INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
BEFORE SHRI H. S. SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 1669 /Del/2016
(Assessment Year: 2007-08)

Crain U K Holdings Limited 50 Lothian Road Edinburgh , Scotland EH39BY PAN : AACCC9135H (Appellant)	Vs.	Deputy Commissioner of Income Tax (International Taxation) – Circle 1(2)(1) New Delhi (Respondent)

Assessee by :	Shri Percy Pardiwala Sr. Adv Shi P Maheshwari, CA Ms. Aarti Sathe, Adv
Revenue by:	Shri Sanjay Puri CIT Shri Anuj Arora CIT DR
Date of Hearing	19/12/2016
Date of pronouncement	09/03/2017

O R D E R

PER PRASHANT MAHARISHI, A. M.

01. This appeal is preferred by Cairn UK Holdings Limited, (hereinafter referred to as 'Appellant") , against the order of the Deputy Commissioner of Income tax , Circle- 1 (2) (1) International taxes, New Delhi (Hereinafter referred to as the 'AO ') dated 25/01/2016 passed u/s 143(3) rws 148 of the

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Income Tax Act (hereinafter referred to as the "act") passed in pursuance of directions under section 144 C(5) of the Act by Ld Dispute Resolution Panel (hereinafter referred to as the "DRP") dated 31/12/2015 given with respect to draft assessment order dated 9/3/2015 passed by the Ld. AO.

02. When the appeal was called for hearing on 15/10/2016 the Ld. authorized representative of the appellant submitted a letter dated 15/10/2016 requesting for adjournment of hearing. It was submitted that appellant along with its holding company Cairn Energy PLC is currently engaged in the arbitration under article 9 of the agreement between government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of India for the promotion and protection of the investment and proceedings are in progress. Therefore, it was argued that the issue is already sub-judice before the International Court of Justice. Therefore, it was argued that considering the importance of the matter under appeal and its significant impact, appellant must necessarily consult its international counsel and due to the short extension previously given it is not been possible to liaise between Indian and

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international counsel in the time allowed. Therefore, the requests said that appeal might be adjourned until January 2017.

03. This adjournment application was vehemently objected to by the Ld. departmental representative stating that that the statement made in the application that the issue is already sub judice is factually incorrect. He submitted that assessee has invoked arbitration under article 9 of the India UK BIPA and three-member arbitral tribunal has been constituted with both the claimants and India having appointed one arbitrator reach and 3rd arbitrator having been decided by the two-party appointed arbitrators. The process is ad hoc arbitration governed by the UNCITRAL Rules, 1976. He further referred to the process of appointment of the arbitrator in the above application filed by the assessee and therefore he submitted that adjournment request is not at all relevant but misleading as well. It was further submitted that India has conveyed its position in clear terms to the claimant and the tribunal that tax disputes are outside the purview of the above agreement. Further, the India has filed on 07/10/2016 an application before the tribunal requesting bifurcations of the arbitration proceedings whereby the tribunal has been asked to hear India's objection to jurisdiction and

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admissibility before proceeding further. Therefore, India has challenged the authority of the tribunal and the maintainability of the arbitral proceedings as far as this dispute is concerned. He therefore submitted that request made for adjournment by the assessee is liable to be rejected. He further submitted that huge revenue is locked in the above appeal and therefore it deserves hear and quick disposal.

04. We have carefully considered the rival contentions. In addition, we have noted that this appeal has been filed by assessee on 30th of March 2016 and was first listed for hearing on 17th of October 2016, however, it was adjourned to 15/11/2016 at the request of the Counsel of the assessee. Further, on the date of hearing on 15/11/2016, this application was made. As considerable revenue is locked in the present appeal, we persuaded both the parties to argue the case irrespective of the matter pending before the tribunal because the order of the tribunal, whenever passed may be applied in arbitration proceedings. It may not have any impact on the tax liability of the company, as the claim of the assessee is reimbursement of tax burden suffered in India on the impugned transaction. We are of the view that keeping the issue unnecessarily pending for a

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very long time where there is no timeline available about the disposal of the application of the assessee for arbitration proceedings, which is pending since 11/03/2014, is not proper. Hence, we directed both the parties to argue the matter before us and we have ensured that enough opportunity would be available to both the parties for putting their case forward. Consequently, on 15/11/2016, the matter was partly heard and the revenue was directed to produce the original records and hearing was adjourned to 18/11/2016. Further, on 18/11/2016, hearing was further adjourned to 14/12/2016. On 14/12/2016, there was a further adjournment request, which was acceded to, and the matter was finally adjourned to 19/12/2016. On 19/12/2016, matter was argued by both the parties and heard.

05. In this appeal following grounds of appeal are raised by appellant:-

Grounds of Appeal

Without prejudice to ongoing international arbitration proceedings involving Cairn Energy PLC, Cairn UK Holdings Limited and the Government of India and all its claims, rights and remedies therein, Cairn UK Holdings Limited (hereinafter referred to as the "Appellant") craves leave to

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prefer appeal against the order dated 25 January 2016 issued by the Learned Deputy Commissioner of Income Tax (International Taxation) - Circle 1(2)(1), New Delhi (hereinafter referred to as "AO") under Section 148 / 143(3) / 144C(13) of the Act in pursuance of the directions dated 31 December 2015 issued by the Hon'ble Dispute Resolution Panel -New Delhi (herein referred to as "DRP").

1. The order passed by the AO pursuant to the directions of the DRP is bad in law and facts and is liable to be set aside on the grounds set forth below.

2. Assumption of Jurisdiction

2.1. The AO has erred in and the DRP has compounded that error by confirming the action of the AO in assuming jurisdiction under Section 147 of the Act, even when there is no income chargeable to tax of the Appellant and the conditions precedent for initiation of reassessment proceedings and various applicable time lines and requirements have not been complied with.

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2.2. The initiation of reassessment proceedings, and consequently the final assessment order, is without jurisdiction, merit, is void ab initio and should be quashed.

3. Levy of Capital gains tax amounting to Rs. 1,02,47,36,42,264

3.1. The AO has erred in and the DRP has further erred in confirming the action of the AO by holding that the gain, if any, arising to the Appellant on account of the sale of shares of Cairn India Holdings Ltd. ("CIHL"), a Jersey Company, to Cairn India Limited ("CIL"), an Indian Company is deemed to accrue or arise in India under Section 9(1)(i) of the Act and is, therefore, chargeable to tax in India.

3.2. The AO has erred and the DRP has further erred by not appreciating the fact that CIHL is incorporated in Jersey i.e. the situs of the shares of CIHL is outside of India and, consequently, the gain, if any, on a transfer of shares in CIHL is not even deemed to

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accrue or arise in India, and is not chargeable to tax in India.

3.3. *The AO's interpretation of Section 9 of the Act, as it stood prior to the amendments pursuant to the Finance Act, 2012, is ex facie contrary to the interpretation thereof by the Hon'ble Supreme Court in Vodafone Holdings B. V. v. Union of India and Another.*

3.4. *The AO failed to appreciate that the purported distinctions between the Appellant's case and the Vodafone case (referred to in paragraph 9.3 of the final assessment order) are of no consequence in determining the chargeability of the transaction to tax in India.*

3.5. *The AO has erred in and the DRP has further erred in not appreciating the fact that the transaction which gives rise to the assessment order at dispute is purely an internal group restructuring, prior to the listing of CIL's shares on stock exchanges in India. It is submitted that the above referenced reorganisation resulted in new subsidiaries in the*

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corporate group but did not generate any real income or crystallise any new value and is, therefore, not chargeable to tax in India.

3.6. The AO has erred in and the DRP has further erred in not considering the various decisions of the Hon'ble Supreme Court of India on the computation of real income and in not appreciating the contention of the Appellant that no real income or gain has accrued to the Appellant on account of the transfer of shares to CIL and a mere accounting entry cannot be income, unless real income has actually been earned. Clearly, there was no commercial transaction with any outside third party and no gain \sas derived from any outside third party. Accordingly, there was no real income or gain realized by the Appellant in connection with these transactions. The AO and the DRP failed to appreciate that the essential elements for imposing capital gains tax do not exist in the present case.

3.7. In purporting to rely on the amount of goodwill in CIL's consolidated financial statements as indicative

of the Appellant's gain on the transaction, the AO and the DRP failed to appreciate that this is a mere accounting entry mandated by Accounting Standard 21 on Consolidation of Accounts, and that such goodwill is the difference between the value of the investment in CIHL and the book value of the assets acquired, and not the fair value.

3.8. *Based on the facts and in the circumstances of the case, the DRP and the AO erred in not accepting the contentions of the Appellant that, in any event, by virtue of transactions of "exchange", within the meaning of Section 2(47) of the Act, which resulted in the Appellant acquiring the impugned shares of CIHL, the aggregate cost of acquisition of such shares in the hands of the Appellant had to be considered at Rs 26,681 crore, as per principles laid down by the Hon'ble Supreme Court of India, being equal to the ultimate sale price realized by the Appellant on subsequent sale of the said shares in favour of CIL; and therefore no capital gains exigible to income tax under Section 45, read with Section 48*

of Act, ever arose in the hands of the Appellant. Even otherwise, the AO's computation of the cost of acquisition of the CIHL shares in the hands of the Appellant is incorrect.

3.9 Based on the facts and in the circumstances of the case, the AO and DRP failed to appreciate that there was no transfer of, or change in control over, any underlying assets in India, as even after the sale of CIHL shares by CUHL to CIL, CIHL and the companies under it remained subsidiaries of CUHL and the ultimate parent company and control of the group remained with the same person i.e. Cairn Energy PLC. Accordingly, even the purported Explanations 4 and 5 to Section 9(l)(i),introduced with retrospective effect pursuant to the Finance Act, 2012, have no applicability and cannot be relied on.

3.10. The AO failed to appreciate that his reliance on the 'separate entity' approach necessarily precludes reliance on the newly-inserted Explanation 5 to Section 9(1)(i) of the Act, which disregards the separate entity approach in order to determine the

situs of shares in a foreign company based on the location of the underlying assets.

3.11. Based on the facts and in the circumstances of this case and on the premise of the grounds mentioned above, the order under Section 147 of the Act dated 25th January 2016, levying income-tax on alleged capital gains amounting to Rs 24,504 Crore in the hands of the Appellant, is patently illegal and thus liable to be quashed.

4. Erroneous findings of the AO

4.1. The AO has erred in concluding that "the money was remitted out of the country bypassing or circumventing all procedural requirements". The AO failed to appreciate that all regulatory requirements were complied with, and that it was these very requirements that dictated the structuring of the transaction. The AO erred in concluding that the structuring of the transaction was to avoid paying tax.

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4.2. The AO has erred in concluding that the final tranche of transfer of CIHL shares for cash was not disclosed in the application to the Foreign Investment Promotion Board, nor was any approval taken for this. The AO failed to appreciate that this final tranche is specifically referred to in the above referenced application and no separate approval was required in relation to such transfer of CIHL shares for cash.

4.3. The AO has erred in concluding that the relevant facts relating to the alleged income of the Appellant were unearthed only because of the survey under Section 133A of the Act by the Department on 15 January 2014. The AO failed to appreciate that all relevant facts were available with the Department several years prior to the above referenced survey.

5. Incorrect levy of interest under Section 234A and 234B of the Act

5.1. The AO has erred in and the DRP has further erred in confirming levy of interest under Section 234AoftheAct.

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5.2. The AO has erred in and the DRP has further erred in confirming levy of interest under Section 234B of the Act. The AO has further erred in incorrectly following the directions of the DRP without providing any opportunity of being heard to the Appellant.

5.3. The AO failed to appreciate that, having acknowledged that the alleged liability to tax arose pursuant to the amendments introduced by the Finance Act, 2012, no interest ought to have been levied.

6. Initiation of Penalty proceedings

6.1. The AO based on the directions of the DRP has erred in initiating penalty proceedings under Section 271(l)(c) of the Act against the Appellant, failing to appreciate that the Appellant has not concealed any particulars of income nor has the Appellant furnished inaccurate particulars of income.

6.2. The AO failed to appreciate that, having acknowledged that the alleged liability to tax arose

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pursuant to the amendments introduced by the Finance Act, 2012, no penalty ought to have been levied.

7. The Appellant reserves the right to add, amend, alter or vary all or any of the above grounds of appeal as they or their representative may think fit.

06. During the course of hearing appellant made an application for admission of additional ground as under :-

"The Appellant prays for the admission and adjudication by the Hon'ble Tribunal, of the following additional grounds of appeal, which do not require investigation into, or examination of, any new facts or evidence that were not already available before the Assessing Officer and Dispute Resolution Panel; this merely involves interpretation of the provisions of the Income-tax Act, 1961 ('the Act') as furtherance or advancement of ground no (2) of the memorandum of appeal (Pg. No. 4) which the Hon'ble Tribunal is otherwise competent to do, in view of the principles of the Hon'ble Supreme Court in the case of National Thermal Power Corporation Limited 229 ITR 383 (SC). Further,

the Appellant believes that the existing grounds are wide enough to cover these grounds, however, as a matter of good order it is filing these as additional grounds.

Below Ground No. 2.2, the following grounds are added:

> *"2.3 On the facts and in the circumstances of the case, the learned AO has erred in completing reassessment proceedings under section 147 / 148 of the Act based on the incorrect approval obtained under section 151 (2) of the Act;*
>
> *2.4 On the facts and in the circumstances of the case, the learned AO has erred in completing reassessment proceedings under section 147 / 148 of the Act based on the issue of an invalid notice under section 143(2) of the Act which is the primary requirement for initiation of any assessment proceedings;"*

Below Ground No. 3.11, the following grounds are added;

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"3.12 On the facts and in the circumstances of the case, the learned AO has erred in taxing the Appellant by invoking the retrospective amendment to Section 9(1X0 of the Act introduced in the Finance Act, 2012, which was not on the statute when the India - United Kingdom Tax Treaty entered into force. It is therefore submitted that the taxability of the Appellant should have been determined under the provisions of section 9(l)(i) the Act which were applicable when the India - United Kingdom Tax Treaty was entered into force".

07. Brief facts of the case is appellant is a company limited by shares incorporated on 26th June 2006 in United Kingdom. On 15th of January 2014, survey was conducted under section 133A of the Income Tax Act by the director of investigation, New Delhi at the office premises of Cairn India Ltd and report of the survey was received by the investigation wing of the income tax Department. According to that investigation report, there were certain documents related to the assessee were found such as financial statements, red herring prospectus of Cairn India Ltd, statement of some officers of Cairn India Ltd, an agreement for conversion

of debt and subscription and share purchase agreement. Those documents were analysed by the Ld. assessing officer and pursuant to that notice under section 148 of the Income Tax Act was issued on 21/01/2014. In response to that notice appellant filed return of income on 03/04/2014 declaring nil income. Appellant further requested for reasons for reopening of the assessment vide its letter dated 10/06/2014 which was provided to the assessee by the Ld. assessing officer vide letter dated 25/07/2014. Appellant objected to the reasons recorded by the assessing officer and such objections were disposed of by order dated 19/02/2015. On basis of that return, notice under section 143 (2) was issued. Also, Notice under section 142 (1) on 07/05/2014 and summons under section 131, dated 20/01/2014 and 22/01/2014 were issued along with the questionnaire. Against all these notices and summons, assessee sought time. The Ld. assessing officer gave a further opportunity vide letter dated 08/10/2014 to the assessee requesting to furnish the details against which the assessee submitted it on 16/10/2014. As the Ld. assessing officer found that assessee has not submitted details as required according to the earlier questionnaire, further letter dated 19/11/2014 was issued

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against which assessee further submitted adjournment applications on these occasions for additional time for 4 weeks. As the information was not forthcoming from the assessee. The Ld. assessing officer exercised powers under section 133 (6) of the act and asked details from Cairn India Limited , purchaser of the shares of Cairn India Holdings Limited.

08. The facts of the impugned transaction, undisputedly are noted by the Ld. assessing officer in para No. 7 of his order as under:-

"*7. Analysis of the transaction of sale of shares of CIHL by Assessee (CUHL) to CIL.*

7.1 Transfer of the Indian Assets from Cairn Energy Plc to CUHL

Cairn UK Holdings Ltd. (CUHL in short) was incorporated on 26.06.2006 in the United Kingdom as a 100% subsidiary of Cairn Energy PLC (CEP). Cairn Energy PLC, a company incorporated in Scotland was holding various oil and gas assets in India through its direct/indirect foreign subsidiaries. In the year 1995, CEP acquired participating interest in the underlying Indian assets. On 30.06.2006, Cairn UK Holdings Ltd. (CUHL) issued 22,14,44,034 ordinary shares of face value of 1£ each to Cairn Energy PLC (CEP) in exchange for the entire issued share capital of the subsidiaries of Cairn Energy PLC which owned Indian assets in the form of Oil and Gas blocks.

7.1.1 Debt Conversion Agreement

On 1 September, 2006 Cairn UK Holdings Ltd increased its authorized share capital to 25,15,00,000 £ 1 ordinary shares and further issued 2,97,80,710 £ 1 ordinary shares at par to Cairn Energy Plc pursuant to a debt conversion agreement

between Cairn Energy Plc, Cairn UK Holdings Limited, Cairn India Holdings Limited and Cairn Energy Hydrocarbons Limited (a subsidiary of Cairn India Holdings at this time).

In summary, this agreement provided that £ 2,97,80,710 due to Cairn Energy Plc from Cairn Energy Hydrocarbons Limited was assigned to Cairn UK Holdings Ltd in exchange for an issue of shares. Cairn UK Holdings subsequently assigned the debt to Cairn India Holdings Ltd in exchange for 2,97,80,710 £ 1 ordinary shares in Cairn India Holdings Ltd.

Basically Cairn Energy Hydrocarbons Ltd. was under a debt of £ 2,97,80,710 from Cairn Energy Plc. As per the debt conversion agreement, the same was made due to Cairn UK Holdings Ltd. (CUHL). In lieu of the same, CUHL issued 2,97,80,710 shares of £ 1 each to Cairn Energy Plc on 01.09.2006.

7.1.2 Transfer of the Indian Assets from CUHL to CIHL

On 02.08.2006, CUHL incorporated another 100% subsidiary Cairn India Holdings Ltd. (CIHL for short) which was registered in Jersey, Channel Islands. On 07.08.2006, CUHL transferred its entire shareholding in the above-mentioned 26 companies to Cairn India Holdings Ltd. (CIHL). In return, Cairn India Holdings Ltd. (CIHL) issued 22,14,44,034 ordinary shares of 1 £ each to CUHL. At the same time, as per the debt conversion agreement mentioned above, CUHL assigned the debt of £ 2,97,80,710 to Cairn India Holdings Ltd. & Cairn India Holdings Ltd. further issued 2,97,80,710 ordinary shares of 1 £ each in exchange to CUHL. Now the debt amount of £ 2,97,80,710 became due to Cairn India Holdings Ltd. (CIHL) from Cairn Energy Hydrocarbons Ltd. Thus as on 01.09.2006 CUHL was holding 22,14,44,034 + 2,97,80,710 = 25,12,24,744 ordinary shares of £ 1 each of Cairn India Holdings Ltd. (CIHL).

7.1.3 Transfer of the Indian Assets from CIHL to CIL

On 15 September, 2006 Cairn UK Holdings Ltd entered into the Subscription and Share Purchase Agreement with Cairn India Limited and Cairn India Holdings Limited (both subsidiaries of Cairn UK Holdings Ltd) with Cairn Energy PLC as the Guarantor. The Subscription and Share Purchase Agreement provided for Cairn India Limited to acquire approximately 21.85% of share capital of Cairn India Holdings Limited in two tranches. Subsequently a new Share Purchase Deed was signed on 12.10.2006 and the entire share holding of Cairn India Holdings Ltd was acquired by Cairn India Ltd, from CUHL.

By virtue of purchase of 100% shares of CIHL from CUHL, CIL acquired the entire Indian business of the group. CIL acquired (purchased) 25,12,24,744 shares of CIHL from CUHL for a total consideration of Rs. 26,681,87,10,140. This transaction was carried out in the following manner:

Date	Mode	From	Number of shares of CIHL	Total Value (Rs.)
12 Oct 2006	Share Purchase	Cairn UK Holdings Limited	4,14,93,659	50,37,39,87,924
22 Nov 2006	Share Purchase	Cairn UK Holdings Limited	1,33,90,789	17,55,42,39,705
20 Dec 2006	Share Swap	Cairn UK Holdings Limited	13,52,67,264	1,37,88,23,82,880
29 Dec 2006	Share Purchase	Cairn UK Holdings Limited	6,10,73,032	61,00,80,99,631
		Total	25,12,24,744	26,681,87,10,140

7.2 Facts noticed from the financial statements of Cairn UK Holdings Ltd. as on 31.12.2006.

7.2.1 The Financial statement of Cairn UK Holdings Ltd as on 31 Dec 2006 contains the following information (Report of the Directors):

"On 21 August 2006 the company incorporated Cairn India Limited (registered in India). On 15 September 2006 the company entered into the Subscription and Share Purchase Agreement with Cairn India Limited and Cairn India Holdings Limited (both subsidiaries of the company). The subscription and Share Purchase Agreement provided the Cairn India Limited to acquire approximately 21.85% of the share capital of Cairn India Holdings Limited in two tranches.

On 12 October the company entered into a second agreement with Cairn India Ltd., the Share Purchase Deed, which provided for Cairn India Ltd to acquire the remaining 78.15% of the share capital of Cairn India Holdings Ltd. 53.84% was to be acquired through a share for share exchange and 24.31% was to be acquired for cash. Total cash proceeds were approximately £ 677 m. £ 312 m was receivable in Indian Rupees and the company entered into a currency exchange option over the year end to convert the Indian Rupees into £. The sale of Cairn India Holdings Ltd to Cairn India Limited resulted in the company generating an exceptional gain on sale of £ 1.361 billion."

7.2.2 Further, in the operating Profits Schedule to the Income Statement the company has declared that the exceptional gain of £ 136,07,84,000 arose on the sale of company's investment in Cairn India Holdings Ltd to Cairn India Ltd.

7.2.3 Future Developments and principal risks and uncertainties

The company will continue to operate as a holding company carrying the investment in Cairn India Limited. In continuing the operations, the principal risk to the Company is the carrying value of the 68.98% investment in Cairn India

Limited, with the remaining 31.02% now trading on the Bombay Stock Exchange and National Stock Exchange of India. The value of the investment will be dependent on the continued success of the Cairn Oil & Gas Exploration and development activities in India.

7.2.4 Regarding taxation, the company in Schedule 6 to the Income Statement has stated that no tax has been provided in respect of the disposal of part of the company's investment in its subsidiary as the disposal is exempt from tax under Schedule 7AC of the Taxation of Chargeable Gains Act, 1992.

7.2.5 Financial Statement of Cairn UK Holdings Ltd (as on 31 Dec 2007) states that during the period an exceptional gain of $ 47.8 m has been recognized as part of the transaction between the company and Cairn India Ltd. in 2006. The gain represents additional consideration received from Cairn India Ltd. under the sale and purchase agreement dated 12 Oct 2006 whereby Cairn India Ltd acquired the entire share capital of Cairn India Holdings Ltd from the company. The additional consideration arose as a result of the price stabilization mechanism which required the issue by CIL of 130,85,041 new shares for total consideration of Rs. 209,36,06,560 on 08.02.2007. There was a consequent reduction in the Company's percentage holding of CIL from 69.5% to 69%.

7.2.6 As per the Financial statement of Cairn UK Holdings Ltd, no tax was payable in UK on the gains arising from sale of shares of Cairn India Holdings Ltd. to CIL.

7.3 As per Notes to Accounts No. 7 to the Income Statement as on 31.12.2006, the details of investments of CUHL are as given below:

7.3.1 Investments

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During the period, the company acquired various investments in subsidiaries from Cairn Energy PLC. A further subsidiary, Cairn India Holdings Limited was incorporated and the investments transferred to this company in a share for share exchange. Cairn India Holdings Limited was then sold to Cairn India Limited for a combination of cash and shares, with the Company acquiring 100% of the share capital of Cairn India Limited. Further details of these transactions are given in Note 13.

Details of the Company's principal subsidiaries at 31 December 2006 are as follows:

Company	Principal activity	Country of Incorporation	Country of operation	Proportion of voting rights and Ordinary shares
Cairn India Limited	*Holding Company*	India	India	100%
Indirect holdings				
Cairn Energy Asia Pty Limited	*Holding Compan Exploration*	Australia	Australia	100%
Cairn Energy India Pty Limited	*Production*	Australia	India	100%
Cairn Energy Australia Pty Limited	*Holding Company*	Australia	Australia	100%
Cairn Energy Discovery Limited	*Exploration*	Scotland	India	100%
Cairn Energy Gujarat Block Limited	*Exploration*	Scotland	India	100%
Cairn Energy Hydrocarbons Limited	*Exploration*	Scotland	India	100%
Cairn Energy Holdings Limited	*Holding Company*	Scotland	India	100%
				100%

Cairn Exploration No(. 7) Limited	*Exploration*	Scotland	India	100%
Cairn Exploration No(.6) Limited	*Exploration*	Scotland	India	100%
Cairn Exploration No (4) Limited	*Exploration*	Scotland	India	100%
Cairn Exploration No (2) Limited	*Exploration*	Scotland	India	100%
Cairn Energy India Holdings BV	*Holding Company*	Scotland	India	100%
Cairn Energy India West BV	*Exploration Production*	Scotland	India	100%
Cairn Energy Cambay BV	*Exploration Production*	Scotland	India	100%
Cairn Energy Gujarat BV	*Exploration Production*	Scotland	India	100%
Cairn Energy Group Netherlands Holdings BV	*Holding Company*	Scotland	India	100%
Cairn Energy Netherlands Netherlands Holdings BV	*Holding Company*	Scotland	India	100%
Cairn India Holdings Limited				

7.4 Treatment given to the transaction by CIL i.e. Cairn India Ltd. in its books of accounts.

7.4.1 The Annual Report of Cairn India Ltd. for the year 2006 contains the following information:

"Currently all operating assets are held by Cairn Indian Holdings Ltd. through its subsidiaries. Cairn India acquired the Indian assets from Cairn UK Holdings Limited by acquiring a majority ownership of Cairn India Holdings Ltd (including its subsidiaries) on December 20, 2006 and subsequently on December 29, 2006 acquired 100% ownership of Cairn India Holdings Ltd."

Thus the entire share holding of Cairn India Holdings Ltd. was acquired by CIL for a sum of Indian Rupees 26,681,87,10,140/-. Accordingly, in the annual financial statement for the year 2006, Cairn India Ltd has disclosed the entire amount of Rs. 26,681,87,10,140/- under the head investments with the following remarks:

"Long term investments (at cost) – unquoted and non-trade 25,12,24,744 ordinary shares of £ 1 each, in Cairn India Holdings Limited, subsidiary company (refer note 9(b) under schedule 13)- 26,681,87,10,140."

7.4.2 Further, in the Annual report under the heading "Subsidiary companies" the following note has been given:

"SUBSIDIARY COMPANIES

During the year, company acquired all the shares of Cairn India Holdings Ltd (CIHL) and consequently CIHL has become a wholly owned subsidiary of the Company. CIHL is also a Holding Company for 26 other companies. Consequently, all these Companies have become subsidiaries of Your Company."

