IN THE INCOME TAX APPELLATE TRIBUNAL "C", BENCH MUMBAI

BEFORE SHRI M.BALAGANESH, AM
&
SHRI AMARJIT SINGH, JM

ITA No.826/Mum/2016
(Assessment Year :2011-12)

M/s. Carestream Health INC C/o. Carestream Health India Private Limited Sunteck Centre 1st Floor, Subhash Road Vile Parle (E) Mumbai – 400 057	Vs.	Dy. Commissioner of Income Tax, Range-2(1)(1) Scindia House, M.M.Road Ballard Pier Mumbai – 400 028
PAN/GIR No. AAECC6050H		
(Appellant)	..	**(Respondent)**

Assessee by	Shri Nitesh Joshi
Revenue by	Shri Padmapani Bora
Date of Hearing	**29/07/2019 & 08/11/2019**
Date of Pronouncement	**06/02/2020**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

This appeal in ITA No.826/Mum/2016 for A.Y.2011-12 preferred by the order against the final assessment order passed by the Assessing Officer dated 23/12/2015 u/s. 144C(13) r.w.s. 143(3) of the Income Tax Act, hereinafter referred to as Act, pursuant to the directions of the ld. Dispute Resolution Panel (DRP in short) u/s.144C(5) of the Act dated 08/12/2015 for the A.Y.2011-12.

2. The only issue to be decided in this appeal is as to whether the ld CITA was justified in confirming the disallowance of capital loss amounting to Rs 3,64,84,092/- on account of capital reduction scheme, in the facts and circumstances of the case.

3. The brief facts of this issue are that the assessee is a company incorporated in and a tax resident of United States of America (USA). It made investments to the extent of 64769142 equity shares of face value of Rs 10 each of Carestream Health India Private Limited (CHIPL), its wholly owned Indian Subsidiary. During the Asst Year 2011-12, CHIPL undertook a capital reduction of its share capital pursuant to a scheme approved by the Hon'ble Bombay High Court. Under the capital reduction scheme, 29133280 share (out of total holding of 6,47,69,142 shares) held by the assessee were cancelled and total consideration amounting to Rs 39,99,99,934/- was received by assessee towards such cancellation / capital reduction. This consideration sum of Rs 39,99,99,934/- worked out to Rs 13.73 for every share cancelled by CHIPL. This was also supported by an independent share valuation report. As per the provisions of section 2(22)(d) of the Act, out of the total consideration of Rs 39,99,99,934/- , the consideration to the extent of accumulated profits of CHIPL i.e Rs 10,33,11,000/- was considered as deemed dividend in the hands of assessee. Accordingly, Dividend Distribution Tax on such deemed dividend @ 16.609% amounting to Rs 1,71,58,924/- (10,33,11,000 * 16.609%) was paid by CHIPL. Since the aforesaid sum of Rs 10,33,11,000/- suffered Dividend Distribution Tax u/s 115-O of the Act, the assessee claimed the same as exempt u/s 10(34) of the Act in the return of income. The balance consideration of Rs 29,66,88,934/- was appropriated towards sale consideration of the shares and capital loss was accordingly determined by the assessee as prescribed in Rule 115A to Rs

3,64,84,092/- and return was filed claiming such long term capital loss. Accordingly, the assessee had claimed long term capital loss of Rs 3,64,84,092/- upon cancellation of the shares held by it in CHIPL pursuant to reduction of capital in the return of income for the year under consideration.

4. The ld AO held that there was no transfer within the meaning of section 2(47) of the Act in the instant case. He observed that the assessee was holding 100% shares of its subsidiary company and during the year, it had reduced its capital. The assessee company had 100% shares in the subsidiary company and after the scheme of reduction of capital also, the assessee was holding 100% of the shares. This clearly establishes that by way of reduction of capital by cancellation of the shares, rights of the assessee do not get extinguished. The assessee before and after the scheme was having full control over its 100% subsidiary. The conditions of transfer therefore are not satisfied. Further the shares have been cancelled and are not maintained by the recipient of the shares. The assessee also took an alternative argument of treating the same as a buy-back before the ld AO. The ld AO in this regard observed that since the assessee had taken approval from the Hon'ble High Court for reduction of capital, the same cannot be treated as a buy-back. He therefore disallowed the claim of long term capital loss in the sum of Rs 3,64,84,092/- due to indexation, and also did not allow it to be carried forward. The assessee filed objections before the ld DRP against this denial of capital loss.

5. The assessee submitted before the ld DRP as under:-

a) As per the provisions of section 45 read with section 48 of the Act, profits or gains from transfer of a capital asset are taxable as capital gains if the following requirements are satisfied :-

(i) There should be an existence of a 'capital asset';

(ii) There should be a 'transfer' of such a capital asset ; and

(iii) Consideration should be received or receivable on transfer of such a capital asset.

Hence the fundamental issue that would need to be analysed is whether reduction of share capital can be regarded as a 'transfer' of a capital asset to trigger the capital gains tax provisions.

b) As per the provisions of the Act, 'transfer' in relation to capital asset is defined u/s 2(47) of the Act as under:-

"transfer' in relation to capital asset includes –

(i) the sale, exchange or relinquishiment of the asset ; or
(ii) the extinguishment of any rights therein ; or
(iii) ……
(iv) ……
(v) ……
(vi) ……"

The assessee submitted that the 'asset' under consideration is the 'shares' of CHIPL which had extinguished due to the capital reduction scheme. The ld AO had erroneously considered the 'percentage of holding' of CHI in CHIPL as the 'asset' for the purposes of section 2(47) of the Act which is contrary to the provisions and scheme of the Act.

c) The assessee submitted that when the share capital is reduced, the right of the shareholder to the dividend on his share capital and the right to share in the distribution of the net assets upon liquidation is extinguished proportionately to the extent of reduction in the capital.

Such reduction of the right in the capital asset would clearly amount to a transfer within the meaning of that expression in section 2(47) of the Act.

d) The assessee further submitted that the scheme of capital reduction requires prior approval of the Hon'ble High Court. Before granting approval for such reduction of capital, the Court had to be satisfied that the consent of the creditors to the reduction of capital is obtained, or the claims or debts of the creditors have been satisfied, discharged or secured. This specific act of the Court signifies that since there is a variation / extinguishment of shareholders rights in the company, prior approval of the Court is required and hence the proposed capital reduction is a 'transfer'.

e) The assessee also placed reliance on the following judgements to support its proposition that reduction of capital amounts to 'transfer' chargeable to tax as capital gains :-

(i) Kartikeya V Sarabhai and Anr vs CIT reported in 228 ITR 163 (SC)

(ii) CIT vs G Narasimhan reported in 236 ITR 327 (SC)

(iii) CIT vs Mrs Grace Collis reported in 248 ITR 323 (SC)

f) The assessee also placed reliance on the decision of Hon'ble Jurisdictional High Court in the case of Sadanand S Varde and Ors vs State of Maharashtra and Ors reported in 247 ITR 609 (Bom) wherein the Hon'ble Bombay High Court ruled that the petitioners in the name of Public Interest Litigation, cannot challenge the scheme sanctioned by the Hon'ble High Court and validly carried out in accordance with the provisions of the Companies Act.

6. The ld DRP disposed off the objections of the assessee by holding that the issue in dispute is covered by the decision of the Special Bench of Mumbai Tribunal in the case of Bennett Coleman & Co. Ltd reported in 133 ITD 1. Applying the ratio laid down in the said decision, the ld DRP observed that the share of the assessee in the total share capital of the company as well as the net worth of the company would remain the same even after capital reduction/ cancellation of shares. Thus there is no change in the intrinsic value of the shares and the rights of the shareholder vis a vis the other shareholders as well as the company. Thus, there is no loss that can be said to have actually accrued to the shareholder as a result of the capital reduction. Pursuant to this direction of the ld DRP, the ld AO passed the final assessment order on 23.12.2015 disallowing the long term capital loss of Rs 3,64,84,092/- claimed by the assessee in the return of income. Aggrieved, the assessee is in appeal before us.

7. We have heard the rival submissions and perused the materials available on record including the judicial pronouncements relied upon by both the parties at the time of hearing before us. The primary facts stated hereinabove remain undisputed and hence the same are not reiterated herein for the sake of brevity. At the outset, we find that the assessee had incurred capital loss only due to claim of indexation benefit and not otherwise. The benefit of indexation is provided by the statute and hence there cannot be any malafide intention that could be attributed on the assessee in claiming the long term capital loss in the subject mentioned transaction. We find that the ld AO had held that there is no transfer pursuant to reduction of capital. But it is a fact that the assessee had indeed received a sale consideration of Rs 39.99 crores towards reduction of capital . This sale consideration was not sought to be taxed by the ld

AO under any other head of income. This goes to prove that the ld AO had indeed accepted this to be sale consideration received on reduction of capital under the head 'capital gains' only as admittedly the same was received only for the capital asset i.e shares. Hence the existence of a capital asset is proved beyond doubt. The capital gains is also capable of getting computed in the instant case as the cost of acquisition of shares of CHIPL and sale consideration received thereon are available. Then how the ld AO is justified to hold that the subject mentioned transaction does not tantamount to 'transfer' u/s 2(47) of the Act. This is the short dispute before us. We find lot of force in the argument advanced by the ld AR in this regard that merely because the transaction resulted in loss due to indexation, the ld AO had ignored the same. Had it been profit or surplus even after indexation, the ld AR argued that the ld AO could have very well taxed it as capital gains.

7.1. We find that the ld DRP had placed reliance on the decision of Special Bench of Mumbai Tribunal in 133 ITD 1 supra, which was vehemently relied upon by the ld DR before us also. The facts of that case was assessee made an investment of Rs 24.84 crores in 13474799 equity shares of its group company i.e Times Guarantee Limited (TGL) and TGL undertook reduction of equity share capital by 50% by reducing the face value of each equity share from Rs 10 to Rs 5 each. Later TGL consolidated two shares of Rs 5 each into one share of Rs 10 each. This resulted in the assessee holding 6737399 equity shares of Rs 5 each in lieu of the original 13474799 shares of Rs 10 each by virtue of consolidation of shares. The assessee claimed a long term capital loss of Rs 22.22 crores in respect of the said capital reduction. The ld AO denied the said claim of loss which stood upheld by the ld CITA. We find that in the issue before the Special Bench in 133 ITD 1 supra, the share capital

was reduced to set off the accumulated losses and no consideration was paid from the company to its shareholders. In the instant case, the assessee herein before us had indeed received the sale consideration of 39.99 crores towards reduction of capital and the same has been accepted as such i.e received for reduction of shares , being a capital asset, by the ld AO. We find that the ld DR further stated that the Special Bench of Mumbai Tribunal supra also placed reliance on the decision of Hon'ble Supreme Court in the case of CIT vs Rasiklal Maneklal (HUF) reported in 177 ITR 198 (SC). But we find that this decision of Hon'ble Supreme Court was duly considered in yet another decision of Hon'ble Supreme Court in the case of CIT vs Grace Collis reported in 248 ITR 323 (SC). The relevant question in dispute before the Hon'ble Supreme Court was as under:-

> *"3. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that section 49(2) of the I.T.Act, 1961 applied to the sale of the shares of the assessees in Collis Line Pvt Ltd., which were obtained by the assessees on the amalgamation of Ambassador Steamship Pvt. Ltd. with Collis Line Pvt Ltd?"*

The facts of that case are briefly narrated as under:-

> The assessee was a shareholder of Ambassador Steamship Pvt. Ltd. The said company, viz. Ambassador Steamship Pvt. Ltd. ('the amalgamating company') was amalgamated with Collis Line Pvt. Ltd. ('the amalgamated company'), pursuant to which the shareholders in the amalgamating company were issued 14 equity shares of Rs. 100 each in the amalgamated company for each share held in the amalgamating company. As a result, the assessee was allotted 45,318 equity shares of Rs. 100 each in the amalgamated company. The assessee transferred these shares in February 1976 for a consideration of Rs. 48.73 lakhs (i.e. at Rs.107.50 per share). The Assessing Officer held that the aforesaid

transfer is subject to capital gains in the hands of the assessee. The said capital gain was computed after applying the provisions of section 49(2) read with section 47(vii), whereby the cost of the shares of the amalgamating company was considered as the cost of the shares of the amalgamated company that the assessee surrendered in exchange under a scheme of arrangement. Since the assessee had not furnished to the Assessing Officer, information as to the cost at which they had acquired the shares of the amalgamating company, the Assessing Officer noted that under the scheme of amalgamation, the assessee had received 14 shares of the face value of Rs. 100 each in the amalgamated company for one share of the face value of Rs. 100 in the amalgamating company. Accordingly, the Assessing Officer multiplied the number of shares of the amalgamated company that the assessees had sold by their face value of Rs. 100 and divided the result by 14 to arrive at their cost. The aforesaid order of the Assessing Officer was confirmed by the CIT(A) and the Tribunal. On reference, the Kerala High Court held that on the amalgamation there was no transfer by the assessees of their shares in the amalgamating company and section 49(2) did not apply to the sale of the shares of the assessees in the amalgamated company which were obtained by the assessees on the amalgamation.

On further appeal to the Hon'ble Supreme Court, it was held as under:-

"15. We have given careful thought to the definition of 'transfer' in section 2(47) and to the decision of this Court in Vania Silk Mills (P.) Ltd. 's case (supra). In our view, the definition clearly contemplates the extinguishment of rights in a capital asset distinct and independent of such extinguishment consequent upon the transfer thereof. We do not approve, respectfully, of the limitation of the expression 'extinguishment of any rights therein[1] to such extinguishment on account of transfers or to the view that the expression 'extinguishment of any rights therein' cannot

be extended to mean the extinguishment of rights independent of or otherwise than on account of transfer. To so read, the expression is to render it ineffective and its use meaningless. As we read it, therefore, the expression does include the extinguishment of rights in a capital asset independent of and otherwise than on account of transfer.

16. This being so, the rights of the assessees in the capital asset, being their shares in the amalgamating company, stood extinguished upon the amalgamation of the amalgamating company with the amalgamated company. There was, therefore, a transfer of the shares in the amalgamating company with the meaning of section 2(47). It was, therefore, a transaction to which section 47(vii) applied and, consequently, the cost to the assessees of the acquisition of the shares of the amalgamated company had to be determined in accordance with the provision of section 49(2), that is to say, the cost was deemed to be the cost of the acquisition by the assessees of their shares in the amalgamating company."

7.2. We find that the case of the assessee is that reduction of capital had resulted in 'Extinguishment of rights in shares' and we find that the definition of 'transfer' u/s 2(47) of the Act includes 'extinguishment of any rights' in a capital asset.

7.3. We find that the ld DR vehemently argued that the percentage of shareholding remains the same because reduction of shares had happened for all shareholders. We find that the ld DR relied on para 24 of the judgement of Special Bench of Mumbai Tribunal in 133 ITD 1 supra to support his proposition. In this regard, we hold that the percentage of shareholding has got no bearing for chargeability of capital gains under the Act. We further find that the provisions of section 55(2)(v) of the Act were applied in the Mumbai Special Bench decision also in para 28 thereon. We find that in the case before us, the provisions of section 55(2)(v) of the Act will have no application at all and if the assessee is not given the benefit, it will never get it and none of the clauses of section 55(2)(v) of the Act would be applicable to the assessee in the instant

case. Hence reliance placed on para 28 of the judgement of Special Bench of Mumbai Tribunal does not advance the case of the revenue.

7.4. We find that the ld AR before us placed reliance on the decision of the Hon'ble Supreme Court in the case of Kartikeya V Sarabhai vs CIT reported in 228 ITR 163 (SC) in support of his propositions. We find that in that case, the assessee had purchased 90 non-cumulative preference shares in Sarabhai Ltd. each of the face value of Rs. 1,000, at a price of Rs. 420 per share. In the year 1965, a sum of Rs. 500 per share was paid off to the assessee upon reduction of share capital, which was effected by reducing the face value of each share from Rs. 1,000 to Rs. 500 and by paying off Rs. 500 in cash. As a result thereof, the assessee became a holder in respect of 90 preference shares of the value of Rs. 500 per share, in place of being the holder of shares of the face value of Rs. 1,000 per share. Subsequently, in the year 1966, Sarabhai Ltd. by virtue of a special resolution, resolved to reduce the liability on the preference shares from Rs. 500 per share to Rs. 50 per share by paying off in cash a sum of Rs. 450 per share. Thus, the share held by the assessee which was originally of the face value of Rs. 1,000 became a share of the face value of Rs. 50 only. Thus, capital reduction had taken place in two stages, firstly, when the face value was reduced from Rs. 1,000 to Rs. 500 per share, and secondly, when the face value was reduced from Rs. 500 per share to Rs. 50 per share. The Assessing Officer in that case held that a sum of Rs. 450 per share, which was received by the assessee in 1966 was subject to capital gains. However, the assessee contended that such reduction of the face value did not result in "transfer" as per the provisions of section 2(47). In this regard, the Hon'ble Supreme Court held as under:

"10. Section 2(47) which is an inclusive definition, inter alia, provides that retinquishment of an asset or extinguishment of any right therein amounts to a transfer of a capital asset. While, it is no doubt true that the appellant continues to remain a shareholder of the company even with the reduction of a share capital, it is not possible to accept the contention that there has been no extinguishment of any part of his right as a shareholder qua the company. It is not necessary that for a capital gain to arise there must be a sale of a capital asset. Sale is only one of the modes of transfer envisaged by section 2(47). Relinquishment of the asset or the extinguishment of any right in it, which may not amount to sale, can also be considered as a transfer and any profit or gain which arises from the transfer of a capital asset is liable to be taxed under section 45.

11. When as a result of the reducing of the face value of the share, the share capital is reduced, the right of the preference shareholder to the dividend or his share capital and the right to share in the distribution of the net assets upon liquidation is extinguished proportionately to the extent of reduction in the capital. Whereas the appellant had a right to dividend on a capital of Rs. 500 per share, that stood reduced to his receiving dividend on Rs. 50 per share. Similarly, if the liquidation was to take place whereas he originally had a right to Rs. 500 per share, now his right stood reduced to receiving Rs. 50 per share only. Even though the appellant continues to remain a shareholder, his right as a holder of those shares clearly stands reduced with the reduction in the share capital.

12. The Gujarat High Court had in another case as Anarkali Sarabhai v. CIT [1982] 138 ITR 437 followed the judgment under appeal. That was a case where there had been redemption of preference share capital by the company and money was paid to the shareholders. It was held therein that difference between the face value received by the shareholder and the price paid for preference share was exigible to capital gains tax. In coming to this conclusion, the Gujarat High Court had followed the judgment under appeal in the present case.

13. The aforesaid decision of the Gujarat High Court in Anarkali Sarabhai's case (supra) was challenged and this Court in the Anarkali Sarabhaiv. CIT [1997] 224 ITR 422 upheld the High Court's decision. It had been contended in Anarkali Sarabhai's case (supra) on behalf of the assessee that reduction of preference share was not a sale or relinquishment of asset and, therefore, no capital gains tax was payable. Repelling this contention, this Court considered the definition of word 'transfer' occurring in section 2(47) and reading the same along with section 45, it came to the conclusion that when a preference share is redeemed by a company, what the shareholder does in effect is to sell the share to the company. The company redeems its preference shares only by paying the preference shareholders the value of the shares and taking back

the preference shares. It was observed that in effect the company buys back the preference shares from the shareholders. Further, referring to the provisions of the Companies Act, it held that the reduction of preference shares by a company was a sale and would squarely come within the phrase 'sale, exchange or relinquishment[1] of an asset under section 2(47). It was also held that the definition of word 'transfer' under section 2(47) was not an exhaustive definition and that sub-section (1) of clause (47) of section 2 implies that parting with any capital asset for gain would be taxable under section 45 of the Act. In this connection, it was noted that when preference shares are redeemed by the company, the shareholder has to abandon or surrender the shares in order to get the amount of money in lieu thereof.

14. In our opinion, the aforesaid decision of this Court in Anarkali Sarabhai's case (supra) is applicable in the instant case. The only difference in the present case and Anarkali Sarabhai's case (supra) is that whereas in Anarkali Sarabhai's case (supra), preference shares were redeemed in entirety, in the present case there has been a reduction in the share capital inasmuch as the company had redeemed its preference share of Rs. 500 to the extent of Rs. 450 per share. The liability of the company in respect of the preference share which was previously to the extent of Rs. 500 now stood reduced to Rs. 50 per share."

7.5. We find that the ld AR also placed reliance on yet another decision of Hon'ble Supreme Court in the case of CIT vs G Narasimhan reported in 236 ITR 327 (SC) in support of his propositions. In that case, the assessee held 70 equity shares in Kasthuri Estates (P.) Ltd. having a face value of Rs. 1000 per share. During the relevant year, the said company passed a resolution to reduce its capital resulting in reduction in face value from Rs. 1,000 to Rs. 210 per share. As a result of this reduction, there was a pro-rata distribution of some properties of the company and payment of money to the shareholders including the assessee. Before the Hon'ble Supreme Court, a question arose as to whether the property/ amounts so received by the assessee upon capital reduction was subject to capital gains. In this regard, the Hon'ble Supreme Court held as under:

"10. In the case of Kartikeya V. Sarabhai, this Court examined the question of capital gains in the context of an amount received by a

shareholder from a company on reduction in the face value of shares on account of a reduction in the share capital of the company. This Court said that it is not necessary for capital gain to arise that there must be a sale of a capital asset. Relinquishment of the asset or extinguishment of any right in it, which may not amount to a sale, can also be considered as a transfer. Any profit or gain which arises from the transfer of a capital asset is liable to be taxed under section 45. As a result of a reduction in the face value of the share, the share capital is reduced, the right of the share holder to the dividends and his right to share in the distribution of net assets upon liquidation, is extinguished proportionately to the extent of reduction in the capital. Even though the shareholder remains a shareholder, his right as a holder of those shares stands reduced with the reduction in the share capital. Therefore, this extinguishment of right is transfer. The amount received by the assessee for such reduction is liable to capital gains under section 45. The Court followed an earlier decision of this Court in Anarkali Sarabhai Ltd. In view of this judgment, the property and money received by the assessee from the company on the reduction in the face value of his shares is a capital receipt subject to section 45.

11. However, in the case of Kartikeya V. Sarabhai (supra) this Court did not consider the provisions of section 2(22)(d) in the context of capital gains arising on a reduction of the share capital. Under section 2(22)(d) any distribution to its shareholders by a company on the reduction of its capital is deemed to be a distribution of dividend to the extent that the company possesses accumulated profits - whether such profits have been capitalised or not. Therefore, any distribution which is made by a company on a reduction of its share capital which can be correlated with the company's accumulated profits (whether capitalised or not), will be dividend in the hands of the assessee. Therefore, it will have to be treated as income of the assessee and taxed accordingly.

12. It is only when any distribution is made which is over and above the accumulated profits of the company (capitalised or otherwise) that the question of a capital receipt in the hands of a shareholder, arises. The original cost to that shareholder of the acquisition of that right in the share which stands extinguished as a result of reduction in the share capital will have to be deducted from the capital receipt so determined. Only when the capital receipt is in excess of the original cost of the acquisition of that interest which stand extinguished, will any capital gains arise.

…….

14. Thus, the amount distributed by a company on reduction of its share capital has two components - distribution attributable to accumulated

profits and distribution attributable to capital (except capitalised profits). Therefore, in the present case, to the extent of the accumulated profits in the hands of Kasthuri Estates (P.) Ltd., whether such accumulated profits are capitalised or not, the return to the shareholder on the reduction of his share capital is a return of such accumulated profits. This part would be taxable as dividend. The balance may be subject to tax as capital gains that accrue."

7.6. From the aforesaid decision of Hon'ble Supreme Court referred to supra, ratio that could be derived would be that reduction of capital amounts to transfer u/s.2(47) of the Act. Even though the shareholder remains a shareholder after the capital reduction, first right as a holder of those shares stands reduced with the reduction in the share capital.

7.7. It is not in dispute that in the instant case, the assessee had indeed received consideration of Rs.39.99 Crores towards reduction of capital and whereas in the facts of the case before the Mumbai Special bench reported in 133 ITD 1 relied upon by the ld. DR there was no receipt of consideration at all. Out of the total consideration of Rs.39.99 Crores arrived @Rs.13.73 per share cancelled in accordance with the valuation report obtained separately, a sum of Rs.10.31 Crores has been considered by the assessee as dividend to the extent of accumulated profits possessed by CHIPL as per the provisions of Section 2(22)(d) of the Act and the same has been duly subjected to dividend distribution tax. The remaining sum of Rs.29.67 Crores has been considered as sale consideration for the purpose of computing capital gain / loss pursuant to reduction of capital.

7.8. The most crucial point of distinction with the facts of the assessee with that of the facts before the Special Bench of Mumbai Tribunal was that in the facts before the Special Bench, the Special Bench was concerned with a case of substitution of one kind of share with another

kind of share, which has been received by the assessee because of its rights to the original shares on the reduction of capital. The assessee got the new shares on the strength of its rights with the old shares and, therefore, same would not amount to transfer. For this purpose, reference has been made to section 55(2)(v) of the Act. According to the Special Bench, the assessee therein will take the cost of acquisition of the original shares as the cost of substituted shares, when capital gains are to be computed for the new shares. It is submitted that in the present case, section 55(2)(v) has no application. The cost of acquisition of 2,91,33,280 shares shall be of no relevance in the assessee's case at any later stage. In para 23 at page 13 of the decision of the Special Bench, it has been observed that though under the concept of joint stock company, the joint stock company is having independent legal entity but for all practical purposes, the company is always owned by the shareholders. The effective share of assessee in the assets of the company would remain the same immediately before and after reduction of such capital. It has thus been observed that the loss suffered by the company would belong to the company and that cannot be allowed to be set off in the hands of the assessee.

7.9. The law is now well settled by the decision of the Hon'ble Supreme Court in the case of Vodafone International Holdings B.V reported in 341 ITR 1 wherein it was held that the company and its shareholders are two distinct legal persons and a holding company does not own the assets of the subsidiary company. Hence, it could be safely concluded that the decision relied upon by the ld. DR on the Special Bench of Mumbai Tribunal in 133 ITD 1 are factually distinguishable and does not come to the rescue of the revenue.

7.10. We find that the ld. DR further placed reliance on the Co-ordinate Bench decision of the Delhi Tribunal in the case of DCIT vs. Daikin Industries in ITA No.1215/Del/2012 dated 18/01/2016. In that case, the assessee, a foreign company, claimed capital loss on cancellation of 54,80,000 equity shares held by it in an Indian group company pursuant to capital reduction by the said company. The Assessing Officer held that there is no relinquishment of capital asset or rights therein in the case of Daikin Industries, and hence the reduction of capital cannot be considered as a "transfer". During the course of the hearing of the appeal filed by the assessee with the Tribunal, the assessee therein conceded that the issue has been decided against it by the Special Bench of Mumbai Tribunal in the case of Bennett Coleman (supra). Accordingly, the appeal was dismissed by the Delhi Tribunal. Therefore, the conclusion reached by the Tribunal in this case was based on a concession of the assessee's counsel.

7.11. Moreover, from the facts recorded in the decision of Daikin Industries it is not clear as to whether the assessee therein received any consideration on cancellation of shares. In any case, it was more of a concession given by the assessee's counsel in that case that the issue in dispute before them was covered by the Special Bench of Mumbai Tribunal in favour of revenue. We have already held that the Special Bench of Mumbai Tribunal is not applicable to the facts of the instant case before us. Hence, the reliance placed on Delhi Tribunal by the ld. DR also would not come to rescue of the revenue.

7.12 We find that at the time of hearing, the ld. AR placed on record a copy of Co-ordinate Bench decision of Bangalore Tribunal in the case of Jupiter Capital Pvt. Ltd. vs. Assistant Commissioner of Income Tax in ITA

No.445/Bang/2018 dated 29/11/2018 wherein it was held that reduction in capital amounts to "transfer" and is subject to capital gains. The facts of the case before the Bangalore Tribunal are that the assessee held 15,33,40,900 equity shares of a face value of Rs. 10 each in its 99.89% subsidiary company. The subsidiary company obtained an order from the Hon'ble Bombay High Court for reduction in share capital from 15,33,40,900 to 10,000 and consequently the share of the assessee was reduced proportionately from 15,35,05,750 (99.89%) to 9,988 (99.89%). The face value of the shares remained the same at Rs. 10 even after the reduction. As a result of the above, the assessee claimed a capital loss of Rs. 164.49 crores (computed as the difference between the consideration of Rs. 3.18 crores received and the indexed cost of acquisition of Rs. 167.66 crores), which was disallowed by the Assessing Officer as well as the CIT(A) on the ground that reduction of capital does not amount to "transfer" as well the provisions of section 2(47) of the Act, relying on the decision of the ITAT Special Bench in the case of Bennett Coleman (supra). The assessee filed an appeal with the Bangalore Tribunal against the order of the CIT(A). In this regard, the Tribunal held as under:-

> "5. *We find that in Para 7.2 of the order of CIT(A), it is noted by CIT(A) that distinguishing factors for which the judgment of Hon'ble Apex Court rendered in the case of Kartikeya V. Sarabhai vs. CIT (supra) is not applicable are noted in Para 6.6 of his order. In Para 6.6oftheorderofCIT(A), it is noted by CIT(A) that as per scheme of reduction of share capital approved by Hon'ble Bombay High Court, although total number of shares held by the assessee in M/s. Asianet New Network P Ltd. (ANNPL) has been reduced from 15,33,40,900 number of shares to 9,988 number of shares but the percentage of holding remains unchanged which was noted to be* 99.88% *prior to reduction as well as after reduction. Because of this, Id. CIT (A) came to the conclusion that though there was a certain reduction in number of shares yet there was no effective reduction in the face value of the shares and more importantly, ratio of shareholding of the assessee company in ANNPL remains 99.88% at the same figure of shareholding prior to the implementation of the share-reduction scheme approved by Hon'ble Bombay High Court. He has held*

that in this factual background, there was no effective transfer or extinguishment of rights as envisaged in the judgment of Hon'ble Apex Court. On this basis, he held that this judgment is not applicable in the present case. Now we reproduce the relevant Para i.e. Para no. 5 from this judgment of Hon'ble Apex Court rendered in the case of Kartikeya V. Sarabhai Vs. CIT(supra). ...

"5. Sec. 2(47) which is an inclusive definition, inter alia, provides that relinquishment of an asset or extinguishment of any right there in amounts to a transfer of a capital asset. While, it is no doubt true that the appellant continues to remain a shareholder of the company even with the reduction of a share capital but it is not possible to accept the contention that there has been no extinguishment of any part of his right as a shareholder qua the company. It is not necessary that for a capital gain to arise that there must be a sale of a capital asset. Sale is only one of the modes of transfer envisaged by s. 2(47) of the Act. Relinquishment of the asset or the extinguishment of any right in it, which may not amount to sale, can also be considered as a transfer and any profit or gain which arises from the transfer of a capital asset is liable to be taxed under s. 45 of the Act.

When, as a result of the reducing of the face value of the share, the share capital is reduced, the right of the preference shareholder to the dividend or his share capital and the right to share in the distribution of the net assets upon liquidation is extinguished proportionately to the extent of reduction in the capital. Whereas the appellant had a right to dividend on a capital of Rs. 500 per share that stood reduced to his receiving dividend on Rs. 50 per share. Similarly, if the liquidation was to take place whereas he originally had a right to Rs. 500 per share, now his right stood reduced to receiving Rs. 50 per share only. Even though the appellant continues to remain a shareholder his right as a holder of those shares clearly stands reduced with the reduction in the share capital."

6. From this Para of this judgment of Hon'ble Apex Court, it is seen that it is held by Hon'ble Apex Court in this case that section 2(47) is containing an inclusive definition and inter alia, it provides that relinquishment of an asset or extinguishment of any ***right*** *there in amounts to a transfer of a capital asset. The Hon'ble Apex Court has also noted that it is no doubt true that the assessee continues to remain* a *shareholder of the company even after the reduction of a share capital but it is not possible to accept the contention that there has been no extinguishment of any part of his right as a shareholder qua the company. In that case, the assessee has purchased 90 non-cumulative preference shares, each of the face value ofRs. 1,000 at a price of Rs. 420 per share and subsequently, the company paid Rs. 500 per share upon a reduction of the share capital of the company by way of reducing the face value of each share from Rs. 1,000 to Rs. 500. Under these facts, it was held that this amounts to transfer in view of the*

*provisions of section 2(4 7) of IT Act. In the present case, the **face** value per share remains same i. e. Rs. 10 per share before reduction of share capital and after reduction of share capital but the total number of shares has been reduced from 15,35,05,750 to 10,000 and out of this, the present assessee was holding prior to reduction 15,33,40,900 shares and after reduction 9,988 shares. In addition to this reduction in number of shares held by the assessee company in ANNPL, the assessee received an amount of Rs. ' 3,17,83,4 74/- from ANNPL. Hence it is seen that in the facts of present case, on account of reduction in number of shares held by the assessee company in ANNPL, the assessee has extinguished its right of 153340900 shares and in lieu thereof, the assessee received 9988 shares at Rs. 10/- each along with an amount of Rs. 3,17,83,474/~. As per this judgment of Hon'ble Apex Court rendered in the case of Kartikeya V. Sarabhai Vs. CIT (supra), there is no reference to the percentage of shareholding prior to reduction of share capital and after reduction of share capital and hence, in our considered opinion, the basis adopted by the CIT(A) to hold that this judgment of Hon'ble Apex Court is not applicable in the present case is not proper and in our considered opinion, this is not proper. In our considered opinion, in the facts of present case, this judgment of Hon'ble Apex Court is squarely applicable and by respectfully following this judgment of Hon'ble Apex Court, we hold that the assessee's claim for capital loss on account of reduction in share capital in ANNPL is allowable."*

7.13. We find that the facts in dispute before us are identical to the facts before the Bangalore Tribunal.

TO SUM UP:-

7.14. In the assessee's case

(a) capital reduction was effected by cancellation/ extinguishment of certain number of shares;

(b) a consideration was received pursuant to such capital reduction;

(c) the share of the assessee in the investee company remained the same even after the capital reduction.

7.15. In view of our aforesaid elaborate observations, we hold that the loss arising to the assessee for cancellation of its shares in CHIPL

pursuant to reduction of capital in the sum of Rs.3,64,84,092/- should be allowed as longterm capital loss eligible to be carried forward to subsequent years. Accordingly, the grounds raised by the assessee in this regard are allowed.

8. The ground No.5 raised by the assessee is with regard to initiation of penalty proceedings u/s.271(1)(c) of the Act, it would be premature for adjudication at this stage.

9. In the result, the appeal of assessee is allowed.

Order pronounced in the open court on this 06/02/2020

Sd/-	**Sd/-**
(AMARJIT SINGH)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 06/02/2020
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai