*   **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+   **WRIT PETITION (CIVIL) No. 6752/2012**

Reserved on: 17th July, 2013
% **Date of Decision: 7th October, 2013**

CAIRN UK HOLDINGS LIMITED ....Petitioner
Through Mr. Shagun Parashar, Advocate.

Versus

DIRECTOR OF INCOME-TAX …Respondent
Through Mr. Abhishek Maratha, Sr. Standing Counsel and Ms. Anshul Sharma, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J.:

Cairn U.K. Holdings Limited questions order dated 1st August, 2011 passed by the Authority for Advance Rulings (AAR, in short).

2. Petitioner, a private limited company registered in Scotland, had earlier filed Special Leave Petition (Civil) No. 30343/2011 challenging the impugned order but vide order dated 30th July, 2012 the Supreme Court directed the petitioner to approach the High Court under Articles 226 and 227 of the Constitution of India. Thereafter, the present writ petition was filed.

3. Petitioner during the period relevant to the assessment year 2010-11 had transferred 4,36,00,000 equity shares of Rs.10/- each of

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Cairn India Limited to Petronas International Corporation Limited, Malaysia for consideration of US$ 241,426,379. This transaction dated 12th October, 2009, pursuant to an agreement dated 14th October, 2009, was an off market transaction i.e. not through a stock exchange. The transaction resulted in long-term capital gain of US$ 85,584,251 in the hands of the petitioner, after applying the benefit under first proviso to Section 48 of the Income Tax Act, 1961 (Act, for short). The question raised relates to the rate of tax applicable/payable on the long term capital gains earned.

4. On an application filed by the petitioner, AAR had framed the following question to be answered:-

> "Whether on the stated facts and in law, the tax payable on long term capital gains arisen to CUHL on sale of equity shares of CIL will be 10% of the amount of capital gains as per proviso to Section 112(1) of the Act?"

5. The case of the petitioner was that under proviso to Section 112(1) they are liable to pay lower rate of tax @ 10% on the said long-term capital gains. The case of the Revenue i.e. Director of Income Tax (International Taxation) was that the proviso to Section 112(1) of the Act was not applicable and, therefore, the petitioner was liable to pay tax @ 20% on the long-term capital gains.

6. AAR has accepted the plea and contention of the Revenue and has held that the proviso to Section 112(1) was not applicable and, therefore, the petitioner cannot avail the lower rate of tax @ 10% on capital gains. The reason and ratio applied was that for the proviso to

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Section 112(1) to apply, second proviso to Section 48 should be also applicable and as second proviso to Section 48 was excluded and was not applicable to the petitioner, benefit of lower rate of tax @10% was not available.

7. In order to decide the question, we are required to interpret Sections 48 and 112(1) of the Act. For the purpose of clarity and for understanding the controversy, the said Sections are reproduced below:

<u>Section 48</u>

> "48. Mode of computation.—The income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely:—
>
> (i) expenditure incurred wholly and exclusively in connection with such transfer;
>
> (ii) the cost of acquisition of the asset and the cost of any improvement thereto:
>
> Provided that in the case of an assessee, who is a non-resident, capital gains arising from the transfer of a capital asset being shares in, or debentures of, an Indian company shall be computed by converting the cost of acquisition, expenditure incurred wholly and exclusively in connection with such transfer and the full value of the consideration received or accruing as a result of the transfer of the capital asset into the same foreign currency as was initially utilised in the purchase of the shares or debentures, and the capital gains so computed is such foreign currency shall be reconverted into Indian currency, so, however, that the aforesaid manner of computation of capital gains shall be

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applicable in respect of capital gains accruing or arising from every reinvestment thereafter in, and sale of, shares in, or debentures of, an Indian company:

Provided further that where long-term capital gains arises from the transfer of a long-term capital asset, other than capital gain arising to a non-resident from the transfer of shares in, or debentures of, an Indian company referred to in the first proviso, the provisions of clause (ii) shall have effect as if for the words "cost of acquisition" and "cost of any improvement", the words "indexed cost of acquisition" and "indexed cost of any improvement" had respectively been substituted.

Provided also that nothing contained in the second proviso shall apply to the long-term capital gain arising from the transfer of a long-term capital asset being bond or debenture other than capital indexed bonds issued by the Government.

Provided also that where shares, debentures or warrants referred to in the proviso to clause (iii) of Section 47 are transferred under a gift or an irrevocable trust, the market value on the date of such transfer shall be deemed to be the full value of consideration received or accruing as a result of transfer for the purposes of this section.

Provided also that no deduction shall be allowed in computing the income chargeable under the head "Capital gains" in respect of any sum paid on account of securities transaction tax under Chapter VII of the Finance (No. 2) Act, 2004.

