

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "G" NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER  
AND  
SHRI Dr. B.R.R. KUMAR, ACCOUNTANT MEMBER**

I.T.A. No.1953/DEL/2014  
Assessment Year: 2009-10

M/s. Simpson Unitech Wireless (P) Ltd., Basement-6, Community Centre, Saket, New Delhi..	vs.	ITO, Ward-8(4), New Delhi.
TAN/PAN: AABCC4864E		
(Appellant)		(Respondent)

ITA No.101/DEL/2014  
Assessment Year: 2009-10

M/s. Cestos Unitech Wireless (P) Ltd., Basement-6, Community Centre, Saket, New Delhi..	vs.	ITO, Ward-8(4), New Delhi.
TAN/PAN: AADCC 4925C		
(Appellant)		(Respondent)

ITA No.2075/DEL/2017  
Assessment Year: 2009-10

DCIT, Circle-1(2), New Delhi.	vs.	Acorus Wireless Unitech P. Ltd., Basement-6, Community Centre, Saket, New Delhi.
TAN/PAN: AAHCA 3335Q		
(Appellant)		(Respondent)

ITA No.2989/DEL/2017  
Assessment Year: 2009-10

Acorus Wireless Unitech P. Ltd., Basement-6, Community Centre, Saket, New Delhi.	vs.	DCIT, Circle-1(1), New Delhi.
TAN/PAN: AAHCA 3335Q		
(Appellant)		(Respondent)

Appellant by:	Shri Salil Agrawal, Adv. Shri Shailesh Gupta		
Respondent by:	Shri S.S. Rana CIT-DR		
Date of hearing:	28	08	2019
Date of pronouncement:	08	11	2019

**ORDER**

**PER AMIT SHUKLA, JM:**

The aforesaid appeals have been filed by the above named appellant-assessee against separate impugned orders; dated 24.02.2014, passed by Commissioner of Income Tax (Appeals)-XI, New Delhi in the case of M/s. Simpson Unitech Wireless Pvt. Ltd.; order dated 01.03.2017 passed by Ld. CIT(A)-XXII in the case of Acorus Wireless Unitech P. Ltd.; cross appeals filed by the assessee as well as by the Revenue in the case of M/s. Cestos Unitech Wireless P. Ltd. passed by CIT(A)-VI, vide order dated 29.11.2013 for the Assessment Year 2009-10. Since issues involved in all the appeals are common arising out of identical set of facts, therefore, same were heard together and are being disposed of by way of this consolidated order.

2. As a lead case, we are taking up the appeal of M/s. **Simpson Unitech Wireless P. Ltd. (ITA No.1953/Del/2014)** and our finding given therein will apply *mutatis mutandis* for all the appeals. In various grounds of appeal, the assessee has challenged the addition of Rs.548,55,00,000/- by holding that assessee has received benefit u/s.28(iv).

3. The facts in brief are that M/s. Simpson Unitech Wireless P. Ltd. was incorporated on 21.10.2008 and hence this was the first year of operation of assessee-company. The assessee had declared loss of Rs.21,456/- in the return of income filed on 06.10.2010. Ld. Assessing Officer noted that the nature of business activity was as under:

*“To promote & establish companies, funds, associations or partnerships for providing telecom networks and to run and maintain telecom services like basic/fixed line services, cellular/wireless/mobile services and as SPV to make investments by way of loans or subscription to equity shares or other securities in telecom companies carrying on and catering to businesses as above, more particularly in Unitech Wireless (North) Private Limited, Unitech Wireless (south) Pvt. Ltd., Unitech Wireless (Kolkata) Pvt. Ltd., Unitech Wireless (Delhi) Pvt. Ltd., Unitech Wireless (East) Pvt. Ltd., Unitech Wireless (Tamil Nadu) Private Ltd., Unitech Wireless (Mumbai) Pvt. Ltd., Unitech Wireless (West) Pvt. Ltd.”*

As a part of Special Purpose Vehicle along with Acorus Wireless Unitech P. Ltd. and M/s. Cestos Unitech Wireless P. Ltd., the assessee company invested a sum of Rs.34,58,62,500/- by way of investment in the shares of eight wholly subsidiary companies of M/s. Unitech Ltd. which were

incorporated as real estate companies on August/September 2007 details of which are as under:

<b>Original name of Company</b>	<b>Date of Incorporation</b>
Adonis Projects Pvt. Ltd.	28.08.2007
Aska Project Ltd.	16.08.2007
Azare Properties Ltd.	01.08.2007
Hudson Properties Ltd.	01.08.2007
Nahan Properties Pvt. Ltd.	16.08.2007
Unitech Builders and Estates Pvt. Ltd.	10.08.2007
Unitech Infrastructure Pvt. Ltd.	10.08.2007
Volga Properties Pvt. Ltd.	01.09.2007

4. The objects of clause of MOA of the above eight companies were altered to incorporate objects relating to telecom business. These eight companies had applied in the auction for 2G Licences to undertake business of telecommunication operations in India and were collectively called as Unitech Wireless Companies (UW Companies). Later on, the names of the above companies were changed with following names:

Name of the Company	Original name of Company
Unitech Wireless (North) P. Ltd.	Adonis Projects P. Ltd.
Unitech Wireless (south) P. Ltd.	Aska Projects Ltd.
Unitech Wireless (Kolkata) P. Ltd.	Azare Properties Ltd.
Unitech Wireless (Delhi) P. Ltd.	Hudson Properties Ltd.
Unitech Wireless (East) P. Ltd.	Nahan Properties Pvt. Ltd.
Unitech Wireless (Tamilnadu) P. Ltd.	Unitech Builders and Estates P. Ltd.

Unitech Wireless (Mumbai) P. Ltd.	Unitech Infrastructure P. Ltd.
Unitech Wireless (West) P. Ltd.	Volga Properties Pvt. Ltd.

5. Thus, in terms of provision to Section 3 of the Companies Act, 1956, these wholly owned subsidiary companies were deemed to be a Public Limited Company of M/s. Unitech Wireless Pvt. Ltd. which was the listed Public Ltd. Company. Somewhere in January/February 2008 all UW Companies applied to the Department of Telecommunication (DOT), Ministry of Communication and Information Technology, Government of India for grant of United Access Services Licenses (UASL). The DOT issued Letter of Intent (LOI) stating certain conditions on January 10, 2008 and post compliance of which UASL Agreement would be assigned. After complying with the conditions of LOI, all UW Companies executed UASL Agreement with DOT on 28 and 29 February, 2008 for different service areas. Thus, these eight companies got allotted spectrum by DOT under UASL of 2G Licenses.

6. Considering the scale of the proposed operation of the telecom business and also the capital intensive nature of the said business, these telecom companies proposed infusion of fresh funds through fresh issue of share capital. In order to meet subsequent capital requirements of telecom operations in accordance with the Government Policy, i.e., a foreign investor could hold up to 74% stake in Telecom Companies operation in India these companies invited foreign

telecom companies. Interest was expressed by the Telenor Group (acting through Telenor Asia Pte Ltd, Singapore and Telenor Mobile Communications AS, Norway) to make the investment in the fresh equity shares. However, Telenor Group insisted that the investment proposed to be made would be made in the equity of one or more companies where the share transfer restrictions are enforceable by law. (This concern was highlighted in view of the provisions of Section 3 of the Companies Act. 1956, under which the telecom companies were deemed to be public limited companies and their shares were freely transferrable). In order to meet the above concern of Telenor Group, the promoters of the appellant company i.e., Unitech Ltd. floated three Special Purpose Vehicle's (SPVs) Companies with the object of acquiring shareholding of above eight Telecom UW Companies from the and consequently cease to be deemed public companies. The details of said three Companies who are assesseees before us are as under:

Sr. No.	Name of the Company	Date of Incorporation	Initial Paid-up share capital (in Rs.)
1	Cestos Unitech Wireless (P) Ltd.	21.10.2008	1,00,000
2	Simpson Unitech Wireless (P) Ltd.	21.10.2008	1,00,000
3	Acorus Unitech Wireless P. Ltd.	24.10.2008	1,00,000

7. Thereafter, a Share Purchase Agreement was entered into whereby 75% shareholding in the eight wireless companies was transferred to SPVs (Telecom Companies) at face value on 25<sup>th</sup> October, 2008. The details of the transaction of acquisition of shares of the telecom companies by the SPV by M/s. Unitech Ltd. were as under:

S. No.	Name of the Telecom Company	Number of Equity Shares of 8 Telecom Companies of Rs.10 each		
		Cestos Unitech	Simpson Unitech	Acorus Unitech
1.	Unitech Wireless (North) Pvt. Ltd.	44,20,000	65,00,000	85,80,000
2.	Unitech Wireless (South) Pvt. Ltd.	42,50,000	62,50,000	82,50,000
3.	Unitech Wireless (Kolkata) Pvt. Ltd.	17,00,000	25,00,000	33,00,000
4.	Unitech Wireless (Delhi) Pvt. Ltd.	17,00,000	25,00,000	33,00,000
5.	Unitech Wireless (East) Pvt. Ltd.	37,40,000	55,00,000	72,60,000
6.	Unitech Wireless (Tamil Nadu) Pvt. Ltd.	17,00,000	25,00,000	33,00,000
7.	Unitech Wireless (Mumbai) Pvt. Ltd.	17,00,000	25,00,000	33,00,000
8.	Unitech Wireless (West) Pvt. Ltd.	42,50,000	62,50,000	82,50,000

8. On 30.01.2009, the said SPVs raised a secured loan in the form of compulsory convertible debentures (CCD) from a subsidiary of Unitech Ltd. and in terms of the CCD

Agreement, it was agreed that the lender would have the option to call upon the SPVs to issue fresh share capital to convert the amount representing the debentures, into equity share capital. On 28<sup>th</sup> October, 2008, the assessee entered into a Subscription Agreement with Telenor Group for acquisition of 60% stake in UW companies. Later on, the subscription agreement was modified by another agreement dated 16<sup>th</sup> March, 2009 whereby the telecom companies made fresh allotment of shares having face value of Rs.10/- to Telenor Group at a premium of Rs.169.73 per share resulting in equity shareholding of Telenor Group at Rs.67.25% in such telecom companies. The details of share allotted by the telecom companies to the Telenor Group for the sake of ready reference are tabulated as under:

<b>Name of the telecom Companies</b>	<b>No. of Shares allotted</b>	<b>Allotment Price</b>	<b>Face Value</b>	<b>Premium</b>	<b>Total price</b>
Unitech Wireless (North) Pvt. Ltd.	1,31,03,306	179.7312	10	169.7312	235,50,72,912
Unitech Wireless (South) Pvt. Ltd.	1,25,99,333	179.7312	10	169.7312	226.44.93.240
Unitech Wireless (Kolkata) Pvt. Ltd.	50,39,733	179.7312	10	169.7312	90.57.97.260
Unitech Wireless (Delhi) Pvt. Ltd.	50,39,733	179.7312	10	169.7312	90.57.97.260
Unitech Wireless (East) Pvt. Ltd.	1,10.87.413	179.7312	10	169.7312	199.27.54.044
Unitech Wireless (Tamil Nadu) Pvt. Ltd.	50,39,733	179.7312	10	169.7312	90,57,97,260
Unitech Wireless (Mumbai) Pvt. Ltd.	50,39,733	179.7312	10	169.7312	90,57,97,260
Unitech Wireless (West) Pvt. Ltd.	1,25,99,333	179.7312	10	169.7312	226,44,93,240

9. Subsequently, Telenor Asia Pte Ltd. subscribed to fresh equity shares of 8 UW companies in four tranches starting from 20.03.2009 to 10.2.2010 at a price of Rs.179.73 per share. It was thus stated that the purpose of said transaction to acquire investments from M/s. Unitech Ltd. was to facilitate investment by Telenor Asia Pte Ltd. in 8 wireless companies without transferring the economic interest in M/s. Unitech Ltd.

10. Ld. Assessing Officer observed that investment made by the assessee in the shares of 8 UW companies and transfer of stake of three of its group companies which was incorporated and floated for the specific purpose of allotting the shares of M/s. Telenor Asia Pvt. Ltd. and the eight telecom companies entering into an agreement with M/s. Telenor Asia P. Ltd., Singapore for raising equity by charging a premium of Rs.159/- per share, happened almost simultaneously. He concluded that assessee company had made a huge gain by acquiring the shareholding in the companies at face value at Rs.10 which otherwise acquired by the Telenor at Rs.169/-. Thus, there was a huge gain of 159 per share which has been taxed u/s. 28(iv). He held that assessee company was incorporated with the objective of permeating and established companies in the telecom sector and to act also as a SPV to make investment in the telecom companies of its own group, therefore, it could be held that purchasing equity shares of telecom companies from M/s. Unitech Ltd. assessee had

started its designated business activity. The transaction involving sale/purchase of share between assessee and M/s. Unitech Ltd. involving shares of a telecom companies is a business transaction because the business of the assessee was to make investment in telecom business. He also observed that both transactions between the telecom companies and M/s. Telenor happen simultaneously and they were marked similarities between the two transactions. He also took note of the following facts from two transactions:

“While assessee got the shares from M/s Unitech Limited, M/s Telenor purchased the shares from the telecom companies directly.

