आयकर अपीलीय अधिकरण, **'डी' न्यायपीठ, चेन्नई।**
IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH: CHENNAI

श्री महावीर सिंह, माननीय उपाध्यक्ष, एवं
श्री **मंजूनाथा. जी, माननीय** लेखा सदस्य **के समक्ष**
BEFORE SHRI MAHAVIR SINGH, HON'BLE VICE PRESIDENT AND SHRIMANJUNATHA.G, HON'BLE ACCOUNTANT MEMBER

आयकरअपीलसं./**ITA No.269/Chny/2022**
निर्धारणवर्ष**/Assessment Year: 2017-18**

M/s.Cognizant Technology-Solutions India Pvt. Ltd., 5/535, Okkiam, Thoriapakkam, Old Mahabalipuram Road, Chennai-600 096.	**v.**	The Asst. Commissioner-of Income Tax, Large Taxpayer Unit-1, Chennai.
[**PAN:**AAACD 3312 M] **(**अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी**/Respondent)**

अपीलार्थी की ओर से/ Appellant by	:	Shri Ajay Vohra, Sr.Counsel For Shri N.V. Balaji, Adv.
प्रत्यर्थी की ओर से /Respondent by	:	Shri R.Shankaranarayanan, Additional Solicitor – General of India For Shri A.P.Srinivas, Sr. Standing Counsel
सुनवाईकीतारीख/Date of Hearing	:	03.07.2023
घोषणाकीतारीख /Date of Pronouncement	:	13.09.2023

आदेश **/ O R D E R**

PER.MANJUNATHA.G, ACCOUNTANT MEMBER:

This appeal filed by the assessee is directed against the order of the Commissioner of Income Tax (Appeals)-18, Chennai, dated 03.03.2022,and pertains to assessment year 2017-18.

2. The assessee has raised the following grounds of appeal:

1. The order under section 115-O of the Income-tax Act, 1961 ('the Act') as upheld by the learned CIT(A) is factually and legally without basis; is contrary to the facts of the case and the provisions of the Act; is violative of principles of equity and natural justice, and is prejudicial to the interest of the Appellant on the grounds, inter alia, set out below. The grounds of appeal listed below are without prejudice to each other.

2. The order under section 115-O of the Act passed by the learned AO, and upheld by the learned CIT(A), treating the Scheme of Arrangement and Compromise ('the Scheme') approved by the Hon'ble Madras High Court in C.P. 102 of 2016 under section 391 to section 393 of the Companies Act, 1956 in the Appellant's case for purchase of own shares, as a Scheme for 'capital reduction' is violative of the Scheme itself as also the order of the Hon'ble High Court.

3. The order under section 115-O of the Act passed by the learned AO, and upheld by the learned CIT(A), erroneously treats the consideration paid by the Appellant for purchase of its own shares from its shareholders in accordance with the Scheme as dividend as per section 2(22) of the Act.

4. The learned CIT(A) has erred in holding that "what is excluded from the definition of dividend us 2(22) and brought into the purview of Sec. 46A is the 77A buy-back of shares and not any other 'purchase of own shares'".

5. The order under section 115-O of the Act passed by the learned AO, and upheld by the learned CIT(A), fails to appreciate that consideration paid by the Appellant for purchase of its own shares in accordance with the Scheme is taxable as capital gains in the hands of the shareholders under section 46A of the Act.

6. The learned CIT(A) has erred in alleging that the "distribution of accumulated profits to shareholders and the 'scheme of arrangement and compromise' is a device designed by the assessee" for repatriation of accumulated profits outside the country without paying the due tax.

7. The learned CIT(A) has erred in holding that the provisions of section 46A of the Act are applicable only to purchase of own shares undertaken in accordance with section 77A or section 391 read with section 77A of the Companies Act, 1956 and is not applicable to purchase of own shares under section 391 of the Companies Act, 1956 which is contrary to the clear and unambiguous language of section 46A of the Act, where no such distinction is provided for.

8. The order under section 115-O of the Act passed by the learned AO, and upheld by the learned CIT(A), fails to appreciate that subsequent amendment in section 115QA of the Act with effect from June 1, 2016, clearly indicates the legislative intent and taxation framework that purchase of its own shares under the Scheme by the Appellant, was covered under section 46A of the Act and not under section 2(22) of the Act.

9. The learned CIT(A) erred in rejecting the submission of Appellant on applicability of section 46A (to purchase of own shares up to 31 May 2016) and section 115QA (to purchase of own shares after 1 June 2016), by artificially dissecting the term "buy-back" into (a) Buy-back, and (b) Purchase of own shares not amounting to buy-back, which is contrary to law, besides being illogical.

10. The learned CIT(A) erred in confirming the findings of the learned AO, which were on points not covered by the Show Cause Notice dated 22 March 2018.

11. The learned CIT(A) has failed to appreciate that the order passed under section 115-O of the Act and the consequent demand raised by the learned AO are in contravention to the provisions of the Double Taxation Avoidance Agreement ('DTAA') entered by India with USA and Mauritius and the principles laid down by the Hon'ble Supreme Court in UOI vs Azadi Bachao Andolan [2003] 263 ITR 706 (SC).

12. Without prejudice, the learned CIT(A) has erred in stating that the credit for INR495 crores deposited under protest during the pendency of the proceedings shall be given effect to only from April 2020 whereas the amount was moved to the regular account (Head of Account No. 106) of the Income-tax department in March 2019 itself.

3. The brief facts of the case are that the assessee, M/s.Cognizanat Technology Solutions India Pvt. Ltd., (in short "M/s.CTS India Pvt. Ltd.") is a Private Ltd. Co., and is engaged in the business of software development and related services/solutions. The assessee is operating in India since 1994 and has grown to be one of the largest Software Development Company in India. The assessee clients predominantly are in the USA. The assessee was originally a wholly owned subsidiary of CTS, USA. Thereafter, in FY 2011-12, there was a restructuring of various businesses directly or indirectly under the control of CTS, USA. Through a Court approved scheme, the Appellant Company was amalgamated with M/s.Cognizant India Pvt. Ltd. (M/s.CIPL) and M/s.MarketRx India Pvt. Ltd. (M/s.MIPL). M/s.CIPL was a wholly owned subsidiary M/s.Cognizant (Mauritius) Ltd., whereas M/s.MIPL was a wholly owned subsidiary of M/s.MarketRx Inc. USA and both of whom are wholly owned subsidiaries of M/s.Cognizant Technology Solutions Corporation, USA. During the FY 2016-17 relevant to AY 2017-18, the assessee had purchased 94,00,534 equity shares of face value of Rs. 10 each at Rs.20,297/- per share aggregating to Rs.19,080.26 Crs. from its shareholders in terms of

Scheme of Arrangement and Compromise (the Scheme) u/s.391 to 393 of the Companies Act, 1956, approved by the Hon'ble High Court of judicature at Madras vide in Company Petition No.102 of 2016 dated 18.04.2016. The purpose and manner in which purchase of shares from shareholders has been specified in Scheme document approved by the Hon'ble High Court of Madras. In accordance with the Scheme as sanctioned by the Hon'ble High Court of Madras, the assessee purchased 94,00,534 equity shares (representing 54.70 % of the outstanding number of equity shares) from its shareholders and paid a total consideration of Rs.19,080.26 Crs.The shareholding pattern of the assessee prior to and after purchase of shares in accordance with the Scheme is tabulated below:

Shareholder	**Before purchase of own shares in accordance with the scheme**		**No. of Shares bought back**	**After purchase of own shares in accordance with the scheme**	
	No. of equity shares of Rs. 10 each	**Shareholding percentage**		**No. of equity shares of Rs. 10 each**	**Shareholding percentage**
Cognizant Technology Solutions Corporation, USA	37,00,747	21.53%	37,00,747	-	-
Marketrx, Inc, USA	2,38,521	1.39%	2.38521	-	-
Cognizant (Mauritius) Limited, Mauritius	1,30,77,516	76.09%	53,01,788	77,75,728	99.87%
CSS Investments LLC, Delaware, USA	1,69,478	0.99%	1,59,478	10,000	0.13%
Total	**1,71,86,262**	**100%**	**94,00,534**	**77,85,728**	**100%**

4. The details of consideration paid to shareholders and tax deducted at source is as follows:

Share holder	No. of shares bought-back	Gross Consideration (INR)	Capital gains (INR)	Tax deducted at source (INR)
Cognizant Technology Solutions Corporation, USA	37,00,747	7,511,40,61,859	7,496,38,22,485	810,73,37,402
marketRx, Inc, USA	2,38,521	484,12,60,737	483,88,75,527	52,33,24,388
Cognizant (Mauritius) Limited, Mauritius	53,01,788	10,761,03,91,036	10,748,63,57,379	Nil (Not chargeable to tax under the India-Mauritius DTAA)
CSS Investments LLC, Delaware, USA	1,59,478	323,69,24,966	323,16,36,873	34,95,01,528
Total	**94,00,534**	**1,90,80,26,38,598**	**1,90,52,06,92,264**	**8,98,01,63,318**

5. The assessee deducted TDS on consideration paid to non-resident shareholders, M/s.Cognizant Technology Solutions Corporation, USA, M/s.MarketRx Inc. USA, and M/s.CSS Investments LLC, Delaware, USA, because, treaty benefit is not available to non-resident shareholders of USA. The assessee did not withheld tax on consideration paid to M/s.Cognizant (Mauritius) Ltd., Mauritius, because, capital gain is not chargeable to tax in the hands of Mauritius shareholders in India under India Mauritius DTAA. The assessee has remitted consideration paid to shareholders for purchase of its own shares and also complied with relevant provisions of FEMA & RBI and also filed Form No.15CA after obtaining a Certificate from Chartered Accountant in Form No.15CB furnishing the details of remittances made to non-resident shareholders.

6. The assessee had filed its return of income for AY 2017-18 on 28.11.2017 declaring total income of Rs.5399,54,16,100/- and the ROI filed by the assessee has been processed u/s.143(1) of the Act, on 30.03.2019. The assessee had received a communication dated 22.03.2018 from the Office of the AO informing the assessee that it is deemed to be assessee in default u/s.115QA of the Act, for failure to pay tax u/s.115-O of the Act, in respect of consideration paid for purchase of its own shares. The AO in the said communication called upon the assessee to explain 'as to why' an order u/s.115-O of the Act, cannot be passed in respect of consideration paid for purchase of its own shares as deemed dividend u/ss.2(22)(a) / 2(22)(d) of the Act. Simultaneously, a survey u/s.133A of the Act, was conducted at the Corporate Office of the assessee. On the very same day, Garnishee notices u/s.226(3) of the Act, were issued by the AO to the assessee bankers and the bank accounts of the assessee were frozen. Challenging the aforesaid actions of the AO, the assessee has filed a Writ Petition before the Hon'ble High Court of Madras in WP No.7354 of 2018. The assessee was afforded interim protection by the Hon'ble High Court of Madras vide its order dated 03.04.2018 by way of lifting the attachment placed on the bank account subject to payment of 15% of the tax demanded and furnishing security for the balance 85% of the tax demanded in the form of lien on fixed deposits or bank guarantees. The said directions were duly complied with and the assessee has deposited a sum of INR 495 Crs.

(being 15% of the tax demanded) and has furnished security in the form of fixed deposits for a sum of INR 2,806 Crs. on which lien has been marked in favour of the CIT-LTU, Chennai. The Writ Petition filed by the assessee was dismissed by the single judge as non-maintainable and the assessee was directed to file an appeal before the Ld.CIT(A) vide order of the Hon'ble High Court of Madras dated 25.06.2019. The Hon'ble High Court of Madras while dismissing the Writ Petition has observed that the consideration paid by the assessee towards purchase of its own shares constituted dividend and that the provisions of Chapter XII-D of the Act, do not envisage any prior proceedings for a taxpayer to be treated as an 'assessee in default'. The assessee challenged the order of single judge of the Hon'ble High Court of Madras before the Division Bench of the Hon'ble High Court of Madras in Writ Appeal No.2063 of 2019. The Division Bench of the Hon'ble High Court of Madras vide its judgment and order dated 06.09.2019 allowed the Writ Appeal in part by setting aside the remarks of the Ld.Single Judge on merits. The Division Bench upheld the directions of the Ld.Single Judge with respect to filing an appeal before the Ld.CIT(A). The Division Bench had also held that all issues to be raised before the Ld.CIT(A). The assessee preferred an SLP against the order of the Division Bench before the Hon'ble Supreme Court on the ground that order dated 22.03.2018 was passed in violation of principles of natural justice without granting the assessee an opportunity of being heard and such order cannot be considered as appealable order. After

hearing the assessee and the Department, the Hon'ble Supreme Court has disposed SLP filed by the assessee on 04.03.2020 in Civil Appeal No.1992 of 2020 arising from SLP (C) No.23705 of 2019 with certain directions. As per the judgments of the Hon'ble Supreme Court, the recovery letter dated 22.03.2018 shall be regarded as a 'show cause notice', to call upon the assessee to submit its response to averments therein within a period of 10 days from the date of the Hon'ble Supreme Court's order. The Hon'ble Supreme Court further directed that the AO shall grant an opportunity of personal hearing to the assessee and thereafter pass order on merits within a period of two months from the date of the order. Pending the proceeding to pass an order on merits of the issue and also till the time period to file an appeal before the Ld.CIT(A), interim passed by the Ld.Single Judge in WP No.7354 of 2018 shall continue to be in force.

7. In accordance with the directions of the Hon'ble Supreme Court, the assessee filed its written submissions on 13.03.2020 and argued that consideration paid for purchase of its own shares from shareholders in pursuant to the 'Scheme of Arrangement &Compromise' sanctioned by the Hon'ble High Court of Madras in terms of provisions of Sections 391 to 393 of the Companies Act, 1956, cannot be considered as deemed dividend u/s.2(22)(a) / 2(22)(d) of the Act. The AO has considered detailed submissions of the assessee and classified into four-parts. Part-A deals with scheme of arrangement & Compromise and other legal

provisions relating to this scheme. Part-B contains positions adopted by the shareholder with respect to the scheme and with respect to the taxes paid thereon. Part-C contains submissions to the effect that the purchase of the shares can be taxed as capital gains u/s.46A of the Act and Part-D contains submission rebutting the contents of 'show cause notice' dated 22.03.2018.

8. The AO after considering relevant submissions of the assessee and also on analysis of various provisions of the Income Tax Act, 1961, with regard to capital gains on buyback of shares and also taken note of relevant provisions of the Companies Act, 1956, deals with buyback of shares, capital reduction and arrangement & compromise referred to u/ss.391 to 393 of the Companies Act, 1956, held that consideration paid by the assessee to its shareholders for purchase of its own shares was liable to tax as deemed dividend u/s.2(22)(d) of the Act, and alternatively, u/s.2(22)(a) of the Act, and consequently, the assessee company was liable for payment of Dividend Distribution Tax (in short "DDT") u/s.115-O of the Act. The AO has discussed the issue at length in light of certain judicial precedents and held that consideration paid by the assessee to its shareholders for purchase of its own shares under the 'Scheme of Arrangement & Compromise' u/s.391 to 393 of the Companies Act, 1956, is nothing but dividend within the meaning of Sections 2(22)(a) / 2(22)(d) of the Act. The AO further held that if you go through the scheme documents submitted by the assessee, it is clear that the

assessee has specifically excluded the provisions of Sec.77A of the Companies Act, 1956, and claimed which is not a buyback of shares as contemplated u/s.77A of the Companies Act, 1956. Therefore, purchase of own shares through any scheme/method available u/s.391 to 393 of the Companies Act, 1956, should invariably fulfill the statutory requirements stipulated u/s.100-104 and 402 of the Companies Act, 1956. To put it in simple words, when purchase of own shares is contemplated under the provisions of Sections 391 to 393 of the Companies Act, 1956, it should be invariably to be r.w.s.100-104/402 of the Companies Act, 1956, or u/s.77A of the Companies Act, 1956, and thus, without invoking provisions of Sections 100-104/402 of the Companies Act, 1956, the provisions of Sections 391 to 393 of the Companies Act, 1956, is inoperative as far as the buyback of shares are concerned. Therefore, opined that consideration paid by the assessee to its shareholders for purchase of own shares through a 'Scheme of Arrangement & Compromise' sanctioned by the Hon'ble High Court of Madras, is akin to distribution by a company of accumulated profit whether capitalized or not, if such distribution entails the release by the company to its shareholders of all or any part of the assets of the company, and thus, said payment is taxable as deemed dividend u/s.2(22)(a) of the Act. The AO further held that alternatively consideration paid by the assessee to its shareholders for purchase of its own shares, is akin to any distribution to its shareholders by a company

on the reduction of its capital to the extent to which the company possess accumulated profits which arose after the end of the previous year ending next before the first day of April, 1983 whether such accumulated profits have been capitalized or not and said transaction comes under the definition of deemed dividend as per u/s.2(22)(d) of the Act. In other words, the AO held that consideration paid by the assessee to its shareholders for purchase of its own shares is nothing but reduction of capital in terms of Sections 100-104/402 of the Companies Act, 1956, and thus, the assessee is liable to pay DDT u/s.115-O of the Act, and thus, rejected arguments of the assessee and computed DDT on total consideration paid, amounting to Rs.19,080.26Crs. to its shareholders and computed tax liability of Rs.4853.42 Crs.

9. Being aggrieved by the assessment order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee reiterated its arguments made before the AO along with certain judicial precedents and argued that the powers of the Hon'ble High Court of Madras u/s.391 to 393 of the Companies Act, 1956, has been held to be complete code in itself and such power is independent and de horse Sec.77A of the Companies Act, 1956. In other words, the assessee submits that 'Scheme of Arrangement & Compromise' sanctioned by the Hon'ble High Court of Madras in terms of Sections 391 to 393 of the Companies Act, 1956, cannot be considered as buyback of shares in terms of provisions of Sec.77A of the Companies Act, 1956, and also

reduction of capital in terms of provisions of Sec.100-104/402 of the Companies Act, 1956. The Ld.CIT(A) after considering relevant submissions of the assessee and also by taking note of various facts brought on record by the AO, discussed the issue at length and held that consideration paid by the assessee to its shareholders for purchase of its own shares through the 'Scheme of Arrangement & Compromise' sanctioned by the Hon'ble High Court of Madras involves capital reduction and is deemed dividend within the purview of Sections 2(22)(a) / 2(22)(d) of the Act, and thus, there is no error in the reasons given by the AO to determine DDT u/s.115-O of the Act. The relevant findings of the Ld.CIT(A) in nutshell to sum up as under:

> *9.27 In nutshell to sum up:*
>
> - *Assessee's impugned transaction of "purchase of its own shares" from its NR shareholders involved mandatory 'capital reduction' to the extent of reducing 54.7% of the total paid-up share capital. Capital reduction to this extent in the transaction is an indisputable fact.*
>
> - *In the transaction, the assessee distributed over Rs.19,099/- crores of its accumulated profits to its NR shareholders. Such payment from accumulated profits to its NR shareholders in the transaction is also an Indisputable facts.*
>
> - *The capital reduction accompanied by distribution of accumulated profits is evident from para 7.2 and 7.3 of the Court approved Scheme as well as from the conduct of the assessee and also as established by the data from the assessee's balance sheet itself.*
>
> - *Admittedly, the impugned transaction is not a buyback u/s 77A of the Companies Act 1956. This is also an indisputable fact.*
>
> - *The above glaring indisputable facts have not been controverted by the assessee.*
>
> - *As per section 2(22)(d) of the Income tax Act, any distribution by way of capital reduction to the extent of accumulated profits is dividend.*
>
> - *With these indisputable facts, as all the conditions u/s 2(22)[d) are satisfied, the inevitable and inescapable conclusion is that the payment in the impugned transaction to the NR shareholders is dividend and the assessee is liable to pay DDT u/s 115-0.*
>
> - *Assessee tried to project that its "purchase of own shares" is u/ s 391 of Companies Act 1956 and it is per se not a transaction of capital reduction. The argument falls flat as "purchase of own shares" cannot be effected without capital reduction. [Reliance is also placed on the decision of the Hon'ble Supreme Court in the case of*

Ramesh B. Desai vs. Bipin Vadilal Mehta [2006] 69 SCL 211 (SC).] Other than the nature of 77A buy-backs, purchase of own shares' is just not possible without effecting 'capital reduction'; in reality also, assessee has carried out the impugned transaction of 'purchase of own shares' by effecting 'capital reduction only. Admittedly, assessee's transaction is not a 'buy-back' u/ s 77A of Companies Act 1956; it exceeds the limit of 25% of total paid-up equity capital fixed in section 77A also. Section 391 cannot be read standalone for the purpose of "purchase of own shares" and it has to necessarily read with section 77 and section 100 of the Companies 1956. Purchase by virtue of Section 77 of Companies Act 1956 or 57 Companies Act 2013is for mandatorily effecting capital reduction. Such purchase cannot be made simpliciter divorced off a reduction capital. Reduction in capital is sine qua non for any purchase of own shares other than sec 77A including that under sec391. Even if the assessee argues that "purchase of its own shares" was done u/s. 391 simpliciter, even then, what happened in reality in the transaction is capital reduction [to the extent of 54.7% of total paid-up share capital], which the assessee has been unable to controvert.

