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

**INCOME TAX APPEAL NO. 1866 OF 2017**

Principle Commissioner of Income
Tax – 14 ....Appellant

V/s.
Aditya Birla Telecom Ltd. ...Respondent

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Mr. Suresh Kumar for Appellant.
Mr. J.D. Mistri, Senior Advocate a/w Mr. Madhur Agrawal i/b Mr. Atul K. Jasani for Respondent.

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**CORAM : K.R. SHRIRAM &**
**N. J. JAMADAR, JJ.**
**DATED : 3rd MARCH, 2022**

**P.C. :**

1. Appellant has proposed following substantial questions of law

*QUESTION OF LAW*

*1. Whether on the facts and circumstances of the case and in law, the ITAT was correct in holding that a sum of Rs.5621,28,25,486/- is not liable to capital gains tax as a short term capital gain.*

*2. Whether on the facts and circumstances of the case and in law, the ITAT was correct in holding that a demerger of the appellants telecom undertaking to Idea Cellular Ltd. (ICL) its holding company, no liability arose under the Income Tax Act, 1961.*

*3. Any other question may be added by the AO.*

2. Assessee was a wholly owned subsidiary of Idea Cellular Limited (ICL) with effect from 28th February, 2007. Assessee had obtained a Unified Access Services License in November, 2006 for providing telecom

services in Bihar (including Jharkhand) service area. During the subject F.Y. assessee filed a Scheme of Arrangement under Section 391 to 394 of the Companies Act, 1956 in the Bombay High Court as well as Gujarat High Court for demerging to ICL. Under the said scheme, assessee had transferred all the assets and liabilities under the telecom undertaking to ICL without any consideration. The said scheme of arrangement was approved by the High Court on 2nd December, 2009 and 22nd January, 2010 and the effective date was declared as 1st March, 2010. In terms of scheme, assessee also revalued its investment in Indus, an asset separate from demerged undertaking and business restructuring reserve was created. During the course of assessment proceedings, the Assessing Officer issued notice asking to show cause why the demerger under the said scheme should not be treated as a transfer for the purposes of Section 45 of the Income Tax Act, 1961 (the Act) and be taxed as capital gains.

3. Assessee gave its submissions and in short submitted that under the Scheme of Arrangement, assessee transferred all the assets and liabilities of the telecom undertaking to ICL without any consideration and when there is no consideration there can be no capital gains. Without going into further details the Assessing Officer come to a conclusion that revaluation of assets of assessee in Indus should be the assets and liabilities of the telecom undertaking to ICL and capital gains to paid thereof.

4. This order of CIT(A) was upheld and assessee preferred an appeal before the ITAT. The ITAT set aside the order of the CIT(A) and come to a conclusion that one of the ingredients for computation for capital gains is consideration and since no consideration has been paid or received by assessee no capital gains would be proposed to be of assessee.

5. We cannot find error with the conclusion of the ITAT that since there is no consideration for transfer of a capital asset, the capital gains computation mechanism fails and thus no capital gains tax can be levied on such transfer.

6. In the case of transfer of capital asset, what can be taxed in the hands of the seller under the Act is real or actual gain that accrues/arises from transfer of the assets and hence, in absence of any sale consideration (resultant profit from such transfer) no notional gain can be imputed in the hands of the seller to tax such transfer.

7. Even the Assessing Officer taking the revaluation of assets in Indus as valuation for transfer of undertaking is incorrect. The Assessing Officer has failed to understand that carrying out such revaluation and passing accounting entry by assessee in its books of account does not represent any consideration whatsoever received from ICL or any third person towards transfer taken by ICL.

8. We have to also note that Section 50D of the Act which provides for fair market value deemed to be full value of consideration in certain cases has been inserted by the Finance Act, 2012. For the Assessment Year 2013-14 Section 50D provides for consideration where the consideration received or accruing as a result of the transfer of a capital asset by an assessee is not ascertainable or cannot be determined. Even that cannot be applied because in the subject case it relates to assessment year 2010-11.

9. In our view, the Tribunal has not committed any perversity or applied incorrect principles to the given facts and when the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that question as pressed raises any substantial question of law.

The appeal is devoid of merits and dismissed with no order as to costs.

**(N. J. JAMADAR, J.)** **(K.R. SHRIRAM, J.)**