Shares were purchased by the assessee from M/s Unitech Limited at a price of Rs.10/- per share, i.e., Face Value, However, shares were offered by the telecom companies to Telenor, Singapore at a premium of Rs.159/- in addition to the face value of Rs.10/-.

Actual market value of such shares, as apparent from the rate at which equity was raised from Telenor comprising face value of Rs.10/- plus share premium of Rs.159/- per share. Such transaction is the true indicator of the market value of the shares of the Eight Telecom Companies.

Thereafter, Assessing Officer held that assessee made a ‘killing’ by getting a chance to purchase share of telecom company at just a face value even when owing to the fact that telecom company had USAL, made their shares were worth much more and the fact that shares commanded the premium in the market and assessee has sold such shares by M/s. Unitech Ltd. at just face value and

benefit in the shape of difference in the value of two prices including premium paid by the Telenor and the cost paid by the assessee for acquisition of shares, has accrued to the assessee. In that process of assessee company stated business of making investment in telecom company of its own group and thus he held that provision of Section 28(iv) is squarely applicable and accordingly he proceeded to computed the benefit u/s.28(iv) in the following manner:

Name of the company	No. of shares	Amount of Premium per share (in Rs.)	Value of Benefit (in Rs.)
Unitech Wireless (Tamilnadu) (P) Ltd.	25,00,000	159	39,75,00,000
Uni tech Wireless (Koikata) (P) Ltd.	25,00,000	159	39,75,00,000
Unitech Wireless (Mumbai) (P) Ltd.	25,00,000	159	39,75,00,000
Unitech Wireless (Delhi) (P) Ltd.	25,00,000	159	39,75,00,000
Unitech Wireless (South) (P) Ltd.	62,50,000	159	99,37,50,000
Unitech Wireless (North) (P) Ltd.	65,00,000	159	103,35,00,000
Unitech Wireless (West) (P) Ltd.	62,50,000	159	99,37,50,000
Unitech Wireless (East) (P) Ltd.	55,00,000	159	87,45,00,000
Total			548,55,00,000

After referring various decisions he made the addition of Rs. 548,55,00,000/- under Section 28(iv).

11. Ld. CIT (A) too has confirmed the said reasoning and findings of the Assessing Officer. He observed that all the conditions relevant to Section 28(iv) were clearly satisfied. His observation and conclusion in this regard reads as under:

“8.1.14 The appellant has also submitted that the shares acquired by the appellant from M/s Unitech Ltd., inter alia, were encumbered property, as they had been mortgaged by M/s Unitech Ltd with banks to obtain loans from such companies. Moreover, the funds required to purchase the shares were also arranged by issuing debentures to M/s Unitech Holdings Ltd., a subsidiary of M/s Unitech Ltd., that shares were purchased from M/s Unitech Ltd and continued to be held under restrictive conditions with no economic benefit to the appellant company and that the entire economic benefit rests with M/s Unitech Ltd. However, as per Schedule 6(3) i.e 'Notes to Accounts' forming part of the Audited Balance Sheet of the appellant company for the relevant assessment year and particularly the 'Related Party Transactions', the shares have been acquired by the Appellant Company from M/s Unitech Limited for Rs.34,50,00,000/- for which the appellant company issued equivalent - 3,45,00,000 Compulsorily Convertible Debentures (CCDs), at par convertible into fully paid equity shares, having a face value of Rs.10/- amounting to Rs.34,50,00,000/- to M/s Unitech Holding Ltd., a related party, Even all the 10,000 equity shares of the appellant company are held by Mr. Ramesh Chandra & Mr. Sanjay Chandra i.e 5000 each, who happened to be the promoters and majority shareholders in M/s Unitech Ltd. (67.67%). Similarly M/s Unitech Holding Ltd is also a 100% owned subsidiary of M/s Unitech Ltd. Therefore, owing to the fact that M/s Unitech Ltd., a related party with common management, held majority stake in the telecom companies and therefore, being in the privileged position, the assessee company was sold such shares by M/s Unitech Limited at just the face value, the benefit is in the

*shape of difference in value of two prices i.e. the price by the assessee for acquisition of shares and the price including premium by M/s Telenor, Singapore, has accrued to the assessee in the process of assessee company's stated business of making investment in telecom companies of its own group. Therefore, the contention of the appellant that such transaction is not covered 'by the provisions of section 28(iv) of the Act is found to be devoid of any merit, as the proximity between assessee and M/s Unitech Limited has thus resulted in accrual of benefit to the assessee as the assessee got control of equity shares which were worth Rs.169/- in the market for just Rs.10/-. Moreover, it is also necessary to lift the corporate veil in this case, to look for the real beneficiaries of such benefit. The cobweb of such transactions clearly is an indicator of applicability of provisions of section 28(iv) in this case.*

*8.1.15 Therefore, the plea of the appellant is hereby rejected legally and factually tenable and the transaction is hereby found to be covered u/s 28(iv) of the I.T. Act 1961. In fact, the case laws cited by the appellant go contrary to the facts of its case.”*

12. Before us, ld. counsel for the assessee after drawing our attention to the facts and background of the case and sequence of events submitted that under the present facts and the nature of transaction involved, it could not be held that any benefit has been received or accrued to the assessee companies in terms of Section 28(iv). He submitted that shares were purchased by these companies from Unitech Ltd. and continued to be held under restrictive conditions with no

economic benefit to the assessee, because the entire economic benefit still rests with Unitech Ltd. In order to clarify the nature of transaction from the material on record, he highlighted the following facts with the evidence placed on record before us.

Sr. No.	Particulars	Evidence
1.		4(e) The seller and the purchaser shall have agreed to or entered into an arrangement/agreement pursuant to which the seller shall have an option to acquire, either directly and/or through its subsidiaries, the direct or indirect ownership/economic interest in the sale shares at any time in future.
2.	CCD subscription agreement between Unitech Holdings Ltd. and Cestos Unitech Holdings Limited and Cestos Unitech Wireless Pvt. Ltd. dated 30.01.2009 (pages 239 to 274 of the Paper Book-I)	Schedule 1 1.4) At the time of conversion of CCDs. Unitech shall at its sole option have a right to purchase the entire issued and paid up share capital of the company from its existing shareholders at par value.
3.	Annual Report of Unitech Limited for the F.Y. 2008-09 (pages 14 to 24 of the Paper Book-I)	In January 2009, the company transferred 7% of its stake in Unitech Wireless to three associate companies, namely Cestos Unitech Wireless Pvt. Ltd., Simpson Unitech Wireless Pvt. Ltd. and Acorus Unitech Wireless Pvt. Ltd.. to fulfil the

		conditions precedent for investment under the subscription agreement. However the company continues to hold economic interest in Unitech Wireless through compulsory convertible debentures <u>and options in the three associate companies</u>
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Further, in order to show that sale of shares of Appellant Company and subscription of shares of telecom companies by Telenor group are not comparable; he submitted a detailed comparative chart, which is reproduced hereunder:

<i>Basis of Difference</i>	<i>Shares of 8 Unitech Wireless Companies held by Cestos, Simpson and Acorus</i>	<i>Shares of 8 Unitech Wireless Companies held by Telenor</i>
<i>Date of Acquisition</i>	Shares were acquired on 30.1.2009 in accordance with the share purchase agreement signed on 25.10.2008.	Shares were acquired in four tranches on 20.3.2009; 19.5.2009; 7.1.2010 and 10.2.2010 in accordance with the addendum to shares subscription agreement signed on 16.3.2009. Hence, there was a significant time-gap between acquisition of shares by 3 companies and subscription of

<i>Conditions imposed on Shares</i>	Shares acquired by 3 companies were pledged with the lenders at the time of acquisition and till 18.1.2010 for securing the credit facility availed by 8 Unitech Wireless Companies.	Shares issued to Telenor were free shares and not pledged with any lenders.
<i>Management Control</i>	3 companies did not get any management control of 8 Unitech Wireless Companies against the shares acquired by them	Telenor got management control of 8 Unitech Wireless Companies from very first day of investment on 20.3.2009.
<i>Beneficiary</i>	3 companies have no right in the shares of 8 Unitech Wireless Companies acquired by them and 100% economic interests therein is held by Unitech, through compulsory convertible debentures and put-call option on the shareholding of 3 companies.	Telenor itself is holding 100% economic interest in the shares subscribed by it.

<i>Transfer Restriction</i>	Shares held by 3 companies cannot be transferred to any foreign party considering FDI restriction in the telecom sector. In fact, shares held by 3 companies can only be transferred to Unitech and that too, only at par value.	There is no transfer restriction on the shares subscribed by Telenor. In fact, Telenor is free to transfer its shareholding even to a foreign party.
<i>Business Risk</i>	At the time of acquisition of shares by 3 companies, there was a significant business risk of non-fulfilment of roll-out obligations under the telecom licenses due to financial crisis, which could have resulted in imposition of liquidated damages and other penalties, encashment of performance and financial bank guarantees of Rs.882 crores by DoT and even cancellation of telecom licenses issued to 8 Unitech Wireless Companies.	Telenor was having sufficient funds and expertise in telecom sector. Since Telenor was having management control of 8 Unitech Wireless Companies, it was controlling utilization of subscription amount received by 8 Unitech Wireless Companies. There was no risk attached to the shares held by Telenor.

	<p>Further, prior to investment by Telenor, 8 Unitech Wireless Companies were not able to make timely payment of interest and other dues to the lenders and there was a significant risk of transfer of these shares by the lenders in their own name by enforcement of pledge.</p>	<p>Since the shares held by Telenor were not pledged with the lenders, there was no risk on the shareholding of Telenor.</p>
<i>Basis of Difference</i>	<p>Shares of 8 Unitech Wireless Companies held by Cestos, Simpson and Acorus</p>	<p>Shares of 8 Unitech Wireless Companies held by Telenor</p>
<i>Purpose</i>	<p>Shares were acquired by 3 companies to comply with pre-condition prescribed by Telenor for investment in 8 Unitech Wireless Companies (conversion to private limited companies from public limited companies), failing which no investment would have received from Telenor and there was a significant business risk as stated above.</p>	<p>There was no business risk for Telenor when it subscribed the shares of 8 Unitech Wireless Companies.</p>

13. Thus, he pointed out that these are two independent transactions with distinct objectives. First transaction is the sale of 75% shareholding in 8 Wireless Companies by M/s. Unitech Ltd. to three affiliated Companies @ Rs.10 per shares, i.e., the assessee-companies and the second transaction is allotment of fresh shares by wireless companies to the Telenor @ 179.73 per shares. He said that even though the two transactions pertained to transfer of shares of wireless companies but otherwise distinctions are quite apparent which could be classified in the following manner:

Basis/ Nature of Difference	Sale of shares by M/s Unitech Ltd. of 8 Wireless Companies to 3 Affiliate companies	Fresh issue/ allotment Shares by 8 Wireless Companies to Telenor
Pledged shares	Yes	No, fresh allotment by 8 wireless companies to
Management and Control (Controlling stake)	No	Yes (67.25%)

Purpose	Shares were acquired by 3 companies to comply with pre-condition prescribed by Telenor for investment in 8 Unitech Wireless Companies (conversion to private limited companies from public limited companies), failing which no investment would have received from Telenor and there was a significant business risk as stated above.	There was no business risk for Telenor when it subscribed the shares of 8 Unitech Wireless Companies.
Dates	30.10.2009 under agreement dated 25.10.2008	Fresh allotment of shares by 8 wireless companies to telecom companies in 4 tranches i.e. on 20.03.2009, 19.05.2009, 07.01.2010 and 10.02.2010 under an agreement dated 28.10.2008 read with addendum dated 16.03.2009 and shareholders agreement dated
Within the group	Yes	No, being an outsider

14. Thus, he submitted that despite the above factual position, both Assessing Officer and Ld. CIT (A) have erroneously held that actual consideration should be adopted @169 per share and thereby making the addition u/s. 28(iv) on purchase of shares by 3 assessee companies of 8 wireless companies which were held as investment of these affiliate companies and instead of actual consideration paid at face value, wrongly making addition of Rs.159/- per share in the hands all 3 assessee-companies on notional basis. He further submitted that the conclusion drawn by the Assessing Officer and Ld. CIT (A) that the assessee was carried on business of investment in the telecom companies is not correct. He submitted that provision of Section 28(iv) will not be applicable on the facts of the case for the following reasons:-

- The investments were made by the appellant company with an intention to invest in telecom companies as an investor. It does not and cannot mean that, the assessee is carrying on any business even as a business of investing in companies. Any gain on investment or disinvestment may result into income and, it is only when it is found that, such investment are being made on a regular basis, having the traits of business, it could be stated that it is engaged in the business or carries on a business. It is only when it is found and established that, assessee is making investments not as an investor but in the course of business and it holds investments as stock-in-trade, only then it can be stated that, such

an assessee is carrying on any business. There is a conceptual difference between business of holding of investments and, carrying on of business. The profits and, gains, must arise or accrue in the course of business and, not in the business of holding of investments. Mere having acquired the shares as an investment when it purchased shares from a public limited company at face value, it cannot be alleged that, there arose any benefit or perquisite to the appellant company.

- Further, mere fact that appellant company had incurred expenses of Rs. 21,180/- to fulfill its statutory obligations, out of which Rs. 16.484/- was declared as business loss cannot also be regarded any business to suggest that either there was business carried on by the appellant company or that investments were made in the course of business of the appellant company.
- Lastly, he submitted that, since appellant is holding investments and there is no business as such, therefore there cannot be any benefit or perquisite in the course of business.

15. Ld. Counsel also placed reliance upon the judgment of Hon'ble Gujarat High Court in the case of Elscope Pvt. Ltd. vs. CIT, 313 ITR 293 wherein it has been held that the income from capital account transaction will not be hit by Section 28(iv). He further submitted that investment pursuant to

object in MOA does not *ipso facto* lead to inference that there is a business activity otherwise. Also, Section 28(iv) will not apply where the transaction has been made in cash or money. Here in this case, assessee has acquired the shares of payment of money. In support, he strongly referred and relied upon the judgment of Hon'ble Supreme Court in the case of **CIT vs. Mahindra & Mahindra Ltd. reported in 404 ITR 1 (SC)** and following other decisions.

- i) CIT vs. Jindal Equipments Leasing & Consultancy Services Ltd., reported in 325 ITR 87 (Del.), affirmed by the Hon'ble Supreme Court in 404 ITR 1 (SC)
- ii) Mahindra and Mahindra Ltd., reported in 261 ITR 501 (Bom.) affirmed by Hon'ble Supreme Court in 404 ITR 1 (SC)
- iii) 324 ITR 154 (Bom) Prashant S. Joshi vs. ITO
- iv) CIT vs. Asian Hotels Ltd. , 323 ITR 490 (Del)
- vi) Ravinder Singh And Another vs. CIT, 253 ITR 353 (Del)
- v) Unitech Holdings Ltd. vs. DCIT, reported in 290 CTR 201 (HC)"

16. Further, the decision of the Assessing Officer and CIT (A) is contrary to the decision of Hon'ble Apex Court in the case of **Excel Industries, 358 ITR 259** and made following submissions.

- i) *It is submitted that the three Judges Bench of the Hon'ble Supreme Court of India in its recent judgment delivered on 08.10.2013 in the case of CIT vs. Excel Industries Ltd. reported in 358 ITR 295 has held in the context of section 28(iv) of the Act that "advance license benefit and DEPB benefits are not taxable in the year of receipt." It held in para 21 that, "the benefits represents at the best, a hypothetical income which may or may not materialize and its money value is therefore not the income of the assessee." In arriving the aforesaid conclusion, their Lordships relied on the following judgments of the Hon'ble Supreme Court:*
- ii) *46 ITR 144 (SC) CIT vs. Shoorji Vallabhdas and Company*
- iii) *82 ITR 835 (SC) Morvi Industries Ltd. vs. CIT*
- iv) *158 ITR 102 (SC) State Bank of Travancore vs. CIT*
- v) *In the above judgment, it is clearly stated that income tax cannot be levied on hypothetical income. The income tax is a tax on real income and there cannot be a tax if income does not result at all. In the said case the court took the view that, the probability or improbability of realization has to be considered in a realistic manner and it was held that there was no real accrual of income.*
- vi) *It is submitted that in the instant case, all that had happened was that, the assessee had purchased shares @ Rs. 10/- per share of eight Unitech Wireless Companies (or telecom companies), that is, at the same rate at which these shares had been acquired by M/s Unitech Ltd. The aforesaid shares, as purchased by the assessee, was thus not the value of any benefit or amenity arising to it either from its business or from the exercise of his profession and thus no such sum per se alone could be held to be an income which is stated to have escaped assessment.*

vii) *It is submitted that mere purported benefit does not result into accrual of income u/s 28(iv) of the Act. It is submitted that any illusory, hypothetical and non-existing sum cannot be regarded as income. The benefit must be tangible and existing and must result from business. The fresh allotment of shares by telecom companies cannot be a basis to suggest any benefit accrued to the assessee company on purchase of shares from M/s Unitech Ltd. It is also well settled law. as held by the Apex Court in the case of Sir Kikabhai Premchand vs. CIT reported in 24 ITR 506 that, “state has no power to tax any potential future advantage” and as such, addition made of uncertain future benefit that the appellant company may obtain on the sale of shares is highly farfetched, misconceived and, untenable.”*

17. Lastly, he submitted that subsequently fair market value of share have been reduced to ‘nil’ on the cancellation of licenses and stated that it may also be mentioned that the telecom licences which had been issued by the DOT in favour of telecom companies have since been cancelled by the judgment of Hon'ble Supreme Court and final order dated 02.02.2012 as a result of the aforesaid judgment, it has been held that the grant of the said licences was contrary to law and consequently the licences so granted were null and void. Inasmuch as the intrinsic worth of the telecom companies, which was ultimately based on the telecom licence(s), itself were held to be null and void, the net asset value got, in any case, eroded. As per the Ld. AO, since the telecom companies had allotted shares at a higher rate, the shares sold by assessee had a higher value per share as a result of licenses allotted to telecom companies. By the same logic, it is

submitted, when the rate became zero on account of cancellation of licenses, the reduced value of shares on account of cancellation of licenses should be equally weigh with you as no real income had accrued and, nor was received. The shares purchased at fair market value under section 56(2)(viia) of the Act. In addition to the above it will be important to mention here that there is a specific provision in the Act has been introduced i.e. Section 56(2)(viia) to tax transactions after June 1, 2010 which is less than fair market value. It is evidently clear that this provision is not applicable in the present case as the instant transaction happened prior to June 2010 and even otherwise as per this provision the tax can only be levied in the hands of recipient company. Accordingly it is submitted that the Ld. AO has completely erred in replacing the actual consideration received by the company with the notional value which according to the Ld. AO ought to be received. Both the AO and CIT (A) have not rebutted any of the basic and fundamental submissions duly supported by case laws. He thus submitted that no benefit arose to the appellant company by purchasing the shares, what to say of any benefit or perquisite under section 28(iv) of the Act. It is submitted that the appellant company had purchased 3.45 crores shares at Rs. 10 per share from M/s Unitech Ltd. of 8 telecom companies for an aggregate consideration of Rs. 34.50 crores under share purchase agreement dated 25.10.2008 and therefore, both logically and legally, any subsequent allotment by such 8 telecom

companies independently to M/s Telenor Asia Pte Ltd. at Rs. 169 per share under share subscription agreement dated 28.10.2008 cannot be a basis to allege, assume or conclude that there is any benefit or perquisite arising from business carried on by the appellant company. That further, since the additions in the cases of M/s. Cestos Unitech Wireless Pvt. Ltd. (ITA No. 101 /Del/2014) and M/s. Acorus Unitech Wireless Pvt. Ltd. (ITA No. 2075/Del/2017 and 2989/Del/2017) are identical to the captioned appeal, thus, the aforesaid submissions may be made applicable to the appeals mentioned above.

18. Ld. DR on the other hand relied upon various observations and findings given in the order of ld. Assessing Officer and Ld. CIT (A). He pointed out that AO has noted that 8 licensee companies of Unitech Group raised fresh equity by issuing shares to M/s Telenor at a premium of Rs. 159 per share. However, the assessee company acquired same shares at face value of Rs 10 per share. Hence, AO was justified in making addition u/s 28(iv) of IT Act. The objective of Assessee Company as reproduced at page 4 of the assessment order clearly states that it was to act as special purpose vehicle to make investment in Telecom companies of its own group. The AO held the transaction for sale/purchase of shares with M/s Unitech Ltd involving shares of Telecom Companies to be a business transaction as it was business of the assessee to make investments in Telecom Sector and by acquiring shares of Telecom Companies; assessee had proceeded with its

business agenda. The assessee had made a “killing” by getting a chance to purchase shares of telecom companies at just the face value even when owing to the fact that telecom companies already had USAL, made their shares worth much more. Due to this very fact the shares commanded a premium in the market. The AO has held that the assessee had claimed expenses of Rs. 21,180 which shows that business of the assessee had commenced. It would be incorrect to state that since assessee was holding investments, there could not be any Business. The assessee has claimed that income is not taxable on the ground that subsequently fair market value of shares has been reduced to zero. This is a subsequent event which cannot affect taxability of the year under consideration. As held by Ld CIT(A) in para 8.1.14, owing to the fact that M/s Unitech Ltd, a related party with common management, held majority stake in the telecom companies and therefore, being in the privileged position, the assessee company was sold such shares by M/s Unitech Ltd at just the face value, the benefit is in the shape of difference in value of two prices, i.e., price by the assessee for acquisition of shares and the price including premium by M/s Telenor, Singapore has accrued to the assessee in the process of assessee company's stated business of making investment in telecom companies of its own group. Hence, provisions of section 28(iv) are applicable in this case. M/s Acorus Unitech Wireless (P.) Ltd. filed writ petition W.P. (C) No. 1954 of 2013 challenging

reopening u/s 147 of I.T.Act. Hon'ble Delhi High Court held as follows:

*"20. Therefore, primary facts in this case - that lead to the AO's satisfaction - have been spell-out in this case in the reasons recorded by the AO. These facts are, at the very least, capable of supporting the inference that the sale of shares to the petitioner in this case from Unitech ltd. was undervalued, and that such undervaluation (compared to the Telenor transaction) was not disclosed by the assessee. Indeed, this is where the Court's inquiry terminates. The adequacy of the reasons provided by the AO fall outside the Court's review powers, and within the domain of the AO. at this stage of the proceedings where only a preliminary finding under Section 147/148 has been made.*

*21. Acorus advanced arguments as to the incorrectness of the AO's views. Here, various aspects of this transaction have been canvassed before the Court, i.e. the lack of comparability between the Unitech-Telenor transaction and the present case, the difference between the nature of the shares itself in the two cases, the inapplicability of Section 28 of the Act given that the purchase of shares was in the nature of an investment and not a business, the lack of accrual of any benefit to the petitioner etc. The Court, however, cannot enter the merits of the satisfaction recorded by the AO. These issues may indeed be raised, but before the AO in the first instance, and subsequently within the appellate regime provided by the Act itself as opposed to a disguised merits review under Article 226 at such an early stage of the proceedings. At the time of a Section 147/148 notice, the inquiry is at a preliminary stage, and thus, conclusive legal or factual determinations are neither called for nor provided. As the Supreme Court noted in Sri Krishna (P.) Ltd. v. ITO [1996] 221 ITR 535, S~ Taxman 315:*

*"80...It is necessary to reiterate that we are now at the stage of the validity of the notice under Section 14H/147. The enquiry at this stage is only to see whether there are reasonable grounds for the Income Tax Officer to believe and not whether the omission/failure and the escapement of income is established, it is necessary to keep this distinction in mind."*

Thus, Hon'ble High Court was of the opinion that there is a prima facie case against the assessee and upheld reopening u/s 147 of IT Act.

19. Further in his written submissions, Ld DR submitted that the decision of CIT Vs Mahindra And Mahindra Ltd., (404 ITR 1) is not applicable to the above cases in view of the following reasons:

*(i) In this case, relief was allowed to the assessee holding that Waiver of loan for acquiring capital assets cannot be taxed as perquisite under section 28(iv) as receipt in hands of debtor/assessee are in form of cash/money and it also cannot be taxed as a remission of liability under section 41(1) as waiver of loan does not amount to cessation of trading liability. In the case of assessees, there is no issue regarding cessation of liability as in the case of CIT Vs Mahindra And Mahindra Ltd.*

*(ii) In para 17 of the order, Hon'ble Supreme Court held as follows:*

*"17. To sum up, we are not inclined to interfere with the judgment and order passed by the High court in view of the following reasons:*

*(a) Section 28(iv) of the IT Act does not apply on the present case since the receipts of Rs 57, 74,064/- are in the nature of cash or money.*

*(b) Section 41(1) of the IT Act does not apply since waiver of loan does not amount to cessation of trading liability. It is a matter of record that*

*the Respondent has not claimed any deduction under Section 36 (1) (iii) of the IT Act qua the payment of interest in any previous year. "*

20. He further submitted that in the case of assessees, benefit has been received in form other than money. Moreover, it is not a case of cessation of liability. The decision in CIT Vs Elscope (Pvt.) Ltd. (313 ITR 293) is not applicable to the above cases in view of the following reasons:

(i) The above judgment was in context of Additional Income Tax on Undistributed Profit of Certain Companies which is not the issue in appeal. It was held that where on reference in quantum proceedings High Cour had held that there was no distributable income, the assessee could not be held liable for additional tax under section 104. The assessee has wrongly stated that it pertained to section 28(iv).

The decision of CIT Vs Excel Industries Ltd. (358 ITR 295) also is not applicable to the above cases in view of the following reasons:

(i) The above judgement was in context of advance licence and duty entitlement pass book. It was held that until imports are actually made by assessee, benefits under advance license or under duty entitlement pass book represent only hypothetical income which cannot be brought to tax by applying provisions of section 28(iv)

(ii) The judgment decided upon which point of time the above income was to be assessed.

21. Lastly, he submitted that the following decisions may be considered with regard to applicability of Section 28 in the present case;

i. CIT Vs Ramaniyam Homes (P.) Ltd f20161 68 taxmann.com 289 (Madras)/ (2016) 239 Taxman 486 (Madras) / (2016) 384 ITR 530 (Madras)/r20161 287 CTR 200 (Madras), where Hon'ble Madras High Court held that amount representing principal loan waived by bank under one time settlement scheme would constitute income falling under section 28(iv).

ii. CIT Vs R.L. Kasliwal M9941 77 Taxman 58 (Rajasthan)/H9941 207 ITR 208 (Rajasthan)/[19941 120 CTR 56 (Rajasthan) where Hon'ble Rajasthan High Court held as follows:

*Assessee was a partner of a firm A part of premises taken by firm on lease was given to assessee-partner free of rent. Assessee offered Rs. 4,000 to be assessed in his hands on this account. ITO included benefit in hands of assessee at Rs. 9,000. AAC deleted entire addition on ground that there was no provision in Act under which such advantage derived by assessee was assessable. Tribunal upheld AACs view. Hon'ble Rajasthan High Court held that provisions of section 28(iv) were applicable and value attributed to use of premises by assessee free of rent was to be added in income of assessee and hence Tribunal was wrong in upholding deletion made by AAC.*

iii. CIT Vs Nagesh Knitwears (P.) Ltd. f20121 22 taxmann.com 309 (Delhi)/[20121 210 Taxman 145 (Delhi)(MAG.)(2012) 345 ITR 135 (Delhi), where Hon'ble Delhi High Court held that premium received on sale of export quota by exporters of readymade garments is not covered by any of clauses i.e., clause (iiia) to (iiic) of section 28 and therefore, cannot be included while computing deduction under section 80HHC.

iv. CIT Vs T.V. Sundaiam Iyengar & Sons Ltd. T19961 88 Taxman 429 (SC)/f19961 222 ITR 344 (SQ/p19961 136 CTR 444 (SC), where Hon'ble Supreme Court held that amount representing unclaimed credit balances written back to profit and loss account by assessee during assessment year under consideration, could be treated as assessee's income and liable to be taxed.

v. Solid Containers Ltd. Vs DCIT f20091 178 Taxman 192 (Bombay)/r20091 308 ITR 417 (Bombay)/r20091 222 CTR 455 (Bombay), where Hon'ble Bombay High Court upheld addition where assessee had taken a loan from 'P' during previous year for business purposes which was written back in relevant assessment year as a result of consent terms arrived at between 'P' and assessee. Assessee claimed that said loan was a capital receipt and, therefore, did not come under section 41(1). Assessing Officer rejected assessee's contention and held that credit balance written back was income of assessee in view of fact that it was directly arising out of business

activity of assessee and, thus, was liable to tax under section 28.

22. We have heard the rival submissions, perused the relevant findings given in the impugned order as well as material referred to before us. The facts and background of the case have been discussed in detail in the foregoing paragraphs; however, certain vital facts are reiterated in a succinct manner. M/s. Unitech Ltd. through its wholly owned 8 subsidiary companies were allotted spectrum by DOT under Unified Access Services Licenses for 2G License for various regions of the country. In order to meet the capital requirements and in accordance with Government Policy, foreign investor can also invest in telecom companies operating in India up to 74% stake, Telenor group came forward for making the investment. However Telenor insisted that the investment proposed would be made in the equity of one or more company where the share transfer is restricted are enforceable by law. With a view to meet the said concern of the Telenor, the promoters companies floated SPVs consisting 3 Companies namely, i) Cestos Unitech Pvt. Ltd.; ii) Simpson Unitech Wireless Pvt. Ltd.; and iii) Acorus Unitech Wireless Pvt. Ltd., who are the appellant-assessee before us. By way of share purchase agreement dated 25.10.2008, 75% shareholding in the eight UW Telecom companies were transferred to the SPVs (three assessee companies) at a face value of Rs.10/- each. Thereafter, SPVs have raised a secured loan in form of CCD from subsidiary of the assessee company

wherein it was agreed that lender would have the option to call upon the SPVs to issue fresh capital so as to convert the amount representing the debentures, into equity share capital. Telenor Group entered into a share subscription agreement to acquire 60% stake in 8 UW companies whereby the telecom companies made fresh allotment of shares having face value of Rs.10 and a premium on share at Rs.169.73 per share resulting into equity shareholding of Telenor group at 67.25 % in the eight telecom companies. Further Telenor subscribed for fresh equity shares of the wireless companies in four tranches starting from 20.03.2009 to 10.02.2010 at a price of Rs.179.73 per share. The entire transaction to acquire investments in 8 UW Companies from M/s. Unitech Ltd. was to facilitate the investment by Telenor Group in the eight companies without transferring the economic interest in M/s. Unitech Ltd. The allegation of the Assessing Officer was that there is a similarity of transaction between the acquisition of shares by the assessee companies under SPVs of 8 Unitech Wireless Companies; and the shares acquired by Telenor of the same 8 wireless companies. However, despite the fact that there was time gap between the acquisition of share by three companies and subscription of share by the Telenor, but the major difference as culled out from the fact are that, *firstly*, the shares which were acquired by the three assessee companies were pledged with the lenders at the time of acquisition for securing the credit facility availed by M/s. Unitech Wireless Companies; whereas share issued to Telenor

were not pledged and were free from encumbrance. *Secondly*, the Telenor had acquired control and management of all the 8 Unitech Wireless Companies which was not the case in the case of 3 assessee companies as they did not have any right in the shares of any of 8 UW companies and 100% economic interest was held by the Unitech Ltd. through CCD and put call options on the shareholdings of three companies; whereas the Telenor was holding 100% economic interest with the shares subscribed by it. *Thirdly*, the share held by the three assessee companies could have been only transferred to Unitech and could be only at par value as per the agreement, whereas in the case of Telenor Group there was no transfer restriction on the shares subscribed and it was free to transfer even to a foreign party. *Lastly*, as pointed out by the ld. counsel, the business risk of the assessee was very high as compared to the Telenor Group, because the Telenor Group has not pledged any of the shares to the lenders. Thus, these two are independent transaction with distinct objectives. The first is sale of 75% shareholding in 8 wireless companies by M/s. Unitech Ltd. to 3 affiliated companies @ 10 per share; and the second transaction is allotment of fresh share by wireless company to Telenor @ 179.73 per share.

23. However on the facts and background of the case, we have to see whether the amount of premium paid by the Telenor Group for acquiring the shares of 8 UW companies can be held to be in the form of any benefit or perquisite arising from the business of assessee u/s 28(iv). The

Department case is that, the shares which have been acquired by 3 assessee companies of 8 UW companies at Rs.10 which the actual consideration paid should be adopted @ 179 (wrongly taken by Assessing Officer as Rs. 169) per shares, because Telenor Group has paid the said amount per share for acquiring same shares of UW companies. First of all, it is unfathomable that the shares of 8 UW companies which were held as investment by the three SPVs could lead to an inference that three companies had earned income arising from the business to be taxed u/s. 28(iv). It is *sine-qua-non* that income which is to be taxed u/s. 28(iv), firstly, should arise from business or profession; and secondly, the benefit which is received has to be in some form other than any shape of money. Hon'ble Supreme Court in the case of **CIT vs. Mahindra & Mahindra (supra)** has reiterated the principle that Section 28(iv) will not apply where the receipts are in the nature of cash or money. Here, the assessee company was formed not either for carrying on any telecom business or business for investing in companies. It has held the shares of 8 UW companies as an investment in order to facilitate the Telenor Group to acquire majority stakes in the 8 UW Companies. It is not a case here that investment has been made on regular basis having the trait of business, albeit the shares were held as investment. If the assessee has acquired the shares as an investment from a public limited company at a face value, then it cannot be held that there arose any benefit or perquisite to the assessee company in

terms of Section 28(iv). If at all, the Revenue was of the opinion that the value of the shares held by the assessee-company of the 8 telecom companies were less than the market value, then the only provision in which it could have been scrutinized or examined was under a deeming provision of Section 56(2)(vii)(a), which provision has brought in the statute w.e.f. 01.04.2013. Apart from that, assessee has not acquired the share in lieu of some benefit or perquisite *albeit* has made the actual payment in money for acquiring the shares, and therefore, the principle laid down by the Hon'ble Supreme Court in the case of **CIT vs. Mahindra & Mahindra (supra)** will also apply here.

24. During the course of hearing, our attention was drawn towards the judgment of Hon'ble Delhi High Court in the case of **Unitech Holdings Ltd. vs. DCIT, reported in (2016) 240 Taxman 70**, wherein Unitech Holding Ltd. had acquired the share of three joint ventures company at a cost price reflected in the books of holding company which as per the Department was lower than the book value of those shares calculated on the basis of net worth of the said company. The Hon'ble Delhi High Court held that it would be difficult to accept that the sale of shares by Unitech Ltd. at its cost price which is lower than the book value of the shares would result in income. The Hon'ble High Court held that acquisition of investment by the assessee could not lead to inference that the assessee had earned income u/s. 28(iv) of the Act. The relevant observation given in paragraph 25 reads as under:

*25. Applying the aforesaid principles, in the facts of the present case, it is difficult to accept that the sale of shares by Unitech Limited at its cost price which is lower than the book value of the shares would result in income (equivalent to the difference between the book value of the shares and the cost price at which they were sold) in the hands of the Assessee. The shares of the three companies in question are held as investments by the Assessee and duly reflected by the Assessee as such. No objection has been raised by the AO in this regard. In the circumstances, we find it difficult to comprehend as to how the acquisition of investments by the Assessee could lead to an inference that the Assessee had earned income under Section 28(iv) of the Act - value of any benefit or perquisite arising from business or profession chargeable under the head profits and gains of business or profession.*

25. The aforesaid principle of the Hon'ble Jurisdictional High Court squarely applies in this case also, because admittedly, three assessee-companies had acquired the shares of 8 UW companies as investment at a par value. Simply because a foreign company had acquired the shares of the same 8 UW companies by paying a premium that does not mean the premium amount become taxable income in the form of benefit or perquisite to the assessee company. If there is any dispute regarding the valuation which is to be added, the same would be applicable under the deeming provision of Section 56(2)(vii)(a) which provision was not applicable in the present assessment year. Here, the assessee company had

purchased 3.54 crore shares at Rs.10/- per share from M/s. Unitech Ltd. of 8 telecom companies for an aggregate consideration of Rs.34.50 crores under share purchase agreement dated 25.10.2008 and any subsequent allotment by such 8 telecom companies independently to Telenor at Rs.179 per share cannot be the basis to hold that there is any benefit or perquisite arising from business carried on by the assessee company. In a worst case scenario if there is any benefit the same benefit would be of M/s. Unitech Ltd. which held the shares of 8 telecom companies from whom the three companies have purchased the shares. It would be also relevant to mention that Ld. CIT (A) in one of the assessee company which is also impugned before us, i.e., M/s Acorus Unitech Wireless Pvt. Ltd., held at page 22 para 11, that the benefit if at all in these transactions actually accrued to Unitech Ltd. and to favour Sri Ramesh Chandra and Sri Sanjay Chandra the actual beneficiaries and not to the assessee company. This itself goes to support the contention of the Ld. Counsel that no benefit or perquisite arose in the hands of the assessee companies.

26. The judgments relied upon by the ld. DR which has also been referred in the impugned order in no manner will apply on the facts of the present case because most of them pertained to waiver of a loan or unclaimed credit balance returned back to the P&L account taken during the course of business. Thus, these judgments do not help the case of the Revenue at all. Accordingly, the additions made by the

Assessing Officer and sustained by the Ld. CIT (A) u/s. 28(iv) are directed to be deleted.

27. Since similar facts are permeating in the case of all the assessee's as discussed above and also accepted by both the parties, therefore, the findings given above will apply *mutatis mutandis* in the other appeals also.

28. In so far as the Revenue's appeal in ITA No.2075 is concerned, the Revenue has challenged the observation and the findings of the Ld. CIT (A) that the amount should be added on protective basis in the hands of the Assessee Company and substantive basis in the hands of Sanjay Chandra and Shri Ramesh Chandra. Since, we have already deleted the additions on merits; therefore, this ground had become infructuous. Accordingly, same is dismissed.

29. In the result, the appeals of the assessees are allowed and the appeal of the Revenue is dismissed.

**Order pronounced in the open Court on 8<sup>th</sup> November, 2019.**

Sd/-

**[B.R.R. KUMAR]  
[ACCOUNTANT MEMBER]**

DATED: 8<sup>th</sup> November, 2019

Sd/-

**[AMIT SHUKLA]  
JUDICIAL MEMBER**