- *Almost all the court decisions available on the subject invariably hold that 'purchase of own shares' (other than 77A buybacks) done u/s 391 should always be read with section 100. None of these decisions hold that such transaction does not involve capital reduction. This has been elaborated under para 9.9.2 above.*

- *Assessee tried to argue that its 'purchase of own shares' is not possible u/s 77 r.w.s 100, as purchase of own shares from its related shareholders was not made in proportionate basis and option has to be given to the shareholders, which are not possible u/s 100 and hence, it had to resort to section 391. The argument of the assessee is patently wrong in view of the explicit provisions of law. 'Capital reduction' can by effected in any way/ in any manner as per section 100 of the Companies Act 1956 {as explained already in paras 9.3.3, 9.3.4 and 9.3.5)for the purposes of 'purchase of own shares', as resolution can provide for any flexibility, subject to adoption of fair value of shares in the transaction. There is no bar in the law in providing for disproportionate purchase (involving capital reduction accordingly) and option for shareholders in the resolution. Resorting to single window section 391 helps avoid approval again· u/s 100, but capital reduction invariably happens in accordance with sections 100-104 in 'purchase of own shares' other than buy-back u/s 77A.*

- *Assessee tried to say that its transaction is "purchase of own shares" and that purchase of shares will not lead to dividend. This argument is against the facts and position of law and is not tenable. The purchase is not mere general purchase of shares; it is purchase of its own shares; as the transaction is not buy-back u/ s 77 A of Companies Act 1956, the "purchase of own shares" is for mandatorily effecting capital reduction. Without capital reduction, "purchase of own shares" is not possible by operation of law. What has happened in reality is also capital reduction to the extent of 54.7% of the total paid-up share capital which fact the assessee is not denying.*

- *Though the assessee admits that there is capital reduction, it tries to say that it is the end result of the transaction of 'purchase of own shares' and that taxation should be looked into on its transaction of 'purchase of own shares' and not from the end result point of view. The argument of the assessee is not correct. Capital reduction is intrinsic part of 'purchase of own shares'. Without capital reduction, 'purchase of own shares' is not possible. Para 7 .3 of the impugned scheme also confirms to this fact. More precisely. it is transaction of 'reduction of capital' through 'purchase of own shares'. Further, for the purposes of section 2(22)(d), what is to be seen is whether there is capital reduction; if the answer is yes, then, section 2(22)(d) comes into play. Whether it is 'transaction of capital reduction through purchase of own shares' or 'transaction of purchase of own shares involving capital reduction' or 'capital reduction being the end result of the transaction of purchase of own shares' etc do not in fact really matter. It is to be noted that section 2(22)(d) simply refers to 'reduction of capital' and it does not even refer to any section of the Companies Act. Only clause (iv) of Sec. 2(22) stipulates that it should not be buy-back u/s 77A. What is to be seen is whether there is capital reduction or not. 'Capital reduction' happened in the transaction is an undeniable fact; it is not buy-back u/s 77A is also an undeniable fact. Then, section 2(22)(d) comes into play automatically.*

- *Even if for argument sake, it is taken that 'capital reduction' is not the transaction, even then, the payments to the shareholders gets covered u/s 2(22la), as the accumulated profits were distributed to the shareholders entailing part of the assets of the company and the transaction not being u/s 77A and thus the assessee is liable to pay DDT u/s 115-0.*

- *In fact, assessee's May 2013 transaction was 'buy-back' of shares u/s 77 and hence, it was exempt from section 2(22)(a) in view of clause (iv) of section 2(22) and the assessee rightly applied section 46A as it was buyback u/s 77A. The present impugned May 2016 transaction of 'purchase of own shares' is admittedly not a buy-back' u/s 77A; so, even if the assessee claims that it is not a transaction of capital reduction, the transaction stands covered/s 2(22j(a), as accumulated profits were distributed to shareholders entailing part of the assets of the assessee company.*

- *For escaping from section 2(22)(d), the assessee says the transaction is not capital reduction; for escaping from section 2(22)(a), the assessee says the transaction involves only 'payment' from accumulated profits and not 'distribution' from accumulated profits; for somehow trying to bring the transaction u/ s 46A, the assessee tried to re-characterize the transaction as 'buyback', resorting to treaty shopping. Assessee stands exposed completely. The truth is the impugned transaction involved capital reduction accompanied by distribution of accumulated profits and is admittedly not 'buy-back' u/s 77A. Thus, it squarely gets covered u/s 2(22)(d)/(a) r.w.s 115-0.*

- *Similarly, the. assessee implemented the impugned transaction of May 2016 as not a 'buy-back' u/s 77A for not getting covered for BBT u/s 115QA; but at the same time, tried to recharacterize the transaction as 'buyback' to somehow bring the transaction u/ s 46A, resorting to treaty shopping; though the transaction actually involved capital reduction, assessee 'arranged' the transaction u/s 391 to somehow say the transaction is not u/s 100, in spite of the fact that 'purchase of own shares' u/s 391 should always be read with section 100, all to escape from section 2(22)(d). Assessee stands exposed completely: the truth is the transaction is not a 'buy-back' u/ s 77 A and so is not covered u/s 46A r.w.s 115QA; the transaction involved capital reduction accompanied by distribution of accumulated profits and is squarely . covered u/s 2(22)(d)/(a) r.w.s 115-0.*

- *Assessee tried to argue that the RD has given his clean-chit for the scheme and based on that, the Court has given approval for the Scheme. It has to be noted that while approving, the Court has clearly stated that the approval does not give any exemption from following any mandatory compliances as per law and does not give any exemption from any due tax as per law. RD nowhere stated that the impugned transaction does not involve capital reduction. RD of Corporate Affairs is not an authority under the Income tax Act. Income tax liability has to be seen independently by the concerned Income tax authorities under the Income tax Act. Hence, this argument of the assessee is not acceptable.*

- *The assessee again argued that as per RBI intimation made by the assessee, the transaction is transfer of shares and not dividend. RBI intimation made by the assessee is for _FEMA purposes and not for Income tax Act purposes. Therefore, RBI intimation made by the assessee cannot govern or determine the tax liability under the Income tax Act. Hence, reliance cannot be placed on RBI intimation for income tax liability. The impugned transaction of 'purchase of own shares' involved capital reduction accompanied by payment of accumulated profits to the shareholders and so, it is dividend u/ s 2(22)(d) of the Income tax Act.*

- *Assessee admits that payments from accumulated profits have been made to the shareholders in the impugned transaction of purchase of own shares involving capital reduction, but it tries to argue that it is only 'payment' and not 'distribution' and so, it does not qualify as dividend u/s 2(22)(d). The fact that this argument is not tenable has been discussed elaborately under para 9.20 above and it has been established that distribution' includes 'payment' also. Further, as per non-obstante section 115-0(1) itself, any amount declared, distributed of paid by way of dividends" is liable for DDT. For the purpose of DDT, dividend includes the ones u/ s 2(22)(a) to 2(22)(d) also, as per Explanation to section 115-0.*

- *The assessee tried to argue that the payment was made as consideration for purchase of own shares and it is quid pro quo and that it is not a voluntary distribution to qualify dividend. This argument of the assessee is not acceptable: First of all, it is not the transaction of general purchase of shares; it is purchase of own shares; the shares purchased are not available for resale as in any ordinary purchase, as such purchased shares gets extinguished automatically. 'Reduction of capital' happens as part of the transaction. It is deemed to be dividend u/s 2(22)(d). Meaning has to be taken specifically from section 2(22ld) when there is capital reduction. 'Purchase of own shares' from shareholders involved 'capital reduction' accompanied by payment from accumulated profits to the shareholders and hence, section 2(22)(d) applies. In such cases, the payment cannot be considered as consideration for purchase, but it has to be considered as 'dividend' by operation of law as provided in section 2(22)(d).*

- *Assessee again tried to argue that only a distribution paripassu (in equal proportion) amongst shareholders can be considered as 'distribution' for the purposes of sections 2(22)(a) or 2(22)(d). This argument is also not acceptable. Assessee extrapolates words into the Act, which is not permissible. Nowhere in section 2(22), there is such stipulation. Assessee cannot go by any general meaning for the dividends u/ s 2(22). Legal meaning as provided in the provisions of section 2(22) can only be looked into. In the impugned transaction of the assessee, there is capital reduction, which is indisputable; and that accompanied payment from accumulated profits to the shareholders; and the impugned transaction is not buy-back u/s 77A. Then, as per the legal meaning of those relevant provisions, it is dividend u/s 2(22)(d)/(a).*

- *As the impugned transaction is not a buy-back u/s 77A of the Companies Act 1956, section 46A of the Income tax Act is not applicable read with Explanation to section 46A section_ 46A, Finance Act comment for section 46A and Circular Memorandum for No.3/2016 [F.No.225/19/2016/I7A.II] dated 26.2.2016. Section 46A does not have any role on the impugned transaction of the assessee. This has been amply demonstrated in detail in paragraphs 9.3.9, 9.12 and 9.13 above. lt may also be noted that non-obstante section 115-0 takes primacy over section 46A. Therefore, the argument of the assessee that the shareholders paid (barring the major Mauritius shareholder under DTAA) capital gains tax u/s 46A and assessee is not liable u/s 115-0, 15 not at all correct and not tenable in the eyes of law.*

- *Even for argument sake, if the assessee had thought that provisions of section 46A along with deduction in terms of section 195 would need to be considered as payments were made to NR shareholders, then the inescapable course for it is to go under the process stipulated in the second proviso to Section 195(1) which clearly states that "provided further that no such deduction shall be made in respect of any dividends referred to in section 115-0. Thus, the assessee ought to have first ruled out the applicability of section 115-0 in its case, which it had failed to do so as per law. This is more so, as the non-obstante section 115-0 gets primacy over section 46A. This prime requirement as per law has not been complied with by the assessee. As all the conditions of capita] reduction, distribution from accumulated profits and transaction not being u/ s 77 A are satisfied, there is no room for the assessee to rule out the applicability of section 115-0 r.w.s 2(22)(d)/2(22)(a). Thus, assessee's liability gets fixed first u/s 115-0 itself and there would be no applicability of section 46A.*

- *By not applying the apt section IIS-0 r.w.s 2(22){d)on itself and by trying to somehow (wrongly) bring in the issue of capital gains u/ s 46A on its NR shareholders, the assessee attempted treaty shopping by claiming exemption to the major Mauritius shareholder under DTAA, which is a colourable device and cannot be accepted at any stretch. By this, the assessee repatriated its accumulated profits to its NR shareholders by not paying the due tax u/ s 115-0 in India. These aspects have been elaborated by the AO in paras 10.8 to 10.8.6of his order and in paras 9.5 to 9.5.16 of this order.*

- *The assessee tried to take shelter under the clarificatory amendment to section 115QA which came into effect from 1.6.2016. The arguments of the assessee in this regard are not correct. As detailed earlier (in paras 9.3.1 to 9.3.11), the terms "purchases of own shares" and "buy-back'' are two different concepts in the Companies Act and used for different purposes. The term "buy-back" was used for transactions effected under the*

newly introduced section 77 A of the Companies Act 1956, while the term 'purchase of own shares' remains with all other relevant existing provisions, like section 77. The same distinction is maintained in all the relevant provisions of Companies Act 2013 also. "Buy-back" of shares attracts buyback tax u/s 115QA, whereas "purchase of own shares" involving the mandatory capital reduction attracts DDT u/s 115-O. In other words, more particularly, "buy-back'' of shares [u/s 77A or u/s 391 r.w.s 77A of Companies Act 1956 or u/s 68 or u/s 230 r.w.s 68 of Companies Act 2013] attracts buyback tax u/s 115QA, whereas "purchase of own shares" involving the mandatory capital reduction [u/s 77 r.w.s 100 or 391 r.w.s 77 &100 of Companies Act 1956 or u/s 67 r.w.s 66 or u/s 230 r.w.s 67 &66 of Companies Act 2013] continues to attract DDT u/s 115-O.There is absolutely no ambiguity in it. This has been amply demonstrated in detail in paragraphs 9.3.10, 9.14, 9.15 and 9.16 above.

- *The assessee again tried to take shelter under the Court's approval for its Scheme, for not paying the due tax u/s 115-0. This is not possible and not acceptable, as the Hon'ble Court in its approval clearly stated "this Court having also observed that "this order will not be construed as an order granting exemption from payment of stamp duty or, taxes or, any other charges, if any, payable, as per the relevant provisions 2I law or, from any applicable permissions that may have to be obtained or. even compliances that ma have to be made as per the mandate of law. "This shows that the court approval has not exempted the assessee from any mandatory compliances as per Companies Act itself and has not given any exemption to the due taxes payable by the assessee as per Income tax Act also. Therefore, approval of the Court for the Scheme has no impact on determination of the tax liabilities under the Income tax Act.*

- *Assessee has taken a plea that the AO has taxed the transaction as dividend distributed u/s 115-0 in the hands of the assessee and simultaneously taxed the same transaction as capital gains in the hands of the NR shareholders. The plea of the assessee is blatantly wrong. The assessee is aware that the AO of the assessee company and the AOs of the NR shareholders are different. The AO of the assessee, based on facts and law, has clearly come to the decision that the impugned transaction is taxable as dividend u/s 2(22)(d) and not as capital gains u/s 46A. Based on this, the AO held that the assessee is liable for DDT u s 115¬O .The _shareholders are exempt u/s 10(34). It is the assessee who had taken the unilateral decision to withhold tax on the payments to the NR shareholders, ignoring its obligation u/ s 115-0. Such a conscious design and decision of the assessee cannot be dubbed to be the action of AO in taxing the transaction in the hands of the shareholders also. It is for the shareholders to seek appropriate relief as per law, before their respective AOs and nothing prohibits the assessee ir assisting the process as indicated in para 9.21.2.4_above.*

- *The assessee argued that the order of the AO u/s 115-0 is in contravention of the provisions of the DTAAs entered by India with USA and Mauritius; the assessee tried to argue that the purchase of shares has to be treated under capital gains only as per DTAAs and such provisions of the DTAAs override the provisions of the Income tax Act. The argument of the assessee is fallacious and not correct. The issue for adjudication is tax liability of the resident assessee company u/s 115-0. The DDT liability u/ s 115-0 has arisen in the hands of the resident assessee company in India and is taxable in India; there is no foreign income accrued or arisen to the assessee in the impugned transaction. Hence, DTAAs are not applicable to the assessee company. When DTAAs are not applicable to the assessee on the impugned transaction at all, there is no question of DTAAs overriding the provisions of the Income tax Act. Hence, the argument of the assessee is patently wrong. The assessee again argued that the respective DTAAs will be applicable for the respective NR shareholders. Once the company is taxed u/s 115-0, the shareholders are exempt u/s 10(34).The taxability of the NR shareholders on the income accrued or arisen or deemed to have accrued or arisen to them in India and the applicability of DTAA benefits on such income are separate issues relevant for consideration in the assessment of the respective NR shareholders. The issue on hand is only the DDT liability u/ s 115-0 on the assessee company. Therefore, the plea that the AO of the assessee has contravened the provisions of the DTAAs has no merit.*

- *Thus, in view of the above facts, the assessee's transaction of "purchase of own shares" through the 'scheme of arrangement and compromise' is not a 'buy-back' of*

shares u/s 77A or u/s 391 r.w.s 77A of the Companies Act 1956, and hence, the provisions of section 46A of the Income tax Act have no application. On the other hand, the assessee's transaction of 'purchase of own shares' through the 'scheme of arrangement and compromise' u/ s 391 is to be invariably read with section 100 of the Companies Act 1956 and involves capital reduction. Even otherwise also, assessee's purchase of own shares' has actually involved 'capital reduction' since the 'paid-up share capital' was utilized for payment for shares and 54.7% of the total 'paid-up share capital' got reduced in the impugned transaction. Therefore, the transaction qualifies for 'distribution by way of reduction of capital' for the purpose of section 2(22)(d) of the Income tax Act, and accordingly falls within the ambit of definition of 'dividends' and consequently liable for DDT u/s 115-0 of the Act.

- *In view of the above, I am of the considered opinion that the AO has rightly concluded that the assessee's purchase of own shares' through the 'scheme of e arrangement and compromise 'involving capital reduction as 'dividends' within the purview of section 2(22)(d)/2(22)(a) of the Income tax Act. Therefore, the AO's determination of DDT u/s 115-O of the Act is clearly in accordance with the provisions of the Income tax Act and justified.*

10. The Ld.Sr.Counsel for the assessee, Shri.Ajay Vohra, submits that the Ld.CIT(A) is erred in upholding the order of the AO passed u/s.115-O of the Act, treating the 'Scheme of Arrangement & Compromise' approved by the Hon'ble High Court of Madras u/s.391 to 393 of the Companies Act, 1956, for purchase of own shares as a scheme for capital reduction in violation of scheme itself and also the order of the Hon'ble High Court of Madras. The Ld.Sr.Counsel for the assessee, referring to the scheme document submitted before the Hon'ble High Court of Madras and approved in their order dated 18.04.2016 submits that upon the scheme coming into the effect, the company shall purchase up to a maximum of 94,00,534 equity shares of face value of Rs.10/- each held by the shareholder with effective date for a price of Rs.20,297/- per equity share being the fair value based on Valuation Report from an independent valuer. The Ld.Sr.Counsel for the assessee, referring to scheme document explained the purpose and intent of scheme and also modality

of purchase of shares from its shareholders and argued that such scheme is voluntary. The Ld.Counsel for the assessee further took us to various clauses of the scheme and argued that it is expressly provided in the scheme that the provisions of Sec.2(22) or Sec.115-O or Sec.115QA of the Act, are not applicable to the purchase of equity shares by the company from its shareholders. Further, said scheme shall not be treated or considered as a capital reduction under the provisions of Sec.100 of the Companies Act, 1956, or buyback under the provisions of Sec.68 of the Companies Act, 2013. The purchase of equity shares and the payment of consideration shall not be treated as distribution of assets or distribution of accumulated profits of the company to its shareholders. The company complied with all statutory provisions, including Foreign Exchange Management Act, 1999, and the regulations and notifications thereunder and also deducted TDS as per the provisions of the Act, wherever applicable. The ld. Counsel for the assessee further referring to various documents submitted that tax has been withheld out of the payment of consideration to the US resident shareholders aggregating to Rs.898.01 Crs. In so far as payment made to M/s.Cognizant (Mauritius) Ltd., tax has not been withheld, because, the same is exempt from the tax in the hands of the non-resident shareholders under Article-13 of the India Mauritius DTAA. The return filed by the US shareholders and the Mauritius shareholders reflecting capital gains on purchase of own shares by the assessee company was processed u/s.143(1) of the Act, and

further, no proceedings have been initiated, thereafter in the hands of either of the US shareholders or Mauritius shareholders.

11. The Ld.Sr.Counsel for the assessee, explaining the power of the Hon'ble High Court, to sanction scheme for purchase of own shares u/s.391 of the Companies Act, 1956, submitted that the power of the Hon'ble High Court u/s.391 to 393 of the Companies Act, 1956, has been held to be complete 'code in itself' and the Court can sanction, inter alia, scheme of arrangement for purchase by the company of its own shares from the shareholders and such powers are independent and de horse Sec.77 of the Companies Act, 1956. The Ld.Counsel for the assessee further submitted that Sec.77 of the Companies Act, 1956, relating to buyback of shares has been held to be merely an enabling provision facilitating a company to buyback its own shares without a Court approved scheme subject to the conditions laid down in the said section. The powers of the Hon'ble High Court u/s.391 of the Companies Act, 1956, to sanction a scheme of arrangement is not in any manner whittle down or restricted u/s.77A of the Companies Act, 1956, and in this regard, he relied upon the decision of the Hon'ble Bombay High Court in the case of SEBI v. Sterlite Industries Ltd., reported in 113 Comp. 273 and also the decision of the Hon'ble Delhi High Court in the case of M/s.Reckitt Benckiser (India) Ltd. Company case No.228/2010. The Ld. Counsel for the assessee further submitted that Sec.230(1) of the Companies Act, 2013, in force from 16.12.2016 specified that a company

cannot buyback/purchase of its own shares under a 'Scheme of Arrangement & Compromise' unless buyback/purchase of own shares is in accordance with Sec.68 of the Companies Act, 2013 (corresponding to Sec.77A of the Companies Act, 1956). Therefore, from the aforesaid, it follows that prior to 15.12.2016, there was no restriction on the powers of the Hon'ble High Court to sanction a scheme of arrangement for purchase of its own shares u/s.391 of the Companies Act, 1956, independent and de horse Sec.77 of the Companies Act, 1956.

12. The Ld.Sr.Counsel for the assessee submitted that purchase of shares and extinguish thereof does not amount to reduction of capital as envisaged u/s.100-104/402 of the Companies Act, 1956. As per sec.77(1) of the Companies Act, 1956, there is a necessity to extinguish shares after buyback of shares by any company u/s.391 or u/s.77A of the Companies Act, 1956. Therefore, the company has to perforce cancel/extinguish shares purchased from the shareholders due to bar in law. Therefore, the scheme of arrangement for purchase of shares cannot be said to be a scheme for reduction of capital u/s.100-104/402 of the Companies Act, 1956. Since, purchase of shares and extinguishment thereof does not amount to reduction of capital, payment of consideration to the shareholders for purchase of own shares cannot, therefore, be said to be occasioned on account of reduction of capital, and consequent reduction of capital cannot be said to be a 'causa causans' or proximate/direct cause of the payment to the shareholder but 'causa sine

qua non' since the extinguishment/cancellation of shares is a consequence of the purchase of shares. Therefore, the counsel submitted that payment of consideration to shareholders for purchase of own shares by the company are ultimately extinguished/cancelled cannot be said to be reduction of capital and in this regard, he specifically referred to Para No.24 of the decision of the Hon'ble Bombay High Court in the case of SEBI v. Sterlite Industries Ltd., (supra).The Ld.Sr.Counsel for the assessee, further referring to the decision of the Hon'ble Delhi High Court in the case of Reckitt Benckiser (India) Ltd., submitted thatbuyback of shares and reduction of capital are different concepts and are operating entirely in different fields. The purchase of own shares by company and consequent extinguish does not amount to reduction of capital.

13. The Ld.Sr.Counsel for the assessee submitted that the Act itself recognize that reduction of capital and purchase of its own shares are distinct and separate legal concepts and cannot be construed as being synonymous of one another. Further, the Companies Act itself uses the term 'reduction of capital' buyback of its own shares/purchase of its own shares distinctly at different instances. There were separate provisions to deal with each issue, even under Income Tax Act, 1961.Provisions of Sec.2(22)(d) of the Act, deals with reduction of capital. Sec.46A & Sec.22(iv) of the Act uses the term 'purchase of its own shares'. Similarly, s.115QA of the Act uses both the terms 'buyback of shares' and also 'purchase of its own shares'. Therefore, it is clearly evident from the

above provisions of the Act that both the Companies Act, 1956, and the Income Tax Act, 1961, itself acknowledged and consciously treat purchase of own shares and reduction of capital are different concepts from one another. Therefore, the legislature in its wisdom has used the said term independent of each other, and thus, different words deliberately used by the legislature in an enactment cannot be used synonymously and interchangeable, and this principle has been explained by the Mumbai Bench of the Tribunal in the case of Goldman Sachs (India) Securities (P) Ltd. v. ITO reported in 70 taxmann.com 46.

14. The Ld.Sr.Counsel for the assessee further submitted that provisions of Sec.2(22)(d) of the Act, does not applicable in the present case, because, the deeming fiction provided therein is triggered when payment is made to the shareholders upon reduction of share capital. In the instant case, the company had under the scheme made an offer to purchase its own shares from its shareholders and acceptance of such offer by the shareholders a contract comes into existence. Therefore, the shareholders tendered whole or part of the shares held at the discretion of the shareholders to the company and the company accordingly, made payment to the shareholders in discharging of the consideration agreed for purchase of shares. Once the company acquired its shares from the shareholders under a completed contract for purchase/sale of shares, the company thereafter, had to necessarily extinguish the shares in view of the bar in law. The payment to the shares was made in pursuance of the

contract and not on account of extinguish of shares. Therefore, the interpretation of the AO that upon reduction of capital, the assessee has made payment to the shareholders, and thus, same is in the nature of deemed dividend, is incorrect. The Ld.Sr.Counsel for the assessee, submits that even Sec.2(22)(a) of the Act, is not applicable, because, said section deals with distribution by a company of accumulated profits, whether capitalized or not, if such distribution entails release by the company to its shareholders of all or any part of the assets of the company to be taxable as dividend. In the facts of the present case, the payment made by the assessee to its shareholders is towards discharge of consideration payable under contract of purchase of shares and thus, same cannot be regarded as distribution, which implies payment being made as/without any 'quid pro quo' or proportionately to all shareholders/ class of shareholders. In case of buyback of shares, the payment is not without any quid pro quo, but towards satisfaction of the liability due by the company equivalent to the amount of purchase consideration proportionate to the number of shares purchased from each shareholder. Furthermore, Sections 2(22)(a) / 2(22)(d) of the Act, are in the nature of deeming provision seeking to enlarge the definition of the term 'dividend' and are therefore, to be directly construed as held by the Hon'ble Supreme Court in the case of CIT v. C.P.Sarathy Mudaliar reported in [1972] 83 ITR 170 (SC) and by the Hon'ble Delhi High Court in the case of C.R.Dass reported in [2012] 204 Taxmann 227 (Delhi).

15. The Ld.Sr.Counsel for the assessee referring to provisions of Sec.46A of the Income Tax Act, 1961 submitted that, provisions of Sec.46A of the Act provides for taxation of capital gains arising to its shareholders on purchase of shares and applies to all kinds of buyback/purchase of shares by the company from its shareholders and the same is not restricted to Sec.77A of the Companies Act, 1956, alone. The reference to Sec.77A of the Companies Act, 1956, in the explanation to the said section is qualifying the specified securities (other than shares buyback of which would be taxable under that section). It is the submission of the assessee that Sec.46A of the Income Tax Act, 1961, being a special provision for bringing into tax capital gains arising to a shareholder on purchase of shares must be given full effect. He further referring to budget speech of the Hon'ble Finance Minister and also the decision of the Hon'ble Supreme Court in the case of K.P. Varghese v. ITO reported in [1981] 131 ITR 597 submitted that speech of the finance bill can be taken into consideration for discerning the legislative intent while interpreting the provisions of the statute. He had also referred to CBDT Circular No.779/1999 regarding clarification on tax issues arising out of the provision to allow buyback of shares by the company and submitted that the provisions of Sec.2(22) of the Act, has been amended by inserting a new clause to provide that dividend does not include any payment made by a company on purchase of its own shares in accordance with provisions contained in Sec.77A of the Companies Act,

1956. It is also inserted a new provision namely Sec.46A of the Act, to provide that any consideration received by a shareholder or a holder of other specified securities from any company on purchase of its own shares shall be subject to provision contained in Sec.48 of the Act. Therefore, from the above it is clear that even assuming that the legislature had been introduced Sec.46A of the Act, all elements required for charge of tax as capital gains upon purchase of shares, are satisfied. Therefore, any consideration paid by a company for purchase of shares to its shareholders is taxable in terms of provisions of Sec.46A of the Act, alone. In this regard, he relied upon the decision of the Hon'ble Supreme Court in the case of Anarkali Sarabhai v. CIT reported in [1997] 224 ITR 422 (SC).

16. The Ld.Sr.Counsel for the assessee further referring to section115QA of the Act, submitted that Sec.115QA of the Act, originally enacted by the Finance Act, 2013 w.e.f.01.06.2013 along with explanation. The scope of the said section was enlarged while amendment made by the Finance Act, 2016 w.e.f.01.06.2016 by amending of definition of buyback in clause and explanation to sub-section (i). From the aforesaid amendment, it would be apparent that w.e.f.01.06.2016, purchase/buyback of shares by a company from its shareholders under any applicable provisions of Companies Act, including Sec.391 of the Companies Act, 1956 would be subject to levy of tax in the hands of the company, u/s.115QA of the Act. In the present case, since

the Hon'ble High Court had approved the 'Scheme of Arrangement & Compromise' u/s.391 of the Companies Act, 1956, vide order dated 18.04.2016, the amended provisions of Sec.115QA of the Act, are not applicable to the case of the assessee. The legislature has amended the definition of buyback by insertion of explanation to bring into tax all forms of purchase of own shares, including through a scheme of arrangement u/ss.391 to 393 of the Companies Act, 1956. From the above, it is clear that before 01.06.2016, purchase of own shares by company in accordance with provisions of Sec.391 of the Companies Act, 1956, is not liable to be taxed u/s.115QA of the Act. The Ld.Sr.Counsel for the assessee further referring to the observation of the AO with regard to provisions of Sec.100-104/402 of the Companies Act, 1956, and provisions of Sec.77A of the Act, submitted that the AO is fundamentally wrong in observing that there is no other mechanism under the Companies Act other than capital reduction u/s.100-104/402 of the Companies Act, 1956, and provisions of Sec.77A of the Companies Act, 1956, for purchase of own shares by a company. If, the arguments of the AO is accepted, then no amendment was needed u/s.115Q of the Act. Therefore, he submitted that a combined reading of provisions of Sec.46A r.w.s.115QA and Sec.10(34) of the Act, clearly indicates that purchase of its own shares, would be taxable in a case buyback referred to u/s.77A of the Act, in the hands of the shareholders u/s.46A of the Act, up to 31.05.2013 and from 01.06.2013, the company is liable to pay additional

income tax u/s.115QA of the Act, and the shareholders does not need to pay any tax by virtue of exemption provided u/s.10(34) of the Act. In case purchase of shares is pursuant to a scheme u/s.391 to 393 of the Companies Act, 1956, up to 31.05.2013 it is taxable as capital gains in the hands of shareholders under provisions of Sec.46A of the Act and from 01.06.2013 to 31.05.2016, once again, it is taxable as capital gains in the hands of the shareholders u/s.46A of the Act. Further, additional income tax u/s.115QA of the Act, is not applicable as the extent provisions of Sec.115QA of the Act, were applicable only for purchase of own shares u/s.77A of the Act. From 01.06.2016, company is liable to pay additional income tax under provisions of Sec115QA of the Act. Therefore, the AO and the Ld.CIT(A) are completely erred in invoking provisions of Sec.2(22)(a) / 2(22)(d) of the Act, and levied tax u/s.115-O of the Act, towards consideration paid for purchase of own shares in a 'Scheme of Arrangement & Compromise'.

17. The Ld.Sr.Counsel for the assessee submitted that the scheme of arrangement once approved by the Hon'ble High Court operates as judgment in 'rem' because, in terms of provisions of Sec.394A of the Companies Act, 1956, notice of the scheme of arrangement was required to be given to the central government, which was empowered to rise objection and representation to the Court. It is important to note that the Regional Director, Ministry of Corporate Affairs filed a 'No Objection Report' before the Hon'ble High Court overruling the objections raised by

the Registrar of Companies to the proposed scheme u/s.391 of the Companies Act, 1956. Therefore, once having furnished 'no objection' from the Regional Director, the Central Government including the AO cannot change the nature of scheme approved by the Court. The contention of the Revenue that the Hon'ble High Court does not give any immunity for payment of taxes, and thus, the AO can very well examine the transactions under Income Tax Act, 1961, is fully misconceived. The assessee reiterated that it has deducted applicable taxes, where the shareholders are liable to be taxed under the Income Tax Act, 1961. Therefore, it was the submission of the assessee that once the scheme is approved by the Hon'ble High Court of Madras after inviting objections from Government, then it operates as judgment in 'rem' and binding on all stakeholders. In this regard, he relied upon the decision of the Hon'ble Supreme Court in the case of Dalmia Power Ltd. v. ACIT reported in [2019] 420 ITR 339 (SC) and the decision of the jurisdictional High Court of Madras in the case of Ponny Sugars (Erode) Ltd. v. ACIT in WP No.12510/04. The Ld.Sr.Counsel for the assessee also relied upon the decision of the Hon'ble Kolkata High Court in the case of CIT v. Purbanchal Power Co. Ltd., reported in [2022] 145 taxmann.com 215 (Calcutta). The ld. Counsel for the assessee further submitted that apart from categorical averments in the scheme to the effect that the provisions of Sec.2(22) or Sec.115-O or Sec.115QA of the Act, are not applicable to the purchase of shares by the company from its shareholders, it shall not

be considered as capital reduction u/s.100 of the Act, or buyback under the provisions of Sec.68 of the Act, is very clear to the effect that purchase of shares and payment of consideration shall not be considered as distribution of assets or distribution of accumulated profits by the company to its shareholders would operate as an estoppel and the Revenue cannot contend otherwise.

18. The Ld.Sr.Counsel for the assessee submitted that the AO has adopted inconsistent stand when it comes to levying tax u/s.115-O of the Act, in the hands of the company and accepting capital gains declared by the shareholders in terms of Sec.46A of the Act, which is evident from the fact that the assessee had withheld and deposited taxes in the case of US resident shareholders to the tune of Rs.898.01 Crs. and the Revenue has been appropriated said taxes against tax liability of shareholders. At the same time, the AO has treated consideration paid by the assessee to its shareholders for purchase of its own shares as deemed dividend u/ss.2(22)(a) / 2(22)(d) of the Act, and levied tax u/s.115-O of the Act, by taking a different stand for the shareholders on one hand and the company on the other hand. He further referring to certain judicial precedents, including the decision of the Hon'ble Supreme Court in the case of Berger Paints India Ltd. v. CIT reported in [2004] 266 ITR 99 (SC) submitted that, it was not open to the Revenue to adopt conflicting/contrary view in the hands of the different tax payers.

19. The Ld.Sr.Counsel for the assessee had also distinguished various case laws relied upon by the AO in support of their claim. The Ld.Sr.Counsel for the assessee referring to the decision of AAR No.P of 2012 reported in 206 Taxman 631 submitted that in the said ruling a selective buyback of shares was undertaking wherein only Mauritius shareholders participated in the buyback and other shareholders for whom capital gains would lead to tax incidence in India did not participate. Under those peculiar circumstances, a portion of the buyback consideration was re-characterized as divided. In the assessee's case, all the shareholders had participated in purchase of shares and it was not a case of selective buyback. Therefore, said case law cannot be applied to the facts of the assessee's case. The Ld.Sr.Counsel for the assessee had also tried to distinguish the decision of the Hon'ble Supreme Court in the case of CIT v. G. Narasimhan236 ITR 327 and argued that in the said case, reduction of capital was undertaken which resulted in reduction in the face value of the shares from INR 1000 to INR 210 per share. Cash and property of the company were distributed pursuant to the scheme of capital reduction. Further, the shareholder still held the same number of shares in the company even after capital reduction and there was no extinguish of the shares held by the shareholder. In the instant case, shares bought back by the assessee have been fully and effectively transferred by the shareholder and the shareholder does not continue to hold the same. Therefore, the ratio of G. Narasimhan v. CIT(supra)which

was rendered under different facts cannot be made applicable to the assessee's case. The Ld.Sr.Counsel for the assessee had also explained the decision of the Hon'ble Gujarat High Court in the case of Shashibala Navnitlal v. CIT reported in [1964] 54 ITR 478. According to the Ld.Sr.Counsel for the assessee, in the said case redemption of preference shares was held to fall under the definition of deemed dividend. However, the judgment of the Hon'ble Supreme Court in the case of Anarkali Sarabhai v. CIT [1997] 224 ITR 422, which was rendered after the above decision as held redemption of preference shares would tantamount to a sale/extinguish of capital asset and chargeable to tax under the head 'capital gains'. Further, said case was decided when the provisions of Sec.46A of the Act, was not in existence. Therefore, same cannot be applied to the facts of the assessee's case. The Ld.Sr.Counsel for the assessee had also distinguished the case law relied upon by the AO in the case of Mysore Electro Chemical Works Ltd. v. ITO reported in [1982] 133 ITR 330 (Karnataka HC) and the decision of the Hon'ble Supreme Court in the case of Ramesh B. Desai and Ors. v. Bipin Vadilal Mehta and Ors. reported in [2006] 69 SCL 211 (SC) and argued that the above judgments are not applicable to the facts of the assessee's case, because, the assessee had purchased shares from the shareholders as per scheme sanctioned by the Hon'ble High Court of Madras under the provisions of Sec.391 to 393 of the Companies Act, 1956. Therefore, he submitted that the AO and the Ld.CIT(A) were completely erred in re-

characterization of transaction of purchase of own shares as reduction of capital in terms of provisions of Sec.100-104/402 of the Companies Act, 1956 and invoking provisions of Sections 2(22)(a)/ 2(22)(d) of the Act r.w.s.115-O of the Act.

20. Shri. R. Shankaranarayanan, the Additional Solicitor General of India (in short "the ASG"), for Shri A.P.Srinivas, Sr.Standing Counsel for the Department submitted that the assessee was originally a fully owned subsidiary of CTS, USA.In the FY 2011-12, there was a restructuring of various business directly or indirectly through a Court approved scheme of amalgamation where the assessee amalgamated with M/s.Cognizanat India Pvt. Ltd., (M/s.CIPL) and M/s.Market Rx India Pvt. Ltd., (M/c.MIPL) in a scheme of amalgamation. Interestingly, the shares were allotted on 1:1 swap based on number of shares held by the shareholders of all entities and the swap was not in proportionate to the market value of the shares in the individual companies. This resulted in CTS, USA holding only 22.92% shares in the amalgamated entity, whereas CTS, Mauritius is holding 76.68% of the share capital of amalgamated entity. This is despite the fact that shares held by CTS, USA had a book value/net worth of Rs.22,581/- per share prior to amalgamation while CTS, Mauritius had a book value/net worth per share only Rs.84.45 per share. If these shares were distributed as per net worth/book value, then CTS, USA ought to have held 98% of the amalgamated entity and this resulted in net value loss of Rs.7,019 Crs. for CTS, USA, whereas there was a net

gain of Rs.6928 Crs. for CTS, Mauritius. Therefore, it is clear that there has been an artificial shifting in profit base from USA to Mauritius for which there is no commercial sense. The ld. ASG further referring to financial statements of the assessee submitted that the assessee has hitherto enjoyed tax exemption under various provisions of Income Tax Act up to and around Rs.30,441Crs. The assessee had also close to Rs.33,804Crs. of accumulated profits, but there has been no dividend declared in any year except for declaration of interim dividend in the AY 2006-07, for Rs.230 Crs. on which DDT of around Rs.33 Crs. has been paid. The ld. ASG, further submitted that in AY 2013-14, the assessee had distributed its accumulated profits through buyback of shares for Rs.2,878Crs thereby triggering Sec.77A of the Companies Act, 1956, and this was done just prior to the introduction of Sec.115QA of the Act, being brought into force to the statute. Therefore, two undisputable facts arose are that (i) the assessee has earned significant profits, but has for reasons best known chosen not to declare dividend and (ii) the only manner in which, the assessee choose to distribute its accumulated profits is by way of resorting to buy back in AY 2013-14 in order to avoid paying taxes. The ld. ASG further submitted that in this back drop, the existing scheme is analyzed, there is no dispute with regard to the fact that the assessee has bought back 9400534 equity shares of face value of Rs.10/- each from its shareholders at a price of Rs.20,297/- per equity share by paying total amount of Rs.19,080.26 Crs. to its non-resident

shareholders. If you see the dates and events, it is clear that the entire scheme was moved in a hurried manner which is evident from the fact that on 29.02.2016, amendment to sec.115QA of the Act, was announced and was in the public domain. The assessee was convened a board meeting on 10.03.2016 and on 05.04.2016, the details of the scheme were sent to the Registrar of Companies. The Registrar of Companies on 07.04.2016 has sent their objections to the Regional Direction. The 'scheme of arrangement &compromise' petition filed by the assessee was came up for final hearing before the Hon'ble High Court of Madras on 11.04.2016 and the Hon'ble High Court of Madras has approved the scheme on 18.04.2016. The assessee has implemented the scheme on 18.05.2016 and on 01.06.2016, amendment to sec.115QA of the Act, had come into force. Therefore, from the sequence of events, it is abundantly clear that the assessee has designed a scheme in a hurried manner so as to distribute accumulated profits to its shareholders without coming into taxation net as per provisions of the Income Tax Act, 1961.

21. The ld. ASG further referring to the scheme document submitted before the Hon'ble High Court of Madras in terms of sec.391 to 393 of the Companies Act, 1956, submitted that as per Clause-5 of the scheme, the assessee adopted a peculiar manner by which shares would be bought back. Firstly, as per Clause-5.2(a) all shares held by shareholder owning less than 1% would be purchased by the company other than 10,000 equity shares of Rs.10/- each. Secondly, as per Clause-5.2(b) all equity

shares held by shareholders holding more than 1%, but less than 25% would be purchased by the company. Lastly, as per Clause-5.2(c), the balance equity shares were proposed to be purchased from shareholders holding more than 25% shareholding in proportionate to their inter se holding in the company. The net effect of the scheme was that post sanction of the scheme, the entire shareholding of CTS-USA and Market RX Inc. USA, would be purchased by the assessee. The only shareholders would be CTS-Mauritius holding 99.87% of the entire shareholding and remaining 10,000 equity shares would be held by CSS Investment LLC, USA. Therefore, from the above, it is undoubtedly clear that the scheme was floated only for two purposes, (i) to effectively shift the complete profit base to Mauritius and (ii) to distribute around Rs.19,000Crs. by claiming that the same is not taxable.

22. The ld. ASG further referring to the scheme document submitted that although, the rational for the scheme given under Clause-2 stated that the scheme aims to rationalize its shareholding and capital structure, but on going through the manner and method in which the scheme was implemented, it is nothing but a façade to shift the profit base to Mauritius. The term 'buyback' is not used anywhere in the scheme. The transactions are always described only as purchase of equity shares. In fact, Clause-6.7 of the Scheme clearly states that purchase of equity shares shall not be treated as buyback u/s.68 of the Companies Act, 2013. The funds out of which the payments for purchase of shares would

be effected is given under Clasue-7.2 and as per said clause, to the extent of face value paid up shares capital shall be adjusted and the difference between the face value and the total consideration shall be paid out of the accumulated credit in the P & L A/c. The assessee has made necessary accounting entries in the books of accounts, including transfer of fund from P & L A/c to the capital reduction reserve account. The real object and purport of the Scheme is also clear by a reading of the clauses in the Scheme where the assessee specifically states that the Scheme will not attract s.2(22), s.115-O or S.115QA of the Act. Further, Clause-6.7 of Scheme states that purchases of own shares would not amount to reduction of share capital u/s.100 and also would not amount to buyback of shares u/s.68 of the Companies Act, 2013. The effect of the scheme is that 54.70% of the total share capital got reduced. Therefore, there are three inescapable conclusions that arise from the present transaction are (i) the entire scheme is a colorable devise to try to avoid payment of tax dues (ii) there is capital reduction & (iii) there is distribution out of accumulated profits.

23. The ld. ASG further submitted that from the above the question that arise for consideration of this bench is whether the amount distributed under the scheme for purchase of own shares would be taxable in the hands of the assessee company as deemed dividend u/s.2(22)(a) / 2(22)(d) of the Act, and therefore, the assessee is liable to pay DDT u/s.115-O of the Act, or not. The crux of the case of the Department is

that the purchase of shares by the assessee through a 'Scheme of Arrangement & Compromise' as sanctioned by the Hon'ble High Court of Madras in terms of provisions of Sec.391-393 of the Companies Act, 1956, is amounts to distribution of dividend and therefore, is to be taxed u/s.115-O of the Act. The ld. ASG referring to provisions of Sec.2(22) explained the definition of dividend and argued that the definition is an inclusive definition and the definition goes beyond the conventional or traditional meaning associated with dividend. The object of such expansive definition seems to be ensure that the assessee do not camouflage payments out of accumulated profits to its shareholders through different channels in order to avoid payment of tax. Therefore, provisions of Sec.2(22)(a) bring within the ambit of dividend any distribution by a company of accumulated profits to its shareholders which entails the release by the company to its shareholder of all or any of the assets of the company. Similarly, s.2(22)(d) covers distribution made to the shareholders by the company on the reduction of its share capital to the extent of the company possess accumulated profits. The expansive scope of the term 'dividend' has been judicially recognized as well in Shashibala Navnitlal v. CIT reported in [1964] 54 ITR 478 and Punjab Distilling Industries Ltd. v. CIT reported in [1965] 57 ITR 1 (SC).

24. The learned ASG further submitted that the Ld.Counsel for the assessee sought to negate the decision of Shashibala Navnitlal v. CIT, on the ground that it is contrary to the decision in Anarkali Sarabhai v. CIT

(supra), but fact remains that the judgment in Anarkali Sarabhai v. CIT which was followed in Karthikeya v. Sarabhai v. CIT reported in [1997] 228 ITR 163 was impliedly held *perincuriam* by the Hon'ble Supreme Court in the case of CIT v. G. Narasimhan reported in 236 ITR 327, as it did not consider the scope of s.2(22)(d) of the Act. Therefore, in order to come within the ambit of s.2(22)(d) of the Act, there must be a distribution to the shareholders on the reduction of its capital and further, it must be to the extent of that company possess accumulated profits. In the present case, both conditions are satisfied. On perusal of the audited financial statement to show that the share capital has been reduced by around Rs.9.4 Crs. which amounts to 54.70 % of the total paid up share capital which got reduced. Further, as per Clause-7 of the scheme, the distribution of money will be out of the general reserve and accumulated credit balance in the P & L A/c. Therefore, both conditions are satisfied and thus, the transactions would come within the ambit of s.2(22)(d) of the Act. The ld. ASG had also negated the arguments of the counsel for the assessee that provisions of Sec.2(22) are not attracted, because, both Sec.2(22)(a) / 2(22)(d) of the Act, requires distribution which would only imply distribution without any *quid pro quo*. Since, the scheme is an offer and acceptance, this involves an element of *quid pro quo* and therefore, there is no distribution. The ld. ASG submitted that the contention of the Ld.Counsel for the assessee that s.2(22)(d) of the Act, requires distribution on reduction of capital is also not satisfied, is incorrect. The

word 'distribution' in s.2(6A) of the Income Tax Act, 1922, which is analogous to Sec.2(22) of the current Income Tax Act, 1961, was considered in the case of Punjab Distilling Industries Ltd. v. CIT reported in [1965] 57 ITR 1 (SC)and the Hon'ble Supreme Court held that the meaning of the word 'distribution' means division/payments between/to several people. The only condition specified was that it must be actual and not notional. Therefore, the definition of the word "distribution" does not contain any aspect of *quid pro quo* or lack thereof. The assessee is trying to add to the ordinary meaning of the word "distribution" as interpreted by the Supreme Court by adding conditions which do not otherwise exist. The pre-requisites for distribution is that there must be payment and the disbursal of the same must be made to more than one person. The second contention made by the assessee is also does not hold good, because, the definition of dividends in Sec.2(22) is an inclusive definition. The intent, as borne out from the case laws, is to cover all scenarios whereby a company distributes its accumulated profits without strictly coming within the term "dividend. Therefore, a literal and hyper technical reading of the term "on the reduction of share capital" would be contrary to the legislative intent. In any event, a reading of the relevant clauses of the scheme would show that there has been distribution on reduction and the mere fact that actually shares certificates are extinguished only after 15 days will not have any bearing. Because, extinguishment is a mere ministerial function. The ld. ASG further

submitted that in any event assuming without conceding, it cannot be treated as distribution on reduction of share capital, then it will automatically fall within Sec.2(22)(a) of the Income Tax Act, 1961, as there is distribution of accumulated profits entailing release of assets to the shareholders.

25. The Ld. ASG further submitted that there is no merit in the submissions of the Ld.Counsel for the assessee that the judgment of the Hon'ble High Court of Madras in sanctioning the 'Scheme of Arrangement & Compromise' u/s.391-393 of the Companies Act, 1956, is operates as judgment in 'rem' and is binding on the Revenue, because, the order sanctioning the scheme itself clearly provides that the sanction shall not grant any immunity to the assessee from payment of taxes under any law for the time being in force. Further, the role of the Hon'ble High Court in approving the scheme is very limited. The Company Court will look at the scheme and act as an umpire to just verify whether (i) the requisite meetings u/s.391(1)(a) of the Companies Act,1956, have been complied with, and further, (ii) has the requisite majority (iii) is just and fair to all members including dissenting members and (iv) just fair and reasonable from the point of view of a prudent man. Therefore, merely the Hon'ble High Court, approving the scheme does not mean that other consequences, including tax implications will not apply to the assessee at all. In this regard, he referred to the decision of the Hon'ble Supreme

Court in the case of Miheer H. Mafatlal v. Mafatlal Industries Ltd (1997) 1 SCC 579.

26. The ld. ASG further submitted that the Revenue is not re-characterizing the scheme as alleged by the assessee, because, the AO is fully empowered to analyze the effects of the scheme and to determine whether they attract the provisions of the Income Tax Act, 1961 or not. The assessee cannot take shelter under the self-serving clauses of the scheme and state that certain provisions of the Income Tax Act,1961 have been excluded. The object and purport of the scheme is to operate as a single window system and therefore, such self-serving clauses would not be binding on the AO and the AO is free to examine the effect of the scheme on the touchstone of the Income Tax Act, 1961.The provisions of Sections 391-393 of the Companies Act, are only a single window scheme, through which, various actions are undertaken. Therefore, the purchase of own shares will have to still relate back to either Sec.77 r.w.s.100 or Section 77A of the Companies Act, 1956. There cannot be any purchase of own shares effected just u/s.391-393 of the Companies Act, 1956. To support his arguments, he relied upon the decision of PMP Automation reported in (1991) 4 Bom CR 387&Hognas India Ltd., 148 Comp Cas 70. The ld. ASG further submitted that the transactions of the assessee would have to fall either under purchase of own shares u/s.391-393 r.w.s.77 and sec.100 of the Companies Act,1956,or sec.77A of the Companies Act, 1956. Those are the only two methods under which a

company can purchase its own shares as per the Companies Act, 1956. There are no other methods through which purchase of own shares is contemplated. The assessee contends that the purchase of own shares amounts to buy-back but not u/s.77A of the Companies Act, 1956. The arguments of the assessee is fallacious for three reasons. Firstly, there cannot be buyback that is possible u/s.391-393 *de hors* reference to any other provision of the Companies Act. Since, the transactions of the assessee is buyback of shares definitely it should be as per provisions of Sec. 77A and sec.100 of the Companies Act, 1956, and thus, consideration paid to shareholders is nothing but distribution of accumulated profits which entails release of part or all assets and thus, comes under the definition of s.2(22)(d) of the Act. Further, buyback of shares as such refers only to buyback u/s.77A and not any other forms of purchase of own shares. The term 'buyback' is used in the Companies Act, 1956, only in Sec.77A and not in any other place and at the relevant time, the term 'buyback' was defined u/s.115-QA of the Income Tax Act, 1961, to mean buyback u/s.77A only. He further submitted that assuming without conceding that the purchase of own shares amounts to buyback but not buyback u/s.77A, it would still be taxable u/s.115-O, because, as per proviso to Sec.2(22), only buyback u/s.77A, is excluded from the definition of dividend. This coupled with the fact that there was reduction of share capital and distribution of accumulated profits would

mean that the purchase of own shares would come within the ambit of dividend.

27. The Ld.Counsel for the assessee had also contended that provisions of Sec.46A of the Income Tax Act, 1961 is applicable to all forms of buyback, and thus, the shareholders are liable to pay capital gains tax on purchase of own shares in accordance with law. The arguments of the assessee is incorrect. Sec.46A is only applicable to buyback u/s.77A and not to any other forms of purchase of shares. The words used in Sec.46A are identical to language in Sec.77A of the Companies Act, 1956, and a reading of memorandum explaining the provisions of the Finance Act makes it dear that it was done to clarify that buyback u/s.77A necessitated a clarification. The insertion of Sec.46A was contemporaneous to the insertion of Sec.77A in the proviso to Sec.2(22) excluding to same within ambit of dividends. Further, explanation to Sec.46A also states that even the words specified securities would have the same meaning attached to it u/s.77A. Therefore, the arguments of the assessee that even for purchase of own shares under 'Scheme of Arrangement & Compromise' the provisions of Sec.46A alone is applicable, is incorrect.

28. The ld. ASG on the point of non-obstante clauses in any statues submitted that there are broadly two types of non-obstante clauses. The first class of non-obstante clauses which refers to specified provisions of the Act which will be overridden by the concerned clauses. The second

class are those clauses which will override all other provisions of the Act. He has explained the provisions with reference to specific provisions of the Income Tax Act, 1961. Therefore, he submitted that s.115-0 of the Act, is in the second category where the legislature has deliberately taken a decision to give an overriding effect to all other provisions of the Act, and thus, the arguments of the assessee fails. The ld. ASG had also negated arguments of the assessee on taxability of purchase of own shares u/s.115QA after 01.06.2016 and submitted that there is a distinction between purchase of own shares upon reduction of share capital and buyback. 'Buyback' is a term and is used only in respect of transactions covered u/s.77A. The object behind amendment of s.115-QA was to clarify that the provision would apply to buyback u/s.77A as well as to buyback u/s.391-393 r.w.s.77A. Therefore, assuming without conceding s.115-QA would govern the transactions from the date of amendment, it would not preclude the transactions from being subject to tax u/s.115-O. Therefore, he submits that all conditions of s.115-O r.w.s.2(22) are satisfied, and thus, the AO has rightly invoked provisions of Sec.2(22) r.w.s.115-0 of the Act.

29. The ld. ASG further submitted that as seen from the facts of the present case, it is abundantly clear that the scheme as such is only a colourable device intended to evade legitimate tax dues and such colourable devices which do not have any commercial purpose cannot be excluded as a fiscal nullity and the AO is empowered to "Look Through"

rather than "Look At" the transaction. Therefore, this is further established by the fact that there is no commercial nexus between the company's activities and Mauritius. The Ld.Counsel for the assessee had raised further contention alleging discrimination and inconsistent treatment by the Revenue on taxing the shareholders on one side and tax in the company hand on the other side. The arguments of the assessee is fallacious, because, the assessee after erroneously treating the same as capital gains, has deposited the amount as TDS with the respondent and is now trying to take advantage of its own wrong. Secondly, the ASG had also distinguished various case laws, including the decision of SEBI v. Sterlite Industries Ltd. (supra), and other judgments and argued that facts of those cases are entirely different and are not applicable to the facts of the assessee's case.

30. Per contra, the counsel for the assessee has filed a rebuttal to the submissions filed by the Revenue and argued that certain facts brought on record by the AO in the assessment order are not forming part of show cause notice dated 22.03.2018, and therefore, the same cannot be considered as necessary without affording an opportunity to the assessee. In any event, the arguments of the Revenue that the scheme of purchase of own shares through arrangement & compromise, is a colourable device for avoidance of tax is devoid of merits, because, the reference to restructuring of shareholding pattern from one shareholder to other shareholder is carried out in accordance with relevant provisions of the

Act, and the Revenue has not disputed the same. The contention of the Revenue that the assessee has availed tax exemptions to crores of rupees and has not distributed any dividend, is also not relevant to decide the issue. The assessee has availed tax exemptions as per the provisions of the Act after satisfying the conditions prescribed therein. The scheme for purchase of own shares is not colourable device for avoidance of tax, because, like assessee, several leading industrial payers had undertaken buyback/purchase of own shares to reward their shareholders. The counsel for the assessee has filed elaborate written submission in rebuttal to submissions made by the Revenue and relevant written submissions filed by the appellant, are as under:

> ***Rebuttal to the submission:***
>
> *1.1. The Revenue contends that the Appellant's Scheme under sections 391 to 393 of the 1956 Act is a colorable device designed for avoidance of taxation on account of the following:*
>
> > *i) The Appellant through carefully orchestrated transactions has shifted its profit base from USA to Mauritius (Paras 2-6 of the submission filed by the Revenue).*
> >
> > *ii) The Appellant has enjoyed tax exemptions over the years and has not declared any dividend in any year despite having earned significant profits (Paras 7-9 of the submission filed by the Revenue).*
> >
> > *iii) The Appellant had bought back equity shares from its shareholders pursuant to the Scheme in a hurried manner considering the amendment to section 115QA of the Act which was to be effective from 1 June 2016 (Para 10 to 14 &Para 47-48 of the submission filed by the Revenue).*
>
> *1.2. The Appellant submits that on comparison of the Show Cause Notice ('SCN') dated 22 March 2018 issued and the order under section 115-0 of the Act passed, the Revenue has commented on aspects which never formed part of the SCN. It is submitted that whatever may have been the intention of the Revenue in issuing the communication dated 22 March 2018 originally, the legal effect of the same has been decided once and for all by Hon'ble Supreme Court of India in the Appellant's case in Civil Appeal 1992 of 2020 arising from SLP (C) No. 23705 of 2019, by holding that it is a SCN, and by holding that the enquiry to be conducted by the Revenue should be centered around this SCN.*
>
> *1.3. The Revenue has erred by traversing upon a number of findings in the order which never found mention in the SCN and thereby not affording the Appellant an opportunity to put forth its rebuttals there-to, which vitiates the order for violation of principles of natural justice as upheld by the Hon'ble Supreme Court in numerous judgments. Therefore, all such comments and adverse remarks ought to be considered as not proper and, therefore should be expunged and deleted.*

1.4. The Appellant submits that the transactions mentioned by the Revenue (i.e., merger of group entities in FY 2011-12, tax exemptions claimed by the Appellant, buy-back of shares under section 77A of the 1956 Act in AY 2014-15) do not in any manner impact the taxability of the purchase of shares under section 391-393 of the 1956 Act undertaken in the AY 2017-18 which is the subject matter of the appeal before this Hon'ble Bench. The only limited issue to be decided in this appeal is whether the purchase of shares by the Appellant under the Scheme is taxable as capital gains or dividend.

1.5. Without prejudice to the above, the Appellant has provided its submission in response to the contentions of the Revenue.

i) Scheme of Amalgamation of group entities with the Appellant in FY 2011-12

1.6. The Revenue's contention that the entire profit base of the Appellant has shifted from USA to Mauritius through carefully orchestrated transactions is completely incorrect and contrary to the facts of the case and the legal position.

*1. 7. The Appellant submits that Cognizant India Private Limited **('CIPL')** and MarketRX India Private Limited **('MIPL'),** group entities of the Appellant, were merged with the Appellant during the Financial Year **('FY')** 2011-12 with the approval of the Hon'ble Madras High Court under section 391 to section 394 of the 1956 Act. The merger had taken place in FY 2011-12 after complying with the relevant provisions of the 1956 Act and the Foreign Exchange Management Act, 1999 and the regulations thereunder.*

1.8. The amalgamation of group entities in India was undertaken with the commercial objective of consolidating the business operations in India. The issue of shares by the Appellant to Cognizant (Mauritius) Limited as consideration for the merger was in accordance with the Scheme of Amalgamation approved by the Hon'ble Madras High Court under section 391 to section 394 of the 1956 Act.

1.9. The Appellant submits that the Scheme of Amalgamation sanctioned by the Hon'ble Madras High Court operates as estoppel by judgment/ record on the Revenue and the genuineness of same cannot be questioned by the Revenue after a period of more than 10 years, more so, considering that the scheme:

(a) has been acted upon and has not been challenged;

(b) accepted by Registrar of Companies and the relevant authority(ies) constituted under the Companies Act;

(c) has been accepted by the Revenue qua both the amalgamating company(ies) and the amalgamated company, in as much as (i) the amalgamation was held to be revenue neutral in the concluded assessment for AY 2012-13; (ii) income of the amalgamating companies have been assessed in the hands of the amalgamated company from A Y 2012-13 and (iii) no assessments have been framed in the name of the amalgamating companies thereafter;

(d) the amalgamating companies have wound up and ceased to exist as legal entity in the eyes of law;

(e) the change in the shareholding of the amalgamated company was duly intimated to the Reserve Bank of India.

*1.10. The **Hon'ble Bombay High Court** in the case of **Unique Delta Force Security Private Ltd. Vs Sumeet Facilities Pvt. Ltd.175 Comp Cas 318** (Pages 105 to 113 of Paper book Volume II) held that once the scheme of arrangement was sanctioned by the Court under section 391 of the 1956 Act, the Court was not authorized to recall or rescind/cancel the scheme. The Court observed as under (Page No. 111 of Paper book Volume II):*

"13. It is therefore well settled by the above decisions of the Hon'ble Supreme Court, that once a scheme is sanctioned and effected, the changes allowed therein

should be minor ones and not "wholesale changes" which would tamper with the essence of the scheme and that if a Company desires to modify a scheme though not necessary to do so for the proper working thereof it is required to follow the procedure prescribed under Section 391 of the Act. In view thereof, allowing the prayers sought by the Applicants to recall/rescind/cancel the scheme in the garb of exercising inherent powers would not only amount to exercising powers not vested in this Court but would also amount to overreaching the law laid down by the Hon'ble Supreme Court. In view thereof I hold that this Court is not only not vested with power to abrogate/rescind/cancel the scheme or to even modify the scheme if it is not necessary for the proper working thereof but this Court cannot exercise inherent powers to abrogate/rescind/cancel the scheme once sanctioned and effective. "

1.11. The Hon'ble Kolkata ITA T in the case of ***Electrocast Sales India Ltd. vs. DCIT [2018] 170 ITD 507*** *held as follows:*

"4.6. The Id AR further argued that the scheme of amalgamation, as sanctioned by the Hon'ble Calcutta High Court, was effective from 1.4.2010 and the parties had acted according to the said scheme and cannot be subjected to reversal after a period of 7 years by virtue of the principle of 'res judicata', 'constructive res judicata' and 'acquiescence'.

……

We find that in the instant case, the income tax department had the opportunity to controvert the specific clause mentioned in para 10(iii) in the scheme of amalgamation, when the scheme was presented before the Hon'ble High Court for approval. Thus, applying the principles of res judicata as explained by the Hon'ble Apex Court in the aforesaid case, the issue can be deemed to be heard and decided. Accordingly, the argument that the same cannot be agitated in appeal uls391(7) of the Companies Act, 1956 deserves attention and merit."

1.12. The Hon'ble Delhi ITAT in the case of ***Priapus Developers (P.) Ltd vs ACIT [2019] 71 ITR(T) 113*** *has also laid down similar principles:*

" ... The amalgamation order passed by the High Court is a judicial order and has statutory force and in case, the department had any objection, then same should have been given before the High Court for which sufficient time was allowed. Now, the department cannot clamour that such an amalgamation have been used by the assessee as a tool for tax evasion or as colourable device."

1.13. Considering the aforesaid position in law, namely that it is not open to the Court sanctioning the scheme of arrangement under section 391 of the 1956 Act to cancel I rescind the same, the Revenue, much less, does not have the power to sit in judgment thereon and dub the sanctioned scheme as a colorable device to avoid tax.

1.14. Given the above, it is not possible for the Revenue to challenge the scheme sanctioned in FY 2011-12 in the present proceedings, (despite having accepted the position for the last several years). It is categorically asserted that the Revenue is estopped from making allegations about the fundamental nature and the genuineness of the amalgamation undertaken by the Appellant in FY 2011-12 which was duly sanctioned by the Hon'ble Madras High Court and seek to have adverse inference therefrom.

ii) ***Appellant's entitlement to income-tax exemptions***

1.15. The Appellant submits that it has been operating in India since 1994 and has grown to be one of the largest investors and employers in India. The Appellant has invested billions of dollars in India and directly employs around 2 lakh professionals across 12 cities in India. The Appellant has paid direct taxes of around Rs.10,000/- crores over the last one decade and had paid Rs.2,054 crores as direct taxes in the relevant AY 2017-18.

1.16. While the tax exemptions enjoyed by the Appellant over the years have no bearing to the issue on hand (i.e., taxability of the purchase of own shares by the Appellant under

the Scheme), the Appellant submits that the tax exemptions claimed by the Appellant are on account of the incentives provided by the Government (i.e., tax holiday under section 10A, section 10AA, section 80-IAB etc of the Act) as part of its fiscal initiatives to boost the level of exports and employment generation which is evident from the following:

> ***Press Information Bureau***
> ***Government of India***
> ***Ministry of Commerce & Industry***
> *11-July-2014 16:42 IST*
> ***Incentives/Facilities to Special Economic Zones***
>
> *In addition to Seven Central Government Special Economic Zones (SEZs) and 11 State/Private Sector SEZs set-up prior to the enactment of the SEZ Act, 2005, formal approval has been accorded to 565 proposals out of which 388 SEZs have been notified. Presently, a total of 185 SEZs are exporting. A list showing State-wise distribution of formally approved, notified and operational SEZs is at* ***Annexure****. The fiscal concessions and duty benefits allowed to Special Economic Zones (SEZs) are inbuilt into the SEZs Act, 2005 and Rules thereunder. These exemptions are uniformly applicable to all SEZs and are in the nature of incentives for export and are consistent with the principles that guide export promotion initiatives of the Government in general. The incentives and facilities offered to the units in SEZs for attracting investments into the SEZs are as under:-*

…..

> *The Government, on the basis of inputs/suggestions received from stakeholders on the policy and operational framework of the SEZ Scheme, periodically reviews the policy and operational framework of SEZs and takes necessary measures so as to facilitate speedy and effective implementation of SEZs as also to promote investment in SEZs thereby augmenting growth of employment and SEZ exports. In order to address the challenges being faced by SEZs, including difficulty in availability of vacant, contiguous land for setting up SEZs, inflexibilities in definition of Sector leading to non-optimal utilization of land etc, certain amendments have been carried out in the SEZ Rules, 2006 vide G.S.R. No. 540(E) dated 12th August, 2013.*

1.17. Like all other leading industry players in the sector, the Appellant has also set-up multiple units in Special Economic Zones (SEZ) and Software Technology Park of India (STPI) over the years. These SEZ units and STPI units have not only generated significant employment opportunities but have also resulted in substantial forex inflow for the country on account of exports which continues to remain one of the primary priorities for the Government.

1.18. It is also worth mentioning that all the tax exemptions claimed by the Appellant are subject to satisfaction of prescribed conditions laid down in the relevant provisions of the Act and such tax exemption has been granted after detailed scrutiny by the Revenue. In light of the above, the Revenue's efforts to taint the Appellant's Scheme on account of the tax exemptions enjoyed by the Appellant is completely unjustifiable and without any basis in law.

iii) The Scheme for purchase of own shares is not a colorable device for avoidance of tax

1.19. The Appellant submits that the rationale for purchase of own shares was to streamline the shareholding of the Appellant by purchasing shares from the minority shareholders of the Appellant and also to improve earnings per share. The rationale and objective of the Scheme have been duly considered by the respective authorities i.e., the Central Government, represented by the Regional Director and the Hon'ble Madras High Court.

1.20. The Appellant submits that the purchase of own shares by the Appellant has to be seen in light of the prevailing economic situation. The IT services industry, which the Appellant is a part of, had witnessed a rapid growth in the last decade which necessitated the industry to re-invest its surplus funds back into the business eyeing further growth potential. During the later years, the level of growth has been gradually declining indicating a dearth of attractive investment or expansion opportunities. In light of this economic reality (i.e., slowing growth), the Appellant undertook the purchase of own

shares to streamline its shareholding, improve earnings per share and long-term shareholder value.

1.21. The Appellant submits that several leading industry players had undertaken buy-back/ purchase of own shares to reward their shareholders, improve earnings per share and long-term shareholder value. A list of buy-back/ purchase of own shares by leading listed IT players (details from annual report) is provided below:

Rs in Crores

Company	***FY 2016-17***	***FY 2017-18***
Tata Consultancy Services Ltd	*16,000*	*-*
Infosys Ltd	*-*	*13,000*
Wipro Ltd	*2,500*	*11,000*
HCL Technologies Ltd	*3,500*	*-*

The above table clearly demonstrates that buy-back/ purchase of own shares was undertaken by leading industry players considering the economic situation and that the Scheme of the Appellant was also to achieve the commercial objectives stated above.

1.22. The Revenue assails the Scheme at two different levels; firstly, the Revenue contends that the Scheme is a facade to shift the profit base to Mauritius. Secondly, the Revenue contends that everything was done in a tearing hurry by Appellant despite the fact that the procedure as prescribed in the 1956 Act, including the service of notice to the Central Government under section 394A of the 1956 Act was duly followed

1.23. Section 394A of the 1956 Act reads as under

> ***"394A. Notice to be given to Central Government for applications under sections 391 and 394.***
>
> *The Court shall give notice of every application made to it under section 391 or 394 to the Central Government, and shall take into consideration the representations, if any, made to it by that Government before passing any order under any of these sections."*

1.24. Accordingly, notice was sent on the Appellant's Scheme seeking approval of the Central Government. The Registrar of Companies initially took an objection, raising all the points now raised by the Revenue. Thereafter, after due deliberation, the Central Government, represented by the Regional Director, accepted the Scheme (the Report of the Central Government, represented by the Regional Director, is at Page Nos 15 to 18 of the Paper book Volume IJ.

1.25. The said Report of the Central Government, represented by the Regional Director, will satisfy this Hon'ble Tribunal on the following two aspects:

> *(a) There was no such facade or sham, as is now being contended by the Revenue, Rather, the Scheme was for genuine corporate purposes.*
>
> *(b) There was no hurry, as is contended. The record does not reflect that the Revenue or the Central Government had sought for further time to submit their response under Section 394A. Everything has been done in the ordinary course, and the approval was granted, only after the Central Government and the High Court found the Scheme to be in order.*

1.26. As per ***General Circular No. 1/ 2014 dated 15 January 2014*** *issued by the Ministry of Corporate Affairs, the Income-tax department is required to provide its objections to the Regional Director in relation to a scheme of arrangement under section 391 to section 394. The Circular further provides that if no response is filed by the*

department, it is presumed that the income-tax department has no objection to the scheme. The relevant extract of the Circular is as follows:

> *3. An instance has recently come to light wherein a Regional Director did not project the objections of The Income Tax Department in a case under Section 394. The matter has been examined and it is decided that while responding to notices on behalf of the Central Government under Section 394A, the Regional Director concerned shall invite specific comments from Income Tax Department within 15 days of receipt of notice before filing his response to the Court. If no response from the Income Tax Department is forthcoming, it may be presumed that the Income Tax Department has no objection to the action proposed under Section 391 or 394 as the case may be.*

1.27. In light of the above circular and considering the principles laid down in the judicial precedents referred to in Para 1.10 to Para 1.12 above, it is now not open to the Revenue to raise the contention that the Scheme is a colorable device to avoid tax.

1.28. The Revenue has also contended that the Scheme is a colorable device to avoid tax on the basis that the Appellant has earned significant profits but has not declared any dividends in the past. The Appellant submits that the decision to declare dividend is the prerogative of the company and is taken by a company based on various factors including the fund requirements in business, expansion plans etc and that the Revenue cannot sit on judgment on the commercial wisdom of the Appellant to declare dividend or not.

1.29. Without prejudice to the fact that the purchase of own shares by the Appellant pursuant to the Scheme was driven by commercial reasons and rationale, the Appellant submits that if two courses are open for distribution of excess cash to the shareholders, viz, buy-back of shares or declaration of dividend, the Revenue cannot compel the Appellant to adopt the course that results in higher tax outgo. To put it differently, where the law enables a taxpayer to choose one out of the various available options, it is the prerogative of the taxpayer to choose the option that leaves the taxpayer with a lighter tax burden.

1.30. A choice exercised by a taxpayer from multiple legally permitted options cannot be treated as tax avoidance. This principle has been upheld by the Hon'ble Supreme Court in ***Vodafone International Holdings B.V. v Union of India (341 ITR 1) and Union of India v AzadiBachaoAndolan (132 Taxman 373).***

1.31. The Hon'ble Bombay High Court while sanctioning scheme of arrangement for purchase of own shares under section 391 of the 1956 Act in the case of ***Capgemini India Private Limited (Company Scheme Petition No. 434 of 2014)*** *has clearly held that purchase of own shares under a scheme cannot amount to avoidance of tax:*

> *"6.According to the Regional Director if the Scheme is sanctioned it will amount to evasion of income tax and outflow of foreign exchange to the tune of Rs. 248 crores and therefore on this ground the Scheme should be rejected. The Regional Director has not furnished any particulars in support of the aforesaid contention.* ***Be that as it may. if the law permits a company to buy back its shares in more than one way. the company cannot be compelled to follow only the method that results in payment of income tax.*** *It is well settled that an assessee can always manage his affairs in a manner so as to avoid payment of tax."*

1.32. Without prejudice to the fact that the provisions of the General Anti Avoidance Rules ('GAAR') are not applicable for the subject A Y under appeal, it is relevant to note that even ***CBDT Circular No. 7/ 2017 dated 27 January 2017*** *on "Clarifications on implementation of GAAR provisions under the Income-tax Act, 1961" provides that GAAR will not interplay with the right of the taxpayer to select or choose method of implementing a transaction:*

Question no. 3:	***Will GAAR interplay with the right of the taxpayer to select or choose method of implementing a transaction?***
Answer:	***GAAR will not interplay with the right of the taxpayer to*** *select or choose method of implementing a transaction.*

1.33. The Expert Committee set-up by the Government to provide report on GAAR has unambiguously held that selection of one or more options by the taxpayer and the timing of a transaction should not be subject to the GAAR provisions. The relevant extracts of the Report are as follows:

(1) Tax mitigation should be distinguished from tax avoidance before invoking GAAR.

(2) An illustrative list of tax mitigation or a negative list for the purposes of invoking GAAR, as mentioned below, should be specified-

(i) Selection of one of the options offered in law. For instance

(a) payment of dividend or buy back of shares by a company

…..

(ii) Timing of a transaction, for instance, sale of property in loss while having profit in other transactions

(iii) Amalgamations and demergers (as defined in the Act) as approved by the High Court.

Interpretation:

Whether to pay dividend to its shareholder, or buy back its shares or issue bonus shares out of the accumulated reserves is a business choice of a company. Further, at what point of time a company makes such a choice is its strategic policy decision. Such decisions cannot be questioned under GAAR.

Interpretation:

Payment of dividend to its shareholder or buy back of its shares or issuing bonus shares out of the accumulated reserves is a business choice of a company, which a company is entitled to exercise at any point of time. It should be interpreted as incidental that the shareholder is entitled to a treaty benefit which exempts capital gains, but it is subject to SAAR (i.e. Limitation of Benefit clause). The decision of X Ltd. cannot be questioned under GAAR.

1.34. The Revenue's contention that the Scheme was moved in a hurried manner is without any basis since the entire procedure as provided for in section 391 to section 393 of the 1956 Act (i.e., approval of the board of directors and shareholders for the Scheme, issue of public advertisements as required, obtaining no-objection report from the Central Government represented by the Regional Director, Ministry of Corporate Affairs) was duly followed by the Appellant for obtaining the sanction of the Hon'ble Madras High Court.

1.35. The Hon'ble Supreme Court judgement in the case of ***Walfort Share &Stock Brokers (P.) Ltd (326 ITR 1)*** *has held as follows with respect to timing of a transaction:*

> *"The fact that the dividend received was tax-free is the position recognized under section 10(33) of the Act. The assessee had made use of the said provision of the Act. That such use cannot be called "abuse of law". Even assuming that the*

transaction was pre-planned there is nothing to "impeach the genuineness of the transaction.."

1.36. In summary, based on the settled legal position and principles laid down by the Hon'ble Supreme Court and High Courts, the Appellant submits that the Scheme sanctioned by the Hon'ble Madras High Court for purchase of own shares by the Appellant from its shareholders, cannot, by any stretch of imagination be considered as a colorable device to avoid tax.

iv) <u>Appropriate taxes have been paid on the purchase of own shares</u>

1.37. The Appellant submits that one of the main objectives of the Scheme was to streamline the shareholding of the Appellant by purchasing shares from the minority shareholders. To achieve this objective, the Appellant purchased all the shares held by the US shareholders (other than 10,000 shares).

1.38. The US shareholders have paid capital gains tax under section 46A of the Act amounting to Rs 898 Crores and hence the contention of the Revenue that no taxes have been paid on the purchase of own shares is without any basis and contrary to the facts of the case.

1.39. The fact that there was no intention to avoid taxes is evident from the fact that the Appellant has purchased all shares (other than 10,000 shares) from the US shareholders which has resulted in the maximum possible tax outflow on the purchase of own shares.

1.40. Had the Appellant decided to purchase own shares only from the Mauritius shareholder or on a proportionate basis from all shareholders, the same would have resulted in Nil or a lower tax outflow as this would have meant purchase of no or lower number of shares from the US shareholders. However, this would not have achieved the commercial objective of the Scheme which was to streamline the minority shareholding of the Appellant.

1.41. In light of the above, the allegation of the Revenue that the Scheme is a colorable device to avoid tax is contrary to the facts of the case and settled legal position.

Part B of the Revenue's contentions: *Payment made by the Appellant to its shareholders under the Scheme is distribution of accumulated profits and therefore falls under the inclusive definition of dividend under the provisions of the Act - Paras 15-33 of submission filed by the Revenue*

2. 1. The Revenue at Paras 15 to 33 of submission has contended that the Scheme involves capital reduction and distribution of accumulated profits of the Appellant and is to be treated as dividend as per section 2(22) of the Act.

2.2. The Appellant draws the attention of the Hon'ble Tribunal to Para 4 to Para 7 its written submission which clearly bring out the legal position that the purchase of own shares by the Appellant under the Scheme cannot be treated as dividend as per section 2(22) of the Act.

*2.3. The Appellant submits that sections 2(22)(a)/ 2(22)(d) of the Act are deeming provisions seeking to enlarge the definition of the term 'dividend' and are therefore **<u>to be strictly construed</u>** as held by the Hon'ble Supreme Court in CIT vs C.P. SarathyMudaliar [1972] 83 ITR 170 (SC) and by the Hon'ble Delhi High Court in C.R. Dass [2012] 204 Taxmann 227 (Delhi).*

<u>Meaning of distribution</u>

2.4. The contention of the Revenue at Para 29 and Para 30 of their submission is that every payment to shareholder amounts to distribution even if such payment is not without any quid pro quo but towards satisfaction of the liability due by the company equivalent to the amount of consideration due for purchase of own shares. This contention of the Revenue is completely contrary to the principles laid down in the case of Punjab Distilling

Industries vs CIT [1965] 57 ITR 1 (SC) wherein the Hon'ble Supreme Court had an opportunity to examine the meaning of the term 'distribution' as it appeared in section 2(6A)(d) of the erstwhile Income-tax Act, 1922 (corresponding to section 2(22)(d) of the Act):

"The word "distribution" has several dictionary meanings. In the context of section 2(6A)(d), it means ***allotment or apportionment of the surplus amongst the shareholders;*** *this allotment takes place and* ***each shareholder gets a vested right to his portion of the surplus*** *as soon as the capital stands reduced .... "*

2.5. The Hon'ble Supreme Court has clearly held that in the case of 'distribution' each shareholder gets a vested right to his entitlement. This clearly means that the shareholder does not provide anything to the company in return for the amount so received pursuant to the distribution. In other words, there is no quid-pro-quo.

2.6. The term 'distribution' is different from 'payment' which refers to fulfilment of a promise; the performance of an agreement. A delivery of money or its equivalent in either specific property or services by a debtor to a creditor. Thus, payment has a pre-requisite feature of quid pro quo.

2. 7. The present case is a case of purchase of own shares by the Appellant which is entirely based on offer and acceptance of the offer and then the transaction is consummated for a pre-determined consideration. In other words, all essential elements of a valid contract are present, viz. invitation made by a company, offer of shares to be bought back from the shareholder, acceptance or non-acceptance of such offer by the company, payment of consideration.

2.8. The use of the term 'distribution' in section 2(22)(a) to section 2(22)(d) of the Act and 'payment' in section 2(22)(e) of the Act itself demonstrates that the legislature has clearly treated 'distribution' and 'payment' as different concepts. Thus, the argument of the Revenue that every payment to shareholder involves distribution is without any basis in law.

2.9. The payment of consideration for purchase of own shares by the Appellant does not fall within the ambit of the term "distribution" so as to attract the provisions of either section 2(22)(a) or section 2(22)(d) of the Act, and consequently attract liability under section 1150 of the Act.

Distribution on reduction of capital

2.10. The Revenue in Para 31 of their submission contends that provisions of section 2(22)(d) of the Act applies as long as there is reduction of share capital; the said section does not distinguish as to whether reduction of capital is the intended result of/ consequence of the Scheme.

2.11. The Appellant submits that the shares purchased by the company from its shareholders under section 391 are necessarily to be extinguished as section 77(1) of the 1956 Act provides that a company cannot hold its own shares.

2.12. The payment to the shareholders was made in pursuance of the contract of purchase of shares and not on account of extinguishment / cancellation of shares, which was a step subsequent to acquisition of shares and compelled by law. The extinguishment / cancellation of shares is a step subsequent to the Appellant having acquired the shares from the shareholders and made payment therefore, at the first instance.

2.13. In the case of a scheme of arrangement where shares are bought back, the reduction of capital is a separate legal consequence of the transfer of tender I repurchase of stock. Therefore, the payment of money to the quondam shareholder pursuant to his tender of shares, will not be a "distribution on reduction of capital", but would rather be a standalone payment, with a reduction of capital being a consequence of the repurchase transaction. Section 2(22)(d) will not be attracted unless the distribution is a direct consequence of the reduction of capital. In this case, Section 2(22)(d) is not attracted at

all. Possibly realizing this, the Revenue desperately contends in Para 31 of their submission that Section 2(22) is inclusive in nature.

2.14. The consequent reduction of capital ***cannot be said to be a causa causans****or proximate/ direct cause of the payment to the shareholder* ***but causa sine qua non*** *since the extinguishment / cancellation of shares is a consequence of the purchase of own shares.*

2. 15. In the case of Accord is Beheer BV vs. DCIT 176 TT J 406 (@ pages 138 to 144 of the Paper book Volume II) the Hon'ble Mumbai bench of the Tribunal observed that reduction of shares in a scheme for purchase of shares by the company is consequential in nature.

> *"15....*
>
> *Further the Ld CIT(A) has observed that the subsequent cancellation or writing off the shares is nothing to do with the transfer made by the assessee, even though the same has resulted in reduction of paid-up share capital of the company, Mis Century Enka Ltd. We agree with the above said observations made by Ld CIT(A). As observed by him, two different activities have been combined with the scheme of arrangement.* ***The first one was to buy back shares belonging to non-resident shareholders and the second one was to cancel the shares so purchased. We agree with the view taken by Ld CIT(A) that they are two different actions and both should not be clubbed together, even though Mis Century Enka Ltd has combined the same, for the sake of its convenience, in the scheme of arrangement."*** *(emphasis supplied)*

2.16. The Revenue's contention at Para 23 of their submission that the judgement of the Hon'ble Supreme Court in the case of Anarkali Sarabhai v. CIT [1997] 224 ITR 422 (SC) was impliedly held per incuriam by the Hon'ble Supreme Court in the case of CIT v. G. Narasimhan (236 ITR 327) (SC) is without any basis as the Hon'ble Supreme Court, in the said judgements, has laid down the position of law on a different transaction:

> *(i) The Hon'ble Supreme Court in the case Anarkali Sarabhai (supra) had held that* ***redemption of preference shares would tantamount to a sale/ extinguishment*** *of a capital asset and is chargeable to tax under the head 'capital gains'.*
>
> *(ii) In the case of CIT v. G. Narasimhan (236 ITR 327) (SC), the Hon'ble Supreme Court dealt with the taxability of an* ***admitted case of capital reduction where only the face value of the shares was reduced*** *and the shareholder held the same number of shares after the capital reduction*

2.17. The Appellant submits that there is no conflict between the ratio laid down in the case of Anarkali Sarabhai (supra), on the one hand, and the view expressed by the Hon'ble Apex Court in the later decision in the case of G. Narasimhan (supra). It has nowhere been held in the later judgment (in the case of G. Narasimhan) that the earlier decision of Anarkali Sarabhai (supra) was per incuriamand, therefore, no longer good law.

2.18. The position of law laid down by the Hon'ble Supreme Court in the case of Anarkali Sarabhai (supra) is applicable to the facts of the case and hence the purchase of own shares by the Appellant would amount to transfer chargeable to tax in the hands of the shareholders as 'capital gains' under section 46A of the Act.

Part C of the Revenue's contentions: *Purchase of shares under section 391 to section 393 of the 1956 Act de-hors the provisions of section 100 of the 1956 Act is not possible - Paras 34-40 of submission filed by the Revenue*

3.1. The Revenue has contended that provisions of section 391 to section 393 of the 1956 Act are only a single window scheme and will necessarily have to still relate to either section 77 read with section 100 or section 77 A of the 1956 Act. The contention of the

Revenue that, "there cannot be sui generis buy-back that is possible under Section 391-393 de hors reference to any other provision of the Companies Act." is contrary to the settled law. [Reference is drawn to decision in SEBI vs. Sterlite Industries Limited: 113 Comp. Cas. 273 (@ pages 1 to 14 of the Paper book Volume II; Hon'ble Andhra Pradesh High Court in Re: T.C.I. Industries Ltd. (2004) 188 Comp Case 373 (AP), the Hon'ble Delhi High Court in Re: Reckitt Benckiser {India) Ltd. Company Pet. 228. 2010 and In Re: Maneckchowk and Ahmedabad (1970) 40 Comp Cas 819).

3.2. The Appellant has clearly explained in Para No. 2 of its written submission filed before the Hon'ble Tribunal that the powers granted to the High Court under section 391 to section 393 of the 1956 Act are independent and de hors section 77 and section 100 of the 1956 Act. In other words, notwithstanding the bar under section 77, a company can purchase its own shares under a Court approved scheme under section 391 of the 1956 Act.

3.3. Notwithstanding the above, the Appellant submits that the discussion in Para 2.11 to Para 2. 15 above clearly demonstrates that the extinguishment/ cancellation of shares and the consequent reduction of capital is necessitated on account of the inability of a company to hold its own shares. The mere fact that shares purchased by the Appellant are subsequently extinguished does not change the character of the Scheme from that of purchase of own shares to a scheme of capital reduction

3.4. It is important to draw the attention of the Hon'ble Tribunal to the fact that the Regional Director South Zone, Ministry of Corporate Affairs filed a 'no objection' report with the Hon'ble High Court, overruling the objections raised by the Registrar of Companies (which are similar to the contentions of the Revenue) to the proposed scheme under section 391 of the 1956 Act. Having received no objection from the Regional Director, the Hon'ble High Court proceeded to sanction the scheme as framed and presented for purchase of the shares from the shareholders in the manner and as provided in the Scheme.

3.5. The Revenue at Para 34 of their submission has contended that the Scheme itself clearly provides that the sanction shall not exempt the Appellant from payment of taxes. It is important to point out that it is not the case of the Appellant that payment made to the shareholders for purchase of shares is exempt under the provisions of the Act. The Appellant re-iterates that applicable taxes were withheld at source out of the payment of consideration to the US resident shareholder companies aggregating to Rs.898.01 Crores (thereby resulting in payment of maximum possible tax on the purchase of its own shares). In so far as the payment to the Mauritian shareholder was concerned, the same was not liable to tax in India by virtue of the exemption provided under the applicable India-Mauritius Double Tax Treaty, which overrides the provisions of the Act in terms of section 90(2) thereof.

3.6. The Appellant submits that while the income-tax consequences of the Scheme can be decided by the Revenue, the Revenue cannot seek to re-characterize the nature of the transaction as approved by the Hon'ble High Court as part of the sanctioned Scheme. The taxability of the consideration paid to the shareholders can be determined by the Revenue only on the basis of the nature of the transaction as sanctioned by the Hon'ble High Court. The transaction being that of a purchase of own shares is confirmed by the Hon'ble High Court and that applicable taxes have been paid thereon. Given the same, the Revenue cannot seek to re-characterize the transaction of purchase of shares as one of reduction of capital.

Part D of the Revenue's contentions: Section 46A of the Act is applicable only for purchase of shares undertaken under the provisions of section 77 A of the 1956 Act and that the amendment to section 115QA of the Act with effect from 01.06.2016 has no relevance - Paras 41-46 of submission filed by the Revenue

4.1. The Revenue has contended that the provisions of section 46A are applicable only to purchase of shares under section 77 A of the 1956 Act and not to other forms of purchase of own shares.

Taxability of purchase of own shares under section 77 A of the Act

4.2. The Appellant has clearly explained in Para No. 8 of its written submission filed before the Hon'ble Tribunal that the provisions of section 46A of the Act are applicable to all kinds of buy-back I purchase of shares by the company from its shareholders. The same is not restricted to section 77 A of the 1956 Act alone.

4.3. While section 46A applies to both purchase of shares and specified securities, the term 'specified securities' is not defined in the Act. The Explanation to section 46A refers to section 77 A of the 1956 Act for the limited purposes of defining the term 'specified securities'. The definition of 'specified securities' in Explanation to section 77 A of the 1956 Act is legislatively incorporated into section 46A of the Act. Therefore, the contention of the Revenue that the provisions of section 46A of the Act are applicable only for purchase of shares as per section 77 A of the 1956 Act is erroneous and without any basis.

4.4. It is trite law of interpretation of statutes that an Explanation cannot enlarge or limit the principal provision to which it is attached. Its role is merely clarificatory, to the extent of the term that it seeks to explain- in this case, it is an explanation of "specified securities" and not the type of transactions or purchase by a company of its own shares which are to be covered by the principal section.

4.5. The principle of GeneraliaSpecialibus Non Derogantclearly provides that special provisions prevail over general provisions. This position has been affirmed by the in the cases of ***CIT v. ShahzadaNand and Sons 60 ITR 392 (SC) and UOI v. Indian Fisheries (P.) Ltd. AIR 1966 SC 35.*** *The Appellant submits that section 46A of the Act, being a special provision for bringing to tax capital gains arising to a shareholder on purchase of its shares by the company must be given full effect to.*

4.6. The Revenue has stated that the exclusion in sub-clause (iv) of section 2(22) of the Act applies only in respect of a buy-back of shares undertaken in accordance with section 77 A of the 1956 Act which implies that every other form of buy-back of shares / purchase of own shares is taxable as 'dividend'.

4. 7. When a transaction of purchase of own shares from its shareholders is not specifically covered under the deeming fiction contained in section 2(22) of the Act, it leads to the inescapable conclusion that the exemption under sub-clause (iv) of the said section has been provided only out of abundant precaution or for clarification purposes. This does not mean that in the absence of exemption qua purchase of own shares under a Court sanctioned scheme, the same would be deemed to be 'dividend' under section 2(22) of the Act. To put it differently, merely because section 2(22)(iv) was inserted in the context of buy back of shares under section 77 A of the 1956 Act cannot ipso facto lead to the conclusion that any other mode of purchase of own shares would be covered within the scope of section 2(22) of the Act, especially without answering the requirement of 'distribution' as envisaged in the section.

Amendment to section 115QA with effect from 01.06.2016

4.8. The Appellant has explained in Para No. 9 of its written submission filed before the Hon'ble Tribunal that the amendment to section 115QA with effect from 01.06.2016 makes it clear that the provisions of section 2(22) and consequently the provisions of section 115-0 are never applicable to purchase of own shares.

4.9. The Revenue at Para 46 of their submission contends that the amendment to section 115QA of the Act applies only to buy-back done under section 391 to section 393 read with section 77 A.

4.10. The above contention of the Revenue is without any basis as is clearly evident from the Explanation to section 115QA of the Act which defines the term 'buy-back':

<u>Explanation to section 115QA- Prior to 01.06.2016</u>

"Explanation - For the purposes of this section:

(i) "buy-back" means purchase by a company of its own shares in accordance with the provisions of section 77A of the Companies Act, 1956 (1 of 1956);"

<u>Explanation to section 115QA- With effect from 01.06.2016</u>

"Explanation - For the purposes of this section,

(i)"buy-back" means purchase by a company of its own shares in accordance with the provisions of any law for the time being in force relating to companies;"

4. 11. The above amendment clearly establishes that buy-back includes purchase of own shares in any form i.e., buy-back includes both purchase of own shares under section 77A and also purchase of own shares under section 391 to section 393 of the 1956 Act.

4.12. Section 115QA of the Act read with section 10(34A) of the Act merely shifts the incidence of taxation of buy-back of shares from the hands of the shareholder to the company undertaking the purchase of shares / buy-back.

4.13. The amendment of section 115QA of the Act with effect from 1 June 2016 levying additional income-tax in the hands of the Company on purchase of its own shares under a scheme clearly indicates that prior to 1 June 2016, such purchase of own shares by the Company can be charged to tax only under the head "Capital Gains" in terms of provisions of section 46A of the Act in the hands of the shareholders. The provisions of section 2(22) were never applicable to such purchase of own shares.

4.14. If the purchase of own shares under section 391 to 393 of the Companies Act was to be treated as dividend and tax was payable under section 115-0 by the company purchasing its own shares, then there was no need for section 115QA of the Act to be amended to bring it to tax in the hands of the company at substantially similar rate of tax.

4.15. The Revenue's contention that the amendment to section 115QA was merely to shift the incidence of taxation from section 115-0 to section 115QA is without any basis as post amendment to section 115QA, there is no corresponding amendment in section 2(22) of the Act or section 115-0 of the Act to carve out purchase of own shares under a court approved scheme from being treated as 'dividend'.

4.16. If after the amendment in section 115QA, the position advocated by the Revenue is to be taken as correct, the same transaction of purchase of own shares would be taxable under both section 115QA of the Act and under section 115-0 of the Act in the hands of the same company. This interpretation would be totally absurd.

4.17. It is submitted that a combined reading of the provisions of section 46A, section 115QA and section 10(34A) of the Act clearly indicates that the purchase of own shares under section 391 to section 393 of the 1956 Act was taxable in the hands of the shareholders under section 46A of the Act prior to 01.06.2016 and is subject to additional income-tax under section 115QA in the hands of the company with effect from 01.06.2016. The provisions of section 2(22) and consequently section 115-0 were never applicable to purchase of own shares under section 391 to section 393 of the 1956 Act.

5. <u>Other contentions of the Revenue</u>

5.1. The Appellant has explained in Para No. 12 and Para No. 13 of its written submission filed before the Hon'ble Tribunal that the Revenue has adopted

inconsistent stands in the case of the Appellant vis-a-vis the shareholders and also in the case of Genpact Ltd which has been denied by the Revenue at Para 49 and Para 50 of their submission.

5.2. The Appellant submits that the tax withheld and deposited in the case of US resident shareholders to the tune of Rs. 898.01 crores have been appropriated by the Revenue. The returns filed by the US shareholders and Mauritian shareholder reflecting capital gains on purchase of shares by the Appellant under section 46A have been processed under section 143(1) of the Act and have become final. The time limit for scrutiny assessment under section 143(3) of the Act for the subject AY has also expired.

5.3. In the case of Genpact vs DCIT [2019] 419 ITR 370 (Delhi) and [2019] 419 ITR 440 (SC) [@ Pages 25 to 46 of the Paper book Volume Ill], the Revenue has sought to levy tax under section 115QA of the Act on buyback/ purchase of shares under section 391 of the 1956 Act.

5.4. The Revenue has in Para 50 of their submission has sought to contend that the facts in the case of Genpact (supra) is distinguishable from the facts of the Appellant's case. However, the purchase of shares in the case of Genpact was also not in accordance with section 77 A of the 1956 Act and Genpact's factual matrix is identical to the Appellant's case as captured below for this Hon'ble Tribunal's reference (relevant extracts from the scheme of arrangement of Genpact is provided below).

Scheme of Arrangement

Between

Genpact India

ANNX-A

And

The Equity Shareholders of Genpact India

16

BACKGROUND

- Genpact India, a private company with unlimited liability, ("the Company"), is incorporated under the Companies Act, 1956 and having its registered office at Delhi Information Technology Park, Shastri Park, New Delhi – 110053

RATIONALE OF THE SCHEME

- The Company is considering to rationalize its capital structure and accordingly intends to purchase its equity shares for the following reasons:
  - (i) Improve Earnings Per Share;
  - (ii) Improve Return on Capital;
  - (iii) Achieve Optimum Capital Structure; and
  - (iv) Service Equity more efficiently.

Accordingly, this Scheme of Arrangement is presented under Section 391 of the Companies Act, 1956 (the "Act") for the purchase of Equity Shares of Genpact India from its existing Equity Shareholders. The Scheme also provides for matters incidental or consequent to the same.

For

4. PURCHASE OF SHARES

4.1 The Company may, at the option of its shareholders, purchase upto a maximum 33% of the Equity Shares held by each shareholder as on Effective Date for a consideration of Rs. [illegible]/- per Equity Share. Shareholder may exercise the option for the entire 33% or any part thereof of the Equity Shares held by him as on the Effective Date.

Company With Unlimited Liability (Private Limited) Information Technology Park Shastri Park, Delhi 110053

Certified to be True Copy

Examiner Judicial Department
High Court of Delhi at
Authorised Under Section 76
Indian Evidence Act

For [illegible] India
(Private Company With Unlimited Liability)

Company Secretary

5. TREATMENT OF SHARES PURCHASED

5.2 In the event of cancellation of shares pursuant to Clause 5.1.

(a) the issued, subscribed and paid-up equity share capital shall stand adjusted to the extent of face value of the Equity Shares cancelled;

(b) The difference between the face value of Equity Shares cancelled under the Scheme and its cost to the Company shall be adjusted against Capital Redemption Reserve / General Reserve / balance in the Profit and Loss Account, to the extent balances are available.

5.5. The above relevant clauses from the scheme of arrangement of Genpact make it amply clear that:

(a) The purchase of own shares by Genpact was undertaken under the provisions of section 391 of the 1956 Act and was not a buy-back/ purchase of own shares under section 77 A of the 1956 Act.

(b) As per the clause 5.2 of the Genpact scheme (as extracted above), the scheme of arrangement of Genpact also involved cancellation of shares purchased as a consequence and it also involved an adjustment to the paid-up share capital and also against the general reserve/ retained earnings.

This demonstrates beyond doubt that the fact pattern in Genpact's scheme of arrangement and the Appellant's Scheme are identical and not different as contended by the Revenue. And in this similar fact pattern, the Revenue, in the case of Genpact, has adopted the stand that such purchase of shares under section 391 is liable to tax under section 115QA of the Act.

5.6. The Appellant seeks to draw attention of the Hon'ble Bench to the decision of the Hon'ble Supreme Court in the case of ***Berger Paints India Ltd. vs. CIT (266 ITR 99)*** *(@ Pages 47 to 51 of the Paper book Volume Ill) wherein the Apex Court held that it was not open to the Revenue to adopt conflicting I contrary view in the hands of the different taxpayers.*

6. Prayer

In light of the foregoing submissions and the arguments of the Appellant in its written submission filed with the Hon'ble Bench, it is humbly prayed that the Hon'ble Tribunal be pleased to allow the appeal filed by the Appellant by holding that the provisions of section 115-0 of the Act are not applicable to the Appellant.

31. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. We have also carefully considered relevant provisions of The Companies Act, 1956,the Companies Act, 2013, and the Income Tax Act, 1961. The case laws relied upon by both parties are perused. The factual matrix of the impugned dispute is that the assessee company had purchased its own shares from non-resident shareholders in a 'Scheme of Arrangement & Compromise' sanctioned by the Hon'ble High Court of Madras in terms of provisions of Sec.391-393 of the Companies Act, 1956, vide order dated 18.04.2016.

The scheme was sanctioned by the Hon'ble High Court of Madras on 18.04.2016, permitting the assessee to purchase up to a maximum of 94,00,534 equity shares at a price of Rs.20,297/- per share. In accordance with the scheme as sanctioned by the Hon'ble High Court of Madras, the assessee has purchased 94,00,534 equity shares (representing 54.70% of the paid up share capital as on the date of implementation of the scheme) from its shareholder at price of Rs.20,297/- per share and paid total consideration of Rs.19,080.26 Crs. As per scheme document submitted and approved by the Hon'ble High Court of Madras, in clause-5, the assessee has specified the manner in which shares can be purchased from each shareholder. Firstly, as per Clause-5.2(a), all shares held by shareholders owning less than 1% would be purchased by the company from its shareholders other than 10,000 equity shares of Rs.10/- each. Secondly, as per Clause-5.2(b),all equity shares held by the shareholders holding more than 1%, but less than 25% would be purchased by the company. Lastly, as per Clause-5.2(c), the balance equity shares were proposed to be purchased from shareholders holding more than 25% shareholding in proportionate to their *inter se* holding in the company. Admittedly, the share capital of the assessee company was held by four non-resident shareholders, and out of which, three shareholders are residents of USA and one shareholder is tax resident of Mauritius. The net effect of the scheme was that post sanction of the scheme, the entire shareholding of CTS-USA and Market RX Inc.,

USA, has been purchased by the assessee. The only shareholders left after purchase of own shares is Cognizant Mauritius Ltd., which was holding 76.09% of shareholding prior to sanction of the scheme and after sanction of the scheme and purchase of shares, shareholding percentage increased to 99.87% of total paid up capital of the assessee company leaving behind 0.13% of shareholding with CSS Investment LLC, Delvare, USA. Before implementation of the scheme, in the FY 2011-12, there was a restructuring of various business directly or indirectly under the control of CTS, USA. Through a Court approved scheme of amalgamation, the assessee was amalgamated with M/s.Cognizant India Pvt. Ltd., (in short "M/s.CIPL")& M/s.Market RX India Pvt. Ltd.(in short "M/s.MIPL"). M/s.CIPL was a wholly owned subsidiary of Cognizant (Mauritius) Ltd., whereas, M/s.MIPL was a wholly owned subsidiary of M/s.Market RX Inc., USA, both of whom are wholly owned subsidiaries of CTS, USA. Interestingly, the shares were allotted on 1:1 swap based on number of shares held by the shareholders of all entities and the swap was not in proportion to the market value of the shares in the individual companies. This resulted in CTS, USA holding only 21.92% shares in the amalgamated entity, whereas, CTS, Mauritius, held 76.68% of the amalgamated entity. This is despite the fact that shares held by CTS,USA had a book value/net worth of Rs.22,581.91 per share prior to amalgamation while CTS, Mauritius, had a book value/net worth per share of only Rs.84.45. If the shares were to be distributed as per net worth/book value, then, CTS USA ought to

have held 98.3% of the amalgamated entity. Therefore, from the above restructuring of shareholding pattern of the assessee company, it is clear that there has been an artificial shifting shareholding base from USA to Mauritius solely with a aim of claiming DTAA benefits, because, as per India Mauritius DTAA capital gains on transfer of equity shares is not taxable in India, as per the Indian Tax Laws. One more important fact brought on record by the AO also needs to be discussed before we continue to discuss the present 'Scheme of Arrangement & Compromise' in light of arguments of the assessee. As per the facts brought on record, the assessee has hitherto enjoyed up to and around Rs.30,441Crs. tax exemption over the years and has close to Rs.33,801Crs. of accumulated profits. However, there has been no dividend distribution to shareholders in any year except for declaration of interim dividend in the AY 2006-07 for Rs.237 Crs. on which DDT of around Rs.33 Crs. has been paid. The only other time profits were distributed to the shareholders was in AY 2013-14 by way of buyback of shares for Rs.2,878Crs. and this was done just prior to the introduction of Sec.115-QA of the Income Tax Act, 1961.

32. In light of above stated facts, we need to analyze the existing 'Scheme of Arrangement & Compromise' for purchase of its own shares as sanctioned by the Hon'ble High Court of Madras in terms of provisions of Sec.391-393 of the Act. As per the scheme sanctioned by the Hon'ble High Court of Madras, the appellant had bought back 94,00,534 numbers

of equity shares of face value of Rs.10/- each from its shareholders at a price of Rs.20,297/- per equity share and paid total consideration of Rs.19,080.26 Crs. to its non-resident shareholders. There is no dispute with regard to the fact that the assessee has withheld tax wherever it is applicable and remitted to the government account. In fact, TDS has been deducted on consideration paid to US tax resident shareholders, because said transaction does give rise to capital gain tax in India. But, TDS has not been deducted on payment to Mauritius tax resident shareholder, because said transaction is not liable to tax in India in terms of India –Mauritius tax treaty. At this stage, it is important to note that the entire scheme itself was moved in a hurried manner, which is evident from the dates and events brought on record by the AO. There was a proposal to amend sec.115QA and the same was announced in public domain on 29.02.2016. The assessee immediately convened a Board Meeting on 10.03.2016 to consider the scheme of purchase of its own shares. The details of the scheme were sent to the Registrar of Companies on 05.04.2016. The Registrar of Companies sent their objections to the Regional Director on 07.04.2016. The scheme came up for final hearing before the Hon'ble High Court on 11.04.2016 and the Hon'ble High Court has approved the scheme on 18.04.2016. The assessee has implemented the scheme on 18.05.2016 and the amendment to Sec.115QA had come into force w.e.f.01.06.2016. From the above dates and events, it is clear that the assessee had moved a

proposed scheme for buyback of its own shares in terms of sec.391-393 of the Companies Act, 1956, when it came to know that provisions of Sec.115QA, which levy additional tax on distributed profit by Indian Companies on purchase of its own shares from shareholders. Therefore, it is necessary to 'look through' the scheme in light of relevant provisions of the Companies Act, 1956 and the Income Tax Act, 1961, to analyze the tax implications.

33. The Ld.Counsel for the assessee and the ld. ASG explained the scheme with relevant clauses. The scheme primarily states that it is a 'Scheme of Arrangement & Compromise' and rational for the scheme is to rationalize its shareholding and capital structure. The fourfold reasons given in the scheme are to increase EPS, to streamline corporate ownership, to optimize the overall capital structure and to reduce the risk in terms of foreign currency fluctuation in respect of rupee funds. If you see the rational explained in the scheme in light of change in capital structure took place after implementation of the scheme, it looks like the entire scheme is nothing but a facade to avoid stating that the dominant and only commercial purpose is to shift the profit base to Mauritius so as to get the tax advantage. The term 'buyback' is not used anywhere in the scheme. The transaction is always described only as purchase of equity shares. In fact, Clause 6.7 of the scheme clearly states that the purchase of equity shares shall not be treated as 'buyback' u/s.68 of the Companies

Act, 2013. The real object and purpose of the scheme is also clear by a reading of some of the clauses in the scheme. In Clause 6.6, it was specifically stated that the purchase of its own shares in pursuant to the scheme will not attract Sec. 2(22), Sec. 115-O or Sec.115-QA of the Act. It was further stated in Clause 6.7 that the purchase of its own shares would not amount to reduction of share capital in terms of sec.100 and further, would not amount to buyback u/s.68 of the Companies Act, 1956.The scheme is also provides for payment of consideration for purchase of shares. As per Clause-7.2(a), the issued, subscribed and paid up share capital shall be adjusted to the extent of face value of equity shares purchased by the company. As per Clause 7.2(b), the difference between the face value and total consideration shall be first paid out of the General Reserve Account and the balance shall be paid out of the accumulated credit balance in the P & L A/c. The scheme further states that the face value of equity shares extinguished shall be transferred from P & L A/c to the 'Capital Redemption Reserve' which is the same reserve into which amounts are transferred following purchase of own shares out of distributable profits. The effect of the scheme is that 54.70% of the total paid up share capital of the assessee got reduced. In terms of consideration, the assessee has paid a sum of Rs.9.4 Crs. from paid up share capital and further, a sum of Rs.59.286 Crs. from General Reserves and the balance of sum of Rs.19,011.57Crs. from retained earnings. Therefore, from the above facts, it is clear that there is a

capital reduction and distribution out of accumulated profit of the Company to its shareholders.

34. In light of above facts, if you examine the present 'Scheme of Arrangement & Compromise', the question that arise for consideration is whether consideration paid by the assessee to its non-resident shareholders in pursuant to 'Scheme of Arrangement & Compromise' approved by the Hon'ble High Court of Madras in terms of Sec.391-393 of the Companies Act, 1956, is taxable in the hands of the assessee or not. The AO and the Ld.CIT(A) have held that consideration paid by the assessee for purchase of its own shares from non-resident shareholders, comes within the ambit of Sec.2(22)(a) / 2(22)(d) of the Act, and the assessee is liable to pay DDT u/s.115-O of the Act. The term 'dividend' has been defined u/s.2(22)(a) of the Act, and as per said definition, any distribution by a company to its shareholders to the extent of accumulated profits, whether capitalized or not, if such distribution entails the release by the company to its shareholders of all or any part of the assets of the company. The definition is an inclusive definition and it goes beyond the conventional or traditional meaning associated with dividend. The definition is broad and covers a wide variety of payments made by a company. In fact, Sec.2(22)(e) even includes a loan given by a company to its shareholder, subject to certain conditions, within the ambit of dividend. Therefore, the object of such an expansive definition seems to

be ensure that the taxpayer do not camouflage payments out of accumulates profits to its shareholders through different channels in order to avoid payment of tax. Sec.2(22)(a) covers any distribution by a company of accumulated profits which entails the release by the company to its shareholders of all or any of the assets of the company. Sec.2(22)(d) covers distribution made to the shareholders by a company on the reduction of its share capital to the extent the company possess accumulated profits. The term 'dividend' has been judicially recognized as well by various Courts, including the Hon'ble Supreme Court in the case of Shashibala Navnitlal v. CIT (supra), wherein the Hon'ble Gujarat High Court has discussed the term 'dividend' in light of sec.2(6A) of the Income tax Act, 1922, and held that distribution of capitalized accumulated profits entailing release of assets of a company amounts to dividend contained in Sec.2(6A)of the Income tax Act, 1922. A similar view has been expressed by the Hon'ble Supreme Court in the case of Punjab Distilling Industries Ltd. v. CIT reported in [1965] 57 ITR 1 (SC), where it was held that divided with which we are concerned is not that which we ordinarily understand by that expression, but dividend by definition. Undersection 2(6A)(d) of the Act, it is one of the ingredients of the definition that it shall have been distributed by a company on reduction of the capital to the extent to which the company possesses accumulated profits. Under section 16(2) of the Act, such a dividend shall be deemed to be an income of the previous year in which it is paid,

credited or distributed. Unless, such a distribution as is mentioned in clause (d) of section 2(6A) of the Act, had taken place, it would not be a dividend. If it was not so distributed, section 16(2) of the Act, would not be attracted. To put it in other words, if accumulated profits were distributed, it would satisfy not only the definition of "dividend" in clause (d) but also would fix the year, in which, it would be deemed to be income. What then is the meaning of the expression "distribution"? The dictionary meaning of the expression "distribution" is to give each a share, to give several persons. The expression distribution connotes something actual and not notional. It can be physical; it can also be constructive. One may distribute amounts between different shareholders either by crediting the amount due to each one of them in their respective accounts or by actually paying to each one of them the amount due to him. The Apex Court had to construed the scope of the word "paid" in section 16(2) of the Act in J.Dalmia v. Commissioner of Income-tax [1964] 53 ITR 83, 90 (SC), Shah J. speaking for the court, observed: "The expression 'paid in Section 16(2), it is true does not contemplate actual receipt of the dividend by the member. In general, dividend may be said to be paid within the meaning of section 16(2) when the company discharges its liability and makes the amount of dividend unconditionally available to the member entitled thereto. Therefore, from the ratio of above two case laws, it is clear that any distribution by a company of accumulated profits, if such distribution entails the release by the

company to its shareholders all of or any part of the asset of the company shall come within the definition of 'dividend' u/s.2(22) of the Income Tax Act, 1961. It is also pertinent to note that the assessee has sought to distinguish Shashibala Navnitlal v. CIT (supra) on the ground that it is contrary to the decision in Anarkali Sarabhai v. CIT (supra). According to the Ld.Counsel for the assessee, said judgment was rendered at the time when the provisions of Sec.46A of the Act, specific to a transaction of purchase of shares was not in existence in the statute and further, it was a case of redemption of preference was held to fall under the definition of 'dividend' under the provisions of the Income Tax Act, 1922. We find that the judgement in Anarkali Sarabhai v. CIT which followed in Karthikeya V. Sarabhai v. CIT [1997] 228 ITR was impliedly held per incuriam by the Hon'ble Supreme Court in CIT v. G.Narasimhan (supra)as the said judgement did not consider the scope of Sec.2(22)(d) of the Act. Therefore, the case law relied upon by the counsel for the assessee does not help the case of the assessee. Therefore, two essential pre-requisites must be satisfied in order to come within the ambit of sec.2(22)(d) of the Act, i.e. there must be a distribution to the shareholders on the reduction of the capital and further, it must be to the extent that the company possess accumulated profits. In the present case, which is evident from the audited financial statement that the share capital has been reduced by around Rs.9.4 Crs. which is equivalent to 54.70% of the total paid up share capital. The Hon'ble Supreme Court, in CIT v. G.Narasihan, has

made it clear that once these parameters are satisfied, then automatically Sec.2(22)(d) is attracted. Further, Clause-7 of the scheme makes it clear that the distribution of money will be out of the general reserves and accumulated credit balance in the profit and loss account. Thus, both conditions are satisfied to treat the transaction within the ambit of Sec.2(22)(d) of the Act.

35. The counsel for the assessee strongly put forth two arguments and contend that the provisions of Sec.2(22) are not attracted in the present case. According to the Ld.Counsel for the assessee, Sec.2(22) (a) / 2(22) (d) requires distribution which would only imply distribution without any *quid pro quo*. Since, the scheme of purchase of own shares is made through offer and acceptance and therefore, this involves an element of *quid pro quo,* and therefore, there is no 'distribution'. He further argued that Sec.2(22)(d) requires distribution on the reduction of capital. Therefore, the reduction of share capital is to be coterminous with the distribution. In the present case, the reduction was only a consequence of the scheme owing to the stipulation in Sec.77 that a company cannot purchase its own shares. There has been no distribution on the reduction of share capital. We do not find any merit in the contention of the assessee, because, the word 'distribution' in Sec.2(6A) of the Income Tax Act, 1922, which is analogous to Sec.2(22) of the current Income Tax Act, 1961, was considered in Punjab Distilling Industries Ltd. v. CIT reported in [1965] 57 ITR 1 (SC). The Hon'ble Supreme Court held that the

meaning of the word 'distribution' means division/payment between/to several people. The only condition specified was that it must be actual and not notional. Therefore, the definition of the word 'distribution' does not contain any aspect of *quid pro quo* or lack thereof. In our considered view, the assessee trying to add to the ordinary meaning of the word 'distribution' as interpreted by the Supreme Court by adding conditions which do not otherwise exist. The pre-requisites for distribution is that there must be payment and the disbursal of the same must be made to more than one person. Further, capital reduction as per Sec.100 of the Companies Act, 1956,itself permits that it can be made in any manner. The second contention of the assessee is that there is no distribution on reduction of share capital. At the outset, it must be clarified that the definition of dividend in Sec.2(22) is an inclusive definition. The intent, as borne out from the case laws, is to cover all scenarios whereby a company distributes its accumulated profits without strictly coming within the term 'dividend' as understood in common commercial parlance. Therefore, a literal and hyper technical reading of the term on the 'reduction of share capital' would be contrary to the legislative intent. In simple words, key essentials that are required to be seen in order to attract provisions of Sec.2(22)(d) are that, there must be reduction of share capital and distribution of accumulated profits to the shareholders. Therefore, in our considered view, sec.2(22)(d) does not make a distinction as to whether reduction of share capital is the intended result

of the resultant consequence to the scheme, as long as there is reduction of share capital. Further, a reading of the relevant clauses of the scheme documents would show that there has been distribution on reduction. The payment of consideration and transfer of title to goods gets complete on the effective date. Thereafter, as per clause 7.1 of the scheme, the extinguishment will happen after 15 days. Therefore, the contract is concluded, and title is transferred on the effective date of the scheme as per Sec.19 of the Sale of Goods Act, 1930. The mere fact that actual share certificates are extinguished only after 15 days will not have any bearing. Because, extinguishment is a mere ministerial function. In any event, assuming without conceding, that it cannot be treated as distribution on reduction of share capital, then it will automatically fall within the ambit of Sec.2(22)(a) of the Income Tax Act, 1961,as there is distribution of accumulated profits entailing release of assets to the shareholders.

36. The Ld.Counsel for the assessee has made another argument in light of certain judicial precedents that the purchase of own shares was by way of a scheme sanctioned by the Hon'ble Madras High Court is operates in 'rem' and is binding on the Revenue. Once, the Central Government through Regional Director of Companies filed a 'no objection' for the scheme proposed by the assessee before the Hon'ble High Court, it cannot re-characterize the scheme, by taking into account immunity

Clause provided by the Hon'ble High Court without understanding the context, in which, said provision has been given by the Hon'ble High Court. In our considered view, there is no merit in the arguments of the Ld.Counsel for the assessee for the simple reason that firstly, the order sanctioning the scheme itself clearly provides that the sanction shall not grant immunity to the assessee from payment of taxes under any law for the time being in force. Further, the role of the High Court in approving the scheme is very limited. The Company Court will look at the scheme and act as an umpire to just verify whether the requisite meetings u/s.391(1)(a) of the Companies Act ,1956, have been complied with, and further, it has requisite majority. The Hon'ble court will also look into the scheme is fair to all members and reasonable to a prudent man. Therefore, the Hon'ble High Court, while sanctioning the scheme will merely look at the commercial wisdom of the creditors and approve the same if it is just and fair and there are no illegalities. The tax consequences and otherwise would be for the AO to look into the scheme in light of relevant provision of the Income Tax Act, 1961. If you go by the arguments of the Ld.Counsel for the assessee that once, the scheme is approved by the Hon'ble High Court, is operates in 'rem' and binding on the Revenue, then the AO would be rendered *functus officio* and the assessment itself would be finalized under the scheme, and in this regard, it is relevant to refer to the judgement of the Hon'ble Supreme Court in the case of Miheer H. Mafatlal v. Mafatlal Industries Ltd., reported in

[1997] 1 SCC. Further, as alleged by the assessee, the Revenue is not re-characterizing the scheme. The AO is fully empowered to analyze the effects of the scheme and to determine whether they attract the provisions of the Income Tax Act, 1961 or not. The AO has taken the facts from the scheme and applied in light of relevant provisions of the Income Tax Act, 1961, which is, in our considered view perfectly valid and this view is supported by the decision of the ITAT Mumbai Benches in the case of Grasim Industries v. DCIT in ITA No.1935/MUM/2020. Further, the determination of the tax liability on the basis of the 'Scheme of Arrangement & Compromise' as sanctioned by the Hon'ble High Court of Madras looking into all the terms laid down therein is the statutory duty of the AO. In any event, the Hon'ble High Court does not specifically restrict the powers of the AO to examine the taxability of payment of consideration by the assessee to its non-resident shareholders in a 'Scheme of Arrangement & Compromise' for purchase of its own shares. Because, the scheme itself provides for liberty to the various authorities to look into the scheme in accordance with relevant laws. Therefore, the arguments of the Ld.Counsel for the assessee that once, the scheme approved by the Hon'ble High Court is operates as in 'rem' and is binding on the Revenue does not holds good. No doubt, the Court approved scheme is binding on all stakeholders, wherever it comes to the commercial wisdom of the persons who proposed the scheme. However, it does not mean that other consequences like tax implications are fully

absorbed by the Court when the scheme was sanctioned. If you accept the arguments of the Ld.Counsel for the assessee, then, it is as good as rendering other authorities powerless even if the law permits them to look into the transactions in accordance with relevant provisions. Further, in our considered view, the assessee cannot take shelter on the basis of self-serving provisions of the scheme and state that certain provisions of the Income Tax Act, 1961 have been excluded. The object and purport of the scheme is to operate as single window system. The scheme spends more time laying out what it is not rather than to explain what it actually should be. Therefore, such self-serving clauses would not be binding on the AO and the AO is free to examine the effect of the scheme on the touchstone of the Income Tax Act, 1961.

37. The provisions of Sec.77 of the Companies Act, 1956 prohibits a company from purchase of its own shares except by way of actual reduction in capital in accordance with sec.100-104 or sec.402 of the Companies Act, 1956. The only exception to this is the newly introduced non-obstinate clause under Sec.77A of the Companies Act, 1956, for buy back of its own shares. The provisions of Sec.391-393 are only a single window scheme through which various actions are undertaken. Therefore, the purchase of own shares will have to still relate back to either Sec.77 r.w.s.100 or Sec.77A. There cannot be any purchase of own shares just u/s.391-393 without relate back to sec.77 r.w.s.100-104 or sec.77A of

the Companies Act, 1956. In this regard, reference is made to the decision of the Hon'ble Bombay High Court in the case of PMP Automation reported in [1991] 4 Bom CR 387 and Hognas India Ltd. 148 Comp CAS 70. Therefore, the transaction of the assessee would either to fall under u/s.391-393 r.w.s.77 and Sec.100 of the Companies Act,1956 or sec.391-393 r.w.s.77A of the Companies Act, 1956. The scheme has clearly states that it is not a buyback u/s.77A of the Act. Therefore, once the assessee itself specifically states that it is not buyback u/s.77A of the Act, then, it should automatically fall back to sec.77 r.w.s sec.100-104 of the Companies Act, 1956. If sec.100-104 r.w.s.77 of the Companies Act, 1956 are applied, then said transaction is nothing but reduction of capital and distribution of accumulated profits, and thus, comes within the ambit of provisions of Sec.2(22)(d) and s.115-O of the Act.

38. The assessee contends that the purchase of own shares amounts to buyback but not u/s.77 of the Companies Act, 1956. It is a *sui generis* buyback which is facilitated through Sec.391-393, and therefore, can only be taxed under the amended provisions of Sec.115-QA and the same was not taxable prior to the amendment to section in 2016. This is fallacious and we do not find any merits in the arguments of the Ld.Counsel for the assessee for three reasons. Firstly, there cannot be *sui generis* buyback that is possible u/s.391-393 *de hors* reference to any other provision of the Companies Act, 1956. A purchase of own shares involving reduction of

share capital can only be done u/s.391-393 r.w.s.77 and s.100 of the Companies Act, and this fact has been clearly explained by the Hon'ble Bombay High Court in the case of Cap Gemini India Private Limited, Company Scheme Petition No. 434 of 2014, where, it has been clearly held that company may either follow procedure u/s.391 r.w.s.100-104 of the Companies Act, 1956, or the procedure u/s.77A (now Sec.68) of the Companies Act 1956. In the present case, the assessee itself has stated that it is not a buyback u/s.77A of the Companies Act. In any event u/s.77A/68of the Companies Act, 1956, a company can buyback only 25% of the total paid up share capital and free reserves. In the present case, if you go by the scheme, the conditions prescribed u/s.77A of the Companies Act, 1956, are not satisfied, because, the purchase of its own shares by the assessee is more than 25% of the total paid up share capital and free reserve which is evident from the facts brought on record by the authorities, where, it has been observed that 54.70% of capital has been reduced after the scheme was given effect. Therefore, once the buyback is not u/s.77A of the Companies Act, 1956, then, it will fall back u/s.391-393 r.w.s.100-104 of the Companies Act, 1956, because, without any reference to sec.100-104 of the Companies Act, 1956, no company can buy back its shares u/s.391-393 alone. Therefore, in our considered view, the AO & the Ld.CIT(A) have rightly held that the transactions of purchase of its own shares is nothing but distribution of accumulated

profits and reduction of capital which falls under the definition of dividend u/s.2(22)(d) of the Act.

39. Further, the term 'buyback' is used in the Companies Act, 1956, only in Sec.77A and not in any other place. Similarly, the term 'buyback' was defined u/s.115-QA of the Income Tax Act, 1961, to mean buyback u/s.77A only. The arguments of the Ld.Counsel for the assessee that purchase of own shares by a 'Scheme of Arrangement & Compromise' u/s.391-393 of the Companies Act, 1956, is taxable u/s.115QA of the Act, only after amendment to the term 'buyback' by the Finance Act, 2016 w.e.f.01.06.2016 is in correct. Because, there is no dispute on the law in so far as buyback of shares u/s.77A of the Act, and therefore, the amendment to sec.115QA by the Finance Act, 2016, is nothing to do with the present tax treatment, when the companies Act has amended by insertion of Sec.77A of the Act, in the year 2016. Simultaneously, a new provision has been inserted under the Income Tax Act, 1961, by way of Sec.115QA to tax consideration paid for buyback of shares to shareholders in the hands of the company. The provisions of Sec.115QA has been amended so as to include all forms of buyback of shares under any provisions of the Companies Act, 1956, because, there are some divergent views has been expressed by various Courts & Tribunals on this issue and to overcome such views amendment has been made to extenuation buyback u/s.115QA. Therefore, the arguments of the

Ld.Counsel for the assessee that purchase of own shares u/s.391-393 is de hors provisions of Sec.77 r.w.s.100-104 of the Companies Act, 1956, is incorrect. In any event, assuming without conceding that purchase of own shares amounts to buyback, but not buyback u/s.77A, which would still be taxable u/s.115-O of the Act. It is to be noted that as per the proviso to Sec.2(22), only buyback u/s.77A is excluded from the definition of dividend u/s.2(22). In other words, any other form of buyback, including purchase of own shares u/s.391-393 would fall back under the definition of Sec.2(22), because, which entails release of all or part assets of a company to its shareholders. This is further fortified with the fact that there was reduction of share capital and distribution of accumulated profits, and thus, purchase of own shares would come within the ambit of dividend u/s2(22) of the Act.

40. The assessee had also taken another stand that the consideration paid for purchase of its own shares is to be taxed only in the hands of the shareholders u/s.46A of the Income Tax Act, 1961, as capital gains. We find no merits in the arguments of the Ld.Counsel for the assessee for the simple reason that sec.46A is only applicable to buyback u/s.77A and not to other forms of purchase of own shares. The words used in Sec.46A are identical to the language in Sec.77A and a reading of the Memorandum explaining the provisions of the Finance Act, inserting Sec.46A, makes it clear that it was done to clarify that buybacks u/s.77A necessitated a

clarification as to whether the same ought to be taxed as capital gains or dividends. The insertion of Sec.46A was contemporaneous to the insertion of Sec.77A and in the proviso to Sec.2(22) excluding the same within ambit of dividends. Lastly, the explanation to Sec.46A also states that even the words 'specified securities' would have the same meaning attached to it u/s.77A. Therefore, normally words in *parimateria*, would have to be construed in the same sense, and therefore, Sec.46A can only apply to buy-back u/s.77Aof the Companies Act, 1956. In any event, assuming without conceding that Sec.46A applies to all forms of buy-back, but Sec.115-O contains a non-obstante clause which would override the provisions of Sec.46A of the Act. Therefore, the contention of the assessee that consideration paid for purchase of its own shares, is only taxable in the hands of the shareholders as per provisions of Sec.46A of the Act, is devoid of merits.

41. The Ld.Counsel for the assessee has raised a contention stating that the non-obstante clause applies only in respect of sec.8 and not to Sec.46A of the I.T. Act, 1961. This argument cannot be accepted for two reasons. First and foremost, there are broadly two types of non-obstante clauses. The first types of non-obstante clauses, which refers to specified provisions of the Act which will be overridden by the concerned provisions. The second types are those clauses which will override all other provisions of the Act. Sec.115-O is in the second category where

the legislature has deliberately taken a decision to give an overriding effect to all other provisions of the Act. Therefore, arguments of the Ld.Counsel for the assessee would amount to overriding the legislative mandate and would render the conscious decision to override the entire Act to be futile, and this cannot be accepted. Secondly, the scope of Sec.8 and Sec.115-O operate in different spheres and does not need non-obstante clause for reconciliation.

42. The assessee had also contended that Sec.115QA was amended in 2016 and the present transaction would only be taxable as per the amended provision. Since, the Hon'ble High Court has sanctioned the scheme on 18.04.2016 before amendment came into statute, the enlarged provisions of Sec.115QA of the Act, were not applicable to the case of the assessee. The arguments of the Ld.Counsel for the assessee is not accepted for two reasons. Firstly, there is a distinction between purchase of own shares upon reduction of share capital and buyback. 'Buyback' is a term used only in respect of transactions covered u/s.77A. In fact, assessee itself stated in the scheme that it is not a buyback of shares in terms of provisions of Sec.77A of the Act. Therefore, the object behind amendment of Sec.115QA has to be read. In our considered view, the amendment to sec.115QA was brought in to clarify that the provisions would apply to buyback of shares u/s.77A as well as to buyback of shares u/s.391-393 of the Companies Act, 1956. Secondly, assuming without

conceding that Sec.115-QA would govern the transactions from the date of amendment, it would not preclude the transaction from being subject to tax u/s.115-O of the Act, because, amendment can also be brought in to shift tax incidence from one provision to another. If all conditions of Sec.115-O r.w.s.2(22) are satisfied, the same cannot be impliedly excluded on the basis of the amendment to Sec.115QA of the Act.

43. At this stage, it is relevant to look into the scheme in light of purpose and intent specified in the scheme document. The assessee claims to have implemented the scheme to rationalize its shareholding and capital structure. The four reasons given are that (i) to increase earnings per share (ii) to streamline corporate ownerships (iii) to optimize the overall capital structure and (iv) to reduce the risk in terms of foreign currency fluctuations in respect of rupee funds. But, if you look at the scheme with its real intent, it is only carried out to shift the capital base of the assessee company to Mauritius based shareholders and also (ii) distribution of accumulated profits of the company to non-resident shareholders without coming within the ambit of any of the provisions, which deals with taxation of consideration paid for purchase of its own shares. The tax laws have been enacted to cover various transactions and the reasons for enacting each sections have been explained in the memorandum. When the Act itself has been provided for specific provisions to deal with specific transactions, then, no person can take an

alternative route via general provisions or single window system to defeat the other provisions of the Act. For example, under the Companies Act, a specific provision has been provided by way of Sec.77to debar the companies to purchase of its own shares up to certain date. The buyback of shares has been allowed by insertion of Sec.77A from a particular date with certain conditions. Therefore, when the Companies Act specifically provides a separate provision for buyback of shares, in our considered view, the assessee cannot take a general provision for its advantage and carry out buyback of shares which ultimately does not come under the specific provision which deals with buyback of shares only for the purpose of defeating said provision, by very well knowing that if shares are bought back under specific provision, then, it attracts the additional Income Tax under provisions of Sec.115QA of the Act. Therefore, from the facts of the present case, it is undoubtedly clear that the scheme as such is only a colourable device intended to evade legitimate tax dues. Such colourable devices which do not have any commercial purpose can be excluded for physical nullity and the AO empowered to 'look through' rather 'look at' the transactions. This is further established by the fact that there is no commercial nexus between the company activities and Mauritius and this fact has been specifically dealt by the lower authorities. Therefore, the entire scheme is a colourable devise serving no commercial purpose and has to be ignored and in this regard, it is relevant to refer to the decision of XYZ India, In Re [2012] 20 taxmann.com 89 and also the decision of

the Hon'ble Supreme Court in the case of Vodafone International Holdings BV v. Union of India & Anr. (2012) 6 SCC 614 (SC). Although, the Ld.Counsel for the assessee refers to the decision of the Hon'ble Supreme Court in the case of Vodafone International Holdings BV v. Union of India & Anr.(supra), in our considered view, the Ld.Counsel for the assessee has selectively referred to the observation of the Court for their advantage, and thus, it cannot be said that the Hon'ble Supreme Court in the above case, had given a blanket sanction to all transactions, including transactions which are carried out to evade legitimate tax dues to the exchequer.

44. The assessee had raised two further contentions alleging discrimination and inconsistent treatment by the Revenue. The Ld.Counsel for the assessee contended that TDS remitted by the assessee for capital gains in the hands of US resident shareholders is still in the possession of the AO, and therefore, the AO accepted the position that it is capital gains in the hands of the shareholders, but had taken a different view in the hands of the assessee. We do not find any substances in the arguments of the counsel for the assessee for simple reason that, the AO has not taken any discriminatory treatment, one in the hands of the assessee and the other in the hands of certain shareholders. In fact, the assessee on its own treating the transaction as capital gains in the hands of shareholders has deposited the amount of TDS in the hands of two non-resident

shareholders and is now trying to take advantage of its own wrong, which is not permissible under the law. Secondly, it is contended that in case of Genpactv. DCIT reported in 419 ITR 440 (SC), where, an identical transaction is taxed under Section 115QA. We do not find any merits in the arguments of the assessee for simple reason that the facts will be different in all schemes. Therefore, it cannot be said that all schemes of purchase of its own shares in terms of sec.391-393 are similar to facts of Genpact (supra). Moreover, there is no estoppel against law. Even if the AO takes a different view in one case upon incorrect appraisal of facts, it cannot disentitle the other AO to take another view, upon appraisal of facts, it come to the knowledge of the AO that the scheme will attract some other provisions of the Income Tax Act, 1961. Therefore, we reject the arguments of the assessee that the AO has taken a different view in the hands of the appellant and shareholders on the very same facts. Further, the case law relied upon by the ld. Counsel for the assesse in Berger Paints India Limited vs. CIT (266 ITR 99) does not applicable to present case, because in this case, the AO did not discriminate appellant and its shareholders and in fact, it was the assessee by mistaken of law has applied incorrect provisions and alleged that the AO had taken different stand and thus, we reject case law relied upon by the assesse.

45. At this stage, it is necessary to consider various case laws relied upon by the assessee in support of their arguments. The Ld.Counsel for

the assessee Shri Ajay Vohra, strongly relied upon the decision of the Hon'ble Bombay High Court in the case of SEBI v. Sterlite Industries Ltd., reported in 113 Comp. 273 (Bom). We have carefully gone through the decision rendered by the Hon'ble Bombay High Court in light of facts of the present case and we find that the decision of the Hon'ble Bombay High Court is actually in favour of the revenue that any purchase of its own shares u/s.391-393 of the Companies Act, 1956, has to be read along with Sec.77 & sec.100-104 of the Companies Act, 1956. Further, the Hon'ble Court held that buyback of shares u/s.391-393 of the Companies Act, 1956, is always refers to Sec.100-104 of the Companies Act, 1956. Therefore, sec.391-394 cannot read separately in isolation with sec.100-104 for the purpose of purchase of own shares involving capital reduction. Since, in the instant case, it is not buyback u/s.77A of the Act, then same relates back to Sec.391-393 r.w.s.100-104 of the Act. Further, the Hon'ble High Court in Para No.70 very categorically held that purchase under an order of Court in a 'Scheme of Arrangement & Compromise' u/s.391-394, is subject to compliance with Sec.100-104. Therefore, if you go by the present scheme, the judgment of the Hon'ble Bombay High Court is supports the stand of the AO, and thus, selective reference by the Ld.Counsel for the assessee, is incorrect.

46. The assessee had also relied upon the decision of the Hon'ble Supreme Court in the case of Anarkali Sarabhai v. CIT (supra).The

Hon'ble Supreme Court ruling was in the context of redemption of preference shares. The issue before the Hon'ble Supreme Court was whether there were any capital gains arose on redemption of preference shares or not. In the said case, it was contested that redemption does not qualify to be a transfer as defined under the Income Tax Act, 1961, and hence, not subject to capital gains tax. The Hon'ble Supreme Court concluded that the redemption does not result in transfer of capital asset and consequently, result in capital gains. The said decision was with reference to taxation in the hands of shareholders and not on the company. Further, said decision was rendered when Sec.115-O was not in statute. The facts of the present case and law involved are entirely different. The Hon'ble Supreme Court was not dealt with the issue of applicability of Sec.2(22) r.w.s.115-O of the Act. Therefore, the reliance placed on the said decision is misplaced.

47. In so far as the case law relied upon by Ld.Counsel for the assessee in the case of Ponny Sugars (Erode) Ltd v. CIT (supra), we find that in the said case, the scheme specifically explained tax implications on account of merger. The Hon'ble High Court taking note of relevant facts approved the scheme and held that once it was specifically stated that it was not a merger as defined under the Income Tax Act, 1961, then, subsequently, the Department cannot call in question the scheme. However, in the present case, the order of the Hon'ble High Court clearly states that it

would not be treated as granting any immunity from payment of any taxes. Thus, case law relied upon by the Ld.Counsel for the assessee is not applicable to present case.

48. The Ld.Counsel for the assessee had also relied upon the decision of Hon'ble Supreme Court in Dalmia Power Limited vs. ACIT reported in (2020) 420 ITR 339 (SC) and argued that the scheme sanctioned by the Hon'ble High Court, operates as a judgment in 'rem' and therefore, essence of sanction cannot be modified. We find that there is no dispute with regard to the fact that the power of the Court in sanctioning any scheme and further, stakeholders involved in the said scheme are binding on the judgment. But, when it comes to look into the scheme on taxation in light of provisions of Income Tax Act, 1961, there is no bar under the law for the AO to look into the scheme in light of relevant provisions of the Act and decide the taxability of the transaction. Moreover, the Hon'ble Madras High Court order itself clearly states that the sanctioning of the scheme was not construed as immunity granted to the assessee for payment of taxes under any law for the time being in force. Therefore, the said judgment does not come to the aid of the assessee.

49. The Ld.Counsel for the assessee had also relied upon the decision of the Hon'ble Calcutta High Court in the case of CIT v. Purbanchal Power Co. Ltd., reported in [2022] 145 taxmann.com 215 (Calcutta). We find

that this case does not laydown general proposition, that a Court sanctioned scheme can never be a colourable device and it cannot be so. In any event, the Court did not find there to be any substantial question of law and dismissed in limine. Therefore, said judgment cannot be applied to the facts of the assessee's case. Similarly, the assessee has relied upon by the decision of the Hon'ble Gujarat High Court in the case of Vodafone Essar Gujarat Ltd. v. Department of Income Tax reported in [2013] 353 ITR 222 (Guj.), where, there was a clear finding that scheme was not entered into only for evading tax. This is in contradiction to the present case. Therefore, the said judgment aids the case of the Revenue that in case, where the scheme is only for the purpose of evading tax, then it can be discarded as a colourable device. In this case, on analysis of the scheme in light of relevant provisions of the Companies Act, 1956, and the Income Tax Act, 1961, with dates and events, it is clearly established that the scheme was implemented with a view to evade legitimate tax and thus, the judgment relied upon by the assessee cannot be applied to the facts of the present case.

50. The assessee had also took support from the decision of ITAT Mumbai Benches in the case of Goldman Sachs (India) Securities (P) Ltd. v. ITO reported in [2016] 70 taxmann.com 46. We find that said judgment is also in favour of the Department, because, in the said judgment, it was a case of buyback of shares u/s.77A which unlike the

present case, where the scheme makes it clear that it is not a buyback. In the said decision, the Tribunal categorically held that sec.46A applies to the buyback of shares u/s.77A of the Companies Act, 1956 only. The Ld.Counsel for the assessee argued that the ratio on which the assessee seeks to rely on said judgment was it has distinguished purchase of own shares on the one hand and reduction of share capital on the other hand. We do not find any merit in the arguments of the Ld.Counsel for the assessee for simple reason that the observation of the Court or Tribunal should be read in conjunction with the facts. Even a passing references cannot be read in isolation with the issue before the Court or Tribunal. Therefore, the distinction sought to be made with reference to said observation of the Bench was only made with reference to buyback of shares referred to u/s.77Aof the Companies Act, 1956, and in that context, it was held that Sec.46A of the Act is alone applicable. In the present case, the assessee itself clearly states that the scheme approved by the Hon'ble High Court is not a buyback u/s.77A of the Companies Act, 1956, and thus, referring to said decision and findings therein are not at all correct in the given facts and circumstances of the case. Therefore, we reject the case law relied upon by the Ld.Counsel for the assessee.

51. In this view of the matter and considering the facts and circumstances of the case, and also by considering various case laws, we are of the considered view that consideration paid by the assessee for

purchase of its own shares in accordance with scheme sanctioned by the Hon'ble High Court of Madras in terms of provisions of Sec.391-393 of the Companies Act, 1956, amounts to distribution of accumulated profits which entails release of all or part of assets of a company on reduction of capital which attracts provisions of Sec.2(22) of the Income Tax Act, 1961. The Ld.CIT(A) has discussed the issue at length in light of plethora of judicial precedents and held the transaction of purchase of own shares by the appellant company is distribution of accumulated profits within the meaning of section 2(22) of the Income Tax Act, 1961. Therefore, we are of the considered view that there is no error in the reasons given by the Ld.CIT(A) to treat the transactions of the assessee as dividend u/s.2(22)(a)/2(22)(d) r.w.s.115-O of the Income Tax Act, 1961, and thus, we are inclined to uphold the findings of the Ld.CIT(A) and dismiss appeal filed by the assessee.

52. In the result, appeal filed by the assessee is dismissed.

Order pronounced on the 13th day of September, 2023, in Chennai.

Sd/-	***Sd/-***
(महावीर सिंह)	**(मंजूनाथा. जी)**
(MAHAVIR SINGH)	**(MANJUNATHA.G)**
उपाध्यक्ष/VICE PRESIDENT	लेखासदस्य**/ACCOUNTANT MEMBER**

चेन्नई/Chennai,
दिनांक/Dated: 13th September, 2023.
TLN

आदेशकीप्रतिलिपिअग्रेषित**/Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त/CIT
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF