limited*, (2010) 6 SCC 257.

13. In *Commissioner of Income Tax versus Mrs. Grace Collis*, (2001) 248 ITR 323 (SC) pursuant to scheme of arrangement, assets and liabilities of the amalgamating company became assets and liabilities of the amalgamated company. Shareholders of amalgamating company were issued shares of amalgamated company in lieu of the shares held by them in amalgamating company. The assessee had sold the shares of the amalgamated company and the question related to the purchase cost of the shares of the amalgamated company. The question raised was whether there was transfer within the meaning of Section 2(47), when an assessee acquired shares in the amalgamated company. It was observed by the Supreme Court that the definition of ‘transfer’ in Section 2(47) was wider and broader than even its ordinary, common and natural meaning. The word ‘transfer’ as defined in Section 2(47) includes extinguishment of any right and it was further observed that the said expression i.e. ‘extinguishment of any right’ would include extinguishment of a right in a capital asset, independent of and otherwise than on account of transfer.”

8. The aforesaid ratio is apposite and would negate the contention raised by the assessee and the finding recorded by the Tribunal to the contrary, that a scheme of arrangement or amalgamation would not result in transfer of the



assets from the earlier owner to the new or the amalgamated company. 'Transfer' in law upon amalgamation can take place. In Section 32A, the Legislature has not used the term 'sale', i.e. 'conveyance' alone, but consciously and deliberately used the expression 'otherwise transferred'. Unlike 1922 Act, the expression 'transfer' is now defined in sub-section (47) to Section 2 which specifically refers to sale, exchange, relinquishment, extinguishment of any right in an asset, compulsory acquisition, conversion by the owner of an asset into stock in trade etc. The term 'transfer' is defined in Section 2(47) of the Act is very broad and wide and goes much beyond the legal term 'sale'. Besides the aforesaid definition is inclusive definition and it would not be appropriate to give restrictive interpretation of a term of such wide denotation.

9. We have already quoted the expression 'transfer' as defined in relation to capital assets in Section 2(47), which refers to extinguishment of rights, which is a very broad and a wide approach. In these circumstances, we are unable to accept the submission of the assessee that the scheme of arrangement or reconstruction in the present case did not result in transfer of the 9 units of the assessee to the three newly formed companies. The said three companies were in fact separate juristic entities in law. The expression "otherwise transfer" according to us cannot be given a narrow meaning to exclude all transfers as a result of merger, amalgamation, etc.

10. The decision of the Supreme Court in *Malabar Fisheries Company versus CIT*, [1979] 120 ITR 49 (SC) is not applicable in the present factual matrix as it was a case of dissolution of a firm and a firm it is well known is not a juristic entity in law. We have also noticed the distinguishing features in the case of *Narang Dairy Products* (supra), but have held that in case of amalgamation or merger, the transfer in law can take place and, therefore,



the legislature had incorporated a saving and ameliorative provision in the form of sub-section (6) to Section 32A of the Act. Reliance placed on certain judgments under Chapter XX-C of the Act is not apposite as the said Chapter related to an entirely different concept of pre-emptive purchase to curtail black money menace in sale and purchase of immovable properties. In *Mustafa Umar versus Appropriate Authority*, [2001] 248 ITR 436 (Ker) the transfer was made by the owner to its 100% subsidiary company.

11. No doubt that Section 32A(5) of the Act is a negative provision, which may be penal, but when the legislative intention and requirement is clear in the form of sub-section (6), it would be difficult to ignore the legislative mandate and hold that amalgamation or merger would not result and constitute transfer within the expression “otherwise transfer” used in sub-section (5) to Section 32A of the Act.

12. However, the assessee, we feel is entitled to succeed on their alternative submission that the aforesaid arrangement is protected being covered under sub-section (6) to Section 32A. We may record that after arguments were heard on 2nd September, 2014, the appeal was re-listed for hearing on the said aspect on 8th September, 2014, when the counsel for the parties were heard on whether the scheme of arrangement would be covered under sub-section (6) to Section 32A of the Act. Accordingly, we deem it appropriate to frame the following additional substantial question of law:

“Whether the scheme of arrangement/reconstruction can be regarded as amalgamation and protected under sub-section (6) to Section 32A of the Income Tax Act, 1961?”

