IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : "C" NEW DELHI

BEFORE SHRI R.K.PANDA, ACCOUNTANT MEMBER AND
SMT. BEENA A PILLAI, JUDICIAL MEMBER

ITA No. 1031/Del/2018
A.Y.: 2014-15

Gagan Infraenergy Ltd. 28 Najafgarh Road New Delhi 110 015 PAN: AABCN 6118 L	**vs**.	DCIT, Circle 10(1) New Delhi

AND

Stay Application No.193/Del/18
(In ITA No. 1031/Del/2018)
A.Y.: 2014-15

Gagan Infraenergy Ltd. 28 Najafgarh Road New Delhi 110 015 PAN: AABCN 6118 L	**vs**.	DCIT, Circle 10(1) New Delhi
(Appellant)		**(Respondent)**

Assessee by	Sh. Salil Kapoor, Adv. Ms.Ananya Kapoor, Adv. & Sh. Sumit Lalchandani, Adv.
Dept. by	Smt. Meeta Singh, CIT, DR
Date of Hearing	09.04.2018
Date of Pronouncement	15.05.2018

ORDER

PER BEENA A PILLAI, JUDICIAL MEMBER

The present appeal has been filed by assessee against order dated 29/12/17 passed by Ld.CIT(A)-35, New Delhi for assessment year 2014-15 on the following grounds of appeal:

"1. That the order passed by Assessing Officer ('AO') dated 30.12.2016 as upheld by the Commissioner of Income Tax (Appeals) ('CIT(A)') dated 29.12.2017 and the

additions/disallowances made and upheld are illegal, bad in law and without jurisdiction.

2. That, in the absence of order u/s 127, the assessment order passed by the DCIT, Circle-10(1), New Delhi, is illegal, bad in law and without jurisdiction.

3. That the AO had no jurisdiction and authority to go into the issue of transfer of shares when the same was not the basis for scrutiny.

4. That the CIT(A) has grossly erred in law and on facts in upholding the addition of Rs. 489,30,83,023/- on account of alleged capital gains earned by the appellant. This addition of Rs. 489,30,83,023/- is totally illegal, bad in law and is liable to be deleted.

5. That the CIT(A) has grossly erred in upholding the addition of Rs.489,30,83,023/- on account of alleged capital gains without properly appreciating the important aspects of the case.

6. That on the given facts and circumstances of the case, the said transaction of shares in our case is not taxable under Sec 45, Sec 2(47) or any other provision of the Income Tax Act, 1961 ('the Ace).

7. That without prejudice, the said transaction of shares is exempted from taxation and is covered by Sec 47 of the Act.

8. That the AO and CIT(A) have failed to appreciate that this transaction of shares is because of a family realignment/reorganization and hence the same is not taxable.

9. That, without prejudice, the AO has failed to appreciate that the deemed sale consideration cannot be assessed as capital gain.

10. That the additions/disallowances made are based on surmises and conjectures and cannot be justified by any material on record. The additions/disallowances made are unjust, arbitrary, against the principles of natural justice and are also highly excessive.

11. That the documents, explanations filed by the assessee and the material available on record has not been properly considered and judicially interpreted.

12. That the AO and CIT(A) have grossly erred on facts and in law in passing the impugned order without affording a proper and sufficient opportunity to the appellant to be heard and submit evidence in its support. The order is passed in violations of principles of natural justice.

All of the above grounds of appeal are without prejudice and are mutually exclusive to each other.
The assesse craves leave to add, amend, alter and or modify the grounds of the appeal."

2. Brief facts of the case are as under:

Assessee filed its return of income declaring loss of Rs.97,82,122/- on 29/11/14. The case was selected for scrutiny and statutory notices were issued in response to which Representative of assessee appeared before Ld.AO and filed various details as required for.

2.1. Ld.AO from financial statements observed that assessee made following disclosure in its "Note to the Financial Statements":

"*Pursuant to the resolution passed by the Board of Directors on 18/03/14 and special resolution passed by the members of the extraordinary general meeting held on 28/03/14, 1,76,94,108 equity shares of Jindal Steel and Power Ltd held by the company as investment have been gifted to Giebe Trading Pvt. Ltd., a company of the O.P Jindal Group. The carrying value of the said shares has been adjusted against reserve and surplus."*

2.2. On the basis of the above, various documents were called for. It was submitted by assessee that as on 31/03/08 assessee was holding 1,11,59,010 equity shares having face value of Rs.1/- each of Jindal Steel and Power Ltd., for Rs.17,29,64,655/-. On 19/09/09 assessee received 5 bonus shares for each share held. Thus assessee received 5,57,95,050 equity shares as bonus shares on 19/09/09 totalling to

6,69,54,060 equity shares against investment of Rs.17,29,64,655. Assessee submitted that out of the total equity shares of 1,76,94,108 of Jindal Steel and Power Ltd. 1,11,59,010 equity shares were acquired before 31st of March,2008 and balance shares of 65,35,098 were allotted as bonus shares on 19/09/09.

2.3. Upon queries raised by Ld.AO, assessee submitted before Ld.AO as under:

"ii. Cost of acquisition of these equities

Total Cost of acquisition of these equity share is Rs. 17,29,64,655/- Break up is: Cost of Equity share of 1,11,59,010 is Rs.17,29,64,655 and for Equity Share of 65,35,098 received as bonus share is Rs. Nil;. Thus total cost of 1,76,94,108 equity shares is Rs.l 7,29,64,655/-.

iii. Fair market value of shares as on date of gift.

Fair market value of share as on date of gift i.e. on 28th March, 2014 is Rs 280.70 .Copy of NSE Statement enclosed as Annexure-2.

iv. The price at which they have been booked in the accounts of M/s Giebe Trading Pvt. Ltd. has booked the above share at NIL Value.

v. Whether these shares are still being held by M/s Giebe Trading Pvt. Ltd.

Yes, Giebe Trading Pvt. Ltd. still hold the above share in their books of Accounts.

vi. If they have been sold off furnish details of capita! gains arising thereon.

As, Giebe Trading Pvt. Ltd. has not sold the share of Jindal Steel & Power Ltd., therefore question of capital gain does not arises.

2.4. Ld. AO after considering the submissions of assessee decided the issue by observing as under:

"1. Considering the notes to accounts and reply of assessee company, it is observed that the assessee company holds 1,11,59,010 equity shares of M/s Jindal steel & Power Ltd (JSPL) as on 31/03/2008 for a value of Rs 17,29,64,655/-. The company got five bonus shares for one share held in JSPL on 19/09/2009 making total investment as 6,69,54,060 equity shares having total value at Rs 17,29,64,655/-. Further during the year under review, the assessee company purchased 4,50,000 shares of M/s Jindal Steel and Power Ltd. making total holding at 6,74,04,060.0ut of such holding, the company transferred 1,76,94, I 08 equity share of JSPL on 20/0312014 without any consideration to its sister concern namely M/s GiebeTrading Pvt Ltd by way passing a board resolution on 18/03/2014 and passing a special resolution in the extra ordinary General meeting held on 20/03/2014.

2.By way of transferring its investment of 1,76,94,108 shares to its sister concern without any consideration , the company not only reduced its investments to nil and booked losses of Rs.17,29,64,655/- which were adjusted out of Reserves of company but also reduced its income to the extent that would have been accrued, if the company would have sold these shares in the open market at the market price. the assessee itself has admitted that the fair market value of each share on date of gift i.e 28/03/2014 was Rs.280.70, as per NSE statement filed by AR of

assessee. By transferring the shares of JSPL without any consideration, the assessee only avoided the payment of taxes .In fact ,it is a sham transaction arranged by the taxpayer company to avoid taxes.

3.A gift by a corporation to another corporation (which is always claimed a independent legal entity) is a strange transaction unless it be one which has been set up for some purpose. To postulate that a corporation can give away its assets free of consideration to another can only be aiding dubious attempts for avoidance of tax payable under the Act. This is more evident from the fact that law makers envisages these transactions in specified circumstances only and therefore inserted sections like 47(iv) and section 47(v) specifically which covers cases of transfer of capital assets by parent company to the subsidiary company or vice versa and other clause deal with amalgamation, demerger and reorganization of business and so on. Further, it is needless to say the gift of shares held in a company by one company to another company would not fall under section 47(iii) of the Act as section 47(iii) speaks of any 'transfer of a capital asset under a gift or will or an irrevocable trust', which is possible by an individual or a Joint Hindu Family or a Human Agency and not by an artificial person. This would not be the intent behind the law. Otherwise, there is no need to insert section 47(iv) and section 47(v) in the Act. The transaction is in fact a camouflage and couched in this form only to eliminate tax .

4. Moreover, the genuineness of the transaction is also not established. The case of the assessee company is that it had transferred the shares without consideration under the authority

given to them by memorandum and resolution passed by the board. The shares have been gifted and moved out of demat account of company on oral understanding, even without a written gift deed or memorandum of understanding. It may be noted that the shares allegedly gifted are the shares in an Indian Listed Company. Under section 82 of companies Act, the shares in any company shall be movable property transferable in the manner provided by articles of the company. The AR of the Assessee company has not submitted anywhere that the transfer of the shares allegedly gifted was in the manner provided by the Articles of the Company. Or in other words it was not proved that the articles of association of company empower the assessee company to transfer its share without any consideration that too on oral understanding. Even in the board Resolution, authorizing the so called gift, there is no mention of any power derived from the articles of association, that too without any consideration and on oral understanding only. Without anything more, it is difficult to imagine any clause in the Article of Association of a company providing for gifting away the assets in the form of shares in another company without any consideration on oral understanding only.

5.The transaction also failed in the test of commercial expediency and business prudence. Companies being artificial persons into existence only for business or non-business purpose as mentioned in their constitutional documents. Companies do not have an existence beyond the law; therefore, they are a fiction created by law. They are instrumentalities for carrying out certain operations.

Unlike Natural persons those have a life much beyond their business or employment - they have relations, sentiments, bondages, and so on, A company, is an artifice and It has no brain or heart of its own except those who are behind the company. Therefore, there cannot be any question of natural love and affection which is prime requirement for dealings such as gifts, settlements, inheritance etc .The company could not, in any case, have an existence outside its business particularly when it was not established as a non profit making company in the eyes of law and the AR of the assessee company fails to establish in the whole of proceedings that such decision has been laid down in the course of business and for the purpose of business.

Therefore, this transfer of shares is nothing but a garb to legitimize a simple transaction of transfer between two separate commercial legal entities in order to evade the legitimate taxes which would have been otherwise payable. If the transaction is effected by way of simple transfer, it will attract Capital Gains Tax under the provisions of Income Tax Act, 1961. Thus by way of the said arrangement taxes are sought to be evaded, which are against interest of revenue. By transferring the said assets for Nil consideration the assessee company is trying to evade capital gain, which otherwise would be payable at the market value. The hidden agenda and the motive behind the scheme appears to evade tax liabilities which will arise if the shares is transferred on market value. Instead the assessee is camouflaging it under the proposed gift scheme and getting it legalized, by misrepresenting the facts."

2.5. Ld. AO held that provisions of Sec.47 (iii) do not apply to facts of present case. Instead he held that the transfer of shares amounting to Rs.4,89,30,83,023/- to Giebe Trading Pvt.Ltd., was a transfer within the meaning of section 2 (47) of the Act, and taxed it under section 45. He computed the value of shares transferred to Giebe Trading Pvt. Ltd. by taking market value of each share transferred at Rs.280.70/- .

3. Aggrieved by the order of Ld. AO, assessee preferred appeal before Ld.CIT(A). Ld.CIT(A) decided this issue by observing as under:

"I have gone through the assessment order and considered the oral and written submissions made on behalf of the appellant. The issue that arises for consideration is regarding taxation of capital gains on transfer of 1,76,94,108 shares of JSPL to GTPL, another company of the Group. It is the case of the appellant that the said 1,76,94,108 shares of JSPL were given as gift without consideration to GTPL pursuant to the internal family realignment of the larger O.P.Jindal group. It is accordingly, contended by the appellant that the said transaction is not covered by section 56(2)(viia) and is exempt from tax u/s 47(iii) of the Income Tax Act, 1961 (the Act).

After considering all the facts and circumstances of the case, it is held that the AO has correctly observed that gift by a corporation to another corporation is a strange transaction as there cannot be a gift between artificial entities/persons. The submissions filed by the Appellant are considered and not found to be tenable. The case laws cited by the Appellant are distinguishable on facts. The AO

has held that the transfer of shares of Rs. 489,30,83,023/- to M/s Giebe Trading Pvt. Ltd. is a transfer within the meaning of sec. 2(47) of the Act and is liable to be taxed u/s. 45 of the Act. The provision of Sec. 47(iii) do not apply in this case. The AO has rightly observed that by transferring its investment to its sister concern by way of gift, the appellant reduced its Income to the extent that would have accrued if the company would have sold the shares in the open market. The AO held that the gift of shares by one company to another company would not fall under section 47(iii) of the Income-tax Act, since the said section only covers gift by an individual or a Hindu family and not by an artificial person otherwise there was no need to insert section 47(iv) and section 47(v) in the Income-tax Act. Hence, I find no reason to interfere with the AO's order on this issue. Appeal on this ground is rejected."

4. Aggrieved by the order of Ld. CIT (A) assessee is in appeal before us.

5. Ground No. 1 is general in nature.

6. Ground No. 2 and 3 have not been argued by Ld. Counsel before us, and hence the same are dismissed.

7. Ground No. 3-8 are in respect of addition made on account of alleged transfer of shares without consideration.

7.1. Ld.Counsel submitted that Assessing Officer made a notional addition on account of alleged income arising on transfer of shares without consideration. He submitted that assessee is a part of Sh.O.P.Jindal group and Jindal Steel and Power Ltd is a flagship operating company of the group. Ld.Counsel submitted

that pursuant to internal family realignment of Sh.O.P Jindal group, assessee transferred 1,76,94,108 equity shares of Jindal steel and Power Ltd to Giebi Trading Pvt. Ltd as gift, without any consideration.

7.2. Ld.Counsel submitted that there is no bar or any prohibition in making such gift by assessee. He submitted that the shares were gifted by assessee pursuant to board resolution dated 18/03/14 and a special resolution passed by the members in extraordinary general meeting held on 28/03/14 and therefore it cannot be doubted. He further submitted that these general meetings and the board resolution has not been disputed by Ld.AO. Ld.Counsel submitted that admittedly there is no other document that has been executed for the gifting of shares by assessee to Giebe Trading Pvt. Ltd., except the board resolutions.

7.3. Ld.Counsel further submitted that assessee as per the Memorandum of Association, was authorised to make and receive gifts, vide Clause 29. Ld.Counsel vehemently argued that, due to internal family realignment, transfer of shares was made as a gift to Giebe Trading Pvt.Ltd., which is exempt from capital gains by virtue of provisions of section 47 (iii) of the Act. He submitted that the shares continue to be held by Giebe Trading Pvt.Ltd., and no amount has been received by assessee. He therefore submitted that there was no question of taxation of any amount in the hands of the assessee. Ld.Counsel submitted that provisions of section 56 (2) (viia) are also not applicable since assessee has not received any shares as gift and that the

recipient still holds the shares in its books of account and has not sold the said shares received as gift from assessee.

7.4. Ld.Counsel submitted that there is no prohibition under any law in assessee gifting shares held as investment, to another company. He submitted that natural love and affection is not a precondition for the purpose of making gift. He placed reliance upon provisions of section 5 of Gift Tax Act and section 122 of Transfer of Property Act, to support validity of transaction. He submitted that transaction was genuine and cannot be regarded as sham without any basis or evidence.

7.5. Ld.Counsel by placing reliance upon the decision of *Hon'ble Supreme Court* in the case of *CIT vs. Excel Industries Ltd reported in (2013) 38 Taxmann.com 100,* submitted that unless there is accrual of income, assessee cannot be taxed on a hypothetical or notional income. He submitted that income is said to have been accrued to assessee only when the liability to pay is accepted by the recipient of the benefit transferred by the transferor. Ld.Counsel submitted that in the present facts of the case shares were transferred in the form of gift to Giebe Trading Pvt. Ltd. and that assessee cannot be taxed on notional income, which is not deemed to have been received by assessee at all.

7.6. He placed reliance upon the decision of *Hon'ble Supreme Court* in the case of *PNB Finance Ltd vs CIT reported in (2008) 307 ITR 75 and Decision of AAR* in case of *Goodyear Tire & Rubber Co*

reported in *(2011) 11 Taxmann.com 43* to submit that section 45 must be read with Section 48 and if the computation provision cannot be given effect to for any reason, the charge under section 45 fails. By saying so he placed reliance upon the decision of *Hon'ble Supreme Court* in the case of *CIT vs B.C.Srinivasan Shetty reported in (1981) 128 ITR 294.* He also submitted that *Decision of AAR* has been upheld by *Hon'ble Delhi High Court* in the case of *DDIT vs. Goodyear Tire & Rubber Co* reported in *(2013) 30 Taxmann.com 400.*

According to Ld.Counsel, the present transaction under consideration, cannot be said to have generated any taxable income to assessee as shares transferred to Giebe Trading Pvt.Ltd was by way of gift. Since no consideration has been passed for the transfer, the transaction could not be taxed under section 45 of the Act read with Section 48 of the Act. It is submitted that section 45 of the Act has to be read with section 48 of the Act and nothing could be computed in terms of section 48 of the Act due to the absence of sale consideration. He placed reliance on the decision of *Hon'ble Supreme Court* in the case of *CIT vs. B. C. Srinivasa Setty (supra).*

Ld.Counsel has also placed reliance upon following decisions:

S. NO.	*Name of the Case*	*Citation*
1.	*DP World (P.) Ltd. vs. DCIT*	*[2012] 26 taxmann.com 163 (Mumbai -Trib)*
2.	*Redington (India) Ltd. vs. JCIT*	*[2014] 49 taxmann.com 146 (Chennai-Trib.)*
3.	*Dana Corporation, In re*	*[2010] 186 Taxman 187 (AAR)*
4.	*Amiantit International Holding Ltd., In re.*	*[2010] 322 ITR 678 (AAR- New Delhi)*
5.	*Deere & Co., In re*	*[2011] 337 ITR 277 (AAR)*
6.	*CIT vs. Shoorji vallabhdas & Co.*	*[1962] 46 ITR 144 (SC)*
7.	*CIT vs. Excel Industries Ltd.*	*[2013] 358 ITR 295 (SC)*
8.	*Ram Charan Das vs. Girjanandini Devi and Ors.*	*AIR 1966 SC 323*
9.	*CIT vs. Kay Arr Enterprises*	*[2008] 299 ITR 348 (Madras)*
10.	*CIT vs. R. Jayanthi (HUF)*	*SLP (C) No. 9079/2008*
11.	*CGT vs. K.N. Madhusudhan.*	*GTA No. 2/2008 (KAR)*
12.	*CIT vs. B.C. Srinivasa Setty*	*[1981] 128 ITR 294 (SC)*
13.	*Goodyear Tire & Rubber Co., In re.*	*[2011] 334 ITR 69 (AAR-New Delhi)*
14.	*DIT vs. Goodyear Tire & Rubber Co.*	*[2014] 360 ITR 159 (DELHI)*

7.7. On contrary Ld. CIT DR submitted that transaction has not been proved by assessee to be genuine, by way of any written contract/agreement. She submitted that merely by passing board resolutions, assessee transferred large number of shares of Jindal Steel and Power Ltd to Giebe Trading Pvt.Ltd., through De-mat account. She submitted that value of shares as on the date of gift was huge, and commercial expediency for such transfer has not been explained/established by assessee at all.

7.8. She submitted that assessee transferred alleged shares as gift in the garb of family realignment. However there has been no evidence that has been placed on record by assessee to prove the need of family realignment either by way of a family settlement or in any other manner as per directions of any Court etc. Even for the sake of establishing the gift pursuant to family realignment, assessee has not produced any documents in terms of any other transfer of assets of like nature by other family members. She placed reliance on observations of Ld.CIT(A) that family of Late O.P Jindal includes his 4 sons, being Sh.Naveen Jindal, Sh.Prithviraj Jindal, Sh.Ratan Jindal and Sh.Sajan Jindal. She submitted that assessee has not established in what way Giebe Trading Pvt.Ltd. is a part of OP Jindal group. By placing reliance upon the audited accounts placed at page 81-101 of paper book, she submitted that nowhere there is mention of Giebe Trading Pvt.Ltd., in the list of associate company, or in the list of other companies, or where assessee is having common control the details of which are placed at page 97-100 of paper book. The contention of revenue is that, transfer of alleged shares would definitely lead to some advantage to assessee and therefore cannot fall within the ambit of 'gift'.

7.9. She placed reliance upon observations of Ld.AO and submitted that admittedly as on date of alleged gift, these shares were carrying fair market value of Rs.280.70/- per share as per NSE statement filed by assessee as per Sec.50D of the Act. She submitted that alleged transfer of shares (held as investment by assessee), to another company without any consideration has

lead to 'Nil' investment in Jindal Steel & Power Ltd., and has given rise to loss of Rs.17,29,64,655/-, which has been adjusted out of reserves of assessee.

7.10. On behalf of revenue Ld.CIT DR raised serious question regarding the genuineness of the transaction. She adverted that the purpose of the transaction is also questioned. She submitted that by merely resolution passed by the Board of Directors of the assessee resolving assessee to voluntarily gift shares held by it in another Public Limited Company was deliberate act to couch the transaction for eliminating tax implications. She submitted that genuineness of gift set up by assessee has been seriously disputed by revenue wherein assessee is supporting alleged transfer on the basis of a board resolution. She submitted the nature of alleged transfer to be sham.

8. We have perused the submissions advanced by both the sides in the light of the arguments and the judicial precedents relied upon by both the sides.

8.1. The scheme of capital gains, as set out in Section 45 to 55 of the Act, excludes certain categories of transaction from its ambit. These are, inter alia, distribution of capital assets on the partition of a Hindu family or on the dissolution of a firm; transfer of a capital asset by a company to its subsidiary or under a scheme of amalgamation; transfer of a capital assets under a gift or a will or an irrevocable trust. The provisions with which we are concerned in sub-s (iii) of Sec.47 are extracted hereunder :

"***47***. *Nothing contained in section 45 shall apply to the following transfers -...*

*(**iii**) any transfer of a capital asset under a gift or will or an irrevocable trust."*

Section 48 lays down mode of computation of capital gains and Section 49 refers to how cost is to be ascertained in cases of certain modes of acquisition.

In the present facts of the case upon going through various observations and documents placed in the paper book it is surprising to note that huge volume of shares in a public limited company is transferred by assessee to another company without any consideration, without any proper documentation being executed as per law and giving it a nomenclature of "gift".

8.2. Amongst these decisions Ld.Counsel has drawn specific reference to the following decisions:

- In the case of *DP World vs. DCIT (supra)* there was a gift deed that was executed in respect of assets that was received by assessee therein, from its sister concern, whereas in the case of present assessee there is no gift deed that has been executed by parties assessee failed to establish its relations with Gibie Trading Pvt.Ltd. Merely by executing board resolution, the alleged transfer has been effectuated.
- In the case of *Redington India Ltd vs. JCIT (supra)* it was a voluntary transfer of shares without consideration to the stepdown subsidiary and the issue therein was whether the

transfer of shares as a gift could be made by a company to another company. It is also observed on perusal of the said decision that DRP therein reconfirmed regarding the transfer of shares as voluntary and without any consideration which is absent in the facts of the present case. Here the Ld. AO himself has disputed the transaction to be a gift, and has instead computed consideration as fair market value of shares as on date of alleged transfer. Also it is not known whether Giebe Trading Pvt. Ltd. is a subsidiary or a group concern. Nothing is brought on record to establish if any gift deed was executed.

- In case of *Redington India Ltd vs. DCIT (supra),* issue under consideration before coordinate bench of this Tribunal was of a "gift" by assessee therein of shares of its wholly-owned subsidiary to another group company with an objective of raising funds for expansion of business as a part of corporate restructuring. It was observed by coordinate bench of this tribunal that the transfer of shareholding in wholly-owned subsidiary to another group company without any consideration was with the intention that post transfer, the transferee company would also be an wholly owned subsidiary. The issue raised by assessing officer therein was that such transfer could not be termed as gift for lack of natural love and affection and therefore would not be covered by exclusion under section 47 (iii) of the act. On perusal of the decision it is observed that the genuinity of the transfer of shares without consideration was not

questioned by the authorities below and therefore this Tribunal decided that gift for the purposes of Gift Tax Act, 1958 qualifies a property in money or monies worth to be transferred to a person which includes "company" as well. It was observed therein that in Gift Tax Act, 1958, there's no attributes like love and affection.

In the facts of the present case the issue is in respect of genuinity of transaction itself has been challenged by authorities below in the absence of gift deed. Even that there is no proof of any family settlement being arrived when the transferee is a party.

- In case of *Hon'ble Madras High Court* in *CIT vs KAY AAR Enterprises (supra)* had approved the decision of coordinate Bench of Chennai Tribunal in *KAY AAR Enterprises vs. JCIT (supra),* wherein Hon'ble Court had held that rearrangement of shareholding in the company amongst the family members under the family arrangement is not liable to capital gains tax. The factual background in that case was pursuant to a family arrangement, family members had transferred shares owned by them into companies to the family members of GE and in lieu thereof GE transferred his entire shareholding in one company to assessee therein and his family.

  In the facts of the present case neither there is any family arrangement/ agreement that has been brought to the notice of authorities below nor has the assessee declared

what has been received by him in lieu of alleged transfer of shares.

- In the SLP decided by *Hon'ble Supreme Court* filed by the revenue against the decision of *Hon'ble Madras High Court* in the case of *CIT vs R.Jayanti (HUF) (supra) it was* held that transfer of shares by way of family arrangement would not attract capital gains tax as the arrangement was to avoid possible litigation amongst family members and was made voluntarily and was not induced by fraud or coercion.

  In the decision of *Hon'ble Karnataka High Court* in the case *of CGT versus K. N. Madhusudan (supra)*, it was held that word 'transfer" in section 45 does not include partition or family settlement as defined in the Act and the facts recorded in the family settlement are akin to a partition and hence the transaction cannot be taxed. Hon'ble Court observed that family members under the scheme of arrangement have an anterior title to the property which is a subject matter of partition or a family arrangement.

  Whereas on facts of present case, assessee has failed to establish its relation with Giebe Trading Pvt.Ltd., as well as has admittedly not executed any documents/gift deed/family settlement, in order to establish the genuineness of the transfer. Merely by stating that the transfer was effectuated in lieu of a family realignment is not acceptable without supportive documents in the eyes of law.

- *Hon'ble Delhi High Court* in the case of *CIT vs Goodyear Tire and Rubber Company (supra)* has dealt with a case where revenue contended treaty shopping as according to revenue transfer was designed to evade tax.

  The facts of this case are that assessee therein was an American company was a promoter holding 74% shares of Indian company. Assessee also had a wholly owned subsidiary company in Singapore. In order to expand the role of Singapore-based company for the benefit of group entities within Asia Pacific region share contribution deed was executed to contribute voluntarily the 74% shares it held to the Singapore-based company. It was also contended that the shares of Indian company held by American company was capital asset. On this factual background *Hon'ble Authority of Advance Ruling* decided that no consideration would accrue or arise to the applicant by transfer of shares and it cannot be presumed that by transfer of shares assessee would have derived any profit or gain.

  In the facts of the present case the shares held by assessee is by way of investments in a public limited company which has been transferred to a 3rd company without establishing the commercial need to do so. There has been no agreement that has been executed for transfer of shares voluntarily and assessee has failed to establish the genuineness of the transaction.

- In the case of *Dana Corporation (supra),* the facts before the Authority of Advance Ruling was that Dana Corporation had undergone bankruptcy proceedings initiated under the Bankruptcy Code of US and in the course of proceedings Dana Corporation submitted a plan for reorganisation before the Court which was confirmed by the Court. *Hon'ble Authority* observed that the transfer of shares was pursuant to the plan of reorganisation that was approved by the Bankruptcy Code of US and therefore it was held that no consideration can at all be attributed to the transfer of shares. The transfer agreement specifically stated that the transfer of shares was without any consideration.

  In the facts of the present case there is no such urgency that has been brought to the notice by assessee either of the authorities below or before us in order to accept the transaction to be genuine without there being any consideration.

- While dealing with the decision in the case of *PNB finance Ltd vs CIT (supra)* by *Hon'ble Supreme Court,* the question considered was whether transfer of banking undertaking on nationalisation the amount received as compensation gave rise to taxable capital gains under section 45 of the Act or not. Hon'ble Supreme Court observed that PNB bank was transferred as a going concern, which consists of not only tangible items but also intangible items like

Goodwill, manpower, tenancy rights and value of banking licence for which cost is not determinable. It was around this background that *Hon'ble Court* by placing reliance upon the decision of *Hon'ble Supreme Court* in the case of *CIT vs. B. C. Srinivasan Setty (supra),* held that earmarking item wise cost was not possible and therefore even though section 45 was applicable to the facts of the case, the computation provision could not be applied.

The above ratio is not applicable to the facts of the present case since here only the shares held by assessee as an investment has been transferred to Giebe Trading Pvt.Ltd., cost of which is determined double as on the date of transfer because the shares that were transferred worth of listed company and NSE.

8.3. Further, other decisions relied on by Ld.Counsel are factually distinguishable and not applicable to the facts of present case. Thus entire list of decisions relied upon by Ld. counsel cannot rescue assessee from tax implication as those are factually different from that of the present as has been discussed above.

8.4. Under section 82 of Companies Act 1956, as it was applicable for the relevant assessment year, shares in a company is a moveable property, transferrable in the manner provided by its Articles of Association. Assessee has not shown/established the manner in which alleged transfer that has been effectuated,

was authorized by its Articles. It is difficult to imagine Articles of Association of a company providing for gifting of assets in the company to another company by way of shares in a public limited company, unless it be one which has been set up for some purpose. Ld.A.O. had rightly raised question regarding the reality and genuineness of transaction, in addition to its validity. In fact when such transactions are entered into, involving assets substantially worth, it behoves the assessee before Ld. AO to establish to the hilt, the factum, genuineness and validity of such transaction, the right to enter into such transaction and bonafides of such transaction, especially when, revenue challenges genuineness of such transaction itself. It has been vehemently contested by authorities below as well as Ld. CIT DR that transaction has been effectuated for avoiding payment of tax and to get out of the ambit of section 56 (2) (viia) of the Act. And it is apparent from record that assessee has not demonstrated by way of documentary evidence or in any of the manner to prove the genuineness and validity of transaction.

8.5. Ld.Counsel has been harping that the shares held by assessee in a Public Limited Company was transferred in lieu of a family realignment, but failed to establish the relation of the alleged transferee company with that of assessee or any of the group/subsidiary companies. Further there is no agreement/document that has been executed between group companies forming part of family realignment. To postulate that a company can give away its assets free to another even orally, can only be aiding dubious attempts at avoidance of tax payable

under the Act unless it is supported by documentary evidence. In our considered opinion Assessing Officer is in a better position to make proper enquiry in to the question of reality, genuineness and validity of alleged transaction, entered into by assessee.

8.6. Assessee is thus directed to provide all necessary and relevant information/details to assist Ld. A.O., as called for, to his satisfaction, in determining correct nature of alleged transaction as per law. It is also directed that in the event assessee fails to provide any document as called for, in order to establish the genuineness and validity of alleged transaction, as has been submitted to be for a family realignment, Ld.A.O. may compute income in the hands of assessee as per law. On the contrary if assessee is able to prove to the satisfaction of Ld.AO regarding genuineness and validity of the transaction, no addition shall be called for.

8.7. With the above directions we set aside the issue raised by assessee back to Ld. AO. who shall decide the issue as per facts and law, after giving due opportunity of being heard to the assessee.

8.8. As we have already disposed of the appeal, the stay application filed in the present case becomes infructuous.

9. In the result appeal filed by assessee stands allowed for statistical purposes.

Order pronounced in the Open Court on 15.05.2018.

Sd/-	Sd/-
(R.K.PANDA)	**(BEENA A PILLAI)**
Accountant Member	**Judicial Member**

Dated: 15.05. 2018.

*mv

Copy of the Order forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR
6. Guard File

By Order

Asst. Registrar
ITAT, Delhi Benches, New Delhi