

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI "A" BENCH: NEW DELHI**

(THROUGH VIDEO CONFERENCING)

**BEFORE SHRI G.S.PANNU, PRESIDENT &
SHRI KUL BHARAT, JUDICIAL MEMBER**

ITA Nos.4745 /Del/2012 & 4952/Del/2013

Assessment Year : 2009-10

ACIT, Central Circle, Meerut.	vs	Anil Kumar Saha, G-22, Sector-27, Noida. PAN-AMYPS1829D
APPELLANT		RESPONDENT
Appellant by	Sh. Satpal Gulati, CIT DR	
Respondent by	Sh. Salil Agarwal, Sr. Adv. & Sh. Shailesh Gupta, Adv.	
Date of Hearing	13.01.2022	
Date of Pronouncement	19.01.2022	

ORDER

PER KUL BHARAT, JM :

Both appeals filed by the Revenue for the assessment year 2009-10 are directed against the order of learned CIT(A), Meerut, both dated 04.06.2012. For brevity, both these appeals are taken up together and are being disposed off by way of the consolidated order.

2. First we take up Revenue's appeal in **ITA No.4745/Del/2012** pertaining to **Assessment Year 2009-10**. The Revenue has raised following grounds of appeal:-

1. "That Ld. CIT (A) has erred in law and on facts in deleting the addition of Rs.39,98,45,580/- made on account of short term capital gain on transfer of shares, without appreciating the fact that there was a transfer of capital assets during the financial year in terms of the provisions of section 2(47) of the I.T. Act 1961 and thus ignoring that

amended provisions of Explanation 2 to section 2(47) of the I.T. Act 1961 was applicable w.e.f. 01/04/1962.

2. *That Ld. CIT (A) has erred in law and on facts in deleting the addition made on account of short term capital gain on transfer of shares by ignoring the actual transfer of capital asset during the previous year relevant to the assessment year 2009-10, without appreciating the fact that assessee has admitted the fact of transaction in respect of registration of the equity shares on transfer in the books of the company ATS Estate (P) Ltd in compliance to the terms of MOU between assessee and other co-promoters.*

3. *That Ld. CIT (A) has erred in law and on facts in considering the short term gain to be a long term gain, without appreciating the fact that the transfer of shares is complete between transferor and the transferee in terms of amended provisions of section 2(47) of the I.T. Act 1961.*

4. *That Ld. CIT (A) has erred in law and on facts in holding that there was only a transfer of "Controlling Interest", ignoring the admitted fact that there was a transfer of 99,66,183 shares of ATS Estate (P) Ltd to M/s IL&FS Realty Fund and IIRF Holding XY Limited during the F.Y. 2008-09 which constitutes an asset.*

5. *That Ld. CIT (A) has erred in law as well as facts in ignoring the admitted transaction regarding sale of shares and in turn substituting his own imaginary transaction of sale of "Controlling Interest" .*

6. *That Ld. CIT (A) has erred in law and on facts in holding that the cost of acquisition of ATS Estates (P) Ltd to the assessee was Rs. 18.30 per share even though there was no obligation on the assessee to pay this sum for acquiring these shares.*

7. *That Ld. CIT (A) has erred in law and on facts in applying the ratio of the decision of Mumbai High Court in the case of Vodafone International Holding B.Y. Ys. Union of India reported in 311-ITR-46 which stands superseded by the Hon'ble Supreme Court decision dated 20th January,*

2012 (247-CTR [SC] 1) in the same case of Vodafone International Holding B.Y. Ys. UOI.

8. That the order of Ld.CIT(A) deserves to be vacated and the assessment order passed by the Assessing Officer be restore.

9. That the appellant craves leave to amend any one or more of the grounds of the appeal as stated above and when need for doing so may arise.”

FACTS:-

2. The facts giving rise to the present case of the assessee are that the assessee is an individual and filed his return of income for the year under consideration on 28.07.2009 declaring total income of Rs.48,07,446/- which was subsequently revised vide income tax return dated 31.03.2011 declaring the same income. Subsequently, the case of the assessee was selected for scrutiny assessment as per the CBDT Guidelines. By framing the assessment u/s 143(3) of the Income tax Act, 1961 (“the Act”), the Assessing Officer (“AO”) observed that in the foot note, a chart of computation was furnished alongwith revised return of income wherein, the assessee had stated that during the year, the assessee had received a sum of Rs.40 crores from ILFS on account of shares of ATS Estate (P.) Ltd. taken by M/s. IL & FS Trust Company Ltd. and IIRF Holding XV Limited., conditionally as per the terms of Share Purchase and Shareholder Agreement dated 08.04.2008 and shares Subscription and Share holders Agreement dated 23.07.2007. It was stated that the share which were taken by IL&FS Trust Company Ltd. and IIRF Holding XV Limited from the assessee had been acquired by the assessee from M/s ATS Infrastructure Ltd. as per the terms of agreements between promoters dated 03.03.2008. Further,

it was stated that the assessee had received money under a conditional agreement and therefore, the shares were not absolutely and forever transferred to M/s IL&FS Trust Company Ltd. and IIRF Holdings Ltd. Accordingly, no calculation on account of capital gain had been made for this transaction. However, under the abundant precaution and to avoid penal interest, the assessee had paid a sum of Rs.5.75 crores as income tax and that was claimed as refund. Thereafter, the Assessing Officer after perusing the agreement called for further information from the assessee. The information so called was supplied to the Assessing Officer. The Assessing Officer after having received the reply, issued another notice dated 30.11.2011, thereby sought further information and cautioned the assessee that in the event of not furnishing convincing and satisfactory reply to the queries, he would compute the capital gain at Rs.39,99,00,000/- on transfer of shares after adopting sale consideration of Rs.40 crores less cost of acquisition of Rs.1 lac. In response to the notice, the assessee filed another reply which was not found to be satisfactory by the Assessing Officer and proceeded to compute the capital gain on transfer of shares. Hence, the Assessing Officer made addition on account of long term capital gain and short term capital gain and computed the income at Rs.40,49,21,179/- against the income declared of Rs.48,07,446/-.

3. Aggrieved against this, the assessee preferred an appeal before Ld. CIT(A), who after considering the submissions, partly allowed the appeal of the assessee. Thereby, ld.CIT(A) deleted the addition made on account of capital gain by holding that there was no transfer of capital assets within the meaning

of section 2(47) of the Act therefore, the capital gain cannot be chargeable to tax in Assessment Year 2009-10.

4. Aggrieved against this, the Revenue is in appeal before this Tribunal.

5. The only effective ground in this appeal is whether Ld. CIT(A) is in error in holding that the capital gain arising out of transfer of shares in question cannot be taxed in the year under appeal.

6. Ld. CIT DR vehemently argued that Ld.CIT(A) was not justified in holding that no taxable event arose in the year under appeal. Ld.CIT DR also filed a written submission, for the sake of clarity same is reproduced hereunder:-

1. "In this case, Mr. Geetamber Anand (GAL Mr. Ashwani Talwar (AT) and Mr. Anil Saha(AKS) (the assessee) were the promoters of ATS group companies. Mr. Anil Saha disengaged himself from the ATS group from 23.09.2007. This disengagement process involved following documentation; -

I. MOU dated 03.03.2008 between Mr. Geetamber Anand, Mr. Ashwani Talwar and Mr. Anil Saha(the assessee)-

> MOU provides for exit of Mr. AKS from the ATS Group companies after taking net realized amount of Rs. 150 Crore. MOU deals with the methodology for realization of such amount by Mr. AKS.

> The Methodology provide that as a first step, GA & AT (other promoters) would ensure transfer of holding of ATS infrastructure Ltd. to the extent of 3 crore shares in ATS Estates Pvt. Ltd. to AKS (the assessee) for a sum of Rs. 54.90 cr @Rs. 18.30 per share on or before 07.03.2008 (refer clause 1 of MOU).

> As a second step, AKS would sell such shares to third party which would be arranged by GA&AT. The arrangement as per MOU is to ensure the sale to third party by AKS at such a price to fetch net realizable value of Rs. 150 crores.

> MOU also specifies (refer clause 4 pg. 3) that if transfer of THREE crore shares of ATS Estates Pvt. Ltd. are not sufficient to fetch net realizable value of Rs. 150 crore for Mr. AKS (The assessee), then GA & AT would transfer further shares of ATS Estate Pvt. Ltd. to AKS.

> Clause 7 of MOU deals with payment by AKS to ATS infrastructure Ltd. at decided price of Rs. 18.30 per share in respect of transfer of shares which in turn were sold by AKS.

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Clause 8 deals with next step of transfer of shareholding in ATS infrastructure Ltd. & other companies to GA&AT.

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Further, MOU dated 03.03.2008 contain following terms;-

- Transfer of 3 Crore shares to be completed by 07.03.2008 (as per MOU)
- Realize exit amount of Rs. 150 Crore by 31.05.2008 (Refer MOU Clause 3- pg 3)
- If failed (till 31.05.2008)- 12% per annum increase on the balance left till 31.08.2008.(refer MOU clause 5)
- If failed till 31.08.2008- 24% per annum (post 31.08.2008) (refer MOU clause 5)
- If failed till 31.03.2009-AKS to sell shares of investor of his choice.(refer MOU Clause 5&6)

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II. *Share Purchase Agreement dated 03.03.2008 between Mr. Geetamber Anand, Mr. Ashwani Talwar and Mr. Anil Saha(the assessee)*

> *Clause 2 of share purchase agreement provides that the transfer is free from Encumbrances and together with all rights attaching there to or after date of agreement.*

> *It is the sale consideration which is linked with next level sale to investor & the sale instance (of shares) per se is independent of next level transaction (refer clause 3 of share purchase agreement).*

III. *Share purchase and Share holder Agreement dated 08.04.2008 with ILFS & IIRF Holdings*

> *On 08.04.2008, the ATS group entered into share purchase & shareholders' agreement with ILFS & IIRF Holdings @ Rs 44.12.*

> *There is no clause which deals with a situation of reversal of transfer or any conditionality attached to transfer of shares.*

IV. *Arbitration decision - 04.03.2017*

V. *High Court decision dated 06.04.2018*

Para 14 of High Court decision-

"However, the MOU did not stipulate that transfer of shares of ATS Estate Pvt. Ltd. to the respondent would be contingent upon the investor (s) being located in advance".

Para 15 - "Obligation to process transfer of shares of ATS Estate Pvt. Ltd. to the Petitioner is Unqualified".

Para 20- " ... The Arbitral Tribunal noted that ATS Infrastructure Ltd. had transferred the first tranche of 90,00,000 shares of ATS Estate Pvt. Ltd. and none of the parties had challenged the said transaction."

Para 21- " .. the Contention that MOU is void the impugned award is unlistenable is unmerited."

2. Assessee position;- The assessee took a position that it is not a case of transfer under section 2(47) of the income tax act as the sale was conditional.

3. The issue involved is that whether the transfer of shares in this case does satisfy the provisions of section 2(47) of the act or not?

Facts relevant to the issue under consideration-

4. The assessee received a sum of Rs. 40 crore from ILFS Reality Fund and IIRF Holdings XIV Ltd. for the transfer of 90,66,183 shares of ATS Estates Pvt. Ltd. which in turn were received by the assessee from ATS Infrastructure Pvt. Ltd.

5. As per information received from M/s ATS Estate (Private) Limited and also as per Registrar of Members and Share Ledger, 9000000 equity shares of M/s ATS Estate Private Limited were registered in the name of Anil Saha (the assessee) as on 01.04.2008 which were as a result of transfer from Mis ATS Infrastructure Ltd. to Anil Saha. Thereafter, Mr. Anil Saha transferred 1191949 equity shares to IL&FS Trust Co. Ltd and 7874234 equity shares to IIRF Holding XV Ltd. This fact has been confirmed by M/s ATS Estate (P) Ltd. in response to notice under section 133(6) of the act.

6. The facts above clearly highlight that there is no dispute on the transfer of 90 lakh odd shares and the entire sale consideration was also received by the seller. Thus, it is a case well covered by section 2(14) and 2(47) of the act. CIT(A) order has laid emphasis on the aspect of real commercial object to achieve transfer of controlling interest and considered transfer of controlling interest as capital asset. Since the controlling interest of ATS was not transferred,

therefore, *Ld. CIT(A)* held it to be a case of non-chargeability of capital gain.

7. It is prayed that order of *Ld. CIT(A)* is without merit as it fails to meet the scheme of the act to charge tax on transfer of shares which is the factual position in this case. So, the share holding which in itself is in the nature of capital asset and its transfer is clearly covered under section 2(47) of the act.

8. Section 2(14) of the act reads as under;-

14) "capital asset" means-

(a) property of any kind held by an assessee, whether or not connected with his business or profession;

(b) any securities held by a Foreign Institutional Investor which has invested in such securities in accordance with the regulations made under the Securities and Exchange Board of India Act, 1992 (15 of 1992),

but does not include-

(i) any stock-in-trade [other than the securities referred to in sub-clause (b)], consumable stores or raw materials held for the purposes of his business or profession;

(ii) personal effects, that is to say, movable property (including wearing apparel and furniture) held for personal use by the assessee or any member of his family dependent on him, but excludes-

(a) jewellery;

(b) archaeological collections;

(c) drawings;

(d) paintings;

(e) sculptures; or

(f) any work of art.

Explanation I.-For the purposes of this sub-clause, "jewellery" includes-

(a) ornaments made of gold, silver, platinum or any other precious metal or any alloy containing one or more of such precious metals, whether or not containing any precious or semi-precious stone, and whether or not worked or sewn into any wearing apparel;

(b) precious or semi-precious stones, whether or not set in any furniture, utensil or other article or worked or sewn into any wearing apparel.

Explanation 2.-For the purposes of this clause-

(a) the expression "Foreign Institutional Investor" shall have the meaning assigned to it in clause (a) of the Explanation to section 115AD;

(b) the expression "securities" shall have the meaning assigned to it in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956);

(iii) agricultural land in India, not being land situate-

(a) in any area which is comprised within the jurisdiction of a municipality (whether known as a municipality, municipal corporation, notified area committee, town area committee, town committee, or by any other name) or a cantonment board and which has a population of not less than ten thousand; or

(b) in any area within the distance, measured aerially,-

(I) not being more than two kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten thousand but not exceeding one lakh; or

(II) not being more than six kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than one lakh but not exceeding ten lakh; or

(III) not being more than eight kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten lakh.

Explanation.-For the purposes of this sub-clause, "population" means the population according to the last preceding census of which the relevant figures have been published before the first day of the previous year;

(iv) 6 per cent Gold Bonds, 1977, or 7 per cent Gold Bonds, 1980, or National Defence Gold Bonds, 1980, issued by the Central Government;

(v) Special Bearer Bonds, 1991, issued by the Central Government;

(vi) Gold Deposit Bonds issued under the Gold Deposit Scheme, 1999 or deposit certificates issued under the Gold Monetisation Scheme, 2015 notified by the Central Government.

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

9. Section 2(47) of the act reads as under;-

(47) "transfer", in relation to a capital asset, includes,-

(i) the sale, exchange or relinquishment of the asset; or

(ii) the extinguishment of any rights therein; or

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

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

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

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

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

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

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

10. It is prayed that the above submission may be duly considered in addition to the order of the AO."

7. Per contra, Ld. Counsel for the assessee supported the order of Ld.CIT(A) and he submitted that the MOU dated 05.03.2008 which was the basis of the transfer of shares was subjected to litigation and the matter reached to the Hon'ble Delhi High Court in *O.M.P.(COMM) 258/2017 & ITA Nos.7520/2017 & 8780/2017 in the case of Getamber Anand & Anr. vs Anil Kumar Saha vide judgement dated 06.04.2018* against the arbitration award. Therefore, it was submitted when the transaction itself was in dispute and subjected to arbitration proceedings, any transfer of shares can not be construed to find and could not be subjected to capital gain tax in the year under consideration. He submitted that the Ld. CIT(A) was justified in deleting the addition. He submitted that transfer of shares by the assessee cannot be construed as part performance of the contract. Under the facts and circumstances of the present case, the entire terms and condition ought to be read as a whole. He submitted that the Assessing Officer failed to appreciate the fact that the agreement to transfer of shares was conditional. He failed to take note of the fact that transfer could be construed as complete on happening of a particular event. And in the present case, serious dispute related to transaction in question arose that culminated into arbitral proceedings between the parties. He took us through the judgement of Hon'ble Delhi High Court in the case of *Getamber Anand & Anr. vs. Anil Kumar Saha* (supra). He submitted that one of the prayers before the Hon'ble High Court was that MOU itself was void being violative provision of section 297 of the Companies Act, 1956.

8. In re-joinder, Ld.CIT DR submitted that transfer was complete in the year under appeal itself qua the share(s) which is subject matter of the present appeal. Therefore, the Assessing Officer was justified in charging tax on capital gain in the year under consideration.

9. We have heard the rival submissions and perused the material available on record. The issue that needs to be examined under the facts and circumstances of the present case is that whether the Ld.CIT(A) committed any error in holding that the transfer is not complete in the year under appeal and gain arising out transfer of shares can be subjected to tax. For the sake of effective adjudication, the relevant contents of the impugned order are reproduced as under:-

4.4. Decision and reasons therefor:

“I have carefully considered the submissions of the AIR and have perused the detailed reasoning given by the AO in the impugned order. I have also carefully gone through the agreements which the appellant executed alongwith the co-promoters of ATS Group. On due examination of the documents and evidences on record I find that prima facie there appears no dispute that during the F.Y. 2008-09, 90,66,183 equity shares of ATS Estates Pvt. Ltd were transferred by the assessee in favour of IL& FS Reality Fund and IIRF Holdings XIV Ltd and pursuant thereto Rs. 40 crores were received from the transferees. Transfer of these shares was recorded in the statutory records of ATS Estates Pvt.Ltd in May 2008 which indicated that due legal procedures were followed by the parties concerned for transfer of shares in favour of the transferees. On these facts the question which is to be adjudicated in the present appeal is whether the shares which came to be registered in the names of IL&FS Reality Fund and IIRF Holdings XIV Ltd in statutory records of ATS Estates Pvt. Ltd represented transfer of shares by the assessee in terms of Sec. 2(47) of the I. T. Act resulting in accrual of income by way of capital gains chargeable in A.Y. 2009-10. The moot question is whether registration of the shares in the names of the 2 purchasing funds amounted to transfer of a capital asset within the meaning of See 2(47) of the Act and thereby transfer of a capital asset took effect in law and by

which charge of tax stood crystallized against the assessee in A.Y. 2009-10.

In AO's opinion there was no doubt or ambiguity about the fact that transfer of the capital asset indeed took place in F.Y. 2008-09 because all the statutory ingredients for assessment of income arising from transfer of capital asset were fully present in the assessee's case. In AO's opinion shares of ATS Estates Pvt. Ltd constituted capital asset within the meaning of Sec 2(14). In the statutory records of ATS Estates Pvt. Ltd. entries were present by which it was established that shares of that company were first transferred in the assessee's name from ATS Infrastructure Ltd and thereafter in May 2008 shares were transferred in the names of IL&FS Reality and IIRF Holdings XIV Ltd. The entries in statutory records established that a legally valid "transfer" of a capital asset took place for a valid consideration and which the assessee received from the transferees of the shares. The AO therefore concluded that all the statutory conditions for assessment of capital gain were satisfied by the transactions which the assessee conducted during the F. Y. 2008-09 and therefore there was no escape from assessment of capital gains in assessee's hands in A.Y. 2009-10.

The facts narrated by the AO In the impugned order prima facie appear convincing to reach the conclusion that the transfer of a capital asset occurred during the relevant previous year and therefore the assessee was liable to be assessed on capital gain in A.Y. 2009-10. On deeper examination of the transactional documents on record the answer to the question however appears to be otherwise. From the documents on record it was noted that the assessee alongwith Sri Getambar Anand and Sri Ashwini Talwar had promoted and established a real estate development business. In the course of carrying this business; the said promoters jointly promoted and incorporated 13 companies under different names for the purpose of carrying on real estate projects at different locations. The group of companies promoted by the said promoters came to be known as "ATS Group of Companies". The word ATS was the

abbreviated version of the first alphabet of the surnames of 3 individual promoters, ATS Infrastructure Pvt.Ltd was the flagship company of the ATS group. The assessee being one of the principal promoter of ATS group was having 1/3rd controlling interest. Over the years when ATS group of companies were carrying on housing projects; certain issues arose between the promoters which prompted the assessee to agree to disassociate or disengage himself from the affairs of the ATS Group. Accordingly promoters of ATS Group executed an MoU on 03.03.2008 in which the terms and conditions regarding assessee's separation from ATS Group were agreed by and between the assessee and Shri Getambar Anand and Shri Ashwini Talwar. The two continuing promoters of ATS group agreed with the appellant that on assessee agreeing to disengage himself from the management and control of ATS Group he would be paid lump sum consideration of Rs.150 crores. In other words the MoU dated 03.03.2008 provided that the assessee would relinquish his 1/3rd controlling interest in favour of the remaining 2 promoters for the agreed consideration. Since the continuing promoters did not have ready funds for making payment of the agreed consideration they devised a scheme or an arrangement for raising requisite funds to pay off their personal obligations under the MoU dated 03.03.2008. It appeared from the MoU dated 03.03.2008 that the continuing promoters devised a scheme of securitizing assets of A TS Group companies for the purpose of raising required funds. In terms of the scheme proposed by the continuing promoters it was agreed that 300 lacs shares held by ATS Infrastructure Ltd in A TS Estates Pvt. Ltd would be first transferred to the assessee for a price @ Rs.18.30 per share. After the shares were so transferred all 3 promoters were to take steps to procure appropriate investor or investors who would pay higher price for these 300 lacs shares to the assessee so as to enable him to realize the agreed consideration provided in the MoU dated 03.03.2008. It was the understanding between the promoters that the price realized by the assessee from sale of 300 lacs shares of ATS Estates Pvt. Ltd would be treated by him as discharge of continuing

promoters' obligation of paying consideration for relinquishing on his 1/3rd controlling interest in the ATS Group.

It appeared from the transactional documents on record that in terms of scheme devised by the promoters, a Share Purchase Agreement dated 03.03.2008 was executed between ATS Infrastructure Ltd, A TS Estates Pvt. Ltd and the assessee. In terms of the said agreement A TS Infrastructure Ltd agreed, to sell 3 crores shares held by that company in ATS Estates Pvt. Ltd at and for a consideration of Rs.54.90 crores in various tranches and agreed to receive sale consideration in installments. Simultaneously with execution of the share purchase agreement on 03.03.2008 the assessee paid Rs. 1 lac as part payment of the consideration.

It further transpired from the documents on record that on 08.04.2008 an agreement titled as Share Purchase and Share Holders Agreement was executed by and between

- 1) Getambar Anand*
- 2) Ashwini Talwar*
- 3) Anil Kumar Saha (assessee herein)*
- 4) ATS Infrastructure Ltd*
- 5) ATS Promoters & Builders Pvt. Ltd*
- 6) ATS Estates Pvt. Ltd*
- 7) IL& FS Realty Fund*
- 8) IIRF Holdings XIV Ltd*

The agreement dated 08.04.2008 was in relation to sale of 90,66,183 shares by Shri A.K. Saha (the assessee herein) to IL&FS Realty Fund and IIRF Holdings XIV Ltd at and for Rs. 40 crores. The sale of these shares was primarily out of the shares which the assessee purchased from ATS Infrastructure Ltd under the agreement-dated 03.03.2008. The agreement dated 08.04.2008 besides providing the terms and conditions relating to transfer of 90,66,183 shares further provided that the rights and obligations of the parties to the said Agreement would also be

governed by Share Subscription and the Share Holders Agreement, executed by the same set of parties earlier on 23.07.2007. From copies of the agreements it appeared that IL&FS Realty Fund and IIRF Holdings XIV Ltd were 2 real estate funds, of which former was registered in India and the latter in Mauritius. Both the funds were principally engaged in providing finance to housing and real estate development projects or companies carrying on infrastructure business in India. These two funds in July 2007 had entered into an agreement with 3 promoters of the ATS Group and also the A TS group of companies in terms of which the 2 funds provided finance enabling the promoters of ATS Group to undertake and execute housing and infrastructure development projects in Northern India for which land parcels were being acquired by the ATS Group of companies. Instead of providing funds in the form of dept or loans the 2 real estate funds subscribed to the equity shares of ATS group of companies which inter alia included ATS Estates Pvt. Ltd. The terms and conditions of the agreement dated 23.07.2007 contained various milestone events and prescribed performance parameters which were agreed to be achieved and/ or performed by the Promoters and companies of ATS Group so as to enable the real estate funds to earn pre agreed rate of return on the capital subscribed by them. The said agreement further provided that promoters of ATS group as also the companies belonging to the group would be under obligation to reacquire or repurchase the shares subscribed by the said 2 funds at a price which was to be arrived at on a pre determined pricing formula assuring the payment of pre agreed rate of return on investment. The Share Purchase Agreement under which the assessee sold 90,66,383 shares was liable to be governed by the covenants put in place earlier in the agreement dated 23.07.2007. A careful scrutiny of these agreement therefore showed that even though 2 real estate funds acquired equity shares of ATS Estates Pvt. Ltd yet, the framework agreement between the parties showed that the conditions contained therein imposed obligations on the promoters of ATS Group to ensure buy back of shares from the real estate funds in the manner and

the time frame predetermined. The terms and conditions of the agreement dated 23.07.2007 indicated that even though the real estate funds subscribed to the equity shares; in reality it was an arrangement for providing funds to ATS Group and for its promoters.

From the combined reading of the Share Purchases Agreement and Share Holders Agreement dated 23.07.2007 and 08.04.2008 it appeared that almost same set of persons were parties to both agreements and both were interconnected. In fact the later agreement was made dependant on the earlier one. Under agreement dated 23.07.2007 2 real estate funds directly subscribed to the equity capital of ATS Estates Pvt. Ltd. Under the latter agreement, however, the said 2 funds acquired additional shares of A TS Estates Pvt. Ltd from the assessee and for which payment was received by the assessee. However purchase of shares in terms of the agreement dated 08.04.2008 was made subject to the same conditions and obligations with regard to its repurchase by the Promoters and Companies of ATS group. From' the combined reading of these agreements it appeared that the Promoters of ATS Group had put in place a complex web of arrangement for raising resources through companies belonging to the group. The shares of the group companies were used as "under lying" asset for raising funds to meet the fund requirements of the promoters individually as also for the companies undertaking project execution. Even though real estate funds purchased shares of ATS Estates Pvt. Ltd from the assessee, yet the agreement dated 08.04.2008 showed that the shares were used only as underlying security to raise funds to meet promoters' obligations arising under the MoU dated 03.03.2008. Reading of agreements executed by the parties as a whole therefore clearly indicated that 2 real estate funds though ostensibly subscribed to the equity capital of a company or purchased shares of ATS Estates Pvt., Ltd yet there was no intention on their part to undertake or bear any risk which was legally associated with acquisition of equity shares of a limited company and the only intention of the transferee of shares was to provide finance to promoters and/or to ATS group of companies.

It is a settled legal proposition that equity capital is a risk capital and therefore the share subscriber carries entire risk associated with the business carried on by the company. There is no guarantee as to the return on investment as also return of investment when a person subscribes to the equity capital of a company. It is for this reason the equity share holder enjoys right to vote; right to receive dividend and right to participate in the surplus of the company. An equity share holder cannot expect to earn predetermined or predefined return on his investment nor is he entitled to the return of capital. In the present case however the terms & conditions explicitly spelt out that 3 promoters of A TS group as also ATS Infrastructure Ltd and ATS Promoters & Builders Pvt. Ltd had jointly assured 2 real estate funds that against shares acquired by them in ATS Estates Pvt. Ltd they would be paid assured rate of return on the funds invested and they were also assured that the shares so acquired by them would be repurchased within an agreed time frame and at a price which would assure them not only return of investment but also assured payment of return on funds invested at a pre-agreed rate. The agreements therefore indicated that though in terms of agreement dated 08.04.2008, two funds acquired shares of ATS Estates Pvt. Ltd; in reality, the entire arrangement was put in place to enable the continuing promoters to pay to the assessee the sum agreed under the MoU dated 03.03.2008.

In terms of the MoU dated 03.03.2008 the continuing promoters of ATS group had put in place a scheme or an arrangement for acquiring assessee's 1/3rd controlling interest in the ATS group at and for a price of Rs.150 crores. In order to achieve that objective the promoters were in need of funds which they did not readily possess. The principal objective of the MoU dated 03.03.2008 was that the 2 continuing promoters would acquire controlling interest of the assessee in ATS group. Assessee's controlling interest in ATS group, in law, constituted a "capital asset" which the assessee could transfer for a consideration. This legal position has now become explicitly clear by the amendment introduced having retrospective effect by Finance Act 2012 in Sec 2(14) of the Act. In the

present case the transactional documents on record as also the facts of the case indicated that the assessee was one of the principal promoters of ATS. The essence of the agreement dated 03.03.2008 was that the assessee was to relinquish or release his promoters controlling interest in ATS group at and for a consideration of Rs.150 crores. The subject matter of transfer under the agreements dated 03.03.2008 and 08.04.2008 was not the shares simplicitor but the real subject matter of the transfer was assessee's controlling interest in ATS group. In order to achieve the transfer of assessee's controlling interest in favour of the remaining 2 promoters; a pre ordained scheme or arrangement was put in place at the behest of the continuing promoters; enabling them to raise funds, required for paying consideration of Rs.150 crores in terms of the MoU dated 03.03.2008. Transfer of 90 lacs shares by ATS Infrastructure Pvt. Ltd to the assessee and thereafter by the assessee to 2 real estate funds was just an intermediate step of the preordained chain of transactions devised by the continuing promoters for achieving the main objective which was acquisition of assessee's controlling interest. It is true that while giving effect to the preordained scheme 90 lacs shares of ATS Estate Pvt. Ltd were first acquired by the assessee and in turn these were transferred to 2 real estate funds and thereby the assessee received Rs. 40 lacs in part satisfaction of the amount to which he was entitled under the MoU dated 03.03.2008. However it cannot be lost sight of the fact that 2 real estate funds acquired shares of ATS Estates Pvt. Ltd subject to various covenants contained in the Agreement dated 08.04.2008 as also in the earlier agreement dated 23.07.2007. The said agreement provided several covenants which were to be fulfilled by the promoters including the assessee at future specified dates. It therefore appeared that the shares of A TS Estates Pvt. Ltd were not purchased by the funds on out right basis but the shares were purchased on the precondition that the promoters of ATS Group and/ or ATS Infrastructure Ltd would buy back the very same shares on predetermined terms and at the price to be arrived at on predetermined pricing formula. The facts on record therefore established

that the payments made by 2 real estate funds to the assessee although apparently resulted in transfer of shares in their favour yet in reality such transaction was just one step, out of the several preconceived and preordained steps agreed to be taken by the promoters of ATS group for acquiring assessee's controlling interest which in law was a capital asset in its own right and which the assessee had agreed to transfer to the remaining 2 promoters on terms provided in MoU dated 03.03.2008. The said asset was separate and distinct from 90 lacs shares of ATS Estates Pvt. Ltd. Transfer of these shares was not an end in itself but it was an integral part of preordained steps taken by the parties to achieve transfer of controlling interest in ATS Group.

In income tax proceedings tax effects of the transaction should be determined with reference to its substance and not from the form in which transaction is conducted. In determining the true tax effect regard should be had to the real object and substance of the transaction. In appropriate circumstances when apparent is not real and substance of the transaction appears to be different from the legal form given by the parties to the transaction then in such situation; form of the transaction can be overlooked or ignored. It is the duty of the taxing authority to ascertain and determine the true object of the transaction and for that purpose a taxing authority is entitled to ignore the form adopted by the parties or nomenclatures given by the parties to the transaction. One must analyze all the facts in an objective manner and then determine the true nature and character of the transaction having regard to real object for which the transaction is undertaken or carried out by the parties. It is necessary to determine the real object or the purpose which the parties wished to achieve and for which a commercial arrangement is put in place. In determining the true tax effect it is not the legal form of the transaction but true commercial considerations weighing with the parties that should be taken into consideration. In the present case the transactional documents showed that the real commercial object which the parties sought to achieve was transfer of assessee's controlling interest in ATS group of companies

to the remaining promoters at and for price of Rs.150 crores. In law "controlling interest" was a valuable right and constituted a distinct "capital asset". The said "capital asset" was agreed to be transferred for Rs. 150 crores. The transactional documents showed that in order to give effect to this principal commercial objective a preordained scheme was devised by the promoters jointly with ATS Infrastructure Ltd, flagship Company of ATS group controlled by the same promoters. In terms of the said preordained scheme shares of ATS Estate Pvt. Ltd were transferred by ATS Infrastructure Pvt. Ltd to the assessee who in turn transferred the same to 2 real estate funds who provided finance to the promoters to enable them to discharge their obligation arising under the MoU dated 03.03.2008. The terms of the agreements dated 03.03.2008 and 08.04.2008 clearly showed that an interim arrangement of raising funds for the promoters was put in place where under the 2 funds purchased shares of ATS Estates Pvt. Ltd from the assessee. In determining the true tax effect of the transaction therefore intermediate steps taken by the promoters for raising requisite funds could not be taken into consideration. Raising of Rs. 40 crores was one of the step taken by the co-promoters of ATS group and it was not an end itself. In my opinion in a preordained scheme of arrangement, sale of 90 lacs shares by ATS Infrastructure Ltd to the assessee and thereafter by the assessee to the 2 real estate funds being one of the intermediate step; that in itself did not constitute independent commercial or real transaction. The said transaction could be considered only as a mean or tool to achieve the real objective of transferring the assessee's controlling interest In ATS group to the remaining 2 promoters.

The House of Lords in the case of Craven (Inspector of Taxes) Vs. White (183 ITR 216) has held that where the tax payers have put in place a scheme, envisaging series of pre ordained transactions involving series of interconnected transactions then for tax purposes the inter connected chain of transaction can be regarded as fiscal nullity if these transactions on their own cannot be considered to be true and independent commercial

transactions. The court held that the tax effect of such preordained transactions can be ignored and tax effect can be determined with reference to ultimate commercial transaction which is sought to be achieved by the preordained Scheme or arrangement put in place by the parties. The observations of Bombay High Court in the case of Vodafone International Holding BV vs. Union of India (311 ITR 46) are also relevant in this regard. In that case one share of a company registered in Cayman Island was transferred by one non resident to another non resident which had legal effect of transferring controlling interest of a company carrying telecommunication business in India. The underlying asset which contributed substantially to the value of one share of Cayman Island Company was telecommunication business carried by an Indian Company in India. It was claimed by the IT authorities that even though the transaction in question involved transfer of a share of a Cayman Island company, yet in reality it resulted in transfer of the controlling interest in a company in India and therefore income liable to tax accrued in India. On these facts the High Court observed that "the shares in themselves may be an asset but in some cases like the present one, the same may be a mere a mode or a vehicle to transfer some other assets. Choice of the petitioner in selecting a particular mode of transfer of these rights will not alter or determine the nature or character of the asset."

Applying principle laid down in these decisions to the present case I find that the true commercial transaction which the parties intended to carry out was transfer of assessee's controlling interest in ATS Group in favour of remaining 2 promoters. There is no dispute about the basic fact that assessee along with Getambar Anand and Ashwini Talwar was the principal promoter of ATS group having equal proportional controlling interest. It was assessee's controlling interest in the ATS group which was the real subject matter of transfer by the assessee in favour of remaining 2 promoters at and or a consideration of Rs.150 crores. The controlling interest was a valuable right and constituted capital asset within the meaning of Sec 2(14) of the Act. Since the promoters did not have ready

funds to acquire the said asset a pre ordained scheme was devised by the promoters which was to be executed through series of transactions to be carried out through intermediate companies such as ATS Infrastructure Ltd and ATS Estate Pvt. Ltd etc. However the ultimate object which the parties desired to achieve was transfer of assessee's controlling interest in the ATS Group. In order to achieve this object the assessee along with other 2 promoters proposed to execute series of preordained transactions so that the agreed consideration of Rs.150 crores could be received by the assessee. In the context of the preordained scheme of arrangement 90 lacs shares were transferred by ATS Infrastructure Ltd to the assessee and then by the assessee to 2 real estate funds. However even the purchase of these shares by 2 real estate funds was subject to numerous covenants including obligation on part of the same set of promoters as also on ATS Infrastructure Ltd to buy back these shares in predetermined manner. On these facts therefore I find that the transactions in question were not based on independent commercial consideration. The impugned transactions could not be divorced from the main and primary transaction contemplated by the MoU dated 03.03.2008. The transaction in question was subservient to the principal transaction contemplated by MoU dated 03.03.2008. Admittedly during the financial year ended 31.03. 2009 the capital asset being assessee's controlling interest in ATS Group was not transferred by the assessee. It is true that under the agreement dated 03.03.2008 the assessee acquired right of specific performance against the co-promoters and it was also evidenced from facts - that with a view to give effect to the said object certain intermediate steps were carried out by the parties during F.Y.2008-09. The facts on record however showed that even till date the transaction contemplated by the MoU dated 03.03.2008 was not consummated and attained finality. In fact the assessee till date has not relinquished his controlling interest in ATS group of companies. It further appeared from the facts on record that the entire arrangement evidenced by MoU dated 03.03.2008 remained unexecuted. In fact at present the matter is sub judice before the Company

Law Board. In terms of the decision of the Company Law Board, the arrangements envisaged by the MoU dated 03.03.2008. See 2(47) of the I T Act and therefore the capital gain as not chargeable to tax in A.Y. 2009-10. The AO shall however be free to assess such income in the year in which he finds that assessee's controlling interest in ATS group of companies was actually transferred. While assessing such income the AO will not only take into account the cash consideration but also the value of movable and immovable assets that will be received by the assessee in terms of MoU dated 03.03.2008. In terms of the above directions the AO shall revise the assessment of the A.Y. 2009-10. Grounds 1 to 3 are allowed.”

10. There is no dispute with regard to the fact that the transaction relating to the transfer of shares was in pursuance to the Memorandum of Understanding (“MOU”) dated 03.03.2008. The serious disputes as arising between the parties in connection with the Memorandum of Understanding dated 03.03.2008 which contended into invocation of the arbitration clause and thus the issue of MOU was subjected to the arbitral proceedings by the parties and an arbitral award dated 04.03.2017 was delivered by the Hon’ble Arbitral Tribunal constituted by a Sole Arbitrator, Dr. Justice Mukandkam Sharma, former Judge of Hon’ble Supreme Court of India in the matter numbered as *Arbitration Case No.9/2012* and captioned as “*Sh.Anil Saha v. Ashwani Talwar and Anr*”. Ld. Arbitrary Tribunal had directed the other Directors of the company namely, Sh. Getambar Anand and Sh. Ashwini Talwar to pay jointly and severally a sum of Rs.110 crores alongwith interest @ 12% per annum from 31.05.2008 till the date of the award. The Arbitral Tribunal had also awarded interest at the rate of 12% per annum from the date of the award till the date of payment and in the event the payment was not made within a period of 120 days from the

date of the award. Sh. Getambar Anand and Sh. Ashwini Talwar were made liable to pay interest @ 15% per annum from 121st day till the day of receipt of the outstanding amount. Further, the said persons were also directed **(i)** to procure, jointly and severally, the ownership, title and possession of a Penthouse measuring 5650 sq. feet covered area alongwith lower floor terrace of 1894.85 sq. feet and above floor terrace of 5361.54 sq. feet and a swimming pool situated in ATS Project titled “Paradiso” located in Greater Noida; **(ii)** to procure a Row House built on 450 sq. meter plot having a covered area of 7355 sq. feet located in the same project; and **(iii)** to jointly and severally pay an amount of Rs.16,46,00,000/- to the company alongwith the interest @ 12% per annum from the date of filing of the counter claims by the said company. This award was challenged before the Hon’ble Delhi High Court in *O.M.P.(COMM) 258/2017* in the case titled as “*Getamber Anand & Anr. vs Anil Kumar Saha*”.

The Hon’ble Court decided the issue as under:-

9. *“It is apparent from the said recitals that the parties had jointly commenced the business as real estate developers and had incorporated several companies, which were mentioned in Schedule 1 of the MOU (hereafter referred to as “the Group Companies”) for carrying on their business. It is also expressly stated that in terms of the mutual agreement, the respondent had disengaged himself from the business and had stopped participating in the affairs of the Group Companies. The recitals also record the mutual understanding between the parties that the respondent would exit the joint businesses after realizing a net amount of ₹ 150 crores (the exit amount). The MOU indicates the agreement between the parties as to the mutual obligations for the respondent’s exit from the jointly held businesses.*

10. *Some of the relevant clauses of the MOU are set out below:-*

1. That GA and T shall procure that ATS Infrastructure Limited transfers 3,00,00,000 (three crores) shares held by it in ATS Estates Private Limited to AKS with clear title and free of any charge or encumbrance for an aggregate consideration of Rs.54,90,00,000 (Rupees Fifty Four Crores Ninety Lacs only) (hereinafter referred to as "Consideration") determined on the basis of a value of Rs.18.30 per share, on or before 7th March 2008;

2. That upon transfer of shares of ATS Estates Private Limited from ATS Infrastructure Limited to AKS, GA and T shall procure that appropriate investor(s) purchases such shares of ATS Estates Private Limited from AKS, either in a single transaction or in tranche, at such value(s) that AKS shall be able to realize a minimum net amount equivalent to his complete Exit Amount of Rs.1,50,00,00,000 after deducting the amount of Consideration from the amounts realized by sale of such shares of ATS Estate Private Limited to such investor(s) (For the purpose of clarity it shall be noted that any tax implication arising out of such transaction/transactions in the hands of AKS shall be AKS liability);

3. That GA and T shall, jointly and severally, ensure on a best efforts basis that AKS shall be able to realize a minimum net amount equivalent to his complete Exit Amount of Rs.1,50,00,00,000/- after deducting the amount of Consideration from the amounts realized by sale of such shares of ATS Estate Private Limited to such investor(s) on or before May 31, 2008;

4. That in order to ensure that AKS shall be able to realize a minimum net amount equivalent to his complete Exist Amount of Rs.1,50,00,00,000 (and further enhanced amounts as per Clause 5 (with penalty) and Clause 6 (fair market value) herein below) after deducting the amount of Consideration from the amounts realized by sale of shares of ATS Estate Private Limited, ATS Infrastructure

Limited shall transfer further shares of ATS Estate Private Limited to AKS if required and GA and T shall procure this action;

5. That GA and T agree and acknowledge that in case they fail in procuring the realization of the minimum net amount equivalent to the complete Exit Amount of Rs.1,50,00,00,000 to AKS after deducting the amount of Consideration from the amounts realized by sale of shares of ATS Estate Private Limited by AKS to the investor(s) on or before May 31, 2008, the aforesaid Exit Amount of Rs.1,50,00,00,000 or any balance thereof as on May 31, 2008 (as the case may be) shall stand increased at the rate of 12% per annum till August 31, 2008 and thereupon all the provisions of this MOU shall apply mutatis mutandis in respect of such increased amount of the Exit Amount or any such balance thereof as the case may be. Further, in case GA and T fail in procuring the realization of the minimum net amount equivalent to the complete Exit Amount of Rs.1,50,00,00,000 to AKS after deducting the amount of Consideration from the amounts realized by sale of shares of ATS Estate Private Limited by AKS to the investor(s) on or before August 31, 2008, the aforesaid Exit Amount of Rs.1,50,00,00,000 or the amount increased after applying the provisions of this Clause or any balance thereof as on August 31, 2008 (as the case may be) shall further stand increased at the rate of 24% per annum for the period after August 31, 2008 and thereupon all the provisions of this MOU shall apply mutatis mutandis in respect of such further increased amount of the Exit Amount or any such balance thereof as the case may be. In both the above cases of delays the Exit Amount payable to AKS shall be deemed to have been increased in the above manner.

6. That without prejudice to the provisions contained in clause 5 above, GA and T agree and acknowledge that in case they fail in procuring the realization of the minimum net amount equivalent to the complete Exit Amount of Rs.1,50,00,00,000 or the increased

amount after applying the provisions of Clause 5, as the case may be, to AKS after deducting the amount of Consideration from the amounts realized by sale of shares of ATS Este Private Limited by AKS to the investor(s) on or before March 31, 2009, AKS shall have option, at his sole discretion, to sell the shares of ATS Estate Private Limited to any investors(s) of his choice and GA and T shall have no objection to such sale of shares and GA ad T shall provide full assistance and cooperation to AKS in this regard; provided however that AKS shall provide a first right of refusal to GA and T or their nominee(s) to purchase the aforesaid shares of ATS Estate Private Limited at fair market value before AKS transfers them to the investor(s) of his choice. GA and T assured that in order to ensure that AKS shall be able to realize a minimum net amount equivalent to his complete Exit Amount of Rs.1,50,00,00,000 (and further enhanced amounts as per Clauses 5 and 6) after deducting the amount of Consideration from the amounts realized by sale of shares of ATS Estate Private Limited, ATS Infrastructure Limited shall transfer further shares of ATS Estate Private Limited to AKS if required and GA and T shall procure this action;

7. xxxx xxxx xxxx xxx

8. That AKS shall transfer his shareholding in ATS Infrastructure Limited and other Companies to GA and Tat nominal/par value in tranches in proportion to the amounts AKS receives from time to time out of his entire net Exit Amount of Rs.1,50,00,00,000 (or the increased amount as per Clauses 5 &6) in the manner laid down in this MOU after excluding the amount of Consideration from the amounts realized from transfer of shares of ATS Estates Private Limited to the investor(s) and the transfer shall be simultaneous."

11. It is apparent from the plain reading of Clause 1 of the MOU that the petitioners had agreed to procure that ATS Infrastructure Limited (one of the Group Companies) transfers three crore shares held in ATS Estate

Private Limited to the respondent with clear title and free of any charge or encumbrances at an agreed consideration of Rs.54,90,00,000/-. In terms of Clause 2 of the MOU, the petitioners had also agreed to procure appropriate investors for purchase of the said shares from the respondent. Before the Arbitral Tribunal, the petitioners had taken somewhat contrary stand. On one hand, the petitioners had contended that the MOU stood fulfilled as the respondent had entered into the SPA with ATS Infrastructure Ltd and ATS Estate Pvt. Ltd for procurement of three crore shares as contemplated under the MOU. On the other hand, contrary to the statement, the petitioners also contended that the MOU was frustrated because of falling market. With regard to transfer of shares of ATS Estate Private Ltd, the petitioners had contended that the same could not be transferred on account of breach of the MOU/SPA by the respondent as it had not paid the consideration for the first tranche of 90,00,000 shares. It was also contended that the parties had agreed that the further shares would be transferred only when the appropriate investors were located.

12. It is apparent from the above that the balance 2.1 crore shares of ATS Estate Pvt. Ltd. were not transferred to the respondent. It can hardly be disputed that transfer of such shares was within their control; thus, plainly, the petitioners had breached their agreement, which obliged them to procure the transfer of three crore shares of ATS Estate Pvt. Ltd. held by ATS Infrastructure Ltd.

13. In terms of Clause 2 of the MOU, the petitioners were also obliged to locate appropriate investors to purchase the shares of ATS Estate Pvt. Ltd from the respondent. Admittedly, the petitioners were unable to find any such investors. In terms of Clause 6 of the MOU, in the event the petitioners failed to procure realization of the minimum net amount equivalent to the exit amount of Rs.150 crores, the respondent would be at liberty to sell the shares of ATS Estate Pvt. Ltd. to the investors of his choice. Since the petitioners had failed to procure the transfer of the balance 2.1 crore shares, the respondent was also prevented from

exercising his rights under Clause 6 of the MOU. The Arbitral Tribunal also, after appreciating the evidence led by the parties, concluded as under:-

"The respondents have failed to fulfill their obligation, firstly, to procure the shares and investor for the sale of balance shares and complete the sale transaction to enable the claimant to realize the entire exit amount. Secondly, there was a failure to procure and transfer the shares in favour of the claimant and provide full assistance, so as to enable the claimant to sell the same and realize the exit amount. Thus, the respondents are in breach of the MOU"

11. The Hon'ble Court decided the issue by observing as under:-

14. *"This Court finds no infirmity with the aforesaid finding. The contention, that the petitioners were only required to ensure that the respondent realizes the exit amount on a best effort basis and, therefore, there is no breach on the part of the petitioners, is unmerited. First of all, the material placed on record clearly indicates that the petitioners had failed to make the necessary efforts to perform their obligations under the MOU. The transfer of additional shares of ATS Estate Pvt. Ltd was, admittedly, under their control; however, the petitioners had failed to procure such transfer. Before the Arbitral Tribunal, the petitioners had also contended that once the SPA was entered into between the respondent, ATS Infrastructure Ltd and ATS Estate Pvt. Ltd, there could be no breach of contract on their part. This contention is also unmerited as, admittedly, the balance shares of ATS Estate Pvt. Ltd. had not been transferred to the respondent. Further, the Arbitral Tribunal had also noted that petitioner no.1, in his cross- examination, had stated that the shares of ATS Estate Pvt. Ltd would have been transferred to the respondent whenever a buyer for the same was found. However, the MOU did not stipulate that transfer of shares of ATS Estate Pvt. Ltd. to the respondent would be contingent upon the investor(s) being located in advance.*

15. Secondly, Clause 3 of the MOU must be read in the context of other clauses. Whilst, Clause 3 mentions that the petitioners would ensure on best effort basis that the respondent realizes with the net exit amount of Rs.150 crores, the obligations to procure transfer of shares of ATS Estate Pvt. Ltd. to the petitioner is unqualified. Clause 4 of the MOU further provided that in the event the respondent is unable to realize the minimum amount of Rs.150 crores as further enhanced, the petitioners would also ensure that additional shares of ATS Estate Pvt. Ltd. are transferred to the petitioners. Further, in terms of Clause 6 of the MOU, in the event the petitioners were unable to locate investors before the specified date, the respondent would be entitled to sell the shares of ATS Estate Pvt. Ltd. Thus, the MOU also provided for the eventuality, where despite best efforts, the petitioners were unable to ensure realization of the exit amount on or before 31.05.2008.

16. In view of the above, this Court finds no infirmity with the Arbitral Tribunal's finding that the petitioners had breached the MOU."

12. The Hon'ble High Court after considering the material available on record, dismissed the petition filed against the award. Thus, it can be inferred that the Agreement between the parties did not attain finality during the year under consideration hence, the impugned transaction in part ought not to have been taxed in the year under consideration. In our considered view, the Agreement is to be read as a whole, the transfer of shares under dispute cannot be read into isolation. Moreover, one of the challenge before the Hon'ble High Court was regarding legality of MOU dated 03.03.2008. It was categorically prayed that MOU was void being contrary to the provisions of section 297 of the Companies Act, 1956. Therefore, under the peculiarity of the facts where the legality and validity of Agreement was under challenge, we

do not see any infirmity into the order of Ld.CIT(A) to the extent it is held that the transfer of shares cannot be subjected to capital gain tax in the year under consideration on the ground that the entire transaction has not fructified.

13. In the result, the appeal of the Revenue is dismissed.

ITA No.4952/Del/2013
[Assessment Year 2009-10]

14. Now, we take up Revenue's appeal in **ITA No.4952/Del/2013** pertaining to **Assessment Year 2009-10**. The Revenue has raised following grounds of appeal:-

1. *“That the CIT (A) has erred in law and on facts in rejecting the application u/s 154 of the Income Tax Act even though there is an apparent mistake from record.*

2 *That the C.IT (A) has erred in law and on facts in not appreciating the fact that the CIT(A) has not considered the amended applicable provisions of section 2(47), thus leading to a mistake apparent from record rectifiable u/s 154 of the I.TAct.*

3. *That the CIT (A) has erred in law and on facts in not appreciating that there is an apparent mistake in applying the ratio of case of Vodafone given by the Hon'ble Bombay High Court which has been superceeded by the Hon'ble Supreme Court.*

4. *That the order of the Ld. CIT (A) being erroneous in law and on fads needs to be rectified u/s 154 of the Act.*

5 *That the appellant craves leave to add or amend anyone or more of the ground of the appeal as stated above as and when need for doing so may arise.”*

15. Since this appeal is against the order of Ld.CIT(A) passed u/s 154 of the Act, the Revenue has challenged action of Ld.CIT(A), on the ground that he failed to take note of the Amended provisions of section 2(47) of the Act.

16. Ld.CIT DR submitted that Ld.CIT(A) failed to take note of the amended provision of section 2(47) of the Act and submitted that he was not justified in rejecting the application of the Revenue filed for rectification of the impugned order.

17. On the contrary, Ld. Counsel for the assessee reiterated the submissions as made before Ld.CIT(A). The submissions of the assessee are reproduced here under:-

“The appellant Sh. Anil Kumar Saha S/o Sh. A.K. Saha R/o G-22, Sector 27, Noida was co-promoters of ATS Group wherein 'A' stand for Anand, 'T' stand for Talwar, 'S' stand for Saha and they equally hold the promoter holdings rights from the beginning. These three directors started business of Real Estate and constructed various multi-storied Group Housing Projects namely ATS-I, ATS-II and ATS Village etc. in Noida. Gradually business activities expanded and they started working in Greater Noida, Ghaziabad, Chandigarh, Gurgaon and Uttaranchal also.

The main companies of above mentioned promoters (directors) were as follows:

a. *M/s A TS Infrastructure Ltd.*

- b. *M/s ATS Promoters & Builders Pvt. Ltd.*
- c. *M/s ATS Estates Pvt. Ltd. (Subsidiary of ATS Infrastructure Ltd.)*

In the year 2008 the appellant Sh. Anil Kumar Saha with the consent of other two promoters i.e. Sh. Getamber Anand and Sh Ashwani Talwar decided to quit from ATS Group of Companies and agreed to transfer all his shares in various Group companies held by the appellant in favour of other two co-promoters Sh. Getamber Anand and Sh. Ashwani Talwar for a consideration of Rs. 150 Crores, Memorandum of Understanding of this affect was also entered into, copy of the MOU is placed on record.

The ATS Infrastructure Ltd. were owning lot of land parcels and inventory in form of finished & unfinished apartments of its own or through its subsidiary companies but were short of liquid funds, therefore in order to pay the agreed amount, all the three promoters agreed to transfer certain shares of M/s ATS Estates Pvt. Ltd.(out of the holdings of ATS Infrastructure Ltd.) to M/s IL&FS Trust Co. Ltd. and IIRF Holdings XV Ltd. to generate the requisite funds. To generate funds in the hands of appellant Sh. Anil Kumar Saba, a mechanism was devised according to which first 3,00,00,000 shares of ATS Estates Pvt. Ltd. were agreed to be transferred by ATS Infrastructure Ltd. in favour of the appellant on a price of Rs. 18.30 per share and then these shares were to be sold to third parties to generate the necessary funds. In this line the promoters have approached IL&FS Trust Co. Ltd. and IIRF Holdings XV Ltd. to purchase approx. 90 Lacs shares of ATS Estates Pvt. Ltd. (out of 3 lacs shares transferred to the appellant) at a price of Rs. 44.12 per share that has generated a consideration of approx. Rs.40 Crores in the hands of appellant. In lieu to this net received amount of approx. Rs. 24 Crores (Rs. 40 crores - 16.47 crores), the appellant as per the agreement in the Exit MOU, proportionately, transferred 80000 shares of ATS Infrastructure Ltd. out of his total holdings of 5,00,400 shares in favour of co-promoters Sh. Ashwani Talwar and Sh. Geetamber Anand.

Thus, in order to implement the terms of MOU, the promoters entered into two further transactions through agreements, one agreement was between the appellant and ATS Infrastructure Ltd., which was executed on 03.03.2008 wherein the ATS Infrastructure Ltd. agreed to sell 3,00,00,000 (three crore) shares of ATS Estates Pvt. Ltd. to appellant for a consideration of Rs. 18.30 per share. This agreement was signed by the appellant, ATS Infrastructure Ltd, ATS Estates Pvt. Ltd and Co-promoters Sh. Geetamber Anand and Sh. Ashwani Talwar. In part compliance to this agreement 90 Lacs shares of A TS Estate Pvt. Ltd. were transferred and physically handed over to the appellant by A TS Infrastructure Ltd. Copy of agreement is placed on record.

Another agreement was executed between appellant and M/s M/s IL&FS Trust Co. Ltd. and IIRF Holdings XV Ltd. on dated 08.04.2008. In this agreement M/s IL&FS Trust Co. Ltd. and IIRF Holdings XV Ltd. agreed to purchase 90,66,183 equity shares of M/s ATS Estates Pvt. Ltd. for a consideration of Rs. 40 Crores at a price of Rs 44.12 per equity share subject to certain terms and conditions. It is important to mention that this agreement was signed by the appellant and by other two Co-promoters Sh. Geetamber Anand & Sh. Ashwani Talwar, M/s ATS Infrastructure Ltd., A TS Promoters & Builders Pvt. Ltd. and M/s A TS Estates Pvt. Ltd. Copy of Agreement is placed on record.

The Brief terms and conditions on the basis of which M/s IL&FS Trust Co. Ltd. and IIRF Holdings XV Ltd. has purchased the shares from the appellant are as follows:

I. This agreement of share purchase is the part of earlier agreement dated 23rd July, 2007 between the Co-promoters Sh. Getamber Anand, Sh. Ashwani Talwar & Sh. Anil Kumar Saha, M/s ATS Infrastructure Ltd. and M/s ATS Estates Pvt. Ltd. wherein purchaser i.e. M/s IL&FS Trust Co. Ltd. and IIRF Holdings XV Ltd. has invested in M/s ATS Estates Pvt. Ltd. a sum of Rs. 105 Crores by way of subscription of Equity & Convertible

Preference shares of M/s ATS Estates Pvt. Ltd. (The copy of parent agreement dated 23rd July, 2007 is placed on record.

2. The investors i.e. M/s IL&FS Trust Co. Ltd. and IIRF Holdings XV Ltd. have a call option and the promoters are under obligation to purchase the shares of investors on agreed price.

3. The promoters and promoters companies have agreed to buyback shares on a agreed price (based on certain IRR) from the investors after completion of a particular period. In case the promoters companies are unable to purchase the shares then the promoters will have to purchase individually.

4. The promoters and their companies represented M/s IL&FS Trust Co. Ltd. and IIRF Holdings XV Ltd. that they need fund for the purpose of development of a Real Estate Project and given a list of the projects which they are going to develop and also agreed to use the money only for the purpose of development of the projects mentioned in the agreement. In violation of utilization of funds other then the project will render the promoters individually, jointly and their companies liable to return money to the investor companies i.e. M/s IL&FS Trust Co. Ltd. and IIRF Holdings XV Ltd. with the damages as agreed in the agreement.

In the light of above the appellant has received a sum of Rs. 40 Crores from IL&FS on account of conditional transfer of shares of ATS Estates Pvt. Ltd. to M/s IL&FS Trust Company Ltd. and IIRF Holdings XV Ltd., as per the terms of Share Purchase & Shareholders Agreement dated 3rd April, 2008 and Share Subscription and Shareholders Agreement dated 23rd July, 2007. The Shares which were conditionally transferred to M/s IL&FS Trust Company Ltd. and IIRF Holdings XV Limited have been acquired by the appellant from ATS Infrastructure Ltd. as per the terms of agreement between promoters vide Share Purchase Agreement dated 3rd March, 2008.

The assessee has received the money under a conditional transfer of shares and therefore, the share were not absolutely and forever sold to

M/s IL&FS Trust Company Ltd. and IIRF Holdings XV Limited. Accordingly no calculation on account of capital gain has been made for this transaction at the time of filing of Income-tax return. And the following foot note was given in the return filed on 28th July, 2009:

"1. During the year assessee has received a sum of Rs. 40 crores from ILFS on account of shares of ATS Estates Pvt. Ltd. taken by M/s IL&FS Trust Company Limited and IIRF Holdings XV Limited, conditionally as per the terms of Share Purchase and Shareholder Agreement dated 8th -April, 2008 and Shares Subscription and Shareholders Agreement dated 23rd July, 2007. (Copy of both the agreements are enclosed)

2. The shares which were taken by M/s IL&FS Trust Company Limited and IIRF Holdings XV Limited from the assessee has been acquired by the assessee from ATS Infrastructure Limited. As per the terms of agreement between promoters dated 3rd March, 2008. (Copy of the agreement is enclosed)."

The similar foot note was also given in the computation sheet attached with the revised return filed by the assessee on 31st March, 2011 by additionally mentioning the following:

"However, under abundant precaution and to avoid penal interest (if any leviable against him), the assessee has paid a sum of Rs. 5.75 Crores as Income-tax that has been claimed as refund herewith."

In view of above, it is to be seen whether Section 2(47) and 45 of Income-tax Act, 1961 are applicable or not on the transfer of shares by transfer of 90,66,183 Equity shares of M/s ATS Estates Pvt. Ltd. to M/s IL&FS Trust Company Ltd. and IIRF Holdings XV Limited?

Section 2(47) of the Income-tax Act, 1961 is attracted where there is a transfer of the Capital Assets by way of sale, exchange or relinquishment.

In the present case, there is a transfer of shares from one person to other person but transfer/sales it not absolute within the meaning of the

Sales of Goods Act, 1930. The Transfer of Property Act, 1882 and Indian Contract Act. Therefore, the provision of section 2(47) is not applicable in case of conditional sale/transfer. "Section 45 of Income-tax Act is attracted when there is an absolute sales/transfer without any further conditions from either side (i.e. Buyer and Seller) in respect of fulfillment of certain future obligations.

In the present case, the transaction in question is coupled with various obligations such as relating to achievement of certain pre-determined income/profits of the company of which shares are being transferred etc.; for the fulfillment of these obligations the Company as well promoters in their individual capacity, severally and jointly are liable as per the terms of shares subscription Agreement dated 23rd July, 2007 and share purchase agreement dated 8th April, 2008. The relevant extracts from such agreements are placed on record.

Therefore, the present transactions being subject to the fulfillment of certain obligations on future date does not fall under the purview of section 45 of the Income-tax Act, 1961.

Moreover, it is clear from the perusal of Agreement, MOU and further conduct of the promoters that they have completely violated the terms of the agreement before the date of filing of the Income-tax returns. Therefore they have become liable to return the amount along with interest, agreed return and damages, therefore the. question of attracting any provision of Income-tax, calculating capital gain either short term or long term does not arise.

The Ld. Assessing Officer despite having above mentioned material on record and written submission, filed time to time and discussion held during the course of hearings, disregarded all such material & submissions and passed the impugned order by simply calculating Short Term Capital Gain on conditional transfer of shares of ATS Estates Pvt. Ltd. by Sh. Anil Kumar Saha to IL&FS Trust Co. Ltd. & IIRF Holdings XV

Ltd. without even giving any benefit in respect of cost of acquisition for the shares purchased by the appellant and calculated tax accordingly.

Whereas in the light of facts and circumstances mentioned above, it is a case of getting funds from IL&FS Trust Co. Ltd. and IIRF Holdings XV Ltd. on certain terms and conditions as mentioned in the Share Purchase & Share Subscription Agreement dated 8th April, 2008 and 23rd July, 2007 respectively, wherein shares are given as a security to lending company. Such transactions do not come under the purview of Section 45 of the Income-tax Act, 1961. This fact is also supported by RBI wherein the premier institution has observed that the funding by incorporating such kind of terms is a debt financing in the garb of so called FDI. Moreover, funds were although given to Sh. Anil Kumar Saha but it was meant given for the purpose of M/s ATS Estates Pvt. Ltd.

There are three transfers in the entire episode, one is of ATS Estates Pvt. Ltd. shares from ATS Infrastructure Ltd. to appellant and second from appellant to IL&FS Trust Co. Ltd. and IIRF Holdings XV Ltd. and third one is transfer of shares of ATS Infrastructure Ltd. out of his promoters holding by the appellant i.e. Sh. Anil Kumar Saha to Sh. Getamber Anand and Sh. Ashwani Talwar, the other co-promoters in equal proportions. And all these three transactions are inter-related, as is clearly expressed from the above stated facts.

As the agreement of Exit of appellant was for a consideration of Rs. 150 Crores and he has only got Rs. 24 Crores uptill now. Hence, the agreement entered between the co-promoters has been partly performed only and for the balance performance the parties are in court (Company Law Board).

Therefore the entire agreement of Exit is in dispute and the fate of the money received by the appellant is uncertain, so no taxability can be imposed on money received by him, because the money received by the appellant is lying in trust.

In view of facts mentioned above, it is prayed that the assessment order passed by the Ld. Assessing Officer may kindly be quashed, the impugned additions may kindly be deleted and the contentions of the appellant may kindly be upheld."

4.3. The written submissions were forwarded to the AO for his comments. The ACIT, (Central Circle), Meerut by his report dated 29.5.2012 chose to rely on the findings recorded in the assessment order by his predecessor and claimed that the capital gains was rightly assessed in the ORDER U/S 143(3). The AO's report was shown to the AR and in response the AR of the assessee filed a rejoinder in which the following further submissions were made.

"Sub. : Rebuttal on the Remand Report of Ld. Assessing Officer dated 15.05.2012

We have gone through with the Remand Report and found that the Ld. Assessing Officer in the Remand Report has not added anything new except the contentions mentioned in the assessment order by the predecessor officer.

Therefore, it does not require any specific comment. We have to only say that the order may kindly be passed on the basis of written submission filed, arguments made in the course of hearing and the assessment order passed by the Ld. Assessing Officer.

In the last hearing your good-self wanted to know that:

- 1. What happened with the obligations imposed by M/s IL&FS Trust Co. Ltd. by M/s IIRF Holdings XV Ltd. to appellant and its co-promoters and companies?*
- 2. What happened III respect to implementation of MOU with the Co-promoters?*

The point-wise reply of the same is as under:

- 1. The share purchase agreement with M/s IL&FS Trust Co. Ltd. and M/s IIRF Holdings XV Ltd. was executed-on dated 23 July,*

2007 and share subscription agreement was executed on dated 8th April, 2008, the obligations was to be fulfilled was in respect of return on investment on the money invested by way of investment in shares.

The appellant has not received any individual notice so far from M/s IL&FS Trust Co. Ltd. and M/s IIRF Holdings XV Ltd., as far as position of the co-promoters/ companies is concerned, the appellant is not aware, as relations are strain with co-promoters. Therefore, it is not possible for appellant to trace any information from the companies as well as co-promoters.

However the obligations are obligations, which has to be fulfilled in any case as and when it is warranted by M/s IL&FS Trust Co. Ltd. and M/s IIRF Holdings XV Ltd.

The assessee is apprehensive that any day or at any moment he will have to comply with the obligations agreed with M/s IL&FS Trust Co. Ltd. and M/s IIRF Holdings XV Ltd., as there is no escape route. However, the final deadlines to provide exit route to M/s IL&FS Trust Co. Ltd. and M/s IIRF Holdings XV Ltd. will expire on 30th of June, 2012 as provided in clause no. 17.5.2 of agreement dated 23rd day of July, 2007.

2. As far as the MOU between Co-promoters dated 08.04.2008 is concerned, Sh. Anil Kumar Saha withdrawn himself from the companies and resigned from the directorship from March, 2009, though he has stopped going to office of ATS Group of Companies from September, 2007 and in part compliance of MOU he has received Rs. 40 Crores as part of the exit amount in April, 2008 but the remaining part of the MOU has not complied with by the other co-promoters. Therefore the matter has been raised in the office of Company Law Board, the proceedings are going on. The details of hearing took place before the Company Law Board is placed on record.

The appellant has also invoked the arbitration clause as provided in MOU and the appellant has also approached to Delhi High Court as the

consented arbitrator has denied to function. The Hon'ble High Court has passed an order for appointment of Arbitrator, the copy of the order is placed on record. Moreover, the first hearing has also been made before the arbitrator so appointed, the copy of the order of the first hearing is also placed on record.”

18. Ld.CIT(A) rejected the application u/s 154 of the Act. For the sake of effective adjudication, the relevant contents of the order of Ld.CIT(A) is reproduced as under:-

“.....On these facts therefore I find that the transactions in question were not based on independent commercial consideration. The impugned transactions could not be divorced from the main and primary transaction contemplated by the MoU dated 03.03.2008. The transaction in question was subservient to the principal transaction contemplated by MoU dated 03.03.2008. Admittedly during the financial year ended 31.03. 2009 the capital asset being assessee's controlling interest in ATS Group was not transferred by the assessee. It is true that under the agreement dated 03.03.2008 the assessee acquired right of specific performance against the co-promoters and it was also evidenced from facts that with a view to give effect to the said object certain intermediate steps were carried out by the parties during F.Y. 2008-09. The facts on record however showed that even till date the transaction contemplated by the MoU dated 03.03.2008 was not consummated and attained finality. In fact the assessee till date has not relinquished his controlling interest in ATS group of companies. It further appeared from the facts on record that the entire arrangement evidenced by MoU dated 03.03.2008 remained unexecuted. In fact at present the matter is sub judice before the Company Law Board. In terms of the decision of the Company Law Board, the arrangement envisaged by the MoU dated 03.03.2008 may be reviewed entirely and in such an event the parties may have to review; modify or reverse the transactions carried out in the interim. On these facts therefore I have no hesitation in holding

that there was no transfer of a capital asset within the meaning of Sec 2(47) of the I T Act and therefore the capital gain was not chargeable to tax in A. Y. 2009-10. The AO shall however be free to assess such income in the year in which he finds that assessee's controlling interest in ATS group of companies was actually transferred. While assessing such income the AO will not only take into account the cash consideration but also the value of movable and immovable assets that will be received by the assessee in terms of MoU dated 03.03.2008. In terms of the above directions the AO shall revise the assessment of the A. Y. 2009-10.....”

19. The moot question remains to be adjudicated whether Ld.CIT(A) was correct in holding that there was no transfer of capital assets within the meaning of section 2(47) of the Act. Therefore, the capital gain was not chargeable to tax in Assessment Year 2010-11. It is the case of the Revenue that Ld.CIT(A) failed to take note of the amended provisions of section 2(47) of the Act. The Authorized representatives of the parties have adopted the same arguments as in ITA No.4745/Del/2012 pertaining to Assessment Year 2009-10.

20. As we have decided the issue of chargeability of capital gain tax in ITA No.4745/Del/2012 [Assessment Year 2009-10] of the Revenue's appeal in favour of the assessee. Therefore, we do not see any reason to interfere into the findings of Ld.CIT(A), the same is hereby affirmed. The grounds raised by the Revenue are dismissed.

21. In the result, the appeal of the Revenue in **ITA No.4745/Del/2012 [Assessment Year 2009-10]** as well as the appeal of the Revenue in **ITA No.4952/Del/2013 [Assessment Year 2009-10]** is dismissed.

Order pronounced in the open Court on 19th January, 2022.

Sd/-

**(G.S.PANNU)
PRESIDENT**

** Amit Kumar **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

**(KUL BHARAT)
JUDICIAL MEMBER**

ASSISTANT REGISTRAR
ITAT, NEW DELHI