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

BEFORE SHRI D.T. GARASIA, JUDICIAL MEMBER

ITA Nos.998, 999 & 1000/M/2017
Assessment Years: 2010-11, 2011-12 & 2012-13

M/s. Creation Publicity Pvt. Ltd., First Floor, Parekh Vora Chambers, 66, Nagindas Master Road, Fort, Mumbai-400 001 **PAN: AABCC2192B**	Vs.	ITO 2(1)(2), Mumbai
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Hero Rai, A.R.
Revenue by : Smt. N. Hemalatha, D.R.

Date of Hearing : 07.11.2017
Date of Pronouncement : 30.11.2017

O R D E R

Per D.T. Garasia, Judicial Member:

The above titled appeals have been preferred by the assessee against the common order dated 28.11.2016 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment years 2010-11, 2011-12 & 2012-13. Since the facts and issues involved in all the three appeals are identical in nature, hence the same are taken together for disposal by this common order.

2. The brief facts of the case are that assessee has filed e-return on 01.10.10 declaring income of Rs.12,75,723/-. During the year assessee has treated Rs.12,55,356/- as charge on income being

income diverted at source by overriding title. The assessee company was asked to justify the claim of such diversion of income from source. The assessee company has submitted that the same is in pursuance of clause 10 of Article of Association of the Company. As per the clause 10 of Article of Association of the Company 0.5% of the total annual income to the company (irrespective of the profit or losses of the company) during each assessment year shall always and absolutely belong to be paid over to the Trustees of the Tulsi Foundation Trust which is registered under the Bombay Public Trust Act, 1950. The assessee has also relied upon the followings decisions:

i) Raja Bejoy Singh Budhuria vs. CIT (1 ITR 135)

ii) CIT vs. Sitaldas Tirathdas (41 ITR 367)

iii) CIT vs. Sunil J Kinariwala (259 ITR 10) and others.

The Assessing Officer (hereinafter referred to as the AO) has considered the above decisions and held that this is not a case of diversion by overriding title as the amounts paid to Tulsi Foundation Trust are out of income received by the company and later paid out. No business expediency has been explained for diversion of income to the trust. The decision to make payment to the Trust has no basis or justification. If such practice is allowed then all business receipts shall not get assessed to tax. Accordingly, the amounts paid to Trust are held to be payments without consideration and thus cannot be held to have been laid down wholly and exclusively for the purpose of the business of the assessee company. AO relied upon the decision of Hon'ble Supreme Court in the case of CIT vs. Jalan

Trading Co. P. Ltd. reported in 155 ITR 536. Accordingly, the AO disallowed the claim of deduction of Rs.12,55,356/-.

3. Matter carried to the Ld. CIT(A) and the Ld. CIT(A) has dismissed the same.

4. The Ld. A.R. has orally argued as well as filed the written submissions. The Ld. A.R. has brought our attention to page 2 of the assessment order wherein 0.5% of the total annual income to the company (irrespective of the profit or losses of the company) during each assessment year shall always and absolutely belong to be paid over to the Trustees of the Tulsi Foundation Trust which is registered under the Bombay Public Trust Act, 1950. The Ld. A.R. submitted that it is decided that during the each year assessee company shall always and absolutely belong to be paid over to the Trustees of the Tulsi Foundation Trust which shows that the said amount is diverted by overriding title. Right from the inception, the amount is earmarked for charity. It is not received by the assessee as its income at all. The assessee is merely a conduit, a pass through entity. It is also very important to note that the above obligation is not dependent upon making a profit or loss and is an absolute liability. The AO has also not raised any doubt or issue regarding the genuineness of the above claim or the actual application towards charity by the trust. In support of the above submissions, reliance is placed upon the following 2 decisions, copies of which have been handed over and gone through during the course of hearing:

i. 106 ITR 884(Bom) CIT v Crawford Bayley & Co.
ii. 190 ITR 198(Bom) CIT v Mulla & Mulla

The entire synopsis of these decisions is relied upon. It is also very important to note that one of the grounds for disallowance in (i) above was that the payment was voluntary. That did not deter the Bombay High Court from holding that the said amounts were not includible as the income of the assessee. The AO has made a few points at page 3 of the assessment order. The submissions qua the same point wise are as follows:

> "I. As submitted above, this is a case of diversion by overriding title.
> II. There is no need for business expediency when considering a case of diversion by overriding title. This is not a case of a claim u/s 37(1) of the Act.
> III. The basis is *0.5%* of the receipts and the justification for the same is the fact that the assessee decided to divert the said amounts at source towards charitable purposes.
> Iv. There need not be any consideration and this is not a claim made u/s 37(1) of the Act.
>
> A copy of the decision relied upon by the learned Assessing Officer reported in *155* ITR 536 (SC) CIT v Jalan Trading Co. P Ltd. was handed over in the course of the hearing. A brief reading of the same, shows that the same dealt with the issue whether a certain royalty payment was capital or revenue in nature. The said decision has no bearing whatsoever on the case before Your Honour.
>
> In response to the 2 points made by the learned DR, it is submitted that all ne relevant facts in respect of the decisions relied upon are contained in the said decisions. It is not as if all the facts are not available. In the cases relied upon,the obligation was under partnership deeds, where as in the case of the appellant before Your Honour, being a company, the obligation is under the Articles of Association. Secondly, the learned DR mentioned that all assessees could make such provisions in their Articles and not pay tax. In this regard, it is submitted that all assessees may not like to be bound to contribute to charity. They may like flexibility as regards the amounts to be contributed, timing of contribution, choice of associations to contribute, etc. On the other hand, if an assessee like the appellant binds itself by overriding title, there is no reason why the same should be taxed. On the point made that the Department is losing tax, it is too well settled that an assessee is not bound to pay the maximum amount of tax and he can arrange his affairs in a manner so as to reduce his liability. If at all required, reliance in this regard is placed upon the decision of the Supreme Court in 263 ITR 706, UOI v Azadi Bachao Andolan. This argument made therefore, should not make any difference whatsoever.

In the light of the above, it is submitted that the claim of the assessee deserves acceptance."

5. The Ld. D.R. orally argued as well as filed the written submissions which read as under:

"At the outset it is stated that all the 4 appeals in the assesses case involves the same issue. Therefore it is requested that all the 4 appeals be disposed off together for better appreciation of facts and legal issues involved.

2. The common issue for adjudication in the 4 Appeals is the claim of the assessee that 0.5% of the total annual income to the company during each assessment year is diverted by overriding title to the Trustees of Tulsi Foundation Trust. But the case of the Revenue is that it is a clear case of Application of Income.

3. During the course of assessment proceedings and before CIT (A) the assessee company relied upon

i. Raja Bejoy Singh Budhuria (1 ITR 135)
ii. Sitaldas Tirathdas (41 ITR 367)
iii. Sunil J Kinariwala (259 ITR 10)

4. During the course of hearing before the H' ITAT, the learned counsel for the assessee company had relied upon the decision of Honourable Bombay High Court in the case of Crawford Bayley & Co.

5. The undersigned would like to draw your attention to the facts and differences of the case relied in support of the assessee to the case in hand.

6. In the landmark case of the **Supreme Court in CIT v. Sitaldas Tirathdas [(1961) 41 ITR 367]** / [TS-9-SC-1960] where a three judge bench of S/Shri J.L. Kapur, M. Hidayatullah, and J.C. Shah, JJ beautifully explain in what circumstances there is a diversion of income by overriding title and where the income can be said to have been applied after it is received by a taxpayer.

Sitaldas Tirathdas was an individual of Bombay (as it was then called). He had many sources of income, chief among them being property, stocks and shares, bank deposits, and a share in a partnership firm. His wife, Deviben and his children had separated from him and Deviben had filed a suit in the Bombay High Court for maintenance allowance, separate residence and marriage expenses for his daughters etc. A decree by consent was passed on 11 March 1953 and maintenance allowance of Rs. 1,500 per month was decreed against Sitaldas. In terms of this decree Sitaldas paid Deviben a sum of Rs. 1,350 for the month of March 1953 and a sum of Rs. 18,000 for the Financial Year 1953-54. He accordingly claimed a deduction of the said sum of Rs. 1,350 from his income for the

Assessment Year 1953-54 and Rs. 18,000 for the Assessment Year 1954-55. No charge on Sitaldas' property was created for payment of this sum. Sitaldas in his assessment, claimed a deduction of these sums relying on the decision of Raja Bejoy Singh Dudhuria (supra). The Assessing Officer and the Appellate Assistant Commissioner disallowed this claim. On appeal, the Tribunal observed as follows:

"This is a case, pure and simple, where an assessee is compelled to apply a portion of his income for the maintenance of persons whom he is under a personal and legal obligation to maintain. The IT Act does not permit of any deduction from the total income in such circumstances."

The Bombay High Court, reversed the order of the Tribunal relying on two of its earlier decisions in **Seth Motilal Manekchand v. CIT (1957) 31 ITR 735 (Born)** / [TS-5-HC-1957(BOM)] and Prince Khanderao Gaekwar v. CIT [(19414 € ITR 294] I [TS-1-HC-1948(BOM)] and held that, as observed those two cases, the test was the same, even though there was no specific charge upon property, so long as there was an obligation upon the assessee to pay, which could be enforced in a Court of law, the income to the extent of the decree should be taken to be diverted to the wife and children and never became the income of the assessee.

8. The tax authorities appealed to the Supreme Court. On behalf of the Bench, Justice Hidayatullah went through all the previous decisions on the subject starting with the case of Raja Bejoy Sigh Dudhuria (supra). He observed that in that case, there was a charge on the property of the Raja for the maintenance of his step mother and therefore, there was a diversion of the income to the extent of the decree, by overriding title and the income could never have said to have reached the Raja in order for him to be able to apply it.

9. The two previous Bombay High Court decisions referred to by the High Court were also distinguished on their own facts.

10. When concluding, the learned judge observed as follows:

> "…in our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assesse as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation, cannot be said to be a part of the income of the assesse. Where by the obligation income is diverted before it reaches the assesse, it is deductible; but where the income is required to be applied to discharge an obligation after the income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's

own income, which has been received and is since applied. The first is a case where income never reaches the assesse, who even if he were to collect it does so, not as part of his income, but for and on behalf of the person to whom it is payable..."

11. Also in the case of Crawford Bayley, the clause in the partnership deeds reads as under:

Clause 33 of annexure "A" is as follows:

"33. In the event of death of an active partner or a sleeping partner leaving a widow, the continuing active partners shall during her life (or until the firm is wound up as provided in clause 38) make to such widow a monthly payment equivalent to Rs. 15 for each year of her husband's service as a partner prior to his death, or his becoming a sleeping partner, whichever be the earlier, but subject to a maximum payment of Rs. 300 per month and under deduction of any income-tax payable by the widow in respect of such monthly payment."

12. As seen from the above clause there is a reason for parting with the income. However in the instant case, there is no logical reason why the assessee company had a legal obligation to part with0.5 % of its annual income to its related concern except for a self imposed clause in its Articles of Association.

13. Further, an application of income is an obligation to apply income, which has accrued or has arisen or has been received amounts to merely for the apportionment of income. Therefore the essentials of the concept of application of income under the provisions of the Income Tax Act are:

(i) Income accrues to the assessee

(ii) Income reaches the assessee

(iii) Income is applied to discharge an obligation, whether self- imposed or gratuitous.

13. Now coming to the facts of the present case, the assessee has created a self imposed obligation vide its Articles of Association to pay 0.5 % of the total annual income to the company during each Assessment Year.

14. The salient points for consideration of this transaction is discussed below:

i. The Tulsi Foundation Trust is related concern of the Directors of the Assessee Company Nalini Tulsidas Vora, Paresh Tulsidas Vora, Sukesh Tulsidas Vora, Kalpesh Tulsidas Vora, Ashok Tulsidas Vora

ii. The Tulsi Foundation Trust is a charitable trust enjoying Income Tax Exemption.

iii. The clause says 0.5 % of the Total Annual Income, that is after the Total Income is arrived from the Profit and Loss Account, has to be paid to the Trust.

iv. For every assessment year the amount of payment to the Trust is decided after arriving at the Total Annual Income of the assessee company. A small illustration of the transaction entered is given in the table below:

AY	Total Annual Income Reflected in P/L Account	0.5% of the Annual Total Income of assessee company paid to the Trust	Revenue Lost
Year 1	100 Cr	50 lacs	15 lacs
Year 2	200 Cr	1 Cr	30 lacs

V. From the above illustration it is clear that it is only application of income received in the hands of the assessee company. The amount of payment itself is derived only from the financials of the assessee company. Therefore this is not a case of diversion by overriding title but only application of the income received by the assessee company. In Year 1 assessee company has applied 0.5 % of its Total Annual income being 50 lacs for donation to its related Trust. Likewise in Year 2 the assessee company has applied 1 Crore of its income as donation for its related Trust.

Vi. It is a clear case where Revenue due to the exchequers of the Government is lost. By a mere self imposed clause in its Articles of Association the assessee company along with its related Concern has circumvented the provisions of the Income Tax.

15. Distinguishing factors in the case laws relied on by the Assessee:

i. Income is parted since there is a charge on the income of the assessee for a reason, i.e a right of maintenance of dependents or of coparceners on partition, right under a statutory provision or a charge created by a decree of a Court of law. But in the instant case there is no reason or obligation on parting with the income except the self imposed clause between related parties.

ii. The income received by overriding title, by the concerned parties in the case law cited, were taxable. Whereas in the instant case the income of the related trust is exempt.

16. The self imposed clause in the Articles of Association of Assessee company is nothing but a colourable device used for tax avoidance. It is pertinent to bring on record the observations of the apex court in McDowell and Co. Ltd.'s case [1985] 154 ITR 148. The same will apply in full vigour to the present case which read thus (pages 160 and 161):

"In our view, the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it. A hint of this approach is to be found in the judgment of Desai J. in Wood Polymer Ltd., In re and Bengal Hotels P. Limited, In re [1977] 47 Comp Cas 597 (Guj) where the learned judge refused to accord sanction to the amalgamation of companies as it would lead to avoidance of tax.
It is neither fair nor desirable to expect the Legislature to intervene and take care of every device and scheme to avoid taxation. It is up to the court to take stock to determine the nature of the new and sophisticated legal devices to avoid tax and consider whether the situation created by the devices could be related to the existing legislation with the aid of emerging techniques of interpretation as was done in Ramsay, Burma Oil and Dawson, to expose the devices for what they really are and to refuse to give judicial benediction."

17. Submitted for kind perusal and consideration. Please take the above on record and oblige."

6. The Ld. D.R. submitted that the common issue for adjudication in the 3 appeals is the claim of the assessee that 0.5% of the total annual income to the company during each assessment year is diverted by overriding title to the Trustees of Tulsi Foundation Trust. The case of the Revenue is that it is a clear case of Application of Income. The Ld. D.R. submitted that assessee company has relied upon the decision of Hon'ble Bombay High Court in the case of CIT v Crawford Bayley & Co. 106 ITR 884(Bom). The Ld. D.R. submitted that in the case of Crawford Bayley & Co. there was a partnership deed in which clause No.33 states that even in death of active partner or sleeping partner leaving a widow, the continuing active partners shall during her life (or until the firm is wound up as

provided in clause 38) make to such widow a monthly payment equivalent to Rs. 15 for each year of her husband's service as a partner prior to his death, or his becoming a sleeping partner, whichever is earlier, but subject to a maximum payment of Rs. 300 per month and under deduction of any income-tax payable by the widow in respect of such monthly payment. The Ld. D.R. submitted that as per this clause the assessee was bound to give the monthly payment and i.e. over riding title. In the instant case there was no obligation on the part of assessee to give 0.5% of total income to his related concern for self imposed clause in its Article of Association. The Ld. D.R. further submitted that the Tulsi Foundation Trust is related concern of the Directors of the Assessee Company Nalini Tulsidas Vora, Paresh Tulsidas Vora, Sukesh Tulsidas Vora, Kalpesh Tulsidas Vora, Ashok Tulsidas Vora. The Tulsi Foundation Trust is a charitable trust enjoying Income Tax Exemption. The clause says 0.5 % of the Total Annual Income, that is after the Total Income is arrived from the Profit and Loss Account, has to be paid to the Trust. Therefore, it is a clear case where Revenue due to the exchequers of the Revenue is lost. By a mere self imposed clause in its Articles of Association the assessee company along with its related Concern has circumvented the provisions of the Income Tax. The Ld. D.R. relied upon the decision of Hon’ble Supreme Court in the case of CIT vs. Sitaldas Tirathdas (41 ITR 367) and in the case of Seth Motilal Manekchand v. CIT (1957) 31 ITR 735 (Bom).

7. I have heard the rival contentions of both the parties. Looking into the facts and circumstances of the case, I find that section 4 & 5 of the Income Tax Act, 1961 are the charging sections which read as under:

> "**Section 4-**
>
> (1) Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions (including provisions for the levy of additional income-tax) of, this Act in respect of the total income of the previous year of every person :
>
> **Provided** that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.
>
> (2) In respect of income chargeable under sub-section (1), income-tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act.
>
> **Section 5-**
>
> 5. (1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which—
>
> (a) is received or is deemed to be received in India in such year by or on behalf of such person ; or
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> (b) accrues or arises or is deemed to accrue or arise to him in India during such year ; or
>
> (c) accrues or arises to him outside India during such year :
>
> Provided that, in the case of a person not ordinarily resident in India within the meaning of sub-section (6)* of section 6, the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India."

8. I find that during the assessment proceeding, the common issue in all these three appeals is the claim of assessee that 0.5% of the total income of the company during each year is diverted by

overriding title to the Trustees of the Tulsi Foundation Trust. I find that as per the facts of the case assessee company has created self imposed obligation vide Article of Association to pay 0.5% of total income to the company during each year. The salient features of consideration of transaction are as under:

> i. The Tulsi Foundation Trust is related concern of the Directors of the Assessee Company Nalini Tulsidas Vora, Paresh Tulsidas Vora, Sukesh Tulsidas Vora, Kalpesh Tulsidas Vora, Ashok Tulsidas Vora
>
> ii. The Tulsi Foundation Trust is a charitable trust enjoying Income Tax Exemption.
>
> iii. The clause says 0.5 % of the Total Annual Income, that is after the Total Income is arrived from the Profit and Loss Account, has to be paid to the Trust.
>
> iv. For every assessment year the amount of payment to the Trust is decided after arriving at the Total Annual Income of the assessee company. A small illustration of the transaction entered is given in the table below:

AY	Total Annual Income Reflected in P/L Account	0.5% of the Annual Total Income of assessee company paid to the Trust	Revenue Lost
Year 1	100 Cr	50 lacs	15 lacs
Year 2	200 Cr	1 Cr	30 lacs

> V. From the above illustration it is clear that it is only application of income received in the hands of the assessee company. The amount of payment itself is derived only from the financials of the assessee company. Therefore this is not a case of diversion by overriding title but only application of the income received by the assessee company. In Year 1 assessee company has applied 0.5 % of its Total Annual income being 50 lacs for donation to its related Trust. Likewise in Year 2 the assessee company has applied 1 Crore of its income as donation for its related Trust.
>
> Vi. It is a clear case where Revenue due to the exchequers of the Government is lost. By a mere self imposed clause in its Articles of Association the assessee company along with its related Concern has circumvented the provisions of the Income Tax.

9. Looking to the above facts and circumstances of the case, I find that the assessee has made arrangement of his business and there was

no liability of the assessee on the part of assessee to create such liability. The plain reading of sections 4 & 5 clarifies the determination of total income of any previous year and to charge the income tax on the total income of the previous year. The provisions of article of association do not have overriding effect over the provisions of Income Tax Act passed by the Parliament. The taxable income is computed after allowing the expenses incurred by the assessee on their said income. The amount of Rs.12,55,356/- which was debited to profit & loss account as a charge of income diverted at source by overriding title. This is an income of the assessee and subject to income tax. Since the charge created as per the charter incorporation document of the company is not a charge of income and does not have any overriding effect on the income arising in India. Assessee's submission is that as far as the Tulsi Foundation Trust is engaged in the charitable activities is concerned, the assessee could have earmarked the funds for charitable trust namely, Tulsi Foundation Trust, out of the income after tax i.e. appropriation of income. By putting a clause in the Articles of Association does not entitle the assessee to debit an amount in the name of the trust as this clause cannot override the provisions of the Income Tax Act. Therefore, I am of the view that this case is not a case of diversion by overriding title as amounts paid to Tulsi Foundation Trust are out of income received by the company and later paid out. Assessee did not explain any business expediency for diversion of income to the trust. The assessee did not point out any basis for making payment of business receipt to such trust. I am of opinion that the amount

paid to trust is held to be payment without consideration and thus cannot be held to have been paid wholly and exclusively for the purpose of business of the assessee company. Hence, I dismiss this appeal.

10. I find that the assessee has relied upon the case where distinguishing factors are discussed as under:

> ‘‘10. When concluding, the learned judge observed as follows:
>
> > "…in our opinion, the true test is whether the amount sought to be deducted, in truth, never reached the assesse as his income. Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation, cannot be said to be a part of the income of the assesse. Where by the obligation income is diverted before it reaches the assesse, it is deductible; but where the income is required to be applied to discharge an obligation after the income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is a case where income never reaches the assesse, who even if he were to collect it does so, not as part of his income, but for and on behalf of the person to whom it is payable..."
>
> 11. Also in the case of Crawford Bayley, the clause in the partnership deeds reads as under:
>
> Clause 33 of annexure "A" is as follows:
>
> "33. In the event of death of an active partner or a sleeping partner leaving a widow, the continuing active partners shall during her life (or until the firm is wound up as provided in clause 38) make to such widow a monthly payment equivalent to Rs. 15 for each year of her husband's service as a partner prior to his death, or his becoming a sleeping partner, whichever be the earlier, but subject to a maximum payment of Rs. 300 per month and under deduction of any income-tax payable by the widow in respect of such monthly payment."
>
> 12. As seen from the above clause there is a reason for parting with the income. However in the instant case, there is no logical reason why the assessee company had a legal obligation to part with0.5 % of its annual

income to its related concern except for a self imposed clause in its Articles of Association.

13. Further, an application of income is an obligation to apply income, which has accrued or has arisen or has been received amounts to merely for the apportionment of income. Therefore the essentials of the concept of application of income under the provisions of the Income Tax Act are:

(iv) Income accrues to the assessee

(v) Income reaches the assessee

(vi) Income is applied to discharge an obligation, whether self- imposed or gratuitous."

11. I find that the assessee has relied upon the case where distinguishing factors are discussed as under:

"i. Income is parted since there is a charge on the income of the assessee for a reason, i.e a right of maintenance of dependents or of coparceners on partition, right under a statutory provision or a charge created by a decree of a Court of law. But in the instant case there is no reason or obligation on parting with the income except the self imposed clause between related parties.

ii. The income received by overriding title, by the concerned parties in the case law cited, were taxable. Whereas in the instant case the income of the related trust is exempt.

16. The self imposed clause in the Articles of Association of Assessee company is nothing but a colourable device used for tax avoidance. It is pertinent to bring on record the observations of the apex court in McDowell and Co. Ltd.'s case [1985] 154 ITR 148. The same will apply in full vigour to the present case which read thus (pages 160 and 161):

"In our view, the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it. A hint of this approach is to be found in the judgment of Desai J. in Wood Polymer Ltd., In re and Bengal Hotels P. Limited, In re [1977] 47 Comp Cas 597 (Guj) where the learned judge refused to accord sanction to the amalgamation of companies as it would lead to avoidance of tax.

It is neither fair nor desirable to expect the Legislature to intervene and take care of every device and scheme to avoid taxation. It is up to the court

to take stock to determine the nature of the new and sophisticated legal devices to avoid tax and consider whether the situation created by the devices could be related to the existing legislation with the aid of emerging techniques of interpretation as was done in Ramsay, Burma Oil and Dawson, to expose the devices for what they really are and to refuse to give judicial benediction."

12. In the result, all the three appeals of the assessee are dismissed.

Order pronounced in the open court on 30.11.2017.

Sd/-
(D.T. Garasia)
JUDICIAL MEMBER

Mumbai, Dated: 30.11.2017.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.