13. We have already quoted sub-section (6) to Section 32A, but at this stage would like to reproduce the term “amalgamation” as defined in Section 2(1B) of the Act (as on 1st April, 1990) which reads:-



“2. In this Act, unless the context otherwise requires,—

xxx

(1B) "amalgamation", in relation to companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company (the company or companies which so merge being referred to as the amalgamating company or companies and the company with which they merge or which is formed as a result of the merger, as the amalgamated company) in such a manner that—

(i) all the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation;

(ii) all the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company by virtue of the amalgamation;

(iii) shareholders holding not less than nine-tenths in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, or by a nominee for, the amalgamated company or its subsidiary) become shareholders of the amalgamated company by virtue of the amalgamation,

otherwise than as a result of the acquisition of the property of one company by another company pursuant to the purchase of such property by the other company or as a result of the distribution of such property to the other company after the winding up of the first-mentioned company;

xxx ”

14. The expression “demerger” is defined in Section 2(19AA) and was inserted by Finance Act, 1999 with effect from 1st April, 2000. Undoubtedly, in case the scheme of arrangement had been implemented with effect from 1st April, 2000, it would have been treated as a scheme of demerger. In the present case, as noticed above, the arrangement had been implemented and applied a decade earlier, as it was effective from 1st April, 1990. It can be argued with some merit and conviction that the Act did not move with the time to accommodate and deal with amalgamation of the nature which were taking place in the corporate world. However, we would not like to base our decision on the said submission/argument, albeit we



have used the said argument to interpret sub-section (6) to Section 32A the Act.

15. We have referred to the definition clause 2(1B) of the Act, which defines the term “amalgamation” in relation to companies to mean merger of one or more companies into another or merger of two or more companies into one. Section 2(1B), therefore, postulates extinction of the company upon merger with the amalgamated company. Clause (i) to Section 2(1B) states that all properties of an amalgamating company immediately before amalgamation should become properties of the amalgamated company and similarly the liabilities of the amalgamating company should become liabilities of the amalgamated company. There should be complete and absolute merger and integration of the amalgamating company with the amalgamated company. In clause (iii), shareholders not less than nine-tenth in value in the amalgamating company subject to certain other conditions, should become shareholders of the amalgamated company by virtue of amalgamation.

16. Section 2(1B) seeks to define the word ‘amalgamation’ for the purpose of the Act and the statutory definition stands enacted should be applied when interpreting the word in a section. However, this rule is subject to the qualification mentioned in the beginning of the definition section – “unless the context otherwise requires”. Repugnancy of the definition would be accepted if the statutory definition is not in agreement with the subject or context. Statutory definitions or abbreviations must necessarily be read subject to this qualification expressed in the definition clause itself. It is possible that the word defined in the definition clause could have a somewhat different meaning in different sections of the Act, depending upon the subject or context. Thus, the Legislature has prefixed



the qualifying words in Section 2. Therefore, one would ordinarily apply the definition clause but this is not inflexible rule and the definition clause can be departed from on account of subject or context in which the word is used in a particular section. In *Vanguard Fire and General Insurance Co. Ltd., Madras versus Fraser & Ross*, AIR 1960 SC 971, it was observed:

“It is well settled that all statutory definitions or abbreviations must be read subject to the qualification variously expressed in the definition clauses which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or the context. That is why all definitions in statutes generally begin with the qualifying words, similar to the words used in the present case, namely, ‘unless there is anything repugnant in the subject or context’. Therefore in finding out the meaning of the word "insurer" in various sections of the Act (Insurance Act, 1938), the meaning to be ordinarily given to it is that given in the definition clause. But this is not inflexible and there may be sections in the Act where the meaning may have to be departed from on account of the subject or context in which the word has been used and that will be giving effect to the opening sentence in the definition section, namely, ‘unless there is anything repugnant in the subject or context’. In view of this qualification, the court has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words under the circumstances.”

