**IN THE INCOME TAX APPELLATE TRIBUNAL,
AHMEDABAD D BENCH, AHMEDABAD**

[Coram: Pramod Kumar VP and Madhumita Roy JM]

ITA No.: 1954/Ahd/ 2017
Assessment year: 2013-14

Ashish Tandon **…………...…………..Appellant**
Bungalow No. 3, Green Woods
Sevasi Gotri Road, Vadodara [PAN: ABMPT 2819H]

Vs

Assistant Commissioner of Income Tax
Circle 1(1)(2), Vadodara **……………..….......Respondent**

Appearances by
S N Soparkar, Milin Mehta, Bandish Soparkar and Parin Shah *for the appellant*
Mahesh Shah and MSA Khan *for the respondent*

Date of concluding the hearing	:	November 13, 2018
Date of pronouncement	:	February 8, 2019

O R D E R

Per Pramod Kumar, VP:

1. This is an appeal filed by the assessee and is directed against the order dated 27th June 2017, passed by the CIT(A) in the matter of assessment under section 143(3) of the Income Tax Act, 1961, for the assessment year 2013-14.

2. Grievances raised by the assessee are as follows:

Capital Receipt not chargeable to tax:

1. *The learned Commissioner of Income Tax (Appeals)-1, Vadodara ["the CIT(A)"] erred in fact and in law in confirming the action of the Assistant Commissioner of Income Tax, Circle 1(1)(2), Vadodara ("the AO") in rejecting the contention of the Appellant that the sum of Rs.9,70,59,873, received on transfer of an asset is a capital receipt not chargeable to tax since the asset was a self-generated asset, having no cost of acquisition / improvement and therefore any gains arising on its transfer is not chargeable to tax.*

2. *The learned CIT(A) erred in fact and in law in computing the cost of acquisition of the capital asset at Rs. Nil by invoking the provisions of section 55 (2)(a) of the Income Tax Act, 1961 ("the Act").*

http://itatonline.org

Business Income:

3. *The learned CIT(A) erred in fact and in law in treating the sum of Rs.9,70,59,873, received on transfer of capital asset, as business income and thereby taxing the amount as revenue receipt invoking section 28(va) of the Act.*

4. *Without prejudice to Ground No. 3, the learned CIT(A) erred in fact and in law in attributing the entire receipt of Rs.9,70,59,873 towards non-compete fees.*

Capital Gains - Alternate Grounds of Appeal:
Without prejudice to Grounds No. 1 and 2:

5. *The learned CIT(A) ought to have directed the AO to tax the receipts of Rs.9,70,59,873 under the head capital gains u/s. 45 of the Act instead of business income.*

6. *The learned CIT(A) erred in fact and in law in not directing the AO to allow deduction u/s 54F of the Act by treating the receipts as income under the head capital gains.*

7. *The learned CIT(A) erred in fact and in law in observing that the transfer of the capital asset is taxable as short term capital gains instead of long term capital gain.*

3. The issue in appeal lies a rather narrow compass of interesting facts. The assessee before us is an individual deriving income under the head salaries, capital gains, house property and income from other sources, such as dividends etc. On 31st July 2013, he filed his income tax return disclosing an income of Rs 29,63,542. When this return was subjected to scrutiny assessment proceedings, the Assessing Officer noticed that the assessee has claimed an exempt income of Rs 9,70,59,873 being income on sale of a technical concept, that the assessee developed on his own, with respect to website malware monitoring. In essence, as noted by the Assessing Officer, the sequence of events was this. A technical concept was conceptualized by the assessee to safeguard websites from getting infected with malware. On 26th March, 2009, the assessee entered into an agreement with his employer, i.e. Indusface Consulting Pvt Ltd (Indusface India, in short), for investment in further development of the concept for commercial exploitation. Between 26th March 2009 and 13th September 2012, Indusface India makes an investment of Rs 4,78,52,797. Thereafter, on 13th September 2012, an agreement is entered into between the assessee, the employer- Indusface India, Indusface Inc (Indusface Canada, in short)- a Canada based entity, on one hand, and Trend Micro Inc, USA, (Trend Micro, in short) on the other, for sale of all the rights in the concept so developed. Under this sale agreement, the assessee got, net of holdback amounts, US $ 15,75,000, Indusface India got US $ 6,70,000 and Indusface Canada got US $ 13,50,000. On these facts, the claim of the assessee was that the amount received by the assessee from Trend Micro India Pvt Ltd was a capital gain in his hands, but as it had no cost of acquisition and in the light of law laid down by Hon'ble Supreme Court in the case of CIT Vs B C Srinivas Shetty [(1981) 128 ITR 1 (SC)], this capital gain was not taxable in nature.

The Assessing Officer took note of the agreement that the assessee entered into with Indusface India and analysed the same in considerable detail. He noted that, as per the said agreement, the assessee has "coined the interesting concept for providing round the clock [24X7X365] or daily or on demand malware monitoring of websites in a zero touch and security as a service (SAAS)" basis and had expressed the willingness to provide the said concept to the company and to assist the company to develop the same into a business idea" on the terms and conditions of the agreement. He further noted that, under the said agreement, Indusface India had represented and assured that "it has the necessary expertise and capabilities for exploiting the concept and has intention of developing product and services by utilizing the said concept and is also ready and willing to allocate reasonable funds for developing the product and/ or services and marketing the same". The Assessing Officer then also noted that as per the details furnished by the assessee, the Indusface India had incurred expenses on this project, under the heads (i) salary and other employee benefits, (ii) direct production and service overheads, and (iii) other expenses, aggregating to Rs 64,81,413 in the financial year 2012-13, aggregating to Rs 1,56,85,551 in the financial year 2011-12, aggregating to Rs 1,67,54,423 in the financial year 2010-11, and aggregating to Rs 89,31,410 in the financial year 2009-10. The Assessing Officer was of the view that "it can thus be seen that the sale consideration represents sale consideration of a developed concept in which a sum of Rs 4,78,52,797 was invested by the employer *(i.e. Indusface India)*". The Assessing Officer was of the view that sale consideration was of a developed concept and not the original cost, and, therefore, it could not be said that the asset sold did not have a cost of acquisition. He thus rejected the assessee's reliance on Hon'ble Supreme Court's judgment on B C Srinivas Shetty's case *(supra)*. Without prejudice to this line of reasoning, the Assessing Officer further observed that, in any event, the "concept" is a subject matter of copyright under the Copyright Act, 1957, and "indisputably was authored by the assessee during his tenure as Chief Executive Officer of Induface Pvt Ltd", and, "accordingly, in terms of Section 17 of the Copyright Act 1957, employer of the assessee is the first owner of the copyright contained in the concept developed by the assessee and is eligible to reap all the benefits from its further development, particularly when a substantial sum is invested by Indusface". The amount received by the assessee could not, therefore, be said to be capital gain on sale of an asset without any cost of acquisition. The Assessing Officer also noted reliance of the assessee on Hon'ble Bombay High Court's judgment in the case of Cadell Wvg Mills Co Ltd Vs CIT [(2001) 249 ITR 265 (Bom)], which stands approved by Hon'ble Supreme Court in judgment reported as CIT Vs D P Sandhu Bros Chembur Pvt Ltd [(2005) 273 ITR 1 (SC)], the Assessing Officer observed that the issue adjudicated by Hon'ble Court was taxability of consideration against surrendering the tenancy rights which had no cost of acquisition but then in the present case the consideration paid was for a developed cost for which Rs 4,78,52,797 was invested by employer of the assessee. Similarly, assessee's reliance on a coordinate bench decision in the case of Niyati B Yodh Vs ACIT [(2004) 4 SOT 941 (Mum)], the Assessing Officer observed that the issue in the said case was regarding taxability of receipt not in the nature of revenue receipts and, for that reason not taxable under the head 'income from other sources', but then in the present case the income is generated on sale of a concept, developed by the employer in the normal course of business of developing software, and is thus materially different. In the light of this detailed analysis, the Assessing Officer concluded that the exemption of Rs 9,70,59,873 claimed by the assessee is unsustainable in law. He rejected the claim and proceeded to bring the said amount of Rs 9,70,59,873 to tax in the hands of the assessee as income from other sources.

Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. While doing so, learned CIT(A) observed as follows:

"5.5 I have considered the facts of the case, the appellant's submissions and the AO's observations. The appellant Shri Ashsish R Tandon is working as an Executive Director of the company M/s. Indusface Pvt. Ltd. w.e.f. 16.05.2005. The terms and conditions, mentioned in the appointment letter issued by the company to the appellant are crucial in deciding the issues involved in this appeal. Hence, a copy of the appointment letter as provided by the appellant has been scanned and pasted in this appellate order as below
"INDUSFACE
Consulting
Dear Mr. AshishTandon

I am pleased to inform you that at the meeting of Board of Directors of the Company held on 16/05/2005, you were unanimously appointed to the position of Executive Director of the Company subject to following terms and conditions viz.: With effect from 16th May, 2005, you will hold position of Executive Director for a initial period of 5 years and then automatically renew annually for subsequent years until decided otherwise.

2. Remuneration:

You shall be paid consolidated remuneration of Rs. 80,000/- per month, making effective from 01/04/2005. Remuneration payable to you will be divided in to such break up of Salary. Allowances and Perquisites, as may be decided by you and the Board of Directors, from time to time!

In addition to the salary, you will also be entitled to perquisites and allowances including benefits of Gratuity, Leave Encashment and facilities of telephone, mobile, internet, club membership fees and Company's owned and maintained Car for official purpose.

3. Sitting Fees:

As long as you function as Executive Director, you will not be paid any sitting fees for attending the meetings of the Board of Directors or any committee(s) thereof.

4 Scope of Work:

Subject to the supervision and control of the Board of Directors of the Company, you as a Executive Director, shall look after overall business operations, technology, marketing and strategic business development, government Liaison etc, and other day to day affairs of the Company and perform all other duties that the Board may delegate to you from time to time.

5. Duties and Responsibilities

Unless prevented by ill health or otherwise granted prior consent by the Board, you will devote all of your working time, attention and ability to the business, and affairs of the Company in your capacity as Executive Director and you shall not be employed by, provide services to, or otherwise be engaged in, any other organization or employment.

Notwithstanding the foregoing, it is recognized that it will be a normal and expected part of your duties and responsibilities that you may represent the Company on suitable external task

groups and committees, when such activity does not conflict with your roles and responsibilities as Executive Director of the Company.

During the course of your appointment hereunder you will truly and faithfully account for and deliver to the Company all money, securities and things of value belonging to the Company that you may from time to, time receive for, from or on account of the Company. You will perform the duties and responsibilities assigned to you in an efficient and competent manner and will devote your skills and best efforts to the business affairs of the Company.

6. Re-imbursement of Expenses, Costs etc.:-
I
You will be entitled to be paid I reimbursed all costs, charges and expenses as may be incurred by him for the purpose of or on behalf of the Company.

7. Policies and Procedures

You will be bound by and will faithfully observe and abide by all the rules, regulations, policies and procedures of the Board of Directors of the Company in force from time to time which are brought to your notice or of which you should reasonably be aware. You will at all times uphold the highest standards conduct and fiscal practices.

8. Termination:
Kindly note that this appointment is a contractual appointment which is terminable in the manner provided herein. The terms thereof are not that of an employee and special terms govern this appointment including the termination thereof.

The Company may terminate this appointment at any time without any cause upon giving of 180 (six months) working days written notice. The Company may waive the notice period by paying o you an amount equivalent to the salary you would have received during the notice period.

You may terminate this appointment upon giving of 180 (six months) working days written notice to the Company. The Company may waive the notice period by paying to you an amount equivalent to the salary you would have received during the notice period.

On behalf of the Board, I would like to mention that the BOD is looking is looking forward to you to play a comprehensive leadership role in all areas of the organization, and mentor, coach,, lead, guide organization to higher, level of performance and achievements.

Wishing you all the very best and good luck!

201/B, SUN, race Cource Circle (W), Baroda, Gujarat- 390007.
SUN, Race Course Circle(W),Baroda, Gujarat
www.indusfaceconsulting.com"

5.5.1. The other crucial issue involved in deciding the appeal is the pattern of share holding in M/s. Indusface Pvt. Ltd. over the years. The same has also been provided by the appellant during the course of the appellate proceedings, which is reproduced below for ready reference:

Name of share holder	*FY 08-09*	*FY 09-10*	*FY 10-11*	*FY 11-12*	*FY 12-13*
Ashish Tandon	*5,500*	*5,000*	*2,55,000*	*2,55,000*	*2,55,000*
Nandini Tandon	*5,500*	*5,000*	*2,55,000*	*2,55,000*	*2,55,000*
Dhanya Thakkar		*4,286*	*2,18,586*	*2,18,586*	*2,18,586*
Venkatesh Sundar			*16,191*	*16,191*	*16,191*
	10,000	*14,286*	*7,44,777*	*7,44,777*	*7,44,777*

5.5.2. It may be also mentioned here that Ms. Nandini Tandon is the spouse of the appellant. Thus, during the FY 2008-09, the appellant was in complete control of the company in association with his wife. At the same time, he was also acting as executive director of the company. In his submissions reproduced above, it has been contended on behalf of the appellant that it is a 'contractual appointment' and not an 'employment agreement'. It has been contended that the terms of appointment are not like that of an employee nor has any reference to employment terms and conditions, Besides, it has been claimed that there is no reference to specific scope of work, much less technical contribution or reference to requirement to develop any product like the concept involved in the present appeal.

5.5.2.1. In this respect, from the perusal of the submission made by M/s. Indusface Pvt. Ltd. in Appeal No. CIT(A)-1/10005/16-17 before this office, it is seen that the company is engaged in the business of providing consultancy in mapping information security strategies and process of information related Government Regulatory and Industry standards such as ISO 27001, RBI, SEBI, SOX etc. It is also engaged in providing security services to "protect organizations key information assets. The object clause of this company, as mentioned in. Memorandum of Association is: "to carry on the business of consultancy and development of computer software and hardware and business". In this background, if the terms and conditions mentioned in the letter of appointment issued to the appellant for being appointed as executive director of this company is examined, then it is evident that the appellant had been appointed as an employee of the company on contractual basis. Such contract was for a fixed period, as the letter clearly states that the appointment is for initial period of 5 years and then it will be renewed automatically for subsequent years annually. Remuneration being granted to the appellant is also in the nature of salary, allowances and perquisites. In addition to the salary, the appellant is also entitled to perquisites and allowances including benefits of gratuity, leave encashment and facilities of telephone, mobile, internet, club membership fees etc. The letter also clearly states that as an executive director, he will not be paid any sitting fees for attending the meetings of Board of Directors or any meetings thereof. All these terms and conditions establish that the appellant has been appointed as an employee of this company. Hence, the work done by the appellant during the course of its employment will be governed by Clause (C) of Section 17 of the Copy Right Act as mentioned by the AO in the assessment order.

5.5.3. To determine as to whether the concept developed by the appellant was in the course of his employment with the company or not, the scope of work, duties and responsibilities as mentioned in the letter of appointment are required to be examined in the perspective of the business profile of M/s. Indusface Pvt. Ltd. The terms related to scope of work clearly mention that the appellant had to work under the supervision and control of the Board of Directors of the company and he was required to look after the overall business operations, technology, marketing and strategic business development etc. Thus, the appellant was responsible for new development to be made in the field of the operation of the company. This is an admitted fact that the company was in the field of internet security operations and the concept allegedly developed by the appellant was directly related to such field. Besides, the appellant was also required to devote all his working time, attention to the business and affairs of the company in his capacity as executive director. It was his working in this capacity that led to the development of this new concept utilizing which the company

was able to develop the new product namely, 'Indus Guard'. Though the appellant claims that this concept was developed independently, but there is no evidence submitted in this regard. The development of the concept was on account of the fact that the appellant, as an executive director of the company, was engaged in the development and operation of computer software in relation to internet security on day to day basis and was also over all in charge for technology development to be made by the company. Thus, the entire development of this new concept is on account of the working of the appellant as an employee of the company.

5.5.4. It is a fact that the company has nowhere claimed that the concept developed by the appellant belong to the company. But, this Is on account of the fact that the company was controlled by the appellant himself along with his wife, as they were the only two share holders of the company having 50% shares each. So if the corporate veil is lifted, there is no difference between the appellant and the company, till FY 2008-09. It was only after that the new share holders were inducted in the company. But, before the induction of the new share holder, the agreement dated 26.03.2009 had been entered into by the appellant with the employer company for developing new products utilizing the alleged concept developed by the appellant. Thus, on both sides of the agreement, the controlling person was the appellant himself. Hence, such agreement is not at all relevant for the purposes of determining as to whether the concept developed by the appellant was in the course of his employment or not.

5.5.5. The facts mentioned above make it clear that the appellant had developed the concept as a part of his duty as an employee .of M/s. Indusface Pvt. Ltd. If the agreement between him and the company had been entered on arms' length basis, then the company would have certainly claimed that the concept belong to it and not to the appellant employee. Under such circumstances, as per clause 'c' of Section 17 of the Copy Right Act, 1957, the employer of the appellant was the first owner of the copy right contained in the concept developed by him and was eligible to reap the benefits arising from its further developments, as substantial sum was invested by the employer in such developments. Hence, the appellants claim that he had sold the concept for which cost of acquisition was not ascertainable and hence, the receipt being capital receipt in nature, the resulting capital gain is not taxable under the income-tax Act, is not acceptable. Also the case laws cited by the appellant in his submissions are not applicable to the facts of the present case.

5.5.6. Now the agreement entered into by the appellant with M/s. Indusface is discussed. In this agreement dated 26.03.2009, the description of the appellant and the company has been given as follows:

"WHEREAS,
1) AT is an individual and is engaged in the activities related to software and more particularly Information Security Services and presently occupies the position of Chief Executive Officer of the Company.

2) If C is presently engaged in providing various services to its clients in the area of Information Security and as a part of the security services it also sells some software products for providing web-site security in the form of SSL Certificates.

3) AT has over the period of years developed an in-depth knowledge of the needs of the industry in Information Security.
4) IFC is exploring the possibilities of venturing into new areas, more importantly developing some new product which meets with the future needs of the IT Industry related to the Information Security.

5) AI has coined an interesting concept for providing round-the-clock [24 X 7 X 365] or daily or on-demand Ma/ware Monitoring of websites in a zero touch and Security as a Service (SAAS) basis essentially to safeguard websites from getting infected with malware ["the Concept"] and is willing to provide the said concept to the Company and also assist the Company to develop the same into a business idea, on the terms and conditions contained herein.

6) The Company is of the view that significant business opportunity can be created if an appropriate product and / or service can be developed around the Concept and is therefore interested in getting access to the Concept, exclusive right to use the Concept and also necessary assistance and support in the process of developing any product and / or service around the Concept.

7) The Parties have agreed to the following terms and conditions for meeting the multiple objectives of permitting the Company to develop product and / or services around the Concept:"

5.5.7. Thus, the description itself shows that the appellant and the company were involved in identical activities and the appellant was acting as Chief Executive Officer of the company. This also supports the facts discussed above that the appellant had developed the concept during the course of his employment in this company and hence, the company was the owner of this concept. The agreement has also stated that the appellant will assist the company to develop the concept into a business idea.

5.6. Thus, the question arises as to what was the real intention of the purchaser of the 'Indus Guard' to make the payment to the appellant, which was even higher than that paid to M/s. Indusface. The answers of the same can be found in Section 9.1 of the purchase agreement entered into by the appellant, Indusface Pvt. Ltd. and Indusface ILC. on one side and M/s. Trend Micro Incorporated on the other side. For ready reference, this clause is reproduced below:

"Section 9. Other Agreements

9.1. Covenant Not To Compete.

(a) In consideration of, and as a material inducement and as a condition to, the entry of the Purchaser into this Agreement and the entry of Trend Micro India into the India Purchase Agreement and the consummation of the transactions contemplated herein and therein, and in consideration of the mutual agreements set forth herein and for other good and valuable consideration the acquisition by Purchaser of the Business and the goodwill associated therewith, and in order to ensure that Purchaser receives the value of such goodwill, the receipt and sufficiency of which are hereby acknowledged, Tandon agrees to execute the Non-Competition Agreement and the other Sellers, on behalf of themselves and their direct and indirect subsidiaries, agrees that they will not directly or indirectly (as an investor, shareholder, advisor, partner, consultant, licensor or otherwise), for a period commencing] on the Closing Date and ending on the third (3rd) anniversary of the Closing Date:

(i) Engage in any business that competes with the Business anywhere in the world:

(ii) recruit, solicit or induce, or attempt to induce, directly or indirectly, any of the Business Employees or the Business Contractors to terminate their employment or engagement with, o[r] otherwise cease their relationship with Purchaser; or

(iii) solicit, divert or take away, or attempt to divert or take away, the business or patronage of any of the 'Business clients, customers or accounts, or prospective clients, customers or accounts, of Purchaser as at the Closing Date (collectively, the activities described in this Section 9.1(a)(i), (ii) and (iii) being the "Restricted Business").

(b) Nothing contained in Section 9.1 (a) shall prohibit Indusface India from acting as an authorized reseller of Purchaser's products in accordance with the Purchased Software License Agreement and the Trend Micro Strategic Channel Partner agreement.

(c) If any restriction set forth in this covenant not to compete is found by any court of competent Jurisdiction to be unenforceable because it extends for too long a period of time or over too great a range of activities or in too broad a geographic area, it shall be interpreted to extend only to the maximum period of time, range of activities or geographic area as to which it may be enforceable.

(d) Sellers acknowledge and agree that the restrictions contained in this [1 covenant not to compete are necessary for the protection of the Business and goodwill of] Purchaser and are considered by Sellers and Purchaser to be reasonable for such purpose. Sellers expressly acknowledge the value of the consideration received in-connection with this covenant 1 not to compete. Sellers agree that any breach of this covenant not to compete will cause Purchaser substantial and irrevocable damage for which the Purchaser will have no adequate remedy at law and therefore, in the event of any such breach or threatened breach, in addition to such other remedies which may be available. Purchaser or any of its Affiliates may seek specific performance and injunctive relief without the requirement of posting a bond and without the necessity of proving actual economic damages and to recover all costs and expenses incurred by Purchaser, including reasonable attorneys' fees and costs, in addition to any other remedies to which Purchaser may be entitled at law or in equity. Sellers hereby waive and agree not to assert the defense that Purchaser has or will have an adequate remedy at law and specifically recognize and acknowledge that Purchaser shall have the right to enforce the terms of this Agreement in its own name. The terms of this Section 9.1 shall not prevent Purchaser from pursuing any other available remedies "for any breach or threatened breach hereof including, but not limited to, the recovery of damages from Sellers. Sellers further agree that the provisions of' the covenants set forth in this Section 9.1 are reasonable and valid, and Sellers waive, all defenses to the strict enforcement thereof."

5.6.1. Further, the reference of such non competition agreement is also made in Section 6 of this agreement in which delivery by sellers to purchasers is enumerated. Clause 6.6 stated as follows:

'Non Competition Agreement: "the original counterpart of the Non Competition Agreement duly executed and delivered by Tandon.'

5.6.2. Thus, the sale has been completed only after the delivery of such Non Competition Agreement signed by the appellant. As already discussed above, the appellant was the main person in the development of the product, Indus Guard, as Chief executive Officer of the Indusface Pvt. Ltd. and hence, was having in depth knowledge of the process to be followed for the production / development to be made utilizing such product. Due to this fact only, the appellant had to enter into the non competition Agreement with the purchaser of Indus Guard,

5.6.3. It may also be mentioned here that in Clause 'd' of Section 9.1, the sellers have expressly acknowledged the value of the consideration received in connection with this covenant not to compete. This is the only place in the entire agreement where the express

recital of the purpose for which the payment has been made to the appellant has been narrated. As has been already stated above, the appellant was working as an employee of M/s. Indusface Pvt. Ltd. and in that capacity only had developed the product Indus Guard including the concept of the same. Under identical circumstances, the Hon'ble High Court of Bombay, in its decision in the case of Arun Toshniwal Mumbai (2015) 50 taxmann.com 274 (Bombay) has held that where pursuant to sale of one division of its business by the company to another person, the director of the seller company received certain amount by entering into the non competition agreement whereby he could not engage in any business activity similar to that of the division sold,, amounts so received is taxable as business income u/s 28(va). The relevant observations of the court are as follows:

"10. It is only vide the Finance Act, 2002 which came into effect from 1st April, 2003 the said capital receipt was now taxable under section 28(va). Accordingly, the Court held that there dichotomy between the receipt of compensation by the assessee for loss of business arising out of the negative covenant compensation for loss of agency would be a revenue receipt as noted in the decision in the case of Gillanders Arbuthnot & Co Ltd. v. CIT [1964] 53 ITR 283 (SC). The assessee in that case was dealing with explosives. That agency was terminated and by way of compensation, Imperial Chemical Industries (Export) Ltd, paid two fifths of the commission accrued on past sales an took a formal undertaking from the assessee to refrain from selling or accepting any agency for explosives. This was considered by the Supreme Court and it was held that the said amount received for non-compete agreement was not taxable upto 1st April, 2003 and, therefore, in that case, the amount received is not liable to be taxed. It is clarified by the Supreme Court that section 28(va) of the Act was amendatory and not clarificatory and, therefore, the amount received before the said date was not taxable under section 28(va) of the Act.

11. Following the aforesaid decision, we are of the view that in the present case, as well the amount received by the assessee was taxable under section 28(va) of the Act. In the present case, it is evident that had the assessee not entered into an agreement of non-compete, he would have earned the amount from the business carried on out of the division which was sold to Thermo Electron LLS India Pvt. Ltd. It is the sale of the said division that has deprived him of the income and part of the sale consideration itself, he was required to execute an agreement of non-compete and the compensation received under the said agreement was relatable on a consideration for sale of the business of the division and, therefore, for these reason also, we are of the view that the amount is taxable under Section 28(va). Furthermore, in the present case, both the assessee have received the amount pursuant to the agreement dated 2nd June, 2008 that is well after 1st April, 2003 and would be covered by the provisions of Section 28(va) of the Act. We are accordingly of the view that no relief can be granted to the appellants. The appeals do not raise any substantial questions of law and the same are dismissed. No order as to costs."

5.6.4. It may be mentioned here that as per the agreement in this case, the entire business related to the product Indus Guard has been sold by the sellers, including the appellant and his employer company, to M/s. Trend Micro. All such items sold have been listed in the agreement viz., Asset Purchase Agreement. As can be seen from enumeration given in Section 6 of this Agreement, even the key employees and some other employees had been transferred to the purchaser. A separate list of assets transferred had been prepared; vide which following assets had been transferred:

Schedule 1.1(m) Customer Contracts
Schedule 1.1 (q) Excluded Intellectual Property
Schedule 2.2(b) Inventory

Schedule 2.2(f) Prepaid Expenses
Schedule 2.3 Seller Identified Excluded Assets
Schedule 4.6(e) Business Products
Schedule 4.6(f) Registered Intellectual Property
Schedule 4.6(v) Open Source Materials
Schedule 4.6(y) Deposits of Source Code
Schedule 4.9 Business Employees and Business Contractors
Schedule 4.11(a) Material Contracts
Schedule 4.15 Real Property
Schedule 4.18 Related Party Transactions
Schedule 6.4 Key Employees and Other Employees
Schedule 9.2 Cooperation re Third Party Intellectual Property
Schedule 9.4 Employees Subject to Non-Solicitation Restriction

5.6.5. Thus, it is evident that M/s. Indusface has transferred one of its business divisions to the purchaser and in pursuance to such transfer; the appellant has received consideration for entering into an Agreement for Non Competing with the purchaser in respect of the work of such transferred division. Thus, under such circumstances, the amount received by the appellant is revenue in nature and is taxable as business income u/s 28(va), though the AO has taxed the same as income from other sources. But, such adoption of different head of income will not make the nature of receipt from revenue to capital.

5.6.6. The requirements of taxability of non competent fee received by the assessee u/s 28(va) has been discussed in the decision by the Special Bench of ITAT, Hyderabad Bench in the case of Dr. B.V. Raju (2012) 18 taxman.com 188 (Hyderabad) (SB). The Bench has discussed the issue as follows:

"37. CAPITAL CAIN OR NON-COMPETE FEE:

The conclusion that emerges from the aforesaid discussion is that when a business is sold and the purchaser enters into agreements to ensure that there is no competition, he may enter into agreements not only with the transferor of the business but a/so with persons connected with the transferor. He may also pay consideration to the transferor for transfer of business, for not engaging in competition. He may also pay consideration to persons associated with the transferor not to indulge in competition. The receipts by the transferor or other persons connected with the transferor can be divided into the following categories;
(a) The consideration paid by the transferee for transfer of the business to the transferor;
(b) Consideration paid to the transferor not to carry on same business directly or indirectly not to indulge in manufacturing same or similar products, not to use the trade names etc. ;

(c) Consideration paid to persons associated with the transferor to ensure that they also do not indulge in competing business;

It has to be clarified that the case laws in which the transferee claims the consideration paid as above as revenue expenditure have no bearing whatsoever when we deal with the case of the tax treatment in the hands of the transferee. There are different considerations for determining whether the cost paid by the transferor is to be regarded as capital expenditure or revenue expenditure.

38. As far as category (a) is concerned the receipt would fall for consideration under the head capital gains as there is a transfer of capital asset in respect of which the machinery provisions of computation of capital gain can be applied. As far as category (b) is concerned the consideration received would fall for consideration under the head capital gain but

depending upon the law that prevailed at the time of transfer. Self generated assets like, goodwill of a business or a trade mark or brand name associated with a business, a right to manufacture, produce or process any article or thing or right to carry on any business, tenancy rights, stage carriage permits or loom hours by their very nature could not have cost of acquisition and therefore, machinery provisions were amended to provide cost of acquisition being treated as nil. These amendments are set out in the later part of this order. As far as category (c) is concerned, the same would fall for consideration to see if it is capital receipt chargeable to tax as on the date of transfer because after 1-4-2003 such consideration even if regarded as capital receipt would be chargeable to tax u/s.28(va)(a) of the Act. Therefore the law as it prevails on the date on which a person agrees to desist from doing certain acts in relation to any business would be relevant.

39. If a payment is in- the nature of non-compete fee received by the transferor when he sells his business and agrees not to carry on the business which he transfers then that would fall for consideration under (category (b) referred to earlier) section 55(2)(a) "right to carry on business". If the non-compete fee is paid to persons associated with the transferor then the same would fall for consideration only under Sec. 28(va)(a) of the Act introduced by the Finance Act, 2002, w.e.f 1-4-2003. It is significant to note that the words used in Sec. 28(va)(a) of the Act are "not carrying out any activity in relation to any business". The proviso (i) to Section 28(va)(a) provides for exception to cases where, such receipts are taxable as capital gain viz., where any sum is received for transfer of a right to carry on any business which is chargeable to tax as capital gain. When the transferor is already carrying on business and agrees not to carry on business transferred, then the same would fall for consideration only under Sec. 55(2)(a) of the Act.

40. With the change in the law receipts on account of giving up right to carry on business even if it is capital receipt would now be chargeable to tax as income from business. The difference would be that if it is paid to the transferor for giving up right to carry on business, it would be regarded as capital gain, the cost of acquisition of right to carry on business being determined in accordance with the provisions of Sec.55(2)(a) of the Act. If it is compensation paid for "not carrying out any activity in relation to any business", which the transferor is not carrying on, the same would be chargeable u/s.28(va)(a) of the Act. If a receipt is considered as payment for not carrying on business which the transferor is already carrying on then it would be regarded as capital gain, being transfer of a capital asset viz., right to carry on business. Thus for the provisions of Sec.55(2)(a) of the Act to apply the transferor must be carrying on a business which he agrees not to carry on. If the transferor is not already carrying on business then he receives consideration only for "not carrying out any activity in relation to any business". In that case the provisions of Sec. 28(va)(a) of the Act would apply and not the proviso thereto.

41. Now in the case before the special bench we are concerned with consideration paid to persons associated with the transferor. Late B.V. Raju was not carrying on business of manufacture of cement. He was associated with two cement manufacturing companies RCL and SVCL in various capacities. With this background, we will examine the meaning of the expression "a Right to Manufacture, produce or process any article or thing" and " Right to carry on any business" used in Sec.55(2)(a) of the Act,

48. Keeping in mind the discussion in para 37 to 41 of this order, let us see what was transferred by Mr. B.V. Raju under the agreement dt. 27.10.1999 for which he was paid a sum of Rs.11l crores by ICL. One should also read the above covenants in the non-compete agreement in the light of the preamble to the agreement which gives the background as to why the agreement was being entered into. The preamble to the non-compete agreement refers to the fact that Mr.B.V. Raju during the course of his employment with Cement

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Corporation of India, RCL and SVCL acquired a corpus of knowledge, skill, expertise, and experience related to the production, distribution, marketing, running and managing of cement plants and has also acquired or otherwise come in possession of various secret information, know-how and trade secrets relating to the Cement line of business. The preamble refers to India Cements Ltd. and its associate companies having acquired RCL from the original promoters during April, 1998. There is also a reference to the fact that Mr.B.V. Raju together with his family members thereafter continued their business in Cement line with SVCL till October, 1999, when SVCL was proposed to be taken-over by India Cements Ltd., and its associate companies. The preamble further refers to the fact that Mr.B.V.Raju along with other persons entered into an agreement with ICL by which they sold the shares held by them in SVCL. The preamble further declares that with the acquisition of SVCL, the core family promoters of RCL & SVCL were out of Cement business. It is thereafter that ICL with a view to ward off competition desired that Mr.B.V.Raju should be restrained from starting a fresh cement unit, lest it should have a bearing on their business. With that object in view, ICL entered into a Non-Compete Agreement with Mr. B.V. Raju.

49. The consideration of Rs. 11 crores received by BV Raju was not for sale of any business nor was it for not carrying on any business which he was carrying on, which he had transferred. It was also not a payment for a "right to manufacture, produce or process any article or thing". As explained earlier, the sum in question was not paid for transfer of any intangible right in respect of manufacture, production or process of cement. The provisions relating to capital gains are therefore not attracted. The amount was paid for "not carrying out any activity in relation to any business" and would fall within the ambit of Sec.28(va)(a) of the Act."

5.6.7. Now, in the present case, the appellant has entered into an Agreement with the purchaser for not carrying out any activity in relation to the business in respect of Indus Guard which stood transferred to M/s Trend Micro and which was being carried on by M/s. Indusface India Ltd. and not by the appellant. The appellant was associated with this business in the capacity of an employee, but was having indepth knowledge of the production & developments to be made utilizing this product. Under such circumstances, the amount received by the appellant is chargeable u/s 28(va)(a) as business income, as has been held by the special Bench and the Hon'ble Bombay High Court. Accordingly, the action of the AO of treating this receipt as revenue receipt in the hands of the appellant is upheld. But he is directed to tax this amount as income from business and not under the head income from other sources.

5.7. Without prejudice to the above, even if the appellant's contention that vide the Asset Purchase Agreement, he had transferred his right on the concept developed by him is accepted, then it requires examination as to what was the nature of asset transferred by the appellant. A perusal of the agreement dated 26.03.2009 entered into by the appellant with M/s. Indusface Pvt. Ltd. shows that the terms and conditions have been enumerated as follows:

"Terms and Conditions

Transfer of the Concept and Consideration

01: AT has developed a Concept, more particularly described in Annexure A to this Agreement related to providing malware monitoring of websites and is desirous of permitting the Company to develop one or more products and / or service lines around the said Concept and the Company is desirous of exploiting the concept and make investment in developing one or more products and / or service lines around the said Concept.

02. In consideration of the terms and conditions agreed upon by the Company, including the reversionary rights contained in Clause [5] below, AT hereby grants permission and approval to IFC to utilize freely the Concept, incur expenditure and develop products and / or services around the Concept.

03. Subject to the provisions of this Agreement, the grant of permission and approval under Clause 02 above, shall be royalty free for IFC, but IFC shall not have a right to assign this right to any other person, body or entity without seeking prior written permission of AT."

5.7.1. A perusal of Clause (2) of the agreement as reproduced above shows that the appellant has not transferred the ownership of the concept allegedly developed by him to the company. He has only granted permission and approval to Indusface to utilize freely the Concept, incur expenditure and develop products and/or services around the Concept. This grant of permission and approval is royalty free. At the same time, M/s. Indusface has not been given any right to assign this right to any other person, body or entity without seeking prior permission of the appellant. Thus, the ownership of the concept remained with the appellant only. Only the right to develop products and/or services around the Concept has been transferred to M/s Indusface. Thus, the appellant's claim that he had transferred the concept whose cost of acquisition is not ascertainable is a false claim. Since, he has only granted permission and approval to IFC for utilizing such concept for developing products and/or services around it, hence such transfer amounts to transfer of an intangible asset in the nature of right to manufacturer, produce or process any article of thing. As per section 55(2)(a), the cost of acquisition of such right to manufacturer, produce or process any article or thing shall be taken as nil, if there is no cost of acquisition to the transferor. This is the situation in the present case.

5.7.2. This transfer of the right to utilize the concept for developing products and/or services, has been made by the appellant in consideration of the terms and conditions agreed upon between the appellant and the company. In the Agreement, no monetary consideration has been paid to the appellant and the agreement clearly says that the transfer is free of any royalty. Thus, this right has been transferred to the company on 26.03.2009 without any consideration except for the reversionary rights. In pursuance of such agreement, the only right for a limited period which remained with the appellant has been narrated in clause '5' of this agreement as follows:

"05. IFC farther agrees and confirms that in case any of the following situations arise before expiry of 7 (seven) years from the date of this Agreement, then the right granted by AT shall revert to AT and thereupon, IFC shall not have any right, title or interest either in developing any product and / or services in relation to the Concept or shall have any right, title or interest in any product and services developed in relation to the Concept or making use of the Concept:

i) If IFC fails to launch any product and / or services resulting into any revenues to IFC on or before expiry of this period;

ii) If there is a change in control of IFC. Change of control for the purpose of this clause shall mean any change in shareholding of the company, either directly or indirectly, giving right to vote to persons other than existing shareholders of the company, beyond 50 % of the outstanding share capital of the Company from time to time.

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iii) If IFC decides to sell or dispose off its right , title or interest in any product and / or services developed based on the Concept, whether as part of the entire sale of business of the Company or as an independent transaction;

iv) If a liquidation event occurs in case of IFC; Liquidation event for this purpose any of the events referred to herein below :

a) The Company is unable to pay its debts in terms of Section 434 of the [Indian] Companies Act, 1956;

b) The Company convenes a meeting of its creditors or makes any arrangements or composition with or any assignment for the benefit of its creditors or a petition is admitted or a meeting is convened for the purposes of considering a resolution or other steps are taken for the winding up of the Company or if an encumbrances takes possession of or a trustee, receiver, liquidator or administrator or similar officer is appointed in respect of all or any part of its business or assets or any distress execution or other legal process is levied, threatened, enforced or sued out against any such assets;
06: It is specifically agreed that if none of the events mentioned in Clause 05 above occur during the period of 7 (seven) years from the date of this Agreement, then AT shall not have any reversionary right provided for in Clause 05 above and such right .then shall terminate on expiry of the 7 (seven) years.

07: AT assures that in case of any transaction involving sale of business, change of control or sale of substantial or substantially the whole of the business of the Company, AT shall, for consideration to be negotiated, agree to either forego his reversionary right contained herein or assign such reversionary right in favour .of the acquirer of the business, shares or part of the business."

5.7.3. Thus, after the signing of this agreement, the only right remaining with the appellant was the revisionary right as narrated in Clause '5' of the agreement. Now, as per clause '7', the appellant had agreed that in case of any transaction involved in selling of business, the change of control or sale of substantial or substantially the whole of the business of the company, he will forgo his reversionary right for the consideration to be negotiated. Moreover, a perusal of Clause '5' shows that upon happening of the circumstances mentioned in this, only the right granted by AT to the company shall be returned back to him. Thus, the right which was bound to be reverted back to the appellant was only the right to utilize the concept for developing products and/or services around it. Accordingly the reversionary right was also in the nature of 'Right to manufacture, produce or process any article or thing'. Hence in the absence of any cost to the appellant for acquiring such right, its cost of acquisition is to be deemed as 'Nil'.

5.7.4. Thus, vide the Asset Purchase Agreement entered into with M/s. Trend Micro by IFC and others, the appellant has foregone the reversionary right in the form of right to use the concept for developing products and/or services around it in lieu of consideration received by him. The consideration has been received by the appellant on account of relinquishment of such intangible asset along with signing the non compete Agreement entered into by him with the purchaser. As already discussed, the cost of acquisition of such right is to be taken as 'Nil' as per the provisions of section 55(2)(a). Hence the resultant capital gain is to be computed and charged to tax in the hands of the appellant accordingly.

5.7.5. Besides the reversionary right has accrued to the appellant only on the date of signing of the agreement by IFC with M/s Trend Micro and on the same date, the right has been relinquished by him by receiving the consideration from the purchaser. Hence the period of

holding of this right is less than 3 years. Accordingly the asset transferred by the appellant is in the nature of short term capital asset. Hence the resultant capital gain is chargeable to tax as short term capital gain. Under such circumstances too, there will be no difference in the tax liability of the appellant.

5.7.6. Further the non compete Agreement is not in relation to the concept because at the time of sale of the business by IFC to Trend Micro, IFC had already developed the intangible product in the form of M/s, Indus Guard by utilizing such concept and was earning revenue, by selling products manufactured by utilizing Indus Guard. Thus, the non-compete fee received by the appellant is not related to the original right granted by him for exploitation of the concept to M/s. IFC. Hence, the consideration received in lieu of entering into non competent Agreement is not taxable as capital gain in the hands of the appellant under any circumstances. Only a part of the consideration received against the foregoing of reversionary right can be held to be a capital gain and in that condition also, the cost of acquisition of such right has to be taken at Nil and the capital gain is to be computed as short term capital gain as discussed above.

5.8. But, a perusal of the Asset Purchase Agreement clearly shows that the dominant intention of the purchaser for making payment to the appellant was to prevent him from engaging in any business which could have competed with the business purchased by M/s. Trend Micro from the sellers. Under such circumstances, the decision in the case of Arun Toshniwal Mumbai (supra) & Dr. B.V. Raju (supra) are fully applicable to the facts of the present case. Hence, it is held that the amount received by the appellant is revenue receipt in his hands and is taxable as business income u/s 28(va) of the Act. Thus, there will be no difference on the tax to be charged from the appellant as the entire amount becomes taxable in his hands as revenue receipt. Accordingly, Ground Nos. 1, 2 & 3 are dismissed."

4. The assessee is not satisfied and is in further appeal before us.

5. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of applicable legal position.

6. It is important, before we take up legal arguments canvassed by the assessee, to analyse the basic facts of this case. Indusface India, at the point of time when it entered into agreement dated 26th March 2009, was a private limited company with only two shareholders holding 5,000 shares each- the assessee and his wife Nandini Tandon. The agreement that the assessee entered into with Indusface India was thus clearly a transaction between closely related persons. It is also important to note that the assessee was an Executive Director of Indusface India, and, Nandini Tandon, his wife, signed this appointment letter on 16th May 2005 which, *inter alia*, provided as follows:

> 4. Scope of work
>
> Subject to supervision and control of the Board of Directors of the company, you, as an Executive Director, shall look after business operations, technology, marketing and strategic business development, Government liaison etc and other day to day operations of the company and all the duties that the Board may delegate to you from time to time.
>
> 5. Duties and responsibilities

Unless prevented by ill health or otherwise granted prior consent by the Board, you will devote all your working time, attention and ability to the business and affairs of the company in your capacity as Executive Director, and you shall not be employed by, provide services to, or otherwise be engaged in any other organization and employment

7. Clearly, at the point of time when assessee "coined the interesting concept for providing round the clock [24X7X365] or daily or on demand malware monitoring of websites in a zero touch and security as a service (SAAS)", he was an employee of Indusface India and expected to "devote all *(his)* working time, attention and ability, to the affairs of the company". If "coining the interesting concept", as the assessee puts it, was indeed a useful and valuable concept that the assessee developed on his own and without any involvement of Indusface India, either the assessee is making a misstatement of facts or the employment agreement dated 16th May 2005, undisputedly an agreement between two closely related parties i.e. the assessee and the company 50% shareholdings of which was owned by him and the remaining 50% shareholding was held by his wife, was followed more in breach than in observance. Here is an employee who is paid Rs 80,000 pm by a company, for full time employment and with the condition that the employee will devote all his working time, attention and ability to the business and affairs of the employer, and yet the employee, in his spare time- which he was not allowed to use for anything other than business and affairs of the company anyway, "coins" such a useful concept that the said concept, on standalone basis, fetches him an earning of almost Rs 10 crores. Let us, at this stage, take a closer look at the description of this concept in annexure to the agreement dated 26th March 2009:

Annexure A

Injecting malware on a web portal is one of the attacks that has been turning out to be most effective attack vector. Organization that is on World Wide Web is responsible for ensuring that their website is secure from malware to its visitors. The number of vulnerabilities in the browser continue to rise, fuelling zero hour exploits which can infect any system before patches or signatures are available.

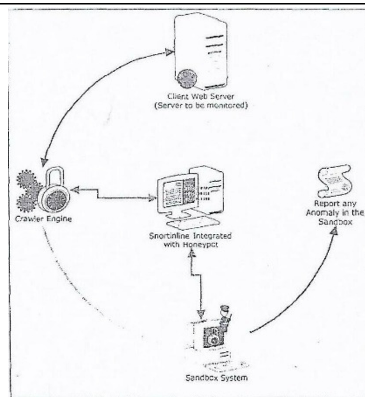
This is the right time to develop a website malware monitoring product and/ or service which is a zero touch, 24/7 or Daily, or On- demand/ Security as a Service (SAAS).

Possible Solution Architecture

Components which should be used for anti malware services would include:

>> *Crawler*
>> *Sandbox System*
>> *Honeypot*
>> *Smortinline*

Possible Detailed Architecture

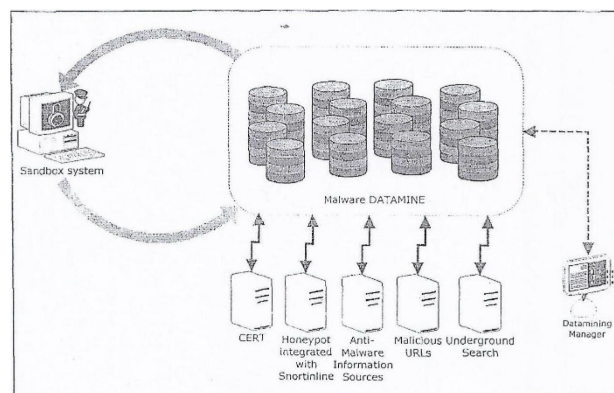


As shown in the above diagram, client's website can be crawled 24X7. The crawler simulates visitor accessing the website. Crawler engine is integrated with sandbox system that scans the website. If any redirection observed in the website immediately reported to the analyst. The analyst will in turn check the redirection is legitimate or not. If the redirection is not legitimate then the analyst may trigger an alert to the client and request a confirmation. If the redirection is redirected to the illegitimate website that contain malware or if it is blacklisted then monitoring mechanism on the sandbox system shall raise an alert and shall pause the crawler scanning the website. Also the sandbox system is also integrated with honeypot and snortinline to check the payload.

Alerting mechanism

Incident Management Force (IMF) should be set up to help clients immediately update, take remedial action and treat the anomaly in the web server.

Information Collection Sources



Key Differentiator to other security

1. *24X7 Screening*
2. *Immediate alter for any malware found on the website*
3. *Base analysis of the malware attack patterns that help the clients to understand what they are facing*
4. *Incident management for our client mitigate malware threats*
5. *Malware details are updated on open community that enables the update malware details over a wide area*
6. *Chain reactions can be detected*

7. Simulating visitor scenario

Other complementary products could be added going forward are Network Vulnerability Assessment, Application Audit, Defacement Detection etc for these websites.

8. As learned CIT(A) rightly points out, in consideration for the assessee allowing the company to commercially develop and exploit this concept, no monetary consideration has been paid to the appellant and the agreement clearly says that the transfer is free of any royalty. Of course, paragraph 5,6 and 7 of the agreement refer to the consequences of IFC failing to launch any product or services, based on the concept, or of sale of business or change of ownership but there is not a whisper of a suggestion as to on what terms the fruits of commercial exploitation of this concept will be shared between the assessee and the employer. Yet, fortunately, both the parties had the clairvoyance of dealing with nuances of how the consideration on sale of business, which is what ultimately happened, will be dealt with. In this light, let us once again take a look at the portion of the agreement which deals with what is given by the assessee and what does the assessee get in return:

01: AT has developed a Concept, more particularly described in Annexure A to this Agreement related to providing malware monitoring of websites and is desirous of permitting the Company to develop one or more products and / or service lines around the said Concept and the Company is desirous of exploiting the concept and make investment in developing one or more products and / or service lines around the said Concept.

02. In consideration of the terms and conditions agreed upon by the Company, including the reversionary rights contained in Clause [5] below, AT hereby grants permission and approval to IFC to utilize freely the Concept, incur expenditure and develop products and / or services around the Concept.

03. Subject to the provisions of this Agreement, the grant of permission and approval under Clause 02 above, shall be royalty free for IFC, but IFC shall not have a right to assign this right to any other person, body or entity without seeking prior written permission of AT.

04. AT undertakes and agrees not to share the concept with any other person other than the IFC and not to grant any right to develop any product/ and or services to any person other than IFC, and, accordingly, IFC shall have the exclusivity in exploiting the concept and deveop products and/ or services in relation to the concept.

05. IFC further agrees and confirms that in case any of the following situations arise before expiry of 7 (seven) years from the date of this Agreement, then the right granted by AT shall revert to AT and thereupon, IFC shall not have any right, title or interest either in developing any product and / or services in relation to the Concept or shall have any right, title or interest in any product and services developed in relation to the Concept or making use of the Concept:

i) If IFC fails to launch any product and / or services resulting into any revenues to IFC on or before expiry of this period;

ii) If there is a change in control of IFC. Change of control for the purpose of this clause shall mean any change in shareholding of the company, either directly or indirectly, giving right to vote to persons other than existing shareholders of the company, beyond 50 % of the outstanding share capital of the Company from time to time.

iii) If IFC decides to sell or dispose off its right , title or interest in any product and / or services developed based on the Concept, whether as part of the entire sale of business of the Company or as an independent transaction;

iv) If a liquidation event occurs in case of IFC; Liquidation event for this purpose any of the events referred to herein below :

a) The Company is unable to pay its debts in terms of Section 434 of the [Indian] Companies Act, 1956;

b) The Company convenes a meeting of its creditors or makes any arrangements or composition with or any assignment for the benefit of its creditors or a petition is admitted or a meeting is convened for the purposes of considering a resolution or other steps are taken for the winding up of the Company or if an encumbrances takes possession of or a trustee, receiver, liquidator or administrator or similar officer is appointed in respect of all or any part of its business or assets or any distress execution or other legal process is levied, threatened, enforced or sued out against any such assets;
06: It is specifically agreed that if none of the events mentioned in Clause 05 above occur during the period of 7 (seven) years from the date of this Agreement, then AT shall not have any reversionary right provided for in Clause 05 above and such right .then shall terminate on expiry of the 7 (seven) years.

07: AT assures that in case of any transaction involving sale of business, change of control or sale of substantial or substantially the whole of the business of the Company, AT shall, for consideration to be negotiated, agree to either forego his reversionary right contained herein or assign such reversionary right in favour .of the acquirer of the business, shares or part of the business."

9. There is no mention in the agreement as to how the fruits of commercial exploitation will be shared between the parties, and that is precisely what the assessee had offered, under the above agreement, for seven years to his employer. In that sense, this agreements seems to be devoid of a consideration for the assessee and, as is only elementary, an agreement without consideration is not a legally enforceable contract. Section 10 of the Indian Contract Act, 1872, specifically states only such agreements are contracts as are, inter alia, entered into “for a lawful consideration”.

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10. It is interesting that while the parties to this agreement did not bother about how to share the fruits of commercial exploitation between the parties during the seven years when the employer was allowed to commercially exploit the concept "coined by" the assessee, the agreement did mention as to what happens if the employer, inter alia, sells his business before the seven years. The parties go into such fine details about this aspect that they decide, stating in so many words, that the assessee assured "that in case of any transaction involving sale of business, change of control or sale of substantial or substantially the whole of the business of the Company, AT *(the assessee)* shall, for consideration to be negotiated, agree to either forego his reversionary right contained herein or assign such reversionary right in favour of the acquirer of the business, shares or part of the business".

11. When we shared our first reactions in respect of these apparent inconsistencies, or somewhat unusual features, in the agreement, to the learned counsel, he vehemently opposed even our expression of doubts on the bonafides of the agreement. He said that there cannot be a half hearted approach inasmuch either the agreement can be accepted or it can be rejected. Learned counsel submits that once we accept an agreement to be genuine, all the necessary consequences follow. Learned counsel's submission is that "it is to be considered whether the agreement of March 2009 can be considered to be not genuine by the ITAT merely on suspicion" and that "in this connection, the latin maxim says that when a person is alleging that apparent is not real, the onus is on the person who alleges so". He then states, in a note filed before us, "the agreement is executed and is before the ITAT duly admitted at the lower level as genuine document and the ITAT cannot brush aside the agreement as not genuine based on mere suspicion" and, then, makes a very interesting comment that "the document 'could' be backdated does not mean that it 'would' be back dated". It is in this backdrop that he refers to the judgments of Hon'ble jurisdictional High Court in the case of Deepak Nitrate Limited Vs CIT [(2008) 175 Taxman 130 (Guj)], Sreelekha Banerjee Vs CIT [(1963) 49 ITR 112 (SC)], Udhavedas Kevalram Vs CIT [(1967) 66 ITR 462 (SC)], CIT Vs Daulatram Rawalmull [(19730 87 ITR 349 (SC)], CIT Vs Orrissa Corporation Pvt Ltd [(1986) 159 ITR 78 (SC)], Dhakeshwari Cotton Mills Ltd Vs CIT [(1954) 26 ITR 775 (SC)]. Learned counsel then pointed out that the genuineness of the above agreement is also accepted, by implication, by Dhanya Thakkar who invested in 30% shareholdings after this agreement, by Venkatesh Sunder, an employee whjo was given ESOP, and the value of his benefit would have been lowered by the outgo to the assessee, by Trend Micro who agrees to compensate the assessee for the loss of reversionary rights, by the Assessing Officer who did not dispute the genuineness and by the CIT(A) who did not doubt the bonafides of the agreement at any stage and discussed it extensively. Learned counsel then added that the concept was a valuable concept and its valuation was done by SSPA & Co, Chartered Accountants, one of the "most reputed firms specializing only in valuations" but since the issue of valuation of concept never came up, the valuation was not fined. We are thus urged to accept the agreement as it is, accept all the corollaries thereto and not to entertain any doubts about the same and allow its logical consequences to be followed.

12. As we examine the agreement before us, we must bear in mind Hon'ble Supreme Court's observation, in the case of CIT v. Durga Prasad More [1971] 82 ITR 540, to the effect that "Science has not yet invented any instrument to test the reliability of the evidence placed before a court or tribunal. Therefore, the courts and Tribunals have to judge the evidence before them by applying the test of human probabilities". Similarly, in a later decision in the case of Sumati Dayal v. CIT [1995] 214 ITR 801/80 Taxman 89 (SC), Hon'ble Supreme

Court rejected the theory that it is for alleger to prove that the apparent and not real, and observed that, This, in our opinion, is a superficial approach to the problem. The matter has to be considered in the light of human probabilities…...Similarly the observation ……that if it is alleged that these tickets were obtained through fraudulent means, it is upon the alleger to prove that it is so, ignores the reality. The transaction about purchase of winning ticket takes place in secret and direct evidence about such purchase would be rarely available ....In our opinion, the majority opinion after considering surrounding circumstances and applying the test of human probabilities has rightly concluded that the appellant's claim about the amount being her winning from races is not genuine. It cannot be said that the explanation offered by the appellant in respect of the said amounts has been rejected unreasonably". As Hon'ble Supreme Court has observed, in the case of Durga Prasad More(supra), ...it is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real party who relies on a recital in a deed has to establish the truth of those recitals, otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents". As a final fact finding authority, this Tribunal cannot be superficial in its assessment of genuineness of a transaction, and this call is to be taken not only in the light of the face value of the documents sighted before the Tribunal but also in the light of all the surrounding circumstances, preponderance of human probabilities and ground realties.

13. In our considered view, if "coining of the concept", as assessee puts it, was indeed so valuable that it would, on standalone basis, fetch the assessee Rs 10 crores, there could not have been any logic in allowing a company to commercially exploit or develop the same for 7 years, without any royalty, consideration and arrangement for sharing the results of its commercial exploitation. The terms of the provisions of the agreement do not make commercial sense at all. What is being shown in this agreement, in our considered view, not real. Apart from the fact that, as noted earlier, on the face of it, it is an agreement without consideration, it does not appear to be a legally enforceable contract anyway, it is completely at variance with the ground realities of the commercial world. All these facts taken together rais serious doubts about the claim of the assessee with respect to the true consideration for the payment of US $ 15,75,000. We donot have sufficient material on record to come to the conclusion that this payment was indeed "coining of an idea", reproduced earlier, and, in any event, if at all, the assessee had one important and significant right that the assessee gave away in this consideration was his non compete right. As learned CIT(A) has rightly observed, "non-complete" by the assessee clause in the business purchase agreement with Trend Micro was clear thrust and a significant obligation by the assessee for which impugned payment was made to the assessee. As clause 6.6 of the business purchase agreement clearly states, "an original counterpart of the noncompetition agreement duly executed and delivered by Tandon *(i.e. the assessee)*" is a was delivered, contemporaneously with or prior to the execution of business purchase agreement. Clause 9.1 (a) of this agreement further provides unambiguous thrust on non competition agreement by the assessee. This clause, for the ready reference, is as follows:

9.1. Covenant Not To Compete.

(a) In consideration of, and as a material inducement and as a condition to, the entry of the Purchaser into this Agreement and the entry of Trend Micro India into the India Purchase Agreement and the consummation of the transactions contemplated herein and therein, <u>and in consideration of the mutual agreements set forth herein and for other good and valuable consideration the acquisition by Purchaser of the Business and the goodwill associated therewith</u>, and in order to ensure that Purchaser receives the value of such goodwill, the receipt and sufficiency of which are hereby acknowledged, <u>Tandon agrees to execute the Non-Competition Agreement</u> and the other Sellers, on behalf of themselves and their direct and indirect subsidiaries, agrees that they will not directly or indirectly (as an investor, shareholder, advisor, partner, consultant, licensor or otherwise), for a period commencing] on the Closing Date and ending on the third (3rd) anniversary of the Closing Date:

(i) <u>Engage in any business that competes with the Business anywhere in the world:</u>

(ii) recruit, solicit or induce, or attempt to induce, directly or indirectly, any of the Business Employees or the Business Contractors to terminate their employment or engagement with, o[r] otherwise cease their relationship with Purchaser; or

(iii) solicit, divert or take away, or attempt to divert or take away, the business or patronage of any of the 'Business clients, customers or accounts, or prospective clients, customers or accounts, of Purchaser as at the Closing Date (collectively, the activities described in this Section 9.1(a)(i), (ii) and (iii) being the "Restricted Business").

(b) Nothing contained in Section 9.1 (a) shall prohibit Indusface India from acting as an authorized reseller of Purchaser's products in accordance with the Purchased Software License Agreement and the Trend Micro Strategic Channel Partner agreement.

(c) If any restriction set forth in this covenant not to compete is found by any court of competent Jurisdiction to be unenforceable because it extends for too long a period of time or over too great a range of activities or in too broad a geographic area, it shall be interpreted to extend only to the maximum period of time, range of activities or geographic area as to which it may be enforceable.

(d) Sellers acknowledge and agree that the restrictions contained in this [1 covenant not to compete are necessary for the protection of the Business and goodwill of] Purchaser and are considered by Sellers and Purchaser to be reasonable for such purpose. Sellers expressly acknowledge the value of the consideration received in-connection with this covenant 1 not to compete. Sellers agree that any breach of this covenant not to compete will cause Purchaser substantial and irrevocable damage for which the Purchaser will have no

adequate remedy at law and therefore, in the event of any such breach or threatened breach, in addition to such other remedies which may be available. Purchaser or any of its Affiliates may seek specific performance and injunctive relief without the requirement of posting a bond and without the necessity of proving actual economic damages and to recover all costs and expenses incurred by Purchaser, including reasonable attorneys' fees and costs, in addition to any other remedies to which Purchaser may be entitled at law or in equity. Sellers hereby waive and agree not to assert the defense that Purchaser has or will have an adequate remedy at law and specifically recognize and acknowledge that Purchaser shall have the right to enforce the terms of this Agreement in its own name. The terms of this Section 9.1 shall not prevent Purchaser from pursuing any other available remedies "for any breach or threatened breach hereof including, but not limited to, the recovery of damages from Sellers. Sellers further agree that the provisions of' the covenants set forth in this Section 9.1 are reasonable and valid, and Sellers waive, all defenses to the strict enforcement thereof."

14. It is beyond any dispute or controversy that the arrangements for non compete takes away a valuable right from the person who agrees not to compete, but then no value has been assigned by the assessee, as a consideration for entering into this non compete agreement.

15. What essentially follows is that undisputed facts of the case and material on record evidence the fact that "coining of" the concept in question was in the course of the employment of the assessee, and, therefore, the plea that it belonged to the assessee, in his individual capacity, is too naïve to meet any judicial approval. In any case, there is no material on record to demonstrate that this coining of concept is such a valuable asset that it could fetch Rs 10 crores of consideration on a standalone basis, and, if that was so, it is simply beyond the human probabilities that such a valuable right could be given to someone for 7 years for commercial exploitation and development, with no strings attached, and without even finalizing as to how the fruits of such commercial exploitation will be shared by that person with the owner of this concept. Even otherwise, whatever little we can make out of the "concept coined by the assessee", attached as Annexure A to the agreement dated 26th March 2009, it is not a scientific invention or a implementable eureka idea but rather a broad, though technically well informed, idea about a product and its need as generally felt by the industry. The agreement dated 26th March 2009, for the detailed reasons discussed above, is neither a legally enforceable document so far as value of or sharing of the fruits of its commercial exploitation is concerned, though, with an unusual vision about the way things were to unfold in future, it has finest details about what is to happen in case the business of the employer is to be sold, nor, for that purpose , it inspires much confidence about its bonafides, inter alia, for the reason that it is an agreement between two such closely related parties, and of such an unusual pattern and in such unusual circumstances, that it clearly lacks free informed consent away from undue influence. This is a self serving document, and, to use the words employed by Hon'ble Supreme Court, in Durga Prasad More's case (supra),"If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax…….. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents".

As for learned counsel's suggestion that he is willing to file the valuation report on the value of the "concept" coined by the assessee, nothing prevented him from filing the same nor there is any application for additional evidence before us. It is for the assessee to decide as to what is appropriate for justifying his case, and when he does not file a document, with specific prayer for admission of such additional evidence, he cannot have a grievance about not been given an opportunity to furnish that evidence. In any case, whatever documents have been placed before us donot help us conclude that the amount received by the assessee from Trend Micro USA is towards the sale consideration of a self generated asset by way of a new concept. It is only elementary that the onus is on the assessee to demonstrate that an income is exempt from tax, and that onus is clearly not discharged by the assessee.

16. Even if we are to assume the agreement to be bonafide and we treat all the averments therein the gospel truth, it does not help the assessee. We cannot treat one agreement as gospel truth and the second agreement meaningless ritual. In terms of the employment agreement that the assessee had with Indusface India, all his working time and attention was to be devoted to the business and affairs of the employer, and the natural presumption thus is that this great concept was developed during the said time. We have reproduced the extracts from the said agreement earlier in this order. The concept developed by the assessee was thus fruit of and related to his employment, and business of the employer was the same. The concept developed by the assessee, during the course of his employment, was sold to a third party, and, going by the claim of the assessee, the amount of US $ 15,75,000 was received on account of sale of this concept. That is the logical conclusion that must follow in the event of our accepting bonafides of the agreements filed by the assessee. Viewed thus, what the assessee has got as a result of the impugned sale of business by his employer to Trend Micro is a result of fruit of his employment, but, as it has not been received from the employer, it is taxable under the head 'income from other sources'. As we observe so, we find support from Hon'ble Supreme Court's decision in the case of Emil Webber Vs CIT [(1993) 200 ITR 483 (SC)] wherein Their Lordships have, inter alia, observed as follows:

> The question then arises under which head of income should the said income be placed. Inasmuch as the assessee is not an employee of Ballarpur, which made the payment, it cannot be brought within the purview of section 17 of the Act. It must necessarily be placed under sub section (1) of section 56, 'Income from other sources'. According to the said sub-section, income of every kind which is not to be excluded from the total income under the Act shall be chargeable to income-tax under the head 'Income from other sources' if it is not chargeable to income-tax under any of the other heads specified in section 14, Items A to E. It is not the case of the assessee that any provision of the Act exempts the said income from the liability to tax.

17. It is also important to note in the non compete agreement that the assessee entered into with Trend Micro, it is also stated that, amongst others, the assessee "by the virtue of employment and affiliation with IFI and/ or IFC It is also important to note in the non compete agreement that the assessee entered into with Trend Micro, it is specifically stated , the restricted party has obtained knowledge concerning confidential information of IFI and IDFC relating to the business" and it is in consideration thereto, in our considered view, the payment has been made. Viewed thus also, the conclusions will remain the same.

18. Continuing with our analysis about the amount being at best in the nature of non compete fees, we find that on an analysis of the business purchase agreement by the Trend Micro, the consideration received by the assessee, if not a fruit of his employment, can at best be treated as a non compete fees. That aspect has been discussed earlier and the factual findings set out in some detail. It is also important to note in the non compete agreement that the assessee entered into with Trend Micro, it is specifically stated that "the restricted party (i.e. including the assessee) acknowledges that………….*(it)…*is entitled to receive valuable consideration pursuant to the Master Asset Purchase Agreement and the Indian Asset Purchase Agreement**, a portion of which is being paid in consideration of covenants and agreements of the restricted party in this agreement**" but then the assessee has not shown any part of the consideration received by the assessee as towards the non compete covenants. Even when we proceed on this basis, we reach the same conclusion with respect to taxability in the hands of the assessee. Incidentally, there is no separate non compete agreement between the assessee and the Trend Micro and there is no separate consideration paid by Trend Micro to the assessee.

19. On this aspect, we are in considered agreement with the learned CIT(A) that "a perusal of the Asset Purchase Agreement clearly shows that the dominant intention of the purchaser for making payment to the appellant was to prevent him from engaging in any business which could have competed with the business purchased by M/s. Trend Micro from the sellers. Under such circumstances, the decision in the case of Arun Toshniwal Mumbai (supra) & Dr. B.V. Raju (supra) are fully applicable to the facts of the present case. Hence, it is held that the amount received by the appellant is revenue receipt in his hands and is taxable as business income u/s 28(va) of the Act". We are in considered agreement with the findings of the CIT(A) and we approve the same. In any case, cost of acquisition, in the case of non compete rights, under section 55(2)(a) is to be taken as NIL, and, as a corollary thereto, the entire receipts is to be taxed in the hands of the assessee.

20. Even if one proceeds on the basis that it is a capital gain, as learned CIT(A) rightly observes, if the consideration received by the assessee could be said to be on account of transfer of a capital asset, that asset is the reversionary right that the assessee had over the concept coined by him. On this aspect also, we are in considered agreement with very well reasoned findings of the CIT(A) as follows:

> *………..vide the Asset Purchase Agreement entered into with M/s. Trend Micro by IFC and others, the appellant has foregone the reversionary right in the form of right to use the concept for developing products and/or services around it in lieu of consideration received by him. The consideration has been received by the appellant on account of relinquishment of such intangible asset along with signing the non compete Agreement entered into by him with the purchaser. As already discussed, the cost of acquisition of such right is to be taken as 'Nil' as per the provisions of section 55(2)(a). Hence the resultant capital gain is to be computed and charged to tax in the hands of the appellant accordingly.*
>
> *5.7.5. Besides the reversionary right has accrued to the appellant only on the date of signing of the agreement by IFC with M/s Trend Micro and on the same date, the right has been relinquished by him by receiving the consideration from the purchaser. Hence the period of holding of this right is less than 3 years. Accordingly the asset transferred by the appellant is in the nature of short term capital asset. Hence the resultant capital gain is chargeable to tax as short term capital gain. Under such circumstances too, there will be no difference in the tax liability of the appellant.*

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5.7.6. Further the non compete Agreement is not in relation to the concept because at the time of sale of the business by IFC to Trend Micro, IFC had already developed the intangible product in the form of M/s, Indus Guard by utilizing such concept and was earning revenue, by selling products manufactured by utilizing Indus Guard. Thus, the non-compete fee received by the appellant is not related to the original right granted by him for exploitation of the concept to M/s. IFC. Hence, the consideration received in lieu of entering into non competent Agreement is not taxable as capital gain in the hands of the appellant under any circumstances. Only a part of the consideration received against the foregoing of reversionary right can be held to be a capital gain and in that condition also, the cost of acquisition of such right has to be taken at Nil and the capital gain is to be computed as short term capital gain as discussed above.

21. Whichever way we look at it, there is no escape from the taxation of these receipts in the hands of the assessee. The erudite arguments of the learned counsel, therefore, donot come to the rescue of the appellant. We are unable to accept the plea of the assessee that the impugned receipt is in the nature of an exempt income. We are, therefore, in considered agreement with the conclusions arrived at by the learned CIT(A). In view of these discussions, as also bearing in mind entirety of the case, we approve the conclusions arrived at by the learned CIT(A) and decline to interfere in the matter.

22. In the result, the appeal is dismissed. Pronounced in the open court today on the 8th day of February, 2019.

Sd/-	***Sd/-***
Madhumita Roy	**Pramod Kumar**
(Judicial Member)	(Accountant Member)

Ahmedabad, dated the 8th day of February, 2019.

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad

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