7.4.3 <u>Facts noticed from the Balance Sheet of M/s Cairn India Ltd as at Dec. 31.01.2006</u>

Balance Sheet of M/s Cairn India Ltd as at Dec, 31 2006 is as below:

"(All amounts are in Indian Rupees) As at Dec. 31, 2006

SOURCES OF FUNDS

Shareholder's funds	
Share Capital	17,65,31,43,790
Stock options outstanding	34,50,58,813
Reserves and surplus	275,01,78,36,642
	293,01,60,39,245

Loan Funds

Unsecured Loans	20,47,07,562
Total	293,220,746,807

APPLICATION OF FUNDS

Investments	26,681,87,10,140”

The investments are qualified with the following remarks:

“Long-term investments (at cost) – unquoted and non-trade 251224744 ordinary shares of £ 1 each, in Cairn India Holdings Limited, subsidiary company (refer note 9(b) under schedule 13) 266818710140”

7.4.4 The Balance Sheet also mentions the following Related Party Transactions;

Reimbursements of expenses incurred on behalf of the Company by:

Cairn Energy Plc	2,50,00,200

Investment made during the period

Cairn India Holdings Limited	26,681,87,10,140

Shares issued during the period (share capital and securities premium)

Cairn UK Holdings Limited	20,723,78,73,500

(Investment made in CIL by CUHL)

7.4.5 Further, in the Notes to the accounts forming part of the auditor's report, Schedule-13 provides the following information:

"During the period, the Company has acquired 25,12,24,744 shares in Cairn India Holdings Limited for total purchase consideration of Rs. 266,81,87,10,140 including Rs. 3276,,30,69,551 for which purchase consideration was payable to Cairn UK Holdings Limited at December 31, 2006. The purchase consideration for this investment was finalized in February 2007 after considering the final amount payable on exercise of Green Shoe Option.

The above transactions (except for the initial share capital) are based on the terms and conditions prescribed by the Share Purchase Agreement executed between Cairn Energy Plc, Cairn UK Holdings Limited, Cairn India Holdings Limited and Company dated October 12, 2006 and in accordance with the approvals in this behalf received from the Foreign Investment Promotion Board, Government of India and from other relevant regulatory authorities in India and as per applicable valuation norms. This strategic investment has been made to acquire the oil and gas assets of CIHL and its subsidiaries."

<u>7.4.6 Facts Noticed from the Consolidated Balance Sheet of M/s Cairn India Ltd.:</u>

As at December 31, 2006 the Consolidated Balance Sheet of M/s Cairn India Ltd. contains the following information (after consolidation of all subsidiaries accounts):

(All amounts are in Indian Rupees, unless otherwise stated)

SOURCES OF FUNDS

Shareholder's Funds

Share Capital	17,65,31,43,790
Stock options outstanding	34,50,58,813
Reserves and surplus	275,01,78,36,642
	293,01,60,39,245

Loan Funds

Unsecured Loans	4,98,47,87,562
Deferred payment liability under finance lease	13,68,30,471
Deferred tax liability (net)	425,81,61,061
	9,37,97,79,094
Total	
	302,39,58,18,339

APPLICATION OF FUNDS

Fixed assets

Gross Cost	152,84,05,817
Less:Accumulated depreciation	
and amortization	102,17,79,615

Net Book Value	50,66,26,202

Exploration, Development and Site-restoration costs

Cost of producing facilities (net)	235,37,76,000
Exploratory & development of wells in progress	1710,19,81,985
Net book value	1945,57,57,985
Good Will	25,411,51,34,287

7.4.7 Schedule 23:- NOTES TO ACCOUNTS of Cairn India Ltd as on 31.12.2006

"CIHL became the Company's subsidiary on December 20, 2006 through acquisition of effective 75.69% stake and wholly owned subsidiary on December 29, 2006. All other above mentioned subsidiaries are direct or indirect wholly owned subsidiaries of CIHL. Accordingly, these financial statements include the result of these subsidiaries for the period December 20, 2006 to December 31, 2006.

(b) During the period, the Company has acquired 25,12,24,744 shares in Cairn India Holdings Limited for total purchase consideration of Rs. 26681,87,10,140 including Rs. 3276,30,69,551 for which purchase consideration was payable to Cairn UK Holdings Limited at December 31, 2006. The purchase consideration for this investment was finalized in February 2007 after considering the final amount payable on exercise of Green Shoe Option.

The above transactions (except for the initial share capital) are based on the terms and conditions prescribed by the Share Purchase Agreement executed between Cairn Energy PLC, Cairn UK Holdings Limited, Cairn India Holdings Limited and the Company dated October 12, 2006 and in accordance with the approvals in this behalf received from the Foreign Investment Promotion Board, Government of India and from other relevant regulatory authorities in India and as per applicable valuation norms. This strategic investment has been made to acquire the oil and gas assets of CIHL and its subsidiaries.

(iii) The difference between the cost to the company of its investment in Subsidiaries over its proportionate share in the equity of the investee company at the time of acquisition of shares in the Subsidiaries is recognized in the financial statements as Goodwill or Capital Reserve as the case may be. Goodwill is tested for impairment by the management on annual basis."

7.4.8 Thus from the stand alone and consolidated annual financial statements of M/s Cairn India Ltd. it is evident that in the process of acquisition of shares of M/s Cairn India Holdings Ltd from M/s Cairn UK Holdings Ltd, the payment of Rs. 266,81,87,10,140/- made by M/s Cairn India Ltd was in excess of the Book value of the acquired assets by a sum of Rs. 25,411,51,34,287/- which is represented by Goodwill in the consolidated financial statements, clearly indicating that substantial capital gains have accrued to the company M/s Cairn UK Holdings Ltd.

7.5 Facts noticed from the Annual report of Cairn Energy Plc:

From the Annual Report 2006 of Cairn Energy Plc, the following facts are noticeable:

"Notes to the account

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3 SEGMENTAL ANALYSIS

Operating segments;

The Group's operating segments were revised following the restructuring carried out in anticipation of the IPO in India to reflect the revised organizational structure. During the year ended 31 December 2006, the Group's operating activities were internally reported to the chief operating decision maker based on two separable areas grouped into different subsidiary entities:

a) Capricorn Energy Limited Group and

b) Cairn India Limited Group.

A third segment 'Other' exists to accumulate Cairn UK Holdings Limited and Cairn Energy PLC company which will include the administrative expenses of Cairn's head office in Edinburgh. This also includes taxation and interest expenses of the Group which cannot be allocated to an operating segment.

In 2005 the operating segments were North Sea, South Asia and Head Office Costs, Comparative information has been restated to reflect the new operating segments. There is no overall financial impact of this change.

The segment results for the year ended 31 December 2006 are as follows:

	Cairn India Limited Group	Capricorn Energy Limited Group	Other	Group 2006
	$000	$000	$000	$000

Revenue from sale of oil, gas and condensate	221956	63753	--	285709
Tariff Income	595	---	---	595
Total Revenue	222551	63753	---	286304
Cost of sales	143751	78685	--	222436
Gross Profit	78800	14.932		63868
Segmental Operating Profit/(Loss)	119725	143675	40620	64570
Cost of sales in the segmental Results above includes;				
Production costs	38585	18346	--	56931
Unsuccessful exploration costs	56650	5368	--	62018
Depletion and decommissioning charge	48516	54971	---	103487
Other segmental items included in the income statements are;				
Impairment of oil and Gas assets	--	71455	--	71455
Depreciation	2393	3	749	3145

Amortization	2242	--	1620	3862

The segment assets and liabilities as at 31 December 2006 and capital expenditure for the year then ended are follows:

	Cairn India Limited Group	Capricorn Energy Limited Group	Other	Group 2006
	$000	$000	$000	$000
Assets	1092022	151250	680639	1923911
Liabilities	1132689	35620	74432	1242741
Capital Expenditure	249622	31624	2715	283961

The average number of full time equivalent employees, including executive directors and individuals employed by the Group working on Joint Venture operations was;

Number of employees	2006	2005
UK	110	107
India	431	460
Bangladesh	83	72
Group	624	639”

7.5.1 Thus even the annual report 2006 of Cairn Energy Plc makes it amply clear that the entire business of the Cairn Energy Plc group was reorganized in two groups namely Cairn India group and Capricorn Group. The assets owned by the subsidiaries of Cairn India Holdings Ltd. were entirely Indian assets. Moreover, it is also noticeable that even the Indian

> operations, revenue from the Indian operations and Indian assets formed a substantial part of the operations, revenues and assets of the Cairn Energy Plc group as a whole."

09. Based on the above facts, Ld. assessing officer examined the taxability of the above transactions whether chargeable to tax in India under section 4, 5 and section 9 (1) (i) of the Income Tax Act and as per DTAA between India UK. He was further of the opinion that appellant acquired the entire assets of the 26 subsidiaries of Cairn energy group whose entire business operation is in India and therefore the impugned assets, which were transferred, were located in India. For this he referred to the notes on accounts of the financial statements of the appellant for the year ending December 2006, wherein in note No. 7 under the heading 'Investment', details of the subsidiaries, country of operation and country of incorporation were mentioned. Most of the companies operations were in India and even the functional currency of the appellant was in Indian rupees. He further referred to the red Herring prospectus issued by Cairn India Ltd at the time of initial public offer. He further referred to the valuation report obtained by Cairn India Ltd with respect to valuation of shares of Cairn India Holdings Ltd from and M Rothschild and Sons India private limited dated 18/09/2006 and 19/12/2006. Therefore according to him, all the assets of cairn India Holdings Ltd and its

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subsidiaries are located in India alone. He further referred to the various statements given by various employees of cairn India Ltd to support his contention. In para No. 8.6 of his order he further referred that none of the employees of the subsidiaries, which were subject to transfer, was employed outside India and, therefore the entire workforce of the PE of Cairn Group , was employed in India only. Therefore, he further held that workforce is also located in India. In para No. 8.8 of his order he referred to the certificate of incorporation of cairn India Holdings Ltd issued by Jersey financial services commission which shows that the company will act as a holding company for a number of companies within the cairn group, which in turn hold Indian oil and gas assets. Therefore he held that that the shares of cairn India Holdings Ltd, which were acquired by cairn India Ltd from appellant derive their value solely from the assets located in India and, therefore, in accordance with the provisions of section 9 (1) (i) of the Income Tax Act, it shall be deemed to have been situated in India and consequently any capital gain arising from the transfer of such shares are chargeable to tax under the Indian Income Tax Act, 1961. He further held that on transfer of shares of cairn India Holdings Ltd from cairn UK Holdings Ltd (appellant) to cairn India Ltd, entire control of oil and gas business of cairn group in India is transferred

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from appellant to cairn India Ltd, therefore, the liability to pay capital gains tax in India arises. Applying the average conversion rate of I GBP to Rs. 86.71, he held that total investment made by appellant in acquiring 25,12,24,744 shares of cairn India Holdings Ltd is Rs. 2178,36,97,552/- which is cost of acquisition of those shares and as Cairn India Ltd has paid Rs. 26,681,87,10,140/– to appellant for acquiring these shares, which is the full value of consideration received or accrued , it resulted into capital gain chargeable to tax as short-term capital gain of Rs. 245,03,50,12,588/-.

10. Before the assessing officer, assessee contended vide its reply dated 21/4/2014 that the transaction does not give rise to any tax liability in India based on the law that prevailed on the date of entering into the transaction as such there was no liability to withhold any tax by the Cairn India Ltd. Assessee relied on the certificate given by a chartered accountant and submitted that that the transaction was also verified by various tax authorities, including income tax authority. It was further submitted that that the impugned transactions is a genuine case of group restructuring, which is not subject to taxation in India. It was further submitted that there was no change in the management and control. Therefore, the conditions stipulated in the definition of the term property is clarified by the The Finance Act, 2012 has not been

satisfied and therefore in view of the provisions of section 9 (1) (i), 2 (47) and 2 (14) of the Income Tax Act , it is clear that the purpose of the amendment was only to tax those transactions wherein the shares of the foreign company have been sold resulting into transfer of management and control. Hence the above transaction is not chargeable to tax in India.

11. The Ld. AO dealt with the submission of the assessee in para No. 9 of his order. He first considered the legal structure of the assessee and chronology of events of acquisition of those shares, which resulted into transfer of control of Indian business from appellant to cairn India Ltd. He further referred to the subscription and shares purchase agreement dated 15/09/2006 and its amendment dated 05/10/2006 entered into between appellant , the seller of the shares, Cairn India Ltd, the purchaser of the shares, along with the guarantor of the transactions and the company, whose shares are transacted . He further analysed the share purchase deed dated 12/10/2006 and the red Herring prospectus of cairn India Ltd, through book building process. Therefore, he held that all these agreements analysed with chronological event of transactions, It resulted in changing the cairn group structure. He also demonstrated that the whole transaction is for transferring assets in India through various subsidiaries - holding

corporate structure. He further analyzed the business operation, nature of income and location of country of operation of the 26 intermediaries companies whose assets are dealt with in this transaction and held that the country of operation of the most of the companies who are in operation is in India. He further referred to the fact of initial public offering and held that the shareholding of the appellant in the Indian company i.e. cairn India Ltd got reduced to 68.98% post-IPO as 31.02% is held by public post IPO. However, the number of equity shares of appellant's in the cairn India Ltd remained the same pre-IPO and post-IPO i.e. 1226843785 shares. To support his finding he also referred to the application dated 02/08/2006 filed by the Cairn India Holdings Ltd, incorporated in Jersey , before the Jersey financial services commission wherein it is submitted that cairn India Ltd will purchase 20% of the issued share capital of the company from appellant with an option to purchase the remaining 80% at a later stage. The cairn India Ltd (proposed company) will be listed on the Bombay stock exchange in order to raise funds to purchase the remaining 80% of the shares of the company. Therefore, he held that that though cairn India Ltd was incorporated only on 21/08/2006 the fact was submitted before the Jersey authorities on 02/08/2006 itself. He further referred to the

various payments made in trenches by cairn India limited to the appellant. Based on this he came to conclusion that the above arrangement structured by the cairn energy group was to systematically divest its stake in Indian oil and gas business. Therefore he held that the affairs of the group were structured in such a manner that the shares of companies which are operating, using and owning the assets in India in oil and gas business were first transferred to a UK-based holding company from where they were transferred to the Jersey-based another holding company and then such shares are ultimately sold to an Indian entity for substantial cash and share consideration, all within a period of 3 months. He further held that all these facts have been unearthed only because of the survey under section 133A of the Income Tax Act by the revenue on 15/01/2014. The fact was also noted that revenue has invoked provisions of section 281B of the act provisionally attaching the shares to safeguard its interest. Regarding the claim of assessee that these transactions were already disclosed to revenue, he held that appellant has not filed any return of income for assessment year 2007 – 08 and the transactions were only disclosed in form No. 3 CEB before the Ld. transfer pricing officer for determination of arm's length price by the Indian associated enterprise i.e. cairn India Ltd. He therefore held that

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the issue there was only for determination of arm's length price in the hands of an Indian entity and not the chargeability of the capital gain tax in the hands of appellant, therefore there was no disclosure made by the assessee as no return of income was filed for the impugned assessment year. He further referred to the disclosure of the transaction made by the Indian entity in the Red Herring prospectus and approval obtained from Foreign Investment Promotion Board and held that there is no concept of 'group taxation' under the Indian Income Tax Act and Indian entity and the appellant are two different assesses. Hence, it cannot be said to be a disclosure at all. He further referred to the provisions of section 47 (iv) rws 47A of the act and held that same are not applicable to the impugned transaction, as the appellant or its nominee did not hold the whole of the share capital of the Indian subsidiaries companies on the date of transfer of capital asset on 29/12/2006. According to him the conditions prescribed under section 47A of the Income Tax Act of holding of the whole of the share capital of the subsidiary company for a period of at least 8 years from the date of the transfer of the capital asset is not satisfied and therefore the exemption under section 47 (iv) does not apply to the appellant. Further, vide para No. 9.2, he analysed the various legal provisions of section 2 (14), 5 and 9 of the Act and held that where

an asset or source of income, which is situated in India or where the capital assets is situated in India, all income which accrues or arises directly or indirectly through or from it shall be treated as income, which is deemed to accrue or arise in India and therefore the gain arising from the impugned transaction is chargeable to tax in India. He further held that due to the amendment in the Income Tax Act by the Finance Act, 2012, interpretation made by the Hon'ble Supreme Court of India in Vodafone International Holdings BV versus union of India and another (341 ITR 1) (SC) is not available to the assessee. He therefore held that Cairn India Ltd, an Indian company, has taken control of the assets and operations situated in India of cairn group which was acquired indirectly through purchase of shares of the holding company cairn India Holdings Ltd, which was incorporated in jersey, hence the capital gains arising to the appellant are deemed to accrue or arise in India and are taxable as short-term capital gain under the provisions of the Income Tax Act.

12. The Ld. assessing officer then dealt with the reply filed by the cairn India Ltd on 21st April 2014 , in response to notice under section 133 (6) of the Act , wherein it has been argued that amendments made to the provisions of section 9 (1) (i) are prospective in nature as it is substantive provision and cannot create a retro obligation on the tax

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deductor who has taken a bona fide stand according to the law prevalent on that date. With respect to this, the Ld. assessing officer held that there is an amendment by The Finance Act, 2012 with retrospective effect from 01/04/1962 which clearly mentions that all income accruing or arising whether directly or indirectly through the transfer of a capital asset situated in India is chargeable to tax as it is deemed to accrue or arise in India. The Ld. assessing officer further drew support from the memorandum of The Finance Act, 2012, explaining the position of the legislature. Therefore he rejected the contention of the cairn India Ltd that the amendments are prospective in nature and further held that Cairn India Ltd made payment of Rs. 26, 6818710140/– to the appellant for acquiring Indian assets through hundred percent shareholding of Cairn India Holdings Ltd and the resulting capital gains for taxable in the hands of the appellant. The Ld. assessing officer further drawing support from the decision of the Hon'ble Supreme Court in CIT versus Vatika Township private limited and held that the language of the expiration for an expression 5 which is been inserted w.r.e.f. 01/04/1962, amendments are clarificatory in nature and the operation is retrospective.

13. After holding that the capital gain arising in the hands of the appellant on account of sale of 100% shares of Cairn India holding Ltd which

derive their value solely from the assets located in India, is taxable in India as per the provisions of section 9 (1) (i) of the Income Tax Act, he also applying the provisions of section 48 of the Income Tax Act determined the actual 'cost of acquisition' of those assets. As appellant acquired 100 % shareholding of Cairn India holding Ltd, Jersey for GBP 251224444, from cairn energy plc, Scotland by issue of shares @at UK pound 1/-. Applying the rate of Rs. 86.71 for UK pound, total investment of Rs. 21783697552/- was determined. The date of acquisition was also determined at 07/08/2006. Therefore, he worked out the cost of acquisition of the asset at Rs. 2178.36 crores and held that as the shares were held for less than 12 months on transfer of appellant has derived short term capital gain chargeable to tax of Rs. 245035012588/– and further the tax payable at the rate of 40% thereon was determined subject to applicable surcharge and cess.

14. The Ld. assessing officer was also aware that the appellant was resident of United Kingdom therefore the provisions of India United Kingdom Double Taxation Avoidance Agreement are applicable to it and if any beneficial treatment is available, shall be given to appellant. Therefore he examined article 13 (sic14) of India- UK DTAA and held that capital gains are taxable as per the domestic laws

of respective countries, therefore, the Double Taxation Avoidance Agreement does not contain any beneficial provisions for the assessee but directs the chargeability of capital Gain according to the domestic tax laws i.e. Income tax Act, 1961. Hence the amount is chargeable to tax, according to the domestic laws of India. Based on this he framed draft assessment order under section 143 (3) rws section 148 and section 144 C (1) of the Income Tax Act on 09/03/2015.

15. Assessee preferred its objection against the draft assessment order to the Dispute resolution panel under section 144C of the act on which the directions were issued under section 144C (5) of the Income Tax Act, 1961 on 31st. December 2015. Certain facts were also noted at page No. 4 and 5 of the direction wherein it has been mentioned that a civil writ petition challenging retrospective application of amendment was filed by Cairn India Ltd before the Hon'ble Delhi High Court, which has been withdrawn, and thus stands dismissed as withdrawn. Ld DRP also rejected claim of the assessee that transactions were part of internal reorganization of the group and are revenue neutral. In nutshell, it rejected all the contentions of the assessee about the chargeability of capital gain in the hands of the assessee. On the aspect of the computation, it also rejected all the contentions including the decision referred before it of the Hon'ble Supreme Court in CIT

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versus Gillanders Arbuthnot & co 87 ITR 407 (SC) and upheld the computation of capital gains. Another objection raised before the Ld. Dispute Resolution Panel about the pendency of international arbitration and therefore requested to keep the proceedings pending was rejected. It was further objected before the Ld. Dispute Resolution Panel that interest under section 234A, 234B and 234C and 234D of the Income Tax Act is not chargeable because taxes required to be deducted by the Indian entity who paid such sum u/s 195 of the Act. Ld. DRP rejected the contention of the assessee with respect to interest under section 234A and 234C, whereas for the purpose of interest under section 234B Ld. AO is directed to reconsider the issue with clear-cut finding in his order. Therefore, in nutshell all the objections raised by the assessee were rejected by ld DRP approving the draft assessment order confirmed in toto by the Ld. Dispute Resolution Panel.

16. Consequently, ld AO framed order under section 143 (3) rws section 148 and section 144C (13) of the Income Tax Act final assessment order on 25th January 2016 determining the total income of the assessee at Rs. 245035012588/– as short-term capital gain chargeable to tax in the hands of appellant taxable at the rate of 40%. Subject to chargeability of surcharge and cess as applicable. Further,

with respect to chargeability of interest under section 234B of the Income Tax Act Ld. assessing officer held that as assessee was liable to pay advance tax on such income, which it has failed to do so, and no tax was deducted at source, therefore it is chargeable. In view of this, the Ld. assessing officer further passed an order that interest under section 234A, 234B, 234C and 234D of the act is chargeable according to the provisions of the Act. Therefore aggrieved by the order of the Ld. assessing officer the assessee has preferred this appeal before us.

17. With respect to additional grounds of appeal filed before us it was submitted that that these additional grounds are with respect to reopening of the assessment proceedings such as incorrect approval obtained under section 151 (2) of the act as well as on the issue of an invalid notice under section 143 (2) of the Income Tax Act. It was further submitted that ground No. 3.12 raised is with respect to invocation of the retrospective amendment to section 9 (1) (i) of the act introduced in The Finance Act, 2012 which was not on the statute, When the India United Kingdom tax treaty entered into force. Hence, it is submitted that tax liability of the appellant should have been determined under the provisions of section 9 (1) (i) of the act which were applicable when the India United Kingdom tax treaty was entered

into force. It was submitted that all these grounds of appeal are though covered under the ground No. 2 and 3 of the memorandum of appeal, however, these are legal grounds and they do not require any investigation into the facts are examination of any new facts or evidence that are not available already before the assessing officer and Dispute Resolution Panel, therefore, they may be admitted. The assessee placed reliance on the decision of the Hon'ble Supreme Court in the case of national thermal power Corporation limited to 29 ITR 383 (SC) to support its claim for admission of these additional grounds.

18. Ld. departmental representative, vehemently objected to the admission of additional ground and stated that as these grounds are not raised before the Ld. Dispute Resolution Panel or before the Ld. assessing officer the contentions are new and therefore same may not be admitted.

19. We have carefully considered the rival contentions. We are of the opinion that all these additional grounds of appeal raised by the assessee are legal in nature and no further facts are required to be investigated, therefore, in the interest of Justice these are admitted.

20. Now we come to the main grounds of appeal on which submission made by the assessee. Ground No. 1 of the appeal of the assessee is

general in nature, arguing that the order passed by the Ld. assessing officer pursuant to the direction of the Ld. Dispute Resolution Panel is bad in law and facts and is liable to be set-aside on the ground set forth below. No specific argument were led on this ground and as it is a preamble to the other grounds of the appeal, it is general in nature, hence, dismissed.

21. Ground No. 2 of the appeal of the assessee is with respect to the assumption of jurisdiction u/s 148 of the Act. The main contention of the assessee is that the Ld. assessing officer has erred and Ld. Dispute Resolution Panel has compounded that error by confirming the action of the Ld. assessing officer in assuming jurisdiction under section 147 of the act, even when there is no income chargeable to tax of the appellant and which is the condition precedent for initiation of reassessment proceedings and various applicable timelines and requirements have not been complied with. It is further submitted that the initiation of the reassessment proceedings and consequently, the final assessment order is without jurisdiction, bad , is void ab-initio and should be quashed.

22. The Ld. authorized representative of the assessee has challenged the validity of the reassessment proceedings under section 147 of the Income Tax Act, 1961 with respect to the approval granted under

section 151 (2) of the Income Tax Act which has not been correctly provided. It is further contended that that the notice issued under section 143 (2) of the act was issued before the disposal of the objection against the reopened proceedings. It was the contention of the Ld. authorized representative that the notice was issued under section 143 (2) of the Income Tax Act on 06/06/2014, whereas the objections were disposed of on 19/02/2015. It is further objected that the recorded reasons provided by the Ld. assessing officer are not signed. It is further contended that that information regarding the share transfer of Cairn India Holdings Ltd was available with the Ld. assessing officer of Cairn India Ltd during regular assessment proceedings of the Cairn India Ltd, therefore, the revenue was always aware about the transfer of the shares, hence the order passed by the Ld. assessing officer is without application of mind. He further argued that reasons for reopening were contrary to the law laid down by the Supreme Court decision in case of Vodaphone International versus union of India (2012) (341 ITR 1) (SC). It is further argued that reopening of the assessment in the instant case is based on the survey report conducted on the premises of Cairn India limited and in all likelihood; the said survey report had been received by the Ld. assessing officer after the issuance of the notice under section 148 of

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the Income Tax Act. Therefore, the action of the reopening of the assessment by the Ld. assessing officer has been attacked on several counts by the Ld. authorized representative in ground No. 2 of the appeal of the assessee. The assessee submitted on each of these issues as under:-

1. *Approval required under Section 151(2) of the Act is not correctly provided*

Relevant Facts under consideration;

1.1. In the notice issued under Section 148 of the Act, there was no mention of the sanction / approval of the higher authorities as required under section 151(2) of the Act *(refer page no. 7 of the Paper Book}.* Further, on 25 July 2014, when copy of the recorded reasons for reopening of assessment was provided by the AO to the Appellant, the said reasons were neither signed nor was containing any sanction / approval of the higher authorities as contemplated under Section 151(2) of the Act *(refer page no. 22 to 30 of the Paper Book).*

1.2. During the course of DRP proceedings, vide submission dated 29 September 2016 the Authorized Representative ('AR') raised an objection that the required approval under section 151(2) of the Act is not obtained by the AO. To the above, DRP Members referred the matter back to the file of the AO and asked the AO to submit the required approvals.

1.3. Further, since this approval was one of the important documents, Appellant also wanted to see the records and ensure that due process of law is followed and the reassessment proceedings are not without jurisdiction. In view of the same, during the course of DRP proceedings, the Appellant, *vide* its letter dated 2 November 2015 and 15 December 2015, also filed a request before the AO to

provide access to the records which was not available with the Appellant *(refer page no. 48 and 49 of the Paper Book).*

1.4. Vide its letter dated 03 December 2015, AO replied to the DRP members that "... *administrative approval of the Add/. CIT for issuance of notice under section 148 of the Act has been taken on 21 January 2014 which was within the prescribed time limit under section 151(2) of the IT Act." (refer page no. 50 of the Paper Book).* Further, in the said letter AO also mentioned that *"A copy of the reasons for reopening of assessment under section 148(2) along with the copy of approval of issue of notice u/s 148 is enclosed herewith for your perusal (refer page no. 51 of the Paper Book).*

1.5. However, the Appellant would like to inform your Honors that copy of the said approval was never provided to the Appellant. Further, when during the course of hearings before DRP when the AR requested Hon'ble DRP Members that copy of the approval should be provided to the Appellant, DRP members mentioned that the said approval is the records of the AO and they cannot share the same with the Appellant. If required, the Appellant should obtain this document from the AO.

1.6. In view of the same, the AR of the Appellant again filed a letter dated 15 December 2015 requesting the AO to provide certain documents including copy of the approval obtained under section 151(2) of the Act.

1.7. However, the AR was not provided with copy of this approval before 22 December 2015. It was only on 22 December 2015, the AR got the copy of the sanction / approval taken from the AO.

1.8. Your Honors may kindly note that the said approval has been given by the Additional Director of Income-tax (International Taxation), Range -1, New Delhi ('the Addl DIT') on the last page of the recorded reasons, *(refer page no. 31 of the Paper Book}*

<u>*Submissions*</u>

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1.9. In this regard, the Appellant refers to the provisions of Section 151(2) of the Act, which reads as under -

"151. .
(1) ...
(2) In a case other than a case falling under sub-section (I), no notice shall be issued under section 148 by an Assessing Officer, who is below the rank of Joint Commissioner, unless the Joint Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is a fit case for the issue of such notice.

(3) ... " ('Emphasis added)

1.10. Therefore, on perusal of Section 151(2) of the Act, it is evident that no notice shall be issued by an Assessing Officer who is below the rank of Joint Commissioner of Income-tax ("JCIT"), unless the JCIT is satisfied on the reasons recorded by such Assessing Officer that it is a fit case for the issue of notice.

1.11. Hence, Section 151(2) of the Act gives administration powers only to JCIT for sanction / approval for issuance of the notice under Section 148 of the Act. .

1.12. In this regard, the Appellant also refers to the definition of JCIT given in Section 2(28C) of the Act, which reads as under:

"(28C) "Joint Commissioner" means a person appointed to be a Joint Commissioner of Income-tax or an Additional Commissioner of Income-tax under sub-section (1) of section 117"

1.13. Based on perusal of the definition of JCIT, it is evident that it does not include the Additional Director of Income-Tax. In fact, Additional Director of Income-Tax has been separately defined under Section 2(1D) of the Act, which reads as under:

"(ID) "Additional Director " means a person appointed to be an Additional Director of Income-tax under sub-section (1) of Section 117"

1.14. Therefore, approval / sanction given by the Addl. DIT in the instant case is not in accordance with the provisions of Section 151(2) of the Act.

1.15. The Appellant further submits that it is a settled position of law that for the purpose of Section 151(2), only approval / sanction of JCIT would be valid and even in a case if CIT or any other higher authority grants an approval then also the same would be invalid.

1.16. Further, the Appellant also submits that the format of notice to be issued under Section 148 of the Act has been prescribed by ITNS - 34. (It shall be noted that the said form, being non-statutory form, is not available in public. However, after basic google search, the Appellant was able to get the prescribed form). The Appellant submits that the form ITNS - 34 clearly mentions that the fact that the notice has to be issued after obtaining necessary satisfaction from the designated authority shall be mentioned in the notice issued under Section 148 of the Act. *(refer page no. 1 and 2 of the Legal Paper Book)*

1.17. Further, in order to further substantiate its contention, the Appellant would also like to bring to the notice of Your Honours that on 29 March 2014, similar notice under Section 148 of the Act was issued to the group company of the Appellant i.e. CPLC by the same AO wherein the AO clearly mentioned that the said notice was issued after obtaining the approval under Section 151 of the Act *(refer page no, 52 of the Paper Book}.*

1.18. In light of the said inconsistency between the two notices issued by the same AO and lapse of mentioning of the same in the notice, as prescribed in ITNS - 34 in the case of the Appellant, makes it very clear that the AO, in substance, has failed to obtain the sanction from the designated authority under Section 151 of the Act before issuance of the notice under Section 148 of the Act.

1.19 In this regard, the Appellant relies on the following judicial precedents, wherein it has been held that absence of approval / sanction from JCIT for issue of notice under Section 148, as contemplated under Section 151(2) of the Act, renders reassessment invalid and therefore should be quashed:

- Soyuz Industrial Resources Ltd. [2015] 58 taxmann.com 336 (Delhi) Hon'ble Jurisdictional High Court held as under -
  "8. The Revenue's argument seems plausible and even logical because the Commissioner or a Chief Commissioner is unarguably ranked higher in authority than a Joint Commissioner. Yet at the same time, this Court has to give effect to plain words of the statute which unambiguously states that the competent authority in such cases is the Joint Commissioner (and not the Chief Commissioner or the Principal Commissioner). The Revenue's submissions that all such cases, are covered under proviso to Section 147(1), the competent authority for prior approval would he four superior officers, renders Section 151(2) superfluous. If anything the Court is clear that it is not its job to render, in the process of interpretation, an entire provision academic or inoperative. This court is of the opinion that accepting the Revenue's position would result in that consequence. The Court also invokes the principle enunciated by the Privy Council in Nazir Ahmad v. Emperor AIR 1936 PC 253 : that if the statute mandates that something be done in a particular manner, should be in that manner or not at all. In this case, since the original assessment was completed "other than" the eventualities contemplated in Section 151(1), i.e. it was processed under Section 143(1). Thus, clearly Section 151(2) applied. » .

- CIT vs. SPL'S Siddhartha Ltd. [2012] 17 taxmann.com 138 (Delhi) Hon'ble Jurisdictional High Court held as under - .
  "7. Section 116 of the Act also defines the Income Tax Authorities as different and distinct Authorities. Such different and distinct authorities have to exercise their powers in accordance with law as per the powers given to them in specified circumstances. If powers conferred on a particular authority are arrogated by other authority without mandate of law, it will create chaos in the administration of law and

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hierarchy of administration will mean nothing. Satisfaction of one authority cannot be substituted by the satisfaction of the other authority. It is trite that when a statute requires, a thing to be done in a certain manner, it shall be done in that manner alone and the Court would not expect its being done in some other manner... " (Emphasis added)

- Ghanshyam K. Khabrani vs. ACIT [2012] 20 taxmann.com 716 (Bom.)

In the said case, the Hon'ble Bombay High Court held as under –

"6. ... Section 151(2) mandates that the satisfaction has to be of the Joint Commissioner. That expression has a distinct meaning by virtue of the definition in Section 2(28C). The Commissioner of Income Tax is not a Joint Commissioner within the meaning of Section 2(28C). In the present case, the Additional Commissioner of Income Tax forwarded the proposal submitted by the Assessing Officer to the Commissioner of Income Tax. The approval which has been granted is not by the Additional Commissioner of Income Tax hut by the Commissioner of Income Tax. There is no statutory provision here under which a power to be exercised by an officer can be exercised by a superior officer. When the statute mandates the satisfaction of a particular functionary for the exercise of a power, the satisfaction must be of that authority. Where a statute requires something to be done in a particular manner, it has to be done in that manner. In a similar situation the Delhi High Court in CIT v. SPL'S Siddhartha Ltd. [2012} 17 taxmann.com 138 held that powers which are conferred upon a particular authority have to be exercised by that authority and the satisfaction which the statute mandates of a distinct authority cannot be substituted by the satisfaction of another. We are in respectful agreement with the judgment of the Delhi High Court. " (Emphasis added)

Further, the above ratio has also been followed in the following judicial precedents -

- DSJ Communication Ltd. vs. DCIT [2014] 41 taxmann.com 151 (Bombay)
- Gajinder Singh Chhabra vs. ITO [2014] 50taxmann.com 312 (Delhi - Trib.)
- Sunint Investment & Technologies (P.) Ltd. vs. ACIT [2012] 26 taxmann.com 260 (Delhi)
- ITO vs. Tirupati Cylinders Ltd. (ITA No. 5084/Del/2012) - .
- M/s Sonotone Electronic P. Ltd. vs. ITO (ITA No. 2493/Del/2010)
- Jai Prakash Ahuja vs. ITO [2014] 48 taxmann.com 86 (Lucknow - Trib.)
- Sardar Balbir Singh vs. ITO [2015] 61 taxmann.com 320 (Lucknow - Trib.)

1.20. Apart from the above, it is to be noted that the AO vide its letter dated 3 December 2015, has informed Hon'ble DRP that administrative approval of the Addl. CIT for issuance of notice under Section 148 has been taken on 21 January 2014 *(refer page no. 50 to 51 of the Paper Book).* Based on the perusal of the copy of the approval obtained by the Appellant, it is evident that the said approval was in fact given by Addl. DIT *(refer page no. 31 of the Paper Book).*

1.21. The Appellant would like draw the attention of Your Honours that there is an inconsistency in the submission of the AO before the DRP to the fact that the approval under Section 151 of the Act has actually been given by Addl. DIT and not Addl. CIT. This shows that even the AO was aware of the fact that approval provided by the Addl. DIT is not a valid approval for the purposes of section 151(2) of the Act and hence he mentioned Addl. CIT in the responses submitted before the DRP.

1.22. In the light of above facts and the binding decision of the Hon'ble Jurisdictional High Court and other judicial precedents relied upon, the Appellant prays before Your Honours that the approval taken by the AO from the Addl. DIT has not satisfied the statutory requirement of Section

151(2) of the Act, and, therefore, the reassessment made by the AO under Section 147 of the Act, without assuming proper jurisdiction to issue notice under Section 148 of the Act, should be quashed for want of statutory approval of the designated authority specified under Section 151(2) of the Act.

2. Without prejudice, notice issued under Section 143(2) of the Act before disposal of the Objections

2.1 Without prejudice to the above submission in point no. 24 to 77, the Appellant would like to place reliance on the decision of the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. v. ITO |2002] 125 taxman 963 which has laid down the procedure in case of reassessment proceedings. The relevant portion is reproduced as under:

"We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the Assessing Officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years," (Emphasis added)

2.2 Based on the above, it is evident that notice under Section 143(2) of the Act for proceeding with the assessment can be issued by the AO only after disposal of objections raised by the Appellant.

2.3 In the instant case, since the notice under Section 143(2) of the Act had been issued before disposal of objections raised by the Assessee, the said notice is bad in law and liable to be quashed. Considering this, the Appellant further submits that once the notice issued

under Section 143(2) of the Act is invalid, the reassessment framed consequent thereto cannot sustain in the eyes of law and liable to be quashed.

2.4 In this regard, the Appellant wishes to rely on the decision of the Bombay High Court in the case of M/s Premier Limited v. DCIT & Another (Writ Petition No. 2340 of 2008 - dated 22 December 2008). In this writ petition, the Appellant has, inter alia, challenged the validity of notices issued under Section 142(1) and 143(2) of the Act, which had been issued by the Assessing Officer without disposing off the objections raised by the Appellant. In this case, the Hon'ble Bombay High Court, considering the decision of the Hon'ble Supreme Court in the case of GKN Driveshafts (discussed supra), has quashed the said notices issued under Section 142(1) and 143(2) of the Act.

3. Recorded reasons provided by the Assessing Officer ('AO') were not signed

Relevant facts under consideration

3.1 On 25 July 2014, a copy of the reasons recorded for reopening of the assessment were provided by the AO to the Appellant *(refer page no. 22 to 30 of the Paper Book).*

3.2 Your Honor's may note that the said reasons were not signed by the AO. *(refer to Page 30 of the Paper Book}.*

Submissions of the Appellant:

3.3 In this regard, it is to be noticed that the reason recorded for reopening forms a crucial base for reassessment proceedings as prescribed under Section 148(2) of the Act. Hence, it is of paramount importance that the copy of reasons recorded being provided to the Appellant shall be legally enforceable. Thus, unsigned reasons provided to the Appellant being not legally enforceable, the reassessment framed in consequent thereto shall be bad in law and liable to be quashed.

3.4 In this regard, the Appellant would like to bring following provisions of the Act and judicial precedents to the notice of your Honors:

a. Section 282A - Authentication of notices and other documents

282A. (I) Where this Act requires a notice or other document to be issued by any income-tax authority, such notice or other document shall be signed in manuscript by that authority,

(2) Every notice or other document to be issued, served or given for the purposes of this Act by any income-tax authority, shall be deemed to be authenticated if the name and office of a designated income-tax authority is printed, stamped or otherwise written thereon.

(3) For the purposes of this section, a designated income-tax authority shall mean any income-tax authority authorised by the Board to issue, serve or give such notice or other document after authentication in the manner as provided in sub-section (2)." (Emphasis added)

3.5 Thus it is amply clear that any document issued by any Income-tax authority shall bear a signature of the designated authority. Further, Section 282A(2) of the Act provides for deemed authentication if the name and office of a designated Income-tax authority is printed, stamped or written there upon.

3.6 However, in the instant case, the reasons for reopening provided by the AO neither bears the signature of the AO nor is the name and office of the AO is printed, stamped or written thereupon *(refer to Page 30 of the Paper Book).*

3.7 Thus, in light of provisions of Section 282A, the reasons for reopening provided by the AO are not correctly provided and does not contain any statutory force.

b. In this regard, the Appellant would like place reliance on decision of Hon'ble Mumbai Tribunal in case of *Mahendra C. Gala v. ACIT (ITA No. 6590/Mum/2013)* wherein it was held that supplying of unsigned reasons renders the notice issued under Section 148 of the Act without jurisdictional foundation under Section 147 of the

Act and hence the subsequent proceedings were also without jurisdiction.

c. Further, reliance is placed on the following judicial precedents in order to highlight the importance given by the judiciary in relation to signature on documents / notices issued by the income-tax authority and whereby such statutory lapses were considered fatal to render the entire reassessment proceedings to be bad in law. Though these precedents are rendered in the context of issuance of unsigned notice under Section 148, however the ratio / observations of these decisions would certainly be applicable in the instant case, where unsigned reasons have been provided to the Appellant.

- B.K. Gooyeev. CIT [1966] 62 ITR 109 (CAL.)
- Dr. Udayan Narayan v. ACIT (ITA. No. 55/PAT/2016)
- ITOv. Sh. Vivek Markan (ITA Nos. 663 & 664/DeI/2010)
- Umashankar Mishra v. CIT [1982] 11 Taxman 75 (MP)

4. Information regarding share transfer of CIHL was available with AO of CIL during regular assessment proceeding of CIL

4.1 Without prejudice to the above submission given in point no. 24 to 73, the Appellant would like to submit that reassessment proceedings initiated by the AO are contrary to the principles laid down by the Hon'ble Supreme Court in the case of CIT v Kelvinator of India Ltd [2010] 320 ITR 561 (SC). As mentioned above, in the case under consideration the information was received by the AO of the Appellant from the AO of CIL. However, the AO of the CIL was always aware about the transfer of shares of CIHL from the Appellant to CIL. The same is also observed by the AO in the Transfer Pricing order of CIL for AY 2007-08 *(refer page no. 57 to 59 of the Paper Book).* In view of the above, the AO of CIL was always aware about the transfer of shares of CIHL by the Appellant and he could have passed on this information to the AO of the Appellant during the assessment proceedings of CIL. However, the AO of CIL has not passed on any such information to the AO of the Appellant during the regular assessment proceedings under section 143(2) of the Act.

4.2 The said principle is also supported by the case of CIT v Kelvinator of India Ltd [2010] 320 ITR 561 (SC) wherein Hon'ble Supreme Court confirmed the view of the Delhi High Court that *"We also cannot accept submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded on analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under section 147. The said submission is fallacious. An order of assessment can be passed either in terms of sub-section (!) of section 143 or sub-section (3) of section 143. When a regular order of assessment is passed in terms of the said subsection (3) of section 143, a presumption can be raised that such an order has been passed on application of mind. It is well-known that a presumption can also be raised to the effect that in terms of clause (e) of section 114 of I he Indian Evidence Act the judicial and official acts have been regularly performed If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding without anything further, the same would amount to giving premium to an authority exercising quasi-judicial function to take benefit of its own wrong"*

5. *Reasons for reopening were contrary to the law laid down by Supreme Court[1] decision*

5.1 Without prejudice to the above submission in point no. 24 to 75, the Appellant submits that if Section 9(1)(i) of the Act is to be interpreted without referring to Explanation 5, then the law in relation to Section 9(1)of the Act has been laid down by the decision of Hon'ble Supreme Court in the case of Vodafone International v Union of India [2012] 341 ITR 1 (SC). Indeed, until the Revenue first began to pursue Vodafone in 2007 for tax related to transfers of offshore shares by an offshore company, Revenue had never sought to assess or collect any such tax - and the 2012 decision of the Supreme Court in *Vodafone International* made it abundantly clear that the Income Tax Act 1961 did not provide the basis for any such taxation. That is why the retrospective amendment came to be passed shortly afterwards in 2012 - to create

the fiction that the basis for such tax existed prior to 2012. The Shome Committee and other distinguished committees constituted by the Government have made this point very clearly as well.

5.2 In the reasons for reopening of assessment, which were provided after being sought by the Appellant, the AO has not referred to the Explanation 5 to Section 9(1)(i) of the Act. Without application of Explanation 5 to Section 9(1)(i) initial reasoning of the AO was contrary to the decision of Hon'ble Supreme Court in the case of Vodafone International *(supra)* and hence bad in law.

6. Reopening of the assessment in the instant case is based on the survey report conducted on the premises of C1L and in all likelihood, the said survey report had been received by the A O after the issuance of the notice under Section 148 of the Act,

6.1 Without prejudice to the above submission given in point no. 24 to 90, the Appellant submits as under: .

On 15 January 2014, a survey was conducted under Section 133A of the Act by Directorate of Investigation. New Delhi at the premises of CIL.

6.2 As per the facts mentioned by the AO in the DAO, the investigation wing has forwarded a report of this survey along with certain documents to the Dy. Director of Income-tax, Circle 1(1), International Taxation, New Delhi. Relevant extract of the draft assessment order is as under:

"A survey u/s 133A of the Income Tax Act, 2961 (hereinafter "the Act") was conducted at the office premises of Cairn India Ltd at 3rd and 4th Floor, Viper Plaza, Sun City, Sector-54, Gurgaon-122002, Haryana by the Directorate of Investigation, New Delhi on 15.01.2014. The report of the survey action -was received from Investigation wing which inter-alia contained following documents "

6.3 It is further submitted that the Hon'bie DRP in its order, on page no. 2, has also observed as under:

"DRP has carefully considered the objections, and examined the draft assessment order as well as the

contents of the Report of the Survey u/s 133A carried out by the Investigation Wing on 15.1.2014 and referenced by the Assessing Officer..... "

6.4 Further, the AO himself in his letter dated 3 December 2015 has observed that the case was reopened under Section 148 on the basis of the survey proceedings under Section 133 A conducted on the office premises of CIL on 15 January 2014.

6.5 Based on the above, the Appellant submits that it is beyond doubt that the reassessment in the instant case had been initiated, based on the report of the survey conducted on the premises of CIL on 15 January 2014. However, the Appellant also notes that no new documents were uncovered by the survey proceedings on 15 January 2014 - all of the documents in question had previously been provided to the FIPB (on which Revenue was represented) and other branches of the government during the course of 2006 in connection with the Cairn 2006 reorganisation transactions and the establishment of CIL.

6.6 Given the above background, the Appellant would also like to bring to the notice of your Honors that on 29 March 2014, a similar notice under Section 148 of the Act was issued to the group company of the Appellant i.e. CPLC by the same AO. Further, the same. AO had also provided reasons for reopening of the said case vide its letter dated 25 July 2014 *(refer page no. 53 to 56 of Paper Book}.*

6.7 Based on the perusal of the said recorded reasons for reopening of the assessment of CPLC, the Appellant observe that the AO has mentioned about the date of receipt of the - report of the survey conducted on the premises of the CIL. Relevant extract is reproduced as under:

"A survey operation u/s 133A of the Income Tax Act was carried out on 15.01.2014 at the office premises of M/s Cairn India Ltd at 3rd & 4th floor, Vipul Plaza, Suncity, Sector-54, Gurgaon-122002, Haryana. A survey report received from office of DDIT(inv.) Unil-IV(2)

vide letter F.No.DDIT(Inv.)/Unit-lv(2)/2Q13-14/453 dated ' 25.02.2014" (Emphasis added)

6.8 Further, in the said reasons, at various places reference was given of the February 2014. This goes to prove that the survey report was received by the AO in the month of February 2014 only.

6.9 In view of the above, the Appellant submits that since the survey report had been received by the AO only in the Month of February 2014 i.e. after issue of notice under Section 148, the reassessment had been initiated without any basis and information and as such the same is liable to be quashed. Furthermore, as noted above, no new documents were discovered by the survey proceedings in January 2014 - all of the documents in question had been in the hands of the government in 2006. The reason that no tax was levied in 2006 was that the transactions in question were not taxable in 2006 - the only arguable basis for taxing them (which Appellant in any event rejects) arose in 2012 with the passage of the retrospective amendment. This has been confirmed by distinguished governmental commissions.

7. *Rebuttal to the observations of the AO and DRP on assuming mere territorial jurisdiction*

In the final assessment order and DRP direction, the AO and DRP has observed that AO has valid jurisdiction over foreign companies on account of certain provisions of the Act and based on the returns of income filed by the Appellant for the subsequent years. However, such an observation of the AO only purports to confirm the territorial jurisdiction of the AO over foreign companies under the Act. The Appellant has been challenging-and is challenging - the validity of assumption of jurisdiction for initiating reassessment proceedings without satisfying the various condition precedent for the valid assumption of jurisdiction as enunciated by the Supreme Court in several decisions,

8. Rebuttal to judicial precedents relied upon by the DRP

8.1 The DRP relied on the decisions of CIT v Mehak Finvest P Ltd [2014] 52 Taxmann.com 51 (P&H) and Majinder Singh Kang v CIT [2012] 344 ITR 358 / 25 taxmann.com 124 (P&H) contending that in view of Explanation 3 to Section 147 of the Act. the AO shall be empowered to make additions even to the extent of grounds on which reassessment notice might not have been issued during reassessment proceedings.

8.2 In this regard, the Appellant wishes to submit that the issue in relation to Explanation 3 to Section 147 of the Act was neither contended by the Appellant during the assessment proceedings nor during the DRP proceedings. The reliance placed by the DRP on these decisions, which deal with Explanation 3 to Section 147 of the Act, is totally irrelevant and baseless.

P. *Prayer*

In view of the above submission, the Appellant prays that the proceedings under Section 147 / 148 of the Act are invalid and hence the assessment framed consequent thereto, is bad in law, void ab initio and liable to be quashed."

23. Ld. authorized representative further referred to page No. 7 of the paper book, which is a notice under section 148 of the income tax act, 1961 dated 21/01/2014 issued to the assessee by the Ld. assessing officer. He further referred to page No. 52 of the paper book wherein assessee has placed another notice issued under section 148 of the Income Tax Act dated 29/03/2014 to Cairn energy plc wherein it is mentioned that that notices issued after obtaining the approval under section 151 of the Income Tax Act, 1961. Therefore, he stated that the notice issued under section 148 to the assessee appellant on 21st.

January 2014 does not have any reference that notice is issued after obtaining the approval under section 151 of the Income Tax Act as stated in notice at page No. 52. He therefore submits that in the notice under section 148 issued to the assessee there is no reference of any sanction taken under section 151 of the Income Tax Act, hence, it is invalid. He further reiterated that according to the provisions of section 151 (2) of the Act the notice under section 148 of the act shall be issued by the assessing officer on the satisfaction of the Joint Commissioner on the reasons recorded by the assessing officer that it is a fit case for issue of such notice. He referred to page No. 22-31 of the paper book which are the reasons recorded for the issue of notice under section 148 of the Income Tax Act and at page No. 31 the satisfaction of Additional Director of Income Tax (International Taxation), Range 1, New Delhi has been obtained. He therefore submitted that there is no power available with the Additional Director of income tax (international taxation) to record satisfaction that it is a fit case for the issue of such notice. He further referred to the provisions of section 2 (28C) and 2 (28D) of the Income Tax Act wherein the definition of 'Joint Commissioner' and 'joint director' is provided. Therefore he vehemently submitted that the power to give sanction under section 151 (2) is only available with the Joint

Commissioner and not with Additional Director. He further submitted that these 2 authorities are quite different. He further referred to the decision of the Hon'ble Delhi High Court in case of CIT versus Pawan Kumar Garg [2009] 178 Taxman 491 (Delhi)/ [2011] 334 ITR 240 (Delhi)/ [2009] 222 CTR 36 (Delhi) wherein it has been held that manner in which expression 'Joint Director' has been used in section 132(1) requires same to be interpreted in its limited sense as meaning only a Joint Director and not an Additional Director of Income- tax.

24. On the issue of reopening of assessment proceedings the ld departmental representative vehemently contested the submission of the assessee and also submitted on each of the issue as under :-

> *1)* Regarding claim that approval does not meet the requirements laid down u/s 151(2)
>
> • The assessee applied for PAN on *8.11.2006.* Based on the information provided by the assessee it was assigned to the jurisdiction of Circle 1(2)(1), Delhi, which came under the jurisdiction of Addl DIT(IT), Range 1, Delhi.
>
> • Vide notifications no. 263/2001 of 14.09.2001 and 250/2007 dated 28.09.2007 read with order of DIT (IT)-I Delhi dated 11.10.2007 (copies enclosed), the Add DIT (IT), Range 1, Delhi was empowered to exercise the powers and the functions of Additional Commissioner of Income-tax.
>
> • Therefore, the grant of approval for issue of notice u/s 148 by Addl DIT (IT), Range-1, Delhi was as per law.
>
> *2)* Regarding matter on Notice u/s 143(2) issued before disposal of the objections
>
> • Notice u/s 148 was issued on 22.01.2014 after obtaining prior approval of the Addl. DIT(IT), Range-1, Delhi, in

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response to which the assessee filed a NIL return on 03.04,2014. After filing of return, and till 07.05.2014 when the first notice u/s 142(1) was sent, the assessee did not make any request seeking reasons for issue of notice u/s 148

- Assessee still did not seek and reasons for re opening till 06.06.2014 when another notice u/s 143(2} was issued. It was only on 10.06.2014 that the assessee for the first time sought reasons for issue of notice u/s 148. These reasons were supplied to the assessee on 25.07.2014

- After obtaining reasons in July 2014, the assessee filed a response on 16th October 2014. Even then, other than raising general contentions, no specific objection was conveyed with regard to the reasons recorded for issue of notice u/s 148. This aspect has been highlighted by the AO in his order dated 19.02.2015 disposing of the 'objections' (para 5 - 6 thereof, pages 43 - 44 of assessee's paper book). Nevertheless, the AO diligently dealt with whatever objections were raised by the assessee and finally disposed them off on 19th February 2015.

- The proposition canvassed by the AR that notices u/s 143(2)/142(1) cannot be issued till the disposal of objections made by the assessee in response to the communication of 'reasons to believe' -is an erroneous interpretation of the SC judgment in *'GKN Driveshafts'* case. After issue of notice u/s 148 the AO cannot be expected to remain idle waiting for the assessee to seek reasons and then prefer objections at the last minute. It is also worth noting that the time available with the AO for passing draft assessment order was only up to 31.03.2015. Under the circumstances, and keeping in view that the assessee had not sought reasons for almost six months even after receiving the notice u/s 148 on 21.03.2014 the action on part of the AO to issue notices u/s 143(2) and 142(1) before 10.06.2014 cannot be faulted upon.

- So far as the case of *Premier Ltd v DCIT& Ors* (WP No. 2340 of 2008) of Bombay HC is concerned, the facts of that case are completely at variance with the case in hand. In that case, the AO had issued notices u/s 148,143(2) and 142(1) altogether. It was in these circumstances that the High Court quashed notices issued u/s 143(2)/142(1) and

directed the AO to proceed with the matter afresh. The cited case-law does not apply here.

3) Regarding claim of assesses that Reasons Recorded by the AO were not signed

- This contention has never been raised before at any stage. Not only that the assessee through letter dated 16.10.2014 responded to the reasons conveyed, but continued to participate in the proceedings even after that without raising any disagreement about the same, till now.

- Nevertheless, the fact that the AO not only recorded reasons (and, of course, signed those) for reopening of assessment, but also obtained approval of the competent authority for issue of notice u/s 148 is undeniable.

- Moreover, the AO conveyed the 'reasons' for issue of notice u/s 148 to the assessee on 25.07.2014 through a duly signed covering letter of the same date. The office copy of the signed letter along with the sticker of 'Speed Post' bar-code is available in the assessment records (P-201/c). It is worth noting that another similar letter addressed to Cairn Energy PLC (a group company) was also sent on the same date to the same address receipt of which is not denied. Proof of dispatch of these letters is also available with the office (copy enclosed).

- As desired by the Hon'ble Bench, the assessment records in original were produced for kind perusal of Hon'ble Members. The Bench also allowed the AR to inspect the assessment file and verify that the AO had indeed sent the reasons for reopening through a covering letter under his signature.

4) Regarding claim that the Information on share transfer was available with AO of CIL

- Even though information was available with the AO of CIL, it reached the AO of the assessee much later. In any case, the law does allow action against an erring assessee (i.e. reopening of assessment in cases where income has escaped assessment) within certain time frame. In this case the action was taken within the prescribed time frame i.e. within 6 years of income having escaped assessment.

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• It is not clear as to how the ratio of the case CIT v. Kelvinator of India [2010] 320 ITR 561 (SC) is being sought to be applied here. That was a case where an order u/s 143(3) was passed and later the assessment was sought to be reopened on the ground that the AO had passed the earlier order without application of mind. The position is completely different here. Even though the assessment of CIL was made with full application of mind, income in the case of the assessee had escaped assessment because, among other aspects, <u>the assessee had failed to file any return whatsoever till the notice u/s 148 was sent.</u>

5) Regarding claim that Reopening is contrary to'Vodafone'Judgment •

• Post Vodafone judgment, to remove doubts the Parliament clarified the law as it stood since 1962. Whether the Parliament of the Country was competent to do so, it is most humbly submitted, cannot be deliberated in this Hon'ble Tribunal.

• At the time of issue of notice, the law was thus clear and the AO had clearly stated (order disposing of objections; page 36 - 47 of assessee's paper book) that the conditions laid down in section 9(l)(i) were satisfied and the capital gains accruing to the assessee from transfer of CIHL shares which derived all their value from the assets situated in India, was taxable in India.

6) Regarding issue on Survey Report

• The insinuation, that while the notice u/s 148 was issued on 21.01.2014, the 'Survey Report', based on which it was purportedly issued, was received by the AO in the month of February 2014, is completely unsupported by the facts on record. As per the assessment records, a report marked 'URGENT MATTERS' was received from DDIT(lnv)-U-IV(2), New Delhi on 16.01.2014. Based on the information provided in that report, the AO recorded his reasons and obtained approval of Addl.DIT(IT)-Range-l, Delhi on 21.01.2014 for issue of notice u/s 148

• In any case, and more importantly, that the assessee did not file the tax return voluntarily is a fact. In

such a scenario, whether the survey brought out any new facts for the purposes of reopening is not material. That there was income chargeable to tax in India and the assessee had not even filed the tax return was sufficient reason to believe that the income had escaped assessment. The survey only confirmed the aspect of income accruing or arising in India through the transfer of assets situate in India. Whether survey report was received by the AO before or after issue of notice u/s 148 does not come in the way of the legality of such notice.

7) Issue regarding Territorial Jurisdiction ^

- The assessee had obtained a Permanent Account Number (PAN) on 08.11.2006, whereupon it was assigned to the jurisdiction of International Taxation, Circle 1(2)(1) and the assessment order in appeal presently was passed in the same jurisdiction. Moreover, the assessee has been regularly filing returns for AY 2010-11 onwards with the Assistant/Deputy Commissioner of Income Tax (International Taxation) Circle 1(2}(1}, New Delhi without raising any issue on the jurisdiction. /-

- The notice u/s 148 was issued to the assessee on 21.01.2014 which was received on the same date by hand to the AR, Mr. Sachin Bansal as well as by e-mail. In response, on 20.02.2014 a request for adjournment of 8 weeks was made. It was only vide letter dated 02.04.2014, that a challenge was made regarding "assumption of jurisdiction" by contending that "the Income Tax Department does not have the jurisdiction to issue a SI 48 notice on CUHL". Essentially the challenge to jurisdiction related to the arguments that "the retrospective amendment was not valid" and that "no capital gains accrued or were deemed to accrue or arise in India". The jurisdiction of Assistant/Deputy Commissioner of Income Tax (International Taxation) Circle 1(2)(1), New Delhi over the assessee was never under challenge.

- In any case, the challenge to the jurisdiction was made 72 days after the service of notice u/s 148, much after the 30 days bar placed in that regard u/s 124 of the Income Tax Act. Any challenge to the jurisdiction of the assessing officer at this stage deserves to be rejected.

25. The Ld. departmental representative for the purpose of the jurisdiction referred to the notification No. 250/2007 dated 28/09/2007 and submitted that the Directors of Income tax referred to in this notification to issue orders in writing empowered the Additional Drectors of the income tax of Joint Directors of income tax, what subordinate to them to exercise the powers to perform the function of Additional Commissioner of income tax or Joint Commissioner of income tax in respect of such territorial areas for of such person or class of person of such income or class of income or of such class of classes of the cases specified in the corresponding entries in that notification. He therefore submitted that Additional Directors of the income tax are equivalent to the Joint Commissioners of the income tax therefore there is no infirmity in the sanction provided under section 151 (2) of the Income Tax Act. He further referred to the notification dated 11/10/2007 issued by the office of the director of income tax, international taxation and notification dated 14/09/2001.

26. In rejoinder, Ld. authorized representative submitted that the notification submitted by the Ld. departmental representative does not specify that the powers of Joint Commissioner with respect to the provisions of section 151 (2) are also with the Additional Commissioner or the Additional Director of the Income Tax Act. He

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therefore further relied upon his written submission made in this behalf.

27. We have carefully considered the rival contentions. The assessee appellant has challenged validity of reopening of assessment t on several counts before us, including the two additional grounds raised and we deal with each of them as under:-

a. The 1st challenge made by the Ld. authorized representative is that the approval required under section 151 (2) of the Income Tax Act has not been correctly provided. It is not in dispute that the approval has been granted by the Additional Director of income tax (international taxation), range – 1, New Delhi on 21/01/2014 as depicted at page No. 31 of the paper book. According to the provisions of section 151 (2) it is provided that in a case other than the case falling under subsection (1), no notice shall be issued under section 148 by the assessing officer, who is below the rank of Joint Commissioner, unless the Joint Commissioner is satisfied, on the reasons recorded by such assessing officer, that it is a fit case for the issue of such notice. Now it is a moot question before us that whether the approval accorded by The Additional Director of Income Tax (International Taxation) is in compliance with the provisions of

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section 151 (2) of the Income Tax Act or not. According to the provisions of section 2 (28C) Joint Commissioner means a person appointed to be a Joint Commissioner of income tax and Additional Commissioner of income tax under subsection (1) of section 117. Further, section 2 (28D) of the act defines joint director means a person appointed to be joined director of income tax and Additional Director of income tax under subsection (1) of section 117. Therefore, from the conjoint reading of the above provisions it is amply clear that the word Joint Commissioner does not include the Additional Director of income tax. However, provisions of section 120 of the Income Tax Act define the jurisdiction of income tax authorities. According to that section all income tax authorities shall exercise all or any of the powers and perform all or any of the functions conferred on them or assigned to them by or under this act in accordance with such direction as the board may issue for the exercise of the powers and performance of the function by all or any of those authorities. It further provides that the direction of the board may authorise any other income tax authority to issue orders in writing for the exercise of the powers and performance of the function by all or any of the other income tax authorities

what subordinate to it. According to those powers notification No. 250/2007 dated 28/09/2007 was issued by the Central board of direct taxes wherein it is provided as under:-

"(b) the Directors of Income-tax referred to in this notification to issue orders in writing empowering the Additional Directors of income-tax or Joint Directors of Income-tax, who are subordinate to them to exercise the powers and perform the functions of Additional Commissioners of Income-tax or Joint Commissioner of Income-tax, in respect of such territorial areas or of such persons or classes of persons or of such incomes or classes of income or of such cases or classes of cases specified in the corresponding entries in column (4) of the Schedule;"

Therefore, the Central board of direct taxes has validly exercises power conferred upon it as provisions of section 120 of the Income Tax Act wherein they have also provided that that the functions performed by Additional Commissioner of income tax or Joint Commissioner of income tax may also be performed by the Additional Director of income tax or joint directors of the income tax. Further, the Ld. departmental representative contested that the assessee has applied for permanent account number on 08/11/2006 which was provided by the revenue, which is assigned to the jurisdiction of circle 1 (2) (1), Delhi,

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which came under the jurisdiction of Additional Director of income tax (international taxation), range – 1, Delhi. Therefore, necessarily the grant of approval for issue of notice under section 148 of the Income Tax Act was also required to be given by the Additional Director of income tax (International Taxation), New Delhi. The appellant also could not say that the notifications relied upon by the revenue are not in accordance with the law. The decisions relied upon by the Ld. authorized representative are not applicable to the facts of the present case as in this particular case there is a notification issued by the Central board of direct taxes conferring jurisdiction of the Joint Commissioner/Additional Commissioner of income tax on the joint director/ Additional Director of income tax. In view of this we reject the contention of the Ld. authorized representative that the approval does not meet the requirements laid down under section 151 (2) of the Income Tax Act, 1961.

b. The 2nd contention raised by the Ld. Authorized representative is that form number ITNS – 34 provides for the format of notice under section 148 of the Income Tax Act, 1961. The above notified form show that there is a specific mention is to be made

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that the notice is being issued after obtaining the necessary satisfaction of the deputy Commissioner, Commissioner, Chief Commissioner of income tax. The Ld. authorized representative also took us to page No. 52 of the paper book where the notice under section 148 issued with respect to some other assessee of Cairn Group was annexed, wherein there is a specific mention that this notice is issued after obtaining the approval under section 151 of the Income Tax Act, 1961. He referred to the notice issued to the assessee, which is placed at page No. 7 of the paper book, where there is no such mention of such approval. Therefore, the contention of the Ld. authorized representative that this non-mentioning of the fact of obtaining necessary approval in the notice itself makes the notice invalid. We have carefully perused the rival contentions. In fact, format of the notice provided in ITNS – 34, is a non-statutory form, which does not find place in the income tax rules, or any other subsidiary rules relating to administration of the Income Tax Act. However, we fully agree with the contention of the Ld. authorized representative that the non-statutory format provided by the Central Board of Direct Taxes clearly provides that there has to be mention about the notice is being issued after

obtaining the necessary satisfaction of the higher authorities prescribed therein. It is also apparent that the notice issued to the assessee on 21st. January 2014 under section 148 of the Income Tax Act does not contain any such statement with respect to obtaining approval under section 151 of the Income Tax Act. Undisputedly, in this case proper approval of Ld. Additional Director of income tax (international taxation) has been taken by the Ld. assessing officer under section 151 of the Income Tax Act. Merely if the notice issued does not mention some facts that are prescribed in a non-statutory form when substantially the procedure laid down by the Income Tax Act has been complied with cannot make the notice invalid. In view of this we also rejected the contention of the Ld. authorized representative of the assessee that the notice is not in the prescribed format, it should be held to be invalid.

c. The 3rd contention of the assessee is that the notice under section 143 (2) of the Income Tax Act has been issued before the disposal of the objections filed against reopening of assessment. The facts relating to this is that the objections filed by the assessee against the issue of reopening were disposed off by the Ld. assessing officer on 19/02/2015, whereas the notice

under section 143 (2) of the income tax was issued to assessee on 06/06/2014. To support its case the assessee has relied upon the decision of the Hon'ble Supreme Court in the case of GKN Drive shaft (India) Ltd versus ITO [2002], 125 Taxmann 963,(SC) which has laid down certain procedure in case of reassessment proceedings. The Ld. authorized representative stressed that direction of the Hon'ble Supreme Court in that decision in holding that the assessing officer is to dispose of the objections, if filed, by passing the speaking order, before proceedings with the assessment, were not complied with. The Ld. authorized representative further relied on the decision of the Hon'ble Bombay high court in case of M/s Premier Ltd versus DCIT to support its contentions. The Ld. departmental representative submitted that assessee has not sought any reasons for reopening till 6th of June 2014 but the assessee has sought reasons only on 10/06/2014. Therefore, there cannot be any occasion for the Ld. assessing officer to dispose of the objection filed by the assessee as there are no objections filed before him before the issue of notice under section 143 (2) of the Income Tax Act. We have carefully considered the rival contentions. The Hon'ble Supreme Court in case of GKN

Driveshaft (India) Ltd versus Ito (2002) 125 Taxmann 963 (SC) has laid down the procedure in case of reassessment proceedings holding that , when notice under section 148 of the income tax is issued, the proper course of action for the noticee is to file return of Income and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of the reason that noticee is entitled to file objection to issuance of notice and the assessing officer is bound to dispose of the same by passing the speaking order before proceedings with assessment. In the present case, the notice under section 143 (2) was issued on 6th June 2014, whereas the assessee has obtained reasons for notice issued under section 148 of the act only on 10/06/2014, therefore, apparently there is no objections pending before the Ld. assessing officer to dispose before the issue of notice under section 143 (2) of the act. Furthermore, there is specific time limit applicable with respect to the issue of notice under section 143 (2) of the Income Tax Act, as per proviso contained therein. It is the prerogative of the assessee to obtain benefit of the guidelines laid down by Hon'ble Supreme Court in case of reopened assessment. However, when the assessee does not

care to safeguard its own interest, it cannot hide behind his inefficiency and claim that there is a flaw in assessment proceedings. In the present case, the notice under section 148 was issued on 21/01/2014 where the Ld. assessing officer granted time of 30 days from the date of service of the notice to file a return. In response to that notice, assessee filed return only on 03/04/2014, beyond the time limits provided by the Ld. assessing officer. The assessee sought the reasons only on 10/06/2014, which were supplied on 25th July 2014 and assessee filed its objection only on 16/10/2014. Therefore, we do not agree with the contention of the Ld. authorized representative that in this case there is any violation of the guidelines laid down by the Hon'ble Supreme Court with respect to disposal of the objection and then commencing the assessment proceedings. Therefore the contention of the assessee is rejected.

d. The fourth contention of the assessee was that information regarding share transfer of Cairn India Holdings Ltd was available with the Ld. assessing officer of gain India Ltd during the regular assessment proceedings of Cairn India Ltd., The argument of the assessee is that reassessment proceedings

initiated by the Ld. assessing officer are contrary to the principles laid down by the Hon'ble Supreme Court in the case of CIT versus Kelvinator of India Ltd (2010) 320 ITR 561 (SC) for the reason that information was received by the Ld. assessing officer of the appellant from the Ld. assessing officer of Cairn India Ltd, however, the Ld. assessing officer of Cairn India Ltd was always aware about the facts of transfer of shares of Cairn India holding Ltd from the appellant to Cairn India Limited. For this it is argued that in the assessment proceedings of Cairn India Ltd for assessment year 2007 -08. The Ld. assessing officer of that company referred the matter for the determination of arms length price of the transfer of the shares to appellant and this information could have been passed on to the Ld. assessing officer of the appellant. However, as the assessing officer of Cairn India Ltd, has not passed on such information to the Ld. assessing officer of the appellant during the regular assessment proceedings under section 143 (3)of the act. Against this, the Ld. departmental representative have argued that that though the information was available with the Ld. assessing officer of Cairn India Ltd, it reached the AO of the assessee much later. In any case it was submitted that law does allow

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action against any assessee within certain time frame in this case the action was taken within the prescribed time frame. The Ld. departmental representative also vehemently submitted that decision of the Hon'ble Supreme Court in the present case, do not apply at all. It was submitted that though the assessment of Cairn India Ltd was made with full application of mind income in the case of the assessee had escaped assessment because the assessee has failed to file any return whatsoever till the notice under section 148 of the Income Tax Act was issued. We have carefully considered the rival contentions and we reject the argument of the Ld. authorized representative of the assessee as well as the reliance upon the decision of the Hon'ble Supreme Court in case of CIT versus Kelvinator of India Ltd (supra). The reasons for the same is that it cannot be argued that if assessment in the case of some another assessee has been made who was also a party to the contract, reassessment proceedings in the hands of the other party cannot be initiated. Here, the argument of the assessee is that that the information could have been passed on to the Ld. assessing officer of the appellant from the assessing officer of the Cairn India Ltd, and such information has not been passed by the Ld. assessing

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officer of the Cairn India Ltd to the Ld. assessing officer of the appellant and therefore the reopening is invalid. Such an argument is required to be rejected at the threshold only because the assessment proceeding of one person is quite different from the assessment proceedings of another person and the provisions of the Income Tax Act should be applied fully with respect to the records and information relevant to that assessee only.

e. The 5th contention raised by the Ld. authorized representative is that that the reasons for reopening were contrary to the law laid down by Supreme Court in case of Vodafone International versus union of India (2012) 341 ITR 1 (SC). The main thrust of the argument of the appellant is that in the reasons for reopening of the assessment, the Ld. assessing officer has not referred to the explanation 5 to section 9 (1) (i) of the Income Tax Act. According to assessee without application of explanation 5 to section 9 (1) (i) reasoning of the assessing officer was contrary to the decision of the Hon'ble Supreme Court in the case of Vodafone, international (supra)and hence bad in law. The Ld. departmental representative submitted that the post Vodafone judgment and to remove doubts, the Parliament has clarified the

law as it stood since 1962. He further vehemently submitted that it cannot be deliberated in this tribunal whether the Parliament of the country was competent to do so or not. It was further argued that at the time of issue of notice the law was very clear that the conditions laid down in section 9 (1) (i) were satisfied and the capital gains accruing to the assessee for transfer of Cairn India holding Ltd shares which derived all the value of the shares from the underlying assets situated in India, was taxable in India. We have carefully considered the rival contentions and also perused the reasons recorded by the assessing officer for initiating reassessment proceedings. The Ld. assessing officer has referred section 9(1) (i) of the act and at page No. 7 of the reasons recorded. He has elaborately considered that provisions of that section are applicable in the present case. Further at page No. 8 it is also been mentioned that that S underlying assets of such shares are situated India which is transferred and capital gain thereon is chargeable to tax in India. He has categorically held that all the subsidiaries are doing business in India are having all the receipts in India and, therefore, the shares of Cairn India holding Ltd derived all its value from the assets located in India. He further held that the real effect of

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transfer of the shares of Cairn India holding Ltd will be the transfer of control of the assets of the subsidiaries in India. Therefore, this transfer of shares would indirectly result in transfer of assets situated In India. It situated in India, hence the condition laid down in section 9 (1) (i) of the Indian Income Tax Act are satisfied thereby making the capital gain taxable in India, as per the domestic tax law. The argument of the Ld. authorized representative is correct that ld AO ha not referred to the explanation 5 while recording the reasons however he has referred to provisions of section 9 (1) (i) of the act and explanation 5 is part of that section. Therefore, merely because no reference is made to explanation 5, reasons recorded by the Ld. assessing officer cannot become invalid when he has referred the overall section. Therefore this contention of the Ld. authorized representative is rejected.

f. The sixth contention of the assessee is that the recorded reasons provided by the Ld. assessing officer were not signed. During the course of hearing the assessment records were called for and reasons recorded by the Ld. assessing officer were examined. We found them duly signed by the assessing officer. The same documents were also shown to the Ld. authorized

representative,Where he could not say that the reasons recorded by the Ld. assessing officer are not signed. In view of this we reject this contention of the assessee.

g. The seventh contention of the assessee is that the reopening of the assessment in the instant case is based on the survey report conducted on the premises of the Cairn India Ltd and in all likelihood the said survey report had been received by the Ld. assessing officer after the issuance of the notice under section 148 of the Income Tax Act. The reasons for such contention of the Ld. authorized representative is that survey was carried out on 15/01/2014 and while recording the reasons for reopening of the assessment in one of the group company cases, the Ld. assessing officer of that company has stated that survey report was received on 25th February 2014. Therefore it is the allegation of the assessee that at the time of recording of the reasons ld AO did not have any information of survey report. To counter this argument, the Ld. departmental representative submitted that as per assessment records report remarked as 'urgent matters' was received from DDIT (investigation), New Delhi on 16/01/2014 and on that basis, the AO has recorded his reasons on 21/01/2014 for issue of notice under section 148 of

the act. In view of the examination of records by bench and also an opportunity of examination given to the Ld. authorized representative at the time of hearing this argument does not have any legs to stand, hence, rejected.

h. On the additional ground No. 2.3 raised before us with respect to incorrect approval under section 151 (2) of the income tax has already been dealt with by us in earlier paragraphs of this order therefore ground No. 2.3 is rejected.

i. On the additional ground raised by ground No. 2.4 regarding the invalidity of notice issued under section 143 (2) of the act, only argument raised before us is that before disposal of objections filed by the assessee such notice was issued. We have already dealt with this issue and hence this additional ground is also rejected.

28. In the result ground no 2 of the appeal of assessee is dismissed .

29. Ground No 3 & 4 of the appeal of the assessee are against chargeability of capital gain and computation of the same under the Income Tax Act 1961.

30. Ld AR submitted on this issue as under :-

"1. Facts under consideration

1.1. Cairn Energy PLC ("CPLC") is a tax resident of United Kingdom under Article 4 of Double Taxation Avoidance Agreement between India and United Kingdom ("India - UK

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DTAA"). In the year 2006, the CPLC Group undertook an internal reorganisation ("internal reorganisation") to simplify the group structure for both operational and strategic reasons, to achieve more effective local management, to access Indian capital market, and to allow equity participation by Indian and Foreign investors in their Indian business.

1.2. Step-wise implementation of the reorganisation has been detailed hereunder:

Step 1 - Share Exchange Agreement dated 30 June 2006 between CPLC and Cairn UK Holdings Limited ('CUHL' or 'Appellant') *(refer Page No. 60 to 66 of Paper Book]*

a) As part of the internal reorganisation, the Appellant was incorporated on 26 June 2006. Thereafter, a Share Exchange Agreement dated 30 June 2006 was entered into between CPLC and CUHL, a company incorporated in United Kingdom, whereby the entire issued share capital of nine (9) wholly owned subsidiaries of CPLC ("the Subsidiaries'") were exchanged with the CUHL.

B In consideration for the aforesaid exchange, the CUHL issued 22,14,44,034 shares of GBP 1 each to CPLC. Consequently, CUHL became a wholly owned subsidiary of CPLC and the holding company of the Subsidiaries.

Step 2 - Share Exchange Agreement dated 07 August 2006 between CUHL and Cairn India Holdings Limited ('CIHL') *(refer Page No. 67 to 73 of Paper Book)*

c) Post completion of Step 1, CIHL was incorporated in Jersey on 2 August 2006. Thereafter, a Share Exchange Agreement dated 07 August 2016 was entered into between the CUHL and CIHL whereby the CUHL exchanged all the shares of the Subsidiaries with CIHL.

d) As a consideration for the aforesaid exchange of shares, CIHL issued 22,14,44,034 shares of GBP 1 each at par to CUHL. Consequently, CIHL became the wholly owned subsidiary of CUHL and the new holding company of the Subsidiaries.

e) Vide Debt Conversion Agreement dated 1 September 2006, the debt of GBP 2,97,80,710 owed by Cairn Energy Hydrocarbons Limited to CPLC was assigned by CPLC to CUHL for a consideration of 2,97,80,710 ordinary shares of CBP 1 each issued by CUHL to CPLC, which debt was further assigned

by CUHL to CIHL for a consideration of 29,780,710 ordinary shares of GBP 1 each issued by CIHL to the Appellant. Accordingly, the total shares under consideration were 25,12,24,744 ordinary shares of GBP 1 each (22,14,44,034 shares plus 2,97,80,710 shares)

Step 3 - Subscription and Share Purchase Agreement between CPLC, CUHL, CIHL and Cairn India Limited ('CIL') *(refer Page No. 75 to 168 of Paper Book)*

f) As a final part of internal reorganisation, CIL was incorporated in India on 21 August 2006 as a wholly owned subsidiary of CUHL. In accordance with Indian regulatory provisions, equity was injected into CIL by CUHL. *Vide* subscription and share purchase agreement dated 15 Sep 2006 and share purchase deed dated 12 Oct 2006 entered into by and among CPLQ CUHL, CIHL and CIL, the entire share capital of CIHL was transferred from CUHL to CIL; The consideration for this transfer was settled partly in cash and partly as shares in CIL. For this purpose, initially funds were infused in CIL on various dates by CUHL and from these funds, on the same day, CIL purchased some part of the share capital of CIHL from CUHL.

1.4. As a result, CIL, a subsidiary of CUHL, acquired 100 percent stake in CIHL from the Appellant.

1.5. With regard to the above transaction. Assessing Officer ('AO'), in the Draft Assessment Order ('DRO') dated 09 March 2015, alleged the gains arising from the sale of shares of CIHL by the CUHL to CIL are short term capital gains and hence chargeable to tax in India at the rate of 40 percent.

1.6. Against the above DRO, CUHL filed objections before the Hon'ble Dispute Resolution Panel ('DRP') vide application dated 6 April 2015.

1.7. After series of hearings and filing of various submissions, Hon'ble DRP issued its directions *vide* order dated 31 December 2015. In the said directions, Hon'ble DRP agreed with almost all the allegations of the AO and confirmed the DRO. Pursuant to the directions of Hon'ble DRP, AO issued Final Assessment Order ('FAO') dated 25 January 2016.

1.8. Against the above FAO, the Appellant has filed captioned appeal before the Hon'ble Income-tax Appellate Tribunal ('ITAT'), Delhi and now the Appellant is placing all the arguments before your Honors.

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2. AO and DRP contentions and Appellants submission against the said contentions

2.1. The AO and DRP have both raised various contentions with regard to taxability of transfer of shares of CIHL to CIL. Further, on the same issues, learned DRP has also provided its contentions and observations at various places in the directions issued. In this regard, detailed reasons of AO and DRP along with the rebuttal of the Appellant are provided in the subsequent paragraphs.

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Retrospective Amendment to section 9(l)(i) of the Act by Finance Act, 2012 is bad in law and ultra vires

1.1. At the outset the Appellant most respectfully submits that the captioned proceedings were initiated on account of retrospective amendment to section 9(1)(i) by the Finance Act, 2012 which has resulted in imposing substantial tax liability on the Appellant. With the due respect to the legislature, the Appellant submits that the said retrospective amendment is bad in law and *ultra vires* provisions of Article 14 of the Constitution of India. Further, in the *"Draft report on Retrospective Amendment - Relating to Indirect Transfers"* issued in 2012 by the Expert Committee appointed by the Government of India, under the Chairmanship of Dr. Parthasarathi Shome also recommended that the said amendment should be applied with prospective effect. In view of the same, your Honors will appreciate that retrospective applicability of the said law is not considered as good law.

2.3. The Appellant is already contesting validity of the said retrospective amendment before the International Court of Justice pursuant to Article 9 of the Agreement between the Government of India and Government of United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments. Further, the Appellant also reserves its right to contest the validity of the above retrospective amendment before the appropriate forum in India. However, in the DRO and FAO and DRP Directions, it was observed by the AO and DRP, that the retrospective amendment is a good law. In view of the same, presuming that your Honors would be dealing with the said observations of the AO and DRP, in the subsequent paragraphs, the Appellant has provided its submissions against the observations of the AO and DRP on retrospective amendment.

2 -. During the course of the assessment, the learned AO has placed reliance on the submissions filed by CIL during the course of proceedings under section 201 of the Act, wherein it was submitted that the amendment of section 9(1)(i) of the Act created new law and new obligations. It was submitted that the legislature though while amending the law has mentioned that the amendments are being made for removal of doubts, however, in view of the settled law in the favorable Supreme Court[1] judgment, this attempt is nothing but to create substantive rights to tax a class of persons and accordingly can only be prospective in nature *(refer Para 9.4 - Page 270 of Appeal Documents).*
•:'-.. 4
2.5. Further, the learned AO has upheld the validity of retrospective amendment by placing reliance oti the following *(refer Para 9.5 to 9.6 from Page 271 to 280 of Appeal Document):*
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a. Memorandum to Finance Act, 2012 and interpretation on the first principles which provides that the insertion of Explanation 4 and 5 to section 9(1) will be applicable with retrospective effect from 01 April 1962;
b. Reliance is placed on the decision of DTT v Copal Research Ltd., Mauritius [2014] 49 taxmann.com 125 (Delhi)
c. Reliance is placed on the decision of CIT v Vatika Township (P) Ltd., Civil Appeal No. 8750 of 2014.
2.6. Further, learned DRP has agreed with the above conclusion of the AO and further relied on the followingjudicial precedents:
a. National Agri Coop Mkg Federation v UOI [2003] 260 ITR 548 (SC); b. ACIT v Netley *'B'* Estate [2015] 56 taxmann.com 436 (SC);
c. Sony Ericson Mobile Communications India P Ltd v CIT [2015] 55 taxmann.com 240 (Delhi HC);
d. CIT v Sati Oil Udyog Ltd [2015] 56 taxmann.com 285 (SC); and e. ShivDuttRai Fateh Chand v UOI [1983] 1984 AIR 1195 (SC).
2.7. With due respect to all the above contentions of the learned AO and DRP, the Appellant most respectfully submits rebuttal to all the above judicial precedents in the subsequent paragraphs.

2.8. Reliance is placed by the learned AO on the amended provisions of section 9(1)(i) read with Explanation 4 and 5 inserted by Finance Act, 2012 is not at all a debatable issue. At this point of time it is very clear that the Act is amended retrospectively to bring transactions of indirect transfers of overseas companies having Indian assets within the tax net of Indian Income-tax Act. The issue which was to be debated is whether the case of the Appellant is a case of indirect transfer or it is a case of corporate reorganisation of holding companies, with no transfer of assets to any outsider and no true gain is realized. Another issue, if at all has to be discussed before your Honors and
winch needs evaluation is whether amendment to section 9(1)(i) of the Act with retrospective effect which has an impact of increasing tax liability on the Appellant is a good law.
Further, reliance placed on the decision of Copal Research *(supra)* is completely irrelevant and out of the context. Learned AO has very conveniently cherry picked certain paragraphs from the decisions and quoted as per his convenience. The main issue before Hon'ble Delhi High Court was whether the transfer of 67 percent shares of Copal-Jersey to Moody UK is chargeable to tax in India. The said transfer of shares was having an effect of transfer of certain assets in India. The main issue dealt by the Hon'ble Delhi High Court in this case was interpretation of the word "substantially" occurring in Explanation 5 to section 9(1)(i) of the Act. In the said interpretation. Hon'ble Delhi High Court just took note of the provisions of Explanation 5. Such an observation^ of Hon'ble Delhi High Court is presented by the AO in such a manner that Hon'ble Delhi High Court has stated that Explanation 5 is for removal of any doubts and hence applicable with retrospective effect. The Appellant submits that the observations of the Hon'ble Delhi High Court are not at all approving the retrospective application of Explanation 5.
2.10. Without prejudice to the submission in Para 2.9 above, the Appellant would also like to submit that even if for the time being one agrees with the observation of the learned AO that Hon'ble Delhi High Court has approved the retrospective application of Explanation 5 to Section 9(l)(i) of the Act, the said observations should not have any binding force of law. The Appellant would like to point out that the main issue before the Hon'ble Delhi High Court was the

interpretation of the word "substantially" appearing in Explanation 5. For the purpose of this interpretation, there was no requirement of making any comment on the retrospective applicability of Explanation 5. In view of the same, the said observations are *obiter dictu*[m] and does not have the binding force of law.

2.11. Further, the decision of Vatika Township *(supra)* is also applied totally out of the context. The main issue involved in this case was whether proviso to section 113 of the Act, which is introduced with effect from 1 June 2002 should be applied retrospectively to the assessment years 1995 onwards or not? In this case, the amendment is introduced from a specific date and the issue was whether the said amendment should be applied with retrospective effect or not. Whereas in the case under consideration, amendment is already introduced with retrospective effect from 1 April 1962. Hence, debate on the issue whether said amendment should be applied with retrospective effect or not? was not an issue before Delhi High Court.

2.12. Further, the learned AO has very conveniently cherry picked certain paragraphs which are favorable to the Revenue and very conveniently ignored all the paras which are in favor of the Appellant and ratio of the judgment. Hon'ble Apex Court decided this case in favour of the Assessee and observed as follows:

[2] *Obiter Dicta* is an observation by a court on a legal question suggested in a case before it but not arising in such a manner as to require a decision. Such an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced. Obiter Dicta is more or less presumably unnecessary to the decision. It may be an expression of a view point or sentiments which has no binding effect. It is also well-settled that the statements which are not part of the ratio decidendi constitute obiter dicta and are not authoritative. The same is various judicial precedents such as KEC International Ltd. v. Ad. CIT [2012] 20 taxmann.com 229 (Mumbai), CIT v SAE Head Office Monthly Paid Employees Welfare Trust [2004] 141 Taxman 364 (Delhi), Saurabh Bansal v ITO [2010] 41 SOT 157 (AHD.), Roshanlal S. Jain (AOP) v. Dy. CIT [2009] 309 ITR 1741 (Guj.), Arvind Boards & Papers Products Ltd. v. CIT [1982] 137 ITR 6352 (Guj.), etc.

The charge in respect of the surcharge, having been created for the first time by the insertion of the proviso to Section 113, in clearly a substantive provision and hence is to be construed prospective in operation. The amendment neither purports to be merely clarificatory nor is there any material to suggest that it was intended by Parliament. Furthermore, an amendment made to a taxing statute can be said to be intended to remove 'hardships' only of the assessee, not of the Department. On the contrary, imposing a retrospective levy on the assessee would have caused undue hardship and for that reason Parliament specifically chose to make the proviso effective from 1.6.2002."

In view of the above, the decision of Vatika Township (supra) is supporting the case of thii Appellant and not the case of the revenue.

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2.13. Tn the case of National Agri Coop Mkg Federation *(supra),* the main issue before the Hon'bHJ Supreme Court ('SC') was validity of the retrospective amendment introduced in sectior) 80P(2)(a)(iii) of the Act. While dealing with the entire issue, learned DRP has very conveniently picked up one statement which was favorable to the Revenue. The Appellant would like to bring following observation of Hon'ble Apex Court to the notice of your Honors:

- *"the retrospectivity must he reasonable and not excessive or harsh, otherwise it runs the risk ofbelns struck down as unconstitutional"*
- *"In real terms therefore there was hardly any retrospectivity, but a continuation of the status quo ante. The desree and extent of the unforeseen and unforeseeable financial burden was, in the circumstances, minimal and cannot he said to be unreasonable or unconstitutional.* "

The above observation of the Hon'ble SC clearly indicates that the amendment dealt in this case was neither having any wider implications on the assessee nor was too harsh or unreasonable. In the case of the Appellant, retrospective amendment has levied a total demand amounting to INR 29,102 Crores. Consequently, given the degree and extent of the unforeseen and unforeseeable financial burden, the amendment cannot have retrospective effect.

2.14. In the case of Netley 'B' Estate *(supra),* the issue involved was of retrospective operation of amendment made to section 26(4) read with section 27 of Karnataka Agricultural Income Tax Act, by the State Legislature held that assessment of agricultural income could not be made in the hands of assessee-firm after its dissolution in so far as said amount pertained to period prior to dissolution of firm. On this issue, Hon'ble Supreme Court decided the case against the Assessee and upheld the retrospective application of the above section. However, it is very much relevant to bring following observations of Hon'ble Supreme Court before your Honors:

- *No right or liability is created for the first time - the only thing done in the present case is that a firm is by fiction of law continued as such for certain purposes of assessment even after its dissolution.*
- *There is no withdrawal of any right which has become a vested statutory right which deprives an assessee of anything in the present case.*

The above observation clearly indicates that the only issue involved was the taxability of income in the hands of the firm after dissolution. The said amendment was not creating any additional tax
liability in the hands of the Assessee or any other person. In view of the same, ratio of this decision cannot be applied in the case of the Appellant because a tax liability was imposed for the first time.

2.15. The decision in the case of Sony Ericsson *(supra),* relied on by the Hon'bleDRP Members, revolves around the issue of marketing intangibles. The major portion of the ruling dealt with the method to benchmark the transaction of excess Advertisement, Marketing or Promotion ('AMP') expenditure incurred by the assessee for its foreign counterpart. The concept of adopting Bright Line Test ('BLT') as a legitimate means of determining the arm's length price of the international transaction has been discussed at length. However while dealing with this issue in greater detail, the Hon'ble Court also made an observation on the issue of retrospective amendment of section 92CA introduced by the Finance Act, 2012. The learned DRP, abruptly quoted those findings without considering that the main issue raised by assessee.

2.16. In the said ruling, the assessee itself considered the excess AMP expenditure as an international transaction and accordingly this question was not dealt in by the Hon'ble Delhi High Court and remained unanswered. This indicates that the decision of Sony Ericson *(supra)* cannot be considered as an authority for interpretation of retrospective amendment. Further, various subsequent rulings, discussed in subsequent paragraphs, by the Hon'ble High Court, have also not considered the decision of Sony Ericson *(supra)* to determine the basic question of whether the excess AMP expenditure incurred would constitute as an international transaction.

2.17. In the case *of Maruti Suzuki India Limited v CIT[2015] 64 taxmann.com 150 (Delhi),* Hon'ble Delhi High Court held that *"The result of the above discussion is that in the considered view of the Court the Revenue has failed to demonstrate the existence of an international transaction only on account of the quantum of AMP expenditure by MSIL Secondly, the Court is of the view that the decision in Sony Ericsson Mobile Communications India (P.) Ltd. case (supra) holding that there is an international transaction as a result of the AMP expenses cannot be held to have answered the issue as far as the present Assessee MSIL is concerned since finding in Sony Ericsson to the above effect is in the context of those Assessees whose cases have been disposed of by that judgment and who did not dispute the existence of an international transaction regarding AMP expenses [Para 51]ⁿ*

2.18. In the case *of Honda Siel Power Products Ltd. V DCIT [2015] 64 taxmann.com 328 (Delhi),*

Hon'ble Delhi High Court observed that *"This court is of the view that the above decision in Maruti Suzuki India Ltd, (supra) holding that the decision in Sony Ericsson Mobile Communications India (P.) Ltd. (supra) wouldnot cover the case of MSIL would also apply as far as the present Appellant is concerned As noticed in Maruti Suzuki India Ltd. (supra) the facts of (he cases of the Assessees in Sony Ericsson Mobile Communications India (P.) Ltd. (supra) did not give rise to a dispute that there is no international transaction involving the Assessee therein and its AEs. In fact each of the Assessees were receiving subsidies/subventions from their respective AEs.*" [Para 22]

2.19. From above, it can be concluded that the findings of Sony Ericson were not considered in the subsequent ruling

pronounced by the Hon'ble Court for determining the basic question of whether the said transaction of excess AMP expenditure would constitute as an international transaction. Accordingly, the said ruling'should not be applied on the facts of the Appellant.

2.20. Decision of Hon'ble Supreme Court in the case of Sati Oil Udyog *(supra)* deals with the retrospective application of section 143(1A) of the Act. The main issue was that section 143(1A) provides for an additional tax of 20 percent where the amount of adjustment made under the first
proviso to clause (a) of sub-section (1) exceed the total income. In this case, reduction of loss was not specifically covered in the provisions of section 143(1 A). In the case of the Assessee, where on account of adjustments there was reduction of the losses, it was alleged that since reduction of loss is not covered by the express provisions of the section 143(1 A) additional tax of 20 percent should not be applied in the case of the Assessee. Thereafter, by Finance Act, 1993 provisions of section 143(1 A) of the Act were retrospectively amended to include even the reduction of loss.

2.21. To the above, Hon'ble Supreme Court concluded that the provisions of section 143(1 A) of the Act are for punishing the assessee. Ultimately, taking a clue from Varghese[3] case, Hon'ble SC concluded that section 143(1 A) of the Act can only be invoked where it is found on facts that th£ lesser amount stated in the return filed by the Assessee is a result of an attempt to evade tax lawfully payable by the assessee. ;;

2.22. From the above, your Honors will appreciate that the decision of Hon'ble SC was driven by the nature of the amendment was for the purpose of punishing the willful defaulters. The principles of the said decision cannot be used to approve the retrospective application of amendment to section 9(l)(i) of the Act which has an impact of the increasing substantial tax liability of the Appellant. Especially in the case of the Appellant, where this transaction was *suo moto* disclosed before various Income-tax and regulatory bodies as evident from various documents submitted before various authorities[4].

2.23. In the case of Shiv Dutt Rai *(supra),* the issue which was dealt by Hon'ble SC was validity of retrospective penalty provisions introduced by way of section 9(2A) of the Central Sales Tax. In this case, the main issue was retrospective

applicability of section 9(2A) introduced in Central Sales levying penalty for non payment of taxes collected.
-1&'-" -
2.24. In the above, your Honors may kindly note that the said judgment was dealing with the penalty provisions of Central Sales tax where the mechanism and levy of penalty is driven entirely by different parameters. Hence, this case law cannot be used as binding precedent in the case of the Appellant. - . . - -

Internal Reorganisation '

2.25. During the course of the assessment proceedings, AO relied on certain submissions filed by CIL during the course of proceedings under section 201 of the Act. In the said submissions one of the contentions raised by CIL was that the above transaction was nothing but a case of internal reorganisation without any involvement of the third party and accordingly, the same should not come within the taxability of the provisions of the Act. Reliance was also placed on the decision of Vodafone[5] and it was argued that in the case of CIL there is no change in the controlling interest as a result of internal reorganisation *(refer Para 8.15 to 8.18 - Page 240 to 241 of the Appeal Documents}.*

2.26. To the above, AO has observed that the share purchase deed provided for cash consideration for 24.31 percent shareholding in CIHL from the Appellant to CIL. To finance this acquisition, CIL brought an IPO in the Indian capital market and the proceeds of the IPO was paid to the Appellant for acquiring shares of CIHL. In this way, Appellant divested its stake in the Indian oil and gas business to CIL and received adequate cash consideration for the same. Therefore the claim of the Appellant that these transactions were part of the internal reorganisation of the group and are revenue neutral is not correct, *(refer Para 9.1.7.2-Page 253 of the Appeal Documents)*

2.27. Further, learned DRP has also agreed with the above observations of the AO *(refer observations of the DRP at Page No. 137to 140 of the Appeal Documents]*

2.28. In this regard, we would like to bring to the notice the flow of transactions as described in *Page No. 294 and 295 of the Paper Book.* As already explained above, vide subscription and share purchase agreement dated 15 September 2006 and share purchase deed dated 12 October 2006, the Appellant

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has infused funds into CIL and the same funds are used by CIL to purchase shares of CIHL. The same is very evident from the dates of funds infused by the Appellant in CIL and on the same day CIL has purchased shares of CIHL and remitted back the same funds to the Appellant.

2.29. Attention of your Honors is also invited to the table provided at *Page 295 of the Paper Book.*

wherein in all the transactions of purchase of shares till 20 Dec 2006 are mentioned. Your Honors will appreciate that funds are injected by CUHL on 12 October 2006 and 22 November 2006. On the very same day CIL purchased shares of CIHL and used the funds injected to pay the Appellant for these shares. Further, on 20 December 2006, 53.84 percent shares were transferred to CIL by way of the share swap arrangement i.e. in exchange for the transfer of shares in CIHL to CIL, consideration was not received by the Appellant in cash, what was received by the Appellant was again shares of CIL. Which means that the assets which, the Appellant was holding, namely shares of CIHL, got exchanged for the shares in CIL. Thus no new funds were received or gains are generated by the Appellant till the 3rd tranche of purchase of shares by CIL.

2.30. The reason for the internal reorganisation was operational i.e. to bring entire Indian business operations of Cairn group under one Indian Company. This was followed by listing the shares of CIL on various stock exchanges in India. If one looks at the above arrangement this is nothing but an internal reorganisation of Indian operations following which an Indian company is listed on stock exchange and further capital was received from qualified institutional investors and general public in India as a result of a fresh issue of shares by CIL. It is only in respect of this 41'1 Tranche where consideration was paid by CIL out of the funds received from the private placement and public issue of new shares as part of IPO of the CIL.

2.31. Under the above scheme your Honors will appreciate that this is purely an internal reorganisation of the Indian operations of the Cairn group. There can be no tax which can be levied on the internal reorganisation where there is no increase in the wealth of the Appellant.

2.32. In the DAO, after considering gist of the RBI Approval dated 10 October 2016, the AO observed that the Appellant presented the facts before the Foreign Investment Promotion

Board ('FIPB') in such a way that the Appellant is making an investment in an Indian Company. In the view of the AO, the cash component of the transferred shareholding for the 4th Tranche was not disclosed in the FIPB application, neither was any approval taken for the same. After considering the approval issued by Reserve Bank of India ('RBI'), the AO has further observed that only the share swap transaction was approved by the FIPB and RBI, which followed that the first two tranches of the
proposed transactions. According to the AO, there was no mention of the approval of the 4th tranche in the application by the Appellant *(refer Para 9.1.10 - Page 255 and 256 of Appeal Documents}.*

2.33. Further, learned DRP has also agreed with the above observation of the AO and further observed that "*// is our considered view that the <u>assessee company >s statement to FIPB were inaccurate / misleading by inter alia suppressing its intention</u> to remit the IPO and pre-IPO proceeds of the equity floatation of Cairn India Limited"'* (refer *Last Para - Page 128 of Appeal Documents).*

2.34. The Appellant most respectfully submits that the above issue of seeking an approval from RBI for share swap arrangement does not have any bearing on taxability of transfer of shares of CIHL to CIL. However, since it is alleged that the Appellant has furnished inaccurate / misleading information, the Appellant is rebutting all above observations of the learned AO and DRP in the subsequent paragraphs.

2.35. At the outset, the Appellant would like to inform your Honors about the purpose of filing of the Application before FIPB. As per the Foreign Direct Investment regulations, no approval is required for the investments which are covered under the automatic route. Approval is required only for the investments which are not covered by the automatic route but covered by the approval route. In the case of the Appellant, in 2006, foreign investment in oil and natural gas exploration was included in the so-called "automatic route" for approval, which meant that FIPB approval under the Foreign Exchange Management Act was not required for such investment. Hence, there was no requirement of filing any pre-approval application before FIPB for purchase of shares by Indian Company in cash. Approval was required only for the share swap arrangement. In view of the same, there was no

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regulator)' requirement for filing any application before FIPB for any investment which is made by way of cash.

2.36. Irrespective of the above submission on legal requirement, the Appellant most respectfully submits that the above observations of the AO and DRP referred to Para 2.32 and 2.33 are factually incorrect. Attention is invited to the following paragraphs of FIPB Application wherein the Appellant has clearly informed about the intention of the CIL to acquire shares of CIHL in cash post completion of IPO. Relevant paragraph is reproduced below *(refer Para 2.5 - Page 203 of Paper Book)"*

"2.5 *Upon completion of the above, CIL will make an Initial Public Offer ("IPO ") in India with a view to list its shares on the Bombay Stock Exchange and the National Stock Exchange.*

- *Under the IPO, CIL will offer a minimum 10 % of its post issue capital to the public for cash. At the same time as the IPO, CIL will issue up to 70 % of its post issue capital, to CUHL in exchange for shares of CIHL. CUHL will subscribe for these shares in exchange for the transfer of an additional stake of up to 70 % in CIHL to CIL.*

Since this subscription for shares of CIL by CUHL will take place for consideration other than cash, it will require approval of the FIPB.

- *Subsequent to completion of the IPO, CIL would acquire the balance equity shares (at leant 10%) of CIHL from CUHL, for a cash consideration under the automatic route of the Reserve Bank of India for overseas investments by Indian companies"*

2.37. From the above your Honors will appreciate that following points were submitted before the FIPB:

a. *Subsequent to completion of the IPO* - The Appellant clearly mentioned about the transactions
to occur after completion of IPO. / b. *CJL would acquire the balance equity shares fat least 10%) of CIHL from CUHL* - The Appellant clearly mentioned that CIL would acquire balance eguitv shares of CIHL from
CUHL. c. *for a cash consideration* - The Appellant clearly mentioned that CIL will acquire the shares
for a cash consideration d. *under the automatic route of the Reserve Bank of India* - The said shares will be acquired undet

automatic route. Since, these shares were acquired under automatic route, there was nd
requirement of mentioning anything additional in the application.

2.38. Further, approval was not required for acquisition of shares in CIL for cash. Approval was sought only for shares acquired by the Appellant in exchange of shares. This is also evident from the following extract of the FIPB Application *(refer Para 2.7-Page 205 ofthe Paper Book}:* '

"2.7.7 *As per current Indian legal requirements, the inward leg of a swap transaction, i.e., the investment in an Indian Company by a foreign company requires approval from the FIPB. Hence, the transaction for issue of equity shares by CJL to CUHL in exchange for shares of CIHL would require prior approval from the FIPB"*

2.39. From the above observations of the FIPB Application, your Honors will appreciate that the allegations of the learned AO and DRP are completely baseless and made without appreciation of correct facts and regulatory requirements as all the required facts were submitted before the FIPB for approval. Further, the facts regarding 4[lh] tranche were also mentioned in the FIPB Application.

No Real Income lias accrued to the Appellant

2.40. The Appellant has argued before the learned DRP that in the above transaction no real income has accrued to the Appellant and no tax can be levied on the Appellant. In this regard, reliance was placed on the following judicial precedents before learned DRP and learned DRP has rejected the same without correct appreciation of facts:

- CITv. Shoorji Vallabhdas & Co. [1962J46ITR 144 (SC) wherein Hon'ble Supreme Court has observed that Income-tax is a levy on real income and a mere book-keeping entry cannot be income, unless real income has actually been earned.
- Sanjeev Woollen Mills v. CIT [2005] 149 TAXMAN 431 (SC), the Hon'ble Supreme Court directly addressed the inability of a company to profit, or to be taxed, on the basis of internal accounting entries where no third party transactions were conducted.
- CIT v Excel Industries Ltd. [2013] 38 taxmann.com 100 (SC), after setting out various decisions of the Hon'ble Supreme Court which relied on the principles of real income,

the Hon'ble Supreme Court (while considering whether the value of certain benefits against export obligations were taxable) held that "Applying the three tests laid down by various decisions of this Court, namely, whether the income accrued to the assessee is real or hypothetical; whether there is a corresponding liability of the other to pass on the benefits of duty free import to the assessee even without any imports having been made and the probability or improbability of realisation of the benefits by the assessee considered from realistic and practical point of view (the assessee may not have made imports), it is quite clear that in fact no real income but only hypothetical income had accrued to the assessee and Section 28(iv) of the Act would be inapplicable to the facts and circumstances of the case. Essentially the Assessing Officer is required to be pragmatic and not pedantic."

2.41. All the above judicial precedents are distinguished by the learned DRP with the observation that ill the case under consideration the Appellant has received full market consideration for the same* which inter alia has been funded by the pre-IPO private placement as well as the IPO funds raised from the public during the course of the public issue by the CIL. . .j

2.42. The Appellant, most humbly submits that the above analysis of the learned DRP is incorrect. While observing the fact that the Appellant has eventually (post-IPO) received full market consideration, as discussed in Para 2.29 to Para 2.32 above, DRP has lost sight of the fact that out of the total consideration received more than 75 percent of the consideration is received from the funds which are infused by the Appellant or *by* way of share swap arrangement. From the above, it is evidently clear that due to the corporate reorganization itself, there was neither any increase in the wealth of the Appellant nor any additional gain received by the Appellant. In substance nothing has changed for the Appellant as far as ownership of 75 percent shares is concerned.

2.43. Further, reliance is placed on the decisions of Hon'ble Calcutta High Court in the case of Kusum Products Limited[6] wherein it is observed that "The receipt shown in the profit and loss account is an illusory receipt. The assessee has communicated its reasons as to why it resorted to make to such an illusory entry which includes that the Company has

sustained losses and in order to impress the bankers and to please the shareholders the aforesaid entry was passed into the profit and loss account. The learned Tribunal on facts was satisfied with the explanation........... When the
learned Tribunal was satisfied that the entry did not represent any real income or any real receipt of money, there is no question of the same being taxable. Hon'ble High Court held that we are as such of the opinion that the question raised by the Revenue is to be answered in the affirmative. The appeal is thus disposed of answering the question in favour of the assessee."

2.44. In the case of the Appellant, though no illusory entry is passed in the books of account, however, post internal reorganisation in substance, no real income has accrued to the Appellant. On account of all the steps mentioned above, all the assets which Appellant was holding in India are now available in different form.

Rebuttal on other observations of the learned AO and DRP

2.45. Learned AO has observed that in assessing the true nature and character of a transaction, the label which parties may ascribe to a transaction is not determinative of its character. The nature of the transaction has to be determinative of its character. The nature of the transaction has to be ascertained from the covenants of the contract and from the surrounding circumstances. It is relevant to note that this observation is a verbatim reproduction of paragraph 140 of the judgment of the Hon'ble Bombay High Court in *Vodafone International Holdings B. Vv. Union of India and Anr.* (Writ Petition No. 1325 of 2010) and was not followed by the Supreme Court.

2.46. Relying on the decision of SC in the case of *National Cement Mines Industries Ltd v CIT[1961]*
42ITR 69 (SC) learned AO has observed that it is clear that the intention of Legislature has always been to tax the income arising out of any real commercial transaction. The use of word "indirectly" in section 9(l)(i) makes the legislative intent regarding inclusion of the income accruing or arising to any person, in the income liable to be taxed in India, very clear.

2.47. With the above judgment, learned AO has explained the intention of legislature has always been to tax the income arising out of any real commercial transaction. The Appellant hereby submits that the said case more than supporting the

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case of the revenue is supporting the case of the Appellant. In the case of the Appellant, as already discussed above, it is merely corporate reorganisation of the holding structure and no real gain has accrued to the Appellant because the internal reorganisation did not result in a change of control. Hence, there should not be any taxability irt the case of the Appellant. >

2.48. Further, learned AO has distinguished the decision of *Vodafone International Holdings B. V V UOI& Another [2012] 341 ITR 1 (SC)* on account of following reasons:

a. In case of Vodafone, it was payment from non-resident to non-resident. But in present case, a resident company i.e. CIL has made payment of INR 26,681.87 crores to the Appellant. In the present case, money was actually remitted out of India (as consideration) to purchase the shares;

b. In case of Vodafone, there was lot of confusion as to whether the purchaser i.e. Vodafone International was able to acquire controlling interest in HEL. However, in the present case, it is quite clear that the purchaser i.e. CIL has acquired 100 percent controlling interest in CIHL and the downstream companies which own their 100 percent assets located in India; and *s.*

C. Vodafone transaction was a completely offshore transaction. In the present case, an Indian Company has made payment to a non-resident for purchase of shares of a Company located in Jersey, which owned Indian Assets.

In view of the above, the capital gains arising to the Appellant are deemed to accrue and arise in India and are taxable as short term capital gains under the provisions of the Act.

2.49. The above points on which the decision of Hon'ble SC is rebutted by the learned AO are completely irrelevant. The basic issue before the Hon'ble SC was that whether transfer of shares of overseas companies having any Indian assets is subject to tax in India under the law prevailing then. All the above points of distinction mentioned by the AO do not dilute applicability of the decision on the principle of indirect transfer. Also, unlike Vodafone, no indirect transfer of Indian shares occurred pursuant to the internal reorganisation. Other than CIL, there were no other Indian incorporated companies in the group.

2.50. It is further submitted that the FAO reproduces the findings of the Hon'ble High Court of Bombay in *Vodafone*

International Holdings B. V v. *Union of India and Anr.* (Writ Petition No. 1325 of 2010) which were subsequently set aside by the Supreme Court, including as set forth below;

Paragraph Nos, in *Vodafone International Holdings B.* Kv. *Union of India andAnr.* (Writ Petition No. 1325 of 2010)	Page Nos. of the Appeal Documents
54(vii)and54(xvii)	261
67	262
77	263
78 and 79	264
80 and 81	265
91. 99 and 100	266
136, 137 and 140	267

However, despite such reproduction, it is categorically stated in the FAO that *"in fact the facts of the present case are clearly different and distinguishable from the facts of Vodafone International Holdings B.V. Vs. UOI& Another, 341 ITR P.* This indicates the self-contradictory and patently incorrect position of the law stated in the FAO which forms the basis of the assessment under challenge.

While computation capital gain in the hands of Appellant, cost of acquisition stepped up to the fair value of the shares of CIHL on the date of acquisition

Without prejudice to the above, assuming but not admitting, that indirect transfer of shares of Company with Indian assets is otherwise taxable in India, no capital gain has arisen in the hands of the Appellant on transfer of shares of CIHL to CIL. This is on account of the fact that, while computing capital gains, cost of acquisition should be stepped up to the fair

market value of the shares of CIHL on the date of acquisition by the Appellant. The said argument is explained in the subsequent paragraphs.

In the above internal reorganisation, following transactions have taken place:

a) Vide^Sfr^sxcThange agreement dated 3(KJiine-2006 *(refer Page No. 60 to 66 of the Paper Book)lC?LC* exchanged shares of nine subsidiaries with the CUHL in lieu of 22,14,44,034 shares of CtJHL at £ 1 each issued at par ('7" *transfer');*

b) Vide share exchange agreement dated 7 August 2006 *(refer Page No. 67 to 73 of the Paper Book).* CUHL exchanged shares of the same nine subsidiaries with CIHL in lieu of 22,14,44,034 shares inCJ>lL-0f£ 1 each issued at par *('2nd transfer'},*

CI£U4ssued 2,97.80,710 shares vide debts conversion agreement dated 1 September 2006 and hence the total number of shares of CIHL increased to 25,12,24,744 shares (22,14,44,034 *plus* 2,97,80,710 shares).

d) Vide subscription and share purchase agreement dated 15 September 2006 *(refer Page No. 74 to 109 of the Paper Book)* and share purchase deed dated 12 October 2006 *(refer Page No. 110 to 168 of the Paper Book),* the CUHL transferred entire 100 percent shareholding in CIHL to CIL in 4 tranches for a consideration amounting to INR 266,81,87,10,140 *(3n! transfer).* The said consideration is paid by CIL partly in cash and partly by way of issue of equity shares in CIL. It is this transfer of shares which is subject matter of dispute and taxed by the AO.

2.54. In the above internal reorganisation, assuming as per the existing provisions of section 9(1)(i) of the Act dealing with indirect transfer of shares is a good law for the year under consideration, all the above transfers (i.e. 1sl, 2nd and 3rd transfer) are taxable in India. However, 1st and 2nd transfer, is by way of *exchange* and 3rd transfer is by way of a sale.

2.55. At this stage, it is important to bring the difference between the concept of'sale' and 'exchange' and its impact on computation of capital gains. When any asset is transferred and the amount of consideration is fixed by both the parties i.e. seller and buyer, then it is a transfer of assets by way of sale. Such fixed consideration for sale can be discharged either

by cash or by any other asset or both. In such a case, while computing capita! gains in the hands of seller, full value of consideration will be the amount of consideration fixed by both the parties. Further, when any asset is transferred in lieu of another asset and no specific amount for consideration is agreed between the parties that) it is a case of transfer by way of exchange. In such a case, while computing capital gains, fair' market value of the asset received in consideration for the asset transferred should be considered as full value of consideration,

2.56. The above principle is supported and explained by the Hon'ble SC in the case of *CITv. Gillanders P Arbuthnot & Co /1973J 87ITR 407 (SC)* and *CIT v George Henderson and Co. Ltd[1967] 66 Ih ITR 622 (SC).* Ratio of these judicial precedents is explained in the subsequent paragraphs. //

2.57. In the case of Gillanders Arbuthnot & Co (supra), the assessee firm through its partners entered into an agreement for sale of some of the shares and securities held by it in favour of Gillanders Arbuthnot & Co for a sum of Rs. 75 Lacs. The Income-tax officer was of the view that the market value of the shares and securities sold was much more than Rs. 75 Lacs. According to him, the Company secured those shares and securities at below market value and on that basis he computed capital gains at a higher amount in the hands of firm. The issue raised before the Hon'ble SC was ' • whether the transaction entered into is a sale or exchange or merely a readjustment.

2.58. It was in light of this fact, that Hon'ble SC was of the view that the transaction under consideration was of sale and not of exchange it held that the sale price was fixed by the parties for the shares and the securities sold is of Rs. 75 Lacs and nothing more. It was further observed that because of the allotment of the shares of the Company in satisfaction of the sale price, the assessee firm got certain benefits but that does not convert the sale into an exchange.

2.59. Hon'ble SC after considering the decision of CIT v R.R. Ramakrishna Pillai [1967] 66 ITR 725 (SC) distinguishing an exchange from a sale observed that *"where the person carrying on the business transfers the assets^to a company in consideration of allotment of shares, it would be a case of exchange and not of sale and the true nature of the transaction will not be altered because for the purpose of*

stamp duty or other reasons the value of the assets transferred is shown as equivalent to the face value of the shares allotted. On the other hand, a person carrying on business may agree with a conwany floate(l by him that the assets belonging to him shall be transferred to the company for a certain money consideration and that in satisfacrtoti of the liability to nay the money consideration shares of certain face value shall be allotted to the transferor. In such a case, there are in truth two transactions, one transaction of sale and the other a contract under which the shares are accepted in satisfaction of the liability to pay the price. The fad that as a result of the transfer of the shares of the "company" to the assessee firm, the latter obtained considerable profits, will not alter the true nature of the transaction"

2.60. It was further observed that *"What exactly is the meaning of the expression "full value of the consideration for which sale is made? Is it the consideration agreed to be paid or is it market value of the consideration? In the case of sale for a price, there is no question of any market value unlike in the case of an exchange"*

2.61. In the case of CIT v George Henderson and Co (supra), the Assessee sold shares at INR. 136 per share when the market value of the shares was INR 620 per share. The Income-tax Officer held that the respondent had sold the shares at the book value of Rs. 136 per share whereas the market value of the shares on that date was Rs. 620 per share and the difference of Rs. 484 per share was capital gain arising from the sale of the shares under section 12B of the Income-tax Act, 1922.

2.62. As observed in this case the dispute was whether the capital gain should be computed at INR 13$ i.e. the price fixed in the agreement or at INR 620 which is the fair market value. In which case, the Hon'ble SC concluded that the transaction under consideration is a transaction of sale and further observed that *"In case of a sale, [he full value of the consideration is the full sale price actually paid. The legislature had to use the words "full value of the consideration " because it • was dealing not merely with sale but with other types of transfer, such as exchange, where the consideration would be other than money^ If it is therefore held in the present case that the actual price received by the respondent was at the*

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rate of Rs. 136 per share the full value of the consideration must be taken at the rate ofRs. 136per share."

2.63. The above observation of the Hon'ble SC gives a dictum that in the case of transfer of capital asset, when transfer is in the nature of sale, full value of consideration should be taken to be the fixed amount of consideration agreed between both the parties. Whereas in the case transfer of capital assets is in lieu of another asset, is a transfer in the nature of exchange and full value of consideration will be the fair market value of the asset received by the transferor. Capital gain in the case of the Appellant for the above transfers should be computed as per the said principle.

2.64. Relevant clauses for 1st transfer of the "Share Exchange Agreement" dated 30 June 2006, are as under: " - . •,

"WHEREAS:-

(A) The Parties hereto have agreed that the Target Companies ...... have an aggregate book value ofGBP 221,444,034, being also the aggregate nominal value of the Consideration Shares....: and

(B) The parties have agreed that the Vendor shall sell to the Purchaser and the Purchaser shall purchase from the Vendor the Sale Shares (as hereinafter defined) and that the consideration for the Sale Shares shall be the issue by the Purchaser of the Consideration Shares .... to the Vendor Upon the terms and conditions specified and contained in the agreement - (refer Page 61 of the Paper Book).

Consideration: -' " -

The total consideration for the sale and purchase of the Sale Shares shall be the allotment and issue of the Consideration Shares at par (credited as fully paid) to the Vendor at Completion " (refer Page 62 of the Paper Book)

2.65. As observed by the above agreement, consideration was agreed as an allotment and issue of the consideration shares. Which means that for the transfer of shares of nine subsidiaries, the consideration was paid by the CUHL to CPLC was by way of issue of shares i.e. it was a transfer by way of exchange. Hence, full value of consideration in the hands of the CPLC should be the fair market value of the shares of CUHL on the date of transfer.

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2.66. As per the ratio laid down by Hon'ble SC, capital gain in the hands of CPLC should be computed as under:
Full Value of Consideration [refer Note (a) below] 266,81,87,10,140 Less: Cost of acquisition
. . 2K78,36J,97,5 52
Capital Gain Taxable in the hands of CPLC ' 245,03.50,12.588
.; [refer Note (b) belowl ij
j
(a) Full value of consideration should be the fair market value of the shares of nine subsidiarj companies. However, since the valuation of the shares of CUHL was not available on the date of transfer, value of the shares of CIHL transferred vide agreements dated 15 September 2006 and 12 October 2006, is considered for the purpose of fair value of shares.
(b) Though the capital gain has accrued in the hands of CPLC and was covered under the provision of section 9(1)(i) of the Act. dealing with indirect transfers, in the assessment proceedings of CPLC, the AO has not alleged to tax the same in the hands of the CPLC.
2.67. In the case of 2nd transfer, Relevant clauses of the "Share Exchange Agreement" dated 07 August 2006, are as under:
-§
'WHEREAS the parties hereto have agreed that the Vendor shall sell to the Purchaser and the Purchaser shall purchase from the Vendor the Sale Shares (as hereinafter defined) and that the consideration for the Sale Shares shall be the Consideration Shares (as hereinafter defined), upon the terms and conditions specified and contained in this agreement - Refer Page 68 of the Paper Book.
Consideration:
3.1 The total consideration for the sale and purchase of the Sale Shares shall be the Consideration.
3.2 The Consideration Shares shall be allotted and issued at par (credited as fully paid) to the Vendor at Completion.
3.3 The subscriber shares shall be credited as fully paid at par as from Completion " - Refer Page 69 of the Paper Book.
2.68. As observed by the above agreement, consideration was agreed as an allotment and issue of the consideration shares. Which means that for the transfer of shares of nine subsidiaries, the consideration was paid by CIHL to CUHL was by way of issue of shares i.e. it was a transfer by way of

exchange. Hence, full value of consideration in the hands of the CUHL should be the fair market value of the shares of CIHL on the date of transfer.

2.69. Capital gain on the 2nd transfer of shares i.e. transfer of shares of nine subsidiaries by CUHL to CIHL on 7 August 2006 should be computed as under:

Full Value of Consideration [refer Note (c) below] 266,81,87,10,140

Less: Cost of acquisition [refer Note (d) below] <u>266.81.87.10.140</u> _ ,

Capital Gain Taxable in the hands of CUHL ________<u>Nil</u> j

(c) Full value of consideration is taken as the fair value of the shares of nine subsidiary companies. When the shares of CIHL were transferred vide agreements dated 15 September 2006 and 12 October 2006, since there is not much time difference between the two transfers, the valuation of shares which is received on transfer of shares of CIHL is considered for the purpose of fair value of shares.

(d) Full value of consideration in the hands of CPLC should be considered as cost of acquisition in the hands of CUHL. N

2.70. Capital gain on the 3rd transfer of shares i.e. transfer of shares of CIHL to CIL should be computed as under:

Full Value of Consideration [refer Note (e) below] 266,81,87,10,140

Less: Cost of acquisition [refer Note (f) below] 266.81.87.10.140

<$p Capital Gain Taxable in the hands of CUHL _________<u>Nil</u>

(e) Full value of consideration as considered by the AO in computation of capital gains.

(f) Full value of consideration in the hands of CUHL in the capital gain computed in Para 2.69 above, should be considered as cost of acquisition in the hands of CUHL.

2.71. Relying on the rationale of the decision of Hon'ble SC discussed above in the George Henderson (supra) and others referred to above, for computing capital gains of these transactions [i.e. Sr. 2.53(a) and 2.53(b)], full value of consideration should be taken as fair market value of shares of nine subsidiaries transferred. In view of the same, it was argued that cost of acquisition of the CIHL shares in the hands of the Appellant should be deemed to be the fair market value of the shares of CIHL on the date of acquisition. .

2.72. However, both the transactions at Sr. No. 2.53(a) and 2.53(b) (i.e. transfer of shares of nine subsidiaries by CPLC to Appellant and Appellant to CIHL) were not sought to be taxed by the tax authorities. This, in the humble submission of the Appellant, does not prevent the step up of cost of acquisition in The hands of the Appellant-namely, the cost basis of the shares of CIHL-from being deemed to be the fair market value of the shares of CIHL in determining whether Appellant enjoyed any capital gains.

2.73. Since, the capital gains for transactions at Sr. No. 2.53(a) and 2.53(b) will be computed by applying fair market value, consequential cost of acquisition of shares of CIHL in transaction at Sr. No. 2.53(d) should also be deemed to be the fair market value of the shares of CIHL. -

2.74. Hon'ble Members will appreciate that, for the purpose of computation of said capital gains, cost of acquisition is incorrectly considered by the AO as only the nominal value of shares issued by CIHL to CUHL i.e. £ 25,12,24,744 (i.e. £ 221,444,034 plus £ 2,97,80,710). However, as demonstrated above, £ 25,12,24,744 is only the nominal value of the shares of CIHL and not the fair market value. In view of the above, for the purpose of computation of capital gains in the hands of Appellant, cost of acquisition should be the fair market value of the shares of CIHL on the date of acquisition. . x ?:

2.75. However, above submission of the Appellant are not accepted by learned DRP on account of various reason mentioned at *Page 145 and 146* of the Appeal Documents. For the ready reference* the said contentions of learned DRP is discussed in subsequent paragraphs. , ,

2.76. Decision of *George Henderson* (supra) is discarded on account of the following reasons:

a. Hon'ble SC has merely remanded case back to the Tribunal;

b. The Judgment does not accord the assessee liberty to transfer assets at less than the fair marketvalue to a related entity;

c. Judgment was under the Income-tax Act, 1922;

d. The price at which the asset has been transferred in the instant case is neither in dispute and or is the revenue questioning the adequacy of the same; e. Various provisions of Income-tax Act, 1961 pertaining to foreign Companies in

respect of arms length pricing render this judgment totally inapplicable in the instant case.

2.77. With due respect to the above observation of the learned DRP, the Appellant most respectfully submits that learned DRP has not been able to appreciate the correct perspective from which this decision is quoted by the Appellant. Though the case was remanded back by the Hon'ble SC and was rendered in the context of earlier Income-tax Act, 1922. However, the principle of sale and exchange were prevailing under both the laws (i.e. 1922 and 1961). In view of the same, the principle dealt with by Hon'ble SC hold good even today. Further, when the case is again remanded back to the Tribunal after giving the principle of law does dilutes the precedent value of the judgment.

2.78. Further, learned DRP has made a very generic remark saying that various provision of Income-tax Act, 1961 pertaining to foreign Companies in respect of arm's length price will render this judgment totally inapplicable in the instant case. However, except for making a generic statement, no specific provision of the Act is pointed by the learned DRP.

2.79. Decision of *Gillanders Arbuthnot* (supra) is discarded on account of the following reasons:

a. Ratio decindendi deals with whether the sale of an agency business and whether the consideration was essentially a revenue receipt or a capital receipt;

b. Facts in this case were different from the case of the Appellant. In the case of the Appellant, it is not the contention of the Appellant to tax the sum received by the UK entity from CIL as revenue receipt;

c. Judgement is an expression of interpretation of law as it stood on that date;

d. Apex court laid down was that in case of sale of an asset what is material is the actual price realized rather than a notional market value. Undoubtedly provisions have been introduced by the legislature since then with a view to prevent evasion of Income-tax by undervaluing the sales consideration particularly in relation of immovable property. In the instant case, neither the quantum of the sales consideration not its divergence from the notional sale price is in dispute.

e. When the sale price of the shares of the CIHL received by the Appellant from CIL is not being questioned by revenue.

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f. In the case before SC it was the case of long term capital gain, whereas in the case of the Appellant it was a case of short term capital gain.

2.80. Your Honors will appreciate that again learned DRP has rejected the above decision on the various irrelevant and incorrect grounds. The issue of capital or revenue receipt was never before the Hon'ble SC. Further, though the judgment deals with the law prevailing as it stood on that date, however, sale and exchange were also included in the definition of "transfer" under the old (i.e. 1922 law) and new law (i.e. 1961 law). Further, the other differentiating points of undervaluing the immovable property, long term and short term, etc are not at all a relevant factor for distinguishing these decisions. With due respect to the learned DRP, the Appellant hereby submits that by making all the above irrelevant observations, learned DRP has very conveniently tried to avoid the actual issue submitted before the them.

2.81. Without prejudice to the above, the AO has alleged that, on sale of shares of CIHL, huge gain is accounted in the books of accounts, by the Appellant. Your Honors will appreciate that the gains accounted in the financial statements of the Appellant does not determine the tax treatment while offering any income for taxing in India. Taxability of such gains will be determined as per the provisions of the Act, which also includes interpretation of the law by the Hon'ble SC[7].

2.82. Reliance is placed on the decision of Hon'ble SC in the case of Kedarnath Jute Mfg. Co. Ltd. v CIT [1971] 82 ITR363 (SC) wherein it was held that *"Whether the assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and not on the view which the assessee might take of his rights nor can the existence or absence of entries in the books of account . be decisive or conclusive in the matter,'"'* In view of the same, even if the amount is recorded as gain in the books of CUHL, it will not necessarily be taxable as per the provisions of the Act.

2.83. Reliance is further placed on the decision of Hon'ble SC in the case ofTuticorin Alkali Chemicals & Fertilizers Ltd v CIT [1997] 227 ITR 172 (SC) wherein it was held that It is wherein it was that "// *is true that this Court has very often referred to accounting practice for ascertainment of profit*

made by a company or value of the assets of a company. But when the question is whether a receipt of money is taxable or not or whether certain deductions from that receipt are permissible in law or not, the question has to be decided according to the principles of law and not in accordance with accountancy practice."

31. During the course of hearing Ld. counsel further referred to the additional ground raised vide ground No. 3.12 contesting that Ld. assessing officer has erred in taxing the appellant by invoking the retrospective amendment to section 9 (1) (i) of the act introduced by The Finance Act, 2012, which was not on the statute, when the India and United Kingdom tax treaty entered into force. Therefore it was submitted that the taxability of the appellant should have been determined under the provisions of section 9 (1) (i) of the act, which were applicable when the India United Kingdom tax treaty was entered into force. For this, the Ld. authorized representative took us to the article 14 related to capital gains of Double Taxation Avoidance Agreement entered into between India and United Kingdom wherein it is provided that each contracting state may tax capital gains in accordance with the provisions of its domestic law. He therefore submitted that the Double Taxation Avoidance Agreement between India and United Kingdom entered into on 11th. February 1994 and therefore, the law of chargeability of capital gain under domestic tax

law is required to be looked into as it was prevailing on that date and not incorporating the retrospective amendment thereto. In short his arguments was that for the purposes of determining capital gain tax on this transaction retrospective amendment made should not eb considered. For this he relied upon the decision of the Hon'ble Delhi High Court in case of Director of Income Tax versus New Skies Satellite BV (2016) 68 Taxmann.com 8 (Delhi). He further vehemently contested that the design internal reorganization of Indian operation of the Cairn group and there can be no tax which can be levied on the internal reorganization where there is no increase in the wealth of the appellant.

32. With respect to computation of the capital gain, he referred that provisions of section 55 (2) do not apply to the facts of the case and therefore he relied upon the decision of the Hon'ble Supreme Court of India in case of Miss Dhoon Dadabhoy Kapadia versus Commissioner of income tax (1967) (63 ITR 651) (SC). He further referred to the decision of the Hon'ble Supreme Court of India in CIT versus R R Ramakrishna Pillai (1967) 66 ITR 725 (SC) and submitted that in the present case, it is a case of exchange and not of sale as the consideration has been settled by allotment of shares, therefore it was not a transfer for a price but for exchange of assets and therefore the

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fair market value of the assets shall be considered for working out cpital gain in the hands of assesseee. Therefore in the present case of the series of the transaction, There is no cost of acquisition which is less than the exchange price and hence there is no capital gain. He further relied upon the decision of the Hon'ble Bombay high court in case of Commissioner of income tax – 6 versus Bharat Bijlee Ltd (2014) 46 Taxmann.com 257 (Bombay). His contention was that of acquisition of those shares is the market value of those shares and therefore the capital gain arising on these transaction is nil.

33. On Ground No 3 and 4 of the appeal, ld Departmental representative vehemently contested the arguments of the assessee and supported that the Income of the appellant is chargeable to tax in India in view of the clear-cut provision of section 4, 5 and 9 of the Income tax Act 1961. His main arguments were as under :-

"Abbreviations
CUHL Cairn UK Holdings Ltd [the Assesses] - company incorporated on 26 February 2006 in UK as a wholly owned subsidiary of CEP
CEP Cairn Energy PLC - company incorporated in Scotland, UK and a tax resident of UK
CIHL Cairn India Holdings Ltd - Company incorporated on 2 August 2006 in Jersey, the Channel Islands, as a wholly owned subsidiary of CUHL
CEHL Cairn Energy Hydrocarbon Ltd-A subsidiary of CEP incorporated in Scotland, UK CIL Cairn India Ltd - Company incorporated in India on 21 August 2006

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Preliminary submission '

1. The issue to be decided in this case is, whether any gain accrued to CUHL in the financial year 2006-07 by acquiring and selling 'CIHL shares'? If yes, whether such gain was taxable in India?

2. On the basis of admitted facts and position of the law, the Revenue's case is that: (i) not only substantial gain accrued to CUHL by first acquiring and then selling 'CIHL shares' in financial year 2006-07, and (ii) this short term capital gain was taxable in India as the shares so sold derived their value substantially from the assets situated in India.

3. To this end in these submissions, in first part those facts are enumerated which are undisputed. The second part discusses a brief history of the transactions as ascertained from the documents filed by CUHL or CIL at different stages in different proceedings. In the third part, the legal position in relation to the gains arising to CUHL from the transactions undertaken by CUHL, and its taxability in India is stated. In the next part, main contentious issues are taken up, with the Revenue's position outlined on such issues. Last part is the conclusions.

Part-1: UNDISPUTED FACTS

4. A Share Purchase DeedVas executed on 12th October 2006 between CEP, CUHL and CIL in respect of the sale/purchase of the 'CIHL shares'. The deed unambiguously identified CUHL as "the Seller" and CIL as "the Purchaser" with CEP being "the Guarantor". Prior to this deed another Subscription and Share Purchase Agreement[2] was also executed on 15th September 2006 between the same three parties, where also the said parties were identified similarly i.e. CUHL being the "the Seller", CIL being the "the Purchaser" and CEP as "the Guarantor",

5. Pursuant to the Share Purchase Deed and the Subscription and Share Purchase Agreement, CUHL "sold the 100% investment in Cairn India Holdings Ltd"[3]i.e 251,224,744 shares of CIHL to CIL "for a total consideration amounting

to INK 266,818,710,140 partly in cash and partly by issue of its [CIL] shares to CUHL"[4]. Thus a total consideration of "INR 266,819 mn" or Rs 26681.9 crores was "paid for acquisition of CIHL"[5] by CIL to CUHL

6. Altogether 251,224,744 CIHL shares of £ 1 each were earlier acquired by CUHL in the following manner:

<u>221,444.034 shares - acquired on 7th August 2006</u>

Following the Share Exchange Agreement[6] CUHL transferred shares of nine (9) group companies[7] to CIHL. In return, as a consideration CIHL issued 221,444,034 of its own shares of £1 each to CUHL, and

<u>29,780,710 shares - acquired on 1st September 2006</u>

Pursuant to a Debt Conversion Agreement[8]executed separately, CUHL sold to CIHL a debt of £29,780,710 (which was due from CEHL)[9]. In consideration, CIHL issued 29,780,710 of its own shares of £1 face value each to CUHL.

7. The shares of CIHL derived their value substantially from the assets situate in India as being a holding company of the nine (9) subsidiaries it was specifically incorporated "within the Cairn group" to "hold Indian oil and gas assets".

Part-11: BRIEF HISTORY

8. Since 1996 CEP has been acquiring oil and gas assets situated in India through its subsidiaries, and as on 30th June 2006 it was holding Indian oil and gas assets through nine (9) wholly owned foreign subsidiary companies[11].

9. On 30th June 2006, pursuant to a Share Exchange Agreement[12] the entire share capital of nine (9) wholly owned subsidiaries of CEP having "an aggregate book value off 221,444,034"[13] was transferred to CUHL In exchange, CUHL issued 221,444,034 of its shares of £1 each to CEP.

10. On 7th August 2006, through yet another Share Exchange Agreement[14], CUHL transferred the shares of aforementioned nine (9) subsidiary companies having an

aggregate book value of £221,444,034 to CIHL. In lieu thereof CIHL issued 221,444,034 of its shares to CUHL.

11. Then on 1st September 2006 two more transactions took placeunder a separate 'Debt Conversion Agreement'[15]. On that date, CEP was owed from CEHL (a group company} a debt of £29,780,710, which was first sold to CUHL which in turn assigned to CIHL in the following manner:

- CEP sold the debt of £29,780,710 to CUHL. As a consideration, CUHL issued 29,780,710 of its own shares of £1 each to CEP;

CUHL in turn assigned the same debt of £29,780,710 to CIHL. As a consideration CIHL issued 29,780,710 of its own shares of £1 each to CUHL.

As a result, the debt of £29,780,710 due from CEHL to CEP was finally vested with CIHL-for which ClHLissued 29,780,710 shares of £1 each to CUHL, who in turn issued equal number of shares (of £1 each) to CEP.

All transactions leading to CUHL acquiring 251,224,744 CIHL shares can be seen as below:

Thus on 1st September 2006, CUHL was holding 251,224,744 shares of CIHL - having acquired 221,444,034 sharesin exchange of the shares of nine (9) companies (book value £221,444,034)and 29,780,710 shares in lieu of the debt of £29,780,710 transferred to CIHL.

12. It was these 251,224,744 shares of CIHL which when sold to CIL resulted in total consideration of Rs26681.87croresreceived in the hands of CUHL.The transactions of sale/purchase/swap were effected in the following tranches:

Date	Transaction Mode	Number of shares	Consideration Received (Rs)	Consideration received as
12 Oct 2006	Sale/Purchase	41,493,659	50,373,987,924	Cash

22 Nov 2006	Sale/Purchase	13,390,789	17,554,239,705	Cash
20 Dec 2006	Swap	135,267,264	137,882,382,880	Consideration received in the form of 861,664,893 Shares of CIL valued at @160 per share
29Dec 2006	Sale/Purchase	61,073,032	61,008,099,631	Cash
	TOTALS	251,224,744	266,818,710,140	

13. Before executing the sale of CIHL shares to CIL, CUHL had subscribed to 365,028,898 shares of CIL (@ 190 per share)[17] for a sum of Rs 6935 crores paid in three tranches of Rs 5037 cr on!2 Oct'06, Rs 1755 cr on 22 Nov'06 and Rs 143 cr on 8 Dec'06. This was in addition to the initial share capital of 50,000 shares subscribed on 21 Aug'06 for Rs 500,000. Subsequently on 20 Dec'06 CUHL was allotted 861,764,893 CIL shares (worth Rs 13788 cr) in the swap transaction as a consideration for 135,267,264 shares of CIHL. There were other investors also, including general public, who subscribed for CIL shares. Details of these share subscriptions are as follows:

For Cash consideration				
Date	Shares Issued to	No of Shares	@(Rs)	Price (Rs) Cr
12-0ct-06	CUHL	365,028,898	190	6935
23-Nov-06	Petronas	176,531,438	160	2825
23-Nov-OB	Others	33,139,475	160	531
29-Dec-06	Public	328,799,675	160	5261
As a consideration for 135,267,264 CIHL shares				
20-Dec-06	CUHL	861,764,893	160	13788

TOTALS	29340

Thus, CIL had sufficient funds to pay the sale consideration of Rs 26681 cr to CUHL for acquiring 251,224,744 CIHL shares

Part-Ill: LEGAL POSITION

14. CUHL being a non-resident, any income accruing or arising to it, whether directly or indirectly, through the transfer of a capital asset situate in India shall be deemed to accrue or arise in India u/s 9(l}(i).

15. CIHL Shares' being the capital asset sold and transferred to CIL, are deemed to be situated in India[19] as they derived their value substantially from the assets situated in India even though CIHL was incorporated outside India[20].

16. CUHL being the transferor of a capital asset situated in India was liable to tax in India on the capital gains accruing from such transfer u/s 45. Even under the DTAA between India and UK the capital gains is to be taxed in accordance with the domestic law (Article 14).

17. Under section 48 the chargeable gain is to be computed by deducting the cost of acquisition from the full value of the consideration received as a result of the transfer of the capital asset. The capital gains has been thus computed by the AO as follows:

Part-IV: CONTENTIOUS ISSUES

18. Cost of acquisition of the capital asset i.e. 251,224,744 CIHL shares

251,224,744 CIHL shares were acquired by CUHL in two tranches.

- ✓ 221,444,034 shares of £1 face value each acquired (on 7th Aug'06) by transferring nine (9) companies holding Indian assets of aggregate book value of £221,444,034 to CIHL
- ✓ 29,780,710 shares of£l face value each acquired (on 1st Sep'06) by selling a debt of £29,780,710 to CIHL[22].

The transaction of sale of debt of £29,780,710 by CUHL for a consideration of equal number of shares from CIHL clearly establishes the price that CUHL paid for each CIHL

share at the time of acquisition i.e. £1. The earlier transaction of acquiring 221,444,034 shares was also by paying in the form of nine (9) companies, whose book value was £221,444,034, placing the cost of acquisition for each CIHL share as £1. The cost of acquisition for 251,224,744 CIHL shares, which were eventually sold by CUHL to CIL, was accordingly taken as £ 251,224,744 (i.e. Rs 2178,36,97,552)[23]. Thus, for acquisition of 251,224,744 CIHL shares, CUHL parted with the assets worth £251,224,744[24]which has accordingly been taken as the cost of acquisition. * -y-

19. Full value of Consideration received in respect of the capital asset
i.e. 251,224,744 CIHL shares
It is undisputed that for selling 251,224,744 of 'CIHL shares' CUHL received from CIL a sale consideration[25] of Rs26,681 cr, partly in cash (Rs 12,893 cr) and partly in the form of shares of CIL (having market value of Rs 13,788 cr). The contention that no real money was paid or received in the transactions of sale of shares to CIL is fallacious and incorrect, considering that:

- ✓ Of the four transaction enumerated in para 12 above, at least one transaction of sale of 61,073,032 CIHL shares was for hard cash of Rs 6101 cr.
- ✓ The book entries of 5037 cr and 1755 cr of cash received from CIL, for sale of 41,493,659 and 13,390,789 CIHL shares respectively, were out of the amounts received by CIL as subscription money for its 365,028,898shares.

- ✓ Even in the swap transaction, CUHL received 861,664,893 shares of CILhaving market value of 13,788 cr for selling 135,267,264 CIHL shares to CIL That the consideration received in the form of CIL shares was of some value is also evident from the fact that when CIL shares were sold later in 2011-12 to Vedanta Group @ Rs 355, the cost of their acquisition was claimed as Rs 160/190[26] per share and not zero, which would have been the case if receipt of these shares was a mere paper transaction having no money value. This clearly shows that even in a swap transaction the valuable asset was parted with and the

equivalent value received in the form of shares having money worth of Rs 13788 cr

Thus for selling 'CIHL shares' the consideration received by CUHL was real, either as money orthe money's worth, and not notional.

20. Applicability of Explanation-5 and constitutional validity of the retrospective amendment

a. Explanation - 5 to section 9(l)(i) of the Income Tax Act, was inserted vide Finance Act 2012w.r.e.f. 1/4/1962 as a clarification to remove doubts concerning taxability of the gains arising from indirect transfer of assets situated in India.

b. It is not disputed that CIHL shares derived their value from the assets situated in India. Any gain arising from sale of such shares was always taxable in India.

21. Reopening of assessment u/s 148 pursuant to the retrospective amendment Since in this case no return was filed by the assessee for the relevant period despite the despite having income chargeable to tax in India by way of the capital gains arising from the transfer of the assets situated in India, reopening of assessment u/s 147 within the prescribed time limit was entirely valid.

<u>Part-V: CONCLUSIONS</u>

22. Through a series of transactions, CEP transferred the assets it owned in India, first to CUHL and then to CIHL, the companies incorporated outside India. Eventually, the assets situated in India were transferred to CIL, an Indian company, for a consideration of Rs 26681 cr. The final transaction of selling Indian assets to an Indian company was done after the market value of Indian assets was ascertained by independent valuation and finally established through the IPO. Through sale of Indian assets to an Indian company, Cairn Group made stupendous gains and paid no taxes anywhere.

23. Moreover, when asked to file tax returns and pay tax dues in India, the Cairn Group has dragged Government of India before an International Arbitration Tribunal by invoking Bilateral Investment Protection Agreement between India and UK. India is contesting the jurisdiction of the Arbitration Tribunal in this matter of taxation, which is a sovereign function. Presently, the matter remains pending before International Arbitration Tribunal.

24. On the gains so earned from the sale of Indian assets, Cairn Group has not paid a single paisa in tax till now, despite Government giving every facility; including assurance of waiver of interest and penalty under a Dispute Resolution Scheme that is to run till 31st December 2016. The Department has also not pursued the demand till now[27], to allow the assessee to avail the benefit of the Scheme."

34. Ld. departmental representative submitted a printout of presentation made during the hearing. He further made a reference to page No. 106 of the paper book which is a debt assignment agreement dated 01/09/2006 amongst cairn energy plc, Cairn UK Holdings Ltd, Cairn India Holdings Ltd and Cairn energy hydrocarbons Ltd. He referred that by this agreement debt of GBP 29780710 was assigned/transferred by which Cairn energy plc, the vendor and Cairn energy hydrocarbons Ltd,the debtor, have agreed to sell it to Cairn UK Holdings Ltd, the appellant. He further referred to the letter placed at page No. 158 of the paper book submitted by assessee before Ld. Dispute Resolution Panel wherein while describing step 3, being subscription and share purchase agreement between cairn energy plc, Cairn UK Holdings Ltd, appellant, Cairn India Holdings Ltd and Cairn

India Ltd, the assessee himself has stated that the consideration for the transfer was settled partly in cash and partly in shares of Cairn India Ltd. He further referred for this purpose, initial funds were infused in Cairn India Ltd on various date by Cairn UK Holdings Ltd and from these funds Cairn India Ltd purchased some part of the shares capital of Cairn India holding Ltd from Cairn UK Holdings Ltd, therefore, he stated that a sum of Rs. 6101 crores are in fact consideration paid in cash and therefore the transaction stated by the assessee is not of exchange, but it is a sale transaction. He further stated that all the agreements placed by the assessee are described as subscription and share purchase agreement except the agreement dated 07/08/2006 and 30/06/2006. Therefore he submitted that these are the transaction of clear-cut purchase and sale of shares and not case of exchange. He further referred to the history of section 9 of the act and submitted that the impugned transaction entered into by the assessee is hit by the provisions of section 9 (1) (i) read with explanation 5 of that section as there is a transfer of share or interest in a company as its value is substantially derived from assets located in India. He relied up on decision of privy council in case of Rohdesia metals Ltd (liquidator) versus Commissioner of taxes [vol. IX ITR (Statutes) 45 to explain source-based taxation and submitted that

where the source of income is residing the income is chargeable to tax in that particular source country. With respect to the provisions of section 2 (14) of the act, he referred to the explanation inserted w.e.f. 01/04/1962 by The Finance Act, 2012 and submitted that 'property' includes right of management or control. In the present case, the right of management and control has been transferred from one entity to another entity and therefore the provisions of section 2 (14) is also satisfied. With respect to the argument of the assessee that at the time of entering into force the double taxation avoidance between India and United Kingdom, taxing provision as per the domestic law prevalent on that day are required to be seen, he submitted that the explanation 5 inserted by The Finance Act, 2012 is clarificatory in nature and therefore as on that date also the transaction under dispute are chargeable to tax.

35. The Ld. authorized representative vehemently contested the arguments of the Ld. Departmental representative and stated that the agreements of transfer of shares and submitted that agreement also refers to exchange and merely because reference to the 'vendor' and 'purchaser' is mentioned in those agreements it does not become the transaction of sale. He further stated that in all these share transfer agreements there is no mention of any value and therefore these

transactions are merely for exchange of shares. With respect of exchange of the debt, he submitted that the debt is also exchanged by way of allotment of shares and therefore it is still an agreement of exchange. With respect to the reliance placed by the Ld. departmental representative on the decision of the privy Council in Rohdesia metal Ltd versus Commissioner of taxes, he submitted that the facts of that case are not applicable in the present case as in that particular case, the only issue was where the source of mining rights are situated, in the present case the issue is shares are situated where they are registered. As the shares are registered in Jersey they are not situated in India but in Jersey.

36. We have carefully considered the rival contentions. To put the facts very simply in a narrow compass , the assessee company is a tax resident of United Kingdom which was incorporated on 26th of June 2006. On 30/06/2006, it entered into the share exchange agreement with Cairn energy Plc where the entire issued share capital of 9 wholly owned subsidiary of Cairn energy plc were exchanged by issue of 221444034 shares of appellant at the face value of GBP 1 each. Thereafter the appellant entered into a share exchange agreement dated 07/08/2016 with another company Cairn India Holdings Ltd which was incorporated on 02/08/2006 in Jersey and appellant

exchanged all the shares of those 9 subsidiaries with that company for issue to the appellant of 221444034 shares of GBP 1 each at par of that co, further for a debt of GBP 29780710 of Cairn energy hydrocarbons Ltd to Cairn energy plc was assigned to appellant for a consideration of 2978 0710 ordinary share of GBP 1 each by appellant to Cairn energy plc. It was further assigned by appellant to Cairn India holding Ltd, Jersey for 29780710 ordinary shares of GBP 1 each issued by Jersey company to the appellant. Thereby, in nutshell, 29780710 shares were acquired by appellant of Cairn India holding Ltd on account of sale/ transfer/ assignment of debt. Therefore by this stage appellant acquired (221444034 + 29780710) 251224744 of Cairn India holding Ltd. Subsequently the assessee sold all the shares to a newly formed company in India i.e., cairn India Ltd, through subscription and share purchase agreement dated 15/09/2006, and share purchase deed dated 12/10/2006. As per submission of the assessee, consideration for this transfer was settled partly in cash and partly by shares issued in cairn India Ltd in favour of the appellant. It is an undisputed fact that Cairn India holding Ltd is the holding company of 9 subsidiary companies in India who are engaged in the business in oil and gas sector in India. Therefore the transaction entered into by appellant of transferring 251224744 shares

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of Cairn India holdings Limited to Cairn India Limited on 12/10/2006 is whether liable to tax in India or not is the precise issue before us. We also examined the other connected issues raised before us arising out of the about transaction as under:-

i. The 1st contention of the assessee is that lower authorities have erred in holding that capital gains arising to the appellant on account of the sales of shares of Cairn India Holdings Ltd to cairn India Ltd is deemed to accrue or arise in India under section 9 (1) (i) of the act and is therefore, chargeable to tax in India. The argument of the assessee is that retrospective amendment to section 9 (1) (i) of the act by The Finance Act, 2012 is bad in law and ultra vires. In view of the decision of the Hon'ble Supreme Court in L. Chandra Kumar V Union of India **2002-TIOL-159-SC-CB** this is not the right forum to challenge validity of provisions of the Income Tax Act. In view of this contention of the assessee rejected.

ii. The 2nd contention raised before us by the assessee is that it is an internal reorganization of the group, as there is no change in controlling interest as a result of these internal or reorganization. The contention of the assessee is that the reason for the internal reorganization was with a view to bring entire Indian business

operations of Cairn group under one Indian company. This was followed by listing the shares of this Cairn India Ltd on various Stock exchanges in India. It is further contended that there is no 3rd party involved in the whole transaction except the group itself and there can be no tax, which can be levied on the internal reorganization when there is no increase in the wealth of the appellant. Explanation to section 2 (14) was a added by The Finance Act, 2012 with retrospective effect from 1/4/1962 as under :-

> "*Explanation* For the removal of doubts, it is hereby clarified that "property" includes and shall be deemed to have always included any rights in or in relation to an Indian company, including rights of management or control or any other rights whatsoever;"

Therefore according to the above provisions, right of management and control is a property u/s 2(14) of the act. In the present case the shareholders of 9 companies situated in India which controls the oil and Gas sector in India are having the ' property' of the right to manage and control that business by virtue of shareholding and further such rights are 'rights in or in relation to an India company'. Therefore any income arising 'through or from' any property In India shall be chargeable to tax as income deemed to accrue or arise in India

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in terms of the provision of section 9 (1) (i) of the act. The cairn India Holdings Limited is the holding company of those subsidiary companies and appellant is holding company of the Cairn India Holdings Limited. Therefore, it is apparent that appellant is holding rights in control and management of the shares of the 9 Indian subsidiary companies engaged in the business of oil and gas Sector through holding subsidiary structure. Now appellant has transferred this property to Cairn India Limited partly in cash and partly in exchange of shares. Appellant submits that it is a case of business reorganization and there is no increase in wealth of the Group. According to us there are series of transactions entered in to by the group, which culminated in to the Initial Public Offering of 98639903 shares @ 160 per share of Cairn India Limited. Part of the purchase price of the share of Rs 6101 crores have been paid out of the proceeds of the public issue by Cairn India Limited to the appellant. In the IPO as per Annexure 1 to the letter submitted before DRP placed at page no 159 of the paper book of the revenue shows that in IPO, cairn India Limited has divested 30.50 % of the stake to the General Public and Institutional investors. The complete financial arrangement of

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the Group has ended through series of transfer of shares from U K Jurisdictions to Jersey Jurisdiction to India. On divesting 30 % stake in these oil and gas assets located in India and part of IPO proceeds app. Rs 6101/- Crore paid to the appellant in U K. Therefore, we are not convinced that these series of transactions entered in to by the group is merely a business reorganization process in consolidation of its oil and gas business India. Furthermore arguments of the assess also do not have any rational that there is no increase in the wealth of appellant as the value of the holdings of the appellant in Cairn India Limited has been unlocked due to IPO and value is derived by the book building process.

iii. The third arguments of the assessee is that there is no real income accruing to the assessee and only real income can be taxed . Relying on the decision of Honourable Calcutta High court in case CIT V Kusum products Limited [2014] 49 taxmann.com 403 (Calcutta) it was submitted that post these internal organization is no real income has accrued to the appellant as al the steps mentioned of internal reorganization all the assets which the appellant was holding in

India are now available in different form. Whether assessee has earned any gain or not to arrive at that decision one has to look at the financial statements of the appellant for year ended on 31st December 2006 and 2007 which are placed at page no 254 to 285 of the paper book of the assessee. For the Year ended on 31/12/2006 the note No 13 of the audited accounts shows the transaction with related party. These transactions shows the following details :-

> *" incorporation of cairn India limited and Sale of Investments in cairn India Holdings Limited "*
> *on 21/08/2006, the company incorporated Cairn India Ltd (registered in India). On 15 September, 2006, the company entered into the subscription and share purchase agreement with Cairn India Ltd and Cairn India Holdings Ltd (both subsidiaries of the company). The subscription and share purchase agreement provided for Cairn India Ltd to acquire approximately 21.85% of the share capital of Cairn India Holdings Ltd into trenches.*
>
> *On 12 October the company entered into a 2nd agreement with Cairn India Ltd, the share purchase deed, which provided for Cairn India Ltd to acquire the remaining 78.15% of the share capital of Cairn India Holdings Ltd. 53.84% was acquired through a share for share exchange and 24.31% was acquired for cash. Total cash proceeds were approximately GBP 677m. GBP 312 M was receivable in Indian rupees and the company entered into an currency exchange option over the year end to convert the Indian rupees into GBP.*
>
> *The sale of Cairn India Holdings Ltd to Cairn India Ltd resulted in the company generating an exceptional gain on sale of GBP1.36 1 billion."*

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Further reading of note No. 6, which relate to taxation, It is mentioned that no tax has been provided in respect of the disposal of part of the company's investment in its subsidiary is the disposal is exempt from tax under schedule 7AC of the Taxation of the chargeable Gains Act 1992.

In view of this, the argument of the assessee that there is no increase in the wealth of the appellant and there is no real income earned by the assessee does not deserve to be accepted. In fact, the assessee has earned substantial gain on sale of the shares and also has gained on account of taxes too as according to the assessee itself such gain is not chargeable to tax. Therefore, the assessee has earned the real income on account of sale of its shares in Cairn India Holdings Ltd to Cairn India Ltd.

iv. The next argument of the assessee is that while computation of the capital gain in the hands of the appellant is made, the cost of acquisition should be stepped up to the fair value of the shares of cairn India holding Ltd on the date of acquisition. Claim of the assessee is that share exchange agreement dated 30

08/06/2006, share exchange agreement dated 07/08/2006 are both transaction of exchange of share for the shares. Further, the assignment of debt was also with respect to exchange of the shares in lieu of debt. In the last impugned transaction, which is, subject matter of dispute is also share purchase agreement dated 15/09/2006 and share purchase deed dated 12/10/2006. By this agreement shareholding in Cairn India holding Ltd was transferred by appellant to Cairn India Ltd in for trenches for a consideration of Rs. 2266,81,87,10,140/– which was paid partly in cash by Cairn India Ltd and partly by issue of equity shares in Cairn India Ltd., Therefore, it is submitted that 1st and 2nd transfer is by way of exchange and 3rd transfer is by way of sale. The main thrust of the argument of the assessee is that when any asset is transferred in lieu of another asset and no specific amount for consideration is agreed between the parties that is a case of transfer by way of exchange. For this, ld AR tried to substantiate it that in none of the agreements no specific amount for consideration is mentioned. Therefore according to the assessee while computing capital gains in such cases fair market value of the asset received in consideration for the assets transferred should be considered as full value of

consideration. The Ld. authorized representative of the assessee has heavily relied upon the decision of the Hon'ble Supreme Court in the case of CIT versus Gillander Arbuthnot and company (1973) 87 ITR 407 (SC) and CIT versus George Henderson and company limited (1967) 66 ITR 622 (SC). The Ld. authorized representative also relied on the decision of Hon'ble Supreme Court in the case of CIT versus R.R. Ramakrishna Pillai (1967) 66 ITR 725 (SC) wherein it has been held that when a person carrying on the business transfers the assets to accompany in consideration for allotment of shares it would be case of exchange and not of sale. Therefore it was submitted that in the case of the appellant for the above transfer the capital gain should be computed in accordance with those principle stating that where transfer of assets is in lieu of another asset the full value of the consideration shall be the fair market value of the assets received by the transferor. Further assessee has submitted that the 1st and 2nd transfer of share as per the stand of revenue is also chargeable to capital gain. Therefore, it was submitted that

1. capital gain in the hands of Cairn energy plc who exchange the shares in the 1st transaction receiving a sum of Rs. 266818710140/- will have the cost of

acquisition of Rs. 21783697552/-and may be liable to capital gain tax in the hands of that cairn Energy PLC of Rs. 245035012588/–.

2. Similarly, in the case of 2nd transfer of shares on 7th of August 2006 when shares of 9 subsidiaries were transferred by appellant to Cairn India holding Ltd should be computed taking the full value of consideration of Rs. 266818710140/-and the cost of acquisition shall be taken at the same value being the full value of consideration in the hands of Cairn energy plc and therefore Nil capital gain shall be chargeable. In the 2nd trench of transaction full value of consideration is taken as the fair value of the shares of 9 subsidiaries company when the shares of Cairn India holding Ltd were transferred by the agreement dated 15/09/2006 and 12/10/2006, since there is insignificant timing difference between the two transfers the valuation of the shares which is received on transfer of shares of Cairn India holding Ltd is considered for the purpose of fair value of the shares by the assessee.
3. Further, the 3rd transfer of shares where the shares of Cairn India holding Ltd were transferred by appellant to Cairn India Ltd, the computation of the capital gain should be by taking the full value of consideration of Rs. 266818710140/-and the cost of acquisition should also be taken at the same value in absence of any timing difference between acquitsion

> and disposal and therefore the capital gain chargeable to tax in the hands of the appellant is Nil.

Against this, the Ld. departmental representative submitted that it is not transaction of exchange, but it is a transaction of sale. He referred to the sale purchase deed and subscription and share purchase agreement according to which the appellant sold the 100 % investment in Cairn India Holdings Ltd, of 25122474 for shares of cairne India holding Ltd, to cairn India Ltd for Rs. 266818710140/-and consideration is partly in cash and partly by issue of shares of Cairn India Ltd to appellant. He further submitted that appellant has acquired 221444034 shares in exchange of the shares of 9 subsidiary companies and 29780710 shares in view of the debt transferred to Cairn India Holdings Limited. Therefore he submitted that the capital gain is required to be computed as per section 48 of the Income Tax Act. According to which the full value of the consideration received is Rs. 266818710140/- and from this, the actual cost of acquisition is required to be deducted. He submitted that there is no dispute on this figure between the revenue as well as the assessee. However, the cost of acquisition stated by the assessee of the identical value is under dispute. He further

submitted that earlier two transactions have not at all been taxed. Therefore, assessee cannot say that earlier transactions also have been charged to tax. Regarding cost of acquisition the claim of the revenue is that shares of Cairn India holding Ltd was acquired by appellant into trenches , i.e. 221444034 shares @ GBP 1 per share and 29780710 shares by selling debt of GBP 29780780710. Therefore actual cost of acquisition is GBP 25124744 which is converted by applying exchange rate of Rs 86.71 per GBP is Rs. 21783697552/- only. On careful consideration on the argument of the both the parties, it is noted that there is no difference between the full value of the consideration determined by the both the parties received accruing to the assessee as a result of the transfer of the capital asset. Both have taken the same at Rs. 266818710410/-only. As there is no difference between the full value of consideration taken by revenue as well as the assessee, we do not find any reason to go in to the controversy whether the transaction is of exchange or sale. Further merely because the consideration is not stated in monetary terms in the various agreements and deed, it cannot be said that sales consideration as well as the cost cannot be determined of the transfer of the property for

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working capital gain. In the present case the price of the shares in each of the agreement is identified and the amount of acquisition recorded in the books of accounts also proves that what the cost is paid for acquisition of the shares. The dispute is with respect to the cost of acquisition of the above property. Revenue has determined it at Rs. 21783697552/-whereas the assessee has stated the it should be taken at Rs. 266818710410/-only. According to the provisions of the Income Tax Act, the Capital gain is required to be computed as per method provided under section 48 wherein it is to be computed by deducting from the full value of consideration received accruing as a result of the transfer of the capital asset by the cost of acquisition of the assets and cost of improvement thereto. Section 55 (2) and (3) provides that for the purpose of section 48 and section 49, what the cost of acquisition with respect to certain transactions as is under :-

> (2) For the purposes of sections 48 and 49, "cost of acquisition",--
>
> (a) in relation to a capital asset, being goodwill of a business, or a trade mark or brand name associated with a business or 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, -
>
> > (i) in the case of acquisition of such asset by the assessee by purchase from a previous owner, means the amount of the purchase price ; and

(ii) in any other case not being a case falling under sub-clauses (i) to (iv) of sub-section (1) of section 49, shall be taken to be nil ;

(aa) in a case where, by virtue of holding a capital asset, being a share or any other security, within the meaning of clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) (hereafter in this clause referred to as the financial asset), the assessee--

(A) becomes entitled to subscribe to any additional financial asset ; or

(B) is allotted any additional financial asset without any payment, then, subject to the provisions of sub-clauses (i) and (ii) of clause (b)--

(i) in relation to the original financial asset, on the basis of which the assessee becomes entitled to any additional financial asset, means the amount actually paid for acquiring the original financial asset ;

(ii) in relation to any right to renounce the said entitlement to subscribe to the financial asset, when such right is renounced by the assessee in favour of any person, shall be taken to be nil in the case of such assessee ;

(iii) in relation to the financial asset, to which the assessee has subscribed on the basis of the said entitlement, means the amount actually paid by him for acquiring such asset ;

(iiia) in relation to the financial asset allotted to the assessee without any payment and on the basis of holding of any other financial asset, shall be taken to be nil in the case of such assessee ; and

(iv) in relation to any financial asset purchased by any person in whose favour the right to subscribe to such asset has been renounced, means the aggregate of the amount of the purchase price paid by him to the person renouncing such right and the amount paid by him to the company or institution, as the case may be, for acquiring such financial asset ;

(ab) in relation to a capital asset, being equity share or shares allotted to a shareholder of a recognised stock exchange in India under a scheme for demutualization or corporatization approved by the Securities and Exchange Board of India established under section 3 of the Securities and Exchange Board of India Act, 1992 (15 of 1992), shall be the cost of acquisition of his original membership of the exchange ;

Provided that the cost of a capital asset, being trading or clearing rights of the recognized stock exchange acquired by a shareholder who has been allotted equity share or shares under such scheme of demutualization or corporatization, shall be deemed to be nil ;

(b) in relation to any other capital asset,--

(i) where the capital asset became the property of the assessee before the 1st day of April, 1981, means the cost of acquisition of the asset to the assessee or the fair market value of the asset on the 1st day of April, 1981, at the option of the assessee ;

(ii) where the capital asset became the property of the assessee by any of the modes specified in sub-section (1) of section 49, and the capital asset became the property of the previous owner before the 1st day of April, 1981, means the cost of the capital asset to the previous owner or the fair market value of the asset on the 1st day of April, 11981, at the option of the assessee ;

(iii) where the capital asset became the property of the assessee on the distribution of the capital assets of a company on its liquidation and the assessee has been assessed to income-tax under the head "Capital gains" in respect of that asset under section 46, means the fair market value of the asset on the date of distribution ;

(v) where the capital asset, being a share or a stock of a company became the property of the assessee on--
(a) the consolidation and division of all or any of the share capital of the company into shares of larger amount than its existing shares,
(b) the conversion of any shares of the company into stock,
(c) the re-conversion of any stock of the company into shares,
(d) the sub-division of any of the shares of the company into shares of smaller amount, or
(e) the conversion of one kind of shares of the company into another kind, means the cost of acquisition of the asset calculated with reference to the cost of acquisition of the shares or stock from which such asset is derived.

(3) Where the cost for which the previous owner acquired the property cannot be ascertained, the cost of acquisition to the previous owner means the fair market value on the date on which the capital asset became the property of the previous owner.

Further provisions of section 49 provides that in certain mode of acquisition the cost with reference to the property, shall be taken as under:-

(1) Where the capital asset became the property of the assessee—

(i) on any distribution of assets on the total or partial partition of a Hindu undivided family ;

(ii) under a gift or will ;

(iii) (a) by succession, inheritance or devolution, or

(b) on any distribution of assets on the dissolution of a firm, body of individuals, or other association of persons, where such dissolution had taken place at any time before the 1st day of April, 1987, or

(c) on any distribution of assets on the liquidation of a company, or

(d) under a transfer to a revocable or an irrevocable trust, or

(e) under any such transfer as is referred to in clause (iv) or clause (v) or clause (vi) or clause (via) or clause (viaa) or clause (vica) or clause (vicb) or clause (xiii) or clause (xiiib) or clause (xiv) of section 47 ;

(iv) such assessee being a Hindu undivided family, by the mode referred to in sub-section (2) of section 64 at any time after the 31st day of December, 1969,

the cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the property acquired it, as increased by the cost of any improvement of the assets incurred or borne by the previous owner or the assessee, as the case may be.

Explanation In this sub-section the expression "previous owner of the property" in relation to any capital asset owned by an assessee means the last previous owner of the capital asset who acquired it by a mode of acquisition other than that referred to in clause (i) or clause (ii) or clause (iii) or clause (iv) of this sub-section.

