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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 82 OF 2015

Vodafone India Services Pvt. Ltd.,]
(formerly known as 3 Global Services Pvt.]
Ltd. or 3GSPL) having its registered office]
at Vodafone House, Corporate Road,]
Prahllad Nagar, Off S.G. Highway,]
Ahmedabad – 380051, Gujarat, India.] ... Appellant

Versus

1. Commissioner of Income-tax – 3,]
3rd Floor, Aayakar Bhavan, M.K. Road,]
Mumbai – 400 020. `]

2. Dy. Commissioner of Income-tax]
Circle 3(3)(2), Room No.609, 6th floor,]
Aayakar Bhavan, M.K. Road,]
Mumbai – 400 020.] ... Respondents

Mr. Harish Salve, senior counsel with Ms. Anuradha Dutt, Ms. Fereshte Sethna, Ms. Gayatri Goswami, Mr. Tushar Jarwal and Mr. Sachit Jolly I/b Dutt Menon Dunmorrsett for the Appellant.

Mr. Kevic Setalvad, senior counsel/special counsel with Mr. Abhay Ahuja, Mr. Sham Walve, Mr. Awais Ahmedji, Ms. Sushma Nagraj and Mr. Swarnangshu Shekhar i/b Mr. Abhay Ahuja for the Respondent Nos.1 and 2.

CORAM : S.C. DHARMADHIKARI &
A.K. MENON, JJ.

RESERVED ON : 6TH MAY, 2015
PRONOUNCED ON : 8TH OCTOBER, 2015

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HIGH COURT OF JUDICATURE AT BOMBAY

***JUDGMENT :* [Per S.C. Dharmadhikari, J.]**

1 An application for interim relief styled as a Notice of Motion was placed before us and at the hearing of which we indicated to the parties that bearing in mind the fact that they intend to canvass extensive arguments and on questions of law, it would be better to decide the appeal itself and finally. Parties consented to this course and, therefore, with their consent and approval, we have taken up this appeal for hearing and final disposal. Once the appeal itself is disposed of, we wish to clarify, the application for stay will not survive.

2 This appeal of the appellant-assessee challenges the order passed by the Income Tax Appellate Tribunal, Bench at Mumbai, dated 10th December, 2014, in Income Tax Appeal No.7514/Mum/2013. The assessment year is 2008-09. The appeal invokes section 260-A of the Income Tax Act, 1961 (for short "IT Act") and raises the following substantial questions of law :

(1) Whether the Tribunal had the jurisdiction to

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arrive at a finding that there was transfer of rights, on a basis that was neither set out in the draft order of assessment, the order of the TPO, or the order of the DRP –thereby negating the entire scheme of assessment created by law in respect of assessees subjected to transfer pricing assessment?

(2) Whether the Tribunal misread and mischaracterized the issues decided by the Hon'ble Supreme Court in VIH BV vs. Union of India & Anr. (2012) 341 ITR 1, and thereby erred in law in holding that it is not bound by that judgment?

(3) In the alternative, even assuming that the issue of transfer of rights did not directly arise before the Hon'ble Supreme Court in the judgment aforesaid, whether it was open in law to the Tribunal to bypass the observations in that judgment and also ignore the findings of this High Court in its

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judgment dated 6 September 2013 and come to the conclusion that the judgment of the Hon'ble Supreme Court was irrelevant?

(4) Whether the Tribunal was misconceived in law in holding that the Hon’ble Supreme Court has not dealt with the transfer of call option rights by the appellant to its associated enterprise when the Hon’ble Supreme Court has examined the transfer of 67% controlling interest from HTIL to VIH BV and the same specifically included the 12.25% option rights that were the subject matter of the appeal before the Tribunal?

(5) Whether the Tribunal erred in law in not appreciating that the jurisdictional fact before the Hon’ble Supreme Court and for invoking transfer pricing provisions in the present case is that there must be a transfer from the appellant to any other

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person and, therefore, once the Hon'ble Supreme Court has decided this jurisdictional fact the Tribunal was bound to follow it?

(6) Whether the Tribunal erred in law in holding that the call options were transferred *vide* the TII Shareholders' Agreement even though no nomination was actually made under the said Agreement and the Tribunal had already rendered a finding in law that a transfer can only take place upon actual nomination?

(7) Whether the Tribunal was correct in law in holding that an assignment has taken place under the TII Shareholders' Agreement by implication when it had already rendered a finding that a transfer cannot be contemplated under Section 2(47) of the Act unless an actual disposal or actual creation or parting of an interest in an asset takes place?

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(8) Whether the Impugned Order has been passed in gross violation of natural justice as the Tribunal has not granted an opportunity of oral hearing and passed a judgment to the detriment of the appellant by construing a document that was not relied upon by any of the parties?

(9) Whether the Tribunal erred in law in placing reliance on a document that has not been relied upon, referred or argued by any of the parties without putting the parties on notice about its relevance and inviting arguments on it?

(10) Whether the Tribunal was correct in law in changing the very basis of the Respondent's case even when the Respondent did not invite the Tribunal's judgment on the TII Shareholders' Agreement?

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(11) Whether the Tribunal was misconceived in law in admitting the TII Shareholders' Agreement without considering its relevance in view of the directions of this Hon'ble Court in 359 ITR 133?

(12) Whether the Tribunal failed to appreciate that the call and put options under the TII Shareholders' Agreement were contingent upon the exercise of the rights vested with the appellant in the 2007 FWAs and, therefore, the rights remained inchoate and unexercised pending actual exercise under the 2007 FWAs?

(13) Whether the Tribunal erred in law in holding that the grant of call option under 2007 FWAs against consideration is an international transaction as per section 92B read with Section 92F(v) when the Tribunal itself held that there has

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not been any assignment under the 2007 FWAs?

(14) Whether the Impugned Order is erroneous in law as even though it has held that the assignment is from the appellant to CGP India Investments Limited it holds that the international transaction is between the appellant and VIH BV?

(15) Whether the Tribunal erred in law in holding that the call and put options under the 2007 FWAs are the same when both are distinct rights vested with different parties?

(16) Whether the Tribunal erred in law and in facts to hold that the fact of exercise of put options was neither agitated nor brought to the notice of the Hon'ble Supreme Court and nor considered by it while rendering its judgment report in 341 ITR 1?

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(17) Whether on the facts and circumstances of the case, the Tribunal has grossly misconceived the law by widening the definition of 'international transaction' beyond its scope as defined under Section 92B(1) of the Act and applying the same to a transaction entered into between two resident entities?

(18) Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that the sale of the Call Centre business by the appellant to HWP India was an international transaction in terms of section 92B(1) of the Act?

(19) Whether on the facts and circumstances of the case, the impugned order passed by the Tribunal in respect of section 92B(1) suffers from gross non application of mind and non-consideration of the criteria laid down in respect of applicability of

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doctrine of lifting of corporate veil and doctrine of substance over form by the Hon'ble Supreme Court in the case of Vodafone International Holding BV vs. UOI & Anr [(2012) 6 SCC 631].

(20) Whether the Tribunal was justified in upholding the action of the DRP in treating the transaction as an international transaction in terms of section 92B(1) when the TPO had sought to treat the transaction as an international transaction in terms of section 92B(2) of the Act?

(21) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that the arm's length price for the transfer of the Call Centre business was to be determined by adopting a valuation for the Call Centre business based upon the Discounted Cash Flow method which was agreed upon by both the

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parties.?"

3 There is no dispute about the wording of these questions and they indeed being substantial questions of law, require answer and opinion by this Court. Hence, this appeal is admitted on the above substantial questions of law. Respondents waive service.

4 The proceedings have a chequered history. The appellant before us was incorporated as a private limited company on 16th March, 1999 under the name and style of 3 Global Services Private Limited (for short "3GSPL") as a wholly owned subsidiary of a Mauritian entity, namely, Hutchison Teleservices (India) Holdings Limited. The said HTIL was in turn a wholly owned subsidiary of CGP Investment Holdings Limited, Cayman Islands (CGPC).

5 Until 8th May 2007, CGPC was held by HTI (BVI) Holdings Limited, a company incorporated in British Virgin Islands which in turn was ultimately controlled by Hutchison Telecommunication International Limited, Cayman Island (for short "HTIL"). Accordingly, the appellant was an entity of the Hutchison group of

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companies, which was carrying on business of telecommunication in India through its subsidiary since 1992. A copy of the shareholding structure chart of HTIL i.e. Hutchison Telecommunication Limited, Cayman Islands is annexed as Annexure B to the Memo of Appeal. The claim of the appellant is that until 8th May, 2007, it was an indirect subsidiary of HTIL, a company whose shares were listed in the Stock Exchange in Hongkong in 2007. Further, HTIL was an indirect subsidiary of Hutchison Whampoa Limited (for short "HWL") which was a company whose shares were also listed on the Stock Exchange in Hongkong in 2007. The appellant was engaged since April, 2003, *inter-alia*, in providing Call Centre services, captive to entities within the HWL group and specifically to two group companies viz. Hutchison 3G Australia Private Limited and Hutchison 3G UK Limited in terms of the Managed Service Agreement for Contact Centre Services between Hutchison Call Centre Holdings Limited, British Virgin Islands and the appellant dated 1st January, 2006.

6 The appellant claims that as per the Foreign Direct Investment (for short "FDI") norms in India, the ceiling in the telecom centre was

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49% and which was enhanced to 74% in November, 2005. In order to acquire further equity interest as and when the FDI ceiling in the telecom sector were relaxed, Hutchison group looked for Indian investors who would be independent, but not hostile and would hold the interests till the sector was opened up. These would make a gain at a subsequent point of time when they exit the investment. The Hutchison group, therefore, identified three investors being Analjit Singh (for short "AS"), who was one of the leading industrialists of the company and a promoter of Hutchison Max Telecom Limited – Mumbai Telecom Circle and had formerly sold his investment to Hutchison. The other one was identified as Asim Ghosh (for short "AG"). He was associated with this group for a long time and was a Chief Executive Officer of Hutchison Essar. The third was the IDFC Group of Investors, leading players in the field of financial investments. These investors required credit support for the investment and the appellant and its then holding company HTIL agreed to procure credit support for them. In consideration thereof, in 2006, the appellant, *inter-alia*, acquired call option rights in pursuance of two Framework Agreements dated 1st March, 2006 with AG and his

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group companies and AS and his group companies. These agreements were styled as Framework Agreements and shall hereinafter be referred to as "2006 FWA" for short. These enabled the acquisition of the above rights over the shares of Asim Ghosh group company and Analjit Singh group company. These companies indirectly or directly held 12.25% equity shares in the Indian telecom operating company, Vodafone India Limited (for short "VIL") and earlier known as Hutchison Essar Limited (for short "HEL"). Under the 2006 Framework Agreements, the appellant was also conferred an option to subscribe itself or to assign and affiliate the rights to subscribe to equity in certain identified group companies of AS and AG which companies held directly or indirectly, equity shares in the Indian telecom operating company VIL. In addition to the call option rights in favour of the appellant, AS and AG had the put option right which obligated the appellant to purchase the shares of AS and AG group company upon exercise of such put option rights by AS and AG. Annexures C and D to the appeal paper-book are copies of these Framework Agreements with the AS and AG group of companies.

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7 On the same date, a Shareholders Agreement was executed between the shareholders in Telecom Investments India Private Limited (for short "TII") i.e. Nadal Trading Company Pvt. Ltd. (for short "Nadal") , ND Callus Info Services Private Limited (for short "ND Callus") and CGP India Investments Limited (for short "CGP India"). TII was an Indian company holding directly or indirectly 19.54% stake in VIL. This agreement granted call option rights to CGP India and put options to Nadal and ND Callus in respect of shares held by the ND Callus and Nadal in TII. Annexure C is a copy of this agreement. In addition to the 2006 Framework Agreements with Asim Ghosh and Analjit Singh and their respective group companies, the appellant entered into a Framework Agreement dated 7th August, 2006, with IDFC group of companies, which through its joint venture company SMMS Investments Private Limited (for short "SMMS") indirectly held 2.77% shares in the operating company VIL. The options in regard to this agreement styled as 2006 IDFC Framework Agreement are referred to in paragraph 20 of the Memo of Appeal. The effect of these options and exercise thereof would mean that the appellant acquiring the entire issued share capital of SMMS

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and obtaining an indirect stake or holding in VIL. Annexure F is this agreement.

8 A public announcement was made by HTIL in December, 2006 of a possible sale of its entire equity interest in the Indian telecom company VIL. The Vodafone group, therefore, solicited its interest in acquiring the Indian telecom business held by the Hutch Group. Accordingly, on 11th February, 2007, HTIL and Vodafone International Holdings B.V. (for short "VIH BV") entered into a Share Purchase Agreement (for short "SPA") whereby HTIL agreed to procure the consent of HTI (BVI) Holdings to transfer the share capital of CGPC and assign certain loan interests to VIH BV. As a result of this SPA executed on 11th February, 2007, VIH BV acquired 66.99% equity interest in VIL and in the manner set out hereinbelow :

(i) 42.34% direct interest in VIL/HEL through 100% wholly owned Mauritius subsidiary of CGPC;

(ii) 9.62% through Indian companies, Telecom Investments India Pvt. Ltd ("TII") and Omega Telecom Holdings Private Limited on a pro-rata basis indirectly held by CGPC;

(iii) 15.03% options through the appellant under the Framework

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Agreements with AS, AG and IDFC Investors. Annexure G is a copy of this SPA.

9. It is the claim of the appellant that subsequent to the acquisition of the telecom operations of the Hutch Group by the Vodafone Group by the SPA, the 2006 Framework Agreements were re-written on 5th July, 2007, merely for reasons of commercial expediency. The further claim is that the appellant's right of call options and the obligations undertaken qua the put options and the rights of AS and AG under the put options and their obligations under the call options were retained entirely. They were thus intact. The further plea is that the reason for the Framework Agreements with Asim Ghosh and Analjit Singh being re-drawn in July, 2007 was that following the course of the Foreign Investment Promotion Board (for short "FIPB") process undergone by VIH BV in connection with the SPA, a new consideration was agreed between the parties. The appellant, by letter dated 9th April, 2007, had confirmed to the FIPB regarding the revision of the consideration to be paid under the revised Framework Agreement. Annexures H, I and J are the copies of the above referred documents.

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10 The appellant, in paragraph 23 of the Memo of Appeal states that the re-writing of the 2007 Framework Agreements and particularly the amended clause 4.4 relating to call options are relevant for the purpose of the present statutory appeal. Under this amended clause 4.4, prospective nominee was included and the appellant retained the sole discretion to appoint a nominee to acquire the shares held by AS and AG in their group companies that indirectly held stake in the operating company, namely, VIL.

11 The TII share holders agreement dated 1st March, 2006, was also re-written consequent to the acquisition of the equity interest in VIL by the Vodafone group. A fresh Shareholders Agreement dated 5th July, 2007, was entered into wherein VIH BV was made a confirming party. Annexure K is a copy of this Shareholders Agreement dated 5th July, 2007. The arrangement with IDFC group of companies and the IDFC transaction agreement dated 5th July, 2007, is then referred to in paragraph 25 of this appeal paper-book.

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12 During the relevant assessment year 2008-09, the appellant filed its return of income on 30th September, 2008, declaring total income of Rs.10,64,71,720/- alongwith Form 3CEB wherein international transactions were reported. That is income earned by the appellant during the relevant financial year from providing Call Centre services to Hutchison Call Centre Holdings Limited and issuance of 908,500 equity shares of the appellant to Vodafone Teleservices (India) Holdings Limited, a Mauritius company at a premium of Rs.13,529/- per share aggregating to a total consideration of Rs.1229,99,99,800/-. It was clarified that the issuance of equity shares did not affect income of the company but was reported merely out of abundant caution.

13 A revised computation of income was filed during the course of assessment proceedings declaring total income of Rs.15,52,48,000/-. The Assessing Officer referred the matter to the Transfer Pricing Officer on 22nd January, 2010, to examine all transactions reported by the appellants. The copies of the return for revised computation are Annexures O and P respectively to this appeal paper-book.

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14 Meanwhile, the transaction of acquisition of CGPC share, which had the effect of VIH BV acquiring 66.98% equity interest in VIL, led to a separate litigation between the Income Tax Department and VIH BV, in which proceedings the Hon'ble Supreme Court in SLP (C) No. 464 of 2009 vide Order dated 23rd January, 2009 of the Hon'ble Supreme Court directed the Income Tax Department to first determine the issue of jurisdiction to proceed against VIH BV in respect of the said transaction executed under the SPA. Accordingly, the Assistant Director of Income Tax (International Taxation) vide order dated 31st May, 2010, held that it had jurisdiction to proceed against VIH BV in respect of the transaction of sale of share capital of CGPC under the SPA dated 11th February, 2007, and thus proceeded to treat VIH BV as an assessee-in-default under Section 201(1) of the Act for (alleged) non-deduction of tax at source under Section 195 of the Act. Against the said order dated 31st May 2010 of ADIT, VIH BV filed a Writ Petition No. 1325 of 2010 before this Hon'ble Court. The Income tax Department's case was that HTIL transferred 66.98% equity interest in the Indian telecommunications company in India and was therefore, liable to capital gains tax and that the said 66.98%

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included, 15.03% interest through call options held by the appellant. This Hon'ble Court vide its order and judgment dated 8th September, 2010, held that the transfer of the share capital of CGPC and the related controlling rights was a transfer of a capital asset outside India, but that some rights and entitlements, particularly, the call and put options under the Framework Agreements with AS, AG and IDFC Group were transferred in India and were part of the consideration paid by VIH BV to HTIL and therefore, constituted capital assets situate in India, and thus upheld the jurisdiction of the Income Tax Department to proceed against VIH BV. A copy of the judgment of this Hon'ble Court dated 8th September, 2010 is Annexure-Q to the appeal paper-book**.**

15 Thereafter, in the same proceedings, VIH BV filed a Special Leave Petition, being SLP (Civil) No. 26529 of 2010 against the aforesaid Order dated 8th September, 2010 of this Hon'ble Court. By an interim order dated 27th September, 2010 in the said SLP, the Hon'ble Supreme Court directed the Assessing Officer to quantify the tax liability of VIH BV under section 201 of the Act. Pursuant to the said direction,

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the Assessing Officer called upon VIH BV to make its submissions on quantification of various rights and entitlements, including the 12.25% call options under the AS and AG Framework Agreements which were held by this Hon'ble Court in its judgment dated 8th September, 2010 to have been transferred to VIH BV. A copy of the interim order dated 27th September, 2010, is Annexure R to the appeal paper-book.

16 VIH BV in its submissions vide, *inter alia*, letter dated 19th October, 2010, to the Assessing Officer in the quantification proceedings, had submitted that the put options under the same 2007 FWAs were subsequently partly exercised in 2009 by Analjit Singh and Asim Ghosh and due taxes were paid by them. Along with the said letter, VIH BV had filed the Share Purchase Agreements between CGP India Investments Limited and AS and AG and their group companies and the corresponding FIPB Approvals in relation to purchase of shares, upon exercise of put option by AS and AG. Thereafter, on 22nd October 2010, the Assessing Officer passed an order quantifying the liability of VIH BV under Section 201 of the Act, whereby the Assessing Officer specifically held that the 15% options were transferred under the 2007

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acquisition of 66.98% equity interest in VIL by VIH BV and factored into capital gains tax liability of Rs. 7900 crores for the transfer of 66.98% equity interest in VIL and computed a total tax and interest liability of Rs.11,218 crores. The order dated 22nd October, 2010, was challenged before the Hon'ble Supreme Court of India by way of an amendment dated 25th October, 2010 (IA No.6) to the SLP, which amendment was permitted by the Hon'ble Supreme Court of India by its order dated 26th November, 2010. All documents and submissions filed by VIH BV before the Assessing Officer during quantification of liability against VIH BV (pursuant to the direction of the Hon'ble Supreme Court), which included the Valuation Reports obtained from two independent valuers namely, KPMG and S.R. Dinodia in relation to valuation of options under the Framework Agreements, the Share Purchase Agreement in relation to the purchase of shares of AS and AG group companies by CGP India Investments Ltd, pursuant to the exercise of put option by AS and AG in 2009 and the approvals obtained from FIPB in relation to the same, were all filed before the Hon'ble Supreme Court and a specific pleading in relation to the subsequent exercise of put option was made before the Supreme Court in the amended SLP.

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Also, filed before the Hon'ble Supreme Court was a presentation of Goldman Sachs which was presented before the FIPB at the time of seeking approval to the transaction under the SPA, wherein VIH BV had specifically undertaken to revise the Framework Agreements based on the fair market value determined in the Goldman Sachs presentation. Copies of VIH BV's submissions dated 19th October, 2010 alongwith the FIPB approvals and the Share Purchase Agreements, Assessing Officer's quantification order dated 22nd October, 2010, Hon'ble Supreme Court's order dated 26th November, 2010, VIH BV's Application for urging additional facts and amendment of the SLP are Annexures S (Colly.), T, U and V**,** respectively to the appeal paper-book.

17 During the course of the hearing of the aforesaid SLP, the main case of the Income Tax Department was that there was a transfer of the same 12.25% call option rights from HTIL to VIH BV. As a matter of fact, the Income-tax Department specifically invited the attention of the Hon'ble Supreme Court to decide upon the issue of assignability of call options in favour of VIH BV by examining the 2007 FWAs. Pertinently, detailed submissions were advanced by both the parties on the issue of assignment of call options under the revised Framework Agreements of

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2007 and other agreements specifically including the TII Shareholders' Agreement, which were duly examined by the Hon'ble Supreme Court. Copies of the written submissions advanced on behalf of the Income Tax Department and VIH BV before the Hon'ble Supreme Court in relation to the Framework Agreements are Annexures W (Colly) and X (Colly), to the appeal paper-book.

18 Meanwhile, while the proceedings before the Hon'ble Supreme Court in SLP(C) No. 26520 of 2010 filed by VIH BV were pending, assessment proceedings for AY 2008-09 of the appellant had commenced and hearings in relation to certain issues were held.

19 On 18th October, 2011, the TPO issued a show cause notice to the appellant, *inter alia*, stating that under 2006 Framework Agreement, the call option could only be exercised by the appellant, however, under Clause 4.4 of the revised 2007 Framework Agreements, this right has been given to the wholly owned subsidiaries of Vodafone Group, which amounts to assignment of call option. The TPO vide the said show cause notice asked the appellant to show cause as to why the alleged

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assignment of right of call option was not disclosed as an international transaction and required the appellant to prove the arm's length nature of the alleged transaction and to provide valuation of rights conferred on its Associated Enterprise (for short "AE"). Therefore, it is imperative to note here that the show cause notice of the TPO was restricted to the re-writing of clause 4.4 of the revised 2007 FWAs. A copy of the show cause notice dated 18th October, 2011, is Annexure Y to the appeal paper-book**.**

20 The appellant *vide* its letters dated 21st October, 2011, and 25th October, 2011, *inter alia,* submitted that under clause 4.4 of the 2007 Framework Agreements, the right of call option remained with the appellant and therefore, since there was no assignment of the call option right by the appellant, there was no question of proving arm's length in respect of the alleged transaction and/or valuation of the rights of the appellant allegedly transferred by the appellant. The TPO, rejecting the submissions of the appellant and without providing any opportunity to the appellant of the comparable it sought to rely on for computing the arm's length price of the alleged transaction, passed the transfer pricing order on 31st October, 2011, holding that in the 2007 Framework

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Agreements, VIH BV became a party and Clause 4.4. was also changed and any wholly owned subsidiary of Vodafone Group Plc was added, which clearly shows that the rights for call options have been assigned to appellant's associated enterprise. The TPO used the valuation of options under the assignment of cashless option by IDFC Investors to the appellant (whereby the appellant acquired the right over 0.1234% of VIL shares) for a consideration of Rs. 62.24 Crores as the internal CUP for valuation of alleged assignment of call option by the appellant and computed the arm's length price of the alleged transaction of assignment of call option as Rs. 6178,88,26,177 by extrapolating the figures of Rs. 62.24 Crores (in respect of direct 0.1234% of VIL shares) to determine arm's length consideration for 12.25% indirect equity held cumulatively by Asim Ghosh and Analjit Singh in VIL. It is the appellant's case that the assignment of cashless option by IDFC Investors in favour of the appellant is not at all comparable to the alleged assignment of call options by the appellant to VIH BV under clause 4.4 of the 2007 FWAs. Copies of the submissions dated 21st October, 2011 and 25th October, 2011 and the TPO's order dated 31st October, 2011 are Annexures Z, AA, and BB respectively to the appeal paper-book.

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21 Pursuant to the TPO's order, the AO issued a show cause notice dated 16th November, 2011 to the appellant seeking explanation as to why the adjustment of ALP recommended by TPO should not be made to the total income of the appellant. Since during this time, the proceedings before the Supreme Court in SLP(C) No. 26529 of 2010, wherein the issue of assignment of call options was in issue, had been completed and the judgment was reserved, the appellant while giving its preliminary submissions on 28th November, 2011, requested the AO to await the decision of the Hon'ble Supreme Court as parallel collateral proceedings on the same issue would not be merely inappropriate, but also amount to interference with the course of justice. The appellant on 15th December, 2011 filed detailed submissions and documents, *inter alia,* submitting that the revision of the Framework Agreements in 2007 does not constitute assignment of call options. In fact, at Para JJJJ, it was specifically pointed out that in April 2009, put options with regard to 49% shares of AS and AG Group companies, were exercised and therefore, prior to such exercise, no transaction can be said to have occurred. Further vide appellant's letter dated 19th December, 2014, certain documents, including the SPA and the 2006 and 2007 Framework

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Agreements as requisitioned by the AO were submitted.

22 However, in complete disregard to the submissions of the appellant, the AO on 29th December, 2011, passed a draft assessment order under Section 144C of the Act. The AO in his draft assessment order also held that since the AE of the appellant, i.e., VIH BV became a party to the 2007 Framework Agreements and the call option clause 4.4 was also changed and any wholly owned subsidiary of Vodafone Group Plc was added in the new framework agreement of 2007, the appellant has clearly assigned its right to call option to its AE for no consideration. Further, the AO took the value of alleged consideration as computed by the TPO. The TPO had taken a 'nil' cost of acquisition while computing the ALP. However, the AO took the cost of acquisition at US$ 16.5 million (=Rs. 73,44,15,000), the amount paid by VIH BV towards option fee under clause 4.4 of the 2007 Framework Agreement and thereby computed short capital gain of Rs.6105,44,11,177/-. It is important to note here that the case of the AO was also restricted to the mere re-writing of the 2007 FWAs and the fact of exercise of the put options by AS and AG was specifically

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brought to the notice of the AO. Copies of the show cause notice dated 16th November, 2011, appellant's submissions dated 28th November 2011, 15th December, 2011 and 19th December, 2011 and the AO's draft assessment order dated 29th December, 2011 are Annexures CC, DD, EE, FF, and GG, respectively to the appeal paper-book.

23 The appellants then point out as to how the Hon'ble Supreme Court of India delivered its judgment reversing that of this Court in *VIH BV vs. Union of India* Special Leave Petition (Civil) No.26259/ 2010. This judgment is reported in *(2012) 341 ITR 1*. The appellants rely on the said judgment to urge that all the agreements noted hereinabove have been referred extensively in the judgment of the Supreme Court of India. Therefore, once the Supreme Court holds that there is no transfer of asset but a transfer of share and that there is no assignment of any call options, then, these findings bind this Court even in the present proceedings. More so, when a review petition filed by the Revenue seeking review of the Hon'ble Supreme Court judgment also raised such issues. Relying on this judgment of the

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Hon'ble Supreme Court, the appellants claimed that they challenge the order of the Transfer Pricing Officer dated 31st October, 2011 as well as the draft assessment order dated 29th December, 2011 only on the issue that the Transfer Pricing Officer (for short "TPO") and the Assessing Officer (for short "AO") did not have the jurisdiction to make transfer pricing adjustments on the same transaction. The appellants also pursued a statutory remedy by filing objections before the Dispute Resolution Panel (for short "DRP") under section 144C of the IT Act on 30th January, 2012, against the draft assessment order and without prejudice to the filing of a writ petition bearing No.488 of 2012 on jurisdictional issues. In the meanwhile, the review petition filed by the Revenue in the Supreme Court of India was also dismissed on 20th March, 2012. The proceedings before the Dispute Resolution Panel referred above continued and without prejudice to their contentions and the stand taken in the writ petition. The appellants filed their submissions on merits before the DRP. In furtherance of the orders passed by this Court dated 13th September, 2012, and 8th October, 2012, the appellants filed their submissions and raised the stand extensively set out in paragraphs 43 and 44 of this

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appeal paper-book. The appellants also point out as to how the Assessing Officer passed the final assessment order under section 143(3) read with section 144C(13) of the IT Act computing the short term capital gains as Rs.6178,88,26,177/- in respect of the alleged transaction of assignment of call options under the 2007 Framework Agreements but this order was not served on the appellants in view of the directions of this Court in its order passed in writ petition No.488 of 2012. This Court eventually passed its order on 6th September, 2013 and that disposed of Writ Petition No.488 of 2012. This Court relegated the appellants to exercise of its statutory remedy of appeal before the Income Tax Appellate Tribunal but made certain *prima facie* observations. We shall make a reference to the same when noting the arguments of the learned senior counsel appearing on behalf of the appellants.

24 After disposal of the writ petition, the appellants were served with the final assessment order dated 31st October, 2012, and which they received on 18th December, 2013. In the light of the orders passed by this Court, the appellants filed their appeal to the Tribunal.

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25 Then, the following events took place during the pendency of the said appeal:

26 Before the Tribunal, the respondent filed three sets of additional evidence on 20th February, 2014 (running into 930 pages), 24th February, 2014 (running into 945 pages) and 3rd March, 2014 (running into 265 pages) *vide* applications dated 24th February, 2014 and 3rd March, 2014, *inter alia*, comprising of annual reports of Vodafone Group Plc, various Shareholders Agreements and Supplement(s) to the Framework Agreements. The respondent sought to file these documents, according to the appellant, *inter alia*, on the false ground that the factum of subsequent exercise of put options in 2009 and the documents in relation thereto have been received from FIPB in February-March 2014 and before that the Revenue was not aware of the factum of exercise of put options. As a matter of fact, the factum of exercise of put options was disclosed by the appellant before the AO vide submissions dated 15th December, 2011 and also in the objections filed before the DRP. In addition, the same fact was

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disclosed before the AO of VIH BV and the Hon'ble Supreme Court in VIH BV's case. Further, this fact was also disclosed in the transfer pricing report of the appellant filed before the TPO for AY 2010-11 vide submissions dated 7th June. 2012. The index of the documents filed by the Revenue on 20th February, 2014 in 3 volumes is Annexure VV to the appeal paper-book. A copy of the Revenue's applications dated 24th February, 2014 is Annexure WW to the appeal paper-book. A copy of the index of the additional documents filed on 24th February, 2014 alongwith the corresponding documents filed in 4 volumes are Annexures XX, YY (Colly.), ZZ (Colly.), AAA (Colly.) and BBB (Colly.), respectively. A copy of the application dated 3rd March, 2014, alongwith the additional documents are Annexures CCC and DDD (Colly.) respectively to the appeal paper-book.

27 In response to the additional documents filed by the Revenue, the appellant on 3rd March, 2014 and 5th March, 2014 filed additional documents in relation to the nomination of CGP India Investments Ltd pursuant to the exercise of put option in 2009 by AS and AG under the 2007 Framework Agreements. Copy of the index of the documents

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filed by the appellant on 3rd March, 2014 alongwith the additional documents are Annexures EEE and FFF (Colly.) respectively. A copy of the index of the documents filed by the appellant on 5th March, 2014 alongwith relevant annexures are Annexures GGG and HHH (Colly.) respectively to the appeal paper-book.

28 Further, the appellant, *vide* its reply dated 13th March, 2014 objected to the admission of additional documents filed by the Revenue, *inter alia*, on the ground that the same were neither new [in any case that they were within the knowledge of the Revenue] nor were they relevant to the present issue of the alleged assignment of call option by rewriting of Framework Agreements in the AY 2008-09. A copy of appellant's reply dated 13th March, 2014 is Annexure III to the appeal paper-book.

29 During the course of hearing on 8th April, 2014, the counsel for the Revenue for the first time alleged that the judgment of Hon'ble Supreme Court in the case of *VIH BV v. Union of India (2012) 341 ITR 1* and that of this Hon'ble Court in the case of *VISPL v. Union of*

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India (2013) 359 ITR 133 have been obtained by fraud since the material facts of put options had not been disclosed before either of the Courts. The appellant *vide* its application dated 9th April, 2014 requested the Tribunal to direct the Revenue to file a detailed application/affidavit describing the nature of fraud and how such fraud had been committed. In response thereto the Revenue filed a response dated 15th April, 2014, reiterating the allegation that the factum of subsequent exercise of put options had not been disclosed before any of the Courts or the authorities below. Upon the request of the appellant to rebut the blatantly false allegations of the Revenue the appellant filed various documents establishing that the fact of subsequent exercise of put options in 2009 had been duly pleaded and placed on record before the Hon'ble Supreme Court of India, this Hon'ble Court, the Assessing Officer and the DRP in the appellant's proceedings. Copies of appellant's application dated 9th April, 2014, Revenue's reply dated 15th April, 2014 and index of rebuttal evidence filed by the appellant on 16th June, 2014, alongwith the relevant rebuttal documents are Annexures JJJ, KKK, LLL and MMM (Colly.) respectively to the appeal paper-book.

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30 Additionally, the appellant had also filed documents about the FIPB proceedings in 2009 in relation to the acquisition of shares of AS and AG Group companies by CGP India Investments Ltd. pursuant to the exercise of put options, subsequent exercise of put option in 2009 and the following nomination of CGP India Investments Ltd. to establish that the Revenue had all through known about the subsequent exercise of the put option in 2009, as it had objected to the approval being granted by the FIPB. Copy of index of documents obtained from the FIPB alongwith the documents containing minutes of FIPB proceedings are Annexures NNN and OOO (Colly.) to the appeal paper-book.

31 The appellant submits that the Supreme Court judgment related to the alleged gain arising from the transfer of the CGP share to VIH BV. The Revenue contended that the consideration in the SPA was not limited to the value of the share but related to other ancillary transactions, at least some of which occasioned the transfer of an asset situate in India, and it was in that context the Revenue relied on the

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reworking of the Framework Agreements to contend that the reworked agreements were an integral part of the transaction embodied in the SPA, and these Framework Agreements brought about assignment/ extinction of valuable rights and thereby resulted in the transfer of an asset in India. The issue whether the transfer actually took place at a later point in time would be a matter of no relevance to this issue.

32 Although voluminous additional documents were filed by the Revenue, including the Shareholders Agreement dated 5th July, 2007 of a downstream Indian company, Telecom Investments India Ltd., however, no arguments were advanced by the Revenue in support of the same and the case of the Revenue throughout was that upon rewriting of the Framework Agreements in 2007, the appellant had assigned its call option rights to it's A.E. under Clause 4.4. Revenue's reliance on the fact of subsequent exercise of put option was restricted to contend that such fact was not placed before the Hon'ble Supreme Court and hence, the finding of the Hon'ble Supreme Court that the call options continued to vest with the appellant was not conclusive. Detailed submissions and arguments were advanced by both the

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appellant and Revenue before the Tribunal on the issue of assignment of call option and the valuation of the call option allegedly assigned and the Tribunal concluded the hearing and reserved its order on the appeal on 13th August, 2014. Copies of list of dates and detailed submissions advanced by the appellant on 20th March, 2014, 24th March, 2014, 23rd to 25th June 2014, 7th August, 2014, 8th August, 2014, 9th August, 2014 and 14th August, 2014 are Annexures PPP (Colly). Further, copies of detailed submissions advanced by the Respondent on 5th May, 2014, 6th May, 2014, 17th June, 2014 and 13th August, 2014 are Annexures QQQ (Colly) to this appeal paper-book.

33 After the lapse of around two and a half months from reserving the order, the Tribunal listed the appellant's appeal for clarification on 31st October, 2014. On 31st October, 2014, the Tribunal informed both the parties that although Shareholder's Agreement dated 5th July, 2007 was filed by the Respondent, yet neither of the parties addressed any argument on the said agreement. Accordingly, the Tribunal directed both the parties to file written submissions on the said shareholder's agreement.

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34 The appellant in its submissions dated 17th November, 2014, submitted that the TII's Shareholders Agreement has no relevance or bearing on the issue of assignment of call options under the 2007 FWAs and that the option rights under the TII's Shareholders Agreement are inchoate rights as they are conditional upon the exercise of call/put options under the 2007 FWAs. On the other hand the Revenue in its submission in respect of the said shareholder's agreement submitted that the introduction of VIH BV as a party to the Framework Agreement as well as Shareholders Agreement for the first time is a clear evidence of the fact that VIH BV acquired the option rights by signing the Framework Agreement and secured its value by entering into the Shareholders Agreement simultaneously. Therefore, nowhere did the Revenue contend that by execution of the Shareholders Agreement, the call options were transferred in favour of CGP India Investments Ltd. Copies of the submissions dated 17th November, 2014, filed by the appellant and submissions dated 19th November, 2014, filed by the respondent in response to the clarifications sought by the Tribunal respectively are Annexures RRR

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and SSS respectively to the appeal paper-book.

35 On 10th December, 2014, the appeal of the appellant was listed for pronouncement before the Tribunal and the impugned order was passed. The Tribunal ruled in favour of the appellant on the original case that was framed against the appellant from the inception of the proceedings culminating in the final assessment order. The Tribunal, after considering arguments of both the parties over a period of 6 months and examining all the covenants of the 2006 and 2007 Framework Agreements, came to a clear finding that no assignment has been made under the 2007 FWAs. The Tribunal held that the inclusion of a prospective nominee does not amount to assignment/ transfer of the call option rights by the appellant. The Tribunal also rightly held that an assignment / transfer cannot take place until an actual nomination is made. In addition, the Tribunal also examined in detail the applicability of the amended provisions of Section 2(47) of the Act and held that the essence of transfer even in the amended provisions remains that actual disposal or actual creation or parting with an interest in an asset. Accordingly, since no actual disposal or

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actual creation / parting in an interest occurred as no nomination was made, the Tribunal held in favour of the appellant.

36 However, even after rendering the above finding in law that no transfer can take place unless an actual nomination happens, the Tribunal held that the call option rights have been transferred and vested in CGP India Investments Limited by virtue of the TII Shareholders' Agreement. Further the Tribunal held that the Hon'ble Supreme Court judgment is not binding on the issue of assignment of call options as the issue whether call options were assigned by VISPL to VIH BV was not an issue before the Supreme Court of India and that the Supreme Court, according to the Tribunal, proceeded on undisputed facts.

37 The appellant submits that since the impugned order has held that the call options have been assigned / transferred to CGP India by virtue of the 2007 TII SHA without providing the appellant an opportunity of hearing on the implications of the 2006 and 2007 TII SHAs, the appellant filed a miscellaneous application on 30th

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December, 2014 (alongwith Addendum on 31st December, 2014) before the Tribunal under Section 254(2) of the Act. In the said miscellaneous application (M.A. No.443/Mum/2014) the appellant has, *inter alia*, stated that the impugned order of the Tribunal suffers from a mistake apparent on the face of the record as findings have been arrived at without providing an opportunity of hearing to the appellant and accordingly the impugned order is violative of the principles of natural justice. In addition, certain other errors apparent from the record were pointed out for rectification. A copy of the miscellaneous application dated 30th December, 2014 alongwith the Addendum filed on 31st December, 2014 are Annexures TTT and UUU, respectively to the appeal paper-book.

38 As on the date of filing the present statutory appeal, the miscellaneous application filed by the appellant is pending consideration by the Tribunal.

39 As stated earlier, with a view to divest the Indian telecom business of Hutchison Essar Limited (hereinafter referred to as

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"HEL"), HTIL entered into an SPA with VIH BV whereby VIH BV acquired the entire equity share capital of CGP. By virtue of the above transaction, the appellant (3GSPL) which was indirectly owned by CGPC, became part of VIH BV. As VIH BV did not want the Call Centre business, which the appellant had been operating since 2003 and was providing services to its overseas AEs, the Call Centre business was hived-off from the appellant. The intent of hiving off the Call Centre business was reflected in the SPA between VIH BV and HTIL.

40 Accordingly, the Call Centre business was sold by the appellant (part of the HTIL Group at the time of sale) to Hutchison Whampoa Properties (India) Pvt. Ltd. ('HWP India'), an Indian resident company (part of the HWL Group). HWP India was incorporated in January 2006 to pursue the real estate business in India. However, this business did not materialize and HWP India was, therefore, a clean HWL-owned company that was readily available to acquire the Call Centre business; hence for good commercial, regulatory and legal reasons, the Call Centre business was transferred to HWP India.

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41 In view of the above, on 8th May, 2007, the appellant executed the Business Transfer Agreement (hereinafter referred to as "BTA") between the appellant (3GSPL at the relevant time) and HWP India (both associated enterprises ('AE') by virtue of being part of the HWL Group) and subsequently, the transaction of sale of the Call Centre business was completed on 4th December, 2007 upon receipt of the statutory approvals/licenses. A copy of the said BTA dated 8th May, 2007, is Annexure VVV to the appeal paper-book.

42 In order to avoid market speculation, notwithstanding the fact that the sale of Call Centre business was approved on 18th April, 2007 in Board of Directors' meeting of the appellant, the parties wished to delay signing the BTA until just prior to completion of the SPA, so that the execution of BTA and completion of SPA could be announced to the public at the same time in accordance with stock exchange requirements.

43 In the interim, a Memorandum of Understanding ('MoU') was signed on 25th April, 2007 between the appellant and HWP India to

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facilitate practical matters such as early payment of sales consideration, commencement of negotiations with landlord of premises (where Call Centre was operating) for transfer of lease and other suppliers, etc. A copy of the said MoU dated 25th April, 2007 is Annexure WWW to this appeal paper-book. In accordance with paragraph 6(b) of the MoU, HWP India paid Rs 64 crores to 3GSPL on 30 April 2007.

44 Following the signing of the BTA and the fulfillment of a number of other conditions precedent, the acquisition of the CGPC share was completed on 8th May, 2007. By virtue of this transaction, the appellant (3GSPL at the relevant time) which was indirectly owned by HTIL became a part of VIH BV. Consequently, the name of 3GSPL was changed to Vodafone India Services Pvt. Ltd. ("VISPL"), i.e. the appellant herein. It is pertinent to state that the appellant was referred to as 3GSPL (part of HTIL Group) before the completion of the SPA and on completion of the SPA, the name of the appellant was changed to VISPL, the appellant (part of VIH BV Group).

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45 As per the terms of the BTA, the Call Centre business was transferred on slump sale basis for a consideration of Rs. 64 crores. The said price of Rs. 64 crores was arrived at based on a valuation report dated 16th March, 2007 issued by M/s. Dalal & Shah, a registered Chartered Accountant firm. The valuation report determined the value of the Call Centre business by using a weighted average of the Net Asset Value (for short "NAV") method and the Profit Earning Capacity Method (for short "PECV") or Earning Capitalization method. This valuation methodology was in accordance with the principles laid down by the Hon'ble Supreme Court in the case of *Hindustan Lever Employees' Union vs. Hindustan Lever Limited and Ors.*, reported in *1995 Supp. (1) SCC 499 = AIR 1995 SC 470.*

46 The appellant submits that the computation of capital gains in case of a slump sale transaction is provided for in section 50B of the IT Act. It is stated that the net worth of the Call Centre amounting to Rs.86,49,50,364/- was duly certified by a firm of Chartered Accountants, namely, Bansi Mehta & Co. which had also the issued

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prescribed Form 3CEA dated 30th September, 2008, in respect of the same. Accordingly in the computation of income, a long- term capital loss in respect of the sale of the Call Centre business was computed in the following manner:

Sale Consideration (Rs.)	64,00,00,000/-
Less: Net worth of the Undertaking (Rs.)	86,49,50,364/-
Long Term Capital Loss (Rs.)	22,49,50,364/-

47 However, during the course of assessment proceedings, the TPO treated the transaction of sale the of Call Centre business, which was admittedly between two domestic entities, as an 'international transaction' under section 92B(2) of the Act. The TPO disregarded the valuation report of Dalal & Shah and valued the Call Centre business based on an average Price Earnings Multiple method and arrived at an arm's length price of Rs 2414 crores in his order dated 31st October, 2011. The Assessing Officer accepted the valuation adopted by the TPO and passed a draft assessment order dated 29th December, 2011.

48 Since in the opinion of the appellant, the transaction of sale of

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the Call Centre business between the two resident entities was not an international transaction, accordingly, the appellant challenged the jurisdiction of the TPO vide writ petition No. 488 of 2012 before this Hon'ble Court. This Hon'ble Court vide its order dated 6th September, 2013 upheld the jurisdiction of the TPO in this regard.

49 Alongside, the appellant had also filed objections to the aforestated draft assessment order which in turn was based on the order of the TPO before the DRP, which objection was disposed of by the DRP vide an order dated 30th September, 2012. While disposing of the objections of the appellant, the DRP in addition to upholding the transaction as a deemed international transaction under section 92B(2), which was applied by the TPO/AO, also alternatively suo moto applied section 92B(1) of the Act. The DRP while issuing directions under section 144C of the Act at Para 10.2.2 erroneously lifted the corporate veil of HWP India and applied the 'substance over form' doctrine and, accordingly, held that the sale of the Call Centre business is an 'international transaction' effectively between the appellant (a resident entity) and HWL (a non-resident entity being the

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parent of HWP India) thus falling within the scope of section 92B(1) of the Act. The DRP also alleged that HWP India was interposed only to evade tax by avoiding transfer pricing compliance. This was in complete disregard to the fact that the call centre business was transferred to HWP India for good commercial, regulatory and legal reasons. So far as the determination of the arm's length price is concerned, the DRP upheld the valuation based on the PE multiple methodology adopted by the TPO/AO but reduced the arm's length price of the Call Centre business to Rs 1408 crores by (i) eliminating 2 out of 3 comparables selected by the TPO/ AO; (ii) directing the TPO to consider the TP adjustment made in the earlier year post-tax to work out the EPS; and (iii) directed the TPO to give relief for cash of Rs.622,427,849 which was not transferred by the assesse to HWP India. The AO passed final assessment order dated 31st October, 2012 in pursuance of directions of DRP, *inter alia*, determining a capital gain on the transfer of the Call Centre business at Rs. 1322 crores.

50 The appellant challenged the aforesaid order of the AO before the Tribunal. The Tribunal vide its order dated 10th December, 2014

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accepted the appellant's contention that section 92B(2) of the Act is inapplicable on the facts and circumstance of the case i.e. that the appellant and HWP India were associated enterprises, but, however, upheld the alternative contention of the revenue that transaction of sale of Call Centre business was an "international transaction" under section 92B(1) of the Act.

History of the Appellant's case regarding ITeS Services:

51 The first year of the appellant's operations was AY 2004-05. The Tribunal in appeal for AY 2004-05 gave a categorical finding at page 9 of its order that the appellant was engaged in the "customer care BPO" segment and that the TPO had selected data of companies which functioned in an entirely different segment and which was not comparable with the appellant's case. A copy of the Tribunal's order dated 18th February, 2010 passed in the appellant's case for AY 2004-05 is Annexure ZZZ to this appeal paper-book.

52 To the best of appellant's knowledge, the said decision of the Tribunal for AY 2004-05 has been accepted by the Department and no

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appeal has been filed in this Hon'ble Court. It is also pertinent to note that there is no change in the business model of the appellant as well as nature of services in the subsequent years.

53 Further in the subsequent years, the Tribunal passed a common order dated 22nd July, 2011 for AYs 2005-06 and 2006-07 in which it held in para 31 that "*it is necessary to find out the exact nature of services rendered by the assessee. It is only after finding out exact nature of services rendered by the assessee can a comparative uncontrolled transaction can be brought to the picture. We, therefore, set aside the order of the CIT(A) and restore the issue to the TPO/AO for a fresh consideration.*" A copy of the Tribunal's common order dated 22nd July, 2011, passed in the appellant's case for the AYs 2005-06 and 2006-07 is Annexure AAAA to this appeal paper-book.

Factual Matrix for the year under appeal – AY 2008-09

54 As aforementioned, the appellant entered into MSAs with its AEs. Clause 6 of each MSA read with Schedule I thereto and a letter dated 5th March, 2007, provided that the appellant would be entitled to

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a service fee of 107% of the total cost. Clause 3 of Schedule 1 to the MSA made it clear that the service fee shall be calculated by reference to the total cost plus an appropriate margin and that the margin shall aim to be an arm's length price on a total cost over a financial period (April to March) adequate to compensate for all the functions performed, assets employed and risk assumed by the appellant and would be determined in accordance with internationally accepted arm's length standard.

55 The appellant along with its return of income furnished a report in Form 3CEB dated 30th September, 2008, in respect of the International transactions entered into by it with its Associated Enterprises. The said report set out the details of the various International transactions and certified that they were at arm's length. The appellant had also prepared a detailed Study Note justifying the arm's length price for the services rendered by it. A copy of the computation of income and the transfer pricing study are Annexures BBBB and CCCC respectively to the appeal paper-book.

56 In the said TP study, the appellant had identified 88 companies

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which were engaged in providing ITeS (Annexure III of this note). Out of this, the appellant selected 11 companies which were engaged in providing voice based call centre services, being functionally comparable to the appellant and which met with all the criteria specified in the Act for being treated as a comparable (Annexure IV of this note). The appellant adopted the Transactional Net Margin Method ("TNMM") and computed the arithmetic mean of the PBIT: operating cost of the said 11 companies at 3.51%. The appellant computed its own effective PBIT as a percentage of operating cost at 7.12% (Annexure V of this note). As the appellant's PBIT to operating cost was higher than that of the comparables, the appellant concluded that the price charged by it of 7% plus cost qualified as an arm's length price for transfer pricing purposes.

57 During the course of transfer pricing proceedings, the appellant was asked by the TPO to update the margin of the comparable companies selected in the TP study using financial data for the FY 2007-08. The arithmetic mean for the FY 2007-08 for the 11 comparable companies worked out to 1.04 percent. Since the

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appellant's Net Cost Plus ('NCP') mark-up was 7.12 percent, it was submitted that the NCP mark-up earned from international transactions was at arm's length. Thereafter, the appellant was further asked by the TPO to conduct a fresh search based on the data available on the PROWESS database, pursuant to which the NCP mark-up earned by the comparables for the contact centre services was 0.99 percent. Accordingly, a computation was submitted before the TPO using the current year's data also which further evidenced that the price charged by the appellant was at arm's length.

58 However, without appreciating the arguments/computations furnished by the appellant, the TPO rejected the functions assets and risk ('FAR') and economic analysis conducted by the appellant in its TP report without pointing out any cogent deficiency or insufficiency in the same. The TPO (para 7.15) rejected the appellant's TP report citing the following reasons:

– not using current year's data;

– not using different accounting year filter;

– not selecting proper criteria for rejecting and selecting

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comparable companies;

– not selecting proper criteria even tough they are functionally similar and operating in similar economic environment.

59 Subsequently, a fresh search of comparables was conducted by the TPO. While doing so, the TPO failed to appreciate that as per section 92C(3) of the Act, he had jurisdiction to do a fresh search of comparables only if the comparables selected by the appellant were either insufficient or had other deficiencies. Neither the AO nor the TPO pointed out which of the above mentioned four conditions of section 92C(3) of the Act, if any, was satisfied.

60 The TPO passed an order dated 31st October, 2011, under section 92CA(3) of the Act by which he determined the arm's length margin of the international transactions entered into by the appellant to be 32.33% based on 17 comparables selected by him.

61 The respondent passed a draft assessment order dated 29th December, 2011, under section 143(3) read with section 144C of the Act whereby the respondent upheld the margin computed by the TPO.

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62 Being aggrieved by the said order of the respondent, the appellant filed its objections before the DRP. The DRP vide order dated 30th September, 2012, allowed partial relief to the appellant by removing some of the comparables from the list of comparables selected by the TPO, which reduced the NCP margin to 19.21% based on a set of 10 comparables.

63 The AO in pursuance to the aforesaid DRP directions, passed the final assessment order dated 31st October, 2012, under section 143(3) read with section 144C of the Act.

64 Being aggrieved by the said order of the Respondent, the appellant filed an appeal before the Tribunal. The said appeal was disposed of by the Tribunal vide its order dated 10th December, 2014. The Tribunal while solely relying on the order of the Tribunal for AY 2007-08 and in complete disregard of the Hon'ble Special Bench ruling in the case of *Maersk Global Services Centres (India) Private Limited* [ITA No. 7466/M/12(Special Bench)] held that the following companies are comparable to the appellant:

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a) Infosys BPO Ltd.

b) WIPRO Ltd. (seg)

c) HCL Comnet Systems and Services Ltd. (seg)

d) E4e Healthcare Solutions Ltd.

65 It may be pertinent to mention here that while the TPO had used segmental financial information of Wipro Ltd. and HCL Comnet Systems and Services Ltd. called upon by issuing notice under section 133(6) of the Act, this information was not made available to the appellant inspite of request for the same. This fact that TPO did not provide information obtained under section 133(6) of the Act to the appellant has been noted by DRP in second para under para 12.5(iv), page 52.

66 The Tribunal after having duly noted the contentions of the appellant in para 135 of the order (Page Nos 157-158) inadvertently omitted to dispose of Ground of appeal no. 16 pertaining to (a) working capital adjustment and (b) risk adjustment to the arm's length margin as required under the Rule 10B(1)(e)(iii) of the Rules. In this

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regard, the appellant has already filed a miscellaneous application on 30th December, 2014, which is pending adjudication by the Tribunal.

67 It is pertinent to mention here that the Tribunal in the order for the preceding year i.e. AY 2007-08 dated 26th April, 2013 adjudicated that the appellant must be granted working capital adjustment in accordance with the OECD guidelines (Para 27.1 on page 43). Even the Respondent in its submissions before the Tribunal conceded that working capital adjustment may be granted to the appellant in line with the appellate order of the Tribunal for AY 2007-08.

68 It is in the above factual scenario and the case as set up by the appellant that we will have to appreciate the contentions raised before us by the learned senior counsel appearing for the parties.

69 Mr. Harish Salve, learned senior counsel appearing on behalf of the appellant submitted that the order passed by the Income Tax Appellate Tribunal and impugned in this appeal is erroneous and illegal. He submits that the said order is vitiated by total non application of mind to several vital and crucial aspects of the case.

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The order passed by the ITAT is perverse inasmuch as the materials which were relevant have either been overlooked or omitted from consideration. This has led to the Tribunal rendering inconsistent and contradictory conclusions. The Tribunal, in a very lengthy order, has failed to note the fundamental controversy and by losing sight of a legal submission canvassed throughout. Thus, the Tribunal misdirected itself in law.

70 Mr. Salve has divided his contentions into several parts. After inviting our attention to the list of dates and events and the ownership structure, Mr. Salve would submit that the matter must go back to the Tribunal as the appellant had no opportunity to meet the case of the Revenue on the agreement between TII and CGP dated 5th July, 2007. Mr. Salve would urge that the Tribunal failed to realise that there is only one transaction. The Revenue is seeking to impose tax on capital gains arising on the transfer of an asset. Hutchison group (Hutchison Telecommunication International) sold a company CGP Investments (Cayman Island company) to VIH BV. On account of transfer of the share, a company called 3 Global Services Private Limited became a

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subsidiary (direct of VIH BV). 3GSPL is now known as the appellant. The appellant had entered into three Framework Agreements under which it had call options and obligations by way of put options. Two of the call options were with the AG and AS group companies. The target of these call options was a downstream company called TII Pvt. Ltd. (which company in turn held directly and indirectly shares in Hutchison Essar Limited / Vodafone India Limited). At the time when these transactions took place, another set of Framework Agreements were signed (with revised consideration) for the call options and put options. VIH BV was made a confirming party to these revised Framework Agreements. Mr. Salve then extensively referred to the first case in which this transaction was the subject matter. He submitted that the Revenue contended in this first case that the revised Framework Agreements were a part of the overall transaction and the consideration for these revised Framework Agreements was also inbuilt into the amount paid by Vodafone to Hutchison for acquisition of the CGP share. Mr. Salve submits that the Revenue's stand and which was accepted by this Court in the first case, later on does not survive in the light of the reversing of the judgment of this Court in

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the first case titled as Vodafone case. When the first case and by way of appeal was pending in the Hon'ble Supreme Court, the Revenue started the second case against the appellant and which involves the same transaction but the Revenue in the second case resorted to transfer pricing so as to assess the appellant to tax on so called capital gains. This matter related to financial year 2007-08. Mr. Salve submits that in the judgment of the Hon'ble Supreme Court reversing that of this Court, there is an observation that the call options had not been exercised “till date”. Mr. Salve submits that when the Supreme Court observed that this option was not exercised till date it had in mind till the end of that financial year. Even if that expression relates to the date of the delivery of the judgment by the Hon'ble Supreme Court, there is nothing erroneous or incorrect about the same. Mr. Salve submits that it is the counter parties who had exercised the put options sometime in 2010 and pursuant to which the shares had been acquired. Mr. Salve, therefore, submits that there was no occasion for the Revenue then to take up a case and which cannot be reconciled with its consistent stand of assignment of call options.

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71 In that regard, Mr. Salve invited our attention to the findings of the Tribunal with regard to what is styled as a third case by him. Mr. Salve faults the Tribunal for having discovered from the documents filed another agreement which was entered into between the shareholders of the appellant CGP (Mauritius) and AG and AS in their companies which allegedly had another set of call options in favour of CGP. The Tribunal arrived at the conclusion that the call options contained in this shareholders agreement rendered the call options contained in the Framework Agreements nugatory. On this basis, the Tribunal concluded that the shareholders agreement, therefore, results in an assignment of the call options of the appellant. Mr. Salve submits that the beneficiary of this assignment was not VIH BV but CGP. Mr. Salve submits that the submissions filed by the Revenue clearly assert that the options of the Framework Agreements became meaningless and thus stood transferred by virtue of the shareholders agreement to CGP Mauritius. Mr. Salve, therefore, submits that the Tribunal seriously erred in law in taking into consideration a case which was not set up by the Revenue. He contended that the Revenue never urged that the shareholders agreement of 2007 to which CGP

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was a party and to which the appellant was not a party resulted in any assignment of the appellants' call options. Had such a case been put to the appellant, it would have pointed out that even in 2006 prior to the Vodafore taking over there was always in place a similar shareholders agreement. Mr. Salve contended that the Tribunal rendered contradictory finding and while it accepted the case that a revised Framework Agreement recognising same options did not constitute a transfer, it was not open to it to then hold to the contrary and by referring to the 2007 shareholders agreement. Therefore, acceptance of the Revenue's case that this shareholders agreement constituted an assignment of the call options has resulted in grave and serious prejudice. Mr. Salve, therefore, heavily criticised this approach of the Tribunal. Mr. Salve submitted that the matter should go back to the Tribunal so as to render complete justice.

72 Alternatively, Mr. Salve would submit that the entire matter stands covered and in favour of the appellant by the judgment of the Hon'ble Supreme Court in the first case. Mr. Salve's arguments and which were spread over several days, revolved around this judgment

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of the Hon'ble Supreme Court. Mr. Salve referred to it in great detail. Firstly, Mr. Salve read out to us paragraphs 23 to 25 of the impugned order of the Tribunal. Then, he referred to paragraph 30 at page 137 of the paper-book from the Tribunal's order. Mr. Salve then took us through the judgment of the Hon'ble Supreme Court and submitted that the main issue is noted in paragraphs 72, 73 and 76 of the judgment. He also referred to paragraphs 235 and 236 of this judgment and equally paragraph 231 to urge that the approach of the Revenue and upheld by the Tribunal is nothing but revisiting or reconsidering these observations and findings in the Supreme Court judgment. Mr. Salve submits that the Supreme Court judgment holds that the call option was not exercised and that the call and put option are not the same. The first one, namely, the call option is to get hold of the company whereas the second or other is to go out. There is no fraud perpetrated on the Revenue and in any manner. The put option in this case was exercised in later years and in that regard, our attention is invited to the law report in which the first Vodafone judgment is reported viz. 341 ITR 1. Mr. Salve has taken us through pages 48, 49 and 50 of this law report to submit that the factual details

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noted in the foregoing paragraphs by us match completely with that of the judgment of the Hon'ble Supreme Court. All agreements are extensively referred and neither is there any fraud nor suppression. Mr. Salve, therefore, submits that the Tribunal has faulted the assessee by holding that the judgment of the Hon'ble Supreme Court was obtained by not disclosing true and correct set of affairs. That is how Revenue's case and which was consistent with the stand taken by it throughout was allowed to be raised and the Tribunal has gone ahead and accepted it. It is in this backdrop that Mr. Salve would submit that the Revenue should be consistent in its stand or version. No shifting or adopting conflicting stands is permissible. With the aid of the ownership structure and the chart in that regard Mr. Salve has urged that if the appellants are not a party to the July 2007 agreement and the subject matter of the two Framework Agreements and the shareholders agreement is different, then, the Tribunal should not have relied on the same to the detriment of the assessee's interests. Had it intended to rely on it, it should have in the course of prolonged hearing put it to the assessee and then the assessee would have met it squarely. In such circumstances, Mr. Salve would submit that even if

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the matter does not go back and this Court is not inclined to adopt that course, still it should not allow the Revenue to raise the plea noted by us hereinabove. This Court, therefore, should hold that the matter is squarely covered in favour of the assessee by the judgment of the Hon'ble Supreme Court.

73 Mr. Salve then submits that even on merits there are alternate pleas and which proceed as follows. The options are not interest in property. The Tribunal would conclude that an important aspect of the case has been missed by the Hon'ble Supreme Court but a binding judgment of the Hon'ble Supreme Court cannot be ignored or brushed aside by a subordinate Court or Tribunal on such specious ground. The mandate of Article 141 of the Constitution of India is relied upon by Mr. Salve in this regard. He would submit that even otherwise the options are not an interest in property because in India, we do not have a recognition and legally given to equitable or beneficial ownership. If call options and put options are treated as purely contractual rights and the principle of finality of judgment is attracted, then, nothing more needs to be decided and to be gone into. Assuming this

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submission fails even then on merits the assignment of call option cannot lead to a taxable capital gain. Mr. Salve relied upon section 2(14) of the IT Act which is a definition of the term 'capital assets'. Mr. Salve would submit that the Parliament has stepped in and inserted an explanation in this definition and given it retrospective effect, but even this explanation is not attracted for an interest in property must be the foundation on which this definition has to be construed. Mr. Salve submits that the Tribunal has misread and misinterpreted the concession of the learned senior counsel before it that call option is valuable. It may be valuable but it is not property. Mr. Salve, therefore, submits that so long as there is no transfer of capital asset, the provisions in Chapter X of the IT Act which are styled as machinery provisions by him are inapplicable.

74 Further alternate submission of Mr. Salve is that there is a difference between assignment of options and an option having potential of assignment. That it is capable of being assigned or has the potential of being assigned would not make the act an assignment of call options. He relied upon pages 152 and 164 of the paper-book. In

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other words, Mr. Salve read out paragraphs after paragraphs from the impugned order to urge that the Tribunal has mixed up the issues, lost sight of the parties to the agreements and committed several factual and legal errors. There has been no assignment and the potential of assignment in favour of CGP Mauritius cannot be termed as assignment.

75 Mr. Salve elaborated the structure of call and put options in the following words :

(A) The first set of agreements were of the year 2006. As the two Framework Agreements are identical, for the sake of simplicity, the FWA relating to the Asim Ghosh (AG) group of companies is being dealt with. The 2006 FWA with AG group of companies is at page 299 of Volume 1.

(B) The FWA of 2006 conferred upon Goldspot (“Tier 1 company”) the right to require 3GSPL/appellant or its nominee to purchase all the Plustech shares (“Tier 2 company”). The 'put' option was contained in Clause 4.3 of the FWA. The 'put' option could be exercised in 2 situations :

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(a) 3GSPL/appellant or CGP India Investment Limited ("CGPM") acquired or became eligible to acquire "subscription shares" (present appeal does not relate to this – it never happened);

(b) The financial institutions, who had advanced monies for the acquisition of TII shares to Centrino issued a notice of default.

(C) There was a 'call' option, whereby 3SGPL/appellant could acquire the entirety of Plustech shares (Tier 2 company) held by Goldspot (Tier 1 company).

(D) This 'call' option was exercisable if any of the following circumstances came into existence :

(a) 3SGPL/CGPM acquired shares under the subscription option; or

(b) 3SGPL/appellant became eligible under Indian laws to hold sufficient shares under the subscription route, whereby it could have more than 50% effective control of either Centrino or TII.

On account of the second condition, until such time as the FDI ceiling of 74% was enhanced, 3SGPL could not exercise these options. This is for the reason that the Essar shareholding of 33% was held to the extent of approximately 22% by Mauritius holding companies and was counted as FDI. This is why the direct and

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indirect holding of Hutchison could never exceed 52% approximately and those equity interests were acquired by Genre 1 and Genre 2 companies. The balance of 15% equity interests were those through the contractual route i.e. options. Any beneficial interest in these 15% would reach the FDI requirements.

(E) Thus it was only if the FDI limit was relaxed that 3GSPL/ appellant would become eligible to increase its stake in any way, whether by acquiring the subscription shares and these option shares or merely by acquiring these option shares.

(F) There was a shareholders' agreement in 2006 which had 'call' and 'put' options at a different level. CGPM had a 'call' option under this shareholders' agreement to acquire the shares of TII held by the two Tier II companies (NDC of the AS group and Centrino of the AG group) at the stipulated price. The shareholders' agreement was a tripartite agreement in the sense that companies of Hutchison group, AS and AG group were parties to it, in addition to the target company i.e. TII.

(G) These options operated at a lower level than the Framework options. Clearly, once the Framework options were exercised by

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3GSPL (a co-subsidiary of CGP) and full value paid, a second transaction at the lower level (acquiring the shares of TII) would only be if Hutchison wanted to move economic value from 3GSPL to CGP – or any other company. This is for the reason that :

(a) GSPL would, by its call option, acquire the shares of the two Tier II companies (Goldspot and Scorpios)

(b) The shares of Goldspot and Scorpios derive value from the downstream shares of the Tier III companies (NDC or Centrino), which in turn derived value from the shares of TII (which also derived value from the shares of HEL / VIL).

(c) Once Goldspot and Scorpios were acquired, the value and indirect equity interest in HEL would have already been available to HTIL (or after the sale, VIL).

(d) Exercising the shareholder agreement option would not add value or increase the indirect equity interest in the Indian company.

(H) The FWAs were recast in 2007. The revised agreement with the AG group of companies is at page 567, Volume 2. In this FWA there was a 'call' option and a 'put' option.

(I) Both these options were at one lever higher :

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a) Instead of the Tier 1 company of the AG group, it was now AG who was given the 'put' option and made subject to the 'call' option. AG thus had the right to require 3GSPL/appellant or its nominated person to buy Goldspot (renamed AG Mercantile) shares i.e. the Tier 1 company shares.

b) There were 3 situations in which this 'put' option could be exercised :

i) when the sectoral cap was eased, and to the extent of the increase of the sectoral cap;

ii) even if the sectoral cap was not eased, after the 5th anniversary of the FWA;

iii) if there was a default notice from the financing institution who had paid for the TII shares (there was a mechanism provided for identifying a suitable Indian person, in case the shares were sold without the sectoral cap being relaxed or in excess of the sectoral cap).

c) The call option continued with 3GSPL/appellant. This call option entitled 3GSPL/appellant to purchase or nominate someone to purchase the Goldspot shares from AG. All limitations on exercise of call options were removed.

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(J) Once again, the condition attached to the put option of Centrino only reflected that the lower lever call and put options in the shareholders agreement were only to be used for restructuring - after the equity interests by way of contractual option had enlarged to a full indirect interest by acquisition of the upstream shares of the Tier 1 company.

(K) 3GSPL would have acquired indirect control over the AG group of companies from Goldspot / AG Mercantile down to Centrino (Nadal) would become a VISPL subsidiary. VISPL would have already acquired indirect control over the TII shares. The only purpose thereafter of Nadal / Centrino exercising a put option would be to remove the shares of TII from one VIH BV subsidiary (VISPL) to another VIH BV subsidiary (CPGM) for purposes of corporate re-structuring. None of this has any relevance.

(L) The SHA of 2007 also had Centrino, NDC, CGPM and TII as parties. VIHBV was added as a confirming party. The agreement was carefully drafted – the rights and obligations under the agreement were cast upon the "parties" which expression was defined, excluding

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VIHBV.

(M) The SHA contained a 'put' option by which NDC or Centrino (Nadal) could require CGPM or its nominated person to purchase the shares held by it in TII (this put option was subject to the limitation in the FWA, i.e. it was subservient to the call option – thus it could only be a measure of restructuring after the appellant had become the parent company).

(N) This SHA also had a call option like the previous SHA. CGPM could compel Centrino (Nadal) and/or NDC to sell their shares held in TII to CGPM. This call option was made subject to the condition that it would not be exercised unless the call or put options under the FWA in relation to Scorpio shares (AS group) and/or Goldspot (AG Mercantile) shares were exercised in full.

(O) The Tribunal overlooked that the SHA gave a second tier option to CGPM to take over the TII shares. This also would happen only after VIHBV had indirectly through the appellant acquired control of these shares.

i) ⬇VIHBV

ii) ⬇3GSPL

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iii) ⬇Goldspot

iv) ⬇Plustech

v) ⬇Centrino/NDC

(1) TII

This would be the structure once the call options under the FWAA were exercised.

76 Thus, Mr. Salve emphasised that the Tribunal proceeded on an erroneous assumption that for the first time an option was exercised in favour of CPGM by way of 2007 TII SHA. Mr. Salve submits that the Tribunal's order fails to note as to how the option contained in the document referred by the Tribunal could confer the right and as concluded by the Tribunal. Mr. Salve submits that the Tribunal confuses between 'call' options and their limitations and 'put' options. As already stated, the FWAs of 2006 & 2007 contained a provision that a buyer could be nominated to honor a put option. Nominating a buyer in relation to a put option is not an assignment for the reason that an obligation simplicitor cannot be assigned. AS and AG had put options under the FWAs which they were entitled to, as and when the

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regulatory regime allowed the appellant to acquire more shares indirectly. The appellant nominated CGPM to discharge the obligation on its behalf and it was pursuant to that nomination that CGPM acquired these shares. The call options under the FWA 2007 which could have been assigned were never actually assigned.

(A) Finally the Tribunal overlooked the 2006 shareholders' agreement. CGPM had similar 'call' options in the 2006 agreement in relation to the TII shares. As submitted, when multiple options at multiple layers are created at different tiers, it is to provide flexibility. If the idea was to confer a call option on CPGM in 2006, there was no need to follow this long procedure. Simultaneous signing of the FWA did not involve any taxable transaction and CGPM could have straight away been given the option if it was CGPM and CGPM alone who could acquire these shares.

(B) Finally, to hold that the call options rights held by the appellant to require AS and AG to sell Goldspot/AG Mercantile and Scorpio shares were assigned by virtue of a clause in the 2007 shareholders' agreement to CPGM, which clause entitled CGPM to acquire TII shares from Centrino / Nadal and NDC is a leap of faith.

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77 As far as the Call Centre business is concerned, Mr. Salve referred to the facts as culled out and then contended that the issue is whether the scope of section 92B(1) of the Income Tax Act, 1961 that defines "international transaction" for the purpose of the application of transfer pricing regulations (Chapter X) can be applied to a transaction entered into between two resident entities on the specious ground that the transaction was entered into with an Indian company to avoid applicability of Chapter X. Secondly, whether the finding that the transfer of an asset from one Indian subsidiary to another Indian subsidiary of Hutch can be considered to be a device to evade tax, because had the transfer been made to a foreign company, the department could have availed of the Chapter X machinery to arrive at an arms length price, overlooking that the transfer of an Indian call centre, owned by an Indian company to a foreign company would create serious regulatory hurdles and problems in relation to Indian Exchange Control Regulations.

(A) There are restrictions under Foreign Exchange Management Act, 1999 ("FEMA") on a foreign company directly (without an

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intermediate Indian company) by way of a business transfer.

(B) Section 6 of the FEMA restricts all Capital Account Transactions except those permitted by the RBI. The RBI has issued general permissions (under the Regulations) that identifies areas in which FDI is permitted - this would however have to be by way of acquisition of shares of an Indian company. A direct acquisition of a call centre would require a special permission from the RBI.

(C) Owing to difficulties in obtaining regulatory approval to run a Call Centre business in India by an Indian branch of non-resident company, together with the legal and practical difficulties of doing so even if such approval could be obtained, it was decided that the Call Centre business would be acquired by an Indian subsidiary of the HWL group. It is common practice for most multinational companies to do business in India through an Indian subsidiary rather than a branch of a foreign company. Merely because such a business arrangement does not fall in Chapter X as an international transaction (at the material time) does not for that reason render it a sham or a fraud.

(D) Furthermore, wholly owned subsidiaries enjoy: (a) greater

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flexibility of operations (e.g. it is easier for an Indian entity to lease office space as compared to a foreign entity) (b) ring fencing of risk, (c) limitation of liabilities, (d) preferential tax regime and so on, as compared to branch of a non-Indian company. Had HWP India not existed, HWL would have incorporated a new Indian wholly owned subsidiary to run the Call Centre business as required under FEMA.

(E) The TPO, during the course of assessment proceedings, alleged the transaction of sale of Call Centre business to be an international transaction under section 92B(2) of the Act. The AO accepted the valuation adopted by the TPO, and passed a draft assessment order dated 29th December, 2011.

(F) The DRP while disposing of the objections of the appellant, in addition to upholding the transaction as a deemed international transaction under section 92B(2), which was applied by the TPO/AO also alternatively *suo moto* suggested that section 92B(1) of the Act could also be applied. This fact has been noted by the Tribunal at para 115 of the impugned order. The DRP, while issuing directions under section 144C of the Act, at para 10.2.2 erroneously lifted the corporate veil of HWP India and applied the 'substance over form'

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doctrine and, accordingly, held that the sale of the Call Centre business is an 'international transaction' effectively between the appellant (a resident entity) and HWL (a non-resident entity being the ultimate parent of HWP India) thus falling within the scope of setion 92B(1) of the Act. The DRP also held that HWP India was interposed only to evade tax by avoiding transfer-pricing compliance. The DRP upheld the valuation based on the PE multiple methodology adopted by the TPO/AO but reduced arm's length price of the Call Centre business. The AO passed the final assessment order dated 31st October, 2012 in pursuance of directions of DRP *inter alia*, determining a capital gain on the transfer of the Call Centre business.

(G) The Tribunal vide its order dated 10th December, 2014, accepted the appellant's contention that section 92B(2) of the Act is inapplicable to the instant case (para 128 of impugned order). However, the Tribunal upheld the alternative conclusion of DRP that transaction of sale of Call Centre business was an “international transaction” under section 92B(1) of the Act (para 126 of impugned order).

(H) The Tribunal noted at para 89 of its order (page 230) the fact that owing to the difficulties in obtaining regulatory approval to run a

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Call Centre business in India by an Indian branch of non-resident company, together with the legal and practical difficulties of doing so even if such approval could be obtained, it was decided that the Call Centre business would be acquired by an Indian subsidiary of the HWL group. It should be noted that it is common practice for most multinational companies to do business in India through an Indian subsidiary rather than a branch of a foreign company.

(I) The Tribunal, at para 126, concluded that HWP India was interposed to avoid chargeability to tax, by giving a different colour to the transaction, with the motive to circumvent the transfer pricing provisions and consequently, applied the doctrine of substance over form solely on the argument that the payment of Rs. 64 crores was made by a HWL group company and was received by HWP India in its bank account and paid out of the same bank account on the same day 30th April 2007. The Tribunal has completely disregarded the fact that HWP India raised the Rs.64 crores for acquisition of the Call Centre business by way of issuance of preference shares to its immediate parent company HWP Investments Holdings (India) Limited, Mauritius. A copy of a preference share certificate issued by

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HWP India and Foreign Inward Remittance Certificate ("FIRC") is at pages 4741 to 4743. This FIRC was in fact filed by the income tax department during the proceedings before the Tribunal vide letter dated 18th June, 2014 at pages 4230 to 4255, relevant pages in submissions being 4241 and 4242 under heading "*Submission on Payment made by HWP India for Call Centre*" and FIRC being at pages 4259 to 4261.

(J) Despite the bank statement referred to above showing the injection of funds from the assessee's parent for subscription of preference shares, the Tribunal in para 126 of the impugned order (page 252 of paper-book-I) alleged that "*there is no record produced by the assessee to show that the HWP (India) procured finance from its Group Companies for the purpose of business.*" Furthermore, the income tax department vide letter dated 18th June, 2014, had also filed the financial statement of HWP Investment Holdings (India) Limited ('HWP Mauritius') for year ended 31st December 2007 (pages 4262 to 4280, paperbook-12) to show the source of funds for payment of preferences shares of HWP India. HWP Mauritius was a tax resident of Mauritius and immediate holding company of HWP India in 2007.

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(K) It is important to note that 3GSPL (transferor) was an indirect subsidiary of HTIL until 8th May, 2007, prior to the completion of SPA. During that period, HWP India (transferee) was also an indirect subsidiary of HWL and both HTIL and HWL were public listed companies in Hong Kong (having significantly different beneficiaries), therefore, in accordance with stock regulations, any transaction between them being a connected transaction was required to be on normal commercial terms and at arm's length.

(L) The appellant submits that in the present case, the corporate veil of HWP India i.e. purchaser of the Call Centre business is lifted, merely on the premise that it raised funds by way of preference shares from its parent company HWP Mauritius and used the same for acquisition of the Call Centre business. This reasoning is perverse on its face.

(M) It is submitted that in the instant case, the transaction of sale of the Call Centre business is between two resident entities i.e. the appellant and HWP (India) and accordingly, the same does not qualify to be “an international transaction” under section 92B(1) of the Act.

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78 Apart from relying upon the judgment of the Supreme Court in the first case Mr Salve relies on the following decisions in support of his above contentions.

(i) Vodafone International Holding B.V. vs. Union of India & Anr. (2012) 341 ITR 1(SC)

(ii) Vodafone India Services Pvt. Ltd. vs. Union of India (2013) 359 ITR 133 (Bom)

(iii) Vodafone India Services Pvt. Ltd. vs. Unionof India & Ors. (2014) 368 ITR (Bom)

(iv) Rambaran Prosad vs. Ram Mohit Hazra & Ors. (1967) 1 SCR 293.

(v) J. Saisbury Plc. vs. O'Connor (Inspector of Taxes) (1991) 1 W.L.R. 963.

(vi) PNB Finance Ltd. vs. Commissioner of Income-tax (2008) 307 ITR 75(SC)

(vii) Mrs. Bacha F. Guzdar vs. Commissioner of Income-tax, Bombay 1955 27 ITR 1.

79 On the other hand, Mr. Setalvad, the learned senior counsel

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appearing on behalf of the Revenue submits that the arguments of Mr. Salve overlook the basic fact that the judgment in the first Vodafone case led to several amendments to the Income Tax Act. He relies upon the definition of the term 'capital asset' [section 2(14)]. He submits that the definition is very wide and emphasized the words "*or any other right whatsoever*". He then relies upon the definition of the term transfer appearing in section 2(47) and particularly explanation 2 to the same. He would submit that the option rights have been transferred to Vodafone PLC. Therefore, these transactions and evidenced by several agreements are covered by sections 92F(v) and 93(4)(a). He would submit that the transaction has all characters and can safely be termed as an international transaction. Mr. Setalvad has elaborated his submissions and has urged that a call and put option are part of the same coin. They are related to the same shares and cannot be viewed as a traditional or narrow option. It is fallacious to urge that one is a right and the other is an obligation. Rather, exercise of one would exhaust the other. Mr. Setalvad has then handed over written notes and further explaining his contentions.

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80. It is urged that the question whether option rights are in the nature of capital asset was considered by the Hon'ble Supreme Court in the original Vodafone Capital Gain dispute. There the issue was whether any capital gain tax was attracted in the hands of HTIL when it transferred its 67% interest in VIL to VIHBV. As HTIL was non resident, the Hon'ble Supreme Court was considering the applicability of Section 9 in the case of an indirect transfer of capital asset. In this connection, the Hon'ble Supreme Court held that u/s. 9, only direct transfers are covered.

(A) Subsequent to the Hon'ble Supreme Court's decision, through Finance Act, 2012, the provisions of section 9 along with section 2(14) and section 2(47) were amended with retrospective effective from 01.04.1962. This combined amendment of section 9 and section 2(14) and section 2(47) was to ensure that any transfer effected by creation of an interest in option rights will now be taxable. The respondent submits that while the language of amended provisions are in themselves adequate to construe that the option rights is a capital asset, and creation of interest in option rights is a transfer, the amendment should be interpreted to advance the purpose of the same.

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(B) The subject matter of dispute in this case is whether the call option rights held by the appellant is a capital asset. In order to determine whether this constitutes a capital asset reference is made to the provisions of Section 2(14). The newly introduced Explanation to section 2(14) is as under:

> *"Explanation to Sec. 2(14) – For the removal of doubts, it is hereby clarified that "property" includes and shall be deemed to have always included any rights in or in relation to an Indian Company, including rights of management or control or any other rights whatsoever"*

(C) A reading of the said explanation makes it amply clear that any right in the options is property for the purpose of section 2(14). The Options relate to shares of an Indian company i.e. Scorpios Beverages (P) Ltd. and AG Mercantile Co. Pvt. Ltd. This in turn entitles the option holder to a 12.25% equity interest in Vodafone India Ltd., (HEL). Thus the right of the appellant to subscribe to the shares of AS and AG group company, is in the nature of a capital asset as defined in section 2(14) of the IT Act 1961. Once it is established that the option rights held by the assessee is property, any interest created therein is also in the nature of property and falls within the ambit of section 2(14) read with Explanation thereto, which was introduced by virtue

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of amendment to the I. T. Act after the Supreme Court judgment.

(D) The contention of the appellant relying upon the decision of the Hon'ble Supreme Court is that the option rights are in the nature of contractual rights and contractual rights do not constitute property. However, the retrospective amendment to section 2(14) specifically includes any rights in an Indian Company, or in relation to an Indian company or any other rights whatsoever. Hence, it is submitted that, once a right, whether contractual or otherwise, falls within the amended section 2(14), it becomes a property and hence a capital asset. Hence, assessee's arguments that option rights being a contractual right do not constitute a property or capital asset do not survive after the amendment.

81. It is then urged by Mr. Setalvad that it is common for multinational companies to create a web of companies for the purpose of holding their stake in different countries. Their holdings structure becomes complex as it has to take into account taxation laws of different countries as well as the regulatory norms. As a result,

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because of the complex structure, it becomes difficult to understand the actual transactions being undertaken and the tax treatment to be given to it. The advanced countries hence developed the transfer pricing (TP) provisions as a part of their respective domestic law. The transfer pricing provisions regulate the transactions entered into by different companies of a multinational group situated in different tax jurisdictions in their dealings with one another. This ensures that each country gets its due share of taxes. These laws have been in place in other countries for many years whereas India was a late entrant.

(A) The Transfer Pricing (TP) provisions were enacted in India in 2001 and the same was first applicable for assessment year 2002-03. The object of these provisions is to prevent erosion of tax base from the country. The Indian TP provisions enact that income arising from an international transaction should be determined having regard to the Arm's Length Price (ALP). The taxable income is computed by substituting the ALP in the place of the actual transaction value.

(B) There is no better way to define or describe the Arm's Length Principle than to refer to the definition contained in Organization for Economic Co-operation and Development (OECD) Model

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convention. Article 9 of the OECD Model Convention has been adopted by almost all the countries of the world as the basis for recognising the intra-group transactions of multi-national corporations. The Arm's Length principle has been explained in the Article 9 of OECD Model Convention as under -

> *Where*
>
> *a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State or*
> *b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,*
>
> *and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.*

82. The Indian TP provisions are based on the OECD model and the essence of the same is that transactions between related parties of an MNC group should be undertaken at the same price at which a similar transaction is undertaken by unrelated parties under similar

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conditions.

83. Reverting to the options, Mr. Setalvad submits that the call and put options in this case are actually not in the nature of an option contract, but are in the nature of a Forward contract. In this connection, an extract from two standard commentaries "Practical Share Valuation" by Nigel Eastway and Others published by BDO as well as "Financial Valuation – Applications and Models" by James R. Hitchner.

The following Write-up is based on these commentaries.

(a) A Call Option provides the holder with a Right to purchase the underlying stock but not the obligation to purchase the stock at a specified price (strike price) and date. A person buys a call option if he anticipates the market to go up. For example, if the prevailing price of ABC Corporation (ABC Corp) is Rs. 700. If A has bought a call option to buy the shares of ABC Corp at 710 say for a premium of Rs. 5 from B, then A would be known as option holder and B would be option writer. Now, if the price of ABC Corp goes to 720, it would be profitable for Mr. A to exercise the option as he would earn profit of Rs. 5 (720 market price – 710 strike price + 5 option premium paid).

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Therefore, a call option is exercised only when the market price of the underlying share goes up, in this example beyond 715 or else the option holder will allow the option right to expire without actual purchase of share.

(b) Similarly, a Put Option provides the holder with a Right to sell but not the obligation to sell, at a known price (strike price) and date. A person buys a put option if he anticipates the market to go down For example, if the prevailing price of ABC Corporation (ABC Corp) is Rs. 700. If A has bought a put option to sell the shares of ABC Corp at 690 say for a premium of Rs.5 to B, then A would be known as option holder and B would be option writer. Now, if the price of ABC Corp goes to 680, it would be profitable for Mr. A to exercise the option as he would earn profit of Rs.5 (option price 690-cost of option Rs5-prevailing market price). Therefore, a put option is exercised only when the market price of the underlying share goes down, in this example beyond 685 or else the option holder will allow the option right to expire without actual sale of share.

84. It has been the contention of the appellant that call options were

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never transferred by it and they remain vested in the appellant. Further, what has been exercised is only the Put Options by AS and AG. It has further been argued by the appellant that Put options exercised by AS/AG are different from Call options referred by the Supreme Court.

85. The arguments of the appellant are not tenable in view of the facts of the case and terms of the FWA's of 2007 detailed herein:

(a) The term 'Option' has been defined to mean **Put Option or Call Option.** Thus, even as per the appellant's FWA, both options are included in the term 'Options' which clearly demonstrates that they are the two sides of the same coin.

(b) As per clause 3.1 of the FWA 2007, AS/AG have to ensure that the entire issued and paid up capital of the Group companies are held by them respectively. Thus, it is ensured that AS and AG cannot bring new shareholders into their company. As per clause 4.1 of this agreement, there is a complete embargo on AG and AS from issuing any further shares in their companies which would alter the issued

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share capital of those companies. The combined effect of these two clauses is that both AS and AG have been completely restrained from making any changes in the shareholding of their companies through which they hold 12.25% stake in VIL. When the restrictions contained in para 3.1 and 4.1 of the FWA's of 2007 as discussed above are read with the Call and Put Option terms, it is clear that to the extent Put option is exercised, automatically, call option to same extent stands extinguished.

(c) The terms Put Shares and Call Shares are separately defined in the FWA's of 2007. For instance, in the FWA agreement of 5th July 2007, entered into with AS and its group, both the Put Shares and Call Shares are defined as 'SBP Shares' (These are the shares of a 100% owned company of AS). From the same, it is evident that both Put option and Call Option are to be exercised in respect of the same shares.

(d) The price at which Put Option and Call option are to be exercised is the transfer price as defined in para 4.6 of the FWA. Thus

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the price of both the Options is the same.

(e) Clause 4.6(b) of the FWA's of 2007 further supports the view that the Call and Put Options are one and the same. As per Clause 4.6(b) of the FWA, in case of transfer of Put Shares by AS/AG, either under Call or Put Options, the annual payment made to AS/AG gets proportionally reduced. This shows that the transfer under Call and Put Options have the same effect under the FWA.

(f) From the terms of the Option, it is also clear that both Call Option and the Put Option can be effectively exercised only when the sectoral CAPS are relaxed.

86. Thus from a reading of the FWA, whether Put option is exercised by AS/AG or Call Option is exercised by the appellant, it is one and the same and can be said to be two sides of the same coin.

87. In this case, VISPL had a Call option to ask AS/AG to sell shares of SBP/AG Mercantile shares while AS and AG had so called put option to ask VISPL to buy same shares of SBP/AG Mercantile.

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The so-called call/put option in the Framework Agreement is examined in view of the above mentioned commentaries.

i. In case of call options granted by AS and AG to VISPL, the option holder is VISPL while the option writer is AS/AG. In case of call option, VISPL pays a premium to AS/AG who are writers of the Options in the form of annual payment of USD 10/6.3 Million to AS/AG, which is as per the principle laid down above.

ii. In case of Put option granted by VISPL to AS/AG, the optiion holders are AS/AG, while the option writer is VISPL. There is no premium paid by the AS/AG to VISPL. This clearly shows that the option given to the AS/AG are not classic put options but only an exit route provided to AS/AG.

iii. It is seen that there is no expiration date of Call Options in the FWA. Therefore, one of the essential conditions of Call Option is missing. Similarly, for Put Option, on expiry of 5 years, another party can step into the shoes of AS/AG [Clause 4.3 b(iii) and the Put Option gets revived for further 5 years, therefore, there is no expiration date for Put Option as well. Thus, under both Call and Put Option under FWA, there is no expiry date which is an essential condition for

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Options.

iv. In classic Call/Put Options, the Call/Put Option expires on the expiration date if the triggering event does not take place, and there is no obligation to buy/sell shares under Call/Put Option. But, in this present case, under both Call and Put options, the delivery of shares is mandatory to VISPL. Thus, both so called Call and Put Options are not option contracts as per the definition of Forward or Future contract discussed above, the call and put option in the Framework Agreement are more akin to forward contract as delivery of shares to VISPL is mandatory in both the cases of Put/Call option.

88. Thus it may be seen that AS and AG were under an obligation to sell their stake and hence had no put option. Hence, what has been transferred is the rights, by whatever name called, under Clause 4.4 of the 2007 FWA with AS and AG. As this right vested in the appellant earlier which has now been transferred to its AE-VIHBV, there is transfer of a valuable right attracting capital gains.

(a) As per para 4.6 of the FWA's of 2007, the transfer price has been fixed at which the put options are to be tendered. As per

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Schedule 1 of FWA's of 2007, the AS group of companies would get minimum amount of Indian rupees equivalent to US$ 164.51 million. Over and above this, the AS group of companies would get 10.2 million per annum accruing on a daily basis up to 7 May 2017 or until AS ceases to hold shares indirectly (Clause 4.4 (d) of FAW of 2007). Similarly, the AG group of companies would get 6.3 million per annum accruing on a daily basis up to 7 May 2017 or until AS ceases to hold shares indirectly (Clause 4.4 (d) of FWA of 2007).

(b) Therefore, there is no reason for AS and AG to exercise put options early as the consideration to be received by them is fixed by the FWA's of 2007. In fact, if the put options are exercised early, it would result in discontinuance of annual payment to AS and AG by the appellant/VIH BV which is valid till 7th May, 2017. Therefore, once the put options are exercised, the AS and AG would be in a great loss by forgiving annual payments i.e. 10.3 million US$ for AS and 6.3 million US $ for AG group of companies. Hence, in the given situation, the AS and AG would not like to exercise their put option as they would be in a great loss by exercising the same. Hence, it may be seen that the argument of the appellant on this account are not based

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on the facts and are misleading.

(c) In this regard, the appellant at para 24 of the note regarding assignment of options has contended that nominating a buyer in relation to a put option is not an assignment for the reason that an obligation simplicitor cannot be assigned and that the call options under FWA's of 2007 which could have been assigned were never actually assigned.

(d) As explained above, the respondents submit that in the facts of the case, the call and put options are the two sides of the same coin. Hence, by exercise of put option, the call option (if they are considered separate) automatically stands assigned/extinguished.

89 As far as the transfer pricing provision and the order of the Transfer Pricing Officer so also the Tribunal, Mr. Setalvad submits that the essential ingredients to invoke the Transfer Pricing Provision are :

(i) There must be a “transaction”. The term transaction is defined in section 92F(v) and Rule 10A(d).

(ii) The transaction should be between 2 or more persons who are

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Associated Enterprise of one another. The relationship of associated enterprise is defined in Section 92A.

(iii) The transactions between these two persons should be in the nature of an international transaction. To qualify as international transaction, the transaction should be between one or more associated enterprises of which at least one is a non-resident (Section 92B).

(iv) The transaction should have impact on income, profit, loss or asset of the company.

(v) Once a transaction is held to be an international transaction, then any income arising from such transaction should be determined in accordance with the Arm's Length Price. Arm's Length price is the price paid by persons other than associated enterprise under uncontrolled conditions.

(vi) Section 92C provides the mechanism for determining the Arm's Length Price in respect of an international transaction.

90 Once the provisions are applicable to a given case, the basic obligation is of the appellant to determine the income arising from the international transaction having regard to the arm's length price.

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Where assessee fails to discharge the basic onus, the onus on Revenue is secondary in nature. The Revenue has to then determine the ALP based on material available with it.

TRANSACTION:

91. The first aspect of the matter is whether there is any transaction undertaken by the appellant. The term 'transaction' has been defined in Clause (v) of sec. 92F and Rule 10A(d).

Clause (v) of sec. 92F

“transaction” includes an arrangement, understanding or action in concert,-

(A) Whether or not such arrangement, understanding or action is formal or in writing; or

(B) Whether or not such arrangement, understanding or action is intended to be enforceable by legal proceeding.”

Rule 10A(d)

“transaction” includes a number of closely linked transactions.

92. The legislature has provided an inclusive definition of the term

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'transaction'. It is a word of widest import. Thus the term transaction not only includes a sale, purchase, lease, mortgage, pledge, rent or hire but also any other dealing or course of dealings undertaken in the normal course. In the specific context of T.P. Provisions, it includes any arrangement or undertaking, or action in concert. Further, there is no necessity that such arrangement or understanding should be in writing or legally enforceable. Thus, even an oral understanding or arrangement which may or may not be enforceable at law will constitute a transaction.

INTERNATIONAL TRANSACTION

93. The next aspect is whether the transaction qualifies as an international transaction. The term 'international transaction' has been defined in sec.92B. Under sub section (1), international transaction has been defined as a transaction between two or more associated enterprises out of which at least one is non-resident. This section further provides that the transaction should be in the nature of :

purchase / sale / lease of tangible or intangible property;

Provisions of services;

Lending or borrowing money;

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Any other transaction having a bearing on the profits, incomes, losses or assets of such enterprise.

The term 'associated enterprises' has been defined in section 92A.

94 All the conditions contained in section 92B(1) are fulfilled in this case.

95 The section requires that there should be a transaction between two or more associate enterprises out of which, at least one is non-resident. In this case, the arrangement and undertaking described in the above paragraphs is the transaction between the assessee, TII, VIH BV and CGP Mauritius out of which, VIH BV and CGP Mauritius are both non-residents.

96 Any other transaction having a bearing on the income, profits, losses or assets of the enterprise is an international transaction. Hence the arrangement, understanding or action in concert resulting in the creation of interest in favour of CGP Mauritius in the option rights held by the assessee under the 2007 FWA by virtue of 2007 TII SHA, falls in the category of any other transaction having a bearing on the

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income, profits, losses or assets of the enterprise. The creation of interest in the option rights has an impact on the income as well as assets of the assessee.

97 **SALE OF CALL CENTRE :**

As far as the sale of the call centre business is concerned, the reason given by the ITAT to reject the revenue's contention u/s. 92B(2) is two fold.

(a) The ITAT has first held that the assessee and HWP India are associated enterprises for a part of the year commencing from 01st April, 2007 and ending on 8th May 2007 i.e. the date when the share transfer took effect. While this conclusion of the ITAT is factually correct, the ITAT has thereafter relied upon the provisions of section 92A(2) to conclude that once the assessee and HWP India are associate enterprises for the part of the year, they remain associated enterprises for the entire year. Having reached this conclusion, the ITAT held that even if it is assumed that the transfer of call centre took place after 08.05.2007, due to the fiction created by section 92A(2), the AE relationship would continue for the entire year and there is no

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question of applying section 92B(2).

(b) Additionally, the ITAT has held that the transfer of call centre took place before the execution of SPA. Once it is held that the call centre was transferred before the share transfer, once again the applicability of section 92B(2) is ruled out.

98 The Revenue submits that while the first conclusion has been arrived at on the basis of language of section 92B(2), the second finding has been arrived at by examining the terms of the SPA. The revenue's argument in respect of the above findings are as follows :

99 The Honourable ITAT has dealt with the first finding at Para 122 of its judgment. It has held that the assessee was a associated enterprise of both HTIL and VIH BV during the previous year in terms of section 92A(2). Thus, once two enterprises are associated enterprise at any time during the previous year they shall be deemed to be the associated enterprise for the purpose of section 92A(1). Similarly at Para 128, it has been held that HWP (India) is an associated enterprise of the assessee for the year under consideration,

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therefore, the provisions of section 92B(2) are not applicable. Further at Para 123, it has been held that the BTA has preceded the SPA.

100 It is the respectful submission of the respondent that section 92A(2) along with section 92B, should be given a purposive interpretation. The words 'at any time during the year' should be considered qua the relevant 'international transaction'. It may be seen that section 92(1) starts with 'any income from an International Transaction....'. Thus, in the TP proceedings, one has to see firstly whether there is a 'transaction', if yes, whether it is entered into between 'associated enterprise'. The words 'at any time during the year' were introduced in the Act to overcome a situation where the assessee would contend that although it was an AE at the time when the transaction was entered into, but was not an AE either at the beginning of the year or at the end of the year, and hence the TP provision would not apply. The relationship of associated enterprise should be considered at the time when the relevant international transaction was entered into. If the interpretation adopted by the ITAT that once two enterprises are associated enterprise at any time during

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the previous year they shall be deemed to be the associated enterprise for the entire year is upheld, it would lead to anomalous and unacceptable situations.

101 The significance of these words 'at any time during the year' is explained diagrammatically as Annexure A-1. In the example depicted therein A Ltd., is an Indian company which has purchased goods from B Ltd. Hongkong. Both A & B are held by the same holding company X Ltd. Mauritius. Therefore, the transaction of purchase of goods by A from B Ltd. is subject to Transfer Pricing provisions at the time the transaction is entered into. Subsequently X Ltd. Mauritius ceases to be the holding company of B Ltd. Hongkong in the same previous year. B. Ltd., is now held by some other party not related to X Ltd., Mauritius and A Ltd., India. Therefore, at some point during the year A Ltd., India and B Ltd., Hongkong ceased to be AEs as they failed to fulfil any of the conditions u/s.92A(1) and (2). That is the position at the end of the previous year.

In order to ensure that the transaction undertaken between A

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Ltd., India and B Ltd., Hongkong (during the period they complied with the conditions in section 92A) is covered by the TP provisions, the legislature used the word 'at any time during the year'. The object of using these words is only to ensure that a transaction which in fact was undertaken between parties who fulfilled the conditions contained in Section 92A at the time when the transaction was undertaken, does not escape the applicability of the TP Provisions. However, the purpose of the words at any time during the year cannot be extended to such an extent that transactions that were undertaken at a time when the parties did not fulfil any of the conditions contained in section 92A(1) the transaction would still be subjected to Transfer Pricing Provisions.

102 The ITAT has arrived at the second conclusion that BTA was transferred before the share is based on the interpretation of the provisions of SPA. The ITAT has relied on clause 8.8(j) of the SPA wherein it is stated that HTIL was under an obligation to procure and deliver the call centre business transfer agreement duly executed into between the assessee and an affiliate of HTIL at the time of

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completion of SPA on 08.05.2007. Relying upon this clause, the ITAT has concluded that the call centre business has therefore been transferred by the assessee before the execution of the SPA on 08.05.2007. Once it was held that the call centre business was transferred prior to the execution of the SPA, the ITAT held that the assessee and HWP India being associate enterprises, section 92B(2) will have no application. Clause 8.8. of the SPA can be referred to at page no.469/Vol.II of appellant paper book. Further the term completion is defined as part of the definition clause in the SPA.

103 Clause 8.8 refers to events that have to be undertaken after the completion of share sale whereas the ITAT has incorrectly assumed that these conditions are required to be fulfilled prior to the completion. The Revenue's argument in this regard is further supported by the following clauses in the SPA as well as the BTA which clearly evidence the fact that the call centre transfer took place on 04.12.2007 long after the execution of SPA on 08.05.2007.

104 The following clauses of the SPA are relevant for this purpose.

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(Vol.II / Pgs. 447 to 566 of the appellant):-

a. Clauses 1.1 – Definition of Call Centre Disposal (Pg. No.451) which shows that the transaction contemplated is disposal and the disposal occurred on 4th December, 2007.

b. Clauses 1.1 - Definition of Completion (Pg. No.452) – Completion means sale and purchase of share and the loans.

c. Clause 1.1 – Closing Period (Pg. No.452) is the period from the date of the SPA to the date of completion of termination.

d. Clause 1.1 – Completion Date (Pg No. 452) means the date when Completion takes place.

e. Clause 1.1 – GSPL Transfer Agreement (Pg. No.453) has been defined as the BTA to be entered into between GSPL and Affiliate of HWL relating to the Call Centre Disposal substantially in the form attached to the Disclosure Letter.

f. Clause 8.1 – Completion (Pg.No. 468). It is undisputed that completion took place on 8th May 2007 when the CGP share was transferred to a VIH BV. The completion date would be 8.5.2007.

g. Clause 8.8(j) (Pg.No.470) – Clause 8.8 provides that BTA qill be executed only after completion, i.e. "On Completion". Since

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completion has been defined as completion of share of CGP, it is obvious that BTA is to be signed only after the share of CGP is transferred.

h. Clause 10.1 (Pg. No.473) – see Paragraph 13 (iv) of these Submissions below.

i. Clause 10.2 (Pg. No.473) - see Paragraph 13 (iv) of these Submissions below.

j. Clause 13(c) (Pg.No.480) – see Paragraph 13 (v) of these Submission below.

105 The following clauses of the BTA clearly show that the intention of the parties was always to transfer the call centre only upon fulfilment of various conditions and the same happened only on 4th December 2007.

i. The appellant has agreed to sell the business as at closing date (Recital (C) on page 45090/Vol.XIII). The 'closing date' is defined as the date on which closing takes place in accordance with BTA as mentioned in Clause 6.1 (Page No.4513/Vol.XIII). As per Clause 6.1, the sale and purchase of the business shall be completed on the third

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business day after the closing conditions are fulfilled as per Clause 5 of the BTA. The closing date as declared in financial of the appellant for the F.Y. 2007-08 is 4th December,2007.

ii. As per Clause 2.1 of the BTA, the appellant shall transfer and the purchaser shall purchase the business at the closing date (Pg.4509/Vol.XIII).

iii. As per Clause 2.2 of the BTA, the ownership and title in the asset shall pass to purchaser on closing (Pg.4509/Vol.XIII).

iv. The obligation to pay the purchase price shall be fulfilled only on closing as per Clause 3 of the BTA (Pg, 4510/Vol.XIII).

v. The obligation of the appellant to sell was conditional upon conditions precedent being satisfied as per clause 5.1 of the BTA (Pg.4512/Vol.XIII). These conditions clearly show that the sale of the business can only take place after the condition specified in clause 5.1 are satisfied. Thus, the transfer could only take place on 4th December, 2007.

vi. It was the responsibility of the appellant to submit a certificate to the purchaser on the closing date certifying that the Board of Directors have passed resolution authorising the sale of the business,

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the execution of BTA and consummation of BTA (refer to Clause 6.2.1 on Pg.4513/Vol.XIII). Similarly, the purchaser also will provide similar certificate under Clause 6.3.1 (Pg.4514/Vol.XIII). The requirement of the Board resolutions and other formalities as of the closing date, shows that the parties to BTA must have obtained these near about 4th December, 2007 and at that time, the seller (appellant) was a Vodafone group company. This conclusively proves that the transaction was completed between two unrelated parties.

vii. As per Clause 6.4(Pg.4514/Vol.XIII) the receipt for payment and the closing memorandum will be issued on completion of actions mentioned in Clause 6,

viii. Clause 8 (Pg.4515/Vol.XIII) shows that the persons working in the call centre were the employees of VISPL (appellant) till the closing date. This also proves that the transfer took place on the closing date.

ix. Clause 14 of the BTA (Pg.4518/Vol.XIII) defines Vodafone group as the vendor and provides that all the communications required to be delivered to vendor, should be addressed to "Vodafone Group Services Ltd., United Kingdom". Since in the transaction of sale of

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call centre the vendor is the appellant and the vendor as per clause 14 of the BTA is stated as the Vodafone Group, it is clear that the BTA has taken place after appellant became part of Vodafone Group.

x. The fact that the BTA was signed after the SPA is further supported by the List of Dates & Events submitted by VIH BV in the Vodafone case before the Supreme Court.(page 3456-3486 /Vol.IX/A). At Sr.no. 71 to 75 of the List of Dates, VIH BV has submitted that the consideration was paid to HTIL and the share was transferred in the name of VIH BV in the register of members of CGP, CI. A tax deed of covenant was also signed in favour of the VIH BV to indemnify VIH BV in respect of taxation or transfer pricing liabilities. Thereafter, the nominee share in 3 GSPL was transferred. This clearly shows that 3 GSPL became a wholly owned subsidiary of Vodafone group on 8th May before BTA was entered. The signing of the BTA has been shown at sr.no.78. Thus, as per VIH BV's own list of dates the BTA was signed after the CGP share was transferred, as was contemplated by the SPA. This is an admission before Hon'ble Supreme Court, which binds the appellant.

xi. As per termination clause in Clause 20 of the BTA

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(Pg.No.4520/Vol.XIII), the BTA can be terminated by mutual consent. Therefore, VISPL has a right to terminate the BTA. In case of termination of BTA, the call centre will remain with VISPL which on 8/5/2007 became a Vodafone group company. Therefore, if the intention was to transfer the call centre from one Hutch group company (GSPL) to another Hutch group company (HWP India), there would have been no need for such a termination clause. This proves that the call centre was to be transferred by Vodafone group to Hutch group with adequate safeguards built in. For example, the SPA provides that the call centre business could only be transferred to an affiliate of HWL. Even the Draft BTA has been made a part of SPA. Similarly, the clause 13(c) (Pg.No.505) ensures that the directors are not changed till the transfer is completed. Similarly, the interest in Vodafone is protected by clause 10.2 (Pg.No.498). This shows that it was not possible to sign the BTA before the share transfer. Hence, the contention of the appellant that the parties to the BTA are associated enterprises is incorrect.

106 In the financials of the Appellant, it is set out as : “Pursuant to

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the aforementioned BTA and completion of statutory formalities, the transfer was effective December 4, 2007". Another strong and irrefutably positive evidence of call centre being part of Vodafone Group for the period from 11.2.2007 to 4.12.2007 is the fact that in its financials for the year ended 31.3.2008, the appellant has not only shown its business being running of call centre (ITES) and holding of investment in call options but has also included the income from call centre business in its hands till the date of transfer. This proves that the transfer took place on 4 December, 2007.

107 After examining the above clauses of the BTA, it is submitted that the transfer call centre was always intended to take place only upon completion of conditions precedent and the same happened only on 4th December 2007. The appellant's return of income also supports the same conclusion. Hence, the date of the international transaction is 4th December, 2007 and the AE relationship is also examined based on the position existing as on 4th December 2007. The above conclusions are supported by the decisions in the case of Harish Chandra & Ors. vs. CIT (1985) 154 ITR 478(Del.) - para No.8, Smt.

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Raj Rani Devi Ramna vs. CIT (1993) 201 ITR 1032 (Pat.) - para No.4 and para No.6.

108 The respondents submit that the date that is relevant for the purpose of deciding the transfer of call centre is the date when the transfer of call centre took effect. The date of the BTA is not relevant for the purpose of deciding the date when the transfer of call centre took place. The BTA merely evidences the terms and conditions under which the transfer of the call centre will take place. The clauses extracted above show that the transfer could not have taken effect until fulfilment of various conditions which took place only on 04.12.2007. This reading is also in accordance with clause 8.8(j) of the SPA. Accordingly, it is submitted that the transfer of call centre business took place only on 04.12.2007 and not at any time before that.

109 In that view of the matter, when the transfer took place on 04.12.2007, the share transfer had already taken effect and the assessee was part of the Vodafone Group and HWP India was not an associate enterprise of the assessee. The revenue submits that it was

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not only the intention of the parties to transfer the call centre business only after fulfilment of various conditions specified in the BTA, but the transfer in fact took place on 04.12.2007. In this connection, it may not be out of place to mention that in the context of the transfer of shares, the relevant date considered for the purposes of determining AE relationship is 08.05.2007 when the SPA was executed and not 11.02.2007 when the SPA was entered into. For these reasons, it is submitted by Mr. Setalvad that there is no merit in this appeal and it be dismissed.

110 At the outset, we must indicate that the factual and legal position is admitted to an extent by the parties. Firstly, it is admitted that there was a writ petition filed in this Court by the company viz. VIH BV and which was contested by the respondents. That is involving an issue whether a transaction of acquisition of share and undertaken and completed overseas can be subjected to Indian tax laws and particularly levying a tax on income. In that writ petition, the original petitioner lost before a Division Bench of this Court and which in a detailed judgment held that the transaction has a nexus or

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connection with the Indian tax law and, therefore, can be subjected to Income Tax Act, 1961. Being dissatisfied with this judgment and order, the original petitioner carried the matter to the Hon'ble Supreme Court and by the judgment delivered and reported in *Vodafone India Holdings BV vs. Union of India 341 ITR 1,* the view taken by this Court was reversed. In other words, this Court's judgment was set aside. The Parliament then amended the Act and the definition of the term 'capital asset' in section 2(14) and 'transfer' in section 2(47) came to be amended. Certain words and expressions and explanations came to be added with retrospective effect. We must further clarify that the parties have proceeded on the basis that these retrospective amendments are constitutionally legal and valid. Their legality and validity is not questioned in these proceedings. Based on the words and expressions earlier used and now employed the parties have addressed us.

111 Now, certain developments and events post filing of the writ petition in this Court, during its pendency and when the matter was at large before the Hon'ble Supreme Court may be noted.

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112 By the impugned order, the Tribunal has partly allowed the assessee's appeal. We are not required to go into the correctness of the Tribunal's findings and conclusions on all grounds, save and except those which have been highlighted before us. We must note that it is with regard to ground Nos.2 to 6 in the Memo of Appeal before the Tribunal that the essential arguments were canvassed. These grounds are taken by the Tribunal together for consideration. From para 21 onwards, the Tribunal has noted the facts and found that the Hutchison Group, Hong Kong (HK) first invested into the telecom business in India in 1992. It invested as a group in an Indian joint venture vehicle by the name Hutchison Max Telecom Limited (HMTL) later renamed as Hutchison Essar Limited (HEL). On 12th January, 1998, CGP stood incorporated in Cayman Islands with limited liability as an exempted company its sole shareholder being Hutchison Telecommunications Limited, Hong Kong (HTL for short). This company HTL stood transferred to HTI (BVI) Holdings Limited [HTIHL (BVI) for short]. The Board resolution dated 17th September,2004, is referred in that regard. Hutchison Telecommunications Limited, Hong Kong, and

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thereafter HTIHL (BVI) was thus the buyer of the CGP share. HTIHL (BVI) was a wholly owned subsidiary (indirect), according to the Tribunal, of Hutchison Telecommunications International Limited (HTIL for short). In February, 2005, consolidation of of HMTL / HEL was effected. Consequently, all operating companies below HEL were held by one holding company HMTL / HEL. There were Indian Tier I companies above HMTL / HEL. The consolidation was first noted as early as July, 2003. On 28th October, 2005, VIH agreed to acquire 5.61% shareholding in Bharti Televentures Ltd. On the same day, Vodafone Mauritius Limited subsidiary of VIH agreed to acquire 4.39% shareholding in Bharti Enterprises Limited which indirectly held shares in Bharti Televentures Limited, now Bharti Airtel Limited. On 3rd November, 2005, Press Note 5 was issued by the Government of India enhancing the Foreign Direct Investment (FDI) ceiling from 49% to 74% in telecom sector. Under this Press Note proportionate foreign component held in any Indian company was also to be counted towards the ceiling of 74%. According to the Tribunal, since there was a sectoral cap / ceiling on the FDI in the telecom sector, the assessee (GSPL) entered into framework agreements in march, 2006

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under which the share holding of HEL was restructured through TII, an Indian company in which Analjit Singh and Asim Ghosh acquired shares through their group companies with the credit support provided by HTIL. In consideration of credit support, the parties entered into framework agreements under which call options were given to GSPL to buy from AG and AS companies, the entire share holding in TII and consequently indirect holding in HEL. The shareholding of HEL underwent a change in August, 2006 through execution of 2006 IDFC framework agreement on similar terms of providing financial assistance by HTIL and assessee and in consideration whereof the assessee would have call option to buy entire equity shares of SMMS thereby its entire holding in HEL. The GSPL was understood as the assessee in the Tribunal's order. The Tribunal in para 23 holds that due to the transfer of the entire share capital (single share) of CGP from HTIL group to VIH BV, the Vodafone group acquired the controlling interest in HEL via its subsidiary VIH BV through the subsidiary companies of HITL group with control of 67% in HEL including indirect 15% holding through framework agreements. New framework agreements were executed in the month of July 2007,

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between the assessee and Indian Partners holding 15% indirect interest in HEL. These new framework agreements were entered into because of change of holding group companies from HTIL to Vodafone. Certain changes in terms and conditions of 2007 framework agreements were made which has led to the controversy in question. The Assessing Officer has treated these changes being transfer / assignment of option rights held by the assessee in 2006 agreement in favour of its holding company VIH (BV) by virtue of 2007 framework agreements. In paragraph 24 of the Tribunal's order at running page 128, how the Tribunal understood the transaction further is quoted hereinbelow:

> *"24. The transaction of transfer of share holding of CGP by HTIL to VIH BV through share transfer agreement (STA) and in consequence the framework agreements of 2006 were re-written as framework agreement 2007 under which the assessee was holding option rights indirectly of 12.25% equity interest in HEL / Vodafone India Ltd. (VIL) through Asim Ghosh and Analjit Singh Group companies under the identical framework agreements."*

113 Then, the Tribunal proceeded to deal with the issue whether recasting of framework agreement in 2007 tantamounts to assignment of option rights held by the assessee under the framework agreement

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of 2006. The Tribunal had before it an argument and very seriously canvassed also before us, that the issues of fact and law now raised are fully covered by the decision of the Hon'ble Supreme Court in the case of *Vodafone India Holdings BV vs. Union of India 341 ITR 1* (supra). Reliance was placed on paragraph 88 of this judgment and several paragraphs which we will note hereinafter. However, the Tribunal's understanding of the matter and the issue is based on the judgment and order of a Division Bench of this Court in a Writ Petition which was filed by one of the parties post the Supreme Court judgment (supra). The Division Bench which delivered the judgment and reported in *359 ITR 133*, according to the Tribunal, notes not only the Supreme Court judgment (supra) but the amendments brought in the Act post that decision and with retrospective effect. That changes the nature and colour of the controversy according to the Tribunal. Hence in paragraph 26 the Tribunal holds that the issue of assignment of option rights has to be adjudicated by considering and examining the framework agreements along with any documents or developments subsequent or prior to the framework agreements in the light of the judgment of the Hon'ble Supreme Court, the observations of this

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Court as well as the amendments in section 2(47) together with transfer pricing provisions of the Act. The Tribunal was also of the view that the new facts and record brought before it are relevant. The argument of the assessee was that there was no transfer or assignment of call option in the present case as no call options were transferred in the framework agreements of 2007. The assessee continued to hold these rights. Reliance was placed, according to the Tribunal, on clause 4.4 of the framework agreements and it was urged that it is identical to or substantially similar to the counterpart clause of the 2006 framework agreement though the language is different. These documents were drafted by different set of foreign lawyers. The assessee's arguments were noted, particularly that there was no material difference between the clauses and, in any case, the new clause 4.4 by no stretch of imagination constitutes *ipso facto* or *ipso jure* any divestiture or assignment of the call option right from the assessee to VIH BV or to any other entity. The argument principally, therefore, was that the issue stands concluded by the judgment of the Hon'ble Supreme Court (supra). We would proceed on the footing that paragraphs 26 to 29 of the Tribunal's order merely note the rival

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contentions.

114 However the position with regard to paragraph 30 onwards is different inasmuch as in the said paragraphs, the Tribunal specifically negates the argument of the assessee's senior counsel that the issue stands concluded by the judgment of the Hon'ble Supreme Court (supra). The reason for the same is to be found in paragraph 31 where the Tribunal concludes that the Hon'ble Supreme Court examined the question in the context of transfer of asset of the assesseee by its holding company HTIL to VIH BV, by virtue of share transfer agreements along with framework agreement and found that despite the transfer of share holding by HTIL to VIH BV, the same would not result in transfer of asset of the assessee to VIH BV. The Tribunal took the view that the question was dealt with only in the context of transaction between HTIL and VIH BV by virtue of share transfer agreement and not in the context of transfer of option rights by the assessee to its affiliate. The understanding of the Tribunal of this judgment and which has been heavily criticised needs to be noted and in the words of the Tribunal itself :

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> *"Therefore, at the first place the judgment of Hon'ble Supreme Court is not based on the finding of facts as examined and investigated by any of the fact finding authority and consequently it is binding on all subordinate courts only on the point of principle laid down on the substantial question of law. The judgment rendered by the Hon'ble Supreme Court under extraordinary special writ jurisdiction is based either on undisputed facts or on assumption of facts and cannot be said that the said judgment is binding even on the finding of facts in a dispute between different parties. Further the judgment of Hon'ble Supreme Court is based upon the unamended provisions of section 2(47) of IT Act in the context of limited facts and documents considered therein and therefore, so far as the applicability of amended provisions of section 2(47) to the facts including new facts of the case are concerned, the judgment of Hon'ble Supreme Court would not be regarded as binding precedent. However if the amended provisions of section 2(47) are not found to be applicable on the facts of the case in hand then, the judgment of the Hon'ble Supreme Court to the extent of interpretation of the agreements and the provisions of section 2(47) would be binding on all the authorities and courts including this Tribunal."*

115 Thus, the Tribunal understood that if the amended provisions of section 2(47) are not found to be applicable to the facts of the case in hand, then, the Supreme Court's observations and conclusions with regard to the nature of the agreements, interpretation of their clauses would bind all authorities and others, including the Tribunal.

116 The Tribunal found that it is incumbent upon it to examine the

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framework agreements, including the additional evidence produced in the light of the amended provisions of section 2(47) of the Income Tax Act as well as sections 92B / 92F of the said Act.

117 We are of the view that before proceeding further it is necessary to dispose of the first contention of Mr. Salve, the learned senior counsel appearing on behalf of the assessee. He had argued and very vehemently that the matter must go back to the Tribunal as the appellant had no opportunity to meet the case of the Revenue on the agreement between TII and CGP dated 5th July, 2007. However, at the same time he argued that it will not make any difference because the entire issue stands covered by the judgment of the Hon'ble Supreme Court (supra). Mr. Salve submits that all the arguments of the Revenue have been considered by the Hon'ble Supreme Court and no revisiting or reconsideration of the said judgment is permissible. Mr. Salve has also urged that a call option was not exercised and never exercised. A put option is not the same as call option. That there is no fraud and perpetrated on the Revenue by the assessee inasmuch as the essential difference between these two options has been lost sight of.

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One is to get hold and the other is to go out. At best, the put option is exercised in later years. There is an extensive reference made by Mr. Salve to the ownership chart. In such circumstances and when this is the sweep of the arguments, it would be futile to send the matter back to the Tribunal and at this belated stage. The parties having addressed us on all material and relevant aspects with regard to ground Nos.2 to 6 as forming part of the Tribunal's Memo of Appeal and record, then, all the more this request of Mr. Salve need not detain us.

118 It need not be granted also because we are going to consider the issue as to whether the judgment of the Hon'ble Supreme Court in the first Vodafone case covers the present controversy. Once we have heard both sides on this aspect extensively and are considering their arguments, all the more the first contention of Mr. Salve on the matter going back must be rejected. It is, accordingly, rejected.

119 One more reason for rejecting the same is that Mr. Salve has taken us not only through the judgment of the Hon'ble Supreme Court extensively, but the Tribunal's order impugned in this case and urged

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that some of the findings in the impugned order of the Tribunal are in favour of the appellant. He urged that the Revenue never argued that there was an assignment in favour of CGP Mauritius and in that regard our attention has been invited to the chart at page 6, the framework agreements, the written submissions of the Revenue as are found in Vol. 13 Page 4490, the appellant's written submissions page 4485 at para 1 and an order of the Transfer Pricing Officer Vol. 14 Pg. 1102, 1175, 1270 and 1315(d). Once he has taken us through all these materials, but complained that the Tribunal never put the case noted by it in paragraphs 40, 41 and 42 of its order to the assessee, then, the request that the matter must go back could have been considered favourably. However, Mr. Salve has also addressed us in the alternative on the nature of the options, their implications and consequences in law. Once having addressed us and in this manner, we do not deem it fit and proper to accede to his request of sending the matter back. That will not serve any fruitful purpose. Once the Tribunal has taken pains and an enormous effort and delivered a lengthy order, then, sending the matter back would result in delay in adjudication of the issue by the Tribunal and thereafter by a higher

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Court. There have been several rounds of litigation between the parties, hence further delay in taking a decision on Revenue matters and involving an important question of law will not serve larger public interest and public purpose either. Hence this request is rejected.

120 Since section 2(47) of the Income Tax Act, 1961, has been relied upon before reproducing it one aspect needs to be noticed and that is the term 'transfer' is defined in relation to a "capital asset". That term itself is defined in section 2(14) and to read as follows :

> *"**2.** In this Act, unless the context otherwise requires,-*
> *…………*
> *(14) "capital asset" means property of any kind held by an assessee whether or not connected with his business or profession, but does not include -*
> *(i) any stock-in-trade, 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.*

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

(a) ornaments made of gold, silver, platinum or any other precious material 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 stone, whether or not set in any furniture, utensil or other article or worked or sewn into any wearing apparel;

(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; [according to the last preceding census of which the relevant figures have been published before the first day of the previous year; or

(b) in any area within the distance, not being more than eight kilometres, from the local limits of any municipality or cantonment board referred to in item (a) as the Central Government may, having regard to the extent of, and scope for, urbanisation of that area and other relevant considerations, specify in this behalf by notification in the Official Gazette.

The following item (b) shall be substituted for the existing item (b) of sub-clause (iii) of clause (14) of section 2 by the Finance Act,20123, w.e.f. 1.4.2014 :

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

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(I) not being more than two kilometers, 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 kilometers, 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 kilometers, 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 ½ per cent Gold Bonds, 1991, 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 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;"

121 This explanation has been inserted by the Finance Act, 2012 with retrospective effect from 1st April, 1962. It clarifies as to how the

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word 'property' includes and shall be deemed to have included any rights in or in relation to an Indian company and including the rights falling in the later part of this explanation. Therefore, a capital asset means property of any kind held by an assessee whether or not connected with his business or profession and which is not covered by the exceptions or the exclusionary part. The term 'transfer' is defined in section 2(47) and reads as under :

> *"2. In this Act, unless the context otherwise requires, -*
> *…………*
> *(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 allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882); or*

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(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 whatsover) 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;"

122 Heavy reliance is placed on both explanations and, therefore, we have reproduced the entire section. The term 'transfer' has been defined in an inclusive manner. It includes the sale, exchange or relinquishment of a capital asset or extinguishment of the rights therein or its compulsory acquisition and various acts and transactions which have the effect of transferring the asset are covered. Explanation -1 is for sub-clauses (v) and (vi) of clause (47) of section

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2 and we will not be required to refer to it in any details.

123 For our purpose, the Explanation - 2 is relevant and which also has been inserted retrospectively by the Finance Act, 2012. What the Explanation does is to remove doubts and to clarify that transfer includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein or creating any interest in any asset in any manner whatsoever directly or indirectly, absolutely or conditionally, voluntarily or involuntarily and by way of an agreement whether entered into in India or outside India or otherwise, notwithstanding that such transfer of rights has been characterised or has been effected or is dependent upon or flowing from the transfer of a share or shares of the company registered or incorporated outside India. Thus, this definition as earlier inserted has been substituted later by the Taxation Laws (Amendment) Act, 1984, with effect from 1st April, 1985. The inclusive portion thereof has been inserted by subsequent Finance Acts. However, the fact remains that the word is defined in relation to a capital asset. The word 'capital asset' has been defined in the manner noted above. That term or word has been

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defined to mean property of any kind. In turn, that expression is taken to have included and always included any rights in or in relation to an Indian company as explained by the explanation inserted in section 2(14) of the Income Tax Act, 1961, with retrospective effect.

124 The arguments and which revolve around the two Explanations are essentially that given the nature of the transaction covered by the Supreme Court judgment the definition and with the wide Explanations will or will not make a difference. The assessee submits given the nature of the transaction and as noted by the Hon'ble Supreme Court, the essential ingredients of the section are not attracted and have not been satisfied. They would urge that for this definition of the term 'transfer' to apply and together with its Explanation, the Court will have to first decide whether there is any capital asset and which is subject matter of the transaction and further whether the capital asset has been transferred in the manner set out in section 2(47) including its explanations.

125 Mr. Salve would urge that everything that is decided in this case

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by the Tribunal and by the impugned order in elaborate details has been already considered and gone into by the Hon'ble Supreme Court. The Hon'ble Supreme Court has already held that at best there is transfer of a share but not an asset. That is not a conclusion according to Shri Salve in abstract, but after analysing all the transactions in great depth. Several facets thereof have been noted by the Hon'ble Supreme Court and the controversy has been dealt with from all angles.

126 To appreciate this argument and to the contrary canvassed by Mr. Setalvad we would have to note the facts and circumstances so also the backdrop in which the Hon'ble Supreme Court delivered its judgment.

127 The Tribunal, as far as the merits are concerned, referred to the rival contentions and from paragraph 37 onwards it proceeded to consider them. The Tribunal referred to the shareholder agreement dated 5th July, 2007 but prior thereto, it took note of the shareholding pattern of Analjit Singh and Asim Ghosh group of companies through

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their 100% subsidiaries in TII as given in the ownership chart. It referred to this ownership chart and from that the Tribunal concluded that Asim Ghosh and Analjit Singh were holding 23.97% and 38.78% shares respectively in TII through their 100% subsidiaries. Thus, the Asim Ghosh and Analjit Singh group of companies were together holding 12.25% shares in HEL through TII. The option rights in the framework agreements of 2007 were essentially in respect of this 12.25% share holding of these two groups in HEL through their subsidiaries and then through their share holding in TII. After having concluded that the assignment of call options by the assessee was not before the Hon'ble Supreme Court and, therefore, to the extent of assignment / transfer of call options by the assessee to its associate enterprise this judgment of the Hon'ble Supreme Court will have no bearing, the Tribunal proceeded to consider the issue of assignment / transfer of call options held by the assessee under the framework agreements. The Tribunal's exercise is founded on the conclusions reached in paragraphs 30 and 31 that the judgment of the Hon'ble Supreme Court of India would not be of assistance in resolving the controversy. Mr. Salve, however, has urged to the contrary and for

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that purpose, we must first refer to the Supreme Court judgment for what it considered and decided.

128 However, before embarking on that exercise, we must clear the ground on how a judgment of a superior court has been termed by the Hon'ble Supreme Court as a binding precedent. What binds the Court is the *ratio decidendi* in the judgment of a superior court or a coordinate court. *Ratio decidendi* means the reasons for deciding grounds of the decision. Therefore, it is not permissible to ignore the same by undertaking a exercise or process unknown to law. A inferior court or Tribunal ordinarily should not venture to chart a course of getting over or brushing aside the ratio in the judgment of a superior court on a issue arising before it once it is admitted that it is identical. The word "precedents" is understood as under :

> *"In law a precedent is an adjudged case or decision of a Court of justice, considered as furnishing a rule or authority for the determination of an identical or similar case afterwards arising, or of a similar question of law. The only theory on which it is possible for one decision to be an authority for another is that the principle which governed the first case is applicable to the variant facts. WILLIAM M. LILE et al., Brieg Making and Use of Law Books 288 (3d ed. 1914).*

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> *"A precedent . . . . . is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the ratio decidendi. The concrete decision is binding between the parties to it, but it is the abstract ratio decidendi which alone has the force of law as regards the world at large." JOHN SALMOND, Jurisprudence 191 (GLANVILLE L., WILLAMS ed., 10th ed. 1947)*

A binding precedent being applied to the same or similar set of facts and issues and following it ensures and guarantees certainty, finality and discipline all of which are necessary for the proper functioning of judiciary. Not adopting such an approach on the specious plea that a different argument is canvassed and all aspects or facets of the issue involved were not considered or dealt with in the binding precedent though the point or question raised in the subsequent matter is identical, will be counter productive. It will encourage those interested in confusing or creating uncertainties and chaos in the decision making. Eventually, this would be subversive to the rule of law. Since Mr. Salve and Mr. Setalvad were agitated and disturbed and the assessee and Revenue were engaged in a fairly detailed but charged argument before the Tribunal that we have said so much on this issue. We remind all concerned about what the Hon'ble

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Supreme Court has repeatedly emphasized. In *AIR 2013 SC 1048 (Ravinder Singh vs. Sukhbir Singh & Ors.)*, the Hon'ble Supreme Court reiterated the principle in the following words:

> *"21. There can be no dispute with respect to the settled legal proposition that a judgment of this Court is binding, particularly when the same is that of a co-ordinate bench, or of a larger bench. It is also correct to state that, even if a particular issue has not been agitated earlier, or a particular argument was advanced, but was not considered, the said judgment does not lose it binding effect, provided that the point with reference to which an argument is subsequently advanced, has actually been decided. The decision, therefore, would not lose its authority, "merely because it was badly argued, inadequately considered or fallaciously reasoned". The case must be considered taking not of the ratio decidendi of the same i.e., the general reasons, or the general grounds upon which, the decision of the court is based, or on the test or abstract, of the specific peculiarities of the particular case, which finally gives rise to the decision. (Vide: Smt.Somavanti & Ors. v. The State of Punjab & Ors., AIR 1963 SC 151; Ballbhdas Mathuradas Lakhani & Ors. v. Municipal Committee, Malkapur, AIR 1970 SC 1002; Ambika Prasad Mishra v. State of U.P. & Ors., AIR 1980 SC 1762; and Director of Settlements, A.P. & Ors. v. M.R. Apparao & Anr., AIR 2002 SC 1598 : (2002 AIR SCW 1504)).*
>
> *22. In The Direct Recruit Class-II Engineering Officers' Association & Ors. v. State of Maharashtra & Ors., AIR 1990 SC 1607 : (1991 AIR SCW 2226), a Constitution Bench of this Court has taken a similar view, observing that the binding nature of a judgment of a court of competent jurisdiction, is in essence a part of the rule of law on the basis of which, administration of justice depends. Emphasis on this point by the*

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> *Constitution Bench is well founded, and a judgment given by a competent court on merits must bind all parties involved until the same is set aside in appeal, and an attempted change in the form of the petition or in its grounds, cannot be allowed to defeat the plea. (See also: Daryao & Ors. v. State of U.P. & Ors., AIR 1961 SC 1457; and Forward Construction Co., & Ors. v. Prabhat Mandal (Regd.), Andheri & Ors. AIR 1986 SC 391).*

129 The Supreme Court noted in the first case that there was an acquisition by VIH BV, a company resident for tax purposes in Netherlands of the entire share capital of CGP Investments (Holdings) Limited (for short CGP), a company resident for tax purposes in Cayman Islands by transaction dated 11th February, 2007 and whose aim was acquisition of 67% controlling interest in HEL being a company resident for tax purposes in India. That was disputed by VIH BV saying that it agreed to acquire a company which in turn controlled 67% interest but not controlling interest in HEL. VIH BV contended that CGP held indirectly through other companies 52% shareholding interest in HEL as well as options to acquire further 15% shareholding interest in HEL subject to relaxation of FDI norms. Thus, the Supreme Court was considering the attempt of the Revenue to tax the capital gains arising from the sale of share capital of CGP on

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the basis that CGP may not be a tax resident in India but it holds underlying Indian assets.

130 That is how from paragraph 3 onwards in its judgment, the Hon'ble Supreme Court set out the relevant facts. The Supreme Court also referred to the TII framework and shareholders agreement dated 1st March 2006 under which the shareholding of HEL was restructured through TII an Indian company in which Analjit Singh and Asim Ghosh acquired shares through their group companies and with the credit support provided by HTIL. In consideration of this credit support parties entered into framework agreements under which the call option was given to 3 Global Services Private Limited, a subsidiary of HTIL to buy from Gold Spot Mercantile Company Private Limited, an Asim Ghosh company and Scorpio Beverages (Private) Limited, an Analjit Singh company, their entire shareholding in TII. Additionally, a subscription right was also provided allowing GSPL a right to subscribe to the share of Centrino Trading Company Private Limited and ND Callus Info Services Private Limited. GSPL was an Indian company under a Mauritius subsidiary of CGP and

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stood indirectly held by HTIL. These agreements also contained clauses which imposed restrictions to transfer downstream interests, termination rights, subject to objection from any party. Thereafter, it referred to the shareholding of HEL in paragraph 10 and in paragraph 11 reference was made to an open offer by Vodafone Group Plc. to Hutchison Whampoa Limited, a non-binding bid and then the Hon'ble Supreme Court makes reference to the further facts right upto paragraph 23 which indicated Vodafone's acquisition of controlling interest in HEL via its subsidiary VIH and companies which control 67% interest in HEL. We find that there is a reference made to the indirect holding in HEL. Thereafter, there is a letter addressed by Asim Ghosh to HEL confirming that he through his 100% Indian companies, owned 23.97% of a joint venture company TII which in turn owned 19.54% of HEL and, accordingly, his indirect interest in HEL worked out to 4.68%. He informed that he had full and unrestricted voting rights in companies owned by him and that he would receive credit support for his investments but primary liability was with his companies. A similar letter was addressed by Analjit Singh on 5th March, 2007, to the Foreign Investment Promotion

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Board. Analjit Singh acquired 7.577% interest of HEL through his companies. Then, there is reference made to Essar's objections with the Foreign Investment Promotion Board (FIPB) and what we find is that by a letter dated 14th March, 2007, addressed by VIH to the FIPB, it stood confirmed that VIH's effective shareholding in HEL would be 51.96%. Following the completion of acquisition of HTIL's shares in HEL, the ownership of HEL is then what is set out by the Hon'ble Supreme Court in paragraph 33. VIH would own 42% direct interest in HEL through its acquisition of 100% CGP. Through CGP, VIH would also own 37.25% in TII which in turn, owns 19.54% in HEL and 38% in Omega which in turn own 5.11% in HEL. These investments combined would give VIH a controlling interest of 52% in HEL. In addition, HTIL's existing Indian partners AG, AS and IDFC who between them held 15% interest in HEL agreed to return their shareholdings with full control, including voting rights and dividend rights. In other words, none of the Indian partners exited and, consequently, there was no change of control. Then there are references made to the settlement agreement between HTIL and the Essar group and in paragraph 38, there is a reference to letter dated

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17th March, 2007, by which HTIL confirmed in writing to AS that it had no beneficial or legal or any other right in AS's TII interest or HEL interest. The reference then extensively is made to the correspondence between FIPB and VIH and from paragraph 49 onwards, what we find is that June 06, 2007, framework agreement, June 27, 2007 declaration of a special dividend by HTIL is referred and in paragraph 50, the Supreme Court refers to the July 05, 2007, framework agreement and then from paragraph 54 the Hon'ble Supreme Court referred to the ownership structure which has been also placed before us. The Hon'ble Supreme Court summed up the case by holding that CGP held 43.34% in HEL through 100% wholly owned subsidiaries viz. Mauritius companies, 9.62% indirectly through TII and Omega and 15.03% through GSPL route. In paragraph 56 the GSPL route was explained by pointing out that on 11th February, 2007, the AG group of companies held 23.97% in TII, AS group held 38.78% in TII whereas SMMS held 54.25% in Omega. The holdings of AG, AS and SMMS came under the option route. The Court noted that GSPL is an Indian company indirectly owned by CGP. It held call options and subscription options to be exercised in

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future under circumstances spelt out in TII and IFDC framework agreements (keeping in mind the sectoral cap of 74%). Then, the several tests and the distinction between "*look at*" and "*look through*" tests are referred and in paragraph 72, the primary argument on behalf of the Revenue was considered viz. that the SPA, commercially construed, evidences transfer of HTIL's transfer of property rights by their extinguishment. The Revenue urged that HTIL under the SPA directly extinguished its rights of control and management which are property rights over HEL and its subsidiaries and consequent upon such extinguishment there was a transfer of capital asset situate in India. The features of the SPA were highlighted and one of them was that the 2006 shareholders / framework agreements had to be continued upon transfer of control of HEL to VIH so that VIH could step into the shoes of HTIL. Such continuance was ensured by payment of money to AS and AG by VIH failing which AS and AG could have walked out of those agreements which would have jeopardised VIH's control over 15% of the shares of HEL and consequently stake of HTIL in TII would have stood reduced to minority.

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131 Then, in paragraph 73 and after referring to all these salient features, the Supreme Court concluded that it is concerned with the sale of shares and not with the sale of assets item-wise. Sale of entire investment made by HTIL through a top company viz. CGP in the Hutchison Structure is involved in the case. Therefore, the Supreme Court is required to apply the "*look at*" test. The Revenue adopted a dissecting approach and, therefore, its stand vacillated.

132 Then, the Hon'ble Supreme Court, in paragraph 74 held as under :

> *"74. Be that as it may, did HTIL possess a legal right to appoint directors onto the board of HEL and as such had some "property right" in HEL? If not, the question of such a right getting "extinguished" will not arise. A legal right is an enforceable right. Enforceable by a legal process. The question is what is the nature of the "control" that a parent company has over its subsidiary. It is not suggested that a parent company never has control over the subsidiary. For example, in a proper case of "lifting of corporate veil", it would be proper to say that the parent company and the subsidiary form one entity. But barring such cases, the legal position of any company incorporated abroad is that its powers, functions and responsibilities are governed by the law of its incorporation. No multinational company can operate in a foreign jurisdiction save by operating independently as a "good local citizen". A company is a separate legal persona and the fact that all its shares are owned by one person or by the parent company has*

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nothing to do with its separate legal existence. If the owned company is wound up, the liquidator, and not its parent company, would get hold of the assets of the subsidiary. In none of the authorities have the assets of the subsidiary been held to be those of the parent unless it is acting as an agent. Thus, even though a subsidiary may normally comply with the request of a parent company it is not just a puppet of the parent company. The difference is between having power or having a persuasive position. Though it may be advantageous for parent and subsidiary companies to work as a group, each subsidiary will look to see whether there are separate commercial interests which should be guarded. When there is a parent company with subsidiaries, is it or is it not the law that the parent company has the "power" over the subsidiary. It depends on the facts of each case. For instance, take the case of a one-man company, where only one man is the shareholder perhaps holding 99% of the shares, his wife holding 1%. In those circumstances, his control over the company may be so complete that it is his alter ego. But, in case of multinationals it is important to realise that their subsidiaries have a great deal of autonomy in the country concerned except where subsidiaries are created or used as a sham. Of course, in many cases the courts do lift up a corner of the veil but that does not mean that they alter the legal position between the companies. The directors of the subsidiary under their Articles are the managers of the companies. If new directors are appointed even at the request of the parent company and even if such directors were removable by the parent company, such directors of the subsidiary will owe their duty to their companies (subsidiaries). They are not to be dictated by the parent company if it is not in the interests of those companies (subsidiaries). The fact that the parent company exercises shareholder's influence on its subsidiaries cannot obliterate the decision-making power or authority of its (subsidiary's) directors. They cannot be reduced to be puppets. The decisive criteria is whether the parent company's management has such steering interference with the subsidiary's core activities that subsidiary can no longer be regarded to perform those activities on the

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HIGH COURT OF JUDICATURE AT BOMBAY

authority of its own executive directors.

133 In paragraphs 75 and 76, the Supreme Court held as under :

> *"75. Before dealing with the submissions advanced on behalf of the Revenue, we need to appreciate the reason for execution of the SPA. Exit is an important right of an investor in every strategic investment. The present case concerns transfer of investment in entirety. As stated above, exit coupled with continuity of business is one of the important tell-tale circumstances which indicates the commercial/business substance of the transaction. Thus, the need for SPA arose to readjust the outstanding loans between the companies; to provide for standstill arrangements in the interregnum between the date of signing of the SPA on February 11, 2007, and its completion on May 8, 2007; to provide for a seamless transfer and to provide for fundamental terms of price, indemnities,warranties etc. As regards the right of HTIL to direct a downstream subsidiary as to the manner in which it should vote is concerned, the legal position is well settled, namely, that even though a subsidiary may normally comply with the request of a parent company, it is not just a puppet of the parent company. The difference is between having the power and having a persuasive position. A great deal depends on the facts of each case. Further, as stated above, a company is a separate legal persona, and the fact that all the shares owned by one person or company has nothing to do with the existence of a separate company. Therefore, though it may be advantageous for a parent and subsidiary companies to work as a group, each subsidiary has to protect its own separate commercial interests. In our view, on the facts and circumstances of this case,the right of HTIL, if at all it is a right, to direct a downstream subsidiary as to the manner in which is should vote would fall in the category of a persuasive position / influence rather than having a power over the subsidiary. In this connection, the following facts are relevant.*
>
> *76. Under the Hutchison structure, the business was*

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carried on by the Indian companies under the control of their Board of Directors, though HTIL, as the Group holding company of a set of companies, which controlled 42% plus 10% (pro rata) shares, did influence or was in a position to persuade the working of such Board of Directors of the Indian companies. In this connection, we need to have a relook at the ownership structure. It is not in dispute that 15% out of 67% stakes in HEL was held by AS, AG and IDFC companies. That was one of the main reasons for entering into separate Shareholders and Framework Agreements in 2006, when Hutchison structure existed, with AS, AG and IDFC. HTIL was not a party to the agreements with AS and AG, though it was a party to the agreement with IDFC. That, the ownership structure of Hutchison clearly shows that AS, AG and SMMS (IDFC) group of companies, being Indian companies, possessed 15% control in HEL. Similarly, the term sheet with Essar dated 5.07.2003 gave Essar the RoFR and right to tag along with HTIL and exit from HEL. Thus, if one keeps in mind the Hutchison structure in its entirety, HTIL as a Group holding company could have only persuaded its downstream companies to vote in a given manner as HTIL had no power nor authority under the said structure to direct any of its downstream companies to vote in a manner as directed by it (HTIL). Facts of this case show that both the parent and the subsidiary companies worked as a group since 1994. That, as a practice, the subsidiaries did comply with the arrangement suggested by the Group holding company in the matter of voting, failing which the smooth working of HEL generating huge revenues was not possible. In this case, we are concerned with the expression "capital asset" in the income tax law. Applying the test of enforceability, influence/ persuasion cannot be construed as a right in the legal sense. One more aspect needs to be highlighted. The concept of "de facto" control, which existed in the Hutchison structure, conveys a state of being in control without any legal right to such state. This aspect is important while construing the words "capital asset" under the income tax law. As stated earlier, enforceability is an important aspect of a legal right. Applying these tests, on the facts of this case and that too in

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the light of the ownership structure of Hutchison, we hold that HTIL, as a Group holding company, had no legal right to direct its downstream companies in the matter of voting, nomination of directors and management rights. As regards continuance of the 2006 Shareholders/Framework Agreements by SPA is concerned, one needs to keep in mind two relevant concepts, viz., participative and protective rights. As stated, this is a case of HTIL exercising its exit right under the holding structure and continuance of the telecom business operations in India by VIH by acquisition of shares. In the Hutchison structure, exit was also provided for Essar, Centrino, NDC and SMMS through exercise of Put Option/TARs, subject to sectoral cap being relaxed in future. These exit rights in Essar, Centrino, NDC and SMMS (IDFC) indicate that these companies were independent companies. Essar was a partner in HEL whereas Centrino, NDC and SMMS controlled 15% of shares of HEL (minority). A minority investor has what is called as a "participative" right, which is a subset of "protective rights". These participative rights, given to a minority shareholder, enable the minority to overcome the presumption of consolidation of operations or assets by the controlling shareholder. These participative rights in certain instances restrict the powers of the shareholder with majority voting interest to control the operations or assets of the investee. At the same time, even the minority is entitled to exit. This "exit right" comes under "protective rights". On examination of the Hutchison structure in its entirety, we find that both, participative and protective rights, were provided for in the Shareholders/ Framework Agreements of 2006 in favour of Centrino, NDC and SMMS which enabled them to participate, directly or indirectly, in the operations of HEL. Even without the execution of SPA, such rights existed in the above agreements. Therefore, it would not be correct to say that such rights flowed from the SPA. One more aspect needs to be mentioned. The Framework Agreements define "change of control with respect to a shareholder" inter alia as substitution of limited or unlimited liability company, whether directly or indirectly, to direct the policies/ management of the respective shareholders, viz., Centrino, NDC, Omega.

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Thus, even without the SPA, upon substitution of VIH in place of HTIL, on acquisition of CGP share, transition could have taken place. It is important to note that "transition" is a wide concept. It is impossible for the acquirer to visualize all events that may take place between the date of execution of the SPA and completion of acquisition. Therefore, we have a provision for standstill in the SPA and so also the provision for transition. But, from that, it does not follow that without SPA, transition could not ensue. Therefore, in the SPA, we find provisions concerning Vendor's Obligations in relation to the conduct of business of HEL between the date of execution of SPA and the closing date, protection of investment during the said period, agreement not to amend, terminate, vary or waive any rights under the Framework/ Shareholders Agreements during the said period, provisions regarding running of business during the said period, assignment of loans, consequence of imposition of prohibition by way of injunction from any court, payment to be made by VIH to HTIL, giving of warranties by the Vendor, use of Hutch Brand, etc. The next point raised by the Revenue concerns termination of IDFC Framework Agreement of 2006 and its substitution by a fresh Framework Agreement dated 5.06.2007 in terms of the SPA. The submission of the Revenue before us was that the said Agreement dated 5.06.2007 (which is executed after the completion of acquisition by VIH on 8.05.2007) was necessary to assign the benefits of the earlier agreements of 2006 to VIH. This is not correct. The shareholders of ITNL (renamed as Omega) were Array through HTIL Mauritius and SMMS (an Indian company). The original investors through SMMS (IDFC), an infrastructure holding company, held 54.21% of the share capital of Omega; that, under the 2006 Framework Agreement, the original investors were given Put Option by GSPL [an Indian company under Hutchison Teleservices (India) Holdings Limited (Ms)] requiring GSPL to buy the equity share capital of SMMS; that on completion of acquisition on 8.05.2007 there was a change in control of HTIL Mauritius which held 45.79% in Omega and that changes also took place on 5.06.2007 within the group of original investors with the exit of IDFC and SSKI.

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In view of the said changes in the parties, a revised Framework Agreement was executed on 6.06.2007, which again had call and put option. Under the said Agreement dated 6.06.2007, the Investors once again agreed to grant call option to GSPL to buy the shares of SMMS and to enter into a Shareholders Agreement to regulate the affairs of Omega. It is important to note that even in the fresh agreement the call option remained with GSPL and that the said Agreement did not confer any rights on VIH. One more aspect needs to be mentioned. The conferment of call options on GSPL under the Framework Agreements of 2006 also had a linkage with intra-group loans. CGP was an Investment vehicle. It is through the acquisition of CGP that VIH had indirectly acquired the rights and obligations of GSPL in the Centrino and NDC Framework Agreements of 2006 [see the report of KPMG dated 18.10.2010] and not through execution of the SPA. Lastly, as stated above, apart from providing for "standstill", an SPA has to provide for transition and all possible future eventualities. In the present case, the change in the investors, after completion of acquisition on 8.05.2007, under which SSKI and IDFC exited leaving behind IDF alone was a situation which was required to be addressed by execution of a fresh Framework Agreement under which the call option remained with GSPL. Therefore, the June, 2007 Agreements relied upon by the Revenue merely reiterated the rights of GSPL which rights existed even in the Hutchison structure as it stood in 2006. It was next contended that the 2003 Term Sheet with Essar was given effect to by clause 5.2 of the SPA which gave Essar the Right to Tag Along with HTIL and exit from HEL. That, the Term Sheet of 5.07.2003 had legal effect because by a specific settlement dated 15.03.2007 between HTIL and Essar, the said Term Sheet stood terminated which was necessary because the Term Sheet bound the parties in the first place. We find no merit in the above arguments of the Revenue. The 2003 Term Sheet was between HTIL, Essar and UMTL. Disputes arose between Essar and HTIL. Essar asserted RoFR rights when bids were received by HTIL, which dispute ultimately came to be settled on 15.03.2007, that is after the SPA dated 11.02.2007. The SPA did not

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create any rights. The RoFR/TARs existed in the Hutchison structure. Thus, even without SPA, within the Hutchison structure these rights existed. Moreover, the very object of the SPA is to cover the situations which may arise during the transition and those which are capable of being anticipated and dealt with. Essar had 33% stakes in HEL. As stated, the Hutchison structure required the parent and the subsidiary to work together as a group. The said structure required the Indian partners to be kept in the loop. Disputes on existence of RoFR/ TARs had to be settled. They were settled on 15.03.2007. The rights and obligations created under the SPA had to be preserved. In any event, preservation of such rights with a view to continue business in India is not extinguishment."

134 After setting out what is a SPA, why it is executed, what object it achieves and its ultimate impact, in paragraph 77, the Hon'ble Supreme Court concluded that under the HTIL structure as existed in 1994, HTIL occupied only a persuasive position / influence of downstream companies qua manner of voting, nomination of directors and management rights. That the minority shareholders / investors had participative and protective rights which flowed from the CGP share. The Supreme Court specifically referred to the call and put options. That the entire investment was sold to VIH through the investment vehicle CGP. Therefore, there was no extinguishment of rights as alleged by the Revenue.

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135 Then, the Supreme Court referred to the role of CGP in the transaction and this reference is made in paragraph 79 and in paragraph 83, the Court concluded as under :

> *"83. According to the Revenue, the entire case of VIH was that it had acquired only 42% (or, accounting for FIPB regulations, 52%) is belied by clause 5.2 of the Shareholders Agreement. In this connection, it was urged that 15% in HEL was held by AS/ AG/ IDFC because of the FDI cap of 74% and, consequently, vide clause 5.2 of the Shareholders Agreement between these entities and HTIL downstream subsidiaries, AS/AG/IDFC were all reigned in by having to vote only in accordance with HTIL's dictates as HTIL had funded the purchase by these gentlemen of the HEL shares through financing of loans. Further, in the Term Sheet dated 15.03.2007, that is, between VIH and Essar, VIH had a right to nominate 8 directors (i.e. 67% of 12) and Essar had a right to nominate 4 directors which, according to the Revenue, evidences that VIH had acquired 67% interest in HEL and not 42%/52%, as sought to be propounded by it. According to the Revenue, right from 22.12.2006 onwards when HTIL made its first public announcement, HTIL on innumerable occasions represented its direct and indirect "equity interest" in HEL to be 67% - the direct interest being 42.34% and indirect interest in the sense of shareholding belonging to Indian partners under its control, as 25%. Further, according to the Revenue, the purchase price paid by VIH was based on an enterprise value of 67% of the share capital of HEL; this would never have been so if VIH was to buy only 42.34% of the share capital of HEL and that nobody would pay US $2.5 bn extra without control over 25% in HEL. We find no merit in the above submissions. At the outset, it may be stated that the expression "control" is a mixed question of law and fact. The basic argument of the Revenue is based on the equation of "equity interest" with the word "control". On perusal of Hutchison structure, we find that HTIL had, through its 100% wholly owned subsidiaries,*

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> *invested in 42.34% of HEL (i.e. direct interest). Similarly, HTIL had invested through its non-100% wholly owned subsidiaries in 9.62% of HEL (through the pro rata route). Thus, in the sense of shareholding, one can say that HTIL had an effective shareholding (direct and indirect interest) of 51.96% (approx. 52%) in HEL. On the basis of the shareholding test, HTIL could be said to have a 52% control over HEL. By the same test, it could be equally said that the balance 15% stakes in HEL remained with AS, AG and IDFC (Indian partners) who had through their respective group companies invested 15% in HEL through TII and Omega and, consequently, HTIL had no control over 15% stakes in HEL. At this stage, we may state that under the Hutchison structure shares of Plustech in the AG Group, shares of Scorpios in the AS Group and shares of SMMS came under the options held by GSPL. Pending exercise, options are not management rights. At the highest, options could be treated as potential shares and till exercised they cannot provide right to vote or management or control. In the present case, till date GSPL has not exercised its rights under the Framework Agreement 2006 because of the sectoral cap of 74% which in turn restricts the right to vote. Therefore, the transaction in the present case provides for a triggering event, viz. relaxation of the sectoral cap. Till such date, HTIL/VIH cannot be said to have a control over 15% stakes in HEL. It is for this reason that even FIPB gave its approval to the transaction by saying that VIH was acquiring or has acquired effective shareholding of 51.96% in HEL."*

136 The Hon'ble Supreme Court has thus concluded that the Hutchison Structure denotes that shares of Plustech in the AG group, shares of Scorpio in the AS group and shares of SMMS came under the options held by GSPL. Pending exercise, options are not management rights. At the highest, options could be treated as

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potential shares and till exercised they cannot provide right to vote or management or control. The Hon'ble Supreme Court concluded that till date GSPL has not exercised its rights under the framework agreement 2006 because of the sectoral cap of 74% which, in turn, restricts the right to vote.

137 The appellants explained to us the circumstances in which initially the Revenue succeeded in this Court. The appellants contended before us that there has been only one transaction in relation to which the Department was seeking to impose tax on capital gains arising on the transfer of an asset. That is because HTIL sold a share of a company CGP Investments to Vodafone International Holdings BV. On account of transfer of the share, a company called 3GSPL became an indirect subsidiary of VIH BV. 3GSPL is now known as Vodafone India Services Private Limited i.e. the appellant. The appellant had entered into three framework agreements under which it had call options and obligations by way of put options. Two of the call options were with AG and AS. The target of these call options was a downstream company called TII Pvt. Ltd. which, in

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turn, held directly and indirectly share in HTIL/VIH. At the time when the transaction took place, another set of framework agreements were signed with revised considerations for these options and VIH BV was made a confirming party to these revised framework agreements. The appellants understand the Department's case to be that the revised framework agreements were a part of the overall transaction and the consideration of these revised framework agreements was also inbuilt into the amount paid by Vodafone to Hutchison for acquisition of the CGP share. The appellant urges that this Court in the first case found that there was assignment of call options held by the appellant and that call options were assets located in India. On that count, the payment by Vodafone to Hutchison involved transfer of some assets in India. Therefore, the Tax Department would have jurisdiction to initiate proceedings for failing to withhold tax against Vodafone. However, the Hon'ble Supreme Court reversed this judgment holding that there was no assignment of call options under these very framework agreements. During the pendency of the appeal before the Hon'ble Supreme Court, the Revenue started proceedings and according to the appellant, regarding the same alleged transaction viz. entering into of

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revised framework agreements. As there was no consideration for this so-called transfer, the Revenue resorted to transfer price. Therefore, before the Hon'ble Supreme Court which disposed of the appeal in January 2012 and relating to Financial Year 2007-08, there has been no attempt to mislead or misinterpret the facts. The call options were never exercised. The counter parties exercised the put options sometime in 2010 and pursuant to which the shares were acquired. It is in that regard they argue as to what is the difference between a call option and a put option. We shall come to this aspect a little later. The Revenue contended that the judgment of the Hon'ble Supreme Court had been obtained by suppression of relevant and material facts and perpetrating a fraud on it. That is because the Supreme Court holds that the call options had not been exercised to date. In any event, this aspect is immaterial according to the appellant because the Tribunal concluded that the revised framework agreements did not amount to an assignment.

138 It is in this context a further reference to the judgment of the Hon'ble Supreme Court becomes necessary and from paragraph 87

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onwards the Hon'ble Supreme Court considered as to whether this Court was right in applying the "nature and character of transaction" test. Then, in paragraph 88, the Hon'ble Supreme Court concluded :

> *"88. We have to view the subject matter of the transaction, in this case, from a commercial and realistic perspective. The present case concerns an offshore transaction involving a structured investment. This case concerns "a share sale" and not an asset sale. It concerns sale of an entire investment. A "sale" may take various forms. Accordingly, tax consequences will vary. The tax consequences of a share sale would be different from the tax consequences of an asset sale. A slump sale would involve tax consequences which could be different from the tax consequences of sale of assets on itemized basis. "Control" is a mixed question of law and fact. Ownership of shares may, in certain situations, result in the assumption of an interest which has the character of a controlling interest in the management of the company. A controlling interest is an incident of ownership of shares in a company, something which flows out of the holding of shares. A controlling interest is, therefore, not an identifiable or distinct capital asset independent of the holding of shares. The control of a company resides in the voting power of its shareholders and shares represent an interest of a shareholder which is made up of various rights contained in the contract embedded in the Articles of Association. The right of a shareholder may assume the character of a controlling interest where the extent of the shareholding enables the shareholder to control the management. Shares, and the rights which emanate from them, flow together and cannot be dissected. In the felicitous phrase of Lord MacMillan in IRC v. Crossman [1936] 1 All ER 762, shares in a company consist of a "congeries of rights and liabilities" which are a creature of the Companies Acts and the Memorandum and Articles of Association of the company. Thus, control and management is a facet of the holding of shares. Applying the above*

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principles governing shares and the rights of the shareholders to the facts of this case, we find that this case concerns a straightforward share sale. VIH acquired Upstream shares with the intention that the congeries of rights, flowing from the CGP share, would give VIH an indirect control over the three genres of companies. If one looks at the chart indicating the Ownership Structure, one finds that the acquisition of the CGP share gave VIH an indirect control over the tier I Mauritius companies which owned shares in HEL totalling to 42.34%; CGP India (Ms), which in turn held shares in TII and Omega and which on a pro rata basis (the FDI principle), totalled up to 9.62% in HEL and an indirect control over Hutchison Tele-Services (India) Holdings Ltd. (Ms), which in turn owned shares in GSPL, which held call and put options. Although the High Court has analysed the transactional documents in detail, it has missed out this aspect of the case. It has failed to notice that till date options have remained un-encashed with GSPL. Therefore, even if it be assumed that the options under the Framework Agreements 2006 could be considered to be property rights, there has been no transfer or assignment of options by GSPL till today. Even if it be assumed that the High Court was right in holding that the options constituted capital assets even then Section 9(1)(i) was not applicable as these options have not been transferred till date. Call and put options were not transferred vide SPA dated 11.02.2007 or under any other document whatsoever. Moreover, if, on principle, the High Court accepts that the transfer of the CGP share did not lead to the transfer of a capital asset in India, even if it resulted in a transfer of indirect control over 42.34% (52%) of shares in HEL, then surely the transfer of indirect control over GSPL which held options (contractual rights), would not make the transfer of the CGP share taxable in India. Acquisition of the CGP share which gave VIH an indirect control over three genres of companies evidences a straightforward share sale and not an asset sale. There is another fallacy in the impugned judgment. On examination of the impugned judgment, we find a serious error committed by the High Court in appreciating the case of VIH before FIPB. On 19.03.2007, FIPB sought a

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clarification from VIH of the circumstances in which VIH agreed to pay US$ 11.08 bn for acquiring 67% of HEL when actual acquisition was of 51.96%. In its response dated 19.03.2007, VIH stated that it had agreed to acquire from HTIL for US$ 11.08 bn, interest in HEL which included a 52% equity shareholding. According to VIH, the price also included a control premium, use of Hutch brand in India, a non-compete agreement, loan obligations and an entitlement to acquire, subject to the Indian FDI rules, a further 15% indirect interest in HEL. According to the said letter, the above elements together equated to 67% of the economic value of HEL. This sentence has been misconstrued by the High Court to say that the above elements equated to 67% of the equity capital (See para 124). 67% of the economic value of HEL is not 67% of the equity capital. If VIH would have acquired 67% of the equity capital, as held by the High Court, the entire investment would have had breached the FDI norms which had imposed a sectoral cap of 74%. In this connection, it may further be stated that Essar had 33% stakes in HEL out of which 22% was held by Essar Mauritius. Thus, VIH did not acquire 67% of the equity capital of HEL, as held by the High Court. This problem has arisen also because of the reason that this case deals with share sale and not asset sale. This case does not involve sale of assets on itemized basis. The High Court ought to have applied the look at test in which the entire Hutchison structure, as it existed, ought to have been looked at holistically. This case concerns investment into India by a holding company (parent company), HTIL through a maze of subsidiaries. When one applies the "nature and character of the transaction test", confusion arises if a dissecting approach of examining each individual asset is adopted. As stated, CGP was treated in the Hutchison structure as an investment vehicle. As a general rule, in a case where a transaction involves transfer of shares lock, stock and barrel, such a transaction cannot be broken up into separate individual components, assets or rights such as right to vote, right to participate in company meetings, management rights, controlling rights, control premium, brand licences and so on as shares constitute a bundle of

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rights. [See Charanjit Lal v. Union of India AIR 1951 SC 41, Venkatesh (minor) v. CIT 243 ITR 367 (Mad) and Smt. Maharani Ushadevi v. CIT 131 ITR 445 (MP)] Further, the High Court has failed to examine the nature of the following items, namely, non-compete agreement, control premium, call and put options, consultancy support, customer base, brand licences etc. On facts, we are of the view that the High Court, in the present case, ought to have examined the entire transaction holistically. VIH has rightly contended that the transaction in question should be looked at as an entire package. The items mentioned hereinabove, like, control premium, non-compete agreement, consultancy support, customer base, brand licences, operating licences etc. were all an integral part of the Holding Subsidiary Structure which existed for almost 13 years, generating huge revenues, as indicated above. Merely because at the time of exit capital gains tax becomes not payable or exigible to tax would not make the entire "share sale" (investment) a sham or a tax avoidant. The High Court has failed to appreciate that the payment of US$ 11.08 bn was for purchase of the entire investment made by HTIL in India. The payment was for the entire package. The parties to the transaction have not agreed upon a separate price for the CGP share and for what the High Court calls as "other rights and entitlements" (including options, right to non-compete, control premium, customer base etc.). Thus, it was not open to the Revenue to split the payment and consider a part of such payments for each of the above items. The essential character of the transaction as an alienation cannot be altered by the form of the consideration, the payment of the consideration in instalments or on the basis that the payment is related to a contingency (`options', in this case), particularly when the transaction does not contemplate such a split up. Where the parties have agreed for a lump sum consideration without placing separate values for each of the above items which go to make up the entire investment in participation, merely because certain values are indicated in the correspondence with FIPB which had raised the query, would not mean that the parties had agreed for the price payable for each of the above items. The transaction remained a contract of

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> *outright sale of the entire investment for a lump sum consideration [see: Commentary on Model Tax Convention on Income and Capital dated 28.01.2003 as also the judgment of this Court in the case of CIT (Central), Calcutta v. Mugneeram Bangur and Company (Land Deptt.), (1965) 57 ITR 299 (SC)]. Thus, we need to "look at" the entire Ownership Structure set up by Hutchison as a single consolidated bargain and interpret the transactional documents, while examining the offshore transaction of the nature involved in this case, in that light."*

139 In paragraph 90, the Hon'ble Supreme Court concluded that the offshore transaction is a *bona fide* structured foreign direct investment into India and fell outside Indian territorial tax jurisdiction and hence not taxable. The said offshore transaction evidences participative investment not a sham or tax avoidant preordained transaction. The said offshore transaction was between HTIL, a Cayman Islands company and VIH BV a company incorporated in Netherlands. The subject-matter of the transaction was the transfer of the CGP a company incorporated in Cayman Islands. Consequently, the Indian authority had no territorial tax jurisdiction to tax the offshore transaction. On that reasoning, the Hon'ble Supreme Court allowed VIH BVs appeal.

140 Even in the concurring judgment from paragraph 100 onwards,

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the transaction is referred and in great details. In the concurring judgment, the third Hon'ble Judge A.S. Radhakrishnan, J. arrived at the same conclusion. Pertinently, while construing section 9(1)(i) viz. a provision dealing with accruing of income or arising of the same in India, His Lordship Hon'ble Mr. Justice Radhakrishnan found that all income accruing or arising whether directly or indirectly through or from any business connection in India or through or from any property in India or through or from any asset or source of income in India or through the transfer of a capital asset situate in India. Therefore, in paragraph 260, the learned Judge held the meaning that will have to be given to the expressions "either directly or indirectly", "transfer", "capital asset" and "situated in India" is of prime importance so as to get a proper insight on the scope and ambit of section 9(1)(i) of the Income-tax Act. Then, the unammended definition of the term "transfer" as appearing in section 2(47) has been reproduced so also the term "capital asset" defined in section 2(14) and the learned Judge from paragraphs 262 onwards interpreted these provisions in the backdrop of the argument of the Revenue that the "source test" must be applied and if that is applied, the transaction has a tax connection in

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India. The Revenue's argument was that it was to ultimately transfer control over HEL and hence, the source of the gain to HTIL was India. The Hon'ble Judge concluded in paragraph 271 that on transfer of shares of a foreign company to a non-resident offshore, there is no transfer of shares of the Indian company, though held by the foreign company and in such a case, it cannot be contended that the transfer of shares of the foreign holding company results in extinguishment of the foreign company control of the Indian company and it also does not constitute an extinguishment and transfer of an asset situate in India. Transfer of the foreign holding company's share offshore, cannot result in an extinguishment of the holding company right of control of the Indian company nor can it be stated that the same constitutes extinguishment and transfer of an asset/management and control of the property situate in India. It is in these circumstances that it is concluded even in the concurring judgment that the sale of the CGP share of HTIL to Vodafone would amount to a transfer of a capital asset within the meaning of section 2(14) of the Income-tax Act and the rights and entitlements flow from FWAs, SHAs, term sheet, loan assignments,brand licence etc. form integral part of CGP share

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attracting capital gains tax, cannot be the conclusion and as reached by this Court. The learned Judge, therefore, disagreed with that conclusion of the High Court.

141 In this context, even if one were to refer to the definition of the term “capital asset” it means property of any kind and which does not fall in the exclusive part. That property should be held by an assessee whether or not connected with the business or profession and it is transfer of such capital asset but which has the impact and to be found in section 2(47), as amended, the tax effect. It is that which, according to the appellant, can be brought to tax.

142 In the present case, the Revenue has urged during oral arguments and also extensively through the notes that in the earlier or in the first Vodafone case, the issue was whether any capital tax gain was attracted in the hands of HTIL when it transferred its 67% VIL shares to VIH BV. As HTIL was a non resident, the Hon'ble Supreme Court was considering the applicability of section 9 in the case of indirect transfer of capital asset. That is how by referring to section 9

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and interpreting it, the Hon'ble Supreme Court held that only direct transfers are covered. However, the amendment to this section changes the colour of the controversy. The amendment to sections 9, 2(14) and 2(47) ensures that any transfer affected by creation of an interest in option rights will now be taxable. The argument is that the language of the amended provisions in itself enough to construe that option rights is a capital asset and creation of interest in option rights is a transfer. Therefore, the amendment to the above sections should be interpreted to advance the purpose of incorporating the same. The emphasis and thrust of Mr. Setalvad's argument is that the explanation to section 2(14) would clinch the issue in favour of the Revenue. That explanation clarifies the doubts and states that property includes and shall be deemed to have included any rights in or in relation to an Indian company, including rights of management of control or any other rights whatsoever.

143 Applying this to the facts of the present case it is urged that the options relate to shares of an Indian company viz. Scorpios Beverages Private Limited and AG Mercantile Company Private Limited. This in

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turn entitles the option holder to a 12.25% equity interest in Vodafone India Limited (HEL). Thus the right of the appellant to subscribe to the shares of AS and AG group company is in the nature of a capital asset as defined in section 2(14) of the IT Act, 1961. Once it is established that the option right held by the assessee is property, any interest created therein is also in the nature of property and falls within the ambit of this section. According to Mr. Setalvad, the argument that option right is a contractual right has no merit because the wording of the explanation is very wide and to include any right whatsoever. Reliance is placed upon certain provisions of similar nature inserted in the tax legislation of some foreign countries.

144 The similarity in the terms and conditions of the IDFC, FWA 2006 and of FWA 2007 of AS and AG group of companies is then emphasized to mean that the appellant's option rights to purchase the shares of AS and AG group of companies are identical to the cashless option under the IDFC FWA. When the IDFC cashless options could be assigned for valuable consideration without actual exercise of the options, it is clear that an interest can be created in respect of the

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option rights held by the assessee as has happened in the facts of the present case.

145 The argument then was that the transaction before the Hon'ble Supreme Court was of sale of CGP share between Hutchison and Vodafone group and the issue of Vodafone group stepping into the shoes of Hutchison. The issue in this appeal is the subsequent creation of interest amongst the companies of Vodafone group and after Vodafone stepped into the shoes of Hutchison. In this case, the appellant was made to create interest in the option rights in favour of VIH BV / subsidiary for which it did not receive a single penny for the capital asset being held by it. Subsequent facts are relied on in which shares were transferred to a Mauritius subsidiary and the assessee was not compensated at all for the transaction although substantial costs were incurred by the appellant for acquiring those rights. Apart from the international angle and element in the transaction what is alleged is that the issue before the Hon'ble Supreme Court was “share sale” whereas at present case involves the issue of creation of interest in the option rights of the appellant.

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146 We have noted that great emphasis has been laid on the findings of the Hon'ble Supreme Court in the first Vodafone case to urge that complete and correct factual position was not before it. However, the Income Tax Appellate Tribunal has considered several documents and these documents would evidence that options have been exercised in April 2009 and August 2009 to the extent of 49%. This resulted in the option reducing by 6% out of the 12.25% in VIL held originally. Subsequently the FWA with AG group of companies was terminated during the financial year 2010-11 relevant to the assessment year 2011-12. The option further reduced during this assessment year. The following documents would evidence the same.

(i) Letter dated 6th April 2009 (Vol.IX, Pg.3516) addressed by Analjit Singh and Neelu Analjit Singh to the Appellant and VIH BV issuing a notice to both the Appellant and VIH BV under Clause 4.5 of the Framework Agreement exercising their put option in respect of 4,900 SBP shares;

(ii) Letter dated 7th April 2009 (Vol.IX, Pg.3517/A) wherein the Appellant has nominated CGP India Investments Pvt. Ltd. (CGP

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India) to purchase the SBP shares from Analjit Singh and CGP India has accepted the nomination;

(iii) 'Supplement to the Framework Agreement' dated 7th April 2009 (Vol.VIII, Pg. 3239/A) amongst others, Analjit Singh, Neelu Analjit Singh, the Appellant as also VIH BV;

(iv) Letter dated 7th April 2009 (Vol.IX, Pg. 3518/A) from the Appellant to Analjit Singh and Neelu Analjit Singh notifying of CGP India to purchase the said 4900 shares;

(v) Letter dated 21st August 2009 (Vol.X, Pg. 3527/A) addressed by Asim Ghosh to the Appellant and VIH BV issuing a notice to both the Appellant and VIH BV under Clause 4.5 of the Framework Agreement exercising their put option in respect of 1,47,000 equity shares in AG Mercantile constituting 49% of the issued and paid up equity share capital of AG Mercantile;

(vi) Letter dated 21st August 2009 (Vol.IX, Pg. 3519/A) wherein the Appellant has nominated CGP India to purchase the AG Mercantile shares from Asim Ghosh and CGP India has accepted the nomination;

(vii) Letter dated 21st August 2009 (Vol.IX, Pg. 3521/A) from the Appellant to Asim Ghosh notifying nomination of CGP India to

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purchase the said 1,47,000 shares;

(viii) 'Supplement to the Framework Agreement' dated 27th August 2009 (Vol.VIII, Pg. 3232/A) amongst others, Asim Ghosh, the Assessee as also VIH BV;

(ix) Letter dated 21st October 2013 (Vol.IX, Pg.3522/A) addressed by Analjit Singh and Neelu Analjit Singh to the Appellant and VIH BV issuing a notice to both the Appellant and VIH BV under Clause 4.5 of the Framework Agreement exercising their put option in respect of 1,95,005,079 shares of SBP constituting 51% of the issued and paid up equity share capital of SBP;

(x) Letter dated 23rd October 2013 (Vol.IX, Pg. 3524/A) wherein the Appellant has nominated CGP India to purchase the 1,95,005,079 SBP shares from Analjit Singh and Neelu Analjit Singh andCGP India has accepted the nomination;

(xi) Letter dated 23rd October 2013 (Vol.IX, Pg. 3525/A) from the Assessee to Analjit Singh and Neelu Analjit Singh notifying nomination of CGP India to purchase the said 1,95,005,079 shares. These documents individually and collectively demonstrate that the options under the 2007 Framework Agreements were exercised in

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2009 itself;

(xii) The Shareholder's Agreement dated 7th April 2009 (Vol. VIII, Pg.3183/A) between Analjit Singh, Neelu Analjit Singh, SBP and CGP India;

(xiii) The Shareholder's Agreement dated 27th August 2009 (Vol.VIII, Pg.3144/A) between Asim Ghosh, Sanjikta Ghose, SG Mercantile and CGP India;

(xiv) Share Purchase Agreement dated 18-09-2009 between ND, TII and CGP Mauritius (Vol.V, Pg.6037/R);

(xv) Share Purchase Agreement dated 10-05-2010 between NDC, AG Mercantile, Asim Ghosh and others. (Vol.V, Pg.6055/R);

(xvi) Second Supplement to the Shareholder's Agreement dated 10-05-2010 between Nadal, NDC, CGP, TILL and VIH BV(Vol.V, Pg.6073/R);

(xvii) Termination agreement dated 10-05-2010 between AG Mercantile, Plus tech, VISPL, Nadal and VIH BV (Vol.V, Pg.6080/R);

(xviii) Second Supplement to the Framework Agreement dated 10th May 2010 (Vol.V, Pg.6091/R) AS, SBP, MVH,VISPL, NDC, AG Mercantile, Plustech, Nadal and VIH BV;"

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147 In this regard we must refer to the findings of the Tribunal and with regard to which there is a serious debate before us. The Tribunal reproduced relevant clauses of the FWA 2006 as well as 2007 in a tabulated form side by side. This is done in paragraph 32. From paragraph 33 onwards, what has been done is to refer to the clauses of the FWA 2006. Clause 4.4 of the same is referred and to mean that the assessee shall have the right at any time to purchase all of the independent shareholding to the extent of 12.25% in VIL as held by the group companies of AS and AG under call options. The call options under the FWA had to be exercised either by the assessee or its nominee whereas the call option under FWA 2007 had to be exercised either by the assessee or any wholly owned subsidiary of Vodafone PLC. Apart from the assessee or wholly owned subsidiary of Vodafone PLC the third option was also provided under FWA 2007 whereby the assessee could nominate a person other than the wholly owned subsidiary of Vodafone PLC for purchase of all but not part only of the shares held by AS and AG group of companies. The Tribunal in paragraph 33 holds that there is difference between the

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2006 and 2007 FWAs regarding call options but the right of exercising the call option by a person other than the assessee is not automatic. It cannot be by inclusion in clause 4.4 of the FWA 2007 of a person other than the assessee. It is subject to assignment or transfer of rights as stipulated in clause 4.10 of the agreement which requires the assignment or transfer by GSPL though without the consent of AS and AG. The finding in the Tribunal's order in paragraph 33 is that the inclusion of probable assignment in clause 4.4 of the FWA 2007 alone would not tantamount to assignment or transfer of call option. Therefore, the Tribunal posed a question to itself as to whether inclusion of any of the subsidiary of Vodafone PLC in the probable assignees would create a right or interest in the property/asset being option rights in respect of the shares held under the call option. In this paragraph the Tribunal reproduces all the amended definitions and particularly of the term 'transfer' and notes the Revenue's argument that inclusion of any of the wholly owned subsidiary of Vodafone PLC as a nominee under clause 4.4 does create a right and interest in favour of the subsidiary of Vodafone PLC to acquire the shares held in the call option and, therefore, the transaction would fall in section 2(47) as

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amended.

148 The Tribunal in paragraph 34 then refers to the *prima facie* observations of this Court in the order passed in the Writ Petition No.488 of 2012 dated 6th September, 2013, and concludes that the essence of transfer still remains and despite amendment, namely, the actual disposal or actual creation of or parting with any interest in an asset. The means and methods of disposal or creation apart such disposal or parting with or creating interest in an asset must exist and be borne out from the arrangement or transfer. Making the provision of one of the prospective nominees would not amount to creating any interest in the asset in the shape of right to acquire the shares held under the call option. Under the FWAs of 2007 , any of the wholly owned subsidiary of Vodafone PLC is a prospective nominee. It would get the right to acquire the share only when a nomination is made by the assessee in favour of such subsidiary. In that regard clause 4.4. read with clause 4.10 of the FWAs have been relied upon. The conclusion reached is that the right to acquire shares remains with the assessee till the assessee exercises the right to nominate a pre

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mentioned wholly owned subsidiary of Vodafone PLC. Clause 4.4(a) (i) is relied upon to conclude further that the assessee shall have the right to purchase or require that any wholly owned subsidiary of Vodafone PLC purchases the shares held under the call option. From a comparative study of the relevant clauses of the two FWAs, by change of prospective nominee, it does not amount to transfer or creating any right in favour of the said prospective nominee until the actual nomination is made.

149 In paragraph 35 the Tribunal refers to the shareholder's agreement dated 5th July, 2007 and concludes that a rewriting of the FWA in the year 2007 stand alone does not constitute assignment, transfer or creating any right of call options in favour of the prospective nominee, but the matter does not rest here. That is because the shareholder's agreement dated 5th July, 2007, is equally existing. It is between the shareholders of TII on one hand and CGP India Investment Ltd., TII and VIH BV on the other. This agreement has been filed as an additional evidence by the Revenue. The matter was then postponed so as to enable parties to canvass their arguments

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on the same. The parties also tendered written submissions. The Revenue reiterated its contention that the assessee-appellant had assigned the call option rights in favour of CGP India Investment Ltd. Mauritius a 100% subsidiary of Vodafone group by rewriting the FWA of 2007. The signing of the shareholder's agreement again establishes the fact that the assessee assigned the call options in favour of CGP Mauritius. The assesseee, however, contended that this agreement was put on record before the Hon'ble Supreme Court in the first Vodafone case. It was duly considered by it and paragraphs 52 and 125 of the judgment have been referred to support the contention that there was no assignment of call options in the 2007 FWA and even after considering the shareholder's agreement dated 5th July, 2007. This conclusion of the Hon'ble Supreme Court and in above paragraphs denotes that TII shareholders agreement will not alter this conclusion i.e. there was no assignment of call options in the financial year 2007-08 by rewriting the FWAs in July, 2007. The alternate contention of the assessee has also been noted and which is that TII shareholder's agreement has no relevance or bearing on the issue. That agreement was entered into between Nadal, ND Callus Info

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Services Pvt. Ltd. and CGP India Investment Ltd. to confirm the understanding regarding regulation of affairs of TII. As per clause 4.2 of this agreement the right to exercise put options was conferred upon by ND Callus and Nadal to require CGP India Investment Ltd. who is the shareholder of TII to purchase shares held by ND Callus and Nadal in TII. Clause 4.3 of the same authorises CGP India Investment Ltd. or its nominated person to purchase the shares held by ND Callus and Nadal. The argument of the assessee was that these options are completely different from call options and put options held by the assessee, Analjit Singh and Asim Ghosh respectively under the 2007 FWAs. In that regard also reference is extensively made to the Hon'ble Supreme Court judgment. The argument was that TII shareholders agreement has no relevance or bearing on the issue of assignment of call options under the 2007 FWA and it relates to shares of different company viz. TII. The option rights under TII shareholders agreement are inchoate as they are conditional upon the exercise of option rights under the 2007 FWA. The Tribunal then proceeds to analyze these contentions further and from paragraph 37 onwards. In paragraph 38, after referring to the ownership chart,the

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Tribunal concludes that Analjit Singh and Asim Ghosh were holding 23.97% and 38.78% shares respectively in TII through their 100% subsidiaries. Thus the AS and AG group companies were holding 12.25% shares in HEL through TII. The option rights in FWA of 2007 were essentially in respect of 12.25% share holding of these two groups in HEL through their subsidiaries and then through their shareholding in TII. The Tribunal once again reiterated that the issue of assignment of call option by the assessee was not before the Hon'ble Supreme Court and, therefore, to the extent of the assignment / transfer of call options by the assessee to its associated enterprise, the judgment of the Hon'ble Supreme Court will have no bearing. Thereafter, the Tribunal refers to the relevant clauses of the FWA 2006, FWA 2007 and shareholder's agreement dated 5th July, 2007. In paragraph 39 of its judgment, the Tribunal concludes that Nadal and ND Callus are common parties to the FWA of 2007 as well as shareholder's agreement. Both set of agreements were assigned by Analjit Singh and Asim Ghosh on their behalf as well as on behalf of Nadal and ND Callus respectively. The call option rights to purchase the shares held by Analjit Singh and Asim Ghosh group of companies

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in TII were with the assessee under the FWAs of 2006 as well as 2007. Though under the FWAs, the assessee was having the right to assign the options to one of the probable persons / assignees till that assignment takes place, the rights remain vested with the assessee. These rights to call upon to purchase the shares held by Asim Ghosh and Analjit Singh, including their 100% subsidiaries in TII stand transferred and vested in CGP India Investment Ltd., Mauritius by virtue of the TII shareholder's agreement as is clear from clauses 4.2 and 4.3 of the shareholder's agreement in question. Even under the FWA of 2007 what was to be transferred under the option rights were 23.97% and 38.78% shares in TII thereby indirect 12.25% shareholding in HEL. Therefore, a combined reading of the FWA 2007 and shareholder agreement of 2007 and a consideration of the surrounding circumstances emerging from the arrangements enabled the Tribunal to conclude in paragraph 40 that option rights under the FWA of 2007 held by the assessee were transferred / assigned in favour of CGP India Investment, Mauritius, the associated enterprise of the assessee by virtue of the shareholder's agreement. The shareholder's agreement is executed pursuant to the FWA and that

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conclusively shows that the shares of TII held by AS and AG would be transferred in favour of CGP or its nominee as and when the call / put option rights are exercised by the respective parties.

150 In furtherance of such conclusion, the Tribunal in paragraph 41 holds that from the share purchase agreement between HTIL and VIH BV, FWAs and TII shareholders agreement as well as surrounding facts and circumstances, the arrangement and exercise was terminated to acquire the 15% shareholding in HEL as and when the restriction on foreign direct investment in telecom sector is relaxed by the Government. Both FWAs and TII shareholders agreement were signed with the sole object of acquiring 12.5% shareholding in HEL on a future date and till then AG and AS agreed to hold the stake in HEL through TII for that they were remunerated.

151 The Tribunal, therefore, was influenced to a great extent by this intention of parties as also the background and surrounding circumstances. The Tribunal's final conclusion is that the Framework Agreements as well as the shareholders agreement were signed in the

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backdrop of the purchase agreement, share transfer agreement between HTL and VIH BV and further with intention to keep the 12.25% shareholding in HEL indirectly through AG and AS so that the assessee could acquire the same whenever it is permissible and as per the FDI limit relaxation in telecommunication sector. The mutual intention was to transfer the option rights vested with the assessee in favour of CGP India Investment Limited. Therefore, the option rights, including the call option held by the assessee under the Framework Agreement stand transferred / assigned in favour of CGP India Investment Ltd. by virtue of TII shareholders agreement.

152 We are of the opinion that the above conclusions of the Tribunal do not in any manner indicate that the essential ingredients of section 2(47) as amended are satisfied. If the deal was indirect, circuitous and to take place in future, then, on the basis of the same the Tribunal could not have concluded that the amended definition of the term 'transfer' is attracted, that the matter must be viewed differently and distinctly and not in the manner noted by the Hon'ble Supreme Court. We are of the opinion that all the aspects and which are so extensively

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referred by the Tribunal and by us were already brought to the notice of the Hon'ble Supreme Court. The Hon'ble Supreme Court expressly viewed them and in such details as were missed by all earlier. The Hon'ble Supreme Court commented and very emphatically held that a holistic view and approach ought to be adopted in considering such intricate deals and complex transactions. One deal cannot be picked up in isolation so as to hold that it is a deliberate and intentional act of parties to circumvent Indian tax structure. The deals and agreements are but part of a larger and bigger picture to gain entry in Indian Telecom market and Multinational Corporations to adopt a mode by which they firmly establish themselves by taking support from Indian partners. On the same transactions and same set of facts reaching a different conclusion than that of the Hon'ble Supreme Court is not possible and rather impermissible. Our conclusion is reinforced by the observations of the Hon'ble Supreme Court in the case of *Director of Settlements A.P. v. M.R. Apparao* reported in *AIR 2002 SC 1598*. At Pg. 160, the court held thus :

> *"7. So far as the first question is concerned, Article 141 of the Constitution unequivocally indicates that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. The*

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aforesaid Article empowers the Supreme Court to declare the law. It is, therefore, an essential function of the Court to interpret a legislation. The statements of the Court on matters other than law like facts may have no binding force as the facts of two cases may not be similar. But what is binding is the ratio of the decision and not any finding on facts. It is the principle found our upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence. To determine whether a decision has declared law it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. An 'obiter dictum' as distinguished from a ratio decidendi is an observation by Court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a binding effect as a precedent, but it cannot be denied that it is of considerable weight. The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided by the Court in a given case. So far as constitutional matters are concerned, it is a practice of the Court not to make any pronouncement on points not directly raised for its decision. The decision in a judgment of the Supreme Court cannot be assailed on the ground that certain aspects were not considered or the relevant provisions were not brought to the notice of the Court (See AIR 1970 SC 1002 and AIR 1973 SC 794). When Supreme Court decides a principle it would be the duty of the High Court or a subordinate Court to follow the decision of the Supreme Court. A judgment of the High Court which refuses to follow the decision and directions of the Supreme Court or seeks to revive a decision of the High Court which had been set aside by

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the Supreme Court is a nullity. (See 1984 (2) SCC 402 and 1984 (2) SCC 324).”

153 In this regard, we have already referred to the controversy before the Hon'ble Supreme Court and the reference in the judgment of the Hon'ble Supreme Court to the issue raised before it. There is some substance in the contentions of Mr. Salve that all the agreements have been referred to as also the ownership structure. The Hon'ble Supreme Court in paragraph 72 of the judgment held as under :

“72. The primary argument advanced on behalf of the Revenue was that the SPA, commercially construed, evidences a transfer of HTIL’s property rights by their extinguishment. That, HTIL had, under the SPA, directly extinguished its rights of control and management, which are property rights, over HEL and its subsidiaries and, consequent upon such extinguishment, there was a transfer of capital asset situated in India. In support, the following features of SPA were highlighted :

(i) the right of HTIL to direct a downstream subsidiary as to the manner in which it should vote. According to the Revenue, this right was property right and not a contractual right. It vested in HTIL as HTIL was a parent company, i.e. a 100 per cent shareholder of the subsidiary;

(ii) *According to the Revenue, the 2006 shareholders/framework agreements had to be continued upon transfer of control of HEL to VIH could step into the shoes of HTIL. According to the*

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Revenue, such continuance was ensured by payment of money to AS and AG by VIH failing which AS and AG could have walked out of those agreements which would have jeopardised VIH's control over 15 per cent of the shares of HEL and,consequently, the stake of HTIL in TII would have stood reduced to minority;

(iii) Termination of the IDFC framework agreement of 2006 and its substitution by a fresh Framework Agreement dated June 5, 2007, as warranted by SPA;

(iv) Termination of the term sheet agreement dated July 5, 2003. According to the Revenue, that term sheet agreement was given effect to by clause 5.2 of the SPA which gave Essar the right to tag along with HTIL and exit from HEL. That, by a specific settlement agreement dated March 15, 2007, between HTIL and Essar, the said term sheet agreement dated July 5, 2003, stood terminated. This, according to the Revenue, was necessary because the term sheet bound the parties;

(v) the SPA ignores legal entities interposed between HTIL and HEL enabling HTIL to directly nominate the directors on the Board of HEL;

(vi) Qua management rights, even if the legal owners of HEL's shares (Mauritius entities) could have been directed to vote by HTIL in a particular manner or to nominate a person as a director, such rights existed de hors the CGP share;

(vii) Vide clause 6.2 of the SPA, HTIL was required to exercise voting rights in the specified situations on the diktat of VIH ignoring the legal owner of CGP share [HTIHL (BVI)]. Thus, according to the Revenue, HTIL ignored its subsidiaries and was

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exercising the voting rights qua the CGP and the HEL shares directly, ignoring all the intermediate subsidiaries which are 100 per cent held and which are non-operational. According to the Revenue extinguishment took place de hors the CGP share. It took place by virtue of various clauses of SPA as HTIL itself disregarded the corporate structure it had set up;

(viii) As a holder of 100% shares of downstream subsidiaries, HTIL possessed de facto control over such subsidiaries. Such de facto control was the subject matter of the SPA.

154 Thereafter, in paragraph 78, in the context of the role of CGP in the transaction, the Hon'ble Supreme Court considered the main contention of the Revenue that CGP stood inserted at a later stage in the transaction in order to bring in a tax free entity (or to create a transaction to avoid tax) and thereby avoid capital gains. The Hon'ble Supreme court has categorically held that there is no merit in these arguments.

155 Prior thereto, in paragraph 77, the Hon'ble Supreme Court holds that under the HTIL structure as it existed in 1994, HTIL occupied only a persuasive position / influence over the downstream companies qua manner of voting, nomination of directors and management rights.

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That such minority shareholders / investors had participative and protective rights which flowed from the CGP share. That the entire investment was sold to VIH through the investment vehicle CGP and, therefore, there was no extinguishment of rights as alleged by the Revenue. The Hon'ble Supreme Court has explained as to how when a business gets big enough,there is a certain degree of reconstruction and restructuring resulting in multitude of commonly owned subsidiaries and creation of various entities as a group to guarantee each other's debts. If there is an indirect way or manner in which control is retained by the holding company, then this ensures the authority. That further takes care of the decisions that are taken or to be taken in future. In all such decisions also, the holding units or companies have their authoritative say. In paragraphs 84 and 85 of this judgment, on which reliance is placed before us, the Hon'ble Supreme Court has has held as under :

> *"84. As regards the term sheet dated March 15, 2007, it may be stated that the said term sheet was entered into between VIH and Essar. It was executed after February 11, 2007 when SPA was executed. In the term sheet, it has been recited that the parties have agreed to enter into the term sheet in order to regulate the affairs of HEL and in order to regulate the relationship of shareholders of HEL. It is also stated in the term sheet that VIH and Essar shall have to*

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nominate directors on the Board of Directors of HEL in proportion to the aggregate beneficial shareholding held by members of the respective groups. That, initially VIH shall be entitled to nominate eight directors and Essar shall be entitled to nominate four directors out of a total Board of Directors of HEL (numbering 12). We must understand the background of this term sheet. Firstly, as stated the term sheet was entered into in order to regulate the affairs of HEL and to regulate the relationship of the shareholders of HEL. It was necessary to enter into such an agreement for smooth running of the business post acquisition. Secondly, we find from the letter addressed by HEL to FIPB dated March 14, 2007, that articles of association of HEL did not grant any specific person or entity a right to appoint directors. The said directors were appointed by the shareholders of HEL in accordance with the provisions of the Indian company law. The letter further states that in practice the directors were appointed pro rata to their respective shareholdings which resulted in four directors being appointed from Essar group, six directors being appointed by HTIL and two directors were appointed by TII. One such director was AS, the other director was AG. This was the practice even before the term sheet. The term sheet continues this practice by guaranteeing or assuring Essar that four directors would be appointed from its group. The above facts indicate that the object of the SPA was to continue the "practice" concerning nomination of directors on the board of sirectors of HEL which in law is different from a right or power to control and manage and which practice was given to keep the business going, post acquisition. Under the company law, the management control vests in the board of directors and not with the shareholders of the company. Therefore, neither from clause 5.2 of the shareholders agreement nor from the term sheet dated March 15, 2007, one could say that VIH had acquired 67 per cent controlling interest in HEL.

85. As regards the question as to why VIH should pay consideration to HTIL based on an enterprise value

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of 67 per cent of the share capital of HEL is concerned, it is important to note that valuation cannot be the basis of taxation. The basis of taxation is profits or income or receipt. In this case, we are not concerned with tax on income/profit arising from business operations but with tax on transfer of rights (capital asset) and gains arising therefrom. In the latter case, we have to see the conditions on which the tax becomes payable under the Income Tax Act. Valuation may be a science, not law. In valuation, to arrive at the value one has to take into consideration the business realities, like the business model, the duration of its operations, concepts such as cash flow, the discounting factors, assets and liabilities, intangibles, etc. In the present case, VIH paid US $11.08 bn for 67 per cent of the enterprise value of HEL plus its downstream companies having operational licences. It bought an upstream company with the intention that rights flowing from the CGP share would enable it to gain control over the cluster of Indian operations or operating companies which owned telecom licences, business assets, etc. VIH agreed to acquire companies which in turn controlled a 67 per cent interest in HEL and its subsidiaries. Valuation is a matter of opinion. When the entire business or investment is sold, for valuation purposes, one may take into account the economic interest or realities. Risks as a discounting factor are also to be taken into consideration apart from loans, receivables, options, RoFR/ TAR, etc. In this case, enterprise value is made up of two parts, namely, the value of HEL, the value of CGP and the companies between CGP and HEL. In the present case, the Revenue cannot invoke section 9 of the Income-tax Act on the value of the underlying asset or consequence of acquiring a share of CGP. In the present case, the valuation done was on the basis of enterprise value. The price paid as a percentage of the enterprise value had to be 67 per cent not because the figure of 67 per cent was available in praesenti to VIH, but on account of the fact that the competing Indian bidders would have had de facto access to the entire 67 per cent, as they were not subject to the limitation of

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sectoral cap, and, therefore, would have immediately encashed the call options. The question still remains as to from where did this figure/expression of 67 per cent of equity interest come ? The expression "equity interest" came from US GAAP. In this connection, we have examined the notes to the accounts annexed to the annual report 2006 of HTIL. According to note 1, the ordinary shares of HTIL stood listed on the Hong Kong Stock Exchange as well as on the New York Stock Exchange. In Note No. 36, a list of principal subsidiaries of HTIL as on December 31, 2006, has been attached. This list shows the names of HEL (India) and some of its subsidiaries. In the said annual report, there is an annexure to the said notes to the accounts under the caption "Information for US Investors". It refers to variable interest entities (VIEs). According to the annual report, the Vodafone Group consisting of HTIL and its subsidiaries conducted its operations inter alia in India through entities in which HTIL did not have the voting control. Since HTIL was listed on New York Stock Exchange, it had to follow for accounting and disclosure the rules prescribed by US GAAP. Now, in the present case, HTIL as a listed company was required to make disclosures of potential risk involved in the investment under the Hutchison structure. HTIL had furnished letters of credit to Rabo Bank which in turn had funded AS and AG, who in turn had agreed to place the shares of Plustech and Scorpios under options held by GSPL. Thus, giving of the letters of credit and placing the shares of Plustech and Scorpios under options were required to be disclosed to the US investors under the US AAP, unlike Indian GAAP. Thus, the difference between the 52 per cent figure (control) and 67 per cent (equity interest) arose on account of the difference in computation under the Indian and US GAAP."

156 If these findings and conclusions of the Hon'ble Supreme Court about the nature of the deal and transaction cannot be revisited or

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reconsidered, then, the conclusions of the Tribunal are wholly unsustainable and difficult to uphold.

157 Mr. Setalvad, learned senior counsel, however, would submit that the Tribunal's order does not go contrary to the judgment of the Hon'ble Supreme Court of India in the first Vodafone case. He submits that the Tribunal was required to decide as to how post this judgment and when the law itself is amended can the transaction be looked at again. That is to consider whether the amended provisions would take within their sweep the particular details and transactions and that was permissible in law.

158 We have noted that the Tribunal was aware of the emphasis placed on the judgment of the Hon'ble Supreme Court and the conclusions therein. However, in paragraph 31 of the impugned order, the Tribunal referred to one of the conclusions of the Hon'ble Supreme Court that the asset of a company belongs to the company and not to the shareholders. Therefore, the asset vested with the company would remain vested, albeit the transfer of ownership. The further

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conclusion of the Tribunal is that the Hon'ble Supreme Court judgment only deals with the question of transfer between HTIL and VIH BV by virtue of the share transfer agreement and not in the context of transfer of option rights by the assessee to its affiliate. It is unfortunate that the Tribunal makes a casual remark in paragraph 31 that the judgment of the Supreme Court is not based on the finding of facts as examined and investigated by any of the fact finding authority and consequently, it is binding on the subordinate courts only to a limited extent. The Tribunal has completely lost sight of the elementary principle that the final judgment of the Hon'ble Supreme Court and analyzing the legal provisions in the backdrop of certain undisputed facts binds the parties as also the courts subordinate to the Supreme Court of India particularly in further litigation pending between these parties on same issues. It is one thing to say that the judgment of the Hon'ble Supreme Court is not based on the facts now noted and another to hold that after the Supreme Court judgment, the Parliament has amended the law and has altered the basis of the judgment itself. The latter may permit the course charted by the Tribunal, but the former does not. The binding force of the judgment

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of a superior court is not to be taken away in this manner. It is only for the Hon'ble Supreme Court itself to come to a conclusion that its earlier judgment or decision does not lay down the correct law and will, therefore, not be binding or any observation and conclusion therein need not be applied to pending cases of similar nature because it has clarified the position in a subsequent order or judgment. It is not for any court other than the Hon'ble Supreme Court to come to such a conclusion. Judicial discipline demands that judgments of the superior Court, particularly the Hon'ble Supreme Court are not brushed aside casually and lightly. We say nothing more.

159 The conclusion then reached by the Tribunal is that the judgment of the Hon'ble Supreme Court is based on unamended provisions of section 2(47) of the Income Tax Act. That was in the context of limited facts and documents. Therefore, after the law has been amended the Tribunal can find out whether the amended provisions will govern the controversy or not. Mr. Setalvad would urge that this course at least was permissible and if that is what is adopted by the Tribunal this Court must not interfere with it. It is in

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that backdrop that the Tribunal has examined the Framework Agreements and the additional evidence. However, while examining the same, the Tribunal prefaced its observations. It held that so far as option rights are concerned, they are a valuable right. The appellants have not disputed this fact. The Tribunal holds that the option rights are held by the assessee under the Framework Agreement of 2006 in consideration of arrangement of funds and with a view to acquire the shareholding to the extent of 15.03% in future with an anticipation of relaxation of sectoral cap /ceiling on FDI and telecom sector. That is why the assessee paid hefty sum of US $10.2 million and US $6.3 million per annum to AS and AG. They would pay this only to keep the call options alive under the FWA. It is this line of reasoning coupled with the fact that Vodafone indirectly obtained the degree of persuasive control over this call options consistent with the holding subsidiary relationship which is the core conclusion in the Tribunal's order. Undisputedly, therefore, the option rights held being valuable and they relate to indirect shareholding to the extent of 15.03% in HEL / VIL, the option rights to acquire 12.25% shares of HEL / VIL through AG and AS FWAs would also enable obtaining such control.

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160 For a closer look and scrutiny of these conclusions we will have to look at the agreements themselves. This will have to be looked at in the backdrop of the ownership chart tendered and which is undisputed.

161 The Centrino Framework Agreement, copy of which is at Annexure-C page 299 of the paper-book, is dated 1st March, 2006. It is among AG and Goldspot and Plustech and 3 GSPL and Centrino Trading Pvt. Ltd. The recitals are that AG is an Indian based professional with wide experience in the management of various businesses world wide, including the telecom business in India for more than eight years and has been instrumental in building HEL. AG was offered an investment in Telecom Investments India Limited (TII), an Indian company which, in turn, will hold beneficial direct or indirect interest of 19.54% interest in the issued share capital of HEL and offered AG the opportunity to make such an investment. AG declined such offer unless AG could be assisted in obtaining the finances necessary to make such investment. GSPL agreed to assist or

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procure assistance for AG in obtaining such finances and to provide any guarantees required by any lenders providing such financing. As a result, AG through Centrino which is in the business of investing in securities of telecommunication companies in India, subscribed to 1275426 ordinary shares of par value of Rs.10/- each which is 23.97% subscription in TII. Goldspot, which is wholly owned by AG, currently holds 100% of the issued equity share capital of Plustech which, in turn, owns 100% of the issued equity share capital of Centrino. Therefore, in consideration of GSPL procuring credit support for financing obtained by Centrino for subscription to the TII shares, Centrino was desirous of granting GSPL right to subscribe for equity shares of Centrino. In consideration of GSPL procuring credit support for financing obtained by Centrino to finance its subscription to the TII shares, Goldspot was desirous of granting GSPL an option to purchase equity shares of Plustech. That is how the further recital H reads. Clause 1 of this agreement contains definition and the word "Change of Control" which is defined at page 303. At page 304, the word "TII Shareholders Agreement" is defined to mean the share holders agreement to be entered into as of the same date between

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Centrino, ND Callus Info Services Pvt. Ltd., CGP and TII. Then, under clause 4 which is entitled "Subscription and Transfer of Shares", clause 4.1 sets out the restrictions on subscription or transfer. Clause 4.2 deals with subscription of Centrino shares and at clause 4.3, the put option is set out and that reads as under :

> ***"4.3 Put Option***
>
> *Goldspot shall, subject to the conditions set out below, have the right to require GSPL or its nominee to purchase all, but not part only, of the Plustech Shares (the "**Put Shares**") held by Goldspot (the "**Put Option**") in accordance with the procedure laid down in clause 4.5 below and at a fair market value determined in accordance with Clause 4.6 below.*
>
> *Goldspot may exercise the Put Option at any time after:*
>
> > *(a) GSPL or its nominee issues the Subscription Notice for subscribing to such number of Subscription Shares which would result in GSPL or its nominee holding more than 50% of the issued share capital of Centrino; or*
> >
> > *(b) CGP or its nominee issues a notice to subscribe to or purchase the shares in TII pursuant to the subscription right or call option, as the case maybe, available under the TII Shareholders Agreement ("**TII Option**") which would result in CGP or its nominee holding more than 50% of the issued share capital of TII. CGP shall procure a copy of the aforesaid notice shall be sent to Goldspot simultaneous with exercise of the TII Option. After issue of the aforesaid notice but prior to subscription to/purchase of any shares in TII by CGP, in the event Goldspot exercises the Put Option, GSPL shall*

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(unless the Parties agree otherwise) complete the purchase of the Put Shares at fair market value determined in accordance with Clause 4.6 below prior to the aforesaid subscription to/purchase of the shares in TII; or

(c) GSPL becomes eligible under all applicable Indian laws and regulations to hold all of the Subscription Shares; or

(d) GSPL transfers the Subscription Option to a party eligible under all applicable Indian laws and regulations to hold all of the Subscription Shares; or

(e) Receipt of a notice of default under the Centrino Financing.

GSPL hereby agrees to abide by the directions of Goldspot in connection with the Transfer of the Put Shares to GSPL or its nominee and undertakes to do or procure all necessary things and execute all necessary forms, documents and agreements to implement such directions and the Parties agree if the Put Option is exercised at any time after the Subscription Notice is issued, then GSPL shall, in its absolute discretion, have the option to withdraw the Subscription Notice or complete thereunder..

At page 308 clause 4.4 is the Call Option. Clause 4.6 deals with transfer price and reads as under :

"4.6 Transfer Price

*Except as stipulated by clause 4.7 and subject to the requirements of any applicable regulatory requirements, the price payable for any Transfer ("**Transfer Price**") pursuant to the Put Option or the Call Option shall be as determined below:*

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> *(a) such fair market value as may be agreed between the Parties; and if the Parties fail to reach agreement within 30 days of the date of the Transfer Notice, then;*
>
> *(b) such fair market value as may be determined in accordance with the formula set out in Schedule 2.*

162 The assignability or transfer of rights is dealt with by clause 4.9 and it states that the parties agree that the subscription option (all or part only) may be freely assigned or transferred by GSPL without the consent of the other parties, that the call option set out in clause 4.4 may be assigned or transferred only to an affiliate of GSPL without the consent of Goldspot and that put option set out in clause 4.3 may not be assigned or transferred without the prior written consent of GSPL. The change of control is dealt with by clause 5.3 and clause 6.2 deals with termination.

163 The Framework Agreement copy of which is at Annexure-D Page 323 is between Analjit Singh and Scorpios Beverges Pvt. Ltd. and MV Healthcare Services Pvt. Ltd., 3 Global Services Pvt. Ltd. and ND Callus Info Services Pvt. Ltd.. Analjit Singh also is styled as an Indian based entrepreneur with diversified interests and investments in various sectors. Hutchison Whampoa Limited, Hutchison

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Telecommunications International Limited and their affiliates (Hutchison Group) have an interest in HEL which is an Indian telecommunications operator. AS was offered an investment in Telecom Investments India Limited (TII) which, in turn, will hold beneficial direct or indirect interest of 19.54% in the issued share capital of HEL and offered AS the opportunity to make such an investment. He also declined it because of lack of finances.

164 GSPL agreed to assist or procure assistance for AS in obtaining such financing and to provide guarantees required by any lenders providing such financing. Since in the past AS has been associated with a joint venture partner with the Hutchison Group in HEL and with a view to enter into strategic alliances with the Hutchison Group in other sectors such as real estate etc. where foreign direct investment is being liberalized, AS agreed to invest in TII. That is how the 2063250 ordinary shares of par value of Rs.10/- per share amounting to 38.78% of the TII shares were acquired by AS through ND Callus. SBP which is wholly owned by AS currently holds 100% of the issued equity share capital of MV Healthcare Services Pvt. Ltd. which in turn

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owns 100% of the issued equity share capital of ND Callus. In consideration of GSPL procuring credit support for the financing obtained by ND Callus to finance its acquisition of TII shares, NDC was desirous of granting GSPL an option to purchase equity shares of MV Healthcare Services Pvt. Ltd. That is how the recitals in the agreement read and which we find contains similar clauses and sub-clauses viz. put option and call option – clauses 4.3 and 4.4 and contains similar signatures.

165 Then there is a Shareholders Agreement dated 1st March, 2006 which follows the Centrino Framework Agreement (AS) and Framework Agreement dated 1st March, 2006 of AG and this shareholders agreement Annexure-E at page 347 is between Centrino Trading Company Pvt. Ltd., ND Callus, CGP India Investments Limited and TII Limited. Here, the TII is defined as the company and the agreement recites that it is engaged in the business of investing in securities of telecommunication companies in India. NDC, CGP and Centrino currently hold 38.78%, 37.25% and 23.97% respectively of the issued equity share capital of TII. The parties were desirous of

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entering in this agreement to confirm their understanding regarding the regulation of affairs of TII and the relationship of the shareholders thereof. TII joined this agreement as a confirming party, *inter-alia*, as the matters contained in this agreement affect the administration of TII. This agreement at running page 355 in clauses 4.2 to 4.4 sets out the put option, call option, subscription and transfer procedure. These clauses at pages 355 and 366 read as under :

> *"**4.2 Put Option***
>
> *Each of NDC and Centrino shall have the right to require CGP to purchase, or procure the purchase of, all but not part only of the NDC Shares and/or the Centrino Shares, respectively (each, a **"Put Option"**) as the case may be, in accordance with the procedure laid down in Clause 4.4 below and at a fair market value determined in accordance with Clause 4.5 below.*
>
> ***4.3 Call Option***
>
> *CGP shall have the right at any time, and from time to time, to purchase any of the NDC Shares and/or the Centrino Shares (each, a **"Call Option"**) in accordance with the procedure laid down in Clause 4.4 below and at a fair market value determined in accordance with Clause 4.5 below.*
>
> ***4.4 Subscription and Transfer Procedure***
>
> *(a) The Subscription Option, Put Option and/or Call Option and/or Default Option, shall be exercised by a written notice **("Transfer Notice")** from the party exercising such Option **("Offeror")** to the applicable counterparty **("Offeree")** and the effective date of its*

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exercise shall be the date of the said written notice. Any resulting issuance, sale or acquisition shall be subject to the approval of any other competent regulatory agencies and shall be completed within the periods stipulated by Clause 4.4(c) or such other extended time which may be required for any determination under Clause 4.5 or to comply with applicable laws (including the obtaining of requisite approvals).

(b) Any notice with respect to the Subscription Option or Call Option or Default Option) given by CGP (or response to any such notice by NDC and/or Centrino) shall stipulate the name of any third party nominated to purchase or take a transfer of the Subscription Shares, NDC Shares and/or the Centrino Shares.

(c) Any issuance of Subscription Shares or Transfer of the Put Shares or Call Shares or Default Shares and payments in consideration thereof shall, subject to any agreement in writing between the Parties to the contrary and Clause 4.4(a), be completed simultaneously within a period of 90 days from the Transfer Notice in question."

Clause 4.9 deals with assignability of transfer of rights and that reads as under :

"4.9 Assignability or Transfer of Rights

The parties agree that the Subscription Option (all or part only) may be freely assigned or transferred by CGP without the consent of the other Parties, that the Call Options set out in Clause 4.3 may be assigned or transferred only to an Affiliate of CGP, without the consent of NDC and/or Centrino, and that the Put Options set out in Clause 4.2 may not be assigned or transferred without the prior written consent of CGP.

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166 The Tribunal, by referring to all these agreements, rendered a finding that a comparison of the Framework Agreement of 2006 and Framework Agreement of 2007 by putting the relevant clauses thereof side by side reveals that the assessee shall have the right at any time to purchase all of the indirect shareholding to the extent of 12.25% in VIL as held by the group companies of AS and AG under call options. The call options under the Framework Agreement of 2006 have to be exercised either by the assessee or its nominees whereas the call option under the Framework Agreement of 2007 have to be exercised either by the assessee or any wholly owned subsidiary of Vodafone Group PLC. Apart from the assessee or wholly owned subsidiary of Vodafone PLC, a third option was also provided under the Framework Agreement of 2007, whereby the assessee could nominate a person other than the wholly owned subsidiary of Vodafone Group PLC for purchase of all but not part of the shares held by AS and AG group of companies. Thus, a combined reading of the relevant clauses of the Framework Agreements of 2006 and 2007 reveals that there is only one difference under the Framework Agreements of 2007 regarding call option and that is including any wholly owned subsidiary of

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Vodafone PLC can exercise the call option. The finding is that the inclusion of a probable assignee in clause 4.4. of Framework Agreement of 2007 alone would not tantamount to assignment or transfer of call option. In that regard, the Revenue's reference to section 2(47) has been considered and thereafter the Tribunal renders a finding in paragraph 34 which is in favour of the assessee.

167 It is this finding which has been relied upon very heavily by Mr. Salve, but Mr. Setalvad submits that there are certain materials and which are relied upon by the Revenue so as to demonstrate that the matter squarely falls within the amended section 2(47) of the Income Tax Act, 1961. The Hon'ble Supreme Court and particularly in paragraph 88 holds that till date, the options remain unencashed with GSPL. The Hon'ble Supreme Court further held that even if the option rights are considered to be property rights, there has been no transfer or assignment of options by GSPL till today. The Revenue submits that these two conclusions have also been arrived at by examining the SPA and the 2006 Framework Agreements. After the amendment brought in to the definition, it is not necessary that options

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become property when they are exercised. Since definition of property has also been amended with retrospective effect to include option rights, it is no longer necessary for the options to be encashed in order to constitute property. Further, in the 2007 Framework Agreements HTIL was not a party. While examining the issue whether 3GSPL has transferred or assigned the options under the Framework Agreements, the Hon'ble Supreme Court was guided by the definition of the terms 'property' and 'transfer' as they then existed. Both these terms have been amended and the scope has been widened through the retrospective amendment. Therefore, whether 3GSPL has transferred or assigned the options will have to be examined in the light of the amended law. Alternative to this it is submitted that the decision of the Hon'ble Supreme Court was rendered on 20th January, 2012. However, various documents were placed on record before the Supreme Court to show that options have been exercised in April 2009 and August 2009 to the extent of 49%. This resulted in reduction of options by 6% out of 12.25% in VIL held originally. Subsequently, the Framework Agreement with AG group of companies was terminated during the financial year 2010-2011 relevant to the

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assessment year 2011-12. The option further reduced by 2.34% during this assessment year. We have already referred and reproduced above that part of the contention of Mr. Setalvad relying upon various letters commencing from 6th April, 2009 and ending upto the second explanation to the shareholders agreements 7th April, 2009, 27th August, 2009. These documents were not before the Hon'ble Supreme Court and though the assessee submitted that VIH BV was a party to the dispute before the Hon'ble Supreme Court, it admitted certain averments in this regard. Thus, there is evidence that options rights were, in fact, exercised. The option rights would not have been exercised unless an interest in the same could have been created in assessment year 2008-09. In any view and without prejudice, the case of the Revenue is not in any way vitally affected by the findings of the Hon'ble Supreme Court in paragraph 88 and in the light of the subsequent amendments to the Income Tax Act. Therefore, the assessee's contention that the word “till date” or “till today” should be read as “during the relevant assessment year” is completely unfounded and the Hon'ble Supreme Court's judgment cannot he read in this manner. We find that the Revenue's arguments are essentially based

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on the Framework Agreements of 2007. Even if those are taken into consideration and as vehemently urged what we find is that the term "transfer" is in relation to a capital asset and includes what is enumerated under clauses (i) to (vi) and by explanation 2 what has been clarified is 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 unconditionally, voluntarily or involuntarily, by way of an amendment (whether entered into in India or outside India or otherwise). Notwithstanding such transfer of the rights has been characterized as being affected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India.

168 The Tribunal in paragraph 34 had before it the amended definition of the word "transfer" and without explanation. The Tribunal held that without going into the means and methods a disposal or parting with or creating any interest in an asset must exist and be borne out from the arrangement or transfer. Making the

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provision of one of the prospective nominees would not amount to creating any interest in the asset in the shape of right to acquire the shares held under call option. Analyzing the Framework Agreement and particularly clause 4.4 read with clause 4.10, the Tribunal concluded that the right to acquire shares remains with the assessee till the assessee exercises its right to nominate a pre mentioned wholly owned subsidiary of Vodafone PLC. If the right of the assessee to acquire or purchase through a wholly owned subsidiary of Vodafone PLC the shares held under the call option is spelt out but what has transpired is that change of prospective nominee will not bring about the transfer or create any right in favour of the prospective nominee until the actual nomination is made. Further, in paragraph 35, the Tribunal held that though the re-writing of the framework agreement in the year 2007 stand alone does not constitute assignment, transfer or creating any right of call options in favour of the prospective nominee, the matter does not rest there as there is a shareholders agreement dated 5th July, 2007 between the shareholders of TII on one hand and CGP India Investment Ltd., TII and VIH BC on the other. This document has been filed as an additional evidence. Based on

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this, the Revenue reiterated that the assessee assigned the call options in favour of CGP India Investment Ltd., a 100% subsidiary of the Vodafone group by rewriting the Framework Agreement of 2007. The signing of this agreement again establishes the fact that the call options were assigned by the assessee in favour of CGP Mauritius. The assessee on the other hand submitted that the options are completely different from call options and put options held by the assessee, AS and AG respectively under the 2007 Framework Agreement. That is with reference to the shareholders agreement of 5th July, 2007. The distinction has been brought about and thereafter what the Tribunal finds is that some clauses of the agreement styled as shareholders agreement dated 5th July, 2007, which was signed in pursuance and in furtherance of the Framework Agreement of 2007 and not as an independent distinct agreement having no connection with the option rights under the Framework Agreements, enables the Tribunal not to agree with the contentions of the assessee that shareholders agreement has no relevance or bearing on the issue of assignment of call options and that observations of the Hon'ble Supreme Court would not bind the other remaining shareholders. We

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find that by this circuitous and somewhat round about method, the Tribunal arrives at a conclusion and which we have already referred in great details above. If the transfer of option rights vested with the asssessee in favour of CGP is mutually intended and reflected from the Framework Agreement, TII shareholders agreement and the background development as well as surrounding circumstances, then, by such intention alone we do not find any justification for reaching the conclusion that option rights including the call option held by the assessee under the Framework Agreement stand transferred / assigned in favour of CGP India Investment by virtue of TII shareholders agreement. This round about or circuitous mode may be depicting a intention of the parties but whether the ingredients of section 2(47) are satisfied or not cannot be determined in this manner. Thus, the conclusions reached in paragraphs 36 to 42 of the impugned order demonstrate that by the mode adopted they could not have been reached in law. Else, something more than that is expressly provided stands incorporated in the amended provisions.

169 We had to undertake the above exercise because of the detailed

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submissions canvassed by Mr. Setalvad orally and in writing. The submissions to a great extent overlap and in the foregoing paragraphs we have noted the same.

170 Mr. Setalvad has disputed the above position and by urging that from a reading of the Framework Agreements and the definition of the term “option” therein, the position as noted in the Supreme Court judgment has undergone substantial change. He has relied heavily upon certain documents and which are referred in the written note V at pages 4 and 5. This written note is on the applicability of the Supreme Court decision. The argument is that the options have been exercised in April and August, 2009 to a considerable extent. He would submit that the Hon'ble Supreme Court holds that options become property only when they are exercised. Since the definition of the word property has also been amended with retrospective effect to include option rights, it is no longer necessary for the options to be encashed in order to constitute property. Further, it is contended that the documents at least those after the letter dated 21st August, 2009, would indicate as to how the Supreme Court judgment will not apply any

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longer. There is evidence that option rights were in fact exercised. The option rights could not have been exercised unless an interest in the option rights had been created in the assessment year 2008-09. Apart therefrom, heavy reliance is placed on the amendments. It is also argued that the appellant has acquired 15.4% option rights through a Framework Agreement of 2006 with AS, AG and IDFC group of companies. The payment have been made as under. Appellant made payment of 47.30 million US$ towards the annual payment during Financial Year 2011-12. Payment of Rs.62.23 crores to IDFC investor for assignment of cashless option. The appellant has not availed its right to purchase 0.123% stake in VIL/HEL on acquiring the cashless option. In the process and to that extent, the Mauritius Associate Enterprise of the appellant benefitted. The IDFC Framework Agreement dated 6th June, 2007, was terminated during Financial Year 2011-12 vide termination agreement dated 23rd November, 2011 and the appellant has paid Rs.2.2.50 million for which it has not received a single share. Thus, the payments have been made from time to time but no benefit has been received by the appellant on creation of interest in the option rights in favour of its

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Associate Enterprise or at the time of exercise of option rights. As on date, there is no option right existing in the hands of the appellant. Thus, the assessee which held valuable option rights had only incurred losses in the whole arrangement. Therefore, this contention of the appellant and particularly that call options were never transferred and remained invested with them should be rejected. In that regard, reliance is placed upon the Framework Agreements.

171 It must be at once noticed that with all this as well, the Tribunal does not go beyond terming the arrangement as a intention of the parties at the time of Framework Agreements and thereafter the Shareholders Agreement dated 5th July, 2007, that the option rights held by the assessee were to be transferred / assigned only to CGP India and none other. This finding is rendered after concluding that the role of the assessee ceased to exist the moment the shareholders agreement was signed. It was then held that it is manifest from these agreements that the intention of the parties to the Framework Agreements was that the option rights held by the assessee were to be transferred / assigned only to CGP India and none other. These

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findings in paragraphs 40 and 41 of the impugned order are now being questioned and by the above process by the Revenue itself. The Revenue urges that from a reading of the Framework Agreements of 2007 it would be apparent whether put option is exercised by AS / AG or call option is exercised by the appellant, it is one and the same and can be said to be two sides of the same coin. In this case, the appellant had a call option to ask AS /AG to sell shares of SBP / AG Mercantile while AS and AG had so called put option to ask VISPL to buy the same shares of SBP / AG Mercantile. Therefore, in the case of call option granted by AS and AG to VISPL, the option holder is VISPL while the option writer is AS / AG.

172 We have adverted to the above arguments and from Note No.6-A and reproduced them. The essence of the same is that AS and AG were under an obligation to sell their stake and hence had no put option. Hence, what has been transferred is rights by whatever name called under clause 4.4. of the 2007 Framework Agreement with AS and AG. As this right vested in the appellant earlier which has now been transferred to its AE i.e. Associate Enterprise in VIH BV it is a

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transfer of valuable right attracting capital gain.

173 At the same time, the argument is that exercise of put options by AS and AG extinguishes the call option even if they are considered separate. They automatically stand assigned.

174 The definition of the term 'transfer' has been repeatedly emphasised and by virtue of the explanation 2 which has been inserted by Finance Act of 2012 with retrospective effect from 1st April, 1962. The word 'transfer' in relation to a capital asset includes the sale, exchange or relinquishment of the asset or the extinguishment of any right therein or the compulsory acquisition thereof under any law or in a case where the asset is converted by the owner thereof into or is treated by him as a stock-in-trade of a business carried on by him, such conversion or treatment. The further sub-clauses (iv-a), (v) and (vi) are not required to be referred, but they would throw light on the intention of the legislature in bringing into the definition of the term 'transfer' the sale, exchange or relinquishment of the asset or the extinguishment of any rights therein, the compulsory acquisition thereof, the conversion or treatment in the manner referred in clause

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(iv), the maturity or redemption of a zero coupon bond or the transaction involving the allowing of possession of any immovable property to be taken or retained, any transaction which has the effect of transferring or enabling the enjoyment of any immovable property.

175 By explanation 2, the doubts have been clarified and it is indicated that transfer would include 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 voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India or otherwise). Notwithstanding such transfer of the rights have been characterized as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India. Nonetheless, it would have to be a transfer in relation to a capital asset. That includes the acts in section 2(47) sub-clauses (i) to (iv). The explanation 2 clarifies that transfer would also include and shall be deemed to have included the acts specified in explanation 2. Even there it must be a disposal or parting with an asset or any

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interest therein or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely voluntarily or involuntarily, by way of an agreement or otherwise. The character that is given to the transfer of rights contemplated by explanation 2 may be effected in the manner further indicated by that explanation or may be dependent upon or flowing from the same. Thus, this transfer may be characterized as being effected or dependent upon or flowing from the transfer or shares of a company which may be registered or incorporated outside India but still it would have to be a transfer.

176 It is not disputed that this must be in relation to a capital asset and capital asset means property. Under section 2(14) capital asset means property of any kind held by an assessee and whether or not connected with the business or profession but does not include what falls in sub-clauses (i) and (ii). Therefore, capital asset means property and what we find is that all throughout it is concluded that there is only a transfer of a share. Further, the overseas transaction and thereafter all the agreements or arrangements noted above evince an intention of the assessee to control the telecommunication business

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of HEL in India through the TII and downstream companies. All this even after the amendment has not been termed as a transfer by the Tribunal even in the impugned order. Even if one peruses and analyses the transactions by reading all the agreements together, the result is not as reached by the Tribunal. That does not bring about the result nor does it culminate in the dealing or transaction falling within explanation 2 and, therefore, included in section 2(47) of the Income-tax Act, 1961. We do not see how we can stretch these amended definitions to such an extent and as desired by the Revenue. The Revenue's contentions either canvassed mainly or alternately or without prejudice would not enable us to hold that section 2(47) would be attracted and even to the situation noted post the judgment of the Hon'ble Supreme Court. It is very clear that the Revenue's arguments take into consideration the explanation which has been inserted in section 2(14) and once again that is to remove doubts and clarify that “property” includes and shall be deemed to have always included any rights in or in relation to an Indian company including rights of management or control or any other rights whatsoever. The argument is that a reading of this explanation makes it clear that any

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right in the options is property for the purpose of section 2(14). However, for the explanation to apply there has to be a property and capital asset means property not falling within the exclusion in any part of the definition of the term 'capital asset'. If it is property, then, that includes and shall be deemed to have always included any right in or in relation to an Indian company, including rights of management or control or any other rights whatsoever. Therefore, option and which is relation to shares of an Indian company namely Scorpios Beverages Private Limited and AG Mercantile Company Pvt. Ltd. are referred to by the Revenue. According to it, these options in turn entitle the option holder to a 12.25% equity interest in VIL(HEL). Thus, the right of the appellant to subscribe to the shares of AS and AG group companies is in the nature of a capital asset as defined in section 2(14) of the Income-tax Act,1961. It is in that context that it is alleged that the option rights held by the assessee is property and any interest created therein is also in the nature of property and falls within the ambit of section 2(14) read with the explanation thereto. Now, this is too far fetched a situation and to accept that it is falling within the explanation one would have to assume that the option rights are held

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by the assessee. The options without being exercised would become property because they relate to shares of an Indian company and the holder thereof is entitled to an equity interest in HEL. At the same time, the argument is that this is a right of the appellant to subscribe to the shares of AS and AG group company and that is in the nature of a capital asset. Thus, this is a situation which is completely contradictory and the Revenue is clearly shifting its stand from time to time. There is substance in the contentions of Mr. Salve to this effect and when Mr. Setalvad urged before us that the appellant was made to create interest in the option rights in favour of VIH BV / subsidiary for which it did not receive a single penny for the capital asset being held by it. Mr. Salve interdicted and urged that this is a completely new case. This was never argued by the Revenue. Something contrary to it was contended and in that regard he placed reliance on page 1051 of Volume III of the paper-book. We see some substance in the contentions and to this effect.

177 Therefore, we are of the view that none of these amendments and post the Supreme Court judgment would enable the Revenue to

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urge that the position as noted in the Supreme Court judgment no longer subsists. Even if there was a change therein on the basis of the Revenue's stand itself the Tribunal concluded quite contrary to what is now urged before us. Apart therefrom, we find that the essential ingredients of the definitions as amended are not satisfied and the conflicting and shifting stand of the Revenue worsens the position.

178 Now what remains for our consideration is the argument of the assessee that the Tribunal discovered from the documents filed, another agreement between a co-subsidiary of the appellant CGP Mauritius and AG and AS and their companies which allegedly had yet another set of call options in favour of CGP. The Tribunal concluded in paragraphs 40 and 42 that the call options contained in this Shareholders Agreement rendered the call options contained in the Framework Agreements nugatory. It then concluded that this Shareholders Agreement results in an assignment of the call options of the appellants and the beneficiary of the assignment was not VIH BV but CGP. The assessee rightly contended that the submissions filed by the Revenue asserted that the assignment was by virtue of the

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Framework Agreements to VIH BV but the Tribunal holds that the options of the Framework Agreements become meaningless and stand transferred by virtue of the Shareholders Agreement to CGP Mauritius. This agreement to which CGP is a party but to which the appellant was not resulted in any assignment of the appellant's call options was never the case of the Revenue. The Tribunal, therefore, considered it and even in relation thereto rendered inconsistent and somewhat contrary findings. In the first place, the Tribunal should have noted that it had already held in the earlier paragraph that a revised Framework agreement which recognised the same options did not constitute a transfer. Therefore, the case that the Shareholders Agreement of 2007 constituted an assignment of the call options is a case put to the assessee by the Tribunal. Even in relation to that we have found that the Tribunal does not conclude that section 2(14) and section 2(47) of the IT Act as amended would be attracted. We have found from a reading of the Tribunal's order that it held that in order to consider the issue of assignment / transfer of call option rights held by the assessee under the Framework Agreements of 2006 as well as the Framework Agreements of 2007 by virtue of the Shareholders

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Agreement dated 5th July, 2007, it is necessary to analyze various clauses of the TII Shareholders Agreement. The relevant clauses of the same have been reproduced in paragraph 38 and thereafter in paragraph 39, the Tribunal concluded that even under the Framework Agreement of 2007 what was to be transferred under the option rights were 23.97% and 38.78% of the shares in TII and thereby indirectly 12.25% shareholding in HEL. We do not see how and when thereafter in paragraph 40 the Tribunal concluded that all this corroborates the intention of the parties at the time of the Framework Agreements and thereafter Shareholder Agreement dated 5th July, 2007 that the option rights held by the assessee under the Framework Agreements were to be transferred / assigned only to CGP India and none other, that the option rights including the call option held by the assessee under the Framework Agreements stands transferred / assigned in favour of CGP India Investment by virtue of the TII Shareholders Agreement. In short and substance it is difficult to reconcile leave alone harmonize the conclusions in the preceding paragraphs with that of the final one rendered in paragraph 42. In any event and as held above, this is only an intention of the parties. It has never translated, even according to

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the Tribunal, into anything beyond what is concluded by the Tribunal and to be termed as a transfer.

179 Then, as far as the issue of international transaction as per the transfer pricing provisions of the Income-tax Act, 1961 is concerned, the Tribunal noted the rival contentions and particularly the arguments of Mr. Setalvad in paragraphs 44 and 45. The Tribunal then noted the contentions of the assessee to the contrary and in paragraph 51 it reproduces the definition of international transaction (section 92B) of the Income-tax Act, 1961. The Tribunal also holds that it has considered the rival submissions as well as various documents executed in connection with the divestment of telecom business in India by HTIL by transfer of stake in HEL through sale of shareholding of CGP. It also holds that it has analysed the relevant facts, clauses of the agreements and the provisions of the Income-tax Act. Then, in paragraph 52, it refers to sections 92, 92B, 92C, 92D, 92E and 92F(v). In paragraph 53 the Tribunal's understands an international transaction to mean a transaction including an arrangement or action in concert between two or more associated

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enterprise in the nature of purchase, sale, lease of tangible or intangible property or provision of services or lending or borrowing money or any other transaction having a bearing on the profits, income, losses or asset of such enterprise. The same also includes a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of or any contribution to any cost, expenses incurred or to be incurred in connection with benefit, service or facility provided to anyone or more of such enterprises. Therefore, in paragraph 54 it concludes that for an international transaction and as contemplated by the afore-referred legal provision it does not necessarily require a transfer or assignment of a property or creating any right or interest in the property but even an arrangement, understanding of the nature specified above would make the transaction an international transaction. It then concludes that even if was accepted that VIH BV is only a confirming / consenting party to the Framework Agreement, the said agreement is a mutual agreement under which the call options were granted by Asim Ghosh and Analjit Singh to the assessee against the consideration to be paid by the assessee or an affiliate for an aggregate amount of US $

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10.2 million and US $6.3 million per annum respectively to the counter parties. There is no dispute that the said consideration has been paid by VIH BV, an affiliate of the assessee, for retaining the call options by AG and AS. Hence the ingredients and conditions of an international transaction between the assessee and its associated enterprise (VIH BV) in terms of section 92B read with section 92F(v) are fulfilled and satisfied. Such a conclusion is reached by terming the 2007 Framework Agreement as an arrangement, understanding or action in concert between the assessee and VIH BV for grant of call option by AG and AS to the assessee against the agreed consideration paid by VIH BV. This mutual understanding and arrangement as well as action in concert between the assessee and VIH BV will certainly have a bearing on the profits, income,losses or asset of the associated enterprise. Hence the grant of call option under Framework Agreement 2007 against the consideration is an international transaction as per the provisions of section 92B read with section 92F(v). The other angle and as noted in paragraphs 54 and 55 eventually lead to the Tribunal's findings at paragraph 56 running page 180. That is with reference to to the entire transaction under SPA and

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other supplementary / ancillary agreements. The entire transaction is taken as one package / composite transaction of transfer of CGP and rights attached to the share. Paragraph 56 of the order of the Tribunal reads as under :

> *"56. The Hon'ble High Court while considering the binding nature of the SPA has observed in para 150-152 that the transaction should be of composite nature where performance of mother agreement may not be feasible without the aid, execution and performance of the supplementary or ancillary agreements for achieving the common object and collectively having bearing on the dispute. In the case in hand the entire transaction under SPA and other supplementary / ancillary agreements is one package / composite transaction of transfer of share of CGP and rights attached to the share. As part of its obligations, HTIL undertook to procure that each wider group company would not terminate or modify any rights under any of its framework agreements or exercise any of their options under any such agreement. HTIL also provided several warranties to VIH as set out in the Schedule 4 to SPA which included that HTIL was the sole beneficial owner of CGP share. The transaction of sale and purchase of CGP share under SPA took place on 08/05/2007. Therefore during the year under consideration both HTIL and VIH BV are the associate enterprise of the assessee as per section 92A(2) of IT Act. SPA and FWAs constitute an arrangement, understanding or action in concert among the assessee, HTIL and VIH BV for grant of Call Option by Asim Ghosh and Analjit Singh to assessee against the agreed consideration paid by the VIHBV. This mutual understanding and arrangement as well as action in concert between the assessee and its AEs for securing the Option Rights against the consideration paid by VIH BV to HTIL and AG and AS certainly having a bearing on the profits, income, losses or asset of the associated*

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enterprises."

180 Mr. Salve has assailed this conclusion by inviting our attention to the definition of the terms "capital asset" and "transfer" to submit that if these definitions and essential ingredients thereof are not satisfied, then, the machinery provision in Chapter X will not be attracted and applicable. His argument is that assignment of the call option cannot lead to a taxable capital gain. Even if the explanation to section 2(14) is given retrospective effect, but that is not applicable. There was never any concession made that call option is property. It is valuable but not property. In the circumstances, he would submit that there was no question of section 92B being attracted. Mr. Salve has submitted that there is no international transaction within the meaning of the above legal provisions. Mr. Salve had throughout taken pains to submit that the Revenue is confusing the issue by placing reliance upon section 92B of the IT Act. In the present case, the appellant had argued that there is no transaction and secondly there is no taxable income that arises as options are not property and are inchoate. There is no transfer of any options. The question of applicability of section 92B would arise only after it is shown that

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there is a chargeability under the provisions of the Act. Thus, section 92B applies only for purpose of computation.

181 Mr. Setalvad had in his oral arguments and the written note submitted that the 2007 Framework Agreement and particularly clause 4.4. thereof as held by the Tribunal does not in itself result in assignment of an option in favour of VIH BV. However, the Tribunal has thereafter considered the terms of TII Shareholders Agreement dated 5th July, 2007 entered into between Nadal, ND Callus and CGP Mauritius a Vodafone Group company. The Tribunal concluded that by virtue of TII Shareholders Agreement and in particular clauses 4.2 and 4.3 the shares held in TII and AS and AG have to be sold only to CGP Mauritius. Once these options were exercised under the 2007 TII Shareholders Agreement, then, TII would become a 100% subsidiary of CGP. The Tribunal has noted that TII being downstream company holding the shares in VIL when that becomes a subsidiary of CGP any stake held by the assessee in AS and AG group of companies being upstream companies is of no relevance. Therefore, ITAT concluded that the intention of the parties all along was to transfer the

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stake in TII to CGP Mauritius only. In arriving at this conclusion the Tribunal has noted that the 2007 Framework Agreement and 2007 TII shareholders Agreement were two connected documents as both of them regulated the option rights held by the assessee. It was further noted that AS and AG were party to the 2007 Framework Agreement, they were bound by the 2007 TII Shareholders Agreement and hence the property rights under the Framework Agreements were effectively assigned in favour of CGP Mauritius by TII Shareholders Agreement. Mr. Setalvad supported all these conclusions of the Tribunal. He submitted that Framework Agreements, SPA and all related documents constitute arrangement or understanding between the parties forming closely linked transactions. These transactions are international transactions as they are entered into between the assessee and its associated enterprise who are non residents. Further, the understanding or arrangement has resulted in creation of an interest in the option rights held by the assessee in favour of VIH BV an associated enterprise of the assessee. The Revenue also submitted before the Tribunal that the ultimate beneficiaries of the option rights was CGP Mauritius another associated enterprise of the assessee. The

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conclusions of the Revenue are sought to be supported by documents and facts on record. In that regard, our attention is invited to the 2007 TII Shareholders Agreement and once again it is urged that in the TII Shareholders Agreement dated 5th July, 2007 between Nadal, ND Callus, CGP, TII and VIH BV are shown as confirming parties whereas Nadal, ND Callus, CGP India are shown as parties to this agreement. In the 2006 TII Shareholders Agreement, HTIL the then holding company of CGP Mauritius was not a party. However, clauses 3.1, 3.2, 3.3, 3.5, 4.1, 4.2, 4.3, 4.4, 4.10, 6 and 6.2(b) are relied upon to urge that the implications from the above clauses would result in the respective stake in share capital of TII held by ND Callus and Nadal not increasing as there is an embargo on any further issue of shares in their favour. On the other hand, call and put options permit CGP to acquire the entire stake of ND Callus and Nadal. CGP acquired the stake of ND Callus and Nadal only after the options were fully exercised under the 2007 Framework Agreements. While the put options can be exercised by ND Callus and Nadal only in respect of their stake in TII, CGP can exercise call option at any time and from time to time wholly or partially. The stake in TII of CGP, Nadal and

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ND Callus cannot be transferred in any manner other than what is provided under clause 4. All this and the terms of the TII Shareholders Agreement indicate that 2007 TII Shareholders Agreement and 2007 Framework Agreement are closely connected to one another. That is how the argument of applicability of section 92B(1) is built. The conditions contained therein are satisfied and fulfilled is the submission.

182 We are unable to accept it for the edifice is built on the applicability of the amended provisions and really the definition of the term “capital asset” and “transfer”.

183 Section 92-B of the Income Tax Act, 1961, reads as under :

> *“92B. (1) For the purpose of this section and section 92, 92C, 92D and 92E, “international transaction”means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a*

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benefit, service or facility provided or to be provided to any one or more of such enterprise.

(2) A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes of sub-section (1), be deemed to be a transaction entered into between two associated enterprises, if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise.

Explanation- For the removal of doubts, it is hereby clarified that -

(i) the expression "international transaction" shall include -

(a) the purchase, sale, transfer or use of tangible property including building, transportation vehicle, machinery, equipment, tools, plant, furniture, commodity or any other article, product or thing;
(b) the purchase, sale, transfer, lease or use of intangible property, including the transfer of ownership or the provision of use of rights regarding land use, copyrights, patents, trademarks, licencees, franchises, customer list,marketing channel, brand, commercial secret, know-how, industrial property right, exterior design or practical and new design or any other business or commercial rights of similar nature;
(c) capital financing, including any type of long-term or short-term borrowing,lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;
(d) provision of services, including provision of

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market research, market development, marketing management, administration, technical service, repairs, design, consultation, agency, scientific research, legal or accounting service;

(e) a transaction of business restructuring or reorganisation, entered into by an enterprise with an associated enterprise, irrespective of the fact that it has bearing on the profit, income, losses or assets of such enterprise at the time of the transaction or at any future date;

(ii) the expression "intangible property" shall include -

(a) marketing related intangible assets, such as, trademarks, trade names, brand names, logos;

(b) technology related intangible assets, such as process patents, patent applications, technical documentation such as laboratory notebooks, technical know-how;

(c) artistic related intangible assets, such as, literary works and copyrights, musical compositions, copyrights, maps, engravings;

(d) data processing related intangible assets such as proprietary computer software, software copyrights, automated databases and integrated circuit masks and masters;

(e) engineering related intangible assets, such as, industrial design, product patents, trade secrets, engineering drawing and schematics, blueprints, proprietary documentation;

(f) customer related intangible assets, such as, customer lists, customer contracts, customer relationship, open purchase orders;

(g) contract related intangible assets, such as, favourable supplier, contracts, licence agreements, franchise agreements, non-compete agreements;

(h) human capital related intangible assets, such as,trained and organised work force, employment agreements, union contracts;

(i) location related intangible assets, such as,

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> *leasehold interest, mineral exploitation rights, easements, air rights, water rights;*
> *(j) goodwill related intangible assets, such as,institutional goodwill, professional practice goodwill, personal goodwill of professional, celebrity goodwill, general business going concern value;*
> *(k) methods, programmes, systems, procedures, campaigns, surveys, studies,forecasts, estimates, customer lists, or technical date;*
> *(l) any other similar item that derives value from the intellectual content rather than its physical attributes."*

184 A bare perusal thereof would indicate as to how the same has been incorporated so as to take care of avoidance of tax. This provision appears in Chapter X entitled "Special Provisions Relating to Avoidance of Tax". Section 92B defines "international transaction" and for the purposes of section 92B, the prior section 92 and the following sections 92C and 92D and 92E to mean a transaction between two or more associated enterprises, either or both of whom are non residents in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income etc. and thereafter follows the inclusive part. The explanation has been incorporated so as to remove doubt and clarify that the

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expression "international transaction" shall include all that is covered by clause (I) sub-clauses (a) to (e). By sub-section (2) of section 92B, a transaction entered into by an enterprise with a person other than associated enterprise shall, for the purpose of sub-section (1) be deemed to be a transaction entered into between associated enterprises, if there exists a prior arrangement in relation to the relevant transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise and the portion which has been added now is inserted by the Finance Act No.2 of 2014 with effect from 1st April, 2015. The computation of income from international transaction having regard to arm's length price is a matter dealt with by section 92 and what is the meaning of associated enterprise is set out in section 92A.

185 The Revenue has urged that in 2007 Framework Agreements, VIH BV is a party and, therefore, it is a mutual agreement / arrangement between the assessee and its associated enterprise for securing the option rights and assignment of the same as well as

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contribution or payment for consideration of grant of call options by AG and AS to assessee or its affiliate which clearly falls within the ambit of an international transaction under section 92B read with section 92F(v). The assessee, on the other hand argued that VIH BV is only a confirming party and not a party to the agreement and relied upon the judgment of the Hon'ble Supreme Court in the first Vodafone case. Thus, once the Supreme Court concludes that there was no assignment of call option in the Framework Agreements of 2007 in the light of the same, the jurisdictional and threshold requirement of existence of a transaction including international transaction vide section 92B of the Income-tax Act is not satisfied. Therefore, the provision of transfer pricing cannot be invoked when there is no transaction by recasting the Framework Agreements of 2007. By the elaborate submission of the assessee and as recorded in paragraph 50 of the impugned order of the Tribunal, it has been asserted that the 2007 Framework Agreements merely reiterated the rights of the assessee which existed even in the 2006 Framework Agreements. Therefore, the inevitable conclusion is that there has been no transaction whatsoever as an assignee which would mandatorily

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require a volitional factual act, usually involving a document by the assignor to at least one other party who is the assignee. If the Department is unable to point out any such volitional act save and except the 2007 Framework Agreements, then, that argument or stand has been rejected Hon'ble Supreme Court and equally by this Court.

186 In the first place, one cannot ignore the heading or title of Chapter X. That contains special provisions relating to avoidance of tax. Section 92(1) states that any income arising from an international transaction shall be computed having regard to the arm's length price. Therefore, the avoidance of tax results because the income from international transaction is not computed as above. It is for such computation that the further sections would come into play. If any income arising from an international transaction is to be computed and not otherwise. In our view, the transaction that the Tribunal refers to in section 92B means a transaction between two or more associated enterprises either or both of whom are non residents in the nature of purchase, sale or lease of tangible or intangible property. In the present case, there is definitely no provision of service nor is it held to

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be one of lending or borrowing money, but is simplicitor held to be any other transaction having a bearing on the profits, income, losses or assets of the associated enterprises and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprise. The Tribunal does not indicate in any of the foregoing paragraphs which we have referred or reproduced above that the transaction in question is in the nature of purchase, sale or lease of tangible or intangible property. The Revenue itself understands that this provision does not necessarily require a transfer or assignment of a property or creating any right or interest in the same, but attempts to justify the conclusion reached by the Tribunal and to be found in the foregoing paragraphs. For the purpose of applicability of section 92B itself we will have to draw an inference but without some concrete primary facts being established. Mere receipt of incidental benefits may not be sufficient to attract transfer pricing provisions. The Tribunal has, while dealing with aspect,

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attempted to bring in a transaction under the SPA and other supplementary / ancillary agreements by terming it as one package / composite transaction of transfer of share of CGP and rights attached to the share. It terms the same as obligation and undertaken by HTIL to procure that each wider group company would not terminate or modify any rights under any of the Framework Agreements in exercise of their options under such agreements. HTIL also provided several warranties to VIH BV as set out in Schedule 4 to the SPA which included that HTIL was the sole beneficial owner of the CGP share. The transaction and purchase of share of CGP under SPA took place on 8th May, 2007. We do not see how the Tribunal then contradicts itself when in paragraph 54 it only takes up the agreement where VIH BV is a confirming party. It holds that even if it is accepted that VIH BV is a confirming / consenting party to the Framework Agreements that is a mutual agreement under which the call options were granted by AS and AG to the assessee against the consideration to be paid by the assessee or an affiliate to the counter parties. It holds that there is no dispute that the said consideration has been paid by VIH BV an affiliate of the assessee for retaining the call options by AG and AS.

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In the ultimate analysis, the requirements of section 92B read with section 92F are fulfilled according to the Tribunal because the 2007 Framework Agreement is an arrangement, understanding or action in concert between the assessee and VIH BV for grant of call option by AG and AS to the assessee against the agreed consideration paid by VIH BV. If that is how the matter is approached, then, we do not see any basis for the subsequent observations. These are on the footing that consideration for purchase of single share of CGP was determined on the basis of 67% of the enterprise value of VIH / HEL and while computing the value of this single share, the equity interest of 15.03% through assessee under the Framework Agreements was very much part of the economic value of the transaction under the SPA between VIH BV and HTIL. That is how the Tribunal records that it is undisputed that Framework Agreements of 2007 were executed in pursuance of and to give effect to the SPA. It then concludes that as per the terms of the SPA all group companies and affiliates of HTIL were bound by the SPA being part of the wider group and that is how it refers to several clauses. It is this understanding of the Tribunal which we find to be completely faulty. In paragraph 56 which we

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have reproduced above, we find that the HTIL obligations are referred to, several warranties are provided to VIH as set out in Schedule 4 to the SPA which included that HTIL was the sole beneficial owner of CGP share. It is thus apparent that the Tribunal has accepted a completely confusing and unclear case of the Department. The Tax Department must clarify if it desires to tax something as income as to from where and which transaction the same arises. We also find that the Tribunal places reliance on section 92F(v). That reads as under :

> *"92F ....*
>
> *(v) "transaction" includes an arrangement, understanding or action in concert, -*
>
> *(A) whether or not such arrangement, understanding or action is formal or in writing; or*
>
> *(B) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings."*

187 A bare reading of clause (v) would indicate that the same defines "transaction" to include an arrangement, understanding or action in concert whether or not such arrangement, understanding or action is formal or in writing or whether or not such arrangement, understanding or action is intended to be enforceable by legal

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proceedings. We also find that during the course of arguments, another facet was tried to be introduced before us and that is that the appellant has entered into the 2007 Framework Agreements with AS and AG group of companies in pursuance to the SPA as there was a change of control over it from Hutchison group. Under the new Framework Agreement of 2006, the appellant had an exclusive right to purchase the entire share capital of AS and AG group giving it a 12.25% interest in VIL. Under the new Framework Agreement of 2007 signed during the Accounting Year 2008-09, an interest in the right to exercise options was created in favour of a wholly owned subsidiary of Vodafone group PLC. Then, reliance is placed on clause 4.4 of the Framework Agreement of 2006 and corresponding clause 4.4 of the Framework Agreement of 2007. It is urged that the exclusive right of the appellant under the Framework Agreement of 2006 no longer survives under the Framework Agreement of 2007. Under the 2007 Framework Agreement, the appellant had agreed that any wholly owned subsidiary of Vodafone group PLC can exercise a right by virtue of the interest created in the option. The words "at its sole discretion" in clause 4.4 of the 2007 Framework Agreement are

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relied upon. It is, therefore, urged that the appellant is the downstream subsidiary of Vodafone group PLC and some other subsidiaries are higher in the hierarchy. Therefore, these words "at its sole discretion" cannot be attributed to the appellant and these are attributable only to Vodafone group PLC. Hence the new Framework Agreement of 2007 has effectively created an interest in the option rights in favour of the Vodafone group subsidiary company. The shares have been purchased by CGP Mauritius subsequently which is a Mauritius based subsidiary company of Vodagone group PLC at the instance of VIH BV. We do not see any basis for this and then the reliance on the retention deed dated 8th May, 2007, between HTIL and VIH BV. That is not something which was relied upon before the Tribunal. The conditions of section 92B(1) are said to be satisfied by relying on the creation of interest in the option rights under the 2007 Framework Agreements. The basis for reliance on clause 4.4 of the 2007 Framework Agreement is to urge that there is an arrangement between the appellant and a wholly owned subsidiary of the Vodafone group PLC and if the appellant is also a wholly owned subsidiary of Vodafone group PLC, it will be an associated enterprise of any other wholly

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owned subsidiary of Vodafone group PLC. That is how the transaction will become an international transaction. VIH which is wholly owned subsidiary of Vodafone group PLC is a non-resident as also CGP Mauritius and which is the company to which the shares are finally transferred. This arrangement between the appellant and other wholly owned subsidiaries of Vodafone group PLC is an arrangement between the associated enterprises out of which one or more are non-residents. As per section 92B(1) there can be two or more than two parties to the transaction. There is no requirement that there has to be only one assignee. That is how and further this transaction having an impact or bearing on the profits, income or losses on the assets of such enterprise that the transaction is an international transaction.

188 We do not find any basis for such a case and now to be introduced. We do not, therefore, accept the same and for the reasons which have been assigned for not acceding to the primary contentions of the Revenue. In any event Mr. Setalvad's arguments overlook the fact that the income from international transaction has to be computed having regard to the arm's length price. It is not clarified throughout

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as to what is the income arising from the international transaction which is to be brought to tax. The Hon'ble Supreme Court has categorically held that there is no capital gain which can be taxed in terms of Indian tax regime. This is as far as the transfer of a share. The Court holds that there is no transfer of asset. As far as the above transactions are concerned, that is termed as arrangement creating an interest in option rights under the Framework Agreement of 2007. As already held this is also not covered by section 2(47) as amended retrospectively.

189 As far as the call centre business is concerned, Mr. Salve has made detailed submissions which we have already recorded above. The detailed submissions and made orally have been supported also by a written note. Mr. Salve's arguments can be summarised as under:

(a) That the Tribunal accepted the appellant's contention that section 92B(2) is not applicable to the instant case (paragraph 128 of the impugned order).

(b) However, the Tribunal upheld the alternate contention of the Revenue as noted by the Dispute Resolution Panel that transaction

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of call centre business was an international transaction under section 92B(1) of the Income Tax Act, 1961.

Thus, Mr. Salve's contention is that the Tribunal firstly considered whether the transaction of sale of call centre business by the assessee to HWP (India) would fall under the explanation "international transaction" as per the provisions of section 92B(1). HWP (India) was incorporated with the object of doing real estate business in India in January, 2006. In December, 2006, the process of divesting telecom business in India by HWL Group started and it was decided to sell the telecom business in India through the sale of downstream subsidiaries except call centre business of the assessee. HWP (India) did not do any business till execution of the business transfer agreement on 8th May, 2007. Even subsequent to the business transfer agreement HWP (India) did not run the call centre business but it was run by the assessee as agreed upon between the parties till 4th December, 2007. Since the HTIL was under an obligation to retain the call centre business and the assessee was going to be subsidiary of VIH BV, therefore, the call centre business group was required to be transferred from the assessee to the affiliate of HWL group.

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190 Mr. Salve submits that in paragraph 126 of the Tribunal's decision it concluded that the transaction made between the assessee and its non resident associate enterprises would be an international transaction in terms of section 92B(1). The second question as raised by the Department is noted in paragraph 127 of the Tribunal's order and in paragraph 128, the Tribunal concluded that an associated enterprise can be a resident or non resident. HWP (India) is an associated enterprise of the assessee for the year under consideration. Therefore, the provisions of sub-section (2) of section 92B are not attracted.

191 We have already reproduced these two sections and what we find is that the assessee in this case had contended that the business was transferred to an India related party. Therefore, both sub-sections (1) and (2) of section 92B are not attracted and consequently, it does not fall under the realm of international transaction. On the other hand, the Revenue's case was that HWP (India) is a dummy entity and that the transaction must be looked into by lifting the corporate veil. The

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alternative argument is that there is a prior agreement between HWP (India), HTIL and VIH BV being part of the SPA. Therefore, the sale of the call centre to HWP (India) would be deemed as sale to HTIL VIH BV. Sub-section (1) of section 92B defines an "international transaction" to mean a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property. The "associated enterprise" is defined by section 92A to mean in relation to another enterprise, an enterprise which participates directly or indirectly or through one or more intermediaries in the management or control of capital of the other enterprise or in respect of which one or more persons would participate directly or indirectly or through one or more intermediaries in its management or control of capital, are the same persons who participate directly or indirectly or indirectly or through one or more intermediaries in the management of capital of the other enterprise. Our attention is invited to the fact whether section 92B(1) which defines international transaction for the purpose of application of Transfer Pricing Regulations (Chapter X) can be applied to a transaction entered into between two resident entities on

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the specious ground that the transaction was entered into with an Indian company to avoid applicability of Chapter X. Secondly, whether the finding that the transfer of an asset from one Indian subsidiary of Hutch to another Indian subsidiary of Hutch can be considered to be a device to evade tax because had the transfer been made to a foreign company, the Department could have availed of the Chapter X machinery to arrive at an arm's length price, overlooking that the transfer of an Indian call centre owned by an Indian company to a foreign company would create serious regulatory hurdles and problems in relation to Indian Exchange Control Regulations.

192 On the other hand, the argument of the Revenue is based on the fact that the appellant is an Indian company incorporated as 3GSPL and it was after 8th May,2007, that its name was changed from 3GSPL to Vodafone India Services Private Limited. It became a part of Vodafone International Holdings BV (VIH BV) on completion of share transfer agreement of 8th May, 2008. Since 2003, assessee operated a capital call centre catering to HWL group companies (Hutchison 3G Australia Pty. Ltd.) and Hutchison 3G UK Limited).

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On 11th February, 2007, HTIL and VIH BV entered into the SPA whereby VIH BV agreed to acquire the entire equity share capital of CGP Investments (Holdings) Ltd. ("CGP") which indirectly owned assessee, together with certain loans. The further argument is that it was agreed upon between HTIL and VIH BV at the time of entering into SPA that the call centre business will not be acquired by VIH BV. Pursuant to this SPA between HTIL and VIH BV the call centre business was transferred to Hutchison Whampoa Properties (India) Pvt. Ltd., a subsidiary of HWL group. After referring to the ownership structure as on 8th May, 2007, it was argued that the Dispute Resolution Panel ("DRP" for short) and the Transfer Pricing Officer ("TPO" for short) have correctly taken the transaction of sale of call centre business as a deemed international transaction under section 92B(2) of the Income Tax Act, 1961. Further, it is held that the sale of call centre business is an international transaction under section 92B(1) of the Income Tax Act, 1961. The DRP upheld the method introduced by the TPO for valuation of the call centre. The assessee neither filed the documents in time nor did it file the complete documents before the TPO. The conduct of the assessee was

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brought out before the High Court in Writ Petition No. 488 of 2012 by filing an affidavit in reply. The assessee filed copy of the BTA after one and half months and even that was incomplete as the schedules forming part of the agreement were not filed. Incomplete schedules were filed only on 21st October, 2011, just before nine days of the time bar. However, Schedule-D to the BTA was not filed by the assessee and the same was filed by the respondent-Revenue. It is then alleged that as per the SPA a draft BTA was attached to the disclosure letter and which formed part of the SPA. However, the assessee did not file a copy of the draft BTA before the TPO or the Assessing Officer. A copy of this draft was filed on 25th September, 2012, before the DRP for the first time and it could not have looked into it as there were only five days left before the order of the DRP would have become time-barred. Hence this draft was not admitted as additional evidence. The copy of the SPA was also filed after two months that too after issuance of the summons under section 131 of the Income Tax Act,1961, Further, the assessee did not file the signed and dated copy of the MOU before the TPO. The details of the number of employees working in the call centre and exact and accurate were not filed. That

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is how the number of employees earlier mentioned as 5483 was later changed to 3640. In all this, it was urged, that the essential ingredients of section 92B(1) and 92B(2) are satisfied. The Tribunal, from paragraph 100 onwards dealt with the primary and the alternate argument and concluded that the transaction of sale of call centre business by the assessee to HWP (India) is an international transaction in terms of section 92B(1). In reaching that conclusion the Tribunal held that the transaction in substance is between the assessee and HTIL / HWL group, the associated enterprises of the assessee and HWP (India) is merely an interpose to give a different colour to the transaction with the motive to circumvent the transfer pricing provisions of the Act. The surrounding facts and circumstances can lead to the conclusion that it was only an arrangement without any substantial business or commercial interest of HWP (India) but to avoid the tax liability in India. The Call centre business, though apparently transferred to HWP (India) but all transactions of sale and purchase is between the assessee and HTIL/HWL Group. That is how this aforestated conclusion is reached.

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193 We are only concerned with the attempt of the Tribunal in not only referring to the share purchase agreement, but the Memorandum of Understanding signed between the assessee and HWP (India). The Tribunal reached the conclusion that the payment was made by HWL group company and not by HWP (India), though it was routed through the bank account of HWP (India).

194 As far as the second question about the applicability of section 92B(2) in the Tribunal's order and impugned in the appeal, at paragraph 127, the Tribunal adverted to sub-section (2) of section 92B and in paragraph 128 held that a transaction within the meaning of this sub-section must be entered into by the enterprise with the person other than an associated enterprise. The definition of the term associated enterprise is to be found in section 92A which does not contemplate associated enterprise to mean a non-resident. Therefore, an enterprise which fulfills the conditions as prescribed under section 92-A will fall under the expression “associated enterprise” irrespective of its residential status, domestic or non-resident. It is only for the purpose of international transaction, a transaction between two or

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more associated enterprises, either or both of whom are non- residents. The condition of non-residence of associated enterprises is only for bringing a transaction between two associated enterprises under the ambit of international transaction. Pertinently with all this, the Tribunal concluded that HWP (India) is an associated enterprise of the assessee for the year under consideration and, therefore, the provisions of sub-section (2) of section 92B are not attracted. We have referred to these conclusions in great details simply because Mr. Setalvad appearing on behalf of the Revenue before us has, during the course of his oral submissions and vide a written note, raised somewhat different contentions. He did not support the Tribunal's conclusions as recorded in paragraph 128 of the impugned order. He would submit that the appellant was operating a call centre which was catering to the customers of Hutchison in Australia, UK and Ireland. This business had approximately 7000 employees. At the time of transfer of 67% stake in the telecom business by HTI to VIH BV, it was decided that the call centre business alone will be retained by Hutchison Group. That is why it was sold off as a running business or a going concern by the appellant to Hutchison Whampoa Properties Limited [HWP

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(India)] by the business transfer agreement dated 8th May, 2007 and the consideration was determined at Rs.64 crores. This transaction was claimed to be a domestic transaction. The business transfer agreement was entered into on 8th May, 2007, and the call centre business was transferred by the appellant to HWP (India) on 4th December, 2007. The Transfer Pricing Officer treated this transaction as a deemed international transaction under section 92B(2) and determined the value of the call centre at Rs.2413 crores by applying a PE multiple of Rs.34.96. The DRP upheld the stand of the TPO under section 92B(2) and also held that it was an international transaction under section 92B(1). The Tribunal, however, accepted the conclusion of the DRP on applicability of section 92B(1) but did not agree with the Revenue on application of 92B(2). In the cross-objections one of the ground is about applicability of section 92B(2). The argument is that both sections are applicable. Mr. Setalvad submits that if the assessee has been held by the Tribunal to be an associated enterprise of both HTIL and VIH BV during the previous year in terms of section 92A(2), then, once two enterprises are associated enterprises at any time during the previous year they shall be termed to be the associated

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enterprises for the purpose of section 92A(1). Mr. Setalvad submits that section 92A(2) along with section 92B should be given a purposive interpretation. In transfer pricing proceedings one has to firstly see whether there is a transaction and if yes whether it is entered into between two associated enterprises. The words "at any time during the year" were introduced in the Act to overcome a situation where an assessee would contend that although it was an associated enterprise at the time when the transaction was entered into but was not an associated enterprise either at the beginning of the year or at the end of the year and hence the transfer pricing provisions would not apply. The relationship of associated enterprise should be considered at the time when the relevant international transaction was entered into and if the interpretation placed by the Tribunal that once two associated enterprises are associated enterprises at any time during the previous year they shall be deemed to be the associated enterprise for the entire year is upheld, it would lead to anomalous and unacceptable situations. In the written note at paragraphs 8 and 9, Mr. Setalvad has given some illustrations and has relied upon them. Mr. Setalvad was at pains to urge that the Tribunal relied on clause 8.8 (j)

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of the SPA and concluded that the call centre business has, therefore, been transferred by the assessee before the execution of the SPA on 8th May, 2007. Once it was so transferred, then, assessee and HWP (India) being associated enterprises, section 92B(2) will have no application. Mr. Setalvad submits that this clause refers to events that have taken place after the completion of the share sale and they have been incorrectly assumed to be conditions required to be fulfilled prior to the completion. Mr. Setalvad submits that the call centre transfer was to take place on 4th December,2007 and long after the execution of the SPA and relied upon clause 1.1 containing definitions of the terms call centre disposal, completion, closing period and submitted that GSPL transfer agreement has been defined as the BTA to be entered into between GSPL and affiliate of HWL relating to the call centre disposal substantially in the form attached to the disclosure letter. Mr. Setalvad, therefore, emphasised that completion took place on 8th May, 2007, when the CGP share was transferred to VIH BV and clause 8.8 provides that BTA will be executed only after completion. If completion has been defined as completion of transfer of CGP share to VIH BV, then, it is obvious that BTA is signed only after this

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transfer. Mr. Setalvad then relied upon the clause of the BTA and as set out in paragraph 13 of his written note. After relying upon it, he would submit that the date of international transaction is 4th December, 2007 and the associated enterprise relationship is also examined based on the position existing as on 4th December, 2007. Once it is held that the term "any time during the year" used in section 92A(2) does not result in establishing associated enterprise relationship for the periods for which conditions of section 92A are not fulfilled and it is also held that the call centre business was transferred after 8th May, 2007, then the limitations cited by the Tribunal for applying section 92B(2) are no longer valid. Thus, all conditions are fulfilled in this case. A very detailed note has been submitted and placed on record to urge that some provisions of the SPA and reproduced at paragraph 22 of this note would show that HWP (India) is a party to the SPA as part of the Vendor group and also as benefits, rights and obligations of the SPA in respect of the transaction involved in the sale of the call centre business will accrue to and bind HWP. In the present case it has been shown that HWP (India) is a party to the SPA thereby fulfilling the condition of prior agreement being between the associated enterprise

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of the appellant i.e. VIH BV and HWP (India). There is no requirement that the prior agreement must be in writing. Since HWP (India) acted as per the conditions stipulated under the SPA its conduct shows that it is acting under an oral agreement with VIH BV. Therefore, the condition required for SPA to be a prior agreement is satisfied.

195 On the applicability of section 92B(1) Mr. Setalvad submits that the relevant terms of the SPA read with the BTA constitute an arrangement, understanding and action in concert, as per the definition of the transaction given in section 92F(v) read with Rule 10A(d). It is widely worded and covers understanding, arrangement and action in concert. Moreover, the action need not be a single transaction and it can be number of closely related transactions. Thereafter, outlining the details of such transaction and relying on paragraphs 28 and 29 of the written note on this subject so also paragraph 30, Mr. Setalvad submits that all conditions are satisfied. Section 92B(1) requires that the transaction should be entered into between two or more associated enterprises out of which at least one is a non resident. In this case, it

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is an admitted position that before signing of the SPA, HTIL, appellant and HWP (India) are associated enterprises. HTIL is a non-resident. Since the transaction is between associated enterprises and one of them is a non-resident, the condition specified in section 92B(1) is satisfied. Further, the transaction involves sale of call centre business which is a capital asset. The capital asset of the assessee is getting transferred which in turn affects the income or profits and assets of the appellant. Hence this transaction of sale of call centre satisfies the condition specified in section 92B(1) and constitutes an international transaction even if the assessee's contention that the BTA was signed before the implementation of the SPA is assumed to be correct for the sake of argument.

196 With all this, he still relies on the doctrine of lifting of corporate veil. In that regard, the written note from paragraphs 34 to 43 has been perused by us as also paragraph 45. We have also perused the further paragraphs 46 to 48.

197 Mr. Salve has submitted that the argument of the Revenue and the conclusions of the Tribunal to the extent assailed by the appellant-

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assessee fail to note the difference between the two sub-sections (1) and(2) of section 92B. He would submit that section 92B(2) cannot be re-written. HWP (India) was an existing Indian company.

198 For appreciating all the above contentions, what we nave to note is that section 92 of the Act, with which Chapter X opens, deals with computation of income from international transaction having regard to arm's length price. Sub-section (1) of section 92 says that any income arising from an international transaction shall be computed having regard to the arm's length price. Then explanation to sub-section (1) says that for removal of doubts, it is hereby clarified that the allowance for any expense or interest arising from an international transaction shall also be determined having regard to the arm's length price. Sub-section (2) of section 92 says that where in an international transaction or specified domestic transaction (the words "specified domestic transaction" have been inserted by Finance Act, 2012 with effect from 1st April, 2013), two or more associated enterprises enter into a mutual agreement or arrangement for allocation or apportionment of, or any contribution to, any cost or expense incurred

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or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprise, the cost of expense allocated or apportioned to, or, as the case may be, contributed by, any such enterprise shall be determined having regard to the arm's length price of such benefit, service or facility, as the case may be.

199 Therefore, it is apparent that sub-section (1) deals with computation of income from an international transaction whereas sub-section (2) deals with an international transaction in which two or more associated enterprises enter into a mutual agreement or arrangement for the for allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprise. By sub-section (2A) any allowance for an expenditure or interest or allocation of any cost or expense or any income in relation to the specified domestic transaction shall be computed having regard to the arm's length price. By sub-section (3) it has been clarified that the provisions of section

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92 itself will not apply in a case where the computation of income or the benefit, service or facility or the determination of the allowance for any expense or interest and in terms of the added sub-sections has the effect of reducing the income chargeable to tax or increasing the loss, as the case may be, computed on the basis of entries made in the books of account in respect of the previous year in which the international transaction or specified domestic transaction was entered into.

200 With all these words appearing in the substantive section 92, then by section 92A comes in the definition of the term "associated enterprise". Section 92B was inserted to define "international transaction" and by sub-section (2) a transaction entered into by an enterprise with a person other than an associated enterprise shall for the purpose of sub-section (1) be deemed to be a transaction entered into between two associated enterprises if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined in substance between such other person and

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the associated enterprise.

201 Mr. Salve is right in urging that when international transaction is defined by sub-section (1) to mean a transaction between two or more associated enterprises either or both of whom are non-residents and in the nature specified in sub-section(1), by sub-section (2) a transaction entered into by an enterprise with a person other than an associated enterprise shall be deemed to be a transaction entered into between two associated enterprises if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise. Thereafter the doubts are cleared by the explanation.

202 Section 92C enables computation of arm's length price and the methods of such computation are set out therein. By Section 92CA a reference to the Transfer Pricing Officer is contemplated and where the Assessing Officer considers it necessary or expedient so to do, he may, with the previous approval of the Commissioner, refer the computation of the arm's length price in relation to the said

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international transaction or specified domestic transaction under section 92C to the Transfer Pricing Officer.

203 The other provisions in Chapter X are sections 92CB, 92CC, 92CD, 92D and 92E. Section 92F contains definitions of certain terms relevant to the computation of arm's length price etc. Thus, by section 92B the meaning of international transaction is given for the purposes of the prior section 92 and the following sections 92C, 92D and 92E and section 92F contains the definitions which are relevant for computation of arm's length price. In that regard, we would reproduce section 92F(ii)(iii) and (iiia):

> *"92F. In section 92, 92A, 92B, 92C, 92D and 92E, unless the context otherwise requires,-*
> *…………*
> *(ii) "arm's length price" means a price which is applied or proposed to be applied in a transaction between persons other than associated enterprises, in uncontrolled conditions.*
>
> *(iii) "enterprise" means a person (including a permanent establishment of such person) who is, or has been, or is proposed to be, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or know-how, patents, copyrights, trade-marks, licences, franchises or any other business or commercial rights of similar nature, or any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process, of which the other*

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enterprise is the owner or in respect of which the other enterprise has exclusive rights, or the provision of services of any kind, or in carrying out any work in pursuance of a contract or in investment, or providing loan or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, whether such activity or business is carried on, directly or through one or more of its units or divisions or subsidiaries or whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or places;

(iiia) "permanent establishment" referred to in clause (iii), includes a fixed place of business through which the business of the enterprise is wholly or partly carried out."

204 Mr. Salve, therefore, emphasises that if any income arises from the international transaction that shall be computed having regard to the arm's length price. He relied upon the fact that the appellant is an Indian company incorporated as 3GSPL and was part of the HTIL group. It operated a capital call centre catering to HWL company since 2003. Under the SPA, HTIL agreed to procure sale of the Indian share capital of CGP, an indirectly wholly owned subsidiary, to VIH BV. The call centre business was required to be hived off to an affiliate of HWL under a business transfer agreement and that is how the call centre business was accordingly transferred by 3GSPL to

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HWP (India). These facts have been noted in paragraphs 86 and 90 of the impugned order of the Tribunal. The business established in 2003 by an Indian company, always held by an Indian company and in 2007, is transferred to an Indian company. He relies upon the dates viz. 11th February, 2007, the date of signing of the SPA between HTIL and VIH BV, 25th April, 2007, Memorandum of Understanding entered into between 3GSPL and HWP (India) following which a business transfer agreement was signed between 3GSPL when it was still part of the HWL group. The completion of SPA took place after the business transfer agreement was signed. One of the conditions precedent for closure of the transaction under the SPA was the transfer of business of the call centre. That was transferred on 4th December,2007 on necessary Government approvals being obtained. Pending completion of the sale of this call centre business of the appellant, HWP (India) paid Rs.64 crores to 3GSPL on 30th April, 2007, under the aforementioned Memorandum of Understanding dated 25th April, 2007. The call centre business was transferred on slump sale basis for consideration of Rs.64 crores. Mr. Salve emphasized that the 3GSPL was always treated by the Income Tax Department as

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a separate corporate personality. It was always assessed as an Indian company, irrespective of the fact that it was wholly owned by a non-resident. It was also submitted that HWP has been filing Income-tax returns as an Indian company and not as a foreign company.

205 In that regard, Mr. Salve has relied upon the judgment of this Court in the case of *Vodafone India Services Pvt. Ltd. vs. Union of India* and that the Division Bench held and in the context of the petitioner which is a wholly owned subsidiary of a non-resident company Vodafone Teleservices (India) Holdings Limited. This latter one is the holding company. The petitioner before this Court required funds for its telecom services provided in India from its holding company during the financial year 2008-09 i.e. the assessment year 2009-10. On August 21, 2008, the petitioner issued 2,89,224 equity shares of the face value of Rs.10/- each at a premium of 8509 per share to its holding company. This resulted in the petitioner receiving a total consideration of Rs.246.38 crores from its holding company on issue of share between August and November, 2008. The fair market value of the issue of the equity shares at 8509 per share was

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determined by the petitioner in accordance with the methodology prescribed by the Government of India under the Capital Issue (Control) Act, 1947. However, according to the Assessing Officer and the Transfer Pricing Officer, the petitioner ought to have valued each share at Rs.53,775/- as against the aforesaid valuation done under the Capital Issue (Control) Act. On that basis a shortfall in premium to the extent of Rs.45,256/- per share resulted in a total shortfall of Rs.1308.91 crores. Both the Assessing Officer and the Transfer Pricing Officer on application of the transfer pricing provision in Chapter X of the Income Tax Act held that this amount of Rs.1308.91 is income. Further, as a consequence of the above, this amount is required to be treated as deemed loan given by the petitioner to its holding company and periodical interest thereon is to be charged to tax as interest income of Rs.86.35 crore in the financial year 2008-09 i.e. assessment year 2009-10. The argument was that absent income arising from international transaction, Chapter X of the Act has no application. The accounting year involved in the proceeding was 2009-10. The basic facts are noted and namely the undisputed position that the holding company is an associated enterprise of the

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petitioner for the purpose of Chapter X as defined in section 92A. The issue of shares, the valuation in terms of the Capital Issue (Control) Act and other facts as set out were also taken to be basic and not denied. All prior references including the order passed by this Court in Writ Petition No.1877 of 2013 dated 29th November, 2013, reported in 2014 (361) ITR 531 and filed by the same petitioner are referred. In Vodafone 3 case (supra) the challenge by the petitioner was to the order dated 28th January, 2013 of the Transfer Pricing Officer passed in terms of section 92CA of the Act and consequently draft assessment order dated 22nd March, 2013, passed by the Assessing Officer in terms of section 143(3) read with section 144C(1) of the Act relating to assessment year 2009-10. In this background and after extensively referring to the order passed in the Vodafone 3 case, this is what is held in paragraphs 14 and 15 :

> *"14 The impugned order further holds that as a consequence of the Petitioner's not receiving the arm's length price on the issue of shares, resulted in lesser premium being garnered by the Petitioner. This would result, in the Petitioner having less liquid funds available at its command which in turn could have reduced its debts or the excess funds could have been invested to earn income. Thus, the amount not received could have enhanced its potential income. In view of the above, the impugned order also holds that the share premium forgone has impacted potential income. Thus,*

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appropriately giving rise to application of Chapter X of the Act to the transaction of issues of share.

15 In conclusion, the impugned order at paragraph 44 holds as under:-

> *" In the light of the elaborate discussion above, the directions given by the Hon'ble Bombay High Court in its order dated 29.11.2013, stands disposed off. The Dispute Resolution Panel's findings are summarized as under:*
>
> *a. On a broader and harmonious construction of the term "income" in Section 92(1), Assessing Officer has jurisdiction to invoke Chapter X as share premium is an income arising from issue of shares (para 21)*
>
> *b. Even if the term "income" is not given a broad interpretation, the Assessing Officer has jurisdiction to invoke Chapter X as there is income potentially arising or affected by the short receipt of share premium (para 24)"*

206 After that, in paragraph 16, the contentions of the petitioner's senior counsel and in paragraph 17, the contentions and submissions of the Revenue have been noted. Thereafter, in paragraph 21, all the relevant provisions, including section 92, sections 92B, 92F are reproduced and in paragraphs 22, 23, 24, 25 and 26, this is what is held :

> *"22 Chapter X of the Act in the present form replaced the erstwhile Section 92 of the Act by Section 92 to 92F of the Act with effect from the assessment year*

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2002-03. Erstwhile Section 92 of Chapter X of the Act did deal with cross border transactions permitting adjustments of profits made by a resident in case of transactions with non-resident (two entities having close connection) if the profits of the resident were understated. This and Section 40A(2) of the Act which governed all assessee, did give some power to the Assessing Officer to ensure the correct profits are brought to tax in case of cross border transactions. However, in the light of Indian Economy opening up and becoming part of the global economy, leading to a spate of foreign companies (Multinational Enterprises) establishing business in India either by itself or through its subsidiaries or joint ventures. Similarly, Indian Companies ventured abroad, operating either by itself or through its subsidiaries or joint venture companies. These multinational enterprises had transaction between themselves and these transactions not being subject to market forces, the consideration were fixed within the group to ensure transfer of income from one tax jurisdiction to another as appeared profitable to them. Thus, the new Sections 92 to 92F of the Act were introduced with effect for A. Y. 2002-03 as a part of Chapter X of the Act. The aim being to have well defined rules to tax transactions between associated enterprises and not left to the discretion of the Assessing Officer and bring out uniformity in treatment to tax of International Transaction between associated enterprises. The Explanatory Notes to the Finance Act, 2001 brings out the objectives as indicated in the Circular No.14 of 2001 which read as under:-

> ***"55.3:-*** *With a view to provide a detailed statutory framework which can lead to computation of reasonable, fair and equitable profits and tax in India. In the case of such multinational enterprises, the Act has substituted section 92 with a new section and has introduced new sections 92A to 92F in the Income-tax Act, relating to computation of income from an*

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International Transaction having regard to the arm's length price, meaning of associated enterprise, meaning of International Transaction, computation of arm's length price, maintenance of information and documents by persons entering into International Transactions, furnishing of a report from an accountant by persons entering into International Transactions and definitions of certain expressions occurring in the said sections.

55.4:- *The newly substituted section 92 provides that income arising from an International Transaction between associated enterprises shall be computed having regard to the arm's length price. Any expense or outgoing in an International Transaction is also to be computed having regard to the arms length price. Thus in the case of a manufacturer, for example, the provisions will apply to exports made to the associated enterprise as also to imports from the same or any other associated enterprise. The provision is also applicable in a case where the International Transaction comprises only an outgoing from the Indian assessee.*

55.5:- *The new section further provides that the cost or expenses allocated or apportioned between two or more associated enterprises under a mutual agreement or arrangement shall be at arm's length price. Examples of such transactions could be where one associated enterprise carries out centralized functions which also benefit one or more other associated enterprises, or two or more associated enterprises agree to carry out a joint activity, such as research and development, for their mutual benefit.*

55.6:- *The new provision is intended to ensure that profits taxable in India are not understated (or losses are not overstated) by declaring lower receipts or higher outgoings than*

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> *those which would have been declared by persons entering into similar transactions with unrelated parties in the same or similar circumstances. The basic intention underlying the new transfer pricing regulations is to prevent shifting out of profits by manipulating prices charged or paid in International Transactions thereby eroding the country's tax base. The new section 92 is, therefore, not intended to be applied in cases where the adoption of the arm's length price determined under the regulations would result in a decrease in the overall tax incidence in India in respect of the parties involved in the International Transaction."*

23 Thus to get over transfer mis-pricing/ manipulation/abuse that the market based transfer pricing was introduced, known as arm's length price. Therefore, it is clear that Chapter X of the Act now existing was to ensure that qua International Transaction between associated enterprises, the profits are not understated nor losses overstated by abuse of either showing lesser consideration or higher expenses between associated enterprises than would be the consideration between two independent entities, uninfluenced by relationship. It did not replace the concept of Income or Expenditure as normally understood in the Act for the purposes of Chapter X of the Act. The objective of Chapter X of the Act is certainly not to punish Multinational Enterprises and/or associated enterprises from doing business inter se. However, we are conscious of the fact that in fiscal statutes, whatever may be the intent of the Parliament, the Courts have to construe the statute strictly on the basis of what is stated in the Act. We are governed by the off quoted passage of Rowlatt J. to the following effect:

> *" In a taxing Act, one has to look merely at what is clearly said. There is no room for any*

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> *intendment. There is no equity about tax. There is no presumption as to tax. Nothing is to be read in nothing is to be implied. One can only look fairly at the language employed".*

The above principle was restated by Justice J. C. Shah (as he then was) in ***Sales Tax Commissioner v/s. Modi Sugar Mills AIR 1961 page 1047*** *in following words:-*

> *" In Interpreting a taxing statute, equitable consideration are out of place. Nor can a taxing statute be interpreted or any presumption or assumptions. It must interpret a taxing statute in the light of what is clearly expressed....."*

Thus, we would examine the provisions of Chapter X of the Act with the aid of the submission made before us.

FINDINGS :

24 A plain reading of Section 92(1) of the Act very clearly brings out that income arising from a International Transaction is a condition precedent for application of Chapter X of the Act. This has already been so held by the order dated 29 November 2013 of this Court in Vodafone-III. We could have straight way held that the issue of examining the jurisdiction to apply Chapter X of the Act stands concluded by the order in Vodafone- III.

25 But we have examined the issue afresh. The word income for the purpose of the Act has a well understood meaning as defined in Section 2(24) of the Act. This even when the definition in Section 2(24) of the Act is an inclusive definition. It cannot be disputed that income will not in its normal meaning include capital receipts unless it is so specified, as in Section 2(24) (vi) of the Act. In such a case, Capital Gains

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chargeable to tax under Section 45 of the Act are, defined to be income. The amounts received on issue of share capital including the premium is undoubtedly on capital account. Share premium have been made taxable by a legal fiction under Section 56(2)(viib) of the Act and the same is enumerated as Income in Section 2(24)(xvi) of the Act. However, what is bought into the ambit of income is the premium received from a resident in excess of the fair market value of the shares. In this case what is being sought to be taxed is capital not received from a non-resident i.e. premium allegedly not received on application of arm's length price. Therefore, absent express legislation, no amount received, accrued or arising on capital account transaction can be subjected to tax as Income. This is settled by the decision of this Court in ***Cadell Weaving Mill Co. vs. CIT 249 ITR 265*** *was upheld by the Apex Court in* ***CIT vs. D.P. Sandu Bros. Chember (P) Ltd. 273 ITR 1.*** *This Court has in Cadell Weaving Mills Co. (supra) inter alia, observed as under:-*

> *" It is well settled that all receipts are not taxable under the Income tax Act. Section 2(24) defines "income". It is no doubt an inclusive definition. However, a capital receipt is not income under section 2(24) unless it is chargeable to tax as capital gains under Section 45. It is for this reason that under section 2(24)(vi) that the Legislature has expressly stated, inter alia, that income shall include any capital gains chargeable under section 45. Under Section 2(24)(vi), the Legislature has not included all capital gains as income. It is only capital gains chargeable under Section 45 which has been treated as income under Section 2(24). If the argument of the Department is accepted then all capital gains whether chargeable under section 45 of not, would come within the definition of the word "income" under section 2(24). Further, under section 2(24)(vi) the Legislature has not stated that "any capital gains" will be covered under the word income. On the*

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contrary, the Legislature has advisedly stated that only capital gains which are chargeable under Section 45 of the Act could be treated as income. In other words, capital gains not chargeable to tax under section 45 fall outside the definition of the word "income" in section 2(24) of the Act. It is true that section 2(24) of the Act is an inclusive definition However, in this case, we are required to ascertain the scope of Section 2(24)(vi) and for that purpose we have to read the sub section strictly. We cannot widen the scope of sub section by saying that the definition as a whole is inclusive and not exhaustive. In the present case, the words "chargeable under section 45" are very important. They are not being read by the Department. These words cannot be omitted. In fact, the prior history shows that capital gains were not chargeable before 1946. They were not chargeable between 1948 and 1956. Therefore, whenever an amount which is other wise a capital receipt is to be charged to tax, section 2(24) specifically so provides."

In view of the above, we find considerable substance in the Petitioner's case that neither the capital receipts received by the Petitioner on issue of equity shares to its holding company, a non-resident entity, nor the alleged short-fall between the so called fair market price of its equity shares and the issue price of the equity shares can be considered as income within the meaning of the expression as defined under the Act.

26 We shall now consider the submissions on behalf of the Revenue in the context of the statutory provisions. At one point of time we were toying with the idea of only dealing with the new grounds in support of the impugned order, as canvassed before us by the learned Solicitor General. This was for the reason that the revenue itself did not adopt the basis/grounds found in the impugned order viz. the short receipt of share premium being sufficient justification to invoke Section

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> *92(1) in Chapter X of the Act. The ground found in the impugned order was substituted /replaced at the hearing with a new ground viz: benefit given by the Petitioner to its holding company on application of Section 92(2) of the Act. However, on further consideration to comprehensively dispose of the proceedings, we decided to deal with both i.e. the grounds found in the impugned order as well as the reasons/grounds urged in support of the impugned conclusions by the learned Solicitor General at the hearing before us, as submissions made in the alternative."*

207 Thereafter in paragraphs 28, 29, 30 and 31, the Division Bench referred to the principles of interpretation to be applied while interpreting a fiscal / taxing statute and held thus :

> *"28 We shall first deal with the grounds recorded in the impugned order to justify the conclusion that the Revenue has jurisdiction to apply Chapter X of the Act to the transaction of issue of shares by the Petitioner to its holding company. This conclusion has been reached on application of Section 92(1) of the Act. Section 92 of the Act provides for computation of income from International Taxation having regard to arm's length price. Section 92(1) of the Act states that while determining/computing/assessing income from an International Taxation regard shall be had to arm's length price. The impugned order correctly holds that although the words International Taxation has been defined in Section 92B of the Act for the purposes of Chapter X of the Act, the words 'Income' has not been defined. Thereafter, the impugned order seeks to widen the meaning of the word "Income" to include all incomings. This is sought to be supported by the intent/object of Chapter X of the Act, particularly the definition of International Transaction given in Section 92B of the Act. The impugned order in support of interpretation on the basis of purpose/intent of the*

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*legislation relies upon the decision of the Supreme Court in **Maulai Hussain Haji Abrahim Vs. State of Gujarat and ors. 2004 AIR (SC) 3946** rendered in the context of Prevention of Terrorist Activities Act 2002 (POTA). This transaction of issue of shares by the Petitioner company to its holding company has nothing to do even remotely with terrorism. In fact, while interpreting a fiscal/taxing statute, the intent or purpose is irrelevant and the words of the taxing statute have to be interpreted strictly.*

*29 In case of taxing statutes, in the absence of the provision by itself being susceptible to two or more meanings, it is not permissible to forgo the strict rules of interpretation while construing it. The Supreme Court in **Mathuram Agarwal Vs. State of M.P. 1999(8) SCC 667** had laid down the following test for interpreting a taxing statue as under:-*

> *" The intention of the legislature in a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing Act it is not possible to assume any intention or governing purpose of the statute more that what is stated in the plain language. It is not the economic results sought to be obtained by making the provision which is relevant in interpreting a fiscal statute. Equally impermissible is an interpretation which does not follow from the plain, unambiguous language of the statute. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spirit and intention of the legislature. The statute should clearly and unambiguously convey the three components of the tax law i.e. the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law. Then it is for the legislature to do the needful in the matter."*

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30 In view of the above, it is clear that it was not open to Dispute Resolution Panel to seek aid of the supposed intent of the Legislature to give a wider meaning to the word 'Income'.

31 Similarly, the reliance by the revenue upon the definition of International Taxation in the sub clause (c) and (e) of Explanation (i) to Section 92B of the Act to conclude that Income has to be given a broader meaning to include notional income, as otherwise Chapter X of the Act would be rendered otiose is far fetched. The issue of shares at a premium does not exhaust the universe of applicability of Chapter X of the Act. There are transactions which would otherwise qualify to be covered by the definition of International Transaction. The transaction on capital account or on account of restructuring would become taxable to the extent it impacts income i.e. under reporting of interest or over reporting of interest paid or claiming of depreciation etc. It is that income which is to be adjusted to the arm's length price. It is not a tax on the capital receipts. This aspect appears to have been completely lost sight of in the impugned order.

32 The other basis in the impugned order is that as a consequence of under valuation of shares, there is an impact on potential income. The reasoning is that if the arm's length price were received, the Petitioner would be able to invest the same and earn income, proceeds on a mere surmise/assumption. This cannot be the basis of taxation. In any case, the entire exercise of charging to tax the amounts allegedly not received as share premium fails, as no tax is being charged on the amount received as share premium. Chapter X is invoked to ensure that the transaction is charged to tax only on working out the income after arriving at the arm's length price of the transaction. This is only to ensure that there is no manipulation of prices / consideration between associated enterprises. The entire consideration received would not be a subject-matter of taxation. It appears for the above reason that the

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learned Solicitor General did not seek to defend the conclusion in the impugned order on the basis of the reasons found therein, but sought to support the conclusion with new reasons.

33 Before dealing with the submissions advanced by the learned Solicitor General in his reply, to support the impugned order on grounds different from those found therein, it would be necessary to note that taxing of premium not received as the ground in the impugned order is given up and the jurisdiction to tax a transaction of issue of shares is on the basis of benefit given to the holding company. The basis/justification of the impugned order is based upon Section 92(1) of the Act, while before us the learned Solicitor General places reliance upon Section 92(2) read with 92(1) of the Act to subject the transaction to tax on the basis of the cost of the benefit passed. Therefore, many of the decisions cited by the Petitioner in its opening submissions are no longer relevant and therefore, not dealt with in this order.

FINDINGS ON SUBMISSIONS OF SOLICITOR GENERAL:-

34 The learned Solicitor General submitted that Section 92(1) has to be read with Section 92(2) of the Act and a conjoint reading would indicate that the cost incurred in passing on the benefit to the holding company is being subjected to tax and not the share premium not received. The difference between the arm's length price and the price charged for issue of shares is the benefit conferred upon the holding company. Thus passing of benefit to holding company, is the cost to the Petitioner, which is being brought to tax. It is submitted that the benefit accrued to the holding company as set out in the affidavit dated 9 September, 2014 in the following manner:-

(a) Cost incurred by Petitioner for a

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corresponding benefit to holding company i.e. it gets shares worth Rs.53,775 each at a price of Rs.8519/- each; and

(b) The valuation of holding company goes up in International Market due to holding of undervalued shares of the Petitioner.

In support the learned Solicitor General wanted us to read Section 92(2) of the Act in the following manner:-

*"**92(2)** Wherein an International Transaction..., two or more associated enterprises enter into a mutual ….arrangement for.. any contribution to, any cost..incurred ..in connection with a benefit, ...provided... to any one or more of such enterprises, the cost...., contributed by, any such enterprise shall be determined having regard to the arm's length price of such benefit...*

(The dotted words are omitted for the purpose of construction/interpretation).

35 This indeed is a unique way of reading a provision i.e. to omit words in the Section. This manner of reading a provision by ignoring/rejecting certain words without any finding that in the absence of so rejecting, the provision would become unworkable, is certainly not a permitted mode of interpretation. It would lead to burial of the settled legal position that a provision should be read as a whole, without rejecting and/or adding words thereto. This rejecting of words in a statute to achieve a predetermined objective is not permissible. This would amount to redrafting the legislation which is beyond/outside the jurisdiction of Courts.

36 Be that as it may, Section 92(2) of the Act deals with a situation where two or more associated enterprises enter into an arrangement whereby they are

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to receive any benefit, service or facility then the allocation, apportionment or contribution towards the cost or expenditure is to be determined in respect of each associated enterprise having regard to arm's length price. Thus, to illustrate, the cost of research carried on by an associated enterprises for the benefit of three associated enterprises, then the cost will be distributed i.e. allocated, apportioned or contributed depending upon the arm's length price of such benefit to be received by the assessed associated enterprise. It would have no application in the cases like the present one, where there is no occasion to allocate, apportion or contribute any cost and/or expenses between the Petitioner and the holding company. Therefore, we find no substance in the above submission.

37 The learned Solicitor General next contended that the issue is no long res integra as the issue stands covered by the decision of the Apex Court in Mazgaon Dock Ltd. (supra) while interpreting Section 42(2) of 1922 Act. It is submitted that the above Section 42(2) of the 1922 Act dealt with transfer pricing. In the above case, the Apex Court held that under Section 42(2) of the 1922 Act, the tax is charged on the resident in respect of profits which he would have normally made but not made, because of a business association with a non resident. The resident was subjected to tax on notional profits in respect of its business dealing with a non resident with whom he had close connection. Section 42(2) of the 1922 Act reads as under:-

> *" Where a person not resident or not ordinarily resident in the taxable territories carries an business with a person resident in the taxable territories, and it appears to the Income Tax Officer that owing to the close connection between such persons, the course of business is so arranged that the business done by the resident person with the person not resident or not ordinarily resident produces to the resident either no profits or less than the ordinary profits which might be expected*

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> *to arise in that business, the profits derived therefrom, or which may reasonably be deemed to have been derived therefrom, shall be chargeable to income tax in the name of the resident person who shall be deemed to be, for all the purpose of this Act, the assessee in respect of such income tax." (emphasis supplied)*

38 If the above provision is contrasted with the provisions of Chapter X of the Act and in particular Section 92 thereof, it would be noticed that the crucial words "shall be chargeable to income tax" which are found in Section 42(2) of the 1922 Act are absent in Chapter X of the Act. We pointed out this difference in the two provisions to the learned Solicitor General and he agreed that the above difference exists. However, according to him this was in view of the fact that Sections 4, 5, 14 and 56 of the Act does create a charge to income tax on deemed income earned from International taxation. Therefore, it is clear that the deemed income which was charged to tax under Section 42(2) of the 1922 Act was done away with under the Act. The charge of Income now has to be found in Section 4 of the Act. If it is income which is chargeable to tax, under the normal provision of the Act, then alone Chapter X of the Act could be invoked. Sections 4 and 5 of the Act brings /charges to tax total income of the previous year. This would take us to the meaning of the word income under the Act as defined in Section 2(24) of the Act. The amounts received on issue of shares is admittedly a capital account transaction not separately brought within the definition of Income, except in cases covered by Section 56(2) (viib) of the Act. Thus such capital account transaction not falling within a statutory exception cannot be brought to tax as already discussed herein above while considering the challenge to the grounds as mentioned in the impugned order.

39 In tax jurisprudence, it is well settled that following four factors are essential ingredients to a

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taxing statute:-

(a) subject of tax;
(b) person liable to pay the tax;
(c) rate at which tax is to be paid, and
(d) measure or value on which the rate is to be applied.

Thus, there is difference between a charge to tax and the measure of tax (a) & (d) above. This distinction is brought out by the Supreme Court in ***Bombay Tyres India Ltd. Vs. Union of India reported in 1984 (1) SCC 467*** *wherein it was held that the charge of excise duty is on manufacture while the measure of the tax is the selling price of the manufactured goods. In this case also the charge is on income as understood in the Act, and where income arises from an International Transaction, then the measure is to be found on application of arm's length price so far Chapter X of the Act is concerned. The arriving at the transactional value/ consideration on the basis of arm's length price does not convert non-income into income. The tax can be charged only on income and in the absence of any income arising, the issue of applying the measure of arm's length price to transactional value/consideration itself does not arise. The ingredient (a) above is not satisfied i.e. subject of tax is income which is chargeable to tax. The issue of shares at a premium is a capital account transaction and not income. The classical distinction between income and capital is that which exists between fruits and tree. Income is a flow while capital is a fund. The Privy Council in* ***CIT v/s. Shaw Wallace & Co., Ltd. 6 ITC 178 (PC)*** *has colourfully stated "Thus income has been likened pictorially to the fruit of a tree or the crop of a field. It is essentially the produce of something which is often loosely spoken of as capital."*

40 It was contended by the Revenue that in view of Chapter X of the Act, the notional income is to be brought to tax and real income will have no place. The

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HIGH COURT OF JUDICATURE AT BOMBAY

> *entire exercise of determining the arm's length price is only to arrive at the real income earned i.e. the correct price of the transaction, shorn of the price arrived at between the parties on account of their relationship viz. associated enterprises. In this case, the revenue seems to be confusing the measure to a charge and calling the measure a notional income. We find that there is absence of any charge in the Act to subject issue of shares at a premium to tax."*

208 In paragraph 44, a similar contention as raised by Mr. Setalvad before us is negatived. In paragraphs 45 and 46 the Bench held as under :

> *"45 Chapter X of the Act is a machinery provision to arrive at the arm's length price of a transaction between associated enterprises. The substantive charging provisions are found in Sections 4, 5, 15 (Salaries), 22 (Income from house property), 28 (Profits and gains of business), 45 (Capital gain) and 56 (Income from other Sources). Even Income arising from International Transaction between associated enterprises must satisfy the test of Income under the Act and must find its home in one of the above heads i.e. charging provisions. This the revenue has not been able to show.*
>
> *46 It was next submitted that the machinery Section of the Act cannot be read de-hors charging Section. The Act has to be read as an integrated whole. On the aforesaid submission also, there can be no dispute. However, as observed by the Supreme Court in* ***CIT v/s. B. C. Srinivasa Shetti 128 ITR 294,*** *"there is a qualitative difference between the charging provisions and computation provisions and ordinarily the operation of the charging provisions cannot be affected by the construction of computation provisions." In the present case, there is no charging provision to tax capital*

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> *account transaction in respect of issue of shares at a premium. Computation provisions cannot replace/ substitute the charging provisions. In fact, in B. C. Srinivasa Shetti (supra), there was charging provision but the computation provision failed and in such a case the Court held that the transaction cannot be brought to tax. The present facts are on a higher pedestal as there is no charging provision to tax issue of shares at premium to a non-resident, then the occasion to invoke the computation provisions does not arise. We, therefore, find no substance in the aforesaid submission made on behalf of the Revenue."*

209 Mr. Setalvad submitted that this judgment would not be of any assistance to the assessee.

210 We are unable to agree with him. In that regard, we have perused the written note No.6 so also considered his oral arguments. We are unable to agree with him that in this case, there is an income arising in the form of capital gains as per the provisions of section 45 and section 2(14) and 2(45) of the Act and, therefore, this Division Bench judgment is inapplicable. Mr. Setalvad's arguments are premised on the explanation to section 2(14) and explanation to section 2(47) read with section 45 and 2(24) of the Income Tax Act. These arguments have been already considered by us and negatived. Therefore, we are of the view that the Division Bench judgment is a

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complete answer to the arguments of the Revenue and additionally we find ourselves in agreement with Mr. Salve's contentions. Therefore, there was no warrant for the Tribunal to have rendered a conflicting conclusion on the applicability of the two provisions, namely, sections 92B(1) and 92B(2). In any event, the Tribunal committed a basic and fundamental error in not referring to Chapter X, its title and sub-section (1) of section 92 before applying the mechanism devised therein. If Chapter X has been inserted to make special provisions relating to avoidance of tax and by section (1) of section 92 computation of income from international transaction having regard to arm's length price has to be done, then, there ought to be an income arising from an international transaction. That only would enable applying further provisions in this Chapter. That being not the position even on this aspect, we are unable to agree with Mr. Setalvad.

211 Now all that remains for consideration are the judgments cited by both sides.

212 We have already referred to the judgment of the Hon'ble

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Supreme Court in the case of *Vodafone International Holding B.V. vs. Union of India & Anr.* (supra) extensively and followed it. Mr. Salve's reliance on this judgment, therefore, need not be considered in further details.

213 Then, Mr. Salve relied upon the order passed in the case of this very assessee reported in (2013) 359 ITR 133. There, this Court considered a challenge to the order passed by the Additional Commissioner of Income Tax, Transfer Pricing to the extent that it relates to the addition of Rs.84,34,39,52,555/- on account of its unreported international transaction and a draft assessment order dated 29th December, 2011, passed by the Assistant Commissioner of Income Tax (for short " the Assessing Officer"). The petitioners sought a writ of mandamus directing Respondent No.3 – the Assessing Officer to revise the draft assessment order, after excluding the transfer price adjustment.

214 This Court, in paragraph 203, on which reliance is placed by Mr. Salve, and the further paragraphs would support the arguments

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canvassed before us in this case and, therefore, we find that the reliance on paragraphs 203 to 211 of this judgment is well placed.

215 Thereafter this Court referred to the post amendment scenario and this Court clarified that it is neither necessary nor proper to indicate the application of section 2(47) as amended to the proceedings before it. In the circumstances, we do not think that any further reference to this judgment is necessary.

216 As far as the Division Bench judgment in the case of *Vodafone India Services Pvt. Ltd. vs. Union of India & Ors., (2014) 368 ITR 1*, we have followed and applied it and hence the reliance on this judgment is well placed. Further, the Department has accepted this judgment is also apparent.

217 Mr. Salve then relied upon the judgment of the Hon'ble Supreme Court in the case of *Rambaran Prosad vs. Ram Mohit Hazr & Ors. (1967) 1 SCR 293* and that reiterated the well settled rule that as far as a mere contract for sale of immovable property is concerned

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that does not create any interest by itself in the immovable property. At best, it creates a right to apply for a consequence or transfer in terms of the contract and thus a suit for specific performance of the contract for sale can be laid in the competent court. The very principle has been relied upon in the subsequent judgments.

218 As far as the judgment of the Court of Appeals reported in 1991 (1) WLR 963 J. Sainsbury Plc. vs. O'Connor (Inspector of Taxes), Mr. Salve submits that as far as the beneficial ownership is concerned, that is equivalent to equitable ownership. By equitable ownership what is meant is, *inter-alia*, the purchaser under a specific enforceable contract. Mr. Salve was at pains to point out that the passage in the judgment by Lloyd, LJ. Should be seen in the context of the position prevailing in English law.

219 In the view that we have taken, it is not necessary to go into any further details of this judgment. Suffice it to note that even after noticing the position in English law, the judgment does not go as far as assisting the contentions of the Revenue before us.

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220 The judgment relied upon by Mr. Setalvad may now be noticed. If we find from his written notes, Mr. Setalvad essentially relies upon the judgment of the Hon'ble Supreme Court in the case of *M/s. A.R. Krishnamurthy & Anr. vs. Commissioner of Income-tax, Madras, (1989) 1 SCC 754*.

221 The judgment of the Hon'ble Supreme Court relied upon by Mr. Setalvad must be read in the backdrop of the facts. There the assessee was a body of individuals. They purchased two pieces of land and thereafter by an instrument of lease-cum-licence, they granted a mining lease in favour of the company (private limited). As noted in paragraph 2, the period of the lease was ten years and the lessee had to pay a premium or salami of Rs.5 lakhs in addition to payment of royalty of Rs.12 per 100 cubic feet of clay extracted subject to a minimum of Rs.60,000/- per year. The Income Tax Officer construed this lease deed as transferring a leasehold interest in the land and came to the conclusion that the transfer was assessable to capital gain tax. The assessee preferred an appeal to the Appellate Assistant Commissioner who rejected the argument of the assessee that the cost

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of acquisition of assets could not be determined. Then, the assessee approached the Tribunal in further appeal which held that the entire ownership of the property means the ownership of a bundle of rights and a limited interest which can be severed and disposed of for a specified period in the form of lease or mortgage or the like is part of that bundle. Therefore, the Tribunal held that the purchase price paid for the land includes therein a component of purchase price attributable to various counts of interests embedded in the said land. That is how the Tribunal confirmed the orders impugned before it and dismissed the appeal.

222 However, the reference to the High Court for the two questions in paragraph 6 resulted in an answer as noted in paragraph 7. Thus, the finding and essentially was that the rights of the owner of a land included a right to grant the lease for exploiting the land. It is in these circumstances and what should be the cost of acquisition of a right which is of limited enjoyment that the Hon'ble Supreme Court in dismissing the appeal made the observations in paragraph 9 which are relied upon by Mr. Setalvad before us. As we have already noted in

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the foregoing paragraphs that the arguments of Mr. Salve on cost of acquisition of the asset have not been dealt with and discussed in detail because of the conclusions on the substantive questions and as reached by us. We have merely noted the argument of Mr. Salve, namely, that if the asset acquired had no cost, unless it falls in section 55(2) of the Income Tax Act, then, no tax can be levied thereon. This was essentially in the context of the cost of call option and how the same has to be valued. Mr. Setalvad's arguments based on this judgment in *A.R. Krishnamurthy* requires no consideration simply because we are not determining the questions as raised before the Hon'ble Supreme Court in this judgment. Whether the cost of acquisition in the leasehold rights would take within its import the cost of the right to excavate clay in the land in terms of money is an issue which must be answered as held by the Hon'ble Supreme Court in each cases on the basis of evidence. It is a question of fact. In these circumstances, we do not think that the reliance by Mr. Setalvad on this judgment will advance his contentions any further.

223 Since we have held that the judgment and order of the Hon'ble

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Supreme Court in the main case covers the controversy, then, it is not necessary to answer anything with regard to the valuation of the call options. The arguments in that regard were canvassed on the footing that there is an assignment of call options. Once we have held that there is no such assignment, then, the question of valuation of the same need not detain us.

224 As far as the valuation of ITES is concerned, the Tribunal has followed its earlier order and for the assessment year 2007-08. Both sides conceded that a substantive appeal in that regard is pending against the same and in this Court. We would, therefore, prefer not to express any opinion on the rival contentions in that regard. It would be thus open for the parties to raise them in the pending appeal as also in an appropriate case. We keep that controversy open. We also grant liberty to file appropriate applications in the pending appeal for A.Y. 2007-2008 so as to enable all parties to raise similar contentions on the issue for A.Y. 2008-09.

225 We conclude the judgment by holding that the Tribunal's order

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contains inconsistent and contradictory findings on the issue discussed above. We have also indicated the contradictions and inconsistencies in these findings in the foregoing paragraphs. We have found that the Tribunal's attempt to get over the binding judgment of the Hon'ble Supreme Court in the manner done also cannot be sustained. We have commented upon the same as well. We have found that there is no substance in the contentions of the Revenue that a fraud was perpetrated by the assessee on the Hon'ble Supreme Court as well as the other authorities by suppressing vital and material facts. Once the Hon'ble Supreme Court judgment was in the field and in which the observations and findings were made on the very issue, then, no attempt by any party to sidetrack the same can be upheld. It is in these circumstances that we find that the Tribunal's order is vitiated by serious errors of law apparent on the face of the record. It is also perverse for it ignores vital materials and which have been noted extensively in the judgment of the Hon'ble Supreme Court. Once the Revenue also tries to impugne and challenge some of the findings in the order of the Tribunal and has filed cross objections, then, our job is fairly easy. Then, the inconsistencies or contradictions in the

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Tribunal's order are apparent. We are unable to uphold the cross-objections of the Revenue because in the given facts and circumstances in upholding some of the contentions of the assessee, the Tribunal committed no error. However, while abandoning that process of upholding the assessee's contentions in the facts and circumstances of this case mid-way, the Tribunal contradicted itself in the manner noted above. Once such conclusion is reached, then, even the cross-objections would have to be rejected.

226 The judgment is lengthy and contains some repetitions as well. We were rather helpless because the arguments were overlapping. The alternate contentions also necessitated repeated reference to the same materials. As a result of the above discussion, the main substantial questions of law are answered in favour of the appellants. Once they have been answered accordingly we do not think that the incidental and ancillary questions would have to be answered separately.

227 Subject to above, the Appeal is allowed and in the aforesaid terms. Once the appeal is allowed, the cross objections would have to

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be dismissed. They are, accordingly, dismissed.

228 All pending applications are disposed of in the light of the above conclusions.

229 In the circumstances, there shall be no order as to costs.

A.K. MENON, J. ***S.C. DHARMADHIKARI , J.***

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