17. G.P. Singh in *Principles of Statutory Interpretation*, 13th Edition, 2012, at page 191 has discussed definition clauses and the effect of the “reference to the context” in the following words:-

“... And as recently stated by Lord Lowry: “If Parliament in a statutory enactment defines its terms (whether by enlarging or by restricting the ordinary meaning of a word or expression), it must intend that, in the absence of a clear indication to the contrary, those terms as defined shall govern what is proposed, authorised or done under or by reference to that enactment.” But where the context makes the definition given in the interpretation clause inapplicable, a defined word when used in the body of the statute may have to be given a meaning different from that



contained in the interpretation clause' all definitions given in an interpretation clause; all definitions given in an interpretation clause are therefore normally enacted subjected to the qualification – 'unless there is anything repugnant in the subject or context', or 'unless the context otherwise requires'. Even in the absence of an express qualification to that effect such a qualification is always implied. However, it is incumbent on those who contend that the definition given in the interpretation clause does not apply to a particular section to show that the context in fact so requires. An argument based on contrary context which will make the inclusive definition inapplicable to any provision in the Act cannot be accepted as it would make the definition entirely useless. Repugnancy of a definition arises only when the definition does not agree with the subject or context; any action not in conformity with the definition will not obviously make it repugnant to subject or context of the provision containing the term defined under which such action is purported to have been taken. When the application of the definition to a term in a provision containing that term makes it unworkable and *otiose*, it can be said that the definition is not applicable to that provision because of contrary context..."

18. The aforesaid observations and decisions are apposite and relevant when we minutely examine sub-sections (5) and (6) to Section 32A. Sub-section (5) to Section 32A fixates and makes pointed reference to allowance made under the said Section in respect of any ship, aircraft, machinery or plant. The allowance is deemed to be wrongly made if the aforesaid assets are sold or otherwise transferred at any time before expiry of eight years from the end of the previous year in which it was acquired or installed or at any time before expiry of ten years the amount credited to the reserve account is not utilized for the purposes of acquiring a new ship, aircraft, machinery or plant or is used for payment of dividend of profits or remittances out of India as profits or for creation of an asset outside India, etc. The core focus and convergence, therefore, is on the assets, namely, ship, aircraft, machinery or plant. The asset created should not be transferred and the reserve created should be used for purchase and installation of the said assets. Sub-section (6) refers to scheme of amalgamation and states that if the amalgamating company sells or otherwise transfers to the amalgamated company, ship, aircraft, machinery



or plant in respect of which investment allowance has been allowed to the amalgamating company, then the amalgamated company shall continue to fulfil the conditions mentioned in sub-section (4) in respect of unexpired lock-in period of sale/transfer or the reserve created by the amalgamating company and provisions of Section 4A of Section 155 shall apply to the amalgamated company as would have applied to the amalgamating company if it would have committed the default. The sub-section (6), therefore, talks of sale or otherwise transfer by the amalgamating to the amalgamated company of a ship, aircraft, machinery or plant. It does not speak and refer to any stipulation with regard to transfer of all properties or assets or liabilities of the amalgamating company being transferred to the amalgamated company. It does not speak of complete merger, extinction or absorption of the amalgamating company into the amalgamated company. Clause (b) of sub-section (6) stipulates that balance of investment allowance, if any, still standing to the amalgamating company in respect of such ship, aircraft or machinery shall be allowed to the amalgamated company in accordance with the provisions of sub-section (3) for the total period for which the balance investment allowance shall be carried forward. Clause (b) clearly supports the view that the amalgamating company need not extinguish or cease to exist pursuant to the scheme of amalgamation. Sub-Section (6) to Section 32A does not, therefore, refer to taking over of all assets and liabilities. In these circumstances, we do not think it would be appropriate and proper to fully apply Section 2(1B) of the Act, when we interpret sub-section (6) to Section 32A. The legislative intent of Sections 32A(5) and 32A(6) of the Act is to the contrary.

19. The word amalgamation is used in Sections 32A, 33(3), 33A(4) & (5), 34(3)(b), proviso, 35(5), 35A(6), 35D(5), 35DD, 35E(7), 41(2), 41(4) (Explanation 2), 43(1) (Explanation 7), 43(6) (Explanation 2), 43C, 47(vi)



and (vii), 49(1)(iii)(e), 49(2), 72A, and 72AA (some of the Sections sta deleted). Thus, the word ‘amalgamation’ finds mention in a number of sections. It may not have universal and similar meaning in all places where it occurs. While interpreting the said word in a particular provision, the language, the context and the purpose of the provision has to be given due recognition and kept in mind. A universal or broad brush application without reference to the context can result in interpretational error for it may negate the very purpose and objective of the Legislation in enacting a provision.

20. The reason for enacting sub-section (5) to Section 32A is to prevent instances of abuse of the concession of investment allowance. Investment allowance was allowed at the rate specified on the cost of acquisition of new machinery and plant installed after a particular date. To prevent abuse, the statutory requirement stipulated creation of a reserve and in case the reserve was not utilized for the purpose of acquiring new machinery or plant within the stipulated time, the investment allowance should be withdrawn. In this manner, the section ensured that an assessee engaged in priority industries adequately provided for renewal or renovation and, therefore, employment and industrial growth was not jeopardized. The stipulation provided stimulus to growth and modernization and reduced dependence of an assessee on financial institutions.

21. The purpose and object of providing limited umbrella protection under sub-sections (6) and (7) of Section 32A, shows the flexible and realistic approach in cases of business reorganization which normally are treated as tax neutral, unless there is ulterior motive of tax evasion, abusive tax avoidance or possibly even tax arbitrage. Thus, cases of business reorganization in the nature of amalgamation or conversion of partnership



firm into a company stand excluded from the effect of sub-section (5) Section 32A of the Act, provided the conditions of the relevant sub-sections are satisfied.

22. The expression ‘amalgamation’ does mean amalgamation of two or more companies which are merged into one. It has the effect of an arrangement by which one of the companies involved absorbs the business, all assets and liabilities of another with the latter being dissolved or in alternative two or more companies being absorbed into one company, formed for that purpose. (Refer *Heavy Head & Co. versus Ropre Holding Ltd.*, 1952 CH 154). Therefore, the term ‘amalgamation’ contemplates a state of things under which two companies are joined so as to form a third entity or one company is absorbed or blended with the other company. Amalgamating company, thereupon, loses its entity and ceases to exist. But there are instances or arrangements under which there is transfer of one or more undertakings to a new company or to another existing company. In these cases, the amalgamating company continues to exist and is not dissolved as it does not get fully merged. Such arrangements are also treated as amalgamation. *Halsbury’s Laws of England* (5th Edition, Volume 15, at p.700) reads as under:-

“1435. Meanings of ‘reconstruction’ and ‘amalgamation’.

Neither ‘reconstruction’ nor ‘amalgamation’ has precise legal meaning.

Where an undertaking is being carried on by a company and is in substance transferred, not to an outsider, but to another company consisting substantially of the same shareholders with a view to its being continued by the transferee company, there is reconstruction. It is nonetheless a reconstruction because all the assets do not pass to the new company, or all the shareholders of the transferor company are not shareholders in the transferee company, or the liabilities of the transferor company are not taken over by the transferee company.



Amalgamation is a blending of two or more existing undertakings into one undertaking, the shareholders of each blending company becoming substantially the shareholders in the company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. Strictly ‘amalgamation’ does not, it seems, cover the mere acquisition by a company of the share capital of other companies which remain in existence and continue their undertakings, but the context in which the term is used may show that it is intended to include such an acquisition.”

(emphasis supplied)

Such schemes are treated as scheme of reconstruction or reorganization or scheme of arrangement. The term ‘amalgamation’ as such is broad to include the said schemes. The term ‘amalgamation’, it has been observed, should not be given any definite legal meaning. Charlesworth similarly observes that neither the word “reconstruct” nor “amalgamation” has any definite legal meaning. A reconstruction is where a company transfers its assets to a new company with substantially the same shareholding. Both, a reconstruction and amalgamation are permissible under the Companies’ law. Section 391 read with Section 394 state that a scheme may take a form of ‘arrangement’ or ‘reconstruction’. They are akin and would broadly fall and treated as amalgamation.

23. Thus, amalgamation as a term can include transfer of one or more undertakings to another company without really blending of one or more existing companies into the transferee/amalgamated company. All assets of the transferor/amalgamating company need not be transferred to the new or other company. The purpose and objective behind sub-section (6) to Section 32A is to facilitate reconstruction and amalgamation and not to obstruct genuine transactions of such nature. The emphasis in sub-section (6) to Section 32A is on sale or transfer of the ship, aircraft, machinery or plant, subject matter of investment allowance in connection with amalgamation or



reconstruction. There is also reference to reserves. The emphasis in sub-section (6) is not upon the blending or merger of the existing company, which has availed of benefit under Section 32A into another or new company. At the same time, appropriate and required conditions have been incorporated in sub-section (6) to Section 32A to ensure that there is no abuse of the conditions applicable to the amalgamating company, both with regard to the reserve and the time stipulation on sale or ‘otherwise transfer’ of assets is applied and adhered to. Violation thereof would cause and result in negative and penal consequences.

24. There is another way of looking sub-section (6) to Section 32A as it uses the expression “in a scheme of amalgamation”. The expression “scheme of amalgamation” can be interpreted as is commercially and legally understood in terms of Sections 391 to 394 of the Companies Act, 1956. Section 394 of the Companies Act, 1956 in the heading uses the phrase “provisions for facilitating reconstruction and amalgamation of companies”. Under Section 394(1)(b), the Legislature besets and includes a scheme which refers to transfer of whole or part of an undertaking, property or liabilities of a company concerned between the transferor/amalgamating and the transferee/amalgamated company. In such cases, the scheme would not generally involve winding up or dissolution of the transferor/amalgamating company.

25. Thus, a defined term would not apply if a contrary intention appears from a provision of the Act. Further, a contrary intention may apply only to a part of the definition and not the whole. There could be restricted application of the definition clause (see Francis Bennion, *Interpretation of Statutes*, Third Edition, at page 433 Section 199, Statutory definitions, paragraphs 3 and 4). The said text also states that whatever meaning may be



expressly attached to a term, it is important to realise that its dictionary meaning is likely to exercise some influence over the way the definition will be understood by the Court. It may not be possible to cancel the ingrained emotion of a word merely by an announcement. Therefore, it is possible that the term defined in the definition provisions of the Act may have a different meaning even, when used within the same Act. In *R versus Lynsey*, (1995) 3 All England Reporter 654, it was observed:-

“ ... The interpreter needs to remember that drafters are fallible. ‘In stipulating a meaning for a word, a writer demands that his reader shall understand the word in that sense whenever it occurs in that work. The writer thereby lays upon himself the duty of using the word only in that sense, and tacitly promises to do so, and tacitly prophesies that he will do so. But sometimes a writer does not use the word only in the sense he has stipulated.’”

26. In *NWL Limited versus Woods*, (1979) 1 WLR 294, Lord Scarman had observed:-

“It is wrong to attempt to construe any section or subsection of these Acts without reference to their legislative purpose. And it is also necessary to have regard to the history of the statute law and the case law since 1906 for a full understanding of them. This history I would summarise as a shifting pattern of Parliamentary assertions and judicial responses, a legal point counterpoint which has been more productive of excitement than of harmony. The judges have been, understandably, reluctant to abandon common law and equitable principles, unless unambiguously told to do so by statute. Parliament has created ambiguity not through any lack of drafting skill but by its own changes of mind.”

The words are not deployed in vacuum, but in the context of their setting and to help the interpreter to arrive at the meaning intended.

27. There is another reason why we feel that this interpretation given to sub-section (6) to Section 32A of the Act. In the present case, 9 out of 13 undertakings of the respondent assessee were taken over by the three new companies, while the earlier company, i.e. the present assessee, continues to exist. The case set up by the Revenue is that in case assessee had ceased to



exist and had merged, conditions mentioned in Section 2(1B) of the A would be satisfied. In other words, in case the scheme of arrangement had postulated creation of a fourth company to which four units which continued to remain with the respondent-assessee had been transferred, requirement of Section 2(1B) of the Act would have been satisfied. Thus, it is a matter of not selecting a correct taxable event, possibly due to inability and lack of foresight in comprehending the objection that could be raised. This would not be in consonance with the object, aim and purpose behind Sub-Section (6) to Section 32A of the Act. In our decision in ITA No.41 of 2002, dated 22nd December, 2014, titled *Commissioner of Income Tax versus Shiv Raj Gupta*, we have held:-

“50. The assessed is well within his right to choose any one event 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 payer 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.”

28. The submission of the Revenue that the assessee was not covered by Section 2(1B), we feel in the context of Section 32A and specially sub-section (6) thereof, should not be accepted because it does not promote the object, aim and purpose behind Section 32A and the restriction or the bar created in sub-section (5) and the exception which has been carved out in sub-section (6). The object and purpose of the provision as is discernible is to promote and encourage industrialization. The restriction of the sale or transfer is to ensure that an assessee who avails of investment allowance does not sell or otherwise transfer the plant and equipment after obtaining tax benefit as it would be contrary to the intention and the purpose behind the enactment of the Section. Sub-section (6) is an exception to sub-section (5) as the legislature did not want to obstruct and withdraw benefit of investment allowance in cases of genuine arrangements required and necessary for business and commercial expediency and good reasons. The intention was not to control and put unnecessary fetters on the manner and method of conducting business but to ensure that the investment allowance provisions are not misused by first claiming tax benefit and then selling or transferring the plant and machinery. The legislature also intended that the amalgamated company must be bound by the terms and conditions, which were applicable to the amalgamating company even when there was transfer or sale of the relevant asset. In this context, we would like to reproduce a passage from *CIT versus Podar Cement (P) Ltd*, [1997] 226 ITR 625 wherein while interpreting the word “owner” in the context of Section 22 of the Act the principle of updating construction of words used in the statute was expounded in the following words:-



“In State (*Through CBI/New Delhi*) v. S. J. Choudhary, AIR 1996 SC 1491, 1494; [1996] 2 SCC 428, this court has quoted the following passage with approval in support of updating construction (page 433 of [1996] 2 SCC):

“*Statutory Interpretation* by Francis Bennion, 2nd edn. Section 288 with the heading ‘Presumption that updating construction to be given’ states one of the rules thus (page 617):

(2) It is presumed that Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed (an updating construction). While it remains law, it is to be treated as always speaking. This means that in its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law.

In the comments that follow it is pointed out that an ongoing Act is taken to be always speaking. It is also, further, stated thus (pp. 618-19):

‘In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the true original intention. Accordingly the interpreter is to make allowances for any relevant changes that have occurred, since the Act’s passing, in law, social conditions, technology, the meaning of words, and other matters. Just as the US Constitution is regarded as “a living Constitution”, so an ongoing British Act is regarded as “a living Act”. That today’s construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will try to foresee the future, and allow for it in the wording.

An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials’.”

(emphasis supplied)



29. The principle of updating construction is premised on the doctrine that Acts are always speaking and are intended to apply over a period of time. There is, therefore, need to interpret and construct them with reference to contemporary understanding. The construction should be continuously updated to allow for changes, after the Act was written. This would be an intention of the Legislature, as it is not expected that the Legislature will intervene every now and then, when the Act is intended to apply over a long time. The Act is a living Act and not a relic. Therefore, it may not be true and correct that the language of statute must always be understood in the sense it was understood when it was passed.

30. Referring to the principle of purposive construction to meet the ends of justice, G.P. Singh in *Principles of Statutory Interpretation* at page 127 had stated:-

“In the context of purposive construction Sinha J.* recommends: “To interpret a statute in a reasonable manner the court must place itself in the chair of a reasonable legislator/author. So done the rules of purposive construction have to be resorted to which would require the construction of the Act in such a manner as to see that the object of the Act is fulfilled.” He then quotes a passage from Barak from his work on Purposive Construction which refers to two elements of objectivity in the process of construction as introduced by Hart and Sachs: “first the interpreter should assume that the legislature is composed of reasonable people seeking to achieve reasonable goals in a reasonable manner; and second the interpreter should accept the non-rebuttable presumption that members of the legislative body sought to fulfill their constitutional duties in good faith. This formulation allows the interpreter to inquire not into the subjective intent of the author, but rather the intent the author would have had, had he or she acted reasonably.””

(emphasis supplied)

(*in *New India Assurance Co. Ltd v. Nusli Nerille Wadia*, (2008) SCC 279, para 51)

31. The Supreme Court in *K.P. Verghese versus ITO* [1981] 131 ITR 597 while adjudicating on the scope of Section 52(2) of the Act relating



under-statement of consideration received on transfer a capital asset
elaborated on purposive construction in the following words:-

“The task of interpretation of a statutory enactment is not a mechanical task. It is more than a mere reading of mathematical formulae because few words possess the precision of mathematical symbols. It is an attempt to discover the intent of the Legislature from the language used by it and it must always be remembered that language is at best an imperfect instrument for the expression of human thought and, as pointed out by Lord Denning, it would be idle to expect every statutory provision to be "drafted with divine prescience and perfect clarity". We can do no better than repeat the famous words of judge Learned Hand when he said:

“ ... it is true that the words used, even in their literal sense, are the primary and ordinarily the most reliable source of interpreting the meaning of any writing: be it a statute, a contract or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.”

We must not adopt a strictly literal interpretation of s. 52, sub-s. (2), but we must construe its language having regard to the object and purpose which the Legislature had in view in enacting that provision and in the context of the setting in which it occurs. We cannot ignore the context and the collocation of the provisions in which s. 52, sub-s. (2), appears, because, as pointed out by judge Learned Hand in the most felicitous language:

“... the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create.” ”

32. Therefore, when we examine, read and interpret sub-section (6) to Section 32A, we do not think that it would be proper to assert and hold that the legislature intentionally kept out schemes of part merger from the protection of Section 32A(6) of the Act. Sub-section (6) to Section 32A is broad enough and would include any scheme of merger provided the legislative stipulations in sub-section (6) are met. We do not think it is necessary and required under the sub-section (6) to Section 32A that the



amalgamating company should have been dissolved or fully merged. The expression “amalgamation” as understood in law and in common parlance is a very broad and a wide expression. It would include any type of corporate restructuring or reorganisation and is not restricted to only cases where the amalgamating company/companies get merged into another entity and cease to thereafter exist. It is not necessary that the scheme of amalgamation must postulate a complete merger of the company with assets and liabilities. Part or partial merger would equally be cases of amalgamation. It is in this context in the case of *Singer India Limited versus Chander Mohan Chadha*, (2004) 7 SCC 1, the aforesaid definition in *Halsbury’s Laws of England* has been accepted and quoted with approval. In the context of the sub-section (6), we think that the term “amalgamation” used was intended to include such amalgamations.

33. In paragraph 25 above, we have referred to Francis Bennion and observed that contrary intention may apply to part of the definition and not the whole. When we apply purposive interpretation for the benefit of the respondent-assessee, it is equally important to ensure that the assessee complies and does not negate the purpose of the Legislation, be it in the form of conditions stipulated in Section 2(1B) and specific stipulations of Section 32A sub-section (6). Conformity and fulfilment of conditions when applicable to cases of amalgamation have to be satisfied. Thus, the assessee should be able to show and establish that the liabilities associated with the plant, machinery, ship or aircraft were transferred to the amalgamated company by virtue of amalgamation (Clause (ii) of Section 2(1B) of the Act) as also the condition that the shareholders not holding less than nine-tenth in value of the shares (Clause (iii) of Section 2(1B) of the Act) was satisfied. Similarly, the stipulations of sub-section (6) to Section 32A must be met and satisfied. As these aspects have not been examined, we pass an



order of remit to the Tribunal to examine the said aspects. We would request the Tribunal to go into the said aspects and if facts are required to be clarified, ask the respondent-assessee to furnish relevant data and details and seek report from the Assessing Officer. Only if it is not possible on the basis of the said exercise to decipher and decide the correct factual position, appropriate orders for further remand may be passed. We have made this request as the present appeal pertains to Assessment Year 1990-91 and if possible, another round of litigation from the first stage should be avoided.

34. The substantial question of law framed on 24th September, 2002 is accordingly answered holding that there was transfer within the meaning of Section 32A(5) of the Act. The substantial question of law framed in paragraph 12 above is partly decided in favour of the respondent assessee and against the appellant Revenue. The assessee would be entitled to protection under sub-section (6) to Section 32A of the Act if the conditions specified in the said sub-section as well as clauses (ii) and (iii) of Section 2(1B) of the Act are satisfied. Stipulations under Section 32A(6) of the Act should also be satisfied. For examination of these two aspects, an order of remand is being passed. To cut short delay, the parties will appear before the Tribunal on 10th February, 2015, when a date of hearing will be fixed.

The appeals are accordingly disposed of. No costs.

(SANJIV KHANNA)
JUDGE

(V. KAMESWAR RAO)
JUDGE

DECEMBER 23rd, 2014
VKR/kkb/NA