(2) Where the capital asset being a share or shares in an amalgamated company which is an Indian company became the property of the assessee in consideration of a transfer referred to in clause (vii) of section 47, the cost of acquisition of the asset shall be deemed to be the cost of acquisition to him of the share or shares in the amalgamating company.

(2A) Where the capital asset, being a share or debenture of a company, became the property of the assessee in consideration of a transfer referred to in clause (x) or clause (xa) of section 47, the cost of acquisition of the asset to the assessee shall be deemed to be that part of the cost of debenture, debenture-stock, bond or deposit certificate in relation to which such asset is acquired by the assessee.

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(2AA) Where the capital gain arises from the transfer of specified security or sweat equity shares referred to in sub-clause (vi) of clause (2) of section 17, the cost of acquisition of such security or shares shall be the fair market value which has been taken into account for the purposes of the said sub-clause.

(2AAA) Where the capital asset being rights of a partner referred to in section 42 of the Limited Liability Partnership Act, 2008 (6 of 2009) became the property of the assessee on conversion as referred to in clause (xiiib) of section 47, the cost of acquisition of the asset shall be deemed to be the cost of acquisition to him of the share or shares in the company immediately before its conversion.

(2AB) Where the capital gain arises from the transfer of specified security or sweat equity shares, the cost of acquisition of such security or shares shall be the fair market value which has been taken into account while computing the value of fringe benefits under clause (ba) of sub-section (1) of section 115WC.

(2AC) Where the capital asset, being a unit of a business trust, became the property of the assessee in consideration of a transfer as referred to in clause (xvii) of section 47, the cost of acquisition of the asset shall be deemed to be the cost of acquisition to him of the share referred to in the said clause.

(2C) The cost of acquisition of the shares in the resulting company shall be the amount which bears to the cost of acquisition of shares held by the assessee in the demerged company the same proportion as the net book value of the assets transferred in a demerger bears to the net worth of the demerged company immediately before such demerger.

(2D) The cost of acquisition of the original shares held by the shareholder in the demerged company shall be deemed to have been reduced by the amount as so arrived at under sub-section (2C).

(2E) The provisions of sub-section (2), sub-section (2C) and sub-section (2D) shall, as far as may be, also apply in relation to business reorganisation of a co-operative bank as referred to in section 44DB.

Explanation For the purposes of this section, “net worth” shall mean the aggregate of the paid up share capital and general reserves as appearing in the books of account of the demerged company immediately before the demerger.

(3) Notwithstanding anything contained in sub-section (1), where the capital gain arising from the transfer of a capital asset referred to in clause (iv) or, as the case may be, clause (v) of section 47 is deemed to be income chargeable under the head “Capital gains” by

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virtue of the provisions contained in section 47A, the cost of acquisition of such asset to the transferee company shall be the cost for which such asset was acquired by it.

(4) Where the capital gain arises from the transfer of a property, the value of which has been subject to income-tax under clause (vii) or clause (viia) of sub-section (2) of section 56, the cost of acquisition of such property shall be deemed to be the value which has been taken into account for the purposes of the said clause (vii) 3or clause (viia).

The property on transfer of which capital Gain is required to be computed are the shares of Cairn India Holdings Ltd, which is incorporated in Jersey and therefore shares transferred are not of an Indian company but Jerseey Company. On conjoint reading of provisions of section 48, 49 and 55 of the Act it is apparently clear that property held by the assessee and its mode of acquisition do not fall in any of the clauses which provides for taking the cost of acquisition in the hands of the assessee in these transaction being cost to the previous owner. No such provision has also been cited before us. We also do not agree with the contention of the assesee that as there is no timing difference between the acquisition and disposal of shares , the full value of consideration and the cost of acquits ion is same. Provision of section 48, 49 and 55(2) of the act does not allow

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such treatment. Therefore the computation of capital gain in the hands of the assessee is required to be made by deducting from the full value of consideration cost of acquisition incurred by the assessee for acquisition of the property. We do not find any infirmity in the order of the ld AO in taking the cost of acquisition, which is derived by issues of shares as well as by sale of debt. In the result we confirm the order of the Ld AO in working out capital Gain on sale of shares of Cairn India Holding limited in the hands of appellant of Rs. 245035012588/-.

v. The ground No. 3.12 has been raised as an additional ground of the appeal , which has been admitted, and therefore requires to be adjudicated. This ground states that according to Article 14 of Indian United Kingdom except as provided in Article 8 and 9 each contracting state may tax capital gain in accordance with the provisions of its domestic law. This Double Taxation Avoidance Agreement was notified on 11.02.1994. The contention of the assessee is that for the purpose of taxability of capital gain the domestic law should be seen as it was in existence on the date on which India UK DTAA was notified. Precisely the argument of the assessee is that on 11.02.1994 the retrospective amendment to section 9 made by the Finance Act

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2012 was not in existence and therefore, if the assessee is eligible for the benefit of DTAA then the domestic tax law is required to be read ignoring the retrospective amendment made by The Finance Act, 2012. To advance his argument Shri Percy Pardiwala relying upon the decision of the Hon'ble Delhi High Court in case of New Sky Satellite BV (2016) 68 Taxmann.com 8 (Del) has specifically referred to Para No. 36 to 40 of that judgment. In response to this ld Departmental Representative submitted that the contention raised by the ld Authorized Representative is not correct. He stated that the India UK Treaty specifically Article 40 has simply provided that capital gain are required to be dealt with in accordance with the domestic tax law. He submitted that transaction has taken place of sale of share by the appellant to Cairn India Ltd in 2006 then how the domestic law prevailing for chargeability of capital gain as on 1994 can be applied to that transaction. With respect to the decision of Hon'ble Delhi High Court in case of DIT Vs. New Sky Satellite BV (supra) he submitted that the law laid down by that decision with respect to chargeability of fees for technical services with respect to definition in DTAA as well as in the domestic state law. There Hon'ble Delhi High Court has held that

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unless there is an amendment in the treaty the amended definition of royalty and fees for technical services in Finance Act by The Finance Act, 2012 cannot be applied where the assessee is eligible for DTAA. We have carefully considered the rival contentions and we reject the argument of assessee for the reason that (i) provision in the Double Taxation Avoidance Agreement cannot make the domestic law static with respect to taxability of a particular income when unequivocally both sates have left it to the domestic laws of the countries . (ii) suppose if there is an exemption provided with retrospective effect under the domestic law can Non-resident assessee be also denied the benefit as it was also not the law at the time of notification of Double Taxation Avoidance argument, the answer is in negative (iii) DTAA are mechanism of avoiding multiplicity of taxation globally of an assessee. Therefore, if in the country of residence taxes are chargeable then the assessee must not suffer the tax burden in the country of source of income. We have referred to the balance sheet of Cairn UK Holding Ltd which is at page No. 261 of the paper Book submitted by the assessee wherein note NO. 6 itself suggests that the appellant has not provided for any tax in respect of disposal of the part of the company's

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investment in its subsidiaries as the disposal is exempt from tax under Schedule 7AC of the Taxation of changeable gain Act 1992 of United Kingdom. (iv) Coming to the decision of the Hon'ble Delhi High Court in case of DIT Vs. New Skies Satellite BV wherein the Hon'ble High court has held that in relation to applicability of Article 3(2) of the relevant DTAAs, that it can apply only to terms not defined in the DTAA. Since the relevant DTAAs in the case before them defined “royalty”, Article 3(2) could not be applied. For terms which are defined under the DTAA, there is no need to refer to the laws in force in the Contracting States, especially to deduce the meaning of the definition under the DTAA. Further, the court has held that neither act of parliament supply or alter the boundaries of DTAA or supply redundancy to any part of its. Similarly, according to us, the provisions of DTAA where it simply provides that particular income would be chargeable to tax in accordance with the provisions of domestic laws , such article in DTAA also cannot the limit the boundaries of domestic tax laws. In view of this, we do not find any force in the argument of the assessee and dismiss ground No. 3.12 of the appeal.

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37. In the result ground No. 3 with all its sub grounds are dismissed.

38. In ground No. 4 of the appeal the assessee has challenged certain findings recorded by the ld AO, such as certain violations of regulatory requirements, non disclosure of certain facts and availability of all facts before the ld AO irrespective of action u/s 133 of the Act. No specific arguments were made before us by both the parties on these issues and we also find them irrelevant to decide the issue in appeal. Hence, we dismiss ground No. 4 of the appeal.

39. Ground No 5 of the appeal of the assessee is against the levy of interest u/s 234A and 234 B of the Act. The LD AR submitted on this issue as under :-

> 2. Appellants submission against the said contentions
> *Levy of interest under section 234A and 234B of the Act is bad in law*
>
> 2.1. As discussed in the earlier submissions, it is only on account of the retrospective amendment introduced by the Finance Act. 2012 in section 9(1)(i) of the Act vide Explanation 4 and 5 Thai the transfer of shares of foreign company incorporated outside India is chargeable to tax in India.
>
> 2.2. However in the instant case, the Appellant had undertaken the internal reorganization in AY 2007-08 and Section 9(1)(i) of The Act then prevailing, provided that income deemed to accrue or arise in India shall be ...income accruing or arising, whether directly or indirectly, through ..... transfer of a capital asset situate in India. As per the law prevailing at that point in time, income accrued on account of transfer of shares of CIHL, i.e. foreign company was not chargeable to tax in India. The said interpretation was also

upheld by the Hon'ble Supreme Court in the case of Vodafone International Holdings B.V v UOI & Another [2012] 341 ITR 1 (SC).

2.3. As the Appellant had no income chargeable to tax in India and the Appellant was not liable to file a return of income in India in accordance with the law prevailing in India for the AY 2007-08, interest under section 234A and 234B of the Act cannot be levied. Furthermore, no new documents were discovered by the survey proceedings in January 2014 - all of the documents in question had been in the hands of the government in 2006. The reason that no tax was levied in 2006 was that the transactions in question were not taxable in 2006 - the only arguable basis for taxing them (which Appellant in any event rejects) arose in 2012 with the passage of the retrospective amendment. This has been confirmed by distinguished governmental commissions.

2.4. The Appellant submits that in the instant case, the legal dictum *lex non cogit ad impossibillia* would be attracted which in simple terms means that *'law cannot compel to do the impossible'.*In this regard, the Appellant relies on the following judicial precedents:

a. In case of CIT v. Revathi Equipment Limited. [2008] 298 ITR 67 (Mad.), wherein the Madras High Court held that. *".......Normally, new provisions are introduced with effect from the next assessment year, but this provision under section 35DDA was introduced by Parliament in its wisdom with effect from April 1, 2001, ie., the same year and that is why difficulty has arisen for visualizing the liability and the assessee could not deduct such expenditure. In fact in almost identical circumstances in the Third Member decision by the Delhi Bench in the case of Haryana Warehousing Corporation v. Deputy CIT [2001] 252 ITR (AT) 34 it was held that in such situations the legal dictum lex non cogit ad impossibillia would be attracted. The simple meaning of this dictum is that 'law cannot compel you to do the impossible'. In the case before us also, the assessee could not have visualized till the last instalment of advance tax, i.e., March 15, 2001, that it would not be entitled to deduct the VRS payments. Therefore, the assessee could not have done anything other than to estimate the liability to pay advance tax on the basis of existing provisions. We are oj the*

considered opinion that in such situation, it cannot he said that the assessee was liable to pay advance tax. Once we come to the conclusion that the assessee was not liable to pay advance tax, there is no question of charging tax under sections 234B and 234C. In similar circumstances in the case of Priyanka Overseas Ltd. v. Deputy CIT [2001] 79 ITD 353 (Delhi) where the assessee had treated the receipt of cash assistance as capital receipts, which was subsequently amended to be business receipt by the Finance Act, 1990, it was held that in such cases interest under sections 234B and 234C was not chargeable. In these circumstances, we think that the assessee was not liable to pay advance tax and therefore levy of interest under sections 234B and 234C is not justified. Further, it is pertinent to note that the assessee by way of abundant caution deposited a sum ofRs. 90,00,000 on August 6, 2001. i.e.. much before the due date of filing of the return, which also proves the bonafide credentials of the assessee. In these circumstances, we set aside the order of the learned Commissioner of Income-tax (Appeals) and delete the levy of interest under sections 234B and234C."

From a reading of the above, it is clear that the Tribunal had taken a view that the Finance 5/77 *introduced was passed in both the Houses of Parliament, receiving the assent of the hon'ble President of India, on May 11, 2001. Till that time, the assessee could not have visualized that the individual liability would be fastened on him. It is also found by the Tribunal that the assessee fairly deposited a sum of Rs. 90,00,000 by way of self-assessment on August 6. 2001, before the date of filing the return which also proved the bona fide credentials of the assessee. On the above two grounds, the Tribunal accepted the case of the assessee that the assessee is not subject to advance tax. Findings given by the Tribunal are based on valid materials and evidence and we do not find any error or legal infirmity in the order of the Tribunal so as to warrant interference. "*

b. In case of Ashok Leyland Ltd. v. DOT [2014] 47 taxmann.com 414 (Chennai. Trib), it was held that, *"14. The third issue raised by the assessee on merit is that the Commissioner of Income Tax (Appeals) has erred in confirming the levy of interest under Sections 234B and*

234C, which were worked out on the basis of the tax determined in the income escaping assessment. We are inclined to allow this ground raised by the assessee. The Hon'ble Madras High Court in the case of CIT v. Revathi Equipment Ltd. [2008] 298 ITR 67 has held that when an assessee could not have foreseen liability caused on account of a subsequent legislative amendment, the assessee cannot be liable for interest on the differential amount of tax in the reason that the assessee could no! have paid the differential amount of tax for the relevant previous year. Here also, the income escaping assessment was passed because of the retrospective amendment brought in by Finance Act, 2009, The additional liability has been generated only in the assessment. It was not possible for the assessee to foresee the retrospective amendment. So, it was not possible for the assessee to pay advance tax for the relevant previous year against the differential demand of tax that would arise in future. Therefore, we delete the liability of interest made under Section 234B and 234C of the Income-tax Act, 1961.

c. Further the following judicial precedents have also upheld that where it is not possible for the Appellant to foresee the retrospective amendment, it was not possible for the Appellant to pay advance tax for the relevant previous year against the demand of tax that would arise in future. Considering the same, interest under section 234A and 234B cannot be levied:

- JWS Steel Limited v. AC1T [2010] 5 ITR (Trib.) 31 (Bang.) . -

- United Helicharters (P.) Ltd. v. ACIT [2013] 37 taxmann.com 343 (Mum-Trib)

- Sivagami Holdings (P.) Ltd. v. ACIT [2012] 20 taxamm.com 166 (Chennai)

d. From the above judicial precedents, it is very clear that when any tax liability imposed on the Assessees on account of retrospective amendment which cannot be foreseen at the time of filing of return of income, interest under section 234A and 234B of the Act cannot be levied on the Appellant.

2.5. Without prejudice to above, the Appellant submits that interest under section 234A cannot bd levied for the period during which it was not possible on Appellant's part to file return of income. Which means, the interest, if any, could be levied only for the period for which the Appellant is permitted to file the return of income. In the extant case, without accepting the default of non-filing of return of income, even if Appellant is construed to be in default, the interest undef section 234A of the Act could be levied only for the period for which the Appellant is permitted to file the return of income i.e. 2 years. Just to explain it clearly, for the AY 2007-08, even if the Appellant could have filed the return of income, statutory time limit as per section 139 of the Act, was 31 March 2009. i.e. one year from the end of the assessment year. Beyond 31 March 2009, as per the law the Appellant was not able to file return of income. Even the Income-tax department's infrastructure could not have allowed the Appellant to file return of income.

2.6. In relation to above, the Appellant reliance is placed on the case of Ms. Priti Pithwala v. ITO [2003| 129 taxman 79 (Mum.) (Mag) (SMC), it was held that:

"9. *With a view to simplify the procedure, which had led to litigation and consequent delay in realization of dues, the Amending Act, 1987, has substituted the aforesaid provisions by a simple scheme of payment of mandatory interest for defaults mentioned therein. The aforesaid provisions provides that where a return of income is furnished after the due date or is not furnished, the assessee shall pay simple interest at the rate of one and one-fourth per cent for every month, or part of a month comprised in the period of default on the amount of tax on total income determined on regular assessment, as reduced by any advance tax paid or tax deducted at source. As such, the word "regular assessment" is used in the context of computation. It does not say that the order passed under section 143(3)1144 of the Act shall be substituted by section 147 of the Act. In terms of section 234A(l)(a)(b), the period for which the interest liability is calculated is the period between the date on which the return was due to be filed and ending on the date the same is actually furnished and when no return is furnished ending on*

the date of completion of the assessment under section 144 of the Act.

10. In the present case the assessees did not furnish the returns. As such, the case of the assessees is not coming within the ambit of section 234A(l)(a) of the Act.

11. Section 234A(l)(b) of the Act contemplates the situation where no return has been furnished. In such a case the period prescribed is ending on the date of completion of the assessment under section 144 of the Act. In the present case the assessments under section 144 were not completed. As such, section 234A(l)(b) cannot be applied.

12. The aforesaid two conditions deals with the period for which interest is to be charged. Once the period is ascertained, the amount is to be fixed. The section prescribes the modus of computation. It is to be computed on the amount of the tax on the total income as determined under subsection (I) of section 143 or on regular assessment as reduced by the advance tax. if any, paid and any tax deducted or collected at source. Explanation 3 is inserted for the sake of clarification. An Explanation may cover a word, a phrase or a concept. It brings out what is implicit in a word or phrase. Nothing more. Therefore, it cannot be said that Explanation 3 hasgot anything to do with the computation of period for the calculation of interest. It is relatable to the computation part of the interest.

13. Since the learned counsel for the assessees conceded his liability to pay interest under section 234A of the Act, there is no point in going further into that matter and to examine whether interest is leviable or not.

14. The only dispute posed before me pertains' to the period for which the interest is to be charged. The contention of the learned counsel was that the assessees should not be made liable to pay interest for the period during which it was not possible on their part to file the returns. Having regard to the facts of the present case and considering the precedents relied upon; I find sufficient force in the contention of the learned counsel on this aspect. I direct the Assessing Officer to recompute the interest in the light of the aforesaid discussion. Accordingly on this aspect I set aside the impugned orders and restore the matter to the file of Assessing Officer, with direction to make fresh computation,

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after providing adequate opportunity to the assessees of being heard.

2.7. Further the following judicial precedents have also upheld that interest under section 234A cannot be levied for the whole period but restricted to the period for the Appellant is permitted to file return of income under the Act:

- ITO v. Capt. H.R. Vinayak [2006] 9 SOT 322 (Mum.)
- ITO v. Amar Chand Boarad [2013] 33 taxmann.com 683 (Jodhpur-Trib.)

Directions of the DRP is not correctly followed by the learned AO

2.8. The learned AO has erred in incorrectly following the directions of the DRP without providing any opportunity of being heard to the Appellant.

2.9. Without prejudice to above, the Appellant wishes to submit that the DRP in its directions observed that where a *"clear cut finding of fact',* duly supported by relevant commercial contract clauses or other documentary evidence from where an inference or presumption could be drawn that Appellant had represented to the payer to deduct tax at a lower rate and that a case is also made out on *"equities that need to be balanced in those peculiar facts"* only then section 234B may be levied and the learned AO was directed to give clear finding regarding this in the extant case of the Appellant. The learned AO neither provided any opportunity to the Appellant to provide any facts or details nor submitted any clear findings in this regard to substantiate the above direction of DRP. The learned AO held in the FAO that interest under section 234B is mandatory and hence levied, which is not a satisfactory compliance of the directions provided by the DRP.

2.10. Considering the above facts, the Appellant humbly submits before your Honors members to direct the learned AO to delete the interest under section 234B as directed even by the DRP as well.

2.11. Without prejudice of the above, interest under section 234B is payable on account of short fall and default in payment of Advance tax. Under section 209(l)(d) of the Act,

the Income-tax calculated on the estimated current income of the Appellant is to be reduced by the Income-tax which would be 'deductible' at source. The Appellant submits that as it is a non-resident, under the provisions of section 195 of the Act, its entire income is subject to deduction of tax at source and the person responsible for making payment to the Appellant is obliged to deduct tax there from. In view of the same, entire income of the Appellant is tax deductible in India. Hence, there would be no liability, on the part of the Appellant to pay advance tax and, consequently, interest under section 234B of the Act are not applicable to the Appellant.

2.12. In this regard, reliance is placed on the following judicial precedents:

- DIT v GE Packaged Power Inc [2015] 56 taxmann.com 190 (Del HC)

"For the above reasons, this Court finds that no interest is leviable on the respondent, assessees under Section 234B, even though they filed returns declaring NIL income at the stage of reassessment. The payers were obliged to determine whether the assessees wer& liable to tax under Section 195(1), and to what extent, by taking recourse to the mechanist provided in Section 195(2) of the Act. The failure of the payers to do so does not leave the. Revenue without remedy: the payer may be regarded an assessee-in-default under Sectioti 20 J. and the consequences delineated in that provision will visit the payer. The appeal of the Revenue is accordingly dismissed without any order as to costs.''

- DIT v.NGC Network Asia LLC [2009] 222 CTR 85 (Bom)

"8. We are in respectful agreement with the view taken In the case ofCITv. Sedco Forex International Drilling Co. Ltd. (supra), by the Uttaranchal High Court. We are clearly of the opinion that when a duty is cast on the payer to pay the tax at source, on failure, no interest can be imposed on the payee assessee.

9. Considering the submissions of both parties and the provisions of law, consequently the appeal is dismissed.''

2.13. Further, post decision of Alcatel in the following decisions various tribunals have ruled in favour of the Appellant:

- ZTE Corporation v. ADIT (2016) 70 taxmann.com 1 (Delhi - Tribunal)
- Satellite Television Asian Region Ltd. v. DDIT (2016) 66 taxmann.com 247 (Mumbai - Trib.)
- Kawasaki Heavy Industries Ltd. v. ACIT (2016) 67 taxmann.com 47 (Delhi - Trib.)

2.14. The ratio of above rulings clearly suggest that since the tax is deductible at source on all the payments made to the Appellant, there is no liability on the Appellant to pay advance tax . In absence of any liability to pay advance tax by the Appellant, interest under section 234B of the Act should not be levied on the Appellant.

2.15. Without prejudice to the above, interest under section 234A and 234B cannot be levied on the basis of the retrospective amendment. In this regard, reliance is placed on the following judicial precedents:

- Deversons (P.) Ltd. v. Chairman, Central Board of Direct Taxes [2004] 140 TAXMAN 628 (GUJ.)

"7. Although the above observations were in the context of levy of additional tax under section 143(1A), the same reasoning would apply in the matter of waiver of interest under section 234B of the Act. On the date when the assessee was required to pay advance tax and even on the date of filing of the return, the assessee could not have been expected to pay tax on the Export Cash Assistance received by him in the year ended 31-3-1989 nor to show the same as income in the return filed on 29-12-1989. <u>It was after expiry of the assessment year that there was a statutory amendment with retrospective effect making Export Cash^ Assistance as taxable with effect from 1-4-1967,</u> Under the

circumstances, the notification dated 23-5-1996. particularly para (d) thereof, issued under section 119(2) (a) would be applicable.

We are, therefore, clearly of the view that the present case would squarely fall under clause (d) of the aforesaid notification. Since the petitioner's tax liability arose subsequently after filing of the return and after expiry of the assessment year on account of retrospective amendment of law. consequential levy of interest under section 234B was clearly required to be dealt with as a fit case for reduction or waiver of interest. "

- Emanii Ltd. v. Commissioner of Income-tax, Central-I, Kolkata [2011] 12 taxmann.com 64 (Cal.)

"It appears that the learned Tribunal has not at all considered the aforesaid aspect as to the liability of the assessee to make payment of the advance tax on the last day of the Financial Year. i.e.. 31-3-2001 when its book profit was nil according to the then law of the land. The various decisions of the other High Courts and the Tribunals relied upon by the Tribunal did not effectively consider the question whether even in a case like the present one where on the last date of the Financial Year preceding the relevant assessment year, the assessee had no liability to pay advance tax, he would be nevertheless asked to pay interest in terms of section 234B and section 234C of the Act for default in making payment of tax in advance which was physically impossible. (Para 14) "

- Orient Overseas Container Line Limited v ADIT (ITA No. 7089/Mum/2010 and ITA No. 7365/Mum/2012) (ITAT Mumbai)

"P. *Other common issues raised by the assessee in the present Appeals related to the levy of interest under section 234B and 234C. As regards the levy interest under section 234B, the assessee in the present case is admittedly a Non Resident in India and its entire income is liable for deduction of Tax at source. As held by the Hon'ble Bombay High Court in the case ofDIT (International Taxation) Vs. NGC Network*

Asia LLC[2009]313 JTR187(Bombay), when a duty is cast upon payer to pay tax ats source, on its failure to do so, no interest can be imposed upon payee Assessee under section 234B. Respectively following the decision of Hon'ble Jurisdictional High Court, we hold that interest under section 234B cannot be imposed on the Assessee on failure of payer to deduct tax at source from the payments made to the Assessee. Moreover the issues relating to levy of under section 234B and 234C are consequential and the AO is accordingly directed to allow consequential relief to the Assessee on these issues. "

2.16. In view of the above, judicial precedents, your Honors would appreciate that if in the relevant year under consideration, the Appellant was not required to pay tax as per the law then prevailing, subsequent retrospective amendment in law cannot make Appellant liable to pay advance tax and consequential levy of interest under Section 234A and 234B of the Act.

3. Prayer:

Based on the above submissions and judicial precedents, the Appellant respectfully prayers before your Honors that interest levied under section 234 A and 234B of the Act is not applicable in the case of the Appellant and should be deleted."

40. The ld Departmental Representative relied upon the orders of the ld Assessing Officer.

41. We have carefully considered the rival contentions. In the present case the interest has been charged on the tax payable by the assessee which has arisen because of retrospective amendment made by The Finance Act, 2012. Therefore, it is correct on the part of the assessee to submit that it could not have visualize its liability for payment of advance in the year of transaction therefore, there cannot be any

interest payable by the assessee u/s 234A and 234B of the Act. the chargeable of the interest in the present case squarely covered in favour of the assessee by the decision of Hon'ble Madras High Court in case of CIT Vs. Rewati Equipment Ltd (2008) 298 ITR 67 and M/s. MRF Ltd Vs. DCIT TC(Appeal No. 234/2016) dated 04th August 2016. Further, Hon'ble Delhi High Court also covers issue in favour of the assessee in DIT Vs. GE Packaged Power Incorporation 373 ITR 65 wherein, it has been held that if tax is required to be deducted on the income of the non-resident assessee under the provisions of section 195 of the Income Tax Act then no fault can rest on the shoulder of a non-resident assessee and hence, he cannot be burdened with the liability of interest u/s 234A, 234B and 234C of the Act. Recently, Hon'ble Supreme Court in case of Ian Peter Morris Vs. ACIT (2016) 389 ITR 501 has held that when the salary income payable to a non-resident is subject to tax deduction at source u/s 192 of the Act question of payment of advance tax do not arise and consequently, provisions of section 234B and 234C also have no obligation. Admittedly in the present case , the income of nonresident appellant has become chargeable to tax due to retrospective amendment in the act and further the payments made to assessee was also subject to withholding tax u/s 195 of the act and in view of the above judicial

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precedents cited before us, we are of the opinion that assessee cannot be burdened with interest u/s 234A and 234B of the Act on tax liability arising out of retrospective amendment w.e.f. 01.04.1962 in the provision of section 9(1) of the Income Tax Act. In the result ground No. 5 of the appeal of the assessee is allowed.

42. Ground No. 6 of the appeal is against initiation of penalty proceedings u/s 271(1) (c) of the Act. No specific arguments were advanced before us and as such at present only penalty proceedings have initiated by ld AO. The issue is premature according to us and therefore ground No. 6 of the appeal is dismissed.

43. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 09/03/2017.

-Sd/-
(H.S.SIDHU)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 09/03/2017
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi