Aditya Birla Nuvo Limited vs The Deputy Director Of Income-Tax on 14 July, 2011

Author: J.P. Devadhar

Bench: J.P. Devadhar, A.A. Sayed

1 wp730-09+++

agk IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.730 OF 2009
AND
WRIT PETITION NO.345 OF 2010

Aditya Birla Nuvo Limited,
(Formerly known as Indian

Rayon & Industries Limited),

A-4, Aditya Birla Centre,
S.K. Ahire Marg, Worli,

Mumbai - 400 030 ..Petitione

Versus

1) The Deputy Director of Income-tax,

(International Taxation), 4(2),
Room No.11, 1st Floor, Scindia House,

Ballard Estate, N.M. Road,
Mumbai - 400 038

2) Union of India,

through the Ministry of Finance,
North Block, New Delhi 110 001 ..Responden

Mr.Soli E. Dastur, Senior Advocate with Mr.R. Murlidhar, Mr.Nitesh Joshi & Mr.Atul K.Jasani for the petitioner.

Mr.Mohan Parasaran, Additional Solicitor General with Mr.G.C. Shrivastava, Special counsel, Mr.B.M. Chatterjee, Mr.D.K. Chidananda i/by Mr.Sure Kumar for the respondents.

AND
WRIT PETITION NO.1837 OF 2009

New Cingular Wireless Services Inc.,

1025 Lenox Park Blvd. Room No.D584,
Atlanta, GA 30319, United States of America
through its Power of Attorney Holder

Mr.Waman Oak,
Limaye Building, Dubash Lane, 3rd Floor,
Girgaum, Mumbai ..Petitioner

Versus

1. The Deputy Director of Income-tax,

(International Taxation), 4(1), 1st Floor,
Scindia House, Ballard Estate,
N.M. Road, Mumbai - 400 038.

2. Union of India,
through the Ministry of Finance,
North Block, New Delhi - 110 001

3. Tata Industries Limited,
Bombay House, 24, Homi Modi Street,
Mumbai - 400 001 ..Respondents

Mr.Aspi Chinoy with Mr.Percy Pardiwala, Senior Advocates with Mr.Jayant Mehta, Mr.Jabin Morris, Mr.Ruchir Wani i/by Little & Co. for the petitioner.

Mr.Mohan Parasaran, Additional Solicitor General with Mr.G.C. Shrivastava, Special counsel, Mr.B.M. Chatterjee, Mr.D.K. Chidananda i/by Mr.Suresh Kumar for respondent Nos.1 and 2.

Mr.Rafiq Dada, Senior Advocate with Mr.P.K. Katpalkar, Mrs.Simran Gurnai i/by Mulla & Mulla & Craegie Blunt & Caroe for respondent No.3.

AND

WRIT PETITION NO.38 OF 2010

Tata Industries Limited,

an existing company under the
Companies Act, 1956, having its
registered office at Bombay House,

24, Homi Mody Street,
Mumbai - 400 001 ..Petitioner

Versus

1.

The Deputy Director of Income-tax,
(International Taxation), 4(1), 1st Floor,

Scindia House, Ballard Estate,
N.M. Road, Mumbai - 400 038.

2. The Additional Director of Income-tax,

(International Taxation), 2(1), 1st Floor,
Scindia House, Ballard Estate,
N.M. Road, Mumbai - 400 038.

3. Union of India,
through the Ministry of Finance,

North Block, New Delhi - 110 001 ..Respondents

Mr.Rafiq Dada, Senior Advocate with Mr.P.K. Katpalkar, Mrs.Simran Gurnai i/by Mulla & Mulla & Craegie Blunt & Caroe for the petitioner.

Mr.Mohan Parasaran, Additional Solicitor General with Mr.G.C. Shrivastava, Special counsel, Mr.B.M. Chatterjee, Mr.D.K. Chidananda i/by Mr.Suresh Kumar for the respondents.

CORAM : J.P. Devadhar & A.A. Sayed, JJ.

Judgment reserved on : 5th May, 2011.

Judgment pronounced on : 14th July, 2011

ORAL JUDGMENT : (Per J.P. Devadhar, J.)

1. Though the reliefs claimed in these four writ petitions are different, the core issue raised in all these four writ petitions is, whether any income chargeable to tax in India has accrued or arisen or deemed to have accrued or arisen in India to New Cingular Wireless Services Inc, USA ('NCWS' for short) and MMM Holdings LLC, USA, ('MMMH' for short) which has subsequently merged with NCWS, on account of share transactions under two Sale and Purchase Agreements both dated 28th September 2005. Hence, all these four writ petitions are heard together and disposed off by this common judgment.

2. Writ Petition No.730 of 2009 is filed by Aditya Birla Nuvo Limited, formerly known as Indian Rayon and Industries Limited ('Indian Rayon' for short) to challenge the order dated 25th March 2009, whereby the Deputy Director of Income Tax (International Taxation) - 4(1), Mumbai ('DDIT'

for short) has held that Indian Rayon is liable to be assessed as a representative assessee (agent) of NCWS under Section 163(1) of the Income Tax Act, 1961 ('1961 Act' for short) in respect of the capital gains accrued to NCWS on transfer of shares of Idea Cellular Limited in favour of Indian Rayon under Sale and Purchase Agreement dated 28th September, 2005. Writ 5 wp730-09+++ Petition No.345 of 2010, is filed by Indian Rayon to challenge the order dated 22nd January 2010 passed by DDIT holding that Indian Rayon is liable to be assessed as the representative assessee (agent) of MMMH. By amending the Writ Petition, Indian Rayon has also challenged the notice dated 12th February 2010 issued under Section 148 of the 1961 Act whereby Indian Rayon was called upon to file return of income as an agent of MMMH in respect of capital gains allegedly accrued to MMMH from the aforesaid sale transactions. Writ Petition No.1837 of 2009 is filed by NCWS to challenge the two notices both dated 31st March 2009 issued to NCWS and MMMH respectively under Section 148 of the 1961 Act whereby NCWS and MMMH are called upon to file return of income for A.Y. 2006-07 in respect of the capital gains allegedly accrued to them from the aforesaid transactions. Writ Petition No.38 of 2010 is filed by Tata Industries Limited ('TIL' for short) to challenge orders passed under Section 201(1) / (1A), 163 and also the notices issued under Section 148 of the 1961 Act.

3. Before dealing with the rival contentions advanced by the Counsel on both sides in each of the writ petitions, we may note relevant facts common to all the four writ petitions.

4. On 4th March 1995, a Company known as Birla Communications Limited (presently known as Idea Cellular Limited) was formed by the Birla Group of Companies in India. At that time, the Birla Group consisted of Grasim Industries Limited, Hindalco Industries Limited, Indian Rayon and 6 wp730-09+++ Industries Limited and Indo-Gulf Fertilizers and Chemicals Corporation Limited.

5. On 5th December 1995, AT&T Corp, a Company incorporated in the United States of America and Grasim Industries Limited representing the Birla Group entered into a Joint Venture Agreement ('JVA' for short), under which, Birla Communications Limited was to be the Joint Venture Company ('JVC' for short) for carrying on the wireless telecommunication service in India by obtaining requisite licence from the Department of Telecommunications in India ('DoT' for short). Under the joint venture, 51% equity shares of the JVC were to be subscribed and owned by the Birla Group and 49% of the equity shares of the JVC were to be subscribed and owned by AT&T Corp. The JVA was executed by the Executive Vice President, AT&T Wireless Services Inc, USA. Thus, AT&T Corp / AT&T Wireless Services Inc, USA ('AT&T USA' for short) and the Birla Group were the two joint venture partners holding 100% shares of the JVC.

6. The salient features of the JVA dated 5th December 1995 were :

> a) AT&T USA & the Birla Group, as founders under JVA, were to jointly own and operate the JVC, namely Birla Communications Limited [see preamble and Article 2.01]
>
> b) The Joint Venture was to provide wireless telecommunication services in India by obtaining a licence from the DoT,

7 wp730-09+++ Government of India. [See Article 1.01]

c) The founders were vested with the control, namely power to direct the management and policies, whether through the ownership of voting securities or by agreement or otherwise.

[Article 1.01]

d) AT&T USA was to subscribe to and pay for the number of common shares constituting 49% of the issued equity capital and the remaining 51% were to be subscribed by the Birla Group. [Article 2.01, 2.03 and 2.03].

e) Owner of the equity capital of the JVC who are parties to the JVA (AT&T USA and Birla Group) would be party shareholders [see definitions]

f) The 'founders were to exercise their rights as members / shareholders of the Company and ensure that the Articles of Association of the JVC are amended so as to incorporate the provisions of the JVA to the extent possible under the laws of India [Article 2.05].

g) Each of the party shareholders who are founders agree that it will vote or cause to be voted all shares of equity capital owned by it. The shares of the JVC shall be held by the 'founders' in 8 wp730-09+++ their own name or through a party fulfilling the role of a 'permitted transferee'. The 'permitted transferee' shall be bound by the terms of JVA. Each founder agrees that its permitted transferees would perform their obligations in accordance with the terms of the JVA. Each founder is jointly and severally liable, as principal obligor for due performance of the obligations imposed on the permitted transferee under the JVA. Each of the party shareholders agree that it will vote or cause to be voted all shares of equity capital owned by it. If any director elected by the founder refuses to follow the terms of the JVA, then the founder shall take steps to remove such director. Any party may proceed against the 'founder' without first proceeding against the 'permitted transferee'. [Article 3.04].

h) The 'permitted transferee' could be any Corporation which is a 100% subsidiary of the founder who owns the equity shares of the JVC. Each founder shall retain directly or indirectly, ownership of all the voting stock of the permitted transferee.

The 'founder' and the 'permitted transferee' were jointly and severally liable for all obligations and on fulfillment of various conditions only would shares for convenience of arrangement be transferred to the subsidiary as a 'permitted transferee'.

9 wp730-09+++ [Article 12.04]

i) The Board of the JVC shall consist of four directors appointed by Birla Group, four directors appointed by AT&T USA and four independent directors with the consent of both the 'founders'.

One director representing each founder shall be a non-retiring Director. The chairman shall be appointed by the Birla Group and both the founders shall designate one board member each to act as the 'Principal Founding Member'. No director shall be removed without the consent of the 'founder' whom he represents. [Article 5.01].

j) The company shall have a President nominated by AT&T USA with the concurrence of the Birla Group. Birla Group shall nominate CFO with the consent of AT&T USA [Article 5.02].

k) Certain key decisions of the group require an affirmative vote of the 'Principal Founding Member' representing AT&T USA and one director representing Birla Group, thus both the founders have 'veto rights'. [Article 5.03].

l) At the general meeting of the company, the 'founders' will exercise their vote and act in such a manner so as to comply with and to fully and effectively implement the terms of the JVA. 'Founders' undertake to ensure that their representatives 10 wp730-09+++ or agents who represents them at the Annual General Meeting of the company to implement the agreement. Entire obligation rests on 'founders' and the 'permitted transferee' is no more than a representative of the 'founder'. [Article 6.02].

m) The 'closing' shall take place within 60 days of receipt of all approvals from Government of India and RBI. Further, at the time of closing, the company shall take steps to allot the shares to the representatives of the 'founders'. [Article 8.01].

n) It is further stipulated that the approval of the Government of India and RBI shall be, "for offer, allotment and subscription of equity shares of the company to the founders as per Section 2.02 of the agreement". [Article 8.01]

o) After 'closing' Birla and AT&T USA, shall allot shares as stated in Article 2.02 [Article 2.02 contemplates allotment to Birla Group and AT&T USA, being the founders in the ratio of 51% :

49%. [Article 8.03].

p) AT&T USA represents and warrants to Birla Group that AT&T USA has full power to execute and deliver the JVA and the material agreements and to consummate the transactions contemplated under the JVA and material agreements. [Article 11 wp730-09+++ 9.01]

q) The JVA, the material agreements and all such other agreements and written obligations entered into and undertaken in connection with the transactions contemplated under the JVA and other agreements would be legally binding obligations of AT&T USA and enforceable against AT&T USA [Article 9.02]

r) The JVA shall survive until six months after such time as the JVC no longer has any licenses to provide wireless communication service in India or until either 'founder'

sells all of its shares of equity capital. [Article 11.01].

s) The equity shares of the JVC cannot be sold by any party shareholder till the third anniversary of the closing date and only subject to the terms of the agreement after that date.

[Article 12.02].

t) The Share Certificate of equity capital held by the 'founders' shall carry an endorsement imprinted on it to the effect that any sale of the shares shall be only subject to the JVA and the holder of shares cannot sell, assign or pledge the shares independent of the terms of the JVA. [Article 12.03].

12 wp730-09+++ u) The 'founder' is allowed to transfer all its shares to the permitted transferee with a prior written notice to the other founder. No such transfer shall be effective until such permitted transferee agrees to be bound by the terms and conditions of the JVA. The founder and the Permitted Transferee shall be jointly and severally liable for all the obligations of the Founder. Upon meeting the above requirements for transfer, the JVC at the closing or thereafter shall issue Equity Capital directly to a permitted transferee.

[Article 12.04].

v) If any party shareholder receives any offer for purchase of its shares, the other founder shall have the right of first refusal.

[Article 12.07].

w) Notices in relation to the Joint Venture Agreement are to be sent to AT&T Wireless Services Inc, a US company and a 100% subsidiary of AT&T Corp, USA.

Thus, under the JVA dated 5th December 1995, the AT&T USA as a founder was to own and hold 49% equity shares in Birla Communications Limited [now known as Idea Cellular Limited]. Under the JVA, the equity shares subscribed by the founders as party shareholders could be issued in 13 wp730-09+++ the name of a permitted transferee which is a 100% subsidiary of the founder. AT&T Cellular Private Limited, Mauritius ('AT&T Mauritius' for short), being a 100% subsidiary of AT&T USA was eligible to hold 49% equity shares of JVC as a permitted transferee of the AT&T USA. Accordingly, AT&T USA subscribed to the shares of the JVC and equity shares of the JVC were allotted in the name of AT&T Mauritius, as a permitted transferee of AT&T USA. As noted above, though the equity shares were issued in the name of AT&T Mauritius under the JVA as a permitted transferee of AT&T USA, all rights in respect of the said equity shares of the JVC, like voting rights, rights of management, right of sale or alienation etc absolutely vested in AT&T USA.

7. On 12th December 1995, the DoT granted a licence to the JVC (Birla Communications Limited) to provide the telecommunication services in the Maharashtra and Gujarat Telecom Circle.

8. With effect from 30th May 1996, the name of Birla Communications Limited was changed to Birla AT &T Communications Limited ('BACL' for short). The change in the name was effected to take advantage of the worldwide brand equity of the Joint Venture Partner namely AT&T USA.

9. In October 1997, AT&T Mauritius and the Birla Group executed a document titled as 'confirmation with respect to closing of Joint Venture Agreement dated 5th December 1995', which reads thus :-

> 14 wp730-09+++ "In relation to the Joint Venture Agreement dated December 5, 1995 between the undersigned (the 'JVA'), we hereby confirm that
>
> a) all the Conditions to Closing as stipulated in Article 8.01 of the JVA have been satisfied, and
>
> b) the actions and deliveries required to be made at Closing as provided in Article 8.03 of the JVA have been made.

The Closing Date, for the purposes of Article 8.01 is September 29, 1997 being the date when the Support Services Agreement and Secondment Agreement were exchanged between the parties; all other actions and deliveries referred to in Article 8.03 having taken place prior to September 29, 1997."

10. AT&T Mauritius was neither a party to the JVA nor was it obliged to pay any amount under the JVA to hold the equity shares of ICL as a permitted transferee of AT&T USA. However, the liability of AT&T USA to pay for the equity shares of the JVC were discharged by AT&T Mauritius during the period from 1996 to 2003. Equity shares of the JVC allotted in the name of AT&T Mauritius were approved by the Reserve Bank of India under Section 19(1)(a), 19(1)(b) and Section 29(1)(b) of the Foreign Exchange Regulation Act, 1973 ('FERA' for short).

11. On 15th December 2000, a Shareholders Agreement was entered into by and between AT&T Wireless Services Inc, USA (acting on behalf of itself and the AT&T Wireless Group), Grasim Industries Limited, India, (acting on behalf of itself and the AV Birla Group) and Tata Industries Limited, (acting on behalf of itself, the Tata Group), wherein it was agreed 15 wp730-09+++ that the Tata Cellular Limited ('TCL' for short) would merge with BACL and the respective share holdings of the three groups in BACL would be restructured as per the Shareholders Agreement. According to Indian Rayon, after the merger of TCL the shareholding of the JVC were as follows :

Birla Group	-	33.70 per cent.
Tata Group	-	31.69 per cent.
AT&T Group	-	32.91 per cent.

Financial Institutions	1.70 per cent.

The Shareholders Agreement specifically records that AT&T Wireless Services Inc. (signatory to the JVA dated 5th December 1995) is operating Cellular Services in Maharashtra and Gujarat telecom through its wholly owned subsidiary AT&T Mauritius. The Shareholders Agreement further records that AT&T Corp controls AT&T Wireless Services Inc, USA.

The Shareholders Agreement records that AT&T USA, the joint venture partner under the JVA would, under the Shareholders Agreement, represent the AT&T Wireless Group. The Shareholders Agreement further records that the terms of the said Agreement would be incorporated in the Articles of Association of BACL. Thus, as a result of the Shareholders Agreement, the share-holdings of the Birla Group as well as AT&T USA (now representing the AT&T Wireless Group) in BACL stood reduced from 51% to 33.70% and from 49% to 32.91% respectively. Under the Shareholders Agreement, the power of AT&T USA to appoint directors as per the JVA was reduced from four to three to accommodate the directors to be appointed by the Tata Group. All 16 wp730-09+++ other clauses in the Shareholders Agreement remained the same as in the JVA dated 5th December 1995.

12. The name of BACL after the merger of TCL was changed to Birla Tata AT&T Limited with effect from 6th November 2001. Subsequently, the name of Birla Tata AT&T Limited was once again changed to Idea Cellular Limited ('ICL' for short) with effect from 12th September 2003.

13. In October 2004, Cingular Wireless LLC, USA acquired shares of AT&T Wireless Services Inc, USA from AT&T Corporation, USA and renamed it as New Cingular Wireless Services Inc, USA ('NCWS').

14. On 26th July 2005, NCWS received an irrevocable offer from India Tele Ventures Limited, an unrelated party, to purchase the interest of NCWS in ICL being the entire share-holdings of 74,35,61,480 equity shares forming 32.91% interest at a price of US$ 0.4035 per share aggregating to US$ 300 million.

15. NCWS found the purchase price of equity shares of ICL offered by India Tele Ventures Limited to be reasonable. However, in terms of Article 10.06 of the Shareholders Agreement, NCWS was obliged to offer the shares of ICL first to the other two founders namely, the Birla Group and the Tata Group (as they had the rights of first refusal) and it was only if these two founders refused to purchase the shares of ICL, NCWS could sell those shares to third parties like India Televentures Limited. Accordingly, NCWS by its 17 wp730-09+++ letter dated 26th July 2005 called upon the Birla Group and the Tata Group to exercise their rights of first refusal in purchasing the shares of ICL owned by NCWS.

16. Grasim Industries Limited, acting on behalf of the Birla Group and Tata Industries Limited acting on behalf of the Tata Group accepted the offer in identically worded letters dated 29th July 2005 and 30th July 2005 respectively and informed NCWS about their willingness to purchase the shares of ICL offered by NCWS. As both the Groups, namely the Birla Group and the Tata Group were interested in purchasing the entire 74,35,61,480 equity shares of ICL offered by NCWS for US$ 300 million, each Group could get 37,17,80,740 equity shares of ICL on payment of US$ 150 million.

17. Before entering into an agreement for purchase of 37,17,80,740 equity shares of Idea Cellular Limited (ICL) offered by NCWS, Indian Rayon representing the Birla Group applied to the Director of Income Tax (Intl Taxn), Mumbai on 29th August 2005 seeking no-objection certificate under Section 195 of the 1961 Act to remit US$ 150 million to AT&T Mauritius towards the purchase price of 37,17,80,740 equity shares of ICL. In the said application, it was inter alia stated that they were purchasing ICL shares from AT&T Mauritius and as per the provisions of Article 13 of the Double Taxation Avoidance Agreement (DTAA) between India and Mauritius as also Circular No.682 dated 30th March 1994 and Circular No.789 dated 13th April 2000, capital gains derived by a resident of Mauritius on alienation of shares in an 18 wp730-09+++ Indian Company shall be taxed only in Mauritius. After considering the application as also the particulars furnished by Indian Rayon and after obtaining approval from DIT (Intl Taxn.), the Assistant Director of Income Tax (Intl. Taxn) by his communication dated 15th September 2005 authorized Indian Rayon to make payment of US$ 150 million to AT&T Mauritius after deducting income tax at source at the rate 'Nil' therefrom under Section 195(1) of the 1961 Act.

18. Thereupon, Indian Rayon entered into an agreement with AT&T Mauritius & NCWS, USA on 28th September 2005 for purchase of 37,17,80,740 equity shares of ICL for US$ 150 million. On 29th September 2005, Indian Rayon deposited US$ 150 million in the bank account of AT&T Mauritius and on the same day, the AT&T Mauritius paid US$ 150,000,475 to NCWS, USA.

19. Tata Industries Limited, ('TIL') however, instead of entering into a similar agreement for purchase of the balance 37,17,80,740 equity shares of ICL for US$ 150 million, entered into a Sale & Purchase Agreement on the same day i.e. 28th September 2005 for acquiring the entire issued and paid up share capital of AT&T Mauritius for US$ 150 million from NCWS and MMMH who were holding 100% shares of AT&T Mauritius. As noted earlier, MMMH has subsequently amalgamated with NCWS on 31st December 2006.

20. On 28th March 2008, the Additional Director of Income Tax (Intl 19 wp730-09+++ Taxn), Mumbai passed an order holding TIL as an assessee in default under Section 201(1) of the 1961 Act since it had failed to deduct tax as required under Section 195 of the 1961 Act, before making payment of US$ 150 million to NCWS and MMMH. Interest liability under Section 201(1A) was also imposed on TIL. Challenging the said order, TIL has filed an appeal before the first appellate authority and the same is pending. Subsequently, by two orders both dated 2nd March 2009, the DDIT has held that TIL is liable to be assessed as agent of NCWS / MMMH under Section 163 of the 1961 Act and accordingly two notices both dated 3rd March 2009 have been issued under Section 148 of the 1961 Act calling upon TIL as agent of NCWS / MMMH to file return of income in the prescribed form relating to income accrued to NCWS / MMMH on sale of shares under the Sale and

Purchase Agreement dated 28th September 2005.

21. In the meantime, on 31st March 2008, the Additional Director of Income Tax (Intl Taxn), Mumbai addressed a letter to the Director of Income Tax (Intl Taxn), Mumbai enclosing a copy of the order dated 28th March 2008 passed by him in the case of TIL under Section 201(1) / (1A) of the 1961 Act. In that letter, it was stated that since the income by way of capital gains is chargeable in the hands of NCWS and MMMH, the Additional Director (Intl Taxn), Range 4, Mumbai may be requested to examine the matter and carry out regular assessment in the hands of the above two US companies.

22. The Deputy Director of Income Tax (Intl Taxn), Mumbai, 20 wp730-09+++ thereupon, issued a show-cause notice dated 8th December 2008 calling upon Indian Rayon to show cause as to why Indian Rayon should not be assessed as a representative - assessee (Agent) of NCWS under Section 163 of the 1961 Act in respect of the gains arising to NCWS pursuant to the transaction under the Sale and Purchase Agreement dated 28th September 2005.

23. Indian Rayon by its reply dated 2nd March 2009 and 17th March 2009 objected to the initiation of proceedings under Section 163 of the 1961 Act inter alia on the ground that : (a) Section 163 cannot be invoked in the present case, as the income has actually accrued in India and cannot be regarded as deemed to accrue or arise in India so as to assess Indian Rayon as a representative assessee of the US Company; (b) Determination made under Section 195(2) after due application of mind and authorizing Indian Rayon to remit the amount without deduction of tax is binding in nature. As Section 162(2) and Section 195(2) are similarly worded decision under Section 195(2) would apply to proceedings under Section 162(2) of the 1961 Act; (c) As per the DTAA between India and Mauritius as well as Circular No. 682 dated 30th March 1994, Circular No.789 dated 30th April 2000 and the decision of the Supreme Court in the case of Union of India V/s. Azadi Bachao Andolan reported in 263 ITR 706, the capital gains arising to AT&T Mauritius cannot be taxed in India; (d) Idea Cellular Limited being an approved Industrial Undertaking under Section 10(23G) of the 1961 Act, any capital gains arising on the sale of shares of Idea Cellular Limited would be 21 wp730-09+++ exempt from payment of income-tax.

24. Rejecting the contention of Indian Rayon, the DDIT passed an order on 25th March 2009 holding that capital gains accrued to NCWS and that Indian Rayon was liable to be assessed as agent of NCWS under Section 163(1) of the 1961 Act. Thereafter, two notices were issued to NCWS and MMMH under Section 148 of the 1961 Act with a view to assess the income chargeable to tax which has allegedly escaped assessment. Challenging the above orders / notices, these four petitions are filed.

25. With these background facts, we may analyse the arguments advanced by the Counsel on both sides in each of the four writ petitions.

26. Mr.Dastur, learned Senior Advocate appearing on behalf of the petitioner (Indian Rayon) submitted that Indian Rayon cannot be assessed as a representative assessee of NCWS / MMMH for the following reasons :

A) Indian Rayon has purchased shares of ICL from AT&T Mauritius and the profits arising or accruing to AT&T Mauritius from such sale is not taxable in India because of the Indo-Mauritius DTAA as discussed elaborately by the Hon'ble Supreme Court in the case of Union of India V/s. Azadi Bachao Andolan reported in 263 ITR 706 (S.C.).

B) Indian Rayon cannot be treated as an agent of NCWS and MMMH under the provisions of Section 160(1)(i) read with Sections 9(1) and 22 wp730-09+++ 5(2) as interpreted by the Hon'ble Supreme Court in Eli Lilly and Company (India) P. Limited reported in 312 ITR 225 (S.C.).

C) ICL being an approved industrial undertaking under Section 10(23G) of the 1961 Act, capital gains arising on sale of the shares of ICL to a resident or non-resident would be exempt from payment of tax.

D) Once certificate under Section 195(2) is issued by the Revenue authorising payment of the sale proceeds for the purchase of Idea Cellular Limited shares without deduction of tax at source and based on such certificate Indian Rayon has remitted the money to the non-

resident, the Revenue cannot now go back on the certificate and seek to recover the tax allegedly due by the non-resident, from Indian Rayon as the non-resident's agent.

E) Having taken steps against NCWS / MMMH for bringing to tax capital gains arising on the transfer of shares of Idea Cellular Limited by (wrongly) piercing the corporate veil, the Revenue cannot continue with the proceedings initiated against Indian Rayon.

(A) Whether Capital gains arising on transfer of shares of Idea Cellular Limited are not taxable in India.

27. According to Mr.Dastur, the capital gains accruing to AT&T Mauritius on sale of ICL shares is taxable only in Mauritius and cannot be brought to tax in India as per Article 13(4) of the DTAA between India and Mauritius. Since AT&T Mauritius is not liable to pay capital gains tax in India on sale of shares of ICL to Indian Rayon, the said tax cannot be recovered from Indian Rayon by treating Indian Rayon as the representative assessee of 23 wp730-09+++ NCWS (being a 70% share-holder of AT&T Mauritius) and MMMH (being a 30% shareholder of AT&T Mauritius). The argument of Mr.Dastur can be summarised thus :-

(a) Section 160 to 167 of the 1961 Act are machinery provisions for assessment and recovery of tax on the income of a principal assessee, from a representative assessee. In the present case, the above provisions are not applicable as the income of the principal assessee (AT&T Mauritius) cannot be brought to tax in India in view of the provisions contained in the DTAA. The shares of ICL were acquired by AT&T Mauritius during the period from 7th May 1996 to 18th November 2003 by subscribing directly from ICL and AT&T Mauritius has been holding the said shares

until their transfer to Indian Rayon on 28th September 2005. These shares of ICL were issued to AT&T Mauritius after obtaining necessary approval from the RBI as required under Section 19(1)(d) (for issue of equity shares by an Indian Company to a non-resident), Section 29(1)(b) (for acquisition of equity shares of an Indian Company by a non-

resident) and Section 19(1)(a) (for export of share certificates to the country of incorporation of the non-resident share-holder) of the FERA. While granting approval, the RBI was fully aware of the fact that AT&T Mauritius was a wholly owned subsidiary of AT&T USA and thus the RBI has accepted that shares of ICL were acquired 24 wp730-09+++ and held by AT&T Mauritius.

(b) Transfer of 37,17,80,740 shares of ICL (being 50% of the shares) in favour of Indian Rayon was effected in India by way of transfer from the depository account of AT&T Mauritius in India into the depository account of Indian Rayon in India. Such transfer of shares gave rise to income by way of capital gains which accrued or arose in India under Section 5(2)(b) of the 1961 Act and hence taxable in India. However, AT&T Mauritius is a resident of Mauritius holding Tax Residence Certificate dated 19th May 1995 issued by the Commissioner of Income Tax in the Republic of Mauritius and the same was valid till the date of transfer of shares as is evident from the certificate issued by the Commissioner of Income Tax, Republic of Mauritius on 18th August 2005. Therefore, capital gains accrued to AT&T Mauritius on transfer of shares of ICL is taxable only in Mauritius and cannot be taxed in India as per Article 13(4) of the DTAA between India and Mauritius.

(c) Section 90(2) of the 1961 Act provides that when the Central Government enters into an Agreement with the Government of any country outside India for granting relief of tax, then in relation to an assessee, the DTAA would prevail except where the provisions of the 1961 Act are more beneficial to the assessee. This position is also made clear by the Central Board of Direct Taxes ('CBDT' for 25 wp730-09+++ short) Circular No.333 dated 2nd April 1982 {137 ITR (st) 1} and upheld by the Apex Court in the case of Commissioner of Income Tax V/s. Azadi Bachao Andolan reported in 263 ITR 706 (SC). In the present case, Article 13(4) of the DTAA being more beneficial to AT&T Mauritius, the DTAA would apply and not the 1961 Act.

(d) In the present case, the Revenue has denied the benefit of DTAA on the ground that the real owner of shares ICL was NCWS / MMMH and it is the NCWS / MMMH (resident of USA) who have transferred the shares of ICL and, therefore, the DTAA between India and Mauritius would not apply. The shares of ICL were held by AT&T Mauritius and were transferred by AT&T Mauritius and, therefore, capital gains accrued to AT&T Mauritius to which Article 13(4) of the DTAA between India and Mauritius would apply.

(e) As per CBDT Circular No.682 dated 30th March 1994 and CBDT Circular No.789 dated 13th April 2000, the capital gains derived by a resident of Mauritius holding Tax Residence Certificate would constitute sufficient evidence for accepting the status of residence as well as beneficial ownership for applying the DTAA. In the present case, AT&T Mauritius is a resident of Mauritius and, therefore, AT&T Mauritius would be the beneficial owner of the shares of ICL and capital gains arising on transfer of those shares would be squarely covered under the DTAA between India and 26

wp730-09+++ Mauritius.

(f) The Apex Court in the case of Azadi Bachao Andolan (supra), while upholding the validity of the CBDT Circular No.682 dated 30th March 1994 and CBDT Circular No.789 dated 13th April 2000 held that the provisions of DTAA would prevail over the 1961 Act and that the Tax Residence Certificate issued by the Mauritius Tax Authorities constitutes sufficient evidence of the status of residence and beneficial ownership of shares. In view of the above binding decision of the Apex Court, it is contended that in the present case, AT&T Mauritius qualifies as a beneficial owner of the shares of ICL and it is not open to the tax authorities in India to lift the corporate veil to find out as to who are the real owners of the shares held by AT&T Mauritius. The fact that the capital gains accrued to a resident of Mauritius and taxable in Mauritius are exempted under the Mauritian tax law cannot be a ground to tax that capital gains in India. Even assuming whilst denying that AT&T Mauritius was incorporated in Mauritius with a view to obtain benefit of the DTAA, the benefits under the DTAA cannot be denied to AT&T Mauritius because there is no provision in the DTAA / domestic law to deny such benefits.

(g) Decision of the Apex Court in the case of Azadi Bachao Andolan (supra) holds good even today and in fact the Review Petition as 27 wp730-09+++ well as the Curative Petition filed against the decision of the Apex Court in the case of Azadi Bachao Andolan (supra) have been dismissed by the Apex Court. Moreover, the decision in the case of Azadi Bachao Andolan (supra) has been followed subsequently by the Authority for Advance Ruling (AAR) in the case of E Trade Mauritius Limited (324 ITR 1), Emirates Fertilizers Trading Company (272 ITR 84) and an unreported judgment of the AAR in the case of D.B. Zwirn Mauritius Trading No.3 Limited.

(h) The Apex Court in the case of Carew & Co. Limited V/s. Union of India reported in 46 Comp. Cases 121 (SC) and Mrs.Bacha F. Guzdar V/s. Commissioner of Income Tax reported in 27 ITR 1 (SC) has laid down that the assets held by a wholly owned subsidiary cannot be regarded as the assets of the parent company.

As per Section 47(iv) and 47(v) of the 1961 Act, the holding company and its wholly owned subsidiary company are two different entities and the assets owned by a subsidiary cannot be regarded as owned by the holding company.

(i) Under Section 2(a), 3 and 4 of the Benami Transactions (Prohibition) Act, 1988 it is not open to NCWS (assuming without admitting it is the beneficial shareholder) to assert its beneficial interest in the shares of ICL allegedly held by it in the name of AT&T Mauritius. If the contention of the Revenue is accepted, then 28 wp730-09+++ absurd situation would arise because under the Benami Transactions Act, NCWS would not have any rights over the shares that stood in the name of AT&T Mauritius but assessable to capital gains under the 1961 Act on sale of shares held by AT&T Mauritius..

(j) The Apex Court in the case of Howrah Trading Co. Limited V/s.

Commissioner of Income Tax reported in 36 ITR 216 (SC) has held that the person whose name is entered in the Register of Members is to be regarded as the holder of the said shares. The Revenue has failed to establish as to how NCWS became the owner of the shares of ICL held by AT&T Mauritius. Apparently, the shares are held by AT&T Mauritius and as per the decision of the Apex Court in the case of Azadi Bachao Andolan (supra) the Revenue cannot go behind the apparent shareholding where the DTAA is applicable.

(k) RBI while granting its approval under Section 19(1)(a), 19(1)(d) and 29(1)(b) of FERA was fully aware of the fact that AT&T Mauritius was then a wholly owned subsidiary of AT&T, USA. If the Revenues contention that NCWS is the real owner of ICL shares held by AT&"T Mauritius is accepted, then, it would mean that ICL as well as NCWS have violated FERA, when in fact they have not violated any provisions of FERA. Therefore, the proper course is to hold that the shares of ICL were validly held by AT&T Mauritius and that the approvals granted by RBI are legal and valid.

29 wp730-09+++

(l) The fact that AT&T Mauritius was the legal owner of the shares of ICL is not disputed by the Revenue in view of the fact that the RBI has granted requisite approval and in fact the shares also stood in the name of AT&T Mauritius. In the present case, NCWS and MMMH (the shareholders of AT&T Mauritius) have contributed funds by way of a share capital and loan to AT&T Mauritius to acquire the shares of ICL. Under para 4.01 of the Shareholders Agreement the liability to make payment for the uncalled capital was on the shareholder i.e. AT&T Mauritius. For application of the DTAA, it is not necessary that the Company as well as the shareholders of the Company must be resident of Mauritius.

Therefore, AT&T Mauritius would be resident of Mauritius even though its shareholders viz. NCWS and MMMH are US residents.

(m) The argument of the Revenue that they are not lifting the Corporate Veil but simply determining as to who should be regarded as the owner of the shares of ICL is not acceptable, because, while accepting that AT&T Mauritius is the legal owner of the shares of ICL (as a registered shareholder) to find out as to whether NCWS is the real owner of the said shares itself amounts to lifting the corporate veil which is not permissible in view of the decision of the Apex Court in the case of Azadi Bachao Andolan (supra).

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(n) The transaction of purchasing the shares of ICL from AT&T Mauritius by Indian Rayon in the year 2005 was based on the Share Purchase Agreement dated 28th September 2005 and not on the basis of JVA dated 5th December 1995. Perusal of the Share Purchase Agreement dated 28th September 2005 shows that AT&T Mauritius was the vendor and sole owner of the shares of ICL and AT&T Mauritius was to instruct the depository for transfer of shares of ICL to Indian Rayon. NCWS had become party to the Sale Agreement, because, NCWS had provided certain warranties under the agreement to the effect that the said shares were free from encumbrances. Similarly,

purchase price was to be paid by Indian Rayon in the bank account maintained by AT&T Mauritius.

(o) On execution of the Shareholders Agreement dated 15th December 2000, the JVA dated 5th December 1995 could not and did not survive, because, the founders in both the agreements are different, share holdings in the two agreements are different, the terms to be incorporated in the Articles of Association are different, requirement relating to quorum of board meeting, appointment of Board of Directors, officers etc are different and above all clause 12.07 of the Shareholders Agreement specifically provides that "This agreement together with all exhibits and attachment hereto represents the entire agreement and understanding between parties 31 wp730-09+++ with respect to the subject matter of this Agreement and supersedes any prior agreement or understanding, written or oral, that the parties may have had". Therefore, there can be no doubt that the 1995 agreement or any terms and conditions contained therein, would not survive after the Agreement dated 15th December 2000 and no reliance can be placed on the 1995 agreement.

(p) Even if it is accepted that the 1995 agreement prevails after the execution of the Shareholders Agreement and AT&T Corp is to be regarded as owner of the shares of ICL, still it is not shown how NCWS became the owner of the shares of ICL in respect of whom Indian Rayon is sought to be treated as the agent and a representative assessee, especially when NCWS was not even a party to the 1995 agreement. If according to the Revenue AT&T Corp is the owner of the shares of ICL, then also it is not clear how transfer of shares could take place on 28th September 2005 in favour of Indian Rayon, because AT&T Corp is not a party to the said agreement. Moreover, Indian Rayon has not been treated as the agent of AT&T Corp.

(q) The fact that the NCWS was a party to the Sale and Purchase Agreement dated 28th September 2005 makes no difference, because, the shares were sold by AT&T Mauritius as vendor and NCWS had agreed to be party to the sale purchase agreement dated 32 wp730-09+++ 28th September 2005, because, it had given warranties to Indian Rayon to the effect that the shares of ICL held by AT&T Mauritius were free from encumbrances and that India Rayon would acquire good and valid title to the shares upon completion of transfer.

(r) Filings by AT&T Corp, Cingular Wireless LLC and NCWS before the Securities Exchange Commission (SEC) of USA regarding the receipt of sale proceeds do not support the case of the Revenue because, US law requires the companies to reflect a consolidated position of the group as a whole and AT&T Mauritius being a subsidiary, the sale proceeds realised by AT&T Mauritius on sale of shares of ICL had to be disclosed before the SEC. Therefore, the fact that disclosures have been made before the SEC by NCWS regarding the sale proceeds received by AT&T Mauritius, it cannot be assumed that the said sale proceeds belonged to NCWS.

(s) The fact that AT&T Mauritius immediately on receipt of the sale proceeds amounting to US$ 150,000,000 on 29th September 2005 transferred on the same day US$ 150,000,475 in favour of NCWS, cannot be a ground to infer that the shares of ICL belonged to NCWS and that the NCWS has received the sale proceeds through AT&T Mauritius. From the cash flow statement of AT&T Mauritius furnished by the Revenue, it is seen that the amount of US$ 150,000,475 paid by AT&T Mauritius to NCWS comprised of 33 wp730-09+++ dividend amounting to US$ 43,915,312

distributed by AT&T Mauritius and US$ 101,685,163 represented repayment of loan.

Thus, the sale consideration was received by the owner of ICL shares viz. AT&T Mauritius and utilized for its own purposes. In any event, Indian Rayon is not concerned with the manner in which AT&T Mauritius dealt with the funds received by it upon sale of shares of ICL to Indian Rayon.

(t) The fact that India Televentures Limited offered to purchase equity shares of ICL directly from NCWS, cannot be a ground to hold that the said shares belonged to NCWS, because NCWS, Birla Group and Tata Group are parties to the process of offer and acceptance as representative of the founders. The offer was in keeping with the requirement in Article 10.06 dealing with the right of first refusal in the Shareholders Agreement dated 15th December 2000. In any event, while determining the residential status of AT&T Mauritius it is wholly irrelevant as to whom the purchase offer was made.

(u) The fact that any notice relating to disputes under the Sale and Purchase Agreement dated 28th September 1995 was required to be given to AT&T Wireless Service INC (NCWS being part of it) does not mean that the shares of ICL belonged to NCWS. Requirement of notice to AT&T Wireless Service Inc was necessitated because, after sale of ICL shares by AT&T Mauritius to Indian Rayon, the shares of 34 wp730-09+++ AT&T Mauritius were to be sold by NCWS / MMMH to TIL and in such a case AT&T Mauritius would not remain a subsidiary of NCWS but would thereafter become a subsidiary of TIL and, therefore, any notice to be given to the Cingular group had to be sent naturally to NCWS. Moreover, NCWS had given certain warranties and if any dispute arises in respect of the sale of shares of ICL by AT&T Mauritius to Indian Rayon, appointment of arbitrator by AT&T Mauritius which thereafter became a Tata group company would not fully protect the interest of the Cingular Group.

Therefore, NCWS has been given the authority to appoint arbitrator.

For all the aforesaid reasons, it is submitted by Mr.Dastur that AT&T Mauritius should be regarded as the owner of the shares of ICL and it must be held that the capital gains arising on sale of those shares are not taxable in India in view of Article 13(4) of the DTAA between India and Mauritius.

28. We have carefully considered the above arguments of Mr.Dastur, as also arguments to the contrary advanced by Mr.Parasharan, learned Additional Solicitor General appearing on behalf of the Revenue.

29. In the present case, Indian Rayon pursuant to a Sale and Purchase Agreement dated 28th September, 2005 has purchased 37,17,80,740 equity shares of ICL from AT&T Mauritius and NCWS (USA) for 35 wp730-09+++ US$ 150,000,000. The dispute is, whether the ICL shares were owned by AT&T Mauritius or by NCWS (USA). According to the Revenue, the said shares were owned by NCWS (USA) and the capital gains arising or accruing to NCWS (USA) from the above transaction is taxable in India either in the hands of NCWS (USA) or taxable in the hands of Indian Rayon as an agent of NCWS (USA) under Section 163(1) of the Income Tax Act, 1961.

30. Admittedly, the shares of ICL were registered in the name of AT&T Mauritius. However, the Sale and Purchase Agreement was executed jointly by AT&T Mauritius and NCWS on 28th September 2005 and on 29th September, 2005, Indian Rayon paid the sale consideration of US$ 150,000,000 to AT&T Mauritius. On the same day that is 29th September 2005 itself AT&T Mauritius transmitted an amount of US$ 150,000,475/- to NCWS, USA. The question, therefore, to be considered is, whether the revenue is justified in contending that the beneficial ownership of the shares of ICL transferred jointly by AT&T Mauritius and NCWS to Indian Rayon had vested in NCWS, when admittedly, the said shares stood in the name of AT&T Mauritius. If the beneficial ownership in the ICL shares (before transfer) had vested in AT&T Mauritius then the capital gains would be taxable in the hands of AT&T Mauritius to which the DTAA between India and Mauritius would apply and if the beneficial ownership in those shares had vested in NCWS, USA, then the capital gains arising on transfer of the ICL shares to Indian Rayon would be taxable in the hands of NCWS (USA) to which the 36 wp730-09+++ DTAA between India and USA would apply.

31. To understand the rival contentions, it would be necessary to refer to the circumstances in which the joint venture company was originally formed and the shares of the JVC were allotted in the name of AT&T Mauritius. Birla Communications Limited - now known as Idea Cellular Limited (ICL) was a Joint Venture Company (JVC) formed under the Joint Venture Agreement (JVA) dated 5th December 1995. The joint venture was between AT&T Corp, USA duly executed by AT&T Wireless Services Inc, USA ('AT&T USA') and the Birla Group (which inter alia includes Indian Rayon).

In October 2004, Cingular Wireless LLC, USA acquired AT&T Wireless Services Inc, USA and renamed it as New Cingular Wireless Services Inc, USA (NCWS). As a result, the interest of AT&T USA in the JVC stood vested in NCWS which is also a Company incorporated in USA. The joint venture was entered into with a view to facilitate AT&T USA to carry on wireless telecommunication business in India. The joint venture partners (AT&T USA and the Birla Group) were to own 100% equity shares of the JVC as party shareholders. As per the JVA, the joint venture partners were entitled to hold the shares of the JVC in the name of a permitted transferee, however, all right, title and interest attached to the said shares were to vest in the joint venture partners only.

32. As per the JVA, AT&T USA was to subscribe and own 49% equity shares of the JVC as party shareholder and AT&T USA could seek allotment of 37 wp730-09+++ shares in the name of its permitted transferee. The expression 'party shareholder' and 'permitted transferee' were defined in the JVA as follows :-

> "Party shareholder" means any owner of Equity Capital who is a party to this Agreement.
>
> "Permitted Transferee" has the meaning set forth in Section 12.04(a).
>
> Article 12.04 of the JVA (to the extent relevant) reads thus :-
>
> "12.04 ig 'Permitted Transfers'.

(a) For purposes of this Article XII, a "Permitted Transferee" is, in the case of shares of Equity Capital owned by a Founder, any corporation of which that Founder directly or indirectly owns all of the shares of voting stock.

(b) Subject to the provisions of this Section 12.04(b), each Founder shall be entitled, upon prior written notice to the Company and the other Founders, to transfer all but not less than all, of its Shares to any Permitted Transferee. No such transfer shall be or become effective, however, until such Permitted Transferee executes and delivers to the Company a counterpart copy of this Agreement thereby agreeing to be bound by the terms and conditions hereof theretofore applicable to the transferor of such shares. The Founder and the Permitted Transferee shall be jointly and severally liable for all of the obligations of the transferor hereunder. Upon meeting the requirements for transfer under this Section, the Company may, upon formation, at the Closing, or thereafter, issue Equity Capital directly to a Permitted Transferee.

(c) Each Founder covenants and agrees with the other Founder that (i) it shall retain, directly or indirectly, ownership of all the voting stock of any Permitted Transferee which now holds or hereafter acquires any shares of Equity Capital so long as such Permitted Transferee holds such shares and (ii) it shall not enter into any agreement or otherwise acquiesce to any transaction whereby Equity Capital or voting interest therein fall under the direct or indirect control of a competitor of the Company or a competitor of the other Founder or of the

38 wp730-09+++ Controlling Shareholder of a competitor of the Company or a competitor of the other Founder.

(d) Without any any way limiting the provisions of Section 12.04(c), neither the Board of Directors nor the Company shall recognize any direction, instruction or notice from any Person or group of Persons who acquires, directly or indirectly, Control of a Shareholder as a result of a transfer or issuance of securities of such Shareholder or securities or other voting interests of any other Person resulting in a violation of Section 12.04 (c)".

33. AT&T Mauritius, being a 100% subsidiary of AT&T USA was eligible to hold the shares as a permitted transferee of AT&T USA. As per Article 2.02 of the JVA, liability to subscribe and pay for 49% equity shares of the JVC was on AT&T USA. Accordingly, AT&T USA carried on business in India by subscribing to the equity shares of the JVC by making payments for the equity shares through AT&T Mauritius, a permitted transferee of AT&T USA.

34. From 1996 onwards equity shares of the JVC subscribed to and owned by AT&T USA were allotted from time to time in the name of AT&T Mauritius with the approval of RBI. From 1996 till February 1998, the approval granted by RBI for allotment of shares of the JVC in the name of AT&T Mauritius was to the extent of 43,82,81,480 shares (see page 58 of the petition).

35. Since the equity share amount was paid by AT&T Mauritius and the equity shares were allotted in the name of AT&T Mauritius with the 39 wp730-09+++ approval of the RBI, it is contended by Indian Rayon, that the beneficial ownership in those shares vested in AT&T Mauritius and not in NCWS. The question, therefore, to be considered is whether, AT&T Mauritius paid the amount for acquiring the equity shares of the JVC in its own name or paid the amount for and on behalf of AT&T USA and whether sale of shares of ICL jointly by AT&T Mauritius and NCWS (successor to AT&T USA) amounts to sale by AT&T Mauritius alone.

36. Apart from the JVA there is no other document on record to show that AT&T Mauritius had independently entered into any transaction for acquiring the equity shares of the JVC. The obligation under the JVA to pay for the equity shares of the JVC was on AT&T USA. 74,35,61,480 equity shares of the JVC allotted in the name of AT&T Mauritius corresponds to the shares subscribed by AT&T USA under the JVA and the Shareholders Agreement. Out of 74,35,61,480 shares allotted to AT&T Mauritius, 43,82,81,480 shares were allotted prior to the execution of the Shareholders Agreement. Obviously, the said 43,82,81,480 equity shares were allotted in the name of AT&T Mauritius in terms of the JVA. Under the JVA, AT&T USA as a founder and party shareholder was entitled to seek allotment of shares in the name of its permitted transferee. Under the JVA the permitted transferee was bound by the JVA and could not independently exercise any of the rights flowing from the shares allotted in its name. Under the JVA all rights in the shares allotted in the name of a permitted transferee (AT&T Mauritius) stood 40 wp730-09+++ vested in the party shareholder (AT&T USA). In terms of the JVA, AT&T USA was to carry on business in India by subscribing to the shares of the JVC with right to appoint four directors to the board of directors of the JVC and to designate one board member as a 'Principle Founding Member'. Under the JVA, no director appointed by the founder could be removed without the consent of the founding member. The JVA specifically provides that the share certificates of equity capital issued in the name of a permitted transferee shall carry an endorsement to the effect that the sale of the said shares shall be subject to the JVA and the holder of those shares cannot sell, assign or pledge the shares independent of the terms of the JVA. In these circumstances, in the absence of any document to show that AT&T Mauritius had entered in to any transaction to subscribe to or purchase the shares of JVC in its own name, the primafacie view of the Revenue that the allotment of 43,82,81,480 equity shares of the JVC in the name of AT&T Mauritius was only as a permitted transferee of AT&T USA under the JVA and such allotment of shares in the name of AT&T Mauritius did not confer any beneficial ownership to the AT&T Mauritius as expressly provided under the terms of the JVA, cannot be faulted.

37. The fact that AT&T Mauritius made payments to the JVC towards the equity shares would not make it to be owner of the equity shares, because, firstly, under the JVA, the joint venture partners alone were to subscribe and own 100% equity shares of JVC and admittedly AT&T 41 wp730-09+++ Mauritius was not a joint venture partner and, therefore, there was no obligation on AT&T Mauritius to pay for the shares. Secondly, it is only because the JVA was implemented by the joint venture partners by subscribing to the shares of the JVC, the shares could be allotted in the name of AT&T Mauritius as a permitted transferee of AT&T USA. In other words, it is only because, the joint venture partners viz. AT&T USA and the Birla Group subscribed and owned the shares of the JVC, shares of the JVC were allotted to the joint venture partners or permitted transferee of the joint

venture partners. Thirdly, there is no document on record to suggest that the AT&T Mauritius had agreed to subscribe / purchase the shares of JVC. In these circumstances, the payments made by AT&T Mauritius cannot be said to be payments for subscribing / purchasing the shares of the JVC in the name of AT&T Mauritius. Therefore, it is evident that the payments made by AT&T Mauritius to the JVC was obviously for and on behalf of AT&T USA, because, under the JVA, the obligation to subscribe and own the shares of the JVC was on AT&T USA.

38. The payments made by AT&T Mauritius towards the equity shares of the JVC was for and on behalf of the joint venture partner / founder

- AT&T USA is further supported by the Shareholders Agreement dated 15th December 2000. It is AT&T USA (not AT&T Mauritius) which has entered into the Shareholders Agreement with the Birla Group and the Tata Group.

Admittedly, on the date of the Shareholders Agreement allotment of 42 wp730-09+++ 43,82,81,480 (see page 58 of the petition) equity shares of the JVC in favour of AT&T Mauritius was approved by RBI. Thus, in spite of the fact that 43,82,81,480 equity shares of the JVC were allotted in the name of AT&T Mauritius, it is AT&T USA which has entered into the Shareholders Agreement as a shareholder of the JVC. Moreover, in the Shareholders Agreement, it is specifically recorded that AT&T Wireless Services Inc, USA (AT&T USA) is carrying on the telecommunication business in India through its wholly owned subsidiary - AT&T Mauritius. AT&T USA could carry on business in India only in terms of the JVA by subscribing and owning the shares of the JVC to the extent permitted under the JVA. Thus, from the Shareholders Agreement it becomes clear that though the shares were allotted in the name of AT&T Mauritius the said shares were held by AT&T Mauritius as a permitted transferee of the owner of the shares namely, AT&T USA.

39. In the Shareholders Agreement, it is AT&T USA which has agreed to act as a representative of the AT&T Wireless Group and agreed that its obligation to pay for the balance equity shares of the JVC would be discharged by the members of the AT&T Wireless Group. Therefore, the fact that AT&T USA in the Shareholders Agreement agreed that the payment in respect of the balance equity shares would be made by the members of the AT&T Wireless Group, it cannot be said that the ownership of the shares were to vest in the member of the AT&T Wireless Group who paid for the balance 43 wp730-09+++ equity shares. The Shareholders Agreement neither divests the ownership of the 43,.82,81,480 equity shares of the JVC already subscribed and owned by AT&T USA (but allotted in the name of AT&T Mauritius) as per the terms of the JVA nor does it provide that the ownership of the shares to be issued after the Shareholders Agreement shall vest in the member of the AT&T Wireless Group who pays for the equity shares of the JVC. In fact, Article 4.01 of the Shareholders Agreement specifically records that the member of the AT&T Wireless Group in whose name the shares are issued or transferred shall designate AT&T USA as its representative to exercise all the rights and to perform all the obligations attached to the shares except the obligation to pay for the equity shares. Thus, even after the execution of the Shareholders Agreement, ownership of the shares of the JVC to be issued, were to vest in AT&T USA and not with the member of the AT&T Wireless Group who paid for the shares or in whose name the shares were to be issued. In other words, though the Shareholders Agreement partially alters the shareholding and management rights

vested in the joint venture partners under the JVA on account of inducting the Tata Group into the joint venture, the Shareholders Agreement does not in any way impair or obliterate the ownership rights in the shares of the JVC vested in the joint venture partners whether allotted prior to or subsequent to the Shareholders Agreement.

40. The argument of Indian Rayon is that since the shares of the JVC purchased by Indian Rayon stood in the name of AT&T Mauritius, the legal 44 wp730-09+++ owner of the said shares would be AT&T Mauritius and, therefore, on sale of the said shares, capital gains would accrue to AT&T Mauritius which as per DTAA between India and Mauritius cannot be taxed in India and consequently the tax on capital gains arising from the transfer of shares of JVC cannot be recovered from Indian Rayon as a representative assessee. As noted earlier, out of 74,35,61,480 equity shares of the JVC allotted to AT&T Mauritius, 43,82,81,480 equity shares were allotted to AT&T Mauritius prior to the execution of the Shareholders Agreement. As per the JVA, 100% shares of the JVC were to be subscribed by the joint venture partners, viz.

AT&T USA and the Birla Group. AT&T Mauritius was not a joint venture partner under the JVA. AT&T USA as a joint venture partner was to subscribe to 49% shares of the JVC and could hold those shares of the JVC in the name of its permitted transferee. The JVA expressly makes it clear that the permitted transferee shall have no right whatsoever in those shares. Thus, it is evident that 43,82,81,480 equity shares of the JVC were allotted to AT&T Mauritius as a permitted transferee of AT&T USA as per the terms of the JVA.

The ownership of the said shares, as per the terms of JVA vested in AT&T USA. Even in respect of the shares of the JVC issued after the execution of the Shareholders Agreement, the ownership in the shares vested in AT&T USA, because, the Shareholders Agreement did not make any departure in the ownership of the shares already issued or to be issued after the Shareholders Agreement. Thus, 74,35,61,480 equity shares allotted in the name of AT&T Mauritius were allotted as per the terms of the JVA and the 45 wp730-09+++ Shareholders Agreement under which the ownership of the shares were to vest in AT&T USA. That is why NCWS (successor to AT&T USA) offered to sell the shares of ICL to the Birla Group and Indian Rayon representing the Birla Group intimated its acceptance of the offer to NCWS. Moreover, NCWS is a party to the Sale and Purchase Agreement. If AT&T Mauritius was the beneficial owner of the shares, then the Sale and Purchase Agreement would have been solely with AT&T Mauritius and not jointly with AT&T Mauritius and NCWS. Therefore, the argument of India Rayon that since the shares of the JVC stood in the name of AT&T Mauritius, it must be treated as beneficial owner of the shares cannot be accepted. Similarly, the argument that NCWS became a party to the Sale and Purchase Agreement on account of the warranties given by NCWS is without any merit, because, as per the clauses in the JVA and the Shareholders Agreement, shares of the JVC allotted in the name of AT&T Mauritius could not be sold by AT&T Mauritius without the consent of AT&T USA (now NCWS). Thus, sale of ICL shares could be effected by AT&T Mauritius only if NCWS consented to the sale. NCWS could give consent only if it wanted to get out of the joint venture partnership.

Therefore, the argument that NCWS was a party to the Sale and Purchase Agreement, because of the warranties given by it cannot be accepted.

41. Even while granting approval for allotment of shares in the name of AT&T Mauritius, the RBI recorded (see page 60 of the petition) that AT&T Mauritius is the wholly owned subsidiary of AT&T USA and that the 46 wp730-09+++ allotment of equity shares of the JVC in favour of AT&T Mauritius shall not exceed 49% (later on reduced to 32.91% under the Shareholders Agreement) of the paid up capital of the JVC. These facts noted by RBI clearly suggests that the RBI approval was in terms of the JVA, wherein the ownership of the shares allotted in the name of AT&T Mauritius was to vest in AT&T USA.

Thus, the approval granted by RBI for allotment of shares in the name of AT&T Mauritius support the contention of the Revenue that the equity shares of the JVC were issued in the name of AT&T Mauritius under the JVA as a permitted transferee of AT&T USA.

42. Similarly, the approval granted by RBI to the effect that the allotment of shares of the JVC in the name of AT&T Mauritius was in accordance with the provisions of FERA does not make AT&T Mauritius legal owner of the said shares, because, the said approval simply means that according to RBI the allotment of shares in the name of AT&T Mauritius as permitted transferee does not violate the provisions of FERA. The RBI approval does not elevate the status of AT&T Mauritius from that of a permitted transferee to a party shareholder. As noted earlier, out of 74,35,61,480 equity shares, 43,82,81,480 equity shares were allotted prior to the execution of the Shareholders Agreement and the remaining shares were allotted after the execution of the Shareholders Agreement. RBI approval does not make any distinction between the shares of the JVC allotted in the name of AT&T Mauritius prior to the Shareholders Agreement and 47 wp730-09+++ subsequent to the Shareholders Agreement. In other words, RBI has merely approved allotment of shares of the JVC in the name of AT&T Mauritius prior to and subsequent to the Shareholders Agreement as a permitted transferee of AT&T USA. Therefore, the fact that the allotment of shares in the name of AT&T Mauritius were in accordance with the provisions of FERA does not support the argument of Indian Rayon that AT&T Mauritius held the shares of the JVC as a party shareholder.

43. AT&T USA as a joint venture partner under the JVA, had subscribed to the shares of the JVC is evident from the fact that AT&T USA was a party to the Shareholders Agreement as a shareholder of the JVC.

Even in the Shareholders Agreement, it is recorded that AT&T USA is carrying on business in India through its subsidiary AT&T Mauritius. Indian Rayon and TIL Were parties to the Shareholders Agreement. Therefore, Indian Rayon (Birla Group), TIL (Tata Group) and NCWS (successor to AT&T USA) cannot contend that AT&T Mauritius was the owner of the ICL, especially when they were the joint venture partners of the JVC and the ICL shares were allotted in the name of AT&T Mauritius as a permitted transferee of AT&T USA, as per the terms of the JVA / Shareholders Agreement. The fact that in the Shareholders Agreement it is recorded that AT&T USA represents the AT&T Wireless Group and that the Shareholders Agreement permits AT&T Mauritius as a member of the AT&T Wireless Group to pay for the balance equity shares of the JVC, does not in any way alter the ownership rights over 48 wp730-09+++ the shares of ICL subscribed to by AT&T USA and allotted in the name of AT&T Mauritius as a permitted transferee of AT&T USA.

44. The argument that the JVA comes to an end on the execution of the Shareholders Agreement is also without any merit. No doubt, clause 12.07 of the Shareholders Agreement dated 15th December 2000 records that the understanding arrived at between the three parties therein in respect of the subject matter of the Shareholders Agreement shall be final and any understanding to the contrary under any other agreement between the parties shall stand superseded. Obviously, clause 12.07 of the Shareholders Agreement seeks to supersede the terms of the JVA to the extent they are in conflict with the Shareholders Agreement. The Shareholders Agreement does not deal with the rights vested in AT&T USA in respect of the 43,82,81,480 equity shares of JVC already subscribed and owned by AT&T USA but allotted in the name of the permitted transferee - AT&T Mauritius. The Shareholders Agreement does not envisage that the ownership of the shares of the JVC to be issued after the Shareholders Agreement shall vest in the member of the AT&T Wireless Group who is authorized to pay for the equity shares of the JVC. In fact, the Shareholders Agreement makes it clear that AT&T USA shall continue to exercise all rights flowing from the shares of the JVC already issued under the JVA or to be issued after the Shareholders Agreement.

Therefore, the argument of Indian Rayon that the Shareholders Agreement supersedes the JVA in its entirety cannot be accepted.

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45. Relying on the CBDT circulars No.682 and 789 as also the Apex Court decision in the case of case of Azadi Bachao Andolan (supra) wherein the above CBDT circulars have been held to be legal and binding, it is argued on behalf of India Rayon that once Tax Residence Certificate is issued to AT&T Mauritius by the Republic of Mauritius, then it would constitute sufficient evidence for accepting the status of residence as well as beneficial ownership for applying DTAA between India and Mauritius and it would not be open to the tax authorities to go behind the Tax Residence Certificate and find out as to who are the beneficial owners of the shares of the JVC.

46. In our opinion, the CBDT circulars explaining the DTAA between India and Mauritius as also the decision of the Apex Court in the case of Azadi Bachao Andolan (supra) have no relevance to the facts of the present case for the following reasons :-

> (a) The CBDT circulars relied upon by Indian Rayon were issued in the context of extending the benefits of the DTAA between India and Mauritius to the investments made in India by the entities incorporated in Mauritius. The said circulars would not apply where the investments are made in India by entities other than the entities incorporated in Mauritius. In the present case, the investments in India are made by AT&T USA under the JVA dated 5th December 1995 (as modified by the Shareholders Agreement) and not by a company incorporated in 50 wp730-09+++ Mauritius. As noted earlier, it is AT&T USA which carried on the business in India by subscribing and owning the shares of the JVC. The fact that AT&T USA discharged its obligation to pay for the equity shares through AT&T Mauritius and the fact that AT&T USA as a joint venture partner of the JVC got the shares in the name of its permitted transferee - AT&T Mauritius, it cannot be said that the investments in

India are made by AT&T Mauritius. In other words, in the present case, AT&T USA carried on business in India by entering into a JVA with the Birla Group and by investing funds in India by subscribing to the shares of the JVC. The fact that AT&T USA paid the amount towards equity shares through AT&T Mauritius and got allotted the shares of the JVC in the name of AT&T Mauritius as a permitted transferee, it cannot be said that the investments in India were made by the permitted transferee viz. AT&T Mauritius. In these circumstances, in the present case since the investments in India were made by AT&T USA and not by AT&T Mauritius, neither, the CBDT circulars nor the DTAA between India and Mauritius are applicable to the facts of the present case.

(b) In the case of Azadi Bachao Andolan (supra), investments in India were admittedly made by the Companies incorporated in Mauritius. Income accrued to those Mauritian Companies were governed by the DTAA between India and Mauritius. However, in many cases, the tax 51 wp730-09+++ authorities sought to treat the shareholders of the Mauritian entities as the real owners and deny the benefit of DTAA between India and Mauritius to the Mauritian entities. In that context, CBDT circulars were issued to the effect that where investments are made by Mauritian entities having tax residence certificate, then the tax authorities cannot go behind the tax residence certificate and deny the benefit of DTAA. Validity of the CBDT circulars were challenged before the Delhi High Court and the Delhi High Court quashed the CBDT circulars. On appeal filed by the Union of India, the Apex Court while setting aside the decision of the Delhi High Court and upholding the CBDT circulars held that where investments are made by a Company incorporated in Mauritius and that company holds valid Tax Residence Certificate, then it is not open to the tax authorities to go behind the Tax Residence Certificate and try to find out as to who are the real owners of the shares of the Indian company and seek to recover tax from them. In the present case, it is AT&T USA which has entered in to the JVA for the purpose of carrying on business in India. It is AT&T USA which has subscribed to and owned 49% equity shares (later on reduced to 32.91%) of the JVC under the JVA. It is at the instance of AT&T USA the shares subscribed were issued in the name of its 100% subsidiary as a permitted transferee. It is AT&T USA as a shareholder of the JVC, entered into a Shareholders Agreement wherein the shareholding was reduced with the induction of the Tata Group. It is 52 wp730-09+++ AT&T USA which has agreed with the other joint venture partner that irrespective of issuance of the shares in the name of a permitted transferee, all rights relating to those shares including the right to sell the shares shall vest in AT&T USA. Therefore, in the facts of the present case, where the investments are made by AT&T USA and not by AT&T Mauritius, the ratio laid down by the Apex court in the case of Azadi Bachao Andolan (supra) would not apply.

47. Once it is primafacie established that the investments in the shares of the JVC were made by AT&T USA and the allotment of shares in the name of AT&T Mauritius was as a permitted transferee of AT&T USA, then the fact that AT&T Mauritius held a Tax Residence Certificate issued by the Republic of Mauritius and that certificate was valid on the date of sale of ICL shares would become wholly irrelevant. Since the shares of the JVC were subscribed and owned by AT&T USA as a joint venture partner and AT&T USA had agreed to sell the shares of ICL along with AT&T Mauritius to Indian Rayon by a Sale and Purchase Agreement dated 28th September 2005, the

amount of sale consideration received by AT&T USA through AT&T Mauritius would be taxable in the hands of the AT&T USA (now represented by NCWS).

The argument that the amount received by NCWS was not the sale proceeds but represented the dividend income and return of loan advanced by NCWS to AT&T Mauritius cannot primafacie be accepted, because, under the JVA the liability to pay for the equity shares was on AT&T USA and if AT&T USA 53 wp730-09+++ discharges that liability by a device of advancing loan to AT&T Mauritius and paying through AT&T Mauritius, then it is open to the assessing officer to discard the device and take into consideration the real transaction between the parties.

48. Strong reliance was placed by the Counsel for Indian Rayon on the decision of the Apex Court in the case of Carew & Company Limited (supra) and Mrs.Bacha F. Guzdar (supra), wherein it is held that the assets belonging to a wholly owned subsidiary cannot be regarded as belonging to the parent company and the person whose name is entered in the Register of Members is to be regarded as the holder of the said shares. In our opinion, those decisions are distinguishable on facts. In the case of Mrs.Bacha F. Guzdar (supra), the assessee was a shareholder in certain tea companies.

60% income of those tea Companies were exempt from tax as agricultural income. The assessee claimed that 60% of the dividend income received by her on account of holding shares in those tea companies would also be exempt from tax as agricultural income. Rejecting the contention of the assessee, the Apex Court held that a shareholder who buys shares of a Company does not buy any interest in the property of that Company. It was held that declaration of dividend by the company is not the source of the dividend income and, therefore, the dividend income could not be treated as agricultural income in the hands of the shareholder. In the present case, there is no dispute that the capital gains accrued on transfer of the shares, 54 wp730-09+++ but the dispute is whether the capital gains has accrued to AT&T USA which as a joint venture partner had subscribed and owned the shares of the JVC, or whether capital gains has accrued to AT&T Mauritius which had paid for the equity shares of the JVC for and on behalf of AT&T USA (by taking loan from AT&T USA) and held the shares of the JVC as a permitted transferee of AT&T USA. Thus, the issue in the present case being totally different, the decision of the Apex Court in the case of Mrs.Bacha F. Guzdar (supra) would have no relevance to the present case. Similarly the decision of the Apex Court in the case of Carew & Company Limited (supra) is distinguishable on facts. In that case, it was held that purchasing 100% shares of a company may inure control and the right of management of the company but it does not follow that while the company is a going concern, the shareholders are the owners of its assets. Thus, in the case before the Apex Court, the dispute was whether the shareholders of a running company own the assets of the Company. In the present case, AT&T USA has entered into a joint venture in India, AT&T USA has agreed to invest in India by subscribing and owning the shares of the JVC and AT&T USA has obtained shares in the name of AT&T Mauritius as its permitted transferee with all rights in the said shares vested in AT&T USA. In the present case, income in the hands of NCWS is being assessed not as a shareholder of AT&T Mauritius but, because, on sale of shares income has accrued to NCWS on account of investments made in India by the predecessor of NCWS. In these circumstances, in our opinion, the decision of the Apex Court in the case of Carew & Co. (supra) is wholly 55 wp730-09+++ distinguishable on facts and has no application in the present case.

49. Reliance was also placed by the Counsel for Indian Rayon on the decision of the Apex Court in the case of Howrah Trading Company Limited (supra). In that case, the assessee had purchased shares in a company under a blank transfer, but his name was not registered in the books of the company. The question was whether the assessee was entitled to the dividend income on the said shares purchased by the assessee therein. In that context, it was held by the Apex Court that the person in whose name the shares are registered in the books of the company would be the shareholder and not the purchaser of the shares who may have equitable right to the dividend on account of purchasing the shares. In the present case, no doubt that the shares are registered in the name of AT&T Mauritius and, hence, it would be holder of the said shares. However, holding of the said shares by AT&T Mauritius itself was as a permitted transferee of AT&T USA, with all rights including the right to sell the said shares vested in AT&T USA. In the case before the Apex Court, the purchase of shares was not complete till the shares were actually transferred in the name of the assessee therein. In the present case, acquisition of shares of the JVC by AT&T USA was complete on allotment of shares in the name of AT&T Mauritius as a permitted transferee of AT&T USA. Therefore, the decision of the Apex Court in the case of Howrah Trading Company Limited (supra) does not support the case of Indian Rayon.

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50. It was contended that having accepted AT&T Mauritius as the legal owner of the shares of JVC it is not open to the Revenue to find out as to whether NCWS is the real owner of the shares as it amounts to lifting the corporate veil which is not permissible in view of the decision of the Apex Court in the case of Azadi Bachao Andolan (supra). In our opinion, the fact that the shares of the JVC stood in the name of AT&T Mauritius did not make AT&T Mauritius the legal owner of the shares because in the present case, allotment of shares of the JVC was to the joint venture partner, receipt of the shares of ICL by AT&T Mauritius was on behalf of the joint venture partner and sale of the said shares was from one joint venture partner to another joint venture partner under the JVA / Shareholders Agreement. In fact, shares were offered for sale by NCWS (successor to AT&T USA) as a joint venture partner and Indian Rayon agreed to purchase the shares of ICL in its capacity as a representative of the joint venture partner under the JVA / Shareholders Agreement. It is not in dispute that 43,82,81,480 equity shares were allotted during the period from 10th April 1996 to 24th February 1998.

Obviously the said allotments were under the JVA, wherein it was expressly stated that the allotment of shares in the name of a permitted transferee (AT&T Mauritius) would be on behalf of the party shareholder (AT&T USA) and that the ownership of the shares shall vest in the party shareholder.

Therefore, in the facts of the present case, the fact that the shares of ICL were allotted in the name of AT&T Mauritius as a permitted transferee and the fact 57 wp730-09+++ that AT&T Mauritius was a party to the sale transaction did not make AT&T Mauritius as the legal owner of the shares of ICL. Thus, in the facts of the present case, the capital gains is sought to be taxed in the hands of NCWS (successor to AT&T USA) not as a shareholder of AT&T Mauritius but on account of the direct investment in India made by AT&T USA as a joint venture partner under the JVA. In these

circumstances, it cannot be said that the Revenue is trying to lift the corporate veil to find out the real owners of the shares but the Revenue is seeking to tax NCWS, because investment in the shares of the JVC made by the predecessor of NCWS viz. AT&T USA by subscribing to the shares of the JVC under the JVA and on sale of the said shares, capital gains have accrued to NCWS.

51. It was contended that if the argument of the Revenue is accepted, then absurd situation would arise, because, under the Benami Transactions (Prohibition) Act, 1988, the US Company would not have any right over the shares that stood in the name of AT&T Mauritius but assessable to capital gains tax under the 1961 Act. There is no merit in the above contention, because under the Benami Transactions Act, 1988, a transaction is considered to be a benami transaction, in which the property is transferred to one person for a consideration paid or provided by another person. In the present case, the shares of the JVC subscribed to and owned by AT&T USA are allotted in the name of AT&T Mauritius as a permitted transferee with all rights attached to those shares vested in AT&T USA. In other words, in the 58 wp730-09+++ present case, there was only a limited transfer of shares of ICL in the name of AT&T Mauritius, because, the allotment itself was subject to the condition that all rights under the said shares including the right to sell the said shares shall vest in the joint venture partner of the JVC, viz. AT&T USA who had subscribed to those shares under the JVA. Thus, in the facts of the present case, shares of ICL were not held by AT&T Mauritius as benami, but were held as a permitted transferee of AT&T USA (joint venture partner of the JVC) as per the terms of the JVA on the specific condition that all rights and obligation thereunder shall vest in the owner of the shares namely AT&T USA and, therefore, the provisions of the Benami Transactions Act would not apply to the facts of the present case.

52. The argument that NCWS and MMMH (the shareholders of AT&T Mauritius) have contributed funds by way of share capital and loan to AT&T Mauritius to acquire the shares of the JVC is of no consequence, because, under the JVA the obligation to pay for the shares of the JVC was on the joint venture partner who had subscribed to those shares and that obligation has been discharged by AT&T USA through AT&T Mauritius. It is not in dispute that the JVA was implemented and AT&T USA carried on business in India as a joint venture partner of the JVC. AT&T USA could carry on business in India only by subscribing and owning the shares of the JVC. Therefore, the fact that AT&T USA paid for the shares of the JVC through AT&T Mauritius by advancing loans to AT&T Mauritius does not 59 wp730-09+++ mean that AT&T USA did not own the shares allotted to it in the name of its permitted transferee viz. AT&T Mauritius.

(B) Whether Indian Rayon cannot be treated as an Agent of NCWS & MMMH under Section 160(1)(i) read with Section 9(1) and 5(2) in the light of Supreme Court decision in the case of Eli Lilly Co. P .

Limited (supra).

53. In the case of a non-resident, Section 5(2)(a) and (b) of the Act provides that all income which is received or is deemed to be received in India or accrues or arises or is deemed to accrue or arise in India to such non-

resident shall be included in the total income of the non-resident. Under Section 160(1)(i) of the Act, a person including a person treated as an agent under Section 163 can be regarded as a representative assessee in respect of the income of a non-resident covered under sub-section (1) of section 9.

Sub-section (1) of section 9 enumerates certain categories of income accruing or arising in India which are deemed to accrue or arise in India. One such category of income set out in Section 9(1)(i) is, the income accruing or arising through the transfer of a capital asset situate in India.

54. The argument of Indian Rayon is that in the present case, the Revenue has admitted that on sale of shares of ICL, income has accrued in India and income is received in India. Once it is accepted that income has accrued or is received in India, then the said income cannot be said to be 60 wp730-09+++ deemed to accrue or arise in India as contemplated under Section 9 of the Act. Reliance is placed on the decision of the Apex Court in the case of Eli Lilly & Co (India) P. Limited (supra) wherein it is held that Section 9 would not apply in respect of income which actually accrues in India. In the present case, since it is admitted by the Revenue that income has accrued and arisen in India, Section 9 would not apply and consequently the question of recovering tax on the basis of deemed income from Indian Rayon as a representative assessee of the non-resident does not arise at all. It is contended that one has to first consider whether the income can be regarded as accruing or arising in India and if so, one is not required to go to the deeming provisions, in which case Section 160 does not come into picture.

55. We see no merit in the above argument advanced on behalf of Indian Rayon. The Apex Court on analysis of Section 5 and Section 9 in the case of Eli Lilly & Co. (Supra) held thus :-

"..... Under Section 5, all residents and non-

residents are chargeable in respect of income which accrues or is deemed to accrue in India or is received in India. Non-residents who are not assessable in respect of income accruing and received abroad are rendered chargeable under section 5(2)(b) in respect of income deemed by section 9 to accrue in India. Section 9 which deems certain categories / heads of income to accrue in India has no application in cases where income actually accrues in India. Likewise, section 9 does not apply in cases where income is received in India. Therefore, if the income is not received in India, a non-resident would not be chargeable to tax upon it unless it accrues or is deemed to accrue in India. Thus, a general charge of income-tax is imposed by sections 4 and 5, and that general charge is given a particular application in respect of non-residents by section 9 which enlarges the ambit of taxation by deeming income to arise in 61 wp730-09+++ India in certain circumstances. Under section 9(1), income is deemed to accrue in India if it accrues directly or indirectly under the five circumstances mentioned therein. To give an example of as to how the 1961 Act is an integrated code we may state that section 9(1) explains the meaning of the words "deemed to accrue or arise in India" in Section 5(2)(b). Section 9(1)(i) performs two functions :

I. It deems the above five categories of income to accrue in India. The deeming provisions of this clause

(a) apply to residents and non-residents alike;

(b) have no application where income actually accrues in India or is received in India.

Both these points have been noted above in dealing with this section generally.

II. It specifies the categories of income in respect of which a vicarious liability is imposed by sections 160 and 161 on an agent to be assessed in respect of a non-resident's income.

In performing this function, the clause

(a) applies to the income of non-residents alone;

(b) specifies the categories of income in respect of which the agent is vicariously liable even if the income actually accrues in India or is received in India."

(emphasis supplied) Thus, the Apex Court in the case of Eli Lilly & Co. (supra) has held that any income which accrues in India or is received in India within the meaning of Section 5 of the Act would be income deemed to accrue or arise in India if such income falls within the categories of income specified under Section 9(1) of the Act. Similarly, this Court in the case of Vodafone International Holdings B.V. V/s. Union of India reported in (2010) 329 ITR 326 (Bom) after construing Section 5 and Section 9 of the Act has held 62 wp730-09+++ that where an asset or source of income is situated in India, all income which accrues or arises directly or indirectly through or from it shall be treated as income which is deemed to accrue or arise in India. In the present case, transfer of ICL shares constitutes transfer of a capital asset situate in India and income from such transfer of capital asset even if accrues or is received in India within the meaning of Section 5 of the Act, such income being specifically enumerated under Section 9 of the Act, would be income deemed to accrue or arise in India.

56. Under Section 163 of the Act, a resident may be regarded as an agent of the non-resident if the resident has acquired by means of a transfer, a capital asset in India from the non-resident. In the present case, Indian Rayon has acquired shares of ICL, a Company incorporated in India, from the non-resident. Income from such sale of shares if accrues or is received in India by the non-resident, then such income would be taxable in the hands of the non-resident under Section 5(2) of the Act or may be taxed in the hands of Indian Rayon under Section 163 read with Section 9(1) of the Act, because, the income accrued to the non-resident falls within the categories of income specified under Section 9(1) of the Act. As held by the Apex Court in the case of Eli Lilly & Co. (supra), Section 9 is a typical example of a combination of a machinery provision which also provides for chargeability.

Therefore, in the present case, the capital gains accruing or arising to the non-resident on transfer of a capital asset situate in India apart from being 63 wp730-09+++ taxed in the hands of non-resident, can be taxed in the hands of the agent of the non-resident under Section 163 read with Section 9 of the Act, because the income in question accrued to the non-resident falls within the

category of deemed income specified in Section 9 of the Act.

57. Once the Apex Court on analysis of Section 5, 9, 160 to 163 of the Act has ruled that the agent is vicariously liable in respect of specific categories of income of a non-resident even if the income actually accrues in India or is received in India, it is not necessary for us to deal with various arguments advanced by the Counsel for Indian Rayon in support of the contention that income has accrued or arisen in India to the non-resident.

58. Thus, the ratio laid down by the Apex Court in the case of Eli Lilly & Co. (supra), in our opinion, supports the contention of the Revenue that the income accruing or arising in India to AT&T USA (now NCWS) on transfer of a capital asset situate in India, (sale of shares of ICL to Indian Rayon) would be income deemed to accrue or arise in India to NCWS and can be assessed in the hands of the US Company or in the hands of Indian Rayon as agent of the non-resident under Section 163 of the Act.

(C) Exemption under Section 10(23G)

59. The argument that the capital gains arising on transfer of ICL shares are exempt under Section 10(23G) of the Act was raised by Indian Rayon in the proceedings initiated under Section 163 of the Act.

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60. However, the Assessing Officer while holding that Indian Rayon is liable to be assessed as a representative assessee, observed that the question of exemption under Section 10(23G) would be considered in the assessment proceedings. Even before us, it is contended on behalf of the Revenue that the exemption issue can be considered only after the question as to whether the investee company had the necessary approval for grant of benefit under Section 10(23G) is investigated in the assessment proceedings.

In these circumstances, we do not consider it proper to dwell upon an issue which is not adjudicated by the assessing officer and leave it for Indian Rayon to agitate the applicability of Section 10(23G) in the assessment proceedings.

D) Impact of Certificate issued under Section 195(2)

61. It is the contention of Indian Rayon that once a Certificate under Section 195(2) of the Act is issued after due application of mind and payments to the non-resident have been made without deducting tax at source on the basis of the Certificate issued, it is not open to the tax authorities to recover the tax allegedly payable by the non-resident from Indian Rayon by initiating proceedings under Section 163 of the Act.

62. In the application dated 29th August, 2005 made to the Assistant Director of Income-tax (International Taxation) seeking NOC under Section 195 of the Act for remitting US$ 150,000,000

to AT&T Mauritius, Indian Rayon had stated as follows :-

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> a) Indian Rayon has agreed to purchase 37,17,80,740 equity shares of ICL from AT&T Mauritius;

b) AT&T Mauritius is a Private Limited company incorporated in Mauritius since 1995 and is a tax resident of Mauritius;

c) As per Article 13 of the DTAA between India and Mauritius and Circular No.682 dated 30th March 1994 and Circular No.789 dated 13th April, 2000, the capital gain derived by a resident of Mauritius by way of alienation of shares shall be taxed only in Mauritius;

d) thus, the capital gains, if any, is not liable to be taxed in India;

e) NOC under Section 195(2) of the Act be granted for remittance of US$ 150,000,000 without withholding tax.

63. On receipt of the above application, the Assistant Director of Income-tax by his letter dated 6th September 2005 called for various documents including 'J.V. Agreement'. In reply, Indian Rayon by its letter dated 8th September 2005 inter alia stated thus :

> "1. We would like to submit as these shares were directly allotted by the Idea Cellular Limited to the AT&T Cellular Pvt. Limited, Mauritius, there is no specific agreement relating to purchase of shares."

5. The latest Joint Venture Agreement between the parties is enclosed herewith. "

> What was forwarded as latest joint venture agreement was the Shareholders Agreement.
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> 64. On the basis of the above particulars furnished by Indian Rayon, issuance of certificate under Section 195(1) without deducting tax at source was approved by D.I.T. and accordingly, a certificate was issued on 15th September 2005 authorizing payment of US$ 150,000,000 to AT&T Mauritius without deduction of tax at source.
>
> 65. Facts revealed subsequent to the issuance of the Certificate under Section 195 of the Act clearly show that the statement made in the application that Indian Rayon intended to purchase 37,17,80,740 shares of ICL from AT&T Mauritius was itself not an entirely correct statement, because, Indian Rayon was purchasing the said shares as a representative of the Birla Group in exercise of the rights of first option which

NCWS (successor to AT&T USA) had called upon the Birla Group to exercise. In fact, Grasim Industries Limited representing the Birla Group by its letter dated 29th July 2005 (see page 690 of the Petition) informed NCWS (successor to AT&T USA) that the Birla Group intends to purchase the shares of ICL subscribed to by AT&T USA (now NCWS). These facts were suppressed by Indian Rayon in the application seeking Certificate under Section 195 of the Act.

66. Indian Rayon, which represents the Birla Group cannot be said to be an innocent purchaser so as to be unaware of the circumstances under which the shares of the JVC (ICL) were issued in the name of AT&T 67 wp730-09+++ Mauritius. The JVC (now known as ICL) was formed under the JVA between AT&T USA and the Birla Group. The JVA specifically records that the Birla Group inter alia consists of Indian Rayon and in fact Indian Rayon is a signatory to the JVA. As per the JVA, 100% shares of the JVC were to be held by the joint venture partners viz. AT&T USA and the Birla Group. The JVA permitted the joint venture partners to seek allotment of shares the name of a permitted transferee. Accordingly, shares of the JVC (ICL) owned by AT&T USA were allotted in the name of AT&T Mauritius from time-to-time. It is not in dispute that in implementation of the JVA (before the execution of the Shareholders Agreement), admittedly 43,82,81,480 equity shares of the JVC were allotted in the name of AT&T Mauritius. These shares were allotted in the name of AT&T Mauritius as a permitted transferee of AT&T USA as provided under the JVA. Indian Rayon being a group concern of the Birla Group, having signed the JVA, cannot be said to be unaware of these facts.

In spite of the above, Indian Rayon represented to ADIT that the shares were directly allotted by ICL to AT&T Mauritius and that there was no specific agreement relating to the allotment of shares of ICL. Whether the representation made by Indian Rayon was a bona fide representation is the question. Having obtained a Certificate under Section 195 of the Act by making representation which is incorrect to the knowledge of Indian Rayon, it is not open to the Indian Rayon to contend that Certificate under Section 195 of the Act has been validly issued.

68 wp730-09+++

67. The Revenue could have taken steps to cancel the Certificate issued under Section 195 of the Act on the ground that the said Certificate was obtained by suppressing material facts and misrepresentation. However, since the period of the Certificate has already expired and the remittances have already been made without deduction of tax, the Revenue has chosen to initiate proceedings under Section 163 of the Act. The question, therefore, to be considered is, whether the Revenue is justified in initiating the proceedings under Section 163 of the 1961 Act in spite of the Certificate issued under Section 195 of the Act ?

68. In the present case, Certificate under Section 195 of the Act was issued by relying on the statements made by Indian Rayon to the effect that the shares it had agreed to purchase belonged to AT&T Mauritius. The specific case put forth by Indian Rayon was that AT&T Mauritius had purchased the shares directly from ICL and that there was no specific agreement relating to the purchase of shares. In the absence of any material to the contrary, the assessing officer was bound to issue Certificate under Section 195 of the Act, because, as per the DTAA between India and Mauritius, income accrued to AT&T Mauritius on sale of the shares of ICL to Indian Rayon could not be brought to tax in India and consequently recovering the tax on the said income accrued to AT&T Mauritius from Indian Rayon as agent of AT&T Mauritius did not arise. Once the statement that income has accrued to AT&T Mauritius was accepted, there was no scope for 69 wp730-09+++ considering the applicability of Section 163 of the Act, because, if the income by way of capital gains accrued to AT&T Mauritius was not taxable in India, there was no question of recovering tax from Indian Rayon as agent of AT&T Mauritius under Section 163 of the Act.

69. According to the learned ASG, the proceedings under Sections 163 and 195 of the Act operate in completely different fields and, therefore, Certificate issued under Section 195 of the Act does not preclude the assessing officer from initiating proceedings under Section 163 of the Act, for the following reasons :-

"(a) Section 195 casts a statutory obligation to deduct tax on the payer. Section 195(2) is a protection against the consequences that may follow out of non deduction, if any. On the other hand, Section 162 grants rights to the representative assessee to recover taxes paid on behalf of the principal.

(b) The statutory obligation u/s.195 gets triggered the moment payer pays any chargeable sum to the non resident. Provisions of Section 162(2) get triggered when there is a dispute between the representative assessee and the principal with regard to the amount of money to be retained.

(c) A certificate u/s.195 (2) grants immunity to the payer from being treated as an assessee in default u/s.201 for non deduction of tax. The order u/s.162(2) settles the amount to be recovered from the representative assessee.

(d) The order u/s.195(2) is tentative in nature and does not have any effect beyond providing immunity u/s.201 and the immunity stops at that stage and does not preclude the assessing officer to either re-examine the chargeability of income in regular assessment proceedings or to recover the taxes from the payer in his representative capacity. On the other hand, the order u/s.

162(2) is final and limits the amount to be recovered from the representative assessee.

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(e) Neither the words used in the statute nor by any reasonable interpretation, it can be inferred that once the certificate u/s. 195(2) is issued, the assessing officer is precluded from proceeding against the payer in his representative capacity.

(f) Liability of an assessee under Section 195 is in his capacity as a payer, whereas, the liability under Section 163 is as a representative assessee of the non-resident with all attendant rights and obligation as per the provisions contained in Section

161. A representative - assessee cannot escape liability on the ground that the assessee as a payer was not required to deduct tax at source as per the Certificate granted under Section 195(2) of the Act.

(g) Moreover, in the present case, when the assessing officer issued a certificate under Section 195(2) he was not having the benefit of following vital documents.

(1) Joint Venture Agreement of 1995.

(2) Offer and acceptance documents.

(3) Share purchase agreement with Tatas.

(4) Share purchase agreement with Birlas.

(5) Declaration made by NCWS before SEC in USA.

(6) Bank details of AT&T Mauritius showing transfer of sale consideration.

In the absence of the above vital documents, the assessing officer could not have come to the conclusion that the income arose to NCWS and that the applicable DTAA was Indo-US DTAA and not Indo-Mauritius DTAA. "

> We find merit in the above arguments advanced on behalf of the Revenue. Accordingly, we hold that in the facts of the present case, initiation of proceedings under Section 163 of the Act cannot be faulted.
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> 71 wp730-09+++

70. Relying on a decision of the Karnataka High Court in the case of Anusuya Alva V/s. DCIT reported in 278 ITR 206 (Karn), it was contended on behalf of Indian Rayon that while discharging the obligation to deduct tax at source, the payer (in the present case Indian Rayon) acts as agent of the Government. It was contended that as per the directions given by the Government of India contained in the Certificate issued under Section 195(2) of the Act, Indian Rayon had made remittances to the non-resident without deduction of tax at source. It was further contended that having induced Indian Rayon to make the remittance without deduction of tax at source, it was not open to the Revenue subsequently to allege that the transaction of sale of shares by AT&T Mauritius to Indian Rayon gave rise to capital gains chargeable to tax in India on which Indian Rayon should pay tax on behalf of the non-resident as a representative-assessee. We see no merit in the above contention because it is Indian Rayon which has primafacie suppressed material facts and induced the assessing officer to issue certificate under Section 195(2) of the Act. As noted earlier, Indian Rayon belonging to the Birla Group was a party to the JVA under which AT&T USA became the joint venture partner of the JVC (now known as ICL) and as per the JVA, shares of the JVC owned by AT&T USA were allotted from 1996 onwards in the name of AT&T Mauritius as a permitted transferee of AT&T USA. This fact was not disclosed to the assessing officer. Not only, Indian Rayon failed to disclose the material facts but wrongly represented to the assessing officer that the shares were directly allotted by ICL to AT&T Mauritius and that there was no 72 wp730-09+++ specific agreement relating to purchase of shares, knowing fully well that the shares were allotted in terms of the JVA to which the Birla Group (including Indian Rayon) was a party. Thus, it is Indian Rayon which has failed to disclose material facts and wrongly represented to the assessing officer that the shares were purchased by AT&T, Mauritius directly from ICL and thereby induced the assessing officer to issue certificate under Section 195(2) to make remittances without deduction of tax at source. If correct facts were disclosed, it would have revealed that the investments in India were made by AT&T USA and not by AT&T Mauritius. Having wrongly represented to the assessing officer, it is not open to Indian Rayon to contend that the assessing officer is precluded from taking corrective steps as is permissible in law.

71. Strong reliance was placed by the Counsel for Indian Rayon on the decision of the Rajasthan High Court in the case of Jaipur Udyog Limited V/s. Commissioner of Income Tax reported in 155 ITR 476. In that case, the Rajasthan High Court has held that once a Certificate under Section 197(3) (omitted with effect from 1st April 1987) of the Act is issued, then no action can be taken on the ground that certain material facts were not placed before the assessing officer and that the Certificate was issued under an error in law. The aforesaid decision of the Rajasthan High Court is distinguishable on facts, because in that case, though the assessee therein while seeking Certificate under Section 197(3) did not mention the profit for the relevant previous year in its letter dated 17th July 1962, the assessee had enclosed a 73 wp730-09+++ statement along with the said letter which indicated the profits earned in the previous year and the same was considered by the Income Tax Officer while

issuing the Certificate. In that context, it was held by the Rajasthan High Court that the failure to mention the profit in the letter would not be a very material difference so as to invalidate the Certificate. In the present case, the basic facts disclosed in the application itself was inaccurate,if not false and the same was compounded by making incorrect statement to the effect that the shares were purchased by AT&T Mauritius directly from ICL. Neither before the assessing officer nor before us, it is contended by Indian Rayon that the JVA was not acted upon or implemented. If the JVA was implemented, then there was no question of issuing the shares of the JVC to AT&T Mauritius, because, as per the JVA 100% shares of the JVC were to be owned by the joint venture partners only. Admittedly, AT&T Mauritius was not the joint venture partner and, therefore, issuing the shares of the JVC directly to AT&T Mauritius did not arise at all. Thus, the decision of the Rajasthan High Court do not support the case of Indian Rayon.

72. In the result, we hold that in the facts of the present case, the Certificate obtained by Indian Rayon by furnishing incorrect facts and by making misleading statements would not preclude the Revenue from initiating proceedings under Section 163 of the 1961 Act, because, the facts discovered subsequent to the Certificate primafacie reveal that it is AT&T USA (now NCWS) which had subscribed to the shares of the JVC and that the said 74 wp730-09+++ shares were owned by AT&T USA and not by AT&T Mauritius. Consequently, on sale of the shares, capital gains accrued to AT&T USA (now NCWS) could be recovered from Indian Rayon as agent of NCWS. Since the proceedings under Section 163 and 195 operate in different fields and in the present case, there is no material on record to suggest that the Certificate under Section 195(2) was issued after considering the applicability of Section 163, in our opinion, initiation of proceedings under Section 163 of the Act cannot be faulted.

(E) Assessment proceedings simultaneously against the resident and the non-resident.

73. The alternative argument advanced on behalf of Indian Rayon is that once the assessing officer has exercised his option under Section 166 of the Act to assess the non-resident NCWS USA directly by issuing notice under Section 148 of the Act, the proceedings initiated to assess Indian Rayon as a representative assessee of the NCWS must come to an end. The submission is that once the assessing officer chooses to assess the non-resident, it means that the assessing officer has given up his right to make an assessment on the representative assessee and, therefore, the assessing officer cannot continue the proceedings against the representative assessee. In support of the above contention, reliance is placed on the decision of the Apex Court in the case of Mrs.Arundhati Balkrishna Shri Ambica Mills Premises V/s. Commissioner of Income Tax reported in 1989 Supp (1) SCC 278 and a decision of the 75 wp730-09+++ Calcutta High Court in the case of Commissioner of Income Tax V/s. Alfred Herbert (India) Private Limited reported in 159 ITR 583 (Cal.).

74. Section 166 of the Act over-rides the provisions contained in Sections 160 to 165 of the Act and confers powers on the assessing officer to assess either the representative assessee or the principal

assessee to whom the income has accrued. Thus, Section 166 provides that initiation of proceedings to assess the income deemed to accrue or arise in India to a non-

resident in the hands of a representative assessee shall not bar direct assessment in the hands of the non-resident. Though the Section contemplates one assessment either in the hands of the non-resident or in the hands of the representative assessee, the Section does not provide any clue to the effect that once the assessment proceedings are initiated against the non-

resident, the proceedings initiated to assess the income of the non-resident in the hands of the representative assessee must be dropped. In other words, there is nothing in Section 166 or any other provision of the Act to suggest that the option to assess either in the hands of the representative assessee or in the hands of the non-resident must be exercised at the threshold itself and not at the end of the assessment proceedings.

75. In our opinion, the observations made by the Apex Court in the case of Mrs.Arundhati Balkrishna (supra) does not support the arguments advanced on behalf of Indian Rayon. The question as to whether the assessment proceedings initiated to assess the income accrued to the non-

76 wp730-09+++ resident in the hands of the representative assessee must come to an end if the assessing officer issues notice under Section 148 of the Act to assess the income directly in the hands of non-resident, was not a question specifically raised in the aforesaid case before the Apex Court. Moreover, the observations made by the Apex Court to the effect that the Income Tax Officer has the option to proceed either against the Trustee or against the beneficiary, would mean that the Income Tax Officer can proceed to pass assessment order against the Trustee or the beneficiary. Therefore, in our opinion it cannot be said that the Apex Court in the case of Mrs.Arundhati Balkrishna (supra) lays down any proposition of law that the assessing officer has to exercise the option at the threshold and not at the end of the assessment proceedings. Though the decision of the Calcutta High Court in the case of Alfred Herbert (supra) supports the contention of Indian Rayon, we find it difficult to subscribe to that view, because, in our opinion there is nothing in the provisions of Section 166 which would indicate that the choice to assess either the representative assessee or the non-resident has to be exercised at the threshold and not at the completion of assessment proceedings.

76. We are aware that continuing the assessment proceeding against the representative assessee as well as the non-resident simultaneously would operate harshly against the representative assessee, because, if the Revenue can assess and collect the tax directly from the non-resident, there is no 77 wp730-09+++ reason as to why the assessment and collection of tax should be made in the hands of the representative assessee and leave the representative assessee to collect the said amount from the non-resident. The very object of assessing the income of the non-resident in the hands of the representative assessee is, on account of the fact that it is quite often difficult to recover the tax from the non-resident. In the present case, remittances to the non-resident were made by Indian Rayon by obtaining Section 195(2) certificate based on incorrect statement. In these circumstances, in our opinion, it would be just and proper to hold that ordinarily the assessing officer must not proceed against the representative assessee once the assessment proceedings are initiated against the

non-resident but in exceptional cases like the present one, where complex issues are involved relating to the computation of capital gains and the assessing officer is unable to make up his mind on account of suppression of material facts, then, it would be open to the assessing officer to continue with the assessment proceedings against the representative assessee and the non-resident simultaneously till he decides to assess either of them.

77. In the present case, AT&T Corp / AT&T Wireless Services Inc (AT&T USA) carried on business in India as a joint venture partner of JVC by subscribing to and owning the shares of JVC. Admittedly in October 2004 Cingular Wireless LLC USA acquired AT&T Wireless Services Inc, USA (AT&T USA) and renamed it as New Cingular Wireless Services Inc, USA (NCWS).

78 wp730-09+++ Thus, from October 2004, NCWS stepped in to the shoes of AT&T USA and all rights and obligations of AT&T USA vested in NCWS. It is neither the case of Indian Rayon nor the case of NCWS that after October 2004 any of the rights and obligations of AT&T USA in the joint venture business continued to vest in AT&T USA. Therefore, it is evident that after October 2004 the joint venture business in the JVC was carried on by NCWS as a successor of AT&T USA and by selling the shares of ICL to Indian Rayon (Birla Group) and TIL (Tata Group), NCWS made exit from the joint venture business in India.

Thus, the sale transaction not merely involved transfer of shares but involved relinquishment of bundle of rights conferred upon AT&T USA (now NCWS) under the JVA and Shareholders Agreement. In these circumstances, the primafacie opinion of the Revenue that from the transaction in question, capital gains has accrued to NCWS cannot be faulted. Consequently, the impugned order passed on 25th March 2009 under Section 163 of the Act and notices issued under Section 148 of the 1961 Act to assess Indian Rayon as agent of NCWS cannot be faulted.

WRIT PETITION NO.345 OF 2010

78. This Writ Petition is filed by Indian Rayon to challenge the order dated 22nd January 2010, whereby it is held that Indian Rayon is liable to be assessed as agent of NCWS as successor of MMMH LLC (which later on merged with NCWS) on account of gains arising to MMMH LLC under the Sale and Purchase Agreement dated 28th September 2005. Indian Rayon has 79 wp730-09+++ also challenged the notice dated 12th February 2010 issued under Section 148 of the Act to assess the capital gains accrued to NCWS as successor of MMMH LLC (which later on merged with NCWS) on account of gains arising to MMMH LLC on transaction under the Sale and Purchase Agreement dated 28th September 2005.

79. As regards the validity of the notice dated 12th February 2010 is concerned, the learned ASG during the course of arguments fairly stated that the impugned notice dated 12th February 2010 is issued beyond the time prescribed under the Act. If the notice issued under Section 148 of the Act is barred by limitation, then assessing the income accrued to NCWS as successor of MMMH, LLC in the hands of India Rayon as an agent of NCWS does not arise. In such a case, challenge to the validity of the order dated 22nd January 2010 becomes academic. Hence, without going into the merits of the order dated 22nd January 2010, we set aside the notice dated 12th February 2010

issued under Section 148 of the Act as time barred.

WRIT PETITION NO.1837 OF 2009

80. This Writ Petition is filed by NCWS to challenge two notices issued under Section 148 of the Act both dated 31 st March 2009, whereby NCWS and the erstwhile MMM Holdings LLC (which has merged with NCWS with effect from 31st December 2006) are called upon to file return of income for assessment year 2006-07 so as to assess the income which according to 80 wp730-09+++ the assessing officer has escaped assessment in the said assessment year.

81. The argument of Mr.Chinoy, learned Senior Advocate appearing on behalf of NCWS can be summed up as follows :

> a) Once proceedings are initiated to assess the income allegedly accrued to the non-resident in the hands of the representative -

assessee, notice under Section 148 cannot be issued so as to assess the very same income in the hands of the non-resident (NCWS)

b) NCWS is a company incorporated in USA and has no presence whatsoever in India. NCWS does not have a representative or liaison office in India nor does it have even a branch or subsidiary in India and, therefore, NCWS cannot be taxed in India.

c) the transaction referred to in the reasons recorded for reopening of the assessment do not amount to transfer of capital asset situated in India and, therefore, not covered under Section 9(1)(i) of the Act.

d) Sale of 50% shares of ICL held by AT&T Mauritius to Indian Rayon may give rise to capital gains in the hands of AT&T Mauritius.

However, as per the DTAA between India and Mauritius, circulars issued by the CBDT and in view of the decision of the Apex court in the case of Azadi Bachao Andolan (supra), capital gains accruing to a Mauritian Company holding Tax Residence Certificate from the 81 wp730-09+++ Republic of Mauritius cannot be taxed in India. Any enquiry by the Income-tax authorities as to who are the shareholders of the Mauritian Company and any enquiry regarding the source of funds which enabled AT&T Mauritius to make investment in India is foreclosed. Even RBI has considered that the shares of ICL belonged to the Mauritian Company and not to AT&T USA (predecessor of NCWS).

e) Admittedly, payments for acquisition of shares of ICL were made by AT&T Mauritius and shares of ICL have been allotted in the name of AT&T Mauritius. Similarly, shares of ICL have been sold by AT&T Mauritius and payments in respect thereof have been received by AT&T Mauritius. In these circumstances, it is futile for the Revenue to contend that the legal ownership of the shares of ICL has vested in NCWS. The fact that predecessor of NCWS had financed loans to AT&T Mauritius to

facilitate them to invest funds in India by acquiring shares of ICL and the fact that AT&T Mauritius immediately on receipt of the sale proceeds received on sale of shares of ICL, repaid the loan with dividend to NCWS, it cannot be inferred that the investments in ICL shares were made by the predecessor of NCWS.

f) NCWS was a party to the Sale and Purchase Agreement not because the ICL shares belonged to NCWS, but because NCWS had given 82 wp730-09+++ certain warranties which had to be discharged before finalizing the deal. Thus, neither the shares of ICL were acquired by NCWS nor NCWS has sold the shares of ICL, nor NCWS has received any amount by way of sale consideration. Accordingly, no income has accrued or arisen in India to NCWS on account of sale of shares of ICL by AT&T Mauritius, which can be assessed in the hands of NCWS.

g) Amounts received by NCWS and MMMH from TIL on account of transfer of shares of AT&T Mauritius cannot be considered as sale of a capital asset situated in India, as the Company (AT&T Mauritius) as well as the shareholders (NCWS & MMMH) of the Company are situate outside India. Even after the purchase of the shares of AT&T Mauritius by TIL, the Company (AT&T Mauritius) continues to exist at Mauritius and TIL became shareholder of AT&T Mauritius situate at Mauritius. Therefore, acquisition of shares of AT&T Mauritius by TIL from NCWS and MMMH cannot constitute transfer of a capital asset situate in India and consequently NCWS and MMMH cannot be held liable to pay tax in India on any gains accruing or arising from the above transaction. In support of the above contention, reliance was placed on two decisions of the Delhi High Court in the case of Carrasco Investments Limited V/s. Special Director, Enforcement Directorate reported in 79 Comp. Cases 631 (Del) & Commissioner 83 wp730-09+++ of Income Tax V/s. Quantas Airways Limited reported in 256 ITR 84 (Del), and a decision of this Court in the case of Commissioner of Income Tax V/s. Framji reported in 54 ITR 588.

82. We have carefully considered the arguments advanced by the Counsel for NCWS.

83. The basic question to be considered in this Writ Petition is, whether initiation of proceedings under Section 148 of the Act is in accordance with law or not. From the reasons recorded for re-opening of the assessment it is evident that the said proceedings have been initiated on the ground that the transactions under two Sale and Purchase Agreements both dated 28th September 2005 entered into by NCWS and AT&T Mauritius with Indian Rayon and TIL respectively are for sale of 74,35,61,480 equity shares of ICL belonging to NCWS for a consideration of US$ 150,000,000 each (total US$ 300,000,000) and the capital gains accruing or arising to NCWS from the above transactions are liable to be taxed in India.

84. The reasons recorded for reopening of the assessment indicate that the predecessor of NCWS, viz., AT&T Corporation representing AT&T Wireless Services Inc., USA (AT&T USA) had entered in to a Joint Venture Agreement (JVA) with Birla Group (which includes Indian Rayon) to form a Joint Venture Company (JVC) known as Birla Communications Limited (presently known as Idea Cellular Limited) on 5th December 1995 under 84 wp730-09+++ which AT&T USA was to subscribe and own 49% equity shares of the JVC.

Under the JVA, the obligation to pay for the equity shares of the JVC was on AT&T USA, and AT&T USA could own the shares of JVC by seeking allotment of shares in the name of a permitted transferee who is a 100% subsidiary of AT&T USA. Under the JVA, all rights including the right to sell the shares of the JVC owned by AT&T USA but allotted in the name of a permitted transferee were to vest in AT&T USA and the permitted transferee was bound by the terms and conditions of the JVA.

85. The reasons recorded for reopening of the assessment as also the argument advanced by the Counsel for the Revenue, to the effect that the shares of ICL sold to Indian Rayon belonged to NCWS (successor to AT&T USA) and the capital gains accrued to NCWS from the above transaction is taxable in India may be summed up as follows :

> (a) AT&T USA carried on the telecommunication business in India as a Joint Venture Partner of the JVC (ICL) by subscribing to and owning the shares of JVC to the extent permitted under the JVA.
>
> (b) The fact that AT&T USA paid the share subscription amount through its 100% subsidiary - AT&T Mauritius and got the shares allotted in the name of AT&T Mauritius as a permitted transferee does not divest the ownership rights in the said shares vested in AT&T USA.

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(c) AT&T Mauritius has not entered into any agreement with the JVC (ICL) to subscribe / purchase shares of the JVC and the shares allotted to AT&T Mauritius were as a permitted transferee of AT&T USA.

(d) Prior to the execution of the Shareholders Agreement dated 15th December 2000, the JVC, as per the JVA had allotted 43,82,81,480 shares in the name of AT&T Mauritius, as a permitted transferee of AT&T USA.

(e) The Shareholders Agreement for all the practical purposes was a reconstitution of the Joint Venture which was originally between AT&T USA and the Birla Group and after the Shareholders Agreement the joint venture was between AT&T USA, Birla Group and the Tata Group. As per the JVA, 100% shares of JVC were to be held by and between AT&T USA and the Birla Group. After the Shareholders Agreement, 100% of the shares of the JVC were to be held by and between AT&T USA, Birla Group and the Tata Group.

(f) In the Shareholders Agreement, it is recorded that AT&T USA represents the AT&T Wireless Group and that the payments for the balance equity shares would be paid by the members of the AT&T Wireless Group (which includes AT&T Mauritius). However, all rights in the equity shares of the JVC to be issued after the 86 wp730-09+++ Shareholders Agreement were to vest in AT&T USA. Thus, the rights in respect of the shares of the JVC allotted to AT&T Mauritius prior to and subsequent to the Shareholders Agreement continued to vest in AT&T USA.

(g) In October 2004, M/s.Cingular Wireless, a Company incorporated in USA, acquired AT&T Wireless Services Inc., USA and renamed it as New Cingular Wireless Services Inc., USA (NCWS). Thus, NCWS stepped into the shoes of AT&T Wireless Services Inc., USA and as a result whereof all rights and obligations in respect of the shares of the JVC issued prior to and subsequent to the Shareholders Agreement stood vested in NCWS.

(h) M/s.India Televentures Limited offered to purchase from NCWS its entire shareholding of 74,35,61,480 equity shares at US$ 300,000,000. As per the JVA as also under the Shareholders Agreement, NCWS could sell the shares of the JVC owned by it, by first offering it to the other two joint venture partners viz., the Birla Group and the Tata Group (rights of first refusal) and if they declined to purchase the shares, then only the shares of the JVC could be sold by NCWS to third parties. Accordingly, NCWS gave option to the Birla Group and the Tata Group to purchase the shares of the JVC owned by NCWS as a joint venture partner.

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(i) The Birla Group as also the Tata Group agreed to purchase from NCWS the entire shares of the JVC owned by AT&T USA (now NCWS).

(j) Indian Rayon representing the Birla Group made an application seeking Certificate under Section 195(2) of the Act. In the application, it was stated that Indian Rayon was purchasing shares of ICL from AT&T Mauritius. It was further represented that AT&T Mauritius directly purchased the shares from the JVC. On the basis of the above representation made, Indian Rayon was permitted to transmit US$ 150 million to AT&T Mauritius without deduction of tax at source.

(k) Indian Rayon representing the Birla Group entered into a Sale and Purchase Agreement on 28th September 2005 with NCWS and AT&T Mauritius for purchase of 37,17,80,740 (50% of the shares of the JVC allotted in the name of AT&T Mauritius as a permitted transferee of AT&T USA for US$ 150,000,000. On 29th September 2005, Indian Rayon remitted US$ 150,000,000 to AT&T Mauritius and on the same day US$ 150,000,475 was remitted by AT&T Mauritius to NCWS. According to the Revenue, out of US$ 150,000,475 the amount of US$ 150,000,000 represented the sale proceeds of the ICL shares received by AT&T Mauritius as a permitted transferee of the AT&T USA (now NCWS).

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(l) As regards the balance 50% shares of ICL held by NCWS i.e. 37,17,80,740 equity shares of ICL, TIL was entitled to purchase the same (in exercise of the rights of first refusal) from NCWS on payment of US$ 150,000,000/-. However, TIL instead of purchasing balance 50% shares of ICL held by NCWS for US$ 150,000,000/- sought to purchase 100% shares of AT&T Mauritius owned by NCWS and MMMH (belonging to the AT&T Group) for US$ 150,000,000/-. NCWS & MMMH held 70% and 30% shares of AT&T Mauritius respectively. Accordingly, a Sale and Purchase Agreement was entered into on 28th September 2005 between TIL on the one hand and NCWS and MMMH on the other hand, wherein it is recorded that TIL would purchase entire shares of AT&T

Mauritius held by NCWS and MMMH for US$ 150,000,000.

The said agreement records that AT&T Mauritius holds 74,35,61,480 shares of ICL and that AT&T Mauritius has agreed to sell 37,17,80,740 shares of ICL to Indian Rayon out of the total 74,35,61,480 shares and that the sale of the shares of AT&T Mauritius to TIL would take place only after the sale transaction between AT&T Mauritius and Indian Rayon is completed.

(m) Thereafter, TIL paid US$ 105 million to NCWS and US$ 45 million to MMMH (total US$ 150 million) towards the purchase price of the entire share capital of AT&T Mauritius held by NCWS and 89 wp730-09+++ MMMH in the ratio of 70% and 30% respectively.

(n) By an order dated 28th March 2008 ADIT (Intl. Taxn.) held that the payment of US$ 150 million by TIL to NCWS and MMMH was in fact for acquisition of the balance 37,17,80,740 equity shares of ICL remaining with NCWS (after selling 37,17,80,740 equity shares of ICL to Indian Rayon) and since payment was made to NCWS and MMMH without deducting tax at source, TIL is liable to be treated as an assessee in default under Section 201(1) / 201 (1A) of the 1961 Act. By two orders both dated 2nd Mary 2009 passed under Section 163 of the Act, it was held that TIL was liable to be assessed as an agent of NCWS and MMMH.

(o) By two notices both dated 31st March 2009 issued under Section 148 of the 1961 Act, NCWS and MMMH LLC were called upon to file return of income, as income accrued to NCWS and MMMH on account of sale and purchase transaction with TIL was a transaction relating to the sale and purchase of shares of ICL which is taxable in India and that income has escaped assessment.

86. From the aforesaid facts on record, in our opinion, the primafacie belief formed by the assessing officer that the Sale and Purchase Agreement dated 28th September 2005 entered into by Indian Rayon with AT&T Mauritius and NCWS as also the Sale and Purchase Agreement dated 90 wp730-09+++ 28th September 2005 entered in to by TIL with NCWS and MMMH were in fact transactions for transfer of the right, title and interest of NCWS in the JVC as a joint venture partner together including the shares of ICL owned by NCWS cannot be said to be without any substance especially when Indian Rayon and TIL in exercise of their rights of first refusal had agreed to purchase equity of ICL from NCWS for US$ 300 million.

87. NCWS being successor to AT&T USA, it could make exit as a joint venture partner of the JVC (now ICL) by not only selling all the shares it held in ICL, but also by relinquishing all right, title and interest vested in it under the JVA / Shareholders Agreement. Accordingly, NCWS as a joint venture partner offered to sell and Indian Rayon / TIL representing the other two joint venture partners accepted the offer to purchase all the shares of ICL in exercise of their right of first refusal under the Shareholders Agreement. As noted earlier, even before the execution of the Shareholders Agreement 43,82,81,480 equity shares of ICL were allotted to AT&T Mauritius as a permitted transferee of AT&T USA with all rights vested in AT&T USA. Thus, shares issued under JVA and thereafter under the Shareholders Agreement could be divested by NCWS by not merely transferring the shares of the JVC but also by relinquishing all rights conferred under the JVA / Shareholders Agreement. By the two Sale and Purchase Agreements, though NCWS has ceased to be the joint venture partner of ICL,

it is the contention of NCWS that the amounts received thereunder do not represent the consideration 91 wp730-09+++ received on relinquishment of right, title and interest including the shares of ICL held by NCWS.

88. It is an admitted fact that the value of 74,35,61,480 equity shares of ICL offered by NCWS to the Birla Group and the Tata Group was US $ 300 million. It is an admitted fact that the Birla Group and the Tata Group had agreed to purchase the said shares of ICL from NCWS for US$ 300 million. It is an admitted fact that on completion of transaction under the two Sale and Purchase Agreements both dated 28th September 2005, NCWS has ceased to be joint venture partner of the JVC and ceased to have any interest in the said shares of the JVC. Indian Rayon as well as TIL have paid US$ 150 million each (total US$ 300 million) under the two Sale and Purchase Agreements both dated 28th September 2005, as a result whereof NCWS has ceased to be the joint venture partner of the JVC. In these circumstances, whether NCWS relinquished its right, title and interest in ICL (as a joint venture partner) under the two Sale and Purchase Agreements both dated 28th September, 2005, without receiving any consideration or whether the consideration of US$ 300 million paid by Indian Rayon and TIL under the said Agreements were the consideration paid to NCWS for relinquishing its right, title and interest in ICL is the question raised by the Revenue, which cannot be said to be without any merit and it cannot be said that initiation of assessment proceedings are without jurisdiction.

Accordingly, the primafacie view formed by the assessing officer to the effect 92 wp730-09+++ that the transaction in question was in fact, a transaction for transfer of a capital asset situate in India (sale of shares of ICL) and the income accrued to NCWS / MMMH from the above transaction are taxable in India cannot be faulted. It would be open to NCWS to prove to the contrary by placing all material facts in the assessment proceedings. Therefore, without going into the merits of the case, we hold that primafacie case is made out for invoking jurisdiction to initiate assessment proceedings against NCWS / MMMH and it is not a fit case for exercising the writ jurisdiction.

WRIT PETITION NO.38 OF 2010.

89. TIL has filed this Petition to challenge the order dated 28th March 2008 passed under Section 201(1) / 201(1A) of the 1961 Act, two orders both dated 2nd March 2009 passed under Section 163 of the 1961 Act and two notices both dated 31st March 2009 issued under Section 148 of the 1961 Act.

90. As regards the challenge to the order dated 28th March 2008 passed under Section 201(1) / 201(1A) is concerned, TIL has already filed an appeal against the said order and the said appeal is pending. Hence, we do not consider it proper to decide the said issue in the present Writ Petition.

91. The challenge to the orders dated 2nd March 2009 passed under Section 163 of the Act is on the ground that TIL had purchased 100% shares of AT&T Mauritius from NCWS and MMMH for US$ 150 million and the 93 wp730-09+++ capital gains arising from the above transaction is not taxable in India. In the ordinary course, income accrued to a non-resident on account of sale of shares of a foreign Company would not taxable in India. However, in the present case, the argument of the

Revenue is that the transaction between TIL and NCWS / MMMH is really a transaction for purchase of 37,17,80,740 equity shares of ICL subscribed and owned by NCWS (successor to AT&T USA) as a joint venture partner of JVC in India and, therefore, income accrued to NCWS and MMMH would be taxable in India.

92. Mr.Dada, learned Senior Advocate appearing on behalf of TIL vehemently contended that the case of TIL cannot be compared with the case of Indian Rayon, because, Indian Rayon has purchased shares of ICL from AT&T Mauritius, whereas TIL has purchased the shares of AT&T Mauritius from NCWS and MMMH. According to Mr.Dada, acquisition of shares of AT&T Mauritius does not mean acquisition of shares of ICL held by AT&T Mauritius. Shares of ICL continued to belong to AT&T Mauritius even after the shares of AT&T Mauritius were acquired by TIL from NCWS and MMMH.

A person who acquires the shares of a Company becomes the shareholder of that Company. Such a shareholder does not proportionately or otherwise own the assets belonging to the Company. Therefore, in the present case, the fact that TIL has acquired the shares of AT&T Mauritius, it does not mean that TIL becomes owner of assets belonging to AT&T Mauritius.

93. It is further contended by the Counsel for TIL that in the present 94 wp730-09+++ case NCWS and MMMH have not transferred any capital asset situate in India and no income accrue or arise or deemed to accrue or arise in India to NCWS and MMMH which can be taxed in India and consequently recovering any tax from TIL as agent of NCWS and MMMH does not arise at all.

94. Referring to various documents annexed to the Writ Petition, as also the compilation of documents furnished, Mr.Dada submitted that in the present case genuineness of the transaction were considered in detail by the Reserve Bank of India and it is only after the genuineness of the transaction was established, TIL was permitted to make remittances to the shareholders of AT&T Mauritius, viz. NCWS and MMMH. It was argued that TIL acquired the shares of AT&T Mauritius with a view to set up its wholly owned subsidiary for exploiting future telecom acquisition opportunities globally. It was further contended that Reserve Bank of India has allotted the identification number to TIL to set up / acquire AT&T Mauritius i.e. the Wholly Owned Subsidiary (WOS) in Mauritius subject to the condition that the WOS would not make any further investment in India without prior permission of Reserve Bank of India and, accordingly, no investments have been made in India. In these circumstances, it was argued that the income-

tax authorities cannot go into the genuineness of the transaction once again and, therefore, the proceedings initiated against TIL be dropped and the amount of Rs.45.40 crores paid by TIL under protest towards the tax liability of NCWS and MMMH be refunded to TIL.

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95. We have carefully considered the above arguments advanced on behalf of TIL. In the present case, TIL in exercise of its right of first refusal contained in the Shareholders Agreement had agreed to purchase 37,17,80,740 equity shares of ICL from NCWS for US$ 150 million.

However, instead of purchasing the said shares of ICL, by a Sale and Purchase Agreement entered into with NCWS and MMMH, TIL agreed to purchase the entire shares of AT&T Mauritius for US$ 150 million. Once we find merit in the contention of the Revenue that primafacie the ICL shares held by AT&T Mauritius belonged to NCWS and the value of the ICL shares remaining with AT&T Mauritius (after selling shares to Indian Rayon) was US$ 150 million, then the question to be considered is, whether TIL paid US$ 150 million for the shares of ICL or for the shares of AT&T Mauritius which had no assets other than ICL shares. These questions would have to be gone into in the assessment proceedings.

96. TIL cannot be said to be unaware of the fact that the shares of ICL held by AT&T Mauritius did not belong to AT&T Mauritius because TIL was party to the Shareholders Agreement, wherein all rights in respect of the shares of JVC to be issued after the Shareholders Agreement was to vest in AT&T USA and not with AT&T Mauritius. In the Share Purchase Agreement, it is recorded that the sale of shares of AT&T Mauritius in favour of TIL would take place only after the sale of shares of ICL in favour of Indian Rayon takes place so that on the date of transfer of shares of AT&T Mauritius, only 50% of 96 wp730-09+++ the ICL shares remain in the name of AT&T Mauritius. Therefore, the primafacie opinion of the Revenue that the transaction between TIL and NCWS / MMMH for sale and purchase of shares of AT&T Mauritius was a colourable transaction and in fact the transaction was for sale and purchase of ICL shares by NCWS to TIL cannot be said to be devoid of any merit.

97. In this view of the matter, we do not see any infirmity on the part of the assessing officer in initiating assessment proceedings against TIL and it would be open to the TIL to establish that the income accrued to NCWS and MMMH was not taxable in India and consequently no amount can be recovered from TIL as agent of NCWS / MMMH.

98. In the result, we find it difficult to accept the arguments advanced by the Counsel for Indian Rayon, NCWS and TIL as, in our opinion, primafacie, the transactions under the two Sale and Purchase Agreements both dated 28th May 2005 were basically transactions to transfer the entire right, title and interest in ICL by one joint venture partner namely NCWS (successor to AT&T USA) to the remaining two joint venture partners namely the Birla Group (represented by Indian Rayon) and the Tata Group (represented by TIL). There is voluminous evidence on record to support the above primafacie view. Therefore, in the facts of the present case, primafacie case is made out by the Revenue for initiating proceedings under Section 148 as also under Section 148 read with Section 163 of the Act. The assessing officer is directed to complete the assessment proceedings as expeditiously as 97 wp730-09+++ possible. All contentions of both the parties are kept open.

99. For all the aforesaid reasons, Writ Petition No.730 of 2009 filed by Aditya Birla Nuvo Limited (formerly known as Indian Rayon & Industries Limited), Writ Petition No.1837 of 2009 filed by NCWS and Writ Petition No. 38 of 2010 filed by Tata Industries Limited are dismissed. Writ Petition No. 345 of 2010 filed by Aditya Birla Nuvo Limited is partly allowed by setting aside the notice dated 12th February 2010 issued under Section 148 of the 1961 Act as time-barred. All the Writ Petitions are accordingly disposed off with no order as to costs.

100. At the request of the Counsel for the petitioners in Writ Petition No.1837 of 2009 and Writ Petition No.38 of 2010 {Writ Petition (L) No.2423 of 2009}, interim reliefs granted in the respective petitions on 1 st December 2009 are continued for a further period of six weeks from today.

(A.A. Sayed, J.) (J.P. Devadhar, J.)