IN THE INCOME TAX APPELLATE TRIBUNAL,
AHMEDABAD D BENCH, AHMEDABAD
[Coram: Pramod Kumar AM and S S Godara JM]

ITA No. 565/Ahd/17
Assessment year: 2012-13

Vodafone India Services Pvt Ltd **…………….........Appellant**
(formerly known as 3 Global Services Pvt Ltd)
Vodaphone House, Corporate Road, Prahlad Nagar, Off S G Highway
Ahmedabad 380 051 [PAN: AAACZ1849D]

Vs

Deputy Commissioner of Income Tax
Circle 4(1)(2), Ahmedabad **……………….......Respondent**

Appearances by

S N Soparkar, Senior Advocate
alongwith **Fereshte D Sethna, Mrunal Parikh, Adhiraj Malhotra, Bandish S Soparkar and Parin Shah** *for the appellant*

Mahesh Shah¸ Commissioner (DR)
alongwith **Vasundhara Upmanyu, V K Singh, Peeyush Sonakar, Mudit Nagapal, Santosh Karnani and Akta Jain,** *for the respondent*

Dates of hearing of the appeal	:	September 14,15,19,20,21 and 22, 2017 October 9,10, 13, 24 and 25 2017
Date on which filing, of written Submissions, was completed	:	November 18, 2017
Date of pronouncing this order	:	January 23, 2018

O R D E R

Per Pramod Kumar, AM:

1. This appeal calls into question correctness of the order dated 17th January 2017 passed by the Deputy Commissioner of Income Tax, Circle 4(1)(2), Ahmedabad in the matter of assessment under section 143(3) r.w.s. 144C of the Income Tax Act, 1961 for the assessment year 2012-13.

2. While this appeal raises several grievances against the said order, main grievance of the assessee is against the arm's length price adjustment of Rs 1,588.85 crores made by the Assessing Officer- which covers almost 99% of the disputed tax demand in this case, and that is the grievance we will take up first. Grievances raised by the appellant, with respect to this arm's length price adjustment, are as follows:

2. That in the facts and circumstances of the case and in law, the AO, Transfer Pricing Officer ("TPO") and Dispute Resolution Panel ("DRP") [collectively hereinafter referred to as "Lower Authorities"] erred in assuming jurisdiction under Chapter X of the Act in the absence of an international transaction, rendering the exercise of jurisdiction by Lower Authorities over a domestic transaction as invalid and bad in law.

3. That in the facts and circumstances of the case and in law, the Lower Authorities erred in carrying out an adjustment of Rs.1588,85,55,303/- to the income of the Assessee vide order dated 17.01.2017 ("Assessment Order") by treating the termination of Option rights under the IDFC Agreement as a deemed international transaction under section 92B(2) of the Act, between the Assessee, VIHBV and the IDFC Investors.

4. That the Lower Authorities in holding that there is an international transaction of extinguishment/relinquishment of Options committed an act of judicial indiscipline, bordering on contempt, in ignoring the binding decision of the Hon'ble Supreme Court in VIHBV vs. UOI - 341 ITR 1 and the decision of the Hon'ble Bombay High Court in Vodafone India Services (P.) Ltd vs. CIT - 385 ITR 169 for AY 2008-09, which while dealing with these call options categorically held that Options are not capital assets, and therefore, the termination of such options does not give rise to any taxable income.

5. That the Lower Authorities failed to appreciate that on the termination of Options between two independent parties, viz., Assessee and IDFC Investors, absent any purported prior agreement in relation to such transaction between the AE (VIHBV) and the independent party (IDFC), the provisions of Chapter X were not attracted in the present case.

6. That the Lower Authorities erred in holding that there is a deemed international transaction between the Assessee, VIHBV and IDFC Investors without confronting the Assessee with or even affording/allowing an opportunity of being heard, since the case made out in the show-cause notice issued by the TPO was completely different from matters finally held in the TP Order.

7. That the TPO erred in first alleging that IDFC Investors and VIHBV are independent parties and on the other hand alleging that IDFC Investors acted in concert with VIHBV to facilitate VIHBV in acquiring further equity interests in VIL.

8. That the TPO failed to appreciate that even after termination of Options (alleged international transaction), shares in SMMS were ultimately acquired by TII, which is an Indian entity and therefore, the provisions of Section 92B (2) were not attracted in the present case.

9. That the TPO, both in the Show Cause Notice, and during the course of the transfer pricing proceedings, proposed an addition only in respect of 2.52% options which were allegedly exercised/extinguished/relinquished in favor of an associated enterprise viz. VIHBV whereas in the final order the TPO has proposed an addition in respect of 3.15% options without appreciating that even if the options are assumed to have been relinquished by the Assessee, 0.63% of such options were held by Analjit Singh and his group of companies which are completely independent parties.

10. The alleged international transaction pertains to extinguishment/ relinquishment of only 2.52% (not 3.15%) options in favor of an AE, and the ALP must be restricted to only 2.52% and not the entire 3.15%.

11. The Lower Authorities erred in benchmarking the alleged international transaction without informing or issuing a show cause notice to the Assessee as to the method and/or comparable on the basis of which benchmarking was to be done.

12. Without prejudice to the aforesaid, the Lower Authorities erred in extrapolating the amount paid by the Assessee to IDFC Investors for assignment of cashless option in AY 2008-09 (FY 2007-08, pertaining to shares in Vodafone India Ltd.) to the alleged international transaction executed in AY 2012-13 (FY 2011-12) in complete violation of Rule 10B (4) of the Income Tax Rules 1962, under which only present year data could be used for benchmarking the alleged international transaction of extinguishment/relinquishment of options; in any event, data for AY 2008-09 could not be used for benchmarking the alleged international transaction, since it was more than 3 years old.

13. Without prejudice, the Lower Authorities erred in not appreciating that alleged comparable transaction used to benchmark international transaction of assignment of call options was incomparable.

14. That the orders of the Lower Authorities are based on incorrect facts, conjectures and surmises and, therefore perverse and bad in law.

3. As all these grounds of appeal pertain to the same arm's length price adjustment of Rs 1588,85,55,303, in respect of the same transactions, we will take up all these grounds of appeal together.

4. The assessee company, incorporated in India in March 1999 as "3 Global Services Pvt Ltd", is directly and fully owned by a Mauritian company, an intermediate subsidiary, by the name of Hutchinson Teleservices (India) Holdings Limited [**Hutch- M**, in short] which is now known as Vodafone Tele-Services (India) Holdings Limited [**Vodafone M,** in short], which, in turn, is a wholly owned subsidiary of CGP Investments (Holdings) Limited [**CGP-Cayman**, in short], a company incorporated in Cayman Islands CGP- Cayman. **CGP-Cayman**, as a result of acquisition of its ownership by Vodafone International Holdings BV, a Dutch company [**VIH BV**, in short] is a fully owned subsidiary of **VIH-BV**, which itself is a fully owned subsidiary of the global telecom giant Vodafone Group plc, United Kingdom

[**Vodafone plc** in short]. The Vodafone Group carries on telecommunication business in India through its Indian operating company, i.e. Vodafone India Limited **[Vodafone-India, in short],** and all the shareholdings of this telecom giant, through a number of subsidiaries and associated entities, as also a maze of call options and associated financial arrangements, is controlled by the **CGP-Cayman.** One such shareholder in Vodafone India is Omega Telecom Holdings Pvt Ltd (**Omega**, in short) which is a direct subsidiary of Vodafone M, and it is Omega's shareholding in the Vodafone India which is core object, and underlying asset dealing with certain ferамework agreements, constituting epicentre of dispute before us. There are many key players in the huge network of companies involved in the group structure, and, as we go along, we will take notice of some of these entities. Of course, given the limited information furnished to us by the parties and the limited purpose of adjudication before us, it is not really possible, nor is that necessary anyway for our adjudication, to deal with all these entities or with the fine points about the structures and *inter se* relationships of these entities**.** All these companies, along with their associate entities will henceforth be collectively be referred to as **Vodafone Group**.

5. While **Vodafone- India** is a telecommunication giant with largest market share in cellular communications business in India and quite unlike what present name of the assessee company may subliminally suggest to a layman, the assessee before us is a small unlisted private company with an authorised capital of Rs 3 crores, its entire paid up capital, at the relevant point of time, was Rs 2.32 crores, and its annual turnover was Rs 288.81 crores, out of which only Rs 5.71 crore was from independent enterprises, and the remaining over Rs 283 crores of turnover was generated from associated enterprises, on account of shared services. The assessee company has, as is put in the balance sheet, "non-current investments" aggregating to Rs 1606.65 crore, certainly the most significant asset reflected in its balance sheet. The importance of the assessee company is thus not in its independent business operations but perhaps in the strategic role it played in structuring the financial transactions for the Vodafone Group, a description typically answered by the shell companies which are used as a conduit in the process of financial manoeuvrings.

6. Coming back to **CGP Cayman** for a while, it was incorporated in Cayman Islands in 1998, with its sole shareholder as Hutchison Telecommunication Ltd Hong Kong (**Hutch HK**, in short). The transfer of shareholding in CGP Cayman, by **Hutch HK** to Vodafone International Holdings BV (**VIH-BV,** in short) did not miss the attention of Indian revenue authorities which attempted to bring it to tax as an indirect transfer (i.e. transfer of underlying assets in a different jurisdiction, through transfer of an intermediate holding company in a different jurisdiction) of business asset in India. This action of the revenue authorities was challenged before Hon'ble Bombay High Court which decided the matter in favour of the tax authorities, in the case of **Vodafone International Holdings BV Vs Union of India & Another [(2010) 329 ITR 126 (Bom)]** but this decision was later reversed by Hon'ble Supreme Court in the judgment reported as **Vodafone International Holdings BV Vs Union of India [(2012) 341 ITR 1 (SC)].** That, however, was not the end of the matter. Hon'ble Supreme Court's verdict, favourable to the assessee, was followed up by a retrospective amendment and fresh tax demands based on the retrospective amendment in law. As taxability of capital gains by this indirect transfer came up for consideration before Hon'ble Courts above, certain aspects of peculiar manner of control exercised by the Vodafone Group over shareholdings in Vodafone India also came to the limelight. One of the important tool exercised in exercising control over shareholdings in Vodafone India was the

mechanism of call and put options, under Framework Agreements, and, once it came to the light, tax implications of various events associated with these call and put options also came up under scrutiny by the tax officials. A case was made out, unsuccessfully though, for taxation at the point of time, as a result of transfer of CGP Cayman ownership to VIH BV, when the call and put options were renegotiated and fresh framework agreements were drawn up, and what is before us now is also the tax implications of termination of a call and put option.

7. The event triggering the impugned ALP adjustment is termination, vide termination deed dated 24th November 2011, of the agreement dated 6th June 2007 (**Framework Agreement 2007 or FA 2007**, in short), and payment of Rs 21.25 crores by the assessee as termination fees. The termination agreement, a copy of which is placed before us at pages 1291-1307 of the Paperbook Volume IV, lists out the following, at pages 1292 and1293, as parties thereto:

> **1) India Development Fund (***acting through IDFC Private Equity Company Limited)*
> **2) Infrastructure development Finance Company Limited**
> **3) IDFC Private Equity Fund II (***acting through IDFC Private Equity Company Limited)*
> **4) SMMS Investments Private Limited**
> **5) Hutchinson Telecommunications (India) Limited**, *Mauritius*
> **6) Vodafone India Services Private Limited** *(formerly known as 3 Global Services Pvt Ltd, i.e. the assessee before us)*
> **7) Omega Telecom Holdings Private Limited**
> **8) Vodafone International Holdings B.V.** *The Netherlands*

8. While we will deal with this termination deed, and all other related aspects a little later, a few facts may be taken not of at this stage. This termination deed, inter alia, noted that all the parties to the termination deed "are parties and subject to the terms of a framework agreement dated June 6, 2007 (**Framework Agreement**) and SMMS, VTIL, Omega and Vodafone are all parties to a shareholder agreement dated June 6, 2017 (**Shareholder agreement**)", and that "….**in consideration of the mutual release of their duties and obligations under the Framework Agreement (as well as other Framework documents, if any), the parties agree that that the Framework Agreement (as well as other Framework Agreement, if any) be terminated and the terms of Framework Agreement (as well as other Framework documents, if any) shall cease to apply and be in force with effect from the termination date**". The termination deed further noted that the assessee "**shall, upon termination date**, and upon being provided evidence to its satisfaction, that the IDF has ceased to hold 51% (fifty one percent) or more of the paid up capital of SMMS**, pay to IDF an aggregate amount of Rs 212,500.00)…".** Quite clearly, the payment of Rs 21.25 crores was paid in consideration of the assessee giving up the rights under the Framework Agreement dated 6th June 2017. It is, therefore, only appropriate that we take a quick look, at this stage itself, at this agreement as well. A copy of this framework agreement (hereinafter referred to as the 'framework agreement 2007') is placed before us, at pages 1256-1290, of the paperbook volume IV filed by the assessee. The parties to this agreement are exactly the same as the parties to the aforesaid termination agreement.

9. Under the Framework Agreement, the assessee company, inter alia, had the right to buy entire equity capital of SMMS Investments Private Limited, which is said to have held 61.6% equity shares of Omega (which in turn, held 5.11% of equity capital in Vodafone India Limited) for Rs 2 crores (plus 17.5% interest compounded thereon annually or Rs 78 lakhs-whichever is higher) and in the event of the fair market value of these shares is in excess of Rs 1500 crores, an additional amount being equivalent to Rs 2 crores plus FMV/1500 crores. In effect, thus, the assessee had a right to buy 3.15% equity in Vodafone India for an amount not more than Rs 2.78 crores as long as fair market value of these shares was less than Rs 1500 crores, and even if the far market value of these shares exceeded Rs 1,500 crores, the assessee was to pay marginally more money for buying these shares worth Rs 1,500+ crores. By no stretch of logic, such an option cannot be said to be anything less than a highly profitable proposition for the assessee.

10. Ironically, however, in consideration of giving up, under termination deed dated 24th November 2011, these highly advantageous call options under the Framework Agreement 2007, the assessee entitles itself to a negative consideration of Rs 21.25 crores i.e. the amount the assessee has to pay, under the said framework agreement, to IDFC Investors at the time of termination of call options. There are many other compliances and conditions attached to the termination deed but, as on now, it is sufficient to take note of the fact that the assessee's giving up the call options, which are highly advantageous to the assessee, under this multilateral arrangements, the assessee paid Rs 21.25 crores. It is this transaction which has triggered the impugned arm's length price adjustment of Rs 1588. 85 crores. In effect, thus, short case of the revenue, underlying this ALP adjustment of Rs 1,588.85 crores, is that rather than paying Rs 21.25 crores on termination of call options, the assessee should have, in an arm's length situation, received Rs 1,610.15 crores (i.e. Rs 1,588.85 – (-) 21.25 crores) for termination of these call options.

11. On 29th November 2012, the assessee filed its income tax return disclosing a taxable income of Rs 19,27,93,617. When the determination of arm's length price of assessee's international transactions came up before the Transfer Pricing Officer, as a result of reference under section 92CA(1), it was noticed that, in one of the notes, i.e. note # 20.2(b), to the audited financial statement of the assessee, the assessee has stated as follows:

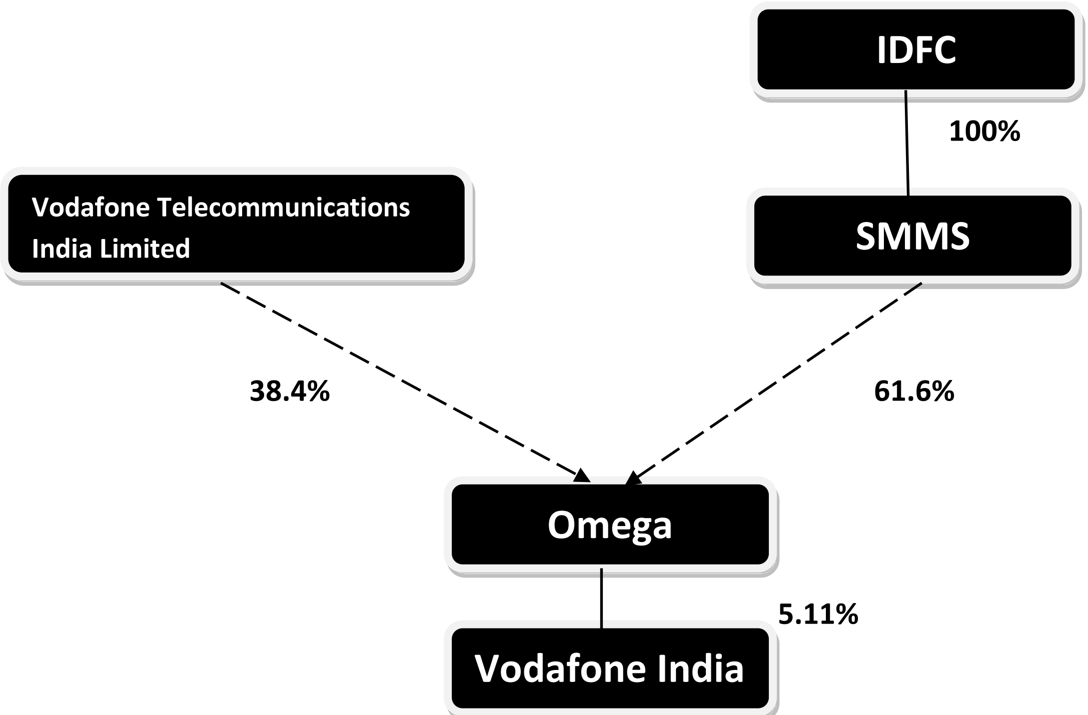
> "**Pursuant to the Framework Agreement dated 6th June 2007 between the assessee, SMMS Investments Private Limited (SMMS), Vodafone International Holdings BV (VIH-BV), Vodafone Telecommunications (India) Limited, Infrastructure Development Finance Co Ltd, IDFC Private Equity Company Limited, and Omega Telecom Holdings Pvt Ltd- the IDFC Agreement- has been terminated during the year pursuant to a termination agreement dated 24 November 2011. Upon termination of IDFC Framework Agreement, the put and call option held by the IDFC and the assessee, respectively, in relation to equity shares of SMMS have ceased to exist. The termination fees of Rs 212.50 million has been paid by the assessee and has been shown as an extra ordinary item in the profit and loss**"

12. Taking note of the above fact, the TPO requisitioned complete details in respect of this transaction and required the assessee to explain the same. It was, inter alia, explained by the assessee, vide submission dated 19th August 2015, as follows:

VISPL *(i.e. the assessee before us),* **vide agreement dated 6 June 2017 (IDFC Agreements), had an option to (call option) to purchase the entire share capital of SMMS. Similarly, the shareholder of SMMS (India Development Fund, Infrastructure Development Finance Company Limited, IDFC Private Equity Fund II- collectively referred to as 'Investors') had an option (Put Option) to require the VISPL to purchase the entire issued capital of SMMS.**

SMMS, indirectly- through 61.6 percent stake in Omega Telecom Holding Private Limited held 3.15 percent equity interests in HEL *(Vodafone India).* **During the financial year 2011-12, vide agreement dated 24 November 2011 ('Termination Agreement'), the parties to the IDFC Shareholders Agreement dated 24 November 2011, between IDFC,SMMS and TII, TII subscribed to 75 percent stake in SMMS. Further, through buy back of investors' share by SMMS, TII's stake increased to 100 percent. Thus, by the virtue of termination agreement and share subscription and shareholder agreement dated 24 November 2011, SMMS became 100 percent subsidiary of TII. Accordingly, the 3.15 percent indirect equity interest in HEL now came to be held by TIOI. VIH-BV, directly and indirectly, held 79.98 percent equity in TII. Thus by virtue of SMMS becoming subsidiary of TII, VIH BVs equity interest in VIL increased by 2.52 percent"**

13. The TPO took note of the above explanation, as also of the copies of certain agreements, connected with the above transaction, filed by the assessee. The TPO also noted the explanation of the assessee that the IDFC also held 3.15% stake in Vodafone India, as on 1st April 2011, whereas the IDFC, as on 31st March 2012, did not have any stake- apparently justifying the payment of Rs 21.25 crores to the IDFC. The diagram submitted by the assessee, which was duly noted and reproduced in the TPO's order, showing the IDFC holding 3.15% stake in Vodafone India, was as follows:



IDFC Indirect stake in Vodafone India = 5.11*61.6*100%= 3.15%

14. The TPO further noted, in additions to taking on record assessee's submissions about cashless options for IDFC Investor's 0.1234% direct equity in Vodafone India for a consideration of 62 crores, that **the investors, under the framework agreement, wanted to sell the entire share capital in SMMS Investments Pvt Ltd,** and thus exercise their put option. "**However**", as submitted by the assessee, "**the assessee was not able to honour the obligation, thus the investors decided to terminate the agreement**". The assessee further explained that "**since there was a delay from assessee's end to terminate IDFC Agreement, VISPL** *(i.e. the assessee before us)* **and Investors mutually agreed for a termination fees of Rs 21,25,00,000 in order to compensate the investors**" and that "**the IDFC Agreement was eventually terminated, vide termination agreement dated 24 November 2011 filed with your office** *(i.e. TPO's office)* **as Annexure 2 to submission dated 21 September 2015".**

15. It is interesting to note, going by the stand so taken by the assessee before the TPO, that it was on account of assessee's inability to buy the 3.15% shareholding in Vodafone India Limited for a pittance of Rs 2.78 crores, that the assessee paid Rs 21.25 crores a compensation to the investors.

16. As evident from the order of the TPO, the assessee further submitted as follows:

> **During the year under consideration, Vodafone International Holdings BV (VIH-BV) increased its direct and indirect interest in Hutchison Essar Limited (HEL) [subsequently name changed to Vodafone Essar Limited (VEL) and now Vodafone India Limited (VIL) by 2.52% as explained below:**
>
> **VISPL, vide agreement dated 6 June 2007 (hereinafter referred to as IDFC Agreement) had an option (call option) to purchase the entire share capital of SMMS Investments Private Limited. Similarly, the shareholders of SMMS (i.e. India Development Fund, Infrastructure Development Finance Co Ltd, IDFC Private Equity Fund II- collectively referred as Investors) had an option (put option) to require VISPL to purchase entire issued capital of SMMS.**
>
> **SMMS, indirectly, through its 61.6 percent stake in Omega Telecom Holding Private Limited, held 3.15 percent equity interest in HEL. During FY 2011-12, vide agreement dated 24 November 2011 (Termination Agreement), the parties to the IDFC Shareholders Agreement, mutually terminated the IDFC Agreement. Vide Share subscription and Shareholders Agreement dated 24 November 2011, between IDFC, SMMS and TII, TII subscribed to 75 percent stake in SMMS. Further, through buy back of investors share by SMMS, TII's stake in SMMS increased to 100 percent. Thus, by virtue of the Termination Agreement and Share subscription and Shareholders Agreement dated 24 November 2011, SMMS became 100 percent subsidiary of TII. Accordingly, the 3.15 percent indirect equity interest in HEL came to be held by TT. VIH-BV directly and indirectly held 79.98 percent equity interest in TII. Thus, by virtue of SMMS becoming subsidiary of TII, VIH-BV's equity interest in VIL increased to 2.52 percent.**

17. The TPO noted that by the mechanism of these call and put options the direct and indirect shareholding of Vodafone Group plc UK has gone up by 2.6%. It was in this backdrop, and having noted the facts with respect to the payment of Rs 21.25 crores and the related issues, that the TPO proceeded to examine "the issue of applicability of Chapter X of the Act related to the aforesaid transaction".

18. However, the assessee raised objections to the assumption of jurisdiction by the TPO, and to the transactions being treated as international transactions. The assessee also contended that "termination of option is not covered under the provisions of Chapter X as there is no capital asset and there is no income". The assessee relied upon the judgment of Hon'ble Bombay High Court in the case of the assessee, reported as Vodafone India Services Ltd Vs Additional CIT [(2014) 368 ITR 1 (Bom)], and the aforesaid decision being accepted by the Union Cabinet. A reference was also made to the definition of 'international transaction' under section 92B(1) and it was conducted that, as evident from the aforesaid definition, only such transactions are covered by the expression 'international transaction' as are (i) between the associated enterprises; and (ii) at least one such parties to the transaction must be a non-resident. It was then pointed out that in the present case both the parties to the transaction, i.e. the assessee and the investors under the framework agreement, are Indian entities. It was then submitted that, in the relevant financial year, three events tooks place, i.e. (i) termination of IDFC Agreement and payment of Rs 21.25 crores to the IDFC; (ii) subscription of 60,00,000 equity shares in SMMS Investments India Ltd by the TII under the Subscriptions and Shareholders Agreement; and (iii) buyback of shares from investors in SMMS by SMMS which resulted in SMMS becoming 100 percent subsidiary of TII. The assessee further submitted that the assessee was only a party to (i) above, and not (ii) and (iii), the assessee could not be said to have entered in an international transaction. It was also contended that the options were not exercised and were only terminated, and that termination of option could not be treated as exercise of options. It was also submitted that, in any event, pending exercise, the options are not assets, that, in the absence of statutory stipulation, the option rights cannot be treated as capital assets. Elaborate submissions were made to support the proposition that "options under the IDFC Agreement were contractual rights, and not property rights, and, therefore, assignment/ termination of such contractual rights does not attract capital gains tax under section 45 of the Act" and that "as a corollary, the machinery provisions contained in chapter X of the Act are not attracted in the present case". As regards the payment of Rs 21.25 crores as termination fees, it was stated that "this was ascertained mutually amongst the parties, as liable to be paid by the assessee to the investors" and that "no income arose in the hands of the assessee, by the virtue of such payment", and, therefore, the transfer pricing provisions do not apply. It was further stated that "any tax liability in relation to such payment was bound to be discharged by the recipient thereof and is not income exigible to tax in the hands of the assessee, or in any manner being brought in the ambit of Chapter X of the Act". A reference was then also made to the judgement of Hon'ble Delhi High Court, in the case of Maruti Suzuki India Ltd Vs CIT (381 ITR 117), in support of the proposition that transfer pricing provisions are intended to substitute ALP for the price charged in an international transaction, which is otherwise chargeable to tax, and not to create international transactions where none exist. As regards the TPO's requisition for complete details about the exercise of put options by the IDFC, the assessee stated as follows:

> **53. Regarding the query as to documents or letters received from investors of SMMS, for exercise of their put options and the reasons why the assessee could not honour its obligations, it is submitted that no letters/ documents were issued by investors of SMMS for exercise of put options in respect of equity shares of SMMS. Infact, no such options in respect of equity shares of SMMS were ever exercised. The investors had merely indicated intent to exercise, but not exercised, the put options. VISPL, being a foreign owned and controlled company, acquisition of equity shares of SMMS (a holding company which held indirect interests in Vodafone India Limited) would have constituted acquisition of shares of a holding company, and also counted towards foreign investment in Vodafone India Limited. Since such acquisition by VISPL was not available under the automatic route, i.e. any acquisition by VISPL would be subject to approval by FIPB, rendering the acquisition of SMMS shares likely to be delayed, it was not considered prudent for VISPL to remain bound to contractual rights and/or obligations vis-à-vis the options. Therefore, the VISPL and IDFC mutually decided to terminate the Framework Agreement, by payment of termination fee to IDFC Investors, which fees was commercially agreed between non- associated enterprises (VISPL and IFDC), and, therefore, deemed to be arm's length consideration.**

19. None of these submissions, however, impressed the TPO.

20. The TPO first dealt with certain technical objections, with respect to jurisdiction of the TPO, raised by the assessee, but, as that aspect of the matter is not in appeal before us, we need not refer to the same in great detail. Suffice to say that these technical objections were rejected and the matter rests there. The TPO then begun by observing that "**during the year the assessee company has terminated the IDFC Framework Agreement of 2007**", and that "**upon termination of IDFC Framework Agreement, the put and call option held by the assessee, respectively, in relation to the equity shares of SMMS have ceased to exist**". It was then noted that "**the termination fee of Rs 212.50 million has been paid by the assessee and has been shown as extraordinary item in the statement of profit and loss account**". The TPO started the analysis of the agreements and documents relating to termination fee by observing that "**In order to understand the termination agreement dated 24th November 2011, the various agreements/documents relevant to this transaction and the rights/ benefits to the assessee company as per these agreements/documents are discussed hereafter**". The TPO analysed these documents and agreements in great detail, noted that, over a period from of 2008-2015, the direct and indirect shareholding of Vodafone Group plc in Vodafone India Limited has increased from 51.58% to 100% , that the understanding "between VIH BV and the assessee is clearly a transaction as per section 92F(v) of the Act" which includes an arrangement, understanding or action in concert- (a) whether or not such arrangement, understanding or action is formal or in writing; or (b) whether or such arrangement, understanding or action is intended to be enforceable by legal proceeding, and that "the transaction is completely based on a prior agreement (IDFC FWA of 2007) whereby VIH-BV guaranteed to IDFC Investors and other parties due and punctual performance by GSPL, or any assignee of the GSPL, of all the obligations of the GSPL under this agreement". The TPO further noted as follows:

> **As per the FWA of 2007, the assessee company had the valuable call options which entitled it to subscribe the shares of HEL** *(Vodafone India)* **indirectly at a fraction of their fair market value. The holding company of the assessee is not only a party to the arrangement but would also provide for financing, share the costs as well as would ask the other Vodafone affiliate to subscribe to the preference shares of the SMMS. The FWA of 2007 also provided for Shareholders Agreement to be entered into between the shareholders of the SMMS. The FWA of 2007 constitutes a prior arrangement on the basis of which termination agreement has been entered into by the assessee and SMMS/IDFC Investors.**

21. The TPO then set out definition of international transaction under section 92B(2) and discussed in detail as to how the transaction of terminating the options under the termination deed is an international transaction. He then addressed himself to the impact of this transaction, in terms of deliberate loss being caused to the assessee on account of termination of call options under the framework agreement, as follows:

> **As per the FWA of 2007 and other agreements, the assessee company has incurred substantial costs over the years in relation to the purchase and maintenance of Call Options. The following costs have clearly been incurred by the assessee:**
>
> - **Rs. 62.23 Cr paid to acquire Cashless Option rights from IDFC Investors**
> - **Payment of "Termination Fee" of Rs. 21.25 Cr to IDFC Investors**
>
> **The assesse company has paid Rs, 83.48 Cr in connection with the call options. The value of the option rights with the assesse is Rs. 1,271 Cr considering the rate they paid to IDFC Investors to acquire 0.1234% of Cashless Option, So by asking the assesse company to terminate the agreement without any compensation, the transaction has resulted in loss of income to the assesse in the form of extinguishment/ relinquishment of call options. This has been done by the assesse company with an understanding, arrangement and acting in concert with its AE VIH BV and or affiliates of the Vodafone Group (all affiliates are part of the FWA 2007). Thereby deliberately causing loss of income to the assesse.**

22. As for the contention that the payment of termination fees was a transaction between the assessee and another resident entity, the TPO rejected the same and observed as follows:

> **Although on the face of it, it appears to be a transaction between the assesse and investors of SMMS (both being domestic/ resident companies), however, after analyzing the history of the case as well as various agreements entered into by the parties involved in these agreements, it is clear that the terms of the**

transaction in essence are being decided by the AEs of the assesse company, ie VIH BV and/or its affiliates, wherein the assesse company has lost substantial income which would have accrued / arisen to the assesse company.

Thus the contention of the assessee that the termination of options is not an international transaction is rejected and the same is held to be an international transaction.

23. The TPO then elaborately discussed the matter from the perspective of capital loss, on account of the value of his call options being terminated without any compensation and by rather charging a termination fees, but as finally no addition was made to the returned income by making an adjustment on account of capital gains but rather, as it appears to us, as in the revenue field, it may not be really necessary to deal with that aspect of the matter in much detail at this stage. However, for the sake of completeness, the related observations are also set out below for a ready reference:

The assessee company was having the rights to buy the shares from IDFC Investors at the option price. The Framework agreement wherein the assessee company has the right to buy the call option was terminated and the shares of SMMS were bought by TII. Thus assessee company's rights are terminated without any compensation being paid. No third party would extinguish/ relinquish its valuable options without adequate consideration.

The termination of the Framework agreement has resulted in the rights being extinguishment/ relinquishment without any corresponding remuneration being paid to the assessee company. Therefore, it is a clear cut case of "extinguishment / relinquishment" of rights which is nothing but transfer as per the definition of transfer as per Section 2(47) of the Act. As per S.2(47) of Income Tax Act, 1961, unless the context otherwise requires, the term "transfer", in relation to a capital asset, includes-
(i) the sale, exchange or relinquishment of the asset; or

(ii) the extinguishment of any rights therein; or

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

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

(iva) the maturity or redemption of a zero coupon bond; or

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

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

Explanations:

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

2. For the removal of doubts, it is hereby clarified that "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India.

The assessee has contended that there has been no exercise of options by the assessee company and has also relied upon the judgements in its own case given by the Hon'ble Bombay High Court in ITA No. 82/2015 for AY 2008-09 wherein it held that pending exercise, options are not property rights and therefore not capital assets for the purposes of Section 2(14) of the Act.

The observation of the Hon'ble Bombay High Court in ITA No. 82/2015 for AY 2008-09 is distinguishable from the facts of the present case. There was no expressed "Termination" of option rights by the assessee in AY 2008-09. In the present case the assessee has entered into a "Termination Agreement" to terminate its rights in option. Termination is same as extinguishment and relinquishment and hence the same is covered by the provisions of section 2(47). The amended provisions of section 2(14) are as under:

"Explanation to Sec. 2(14) - 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"

The Explanation added to Section 2(14) clarifies and states that property includes and shall be deemed to have included any rights in or in relation to an Indian company, including rights of management or control or any other rights whatsoever. When this definition is applied to the facts of the present case, it is apparent that the Options relate to shares of an Indian Company ie SMMS. This in turn entitles the option holder to a 3.15% equity interest in VIL. Thus the right of the assessee to subscribe to the shares of SMMS is in the nature of a capital asset as defined in section 2(14) of the Act. During the year under consideration, the options held by the assessee company have been extinguished

by entering into a Termination Agreement. Therefore, the option rights held by the assessee company does not remain in existence after entering into the Termination Agreement. This is nothing but exercise of the options by the assessee as far as the rights of the assessee in Option Rights are concerned. In other words, the right of the assessee company stands extinguished / relinquished and the assessee company does not hold these rights after the Termination Agreement. Assessee in fact C NJ' has exercised these options to that extent.

The assessee has relied on the Hon'ble Bombay High Court judgement in its assessee's own case for the proposition that pending exercise, options are not property rights and therefore not capital assets for the purpose of section 2(14) of the Act. The judgement of the Hon'ble High Court is not applicable to the facts of the present case because in this year the option rights of the assessee stands terminated by extinguishment/ relinquishment. At the end of the Termination Agreement the assessee does not hold these Option Rights at all. Hence, the option rights of the assessee have been exercised in the form of extinguishment/ relinquishment.

The following words make the Options, a capital asset:

"any rights in or in relation to an Indian Company ………………….. or any other rights whatsoever".

The contention of the appellant relying upon the decision of the Hon'ble Supreme Court is that the option rights are in the nature of contractual rights and contractual rights do not constitute property. However, the retrospective amendment to section 2(14) specifically includes any rights in an Indian Company, or in relation to an Indian company. The observations of the hon'ble Supreme Court are distinguishable on the fact that there was no expressed "Termination" of option rights by the assessee in AY 2008-09. In the present case the assessee has entered into a "Termination Agreement" which resulted in termination of its rights in option. The options have been exercised and thus even going by the ratio of Hon'ble Supreme Court, the options are capital assets as per facts of the instant case.

After the Hon'ble Supreme Court's judgment the Hon'ble Bombay High Court had an occasion to examine whether Option Rights are property rights in view of the amended definition of the section 2(14) of the Act. After considering the judgement of the Hon'ble Supreme Court as well as the amended definition of Section 2(14) of the Act, a categorical finding has been given by the High Court that pending exercise options are not property rights and therefore not capital assets for the purposes of section 2(14) of the Act. However, in the present case, in view of the Termination Agreement entered into by the assessee the option rights held by the assessee stands terminated and the assessee is no more holding these rights. Therefore it is an exercise of these options in the form of extinguishment / relinquishment. Exercise of an option connotes an active action on the part of the assessee which can take numerous forms, example exercise

resulting in transfer, exercise resulting in extinguishment or exercise resulting in relinquishment.

24. The TPO thus completed his analysis about various aspects of the transaction, and he then proceeded to conclude as follows:

"10. Conclusion

In view of the above, it is concluded that the TPO has jurisdiction under section 92CA(2A) of the Act to determine the arm's length price of the international transaction of extinguishment/ relinquishment of option rights by the assessee.

Once all the contentions and objections of the assessee related to the jurisdiction of the TPO and other legal issues have been settled, I now proceed to compute the arm's length price of the international transaction.

11. Arm's Length Price

It is the obligation on the part of the assessee to provide the benchmarking for the international transaction along with its arm's length price. The assessee has not provided any benchmarking or arm's length price for the extinguishment / relinquishment of Option Rights.

At this stage, it is pertinent to refer to Cashless Option which was assigned by IDFC Investors to GSPL for a payment of Rs. 62.23 Crores in AY 2008-09. In this transaction, the right of the IDFC Investors to buy 0.1234% share of HEL was relinquished by IDFC (Refer Clause 2.3 of the Agreement dated 05.06.2007- Annexure 9). The termination of option in the current financial year is identical to relinquishment of cashless option by IDFC Investors in AY 2008-09 for which they charged Rs. 62.23 Cr for 0.1234% share in HEL. The valuation of option is used as an Internal CUP for valuation of termination of option by the assessee.

12. The computation of arm's length price for termination of call option is computed as under:

Percentage of Option assigned	***Value of Option (Rs.)***
0.1234%	***62,24,27,849***
3.15%	***(62,24,27,849*3.15)/0.1234 = 1588,85,55,303***

In view of the above, the arm's length price for extinguishment/ relinquishment of option rights is determined as Rs. 1588,85,55,303 and adjustment of the same is made to the international transaction of the assessee."

25. It was in this backdrop that the Assessing Officer proposed an addition of Rs 1588,85,55,303, in respect of termination of call options under the Framework Agreement 2007, aggrieved by which assessee raised an objection before the Dispute Resolution Panel but without any success. The DRP reiterated, in broad terms, the observations made by the TPO. The Assessing Officer, therefore, proceeded with the said ALP adjustment. The assessee is not satisfied and is in appeal before us.

26. When this appeal came up for hearing, which was spread over several sessions, learned Departmental Representative submitted a compilation of documents as additional evidences. It was submitted that these documents are relevant and material in helping us understand true nature of transaction and the issues in appeal before us. All these documents were stated to pertain to the options and framework agreement and related transactions, as also intra AE transactions between the AEs of the assessee, and crucial for determining the issues arising in appeal. Learned senior counsel for the assessee has taken a somewhat ritualistic objection to the admission of these additional evidences, and has submitted that the learned Departmental Representative is required to demonstrate and establish relevance of each document before the same is accepted. We are, however, not inclined to accept these hyper technical objections. The assessee had full opportunity to peruse these evidences and infact almost all the evidences relied upon, and actually referred to, are from the material on record and in full knowledge of the assessee. In a strict sense, therefore, these can hardly be termed as additional evidences, as these evidences are already on record. We are of the considered view that the material relied upon by the learned Departmental Representative is actually relevant for adjudication of this appeal, and we, therefore, admit the same in exercise of our powers under rule 29 of the Income Tax (Appellate Tribunal) Rules,1963.

27. Shri S N Soparkar, learned Senior Advocate appearing for the assessee, begins by submitting that the ALP adjustment in the impugned order has been made as in respect of the capital gains and the core issue, therefore, is whether or not the call option is a capital asset or not. Of course, as he does so, he adds that the transaction in question is not an international transaction at all and that there are many other equally important legal grounds on account of which the impugned transfer pricing adjustment is not sustainable in law at all. He submits that in case we come to the conclusion that call option is not a capital asset, the very foundation of impugned ALP adjustment ceases to be legally sustainable. He then submits that this issue is covered, in favour of the assessee, not only in assessee's own case for the assessment year 2008-09 by Hon'ble Bombay High Court's judgment in the case reported as **Vodafone India Services Ltd Vs CIT [(2016) 385 ITR 169 (Bom)]**, but by Hon'ble Supreme Court's judgment in the case of **Vodafone International Holdings BV** *(supra).* He submits that in both of these judgments, it has been categorically held that the call options cannot be treated as capital assets, and, as such, there cannot be any question of capital gains in respect of such call options. He laboriously takes us through these judgments to make his point. As for the observations made by the DRP to the effect that observations made by Hon'ble Bombay High Court in the aforesaid case "**are distinguishable on the facts of the present case**" as "there was no express termination of option rights by the assessee….. whereas…….. *(in the present case),* the assessee has entered into a termination agreement to terminate its options", learned counsel submits that nothing turns upon the express

termination of options since, termination or no termination, option rights are not capital assets, and once the option rights are not capital assets, the compensation on termination of option rights cannot be treated as capital gains at all which is the case of the assessee. As for the addition being made to the returned income in revenue field, learned counsel submits that, as a plain reading of the orders of the authorities below would show, the ALP adjustment is made only in the capital filed and it is nothing but a mistake apparent on record that the ALP adjustment has been made in the revenue field. Learned counsel further informs us that a rectification petition, under section 154 of the Income Tax Act, has been filed before the Assessing Officer seeking the ALP adjustment being made as capital gains and not as income of the assessee. This application, we are further informed, continues to remain pending with the Assessing Officer.

28. Learned counsel for the assessee then takes us through the portion of the TPO's order which makes out a case for the arm's length price adjustment as relatable to a capital asset. It is reiterated that the case of the revenue hinges on whether or not the call options are capital assets, and since the call options are admittedly not capital assets, in the light of the judgments of Hon'ble Courts above, there cannot be any income on extinguishment, even if that be so, of these call options. Learned counsel then invites our attention to the TPO's show cause notice dated 28th December 2015 which, according to him, wrongly states that "the options to the extent of 2.6% shareholding have been exercised during the year" but then no such exercise of options has taken place; the assessee has simply given up the options, and there is a vital distinction between exercise of options and giving up of options. It is thus contended that the very foundation of revenue's case is devoid of any legally sustainable merits. In any case, according to the learned counsel, once the legal position is settled, by an authority no less than Hon'ble Supreme Court, that call options in questions are not capital assets, the giving up of these options, termination of these options or, for that purpose, even extinguishment of these options cannot result in any taxable capital gains. It is then pointed out that transfer pricing provisions do not create a source of income; all that the transfer pricing provisions do is that when an international transaction leads to an income, the basis on which such an income is determined is the arm's length price of such a transaction. The transfer pricing provisions, according to the learned counsel, only result in determination of a taxable income on the basis of arm's length price. However, since there is no taxable income as a result of the termination of call options, the arm's length provisions do not come into play.

29. When learned counsel's attention is invited to the fact that the assessee has debited the profit and loss account by Rs 21.25 crores on account of compensation paid at the time of termination of option, and the profits and losses of the assessee are thus affected by termination of options, he clarifies that the assessee did not claim any deduction, in computation of taxable income, for the payment of termination fees. Therefore, according to the learned counsel and on the facts of this case, the payment of termination fees did not have any impact on taxable income of the assessee.

30. Learned counsel then submits that in the present case, there is no international transaction at all inasmuch as the transaction is between two domestic entities, i.e. the assessee and the IDFC. The assessee has paid the termination fees to a resident entity, i.e. IDFC, and, therefore, the payment of termination fees to IDFC is not covered by the definition of international transactions which cover only such transaction as between one or

more non-residents. Section 92B(1), as pointed out by the learned counsel, covers "a transaction between two or more transactions, either or both of which are non-residents", but then once the transaction is admittedly between two domestic enterprises, it cannot be covered by the definition of 'international transaction' as set out in Section 92B.

31. On this aspect also, learned counsel claims the matter to be covered matter in the sense, according to the learned counsel, Hon'ble Supreme Court has categorically held that the call option transactions between the assessee and the IDFC are independent transactions in their own right, and the VIH BV, as a parent company of the assessee, nothing more than a confirming party. Once Hon'ble Supreme Court has held these call options to be independent transactions between the assessee and the IDFC, it cannot be open to the revenue to contend that these are transactions between the associated enterprises just because the VIH-BV, ultimate parent company of the assessee and a non-resident entity, is a nominal and confirming party to the transaction.

32. Learned counsel submits that whether we take a macro view of the matter or micro view of the matter, there is no international transaction. He says this on the basis that in the event of our taking a macro view, it is a purely internal transaction shifting shareholding from one group entity to the other group entity and it does not lead to any income or advantage to any group entity. Whether the shares are held by one of the group entity or the other group entity, it does not make a difference to the shares held by the group as a whole or to the ultimate parent company. He thus submits that from the macro point of view there is no transaction at all. It is then submitted that in the event of taking a micro view, it is a transaction between two independent enterprises- namely the assessee and the IDFC. The profit or loss, if at all can be treated to have arisen, it is on account of a bonaifde transaction between two independent enterprises. Whichever way one looks at, according to the learned counsel, there is no international transaction at all.

33. Learned counsel then submits that it is wholly erroneous to even suggest that the payment of compensation on termination of call options is in the revenue field inasmuch as it is nobody's case that the assessee was engaged in the business of entering into call options or of dealing in shares. It is contended that the assessee was not a trader in shares or call options, and that, by no stretch of logic, the income or losses on termination of call options can be said to be in the revenue field affecting profits and losses of the assessee. That is the reason, according to the learned counsel, that loss on termination of option was treated as one of the extra ordinary items in the profit and loss account and not claimed as deduction in computation of taxable income. He submits that even shares held by the assessee were held as investments, and even if the assessee was to acquire any shares as a result of these call options, such shares would not have been trading assets of the assessee. Under these circumstances, the payment on account of termination of call options, according to the learned counsel, cannot be said to be in revenue field as it had nothing to do with the revenue gains or losses. He argues at length as to how the assessee cannot be said to be trading in options, and, that, for this reason, the gains, even if there be any, in respect of the options cannot be treated as business income. Learned counsel refers to a large number of judicial; precedents in support of various propositions. In the written submissions subsequently filed, learned counsel for the assessee makes his point in more detail in the following words:

BUSINESS INCOME

89. The income determined by the TPO to be purportedly foregone by the Assessee by virtue of the TA 2011 constituting an alleged exercise/extinguishment/relinquishment of 'call option', has been treated by the Assessing Officer as taxable under the head of Business Income, and as a corollary, taxed at the rate of 30%, as against the 20% tax rate applicable to (alleged) capital gains.

90. The approach of the Revenue has been assailed inter alia on the ground that the entire order of the TPO proceeds on the footing of 'option' constituting a 'capital asset' under section 2(14), transferred or extinguished or relinquished under section 2(47), to conclude that the Assessee is therefore liable to capital gains tax.

91. Under section 92CA (4)43, the AO is bound by the order of the TPO, and as a necessary corollary must proceed to compute taxable income in terms of the order of the TPO, i.e. under the head of capital gains; however, the AO purports to tax alleged income of the Assessee under the head of Business Income.

92. The Assessee's rectification application filed with the AO on 13 February 2017, has not been disposed of, despite the mandate of s.154(8). Such a patent error could not be permitted to be perpetuated, merely on account of the AO not disposing of the rectification application. The Assessee in its grounds of appeal (Ground No. 25)

93. Reliance has been placed on MCorp Global (P.) Ltd v CIT (2009) 309 ITR 434 (SC) to contend that an error made by the Revenue cannot be allowed to continue, and that it cannot take advantage of the AO's error to perpetuate it, including to enhance an assessment. The relevant extract of the ruling in MCorp (supra) is reproduced below:

> **"6. In the case of Hukumchand Mills Ltd. v. CIT [(1967) 63 ITR 232] this Court has held that under section 33(4) of the Income-tax Act, 1922 [equivalent to section 254(1) of the 1961 Act], the Tribunal was not authorized to take back the benefit granted to the assessee by the Assessing Officer. The Tribunal has no power to enhance the assessment. Applying the ratio of the said judgment to the present case, we are of the view that, in this case, the Assessing Officer had granted depreciation in respect of 42,000 bottles out of the total number of bottles (5,46,000), by reason of the impugned judgment. That benefit is sought to be taken away by the Department, which is not permissible in law. This is the infirmity in the impugned judgment of the High Court and the Tribunal".**

94. Following the MCorp judgment (supra), the Assessee has submitted (relying on Appeal Ground no.25) that where the AO has erred in bringing the Assessee to tax under the head of Business Income, whereas the AO was bound by the TPO order (correctness of which is assailed by the Assessee), the AO was bound to rectify the Assessment Order, and the Tribunal has no power to enhance the assessment through concluding that the Assessee is exigible to tax on Business Income. MCorp has been followed in Fidelity Shares & Securities Ltd v. Deputy Commissioner of Income-tax (2017) 390 ITR 267 (Guj.), wherein it has been held that the Tribunal has no power under the Act to enhance the assessment in appeal.

95. As to whether the Assessee earned Business Income on the alleged 'exercise' of 'option', it is well settled that chargeability of tax under the head of 'Business Income' can only arise where the income generates from stock in trade44.

96. As per CBDT Circular No.6 /201645 dated 29 February 201646, issued to reduce litigation in respect of taxability of surplus on sale of shares and securities, income from listed securities held for more than 12 months is considered as 'capital gains'. Clause 3(b) of the Circular states: "in respect of listed shares and securities held for a period of more than 12 months immediately preceding the date of its transfer, if the assessee desires to treat the income arising from the transfer thereof as Capital Gain, the same shall not be put to dispute by the Assessing Officer. However, this stand, once taken by the assessee in a particular Assessment Year, shall remain applicable in subsequent Assessment Years also and the taxpayers shall not be allowed to adopt a different/contrary stand in this regard in subsequent years". No effective rebuttal is forthcoming from Revenue as to why this Circular should not apply to unlisted securities, assuming while assailing liability to 'capital gains tax' at all.

97. Settled pre-requisites, for determining whether income earned is in the nature of business income or in the nature of capital gains, are:

> **97.1 Whether income is arising from a 'Capital Asset' or a 'Trading Asset i.e. stock in trade';**
>
> **97.2 Infusion of money is either on capital account or current account, since if the infusion is on capital account then the asset would be classified as a 'Capital Asset', whereas if the infusion is on account of current account then the asset would be 'Trading Asset i.e. stock in trade';**
>
> **97.3 The frequency or number of transactions;**

97.4 Intention of the party at the time of acquiring the 'Capital Asset' or a 'Trading Asset

98. Examined from the standpoint of audited financial statements of the Assessee placed on record by the Revenue, there is no scope for 'options' to be reflected in the Assets or Liabilities of the Assessee, because these are merely contractual rights as to potential shares, which do not crystallize until 'exercise'.

99. Examined also, from the standpoint of the Revenue's contention that Assessee is holding options for VIHBV, it cannot possibly be contended that VISPL is in the business of buying and selling options.

100. Further, options being merely contractual rights to potential shares are not capable of being 'traded' by the Assessee, whether as stock-in-trade, or at all, and there is no material relied upon by Revenue to establish such assertion of 'trading' by the Assessee – reliance upon other investments by the Assessee in preference share capital does not constitute evidence of trading activity, due regard being had inter alia to the duration of the investment.

101. The audited financial statements of the Assesee reflect, in any event, the preference share capital to which the Assessee has subscribed, in the Assessee's balance sheet as 'investments' – again, this position has hitherto not been assailed by Revenue.

102. Again, examining those investments from the standpoint of frequency of transactions in preference shares, no basis arises to conclude that the Assessee is in the business of dealing in shares.

103. The audited financial statements inter alia establish that following the exercise of 'put' option in relation to preference shares, by the IDFC Investors, the Assessee discharged the obligation to purchase such shares – this was in conformity with FWA 2007.

104. There is no material on record from the Revenue to establish that the Assessee had borrowed funds for making investments. It is well-settled48 that even where investments are made from borrowed funds, the nature of income will not change from Capital Gains to Business Income.

105. In prior assessments of the Assessee, the Revenue has purportedly taxed the alleged income purportedly 'adjusted'/'added' by the TPO, strictly under the (alleged) head of capital gains, as will be evident from orders passed by various tax authorities, in the case of the Assessee:

105.1. Assessment Order for Assessment Year 2010-11 dated 10 December 2014 - Paragraph 6149

105.2. Transfer Pricing Order for Assessment Year 2011-12 dated 30 January 2015 – Paragraph 950

105.3. Directions of Dispute Resolution Panel for Assessment Year 2011-12, issued on 30 December 2015 – Paragraph 5.1451

106. Wholly in the alternative, even if the alleged income of the Assessee were to fall under the head "income from business", in any event:

106.1 The Revenue has no right to substitute for apparent consideration, market value;

106.2 ALP cannot be substituted, where there is no income to the Assessee. Even if it is assumed that income is in the nature of business income, transfer pricing provisions would not be applicable absent taxability under the domestic provisions. In the present case, the transaction is that of termination between the Assessee and IDFC Investors,;the Assessee has not received any money. On the contrary, the Assessee has paid Rs.21.25 crores to IDFC Investors.

107. Further, if a tax payer foregoes income it cannot be taxed in his hands merely because section 92B of the Act entitles ALP to be substituted for a consideration. Absent any consideration/income, there is no scope for introducing consideration, where there is none. Reliance is placed on ruling in Assessee's own case i.e. Vodafone India Services (P) Ltd. vs. Union of India [(2014) 368 ITR 1 (Bom) – Para 30 & 40 to 45].

34. Coming back to the ALP adjustment as capital gains, which, according to the learned counsel, revenue's sole claim is, it is submitted that in order to bring any capital gains to tax, the cumulative pre-requisites are (i) a capital asset; (ii) transfer of a capital asset; (iii) receipt of consideration on transfer of capital assets; and (iv) application of machinery provisions for computing the capital gains. None of these conditions, according to the learned counsel, are satisfied on the facts of the present case. Leaned counsel then once again takes us through the judgment of Hon'ble Supreme Court in the case of Vodafone International Holdings BV *(supra).* He invites our attention to the observation made by Hon'ble Supreme Court, at page 29 of Income Tax Report Volume 341, to the effect that "**On June 6, 2007, a framework agreement was entered into among IDF, IFDC, SMMS, IDFC PE, HTIL Mauritius, GSPL, Omega and VIH by which GSPL** *(i.e. the assessee before us now)* **had the call option to purchase entire equity shares of SMMS**". He does so with a view to highlight that the very call options, which are subject matter of consideration by us, were subject matter of consideration before Hon'ble Supreme Court. He then takes us through the observations of Hon'ble Supreme Court to the effect that this framework agreement is required to be treated as an agreement between the independent entities, starting with the observation, at page 45, that "on the facts of this case and that too in the light of the ownership structure of Hutchinson, we hold that HTIL, as a group holding company, had no legal rights to direct its

downstream companies in the matter of voting, nomination of directors and management rights" and that "**these exit rights** *(through exercise of put options/ TARs)* **in Essar, Centrino, NDC and SMMS (IDFC) indicate that these companies were independent companies**" Learned counsel then invites our attention to the observation of Hon'ble Supreme Court, at page 47, to the effect that **"It is important to note that even in the fresh agreement, the call options remained with GSPL** *(i.e. the assessee before us)* **and that the said agreement did not confer any rights on VIH**". It was thus contended that the VIH-BV did not have any role to play under the aforesaid framework agreement, and that, therefore, VIH-BV cannot be treated as a party to the Framework Agreement. Our attention was then invited to Hon'ble Supreme Court's observation, at page 53, that "**Pending exercise, option rights are not management rights. At the highest, options could be treated as potential shares and, till exercised, they cannot provide right to vote**", and, at page 78, taking note of revenue's argument that "**the call and put options, despite being a contingent right, are capable of being transferred and they are property rights and not merely contractual rights and hence would be taxable**" which was rejected by the Hon'ble Supreme Court *inter alia*, observing , at page 116, that "**Call and put options are contractual rights and do not sound in any property and hence they cannot be, in the absence of a statutory stipulation, considered as capital assets**". It is pointed out that these findings are independent findings which hold good in the present context as well. We were then taken through subsequent observations which reiterate that the call options in question were nothing more than "**contractual rights**". Learned counsel thus contends that the legal position is well settled by Hon'ble Supreme Court's judgment in the sense that (i) the transaction of call options in question is required to be treated as independent transaction; and that (ii) the call options are not capital assets, and, as such, no capital gains arise on extinguishment of call options. It is also submitted that the Framework Agreement conferred a contractual agreement 'as to' the shares, but, as he puts it, not an interest 'in' the shares.

35. Learned counsel contends that, hypothetically speaking, even if these call options are treated as capital assets, the transfer of such rights, even if such a surrender can be treated as transfer, does not result in any capital gains as there is no cost of acquisition of such purported capital assets. A reference is then made to Hon'ble Supreme Court's judgment in the case of **CIT Vs B C Srinivas Shetty [(1981) 128 ITR 294 (SC)]**. It is then pointed out that in order to compute the capital gains, cost of the asset should be determinable, and such a cost has to be real cost rather than a notional or hypothetical cost. As the authorities below have not even attempted to, leave alone establishing, the actual cost of acquisition of what has been termed as 'capital asset', according to the learned counsel, computation mechanism must fail. The cost of acquisition has not been, as is contended before us, at all identified.

36. It is pointed out that in order to compute capital gains on transfer, there has to be a consideration, but then it is an undisputed position that the assessee did not receive any consideration, and that, on the contrary, the assessee paid Rs 21.25 crores, on account of termination fees, to the IDFC Investors. Learned counsel contends that by applying the transfer pricing provisions, an additional head of income can not be

created. In support of this proposition, he relies upon the judgment of Hon'ble Bombay High Court, in the case of Vodafone India Services Pvt Ltd Vs Union of India (368 ITR 1). Learned counsel then submits that in any event, there is no scope for addition to business income as the assessee was not, and could not have been, in the business of trading in investments. Once the undisputed position is that the assessee was holding investments, there is no question of business income in connection with the same. As to whether the assessee has earned business income on termination of options, learned counsel contends that "it is well settled that chargeability to tax under the head 'business income' can only arise where the income generates from stock in trade". In support of this proposition, reliance is placed on Hon'ble Supreme Court's judgment in the case of **CIT Vs Calcutta Discount Co Ltd [(1973) 91 ITR 8 (SC) @ page 3]** and of Hon'ble Gujarat High Court's judgment in the case of **A Raman & Co Vs ITO [(1966) 59 ITR 290 (Guj) @ page 7]**. It is then contended that, in any event, the assessee is protected by the CBDT Circular No. 6 of 2016, dated 29th February 2016, which requires income from sale of the shares and listed securities held for more than 12 months being treated as capital gains, must apply to the unlisted securities as well. It is pointed out that the options were, beyond any dispute or controversy, held for a period of more than twelve months. It is explained that if the options are to be treated as assets at par with shares, the issue stands covered by the CBDT circular in the sense that these options were held for more than twelve months and as such these are required to be treated as investments. Once these are treated as investments, as the CBDT requires the shares to be treated, receipts in connection with the same cannot be treated in the revenue field. Learned counsel further submits that there cannot be any business of investments, and the way it is seen in the world of taxation, it can either be a business asset or an investment asset because either assessee acquires stock in trade or investment asset and as investment would presuppose capital investment.

37. Learned counsel then takes us through the judgement of Hon'ble Bombay High Court, in the case of **Vodafone India Services Pvt Ltd Vs Additional Commissioner of Income Tax [(2014) 368 ITR 1 (Bom)].** He submits that this judgment, in assessee's own case, holds that unless transaction is taxable in domestic law, no arm's length price adjustments can be made, and the law so laid down by Hon'ble Bombay High Court has been accepted by the Union Cabinet. Our attention is also invited to the wording of the press release about Union Cabinet accepting the aforesaid judgment, wherein it is, *inter alia*, stated that "**The Cabinet came to this view as this is a transaction on the capital account and there is no income to be chargeable to tax. So applying any pricing formula is irrelevant**". Learned counsel submits that it is undisputed position, as noted by the TPO himself, that this transaction is also on capital account, and, therefore, application of transfer pricing provisions on the facts of this case is wholly irrelevant. He submits that when such are the views of the Union Cabinet, and to this extent judgment of Hon'ble Bombay High Court stands accepted by way of a conscious decision, the authorities below were completely in error in making the ALP adjustment. Learned counsel then invites our attention to the observations made by the TPO to the effect that the transaction was in capital field.

38. Learned counsel submits that the provisions of transfer pricing can come into play only when as a result of an international transaction involving a non-resident, an income shifts from one tax jurisdiction to another tax jurisdiction, but then, in the present case, the payment is made by one resident entity to another resident entity and as such it has no tax implications beyond Indian tax jurisdiction. Whatever was taxable in India, the impugned transaction or not, will continue to be taxable in India. On these facts, according to the learned counsel, the transfer pricing provisions cannot be invoked.

39. It is then submitted that, in any event, determination of purported arm's length price (ALP) is riddled with fallacies. The stand of the assessee is that the onus to determine ALP is, in accordance with the statutory requirements, on the revenue authorities. The determination of ALP, according to the learned counsel, "cannot be determined on the basis of preponderance of probabilities or based on objectives sought to be achieved in an enactment or policy guideline of the Government". On the basis of this Tribunal's decision in the case of **UCB India Pvt Ltd Vs ACIT [(2009) 30 SOT 95(Mum)],** it is contended that "documentation and data has to be available to the assessee and the comparability demonstrated, before an addition is made". The assessee contends that the TPO is required to, before adopting a particular arm's length price, put the assessee to notice with respect to all the material gathered by him. While it is admitted that the information gathered by the TPO was furnished to the assessee, it is contended that since the TPO did not issue any specific show cause notice for such information being used for ascertaining the ALP, the action of the TPO vitiated principles of natural justice. In any case, the information so gathered was in respect of direct equity interests in Vodafone India Ltd which was qualitatively different from the options in SMMS Investments. Learned counsel for the assessee also submits that though the TPO had the authority to appoint a technical expert to conduct value of SMMS Investment shareholdings, and, to put in the words of the learned counsel, "having not assailed the share subscription and/ or buyback price of Rs 15 per equity shares of SMMS, in any event, estopped from attributing any other price for the SMMS Shareholdings which is claimed to be the subject matter of an alleged call option exercised or extinguished/relinquished by the assessee". It is then argued that by adopting the value of 2007 cashless option exercise, which consisted of 0.1234% equity in Vodafone India Limited, the TPO has acted contrary to rule 10B(4) of the Income Tax Rules which bars use of data pertaining to a transaction more than two year old, in ascertaining the ALP. Learned counsel also points out, in the written submissions, following additional errors in benchmarking the alleged international transaction and ascertaining the arm's length price:

> **126. The transaction of exercise/assignment of Cashless Option between the Assessee and IDFC Investors has been held to be an**

external CUP from AY 2008-09, for the purposes of benchmarking the alleged assignment of call options by the Assessee.

127. Therefore, a transaction in the present AY between IDFC Investors and the Assessee cannot be treated as a transaction between associated enterprises for the purposes of the Act.

128. Further, the mere fact of making payment by the Assessee cannot be construed as an international transaction warranting a transfer pricing adjustment. At best, the Revenue could have sought disallowance of such expenditure, if the Assessee had made a claim towards this end; which is not the case, in any event, since the Assessee has not claimed deduction for this amount and the payment does not have any tax impact; hence, the payment cannot be treated as consideration for an 'international transaction'.

129. In any event, the TPO committed an error of attributing 3.15% stake of SMMS indirectly held in VIL, through Omega, overlooking that CGP held 79.98% stake in SMMS, through TII, and as a corollary held 2.52% in VIL, through TII via SMMS/Omega, with the balance controlled by Analjit Singh Group, which again, is an error the DRP failed to rectify.

130. Accordingly, the purported addition of Rs.1588,85,55,303 for a 3.15% stake in the underlying VIL, arrived at through deploying the Cashless Option strike price of Rs.62.24 crores for a 0.1234% stake in VIL, would automatically reduce the addition to Rs.1271,08,44,242 (basis 2.52%).

131. Without prejudice, assuming Revenue's contention that the TA and/or the SSSA 2011, whether viewed in isolation, or in conjunction with the SSSA 2011, constituted an 'international transaction' were upheld, in any event, in the absence of income to the Assessee, there is no scope for the Assessee to become liable to tax, much less in relation to an agreement that had the legal effect of terminating contractual rights.

40. Learned counsel for the assessee submitted that since relevant facts of the case have already been examined by Hon'ble Courts above and, and decisive pronouncements given on the same- which he has taken us through, it is not really necessary to go into the facts in deep details. He, nevertheless, explained facts of the case. These facts are set out in the backdrop of acquisition of Hutchison Group's business interests in India, in telecommunication business, by Vodafone Group plc UK, and the transaction before us is a one of numerous complex web of transactions, by a large number of entities, as a part of the holding structure and things incidental

thereto. As a matter of fact, at one stage, we did toy with the idea of calling an expert witness to understand the true nature of these transactions and the bigger picture thereof. While learned senior counsel for the assessee vehemently opposed it on the basis of elaborate legal submissions, Ms Sethna, his junior colleague, was visibly irritated when she spoke out of the turn to point out that when Hon'ble Supreme Court has heard the matter for three months and decided all the issues comprehensively in favour of the assessee, what is left for the experts to throw light on. Ms Sethana, at this stage, has a very unusual plea. She submits that since related facts have been thrashed out by Hon'ble Bombay High Court, and the appeal is now pending before Hon'ble Supreme Court, any parallel factual findings by this Tribunal may prejudice the case of the assessee and that it is for this reason that Mumbai bench of the Tribunal has adjourned similar cases of the assessee. She urges us not to tinker with the well settled facts of the case and adjourn the hearing till Hon'ble Supreme Court disposes of the appeal. Learned senior counsel, though on a different note and for different reasons, makes the same request. He submits that it will avoid multiplicity of proceedings and allow early finality. In all fairness, however, he submits that it is only suggestion and he leaves the matter to the bench as to whether we want to go ahead with the matter or not. He also expresses his willingness to take us through the facts in as much of a detail as much we want but opposes the use of external experts on the ground of legal propriety and the scheme of the Act and the Income Tax (Appellate Tribunal) Rules, 1963. There was strong resistance to calling of an outside expert by the assessee, even though learned Departmental Representative did not really object to it but left the matter to us stating that the Tribunal, as the final fact finding authority, has to take a conclusive and final call on all factual aspects. However, as we did not really pursue the matter further with respect to calling an outside expert, there is no need to deal with these issues in any greater details.

41. We may first reproduce what has been stated to be a summary of material facts by the assessee and filed in the written submissions. These are set out below:

FACT MATRIX

> **2. Briefly, following the execution of a Sale and Purchase Agreement dated 11 February 20o7 ("SPA"), between Hutchison Whampoa Group of Hong Kong ("Hutchison Group") and Vodafone Group of UK, for acquisition of direct and indirect equity interests in Hutchison Essar Limited ("HEL", since renamed Vodafone India Limited, "VIL"), the (Indian) Foreign Investment Promotion Board ("FIPB") granted approval on 7 May 2007, to the acquisition, by VIHBV, of "51.96% in M/s. Hutchison Essar Limited".**
>
> **3. At the time of execution of the SPA, certain Framework Agreements and corollary Shareholders' Agreements in force, entered into under Hutchison Group structure, were, *inter alia,*:**
>
> > **3.1 Framework Agreement dated 7 August 2006[2]("FWA 2006") between *inter alia* the Assessee and IDFC Investors, which contained *inter se* 'call' and 'put' options, relating to the 100% equity and**

preference shareholding interests of IDFC Investors in SMMS;

3.2 Shareholders' Agreement dated 17 August 2006[4] ("SHA 2006") entered into *inter alia* between the shareholders of Omega Telecom Holdings Private Limited[5] ("Omega").

4. The Hutchison Structure Chart, as at 11 February 2007, i.e. the date of the SPA, reflects *inter alia* that SMMS is a company incorporated in India, with direct equity interests held in Omega.

5. The AY 2012-13 Structure Chart, in relation to the transaction(s) during the relevant AY, depicts *inter alia* the share ownership pattern of SMMS, i.e. the 100% equity interests of IDFC Investors at the beginning of the relevant FY (2011-12), and the 100% equity interest of TII in SMMS at the end of the relevant FY (2011-12).

6. After the grant of FIPB approval (on 7 May 2007), consequent upon invocation of 'Change of Control' provisions in the FWA 2006[8] by the IDFC Investors in around March 2007, a Transaction Agreement dated 5 June 2007 [9]("TRA 2007") was entered into *inter alia* between the IDFC Investors and the Assessee, relating to exercise of 'Cashless Option' n relation to 0.1234% interests of Omega in Hutchison Essar Limited by the IDFC Investors.

7. A Framework Agreement dated 6 June 2007[11] ("FWA 2007") was entered into *inter alia* between the Assessee and the IDFC Investors, in essence, constituting re-writing of *inter se* 'call' and 'put' options, relating to the 100% equity and preference shareholding interests of the IDFC Investors in SMMS. At the material time, SMMS held 54.21% equity interests in Omega.

8. A Shareholders' Agreement dated 7 June 2007[12] ("SHA 2007") was entered *inter alia* to regulate matters between the shareholders of Omega, which stipulated in material part (in consonance with arrangements reflected in TRA 2007, that following subscription of 37,695,443 new equity shares by SMMS in Omega), the equity interests held by SMMS in Omega would be increased to 61.60% (from 54.21%) and HTIL would hold 38.40%.

9. On 7 June 2007, a Termination Agreement[13] ("TA 2007") was entered into *inter alia* between the Assessee and the IDFC Investors, bringing to an end all rights and obligations under the FWA 2006 and the SHA 2006.

10. Under the FWA 2007 (*inter alia* Clause 5), the IDFC Investors exercised 'put' options from time to time in relation to preference shares held in SMMS, which in turn were acquired by the Assessee on terms stipulated in Schedule 1 of FWA 2007.

11. In August 2011, the IDFC Investors approached the Assessee proposing 'exit'. As explained by the Assessee in paragraph 53 of the submission dated

19 January 2016 filed with the TPO, "VISPL, being a foreign "owned and controlled" company, acquisition of equity shares of SMMS (a holding company, which held indirect interest in Vodafone India Ltd.) would have constituted acquisition of shares of a holding company, and also counted towards foreign investment in Vodafone India Ltd. Since such acquisition by VISPL was not available under the automatic route, i.e. any acquisition by VISPL would be subject to approval from FIPB, rendering the acquisition of SMMS shares likely to be delayed, it was not considered prudent for VISPL to remain bound to contractual rights and/or obligations vis-à-vis the options. Therefore, VISPL and IDFC mutually decided to terminate the Framework Agreement, by payment of termination fee to IDFC investors, which fee was commercially agreed between non-associated enterprises (VISPL and IDFC) and, therefore, deemed to be arm's length consideration."

12. Following TII willingness to acquire up to 75% equity interest in SMMS, a Share Subscription and Shareholders' Agreement dated 24 November 2011 ("SSSA 2011") came to be entered into, accordingly. The SSSA 2011 encapsulated 'options' for the IDFC Investors to exit, including through exercise of Buyback, Tag Along, Drag Along rights, etc. Both the subscription and buyback price of equity shareholding in SMMS were agreed at Rs.15/- per equity share, i.e. at a premium of Rs.5/- per equity share.

13. In order to effectuate the SSSA 2011, the Assessee executed a Termination Agreement on 24 November 2011 ("TA 2011"), which had the legal effect of bringing all rights and obligations *qua* IDFC Investors ensconced within FWA 2007 and SHA 2007 to an end, since TII simultaneously with execution of the SSSA 2011 subscribed to 75% equity interests in SMMS. As part of the termination arrangements arrived at between the Assessee and the IDFC Investors, a negotiated Termination Fee of Rs.21.25 crores was payable to the IDFC Investors; which was *suo motu* disallowed in the Assessee's computation of total income, thereby not giving rise to any implication to the taxable income of the Assessee. Tax jurisprudence is concerned with exigibility of income in the hands of the Assessee to tax; in this case, the Assessee paid a termination fee, rather than received any income.

14. After TII subscribed to 60,00,000 equity shares of SMMS (for an aggregate Rs.9 crores at the rate of Rs.15 per equity share) on 24 November 2011, the IDFC Investors elected to exercise the option of 'buyback'.

15. Accordingly, SMMS bought back the IDFC Investors' equity interests in SMMS, at the price of Rs.15 per equity share, with corollary cancellation following, by SMMS, in relation to the original 20,00,000 equity shares held by IDFC Investors, on or about 23 January 2012.

16. Noteworthy that, Revenue has not assailed the value of the equity shares of SMMS paid in either of the two transactions, i.e. the share subscription price in SMMS of Rs.15 per share paid by TII, or the buyback price of Rs.15 per share paid by SMMS to the IDFC Investors.

17. In the course of the assessment proceedings for AY 2012-13, the Transfer

Pricing Officer ("TPO") treats the TA 2011 as tantamount to exercise of 'call' option or extinguishment/relinquishment of 'call' option in relation to SMMS equity interests, by the Assessee. The TPO *inter alia* invokes s2(14) to hold that the 'option' is a 'capital asset'; then invokes s2(47) to hold a 'transfer'; and adjusts/adds Rs.1588.85 crores premised on benchmarking the alleged exercise of the Call Option against the Cashless Option exercised by the IDFC Investors *vide* TRA 2007.

18. In violation of the mandate of s.92CA(4), i.e. binding nature of the TPO Order, the Assessing Officer("AO") effectuates such purported addition of Rs.1588.85 crores under the head of 'Business Income'.

19. The DRP, in its order, in paragraph 5.2.47 expressly holds that there is nothing but a transfer as per s.2(47), and yet does not disturb the head of 'Business Income'.

20. Owing to the *rationale* for the impugned addition by the TPO premised on (alleged) 'capital gain', and the AO's order premised thereon save and except for the 'addition' at the foot of the AO's order, a s154 application was filed, seeking rectification; which has not been disposed of within the six-month period stipulated under s154(8).

Section II- DETAILS OF VARIOUS AGREEMENTS:

A. OBJECT OF THE 2007 FWAs & SHAs:

21. Owing to extant Indian Foreign Direct Investment (FDI) Policy guidelines stipulating a sectoral cap of 74% for foreign investment in telecom, with 49% by the automatic route, and the balance (up to) 25% through approval of the FIPB, during the year 2006, the Assessee (then forming part of the Hutchison Group structure) entered into three separate and distinct arrangements with independent, unrelated groups of Indian investors, *viz.* Analjit Singh Group, Asim Ghosh Group and IDFC Group. At the material time, the India-based Essar Group controlled ~33.01% equity interests in HEL, through both foreign and Indian shareholding interests.

22. Accordingly, three independent agreements were entered into by the Assessee, documented in Framework Agreements ("FWAs"), aimed to preserve the priority rights vested in, and accorded to the Assessee, to acquire equity interests of the counter-party, in anticipation of revised FDI sectoral caps and/or until 'Change of Control' through securing a 'Call Option' for the Assessee. Parallel 'put' option rights were granted to counter-parties relating to such equity interests. The arrangements arrived at around price, exit, etc., were captured within FWAs. Corollary Shareholders' Agreements ("SHAs") regulated *inter se* arrangements between the shareholders.

23. The pattern of ownership, and corollary interests of Hutchison Group, in HEL, which were the subject-matter of negotiation by Vodafone, are described thus, in 341 ITR 1, paragraph 33: *"By letter dated 14.03.2007 addressed by VIH to*

FIPB, it stood confirmed that VIH's effective shareholding in HEL would be 51.96%. That, following completion of the acquisition HTIL's shares in HEL the ownership of HEL was to be as follows: (i) VIH would own 42% direct interest in HEL through its acquisition of 100% CGP (CI), (ii) Through CGP (CI), VIH would also own 37.25% in TII which in turn owns 19.54% in HEL and 38% (45.79%) in Omega which in turn owns 5.11% in HEL (i.e. pro-rata route), (iii) These investments combined would give VIH a controlling interest of 52% in HEL, (iv) In addition, HTIL's existing Indian partners AG, AS and IDFC (i.e. SMMS), who between them held a 15% interest in HEL (i.e. option route), agreed to retain their shareholdings with full control, including voting rights and dividend rights. In other words, none of the Indian partners exited and, consequently, there was no change of control, (v) The Essar Group would continue to own 33% of HEL."

24. A recurrent theme across the FWAs and SHAs, independently negotiated by the Vodafone Group with the (three) Indian investors, was the restriction on free transferability of shares, with the aim of ensuring both priority rights for purchase of shareholding of the Indian investors and in parallel ensuring compliance with FDI Policy.

25. Restrictions on free transferability of shareholding, through articles of association of a company, enjoys statutory recognition in s.3(iii)(a)of the erstwhile Companies Act, 1956 (currently ensconced in s. 2(68)(i) of Companies Act, 2013).

26. Restrictions on transferability of shares in a company take on a multitude of well-recognized forms in corporate ownership. Key amongst these are 'Right of First Refusal Covenants' (RoFR). The 'RoFR', "… ***permits its holders to claim the transfer of the subject of the right with a unilateral declaration of intent which can either be contractual or legal. No statutory recognition has been given to that right either in the Indian Company Law or the Income Tax Laws. Some foreign jurisdictions have made provisions regulating those rights by statutes. Generally, ROFR is contractual and determined in an agreement. ROFR clauses have contractual restrictions that give the holders the option to enter into commercial transactions with the owner on the basis of some specific terms before the owner may enter into the transactions with a third party. Shareholders' right to transfer the shares is not totally prevented, yet a shareholder is obliged to offer the shares first to the existing shareholders. Consequently, the other shareholders will have the privilege over the third parties with regard to purchase of shares.*****"– reproduced from 341 ITR 1, page 87.**

27. Another commercially well recognized form of restriction on transferability of shares was that contained in the subject FWA 2007, of 'call' and 'put' options, inherent to which is a RoFR, and through which a multitude of rights *inter alia* in a group holding structure are capable of being preserved.

28. The use of 'call' and 'put' options globally, for securing 'priority' rights in relation to the acquisition or sale of shareholding interests, is in force globally, as a commercially well-recognized practise. Over the course of pursuing matters before the FIPB, a letter dated 25 January 2010 issued by J P Morgan[23] was relied upon by VIHBV, copy whereof has been placed by the Assessee, into the record of the present proceedings.

29. The mechanism of 'Call' and/or 'Put' Options facilitates the coming

together of 'independent, not hostile' shareholders, in companies, whether private limited companies or closely-held public limited companies, and permit participation by a multitude of stakeholders, each with varying shareholding patterns, commensurate to levels of investment. Unsurprisingly, majority shareholders will endeavour, to the extent feasible, that the minority shareholders are not 'hostile' investors, in the best interests of all stakeholders in the corporate structure.

30. It is thus apparent that the key aims of the feature of restricted transferability ensconced within the FWAs, were to facilitate regulatory compliance, with FDI Policy requirements, to ensure that if and when the FDI Policy of India were to undergo any relaxation, whereby foreign interests in the telecom industry were capable of exceeding 74%, then in such event, it would become available for Vodafone group to ramp up its equity interests in HEL.

31. The SHA, contained terms to regulate matters relating to shareholders' rights and obligations *inter se*, aimed principally at protecting the non-resident shareholders' interests from a regulatory standpoint, as explained in detail in paragraphs 223 to 230 below. Detailed analyses of FWA 2007 and SHA 2007, below.

OBJECT OF SSSA 2011:

32. Under and by virtue of the SSSA 2011, the issued share capital of SMMS was increased from 20,00,000 equity shares to 80,00,000 equity shares, recording *inter alia* that TII was entitled to subscribe up to 60,00,000 equity shares at the rate of Rs.15 per share (inclusive a premium of Rs.5 per share). The SSSA 2011 *inter alia* conferred rights upon the IDFC Investors to exercise the option of a buyback of the SMMS at the rate of Rs.15 per share, apart from conferring Tag Along, Drag Along, Call and Put Options in relation to SMMS equity shareholding. The Assessee was, properly, not party to the SSSA 2011, since it was neither obliged to subscribe to nor buyback SMMS shareholding. Detailed analysis of SSSA 2011, below.

OBJECT OF TA 2011:

33. Under the TA, Call Options held by the Assessee and Put Options held by IDFC Investors in relation to equity interests of IDFC Investors in SMMS, under FWA 2007, were terminated, against payment of a Termination Fee by the Assessee to the IDFC Investors, in the sum of Rs.21.25 crores; in parallel with cessation of corollary rights under SHA 2007. The Assessee was a 'proper and necessary' party to the TA 2011.

34. The basis on which the 'Termination Fee' was paid to the IDFC Investors, was not queried by the TPO, AO and/or DRP. Firstly, this was a payment by and not to the Assessee; next, this was a negotiated arms-length commercial consideration agreed to be paid by the Assessee to the IDFC Investors, with FWA 2007 obligations agreed to be brought to an end; and, finally, this was a sum paid on account of a multitude of factors, including the slight delay (August-

November 2011), and there is no scope for correlating such payment with potential contractual liability if a 'call' option or 'put' option were exercised, moreover when the Revenue has not questioned the SMMS share valuation of Rs.15/- per equity share for purposes of share subscription or buyback.

B. MATERIAL CLAUSES OF RELEVANT AGREEMENTS:

1. FWA 2007:

35. PUT OPTION: *Vide* clause 5.1, a Put Option was granted to each of the IDFC Investors (defined, as India Development Fund, Infrastructure Development Finance Company Limited, IDFC Private Equity Fund II) to require the Assessee or nominee to purchase all or part of the SMMS Shares held by the respective Investor(s), on one or more occasions, for an amount equal to the Transfer Price agreed in relation to such Put Shares ("Put Option").

36. CALL OPTION: *Vide* clause 6.1, the Assessee had an option to purchase all the SMMS Shares held by the Investors, for an amount equal to the Transfer Price agreed in relation to such Call Shares ("Call Option").

37. TRANSFER PRICE: *Vide* clause 8, the Transfer Price in relation to the Put Option and the Call Option for the SMMS Shares was defined as the value to be determined in accordance with the formula set out in Schedule 1, subject to a maximum aggregate amount of Rs.15 billion.

38. DEFAULT OPTION: *Vide* clause 7.1, the Assessee had a default option, which would trigger following any Event of Default on the part of the Investors, to require the ivestors to sell to the Assessee all the SMMS Shares held by the Investors, for an amount determined in accordance with the provisions of Part 1 of Schedule 2, subject to a maximum of Rs.15 billion ("Default Option").

39. ASSIGNABILITY OF OPTIONS: *Vide* clause 11.1.1, the Assessee was entitled to seek assignment or transfer of the Call Option only to an affiliate of the Assessee, without prior written consent of the Investors; and *vide* clause 11.1.2, the Put Option was not capable of assignment or transfer without prior written consent of the Assessee.

40. TERMINATION BY MUTUAL CONSENT: *Vide* clause 16.1.1, the FWA 2007 would remain in full force and effect until *"terminated by mutual consent of the parties"*, or *"all the parties' obligations under all the Options have been discharged or their rights thereunder have been fully exercised or extinguished"*.

41. NON-ASSIGNABILITY OF FWA: *Vide* clause 19.4, the FWA 2007 was not assignable, without the prior written consent of the other parties.

42. FORMULA FOR TRANSFER PRICE: Schedule 1, set forth *inter alia* the Initial Investment Amount relating to the SMMS Ordinary Shares, and the

Transfer Price formula mutually agreed to be computed on the basis of compounding the Initial Investment Amount annually at the rate of 17.5% per annum, or Rs.7,600,000, whichever is higher, and if the FMV of VIL exceeded US$15 billion, then a stipulated formula would apply to factor such value into the transfer price.

2. TA 2011:

43. DISCHARGE OF OBLIGATIONS: Clause 2 recorded a "mutual release of their duties and obligations" under the Framework Documents (defined therein as the Framework Agreement and the Shareholders Agreement), consequent whereupon the Framework Documents shall cease to apply and be in force with effect from the Termination Date (defined therein as *"the date on which closing under the Share*

***Subscription and Shareholders Agreement entered into by IDF and SMMS with Telecom Investments India Private Limited dated on or around the date hereof occurs and consequently IDF ceases to hold 51% (fifty one percent) or more of the paid up equity capital of SMMS"*), based on which the parties "acknowledge and agree that none of them have any outstanding liabilities or claims against each other with respect to the Framework Agreement";**

44. CONSIDERATION PAYABLE TO IDFC INVESTORS: *Vide* clause 5, that the Assessee shall pay Rs.21.25 crores to IDF, upon being provided evidence to its satisfaction that IDF has ceased to hold 51% or more of the paid-up capital of SMMS;

45. INDEMNITIES RELATING TO BREACHES OF FDI POLICY: *Vide* clause 6, read with clause 3, indemnities under the FWA 2007, specifically encompassing any non-compliance of the FDI policy of the Government of India by Vodafone India Limited, would survive 'termination'.

3. SSSA 2011:

46. SHARE SUBSCRIPTION BY TII: *Vide* clause 2.3, TII (defined therein, as 'New Investor') agreed to subscribe to and acquire 6,000,000 equity shares, comprising 75% of the paid-up equity share capital of SMMS, for a total consideration of

Rs.9,00,00,000. The 'Valuation Price' of Rs.15/- per equity share (defined, for a duration of twelve months) represented the face value thereof (Rs.10/-) and premium of Rs.5/- per equity share;

47. BUYBACK OPTION: *Vide* clause 7.3(a), IDF (defined therein, as 'Existing Investor') was entitled, at any time after a period of 15 days (or such other period of time that may be agreed, in writing) after the Closing Date (defined in clause 3.1, as 30 November 2011, or such later date as may be mutually agreed), at its sole option to have the right to require SMMS to acquire all of the Original Investor Shares (i.e. the 2,000,000 equity shares held in SMMS by IDFC

Investors), through delivery of a Buy-Back Notice stating its intention to exercise this exit option. Based thereon, SMMS would be obliged to commence the buy-back, at the applicable Valuation Price, within ten days and ensure completion within sixty days or such date as may be mutually agreed. The New Investor (TII) was not entitled to offer its securities for buy-back.

48. PUT OPTION: *Vide* clause 7.4(c), in the event of inability on the part of SMMS in completing the buy-back within the sixty-day timeframe prescribed (or such mutually extended timeframe), the IDFC Investors were entitled to require TII to purchase all its equity at the Valuation Price.

49. CALL OPTION: *Vide* clause 7.4, in the event of the IDFC Investors not exercising the buy-back option, or the buy-back not being completed within the prescribed timeframe, then TII had an irrevocable and unconditional right to purchase or procure the purchase of the IDFC Investors' shares from the IDFC Investors, i.e. a Call Option, exercisable at the Valuation Price.

50. TAG ALONG: *Vide* clause 7.5, a Tag Along Right was granted to the IDFC Investors.

ANALYSIS OF AGREEMENTS

51. At the outset, it is plain from a reading of 341 ITR 1 that all of the SPA, the FWAs (including with Analjit Singh and Asim Ghosh), SHAs, TRA 2007 and TA 2007 (the "Agreements"), read in tandem with corollary approvals granted by the relevant regulatory and statutory authorities, were extensively examined by the Hon'ble Supreme Court of India. The interpretation of Agreements by the Hon'ble Supreme Court of India, including as to the scope, amplitude and legal effect, is binding on this Hon'ble Tribunal under Article 141 of the Constitution of India.

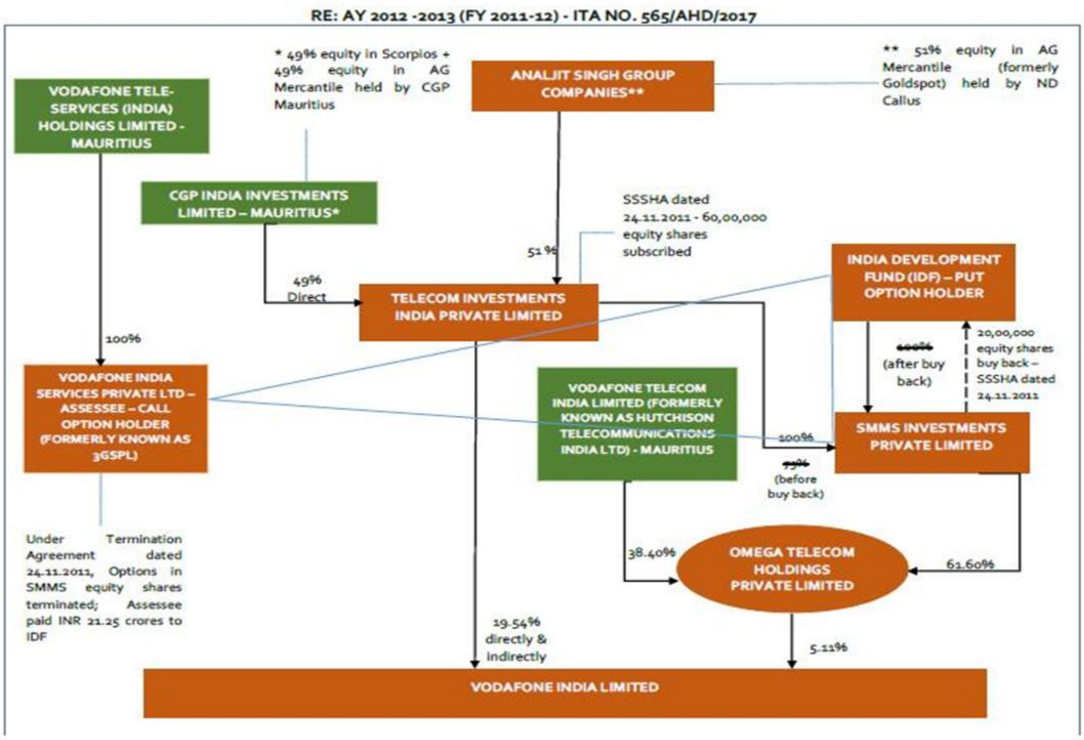
52. The attempts by Revenue to assail the judgment reported in 341 ITR 1, on grounds that the Hon'ble Supreme Court erred in concluding that VIHBV was not a Confirming Party to certain agreements, etc., are not matters that fall within the jurisdiction of this Hon'ble Tribunal, and the invitation of Revenue to embark on such an exercise will be contrary to the binding mandate of Article 141 of the Constitution of India.

53. While the Dispute Resolution Panel has aimed to distinguish the judgment reported in 341 ITR 1, purporting to carve out the facts of the present case from those before the Hon'ble Supreme Court of India, is erroneous, since the purported distinction stems from a conclusion that the present case concerns 'exercise' of options, whereas there is neither any exercise of call or put option by the IDFC Investors. Apart from the lack of justification for the Revenue to substitute the actual transaction, in manner had resort to by the TPO, AO and DRP, there is no scope, in law, for this Tribunal to interpret the Agreements in manner contrary to 341 ITR 1.

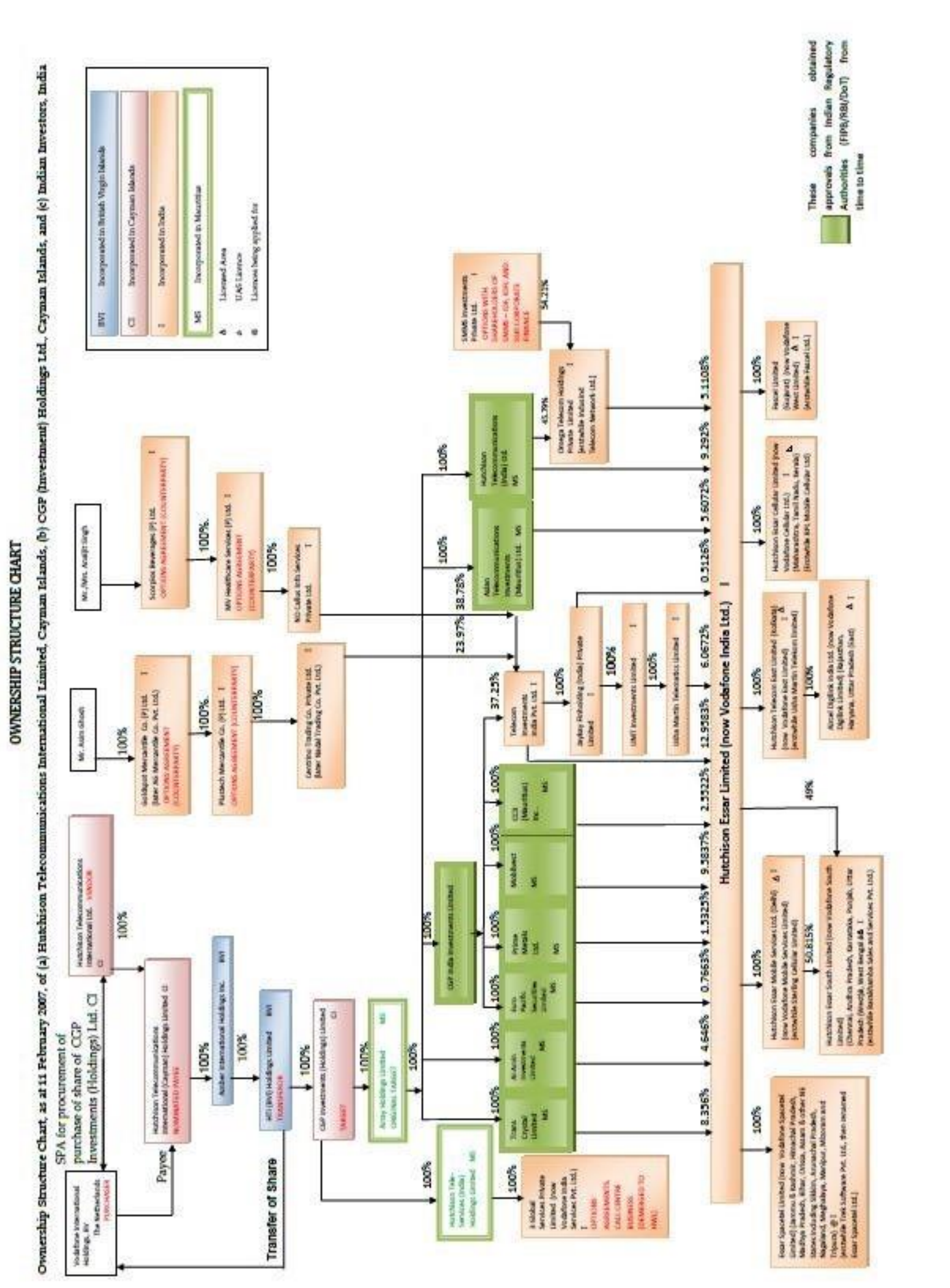
54. The submissions made by the Revenue overlooking the interpretation of

> **the Hon'ble Supreme Court ignores the commercial contracting and funding requirements that accompanied the acquisition of direct and indirect equity interests held through investment companies/holding entities, which constitute intermediaries between the parent holding company and the downstream operating company, all with sound economic rationale and business purpose. Corollary commercial arrangements, replete with attendant economic requirements of such corporate structures, including funding investment/holding companies, through subscription to equity and/or preference shareholding and/or grant of loans and/or creation of pledges, corollary obligations for release of pledged shareholding, all in this case inherited by Vodafone Group from the Hutchison Group, were examined by the Hon'ble Supreme Court.**

42. The assessee has filed a structure chart, according to his perception, showing the transaction in question. This chart is reproduced below:



43. The assessee has further filed a structure chart of the group, as on 11th February 2007, which is also being reproduced below for ready reference:



44. Learned counsel submits that in the light of the Foreign Direct Investment Policy then in force, there were certain restrictions on the foreign direct investment in telecommunication

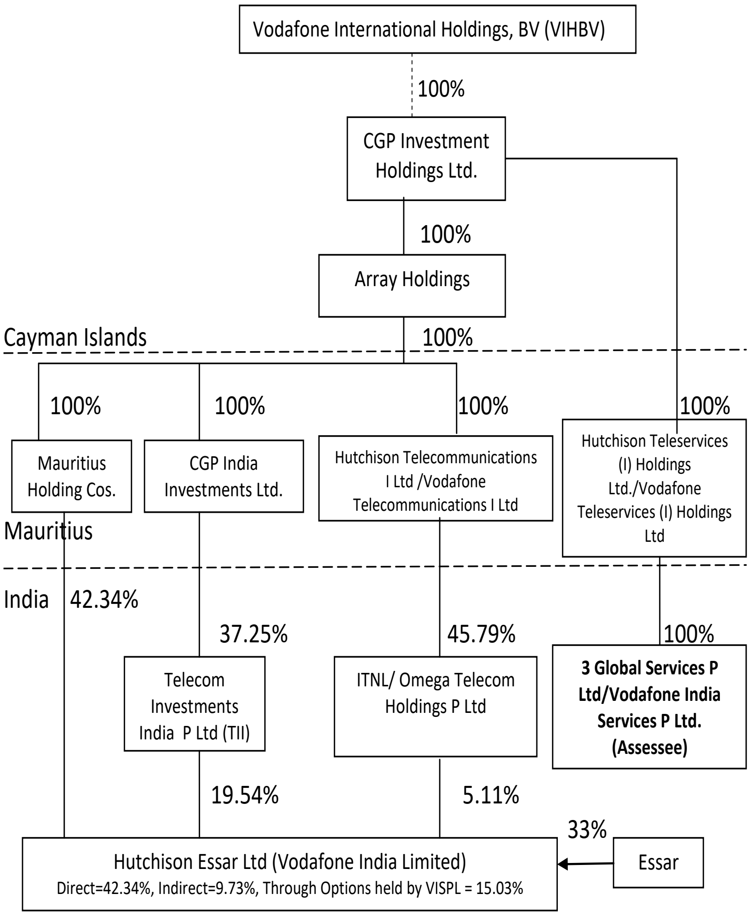
business, but, in the anticipation of such limits being relaxed, the assessee, then forming part of Hutchinson Group and in the year 2006, entered into three separate and distinct arrangements with, what he terms as, unrelated and independent group of investors- i.e. Analjit Singh group, Asim Ghosh Group and IDFC Group. These agreements were subsequently, in 2007, rewritten as a result of sale of telecommunication business interests by Hutchinson Group to Vodafone Group. The purpose of this arrangement was "to preserve the priority rights vested in, and accorded to, the assessee, to acquire equity interests of the counter party, in anticipation of revised FDI sectoral cap and/ or until 'change of control', through securing a call option for the assessee". While the Hutchinson held 52% shareholding in Hutchinson India Limited/ Vodafone India Limited, 15% shareholding was held by these three partners and the remaining 33% was held by Essar India Limited. These entities continued to hold their shareholdings, even after the sale of business, and there was no change of control. It is then submitted that the use of call and put options is a commercially well recognized practice and it facilitates coming together of independent, not hostile shareholders. He adds that there is nothing wrong in the preference of the majority shareholders for minority shareholders not being hostile. Learned counsel submits that, under the Framework Agreement 2007, the assessee did enter into a call and put option with IDFC Investors, and the assessee had a right to buy the entire equity capital of SMMS Investments at an agreed price, and, correspondingly, the assessee had an obligation to buy the entire share capital of SMMS Investments when IDFC Investors so requisitions. It was explained that SMMS Investments held 61.60% shareholdings in Omega Telecom Holdings, which, in turn, held 5.11% shareholdings in Vodafone India Limited. In effect, thus, under the arrangement, the assessee had a right, as indeed an obligation, to buy the entire shareholdings of SMMS Investments at an agreed price. It is pointed out that in August 2011, the IDFC Investors approached the assessee proposing 'exit' from the arrangement, and, the assessee, being a foreign "owned and controlled" company, acquisition of equity shares of SMMS (a holding company, which held indirect interest in Vodafone India Ltd.) would have constituted acquisition of shares of a holding company, and also counted towards foreign investment in Vodafone India Ltd. Since such acquisition by VISPL was not available under the automatic route, i.e. any acquisition by VISPL would be subject to approval from FIPB, rendering the acquisition of SMMS shares likely to be delayed, it was not considered prudent for VISPL to remain bound to contractual rights and/or obligations vis-à-vis the options. Therefore, VISPL and IDFC mutually decided to terminate the Framework Agreement, by payment of termination fee to IDFC investors, which fee was commercially agreed between non-associated enterprises (VISPL and IDFC) and, therefore, deemed to be arm's length consideration. It was thus reiterated that, during the relevant previous year, it was decided to terminate the arrangement, and, in consideration of so terminating the arrangement, the assessee paid Rs 21.25 crores to IDFC Investors. However, the payment so made by the assessee to the IDFC Investors was not claimed as a deduction in computation of business income, and, therefore, this payment had no income tax implications. It is once again highlighted that the assessee and the IDFC Investors are both Indian tax residents, and, as such, there is no erosion of base or shifting of income from one tax jurisdiction to another, which is *sine qua non* for application of transfer pricing provisions. Learned counsel also highlights that Hon'ble Supreme Court has held that these very arrangements, which we are dealing with in this appeal, came up for consideration before Hon'ble Supreme Court, and Their Lordships have categorically held that these transactions are independent of VIH-BV and by the parties in their own capacity. Our attention was again invited to Hon'ble Supreme Court's observation, at page 47, to the effect that "It is important to note that even in the fresh agreement the call option remained with GSPL and that the said agreement did not confer any rights on VIH". It is submitted that since these are transactions are, as categorically held by the Supreme Court, transactions between the independent transactions, without any influence of VIH-BV, there is no occasion for application of transfer pricing provisions. In any event, the case of the revenue hinges on taxation as capital gains but then, as categorically held by Hon'ble Supreme Court, "Call and put options are contractual rights and donot sound in any property and hence they cannot be, in the absence of any statutory stipulation, considered as a capital asset". Once the call and put options are not capital assets, there cannot be any question of taxation of capital gains, on exercise of these options. He, however, hastens to add that there was no exercise of option on this case. At best what the assessee had done is decided not to make money by exercising the option but can a gift, even if that be so, taxed as capital gains. Learned counsel once again takes us through his complex web of arguments in support of his stand that, given these facts and the legal position, the issue is squarely covered by the binding judicial precedents from Hon'ble Courts above, and no ALP adjustment can be made on the facts of this case.

45. It is broadly on the basis of these arguments that learned senior counsel for the assessee urges us to set aside the impugned ALP adjustment of Rs 1,588.85 crores.

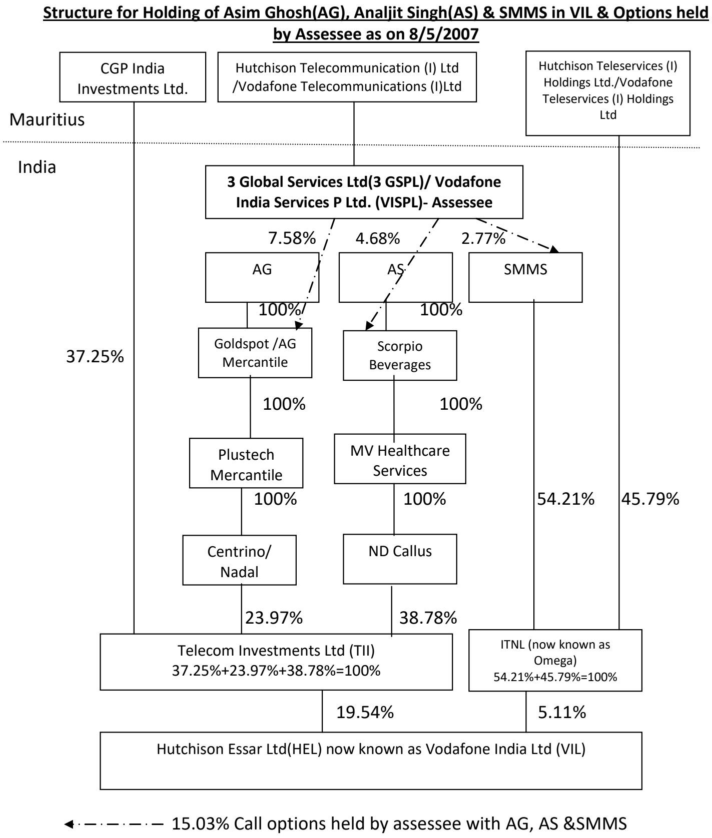
46. Learned Commissioner- Departmental Representative begins by pointing out that the issues in the judicial precedents cited by the learned senior counsel for the assessee are entirely different, than the issue before us, and not much, therefore, turns on these judicial precedents. All that we are required to adjudicate in the present case is, whether, from the perspective of the transfer provisions under the Income Tax Act, there was "an international transaction" or not, and, if so, whether such an international transaction was at an arm's length price or not. In case the international transaction is not at an arm's length price, we have to have, according to the learned Departmental Representative, take a call on what should be the arm's length price of the said international transaction. He suggests that rather than looking at the law and the judicial precedents to begin with, let us take a look at the relevant facts first, so as to understand the true nature of transactions before us.

47. Learned Departmental Representative begins by pointing out that the assessee, incorporated in March 1999, as of '3Global Services Pvt. Ltd.' (now known as "Vodafone India Services P Ltd" in short 'VISPL'), was a wholly owned subsidiary of Hutchison Teleservices (India) Holdings Ltd Mauritius (now known as Vodafone Teleservices (India) Holdings Ltd Mauritius) which, in turn was held by CGP Investment Holdings ltd, Cayman Island. The FDI ceiling in the telecom sector was 49%, which was increased to 74% (Press Note of 2005). Subsequent to this, the HTIL decided to reorganize the holding of Hutchison Essar Ltd. (HEL) to make it FDI compliant. The Hutch Group was holding 67% equity interest in Hutchison Essar Ltd (HEL), the telecom operator in India which comprised of 52% equity interest directly or indirectly where as 15.03% were held through option rights with Analjeet Singh (AS), Asim Ghosh (AG) and IDFC Investors. These option rights were held by the appellant. The remaining 33% equity was being held by the other partner Essar Group. The appellant was holding option rights to the extent of 15.03% through AS, AG and IDFC. The issue involved in this AY is only concerning the option rights held by the appellant with IDFC Investors which was 3.15%. Learned Departmental Representative points out that the shareholdings in HEL/VIL, as at time of the related Framework Agreement, was as follows:

Direct and Indirect Holding of Vodafone International Holdings, BV (VIHBV) as on 8/5/2007



48. It is then pointed out that remaining 62..25% stake in TII and 54.21% stake in Omega, the two companies directly holding equity capital of HEL/VEL, was held by three domestic entities on the strength of financial backing of the Vodafone Group. These three Indian entities, in turn, had executed call options in favour of the assessee to acquire entire indirect stake held by them at any time at the agreed amount. The structure of holdings by these domestic entities- namely Analjit Singh Group, Asim Ghosh Group and IDFC Group, according to the learned Departmental Representative, was as follows:



49. As we reproduce the above chart, we may add that there appears to be a slight mistake in the above chart inasmuch as the call option was given by IDFC Investors, which, in turn, held the entire capital of SMMS which held equity interests in Omega. The box for IDFC Investors is entirely missing in the above chart. Be that as it may, the correct position is that the assessee had call option from IDFC Investors with respect to entire share capital of SMMS which had 54.21% equity interests in Omega- holding 5.11% equity capital of Hutchinson Essar Limited/ Vodafone India Ltd.

50. Learned Departmental Representative submits that in order to understand the true nature of this transaction, we will have to look at some background facts. Vide Share purchase Agreement dated 30 June 2006 Hinduja TMT Ltd and Hutchison Telecommunications (I) Ltd. agreed to purchase 47.89% equity in ITNL (now known as Omega) for USD 193.38 million from Hinduja TMT Ltd. which were subsequently acquired by SMMS on 7 Aug 2006. As per the agreement, the shares were to be purchased from Hinduja by the Indian nominee of Hutchison. Learned Departmental Representative then takes us through the share purchase agreement, which, inter alia, provides as follows:

THIS SHARE PURCHASE AGREEMENT is made this 30 day of June, 2006

BETWEEN

1. Hinduja TMT Limited a company incorporated under this Companies Act, 1956 and having its registered office at In Centre, 49/50 MIDC, 12th Road, Andheri (East), Mumbai- 400 093 (hereinafter referred to as the "Vendor" which expressions, unless repugnant to the context of meaning thereof shall be deemed in include its successors and assigns)

AND

2. Hutchison Telecommunications (India) Limited a company incorporated made the laws of Mauritius, and having its registered office at 1st floor, Lex Cascades Building, Edith Cavell Street, Port Louis, Mauritius (herein referred to as the "Purchaser" which expressions unless repugnant to the context of meaning thereof shall be deemed to include its successors and assigns).

RECITALS

A. The Company (as defined in Clause I) holds 21,163,258 ordinary equity shares in Hutchison Essar Limited, a license of cellular mobile telephone services in respect of the Mumbai and other telecommunications circles in India.

B. As of the date of this Agreement, the authorized equity share capital of the Company is Rs. 1,960,000,000 divided into 196,000,000, equity shares of Rs. 10 each (each, a "Share"). As of the date of this Agreement, the issued subscribed and paid-up share capital of the Company is Rs. 1,958,784,650 being 195,878,465 equity shares of face value of Rs. (10/-) each.

C. As of the date of this Agreement, the Vendor is the legal and beneficial owner of 93,811,513 fully paid up shares, representing 47.89% of the issued and outstanding equity share capital of the Company (such Shares, the "Sale Shares").

D. At the request of the Purchaser, the Vendor has agreed to sell to an Indian Nominee of the Purchaser before the Long Stop Date and the Purchaser shall guarantee that the Indian Nominee shall purchase from the Vendor, the Sale Shares, on the terms and subject to the conditions contained in this Agreements.

Share Purchase Agreement dated 30 June 2006 between Hinduja TMT Ltd and Hutchison Telecommunications (I) Ltd for purchase of 47.89% equity in ITNL (now known as Omega) for US$ 193.38 million which were acquired by SMMS on 7Aug 2006. As per the agreement, the shares were to be purchased from Hinduja by an Indian nominee of Hutchison.

2. Agreement to Sell and Purchase Shares

2.1 Purchase and Sale of Sale shares. Subject to and in accordance with the terms and conditions of this Agreement, the vendor shall, as the legal and beneficial owner of the Sale Shares, Sell, assign, transfer and deliver the sale shares to the Purchaser, and the Purchaser shall purchase and acquire from the vendor, the sale shares together with all rights, including without limitation, all ancillary rights now

or hereafter attaching thereto, free and clear from any and all Encumbrances before the Long Stop Date. Provide that the Vendor acknowledges that the Purchaser is free to nominate the Indian Nominee on its behalf to undertake the rights and obligations of the Purchaser under this Agreement and the Vendor acknowledges and agrees that the performance of the Purchaser's obligations under this Agreement shall discharge the Purchaser's obligation in that regard but such right of nomination shall not in any way release the purchaser from any of its obligation under this Agreement.

3. Purchase Consideration

3.1 Purchase Consideration Amount. The consideration for the purchase of the Sale Shares by the Purchaser or the Indian Nominee (the "Purchase consideration Amount") shall be Rs. Equivalent of US$193,380,115 (One hundred ninety three million and three hundred and eighty thousand and one hundred and fifteen U.S. Dollars) converted in Rupees at RBI Spot Selling Rate at the opening on the Business Day immediately preceding the Completion Date.

3.2 Commitment Fee. In addition to the Purchase Consideration Amount, the Purchaser shall pay to the Vendor in Rs. the Commitment Fee on the Completion Date.

3.3. Payment. The Purchaser shall pay the Vendor before the Long Stop Date the Purchase Consideration Amount and the Commitment Fee payable by the Purchaser to the Vendor in accordance with Clause 3.1 and 3.2 by means of a pay order or draft or banker's cheque drawn on a bank reasonably acceptable to the Vendor.

51. Learned Departmental Representative submits that on a perusal of the above Agreement, it is very clear that HTIL has entered into an agreement with Hinduja TMT Ltd. to buy stake in Omega, and that the terms & conditions as well as the price at which the shares are to be transferred by Hinduja have already been decided by HTIL. Thereafter, IDFC Investors were nominated by HTIL as its nominee for purchase of shares from Hinduja TMT Ltd. Therefore, the IDFC investors bought the shares as "financial investors" who were only interested in earning a decent return on their investment and were not holding the shares as "owners" in their own right. This is so because if any person is investing in the shares of any company, the price at which the shares are being bought as well as the other terms and conditions associated with the transaction would form the basis of entering into a transaction which is not the case here. In this case all the terms as well as the price had already been decided by the HTIL on its own right and thereafter the IDFC Investors were asked to hold the shares on behalf of HTIL.

52. Learned Departmental Representative then points out that on the same date, i.e. 30 June 2006, one more Share Purchase Agreement was entered into between In Network Entertainment ltd. and Hutchison Telecommunications (I) Ltd for purchase of 6.32% equity in ITNL for USD 25.51 million which were subsequently acquired by SMMS on 7 Aug 2006.

As per this agreement also, the shares were to be purchased from Hinduja by an Indian nominee of Hutchison. Our attention was then invited to related observations in the said agreement, which are as follows:

Share Purchase Agreement Between In network Entertainment Limited And Hutchison Telecommunications (India) Limited

THIS SHARE PURCHASE AGREEMENT is made this 30 day of June, 2006

BETWEEN

1. In Network Entertainment Limited, a company incorporated under this Companies Act, 1956 and having its registered office at In Centre, 49/50 MIDC, 12th Road, Andheri (East), Mumbai- 400 093 (hereinafter referred to as the "Vendor" which expressions, unless repugnant to the context of meaning thereof shall be deemed in include its successors and assigns)

AND

2. Hutchison Telecommunications (India) Limited a company incorporated under the laws of Mauritius, and having its registered office at 1st floor, Lex Cascades Building, Edith Cavell Street, Port Louis, Mauritius (herein referred to as the "Purchaser" which expressions unless repugnant to the context of meaning thereof shall be deemed to include its successors and assigns).

RECITALS

A. The Company (as defined in Clause I) holds 21,163,258 ordinary equity shares in Hutchison Essar Limited, a license of cellular mobile telephone services in respect of the Mumbai and other telecommunications circles in India.

B. As of the date of this Agreement, the authorized equity share capital of the Company is Rs. 1,960,000,000 divided into 196,000,000, equity shares of Rs. 10 each (each, a "Share"). As of the date of this Agreement, the issued subscribed and paid-up share capital of the Company is Rs. 1,958,784,650 being 195,878,465 equity shares of face value of Rs. (10/-) each.

C. As of the date of this Agreement, the Vendor is the legal and beneficial owner of 12,374,571 fully paid up shares, representing 6.32% of the issued and outstanding equity share capital of the Company (such Shares, the "Sale Shares").

D. At the request of the Purchaser, the Vendor has agreed to sell to an Indian Nominee of the Purchaser before the Long Stop Date and the Purchaser shall guarantee that the Indian Nominee shall purchase from the Vendor, the Sale Shares, on the terms and subject to the conditions contained in this Agreements.

2. Agreement to Sell and Purchase Shares

2.1 Purchase and Sale of Sale shares. Subject to and in accordance with the terms and conditions of this Agreement, the vendor shall, as the legal and beneficial owner of the Sale Shares, Sell, assign, transfer and deliver the sale shares to the Purchaser, and the Purchaser shall purchase and acquire from the vendor, the sale shares together with all rights, including without limitation, all ancillary rights now or hereafter attaching thereto, free and clear from any and all Encumbrances before the Long Stop Date. Provide that the Vendor acknowledges that the Purchaser is free to nominate the Indian Nominee on its behalf to undertake the rights and obligations of the Purchaser under this Agreement and the Vendor acknowledges and agrees that the performance of the Purchaser's obligations under this Agreement shall discharge the Purchaser's obligation in that regard but such right of nomination shall not in any way release the purchaser from any of its obligation under this Agreement.

3. Purchase Consideration

3.1 Purchase Consideration Amount. The consideration for the purchase of the Sale Shares by the Purchaser or the Indian Nominee (the "Purchase consideration Amount") shall be Rs. Equivalent of US$25,508,553 (Twenty five million and five hundred and eight and five hundred and fifty three U.S. Dollars) converted in Rupees at RBI Spot Selling Rate at the opening on the Business Day immediately preceding the Completion Date.

3.2 Commitment Fee. In addition to the Purchase Consideration Amount, the Purchaser shall pay to the Vendor in Rs. the Commitment Fee on the Completion Date.

3.3. Payment. The Purchaser shall pay the Vendor before the Long Stop Date the Purchase Consideration Amount and the Commitment Fee payable by the Purchaser to the Vendor in accordance with Clause 3.1 and 3.2 by means of a pay order or draft or banker's cheque drawn on a bank reasonably acceptable to the Vendor.

53. It is pointed out that these two agreements are materially identical – while HTIL bought 47.89% in Omega from Hinduja TMT Ltd. Agreement, 6.32% Equity shares were bought from In Network Entertainment Ltd. – taking the total holding to 54.21% in Omega. These acquisition of equity shares were funded by loans taken from DSP Merrill Lynch Capital Ltd. and IDFC of Rs. 810 crore and Rs.190 crore respectively, plus preference shares of Rs. 48 crores subscribed by IDFC Investors. HTIL Cayman Island provided guarantee for these loans. While the aforesaid 54.21% holding in Omega were so bought by HTIL from Hinduja TMT Ltd. and Network Entertainment, the HTIL entered into an agreement with IDFC Investors who invested Rs. 2 Crore comprising of Rs.20 Lakh shares of Rs.10 each. The equity capital of SMMS was only to the extent of Rs.2 crores. In effect thus IDFC Investors, for a consideration of Rs 2 crores, get a company, holding 54.21% equity interest in Omega, worth Rs.1032.32 crores. Learned Departmental Representative, with all these

facts and figures, attempts to drive home the point that the investments held by IDFC Investors are not in the capacity as *bonafide* investors.

54. We are then taken through the SMMS Framework Agreement 2006 was entered into with the IDFC Group of investors, under which the assessee had call options to purchase the e3tire equity of SMMS entitling it to get equity interest of 2.77% in HEL by paying Rs. 66.13 cr plus interest @15% starting after 2nd year. It is also pointed out that Omega granted an investor option to IDFC Investors to purchase 0.1234% equity of HEL from ITNL at a strike price of Rs. 50 crore known as cashless option. Our attention is invited to the restrictions on transfer of shares acquired under the arrangement. Learned DR then points out that a shareholders agreement was also entered into between the parties to manage the affairs of Omega (placed at page numbers 1416 to 1449 of the PB-4) and that HTIL is a confirming party to this agreement as it is not a shareholder of Omega.

55. It is then pointed out that Vodafone International Holdings B.V., a company incorporated in the Netherlands (VIHBV) entered into a Share purchase agreement (SPA) with HTIL for procuring the purchase of the equity share capital of CGP Investments Holdings Ltd., a Cayman Islands Company (CGP) to acquire HTIL's telecom business in India. VIHBV acquired 66.98% equity interest in the Indian operating company. 42.34% interest was direct in VIL through 100% wholly owned subsidiaries (Mauritius Companies), 9.62% indirectly through TII and Omega Telecom Holdings Pvt. Ltd. (Omega)(i.e. pro rata route) and 15.03% through VISPL, which held the call options under the FWAs with AG, AS and IDFC. After the completion of this transaction on 8th May 2007, the Vodafone group stepped into the shoes of Hutchison.

56. Learned Departmental Representative points out that on 5th June 2007, Transaction Agreement executed between IDFC Group of Investors, the assessee, and VIH BV dated 05.06.2007 due to change of control, and that old loan along with interest amounting to Rs. 1,041 cr was repaid from the proceeds of preference shares subscribed by assessee of Rs. 583cr and by IDFC investors of Rs. 600 cr. The balance amount was used to redeem old preference shares and to subscribe to 3,76,95,443 new shares of Omega. The IDFC Investors assigned the cashless option to the assessee for a consideration of Rs. 62.24 cr. The assessee became entitled to purchase 0.1234% equity of HEL on payment of Rs. 50 cr. Our attention is then invited to this agreement, which, *inter alia*, states as follows:

The transaction agreement was entered on 5 June, 2007 between the parties"

(i) India Development Fund, a unit scheme of IDFC Infrastructure Fund.
(ii) Infrastructure Development Finance Co. Ltd.
(iii) SSKI Corporation Finance Pvt. Ltd.
(iv) IDFC Private Equity Fund.
(v) SMMS Infrastructure Pvt. Ltd.

(vi) Hutchison Telecommunications (India) Ltd.
(vii) 3 Global Services Pvt. Ltd.
(viii) Omega Telecom Holdings Pvt. Ltd.
(ix) Vodafone International Holdings B.V.

Whereas:

(A) Omega is an infrastructure holding company engaged in the business of investing in securities of telecommunication companies in India and holds 21,163,258 ordinary equity shares (the HEL Shares) in Hutchison Essar Ltd. (HEL) a licensee of cellular mobile telephone services in respect of telecommunications circles in India.

(B) The original investors through SMMS, an infrastructure holding company which is in the business of investing in securities of infrastructure holding companies which invest in telecommunications companies in India, hold 64.21% of the issued equity share capital of Omega of 106,165,064 ordinary shares of per value Rs. 10 each in Omega (the Old SMMS Omega shares) subject to the terms of a framework agreement dated 7 August 2006 (the 2006 Framework Agreement) between the original Investors, SMMS, HT India, GSPL Omega and Hutchison Telecommunications International Ltd. (HTL) and a share holder agreement dated 17 August 2006 (the 2006 Shareholder Agreement) between SMMS, HT India Omega and HTL.

(C) Under the terms of the 2006 Framework Agreement (i) GSPL has granted the Original Investors an option to purchase HEL shares by way of cashless exercise (the cashless option) which option can on GSPL's request be assigned to GSPL or to nominee (ii) the original investors have granted to GSPL the right to exercise an option to purchase the entire issued equity share capital of SMMS and (iii) GSPL has granted the original investors an option to purchase the entire issued equity share capital of SMMS and (iii) GSPL to purchase the entire issued equity share capital of SMMS (the 2006 Put Option)

(D) Vodafone and HTL have entered into an agreement dated 11February 2007 under which HTL has agreed to sell and Vodafone has agreed to purchase a controlling interest in CGP Investments (Holdings) Ltd., the indirect holding company of CGP and GSPL (the Acquisition Agreement)

(E) On Acquisition Completion there was a change in control of HT India for the purposes of the Framework Agreement the Original Investors to exercise the 2006 Put Option and the Cashless Option.

(F) The original investors and GSPL have agreed that the Original Investors may exercise the Cashless Option conditional on Acquisition Completion on the terms and conditions set out in this Agreement. The original Investors have further agreed that following exercise of the cashless option the original investors shall be entitled to dispose of the SMMS Ordinary Shares held by the IDFC and SSKI in SMMS without being required to offer such shares to GSPL.

(G) Vodafone has agreed conditional Acquisition Completion to subscribe for the Vodafone Preference Shares and IDFC and IDFC PE have agreed to subscribe for

IDFC Preference Shares and the IDFC Fund II Preference Shares on the terms and conditions set out in this Agreement.

(H) As a result of the foregoing, the parties have agreed to enter into this Agreement

57. What, according to the learned Departmental Representative, clear from this agreement is that VIH-BV calls the shots. The preference shares are to be VIH BV or by its nominees, these shares will be registered in the name of VIH BV or its nominees. In effect thus, the terms of the agreement are being decided in substance by VIHBV. It is pointed out that the terms of arrangements, taken as a whole, adequately demonstrate that VIHBV has complete control on the exercise or procure the exercise of the options by the original investors, and that VIHBV which has determined the terms of the relevant transactions in substance with the original investors. It is then pointed out that once Vodafone Group stepped in the shoes of Hutchinson, the Framework Agreement was rewritten by Vodafone group. This is known as FWA of 2007. Learned Departmental Representative invites our attention to the relevant clauses of this agreement, which are stated to be as follows:

This Agreement is made on 06 June 2007 between:

INDIA DEVELOPMENT FUND (IDF)

INFRASTRUCTURE DEVELOPMENT FINANCE COMPANY LIMITED (IDFC)

IDFC Private Equity Fund II (IDFC PE)

SMMS INVESTMENTS PRIVATE LIMITED (SMMS)

HUTCHISON TELECOMMUNICATIONS (INDIA) LIMITED (HTIL)

3 GLOBAL SERVICES PRIVATE LIMITED (GSPL)

Omega Telecom Holdings Private Limited (Omega)

Vodafone International Holdings B.V. (Vodafone)

The recital in of this agreement is mentioned as under:

(A) Omega is an infrastructure holding company engaged in the business of investing in securities of telecommunication companies in India and holds 21,163,258 ordinary equity shares ("the HEL Shares") in Hutchison Essar Limited (HEL), a license of cellular mobile telephone services in respect of telecommunications circles in India.

(B) Vodafone and Hutchison Telecommunication International Limited entered into an agreement dated 11.02.2007 pursuant to which Vodafone agreed to acquire a controlling interest in CGP India Investments (Holdings) Limited, the indirect holding company of HT India and GSPL ("the acquisition agreement"). On the completion date HT India and GSPL became wholly owned subsidiaries of Vodafone.

(C) Pursuant to an agreement dated on or around 05.06.2007 between the parties hereto and SSKI and HTL (the "Transaction Agreement") (i) IDF agreed to acquire the equity

shares in SMMS held by IDFC and SSKI (ii) IDFC, IDFC PE and Vodafone agreed to subscribe or procure that another member of the Vodafone Group subscribe for preference shares in SMMS (iii) SMMS agreed to repay loans under the Loan Agreements and redeem the Old Preference Shares (iv) SMMS agreed to subscribe for 37,695,443 Omega Shares (the "New Omega Shares")

(D) Immediately following completion of the transaction described in Recital (D), Omega's issued share capital will consist of 233,574,587 Omega Shares, 69,693,060 of which HT India will hold (38.4% of the Omega's issued share capital) and 143,881,527 of which SMMS will hold (61.6% of Omega's issued share capital)

(E) In mutual consideration of the foregoing, the parties have agreed (i) to enter into this Agreement pursuant to which the investors have agreed to grant to GSPL an option to purchase the entire issued share capital of SMMS and GSPL have agreed to grant the investors an option to require GSPL to purchase issued share capital of SMMS and (ii) to enter into a shareholder agreement to confirm their understanding regarding the regulation of the affairs of Omega and the terms and conditions governing their relationship as shareholders of Omega.

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"Affiliate when used with reference to any corporate entity shall mean another company controlled by, controlling or under common control with that entity, where "Control" means either (i) the ownership, either directly or indirectly, of more than fifty percent (50%) of the voting shares or comparable interests in such entity or other company as the case may be, or (ii) the right to elect the majority of the directors of such entity or other company, as the case may be, where such rights may be exercised without the consent of any third party."

"Sectoral Cap" shall mean the maximum prescribed limits of foreign investment in the telecommunications sector in India imposed by the Government of India from time to time (which at present limits foreign direct investment to 74% of the equity share capital of any company in the telecommunications sector in India.

4 Prohibition on Transfer and issue of Shares

4.1 Save as provided in this Agreement and the Transaction Agreement, the Investors and GSPL undertake to the other parties that there shall be no transfer of SMMS Shares.

4.2 Any proposed Transfer of SMMS Shares;

4.2.1 inter se Investors and their respective Affiliates shall be subject to the prior written consent of GSPL and the other Investors, such consent shall not be unreasonably withheld; and

4.2.2 inter se GSPL and its Affiliates shall be subject to the prior written consent of all the Investors, such consent shall not be unreasonably withheld."

5 Put Option

5.1 The Put Option

With effect from Investment Completion, each of the Investors shell, subject to the conditions set out In this Clause 5, have the right (the 'Put Option') to require GSPL or Its nominee to purchase all or part of the SMMS Shares held by the respective Investor(s) (the 'Put Shares') on one or more occasions for an amount equal to the Transfer Price attributable to such Put Shires on the terms of this Clause 5 and Clause 9, subject to a maximum aggregate amount of Rs. 15 billion. Save as expressly stated, the Put Option shall be exercisable by an investor In whole but not in pan in respect of any Put Shares held by it Implemented in a phased manner In accordance with the provisions of this Clause 5.

5.2 Exercise

The Put Option is exercisable by notice in writing from the relevant investor(s) to GSPL, such notice lobe given:

5.2.1 In the case of the IDFC Fund II Preference Shares, at any time after the second anniversary of the investment Date in respect to all (but not part only) of the IDFC Fund II Preference shares;

5.2.2 In the case at the SMMS Ordinary Shares, at any time after the third anniversary of the Investment Date In respect of all (but not part only) of the SMMS Ordinary Shares;

5.2.3 In the case of the IDFC Preference Shares:

(i) at any time after 25 March 2008 in respect of 200,000 of the IDFC Preference Shares (end not any lesser number) (the 'Put Option' Al Shares');

(ii) at any time after the date felling one year after exercise of the option referred to in paragraph (i) above in respect of 85,000 of the IDFC Preference Shares as determined by IDFC in accordance with Schedule 1 (end not any lesser number) (the 'Put Option A2 Share")

(iii) at any time after the date falling one year after exercise of the option referred to in paragraph (ii) above in respect of 90,000 of the IDFC Preference Shares as determined by IDFC in accordance with Schedule 1 (and not any lesser number) (the 'Put Option A3 Shares"); and

(iv) at any time after the date falling three years after the Investment Date in respect of 125,000 of the IDFC Preference Shares as determined by IDF in accordance with Schedule 1 (and not any lesser number) (the 'Put Option A4 Shares);

5.2.4 In the case of all (but not part only) of the SMMS Shares held by the Investors, If HEL loses or surrenders the telecommunications license granted to it by the Department of Telecommunications. Government of India;

5.2.5 In the case of all of a particular class (but not part only) of the SMMS Shares held by the Investors, in the event of any restrictions under applicable Indian law (other than any restriction arising as a result of any action or Inaction on the part of any of the Investors or any member of their respective groups or their respective direct shareholder excluding the Government of India) being placed on any of the Investors in holding the SMMS Shares provided the relevant Investor(s) has received a written direction from the Government of India or has obtained a written legal opinion from Indian legal counsel addressed to and acceptable to GSPL acting reasonably, to the effect that it is so restricted from holding the applicable SMMS Shares;

5.2.6 in the case of all (but not part only) of the SMMS Shares held by the investors, in the event of a Change In Control of Vodafone or HEL (other than a Change of Control in Vodafone Group Plc) and the Investors having objected in writing to such Change of Control; or

5.2.7 In the case of all (but not part only) of the SMMS Shares held by the Investors, in the event of the Vodafone Group ceasing to hold a minimum aggregate Interest (direct or indirect) in HT India's issued equity capital of 50.1% or HT India ceasing to hold a minimum aggregate interest (direct or Indirect) in Omega's issued equity capital of 38.4%.

whereupon the relevant investor(s) shall sell and GSPL or such person as It may nominate shall purchase the relevant Put Shares. A notice under this sub-clause shall be Irrevocable.

GSPL agrees to abide by the directions of the Investors in connection with the Transfer of the Put Shares le GSPL or any person that GSPL nominates as its nominee and undertakes to do or procure ail necessary things and execute at necessary forms, documents and agreements to implement such directions.

6 Call Option

6.1 The Call Option

With effect from Investment Completion, GSPL shall, subject to the conditions set out in this Clouse 6, have an option (the 'Call Carton') to purchase at (but not part only) of the SMMS Shares held by the investments (the 'Call Shares') from the investors for an amount equal to the Transfer Price attributable to such Call Shares on the terms of this Clause 6 and Clause 9.

6.2 Exercise

6.2.1 The Call Option is exercisable in whole but not in part by notice in writing from GSPL to the investors given at any time after investment Completion whereupon the Investors shall sell end GSPL, or such parson as it may nominate, shall purchase the Call Shares. A notice under this sub-clause shall be irrevocable;

6.2.2 Each of the Investors and SMMS hereby agrees to abide by the directions of GSPL In connection with the Transfer of the Cell Shares to GSPL, or such person as It may nominate, and undertakes to do or 'procure all necessary things and execute at necessary forms, documents and agreements to Implement such directions.

7 Default Option

7.1 Following any Event of Default on the part of the Investors or SMMS, GSPL shall have the right by giving written notice to the Investors, to require the Investors to sell to GSPL, or any person that GSPL nominates, all (but not part only) of the SMMS Shares held by the Investors for an amount as determined in accordance with the provisions of Part 1 of Schedule 2, subject to a maximum of Rs. 15 billion, on the terms of this Clause 7 and Clause 9.

7.2 Following any Event of Default on the part of GSPL, the Investors shall have the right by giving written notice to GSPL to require GSPL or any person that GSPL nominates to purchase all (but not part only) of the SMMS Shares held by the Investors for an amount as determined in accordance with the provisions of Part 2 of Schedule 2, subject to maximum of Rs. 15 billion, on the terms of this Clause 7 and Clause 9. Upon receipt of the requisite funds the Investors will thereafter Transfer in accordance with such instructions

as may be given in this regard by GSPL, the SMMS Shares to GSPL or such person as GSPL shall nominate and shall, following the Transfer of all of the SMMS Ordinary Shares, also consequently procure the resignation of the investors' representatives (if any) from the Board of SMMS.

7.3 In addition to the rights in Clause 7.2, if GSPL defaults on any payment obligation (Including any inability by GSPL to honour such obligations due to restrictions under applicable Indian Law) in respect of any Option (including but not limited to any payment to be made by GSPL under the provisions of Clause 7.4 below), and such default remains un-remedied for 15 days after the due date specified in the notice referred to in Clause 9.1 for payment, than the investors and SMMS Directors in Omega shall have the right to require Omega to sell sufficient of the HEL Shares and/or SMMS to sell sufficient of the Omega Shares held by it to relies an amount sufficient for Omega and/or SMMS, as relevant, to transfer to the Investors an amount equivalent to the amount which GSPL is required to pay to the relevant Investor(s) under the Default Option (after taking into account any amounts received from other security available to the Investors and SMMS in respect of GSPL's obligations In respect of the Options). Upon receipt of such amounts from Omega and/or SMMS, as relevant, the Investors shall Immediately transfer all the SMMS Shares to GSPL or such person as it may direct and thereafter GSPL shall be liable to Omega and/or SMMS for the amount paid to the Investors by Omega and/or SMMS.

7.4 If at any time at which the Investors are permitted under the (arm's of this Agreement to exercise an Option and at such time:

7.4.1 the relevant investor(s) is prevented from exercising such Option due to restrictions under applicable Indian law (Other than any restriction wising as a result of any action or inaction on the part of any of the Investors or any member of their respective groups or their respective direct shareholders excluding the Government of India); or

7.4.2 the relevant Investor(s) has received a written direction from the Government of India or has obtained a written opinion from Indian legal counsel addressed to and acceptable to GSPL acting reasonably, to the effect that it is so prevented;

and the relevant investor has notified GSPL in writing of its desire to exercise such Option and has provided with the notice, a copy of such direction or legal opinion to GSPL, GSPL shall pay to the relevant investor(s) with 30 days from the date of such notification an amount equivalent to the amount which GSPL would have been required to pay to the relevant Investor(s) on exercise of such Option and upon receipt by the relevant investor(s) of the amounts referred to in this Clause 7.4, the relevant Investor(s) shall immediately Transfer the SMMS Shares which would have been the subject of the relevant Option to GSPL or such person as it may direct in accordance with such Instructions as may be given in this regard by GSPL and, following the Transfer of all of the SMMS Ordinary Shares, shall also consequently procure the resignation of the Investors' representatives (If any) from the board of SMMS. If GSPL does not accept the opinion of the legal counsel referred to in Clause 7.4.2, the relevant Option shall be deemed to have been exercised as if such restriction did not exist and the date of exercise of such Option shall be deemed to be the date on which the relevant Investor served notice on GSPL of its desire to exercise such Option In accordance with the provisions of this Clause 7.4 and GSPL shall Indemnify the relevant Investor(s) in respect of any loss or liability suffered or Incurred by such Investor(s) as a direct result of the exercise of the relevant Option being subsequently determined by a court of competent jurisdiction or applicable regulatory authority not to have been so permitted.

7.5 If at any time GSPL is permitted under the terms of this Agreement to exercise an Option and at such time:

7.5.1 GSPL is prevented from exercising such Option due to restrictions under applicable Indian law (other than any restriction arising as a result of any action or inaction on the part of GSPL or any member of its group or its direct or indirect shareholders); or

7.5.2 GSPL has received a written direction from the Government of India or has obtained a written opinion from Indian legal counsel addressed to and acceptable to the Investors acting reasonably, to the effect that it is so prevented;

and GSPL has notified the relevant inventor in writing of its desire to exercise such Option and has provided with the notice, a copy of such direction or legal opinion to the relevant Investor, GSPI shall pay to the relevant Investor(s) within 30 days from the date of such notification an amount equivalent to the amount which GSPL would have been required to pay to the relevant investor(s) on exercise of such Option and upon receipt by the relevant investor(s) of the amounts referred to in this Clause 7.5, the relevant Investor(s) shall immediately Transfer the SMMS Shares which would have been the subject of the relevant Option to GSPL or such parson as it may direct in accordance with such instructions as may be given in this regard by GSPL and, following the Transfer of all of the SMMS Ordinary Shares, shall also consequently procure the resignation of the Investors' representatives (If any) from the Board of SMMS. If the relevant Investor does not accept the opinion of the legal counsel referred to in Clause 7.5.2, the relevant Option shall be deemed to have been exercised as if such restriction did not exist and the date of exercise of such Option shall be deemed to be the date on which GSPL served notice on the relevant investor of its desire to exercise such Option in accordance with the provisions of this Clause 7.5 and the relevant Investor shall indemnify GSPL in respect of any loss or liability suffered or incurred by GSPL as a direct result of the exercise of the relevant Option being subsequently determined by a court of competent jurisdiction or applicable regulatory authority not to have been so permitted.

7.6 Upon receipt by the relevant investor(s) of the amounts referred to In Clause 7.4 and/or 7.5 by Omega and/or SMMS, as relevant, the relevant investor(s) shall immediately Transfer the SMMS Shares which would have been the subject of the relevant Option to GSPL or such parson as it may direct in accordance with such instructions as may be given in this regard by GSPL and, following the Transfer of all of the SMMS Ordinary Shares, shall also consequently procure the resignation of the Investors' representatives (If any) from the Board of SMMS.

8 Transfer Price

Except as stipulated by Clauses 7 and 9 and subject to the requirements of any applicable regulatory requirements, the price payable for any Transfer ("Transfer Price") shall be such value as may be determined in accordance with the formula set out in Schedule 1. Subject to a maximum of Rs.15 billion.

9 Transfer Procedure

9.1 The Options specified in Clauses 5, 8 and 7 may also be exercised by the exercising party giving written notice as provided for therein and the effective date of its exercise shall be the date of such written notice.

9.2 Subject to Clause 9.5, the sale and purchase of the Put Shares, the Call Shares or the Default Shares, as relevant, which are the subject of the Option Notice shall be

completed at the registered office of SMMS or such other place as GSPL and the Investors may agree on the date specified in the notice referred to in Clause 9.1, such date to be not shorter than 10 days or later than 30 days from the date of the relevant notice under Clause 9, or if later, within five Business Days after written notice of the determination of the Fair Market Value pursuant to Schedule 1.

9.3 The investors shall deliver to GSPL a duly executed transfer form for the transfer of the Put Shares, the Call Shares and/or the Default Shares, as relevant, the subject of the Option Notice against payment of the Transfer Price by GSPL.

9.4 The Investors shall procure the passing of a board resolution of SMMS. Inter all, approving the transfer of the Put Shares, the Call Shares and/or the Default Shares, as relevant, which are the subject of the Option Notice to GSPL or such person as it may direct and the entering of GSPL's name or the name of its nominee in the register of holders of members in respect thereof and the delivery to GSPL of proof of the same.

9.5 Any Transfer of the Put Shares, Call Shares and/or Default Shares shall be subject to the approval of any competent regulatory agencies and shall be completed within the periods stipulated by Clause 9.2 or such other extended time as GSPL and the transferring party(s) may agree is required to comply with applicable laws (including the obtaining of requisite approvals). If GSPL and the relevant transferring party(s) cannot agree the extended time, completion will take place no later than 60 days after the date of the relevant notice, or if later, within five Business Days after written notice of the determination of the Fair Market Value pursuant to Schedule 1 and it shall be the responsibility of GSPL to nominate a purchaser in compliance with all applicable laws by that date.

9.6 Upon exercise of any Option the Investors shall sell the Put Shares. Call Shares and/or Default Shares, as relevant, with full title guarantee free from Encumbrances and with all rights then or subsequently attaching to them and the Investors shall execute and deliver such documents and lake such other steps at the reasonable request and cost of GSPL following completion to the extent required to vest the Put Shares, Call Shares or Default Shares, as relevant In GSPL and otherwise to give it the full benefit of this Clause.

9.7 Each of the parties shall promptly and duly execute and deliver all such Instruments and documents, and do or procure to be done all such acts or things, as may be necessary or desirable for giving effect to Clauses 5.6. 7 and 9.

10 Stamp Duty

GSPL, or such person as it may nominate to purchase any shares pursuant to the provisions of this Agreement shall be liable to bear and pay the stamp duly for the transfer/purchases of such shares.

11 Assignability or Transfer of Rights

11.1 The parties agree that:

11.1.1 the Call Option may be assigned or transferred only to an Affiliate of GSPL, without the prior written consent of the Investors; and

11.1.2 the Put Option may not be assigned or transferred without the prior written consent of GSPL.

"12.7 Vodafone Representations

Vodafone represents, warrants and undertakes that:

12.7.1 at completion Vodafone held (directly or indirectly) a minimum interest of 50.1% of the issued equity share capital of HT India and that HT India held (directly or indirectly) 45.79% of the issued equity share capital of Omega, representing an indirect interest in 2.34% of the issued share capital of HEL;

12.7.2 at investment completion immediately following the subscription by SMMS of the New Omega Shares in accordance with the terms of the Transaction Agreement, Vodafone holds and will hold (directly or indirectly) a minimum interest of 50.1% of the issued equity share capital of HT India, and HT India holds and will hold (directly or indirectly 38.4% of the issued equity share capital of Omega, representing an indirect interest in 1.96% of HEL; and

12.7.3 immediately following the subscription by SMMS of the New Omega Shares in accordance with the terms of the Transaction Agreement, assuming compliance by IDF with Clause 12.4.2, HEL will not be in violation (either through direct or indirect ownership) of Foreign Direct Investment Guidelines".

"12.9 Vodafone Undertakings

12.9.1 Vodafone undertakes to procure the due and punctual performance by GSPL, or any assignee of GSPL, of all the obligations of GSPL under this Agreement and in accordance with this Agreement and in the event of failure of such performance by GSPL, Vodafone shall itself (or through a nominee agent) perform such obligations. The obligations of Vodafone under this clause shall be the same and in no event greater than any obligation of GSPL under this Agreement and Vodafone may assume and rely upon such rights of set-ogg, defence, counterclaim, limitation of liability and /or counter charges as GSPL may have against the other parties.

12.9.2 Vodafone undertakes to procure that none of HT India or any director of Omega who is appointed by Vodafone will take or approve any action to cause Omega to incur any borrowing or indebtness.

12.9.3 Vodafone undertakes not to, and to procure that none of HT India or any of its Affiliates, take any action to create an Encumbrance over any share in HEL held by Omega "

"12.10 Costs

12.10.1 Vodaofone (ie VIH BV) shall reimburse to the investors all reasonable costs incurred by the Investors in connection with this Agreement, including the costs of the maintenance, regulatory filings, audit formalities, stamp duty, legal costs and other expenses and administrative costs borne by SMMS.

12.10.2 Vodafone agrees to reimburse the Investors for all third party expenses, such as legal and financial due diligence costs and other costs borne by the Investors for preparation, execution and completion of this Agreement and the Shareholder Agreement subject to a cap of Rs. 5,000,000 towards the out of pocket expenses of IDFC PE incurred in connection with this Agreement, and to reimburse IDFC PE any further such expenses in excess of such amount within seven days of receipt of an invoice for such amounts.

12.10.3 Vodafone and GSPL further agree to meet the further ongoing administrative costs of Omega relating to their respective maintenance as companies incorporated under the Act."

13. Indemnification

13.1 Vodafone shall indemnify and hold harmless promptly upon demand at any time and from time to time, from and against any and all losses, claims, damages, liabilities, costs (including reasonable attorney's fees and disbursements) and expenses (collectively "Losses") to which the Investors and SMMS, their respective managers, officers, directors and employees (individually and "indemnified party", and collectively, the "indemnified parties") may become subject, insofar as such Losses directly arise out of, in any way relate, or result from (i) the Indemnified Party's appointment as a director or officer of Omega against any liability arising out of such appointment other than due to such Person's negligence or misconduct; and (ii) any claim or proceeding by nay third party against the Indemnified Parties or Omega arising out of any transaction undertaken by Omega on or after Investment Completion."

58. It is then pointed out that in terms or the above agreement, there was a complete prohibition on transfer and issue of shares of SMMS otherwise then as provided in this agreement or the transaction agreement either by SMMS or Investors. The other notable aspects of this agreement were explained as follows. The assessee had granted put option to the investors for equity shares as well as the preference shares and the investors have given the appellant call options to purchase all shares of the SMMS. The Transfer Price was determined as per Schedule 1 of this agreement, as per which, it was 2 crore plus interest @17.5% per annum compounding annually or Rs. 7.6 million whichever is higher. The other condition of FMV of VIL being more than USD 15 Billion has not reached therefore, this is not applicable. The Transfer price as per this formula works out to Rs. 4.13 crores on the date of termination of this agreement. The default option is given in Clause 7 of the agreement wherein in case of default, the either party is required to pay 115% of the transfer price. Therefore, the maximum amount payable in case of default would also be 115% of Rs. 4.13 crores, which comes to Rs. 4.75 crores. Therefore, as per this agreement the maximum amount payable would be 4.75 crores for acquisition of equity shares. As per Clause 12.9 of the agreement, the VIHBV has undertaken to procure the due and punctual performance by GSPL or any assignee of GSPL of all the obligations under this agreement. It has further undertaken that in the event of failure by the appellant, VIHBV shall itself or through a nominee agent perform such obligations. It was also pointed out that as per Clause 12.10, all the expenses and reasonable costs incurred by the investors in connection with this agreement were to be reimbursed by VIHBV, and as per Clause 16.1, it has further been provided that the Agreement could be terminated by mutual consent.

59. Learned Departmental Representative now invites our attention to the Shareholders Agreement 2007 which puts complete restrictions on transfer, except under the terms of this agreement itself, of shareholdings in SMMS. He then moves on termination agreement dated 24.11.2011, whereby Framework Agreement 2007 is terminated. A copy of the said agreement was placed before us at pages 1291 to 1307 of the Paper-book IV filed by the appellant. Learned Departmental Representative repeatedly points out that, to quote his own

words, "p***arties to the agreement page no 1292 and 1293 these all have been described as parties in the agreement (contrary to observation of Hon'ble SC in VIH BV case wherein it has been described as a conforming party" .*** These parties are ***India Development Fund, Infrastructure development Finance Company Limited, IDFC Private Equity Fund II, SMMS Investments Private Limited, Vodafone Telecommunications (India) Limited Vodafone India Services Private Limited, Omega Telecom Holdings Private Limited, and Vodafone International Holdings B.V. Our attention is then invited to the following extracts from the termination agreement:***

Whereas

(A) ***IDF and IDBI Trusteeship Services Limited ("ITSL) (in its capacity as trustee for Mr. Satish Mandhana) are the sole equity shareholders in SMMS with ; (i) IDF holding 1,999,990 (one million nine hundred ninety nine thousand nine hundred and ninety) equity shares of Rs.10/- (Indian Rupees Ten only) each in SMMS; and (ii) ITSL (in its capacity as trustee for Mr. Satish Mandhana) holding 10 (ten) equity shares of Rs. 10/- (Indian Rupees Ten only) each in SMMS.***

(B) ***SMMS is a shareholder in Omega holding 143,881,525 (One hundred forty three million eight hundred eighty one thousand five hundred and twenty five) equity shares of Rs.10/- (India Rupees Ten only) each in Omega. In addition (i) Ms. Rupa Vora Holds one equity share of Rs.10 in Omega jointly with SMMS ; and (ii) Mr. Satish Mandhna holds oe equity share of Rs.10 in Omega Jointly with SMMS.***

(C) ***IDF, IDFC, IDFC PE, SMMS, VTIL, VISPL, Omega and Vodafone are all parties and subject to the term of a framework agreement dated June 6, 2007 ("Framework Agreement ") and SMMS, VTIL, Omega and Vodafone are all parties to a shareholder agreement dated June 6, 2007 ("Shareholders Agreement").***

(D) ***Under the Framework Agreement, certain rights, duties, benefits and / or obligations have been made available to or imposed upon the parties in accordance with its terms. After detailed discussions, the parties have agreed that in consideration of the mutual release of their respective duties and obligations under the Framework Agreement, the Framework Agreement shall stand terminated on the terms and conditions hereinafter contained.***

(E) ***As a result of the foregoing the parties have agreed to enter into this Agreement.***

60. It is then pointed out that the definitions have been given in Clause 1 of the agreement which, inter alia, state as follows:

"Framework Documents" means collectively the Framework Agreement as well as all other deeds, document or other writings entered into by or between any two or more of the parties in furtherance of the provisions of the Framework Agreement, if any, but shall not include the shareholders agreement.

<u>"Termination Date" means the date on which closing under the share subscription and shareholders agreement entered into by IDF and SMMS with Telecom Investments India Private Limited dated on or around the date hereof occurs and consequently IDF ceases to hold 51% (fifty one percent) or more of the paid up equity capital of SMMS.</u>

(Emphasis applied by underlining)

61. It is then pointed out that termination date of this agreement means the date on which closing under the share subscription and the shareholders agreement entered into by IDFC and SMMS with Telecom Investment India P. Ltd. (TII) occurs and consequently IDF ceases to hold 51% or more of the paid up equity capital of SMMS. It is not thus simply a termination of an arrangement but also ensuring that another group entity, obviously as a nominee of the VIH-BV, eventually gets the benefit. This arrangement, according to the learned Depatmental Representative, proves beyond doubt that the substance of transaction is transfer of the call option rights by the assessee in favour of its AE VIHBV which is directing the appellant to do so, and there cannot be any other justification of the assessee requiring evidence to its satisfaction that IDF has ceased to hold 51% or more in SMMS. The termination agreement, as also the share subscription and shareholder agreemet- which have been entered into on the same date, are required to be read together.

62. Learned Departmental Representative then takes us through the share subscription and shareholder agreement in detail. It is then pointed out that as per the FWA of 2007, the call options for acquisition of shares of SMMS were held by the appellant, and the assessee in turn granted put options for the preference shares as well as equity shares to IDFC Investors. All the put options of preference shares were exercised by the investors wherein the appellant subscribed to the preference shares as provided in Clause 5 of the FWA and paid a premium of Rs. 178 crores over and above the issue price. However, in case of equity shares, which were to be acquired by the appellant for a sum of 4.13 crores as per schedule 2 of the FWA of 2007, the appellant terminated the FWA and paid a compensation of Rs. 21.25 crores. It is submitted that when the appellant could have acquired the equity shares for a meager sum of Rs. 4.13 crores only why any prudent businessman would pay a compensation of Rs. 21.25 crores for the so called default. Learned DR points out that even as per the default clause of the FWA 2007 the maximum liability of the appellant was 4.75 crores (4.13 crore transfer price multiplied with 115% to arrive at the default price). It is once again pointed out that VIHBV is the controlling party which took upon itself to subscribe to Vodafone Preference Shares with IDFC Investors. Learned DR's contention is that it is clearly been provided in this agreement that either VIHBV or as directed by it, any of the subsidiaries would subscribe to the preference shares and that it has been further been provided in Clause 10 of the transaction agreement that each of the IDFC investors irrevocably undertakes and agrees with Vodafone, HT India and GSPL that they will not without the written consent of VIHBV exercise the put options under 4.0 and 4.2 of the 2006 FWA. Learned DR's contention is that in view of the above factual position it is clearly provided between VIHBV and IDFC Investors that the put options could not have been exercised without the written consent of VIHBV, and that, thereforem, the terms in substance have been decided by VIHBV with IDFC Investors and VIHBV had the total control and veto on the exercise of the option rights and the same are being exercised by VIHBV only.

63. It is thus contended that IDFC Investors were just the financial investors, holding the investments in a fiduciary capacity rather than in investor's capacity, and were no more than conduits or facilitators of the structuring transactions. If the shares of SMMS were acquired by the assessee, these investors would have received Rs. 4.13 crore as were prescribed in Schedule 2 of FWA 2007 as transfer price but by entering into this arrangement with VIHBV, these investors have received Rs. 21.25 cr which is more than 5 time of the transfer price. The investors were bound by various agreements as discussed above by which the terms of holding as well as transfer of shares were in substance decided by VIHBV. Learned DR

contends that there was no commercial reason whatsoever for termination of options and payment of termination fees of Rs. 21.25 cr. The appellant could have got the shares of SMMS by exercising the option rights which were having an ALP of Rs. 1488 cr for a paltry sum of Rs. 4.13 cr. He submits that the termination of options has taken place only because the benefit was to be given to the AE of the appellant. No independent third parties would have entered into such transaction which has no commercial justification, purpose or prudence and therefore, the same has not been entered into at an arm's length price. Learned DR submits that this transaction would fall under 92B (2) of the Act in which the transaction is between VIHBV and IDFC Investors the terms of which are determined in substance between VIHBV and IDFC investors which is quite evident from the transaction agreement of 2007, FWA of 2007 as well as the termination agreement which has been made subject to the share subscription and shareholder agreement. This transaction would clearly fall under any transaction having a bearing on the profits, income , losses or assets of the appellant. The appellant has been paying substantial costs for maintenance and acquisition of option rights and have been debiting these expenses in the P and L account though, as extraordinary items. The debiting of these transactions clearly had an impact on the losses as well as assets of the appellant. The shares of SMMS which could have been acquired by the appellant by exercising these options would have given indirect shareholding of 3.15% equity interest in VIL which is worth more than Rs. 1500 crores (as the ALP of the option rights itself was Rs. 1488 crores) which could have been acquired by the appellant by paying a meager sum of Rs. 4.13 crores. This directly had an impact on the profits, income and the assets of the appellant. This clearly goes onto prove that this is a deemed international transaction as per the provisions of sections 92 B(2) of the Act. It is further contended that without prejudice to the foregoing line of argument, the transaction would also be covered under section 92 B (1) of the Act as this is a transaction between VIHBV and the appellant by which VIHBV directed the appellant to exercise the options in favour of VIHBV and/ or its affiliate. In this transaction, VIHBV is a non resident and the appellant is a resident. By entering into this transaction, the VIHBV directly got benefitted by holding indirect interest to the extent of 3.15% equity interest in VIL. Earlier this interest was being held in the form of option rights which directly got converted into the shares of VIL. Therefore, there is a direct benefit of this transaction to VIHBV. While dealing with the legal submissions of the learned Departmental Representative, in the factual backdrop as set out above, we may refer to extracts from the written submissions, a large part of which is not relevant for our purposes but is being reproduced nevertheless, as filed by the Departmental Representative as follows:

> *As per the FWA 2007, the appellant could acquire the shares either itself or to a person nominated by it. The appellant could have transferred this right in favour of any resident Indian who could have exercised these options instantly. By nominating an Indian resident, the appellant could have earned the difference between the fair market value of the shares of VIL and the price which was required to be paid by such person. The appellant has foregone this income. It has clearly been held in the case of Instrumentarium Corporation ltd. Vs ADIT (Special bench Kolkata) 71 taxmann.com – 193 in which the Hon'ble ITAT has held in para 19 that "A plain reading of Section 92(3), however, is that what is to be seen is impact on profits or losses for the year in consideration itself as it is to be computed on the basis of entries made in books of accounts in respect of previous year in which the international transaction was entered into. There is thus no scope at all for taking into account the impact on taxes for the subsequent years."*

Therefore, it is an international transaction as per provision of Section 92B(1) and 92B(2) of the Act as discussed above.

***2.4 The termination agreement has triggered the following events** –*

1. *The call options held by the appellant came to an end.*
1. *Investors getting 5 times the sum which they would have got had the call options were exercised by the appellant. (Payment of Rs. 21.25 cr as termination fees by the appellant)*
2. *Redemption of preference shares by the appellant by paying a premium of Rs 178 cr to IDFC Investors as per Clause 5 of FWA 2007 regarding put options. The investors got full value of their preference shares along with premium of Rs. 178 cr.*
3. *Appellant's agreement not to exercise the call option subject to IDF ceasing to hold 51% or more shares in SMMS and an evidence of the same to the satisfaction of the appellant to be submitted by IDF*

2.5 The share subscription agreement has triggered the following events:

1. *Payment of Rs. 21.25 cr by the appellant as termination fees*
2. *Payment of preference shares to the IDF by redemption*
3. *Buy back of equity shares by TII*
4. *Appellant's agreement not to exercise the call option.*

2.6 It has already been elaborated in the earlier part of these submissions that both these agreements are closely linked agreements and therefore both have to be read together to understand the transaction during the year. As per Rule 10A(d) of the IT Rules, a transaction includes a number of closely linked transactions. The transaction has also been defined in Section 92F (v) of the Act as under:

"transaction" includes an arrangement, understanding or action in concert-
- *(A) Whether or not such arrangement, understanding or action is formal or in writing,*
- *(B) Whether or not such arrangement, understanding or action is intended to be enforceable by legal proceeding.*

2.7 This clearly explains that it is an inclusive definition having wide meaning and also includes an arrangement, understanding or action in concert whether the same is formal or in writing or whether the same is enforceable or not.

The effect of the transaction entered into by the appellant with VIHBV as per the termination agreement discussed above is that the appellant has exercised the call options in favour of VIHBV and its affiliate. It has been argued by the appellant during the course of hearing that the contract was terminated for whatever reasons. May be it is not required at all. These arguments of the appellant are not based on the facts of the case as the appellant did not get a single penny by exercising the option rights in favour of VIH BV whereas the ALP of these rights was Rs.1488 crores. It is an understanding/arrangement and the appellant as well as VIH BV were acting in concert by which this transaction has been given effect to. Even the submissions given by the appellant before the TPO were quite misleading and were not based on the facts of the case which has clearly been demonstrated by the revenue before the Hon'ble ITAT. Even the IDFC Investors have categorically stated that they have not exercised any put options. This transaction is taxable transaction as has been demonstrated in these written submissions in the earlier part.

2.8 The options held by the appellant were duly exercised by the appellant during this year in favour of VIH BV by entering into a series of transactions. The termination agreement were subject to IDFC ceasing to hold 51% or more shares in SMMS and the appellant was to be given an evidence to this effect to its full satisfaction proves beyond doubt that the option rights were exercised by the appellant in favour of VIH BV. This clearly demonstrates that both these agreements are inter related and therefore have to be read together to understand the transaction. Both these agreements are not independent agreements at all as has been claimed by the appellant. The same is not based on the facts of the case. The fact that these two entities are not parties to the share subscription and share holder agreement would not make a difference in the facts of the case as termination agreement would come into effect only after share subscription and shareholder agreement is given effect to. The appellant and VIH BV both are parties to the transaction agreement, FWA of 2007 as well as the termination agreement. The VIH BV had the controlling authority as well as Veto power to direct any of the affiliates to act as per its directions which is clearly stated in these agreements as highlighted in the written submissions.

2.9 It may also be reiterated here that the appellant has granted the put option to IDFC Investors for equity as well as preference shares. The appellant has subscribed to the preference shares completely as per the put option given in Clause 5 of the FWA 2007 and also paid a premium of Rs. 178 cr. However, when the time for exercise of option regarding equity shares came, the same has been exercised in favour of VIHBV and its affiliate at the direction of VIHBV. This also demonstrates clearly that the option rights have actually been exercised by the appellant during the year.

2.10 A series of transactions / bundle of transactions can be clubbed together for finding out the ALP if closely connected.

2.10.1 It is an undisputed fact that a bundle of transactions can be clubbed together for finding outr ALP if closely connected. The various judicial authorities have clearly held that a series of transactions if closely connected can be seen together to find out the transactions. The provisions of the IT Act as well as the Rules framed there under are also very clear on this issue. For this proposition, the revenue relies on the judgement of the Hon'ble Delhi HC in the case of Sony Ericsson Mobile Communications India P. Ltd. vs CIT-3 2017 (55 taxmann.com 240). Reliance is placed on paras 79 to 82 of section G of this order. The reliance is also placed on the order of Hon'ble ITAT Pune Bench in the case of Cummins India Ltd vs DCIT, Circle 1 (1), Pune. (Taxmann.com 62). The revenue relies on para no. 15 and 16 of this order.

<u>3. Whether any income arising from the transaction</u>

3.1. Whether the income arising is business income or not?

Once it is established that the transaction in question is an international transaction, the second stage is to find out whether any income is arising from the transaction. It has been held by the AO in the Assessment Order that the income arising from the transaction is business income and therefore has taxed the same at the rates prescribed for business income. The domain of the TPO is to determine the ALP of the transaction. Relevant provisions of the Act on this issue and the domain of the AO and TPO as has been demarcated by the Act is being discussed as under.

3.2 The TPO while passing the order has determined the ALP of the transaction in question. As per the provisions of the Act, the TPO is duty bound to determine the ALP of the transactions as per the provisions of Section 92C. For clarity sake, the relevant provisions of the Act are being reproduced as under :-

"(1) The arm's length price in relation to an international transaction shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe."

3.3. Therefore, the mandate of the Act requires that the TPO would determine the ALP of the transaction by following the most appropriate method once a reference has been made by the AO to the TPO u/s.92C(1) of the Act. Section 92CA(2A)/(2B) empowers the TPO to determine the ALP of the transaction which comes to his notice during the course of such proceedings although reference for the same has not been made by the AO. Thereafter, as per the provisions of Section 92CA(4) of the Act, on receipt of the order of the TPO as provided under sub-section 3, the AO is required to compute the total income of the assessee in conformity with the ALP so determined by the TPO. For clarity sake, the provisions of Section 92CA(4) are reproduced as under :-

"(4) On receipt of the order under sub-section (3), the Assessing Officer shall proceed to compute the total income of the assessee under sub-section (4) of section 92C in conformity with the arm's length price as so determined by the Transfer Pricing Officer."

3.4 Therefore, the provisions of the Act are absolutely clear that once the ALP is determined by the TPO, the AO is required to compute the total income of the appellant as per the provisions of the Act. Computation of total income has been given in Chapter IV of the Income Tax Act with the Heading 'Computation of total income'. As per the provisions of Section 14 of the Act, the total income is divided into 5 Heads of Income. For clarity sake, Section 14 is reproduced as under :

"Heads of Income :

14. Save as otherwise provided by this Act, all income shall, for the purpose of charge of income-tax and computation of total income, be classified under the following heads of income –

A - Salaries.

B - Interest on securities.

C - Income from house property.

D - Profits and gains of business or profession.

E - Capital gains.

F - Income from other sources."

3.5 Therefore, it is quite clear that a particular income would be taxable under which head of income is the domain of the AO as has clearly been provided in the provisions of section 92CA(4) of the Act. Whether a particular income would fall under the head salaries or income from house property or Profits and gains of business or profession or capital gain or income from other sources would fall under the domain of AO. It is further reiterated here at the cost of repetition that ***the TPO is required to determine the ALP of the transaction only.*** *It is the duty of the AO to decide under which head of income a particular income would fall. On a perusal of the Assessment Order passed in this case for the A.Y. 2012-13, it is very clear that the AO has taxed the ALP of the transaction under the head "**Profits and gains of business or profession**" and accordingly, the transaction has been taxed at 30% (the rate specified for business transactions). Therefore, it is a fact that the income from this* *transaction has been taxed by the AO as Profits and gains of business or profession. Therefore, the income arising from this transaction has been taxed by the AO under the head Profits and Gain and Business and Profession.*

The TPO while passing the order has dealt with the submissions of the appellant. In that context the TPO has dealt with the submissions filed by the appellant whether the income is taxable as per section 45 of the Act as capital gains and whether the option rights being held by the appellant are property rights or not. The appellant has filed elaborate submission of these two aspects during the course of TP proceedings and the TPO simply dealt with the submissions of the appellant. It is not the case of the TPO that the income arising from this transaction would be taxable under the head capital gains. This is not in the domain of the TPO as has been elaborated by referring to various provisions of the Act supra. Therefore, there is no force in the arguments of the appellants that the TPO has taxed the transaction under the head capital gains.

3.6 The following facts also prove that the income arising from this transaction would be taxable as Profits and Gain of Business and Profession:

(1) The appellant has not challenged the action of the AO of taxing this transaction as business income at all in any of the grounds taken before the Hon'ble ITAT. If no specific ground has been taken by the appellant, it shows that the appellant has accepted the treatment given by the AO of treating the ALP of this transaction as business income. The only ground taken by the appellant is a miscellaneous ground (which is ground No.25) in the appeal and that too was against non-disposal of rectification application under Section 154 by the AO. The rectification application filed by the appellant is placed on Page No.656 of Paper Book No.2 of the appellant's submission. Since the rectification application is pending with the AO, the grievance of the appellant, if any, would arise only when the application u/s.154 is disposed off by the AO. Till then, there is no apparent grievance on the part of the appellant. If the appellant is aggrieved with the order of the AO, a specific ground is required to be taken by the appellant before the Hon'ble Tribunal. Therefore, the first argument of the Revenue is that the appellant has accepted the treatment of the income arising from the transaction as business income as has been specifically been assessed as such by the AO as per the computation of income on the last page of the Assessment Order. Therefore, there is no dispute on this issue as there is no specific ground raised by the appellant before the Hon'ble ITAT.

(2) The appellant has paid an amount of Rs.21.25 crores as Termination fees which has been debited in the Profit & Loss Account as an extra ordinary item. However, on perusal of Column 17(a) of 3CD Report prepared by the appellant for the impugned year does not show this payment on Capital Account which is placed on Page No.65 of the PB-1 of the appellant. This also proves that the alleged payment of Rs.21.25 crores has been shown by the appellant on account of revenue.

(3) As per the balance sheet of F.Y. ending on 31/03/07, the appellant's total share capital and reserves and surplus (shareholders funds) was Rs. 45.60 crores. Out of which, the investment in the fixed assets was to the tune of Rs. 40.84 crores (net). The current assets of the appellant was 45.67 crores whereas the current liabilities and provisions were 40.42 crores leaving net current assets of only Rs. 5.25 crores. Out of total current liabilities, the appellant has taken advance from related party ie Hutchison call centre holdings ltd. to the extent of Rs. 27.86 crores which appears to be short term loan/advance. Admittedly, in this year, the appellant has entered into option agreement with various parties such as AS, AG and SMMS for the stake of 15.4% in VIL. The total value of this stake would be approx 11500 crores. (if enterprise value of VIL is taken at 11 Billion dollars on the date of acquisition

which was paid by Vodafone for 67% stake) so the total commitment by the appellant was to this extent. Even if the appellant has to pay 10% of this amount for securing these option rights, it would amount to Rs. 1150 crores. However, the total shareholders funds of the appellant were only Rs.45.6 crores as on 31/03/2007. Therefore, by no stretch of imagination, the same can be termed as investment as appellant has no source for this kind of investment. Therefore, the transaction of acquiring option rights is clearly in the nature of adventure in the nature of trade. The Balance sheet of 2007-08 is placed on page no. 810 of PB 6 of Revenue. One the principles enunciated by various courts is whether the investment made by the appellant is from readily available funds, or within financial capability of the assessee or otherwise. Since it is clearly demonstrated here that the appellant did not have the financial capability as well as readily available funds for this kind of investment, the same would be an adventure in the nature of trade and assessable as profits and gains business or profession.

(4) It is also seen that the appellant has made systematic investment. The appellant has been carrying out regular activities in case of options, the details of which is given by the TPO on internal page 31 of his order. The appellant kept decreasing its options regularly thereafter.

(5) Appellant was dealing in options all the time. Therefore trade in F&O is always in the nature of business. TPO's order detailing the reduction in the options is given on internal page no 31 of TPO's order.

*(6) One of the other important principles enunciated by courts is that whether the investment has been made with the view to earn dividends or not. If the investment has been made for earning dividends the same would qualify as investment. The appellant had made an investment of **Rs.1360 crores** in 0.1% redeemable preference shares of SMMS Investments Pvt. Ltds as on 31/03/2011 which is evident from the balance sheet placed on page no.1035 of PB-7 of the Revenue. Therefore, it can clearly be concluded that investments has not been made for earning dividends at all.*

(7) The appellant has carried out systematically subscribing to the preference shares almost every year. The details of the Preference Shares acquired by the appellant as per the Put options given to IDFC Investors are as under :

1. *IDFC fund II purchase of 1,00,000 pref shares worth 100 crores at Rs. 145 crores on 29/04/2009* ***(PB 7 of Revenue page no 1000)***
2. *Purchase of 85000 preference shares of SMMS seriesA2 series for Rs. 107.95 crores (purchase price of Rs. 85 crores + premium of 22.95 crores on 22/06/09* ***(PB vol 7 page no 1000)***
3. *Purchase of 2,00,000 preference shares of SMMS seriesA1 series for Rs.251.6 crores (purchase price was 200 crores + premium of Rs. 51.6 crores on June 2008* ***(PB 7 of Revenue page no 976)***
4. *Purchase of 2,15,000 preference shares of SMMS seriesA3 and A4 series for Rs.273.5 crores (purchase price was 215 crores + premium of Rs. 58.5 crores on 9th June 2010* ***(PB 7 of Revenue page no. 1035)***
5. ***Total Investment made by the assessee Rs. 1361 crores in the preference shares of 0.1% redeemable cumulative preference shares.***
   i. *Total amount paid for 0.1% preference shares 600 crores and Premium paid is Rs. 178.05 crores. A also invested initially Rs. 583 crores in the preference shares of SMMS during the F.Y. 2006-07.* ***(PB 6 page no 814)***
   ii. *The aseesee also invested 170 crores in preference shares of Jaykay fin, a subsidiary of TII*

iii. *The appellant also invested 129.7 crores in the preference shares of TII* ***(Same page on PB 6)***

(8) This also shows the financial role played by the appellant from day one which resulted in regular investment activity by the appellant. The appellant also made the following payments over the years:

(a) Payment of Rs.62.23 Cr. To IDFC Investor for assignment of cashless option. However, no shares of HEL came to assessee though it was entitled to acquire 0.123% of Vodafone India Limited share from Omega.
(b) Part payment of 4.73 crores to AS towards the annual option fee during F.Y. 2011-12 and charged it to its Profit & Loss account.
(c) The IDFC Framework Agreement dated 6th June 2007 was terminated during F.Y. 2011-12 vide Termination Agreement dt. 24/11/2011 and assessee has paid Rs.21.25 cr. for which it has not received a single share.

(d) Assessee paid Rs.68.41 crores to AS towards option fee in F.Y. 2012-13 and charged it to Profit & Loss account.

(e) Assessee paid Rs.11.28 cr., to AS towards option fee and charged it to Profit & Loss account in F.Y. 2013-14.

(f) The appellant also paid a termination fee of 21.25 crores in this year.

3.7 The Hon'ble Supreme Court as well as High Courts in various decisions have given certain principles to decide whether the transaction in question is to be treated as business transaction or a transaction on account of Capital Gain. The same are as under:-

(1) Whether the investments being made by an assessee are from readily available fund or within financial capability of the assessee or otherwise

In the case of the appellant, as on 31/03/2007 the appellant's total share capital and deserves was Rs.45.6 crores only. The current assets of the appellant at that time was Rs.45.67 crores, whereas the net current liabilities and provisions were of Rs.40.42 crores leaving net current assets of only Rs.5.25 crores. To finance the current assets, the appellant has taken short term advances of Rs.27.86 crores from one of its related parties. If the value of all the call options rights which were held by the appellant is determined on the basis of the enterprise value of VIL (67% of VIL stake brought by Vodafone for Ra.50,000 crores), it comes to Rs.11,500 crores. If the appellant is required to pay even 10% of this amount for subscribing the options, the same amounts to Rs.1150 crores. On this basis alone, it can be concluded that there are no assets of the appellant to back such account of investment. Hence, the appellant has taken a big risk by holding these option rights which cannot be termed as on account of investment. If an assessee is taking big risk, the reward also needs to be proportionate to the risk and therefore, the same would qualify as an adventure in the nature of trade.

(2) Whether the sale of the investment is for the pressing needs or necessity to pay existing liabilities:

Apparently the appellant has systematically liquidated the investments (the option rights) over a period of time as has already been discussed in the earlier part of this submission, without *getting a single penny. The intention of the appellant as well as the subsequent conduct of the appellant and other circumstances point to this being business income.*

(3) Investments which would not yield dividends:

It has clearly been held by the Courts that if the investments have been made with a view to earn dividend, the same would qualify as capital asset, whereas if an investment has been made not for earning dividend, the same would qualify as business income. Admittedly, the appellant had made an investment of Rs.1361 crores in 0.1% redeemable preference shares of SMMS Investments Pvt. Ltd. Therefore, it can clearly be concluded that investments has not been made for earning dividends at all.

(4) For this proposition, the revenue relies on the following judgments:

(i) Sutlej Cotton Mills Supply Agencies [No. (1975) 100 ITR 706 (SC)]
(ii) G. Venkatswami Naidu & Co. [No. (1959) 35 ITR 594 (SC)]
(iii) CIT vs. Raja Jagdish Pratap Sahi [No. (1971) 79 ITR 235 (ALL.)]

4. ***<u>Whether option rights are property rights/ capital assets and exercise/ termination would amount to transfer</u>***

Without prejudice to the stand of the Revenue that the transaction in question is in the nature of business income and therefore, the same should be taxable as business income as has rightly been taxed by the AO and accepted by the appellant (as the appellant has not challenged the finding of the AO in any of the grounds of appeal). The income from this transaction would also be assessed as income from capital gain.

<u>5. Whether option rights are property rights/ capital assets and exercise/ termination would amount to transfer</u>

<u>(a) Whether option rights are property rights/ capital asset</u>

(i) The term capital asset has been defined in Section 2(14) and the term "transfer" has been defined in Section 2(47) of the Act of the I.T. Act, in the following manner:
"2(14) "capital asset" *means—*
(a) property of any kind held by an assessee, whether or not connected with his business or profession;
(b) xxx xxx xxx,
but does not include—
(i)-(vi) xxx xxx xxx
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;"

"2(47) "transfer"*, in relation to a capital assets, includes, -*
(i) – (vi) xxx xxx xxx
Explanation 1. Xxx xxx xxx
Explanation 2. For the removal of doubts, it is hereby clarified that "transfer" includes and shall be deemed to have always been included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India."

(ii) As can be seen from the above definition, the term "capital asset" means property of any kind held by an assessee. The section excludes certain specific items of property from the scope of capital asset. Further an Explanation has been introduced vide Finance Act 2012 with retrospective effect from 01/04/1962, clarifying the scope of the term property to include management rights and other rights in or in relation to a company. It is common to describe property as a 'bundle of rights'. These rights include the right to possess, to use and the right to transfer. In a very strict sense, property is used to describe the right of ownership. The term property is also applied to every kind of valuable right and interest that can be made the subject matter of ownership. Indian Courts have therefore interpreted the term property by giving it the widest meaning, having regard to the use of the suffix 'of any kind' in the definition of 'capital asset' in section 2(14) of Act and 'asset' in section 2(e) of the Wealth Tax Act,1957.

(iii) The Hon'ble Supreme Court, while interpreting the scope of the term 'asset' under the Wealth Tax Act held the right of an assessee to receive a specified share of the net income from an estate in respect of which Wakf – Allal – Aulad[1] has been created, to be in the nature of property.

(iv) As per the terms of FWA 2007, entered into with IDFC investors, the assessee had two rights namely a right to buy the entire share capital of SMMS which is termed as the call option. The assessee further has a right to assign these Call Options to any of the person nominated by it. While the assessee may not be entitled to hold the shares in its own name by exercising the option before the regulatory cap is removed, the assessee at all times was entitled to transfer the call option to an Indian third party. Such Indian third party not being subject to sectoral cap, can exercise the option immediately and realise the value. The assessee, therefore, has two distinct rights viz., one to exercise the option by purchasing these shares of SMMS and thereby have a proportionate stake in VIL and the second right of assigning the said call option. This right of the assessee to assign the call option is an absolute right vested in the assessee, not requiring anything more to be done by any other party. This is in the nature of a property right qualifying as a capital asset. One of the essential features of property right is transferability. The assessee has a right under the Framework Agreement to transfer this right. The transferability of the right to acquire the shares of SMMS is independent of the actual acquisition of shares and without requiring any consent from SMMS, while IDFC investors to assign his right of put option required prior written consent.

6. Capital Asset based on retrospective amendment:

(i) The definition of "capital asset" contained in section 2(14) of the Act has been expanded considerably by the introduction of Explanation to the said section by Finance Act 2012 w.e.f. 01/04/1962. Relevant extract of the Memorandum to the Finance Bill of 2012 explaining the amendment is reproduced hereunder, for ready reference:

F. RATIONALISATION OF INTERNATIONAL TAXATION PROVISIONS

Income deemed to accrue or arise in India

Section 2 of the Income Tax provides definition so various terms which are relevant for the purposes of the Act.

Section 9 of the Income Tax provides cases of income, which are deemed to accrue or arise in India. This is a legal fiction created to tax income, which may or may not arise in India and would not have been taxable but for the deeming provision created by this section. Sub-

[1] In the case of Ahmed G H Arif& Others vs. CWT (1969) 2 SCC 471

section (1)(i) provides a set of circumstances in which income accruing or arising, directly or indirectly, is taxable in India. One of the limbs of clause (i) is income accruing or arising directly or indirectly ***through the transfer of a capital asset situate in India.*** *The legislative intent of this clause is to widen the application as it covers incomes, which are accruing or arising directly or indirectly. The section codifies source rule of taxation wherein the state where the actual economic nexus of income is situated has a right to tax the income irrespective of the place of residence of the entity deriving the income. Where corporate structure is created to route funds, the actual gain or income arises only inconsequence of the investment made in the activity to which such gains are attributable and not the mode through which such gains are realized. Internationally this principle is recognized by several countries, which provide that the source country has taxation right on the gains derived of off shore transactions where the value is attributable to the under lying assets.*

Section 195 of the Income – tax Act requires any person to deduct tax at source before making payments to a non-resident if the income of such non-resident is chargeable to tax in India. "Person", here, will take its meaning from section 2 and would include all persons, whether resident or non-resident. Therefore, a non-resident person is also required to deduct tax at source before making payments to another non-resident, if the payment represents income of the payee non-resident, chargeable to tax in India. There are no other conditions specified in the Act and if the income of the payee non-resident is chargeable to tax, then tax has to be deducted at source, whether the payment is made by a resident or a non-resident.

7. Certain judicial pronouncements have created doubts about the scope and purpose of sections 9 and 195. Further, there are certain issues in respect of income deemed to accrue or arise where there are conflicting decisions of various judicial authorities.

Therefore, there is a need to provide clarificatory retrospective amendment to restate the legislative intent in respect of scope and applicability of section 9 and 195 and also to make other clarificatory amendments for providing certainty in law.

I. It is, therefore, proposed to amend the Income Tax Act in the following manner:-

(i) Amend section 9(1)(i) to clarify that the expression 'through' shall mean and include and shall be deemed to have always meant and included "by means of", "in consequence of" or "by reason of".

(ii) Amend section 9(1)(i) to clarify that an asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India if the share or interest derives, directly or indirectly, its value substantially from the assets located in India.

(iii) Amend section 2(14) to clarify 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 what so ever.
(iv) Amend section 2(47) to clarify that 'transfer' includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily by way of an agreement (whether entered into in India or outside India) or otherwise, not withstanding that such transfer of rights has been characterized as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India.

(v) Amend section 195(1) to clarify that obligation to comply with sub-section (1) and to make deduction there under applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident has:-

(a) a residence or place of business or business connection in India; or
(b) any other presence in any manner what so ever in India.

These amendments will take effect retrospectively from1st April, 1962 and will accordingly apply in relation to the assessment year 1962-63 and subsequent assessment years."

*(ii) In the original **Vodafone** dispute **[341 ITR 1(SC)]**, the subject matter was purchased by VIHBV, of the entire share capital i.e. one share held by CGP Investment Holdings Ltd., Cayman Islands [**"CGP"**]and SC considered the nature of 'right of management and control' of a holding company over its subsidiary companies. The Hon'ble SC considered the issue in para 72 to 77 of its judgment and held that the right of a holding company to exercise control over its subsidiaries is not a property right and it is not a capital asset. It has also held that the various rights to exercise managerial authority over the subsidiaries emanated from shareholder agreement and therefore the management rights was in the nature of a contractual right not amounting to property. Further, in the concurring judgment at para 137 and 138, it has been held that call and put options are contractual rights not amounting to property.*

(iii) The Memorandum explaining the amendment specifically states that explanation has been introduced to overcome certain judicial pronouncements that have created doubts on the scope of the provisions relating to section 9 and section 195. The amendment to the definition of capital asset contained in section 2(14) has been undertaken to achieve the same. The new explanation specifically refers to right of management or control. The new explanation specifically includes "any right in or in relation to an Indian company" within the scope of property. After the introduction of said Explanation, right of management or control in or in relation to an Indian company is deemed to be a property right even if it arises out of a contractual arrangement. The term 'any right in or in relation to an Indian company' takes within its ambit, the call option which is nothing but a right to subscribe to the entire share capital of an Indian company. Therefore in the same manner as 'rights of management or control', the 'call option' is also deemed to be a property right even if it arises out of a contractual arrangement.

(iv) The term "rights in or in relation to an Indian company" has been used in a very broad sense which is further supported by the last term used in the explanation namely, "any other right whatsoever". This term "any other right whatsoever" takes within its ambit all rights whether contractual or otherwise. The option right of the assessee is the right to purchase the entire share capital in SMMS. The right to purchase shares of a company falls within the term "any right in or in relation to an Indian company". Therefore the options are to be regarded as property, furthermore they also fall within the extended scope of term 'property' as elaborated in the Explanation to Section 2(14) of the Act inserted as a clarificatory amendment.

8. Whether the Call Option rights are property rights:

(i) The assessee's contention has been that the options are in the nature of contractual rights and hence not property. For this purpose, the assessee placed reliance on the decision of SC in Vodafone International Holdings BV [341 ITR 1(SC)].

(ii) Whether a right is a contractual right or a property right is to be determined only after evaluation of various terms and conditions contained in the arrangement between the parties. The fact that the right emanates from a contractual arrangement does not determine the right to be just a contractual right. The distinguishing feature between a contractual right and a property right is based on the doctrine of privity of contract i.e. only the parties to the contract may sue or be sued upon the contract. However, there are a number of exceptions to this Rule wherein a contractual arrangement also results in creating rights in favour of third parties. Therefore the line of demarcation between the two is becoming lesser and lesser obvious.

*(iii) A number of property rights have their origin in contractual arrangements. In this connection, reference is made to the commentary **Athiyas's Introduction to the Law of Contract – Claridon Law Series, 6th Edition, Page No. 337**, where the relationship between contractual rights and property rights are explained in the following.*

"Third parties and property law

There are other kinds of contracts that appear to bridge the gulf between contract and property, especially in connection with land law. For example, a contract to buy or rent land has itself become, over the years, something in the nature of a proprietary interest in land. Originally such contracts became enforceable against third parties when they had notice of them, but this requirement has been replaced by a system of registration. If the contract i registered it becomes virtually as good as an actual transfer, that is, a conveyance of the land. More recently mere licences, hitherto always thought to be purely contractual in their nature, were added to the list of interests in land that could be enforced against third parties, and (at least in some cases) thus crossed the bridge between contract and property.

Leases are a striking instance of the interplay between contract and property conceptions. When two parties execute a lease they enter into certain obligations of a contractual nature, such as the obligation to pay rent on the one hand, and the obligation to allow the tenant possession on the other. However, these obligations are of a somewhat impersonal nature since they are intended to be effective, not so much between the particular parties concerned, as between the landlord and tenant for the time being-the individual identities of the parties are immaterial from this perspective. Hence, from a very early date it came to be recognized that obligations of this kind 'fun with the land'. If the tenant assigns his lease (but not if he merely sublets) the new tenant can be sued for the rent by the landlord and if the landlord sells the freehold, the new landlord can sue, or be sued by the tenant, whether he is the original party or an assignee. These old principles were reaffirmed and applied by the House of Lords to the case of a guarantor of the rent of a tenancy, the freehold of which was sold to new buyers. It was held that the buyers-the new landlords-were entitled to the benefit of the guarantee, and could sue the guarantor even though they were not strictly parties to the same contract."

(iv) Another exception to the rule of privity of contract is the law relating to agency. A contract of agency may create two entirely different relationships so that while there may be a contractual arrangement between the principal and agent, when the agent enters into contract with third parties, the agent binds the principal.

(v) Similarly, insurance contracts are examples of instances where a third party who is a beneficiary is entitled to enforce a contractual arrangement between the insurer and insurance company. Further law of trusts which is closely associated with law of property is

not subject to the restriction of privity doctrine even though the rights under the trust are created out of contractual arrangements. Various statutes confer rights or enforce liabilities on third parties in India. In this connection, reference may be made to the following text from the commentary of ***Pollock & Mulla – the Indian Contract and Specific Relief Acts – 14th Edn., Page 108****.*

"A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or children, shall be deemed to be a trust for the benefit of his wife or such children. An insurer issuing a policy under the Motor Vehicles Act, 1988 covering third party liability is liable to satisfy any judgment or decree which may be passed in favour of the third party against the insured in respect of compensation for loss to the third party arising in an accident involving a motor vehicle. Where an insured under such a policy becomes insolvent or makes compromise or arrangement with creditors, or the insurance company is wound up, the rights of the insured against the insurer stand transferred to such third party to whom such liability is incurred.; Where a person (principal employer) employs a contractor for execution of any work involved in his business or trade, such principal employer is liable to pay compensation under the Workmen's Compensation Act, 1923 arising out of accidents to the workmen employed by the contractor in doing such work (subject to being indemnified by the contractor). A mortgagee, consignee or other person having an interest in the subject matter insured, may insure on behalf of and for the benefit of other persons insured as well as for his own benefit".

(vi) It is, therefore, submitted that without referring to the actual terms and conditions of the contractual arrangements, every right that is emanating from a contract cannot be dismissed as not conferring a property right. A contractual right that has already come into existence can be transferred by the assessee freely and therefore the same would amount to a property right.

(vii) In the present case, the assessee has exercised the call option in favour of its AE. Therefore, the same would clearly fall in the definition of property right and therefore a capital asset as per the provisions of the Act. Even the Hon'ble Supreme Court has clearly held in the case of VIH BV (referred Supra) that option rights pending exercise are not property rights. However, in the present case, the option rights have been exercised by the appellant in favour of its AE. Therefore, the option rights are capital asset in this year.

(viii) Before the Hon'ble Bombay High Court, the assessee had relied upon the decision of SC to submit that the options are not in the nature of the property and therefore there is no capital asset resulting in capital gains. The arguments of the assessee are referred to by the High Court at para 71 to 74 of the judgment. The High Court has dealt with the issue at para 176 and 177 of the judgment. After having noted the revenue's argument that the options are in the nature of property as also the arguments based on the retrospective amendment introducing the explanation, the High Court holds that the Revenue is taking contradictory stand and for this purpose refers to page 1051 of volume III of the Paper Book filed by the assessee before the Hon'ble High Court. Page 1051 of volume III of the Paper Book is the submission made by the revenue before SC in the Original Vodafone dispute [341 ITR 1(SC)] on capital gains. Revenue's submissions as contained in page 1051 of Vol. III filed before the High Court is extracted below for ready reference:

"In fact, the transaction documents itself demonstrate the steps to ensure that these rights were transferred to VIHBV. As IDFC was an independent third party, a fresh framework agreement is contemplated as part of the Transaction Documents.

Therefore, to contend that GSPL is a subsidiary of CGP and therefore, once the CGP share is sold, the call option rights that vest in GSPL automatically fall into Vodafone's hands is not correct. In fact, those call option rights need to be secured for Vodafone's benefit and that require something more than the transfer of the CGP share. It requires the representations in the Share Purchase and Loan Assignment Agreement that no rights under the framework agreement will be exercised (clause 6.1 (d)(ix)). And as is evident from the documents subsequent to 11.2.2007, it required that a separate Deed of Retention, and fresh Framework Agreements were later to be entered into. It must be emphasized again that Vodafone was paying HTIL (or its nominee) a purchase price equal to 67% of the enterprise value of HEL and it was obviously not going to be interested in a transaction where immediately following completion, the 15% call option right (at a significantly discounted price less than market value) was not available to it. This again demonstrates that the transaction was a composite transaction for 67% interest in HEL and not "the mere sale of one CGP share" as is sought to be contended by the petitioner".

(ix) The above extract indicates that the submissions of the revenue were in the context of original capital gains dispute and the chargeability to tax in the hands of HTIL, a Non-Resident in respect of the indirect sale of stake made by it to VIHBV, another non-resident. Revenue's contention in the original dispute was that the sale transaction was a composite transaction which involved besides the sale of one share of CGP, the completion of other actions such as signing of fresh framework agreement. The nexus with India was sought to be established by referring to new framework agreement. It is unclear as to how these arguments in any way contradict the stand of the revenue in the present dispute.

The present transfer pricing dispute is in respect of the tax liability of the assessee, a resident company, particularly in the context of transfer pricing provisions. The assessee, by transferring its right to its AE without any consideration, has violated the provisions of Chapter X.

(x) The revenue relies on the following judgments for the proposition that the option rights are capital assets and exercise/ termination of the same would amount to transfer:

1. CIT vs Tata Services Ltd.1 Taxmann 427 (Bom) - for the definition of capital asset as given on the last para of page no. 214 and for the definition of transfer as given in para no. 3 of page no. 215 of the case laws paper book submitted by the revenue.
2. Booz Allen and Hamilton Inc Vs SBI Home Finance Ltd and others (SC) – para 37 on page no. 218 of the paper book of the judgment wherein the distinction between a right in rem and a right in personam

3. Indian Aluminium Cables Ltd. Vs DCIT ITAT Delhi Bench – 73 ITD 109

For the definition of property under the head "HELD" on page no. 238 as well as para numbers 8, 9, 10, 11, 18 & para 26 for meaning of transfer.

4. SC judgment in the case of Ahmed G.H. Arif V CWT 76 ITR 471 (SC) – revenue relies on para 3 onwards under the head "Held" on page no. 249 of PB and last para of page no. 252.

5. Hon'ble ITAT Mumbai in the case of Siemens Nixdorf Information System GMBH Vs DDIT (IT) 2(1), Mumbai – Revenue relies on para 3 onwards under the head "Held" on page no. 255 till the last para under the same head on page no. 256 and the findings in para 7 & 8 on page numbers 257 & 258.

6. Anarkali Sarabhai Vs. CIT (SC) 90 Taxman 509(SC) - For the proposition of extinguishment as transfer. Revenue relies on the "Facts" and "Held" on page nos. 260 & 261 as well as the findings on paras 21 & 22 on page no. 265.

7. CIT Vs Vijay Flexible Containers Bombay High Court 48 Taxman 86 - For the proposition of capital asset as well as transfer. Revenue relies on "FACTS" and "HELD" on page no. 266 and 267 as well as para 14 of the judgment.

8. CIT vs. Rasiklal Maneklal 95 ITR 656 (Bombay) – Revenue relies for the proposition of the definition of the term "Relinquishment" as given in the Last para on the page no. 276.

9. Hari Brothers P. Ltd. Vs. ITO High Court of Punjab and Haryana (52 ITR 399) – Revenue relies on "HELD" on page no. 279 and the definition of relinquishment in the last para of page no. 281.

10. High Court of Delhi Gulshan Malik Vs. CIT 43 taxmann 200- Revenue relies on the "HELD" on page no. 285 & 286.

11. SC judgment in the case of Kartikeya vs Sarabhai 228 ITR163 – For the proposition of transfer as per section 2(47) of the Act. Revenue relies on para 10 on page no. 294.

12. CIT vs. G. Narasimhan (SC) 236 ITR 327 – Revenue relies on para no. 10 & 11 on page no. 299 & 300.

13. CIT Vs Grace Collis (SC) 115 Taxman 326 – Revenue relies on "FACTS" and "HELD" on page no. 301 & 302 as well as para 15 & 16 on page no. 305.

14. CIT vs Smt. Laxmidevi Ratani 147 Taxman 642 (MP) – Revenue relies on "FACTS" and para 14 on page no. 311 & para 18 on page no. 312 in which it distinguished the judgment of SC in case of Vania Silk Mills Pvt. Ltd 191 ITR 647 by SC itself in the case of Grace Collis 248 ITR 323.

64. Learned Departmental Representative then points out that the submissions made by the assessee at the stage of TPO were misleading and incorrect, and he refers to various specific instances to make his point. When assessee was asked as to why did he pay Rs 21.25 crores as termination fees, the assessee stated, in writing, that "*Investors wanted to sell their stake in VIL by exercise of put option in August 2011. However, the assessee was not able to honour the obligation, thus the investors decided to terminate the agreement. Since there was a delay from the assessee's end to terminate IDFC Agreement, VISPL and Investors mutually agreed for a Termination Fee of Rs.212,500,000 in order to compensate Investors. The IDFC Agreement was eventually terminated vide Termination Agreement dated 24 November 2011 filed with your office as Annexure-2 to submission dated 21 September 2015."* However this information was found to be incorrect as, in response to requisition under section 133(6), the investors have categorically denied having exercised any put option in this case. A copy of the letter denying exercise of put options was placed before us at pahe 1529 of PB 4. This letter is issued by IDBI Trusteeship services ltd dated 08/01/16 stating

that the fund had not exercised any option asking Vodafone India Services Pvt. Ltd to purchase equity shares of SMMS. One more letter is placed on page no 1631 of PB4 received from IDBI Trusteeship services ltd dated 19/01/16. In this letter also, it has categorically been stated that in our capacity of being erstwhile trustee of the fund, we submit that the fund had taken a commercial decision for not exercising the right available with it. *Clearly, according to the learned Departmental Representative, conduct of the assessee was not above board.*

65. It is then pointed out that though the assessee was holding call options to the equivalent of 15.4% shareholding in VIL, the same has been transferred over the years to the other AEs of VIHBV, without any consideration, even as the assessee has spent considerable sums of money for these options although the appellant has spent crores of rupees for these options. It is then submitted that over the years, as per the sectoral limits **fixed by** FIPB for the telecommunication sector in India, the Vodafone Group has been increasing its direct and indirect shareholding in Vodafone India Limited which can be analyzed from the shareholding of VIH BV in VIL over the years as follows:

Direct and Indirect Shareholding of VIH BV in VIL				
Year ended	**Wholly owned subsidiary**	**Companies where less than 50% owned by VIH BV**	**Call Options**	**Total**
31.03.2015	**100%**			**100%**
31.03.2014	**89%**			**89%**
31.03.2013	**84.5%**		**4.5%**	**89%**
31.03.2012	**84.5%**		**4.5%**	**89%**
31.03.2011	**59.9%**		**7.1%**	**67%**
31.03.2010	**57.59%**		**9.39%**	**66.98%**
31.03.2009	**51.58%**	**15.4%**		**66.98%**
31.03.2008	**51.58%**	**15.4%**		**66.98%**

66. Regarding the impact of call and put options, it is submitted that these are two sides of the same coin, and even though put obligation is a responsibility of the assessee to buy the share capital at an agreed value, given the facts of the case and given the ridiculously low price at which the assessee has to buy these shares, it is not an obligation in real terms. It is a mode of exit by the parties. The exercise of one reduces the quantity of the other. In other words, if a put option is exercised by the investors the call option gets reduced to that extent automatically as it relating to the same shares. same is not strictly speaking a put option in the sense of the term as understood. While on this aspect of the matter, our attention is then invited to the commentaries of Nigel Eastaway and Others published by BDO titled 'Practical Share Valuation' and 'Financial valuations – application and models' by James R. Hitchner. These commentaries explains a Call Option and a Put Option as follows:

(i) A Call Option provides the holder with a Right to purchase the underlying stock but not the obligation to purchase the stock at a specified price (strike price) and date. A person buys a call option if he anticipates the market to go up. For example, if the prevailing price of ABC Corporation (ABC Corp) is Rs. 700. If A has bought a call option to buy the shares of

ABC Corp at 710 say for a premium of Rs. 5 from B, then A would be known as option holder and B would be option writer. Now, if the price of ABC Corp goes to 720, it would be profitable for Mr. A to exercise the option as he would earn profit of Rs. 5 (720 market price - 710 strike price +5 option premium paid). Therefore, a call option is exercised only when the market price of the underlying share goes up, in this example beyond 715 or else the option holder will allow the option right to expire without actual purchase of share.

(ii) A Put Option provides the holder with a Right to sell but not the obligation to sell, at a known price (strike price) and date. A person buys a Put Option if he anticipates the market to go down For example, if the prevailing price of ABC Corporation (ABC Corp) is Rs. 700. If A has bought a Put Option to sell the shares of ABC Corp at 690 say for a premium of Rs. 5 to B, then A would be known as option holder and B would be option writer. Now, if the price of ABC Corp goes to 680, it would be profitable for Mr. A to exercise the option as he would earn profit of Rs. 5 (option price 690-cost of option Rs 5 -prevailing market price). Therefore, a Put Option is exercised only when the market price of the underlying share goes down, in this example beyond 685 or else the option holder will allow the option right to expire without actual sale of share.

67. Learned Departmental Representative contends that even as per the specific terms of the framework agreement, the Put Option is merely an exit route for IDFC investors. The following terms of the framework agreement shows that exercise of Call Option by the assessee or exercise of the Put Option by IDFC investors is one and the same: “ The term 'Option' has been defined to mean ‘Put Option’ or ‘Call Option’.” Accordingly, as the learned DR contends, hat the call and put options as have been used in the FWA 2007 are two sides of the same coin. It is not a typical put option as is being understood in the general parlance.

68. Coming to the applicability of Hon’ble Supreme Court’s judgment in the case of Vodafone International Holdings BV (supra), learned Departmental Representative submits as follows:.

12.1 The judgment relied upon by the appellant in the case of Vodafone International Holding BV vs. Union of India of Hon'ble Supreme Court in 341 ITR 1(SC) is not applicable to the facts of this case due to the following reasons:-

12.1.1 The matter before the Hon'ble Supreme Court was whether transfer of a single share of CGP Investments (Holdings) Ltd, Cayman Islands from HTIL to VIH BV would be taxable in India as per the provisions of section 9(1)(i) of the Act or not. The same has been discussed by the Hon'ble Supreme Court in para 2 on page No.18 of this order under the head “Introduction”. For clarity sake, the same is reproduced as under:

“This matter concerns a tax dispute involving the Vodafone group with the Indian tax authorities (hereinafter referred to for short as “the Revenue”), in relation to the acquisition by Vodafone International Holdings BV (or short “VIH”), a company resident for tax purposes in the Netherlands, of the entire share capital of CGP Investments (Holdings) Ltd. (for short “CGP”), a company resident for tax purposes in the Cayman Islands (“CI” for short), vide transaction dated February 11, 2007, whose stated aim, according to the Revenue, was “acquisition of 67 per cent. Controlling interst in HEL”, being a company

resident for tax purposes in companies which in turn controlled a 67 per cent. interest, but not controlling interest, in Hutchison Essar Ltd. ("HEL" for short). Accordingly to the appellant, CGP held indirectly through other companies 52 percent. Shareholding interest in HEL as well as options to acquire a further 15 per cent. Shareholding interest in HEL, subject to relaxation of FDI norms. In short, the Revenue seeks to tax the capital gains arising from the sale of the share capital of CGP on the basis that CGP, whilst not a tax resident in India, holds the underlying Indian assets."

12.1.2 The Hon'ble Supreme Court has summarized the facts of the dispute in this case in the last two lines of this para in which it has been stated that in short the revenue seeks to tax the capital gains arising from the sale of the share capital of CGP on the basis that CGP, whilst not a tax resident in India, holds the underlying Indian assets. The facts in the present case are absolutely different and deals with income arising from an International transaction.

12.2 The Hon'ble Supreme Court in the facts has discussed about TII Framework and Share holder agreement as well as IDFC Framework agreement in the facts of the case. The same has been dealt with in paras 19 and 20 which are being reproduced as under:-

"On March 1, 2006, TII framework and shareholders agreements stood executed under which the shareholding of HEL was restructured through "TII" an Indian company, in which Analjit Singh (AS) and Asim Ghosh (AG), acquired shares through their group companies, with the credit support provided by HTIL. In consideration of the credit support, parties entered into framework agreements under which a call option was given to 3 Global Services Pvt.Ltd. ("GSPL" for short), a subsidiary of HTIL, to buy from Goldspot Mercantile Co.P.Ltd. ("Goldspot" for short) (an AG Company and Scorpios Beverages P.Ltd. ("Scorpios" for short) (as AS company) their entire shareholding in TII. Additionally, a subscription right was also provided allowing GSPL a right to subscribe to the shares of Centrino Trading Co.P.Ltd. ("Centrino" for short) and ND Callus Info Services P. Ltd.("NDC" for short). GSPL was an Indian company under a Mauritius subsidiary of CGP which stood indirectly held by HTIL. These agreements also contained clauses which imposed restriction to transfer downstream interests, termination rights, subject to objection from any party, etc.

The shareholding of HEL again underwent a change on August 7, 2006, through execution of 2006 IDFC framework agreement with the Hinduja group exiting and its shareholding being acquired by SMMS Investments P.Ltd. ('SMMS" for short), an Indian company. Hereto, the investors (as described in the framework agreement) were prepared to invest in ITNL provided that HTIL and GSPL procured financial assistance for them and in consideration whereof GSPL would have call option to buy entire equity shares of SMMS. Hereto, in the framework agreement there were provisions imposing restrictions on share transfer, change of control, etc. On August 17, 2006, a shareholders agreement stood executed which dealt with govemance of ITNL."

12.3 The Hon'ble Supreme Court has further held in para 33(iv) on page No.25 that none of the Indian partners has exited and consequently, there was no change of control. The relevant para is reproduced as under:

"In addition, HTIL's existing Indian partners AG, AS and IDFC (i.e., SMMS), who between them held a 15 per cent interest in HEL (i.e. option route), agreed to retain their shareholdings with full control, including voting rights and dividend rights. In other words, none of the Indian partners exited and, consequently, there was no change of control."

12.3.1 However, in this year, the IDFC investors exited from the Framework agreement and therefore, there is a change in control. Hence, the facts in this year, are different.

12.4. The Hon'ble Supreme Court has also discussed the reconciliation whether the holding of HTIL was 67% or 52% in that year. The relevant paras i.e. para Nos.39, 40 and 42 on page No.27 of the order are being reproduced as under:

"On March 19, 2007, a letter was addressed by the FIPB to VIH asking VIH to clarify as to under what circumstances VIH agreed to pay US $11.07 bn. for acquiring 67 per cent. Of HEL when the actual acquisition is only 51.96 per cent. This query presupposes that even, according to the FIPB, the actual acquisition was only 51.96 per cent. (52 percent approx.)

On the same day, VIH replied that VIH has agreed to acquire from HTIL, interests in HEL which included 52 per cent equity shareholding for US $11.08 bn. That, the price included a control premium, use and rights to the Hutch Brand in India, a non-compete agreement with the Hutch group, the value of non-voting non-convertible preference shares, various loans obligations and the entitlement to acquire a further 15 per cent indirect interest in HEL as set out in the letter dated March 14, 2007, addressed to the FIPB (see page 6117 of SLP Vol.26). According to the said letter dated march 19, 2007, all the above elements together equated to 67 per cent of the economic value of HEL.

In reply to the queries raised by the FIPB regarding break up of valuation, VIH confirmed as follows:

Various assets and liabilities of CGP included its rights and entitlements, including subscription rights, call options to acquire in future a further 62.75 per cent of TII, call options to acquire in future a further 54.21 per cent of Omega which together would give a further 15.03 per cent. Proportionate indirect equity ownership of HEL, control premium, use and rights to Hutch branch in India and a non-compete agreement with HTIL. No individual price was assigned to any of the above items. That, under IFRS, consolidation included TII and Omega and, consequently, the accounts under IFRS showed the total shareholding in HEL as 67 per cent (approx.). Thus, arrangements relating to options stood valued as assets of CGP. In global basis valuation, assets of CGP consisted of its downstream holdings, intangibles and arrangements relating to options, i.e. bundle of rights acquired by VIH. This reply was in the letter dated March 27, 2007, in which it was further stated that HTIL had conducted an auction for sale of its interests in HEL in which HTIL had asked each bidder to name its price with reference to the enterprise value of HEL. As a consequence of the transaction, Vodafone will effectively step into the shoes of HTIL including all the rights in respect of its Indian investments that HTIL enjoyed. Lastly, the Indian joint venture partners would remain invested in HEL as the transaction did not involve the Indian investors selling any of their respective stakes."

12.5 The Hon'ble Supreme Court has also discussed about the GSPL's (now known as VISPL, the appellant) route briefly in para 56 on page No.32 of the order, which is being reproduced as under:-

"To explain the GSPL route briefly, it may be mentioned that on February 11, 2007, the AG group of companies held 23.97 per cent in TII, AS group of companies held 38.78 per cent in TII whereas SMMS held 54.21 per cent in Omega. Consequently, holding of AG in HEL through TII stood at 4.68 per cent whereas holding of AS in HEL through TII stood at 7.577 per cent and holding of SMMS in HEL through Omega stood at 2.77 per cent which adds up to 15.03 per cent in HEL. These holdings of AG, AS and SMMS came under the option route. In this connection, it may be mentioned that GSPL is an Indian company indirectly owned by

CGP. It held call options and subscriptions options to be exercised in future under circumstances spelt out in TII and IDFC framework agreements (keeping in mind the sectoral cap of 74 per cent).

12.6 The Hon'ble Supreme Court has further held that the call options remained with GSPL and they did not confer any rights on VIH. This clearly shows that at the impugned time, the call options remain with the appellant. However, in the present year, the same have been exercised in favour of VIH BV and the appellant no more holds these rights. On this basis also the judgment has no application to the facts of this case. For clarity sake the same is reproduced as under:

"The next point raised by the Revenue concerns termination of the IDFC framework agreement of 2006 and its substitution by a fresh framework agreement dated June 5, 2007, in terms of the SPA. The submission of the Revenue before us was that the said agreement dated June 5, 2007 (which is executed after the completion of acquisition by VIH on May 8, 2007) was necessary to assign the benefits of the earlier agreements of 2006 to VIH. This is not correct. The shareholders of ITNL (renamed as Omega) were Array through HTIL Mauritius and SMMS (an Indian company). The original investors through SMMS (IDFC), an infrastructure holding company, held 54.21 per cent of the share capital of Omega; that, under the 2006 framework agreement, the original investors were given put option by GSPL (an Indian company under Hutchison Teleservices (India) Holdings Ltd. (Ms) requiring GSPL to buy the equity share capital of SMMS; that on completion of acquisition on May 8, 2007, there was a change in control of HTIL Mauritius which held 45.79 per cent in Omega and that changes also took place on June 5, 2007, within the group of original investors with the exit of IDFC and SSKI. In view of the said changes in the parties, a revised framework agreement was executed on June 6, 2007, which again had call and put option. Under the said agreement dated June 6, 2007, the investors once again agreed to grant call option to GSPL to buy the shares of SMMS and to enter into a shareholders agreement to regulate the affairs of Omega. It is important to note that even in the fresh agreement the call option remained with GSPL and that the said agreement did not confer any rights on VIH. One more aspect needs to be mentioned. The conferment of call options on GSPL under the framework agreements of 2006 also had linkage with intra-group loans. CGP was an investment vehicle. It is through the acquisition of CGP that VIH and indirectly acquired the rights and obligations of GSPL in the Centrino and HDC framework agreements of 2006 (see the report of KPMG dated October 18, 2010) and not through execution of the SPA. Lastly, as stead above, apart from providing for "standstill", an SPA has to provide for transition and all possible future eventualities. In the present case, the change in the investors, after completion of acquisition on May 8, 2007, under which SSKI and IDFC exited leaving behind IDF alone was a situation which was required to be addressed by execution of a fresh framework agreement under which the call option remained with GSPL. Therefore, the June, 2007 agreements relied upon by the Revenue merely reiterated the rights of GSPL which rights existed even in the Hutchison structure as it stood in 2006.

12.6.1 It has clearly been held by the Hon'ble Supreme Court even after the Vodafone International Holdings BV coming on board and being the stake from HTIL, the call option remain with GSPL and the said agreement did not confirm any rights on VIH. In the present case the call option rights of the appellant has been exercised in favour of VIH thereby VIH is now holding indirect interest to the extent of 3.15 per cent of share holding in VIL. Before the present transaction, the VIL was only holding indirectly the option rights through GSPL. Therefore, the facts of the present transaction are absolutely difference and hence the judgement of Hon'ble Supreme Court has no applicability.

12.7 It has clearly been held by the Hon'ble Supreme Court that pending exercise the option rights are not management rights. At the highest, options can be treated as potential shares and till exercised they cannot provide, right to vote or management or control. The relevant para is reproduced as under:-

"Thus, in the sense of shareholding, one can say that HTIL had an effective shareholding (direct and indirect interest) of 51.96 per cent (approx. 52 per cent) in HEL. On the basis of the shareholding test, HTIL could be said to have a 52 per cent control over HEL. By the same test, it could be equally said that the balance 15 per cent. Stake in HEL remained with AS, AG and IDFC (Indian partners) who had through their respective group companies invested 15 per cent. In HEL through TII and Omega and consequently, HTIL had no control over 15 per cent stakes in HEL. At this stage, we may state that under the Hutchison structure shares of Plutech in the AG group, shares of Scorpios in the AS group and shares on SMMS came under the options held by GSPL. ***Pending exercise, options are not management rights.*** *At the highest, options could be treated as potential shares and till exercised they cannot provide, right to vote or management or control. In the present case till date* ***GSPL has not exercised its agement or control****. In the present case till date GSPL has not exercised its rights under the framework agreement 2006 because of the sectoral cap of 74 per cent which in turn restricts the right to vote. Therefore, the transaction in the present case provides for a triggering event, viz., relaxation of the sectoral cap. Till such date, HTIL/VIH cannot be said to have a control over 15 per cent. Stakes in HEL. It is for this reason that even the FIPB gave its approval to the transaction by saying that VIH was acquiring or has acquired effective shareholding of 51.96 per cent in HEL."*

12.7.1 In this transaction, the option rights held by GSPL have actually been exercised by the appellant and the same has been converted into shares of SMMS which indirectly holds 3.15 per cent stake in VIL. Therefore, the judgment is not applicable to the facts of the case.

12.8 In para 88 on page 56 of this judgment, the Hon'ble Supreme Court has clearly held that the subject matter of this transaction is a share sale and not a asset sale. The Hon'ble Supreme Court has further observed in para 88 that till date options have remained un-encashed with GSPL. It has further been held by Hon'ble Supreme Court that this option have not been transferred till date. Call and put options were not transferred vide SPA dated February 11, 2007, or under any other document whatsoever. However, in the present transaction, the call options have been exercised by the appellant in favour of VIH BV and this option rights no more remained unencahsed with the appellant. Therefore, observations of the Hon'ble Supreme Court are not applicable to the facts of the case.

12.9 The Hon'ble Supreme Court has observed that in FWA of 2006, the HTIL was only a conforming party in para 65 on page 101. However, it has been demonstrated by the Revenue before the Hon'ble ITAT that this observation of Hon'ble Supreme Court is not based on the facts of the case. As per the FWA of 2006 HTIL was also a party to the agreement.

12.10 In para 235 on page 116, it has been observed by the Hon'ble Supreme Court that the call and put options were in favour of 3GSPL and were continued to be so even after entry of Vodafone International Holdings BV. However, this is not the case here in the present assessment year as the call and put options are no more with the appellant and the same have been exercised in favour of VIH BV.

12.11 Therefore, in view of the above discussion, it is respectfully submitted that the judgment of Hon'ble Supreme Court is not applicable to the facts of the present case.

69. Similarly, with respect of applicability of Hon'ble Bombay High Court's judgment in assessee's own case for the assessment year 2008-09, learned Departmental Representative submits as follows:

> *13.1. The judgment of Hon'ble Bombay High Court is not applicable to the facts of the case at all. In A.Y. 2008-09, the issue before the Hon'ble Bombay High Court was whether in the case of Analjit Singh (AS) and Asim Ghosh (AG) in view of the change in the Frame Work Agreement (FWA) of 2007 wherein the call option vested in the appellant were also given to any of the* ***affiliate/subsidiary company of Vodafone PLC, would amount to creation/dilution of rights by the appellant in favour of Vodafone PLC and/or affiliate/subsidiary of Vodafone PLC or not.*** *Therefore, the issue before the Hon'ble Bombay High Court was whether inclusion of affiliate/subsidiary of Vodafone PLC along with the appellant as a call option holder would amount to creation of any rights in favour of Vodafone PLC by the assessee or not.* ***It is again reiterated here that the issue of exercise/termination of call option of IDFC Investors was never disputed by the Revenue before this Assessment Year and was never in dispute before any High Court or Supreme court before the proceedings in this year. The same was never in dispute before the Hon'ble Bombay High Court also in the A.Y. 2008-09 at all as the call option clause of FWA of 2006 and FWA of 2007 was identical.***
>
> *13.2. As per the Frame Work Agreement of 2006 entered into by HTIL with AS & AG, the call option was granted to the appellant or any person nominated by the appellant. In 2007, when HTIL sold its business to Vodafone group, a new frame Work Agreement (FWA of 2007) was entered into between VIH BV, appellant and AS & AG and their group of companies. In this agreement, the call option clause was changed and the call option rights were also given to any of the* ***affiliate/subsidiary company of Vodafone PLC.*** *Hence, in FWA of 2007, the call options were given to the appellant or any person nominated by it* ***and/or any of the affiliate/subsidiary company of Vodafone PLC. (emphasis supplied).*** *The relevant clause (clause 4.4 of FWA 2006) is placed at page 10 of Vol 2 of Revenue and clause 4.4 of FWA 2007 is placed at page no 292 of Vol 2 of Revenue. It has also been reproduced on page no 6 of the "list of dates and events" submitted during the course of hearing. Accordingly, the dispute in the impugned year was whether by including any affiliate or subsidiary of Vodafone PLC for the call options, any rights have been created/diluted in favour of Vodafone PLC and/or affiliate/subsidiary of Vodafone PLC by the assessee company or not. Therefore, the issue before the Hon'ble Bombay High Court was whether inclusion of affiliate/subsidiary of Vodafone PLC along with the appellant as a call option holder would amount to creation of any rights in favour of Vodafone PLC by the assessee or not in the case of AS and AG.*
>
> ***13.3. It is again reiterated that as far as the IDFC group of investors were concerned, there was no change whatsoever between the FWA of 2006 and FWA of 2007 entered into at the time of HTIL for 2006 and Vodafone in 2007. Hence no transfer pricing adjustment was made by the TPO in A.Y. 2008-09 for call options of IDFC Investors. Once the same has been accepted by the TPO as it is, there was no dispute whatsoever and therefore, this issue was not there before the Hon'ble Bombay High Court at all. Accordingly, on the facts of the case itself, the judgment of the Hon'ble Bombay High Court is not applicable to the facts of the present case and the reliance of the appellant on this judgment is farfetched.***

70. Learned Departmental Representative then submits that there was no change, whatsoever, between the FWA of 2006 and FWA of 2007 as far as the call option rights of IDFC Investors were concerned. Therefore, there was no dispute whatsoever in A.Y 2008-09 for IDFC Investors. Learned Departmental Representative has filed a detailed chart demonstrating this point, but, for the reasons we will set out in due course, it is not really necessary to set out the same in this order. He then refers, in support of this point, to the following observations:

> *13.6. This is also clearly evident from the Facts-1 as has been mentioned by the Hon'ble Bombay High court in para-1 and 4 on page 3 of the order. For clarity sake, the relevant paras are reproduced as under:*
>
> ***13.6.1 Para-1 on page 3 of the Impugned Order***
>
> *"New framework agreements were executed in the month of July, 2007, between the assessee and Indian partners holding 15 per cent indirect interest in HEL. These new framework agreements were entered into because of change of holding group companies from HTIL to Vodafone. Certain changes in terms and conditions of 2007 framework agreements were made which led to the controversy in question. The call options under the FWA 2006 had to be exercised either by the assessee or its nominee whereas the call option under FWA 2007 had to be exercised either by the assessee or any wholly owned subsidiary of Vodafone PLC. Apart from the assessee or wholly owned subsidiary of Vodafone PLC, the third option was also provided under FWA 2007 whereby the assessee could nominate a person other than the wholly owned subsidiary of Vodafone PLC for purchase of all but not part of the shares held by AS and AG group of companies. The Assessing Officer treated these changes being transfer /assignment of option rights held by the assessee in 2006 agreement in favour of its holding company VIH (BV) by virtue of 2007 framework agreements.*
>
> ***13.6.2 Para-4 on page 3 of the Impugned Order***
>
> *"The Tribunal held that the inclusion of a prospective nominee did not amount to assignment/transfer of the call option rights by the assessee. However, even after rendering the above finding in law that no transfer can take place unless an actual nomination happens, the Tribunal held that the call option rights had been transferred and vested in VIH BV by virtue of the TII Shareholders' Agreement. Further the Tribunal held that the Supreme Court judgment was not binding on the issue of assignment of call options as the issue of assignment of call options was not before the Supreme Court and that the Supreme Court, according to the Tribunal, proceeded on undisputed facts."*
>
> *From the above facts, it is crystal clear that the Hon'ble Bombay High Court has not dealt with the FWA 2007 with IDFC Investors as these clauses are not present in the call options of IDFC Investors. This also abundantly makes it clear that the judgment of Hon'ble High Court was given in the context of AS & AG FWA of 2007 and that too whether the inclusion of any of the subsidiary/affiliate of Vodafone PLC would amount to creation/dilution of call option rights in favour of Vodafone PLC or any of its subsidiaries. The question before the Hon'ble ITAT in this year is whether the exercise/termination of the call option rights by the appellant in favour of its AE would amount to an International Transaction as per the provisions of section 92B of the Act. Therefore, the facts in this year are completely different than that of A.Y 2008-09 and hence the judgment of Hon'ble Bombay High Court is not applicable to the facts of this case.*

14. Judgment has to be read in the context of the questions raised:

It has been held by Hon'ble Supreme Court of India that it is neither desirable nor permissible to pick out a word or a sentence from the judgment divorced from the context of the question under consideration and treat it to be the complete law declared by the Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before the court. Therefore, the revenue relies on this judgment for the proposition that all the case laws relied upon by the appellant has to be seen and decided in the context of the questions under consideration before the Hon'ble Court. The judgment must be read as a whole and the observation has to be considered in the light of the questions which were before the Court. The revenue relies on the decision of Sun Engineering Work (P) Ltd (SC) 198 ITR 297.

71. Learned Departmental Representative has also made elaborate submissions about certain other aspects of the matter, which have been taken to record, but, in our considered view, it is not realty necessary to deal with the same at this stage. While concluding the arguments, learned Departmental Representative also submitted, at the cost of many repetitions, that, with the amendments in the statutory definition in Section 2(14) and Section 2(47), the law as laid down by Hon'ble Supreme Court in Vodafone's case is not good law, and, in any event, it has nothing to do with the core issue in this appeal that is existence of an international transaction, that the assessee was all along in the business of investing in options and therefore its gains from options cannot be considered in isolation with business activities, that the assessee itself did not claim deduction for Rs 21.25 crores for termination fees, and rightly so, as it was a part of the cost of acquisition of a capital asset, that the activities of the assessee were not driven by the desire to earn dividend as evident from the fact that the assessee invested Rs 1,360 crores in 0.1% redeemable cumulative preference shares of SMMS Investments, and that the assessee was clearly engaged in the business of making and holding investments. Learned Departmental Representative once again referred to and relied upon oft quoted Supreme Court decision in the case of CIT Vs Sun Engineering Works Pvt Ltd (198 ITR 297). He also referred and relied upon OECD Transfer Pricing Guidelines and BEPS documents to justify the adoption of cashless options assigned to the assessee as a valid comparable but submitted that nothing really turns on this because if this comparable is to be discarded, the assessee will be worse off, and that it is not open to this Tribunal to make an enhancement in income of the assessee- which is inevitable in such a situation. Learned Departmental Representative then referred to several judicial precedents in support of the proposition that when there are several interconnected transactions, as in this case, all these transactions should be taken together for benchmarking. In response to bench's suggestion that in any event, termination of an agreement cannot be considered in isolation with the manner in which it is terminated, subject to what conditions is it terminated and what were the conditions of agreement anyway, learned DR submitted that, in that event, he has nothing further to say on the aggregation of transactions. Learned Departmental Representative also reiterated his submissions once again. He finally submitted that here is a case of an absolutely non-cooperative assessee who does not share the correct information, leaves the revenue authorities guessing and speculating about the actual facts, does not do the benchmarking of its international transactions, and yet concentrates all in his energies in finding technical faults in the action of the authorities. The conduct, approach and actions of the assessee leave a lot to be desired. One can understand stand of the assessee that, according to him, it was not an international transaction, but he was nevertheless required to at least benchmark the transaction, even under protest, but the assessee did not do so. It was

contended that on merits also, for the detailed reasons assigned by the learned Departmental Representative- which we have set out above, the assessee does not have a case. On the strength of all these submissions, we are urged to reject the grievances of the assessee and confirm the action of the authorities below.

72. As we proceed to take on record the arguments advanced by the learned counsel, at the stage of rejoinder, we may reproduce the following relevant observations from the written submissions filed by the assessee:

> SECTION 4. CASE OF REVENUE AND THE ASSESSEE’S RESPONSE:
>
> 132. A multitude of misleading assertions have been advanced by the Revenue; these are addressed, below.
>
> 133. The Assessee was a mere conduit for VIHBV, who controlled all matters concerning the shareholding and exercise of ‘options’.
>
> RESPONSE OF ASSESSEE:
>
> 134. In 341 ITR 1, the Hon’ble Supreme Court, has held on matters concerning ‘Holding’ and ‘Subsidiary’ companies, that:
>
> “The approach of both the corporate and tax laws, particularly in the matter of corporate taxation, generally is founded on the abovementioned separate entity principle, i.e., treat a company as a separate person. The Indian Income Tax Act, 1961, in the matter of corporate taxation, is founded on the principle of the independence of companies and other entities subject to income-tax. Companies and other entities are viewed as economic entities with legal independence vis-à-vis their shareholders/participants. It is fairly well accepted that a subsidiary and its parent are totally distinct tax payers. Consequently, the entities subject to income-tax are taxed on profits derived by them on standalone basis, irrespective of their actual degree of economic independence and regardless of whether profits are reserved or distributed to the shareholders/participants. Furthermore, shareholders/participants, that are subject to (personal or corporate) income-tax, are generally taxed on profits derived in consideration of their shareholding/participations, such as capital gains. Now a days, it is fairly well settled that for tax treaty purposes a subsidiary and its parent are also totally separate and distinct taxpayers.” (paragraph 66)
>
> “It is generally accepted that the group parent company is involved in giving principal guidance to group companies by providing general policy guidelines to group subsidiaries. However, the fact that a parent company exercises shareholder's influence on its subsidiaries does not generally imply that the subsidiaries are to be deemed residents of the State in which the parent company resides. Further, if a company is a parent company, that company's executive director(s) should lead the group and the company's shareholder's influence will generally be employed to that end. This obviously implies a restriction on the autonomy of the subsidiary's executive directors. Such a restriction, which is the inevitable consequences of any group structure, is generally accepted, both in corporate and tax laws. However, where the subsidiary's executive directors' competences are transferred to other persons/bodies or where the subsidiary's executive directors' decision making has become fully subordinate to the Holding Company with the consequence that the subsidiary's executive directors are no more than puppets then the turning point in respect of the subsidiary's place of residence comes about. Similarly, if an actual controlling Non-Resident Enterprise (NRE) makes an

indirect transfer through "abuse of organisation form/legal form and without reasonable business purpose" which results in tax avoidance or avoidance of withholding tax, then the Revenue may disregard the form of the arrangement or the impugned action through use of Non-Resident Holding Company, re-characterize the equity transfer according to its economic substance and impose the tax on the actual controlling Non-Resident Enterprise. Thus, whether a transaction is used principally as a colourable device for the distribution of earnings, profits and gains, is determined by a review of all the facts and circumstances surrounding the transaction. It is in the above cases that the principle of lifting the corporate veil or the doctrine of substance over form or the concept of beneficial ownership or the concept of alter ego arises. There are many circumstances, apart from the one given above, where separate existence of different companies, that are part of the same group, will be totally or partly ignored as a device or a conduit (in the pejorative sense).” (paragraph 67)

“Be that as it may, did HTIL possess a legal right to appoint directors onto the board of HEL and as such had some "property right" in HEL? If not, the question of such a right getting "extinguished" will not arise. A legal right is an enforceable right. Enforceable by a legal process. The question is what is the nature of the "control" that a parent company has over its subsidiary. It is not suggested that a parent company never has control over the subsidiary. For example, in a proper case of "lifting of corporate veil", it would be proper to say that the parent company and the subsidiary form one entity. But barring such cases, the legal position of any company incorporated abroad is that its powers, functions and responsibilities are governed by the law of its incorporation. No multinational company can operate in a foreign jurisdiction save by operating independently as a "good local citizen". A company is a separate legal persona and the fact that all its shares are owned by one person or by the parent company has nothing to do with its separate legal existence. If the owned company is wound up, the liquidator, and not its parent company, would get hold of the assets of the subsidiary. In none of the authorities have the assets of the subsidiary been held to be those of the parent unless it is acting as an agent. Thus, even though a subsidiary may normally comply with the request of a parent company it is not just a puppet of the parent company. The difference is between having power or having a persuasive position. Though it may be advantageous for parent and subsidiary companies to work as a group, each subsidiary will look to see whether there are separate commercial interests which should be guarded. When there is a parent company with subsidiaries, is it or is it not the law that the parent company has the "power" over the subsidiary. It depends on the facts of each case. For instance, take the case of a one-man company, where only one man is the shareholder perhaps holding 99% of the shares, his wife holding 1%. In those circumstances, his control over the company may be so complete that it is his alter ego. But, in case of multinationals it is important to realise that their subsidiaries have a great deal of autonomy in the country concerned except where subsidiaries are created or used as a sham. Of course, in many cases the courts do lift up a corner of the veil but that does not mean that they alter the legal position between the companies. The directors of the subsidiary under their Articles are the managers of the companies. If new directors are appointed even at the request of the parent company and even if such directors were removable by the parent company, such directors of the subsidiary will owe their duty to their companies (subsidiaries). They are not to be dictated by the parent company if it is not in the interests of those companies (subsidiaries). The fact that the parent company exercises shareholder's influence on its subsidiaries cannot obliterate the decision-making power or authority of its (subsidiary's) directors. They cannot be reduced to be puppets. The decisive criteria is whether the parent company's management has such steering interference with the subsidiary's core activities that subsidiary can no longer be regarded to perform those activities on the authority of its own executive directors.”

(paragraph 74)

"Before dealing with the submissions advanced on behalf of the Revenue, we need to appreciate the reason for execution of the SPA. Exit is an important right of an investor in every strategic investment. The present case concerns transfer of investment in entirety. As stated above, exit coupled with continuity of business is one of the important tell-tale circumstance which indicates the commercial/business substance of the transaction. Thus, the need for SPA arose to re-adjust the outstanding loans between the companies; to provide for standstill arrangements in the interregnum between the date of signing of the SPA on 11.02.2007 and its completion on 8.05.2007; to provide for a seamless transfer and to provide for fundamental terms of price, indemnities, warranties etc. As regards the right of HTIL to direct a downstream subsidiary as to the manner in which it should vote is concerned, the legal position is well settled, namely, that even though a subsidiary may normally comply with the request of a parent company, it is not just a puppet of the parent company. The difference is between having the power and having a persuasive position. A great deal depends on the facts of each case. Further, as stated above, a company is a separate legal persona, and the fact that all the shares are owned by one person or a company has nothing to do with the existence of a separate company. Therefore, though it may be advantageous for a parent and subsidiary companies to work as a group, each subsidiary has to protect its own separate commercial interests. In our view, on the facts and circumstances of this case, the right of HTIL, if at all it is a right, to direct a downstream subsidiary as to the manner in which it should vote would fall in the category of a persuasive position/influence rather than having a power over the subsidiary. In this connection the following facts are relevant." (paragraph 75) "Companies Act in India and all over the world have statutorily recognised subsidiary company as a separate legal entity. Section 2(47) of the Indian Companies Act 1956 defines "subsidiary company" or "subsidiary", a subsidiary company within the meaning of Section 4 of the Act. For the purpose of Indian Companies Act, a company shall be subject to the provisions of sub-section 3 of Section 4, be deemed to be subsidiary of another, subject to certain conditions, which includes holding of share capital in excess of 50% controlling the composition of Board of Directors and gaining status of subsidiary with respect to third company by holding company's subsidization of third company. A holding company is one which owns sufficient shares in the subsidiary company to determine who shall be its directors and how its affairs shall be conducted. Position in India and elsewhere is that the holding company controls a number of subsidiaries and respective businesses of companies within the group and manage and integrate as whole as though they are merely departments of one large undertaking owned by the holding company. But, the business of a subsidiary is not the business of the holding company (See Gramophone & Typewriter Ltd. v. Stanley (1908-10) All ER 833 at 837)." (paragraph 149)

"Subsidiary companies are, therefore, the integral part of corporate structure. Activities of the companies over the years have grown enormously of its incorporation and outside and their structures have become more complex. Multi National Companies having large volume of business nationally or internationally will have to depend upon their subsidiary companies in the national and international level for better returns for the investors and for the growth of the company. When a holding company owns all of the voting stock of another company, the company is said to be a WOS of the parent company. Holding companies and their subsidiaries can create pyramids, whereby subsidiary owns a controlling interest in another company, thus becoming its parent company." (paragraph 150)

"Legal relationship between a holding company and WOS is that they are two distinct legal persons and the holding company does not own the assets of the subsidiary and, in law, the management of the business of the subsidiary also vests in its Board of Directors. In Bacha F. Guzdar v. CIT AIR 1955 SC 74, this Court held that shareholders' only rights is to get dividend if and when the company declares it, to participate in the liquidation proceeds and to vote at the shareholders' meeting. Refer also to Carew & Co. Ltd. v. Union of India (1975) 2 SCC 791 and Carrasco Investments Ltd. v. Special Director,

Enforcement Directorate (1994) 79 Comp. Cas. 631 (Delhi).” (paragraph 151)

“Holding company, of course, if the subsidiary is a WOS, may appoint or remove any director if it so desires by a resolution in the General Body Meeting of the subsidiary. Holding companies and subsidiaries can be considered as single economic entity and consolidated balance sheet is the accounting relationship between the holding company and subsidiary company, which shows the status of the entire business enterprises. Shares of stock in the subsidiary company are held as assets on the books of the parent company and can be issued as collateral for additional debt financing. Holding company and subsidiary company are, however, considered as separate legal entities, and subsidiary are allowed decentralized management. Each subsidiary can reform its own management personnel and holding company may also provide expert, efficient and competent services for the benefit of the subsidiaries.” (paragraph 152)

135. The Assessee is admittedly an indirect wholly owned subsidiary of VIHBV, but that by itself, does not automatically imply, in the absence of cogent material, that VIHBV is the directing mind of the Assessee, so as to obliterate the corporate separateness of VIHBV and the Assessee, each of which are distinct juridical entities.

136. While, and not unsurprisingly, VIHBV – by virtue of being the indirect parent/holding company of the Assessee, was bound to have full knowledge of matters involving its downstream shareholding interests in India, and to ensure due observance and discharge of any obligations undertaken by its subsidiary, including discharging any financial obligations undertaken by the Assessee inter alia to the IDFC Investors, the Revenue has overlooked that the Assessee, as a distinct juridical entity, enjoys good corporate standing in its own right, and as will be evident from its financial statements conducts a call centre business comprised of ~7000 employees, with a board of directors at the helm of its affairs, has been inter alia granted a s.10AA exemption granted by the Department of Revenue in relation to its ITES businesses, and is independently assessed by the Department of Revenue. More recently, the Central Board of Direct Taxes has entered into an Advanced Pricing Agreement with the Assessee, in relation to matters concerning ITES.

137. While VIHBV, in terms of arrangements agreed with the IDFC Investors undertook to facilitate financing of the IDFC Investors, which may perhaps have facilitated the IDFC Investors in securing better interest rates for borrowings, or such other arrangements to which the Assessee was not party, that cannot automatically imply that it was VIHBV who was directing or controlling the business and affairs of the Assessee. There is no rational justification by the Revenue to seek to treat the Assessee as a conduit of VIHBV.

138. IDFC Investors and/or AS and/or AG, who held 15.03% stake in VIL, were mere shell structures or conduits to overcome FDI Policy:

RESPONSE OF ASSESSEE:

139. The submission of the Revenue that matters concerning ‘options’ relating to AS –

7.577%, AG 4.68% & IDFC Investors via SMMS 2.77%, before the Hon’ble Supreme Court, in the case reported in 341 ITR 1, were in the nature of a mere passing reference, is both erroneous and misleading, for the following reasons:

139.1. the 2010 judgment of the Bombay High Court64 in the VIHBV case squarely put the IDFC 'options' into contention - the Assessee has relied upon paragraphs 28, 31, 33, 41, 107, 121, 124, 141, 147, 152 to 155, 158, 160 and 161;

139.2. the Supreme Court judgment in 341 ITR 1- the Assessee has relied upon paragraphs 2,9, 10, 16, 48, 49,50, 51, 55, 66, 67, 74, 72, 75, 76, 77, 83, 88, 133, 149, 150, 151, 152, 225, 235, 238 and 239, independently of laying emphasis on paragraphs 83 and 235, for the proposition that distinctly emerges, viz. that pending exercise options are potential shares, i.e. a contractual right, and no more, i.e. no 'property' or 'interest' is created therein, and as such the 'options' remained vested with the Assessee, notwithstanding the execution of the FWA(s) 2007 – this principle of law squarely applies in view of no 'exercise' of 'option', in the relevant AY 2012-13;

139.3. the grounds of review filed by Revenue in the VIHBV case in Review Petition no.458 of 2012 in Civil Appeal No. 733 of 201265 - part of the Compilation filed on 25 October 2017;

139.4. matters concerning FIPB correspondence66 relating to the VIHBV transaction, placed in the form of a compilation to the Supreme Court, which compilation itself was filed up electronically with the Tribunal on 25 October 2017, with attention specifically drawn to a representation by an NGO - Telecom Watchdog to FIPB, relating to AS, AG & IDFC shareholding and similar ex facie misconceived allegations of IDFC Investors being benamidaars, which evidently did not find an iota of credibility with FIPB or weighed with the Hon'ble Supreme Court, as will inter alia be apparent from the fact that the

Assessee's contractual arrangements for 'options' were held to have remained intact inter alia recognizing that these were the subject-matter of permissions granted by FIPB;

139.5. judgment of the Hon'ble Bombay High Court in the case of the Assessee for AY 2008-0967, which albeit restricted to AS and AG options, must by itself fortify that Revenue always treated IDFC transactions as being completely arms-length.

140. 341 ITR 1 not relevant: distinguishable on facts RESPONSE OF ASSESSEE:

141. The Hon'ble Supreme Court concluded that the FWAs did not confer any rights on VIHBV, and further that the right to acquire shares through exercise of Call Options vested in the Assessee, and not in Vodafone group companies generally, upholding corporate separateness in the Hutchison structure inherited by Vodafone.

142. The law laid down vis-a-vis Call and Put Options are mere contractual rights and do not sound in property, and therefore are not capital assets, until exercised, has full application, in the facts and circumstances of the present case.

143. The Assessee has submitted that factual rights do not exist independent of legal rights, i.e. the law recognizes a right enforceable in law, or no right at all, and it is not available to Revenue to segregate de facto rights as independent stand-alone rights;

144. In the circumstances, since rights in relation to the options vested in the Assessee, and not in any holding company within the Vodafone Group, when the right was terminated vide TA 2011, there was no scope for any 'international transaction'.

145. To the extent that the Revenue sought to rely upon TRA 2007 to assert that prior VIHBV permission should be obtained in relation to exercise of options- which would not be unreasonably withheld, this was at best an administrative exercise, with nothing more, and intended to hinder commercial risks of any dealings by investors with a competitor of VIHBV, and thus a perfectly reasonable clause, conferring no rights upon VIHBV independent of the Assessee, in whom, as held by the Hon'ble Supreme Court, the options lay vested (by virtue of FWA 2007).

146. Grant of a protective covenant in relation to an investment cannot alter the de facto ownership of shareholding (of such Investor), so as to deprive the investor of ownership rights in respect of such shareholding. There are no covenants in the Agreements that would be capable of being reasonably construed as a consent of the investor to be deprived of right to dividend or right to vote or right to negotiate entitlements relating to such shareholding, and in the absence of any such contractual stipulations (indeed, there are none contained in the Agreements), and in the circumstances the contention of Revenue to assert that such protective covenants are liable to be so construed, is plainly distortive of arms-length commercial business arrangements which the Revenue is bound to have taxed in the relevant assessment years in the hands of those very Investors without any assertion of shell/conduit entities or analogous nomenclature. Illustratively, when AS and AG exercised put options in AY 2010-11 and paid tax thereon (which was likely paid under the head capital gains), to the best knowledge of the Assessee, AS and AG will have been assessed, without any assertion that AS or AG were conduits for VIHBV. Similarly, when IDFC Investors exercised put options, again, the IDFC Investors were bound to have been assessed to tax, free of any assertion on lines that IDFC Investors were conduits for VIHBV.

147. The only role of IDFC Investors was to hold shares, and the FWA was a mere finance agreement, with the IDFC Investors acting as benamidaars:

RESPONSE OF ASSESSEE:

148. Submissions by the Revenue ignore the commercial and economic realities of corporate structures, which may encompass investment companies/vehicles, whose business models analogous to that of private equity investors, facilitate investing across different industries/sectors/verticals, with a view to participate in profits (through declaring of dividends) and secure return on investment (typically, at the time of 'exit', through transfer/sale of shareholding), whether with or without a seat on the board (in order to partake in management of the business), inevitably determined by the level of the equity interests in a downstream operating company. Thus, for instance, Mr. Analjit Singh, whose Max Group held substantial telecom interests jointly with Hutchison Group back in the year 1994 onwards, through Hutchison Max Telecom Limited, and later continued as investor in Vodafone India Limited, through the Analjit Singh Group equity interests (again held through a series of corporate vehicles) in TII, held the position of Chairman of Vodafone India Limited, for several years.

149. Restrictions on free transferability of shares are only but one element of a share which does not alter component elements of its ownership, since a share is comprised of a congeries of rights68,inter alia conferring right to dividend, right to management, right to vote, right to seek winding-up, relief in the case of mismanagement, relief in the case of oppression and share in the surplus on winding up, all of which will continue to be enjoyed by the legal de facto owner of the share until it is transferred. There is no material placed on record by Revenue to establish that IDFC Investors stood denuded of their rights as

shareholders or that beneficial ownership in the shareholding of the IDFC Investors lay with any person or entity, much less the Assessee.

150. All of the shareholding owned in SMMS by IDFC Investors, continued to remain reflected in their respective audited financial statements, as an investment of IDFC Investors, until the exercise of 'put options' insofar as relates to the preference shareholding interests in SMMS, and the buyback insofar as relates to the equity shareholding interests in SMMS.

151. In the circumstances, to ascribe to the IDFC Investors the role of mere benamidaar holders of shares for the benefit of VIHBV, portrays a blinkered approach, overlooking the business and economic realities of corporate structures, through which businesses are held, specifically in this case the Vodafone group structure and those of the IDFC Investors, including but not limited to:

151.1. the good corporate standing of all entities comprised of the Vodafone group structure, including the IDFC Investors, who had a long-standing interest/exposure to the telecom industry, apparent from commercial arrangements originating in 2006 with Hutchison;

151.2. the fact that if any dividends had been declared on the SMMS shareholding, these would have been paid to the legal owners of the equity interests, i.e. to IDFC Investors;

151.3. when IDFC Investors exercised 'put' options, the Assessee purchased the preference shareholding of the IDFC Investors (apparent from audited financial statements of the Assessee and SMMS, apart from those of the IDFC Investors);

151.4. in fact, IDFC Investors enjoyed a fixed return on preference shareholding, as stipulated in Schedule 1 of FWA 2007, with returns in the region of 25%69, which are bound to have been brought to tax in their hands;

151.5. the equity interests of the IDFC Investors contemplated a valuation upside, whether through 'call' or 'put' option, built-in through stipulation of a minimum rate of return of 17.5% on its investment, and pegging value to be derived for its shareholding with valuation of Vodafone India Limited, with an in-built maximum of US$15 billion Enterprise Valuation;

151.6. restrictions agreed around free transferability of shareholding with IDFC Investors (in relation to equity interests in SMMS), did not, as a matter of law, imply anything beyond an arrangement assuring cooperation between IDFC Investors and Vodafone, such that in the event of relaxation of FDI Policy in telecom by foreign investors, Vodafone group would be entitled to priority rights to ramp up its equity ownership interests up to 100% or alternatively in circumstances where a 'Change of Control' took place.

152. Examining from the standpoint of rights inherent in shares, therefore, the FWA 2007 through imposing restrictions on free transferability of shareholding in SMMS by IDFC Investors did not interdict in absolute terms or at all, any rights enjoyed by the IDFC Investors in relation to the SMMS equity, save and except that around unhindered rights of 'transfer'. In effect, the tests relating to the rights secured by the Assessee under the FWA 2007, must necessarily yield the conclusion that the FWA 2007 neither restricted the IDFC Investors' right to receive dividend, if declared, by SMMS, nor the IDFC Investors' right to vote or manage their interests in SMMS, including but not limited to negotiating a Termination Fee, etc.

153. A perusal of the statutory records of SMMS, available in public domain, through the web portal maintained by the Ministry of Corporate Affairs, Government of India, will establish that all directors appointed to the board of SMMS were nominees of the IDFC Investors, and not appointees of the Assessee and/or any affiliate of VIHBV or any other Vodafone group company.

154. Similarly, there was no scope for any Vodafone company to take any decisions in relation to SMMS shareholding- thus, the TA, under which SMMS shareholders, i.e. IDFC Investors negotiated a Termination Fee of Rs.21.25 crores was negotiated by those IDFC Investors, and not by a Vodafone nominee or company.

155. That the investment of IDFC Investors was a benami name lending exercise or was initially financed by Hutchison, and later by Vodafone, is unsubstantiated, and is a completely new unsubstantiated case being advanced by the Revenue before this Hon'ble Tribunal.

156. Neither the contents of the FWA 2007, nor FWA 2006, and/or corollary SHA(s) justify the stand of the Revenue that IDFC Investors did not put in their own funds or that they are mere benamidaars, on account of VIHBV having (allegedly) funded their investments and/or those of Analjit Singh and/or Asim Ghosh. On the contrary, the TPO order dated 13 October 2017 (relating to AY 2014-15) states: "4.2.3 In order to acquire further equity interest as and when the FDI ceiling in the telecom sector were relaxed, assessee identified three investors being Analjit Singh and Neelu Analjit Singh (for short AS) who was one of the leading industrialists of the company and a promoter of Hutchison Max Telecom Limited Mumbai Telecom Circle and had formerly sold his investment to Hutchison. The other one was identified as Asim Ghosh (for short AG). He was associated with this group for a long time and was a Chief Executive Officer of Hutchison Essar. The third was the IDFC Group of Investors leading players in the field of financial investments." (bold emphasis, ours)

157. There is no material brought on record by the Revenue to establish that the funding of equity or preference shareholding by IDFC Investors was obtained from VIHBV. Such a vague and untenable assertion is therefore, incapable of being examined in the absence of such material on record, particularly when it is plainly premised on mere surmise and conjecture by the Revenue.

158. Without prejudice to the submission that Additional Evidence filed by the Revenue has no relevance to determination of the appeal, and is not liable to be taken into consideration, the Rabo Bank documents placed in Revenue's Additional Evidence Volume no. 2 at page 370 to 375A do not relate to the IDFC Investors. Perusal of the Rabo Bank documents relied upon by Revenue, in any event, establish a Standby Letter of Credit, which at the highest is in the nature of a collateral arrangement, rather than primary funding, and decimates the case of the Revenue that the Investors were funded by Vodafone; if a collateral arrangements were to secure better terms for an investor, that cannot constitute funding of such investor by Vodafone. In any event, these were matters examined by the Hon'ble Supreme Court in 341 ITR 1, and no such contention of Revenue was entertained, and on the contrary, the Hon'ble Supreme Court upheld and sanctified the arrangements in the form of the FWAs executed between the Assessee and the three Indian partners.

159. Even if VIHBV may have undertaken facilitation of funding by IDFC Investors, these were matters strictly between VIHBV and the IDFC Investors, which:

159.1. cannot equate with funding of the IDFC investment in SMMS;

159.2. even if granted, could at best have merely secured advantageous funding terms for IDFC Investors – again, not a matter within the knowledge of the Assessee, or a matter on the record of this appeal;

160. To the best knowledge of the Assessee, the holding of legal and beneficial interests in shareholding in SMMS by IDFC Investors has never been put into dispute by the Revenue or any other Indian statutory or regulatory authority; indeed, arrangements between the Assessee, VIHBV and the IDFC Investors enjoyed full sanction by the FIPB, and the entities have each been accorded corporate separateness and independently assessed to tax by the Revenue.

161. The Hon'ble Supreme Court of India in 341 ITR 1, has extensively examined70 the Hutchison group structure, including all details surrounding the FWAs and SHAs between the three Indian investors in the Hutchison group structure and later the Vodafone group structure, the grant of FIPB approvals, albeit in the context of examining 'jurisdiction' of the Indian Tax Authority to render exigible to tax the

11.2.2007 transaction, from the standpoint of tax deduction obligations of VIHBV, and concluded that "Thus it cannot be said that the structure was created or used as a sham or tax avoidant. It cannot be said that HTIL or VIH was a fly-by-night operator/short time investor" (paragraph 73, page 42).

162. Filings examined by the Hon'ble Supreme Court relating to the FIPB, viz. all of the arrangements proposed to be entered into with the (three) Indian Investors by Vodafone International Holdings BV, including inter alia the express approval in writing (dated 7 May 2007) obtained prior to 'closing' (on 8 May 2007) of the SPA dated 11 February 2007, which was followed by execution of the FWA 2007 and SHA 2007 inter alia with the IDFC Investors, have been placed on the file of this Tribunal71. It is apparent from 341 ITR 1 that the Hon'ble Supreme Court of India in the course of examining the Hutchison group structure and the Vodafone group structure examined all material details concerning the FWA 2006 and FWA 2007 and related SHAs, concerning the IDFC Investors, and the conclusions around the integrity of the structure are, therefore, binding upon and rendered unassailable by the Revenue.

163. In the circumstances, Revenue is estopped from questioning the good standing of the (three) Indian Investors, in the present AY, or classifying the IDFC Investors as mere benamidaars.

164. The submissions by the Revenue overlook that IDFC Investors invested over Rs. 600 crores, in SMMS, during 2006, which is recorded in SMMS audited financial statements. This investment has not, to the best knowledge of the Assessee, ever been questioned in the IDFC Investors' assessment proceedings, who will inevitably have been taxed on all returns on investment, in howsoever manner treated in the books of IDFC Investors. In fact, in the course of the proceedings, the Revenue has relied upon tax treatment of a Termination Fee paid by the Assessee to the IDFC Investors73, in relation to the TA 2011.

165. Significantly, the TA 2007 executed by the IDFC Investors, was not rendered exigible to any transfer pricing adjustment, which only establishes that the Revenue is

adopting an ad hoc and arbitrary approach to matters concerning IDFC rights juxtaposed with those of the Assessee.

166. IDFC exercised ‘put’ options in relation to its preference shareholding in SMMS, in manner stipulated in clause 5 of the FWA 2007, based on which the Assessee purchased the ‘put’ preference shareholding interests of the IDFC Investors during FY ended 31.3.2008 (Rs.200 crores, so as to reduce the IDFC Investors’ preference shareholding to Rs.400 crores), FY ended 31.3.2009 (Rs.185 crores, so as to reduce the IDFC Investors’ preference shareholding to Rs.215 crores) and the balance during FY ended 31.3.2010.

167. ‘Options’ were capable of exercise by payment of meager amount, and were purely financial investors, since return on investment was fixed:

RESPONSE OF ASSESSEE:

168. Firstly, the terms agreed with IDFC Investors were approved by the FIPB – as will be apparent from the FWA 2007, a minimum return on investment of 17.5% was stipulated – this does not qualify as a meagre amount.

169. There is nothing placed on record by the Revenue to establish that the IDFC Investors agreed to compromise their return on investment – this would be capable of being established by Revenue only if the Revenue were to rely on some form of exceptional profits made by the investee company, which were not dividended up to the investors, which is not the case.

170. Revenue fails to engage with or provide any satisfactory explanation for the fact that

(a) significant sums were paid on exercise of ‘put’ options relating to the preference shareholding of the IDFC Investors – this was in conformity with FWA 2007 obligations, (b) that the value of SMMS shareholding was properly reflected in the sum paid by way of ‘subscription’ by TII & ‘buyback’ of equity shareholding of IDFC Investors, and has not been challenged by the Revenue, who instead seeks to attribute an absurd ALP on those very shares which it purports to treat as income in the hands of the Assessee; and (c) the exercise of ‘option’ by the Assessee or IDFC Investors would have entailed prior FIPB approval and corollary delays; and (d) the SSSA 2011 and TA 2011 were arrangements entered into with IDFC Investors and TII, the legality or validity of which has not been challenged by Revenue.

171. In any event, the Revenue raised objections before the FIPB, which were rejected and cannot claim a second innings before the ITAT now.

172. International Transaction arises under both s92B(1) & (2):

RESPONSE OF ASSESSEE:

173. This argument admits that Revenue is unable to find an ‘international transaction’ under s.92B(1) and, must therefore have resort to s92B(1).

174. There is no ‘international transaction’.

175. Assessee’s investments in SMMS preference shares, in JKF and in TII do not render the Assessee liable to be treated as being in the business of trading in investments, and in any event, it is not available to the Assessee to argue matters of ‘capital gain’, since the income

sought to be brought to tax in the hands of the Assessee is under the head of 'business income'.

RESPONSE OF ASSESSEE:

176. The entirety of the order of the TPO proceeds on the basis of 'Options' constituting a capital asset, which options have been exercised/transferred and/or extinguished and/or relinquished, and therefore constitutes 'gain'.

177. It is not available to the Revenue to rely on the error of the AO, which was the subject-matter of a rectification application, for which over six months have elapsed, but remains unrectified.

178. The Assessee asserts the settled legal position that options are mere contractual rights, and do not constitute 'property', and further that options constitute 'rights as to potential shares', rather than constituting 'rights in shares', as held by the Hon'ble Supreme Court of India.

179. Also, the Hon'ble Bombay High Court74, in the AY 2008-09 assessment proceedings of the Assessee, has held that the Assessee in not exercising options, had no exigibility to capital gains tax.

180. As to alleged 'trading' in options, the Assessee relies on submissions in the foregoing.

181. By virtue of the FWA 2007 granting a right of assignability of the 'options', conferred upon the Assessee an interest in the SMMS shares.

RESPONSE OF THE ASSESSEE:

182. There is no assignability of 'options', but rather the Assessee has a right to nominate a person to fulfil obligations that may arise on exercise of 'options'.

183. In the present case, the Assessee elected to terminate rights relating to options, and, therefore, there was no question of any alleged assignment of options.

184. The Assessee's rights of call option and the IDFC Investors rights of put options were mutually capable of termination, both contractually and in law.

185. The Share Subscription and Shareholders Agreement and the Termination Agreement are in violation of the FWA 2007

RESPONSE OF THE ASSESSEE:

186. The parties to an agreement are entitled to contract out of it, including to substitute fresh terms, and since in this case, the IDFC Investors and the Assessee, entered into TA 2011 qua the FWA 2007 and SHA 2007, they were no longer bound by the contractual obligations undertaken in the 2007 writings, and were at liberty to arrive at a fresh negotiation and to implement the commercial understanding arrived at, which occurred on arm's length basis, since the IDFC Investors were independent third party investors. The status of IDFC Investors as independent investors has previously been accepted by the Revenue.

187. The SSSA 2011 and TA are liable to be read together, and gave rise to 'Business Income' foregone in the hands of the Assessee

RESPONSE OF THE ASSESSEE:

188. Exercise of 'put' options, and corollary purchases of preference shareholding of IDFC Investors by the Assessee do not classify as 'trading', but rather was in consonance with long-term investment strategy, as will be evident from the dealings in equity and preference shareholding by the Assessee, who was vested with call option rights, as held by the Hon'ble Supreme Court of India.

189. There is no reasoned finding in any of the orders of the Lower Authorities in relation to alleged 'trading' activity of the Assessee to support the allegation of Business Income. It is well-settled that Revenue cannot improve its case before the ITAT – Mahindra & Mahindra (Special Bench)75 and Slocum (Delhi-ITAT) - in Slocum76 it was held that Revenue cannot change complexion of the matter before the ITAT for the first time.

190. The cost of 'call option' is Rs.62.24 crores or Rs.4.31 crores or Rs.21.25 crores RESPONSE OF THE ASSESSEE:

191. Firstly, the Revenue is not concerned with the purported cost of a capital asset in generic terms, but rather is strictly concerned with the cost of acquisition of the capital asset.

192. In computing capital gains the actual cost has to be considered, and not notional cost77.

193. None of the three sums advocated by Revenue as constituting the cost of acquisition can be allocated/applied, since cost has to be ascertained at the time of acquisition, whereas the sums relied on by Revenue are notional costs purportedly arising at the time of alleged transfer of asset, and/or entirely extraneous by virtue of constituting a price at which an independent June 2007 transaction between the IDFC Investors and the Assessee occurred.

194. As far the sum of Rs.21.25 crores is concerned, this was the sum paid by the Assessee to IDFC Investors in 2011 by way of Termination Fee to bring an end to contractual obligations, and not to acquire any capital asset, it was not paid in 2007 when the FWA was executed by the Assessee, and therefore it is not a cost of the acquisition of the option.

195. As far as the Rs.62.24 crores is concerned, it was the subject matter of a separate and distinct transaction, i.e. the Cashless Option exercise by the IDFC Investors, and is incapable of being equated with the 'cost of the option'. In any event, the TPO's selection of that as an independent transaction, relied upon in benchmarking the consideration, overlooked that there was no economic characterization or comparability between Cashless Option and the termination of contractual rights through payment of a Termination Fee.

196. Finally, the Rs.4.31 crores is derived from the contractual value of the option, i.e. the sum that the Assessee was liable to pay to the IDFC Investors, in the event that the option had been exercised, and is not capable of being equated as the cost of the option. This amount was payable only if options were exercised by VISPL; in absence of such exercise, notional costs were incapable of being treated as cost of acquisition by the Revenue.

197. Assignment and/or relinquishment and/or extinguishment of 'call option' gives rise to a taxable event

RESPONSE OF THE ASSESSEE:

198. As to the Revenue argument that there has been an assignment and/or relinquishment and/or extinguishment of a capital asset, viz. the call option of the Assessee in relation to the SMMS equity interests of the IDFC Investors, firstly, the Revenue has left this matter amorphous, through failing to clearly identify in whose favour any such purported assignment of call option occurred, i.e. whether to VIHBV or to TII or to CGP, is not articulated by Revenue – leaving this virtually to guesswork.

199. In any event, admittedly, no consideration was received by the Assessee; hence, it would perhaps logically be capable of being inferred that it is the argument of Revenue that the Assessee has foregone income, in which event if that arguments were taken to its logical end, then at best it may constitute a 'gift' by the Assessee to its AE – again, which AE is a matter of guesswork.

200. It is not the case of the Assessee that there was any assignment or transfer or gift whatsoever of call option, but rather that there was a 'termination'; however, in any scenario whatsoever, absent payment of any consideration to the Assessee in relation to the termination of options, no tax arises in the hands of the Assessee. Even if the Revenue were to purport to treat it as a gift, provisions of s.47(iii) stipulate that a gift from one person to another will not be treated as a taxable transfer, i.e. provisions of section 45 would not be applicable.

201. In the circumstances, no income is received in the hands of the Assessee that is exigible to tax.78

202. For reasons stated above, the TA 2011 was executed to terminate FWA 2007 and SHA 2007; no income can arise under the head 'capital gain' as argued by the Assessee, much less 'Business Income' - as argued by Revenue.

SECTION 5. OTHER SUBMISSIONS OF REVENUE AND RESPONSE OF THE ASSESSEE:

203. The Revenue relies upon FWA 2007, TRA 2007 and SHA 2007 to submit that it was VIHBV who was directing the Assessee, who was a mere dummy entity.

RESPONSE OF THE ASSESSEE:

204. The approach of Revenue to attribute, based on the TRA 2007, and in particular relying on recitals therein and clauses 2.1 to 2.6, 4.1 to 4.3, 6.1 & 6.2, 8.3, 10.1, that the Assessee's role in SMMS was an activity performed at the direction of VIHBV, and that the Assessee was therefore a dummy entity, overlooks established commercial means through which multi-national companies conduct investments and business activities generally. Similar misinterpretation of covenants, rights, duties and obligations under FWA 2007 and SHA 2007 are misconceived.

205. The Revenue argument not only overlooks that it was the Assessee with whom all rights and obligations under the FWA 2006 (while under the Hutchison Group structure) and FWA 2007 (under the Vodafone Group structure) had vested, and therefore the Assessee was

the natural intermediary entity of choice for subscribing to preference shares of SMMS, but also that protective covenants in relation to investments are not unusual. The primary commitments were made by the IDFC Investors to the Assessee. Any reaffirmation of protective covenants to VIHBV was just that, and no further, since the rights to call options vested in the Assessee, as held by the Hon'ble Supreme Court.

TRANSACTION AGREEMENT 2007:

OBJECT OF AGREEMENT:

206. The SPA dated 11 February 2007, between Hutchison Group and Vodafone Group, which had entailed 'change of control' under the FWA 200680, triggered clause 5.3 (read with the definition of 'Change of Control'), led to a series of arrangements between Vodafone with the original IDFC Investors, documented in Transaction Agreement dated 5 June 200781, including: (a) Exercise of Cashless Option pertaining to 0.1234% stake in HEL, contained in clause 4.2 of FWA 2006, exercised/assigned by IDFC Investors in favour of the Assessee, in turn leading to Assessee becoming liable to pay the agreed Strike Price to IDFC Investors;(b) liberty to the original IDFC Investors to dispose of equity shares in SMMS held by IDFC and SSKI, without offering these to Assessee; (c) Subscription to preference shares in SMMS by Vodafone and IDFC; (d) Redemption of Old Preference Shares held by the Original Investors; (e) Substitution of Loan Agreements between SMMS and IDFC, and SMMS and DSP Merrill Lynch Capital Limited; (f) Subscription of new shares in Omega by SMMS, and ancillary arrangements, as stipulated therein.

MATERIAL CLAUSES:

207. EXERCISE OF CASHLESS OPTION: Vide clause 2, the original IDFC Investors were entitled to exercise the Cashless Option without first being required to execute the 2006 Put Option; as a corollary, upon invocation thereof by the original IDFC Investors, who in turn irrevocably agreed to assign the Cashless Option to the Assessee, and which assignment the Assessee agreed to accept, the Assessee became liable to pay Rs.62.24 crores to the original IDFC Investors (to be apportioned in manner set forth in Schedule 6 thereto) simultaneously with redemption of preference shares of the original IDFC Investors, without the original IDFC Investors being first required to exercise the Put Option (as contemplated in FWA 2006) and waiving rights thereto. Accordingly, the Cashless Option was treated as terminated, and the Assessee treated as having discharged in full its FWA 2006 obligations

208. SALE OF SMMS SHARES: Vide clause 3, following the assignment of the Cashless Option, both Infrastructure Development Finance Company Limited and SSKI Corporate Finance Private Limited were at liberty to sell their SMMS equity interests; and had thus irrevocably agreed to sell their equity shareholding of SMMS shares to IDFC Investors, at par, on investment completion, such that IDFC Investors would not insist on registration of transfer until after procuring repayment in full of amounts due under loan agreements.

209. SUBSCRIPTION OF VODAFONE PREFERENCE SHARES: Vide clause 4, VIHBV would seek allotment of preference shares in SMMS, either to it or such other Vodafone Group company nominee as it may procure such application by, with attendant obligation upon SMMS to, following subscription by SMMS to new shareholding in Omega, cancel any excess allotment of Vodafone Preference Shares, subject always to requisite approvals.

210. SUBSCRIPTION OF IDFC & IDFC II PREFERENCE SHARES: Vide clause 5, following subscription by payment of monies and allotment to a Vodafone nominee of SMMS Preference Shares, and subject always to certification that HEL is in compliance with the FDI sectoral cap, IDFC would subscribe to preference shares in SMMS, and following SMMS repaying all outstanding loan amounts, receipt of Cashless Option consideration, allotment of IDF Preference Shares by SMMS and SMMS registering the transfer of IDFC equity shares sold to IDF, IDFC II would become obliged to subscribe to preference shares in SMMS.

211. REDEMPTION OF OLD PREFERENCE SHARES & REPAYMENT OF LOANS: Vide clause 6, primary use of preference share subscription monies of Vodafone, IDFC and IDFC II was repayment of loans obligations, following the termination of which loans, and release of existing pledges over Omega and HEL shares, would be created in favour of Infrastructure Development Finance Company Private Limited and DSP Merrill Lynch Capital Limited; and redemptions of old preference share would occur, with Rs.23.52 crore payable to each IDF and IDFC, and Rs.96 lakhs to SSKI.

212. SUBSCRIPTION OF NEW OMEGA SHARES: Vide clause 7, SMMS to subscribe to (New Omega) 37,695,443 equity shares in Omega, at par.

213. INVESTMENT COMPLETION: Vide clause 8, payment by Vodafone of Preference Share Subscription Amounts to SMMS was accorded priority, which would be followed by IDFC paying the Preference Shares Subscription Amount, following which SMMS would repay all loans, after which the Assessee would pay the Cashless Option amount, followed by SMMS to redeem the IDF, IDFC and SSKI Preference Shares (in that order), after which IDFC PE shall pay IDFC Fund II Preference share subscription monies after which SMMS shall subscribe to new Omega shares.

214. STATUS QUO PENDING COMPLETION & EXERCISE OF OPTIONS: While clause 9 aimed to preserve rights of the parties pending the performance of rights and obligations inter se, clause 10 contained a covenant that the put, investor or default options under FWA 2006, will require Vodafone’s prior consent.

215. Again, all of these clauses were examined by the Hon’ble Supreme Court in 341 ITR 1.

TERMINATION AGREEMENT 2007:

OBJECT OF THE AGREEMENT:

216. By virtue of the transaction recorded in the SPA dated 11 February 2007, between Hutchison group and Vodafone group, entailing ‘change of control’, in turn triggering clause 5.3 of the FWA 200683, the IDFC Investors exercised the Cashless Option, which had, in turn, led to execution of the TRA 200784.

217. Consequent upon invocation of the Cashless Option, the parties to the FWA 2006, i.e. IDFC Investors and the Hutchison Group companies agreed to discharge inter se of all rights and obligations under FWA 2006 and under SHA 2006, which were brought to an end by TA 2007.

218. Materially, no line of argument analogous to that now advanced by Revenue in AY 2012-13, to the effect that the ‘termination’ has led to foregone income in the hands of the

Assessee in relation to the IDFC Investors' options during AY 2008-09, was raised by Revenue. This new argument is fraught with inconsistency, when Revenue's interpretation of TA 2007 (in AY 2008-09) is juxtaposed with Revenue's interpretation of TA 2011.

219. In AY 2008-09, Revenue accepted, without question, the contractual Strike Price recorded in the TRA 2007 paid by the Assessee, which had been arrived at contractually with the IDFC Investors, who Revenue accepted as third party investors.

MATERIAL CLAUSES:

220. TERMINATION OF FWA 2006: Vide clause 2, in consideration of mutual release of obligations under FWA 2006, the parties agreed to terminate FWA 2006, and covenanted that its terms shall cease to apply with immediate effect.

221. TERMINATION OF SHA 2006: Vide clause 3, in consideration of mutual release of obligations under SHA 2006, the parties agreed to terminate SHA 2006, and covenanted that its terms shall cease to apply with immediate effect.

222. UNCONDITIONAL WAIVER OF CLAIMS & RIGHTS: Vide clause 4, the parties acknowledged and agreed that there were no outstanding liabilities or claims against the other, in respect of FWA 2006 or SHA 2006, and stipulated that indemnities shall survive until 7 August 2009.

SHA 2007 OMEGA:

OBJECT OF SHA 2007: to regulate matters, rights, obligations of inter se shareholders of Omega.

MATERIAL CLAUSES:

223. The SHA 2007 contained usual terms, conditions, stipulations, covenants, protections to regulate the business and affairs of Omega, in manner commonplace in companies wherein shareholding patterns are liable to comply with FDI regulatory matters, inevitably calling for a non-resident shareholder to adopt multiple layers of precaution to ensure against any breach of sectoral requirements/caps, which may otherwise compromise the sanctity/legality of its shareholding interests and potentially compromise corollary interests in downstream businesses, aimed to be preserved through the mechanism of entering into a binding SHA. Accordingly, SHA clauses 3.1 and 3.2 laid down stringent observances around equity ownership patterns, with emphasis on resident Indian ownership, to be compliant with Indian FDI Policy:

224. EQUITY SHARE CAPITAL: Vide clause 3.1, the agreed proportion in which the issued and paid up equity share capital of Omega shall be held, i.e. 38.4% by Hutchison Telecommunications (India) Limited, Mauritius (89,693,060 shares) and 61.6% by SMMS (143,881,527 shares), was set forth, with clause 3.2 setting forth the procedure to be followed for any additional capital contribution, provided it was not in breach of the Sectoral Cap.

225. RESIDENT INDIAN CITIZENS: Vide Clause 3.3, it was undertaken by SMMS that its entire equity share capital is, and shall remain held by IDFC Investors, and it was represented by SMMS that not less than 88 percent of the total issued equity capital is and

will be held either directly or indirectly by Resident Indian Citizens (again, a means to ensure that the rigors of the FDI Policy were strictly observed).

226. RESTRICTIONS ON TRANSFER: Vide Clause 4.1, it was stipulated that all share transfers shall accord with the FWA, in matters of legal or beneficial interest therein.

227. APPOINTMENT OF DIRECTORS: Amongst key rights exercised by a shareholder, is the right to appoint directors, which in the case of Omega, as captured in the SHA (clause 6.1.1, read with clause 6.1.6), reflected proportionate representation of each shareholder, through SMMS being vested with the right to appoint three directors – commensurate with its 61.6% equity interests in Omega, and two directors to be appointed by the non-resident Vodafone Group entity - HutchisonTelecommunications (India) Limited, Mauritius ("HTM", was part of the Hutchison Group structure, at the time of the 11 February 2007 SPA; HTM was later renamed Vodafone Telecommunications (India) Limited).

228. DEFAULT RIGHTS: In the event of any breach of obligations undertaken by Vodafone in relation to Options (under FWA 2007), including by virtue of any statutory, regulatory or other restriction imposed under applicable law in the course of exercise of Options, it was stipulated that the SMMS directors should have full right to require Omega to sell/transfer a sufficient number of HEL (VIL) shares in order to compensate the shareholders from out of funds raised out of disposal of such shareholding. In the event of such a sale of shareholding, the Vodafone entity would be required to waive claims to sums realized, in order that SMMS shareholders were compensated, accordingly.

229. PREFERENCE SHARES: Vide clause 3.4, issuance of non-convertible cumulative redeemable preference shares was contemplated, with such shares to be redeemable for a period of up to 20 years from issue, for an aggregate subscription amount of Rs.15 billion, at redemption premium to be agreed.

230. In addition to routine matters around good corporate governance, including convening of an annual general meeting, shareholders' meetings, board meetings, quorum (one representative of each SMMS and the non-resident Vodafone entity), agenda, appointment of Chairman, participation thereat, voting covenants, encumbrance-free shareholding of HEL, representations, warranties, undertakings, dispute resolution, governing law, etc., the SHA stipulated inter alia routine commercially well-accepted contractual safeguards for SMMS shareholders.

IN CONCLUSION:

231. The starting point for Revenue in the present matter was the increase in percentage holding of VIHBV in VIL. The Revenue failed to appreciate that whether the Assessee or any of its affiliates acquired the shares in VIL, there would have been an increase in percentage holding of VIHBV in VIL; this is no ground for invoking transfer pricing.

232. Further, insofar as payment to IDFC Investors is concerned, it is submitted as under: 232.1. firstly, Termination Fee was a payment by and not to the Assessee;

232.2. next, this was a negotiated arms-length commercial consideration agreed to be paid by the Assessee to the IDFC Investors, at the time of 'exit';

232.3. thirdly, this was a sum paid on account of a multitude of factors, including the slight delay to the proposed exercise of put option by IDFC Investors and there is no scope for correlating such payment with potential contractual liability if a 'call' option or 'put' option was exercised, moreover when the Revenue has not questioned the SMMS share valuation of Rs.15/- per equity share for purposes of share subscription or buyback;

232.4. fourthly, it is pertinent that the transaction of assignment of cashless option between the Assessee and IDFC Investors has been held to an external CUP from AY 2008-09 for the purposes of benchmarking the alleged assignment of call options by the Assessee – therefore, a transaction in the present AY between the Assessee and the IDFC Investors cannot be treated as a transaction between the associated enterprises;

232.5. lastly, the mere fact of making a payment cannot be construed as an international transaction warranting transfer pricing adjustment. At best, the Revenue could have sought disallowance of such expenditure, if the Assessee had made a claim in this regard – however, since the Assessee has not claimed deduction for this amount and the payment does not have any tax impact on the Assessee, there is no basis that such payment be treated as an international transaction.

233. Therefore, there is no 'international transaction', warranting a transfer pricing adjustment in the present case. The impugned order is driven by economic intendment, which is impermissible in law, and in the circumstances, the order is liable to be quashed and set aside.

73. Learned senior counsel submits that every time Revenue does not want to follow the binding judicial precedent, it is a normal practice to use the Sun Engineering decision (supra) as a ready excuse. That cannot be permitted. There will always be differences in facts of each case, as these cases cannot be mirror images of each other, but what is relevant is the principle emerging from the binding judicial precedents. The principle is quite clear and unambiguous inasmuch it treats VIH-BV as not being a party to the options arrangement. He also submits that Hon'ble Supreme Court, in Vodafone International Holdings's case (supra) has pronounced on the whole transaction structure and these findings, which are equally valid in all respects- including in respect of international transactions, bind all the parties. Learned senior counsel once again takes us through the judgment of Hon'ble Bombay High Court, which was reversed by Hon'ble Supreme Court, and submits that the arguments of the learned Departmental Representatives would have been valid if the judgment of Hon'ble Bombay High Court was not to be reversed as such. Learned counsel once again invites our attention to 2006 position when 52% equity in VEL was held by Hutchinson Group, 33% equity in VEL was held by Essar Group and the rest 15% equity in VEL was held by independent, and as he himself puts it, 'legitimate' investors. He submits that when these independent legitimate investors walked out, the assessee had to bring in other independent investors, and these three investors, namely AS, AG and IDF Investors, filled in that slot. At this stage, when bench asked the learned counsel as to what is the difference between a legitimate independent investor and independent investor, and whether this implies the difference between an investor in own capacity or investor in fiduciary capacity, learned counsel submits that the word 'legitimate' was not really appropriate in the context and he would like to withdraw the same. The expression was thus corrected and the word

‘legitimate’ withdrawn. Be that as it may, learned senior counsel proceeded with his highlighting the main planks of his arguments, and submitted that the call options cannot be considered in put options and the assessee did not simply have a right under the options agreement but he had an obligation as well. As we assign the value to the right, we must also not ignore the obligations. He also read out observations of Hon’ble Supreme Court holding that VIH-BV did not have any right in respect of call options. He once again submitted that there is nothing like a factual control, as held by Hon’ble Supreme Court, and that the very distinction between *de facto* control and *de jure* control, is, therefore, meaningless. If the VIH BV did not have any legal rights, it cannot be inferred that the VIH-BV had any rights at all, and VIH-BV did not have any rights, that was the end of the matter and the transaction in question cannot be an international transaction. The very foundation of the case of the Revenue, therefore, unsustainable in law. It is then contended that TII, the entity to which the assignment rights were assigned, is also an Indian company and, as such, even if the assignment is for less than arm’s length consideration, there is no shifting of taxations base, and since there is no shifting of tax base, the transfer pricing provisions cannot come into play at all. When asked whether the TII was also holding the shares for its foreign parent company, and the benefit *de facto* accrues to the foreign parent company, learned counsel does not dispute that but submits that, in that case, whether shares are held by the assessee or the TII it does not make a difference to the group interest at all. In response to a specific question by the bench whether the assessee was compensated for the services rendered to protect and purse the interests of the VIH-BV in handling the investments, learned counsel submitted that even if its assumed that suhc services were indeed rendered by the assessee to VIH-BV, the it is irrelevant since the ALP adjustment is made on account of consideration for rendition of these services by the AE. On the strength of these submissions, as also the elaborate submissions made by the learned counsel- as set out earlier, he urges us to set aside the impugned ALP adjustment.

74. We have heard the rival contentions at great length, perused the material on record very carefully and duly considered facts of the case in the light of the applicable legal position.

75. We find that there is no dispute that the impugned arm’s length price adjustment is triggered by the payment of Rs 21.25 crores, under the termination agreement dated 24th November 2011, on termination of call options held by the assessee under the Framework Agreement dated 6th June 2007. However, in order to understand the relevance of this termination agreement, we will have to first understand the nature, scope and backdrop of the original agreement dated 6th June 2007, i.e.’ FA 2007, and, in order to understand the nature, backdrop and scope of the FA 2007, we will have to understand the regulatory framework, with respect to foreign direct investment in the telecom sector, as it originally was and how it has evolved over a period of time.

76. While, as on now, there can be one hundred percent foreign direct investment in the telecommunication sector, it was not always the case. The opening up of Indian telecom sector to private participation and foreign direct investment started with National Telecom Policy of 1994, and, thereafter, the policy on private participation and foreign direct

investment has been evolving. The foreign direct investment limit in the telecommunication sector, which now stands at one hundred percent, has reached this level by slow and gradual increase at different points of time. Vide Press Note No 2 (2000 Series) dated 11th February 2000, and attached sector specific guidelines for foreign direct investment, the FDI limits in the telecommunication business was stated to be as follows:

> **i. In basic, cellular mobile, paging and value added service, and Global Personal Mobile Communication by Satellite, FDI is limited to 49% subject to grant of license from Department of Telecommunications and adherence by the companies (who are investing and the companies in which investments are being made) to the licence conditions for foreign equity cap and lock in period fir transfer and addition of equity and other licence provisions**

77. On 3rd November 2005, however, there was a relaxation in foreign direct investments in the telecommunication sector. Vide Press Note No. 5 (2005 series), the FDI limit was enhanced to 74%, and, announcing this relaxation, the press note, inter alia, stated as follows:

> ***In pursuance of the Government's commitment to liberalise the FDI regime, it has been decided to enhance the Foreign Direct Investment ceiling from 49 per cent to 74 per cent in certain telecom services [such as Basic, Cellular, Unified Access Services, National/International Long Distance, V-Sat, Public Mobile Radio Trunked Services (PMRTS), Global Mobile Personal Communications Services (GMPCS) and other value added services], subject to the following conditions:-***
>
> ***A. The total composite foreign holding including but not limited to investments by Foreign Institutional Investors (FIIs), Non-resident Indians (NRIs), Foreign Currency Convertible Bonds (FCCBs), American Depository Receipts (ADRs), Global Depository Receipts (GDRs), convertible preference shares, proportionate foreign investment in Indian promoters/investment companies including their holding companies, etc., herein after referred as FDI, will not exceed 74 per cent. Thus, 74 per cent foreign investment can be made directly or indirectly in the operating company or through a holding company. Hence, the remaining 26 per cent will be owned by resident Indian citizens or an Indian Company (i.e. foreign direct investment does not exceed 49 percent and the management is with the Indian owners). It is clarified that proportionate foreign component of such an Indian Company will also be counted towards the ceiling of 74%. However, foreign component in the total holding of Indian public sector banks and Indian public sector financial institutions will be treated as 'Indian' holding. The licensee will be required to disclose the status of such foreign holding and certify that the foreign investment is within the ceiling of 74% on a half yearly basis.***

78. On 19th April 2007, the aforesaid guidelines, as a result of a review, were modified. The Government decided to enhance the foreign direct investment limit from 49% to 74% in telecom services subject to, inter alia, the following conditions:

> ***(i) The enhancement of the FDI ceiling will be applicable in case of Basic, Cellular, Unified Access Services, National/International Long Distance, V-Sat, Public Mobile***

Radio Trunked Services (PMRTS), Global Mobile Personal Communications Services (GMPCS) and other value added Services.

(ii) Both direct and indirect foreign investment in the licensee company shall be counted for the purpose of FDI ceiling. Foreign Investment shall include investment by Foreign Institutional Investors (FIIs), Non-resident Indians (NRIs), Foreign Currency Convertible Bonds (FCCBs), American Depository Receipts (ADRs), Global Depository Receipts (GDRs) and convertible preference shares held by foreign entity. Indirect foreign investment shall mean foreign investment in the company/companies holding shares of the licensee company and their holding company/companies or legal entity (such as mutual funds, trusts) on proportionate basis. Shares of the licensee company held by Indian public sector banks and Indian public sector financial institutions will be treated as 'Indian holding'. In any case, the 'Indian' shareholding will not be less than 26 percent.

(iii) FDI upto 49% will continue to be on automatic route. FDI in the licensee company/Indian promoters/investment companies, including their holding companies, shall require approval of the Foreign Investment Promotion Board (FIPB) if it has a bearing on the overall ceiling of 74%..................

79. With the passage of time, however, the foreign direct investment limit was enhanced to 100% and that is where it stands as on now.

80. As the limit on FDI increased, and with the hope of further relaxation in the permissible FDI limit, Hutchinson Group focussed on the shareholdings by Indian investors. In the year 2006, the Hutchinson Group, which was then holding interests in the assessee company- as indeed in the entire group entities, apparently started a restructuring process and buying out interests of investors, other than Essar Group, in the entities holding the shares in what was then Hutchinson Essar Limited (now known as Vodafone India Limited). These shares were purchased in the name of certain seemingly independent entities which were owned by IDF, Analjit Singh and Asim Ghosh, but *de facto* under full control of the group entities. While Analjit Singh and Asim Ghosh were closely connected with former avtars of Vodafone India Limited, as its Chairman and Managing Director/ CEO respectively, IDF was a trust by IDFC Group which is engaged in the business of rendering financial services. The acquisition of shares in the controlling companies was with the active and financial support of the Hutchinson Group, and, by that standard, cannot be treated as independent acquisition their own right. While it is not for us to give complete and conclusive findings about all these developments as these are spread over several group entities and several assessment years, we have take note of the some facts, related to the shareholdings which are subject matter of option rights in this appeal, which unambiguously indicate so.

81. On 30th June 2006, Hutchinson Telecommunications (India) Limited, Mauritius based group entity, entered into an agreement with Hinduja TMT Limited, a resident company, for purchase of 47.89% Equity shares in Indusland Telecom Network Limited (ITNL)-which was subsequently renamed as Omega for a consideration of US $ 193.38 million. On the same date, Hutchinson Telecommunications also entered into an agreement with In Network Entertainment Limited, for purchase of 6.32% equity in ITNL for a consideration of US $ 25.51 million. Both of the companies, shareholdings in which were subject matter of sale, had

shareholdings in ITNL, which, in turn, was directly holding 2,11,63,258 shares in Hutchinson Essar Limited (now known as Vodafone India Ltd). The core asset, and real worth, of ITNL was in its direct shareholding in, what is now known as, Vodafone India Ltd.

82. A common clause, appearing in both these agreements- copies of which are placed at pages 1491- 1512 and 1513-1528 of the paper-book IV reads as follows:

> **At the request of the purchaser, the vendor has agreed to sell to an Indian nominee of the purchaser before the Long Stop Date** *(i.e. the date on which 60 days from the date on which the agreement is executed, and, if such a day is not a business day, the next business day)***, and the purchaser shall guarantee that the Indian nominee shall purchase from the Vendor, the Sale Shares, on the terms and subject to the conditions in this Agreement.**

83. Clearly, therefore, the Hutchinson Telecommunications (India) Ltd Mauritius had all the rights, and rather unfettered rights, to nominate the Indian nominee to which 54.21% shareholdings in ITNL are to be transferred by Hinduja Group entities, namely Hinduja TMT Limited and In Network Entertainment Ltd.

84. On 7th August 2006, SMMS Investments Pvt Ltd, obviously as a result of its nomination by Hutchinson Telecommunications (India) Ltd Mauritius, acquired this 54.21% shareholding in ITNL, which was subject matter of the above two agreements, from Hinduja TMT Limited and In Network Entertainment Ltd for a consideration of TRs 1,032.32 crores. This acquisition was funded by loans taken by SMMS Investments Ltd from DSP Merrill Lynch Capital Limited (Rs 810 crores) and IDFC (Rs 190 cores), in addition to investment of Rs 2 crore in its entire equity capital and of Rs 48 crores in its preference shares by IDFC Investors. It is also an undisputed position that the loans taken by SMMS Investments were guaranteed by Hutchinson Telecommunication International Ltd, Cayman Island (HTIL-Cayman), the then ultimate parent company of all the group entities, including the assessee.

85. As a result of the above arrangement, IDFC Investors, a seemingly independent enterprises, with an equity investment of Rs 2 crores in SMMS Investments, became owner of SMMS Investments which, in turn, owned 54.21% owner of ITNL, which, in turn, held 2,11,63,258 shares in HEL, which formed 5.11% of its share capital. Looking to the worth of shareholdings in HEL, which was several hundred times the investment that the IDFC Investors made in SMMS Investments, this transaction cannot be taken, on standalone basis, at its face value. There had to be something more to it, and that is what Framework Agreement, termination of which has lead to this dispute before us, demonstrate. In other words, this nomination by HTIL-M in favour of SMMS has to be read with the arrangement that HTIL, directly or indirectly, had with the concerned parties- including SMMS shareholder. Let us, in this light, come to the agreements and arrangements that the HTIL, its successors and group entities had with the parties connected with this transaction. To begin with, we would like to reproduce certain extracts from the Transaction Agreement dated 5th June 2007 (**TA 2007**, in short) between, amongst others, the assessee, IDFC Group of Investors and VIH-BV. The relevant extracts, for the time being, are as follows:

Dated 5 June, 2007
IDFC PRIVATE EQUITY COMPANY LIMITED,
acting for INDIA DEVELOPMENT FUND
and
INFRASTRUCTURE DEVELOPMENT FINANCE COMPANY LIMITED
and
SSKI CORPORATED FINANCE PRIVATE LIMITED
and
SMMS INVESTMNETS PRIVATE LIMITED
and
HUTCHISON TELECOMMUNICAITONS (INDIA) LIMITED
and
3 GLOBAL SERVICES PRIVATE LIMITED
and
OMEGA TELECOM HOLDINGS PRIVATE LIMITED
and
IDFC PRIVAGE EQUITY COMPANY LIMITED
acting for IDFC PRIVATE EQUITY FUND II
and
VODAFONE INTERNATIONAL HOLDINGS B.V.
AGREEMENT
In relation to
Omega Telecom Holdings Private Limited

This agreement (the "Agreement") is made on 5 June 2007

(1) India Development Fund ("IDF") is a unit scheme of IDFC Infrastructure Fund, a trust created under the Indian Trusts Act, 1882, which is a venture capital fund registered under the Securities and Exchange Board of India (Venture Capital Funds) Regulations, 1996, having its office at 17, Vaswani Mansion, 3rd Floor, Dinshaw Vachha Road, Churchgate, Mumbai – 400 020, State of Maharashtra,of which IDBI Trusteeship Services Limited is the trustee, acting through its investment manager IDFC Private Equity Company Limited, a company incorporated under the Companies Act, and having its Registered Office at 17, Vaswani Mansion, 3rd Floor, Dinshaw Vachha Road, Churchgate, Mumbai 400 020.

(2) Infrastructure Development Finance Company Limited, a company registered under the Companies Act, 1956 and having its registered office at ITC Centre, 760 Anna Salai, Chennai 600 002 and its office at Ramon House, 2nd floor, HT Parrekh Marg, 169 Backbay Reclamation, Churchgate, Mumbai 400 020 ("IDFC")

(3) SSKI Corporate Finance Private Limited, a company registered under the companies Act, 1956 and having its registered office at 703/704, Tulsiani Chambers, 7th Floor, (East Wing), Nariman Point, Mumbai 400 021 ("SSKI") (IDF, IDFC and SSKI together the "Original Investors"):

(4) IDFC Private Equity Fund II, a unit scheme of IDFC Infrastructure Fund 2, a trust created under the Indian Trusts Act, 1882, which is a venture capital fund registered under the Securities and Exchange Board of India (Venture Capital Funds) Regulations, 1996, having its office at 17, Vaswani Mansion, 3rd Floor, Dinshaw Vachha Road, Churchgate, Mumbai – 400 020, State of Maharashtra, of which IDBI Trusteeship Services Limited is the trustee, acting through its investment manager IDFC Private Equity Company Limited,

a company incorporated under the Companies Act, 1956 and having its Registered Office at 17, Vaswani Mansion, 3rd Floor, Dinshaw Vachha Road, Churchgate, Mumbai 400 020 ("IDFC PE") (IDF, IDFC and IDFC PE, together the "Investors");

(5) SMMS Investments Private Limited, a company incorporated under the Companies Act, 1965, and having its registered office at 17, Vaswani Mansion, 3rd Floor, Dinshaw Vachha Road, Churchgate, Mumbai 400 020 ("SMMS")

(6) Hutchison Telecommunications (India) Limited, a company incorporated under the laws of Mauritius, and having its registered office at 4th Floor, Les Cascades Building, Edith Cavell Street, Port Louis, Mauritius ("HT India");

(7) 3 Global Services Private Limited, a company incorporated under the Companies Act, 1956, and having its registered office at Spectrum Towers, Mindspace Complex, off Link Road, Malad (West), Mumbai 400 064, India ("GSPL");

(8) Omega Telecom Holdings Private Limited, a company incorporated under the Companies Act,1956 and having its registered office at 17, Vaswani Mansion, 3rd Floor, Dinshaw Vachha Road, Churchgate, Mumbai 400 020, India ("Omega"); and

(9) Vodafone International Holdings B.V., a company incorporated in the Netherlands whose registered office is at Rivium Quadrant 173-177, 2909 LC Capelle aan denil the Netherlands ("Vodafone").

WHEREAS

(A) Omega is an infrastructure holding company engaged in the business of investing in securities of telecommunication companies in India and holds 21,163,258 ordinary equity shares (the "HEL Shares") in Hutchison Essar Limited ("HEL"), a licensee of cellular mobile telephone services in respect of telecommunications circles in India.

(B) The original investors through SMMS, an infrastructure holding company which is in the business of investing in securities of infrastructure holding companies which invest in telecommunications companies in India, hold 64.21% of the issued equity share capital of Omega of 106,165,064 ordinary shares of per value Rs. 10 each in Omega (the Old SMMS Omega shares) subject to the terms of a framework agreement dated 7 August 2006(the 2006 Framework Agreement) between the original Investors, SMMS, HT India, GSPL Omega and Hutchison Telecommunications International Ltd. (HTL) and a share holder agreement dated 17 August 2006 (the 2006 Shareholder Agreement) between SMMS, HT India Omega and HTL.

(C) Under the terms of the 2006 Framework Agreement (i) GSPL has granted the Original Investors an option to purchase HEL shares by way of cashless exercise (the cashless option) which option can on GSPL's request be assigned to GSPL or to nominee (ii) the original investors have granted to GSPL the right to exercise an option to purchase the entire issued equity share capital of SMMS and (iii) GSPL has granted the original investors an option to purchase the entire issued equity share capital of SMMS and (iii) GSPL to purchase the entire issued equity share capital of SMMS (the 2006 Put Option)

(D) Vodafone and HTL have entered into an agreement dated 11February 2007 under which HTL has agreed to sell and Vodafone has agreed to purchase a controlling interest in CGP

Investments (Holdings) Ltd., the indirect holding company of CGP and GSPL (the Acquisition Agreement)

(E) On Acquisition Completion there was a change in control of HT India for the purposes of the Framework Agreement the Original Investors to exercise the 2006 Put Option and the Cashless Option.

(F) The original investors and GSPL have agreed that the Original Investors may exercise the Cashless Option conditional on Acquisition Completion on the terms and conditions set out in this Agreement. The original Investors have further agreed that following exercise of the cashless option the original investors shall be entitled to dispose of the SMMS Ordinary Shares held by the IDFC and SSKI in SMMS without being required to offer such shares to GSPL.

(G) Vodafone has agreed conditional Acquisition Completion to subscribe for the Vodafone Preference Shares and IDFC and IDFC PE have agreed to subscribe for IDFC Preference Shares and the IDFC Fund II Preference Shares on the terms and conditions set out in this Agreement.

(H) As a result of the foregoing, the parties have agreed to enter into this Agreement

86. On the same date on which SMMS Investments became owner of 54.21% owner of ITNL, and on which IDFC Investors came to hold entire equity of SMMS Investments, i.e. on 7^{th} August 2006, a Framework Agreement was entered into. A copy of this agreement was also placed before us at pages 1362 to 1415. The parties to this framework agreement and the recitals of the agreement are as follows:

FRMAEWORK AGREEMENT

THIS FRAMEWORK AGREEM.ENT (this "Agreement") entered into this day of 7^{th} August, 2006, among:

(1) INDIA DEVELOPMENT FUND, (hereinafter referred to as "IDF" and which expression unless repugnant to the context, be deemed to include its successor and assigns) a unit scheme of IDFC Infrastructure Fund, a trust created under the Indian Trusts Act, 1882, which is a venture capital fund registered under the Securities and Exchange Board of India (Venture Capital Funds) Regulations, 1996, having its office at 17, Vaswani Mansion, 3^{rd} Floor, Dinshaw Vachha road, Churchgate, Mumbai – 400 020, State of Maharashtra (of which IDF is a unit scheme) acting through its trustee for the time being viz. IDBI Trusteeship Services Limited, acting through IDFC PRIVATE EQUITY COMPANY LTD, a company incorporated under the Companies Act, 1956 and having its Registered Office at 17, Vaswani Mansion, 3^{rd} Floor, Dinshaw Vachha road, Churchgate, Mumbai 400 020 ("IDFC PE"); (2) INFRASTRUCTURE DEVELOPMENT FINANCE COMPANY LIMITED, a company registered under the Companies Act, 1956 and having its registered office at ITC Centre, 760 Anna Salai, Chennai 600 002 and its office at Ramon House, 2^{nd} floor, HT Parrekh Marg, 169 Backbayt Reclamation, Churchgate, Mumbai 400 020 (hereinafter referred to as "IDFC" which expression unless repugnant to the context, be deemed to include its successor and assigns); and (3) SSKI CORPORATE FINANCE PRIVATE LIMITED, a company registered under the companies Act, 1956 and

having its registered office at 703/704, Tulsiani Chambers, 7th Floor, (East Wing), Nariman Point, Mumbai 400 021 (hereinafter referred to as "SSKI" which expression unless repugnant to the context, be deemed to include its successor and assigns) (IDF, IDFC and SSKI together the "Investors"):

AND

SMMS INVESTMENTS PRIVATE LIMTED, a company incorporated under the Companies Act, 1965, and having its registered office at 17, Vaswani Mansion, 3rd Floor, Dinshaw Vachha Road, Churchgate, Mumbai 400 020 (hereinafter referred to as "JVC", which expression unless repugnant to the context hereof be deemed to include its successors and permitted assigns);

AND

HUTCHISON TELECOMMUNICATIONS (INDIA) LIMITED, a company incorporated under the laws of Mauritius, and having its registered office at 4th Floor, les Cascades Building, Edith Cavell Street, Port Louis, Mauritius (hereinafter referred to as "HTIL" which expression unless repugnant to the context hereof be deemed to include its successors and permitted assigns);

AND

3 GLOBAL SERVICES PRIVATE LIMITED, a company incorporated under the Companies Act, 1956, and having its registered office at Spectrum Towers, Mindspace Complex, off Link Road, Malad (West), Mumbai 400 064, India (hereinafter referred to as "GSPL" which expression unless repugnant to the context hereof be deemed to include its successors and permitted assigns)'

AND

INDUSIND TELECOM NETWORK LIMITED, a public limited company incorporated under the Companies Act, and having its registered office at Hinduja House, 171 Dr. Annie Besant Road, Worli, Mumbai 400 018, India (hereinafter referred to as "ITNL" which expression unless repugnant to the context hereof be deemed to include its successors and permitted assigns)'

AND

HUTCHISON TELECOMMUNICATIONS INTERNATIONAL LIMITED, a company incorporated under the laws of the Cayman Islands, having its registered office at 22/F, Hutchison House, 10 Harcourt Road, Central, Hong Kong (hereinafter referred to as "HTL" which expression unless repugnant to the context hereof be deemed to include its successors and permitted assigns);

(Investors, JVC, HTIL, GSPL, ITNL and HTL are hereinafter collectively referred to as the "Parties", and severally as a "Party".)

WHEREAS

A. ITNL is an infrastructure holding company engaged in the business of investing in securities of telecommunication companies in India and holds 21,163,258 ordinary

equity shares (the "HEL Shares") in Hutchison Essar Limited ("HEL"), a licensee of cellular mobile telephone services in respect of telecommunications circles in India.

B. The shareholders of ITNL wish to sell their shares in ITNL and the Investors were offered the opportunity to purchase the controlling stake in ITNL. The Investors are willing to take up such controlling stake in ITNL provided HTL and GSPL provide assistance in obtaining the financing necessary to make such investment.

C. As a precursor to the investment by the Investors, HTL and GSPL, have agreed to assist or procure assistance for the Investors in obtaining such financing and to provide necessary and adequate guarantee required by any lenders providing such financing.

D. Consequently, the Investors, through JVC, an infrastructure holding company which is in the business of investing in securities of telecommunications companies in India shall purchase 54.21% of the issued equity share capital of ITNL of 106,186,084 ordinary shares of par value Rs.10 (Rupees ten) each (the "JVC ITNL Shares") in ITNL subject to the terms and conditions herein.

E. In mutual consideration for the aforesaid, the Investors grant GSPL a right to an option to purchase the entire equity shares of JVC, and GSPL grants the Investors an option to require GSPL to purchase the entire equity shares of JVC in accordance with the terms and conditions herein.

F. The Investors having agreed to procure JVC to enter into the shareholders' agreement with HTIL, ITNL and HTL in respect of JVC's and HTIL's shareholding in ITNL (the "ITNL Shareholders Agreement") to define the inter se rights and obligations of the shareholders of ITNL and set out the terms and conditions governing their relationship as shareholders and record the terms and to provide certain management services and investment advice to ITNL. ITNL agrees to grant the Investors an option to purchase the investors Option Shares (as defined herein).

87. As stated in the recitals itself, a shareholders' agreement was also an integral part of this arrangement. A copy of the said shareholders' agreement, between SMMS Investments, Hutchison Telecommunications (India) Ltd- Mauritius, Indusind Telecom Network Limited and Hutchinson Telecommunications International Ltd- Cayman Islands, was also placed before us at pages 1416-1449 of the paper book IV. This agreement, as evident from the observations in the extracts reproduced below, was entered into "on the basis of representations and warranties provided in the Framework Agreement". We may also refer to the following extracts from the aforesaid shareholders agreement:

<u>SHAREHOLDERS AGREEMENT</u>

THIS SHAREHOLDERS AGREEMENT (this "Agreement") entered into this 17th day of August 2006, among:

SMMS INVESTMENTS PRIVATE LIMITED, an infrastructure holding company incorporated under the Companies Act, 1956, and having its registered office at 17, Vaswani Mansion, 3rd Floor, Dinshaw Vachha Road, Churchgatcs Mumbai 400020, India, (hereinafter referred to as "JVC" which expression unless repugnant to the context hereof be deemed to include its successors and permitted assigns), of the FIRST PART;

HUTCHISON TELECOMMUNICATIONS (INDIA) LIMITED, a company organised under the laws of Mauritius and haying its registered office at 4th Floor, Les Cascades Building, Edith Cavell Street, Port Louis, Mauritius (hereinafter referred to as "HTIL" which expression unless repugnant to the context hereof be deemed to include its successors and permitted assigns), of the SECOND PART;

INDUSIND TELECOM NETWORK LIMITED, a company incorporated under the Companies Act 1956 and having its registered office at Hinduja House, 171 Dr Annie Besant Road, Worli, Mumbai 400 018, India (hereinafter referred to as the "Company" which expression unless repugnant to the context hereof be deemed to include its successors and permitted assigns) of the THIRD PART; AND

HUTCHISON TELECOMMUNICATIONS INTERNATIONAL LIMITED, a f company incorporated under the laws of the Cayman Islands, having its registered office at 22/F Hutchison House, 10 Harcourt Road, Central, Hong Kong (hereinafter Preferred to as "HTL." which expression unless repugnant to the context hereof be deemed to include its successors and permitted assigns) of the FOURTH PART.

(JVC and HTIL are hereinafter collectively referred to as the "Parties", and severally as the "Party")

WHEREAS:

A. ***The Company is engaged 'in the business of investing in securities of telecommunications companies in India and is an infrastructure holding company. The Company holds not less than 90% of its total assets in investments in shares for the purpose of holding stake in investee companies; does not trade in shares except to dilute or divest holding; is not carrying on any other financial activities and does not hold or accept public deposits.***

B. ***HTIL and JVC will from the Effective Date hold 45.79% and 54.21%, respectively, of the issued equity share capital of the Company. The Patties are entering into this Agreement on the basis of the representations and warranties provided herein and in the Framework Agreement.***

C. ***The Parties are desirous of entering into this Agreement to confirm their understanding regarding the regulation of the affairs of the Company, and the relationship of the Shareholders thereof.***

D. ***The Company is executing this Agreement as a confirming party, inter alia, as the matters contained in this Agreement materially affect the administration of the Company.***

E. ***HTL is executing this Agreement as a confirming party as it is the parent company of HTIL.***

88. On 11th February 2007, the Vodafone Group, through VIH-BV, acquired entire stake in CGP**- Cayman**, and thus the controlling interest in Hutchinson Essar Limited, which was then renamed as Vodafone India Limited. VIH-BV thus acquired 66.98% equity interest in

Indian operating company- 42.34% direct interest, through wholly owned subsidiaries, 9.62% indirectly through part holdings in Omega and TII, and 15.03% through the assessee which held call options with AG, AS and IDFC. This transaction was completed on 8th May 2007.

89. It is also interesting to note that, out of total sale consideration of US $ 11.076 billion paid by VIH-BV to HTIL-M, for purchase of a single share in CGP- Cayman Islands, VIH-BV retained US$ 351.80 million for exercise of options. This fact is clearly borne out from the following document executed on 8th May 2007- a copy of which is placed before us at pages 365-3678 in paper book II filed by the learned Departmental Representative:-

> ***CONFIDENTIAL***
> ***Hutchison Telecom***
>
> ***Date : 8 May 2007***
>
> ***From : Hutchison Telecommunications International Limited ("We" or the "Vendor")***
>
> ***To : Vodafone International Holdings B,V. ("Vodafone" or the "Purchaser")***
>
> ***We refer to :***
>
> ***(a) the me agreement entered into between the vendor and the purchaser on 11 February, 2007('the "SPA") for the sale and purchase of certain shares and loans representing our interests in Hutchison Essar Limited "HEL"); and***
>
> ***(b) the release and waiver provided by the Purchaser in favour of the Vendor under the Purchaser's Deed of Waiver dated 15 March, 2007 (the "Deed of Waiver").***
>
> ***1. Analjit Singh, Asim Ghosh, the Vendor and the Purchaser have agreed ("FMV Agreement") that on an assumed future equity valuation of US$ 25 billion for HEL, the equivalent fair market value for (i) the equity shares of ND Callns (or MV healthcare or Scorpios Beverages Private Limited) or the direct and indirect holdings of Analjit Singh and his wife in Telecom Investment India Private Limited ("TII") (the "AS Stake") and 9ii) the equity shares in Centrino (for Phusteeh Mercantile or Goldspot Mercantile Company Private Limited) or the direct and indirect holdings of Asim Ghosh in TII (the "AS Stake") is the Indian rupees equivalent to US$266.25 million and US$165.51 million respectively. The Purchaser has imposed as a condition for proceeding to Completion, and has agreed to the waiver contemplated in clause 4 below, in consideration for the Vendor's agreement to contribute up to US$351.8 million towards the acquisition cost which the Purchaser (or its nominated person) incurs upon exercise of the put and call options granted under the Framework Agreements or the TII Shareholders Agreement ("Options Exercise") resulting in the sale and purchase of the whole of part of the AS Stake and/or AG Stake on the terms set out in clause 2 below.***
>
> ***2. We hereby agree that US$351.8 million of the sum payable by the Purchaser pursuant to Clause 10(b) of the SPA (the "Retention amount") shall be withheld and retained at completion by the Purchaser form the consideration and is to be dealt with as follows:-***

2.1 At anytime during ten (10) years from the date of Completion, if and to the extent that the Purchaser (or its nominated person) shall incur my acquisition cost in the purchaser of the whole or part of the AS Stake and.AG Stake upon the Options Exercise, as to up to:

2.1.1 US$225 million in acquiring any part of the AS Stake; and/or
2,1,2 US$126..8 million in acquiring any part of the AG Stake,

the Purchaser shall (i) promptly notify the Vendor in writing upon the occurrence of each such event, (ii) promptly submit to the Vendor a statement of the acquisition cost incurred in association therewith (along with supporting evidence clearly demonstrating and certifying the cost incurred and consideration being received in the sale and purchase of the AS Stake and/or AC Stake), and (iii) be entitled to retain an equivalent amount out of the Retention Amount. It being agreed that in the case of a partial acquisition of the AG Stake or AS Stake, a "Relevant Proportion" 'of the acquisition cost incurred and received in the sale and purchase of any part of the AS Stake and/or the AG Stake shall be retained out of the Retention Amount until the aggregate thereof shall be equal to the amount stated in sub-clause. 2.1.1 or, as the case may be, 2.1.2. In the case of a partial acquisition of the AS Stake, the "Relevant Proportion" shall be a factor the numerator 'of which is 225 and the denominator of which is 266.25. In the case of a partial acquisition of the AG Stake, the "Relevant Proportion" shall be a factor the numerator of which is 126,8 and the denominator of which is 164.51.

2.2 Upon the earlier of (i) the Options Exercise resulting in the purchase of the whole of the AS and AG Stakes, and (ii)the tenth anniversary of the Completion Date, the Purchaser shall, within fourteen (14) days of such purchase or date, return of procure that there is returned to the Vendor (in such bank account as ft may direct in writing) that part of the Retention Amount that has not been retained in accordance with clause 2.1 above (the "Returned Retention Amount") (together with interest on the Returned Retention Amount from (and including) the date of Completion to (but excluding) the date of return of the Returned Retention Amount at LIBOR (compounded and with the rate reset both on the first London business day of each month) calculated by reference to the actual number of days elapsed and on the basis of a 360-day year).

3. The reference to 30 May 2007 in Clause 2.3 of the Deed of Waiver being Inappropriate, the parties thereto now agree to delete " or 30 May 2007 if earlier" with effect from the date hereof, and references herein to "Deed of Waiver" shall mean references to such documents as amended.

4. Without prejudice to the release and waiver provided by the Purchaser pursuant to the Deed of Waiver, the Purchaser hereby irrevocably and unconditionally, with effect from Completion'

4.1 waives any and all rights it has, may have or claims to have under the Vendor Warranty set out in paragraphs 4.4 and 4.7 of Schedule 4 o the SPA only as a result of in connection with or arising from the FMV agreement the "Related Vendor Warranties"); and

4.2 to the extent that the subject matter of any right or claim that could have been brought by the Purchaser but for clause 4.1 above gives rise to any right or claim

under any Vendor Warranty other than the Related Vendor Warranties, waives any and all rights it has, may have or claims to have under any such other Vendor Warranty.

5. ***The balance of the sum payable pursuant to Clause 8.10(b) of the SPA after deducting the amount to be retained under clause 2 of this deed shall be paid to the Vendor or as it may otherwise direct in accordance with that Clause.***

Terms used but not defined in this deed shall have the respective meaning given to them in the SPA.

This deed may be entered into in any number of counterparts, all of which taken together shall constitute one and the same agreement.

The provisions of Clauses 15, 28 and 29 of the SPA shall apply to this deed as they apply to the SPA, mutatis mutandis.

The parties to this deed agree that the English courts shall have exclusive jurisdiction to settle any dispute which may arise in connection with the creation, validity, effect, interpretation or performance of, or the legal relationships established by, this deed or otherwise arising in connection with this deed, and for such purposes irrevocably submit to the jurisdiction of the English court.
i
The parties to this deed irrevocably consent to service of process or any other document in connection with any proceedings by facsimile transmission, personal service, delivery at the relevant address specified by reference (above) to clause 28 of the SPA, or any other usual address, by mail or in any other manner permitted by English law, the law of the place of service, or the law of the jurisdiction where proceedings are instituted.

This deed shall be governed by, and construed in accordance with, English law.

Sd/-
TIM PENNINGTON

Executed and delivered as a deed for an on behalf of
Hutchison Telecommunication International Limited

Executed and delivered as a deed for an on behalf of
Vodafone International Holdings B.V.

90. Quite clearly, therefore, irrespective of whether the VIH-BV had the legal right over the exercise of options by the assessee- which is a question we will deal with at a later stage, VIH-BV even retained the amount, payable on exercise of options, from the sale consideration of solitary share in CGP- Cayman Islands. We may also add that this retention does not include any amounts payable to IDF that we are dealing with at present but then, unlike AS and AG, IDF was a purely financial services entity and it had a small investment of Rs 2 crores in equity shares of SMMS Investments (apart from the investments in preference shares of SMMS Investments- which were redeemed anyway at substantial premium), which

was compensated, *inter alia*, for by the cashless options being assigned to the assessee by the IDFC Investors for Rs 62.24 crores- options which were not exercise anyway, by the payment of Rs 21.25 cores as compensation for termination of options.

91. The new Framework Agreements were then entered into, in view of the fact that, in terms of the original framework agreements, any change in the control of the company was to result in a situation that the Indian partners were not to remain bound by the framework agreements. While there were some variations in the new Framework Agreements, entered into as a result of acquisition of business by Vodafone Group plc, so far as AS and AG were concerned, and that is what resulted in a transfer pricing dispute which is now before Hon'ble Supreme Court, it is an undisputed position that there was no significant variation in the framework agreement with which we are concerned at present, i.e. with respect to SMMS Investments Pvt Ltd. In the meantime, however, name of Indusind Telecom Network Limited, i.e. ITNL, was changed to Omega Telecom Holdings Pvt Ltd, i.e. Omega. This was the entity holding direct investments in the shares of, what was now, Vodafone India Ltd.

92. A series of agreements, including agreements between various stakeholders on 5th June 2007 providing for exercise of put option and cashless option under this agreement rather than under 2006 agreement and between SMMS HTIL and VIH on 7th June 2007 for regulating the affairs of Omega, were signed. The shareholding pattern of Omega now stood at 38.4% with HTIL-M and 61.6% with SMMS. The recitals of this framework agreement were as follows:

IDFC PRIVATE EQUITY COMPANY LIMITED,
acting for INDIA DEVELOPMENT FUND
and
INFRASTRUCTURE DEVELOPMENT FINANCE COMPANY LIMITED
and
IDFC PRIVATE EQUITY COMPANY LIMITED
acting for IDFC PRIVATE EQUITY FUND II
and
SMMS INVESTMNETS PRIVATE LIMITED
and
HUTCHISON TELECOMMUNICAITONS (INDIA) LIMITED
and
3 GLOBAL SERVICES PRIVATE LIMITED
and
OMEGA TELECOM HOLDINGS PRIVATE LIMITED
and
VODAFONE INTERNATIONAL HOLDINGS B.V.

FRAMEWORK AGREEMENT

This agreement (the "Agreement") is made on 6 June 2007

(10) India Development Fund ("IDF") is a unit scheme of IDFC Infrastructure Fund, a trust created under the Indian Trusts Act, 1882, which is a venture capital fund registered under the Securities and Exchange Board of India (Venture Capital Funds) Regulations, 1996, having its office at 17, Vaswani Mansion, 3rd Floor, Dinshaw Vachha Road, Churchgate, Mumbai – 400 020, State of Maharashtra,of which IDBI Trusteeship Services Limited is the trustee, acting through its investment manager IDFC Private Equity Company Limited, a company incorporated under the Companies Act, and having its Registered Office at 17, Vaswani Mansion, 3rd Floor, Dinshaw Vachha Road, Churchgate, Mumbai 400 020, India.

(11) Infrastructure Development Finance Company Limited, a company registered under the Companies Act, 1956 and having its registered office at ITC Centre, 760 Anna Salai, Chennai 600 002 and its office at Ramon House, 2nd floor, HT Parrekh Marg, 169 Backbay Reclamation, Churchgate, Mumbai 400 020, India ("IDFC")

(12) IDFC Private Equity Fund II ("IDFC PE"), a unit unit scheme of IDFC Infrastructure Fund 2, a trust created under the Indian Trusts Act, 1882, which is a venture capital fund registered under the Securities and Exchange Board of India (Venture Capital Funds) Regulations, 1996, having its office at 17, Vaswani Mansion, 3rd Floor, Dinshaw Vachha Road, Churchgate, Mumbai – 400 020, State of Maharashtra, IDBI Trusteeship Services Limited is the trustee, acting through its investment manager IDFC Private Equity Company Limited, a company incorporated under the Companies Act, 1956 and having its Registered Office at 17, Vaswani Mansion, 3rd Floor, Dinshaw Vachha Road, Churchgate, Mumbai 400 020, India (IDF, IDFC and IDFC PE, together the "Investors");

(13) SMMS Investments Private Limted, a company incorporated under the Companies Act, 1965, and having its registered office at 17, Vaswani Mansion, 3rd Floor, Dinshaw Vachha Road, Churchgate, Mumbai 400 020, India ("SMMS")

(14) Hutchison Telecommunications (India) Limited, a company incorporated under the laws of Mauritius, and having its registered office at 608, St James Court, St. Denis Street, Port Louis, Mauritius ("HT India");

(15) 3 Global Services Private Limited, a company incorporated under the Companies Act, 1956, and having its registered office at Spectrum Towers, Mindspace Complex, off Link Road, Malad (West), Mumbai 400 064, India ("GSPL");

(16) Omega Telecom Holdings Private Limited, a company incorporated under the Companies Act,1956 and having its registered office at 17, Vaswani Mansion, 3rd Floor, Dinshaw Vachha Road, Churchgate, Mumbai 400 020, India ("Omega"); and

(17) Vodafone International Holdings B.V., a company incorporated in the Netherlands whose registered office is at Rivium Quadrant 173, 2909 LC Capelle aan denil the Netherlands ("Vodafone").

WHEREAS

(I) Omega is an infrastructure holding company engaged in the business of investing in securities of telecommunication companies in India and holds 21,163,258 ordinary equity shares (the "HEL Shares") in Hutchison Essar Limited ("HEL"), a licensee of cellular mobile telephone services in respect of telecommunications circles in India.

(J) Vodafone and Hutchison Telecommunications International Limited entered into an agreement dated 11 February 2007 pursuant to which Vodafone agreed to acquire a controlling interest in CGP India investments (Holdings) Limited, the indirect holding company of HT India and GSPL (the "Acquisition Agreement"). On the Completion Date HT India and GSPL became wholly-owned subsidiaries of Vodafone.

(K) Pursuant to an agreement dated on or around 5 June 2007 between the parties hereto and SSKI and HTL (the "Transaction Agreement") (i) IDF agreed to acquire the equity shares in SMMS held by IDFC and SSKI, (ii) IDFC, IDFC PE and Vodafone agreed to subscribe or procure that another member of the Vodafone Group subscribe for preference shares in SMMS, (iii) SMMS agreed to repay loans under the Loan Agreements and redeem the Old Preference Shares and (iv) SMMS agreed to subscribe for 37,695,443 Omega Shares (the "New Omega Shares").

(L) Immediately following completion of the transactions described in Redial (D), Omega's issued share capital will consist of 233,574,587 Omega Shares, 69,693,060 of which HT India will hold (38.4% of Omega's issued share capital) and 143,881,527 of which SMMS will hold (61.6% of Omega's issued share capital).

(M) In mutual consideration of the foregoing, the parties have agreed (i) to enter into this Agreement pursuant to which the investors have agreed to grant to GSPL an option to purchase the entire issued share capital of SMMS and GSPL have agreed to grant the Investors an option to require GSPL to purchase the entire issued share capital of SMMS and (ii) to enter into a shareholder agreement to confirm their understanding regarding the regulation of the affairs of Omega and the terms and conditions governing their relationship as shareholders of Omega.

93. The accompanying shareholder agreement referred to above, which is essentially an integral part of the arrangements under the FA 2007 as also TA 2007, *inter alia* states as follows:

Dated 7 June 2007
SMMS INVESTMENTS PRIVATE LIMITED
and
HUTCHISON TELECOMMUNICAITON (INDIA) LIMITED
And
OMEGA TELECOM HOLDINGS PRIVATE LIMITED
and
VODAFONE INTERNATINAL HOLDINGS B.V.
SHAREHOLDER AGREEMENT

In relation to
Omega Telecom Holdings Private Limited

This Agreement" (the '''Agreement") is made on 7 June, 2.007 between

1. ***SMMS INVESTMENTS PRIVATE LIMITED, an Infrastructure holding company incorporated under the Companies Act, 1956; and having its registered office at 17, Vaswani Mansion, 3rd Floor, Dinshaw Vacha Road, Churchgate, Mumbai - 400 020, India ("SMMS");***

2. ***HUTCHISON TELECOMMUNICATIONS (INDIA) LIMITED, a company organised under the laws of Mauritius and having its registered office at 608 St. James Court, St. Denis Street, Port Louis, Mauritius ("HT India");***

3. ***OMEGA TELECOM HOLDINGS PRIVATE LIMITED, a company incorporated under the Companies Act, 1956,and having its registered office at 17, Vaswani Mansion, 3rd Floor, Dinshaw Vacha Road, Churchgate, Mumbai-400 020, India (the "Company"); and***

4. ***VODAFONE INTERNATIONAL HOLDINGS B.V., a company incorporated in the Netherlands whose registered office is at Rivium Quadrant 173-177, 2909 LC Capelle aan denil the Netherlands ("Vodafone").***

Whereas:

A. ***The Company is engaged in the business of investing in securities of telecommunications companies in India and is an infrastructure holding company. The Company holds not less than 90 per cent of its total assets in investments in shares for the purpose of holding stakes in investee companies; it does not trade in shares except to dilute or divest holding, is not carrying on any other financial activities and does not hold or accept public deposits.***

B. ***On 11 February 2007, Vodafone entered into an acquisition agreement (the "Acquisition Agreement") with Hutchison Telecommunications International under the terms of which Vodafone agreed to acquire a controlling interest in CGP Investments (Holding) Limited, the indirect holding company of HT India. |***

C. ***Pursuant to an agreement dated on or around 5 June 2007 between, inter alia, Vodafone, SMMS, India Development Fund, Infrastructure Development Finance Company Limited and IDFC PE (the "Transaction Agreement"), Vodafone, the Company, HT India and SMMS agreed to enter into this agreement on the Investment Completion Date to confirm the Shareholders understanding regarding the regulation of the affairs of the Company and the terms and conditions governing their relationship as shareholders.***

D. ***On the Investment Completion Date SMMS subscribed for 37,695,443 now equity shares of Rs.10 each in the Company.***

E. ***Following the subscription referred to in Recital (D), HT India holds 89,693,060 equity shares of par value and Rs.10 in the Company representing 38.4 percent of the issued equity share capital of the company at such time and SMMS holds 14,38,81,527 equity shares of par value Rs.10 in the company representing 61.6% of the issued equity share capital of the company at such time.***

F. ***The Company is executing this Agreement as a confirming party, inter alia, as the matters contained in this Agreement materially affect the administration of the Company.***

G. Vodafone is executing this Agreement as a confirming party as it is the parent company of HT India.

94. The main thrust of these arguments and rival perspectives on the main provisions has already been set out earlier in this order. We need not be repetitive about the same, and we will deal with these provisions, as may be necessary, as we go along. So far as adjudication on this appeal is concerned, it is sufficient to note that the thrust of this arrangement was that while share purchased from the outside investors were, these shares were parked in an entity, and finances arranged for the same, which was owned by a seemingly independent enterprise but all these ownership right, of such independent enterprise, in the entity holding the shares were subjected to *certain degree of* control by the assessee under a series of agreements.

95. These arrangements, however, were terminated on 24th November 2011. As a part of this termination arrangement, another group entity i.e. TII was nominated for assignment of the rights that the assessee had for purchase of entire equity in SMMS Investments for an agreed consideration of Rs 2 crores plus interest. It was not a simple termination of the options rights in the sense that the assessee did not walk away from the situation; quite to the contrary, the termination deed, read with related documents such as shareholders agreements- copies of which were placed before us, was designed to ensure smooth transition of control to a Vodafone Group entity, i.e. TII. Earlier in this order, we have already reproduced recitals of the termination deed dated 24th November 2011. We may also set out some other extracts from this termination deed as follows:

Whereas:

(A) IDF and IDBI Trusteeship Services Limited ("ITSL") (in its capacity as trustee for Mr. Satish Mandhana) are the sole equity shareholders in SMMS with (i) IDF holding 1,999,990 (One million nine hundred ninety nine thousand nine hundred and ninety) equity shares of Rs.10/- (Indian Rupees Ten only) cash in SMMS; and (ii) ITSL (in its capacity as trustee for Mr. Satish Mandhana) holding 10 (ten) equity shares of Rs.10 (Indian Rupees Ten only) each in SMMS.

(B) SMMS is a shareholder in Omega, holding 143,881,525 (One hundred forty three million eight hundred eight one thousand five hundred and twenty five) equity shares of Rs.10/- (Indian Rupees Ten only) each in Omega. In addition, (i) Ms. Rupa Vora holds one equity share of Rs.10 in Omega jointly with SMMS; and (ii) Mr. Satish Mandhana holds one equity share of Rs.10 in Omega jointly with SMMS.

(C) IDF, IDFC, IDFC PE, SMMS, VTIL, VISPL, Omega and Vodafone are all parties and subject the terms of a framework agreement dated June 6, 2007 ("Framework Agreement") and SMMS, VTIL, Omega and Vodafone are all parties to a shareholder agreement dated June 6, 2007 ("Shareholders Agreement").

(D) Under the Framework Agreement, certain rights, duties, benefits and/or obligations have been made available to or imposed upon the Parties in accordance with its terms. After detailed discussions, the Parties have agreed that in consideration of the mutual release of their respective duties and obligations under the Framework Agreement, the

Framework Agreement shall stand terminated on the terms and conditions hereinafter contained.

(E) As a result of the foregoing the Parties have agreed to enter into this Agreement.

It is agreed as follows:

1. Definitions

"Framework Documents" means collectively the Framework Agreement as well as all other deeds, document or other writings entered into by or between any two or more of the Parties in furtherance of the provisions of the Framework Agreement, if any, but shall not include the Shareholders Agreement.

"Litigation" means the writ petition dated 1 March 2007 filed by the Telecom Watchdog before the High Court of Delhi at New Delhi.

"Public Authority" means any governmental, quasi-governmental, statutory, departmental, administrative, fiscal, regulatory, supranational or public body or commission constituted by any statute, law, regulation, ordinance, rule or bye-law or a tribunal or court of competent jurisdiction or other authority in any nation, state, city, locality or other political subdivision thereof, including, but not limited to, the FIPB, the Ministry of Commerce & Industry, Government of India, the Ministry of Communications and Information Technology, Government of India, (including the Department of Telecommunications) and the Reserve Bank of India and any tax authority having jurisdiction over the matter in question, whether in effect as of the date hereof or at any time thereafter.

"Termination Date" means the date on which closing under the Share Subscription and Shareholders Agreement entered into by IDF and SMMS with Telecom Investments India Private Limited dated on or around the date hereof occurs and consequently IDF ceases to hold 51% (fifty one percent) or more of the paid up equity capital of SMMS.

2. Subject to Clause 3 below and in consideration of the mutual release of their duties and obligations under the Framework Agreement (as well as under the other Framework Documents, if any), the Parties agree that the Framework Agreement (as well the other Framework Documents, if any) be terminated and the terms of the Framework Agreement (as well as the terms of the other Framework Documents, if any) shall cease to apply and be in force with effect from the Termination Date. The Parties hereby acknowledge and agree that none of them have any outstanding liabilities or claims against each other with respect to the Framework Agreement.

3. Notwithstanding the termination of the Framework Agreement pursuant to the provisions of Clause 2 above, it is hereby agreed by the Parties that the provisions of the Framework Agreement which are recorded therein as surviving termination of the Framework Agreement shall survive termination of the Framework Agreement save and except for the provisions of Clauses 7, 9, 16.3 to 19.1 of the Framework Agreement which, notwithstanding anything to the contrary in the Framework Agreement, shall stand terminated as on the Termination Date and shall cease to be in force and effect from the Termination Date onwards. It is farther agreed and understood and expressly agreed by the Parties that the indemnities provided to IDF, IDFC, IDFC PE and SMMS under the provisions of Clause 13.1 of the Framework Agreement and the indemnities provided by each Party under the provisions of Clause 13.2 of the Framework Agreement shall survive termination of the Framework Agreement.