Explanation.—For the purposes of this section,—

(i) "foreign currency" and "Indian currency" shall have the meanings respectively assigned to them in Section 2 of the Foreign Exchange Regulation Act, 1973 (46 of 1973);

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(ii) the conversion of Indian currency into foreign currency and the reconversion of foreign currency into Indian currency shall be at the rate of exchange prescribed in this behalf;

(iii) "indexed cost of acquisition" means an amount which bears to the cost of acquisition the same proportion as Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the first year in which the asset was held by the assessee or for the year beginning on the 1st day of April, 1981, whichever is later;

(iv) "indexed cost of any improvement" means an amount which bears to the cost of improvement the same proportion as Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the year in which the improvement to the asset took place;

(v) "Cost Inflation Index", in relation to a previous year, means such Index as the Central Government may, having regard to seventy-five per cent of average rise in Consumer Price Index for urban non-manual employees for the immediately preceding previous year to such previous year, by notification in the Official Gazette, specify, in this behalf.

Section 112

112. Tax on long-term capital gains.—(1) Where the total income of an assessee includes any income, arising from the transfer of a long-term capital asset, which is chargeable under the head "Capital gains", the tax payable by the assessee on the total income shall be the aggregate of,—

(a) in the case of an individual or a Hindu undivided family 2[being a resident],—

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(i) the amount of income tax payable on the total income as reduced by the amount of such long-term capital gains, had the total income as so reduced been his total income; and

(ii) the amount of income tax calculated on such long-term capital gains at the rate of twenty per cent:

Provided that where the total income as reduced by such long-term capital gains is below the maximum amount which is not chargeable to income tax, then, such long-term capital gains shall be reduced by the amount by which the total income as so reduced falls short of the maximum amount which is not chargeable to income tax and the tax on the balance of such long-term capital gains shall be computed at the rate of twenty per cent;

(b) in the case of a [domestic company] —

(i) the amount of income tax payable on the total income as reduced by the amount of such long-term capital gains, had the total income as so reduced been its total income; and

(ii) the amount of income tax calculated on such long-term capital gains at the rate of 4[twenty per cent]:

(c) in the case of a non-resident (not being a company) or a foreign company,—

(i) the amount of income tax payable on the total income as reduced by the amount of such long-term capital gains, had the total income as so reduced been its total income; and

(ii) the amount of income tax calculated on long-term capital gains except where such gain arises from transfer of capital asset referred to in sub-clause (iii) at the rate of twenty per cent; and

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(iii) the amount of income tax on long-term capital gains arising from the transfer of a capital asset, being unlisted securities, calculated at the rate of ten per cent on the capital gains in respect of such asset as computed without giving effect to the first and second proviso to Section 48.

[(d)] in any other case of a resident—

(i) the amount of income tax payable on the total income as reduced by the amount of long-term capital gains, had the total income as so reduced been its total income; and

(ii) the amount of income tax calculated on such long-term capital gains at the rate of [twenty per cent];

Explanation.—

Provided that where the tax payable in respect of any income arising from the transfer of a long-term capital asset, [being listed securities or unit] [or zero coupon bond], exceeds ten per cent of the amount of capital gains before giving effect to the provisions of the second proviso to Section 48, then, such excess shall be ignored for the purpose of computing the tax payable by the assessee.

Explanation.—For the purposes of this sub-section,—

(a) the expression "securities" shall have the meaning assigned to it in clause (h) of Section 2 of the Securities Contracts (Regulation) Act, 1956 (32 of 1956);

(aa) "listed securities" means the securities which are listed on any recognised stock exchange in India;

(ab) "unlisted securities" means securities other than listed securities;

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(b) “unit” shall have the meaning assigned to it in clause (b) of Explanation to Section 115-AB.

8. As per Section 48, income chargeable under the head “capital gains” shall be calculated after deducting from the full value of consideration received or accruing, expenditure wholly and exclusively for the transfer in question plus the “cost of acquisition” of the asset and “cost of improvement” incurred.

9. First proviso to Section 48 applies to a non-resident, who has income by way of long term capital gains arising from transfer of a capital asset being shares or debentures of an Indian company, when the shares and debentures were acquired/purchased by conversion of foreign currency into Indian rupee (i.e. purchase price). In such cases capital gains is computed on reconversion of Indian rupee into the same foreign currency (i.e. sale price). The first proviso neutralizes exchange rate fluctuation in case the shares or debentures were purchased by a non-resident in foreign currency, which was converted.

10. The second proviso to Section 48 stipulates that where long-term capital gains results from transfer of a long-term capital asset, the words “cost of acquisition” and “cost of improvement” will be read as “index cost of acquisition” and “index cost of improvement”, respectively. The “index cost of acquisition” and “index cost of improvement” have been defined in the explanation to mean the amount calculated as provided by taking into consideration cost inflation index. The second proviso tends to neutralize the gain as a result of inflation, to ensure that the true gain or increase in capital value is tax and the gain as a result of inflation is not taxed. However, second proviso is not applicable to non-resident on transfer of shares or

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debentures of Indian company, referred to in the first proviso of Section 48. Thus, a non-resident, who is entitled to take benefit of the first proviso, i.e., neutralization of exchange rate fluctuation, cannot take benefit of "index cost of acquisition" or "index cost of improvement".

11. The third proviso to Section 48 stipulates that the second proviso will not apply when long-term capital gain arises from transfer of a bond or debenture, other than capital index bonds issued by the Government.

12. Section 112(1) as the heading suggests, deals with rate of tax payable on the long-term capital gains. In case of a non-resident, sub-clause (c) to Section 112(1) applies. As per clause (c), income tax is calculated on long-term capital gains @ 20%.

13. Proviso to Section 112(1), however, gives a beneficial option to taxpayers on transfer of long-term capital asset being listed securities, units or zero per cent coupon bonds. They are liable to pay tax @ 10% on the amount of capital gains, but before giving effect to the provisions to the second proviso of Section 48, i.e., the assessee have the option to pay tax @ 10% without benefit of inflation indexation. Tax @ 10% is payable on the consideration received, less the expenditure wholly and exclusively incurred on the transfer, and the cost of acquisition and cost of improvement.

14. The petitioner submits that they are covered by the proviso to Section 112(1) as they are not taking benefit of indexation under the second proviso to Section 48. The assets sold by them were shares listed on the Bombay Stock Exchange and National Stock Exchange.

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This satisfies the statutory requirement of assets to be listed securities. The proviso nowhere stipulates that if an assessee takes benefit of first proviso to Section 48, the proviso to Section 112(1) is not applicable. Neither does the language postulate that an assessee must be entitled to benefit of the second proviso to Section 48 and only when the said proviso is applicable but not applied, that an assessee can get benefit under proviso to Section 112(1) of the Act. Language of the provisions is clear and unambiguous. It is submitted that the view of the petitioner was repeatedly accepted and followed by the AAR at least in six prior cases before the present decision and even in one decision after the present decision. Our attention was drawn to the decision dated 1st October, 2007 in ***Timken France SAS, In re*** reported in (2007) 294 ITR 513 (AAR).

15. Learned Senior Standing Counsel for the Revenue, on the other hand, has placed reliance on the impugned order and the reasoning given therein. Second proviso to Section 48 should be applicable to an assessee before proviso to Section 112(1) could be applied. This was implicit from the provisions, when read together and from the purpose and intention behind the provisions.

16. The impugned decision dated 1st August, 2011 and the earlier decision of the AAR in ***Timken France SAS*** (supra) cannot be reconciled and are diametrically opposite. We have to decide which of the two legal findings and ratio is correct. This is a classic case where provisions have been interpreted with operatic opposite conclusions by applying two different principles of interpretation to enunciate and propound the legislative intent. In the case in hand contextual or purposive interpretation principle has been adopted, whereas in the

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earlier decision of ***Timken France SAS, In re*** (supra), literal interpretation rule was applied and contextual interpretation, it was held, should not be adopted because the purpose itself was ambiguous. It has also been observed that contextual interpretation put forward by the Revenue was faulty and misconceived.

17. In ***Timken France SAS, In re*** (supra), the reasoning of AAR can be crystallized as under:

(i) The proviso was applicable to the entire sub-section (1) to Section 112 and was not a proviso to clause (d) only. It would be irrelevant and incongruous to read or treat the proviso as applicable to clause (d) only. (This finding stands accepted by AAR in the impugned order).

(ii) Proviso to Section 112(1) applies to all assessees and was not restricted to resident assessees. There was no such express stipulation in the proviso itself. The words used in the proviso were plain and preemptory. While interpreting them we should not travel beyond what was stated and specified. The proviso limits the rate of tax on the gains on transfer of listed securities to 10% but with an important rider that the quantum of capital gains should be arrived at without taking into account indexation in the second proviso to Section 48. The Legislature has not stated that reduced rate of tax would not be applicable to an assessee who takes benefit of the first proviso. The words were not exclusionary.

(iii) In case the legislative intent was different, it could have been spelt out and clearly stated in the proviso to Section 112(1).

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(iv) Eligibility to avail benefit of indexed cost of requisition (under second proviso to Section 48) was not *sine qua non* for applying the reduced rate of 10% prescribed by proviso to Section 112(1).

(v) Contention of the Revenue that the purposive construction should be adopted having regard to the object of the provision, was rejected by referring to:-

(a) Paragraph 41 of the explanatory notes of the Finance Act, 1999 and emphasis was laid on the words "all assessees" paragraph 41. Proviso to Section 112(1) was not intended to maintain distinction between resident and non-resident assessees.

(b) Reason behind insertion of first proviso to Section 48 was discernible from the explanatory notes on the Direct Tax Laws (Second Amendment) Act, 1989 incorporated in Circular No. 554 dated 13th February, 1990. It protects non-residents, who invest in shares and debentures by utilizing foreign currency, from adverse effect of fall in the rupee value vis-à-vis the foreign currency. The second provision was conceived as a measure offsetting the effect of inflation, (vide circular No. 636 dated 31st August, 1992) by giving benefit of indexation. Paragraph 35.3 of the circular No. 636 dated 31st August, 1992, states that as protection from fluctuation of rupee value in terms of foreign currency, ensures protection from inflation, benefit of indexation was not available to non-residents who avail the concession under the first proviso of section 48, but the said reason or

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explanations were not indicative of clear legislative intent to deny benefit under the proviso to Section 112(1). This reason was not unequivocal or clear enough to highlight any rationale of extending or not extending the benefit of reduced rate of tax under proviso to Section 112(1).

(c) Contention based on double benefit or additional relief was rejected on the ground that it was not a taboo. Exchange rate or rupee value fluctuation benefit cannot be a ground not to allow non-residents to benefit of reduced rate of tax applicable to residents.

(d) Proviso to Section 112(1) was introduced by Finance Act, 1999 w.e.f. 1st April, 2000. Prior to insertion, long term capital gains was payable under Section 112(1) at uniform rate of 20%. However, certain categories of non-residents viz. foreign institution investors were entitled to benefit of lesser rate of tax of 10% vide Section 115AD. Proviso was enacted with a view to provide minimum rate of tax of 10% on long term capital gains in respect of listed securities. Later on two more items, 'units' and 'zero bond coupons' were added.

(e) The proviso to Section 112(1) was applicable to listed securities, units and zero coupon bonds which were included by Finance Act 2000 and 2005. The third proviso to Section 48 introduced by Finance 1997 ordains that nothing contained in the second proviso shall apply to the transfer of long term capital asset being bond or debenture other than capital indexed bonds. The third proviso, therefore, restricts

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or excludes benefits of the second proviso. Zero-coupon bonds were not eligible for benefit of indexation under second proviso to Section 48 in view of the third proviso. If the contention of the Revenue was accepted, zero coupon bonds would also be excluded from the purview of benefit of 10% rate of tax stipulated under Section 112(1), thus, leading to conflict between two sections, a prescription and self-effacing exercise. This illogical interpretation should not be accepted.

(f) Debentures or securities listed on a stock exchange fall within the domain or proviso to Section 112(1). In view of the third proviso to Section 48 benefit of indexation does not apply to debentures. Again if Revenue's interpretation was accepted, a resident assessee would have to pay 20% long term capital gain tax on transfer of debenture because second proviso to Section 48 was not a applicable to debentures.

18. AAR in the present or the impugned order has given the following reasoning:

1. It is the duty of the court to give effect to the intention of the Legislature. Intention has to be gathered from the language employed but when liberal construction leads to unreasonable results, reference should be made to the object and purpose of the provision.

2. The two Sections i.e. Section 48 and 112(1) of the Act have to be read together.

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3. Proviso to Section 112(1) of the Act uses the word "exceeds" and only the excess amount over and above 10% capital gains has to be ignored. Addition of the word "and" in the proviso shall integrate the two parts of the proviso i.e. "the tax payable in respect of any income arising from – and 10% of the amount of capital gains before giving effect to the provisions of second proviso to Section 48 – such excess could be ignored for the purpose of calculation of tax". Therefore, for the proviso of section 112(1) to apply, the second proviso to Section 48 of the Act should be also applicable and only then the amount of tax could be determined in excess of 10%. The exact reasoning given in paragraph 24 of the impugned order reads:

> "24. The importance of the word **'exceeds'** occurring between the two phrases in the above proviso:
>
> > "where the tax payable in respect of any income arising from the transfer of a long terms capital asset being listed
> >
> > **and**
> >
> > "ten per cent of the amount of capital gains before giving effect to the provisions of the second proviso to section 48"
>
> Means integration of the two limbs of the proviso. The proviso would stand to nullity if read in isolation. Again at the end of the two phrases, the phrase used is :
>
> > "such excess shall be ignored for the purpose of computing the tax payable by the assessee."
>
> The application of the proviso can thus be understood in the following manner:
>
> **A.** Determine the tax payable on the capital gains arising from the transfer of long-term

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capital asset on the income computed as per section 48 of the Act.

B. Determine 10% of the capital gains arising from the transfer of long-term capital asset without giving effect to the provisions of 2nd proviso to section 48 of the Act. [**10% of the capital gains = 10% (full value of consideration – cost of purchase including cost of improvement, if any)**

then,

If the value of **A** is greater than **B,** ignore the excess

Like is thus compared with the likes, observing the principles of equality amongst the equals in legislating the above proviso."

4. The reduced rate of 10% tax on the amount of capital gains before giving effect to the provisions of second proviso to Section 48 was a second limb and when read distinctively it means 10% of the full value of consideration less cost of purchase including cost of improvement, if any. This interpretation will result in equality i.e. residents and non-residents should be treated alike. There should be level playing field.

5. "Before giving effect to" the words used in proviso to Section 112(1) connotes that the effect and benefit under the said provision could otherwise have been given. The asset of the assessee should qualify and should be entitled to indexation under the second proviso to Section 48 of the Act. Proviso to Section 112(1) applies when the gains on the transfer of the capital asset could be computed by applying second proviso of Section 48 of the Act. Second proviso of the Section 48 of the Act was inapplicable to non-residents covered by the first proviso.

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6. As a result of first and second proviso resident and non-resident assessees were allowed computation of capital gains on the basis of indexation i.e. on the basis of exchange rate fluctuation in the case of non-residents and inflation in the case of residents.

7. There was no dichotomy in the proviso to Section 112(1) and third proviso to Section 48. Third proviso to Section 48 restricts benefit of indexation to such assets owned by a person. It does not apply to non-residents who come under first proviso to Section 48.

8. Under Section 115AC(3) and 115AD(3) of the Act specify that non-resident assessees were allowed benefit of lower rate of tax @ 10% but the benefit under second proviso to Section 48 was not available to them while calculating amount of income tax on incomes from of long term capital gains.

19. Having considered the two provisions i.e. Section 48 and Section 112(1) of the Act, the reasoning given in the case of the petitioner and in ***Timken France SAS*** (Supra), we are inclined to accept the legal position approved and accepted in ***Timken France SAS.*** Our reasons are elucidated below.

20. Language of proviso to Section 112(1) syntactically and grammatically mandates one interpretation. If one squarely focuses and orates the words used in the proviso and interprets them without extracting or subtracting any phrase or word, a non-resident assessee is entitled to benefit of the said provision. The proviso to Section 112(1) of the Act does not state that an assessee, who avails benefits of the first proviso to Section 48, is not entitled to benefit of lower rate of tax

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@ 10%. The said benefit cannot be denied because the second proviso to Section 48 is not applicable. The stipulation for taking advantage of the proviso to Section 112(1) is that the aggregate of long-term capital gains to the extent it exceeds 10% of the amount of capital gains, should be before giving effect to the provisions of second proviso to Section 48. Inflation indexation shall be ignored. In case the Legislature wanted to deny the said advantage/benefit where the assessee had taken benefit of the first proviso to Section 48, it was easy and this would have been specifically stipulated, that an assessee, who takes advantage of neutralization of exchange rate fluctuation under the first proviso to Section 48 would not be entitled to pay lower rate of tax @10%. Legislature had a far easier and simpler way to deny benefit of the proviso to Section 112(1) by using different words and phrases had thus been the intention. The legislature in fact did not intend to deny the said benefit.

21. In Section 115AD(3) it is noticeably stipulated that nothing contained in the first and second proviso to Section 48 shall apply to transfer of securities and capital gains referred to in sub-section 1(b) of the said section.

22. High Court of Andhra Pradesh in their recent decision in W.P.(C) 14212/2010, ***Sanofi Pasteur Holding SA Vs. Department of Revenue*** has lucidly observed and laid down the following principles:-

> "We notice and have endeavored to conform to principles of statutory construction, relevant to the lis before us. We are conscious that the democratic integrity of law, depends entirely upon the degree to which its processes are legitimate and as Judge Robert H. Bork cautioned, a judge who announces a

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decision must be able to demonstrate that he began from recognized legal principles and reasoned in an intellectually coherent and politically neutral way to his result; and that the desire to do justice, whose nature seems to him obvious, is compelling while the concept of the legal process is abstract, the signals occasionally ambivalent and the abstinence it counsels (from encroaching into the realm of other organs of Government) unsatisfying. We are also conscious of Cardozo's stately admonition, more appropriate to pursuing the interpretive role in adjudication; and that choice of appropriate interpretive principles is a hermeneutic choice not a political or a policy choice. The relevant principles:

(i) The task of interpretation is to arrive at the legal meaning of an enactment. This is not necessarily the same as its grammatical meaning. Salmond observed: the object of interpreting a statute is to ascertain the intention of the legislature enacting it;

(ii) The grammatical meaning of an enactment is its linguistic meaning taken in isolation from legal considerations, i.e., the meaning it bears when, as a piece of English prose, it is construed according to the rules and usages of grammar, syntax and punctuation (the verbal formulae) and the accepted linguistic canons of construction. An enactment is grammatically ambiguous where grammatically capable of more than one meaning. A modern statement of the nuanced principle on this aspect is clear from the following passage in the speech of Lord Simon of Glaisdale: Suthendran v. Immigration Appeal Tribunal :

Parliament is prima facie to be credited with meaning what is said in an Act of Parliament. The drafting of

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statues, so important to a people who hope to live under the rule of law, will never be satisfactory unless courts seek whenever possible to apply 'the golden rule' of construction, that is to read the statutory language, grammatically and terminologically, in the ordinary and primary sense which it bears in its context, without omission or addition. Of course, Parliament is to be credited with good sense; so that when such an approach produces injustice, absurdity, contradiction or stultification of statutory objective the language may be modified sufficiently to avoid such disadvantage, though no further, a passage quoted with approval in Harbhajan Singh v. Press Council of India;

(iii) Identifying the legal meaning of an enactment from its grammatical meaning requires an informed interpretation, which according to the rule propounded by Oliver, LJ, in relation to taxing statutes in - Wicks v. Firth (Inspector of Taxes), is however of general application. The formulation reads: accepting once more that the subject is not to be taxed except by clear words, the words must, nevertheless, be construed in the context of the provisions in which they appear and of the intention patently discernible on the face of those provisions from the words used;

(iv) Where, in relation to the facts of a given case, the enactment is grammatically ambiguous, the legal meaning is the one to which on balance of factors arising from the relevant interpretative criteria accord the greater weight;

(v) Ambiguity could be semantic, syntactical or contextual. The latter is where there is a conflict between the enactment and its internal or external

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context. Thus, where there are two possible grammatical meanings of the enactment in relation to its internal or external context, it is ambiguous;

(vi) Grammatical ambiguity in the above sense could be general or relative, the latter when it is ambiguous only in relation to certain facts;

(vii) In a case of relative ambiguity the facts must be brought into the equation;

(viii) The unit of interpretation is not merely the subset of the relevant provision falling to be construed, the provision itself or the generic enactment in which it occurs but the whole universe of applicable and relevant legal rules of which the enactment is a part;"

23. Courts are bestowed with the power to interpret Legislation and decide what is the Legislative intent behind a provision. The court declares the legal meaning of what is intended by the Legislature. There is difference between legal meaning and literal meaning which is equivalent to grammatical or linguistic meaning. Normally, the legal meaning of an enactment corresponds to the grammatical meaning. Linguistic or grammatical interpretation means, the meaning as the word bears when construed according to rules and usages of grammar, syntax, punctuation and linguistic canons of construction. Legal meaning does not mean ignoring rational reasoning but accepts that the legislative intent is best stated in the words used. The words reflect the legislative intent and the court should not enact or create Legislation by adding or subtracting words to the provision. Nevertheless the courts have accepted another principle of

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interpretation, contextual or purposive interpretation which may ignore the literal meaning when one or more of the following tests are satisfied:

(i) Semantic and syntactic ambiguity is apparent and therefore, the Legislation grammatically is capable of more than one meaning;

(ii) There is contextual ambiguity which can be internal or external in nature in the following manner:

(a) There is an error in the text which falsifies Parliament's intent;

(b) There is repugnancy between the word of the enactment and another enactment resulting in ambiguity.

(c) Consequences of literal construction are so undesirable that the Legislature could not have intended the said consequences.

(d) Passage of time since the enactment, would justify contemporaneous construction, as verbal texts do not get frozen in time.

(Refer Bennion on Statutory Interpretation, fifth edition).

24. Blackstone has written "In general law all cases cannot be foreseen, or if foreseen cannot be expressed: some will arise that will fall within the meaning, though not within the words of the Legislation,

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and others which may fall within the letter may be contrary to the meaning, though not expressly expected. These cases thus out of the letter, are often said to be within the equity of an act of Parliament, so cases within the letter are often out of the equity."

25. The above principles elucidate that literal meaning of the provision carry weight but Judges and interpreters recognize that some cases justify another interpretational criterion. However, the textual ambiguity should not be presumed on the basis of apriori ideas or thinking as to the Legislative intent or readily accepting the argument of fallible drafter. Court should not doubt the grammatical meaning merely on conjecture or fanciful reasoning to hold that doubt or ambiguity is real and substantial. Hairsplitting and unduly recondite arguments have to be rejected. The rule laid down by Oliver LJ in relation to taxing statute is "that the subject is not to be taxed except by clear words, the words must, nevertheless, be construed in the context of the provisions in which they appear and of the intention patently discernible on the face of those provisions from the words used". [see ***Wicks Vs. Firth (Inspector of Taxes***, 1982 Ch.355)] .

26. From the reasoning given in the impugned order, it is apparent that contextual and purposive interpretation has been adopted mainly on the following grounds; non-resident under the first proviso to Section 48 are entitled to neutralize exchange rate fluctuation for computing long-term capital gains, when the shares/derivatives were purchased utilising foreign currency. The second proviso is not applicable to non-residents covered by the first proviso and entitles an assessee to claim benefit of indexation while computing long-term capital gains. Thus the second proviso to Section 48 has object of

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neutralizing the effect of inflation. Proviso to Section 112(1) is certainly not applicable in case where an assessee is entitled to benefit of indexation under the second proviso to Section 48. If an assessee does not take benefit of indexation under the second proviso of section 48, they are eligible for the lower rate of tax @10%. Otherwise, an assessee is liable to pay tax @ 20% after taking benefit of indexation. If an assessee covered by the first proviso to Section 48 is allowed benefit of the proviso to Section 112(1), two consequences flow: (i) a non-resident becomes entitled to two or double deductions. Firstly, under the first proviso to Section 48 and then benefit of lower rate of tax under the proviso to Section 112(1); and (ii) this interpretation would discriminate between the assessees covered by the first proviso and those covered by the second proviso to Section 48.

27. Similar contention was raised on behalf of the Revenue in the case of ***Timken France SAS*** (supra) but was rejected observing that the circular of the Central Board of Direct Taxes or explanatory memoranda were not equivocal and clear enough to throw light on the rationale of extending or not extending the benefit of reduced rate of tax in terms of the proviso to Section 112(1). The expression 'level playing field' was flexible and capable of being understood in more than one way. The argument of double benefit was not a taboo under law and protection against exchange rate fluctuation under the first proviso to Section 48 does not go against the concept of lower rate of tax. It has been further observed that enquiry to delve into legislative intent and purpose would be a hazardous guess.

28. Argument of the Revenue on the surface is plausible, but on deeper scrutiny, we do not think that contextual interpretation

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underscoring contention of the Revenue is applicable and the contention or plea is in fact reflective of the true intention of the legislature.

29. First proviso to Section 48 is applicable when a non-resident had purchased an asset being a share or debenture with foreign currency, converted into Indian rupee. It stipulates that on transfer or sale of the said share or debenture the consideration received in Indian rupee should be reconverted into the same foreign currency. Sale and purchase of shares has to be in Indian rupee, the legal tender in India, but the foreign investor had brought in foreign currency and, therefore, logically and naturally for him, the gain should be computed in foreign currency. The said investor would like to convert the sale consideration received in Indian rupee into foreign currency. This would reflect the true gain or income earned. For a non-resident who has utilized/brought in foreign currency for purchase of shares or debentures in Indian rupee, inflation in India is immaterial and inconsequential. For him, the gain or loss is to be computed with reference to the foreign currency utilized for purchase and foreign currency available to him for repatriation after the sale. From the said assessee's view point and objective, he is most concerned with exchange rate fluctuation and his true and actual gain should take into account the exchange rate fluctuation. The second proviso is applicable to all others including non-residents, who are not covered by the first proviso and they are entitled to benefit of cost of indexation which neutralize inflation. It is a misnomer and wrong to state that inflation alone contributes and is the determinative factor in exchange rate fluctuation. No doubt, a country with persistent low inflation can

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expect rising currency value as purchasing power increases in relation to other currencies with high inflation rate, but it is equally true that countries with typically higher inflation rate might not see corresponding or equal depreciation in their currency value. Inflation by itself cannot be the sole or even a primary factor in exchange rate depreciation. Current account deficit and public debt, terms of trade, political stability, economic performance, etc. are various other factors, which determine the exchange rate. These are complex factors and several parameters can affect the foreign exchange rate fluctuation and, therefore, persons affected by exchange rate fluctuation indulge in hedging.

30. Inflation in India has been relatively high but there have been occasions when Indian rupee has appreciated against foreign currencies for varied and diverse reasons. Indian rupee had earlier appreciated, before the present day depreciation, in spite of the fact that India had relatively higher rate of inflation as compared to several countries. It is difficult to determine which factors are the most relevant for determining exchange rate fluctuation. There are several important causes or factors, which are opaque in principle and difficult to decipher and pin-point in practice.

31. As already stated above, the first proviso to Section 48 ensures that a non-resident, who utilized his foreign currency, is taxed after taking into consideration the fluctuation in exchange rate. Indian rupee can and has in past appreciated against foreign currencies. In such cases, the long-term capital gains payable can increase. On the contrary we are not aware of occasions of deflation in India in last two decades and it would be incorrect to hold that the Legislature while

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enacting the second proviso had in mind or assumed that there would be deflation. The two provisos cannot be equated as granting same relief or benefit. They operate independently and have different purpose and objective.

32. In view of the above, it is difficult to state that benefits under the first proviso and the second proviso to Section 48 are identical or serve the same purpose.

33. There is some merit in the contention that if proviso to Section 112(1) is applied, then almost all assessees covered by the first proviso to Section 48 would be liable to pay tax @ 10% only and not @ 20% on long-term capital gains. This appears to be correct and a logical consequence of the proviso to Section 112(1) and the interpretation given by us, but this cannot be a ground to contextually read the proviso to Section 112(1) differently. The said proviso is applicable to listed securities or units or zero coupon bonds. Long-term capital gain is not payable on listed securities sold through stock exchanges as STT is payable. First proviso to Section 48 is applicable on sale of shares or debentures in Indian company, whether or not the said shares or debentures are listed or not. Thus, proviso to Section 112(1) is more restrictive and will not necessarily apply in all cases covered by the first proviso to Section 48. Secondly, the proviso to Section 112(1) is not applicable to debentures. Nevertheless, the proviso to Section 112(1) is applicable to units and zero coupon bonds, which are not covered by the first proviso to section 48 of the Act. Second proviso to Section 48 is not applicable on transfer of long-term capital asset being bond, debenture other than the capital index bond. Zero coupon bonds

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are, however, specifically made eligible for benefit under the proviso to Section 112(1).

34. It is clear from the aforesaid discussion that it is not possible to decipher and clearly elucidate the exact legislative purpose and object behind the proviso to Section 112(1) in a categorical and unambiguous manner. The purpose and object behind the proviso to Section 112(1) itself is somewhat debatable, except that the legislative intention was to tax long-term capital gain on listed shares, bonds and units @ 10%, without benefit of indexation under second proviso to Section 48 of the Act. Legislative policy and object is nothing more, and it is impermissible to read into the said provision an affirmative legislative intention on assumption and guess work and this would be beyond the acceptable principles of interpretation.

35. There is another aspect which should be taken into consideration and not ignored. Decision in the case of ***Timkin France SAS*** (Supra) was pronounced on 1st October, 2007, which has been followed by AAR in several cases over the last 3-4 years. Several decisions of AAR have been accepted by the Revenue on merits. We are informed that there are six such decisions and only in one case Revenue has challenged the decision of AAR. The decision of AAR in the present case dated 1st August, 2011, taking a diametrically reverse view has brought about an uncertainty in understanding the impact and the effect of the proviso to Section 112(1). Certainty is integral to rule of law. Certainty and stability form the basis foundation of any fiscal laws. Highlighting this fact in ***Vodafone International Holding B.V. Vs. Union of India***, [2012] 341 ITR 0001, the Supreme Court has observed that foreign direct investment flows towards a location with a

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strong governance infrastructure which includes enforcement of laws and how well the legal system work. There should be consistency and uniformity in interpretation of provisions as uncertainties can disable and harm governance of tax laws. Authority should follow their earlier view, unless there are strong grounds and reasons to take a contrary view, but in the present case there is no compelling justification and reason to override and disturb the earlier view.

36. With the aforesaid observations, we allow the present writ petition and a writ of certiorari is issued and the impugned decision dated 1st August, 2011 passed by the Advance Ruling Authority in AAR No.950/2010 is quashed. It is declared that the petitioner will be entitled to benefit of proviso to Section 112(1) of the Act on sale of equity shares in question. This direction is being issued as it is not disputed and contested before us that other conditions of first proviso to Section 112(1) of the Act are satisfied.

37. The writ petition is accordingly disposed of. There will be no order as to costs.

-sd-
(SANJIV KHANNA)
JUDGE

-sd-
(SANJEEV SACHDEVA)
JUDGE

October 7th, 2013
VKR/kkb

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