4. It is further agreed by the Parties that notwithstanding the termination of the Framework Agreement in accordance with the provisions of Clause 2 above, IDF, IDFC and IDFC PE shall have the right to represent themselves before any judicial court, tribunal or other judicial or quasi-judicial forum or body in relation to or for any matter, claim or proceeding that either:

(i) has been filed on or prior to the date of execution of this Agreement; or
(ii) which may be filed at any time thereafter

as a result of either:

(i) IDF, IDFC and IDFC PE (or any of them) at any time acquiring or holding any shares of SMMS or at any time being shareholders of SMMS;

(ii) SMMS at any time acquiring or holding any shares of Omega or at any time being a shareholder of Omega; or

(iii) any of the transactions contemplated under the Framework Agreement;

The other Parties do hereby agree and undertake to provide IDF, IDFC and IDFC PE (or any of them) with all such assistance as IDF, IDFC and IDFC PE (or any of them) shall reasonably require in this regard.

5. VISPL shall, on the Termination Date, and upon being provided evidence to its satisfaction, that IDF has ceased to hold 51% (fifty one percent) or more of the paid up capital of SMMS, pay to IDF an aggregate amount of Rs.212,500,000 (Rupees two hundred and twelve million and five hundred thousand) in immediately available funds by way of a telegraphic transfer to the bank account of IDF as set out below.

Name of Fund: IDFC infrastructure Fund - India Development Fund
Name of Bank: HDFC Bank
Branch: Industry House, Churchgate, Mumbai
Account Number: 0501 232 000 1826
Type of Account: Current
RTGS/IFSC Code: HDFC0000501

6. Costs and Indemnity

(a) Each Party shall bear their respective costs incurred in connection with the preparation, execution and completion of this Agreement and the transactions contemplated herein.

(b) Subject to Clauses 6 (c) to 6 (i) below, Vodafone does hereby irrevocably agree and undertake to each of IDF, IDFC and IDFC PE that Vodafone shall indemnify and hold harmless promptly upon demand at any time and from time to time, from and against any and all losses, claims, damages, liabilities, costs (including reasonable attorneys' fees and disbursements) and expenses (collectively, "Losses") to which tiny of IDF, IDFC of IDFC PE, their respective managers, officers, directors and employees individually, an "Indemnified Party" and collectively, the "Indemnified Parties") become subject and actually incur, insofar as such Losses directly result from;

(i) IDF, IDFC and IDFC PE (or any of them) being shareholders of SMMS or SMMS being a shareholder of Omega, including any Losses that directly result from the Litigation; and

(ii) (A) non-compliance by Vodafone India Limited of the sectoral limits under the foreign direct investment policy of the Government of India ("FDI Policy Event"): or

(B) any tax liability imposed upon any direct or indirect shareholder of Vodafone India Limited (other than any Indemnified Party or Omega) to the extent that a Public Authority seeks to recover any such tax liability from any Indemnified Party ("Tax Event", and together with FDI Policy Events referred to as "Indemnification Events").

(c) Notwithstanding any other provisions of this Clause 6:

(i) the maximum aggregate amount of Vodafone's liability under this Clause 6 is limited to and shall not, under any circumstances, exceed Rs. 1,000,000,000 (Rupees one billion); and

(ii) the indemnity granted under this Clause 6 shall be in effect until the expiry of 8 years from the date hereof.

(d) Notwithstanding the provisions of Clause 6 (b) above, Vodafone shall not be liable to indemnify the Indemnified Parties (or any of them) for any Losses pursuant to this Clause 6 in the event that such Losses:

(i) result from any action or inaction on the part of any person, including but not limited to Vodafone India Limited and its shareholders, prior to 7 June 2007. Provided however that this sub-clause 6(d)(i) shall not limit Vodafone's liability to indemnify the Indemnified Parties (or any of them) for Losses that directly result from the Litigation; or

(ii) result from any breach by any Indemnified Party of:

(A) the Framework Agreement or any representation or warranty thereunder; or

(B) any share subscription and / or shareholders agreement, other than the Shareholders Agreement, entered in to by one or more of the Indemnified Parties in relation to the subscription of shares in SMMS or any representation or warranty thereunder; or

(C) the Shareholders Agreement or any representation or warranty thereunder; or

(D) any other written representation or statement made by IDF, IDFC or IDFC PE, SMMS or Omega to Vodafone India Limited or any Public Authority in relation to compliance with the foreign direct investment policy of the Government of India; or

(iii) relate to any taxes payable by any Indemnified Party;

(A) in relation to the subscription, purchase, sale or transfer of any shares (or any interest therein) held by IDF, IDFC or IDFC PE in SMMS; or

(B) for any other reason whatsoever, including as a result of transactions contemplated under any share subscription and / or shareholders agreement entered in to by one or more of the Indemnified Parties in relation to the subscription of shares in SMMS; or the Shareholders Agreement; or the Framework Agreement; or this Agreement.

(e) If any or all of the Indemnified Parties receive any notice, document, communication or any information in any form whatsoever including from any Public Authority relating to an Indemnification Event ("Claim Information"), which might result in an indemnity payment to any or all of the Indemnified Parties under this Clause 6 ("Indemnity Payment") or in the event that any or all of the Indemnified Parties consider that any indemnity Payments are due, each Indemnified Party shall:

(i) promptly upon receiving any Claim information, notify Vodafone in writing and in reasonable detail of such Claim Information and provide Vodafone with copies of the Claim information and all documents and information requested by Vodafone in relation thereto;

(ii) promptly upon any Indemnified Party considering that any Indemnity Payments are due, notify Vodafone in writing, with reasons for such consideration and provide Vodafone with all documents and information in relation thereto, including documents and information requested by Vodafone; and

(iii) deliver to Vodafone copies of all notices, communications and documents (including court papers and communications with any Public Authority) relating to an Indemnification Event received or submitted by any Indemnified Party promptly after receipt or submission thereof.

(f) If any claim is made against any or all of the Indemnified Parties in respect of an Indemnification Event ("Claim"). Vodafone shall be entitled to assume the defence thereof or initiate and control proceedings seeking the refund of any amounts claimed pursuant to such Claim or an order seeking that no such payment need be made ("Refund Proceedings", and each such event, an "Assumption") with counsel selected by Vodafone, in which event each Indemnified Party shall code custody and control and shall take all such actions and do all such things, as Vodafone may request, to assist Vodafone in assuming and maintaining custody and control of such Claim or such Refund Proceedings, as the case may he, whether or not Vodafone is or becomes impleaded as a party to such Claim or Refund Proceedings, as the case may be.

(g) In the event of an Assumption:

(i) Vodafone shall pay all legal and other expenses of each Indemnified Party reasonably incurred and documented in connection with the relevant Claim or Refund Proceedings, as the case may be, to the extent that advisors with respect to which such expenses are incurred are selected or approved by Vodafone and such advisors act on Vodafone's instructions. For the avoidance of doubt, Vodafone shall not be liable for any other legal or other expenses of any Indemnified Party;

(ii) The relevant Indemnified Party or Indemnified Parties as the case may be, shall cooperate with Vodafone with respect to any Claim and Refund Proceedings, as the case may be, including by retaining and providing promptly to Vodafone records and information that are relevant to such Claim or Refund Proceedings or requested by Vodafone in writing, and making employees available on a mutually convenient basis to provide additional information and explanation of any material provided hereunder; and

(iii) each Indemnified Party shall agree to any settlement, compromise or discharge of a Claim or Refund Proceeding that Vodafone may recommend.

(h) Irrespective of whether an Assumption occurs:

(i) no Indemnified Party or Indemnified Parties, as the case may be, shall make any payment pursuant to a Claim or Refund Proceeding or admit any liability with respect to, or settle, compromise or discharge, any Claim or Refund Proceeding without Vodafone's prior written consent, which consent shall be provided or declined within a reasonable period;

(ii) The Parties agree to cooperate fully with each other in connection with the defence, negotiation, settlement, or prosecution of any Claim or Refund Proceedings; and

(iii) Vodafone shall be liable to indemnify the Indemnified Parties for Losses that directly result from a Claim, provided that such liability shall at all times be subject to the provisions of this Clause 6.

(i) Each Indemnified Party shall cooperate with Vodafone with respect to resolving or mitigating any claim or liability with respect to which Vodafone is obligated to make any Indemnity Payment, inclining by making all efforts required under all applicable laws to mitigate or resolve any such claim or liability.

96. This termination agreement, as rightly pointed out by the learned Departmental Representative, is required to be read alongwith the shareholders agreement. While it may not be possible, for the sake of brevity, extensively reproduce from all these agreements, and even complete termination deed, it is sufficient to note the undisputed position that the termination was in such a manner so as to virtually ensure the control of SMMS Investments to another Vodafone Group entity and that the control of SMMS Investments does not remain, even for a moment, with the independent investors i.e. IDF Investors. In termination deed also, the smooth transfer of ownership interests in SMMS Investments to another Vodafone Group entity, and complete control of Vodafone Group entity, is ensured.

97. The question that we really need to address ourselves to is whether the above arrangement constitutes an 'international transaction'. However, before we do so, it is only appropriate that we take a look at the relevant definitions under the Income Tax Act, 1961. Section 92 B of the Act, which defines 'international transaction' states as follows:

92B - Meaning of international transaction

(1) For the purposes of this section and sections 92, 92C, 92D and 92E, "international transaction" means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to anyone or more of such enterprises.

(2) A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes of sub-section (1), be deemed to be a transaction entered into between two associated enterprises, if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise.

(Explanation to Section 92 B is not reproduced here, as it is not relevant for our purposes at present)

98. Section 92 C refers to the expression 'transaction' which, in turn, is defined under section 92F(v) in an inclusive manner. This statutory definition is as follows:

In Section 92, 92A, 92B, 92C and 92 D, unless the context otherwise requires,
………
………

(v) "transaction'' includes an arrangement, understanding or action in concert,-

> ***(A) whether or not such arrangement, understanding or action is formal or in writing; or***
> ***(B) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceeding***

99. When we interpose the aforesaid statutory definition in Section 92C(1), we find that the expression 'international transaction' means **"an arrangement, understanding or action in concert etc between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other an arrangement, understanding or action in concert having a bearing on the profits, income, losses or assets of such enterprises ……..".** Therefore, in order to ascertain whether a particular transaction or not is an international transaction or not, the necessary preconditions which are to be satisfied are (a) that it is in the nature "an arrangement, understanding or action in concert etc"; (b) that it is between two or more associated enterprises, either or both of whom are non-residents; and (c) that it has a bearing on the profits, income, losses or assets of such enterprises.

100. As we deal with the question whether the payment made on account of termination fees is under an arrangement, understanding or concert etc with two or more associated enterprises, either or both of which are non-residents, it is essential to bear in mind the fact that termination deed is essentially required to be read with the related framework agreements, which has as its integral part the shareholders agreements and transaction agreements, and share purchase agreement between HTIL and TMT Hinduja, as also HTIL and Indusind Network India Ltd at its foundation. It is simply not possible to read termination deed in vacuum or to understand termination of option rights in vacuum. How

can one interpret deed terminating the framework agreement 2007, unless one looks at framework agreement 2007 itself- which has, at its origin, framework agreement 2006, and none of these framework agreements would have come into existence if the share purchase agreements between TMT Hinduja and Indusind Network and HTIL Mauritius were not to come into existence. When we put all these documents together, the arrangement appears to be like this. HTIL-M, a Mauritius based entity, who had contracted to buy, from two Indian companies by the name of TMT Hinduja and Indusind Network, 54.21% equity capital of ITNL, which in turn, held investments in HEL/VIL, nominates SMMS Investments to buy this equity shareholding, and also arranges for finances to enable such acquisition, by, inter alia, arranging guarantee from its ultimate parent company CGP-Cayman Islands and by ensuring subscription of, inter alia, SMMS Investment's equity shares (Rs 2 crores) and redeemable preference shares (Rs 48 crores) by IDFC Investors. However, in order to ensure that SMMS Investors remains in the control of the group entities, the assessee, a group entity, enters into an agreement with IDFC Investors under which assessee had a right to buy entire equity of SMMS Investments from IDFC Investors for a consideration of the same Rs 2 crores plus interest @ 17.5% p.a. – which reflects compensation for the investment of Rs 2 crores and separately for the allied services rather than the intrinsic worth of the underlying assets of SMMS Investments which are several hundred times more than the agreed consideration. This arrangement is terminated on 24th November 2011, and under the termination arrangement, the shareholdings in SMMS Investments is transferred to TII, another group entity, and yet the assessee, for this loss of opportunity of buying the SMMS Investments equity for a mere Rs 4.13 crores (i.e. including interest) whereas the said equity is stated to be worth Rs 1,588. 85 crores, the assessee pays a further amount of Rs 21.25 crores to IDFC Investors. Learned counsel for the assessee also contends that options were not for a meagre amount as "a minimum return of 17.5% was stipulated- this does not qualify as a meagre amount". However, it is this plea of the assessee which infact demonstrates that the IDFC Investors, who was under an option to sell entire equity of SMMS at an agreed price of 2 crores plus 17.5% interest, was nothing more than a financial investor- something much less than a genuine investor as the connotation of this expression are known in the commercial world.

101. As a plain look at the above facts unambiguously indicates, while the payment is certainly by the assessee to an Indian entity, the payment is under an arrangement and understanding which has several parties acting in concert and many of these parties are non-resident associated enterprises. Can we say that HTIL-M, which is Mauritian parent company of the assessee, is not a party to this understanding when entire edifice of agreements is in respect of certain shares which, at the sweet will of HTIL-M, have been acquired by, and all the arrangements for finance to fund this acquisition have been guaranteed for by another key group entity almost at the top of the pyramid (i.e. CGP Cayman Islands), by an entity shareholding in which is subject matter of the present options i.e. SMMS Investments. The option to purchase entire shareholding in this entity, i.e. SMMS Investments, have been obtained by the assessee company only because of , and clearly as a result of, HTIL-M nominating SMMS Investments for the purpose of purchase of equity shares in, what is now, Omega Investments and as a result of arranging finances for this acquisition. If it was not to happen, SMMS Investments was a worthless entity and it is certainly little more than an innocent coincidence that the acquisition of ITNL/Omega equity by SMMS Investments and the assessee getting the option to buy the entire SMMS Investments equity from IDFC

Investors, owners of entire equity in SMMS Investments, at a nominal consideration of Rs 2 crores plus interest @17.5% p.a. compounded annually w.e.f. July 2007. Certainly, it will be preposterous to even suggest that HTIL-M, which is admittedly a non-resident associated enterprise, is not a party to the arrangements in question. Similarly, it is also not possible to even seriously suggest that VIH-BV, which is the ultimate parent company was not part of the arrangement in question. VIH-BV is not only a signatory and party to the FA 2007, SHA 2007, TA 2007 and Termination Deed 2011, it is the end beneficiary of all these arrangements. Once an entity is party to an agreement, it cannot be said that the said entity, even if it does not have any legal rights under the agreement, is not part of arrangement or understanding. An entity may be part of the arrangements with or without any enforceable legal rights. The correctness of statement, however, independent of the position whether or not such an entity may or may not have any enforceable legal rights, is evident from the statutory definition of transaction which states that "transaction, includes any an arrangement, understanding or action in concert,-(a) whether or not such arrangement, understanding or action is formal or in writing; or(b) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceeding".

102. As we have noted earlier as well, learned counsel has a serious objection with respect to the above position. Every time we put to him any proposition on the lines of our understanding as set out above, he submitted that the issue, as to whether VIH-BV or HTIL-M is a party to the arrangement with respect to the options, is no longer *res integra* in view of Hon'ble Supreme Court's judgment in the case of Vodafone International Holdings BV *(supra)* and reminded us about article 141 of the Constitution of India. Learned counsel also relies upon certain observations made by Hon'ble Bombay High Court, in assessee's own case for the assessment year 2008-09. Learned counsel apprised us on how our treating VIH-BV and HTIL-M as parties to the arrangements will may be seen as contrary to the principles of judicial discipline because Hon'ble Supreme Court has categorically held the options agreement are independent agreements between the assessee and the IDFC Investors which is an Indian entity. He submits that all the players in the transaction are Indian entities and, therefore, it cannot be said that any non-resident AE is involved in the transaction, but then even if beneficial ownership of the ultimate parent company is to be taken into account, there is no international transaction since it does not make a difference to the ultimate parent company whether group entity 'x' or group entity 'y' holds these shares because both the entities are only holding it for the same beneficial owner i.e. the ultimate parent company. Viewed thus, even if beneficial ownership aspect is to be taken into account, there is no international transaction in the shares being held by any one of the entity controlled by the same ultimate parent company. He urges us not to take a myopic view of the matter. He also submits that what is before us is termination of agreement and there cannot be a prior arrangement about termination of agreement so as to satisfy the requirements of Section 92B(2). An arrangement, according to the learned counsel, can only be to effectuate not to terminate. It is thus contended that the scope of expression 'transaction', by no stretch of logic, can include 'termination' of a transaction. The fact that TII was a foreign controlled entity, as against the IDFC Investors being an independent enterprise, does not make a difference, because if one has to see as to who owns whom, we should further look up the pyramid as well which shows that the end beneficiary of all the arrangements is the same entity. Learned counsel has then referred to judgment of Hon'ble Bombay High Court, in the

case of **Vodafone India Services Pvt Ltd Vs Union of India [(2014) 361 ITR 531 (Bom)]** in support of the proposition that unless there is an income from a transaction, the provisions of transfer pricing donot come into play, and, in that sense, existence of income is a jurisdictional requirement for invoking the transfer pricing provisions. This condition, according to the learned counsel, is not satisfied in the present case since there is no income and the assessee has merely made a payment of Rs 21.25 crores which is tax neutral as no deduction is claimed in respect of the same. It is also contended that transfer pricing provisions cane come into play only when there is shifting of profits and erosion of tax base. It is also contended that we are looking at only rights under call options and not obligations under put options. We are urged to take a holistic view of the matter and take into account the put options as well. Learned counsel also suggests that since the proceedings for the assessment year 2008-09, which deals with somewhat similar issue is pending before Hon'ble Supreme Court, we should block the hearing of this case till Hon'ble Supreme Court disposes of the said case. A very curious justification for blocking of the appeals is that the facts found by us may prejudice the interests of the assessee in proceedings before Hon'ble Supreme Court. Learned counsel submits that it is for this reason that a Mumbai bench of this Tribunal has blocked hearing of one the assessee's appeal on a related issue. We are urged to follow the path so shown by the coordinate bench. On the basis of this line of reasoning, we are urged to hold that non-resident AEs are not part of the transaction of termination of options, and, in the alternative, at least block the hearing till Hon'ble Supreme Court takes a call on assessee's case for the assessment year 2008-09 which is pending before Hon'ble Supreme Court at the instance of the revenue authorities. As for the plea for adjournment on the ground that some other year is pending before Hon'ble Supreme Court, even though the issues in the said case before Hon'ble Supreme Court are different because our findings may affect that case as well, it is only fit to be noted and rejected. Let us, therefore, deal with other aspects of the matter before proceeding further.

103. Let us first deal with the judgment of Hon'ble Supreme Court in the case of Vodafone International Holdings BV (supra) The backdrop of this decision was that there was sale of share of CGP Cayman Islands, by HTIL Cayman Islands to VIH-BV, The Netherlands. What was in challenge in this case before Hon'ble Supreme Court was Hon'ble Bombay High Court's judgment in the case of **Vodafone International Holdings Vs Union of India [(2010) 329 ITR 126 (Bom)**], and the conclusions so arrived at by Hon'ble Bombay High Court, which were under challenge, have been aptly summed by headnotes in the Income Tax Report at page 129 as follows:

> *Held, dismissing the writ petition, that* **HTIL's interest in HEL arose by way of indirect equity shareholding, option agreements, finance agreements, shareholders agreements, etc., the aggregate of which conferred a controlling interest of 66.9848 per cent, in HEL. All these varied interests did not emerge only from one share of CGP and could not have been conveyed by the transfer of only one equity share. The transaction between HTIL and VIH BV was structured so as to achieve the object of discontinuing the operations of HTIL in relation to the Indian mobile telecommunication operations by transfer¬ring the rights and entitlements of HTIL to VIH BV. HEL was at all times intended to be the target company and a transfer of the controlling interest in HEL was the purpose which was achieved by the transaction. The true nature of the**

transaction as it emerged from the transactional documents was that the transfer of the solitary share of the Cayman Islands company reflected only a part of the arrangement put into place by the parties in achieving the object of transferring control of HEL to VIH BV. HTIL had put into place, during the period when it was in control of HEL, a complex structure including the financing of Indian companies which in turn had holdings directly or indirectly in HEL. In consideration call and put options were created and the benefit of those options had to be transferred to the purchaser as an integral part of the transfer of control over HEL. These rights and entitlements constituted in themselves capital assets within the meaning of section 2(14) which expression is defined to mean property of any kind held by an assessee. VIH BV's disclosure to the FIPB was indicative of the fact that the consideration that was paid to HTIL in the amount of US $ 11.01 billion was for the acquisition of a panoply of entitlements including a control premium, use and rights to the Hutch brand in India, a non-compete agreement with the Hutch group, the value of non-voting non-convertible preference shares, various loan obligations and the entitlement to acquire subject to the Indian foreign investment rules, a further 15 per cent, indirect interest in HEL. The transaction in question had a significant nexus with India. The essence of the transaction was a change in the controlling interest in HEL which constituted a source of income in India. The transaction between the parties covered within its sweep, diverse rights and entitlements. VIH BV by the diverse agreements that it entered into had a nexus with Indian jurisdiction. *In these circumstances, the proceedings initiated by the income-tax authorities could not be held to lack jurisdiction.*

104. Hon'ble Supreme Court, inter alia, noted that the basic case of the revenue is that "**the SPA** *(Share Purchase Agreement),* **commercially construed, evidences a transfer of HTIL's property rights by their extinguishment**" and that "**HTIL had, under the SPA, directly extinguished its rights of control and management, which are property rights, over HEL and its subsidiaries and, consequent upon such extinguishment, there was a transfer of capital asset situated in India**". Their Lordships then took note of the features of SPA, which were highlighted in support of this proposition, including the revenue's stand that "**as a holder of 100 percent shares of downstream subsidiaries, HTIL possessed de facto control over such subsidiaries"** and that **"such de facto control was the subject matter of SPA**". As Hon'ble Supreme Court proceeded to examine this aspect of the matter, it was, inter alia, observed as follows:

…………In a case like the present one, where the structure has existed for a considerable length of time generating taxable revenues right from 1994 and where the court is satisfied that the transaction satisfies all the parameters of "participation in investment" then in such a case <u>the court need not go into the questions such as de facto control vs. legal control, legal rights vs. practical rights, etc.</u>

74. Be that as it may, <u>did HTIL possess a legal right to appoint directors onto the board of HEL and as such had some "property right" in HEL? If not, the</u>

> **question of such a right getting "extinguished" will not arise. A legal right is an enforceable right. Enforceable by a legal process. The question is what is the nature of the "control" that a parent company has over its subsidiary. It is not suggested that a parent company never has control over the subsidiary…..**

(@ page 42; Emphasis, by underlining, supplied by us now)

105. Clearly, Their Lordships were dismissive about *de facto* rights and practical rights and concentrated only on the question whether HTIL-CI had any legal rights, enforceable by law and by legal process, which were in the nature of 'property rights'. This underlying approach of Their Lordships is even more unambiguous from the following observations:

> **………In this case, we are concerned with the expression "capital asset" in the income tax law. Applying the test of enforceability, influence/persuasion cannot be construed as a right in the legal sense. One more aspect needs to be highlighted. The concept of "de facto" control, which existed in the Hutchison structure, conveys a state of being in control without any legal right to such state. This aspect is important while construing the words "capital asset" under the income tax law. As stated earlier, enforceability is an important aspect of a legal right. Applying these tests, on the facts of this case and that too in the light of the ownership structure of Hutchison, we hold that HTIL, as a Group holding company, had no legal right to direct its downstream companies in the matter of voting, nomination of directors and management rights.**

(@ page 45; Emphasis, by underlining, supplied by us now)

106. Quite clearly, entire thrust of discussions by Hon'ble Supreme Court is on the aspect of legal rights and it was in this context that Hon'ble Supreme Court held that **"It is important to note that even in the fresh agreement, the call option remained with GSPL and the said agreement did not confer any rights on VIH".** This observation, given the backdrop discussions above, refers to only the legal rights and not the factual rights. The concluding portion of the lead order, authored by late Hon'ble Justice Kapadia (as he then was) and which was concurred with other Hon'ble Justices on this bench, was as follows:

> **Summary of Findings**
>
> **90. Applying the look at test in order to ascertain the true nature and character of the transaction, we hold that the Offshore Transaction herein is a *bonafide* structured FDI investment into India which fell outside India's territorial tax jurisdiction, hence not taxable. The said Offshore Transaction evidences participative investment and not a sham or tax avoidant preordained transaction. The said Offshore Transaction was between HTIL (a Cayman Islands company) and VIH (a company incorporated in Netherlands). The subject matter of the Transaction was the transfer of the CGP (a company incorporated in Cayman Islands). Consequently, the Indian Tax Authority had no territorial tax jurisdiction to tax the said Offshore Transaction.**

> **Conclusion**
>
> **91. FDI flows towards location with a strong governance infrastructure which includes enactment of laws and how well the legal system works. Certainty is integral to rule of law. Certainty and stability form the basic foundation of any fiscal system. Tax policy certainty is crucial for taxpayers (including foreign investors) to make rational economic choices in the most efficient manner. Legal doctrines like "Limitation of Benefits" and "look through" are matters of policy. It is for the Government of the day to have them incorporated in the Treaties and in the laws so as to avoid conflicting views. Investors should know where they stand. It also helps the tax administration in enforcing the provisions of the taxing laws. As stated above, the Hutchison structure has existed since 1994. According to the details submitted on behalf of the appellant, we find that from 2002-03 to 2010-11 the Group has contributed an amount of Rs. 20,242 crores towards direct and indirect taxes on its business operations in India.**
>
> **Order**
>
> **92. For the above reasons, we set aside the impugned judgment of the Bombay High Court dated 8.09.2010 in Writ Petition No. 1325 of 2010. Accordingly, the Civil Appeal stands allowed with no order as to costs. The Department is hereby directed to return the sum of Rs. 2,500 crores, which came to be deposited by the appellant in terms of our interim order, with interest at the rate of 4% per annum within two months from today. …….**

107. **While on the subject, we may take note of the fact** that Hon'ble Supreme Court also held that since options, as held by the assessee, do not constitute capital asset. While doing so, Their Lordships have observed **"Call and put options are contractual rights and do not sound in property and hence they cannot be, in the absence of a statutory stipulation, considered as capital assets".** However, we will come back to this aspect of the matter, in detail, a little later. We may at this stage also take note of the fact that put options, in the present set of facts, are nothing more than exit options from the arrangements. In any case, these put options cannot have any value in the hands of the person exercising the option, beyond as a mode of exit, because put option, in this case, obligates the other party, i.e. the assessee, to buy the entire equity capital in SMMS Investments at a fraction of its intrinsic and fair market value. In a classical sense, a put option provides the option to sell, but not the obligation to sell, at an agreed price. That is not the case here. In the present situation, it is tagged along with the call options and is, in our humble understanding, only an exit option for all practical purposes.

108. Coming back to Hon'ble Supreme Court's detailed observations, in the case of Vodafone International Holdings BV *(supra)*, on what constitutes 'legal rights' of the holding company, this is what learned counsel for the assessee puts before us as the foundation of his contention that the termination of framework agreement, vide termination deed dated 24.11.2011, was a transaction between independent entities, namely the assessee, IDFC

Investors and, at best, TII Investments. The relevant observations, in the written submission filed by the assessee, are once again being reproduced below for ready reference:

> **141. The Hon'ble Supreme Court concluded that the FWAs did not confer any rights on VIHBV, and further that the right to acquire shares through exercise of Call Options vested in the Assessee, and not in Vodafone group companies generally, upholding corporate separateness in the Hutchison structure inherited by Vodafone.**
>
> **142. The law laid down vis-a-vis Call and Put Options are mere contractual rights and do not sound in property, and therefore are not capital assets, until exercised, has full application, in the facts and circumstances of the present case.**
>
> **143. The Assessee has submitted that factual rights do not exist independent of legal rights, i.e. the law recognizes a right enforceable in law, or no right at all, and it is not available to Revenue to segregate de facto rights as independent stand-alone rights.**
>
> **……..**
>
> **161. The Hon'ble Supreme Court of India in 341 ITR 1, has extensively examined the Hutchison group structure, including all details surrounding the FWAs and SHAs between the three Indian investors in the Hutchison group structure and later the Vodafone group structure, the grant of FIPB approvals, albeit in the context of examining 'jurisdiction' of the Indian Tax Authority to render exigible to tax the 11.2.2007 transaction, from the standpoint of tax deduction obligations of VIHBV, and concluded that "Thus it cannot be said that the structure was created or used as a sham or tax avoidant. It cannot be said that HTIL or VIH was a fly-by-night operator/short time investor" (paragraph 73, page 42).**
>
> **162. Filings examined by the Hon'ble Supreme Court relating to the FIPB, viz. all of the arrangements proposed to be entered into with the (three) Indian Investors by Vodafone International Holdings BV, including inter alia the express approval in writing (dated 7 May 2007) obtained prior to 'closing' (on 8 May 2007) of the SPA dated 11 February 2007, which was followed by execution of the FWA 2007 and SHA 2007 inter alia with the IDFC Investors, have been placed on the file of this Tribunal. It is apparent from 341 ITR 1 that the Hon'ble Supreme Court of India in the course of examining the Hutchison group structure and the Vodafone group structure examined all material details concerning the FWA 2006 and FWA 2007 and related SHAs, concerning the IDFC Investors, and the conclusions around the integrity of the structure are, therefore, binding upon and rendered unassailable by the Revenue.**

> **163. In the circumstances, Revenue is estopped from questioning the good standing of the (three) Indian Investors, in the present AY, or classifying the IDFC Investors as mere benamidaars.**

109. In taking this plea, what learned counsel for the assessee essentially ignores us is that unlike, for instance, in taxation of capital gains- as held by Hon'ble Supreme Court in the case of Vodafone International Holdings BV (supra), existence of "legal rights" is not a *sine qua non* for treating a transaction as an international transaction under section 92B. Since, as Hon'ble Supreme Court has categorically observed in so many words, in this case Their Lordships were essentially concerned about legal rights which are "enforceable in law", and, to that extent, *de facto* control or practical situation was irrelevant. As a matter of fact, Their Lordships did observe that "as a practice, the subsidiaries did comply with the arrangements suggested by the group holding company" but then hastened to add that since they are "concerned with the expression 'capital asset' in the income tax law" "applying the test of enforceability, influence/persuasion cannot be construed as a right in the legal sense". Their Lordships had adopted a strictly legal approach and preferred to "look at" rather than "look through" the arrangements. These discussions on legal rights, in our considered view, have no relevance in the context of definition of transaction under section 92F(v). That apart, the law itself stands amended now, and the statutory definition of capital asset under section 2(14), in the light of retrospective amendment w.e.f. 1st April 192 by the Finance Act 2012, is materially different and much wider. As regards learned counsel's contention that "factual rights do not exist independent of legal rights, i.e. the law recognizes a right enforceable in law, or no right at all, and it is not available to Revenue to segregate de facto rights as independent stand-alone rights", this plea also proceeds on the fallacy that existence of legal rights of the parties is a condition precedent for any arrangements, understanding or action in concert etc being treated as a "transaction" under section 92F(v). What plea of the learned counsel overlooks is that Section 92F(v) specifically provides that irrespective of whether an arrangement, understanding or action in concert "is intended to be enforceable by legal proceedings" or not, it is includible in the definition of 'transaction'. In other words, as the statutory provisions make clear, lack of enforceability in law does not take an arrangement, understanding or action in concert outside the ambit of the expression 'transaction'. Ironically, however, the entire defence of the assessee, on this aspect, rests on a judicial precedent which deals only with "enforceability in law" and the "legal rights".

110. In our considered view, stand of the assessee proceeds on the assumption, which is wholly incorrect and contrary to the plain statutory provisions, that we are required to keep any arrangement, understanding or action in concert outside the ambit of 'international transaction' under section 92B just because such an arrangement, understanding or action in concert does not give legal rights to the parties to arrangement, understanding or action in concert.

111. The expression 'acting in concert', in common business parlance, suggests two or more persons acting in coordination or in tandem for a common goal, even if for different purposes. Its dictionary meaning includes (a) "agreement of two or more persons in a design

or a plan; combined action; accord or harmony"; and (b) "to arrange or contrive (a plan) by agreement"; and (c) "acting in a coordinated fashion with a common purpose". As the parties to the agreement include the foreign AEs and, leaving aside the question whether such foreign AEs had legally enforceable rights or not, there can hardly be any dispute that all the parties to the agreement are essentially 'acting in concert'. In the absence of a statutory requirement to that effect, legal rights of the parties cannot be inferred to be *sine qua non* for treating the parties 'acting in concert' as such. Whether persons are acting in concert or not is essentially a question of facts which must be decided in the light of facts of each case. In the case of **CIT Vs Jubilee Mills Ltd [(1963) 48 ITR 9 (SC)]** connotations of the expression '**action in concert**', which finds place in the inclusive definition of 'transaction' under section 92F(v), came up for consideration before Hon'ble Supreme Court. It was in the context of determining whether the assessee company is a company in which public is substantially interested. Hon'ble Supreme Court took note of its earlier judgment in the case of **Raghuvanshi Mills Ltd Vs CIT [(1961) 41 ITR 613(SC)]**, and observed that "one has to find out is whether there is an individual who, or a group acting in concert which, controls or control the affairs of the company". It was in this backdrop that Their Lordships had thrown light on connotations of the expression 'acting in concert' by observing that "**The test is not whether they have actually acted in concert but whether the circumstances are such that human experience tells us that it can safely be taken that they must be acting together".** We respectfully adopt this test for the purpose of deciding what amounts to 'acting in concert' for the purpose of definition of transaction under section 52F(v)as well, particularly as there is no statutory definition of this expression, there is nothing contrary to this meaning in the context and there is no judicial precedent suggesting to the contrary. Quite clearly, therefore, as to whether the assessee has acted in concert with its overseas AEs is a question of fact to be decided on the basis of reasonable inferences from facts of facts and circumstances of the case, and it has nothing to do with legal rights of the parties. Viewed in this light, let us also look at the facts of the case to find out whether the parties can be said to have acted in concert or not. Let us not forget that it is a case in which HTIL-M nominates SMMS Investments as nominee under the share purchase agreement, for transfer of shares in ITNL/Omega held by Hinduja group companies–namely Hinduja TMT and IndusInd Network, and, at the same time, the assessee enters into the framework agreement with IDFC for option rights to buy entire equity of SMMS Investments at a nominal price which is just a small fraction of prevailing price of these shares now held by SMMS Investments. Can it be said that it is not an action in concert with HTIL-M; our answer is an emphatic 'No'. It is a later avtar of this Framework Agreement, entered into by the assessee with IDFC and others- including overseas AEs, which was terminated on 24th November 2011 and payment of termination fees by the assessee is triggered. Even as the agreement was terminated, the payment was not only for termination of options agreement but virtually ensuring that the shareholdings in SMMS Investments are transferred to another group entity, i.e. TII Investments- which has the same ultimate parent company as the assessee and the said ultimate parent company is also a part of this entire arrangement. Given these facts, can it be said that the ultimate parent company, a non-resident AE, has not acted in concert in this arrangement? Once again, *de horse* the question whether there is any evidence to the effect that the assessee and the ultimate parent company has actually acted in concert or not, "**the circumstances are such that human experience tells us that it can safely be taken that they must be acting together"** and that is what satisfies the test of "acting in concert" as laid down by Hon'ble Supreme Court.

112. Nothing, therefore, turns on the lack of legal rights to the foreign AEs, under the agreements on termination of which the termination fee of Rs 21.25 crores was paid by the assessee. As long as the action in concert, understanding or arrangements included any non-resident AEs, and *de horse* the question of their legal rights under the action in concert, understanding or arrangement, such a non-resident AE being a party to the arrangement, understanding or action in concert satisfied the first limb of definition of international transaction under section 92B read with section 92F(v).

113. Once we come to the conclusion that the lack of legal rights to the non-resident AE does not take away the transaction from the ambit of 'international transaction' under section 92B r.w.s. 92F(v), as we do in our foregoing analysis, learned counsel's reliance on Hon'ble Supreme Court's judgment in the case of Vodafone International Holdings BV *(supra)* ceases to be relevant. We are not really impressed with the line of reasoning adopted by the assessee. Having said so, we may also add that all that Article 141 states is that "**(t)he law declared by the Supreme Court shall be binding on all courts within the territory of India**". The question whether the non-resident AE of the assessee has acted in concert with the assessee, in an arrangement with the assessee or as a part of understanding with the assessee are all questions of fact and these aspects have not even been considered by Their Lordships in the aforesaid case. The reliance placed on Hon'ble Supreme Court's judgment in Vodafone International Holdings' case *(supra*), to the extent it pertains to the question as to whether there was an international transaction, involving non-resident AEs or not, is devoid of legally sustainable merits.

114. Learned counsel, however, submits that even if one could say that there is a transaction, unless an income emanates from a transaction, the requirement of section 92B, so as to be termed 'international transaction' cannot be satisfied and the transfer pricing provisions cannot be invoked. It is contended that since options are not capital assets under section 2(14), even under the post 2012 amendment law, no capital gains can arise in respect of these options. He refers to a large number of judicial precedents in support of the contention that in the absence of income, transfer pricing provisions have no applicability. He submits that as held by Hon'ble Supreme Court, options donot constitute capital assets, and the legal position, so laid down by Hon'ble Supreme Court, still constitutes good law. He also leans on the observations made by Hon'ble Bombay High Court in assessee's own case for the assessment year 2008-09 (reported at 385 ITR 169) to suggest that the law laid down by Hon'ble Supreme Court in Vodafone's case still holds good law. In particular, our attention is invited to the observation at page 284 where it is stated that "…**none of these amendments post Supreme Court judgment would enable the revenue to urge that the position as noted in the Supreme Court judgment no longer subsists**". It is thus urged that there is no change in the legal position so far as the definition of 'capital asset' and 'transfer', so far as relevant to Hon'ble Supreme Court decision in Vodafone's case *(supra),* is concerned.

115. Coming back to the definition of 'international section' once again, it is important to note that a transaction can be an international transaction, only when, inter alia, it is established that the transaction is in the nature of (i) purchase, sale or lease of tangible or

intangible property, (ii) provision of services, or (iii) lending or borrowing money, or (iv) any other transaction having a bearing on the profits, income, losses or assets of such enterprises. In the present case, the assessee has debited Rs 21.25 crores to the profit and loss account on account of termination fees for options. Clearly, therefore, in the present case, there is an impact on the profits of the assessee, and, to this extent, this condition is also satisfied. The contention of the assessee that the said amount has not been claimed as a deduction in the computation of total income, and, therefore, it has no impact on income of the assessee is only fit to be noted and rejected. Section 92(1) requires that "any income arising from an international transaction shall be computed having regard to the arm's length price". Essentially, therefore, it is only when a transaction is inherently incapable of producing an income that the provisions of transfer pricing will not come into play, and that is precisely what Hon'ble Courts above, as also various benches of the Tribunal, have held time and again. However, just because an income is not reported or taken into account in computation of taxable income, an international transaction does not get out of the ambit of application of transfer pricing provision. Explaining the above legal position, a Special Bench of this Tribunal, in the case of **Instrumentarium Corporation Ltd Vs ADIT [(2016) 49 ITR (T) 589 (SB)],** has summed up the legal position as follows:

> **39. In our considered view, the assessee is not really correct in contending that when the assessee has not reported any income from a particular international transaction, the ALP adjustment cannot compute the same. The computation of income on the basis of arm's length price does not require that the assessee must report some income first, and only then it can be adjusted for the ALP. Section 92(1) is not an adjustment mechanism; it is a computation mechanism. The arm's length price principle requires that an arm's length price is assigned to the transactions between the associated enterprise, and if the income in computed, if any, on the basis of the arm's length price so assigned. As regards reliance on the Vodafone India Services (P.) Ltd.'s case (supra), that deals with a situation in which the international transaction was inherently incapable of producing the income chargeable to tax as it was in the capital field. This is evident from the observation of Hon'ble Bombay High Court to the effect that, "In this case, the revenue seems to be confusing the measure to a charge and calling the measure a notional income. We find that there is absence of any charge in the Act to subject issue of shares at a premium to tax". Undoubtedly, learned counsel is right in interpreting this decision to the extent that what is not in the nature of income cannot be turned into income so as to make ALP adjustment therein, and then bring the ALP adjustment to tax, since the computation is of income and it is only the price at which transaction is entered into that is to be taken as an arm's length price in computation of that income. The ALP adjustments cannot be treated as income per se. However, the assessee does not derive any support from this decision since consideration for a loan, i.e interest, is inherently in the nature of income. There is no, and there cannot be any, dispute or controversy about this character of income. The point of dispute is whether zero interest, or no interest, is good enough for computing the income or whether an arm's length interest must substitute this zero interest. The answer is obvious. As long as the transaction is an international transaction between the AEs, the computation of income has to be on the basis of arm's**

> **length interest. Therefore, in our considered view, even when no income is reported in respect of an item in the nature of income, such as interest, but the substitution of transaction price by arm's length price results in an income, it can very well be brought to tax under Section 92. This plea of the assessee is also, therefore, unsustainable in law**.

116. Clearly, therefore, nothing turns on, so far as definition of ‘international transaction’ or applicability of transfer pricing provisions or are concerned, on reporting or non- reporting of an item of income or expenditure for the purpose of computation of tax liability of the assessee is concerned. What is material is whether the transaction in question is capable of producing an income chargeable to tax or not, and that is an aspect that we have to now examine, but let us first finish the analysis with respect to applicability of Section 92B deal with definition of international transaction.

117. Viewed in the above light of the above analysis, the conditions precedent for invoking section 92B(1) are satisfied inasmuch as, with legally enforceable rights or not, foreign AEs, namely VIH- BV and HTIL-M are part of the arrangements and action in concert, and the transaction has a bearing on the profits of the assessee.

118. We now move on to Section 92B(2), which sets out a deeming fiction with respect to ‘international transaction’. It provides that even a transaction with an independent enterprises, i.e. non AE, will be deemed to be an intra AE transaction, if there exists (i) a prior agreement in relation to the relevant transaction between such other person and the associated enterprise, or (ii) the terms of the relevant transaction are determined in substance between such other person and the associated enterprise”. When we interpose the definition of expression ‘transaction’ under section 92F(v), the relevant provision reads, i.e. section 92B(2), reads like this.

> An *arrangement, understanding or action in concert etc [(a) whether or not such arrangement, understanding or action is formal or in writing; or(b) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceeding]* entered into by an enterprise with a person other than an associated enterprise shall, for the purposes of sub-section (1), be deemed to be a transaction entered into between two associated enterprises, if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprise, or the terms of the relevant *arrangement, understanding or action in concert etc [,-(a) whether or not such arrangement, understanding or action is formal or in writing; or (b) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceeding]* are determined in substance between such other person and the associated enterprise

119. The present transaction before us is that of not only termination of options, but also, as we have seen in our analysis earlier, transfer of the shareholdings in SMMS Investments to

of an Indian subsidiary of VIH-BV at a fraction of its market worth, and this arrangement involves an agreement between not only between Indian entities but also foreign AEs of the assessee, i.e. HTIL-M and VIH-BV. There may not be formal, written or legally enforceable arrangement, understanding or action in concert, but applying the test laid down in Jubilee Investment's case (supra), "**the test is not whether they have actually acted in concert but whether the circumstances are such that human experience tells us that it can safely be taken that they must be acting together"** which would essentially imply that the terms of the relevant arrangement, understanding or action in concert are, in substance, decided by the parent company. Given the facts of the case, it is a reasonable inference and that is what, in the light of judicial position set out above, is legally permissible. In a situation like this, there cannot be conclusive evidence of such an arrangement, particularly in a situation in which assessee is less than forthcoming is sharing all the relevant material. We will be superficial in our approach if we are to hold that the assessee's giving up, by paying additional amount of Rs 21.25 cores, the right to buy interests in VEL equity at a fraction of its market worth, and facilitating another group entity to buy these interests on the same terms, is something without the terms of this arrangement being approved and decided by the parent company. In the normal course of life, every corporate entity seeks to maximise its gains and assets but here is a situation in which the business conduct of the assessee cannot be justified on the basis of what has been shared with us. The justification initially given for termination of options, and payment of Rs 21.25 crores for the same, was that the IDFC Investors had exercised its put option which the assessee could not fulfil, but then information gathered by the income tax authorities very well established that it is incorrect information. What is then submitted by the assessee is that options had to terminated because a delay was expected, due to required FIPB clearance, the assessee terminated the agreement and paid the termination fees of Rs 21.25 crores. This explanation is also unacceptable for the simple reason that the maximum exposure of the assessee, under the framework agreement- clause 7, was 115% of the transfer price, and since transfer price works out to Rs 4.13 crores, the assessee was required to pay not more than Rs 4.75 crores. No commercial entity would pay Rs 21.25 crores to terminate a contract when its maximum exposure under the contract is Rs 4.75 crores. Obviously, there are some other considerations other than normal commercial consideration, and, given the present set of facts, these considerations, as these are not commercial considerations of the assessee, can only be the business considerations of the group as a whole i.e. of the ultimate parent company. In Hon'ble Bombay High Court's judgment dated 8th October 2015, in assessee's own case for the assessment year 2008-09, it is specifically noted that the entire arrangement of framework agreement was initiated by Hutchinson Group which was looking for "**Indian investors, who would be independent, but not hostile, and hold the interests till sector opened up**". It is then stated that "**Hutchinson Group, therefore, identified three investors**…….". These observations of Hon'ble Bombay High Court donot leave anything for imagination so far as brain begind framework agreement is concerned. We may, in this context, refer to the following observations in sixth paragraph of the aforesaid order:

> **6. The appellant claims that as per the Foreign Direct Investment (for short "FDI") norms in India, the ceiling in the telecom centre was 49% and which was enhanced to 74% in November, 2005. In order to acquire further equity interest as and when the FDI ceiling in the telecom sector were relaxed, <u>Hutchison group looked for Indian investors who would be independent, but not hostile and would hold the interests till the sector was opened up</u>. These would make a gain at a**

subsequent point of time when they exit the investment. <u>The Hutchison group, therefore, identified three investors</u> being Analjit Singh (for short "AS"), who was one of the leading industrialists of the company and a promoter of Hutchison Max Telecom Limited – Mumbai Telecom Circle and had formerly sold his investment to Hutchison. The other one was identified as Asim Ghosh (for short "AG"). He was associated with this group for a long time and was a Chief Executive Officer of Hutchison Essar. The third was the IDFC Group of Investors, leading players in the field of financial investments. <u>These investors required credit support for the investment and the appellant and its then holding company HTIL agreed to procure credit support for them. In consideration thereof, in 2006, the appellant, inter-alia, acquired call option rights in pursuance of two Framework Agreements</u> dated 1st March, 2006 with AG and his group companies and AS and his group companies. These agreements were styled as Framework Agreements and shall hereinafter be referred to as "2006 FWA" for short. ………..

(Emphasis supplied, by underlining, by us)

120. As evident from the above observations, not only the investors were selected by the Hutchinson Group, which was taken over by Vodafone Group plc next year, but even the options were received in consideration of HTIL providing credit support to these investors. It is really strange that an assessee, which makes these submissions before Hon'ble Bombay High Court, now contends that the arrangements for framework agreement donot involve the foreign AEs. The fact and evidence about the terms of arrangements of this transaction being decided, in substance, by the foreign AEs is something which is in exclusive knowledge domain of the assessee and its group entities and when the assessee decide not to share it and the circumstances are such that the terms of the transactions are established to not at all justified by the known commercial considerations of the assessee, the assessee cannot blame the revenue authorities for not brining on record the evidence of the terms of arrangement being decided by the foreign AE. In these peculiar facts, which are very unsusal facts by any standards, even in the absence of such an evidence, the terms of arrangements being decided by the foreign AE can be reasonably accepted. In view of these discussions, the arrangement, understanding and action in concert, with respect to framework agreement and termination thereof, is an international transaction under section 92B(2) as well. In other words, while foreign AE and parent company of the assessee is not only a party to the agreement but the terms of the agreement, in substance, are being decided by the foreign AE.

121. As we part with this issue, we may also quickly deal with the statement made by the assessee, in the written submissions, on this aspect of the matter. The stand of the assessee is once again set out as follows:

135. The Assessee is admittedly an indirect wholly owned subsidiary of VIHBV, but that by itself, does not automatically imply, in the absence of cogent material, that VIHBV is the directing mind of the Assessee, so as to obliterate the corporate separateness of VIHBV and the Assessee, each of which are distinct juridical entities.

136. While, and not unsurprisingly, VIHBV – by virtue of being the indirect parent/holding company of the Assessee, was bound to have full knowledge of matters involving its downstream shareholding interests in India, and to ensure due observance and discharge of any obligations undertaken by its subsidiary, including discharging any financial obligations undertaken by the Assessee inter alia to the IDFC Investors, the Revenue has overlooked that the Assessee, as a distinct juridical entity, enjoys good corporate standing in its own right, and as will be evident from its financial statements conducts a call centre business comprised of ~7000 employees, with a board of directors at the helm of its affairs, has been inter alia granted a s.10AA exemption granted by the Department of Revenue in relation to its ITES businesses, and is independently assessed by the Department of Revenue. More recently, the Central Board of Direct Taxes has entered into an Advanced Pricing Agreement with the Assessee, in relation to matters concerning ITES.

137. While VIHBV, in terms of arrangements agreed with the IDFC Investors undertook to facilitate financing of the IDFC Investors, which may perhaps have facilitated the IDFC Investors in securing better interest rates for borrowings, or such other arrangements to which the Assessee was not party, that cannot automatically imply that it was VIHBV who was directing or controlling the business and affairs of the Assessee. There is no rational justification by the Revenue to seek to treat the Assessee as a conduit of VIHBV.

122. Learned counsel for the assessee has at least admitted that the VIH-BV was, and had to be, all along in the loop; his defence, however, is on the emphasis on distinct juridical entity with good corporate standing, separate tax assessment, APAs being entered into by the assessee with the CBDT and there being "no cogent material" to suggest that VIH-BV is directing the mind of the assessee. The material evidencing the VIHBV, as we have already noted, can only be in the exclusive knowledge of the assessee and its group entities, and, in any event, it may have been needed only if the actions and business conduct of the assessee was justified as a separate entity on commercial considerations; what is being done by the assessee does not make any commercial sense to us. We have discussed this aspect of the matter in detail in the foregoing paragraphs. Coming to assessee's claim about being distinct juridical and commercial entities, that cannot be a reason enough for non-application of arm's length standards. As a matter of fact, entire purpose of the transfer pricing is to neutralize the impact of *intra* AE relationships on how separate juridical entities behave commercially. Let us not forget that the assessee is basically involved in intra AE transactions, and its entire turnover with independent enterprises is just Rs 5.71 crore in the entire year. The fact that the assessee is assessed separately or it has entered into APAs with the CBDT does not in any manner affect its primarily supportive role in the intra group transactions, and that is what facts and circumstances of the case very well demonstrate. In any event, it does not make a difference to our conclusion; even if an assessee has, let us say, 10,000 crores but that assessee does something which is wholly ununderstandable from a commercial perspective, but which can only be justified on account of its relationship with the AE, the same conclusion will be in order. The arguments of the assessee proceed on the basis that there is a need of clearly conclusive evidence to the effect that the assessee and the AEs has acted in

concert, but, as is the well settled legal position- discussed earlier in this order, it is not required to be established, with conclusive evidence, that the assessee and the foreign AE has acted in concert; all that is necessary is that the circumstances are such that human experience tells us that it can safely be taken that they must be acting together. In view of these discussions, as also bearing in mind entirety of the case, we see no legally sustainable merits in the aforesaid stand of the assessee.

123. Let us now take up the issue whether the international transaction in question was capable of generating an income, which is held to be a *sine qua non* for the applicability of transfer pricing provisions.

124. Learned counsel, however, is not fully content even with this proposition. As we have noted earlier as well, he reminds us that Hon'ble Bombay High Court's judgment dated 10th October 2014, in the case of **Vodafone India Services Pvt Ltd Vs ACIT [(2014) 368 ITR 1 (Bom)],** has been accepted by the Union Cabinet. This action of the Union Cabinet, vide press release dated 28th January 2015, has been summed up as follows:

> *The Union Cabinet, chaired by the Prime Minister Shri Narendra Modi, in a major decision, has decided to accept the order of the High Court of Bombay in the case of Vodafone India Services Private Limited (VISPL) dated 10.10.2014. This is a major correction of a tax matter which has adversely affected investor sentiment.*
>
> *Based on the opinion of Chief Commissioner of Income-tax (International Taxation), Chairperson (CBDT) and the Attorney General of India, the Cabinet decided to:*
>
> > *i. accept the order of the High Court of Bombay in WP No. 871 of 2014, dated 10.10.2014; and not to file SLP against it before the Supreme Court of India;*
> >
> > *ii. accept of orders of Courts/ IT AT/ DRP in cases of other taxpayers where similar transfer pricing adjustments have been made and the Courts/ IT AT/ DRP have decided/decide in favour of the taxpayer.*
>
> *The Cabinet decision will bring greater clarity and predictability for taxpayers as well as tax authorities, thereby facilitating tax compliance and reducing litigation on similar issues. This will also set at rest the uncertainty prevailing in the minds of foreign investors and taxpayers in respect of possible transfer pricing adjustments in India on transactions related to issuance of shares, and thereby improve the investment climate in the country.*
>
> *The Cabinet came to this view as this is a transaction on the capital account and there is no income to be chargeable to tax. So applying any pricing formula is irrelevant.*
>
> *VISPL is a wholly owned subsidiary of a non-resident company, Vodafone Tele-Services (India) Holdings Limited, Mauritius. On 21.8.2008, VISPL issued shares (at a premium of Rs.8509/-) which resulted in VISPL receiving a total consideration of Rs.246.39 crore from Vodafone Mauritius, on issue of shares and this was shown as*

"Capital Receipts" in the books of accounts. VISPL reported this transaction as an "International Transaction" and stated that this transaction does not affect its income.

The Transfer Pricing Officer (TPO), vide order dated 28.01.2013, determined the Arm's Length Price of the shares issued by VISPL on the basis of Net Asset Value, at Rs.53,775/- per share and made an upward adjustment of Rs.1,308.91 crore. In addition, the difference Rs.1,308.91 crore between the transaction price and the Arm's Length Price was treated as 'deemed loan' given by VISPL to the holding company; and interest that would have been payable on the loan in an arm's length transaction was computed at Rs.88.35 crore. In total, transfer pricing adjustment of Rs.1,397.26 crore was proposed by the TPO for Assessment Year 2009-10. The matter was agitated by VISPL at the stage of Draft AO itself and therefore the tax payable could not be crystallized. However, the tax rate of 33 percent was applicable for Assessment Year 2009-10.

The DRP, on 11.2.2014, held that the premium determined by the TPO, to the extent not received, is an income arising from issue of shares, and that the AO and the TPO have jurisdiction.

VISPL filed a 2nd Writ Petition in the High Court of Bombay. The High Court, on 10.10.2014, has amongst other things observed:

> *a) "Section 92(2) of the Act deals with a situation where two or more AEs enter into an arrangement whereby they receive a benefit, service or facility then the allocation, apportionment or contribution towards the cost or expenditure is to be determined in respect of each AE having regard to ALP. It would have no application in the cases like the present one, where there is no occasion to, allocate, apportion or contribute any cost and/ or expenses between the Petitioner and the holding company."*
>
> *b) The crucial words "shall be chargeable to income tax" which are found in Section 42(2) of the 1922 Act are absent in Chapter X of the Act..... Therefore it is clear that the deemed income which was charged to tax under Section 42(2) of 1922 Act was done away with under this Act."*
>
> *c) The tax can be charged only on income and in the absence of any income arising, the issue of applying the measure of Arm's Length Pricing to transactional value/ consideration itself does not arise."*
>
> *d) If its income which is chargeable to tax, under the normal provisions of the Act, then alone Chapter X of the Act could be invoked. Sections 4 and 5 of the Act brings /charges to tax total income of the previous year. This would take us to the meaning of the word income under the Act as defined in Section 2 (24) of the Act. The amount received on issue of shares is admittedly a capital account transaction not separately brought within the definition of Income, except in cases covered by Section 56(2)(viib) of the Act. Thus such capital account cannot be brought to tax as already discussed herein above while considering the challenge to the grounds as mentioned in impugned order."*

> *e) The issue of shares at a premium is on Capital account and gives rise to no income. The submission on behalf of the revenue that the shortfall in the ALP as computed for the purposes of Chapter X of the Act is misplaced. The ALP is meant to determine the real value of the transaction entered into between AEs. It is a re-computation exercise to be carried out only when income arises in case of an International transaction between AEs. It does not warrant re-computation of a consideration received / given on capital account.*

The Bombay High Court quashed the reference dated 11.7.2011 by the AO to the TPO, order dated 28.1.2013 of the TPO, draft AO dated 22.3.2013 of the AO and order dated 11.2.2014 of the DRP on the preliminary issue of jurisdiction to tax, setting them aside as being without jurisdiction, null and void.

125. Let us note some of the contentions of the learned counsel once again. Learned counsel contends that it has been decided by the Union Cabinet that “the transaction is on the capital account and there is no income chargeable to tax”, and it is for this reason that the transfer pricing provisions are held to be inapplicable. That precisely is the case before us as well. Learned counsel then invites our attention to the observation that “the tax can be charged only on income, and in the absence of any income arising, the issue of applying the measure of arm’s length pricing to transactional value/ consideration itself does not arise”. It is then pointed out that there is no income in the present case, and in the absence of an income, the same cannot be inferred. The assessee has only incurred an expenditure, in respect of which even deduction is not claimed, and the expense so incurred cannot be converted into an income. He submits that in view of the above facts and in the light of the conscious decision taken by the highest body representing Government of India, the transfer pricing provisions cannot be applied in this case as well.

126. The issue in the case before Hon’ble Bombay High Court was whether arm’s length standards and transfer pricing provisions can be applied in a situation in which the receipts in questions are admittedly on capital account which cannot be brought to tax. These receipts were thus inherently incapable of producing an income, inasmuch as it is a settled position of law only such capital receipts can be brought to tax when there is a specific enabling provision to bring the same to tax. In this case, it was an admitted position that there was no specific provision enabling the taxation of arm’s length price of the premium, which is not actually received from the non-resident assessee, and yet the revenue authorities proceeded with determining the arm’s length premium. The arm’s length price adjustment was thus sought to be made in respect of an item which could never be brought to tax as income under section 2(24). In effect, thus ALP adjustment itself was seen as a levy of tax. Hon’ble High Court did not accept the stand of the revenue authorities. It was in this context that Their Lordships observed that, “….**we find considerable substance in the Petitioner's case that neither the capital receipts received by the Petitioner on issue of equity shares to its holding company, a non-resident entity, nor the alleged short-fall between the so called fair market price of its equity shares and the issue price of the equity shares can be considered as income within the meaning of the expression as defined under the Act**”. It was thus not the fact of non-disclosure of income by the assessee but the fact that the receipts

in question, in respect of which ALP adjustments were sought to be made, were inherently incapable of producing the income, that was the crucial factor underlying the principle laid down by the said judgment. Section 92(1) provides that "any income arising from an international transaction shall be computed having regard to the arm's length price", and, therefore, the arm's length price has a role to play in computation of income. Its only when the transactions are such that there is no question of an income coming to be determined that the provisions with respect of arm's length pricing will not come into play. Even if a transaction does not report or show any income but application of arm's length prices are to result in an income, the conditions of Section 92(1) will be satisfied. Learned counsel, however, is interpreting the press release as a statute and is seeking a literal implementation of the words in the press release. Such a pedantic and literalistic approach cannot meet our approval. The words used in the press release are not the words of the statute; these are the words of the laymen which are required to be given contextual meaning. In any case, we are unable to read the press release as implying that when there is no income chargeable to tax is reported, the arm's length standards can not be applied. As long as an income, within the meanings of section 2(24), can arise from an international transaction, the arm's length standards are to be applied in computation of an income. We, therefore, see no legally sustainable merits in this plea as well.

127. We now move on to the question whether the transactions before us were capable of producing an income chargeable to tax. Undoubtedly, as we agree with the learned counsel, when an international transaction is inherently incapable of producing an income, covered by section 2(24), there is no question of applying the transfer provisions. At the end of the day, the only role that the application of arm's length standards play is in computation of an income, and when there is no income, the application of arm's length standard is a meaningless ritual.

128. On this issue, basic stand of the learned counsel is that options do not constitute capital assets, and that, as learned counsel puts it in the written submissions, 'where no exercise, there is no transfer'. In effect, neither there was any capital asset to be transferred, nor there was any transfer anyway, and, therefore, there is no question of capital gains in the hands of the assessee. Learned counsel for the assessee relies on various observations made by Hon'ble Supreme Court, in the case of Vodafone International Holdings BV (supra), and by Hon'ble Bombay High Court, in assessee's own case for the assessment year 2008-09- reported at 385 ITR 169 (supra).

129. As we have noted earlier in this order, Hon'ble Supreme Court has, in Vodafone International Holdings BV's case (supra), held that **"Call and put options are contractual rights and do not sound in property and hence they cannot be, in the absence of a statutory stipulation, considered as capital assets".** Their Lordships also noted that "**Pending exercise, options are not management rights**" and that "**At the highest, options could not be treated as potential shares, and, till exercised, they cannot provide right to vote, management or control**". It is on the strength of these observations of Hon'ble

Supreme Court that it is contended that the options are not capital assets, and, therefore, there is no basis of our holding that any income, by way of capital gains, can arise from these options.

130. There is, however, a subsequent amendment to definition of 'capital asset' which neutralizes the impact of above observations of Hon'ble Supreme Court, so far as situation before us is concerned.

131. Vide Finance Act 2012, an Explanation was added, with retrospective effect from 1st April 1962, to Section 2(14) which defines the expression 'Capital Asset'. Similarly, Explanation 2 was also added to the definition of Section 2(47) which defines the expression 'transfer'. These Explanations read as follows:

> **Section 2(14)**
>
> **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.**
>
> **Section 2(47)**
>
> **Explanation 2. For the removal of doubts, it is hereby clarified that "transfer" includes and shall be deemed to have always been included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India.**

132. In the light of insertion of Explanation to Section 2(14), in our considered view, the scope of expression "property" includes any rights whatsoever, including rights of management and control, not only in, but in relation to, an Indian company. The question then is whether the options give any rights in relation to an Indian company, and the answer has to be essentially in positive. When we examine the framework agreement 2007, we find that the assessee did have, by the virtue of the aforesaid agreement, valuable rights in relation to an Indian company. These rights include the right to buy entire equity capital of an Indian company, i.e. SMMS Investments, at an agreed price of Rs 2 crores plus interest @ 17.5%. What is more important is that the assessee also had a right, infact the right which the assessee exercised, to nominate a person for assignment of call options. These rights are independent of each other in the sense that when one of these rights is exercised, the other right is rendered infructous. These two rights are separate and distinct rights. In other words, the assessee could also decide as to who, if not the assessee itself, will buy the entire share

capital of SMMS Investments at the agreed price of Rs 2 crores plus interest @ 17.5% w.e.f. the date of options agreement.

133. Learned counsel's defence is that, as held by Hon'ble Bombay High Court in assessee's own case for the assessment year 2008-09, even post the 2012 amendments, the definition of capital asset does not cover the option rights. As for the right to nominate the assignee, learned counsel is dismissive of the same and submits that such a right to nominate the assignee is not an independent right at all.

133. As we deal with learned counsel's contention, let us not forget that the right which has been exercised in the present year is the right to nominate the person for assignment of option rights. The question, therefore, is whether the right to nominate a person to enable such a person to buy the entire capital of SMMS Investments, for a consideration of Rs 2 crores plus interest, constitutes capital asset or not. It is also important to note that transferability of the right to acquire the shares of SMMS is independent of the actual acquisition of shares and it did not require any consent from SMMS. On the other hand, when IDFC Investors were to assign the put options, such an assignment of put option was dependent on the prior written consent of the assessee. Let us is, in this light, look at the definition of Capital Asset under section 2(14). Section 2(14) states that Capital Asset means **property of any kind held by the assessee, whether or not connected with his business or profession**, and does not include certain items, which are not relevant for our purposes at present. The Explanation to Section 2 (14) explains the scope of expression 'property' used in above definition and states that the scope of expression "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. In effect thus, any rights whatsoever (including the rights to management or control) in, or in relation to, an Indian company are covered by the meaning of expression 'property' for the purpose of this definition. The question, therefore, is whether the right to nominate a person to buy entire equity share capital of an Indian company, by the name of SMMS Investments Pvt Ltd, for a consideration of Rs 2 crores, plus interest, particularly in a situation in which the value of underlying assets held by such Indian company is several hundred times the value of the consideration, is a "right of any kind whatsoever" and is "in relation to an Indian company" or not.

134. The answer, in our humble understanding, is in positive, as, in our considered view and for the detailed reasons set out above, the right to nominate an assignee under framework options meets the tests laid down in Explanation to Section 2(14)

135. Learned counsel had also suggested that while interpreting the scope of Explanation to Section 2(14), we have to first hold that the asset in question is a 'property', and it is only when the asset in question meets the description of 'property' that Explanation to Section 2(14) can come into play. We find it difficult to understand this approach. We may also mention that Hon'ble Callcutta High Court, in the case of CIT v. Jayashree Charity Trust [1986] 159 ITR 280 (Cal.) has inter alia observed that "to resolve this controversy, regard must be had to the language that has been employed and also to the object of the statute. It is

well-settled that, if possible, the words of a statute must be construed so as to give a sensible meaning to them. The words ought to be construed ut res magis valeat quam pereat". Hon'ble Supreme Court has, in the case of CIT v. Teja Singh [1959] 35 ITR 408, explained this principle as follows:

> *"A construction which leads to such a result must, if that is possible, be avoided, on the principle expressed in the maxim, "ut res magis valeat quam pereat". Vide Courtis v. Stovin and in particular, the following observations of Fry, L.J., at page 519 :*
>
> *The only alternative construction offered to us would lead to this result, that the plain intention of the Legislature had entirely failed by reason of a slight inexactitude in the language of the section. If we were to adopt this construction, we should be constructing the Act in order to defeat its object rather than with a view to carry its object into effect."*
>
> *Vide also Craies on Statute Law, page 90 and Maxwell on The Interpretation of Statutes, Tenth Edition, pages 236-237. "A statute is designed", observed Lord Dunedin in Whitney v. Commissioners of Inland Revenue, "to be workable, the interpretation thereof by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable."*

136. In case we are to accept the contentions of the learned counsel, Explanation to Section 2(14) will have to be treated as otiose because if the an asset meets the description of 'property' without taking into the impact of Explanation to Section 2(14), there is obviously no need to look at the Explanation. In our humble understanding, Explanation to Section 2(14) should be read as enlarging the scope of expression 'property' in the main definition clause, and, when such is the position, whether or not the asset in question is a 'property' as per meanings in main provision of Section 2(14), as long as it meets the test laid down in Explanation to Section 2(14), it is to be treated as a 'Capital Asset' nevertheless.

137. Learned counsel is nonetheless quite fair in admitting that what Hon'ble Bombay High Court deals with is the question whether as a result of variation in terms of framework agreement 2006 vis-à-vis framework agreement 2007, there was, in effect, transfer of unexercised option rights by the assessee to its AEs. That means undisputedly, there were no nominations or assignments in the said case. Undisputedly, nomination rights were not exercised in the said case. Undisputedly, the question as to whether the right to nominate the assignee is a right in respect of an Indian company did not come up in the said case. There are some observations on the question whether options rights can be treated as property or not but even in that context, as Their Lordships noted, there were conflicting factual claims were being made by the Revenue and the Revenue was "clearly shifting its stand from time to time". When a plea was raised by the Revenue, as noted by Their Lordships, "Mr Salve interdicted and urged that it is a completely new case. This was never argued by the Revenue. Something contrary to it was contended and in that regard he placed his reliance on page 1051 of paper-book". Their Lordships then observed that "We see some substance to that effect". This aspect is even more clear from the subsequent observation made by Their Lordship to the effect "Even if there was a change therein *(i.e. the legal position post 2012*

amendment), on the basis of Revenue's stand itself, Tribunal concluded quite contrary to what is now urged before us. Apart therefrom, we find that that the essential ingredients of the definitions as amended are not satisfied and the conflicting and shifting stand of the Revenue makes worsens the position". That was more of an indictment of the pleadings by the Revenue, and, in any event, no clear legal principles were laid down which could be of application in this case. In any event, Their Lordships dealt with the scope of transfer in a situation in which only the framework agreement were renegotiated rather than an exercise of the option or the nomination. Their Lordships also dealt with the connotations of capital asset but that was in the context of options in a situation in which even the Indian company to which they pertain was less than clear and there were, what Their Lordships termed as, "contradictory" claims made by the Revenue. None of these situations pertain to the case before us. Clearly, given the facts of the case before us, the observations made in the context of issue before Hon'ble Bombay High Court will not have application here. As we say so, we are reminded of the words of advice, with respect to binding force of the judicial precedents, contained in Hon'ble Bombay High Court's judgment in the case of **CIT Vs Sudhir Jayantilalji Mulji [(1995) 214 ITR 154 (Bom)]** **"It is well-settled that the ratio of a decision alone is binding, because a case is only an authority for what it actually decides and not what may come to follow from some observations which find place therein.** The legal position in this regard has been summed up in Hon'ble Supreme Court's judgment in the case of **CIT vs. Sun Engineering Works P. Ltd. (1992) 198 ITR 297 (SC)** in the following words "**It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete `law' declared by this Court. The judgment must be read as a whole and the observations from the judgments have to be considered in the light of the questions which were before this Court. A decision of the Court takes its colour from the questions involved in the case in which it is rendered and, while applying the decision to a later case, the Courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings."** Beyond any doubt or controversy, the question before Hon'ble Bombay High Court was not the same as we are dealing with right now. In our humble understanding, therefore, the views expressed by Hon'ble Bombay High Court in this case do not govern the present situation. We have, therefore, decided this issue based on our limited understanding and knowledge on merits- which, in any event, is subject to what Hon'ble Courts above approve.

138. In the light of the above discussions, in our considered view, the right to nominate the assignee of the option rights, which was exercised by the assessee during the relevant previous year, was a capital asset. As we have decided the question of capital asset on this basis alone, we see no need to deal with other contentions of the revenue authorities on this point.

139. The next question is whether there was any transfer of capital asset in the relevant previous year.

140. As we have noted earlier, by way of a retrospective amendment with effect from 1st April 1962, the Finance Act 2012 has added Explanation 2 to Section 2(47) which states that "'transfer' includes and shall be deemed to have always been included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India". In the present case, the right to nomination was exercised and it was thus disposed of, the assessee had to part with the right to nominate since it could only be exercised only once, and once the right is exercised, the existence of right comes to an end. There cannot be, and there is no, controversy on this aspect of the matter. Clearly, therefore, there was a transfer of the right.

141. As the assessee had exercised the right of nomination, which could have been done only once, the right of nomination came to end, and was thus, in terms of Explanation 2 to Section 2(47), this was covered by the definition of 'transfer'.

142. The next issue is that we have to decide is whether, even if there is a capital asset and it was transferred, such a capital asset had any cost of acquisition.

143. The legal position is fairly well settled that in the absence of a cost of acquisition, gains on transfer of capital asset can not be brought to tax. In the case of **CIT vs B C Srinivas Shetty [(1981) 128 ITR 294 (SC)]**, Hon'ble Supreme Court has, inter alia, observed as follows:

> **11. What is contemplated is an asset in the acquisition of which it is possible to envisage a cost. The intent goes to the nature and character of the asset, that it is an asset which possesses the inherent quality of being available on the expenditure of money to a person seeking to acquire it. It is immaterial that although the asset belongs to such a class, it may, on the facts of a certain case, be acquired without the payment of money. That kind of case is covered by section 49 and its cost, for the purpose of section 48, is determined in accordance with those provisions. There are other provisions which indicate that section 48 is concerned with an asset capable of acquisition at a cost. Section 50 is one such provision. So also is sub section (2) of section 55. None of the provisions pertaining to the head "Capital gains" suggests that they include an asset in the acquisition of which no cost at all can be conceived. Yet there are assets which are acquired by way of production in which no cost element can be identified or envisaged. From what has gone before, it is apparent that the goodwill generated in a new business has been so regarded. The elements which create it have already been detailed. In such a case, when the asset is sold and the consideration is brought to tax, what is charged is the capital value of the asset and not any profit or gain.**

> **12. In the case of goodwill generated in a new business there is the further circumstance that it is not possible to determine the date when it comes into existence. The date of acquisition of the asset is a material factor in applying the computation provisions pertaining to capital gains. It is possible to say that the "cost of acquisition" mentioned in section 48 implies a date of acquistion, and that inference is strengthened by the provisions of sections 49 and 50 as well as sub-section (2) of section 55.**
>
> **13. It may also be noted that if the goodwill generated in a new business is regarded as acquired at a cost and subsequently passes to an assessee in any of the modes specified in sub-section (1) of section 49, it will become necessary to determine the cost of acquisition to the previous owner. Having regard to the nature of the asset, it will be impossible to determine such cost of acquisition. Nor can sub-section (3) of section 55 be invoked, because the date of acquisition by the previous owner will remain unknown.**
>
> **14. We are of opinion that the goodwill generated in a newly commenced business cannot be described as an "asset" within the term of section 45, and, therefore, its transfer is not subject to income-tax under the head "Capital gains".**

144. In effect, thus, all that is needed is to ascertain the cost of acquisition of an asset, in order to being its transfer resulting in a capital gain which can be charged to tax under section 45. Let us revert to the facts of the case in this light. There is no dispute that all the related agreements, i.e. framework agreement, shareholders agreements, and transaction agreements etc are to be read together to understand the transaction. We have noted that under clause 2 of the Transaction Agreement dated 5th June 2007, a copy of which was placed before us at pages 202-240 of the paper-book volume 2 filed by the Revenue, the assessee paid Rs 62.24 crores towards assignment of right to buy 0.1234% equity in VIL for a consideration of Rs 50 crores. This right, however, was never actually exercised by the assessee, and this payment was in terms of the obligations under the same framework agreement which gave him a right to buy entire equity of SMMS Investments for a nominal consideration of Rs 2 crore plus interest. This payment of Rs 62.24 crores cannot be considered in isolation, as all these agreements and arrangements are to be read together. The assessee and the group entities are clearly acting in concert, and we have already given a categorical finding on this aspect. The assessee not exercising the options which he received on payment of Rs 62.24 crores is also a part of this arrangement. In any case, once that right is not exercised but the payment is made nevertheless, the payment is to be treated as a de facto payment for the right received by the assessee under the arrangement and actually exercised by the assessee. As regards the payment of Rs 21.25 crores by the assessee for termination deed and the arrangement under which the nomination in favour of another Vodafone Group entity is concerned, in our cosndiered view that since this cannot be considered in isolation and is essentially required to be considered as a part of the overall arrangement, it is is also required to be included in the cost of acquisition for the right to purchase the entire equity capital of SMMS Investments for Rs 2 crores plus interest or to nominate a Vodafone Group entity for the What the assessee paid under these framework arrangements read with shareholders agreement read with

transaction agreements, is Rs 62,24 crores plus Rs 21.25 crores and the right that the assessee got under these arrangements, and actually exercised by the assessee, is the right to nominate an affiliate entity to receive the option rights for buying entire equity capital of SMMMS Investments for Rs 2 crores plus interest. Given these facts, and bearing in mind the fact that the payment of Rs 83.49 crores was under the same arrangement and the same set of agreements which entitled him to buy entire equity, or to nominate an affiliate entity to buy the entire equity, of SMMS Investments at a nominal consideration of Rs 2 crores, in our considered view, the cost of acquisition for the right exercised by the assessee, as both the rights are mutually exclusive, which is held to be capital asset in the light of earlier discussion, is Rs 83.49 crores.

145. In the light of the above discussions, in our considered view, the cost of acquisition in this case is clearly identifiable and, therefore, the provisions for computations of capital gain are workable. The law laid down by Hon'ble Supreme Court in the case of B C Srinivas Shetty (supra) does not come to the rescue of the assessee.

146. The next point made by the assessee is that there is no consideration for the transfer and, for this reason, the computation of capital gains in not possible.

147. It is true that the consideration in this case is zero but then that precisely is the be a zero consideration for transfer of this valuable right in an arm's length situation, and, therefore, while computing the income of the assessee, arm's length consideration should be taken into. The plea of the revenue authorities is indeed well taken. Once we come to the conclusion that an income, which essentially includes a capital gain, has arisen on account of an international transaction, such an income has to be computed on the basis of an arm's length price. Section 92(1) categorically states that "any income arising from an international transaction shall be computed having regard to the arm's length price". Therefore, even when there is a zero consideration in fact but application of arm's length principle results in a consideration being assigned, the income, i.e. capital gain in this case, is to be computed on the basis of arm's length consideration.

148. In view of the above discussions, in a situation in which the assessee has not assigned any consideration to transfer of a capital asset under an international transaction, though, in an arm's length situation, a consideration is required to be assigned, the computation of capital gains will not fail because, so far as computation of capital gains in such a situation is concerned, it has to be on the basis of arm's length price rather than stated consideration. This plea of the assessee also, therefore, fails.

149. Learned counsel has argued at length that all along the TPO has proceeded on the basis that it is a case of capital gain, and, therefore, it is not open to the Assessing Officer to treat the receipt in question as revenue receipt. We are unable to see any merits in this plea. The mandate of the TPO is confined to determination of arm's length price. As learned Departmental Representative rightly points out, Section 92CA(1) permits a reference to the

Transfer Pricing Officer only “computation of arm’s length price” in respect of an international transaction. Under section 92CA(4) it is for the Assessing Officer to compute total income of the assessee “in conformity with the arm’s length price so determined by the Transfer Pricing Officer”. It is for the Assessing Officer to take a call about the head in which the income in question falls, and that call is essentially to be taken on the basis of the facts of each case and in the light of the pleadings of the parties.

150. Learned counsel’s next arguments that the options and investments were not held as stock in trade, and, as such, any income from such investments, even by substituting ALP for the actual consideration, cannot be a business income. What this plea overlooks that even holding investments can constitute business and give rise to business income. The concept of business of holding investments is not alien to income tax law. While dealing with the concept of ‘business of holding investments’, we may refer to following observations made by legendry Justice K S Hegde (as he then was) in the case of **CIT Vs Distributors (Baroda) Pvt Ltd [(1972) 83 ITR 377 (SC)]** at page 382-383:

> **We next come across another expression which is far more difficult to comprehend than the one that we were considering till now. Section 23A speaks of the business of "holding of investments". Here comes the enigma. It is easier to understand when the section speaks of a company having the business of dealing in investments though to say that the company is dealing in investments may, at first sight, look somewhat incongruous. When the legislature spoke of dealings in investments, it meant dealing in shares, stocks and securities, etc. But when a person invests in the shares of some of the companies, it is difficult to say that his business is one of investing. In commercial circles investing is not considered as business. An investor may feel perplexed if he is called a businessman.**
>
> **This court in Bengal and Assam Investors Ltd. v. Commissioner of Income-tax [1966] 59 ITR 547 ; [1966] 2 SCR 471 (SC)came to the conclusion that an individual who merely invests in shares for the purpose of earning dividend, does not carry on a business and that the only way he can come under section 10 of the Act is by converting the shares acquired by him into stock-in-trade, i.e., by carrying on the business of dealing in stocks and shares. In that case this court was considering whether the dividend income of the assessee-company therein could be considered as business income under section 10 of the Act. Therein this court was not considering the scope of section 23A. But all the same in that case this court proceeded on the basis that no one can make a business of investing. But then section 23A speaks of the business of "holding of investments". We were told by the counsel for the assessee that that expression is an incongruous one and that we should, following the decision of this court in Bengal and Assam Investors Ltd. case (supra)hold that there is nothing like a business of "holding of investments". We feel unable to accede to that contention. We cannot say that the legislature did not know its own mind when it used that expression in section 23A. We must give some reasonable meaning to that expression. No part of a provision of a statute can be just ignored by saying that the legislature enacted the same not knowing what it was saying. We must assume that the legislature**

> **deliberately used that expression and it intended to convey some meaning thereby. The expression "business" is a well-known expression in income-tax law. It means, as observed by this court in Narain Swadeshi Weaving Mills v. Commissioner of Excess Profits Tax [1954] 26 ITR 765; [1955] 1 SCR 952 (SC): "some real, substantial and systematic or organised course of activity or conduct with a set purpose". This is also the meaning given to that expression in the earlier decisions of the High Courts and the Judicial Committee. We must, therefore, proceed on the basis that the legislature was aware of the meaning given by courts to that expression when it incorporated section 23A into the Act in 1957. Hence we must hold that when the legislature speaks of the business of "holding of investments", it refers to real, substantial and systematic or organised course of activity of investment carried on by an assessee for a set purpose such as earning profits.**

151. When as assessee is in business of investment, the profits on sale of investments are nevertheless taxed as capital gains as long as the same fulfil the test of 'capital asset' under section 2(14). Unlike the case of a dealer or trader in shares, in which the fact that investments are traded in and are thus rendered stock in trade taking them out of the ambit of definition of capital asset under section 2(14), in the case of business of investments, the investments, as long as other necessary pre-conditions are fulfilled, continue to be 'capital asset' nevertheless. However, what is important is that by the virtue of Section 28(iv), "the value of any benefit or perquisite, whether convertible or not, arising from the exercise of business or profession" also partakes the character of business income. In other words, any benefits accruing or arising from the conduct of such business of investments - whether part of the business or incidental thereto, become taxable- either as profits or gains of business under section 28(i) or as perquisite or benefits incidental thereto under section 28(iv). This fine distinction between the business of dealing in shares and business of investing in shares, in our considered view, merits being accepted – particularly in the context of taxation of incidental benefits, if the right to options and right to nominate for the benefits of options, are treated as incidental benefits and not income liable to be taxed as capital gains. The benefit that the assessee had by the virtue of holding the option rights and by the virtue of holding right to nominate a Vodafone Group entity to buy the entire equity of SMMS Investments at a price of Rs 2 crores plus interest was an advantage which accrued to the assessee in the course of the business he was carrying out, and it cannot, therefore, be considered in isolation of the business of the assessee. These options are clearly fruits of business of holding investments that the assessee was engaged in. We have noted that it is not the specific case of the assessee that he was engaged in all these investments in various options and arrangements to hold investments interests of its group entities but hat aspect of the matter, in our considered view, is obvious from the series of investments that the assessee has made for which only commercial justification is interests of its holding company. If there was any rationale in making these investments, and we cannot infer the activities of the assessee as meaningless random exercise, the investments were in the course of business of investments. It is so evident from a plain look at the relevant facts. While dealing with this aspect of the matter, we may also refer to the following extracts from the written submissions filed by the learned DR:

3.6 The following facts also prove that the income arising from this transaction would be taxable as Profits and Gain of Business and Profession:

(1) The appellant has not challenged the action of the AO of taxing this transaction as business income at all in any of the grounds taken before the Hon'ble ITAT. If no specific ground has been taken by the appellant, it shows that the appellant has accepted the treatment given by the AO of treating the ALP of this transaction as business income. The only ground taken by the appellant is a miscellaneous ground (which is ground No.25) in the appeal and that too was against non-disposal of rectification application under Section 154 by the AO. The rectification application filed by the appellant is placed on Page No.656 of Paper Book No.2 of the appellant's submission. Since the rectification application is pending with the AO, the grievance of the appellant, if any, would arise only when the application u/s.154 is disposed off by the AO. Till then, there is no apparent grievance on the part of the appellant. If the appellant is aggrieved with the order of the AO, a specific ground is required to be taken by the appellant before the Hon'ble Tribunal. Therefore, the first argument of the Revenue is that the appellant has accepted the treatment of the income arising from the transaction as business income as has been specifically been assessed as such by the AO as per the computation of income on the last page of the Assessment Order. Therefore, there is no dispute on this issue as there is no specific ground raised by the appellant before the Hon'ble ITAT.

(2) The appellant has paid an amount of Rs.21.25 crores as Termination fees which has been debited in the Profit & Loss Account as an extraordinary item. However, on perusal of Column 17(a) of 3CD Report prepared by the appellant for the impugned year does not show this payment on Capital Account which is placed on Page No.65 of the PB-1 of the appellant. This also proves that the alleged payment of Rs. 21.25 crores has been shown by the appellant on account of revenue.

(3) As per the balance sheet of F.Y. ending on 31/03/07, the appellant's total share capital and reserves and surplus (shareholders funds) was Rs. 45.60 crores. Out of which, the investment in the fixed assets was to the tune of Rs. 40.84 crores (net). The current assets of the appellant was 45.67 crores whereas the current liabilities and provisions were 40.42 crores leaving net current assets of only Rs. 5.25 crores. Out of total current liabilities, the appellant has taken advance from related party ie Hutchison call centre holdings ltd. to the extent of Rs. 27.86 crores which appears to be short term loan/advance. Admittedly, in this year, the appellant has entered into option agreement with various parties such as AS, AG and SMMS for the stake of 15.4% in VIL. The total value of this stake would be approx 11500 crores. (if enterprise value of VIL is taken at 11 Billion dollars on the date of acquisition which was paid by Vodafone for 67% stake) so the total commitment by the appellant was to this extent. Even if the appellant has to pay 10% of this amount for securing these option rights, it would amount to Rs. 1150 crores. However, the total shareholders funds of the appellant were only Rs.45.6 crores as on 31/03/2007. Therefore, by no stretch of imagination, the same can be termed as investment as appellant has no source for this kind of investment. Therefore, the transaction of acquiring option rights is clearly in the nature of adventure in the nature of trade. The Balance sheet of 2007-08 is placed on page no. 810 of PB 6 of Revenue. One the principles enunciated by various courts is whether the investment made by the appellant is from readily available funds, or within financial capability of the assessee or otherwise. Since it is clearly demonstrated here that the appellant did not have the financial capability as well as readily available funds for this kind of investment, the same would be an adventure in the nature of trade and assessable as profits and gains business or profession.

(4) It is also seen that the appellant has made systematic investment. The appellant has been carrying out regular activities in case of options, the details of which is given by the TPO on internal page 31 of his order. The appellant kept decreasing its options regularly thereafter.

(5) Appellant was dealing in options all the time. Therefore trade in F&O is always in the nature of business. TPO's order detailing the reduction in the options is given on internal page no 31 of TPO's order.

(6) One of the other important principles enunciated by courts is that whether the investment has been made with the view to earn dividends or not. If the investment has been made for earning dividends the same would qualify as investment. The appellant had made an investment of Rs.1360 crores in 0.1% redeemable preference shares of SMMS Investments Pvt. Ltds as on 31/03/2011 which is evident from the balance sheet placed on page no.1035 of PB-7 of the Revenue. Therefore, it can clearly be concluded that investments has not been made for earning dividends at all.

(7) The appellant has carried out Systematically subscribing to the preference shares almost every year. The details of the Preference Shares acquired by the appellant as per the Put options given to IDFC Investors are as under :

6. ***IDFC fund II purchase of 1,00,000 pref shares worth 100 crores at Rs. 145 crores on 29/04/2009 (PB 7 of Revenue page no 1000)***
7. ***Purchase of 85000 preference shares of SMMS seriesA2 series for Rs. 107.95 crores (purchase price of Rs. 85 crores + premium of 22.95 crores on 22/06/09 (PB vol 7 page no 1000)***
8. ***Purchase of 2,00,000 preference shares of SMMS seriesA1 series for Rs.251.6 crores (purchase price was 200 crores + premium of Rs. 51.6 crores on June 2008 (PB 7 of Revenue page no 976)***
9. ***Purchase of 2,15,000 preference shares of SMMS seriesA3 and A4 series for Rs.273.5 crores (purchase price was 215 crores + premium of Rs. 58.5 crores on 9th June 2010 (PB 7 of Revenue page no. 1035)***
10. ***Total Investment made by the assessee Rs. 1361 crores in the preference shares of 0.1% redeemable cumulative preference shares.***
    i. ***Total amount paid for 0.1% preference shares 600 crores and Premium paid is Rs. 178.05 crores. A also invested initially Rs. 583 crores in the preference shares of SMMS during the F.Y. 2006-07. (PB 6 page no 814)***
    ii. ***The aseesee also invested 170 crores in preference shares of Jaykay fin, a subsidiary of TII***
    iii. ***The appellant also invested 129.7 crores in the preference shares of TII (Same page on PB 6)***

(8) This also shows the financial role played by the appellant from day one which resulted in regular investment activity by the appellant. The appellant also made the following payments over the years:

(g) **Payment of Rs.62.23 Cr. To IDFC Investor for assignment of cashless option. However, no shares of HEL came to assessee though it was entitled to acquire 0.123% of Vodafone India Limited share from Omega.**

(h) **Part payment of 4.73 crores to AS towards the annual option fee during F.Y. 2011-12 and charged it to its Profit & Loss account.**

(i) **The IDFC Framework Agreement dated 6th June 2007 was terminated during F.Y. 2011-12 vide Termination Agreement dt. 24/11/2011 and assessee has paid Rs.21.25 cr. for which it has not received a single share.**
(j) **Assessee paid Rs.68.41 crores to AS towards option fee in F.Y. 2012-13 and charged it to Profit & Loss account.**
(k) **Assessee paid Rs.11.28 cr., to AS towards option fee and charged it to Profit & Loss account in F.Y. 2013-14.**
(l) **The appellant also paid a termination fee of 21.25 crores in this year.**

152. While we see merits, in principle, in plea of the learned DR, in the given set of facts this plea cannot be accepted. When we are to compute income from the business of investments, as per the mandate of Section 92(1), income is to be computed on the basis of arm's length price of international transaction. Therefore, there is no illegality, as such, in the action of the Assessing Officer in computing the business income by taking into account arm's length price of nominating a Vodafone Group entity as recipient of right to purchase capital of the SMMS Investments for a nominal price of Rs 2 crores plus interest – particularly when admittedly intrinsic worth of these shares, because of the assets held by the company, was several hundred times higher than such a consideration. The question that one has to consider in this case is that if the assessee was to nominate a person as such, what should have been arm's length consideration of this nomination, and whatever be such arm's length consideration, business profits are required to be computed essentially on that basis. When a transaction entered during the course of business results in a capital gain, it can only be taxed as such, and that's is the reason why income on alienation of investments, even when assessee is engaged in the business of investments in shares, is treated as capital gain. However, when business is of trading in shares etc, there is no occasion to treat the same as capital gain because by the virtue of investments forming part of stock in trade, it ceases to be a capital asset under section 2(14). In any case, the Assessing Officer has treated the income as a business income, and the assessee has not raised any specific ground against the same except for being aggrieved of the non-disposal of rectification petition. Having said that, however, we have also noted learned Departmental Representative has argued at length, spread over several days, that the international transaction in question results in a capital gain. There cannot be a capital gain and business income at the same time. When income on account of a transaction is held to capital gains, for that reason alone, it ceases to taxable under the head business income.

153. In effect thus, we hold that while the income is question is indeed of the nature which can may, in certain circumstances, can be taxable under the head 'profits and gains from business and profession', given the facts and circumstances of the present case, it is required to be taxed as capital gains.

154. Learned counsel for the assessee has contended that in any event, the TPO has committed an error in attributing 3.15% stake of SMMS indirectly held in VIL, through Omega, overlooking that CGP held 79.98% stake in SMMS, through TII, and, as a corollary held 2.52% in VIL, through TII via SMMS/Omega, with the balance controlled by Analjit Singh Group, which again, in an error that DRP failed to rectify".

155. We are unable to see any merits in this plea either. It is so for the reason that the right that was assigned by the assessee to TII was for purchase of entire equity of SMMS Investments and the SMMS Investments admittedly controlled, through Omega, 3.15% equity in Vodafone India Ltd. Once it is an undisputed position that the right of nomination covers entire equity of SMMS Investments in favour of the assessee, the fact of 79.98% actual holding by CGP, in our considered view, does not really matter. The question that is relevant for finding out the ALP of consideration is as to what is really transferred, and undisputedly that is 100% equity shares in SMMS Investment which entitles the assignee to control 3.15% shareholding in VEL. What the assignee actually does with what he gets does not affect the consideration. In any event, sufficient specific details and complete facts were not placed on record at any stage, and even before us. In the absence of specific details in support of this plea and in view of the fact that the nomination was in respect of entire equity in SMMS Investments, we reject this plea as well.

156. Learned counsel's next point is that the lower authorities erred in accepting the assignment of cashless options to Vodafone as a comparable case since this event took place more than three years ago, and, since, going by the stand of the revenue, it was an intra AE transaction anyway. Learned counsel has also pointed out several distinguishing features in the international transaction in question vis-à-vis the comparable adopted by the TPO as also the transaction between ETHL Communications Holdings Ltd and Piramal Healthcare Limited. In view of these distinguishing features, which are admittedly in respect of form rather than substance, we are urged to discard the comparables.

157. We are unable to see as to, given the facts of this case, what benefit will be derived by the assessee from this plea. It is only elementary that the onus of benchmarking the transaction is on the assessee but the assessee has not discharged the same as all along he has persisted with his plea that there is no international transaction at all. Yet, when comparables are adopted by the TPO, all sort of hyper technical objections are raised about the comparables. There is no dispute that the assessee was confronted with the share purchase agreements between ETHL Communications Holdings Ltd and Piramal Healthcare Ltd, but the objection of the assessee is that the information so confronted to the assessee was without a specific show cause noticed attached to the documents and thus making it clear that these comparables were to be adopted. Such objections are simply not acceptable. There was clearly a context to the assessee being confronted with this information, and a specific show cause notice also would not have stated anything other than obvious and what could have been inferred by the assessee on his own. The hyper technical objection of the assessee cannot be accepted, and, in any case, as is the settled legal position those seeking legal remedies must come with clean hands. The assessee's conduct, its not benchmarking the international transactions, its being less than forthcoming and transparent in sharing the information in its exclusive knowledge leaves a lot to be desired. The assessee was provided with records obtained under section 133(6) with respect to share purchase agreements dated 10th August 2011 and 3rd February 2012 between ETHL Communications Holdings Ltd and Piramal Healthcare Ltd, and copies of these agreements were also placed before us at pages 1597- 1629 and 1647-1651 of the paper book Volume 4. No specific and legally sustainable objections to at least this comparable have been raised by the assessee; the assessee is simply living in denial. As evident from the consideration set out at page 1627, the consideration in this agreement was Rs 3,071.07 crores, for a VEL shareholding, at stated at page 1626, of 5.485%. Adopting this as a comparable, the arm's length price of 3.15% holding comes to Rs

1,727 crores. No matter how liberal an adjustment is made for indirect holding, in any event, the ALP of nomination to buy the entire equity of SMMS Investments, which held 3.15% shareholding in VEL, for a consideration of Rs 2 crores plus interest, this ALP will be far more than 1,588.85 crores. Since this Tribunal has no powers of enhancement, even if we discard the comparable as adopted (i.e. assignment of rights by IDFC to acquires 0.1234% shareholding in VEL for Rs 50 crores), the assessee does not derive any advantage. The plea raised by the assessee is thus wholly academic and does not deserve any adjudication by us at this stage. As for issues raised by the learned counsel with respect to dissimilarities between the nomination rights exercised by the assessee and the transactions compared with, all we can say is that even if the comparable transaction is not a mirror image of the international transaction in question, it does not cease to be relevant in determination of ALP as long as, in substance, and in effect, things are comparable- though, depending upon the facts of the case, adjustments will be justified.

158. Keeping in view the above discussions, as also entirety of the case, we reject all the pleas of the assessee so far as transfer pricing provisions are concerned.

159. We may, however, add that even as we uphold the ALP adjustment, the manner in which income is computed is something which is clearly contrary to the scheme of the Act. The Assessing Officer has simply added the entire amount of ALP as income in the hands of the assessee- something which is clearly impermissible. Once a stand is taken that the ALP determination is in respect of a capital gain, the natural corollaries have to follow. To this extent, the computation of income in the impugned order is required to be modified and the gains in question are required to be treated as capital gains.

160. As we part with this aspect of the matter, we may add, no matter how naïve we may seems to be, that, from a layman's perspective, this transaction could also be viewed is a simple transaction in which a subsidiary is rendering certain services to its parent company in pursing the legitimate business and investment interests of the parent company, but the subsidiary is not adequately, and in fact not at all, compensated for the services so rendered. That, however, is nobody's case. We leave it at that.

159. Subject to the above observations, ground nos. 1 to 14 are dismissed.

160. We now move to the corporate tax grounds raised by the assessee.

161. In ground nos. 15 and 16 plead that both the lower authorities have erred in law as well as on facts in denying depreciation on goodwill amounting to Rs.19,53,97,454/- on account of its amortization. These grounds are as follows:-

> ***15. That the AO and DRP erred in making a disallowance of Rs.19,53,97,454/- in respect of depreciation claimed by the appellant on goodwill relating to acquisition of call centre business of VGEL, by mechanically following the DRP directions for AY 2011-12, without appreciating that goodwill is an 'intangible asset' under Section 32 of the Act.***

> ***16. That the AO and DRP erred in following order of AY 2011-12 and not considering the bifurcation of assets and liabilities acquired by the appellant details of which were provided to the AO vide submission dated 29.02.2016."***

162. There is no dispute about the assessee having acquired M/s. "VEGL" call center business on 08.11.2008 by way of a business transfer agreement (BTA) as a going concern on slum sale basis effective from 01.11.2008. Its case throughout has been that the said agreement defines "business assets" to mean assets and liabilities, working capital, employees and assumed contracts pertaining to the above call center business. The assessee further pleaded to have paid consideration amount of Rs.160.54crores to the above entity. It computed net assets value at Rs.1.84 crores whereas the remaining consideration was recorded as "goodwill". This followed assessee's impugned depreciation claim. The Assessing Officer declines the same in assessment order in view of his corresponding findings in all preceding assessment years right from 2009-10 onwards disallowing the very claim as reproduced in assessee's written submissions before us.

163. Learned senior counsel vehemently contends that the issue as to whether the goodwill in question forms an intangible asset u/s.32(1)(ii) of the Act or not to be entitled for depreciation relief is no more *res integra* as hon'ble apex court's land mark judgment in Smiffs Securities Ltd. case (2012) 348 ITR 302 (SC) has settled the law in assessee's favour. We see no substance in the instant argument since there is no change so far as all facts pertinent to this issue vis-a-vis those involved in preceding assessment years are concerned. The authorities below have already adopted the very reasoning as in said earlier years to reject assessee's instant claim. It is not clear as to what is the fate of these assessment years before this Tribunal. Learned counsel at this stage submits that assessee's appeal for the said earlier assessment year 2011-12 is pending but the position of the earlier years is not clear. In any event, there is no independent adjudication on this issue by the Assessing Officer. In view of these discussions, in our considered view, the matter is required to be remitted to the file of the Assessing Officer for adjudication de novo by dealing with the specific issues raised by the assessee and in the light of whatever is the position in respect of earlier assessment years- particularly as we have donot have the benefit of knowing the precise status of outcome of appeals before this Tribunal. As learned counsel states that 2011-12 is pending before this Tribunal, the Assessing Officer is directed to take into account the decision of this Tribunal for the assessment year 2011-12, as indeed any other assessment year, as may be available to the Assessing Officer at the point of time when he so decides the matter afresh.

164. In the result, Ground Nos. 15 to 16 are allowed for statistical purposes.

165. In ground No. 17 to 21 challenge correctness of both the lower authorities' action invoking Section 14A r.w. Rule 8D disallowance of Rs.8,30,32,750/- made in course of the impugned assessment forming subject matter of challenge before us. These grounds are as follows:-

> ***17. That the AO and DRP erred in making a disallowance Rs. 8,30,32,750/- under Section 14A of the Act read with Rule 8D of the Income Tax Rules, without appreciating that the Appellant has not earned any exempt income in AY 2012-13.***

18. That the DRP erred in confirming the aforesaid disallowance by following the DRP directions of AY 2011-12 which relied on the decision of the Special Bench of the Delhi Tribunal in Cheminvest Ltd. v. ITO [2009) 124 TTJ 577, without appreciating that the said decision has been reversed by the Hon'ble Delhi High Court in [2015] 378 ITR 33(Del).

19. That the AO and DRP erred on facts and in law in not appreciating that no expenses had been incurred in earning the exempt dividend income. The AO and DRP also failed to consider that investments as reflected in balance sheet for the year ended 31 March 2012 have been made out of internal accruals and no borrowings have been made for the purposes of investments.

20. That the AO erred on facts and in law in invoking the provisions of section 14A of the Act, and was bound to record his satisfaction that having regard to the books of accounts of the Appellant, no expenditure was actually incurred for earning the exempt dividend income.

21. Without prejudice, that the AO and DRP erred in disallowing expenditure of Rs.8,30,32,750/- while computing book profits under Section 115JB of the Act without appreciating that no such adjustment was permissible under Section 115JB of the Act.

166. Suffice to say, the lower authorities fail to dispel assessee's basic plea of having not derived any exempt income in the impugned assessment year. Hon'ble jurisdictional high court's recent judgment in **CIT Vs Corrtech Energy (P) Ltd. [(2015) 372 ITR 97 (Guj)]** holds that such a disallowance under section 14(A) is not sustainable in absence of any exempt income having been derived in the relevant previous year. We therefore accept the plea of the assessee and delete the impugned disallowance of Rs 8,30,32,750.

167. In the result, Ground Nos. 17 to 21 are allowed.

168 This leaves us with assessee's last grievance in grounds no. 22 to 24 challenging the lower authorities' action disallowing club membership expenditure of Rs.53,82,480/- incurred towards entrance fee, subscription fee, processing fee and annual game fee of Puna Club Ltd. and Karnavati Club Ltd. by holding that the same provided enduring benefits rendering the expenditure in question to be capital in nature. The grounds raised by the assessee are as follows:-

"22. That the AO and DRP erred in making addition of Rs.53,82,480/- incurred towards entrance fee, subscription fee, processing fee and annual game fee of Poona Club Limited and Karnavati Club Limited, by erroneously holding that such membership provided an enduring benefit to the Assessee and was capital in nature.

23. That the DRP erred in not adjudicating other grounds of objection raised by the Appellant pertaining to (a) disallowance not exceeding expenses, (b) amortization of subscription fees, and [c) computing disallowance of club membership expenses, and a singular invoice considered twice leading to dual addition.

> ***24. The Applicant has filed rectification application in this regard, both with the AO on 31.03.2016 and with the DRP on 16.01.2017 which is pending for disposal.***

169. We notice that the assessee has throughout been pleading that the impugned expenditure is wholly and exclusively incurred for the purpose of its business. We find from assessment order that the assessee itself had clarified to have paid subscription fee regarding Puna Club for seven years in the nature of entrance fee etc. This has made the Assessing Officer to accept its case qua the corresponding 1/7th extent coming to Rs.3,97,080/- only thereby disallowing the remaining amount of Rs.23,82,480/-. Learned counsel fails to dispute that the assessee had not filed the relevant details qua a similar time duration relating to latter Karnavati Club. We therefore reject assessee's arguments qua former club payment issue after concluding that the authorities below have rightly followed matching concept in accepting the impugned expenditure pertaining to the relevant assessment year. Coming to latter club, we direct the Assessing Officer to verify the relevant facts as to whether the impugned membership expenditure has been incurred for the relevant previous year in entirety or not. That being the case, the assessee is directed to file necessary details for appropriate verification of the relevant facts. The instant issue is taken as partly allowed for statistical purposes.

170. In the result, Ground Nos. 22 to 24 are partly allowed for statistical purposes.

171. We find that the assessee has also taken Ground No.25 pleading to the effect that it has filed a rectification application dated 13.02.2017 before the Assessing Officer raising the following substantive contentions:-

> ***"25. The Assessee has, on 13 February 2017, filed a rectification application inter alia highlighting the mistakes apparent on record which are enumerated in detail as under:***
>
> ***a) Disallowance on account of club expenditure of Rs. 53,82,480/- in the assessment order. In this regard, as submitted earlier vide rectification application dated 13 February 2017 (which is pending for disposal), the actual disallowance of club expenses would amount to Rs. 34,70,100/-.***
>
> ***b) The Assessee for the captioned AY had computed and reported book loss under Section 115JB of the Act amounting to Rs. 9,94,13,659/- in the return of income. However, the AO has erroneously considered the book profit of Rs. 40,06,45,113/- under Section 115JB of the Act and accordingly, worked out the total book profit of Rs. 48,36,77,863/- post-adjustment under Section 14A of the Act***
>
> ***c) The AO erred in computing tax payable on the alleged transfer pricing adjustments at the rate of 30%, i.e. treating the adjustment as business income. It is the case of the Revenue that Assessee relinquished/extinguished its rights in options, which arc capital assets; therefore, the tax, if any, arising on alleged relinquishment / extinguishment should be levied at the rate of 20%, because the options would (purportedly) classify as long term capital assets as per the provisions of section 2(29A) of the Act.***

d) In the income tax computation form, the tax payable has been determined without giving credit of prepaid taxes, viz. 'advance tax' amounting to Rs. 80,00,000/- and 'tax deducted at source' of Rs. 15,67,77,158/- aggregating Rs. 16,47,77,158/-.

e) Pursuant to rectification of mistakes as highlighted in (a) to (d) above, interest charged under section 234B of the Act will correspondingly decline.

f) The AO has in the Income-tax computation form charged interest of Rs. 27,25,115/- under section 234C of the Act; interest under this section is required to be computed on the returned income, which is NIL in this case. Accordingly, the interest under Section 234C of the Act should stand deleted."

172. Shri Soparkar submits that the said rectification application is yet to be decided at the Assessing Officer's end. There is, therefore, no need for our adjudication on this aspect of the matter. Suffice, however, to say that the rectification petition should be disposed of in a reasonable time frame, and such an inordinate delay in disposal of the rectification is indeed undesirable. We hope that the Assessing Officer will take note of our observations and dispose of the petition at an early date.

173. In the result, Ground No.25 is dismissed as premature.

174. As we part with the appeal, we may place on record our deep appreciation for the immense help rendered to us by both the learned representatives and their respective team members. Legal erudition of learned Senior Advocate and Commissioner (DR) at the bar apart, the indefatigable efforts, rich knowledge and thorough research of the team members was also second to none. We may also add that a very large number of judicial precedents were cited at the bar and many of these precedents have not been specifically dealt with as these judicial precedents were either repetitive or were not relevant in the context of the our adjudication.

175. In the result, the appeal of the assessee is partly allowed, in the terms indicated above. Pronounced in the open court today on the 23rd day of January 2018

Sd/xx	***Sd/xx***
S S Godara	**Pramod Kumar**
(Judicial Member)	(Accountant Member)

Ahmedabad, Dated the 23rd day of January, 2018

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

By order

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad