

**आयकर अपीलिय अधिकरण, 'सी' न्यायपीठ, चेन्नई**  
**IN THE INCOME TAX APPELLATE TRIBUNAL, 'C' BENCH, CHENNAI**  
**श्री महावीर सिंह, उपाध्यक्ष एवं श्री जी. मंजुनाथ, लेखा सदस्य के समक्ष**  
**BEFORE SHRI MAHAVIR SINGH, VICE-PRESIDENT**  
**AND SHRI G.MANJUNATHA, ACCOUNTANT MEMBER**

S.No.	ITA No	Asst.Year	Appellant	Respondent
1.	80/Mds/2008	2003-04	Assistant Commissioner of Income Tax, Company Circle-III(2), Chennai-34	The Investment Trust of India Ltd. 1, Krishnamma Road Nungambakkam, Chennai-34 PAN:AABCR 6577K
2.	498/Chd/2007	2003-04	Deputy Commissioner of Income Tax, Circle-5(1), Chandigarh	M/s. HFCL Infotel Ltd B-71, Phase VII, I.A Mohali. PAN: AAAGE 3979K
3-4	728/Chny/2008 & 1377/Chny/2008	2004-05 & 2005-06	Assistant Commissioner of Income Tax, Company Circle-III(2), Chennai-34	The Investment Trust of India Ltd. 1, Krishnamma Road Nungambakkam, Chennai-34 PAN:AABCR 6577K
5	1809/Chny/2014	2009-10	The Investment Trust of India Ltd. 7, B Block, 1 <sup>st</sup> floor, Alsa Samar 2 <sup>nd</sup> Avenue, Anna Nagar East Chennai-600 102. PAN:AABCR 6577K	Assistant Commissioner of Income Tax, Company Circle-III(2), Chennai-34

अपीलार्थीकीओरसे/ Revenue by	:	Mr. M.Swaminathan, Sr.Standing Counsel & Mrs.V.Pushpa, Standing Counsel
प्रत्यर्थीकीओरसे/ Assessee by	:	Mr.R.Vijayaraghavan, Advocate S/Shri.Sudhir Seghal & Vishal Kalra, Advocates

सुनवाईकीतारीख/Date of hearing	:	<b>04.05.2021</b>
घोषणाकीतारीख /Date of Pronouncement	:	<b>17.05.2021</b>

**आदेश / O R D E R**

**PER G.MANJUNATHA, AM:**

These four appeals filed by the Revenue and one appeal filed by the assessee are directed against separate orders of the learned Commissioner of Income Tax (Appeals)-III, Chennai

dated 29.10.2007, 31.01.2008, 20.03.2008 & 28.03.2014 and learned CIT(A), Chandigarh dated 28.02.2007, and pertain to the Assessment Years 2003-04, 2004-05, 2005-06 and 2009-10. Since, facts are identical and issues are common, for the sake of convenience, these appeals were heard together and are being disposed off, by this consolidated order.

**ITA No.80/Mds/2008 and ITA No 498/Chd/2007-Asst Year 2003-04**

2. The common issue involved in both appeals of the Revenue is computation of capital gain on sale of shares. The Revenue has more or less filed common grounds of appeal in both appeals. Therefore, for sake of brevity, grounds of appeal filed in ITA No. 80/Mds/2008 are reproduced as under:-

*“1. The order of the learned CIT(A) is contrary to law and facts and circumstances of the case.*

*2.1 The learned CIT(A) erred in holding that the income arising out of the sale of shares of Pioneer ITI AMC Ltd cannot be assessed in the hands of the assessee company.*

*2.2. The learned CIT(A) failed to note that the assessee adopted colourable device to avoid payment of tax on the gains arising out of sale of shares of Pioneer ITI AMC Ltd in the guise of amalgamation and slump sale.*

2.3. *The learned CIT(A), missed the woods for the trees and erred in considering the legality and merit of each event in isolation and failed to appreciate the larger picture and the motive behind the transactions. The learned CIT(A) ought to have appreciated that notwithstanding the alleged merger, in fact the ITI(Old) and HFCL Infotel continued to carry on their respective businesses of finance cum leasing and Telecommunication services respectively in their new identities viz., JTI(New) and HFCL and the avowed purpose of amalgamation was never intended to be put to action.*

2.4. *The learned CIT(A) failed to appreciate that the almost all of the sale consideration including balance receivable from escrow account on sale of shares was ploughed back by ITI(Old) to ITI (New) in the guise of Optionally Fully Convertible Debentures (OFCD) and other assets.*

2.5 *The learned CIT(A) failed to appreciate that so called slump sale of NSFC business to Rajam Finance and Investments P Ltd (which became The Investment Trust of India Ltd) was not genuine. Rajam Finance and Investments Ltd became subsidiary of ITI(Old) only a week before the alleged slump sale. The value of properties located in prime areas of Chennai and other cities were transferred at values much lower than market value in the full knowledge of the fact that there would effectively no change of ownership. The transaction was not a slump sale as each of these assets was valued separately.*

2.6. *The learned CIT(Appeals) failed to consider factual details provided by the assessing officer in his remand report which showed that the entire exercise was an afterthought to save tax on capital gains for A.Y. 2003-04 and began only after February 2003 and erred in not considering the evidence adduced by the Assessing Officer. The learned CIT(Appeals) ought to have appreciated that very consideration for the alleged slump sale i.e., debentures were allotted only in February 2003 when the slump sale had allegedly taken place on 1.9.2002.*

2.7. *The learned CIT(A) ought to have upheld the assessment as the Supreme Court has held in the case of Marshall Sons and Company (India) Ltd V. Income Tax Officer 223 ITR 809 that it would be open to the tax authorities to question the amalgamation if the purpose is*

*evasion of tax. The learned CIT(A) ought to have followed the decision of the Supreme Court in the case of Mcdowell Co. Ltd v.CTO 154 ITR 148 and the decision of the Bombay High Court as reported in Economic times dated 14.10.2006 wherein the High Court has held relying on the decision of the Supreme Court in the case of Mihir H Mafatlal Industries Ltd that amalgamation can be rejected on grounds of tax evasion and said that Court can verify whether amalgamation was a genuine corporate exercise or a device to evade taxes due to the Government.*

*3.0 The learned CIT(Appeals) erred in allowing the assessee's claim of premium payable on debentures.*

*3.1 The learned CIT(Appeals) ought to have appreciated that the allotment of debentures was nothing but a device to transfer the profit on sale Pioneer AMC Units earned by ITI(Old) to ITI(New). There was no other business consideration for purchase of debentures by ITI(Old)/(HFCL) in ITI(New) as the avowed purpose of amalgamation was utilization of excess funds of ITI(Old) in the business of HFCL Infotel, the amalgamating company. The allotment of debentures only exposes the true purpose of amalgamation which is avoidance of tax on sale of shares. The debentures were allotted in consideration of the slump sale which itself was not genuine. The allotment of debentures for additional value only goes to show that the stated consideration for slump sale was not the actual one.*

*3.2. The learned CIT(Appeals) ought to have appreciated the genuine intention behind the slump sale and allotment of debenture and therefore erred in allowing the provision for premium as a deduction especially as the same was not claimed in the original return. In any event the premium cannot be said to have accrued for two months on debentures issued on 15th February and for one month on the debentures allotted on the last date of the previous year. The learned CIT(appels), therefore erred in determining the amount of premium which had actually accrued on the debentures.*

*4. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the learned CIT(A) may be set aside and that of the Assessing Officer restored.'*

2. The brief facts of the case are that M/s INVESTMENT TRUST OF INDIA LIMITED(ITI old)having its registered office at Chennai, was an existing company engaged in the business of Finance, Investments, Hire purchase etc. for the past over seventy five years and was listed in Stock Exchange. M/s Investment Trust of India Limited was a cash surplus company having substantial profits and reserves and wanted to diversify into sunshine industries having bright future prospects. M/s HFCL INFOTEL LIMITED,(HFCL Old) having its registered office at Chandigarh was an existing company, which got the License to provide Telecom services in 1997. It was engaged in the business of providing Telecom services in the State of Punjab for the past over five years and was not listed in any Stock Exchange. It was an infrastructure company u/s. 10(23)G of the Income Tax Act, 1961. M/s HFCL Infotel Limited, being a highly

capital-intensive infrastructure company was having huge business losses and unabsorbed depreciation in its initial years of operations. It had successfully implemented the Telecom project in Punjab and it badly needed capital base and access to the Capital Market. Thus, the Shareholders of ITI Ltd and HFCL Infotel Ltd found synergy in their needs and objects and decided for a scheme of amalgamation whereby M/s HFCL Infotel Ltd was amalgamated with M/s ITI Ltd., Accordingly, after obtaining approvals from Board of Directors, Shareholders, Bankers, Creditors, Registrar of Companies, Regional Directors of Companies, Government of India and after giving due Public Notice, the Scheme was approved by the Hon'ble High Courts of Madras and Hon'ble High Court Punjab & Haryana. Thus, as per scheme of amalgamation, M/s HFCL Infotel Ltd was amalgamated with The Investment Trust of India Ltd from 1-9-2002. In this case, M/s HFCL Infotel

Limited is amalgamating company and M/s Investment Trust of India Limited is Amalgamated Company. Further, the Amalgamated Company M/s Investment Trust of India Limited (ITI old) changed its name to M/s HFCL Infotel Limited (Infotel New) with effect from April 2003.

3. M/s Rajam Finance and Investment India Limited is a wholly owned subsidiary of M/s Investment Trust of India Limited (ITI old). As per the scheme of amalgamation, ITI (Old) had to hive off its NBFC business w.e.f. 01.09.2002 to Rajam Finance and Investment India Ltd., who is the appellant right now and since it has changed its name from Rajam Finance and Investment India Ltd. to The Investment Trust of India Ltd., hereinafter it will be referred to as (ITI New). As a result, HFCL Infotel Limited (old) merged into ITI Limited (old) w.e.f 1.9.2002 and ceased to

exist thereafter. At the same time, ITI Limited (old) wants to concentrate on their newly chosen Telecom business, exited from Finance Business (a non-infrastructure business U/s 10(23)(G) and hived off the assets & liabilities of the NBFC business to its 100% subsidiary company namely Rajam Finance & Investment (I) Limited. w.e.f 1.9.2002. This business rearrangement was also part and parcel of the Scheme as approved by the two Hon'ble High Courts. The Scheme was duly implemented and thereafter, ITI Limited (old) continued to carry on Telecom business and Rajam, i.e., ITI Limited (new) continued to carry on Finance business. Since the telecom business was being operated in Punjab, ITI Limited (old) moved its registered office from Chennai to Chandigarh after obtaining all the necessary approvals from the Government. M/s Rajam, i.e., ITI Limited (new) continued to carry on the Finance business from

Chennai since its clients, existing assets etc. were located in and around Chennai.

4. M/s HFCL Infotel Limited (old) had successfully run the Telecom business for more than five years and had made a name for itself and established brand equity. The Govt. of India and the Registrar of Companies also have made it mandatory for companies to keep a name that reflects their nature of business activity. In view of these reasons, ITI Limited (old) decided to continue with the name and thus also the goodwill of Infotel old and renamed itself as HFCL INFOTEL LIMITED (hereinafter referred to as HFCL Infotel Limited New) w.e.f April 2003 after obtaining approvals from all the concerned Government Departments. Rajam Finance and Investments India Limited, which was a rather new company and now running the finance business it got from ITI Limited (old) thus changed its name from

Rajam Finance and Investments India Limited to INVESTMENTTRUST OF INDIA LTD. (ITI Limited new) w.e.f April 2003 after obtaining approvals from all the concerned Government Departments. After the above rearrangements, HFCL Infotel Limited (old) filed its return of income for the period 1.4.2002 to 31.8.2002 at Chandigarh. M/s ITI Limited (old) now renamed as HFCL Infotel Limited (new) filed its return of income from Finance business for the period 1.4.2002 to 31.8.2002 and from Telecom business from 1.9.2002 to 31.3.2003 at Chandigarh. M/s Rajam, now renamed as ITI Limited (new) filed its return of income from its old business from 1.4.2002 to 31.3.2003 and from the business transferred from ITI Limited (old) from 1.9.2002 to 31.3.2003 at Chennai.

5. M/s ITI Limited (old) was holding 37,65,762 Equity Shares of Rs 10 each in M/s. Kothari Pioneer AMC Ltd which it had acquired between 1993-94 to 1999-2000.

The said shares was sold on 23rd July 2002 by a Share purchase Agreement entered into between ITI Limited(old) and Templeton Assets Management(India) Pvt Ltd for a consideration of Rs.104,07,05,229/-. As there were certain contingent liabilities of the AMC Company, an Escrow Agreement was executed on 23rd July 2002 and a sum of Rs 22,08,62,634/- was kept with M/s. Wadia Ghandy & Co who were appointed as Escrow Agents. The Escrow Agents were to get the Accounts audited and settle all liabilities out of this amount of Rs 22,08,62,634/-. The balance amount, if any, was to be paid by the Escrow Agents to ITI Limited (old) as additional Sale consideration on sale of shares of Kothari Pioneer AMC Ltd. Accordingly, ITI Limited (old) received Rs 104,07,05,229/- less expenses of Rs 6,64,50,207/- from Templeton in July 2002. M/s ITI Limited (old) computed capital gain from sale of shares after deducting indexed cost of acquisition of Rs

7,19,89,859/- and declared capital gain of Rs 90,35,34,689/-. Since, profit from sale of shares was earned in July 2002, which was in the previous year relevant to assessment year 2003-2004, ITI Limited (old) included these profits in its return of income for assessment year 2003-04 which was filed in Chandigarh. Further, the Escrow Agents settled all the liabilities and released further sum of Rs 17,11,42,382/ out of the Escrow Amount of Rs 22,0862,634/- in June 2004 and hence, ITI Limited (old) revised its return of income for Asst Year 2003-04 and included therein the additional sale consideration of Rs 17,11,42,382/-. Further, this profit was set off against current year losses and Depreciation of Telecom business it got from HFCL Infotel Limited (old) during the period 1.9.2002 to 31.3.2003.

6. The Assessing Officer, Circle 5 (1), Chandigarh passed assessment order u/s 143 (3) of the Act, dated 31.3.2006, wherein the income arising on the sale of shares of Kothari Pioneer AMC Ltd was assessed in the hands of ITI Limited (old), later renamed as HFCL Infotel Limited (new) on 'protective basis' as against the assessee admission of capital gain on sale of shares on 'substantive basis'. The ITI Limited (old) later renamed as HFCL Infotel Limited (new) filed an appeal before the CIT (Appeals), Chandigarh. The said CIT (Appeals) has held vide his appellate order dated 28.2.2007 that the income of Rs. 90.35 crores arising from sale of shares of Kothari Pioneer AMC Ltd as well as the additional purchase consideration of Rs 17.11 crores received under the Escrow agreement was indeed the income of ITI Limited (old) and hence, assessed the income on 'substantive basis'.

7. M/s Rajam Finance and Investment India Limited now renamed as ITI Limited (new) filed its return of income for the Asst. Year 2003-2004 at Chennai wherein it included income from its old business from 1.4.2002 to 31.3.2003 and from the business transferred from ITI Limited (old) from 1.9.2002 to 31.3.2003. M/s ITI Limited (new) did not include the profit from sale of shares of Pioneer, which were sold by ITI Limited (old) in July 2002 in its return of Income for Asst. Year 2003-2004. The Assessing Officer of Rajam, i.e., ITI Limited (new) held that the Scheme of amalgamation and consequent merger of HFCL Infotel Limited (old) into ITI Limited (old) was a "colorable device" perpetrated with a view to avoid payment of tax on the profit on sale of shares of Kothari Pioneer AMC Limited. He, further, held that ITI Limited (new) was not Rajam and was in fact ITI Limited (old) and further held that profit from sale of shares of Kothari

Pioneer was assessable in the hands of ITI Limited (new). Accordingly, made additions towards capital gain raising out of sale of shares in the hands of ITI Limited (new)

8. M/s ITI Limited (New) being aggrieved by the assessment order preferred an appeal before the Id. CIT(A). The Id. CIT(A), III Chennai vide his appellate order dated 29-10-2007 for detailed reasons held that capital gain from sale of shares of Kothari Poiner AMC Ltd by ITI Limited (Old), i.e. the holding company of the assessee is not taxable in the hands of the assessee. The Id. CIT(A) has discussed the issue in light of amalgamation of HFCL Infotel Limited (old) with ITI Limited (old) and had also discussed various reasons given by the AO to treat amalgamation as sham transaction in light of the decision of Hon'ble Supreme Court in the case of McDowell Co Limited vs CTO

(1985) 154 ITR 148 and held that the Id. AO, instead of concentrating on the aspect as to why and how income of holding company can be taxed in the hands of subsidiary company, tried to establish amalgamation of two companies with the approval of two respective jurisdictional High Courts is a tool to avoid taxes and further it is a colorable devise. The Id. CIT(A) has also discussed the issue in light of the decision of Hon'ble Supreme Court in the case of Azadi Bachao Andolan vs UOI(supra) and held that each and every tax planning within four corner of tax laws, although leads to payment of less taxes, cannot be termed as colorable devise. The Id. CIT(A) has also taken into account the findings of Id. CIT(A), Chandigarh where he had categorically held that amalgamation of HFCL Infotel Limited with ITI Limited is genuine transactions to hold that capital gain from sale of shares is taxable in the hands of holding company, i.e. ITI Limited (Old) and

held that the AO has completely erred in taxing income of holding company in the hands of subsidiary company, even though transaction took place before the business was hived off to subsidiary company.

9. The Revenue, being aggrieved by the orders of respective CIT(A)'s filed present appeals before us. Since, the solitary issue involved in both appeals is with regard to taxability of capital gain on transfer of shares, we heard and disposed off both appeals by this common order.

10. The Id. Senior Standing counsel Shri. M Swaminathan submitted that Id. CIT (A) erred in holding that capital gain from sale of shares of Kothari Poiner AMC Limited is assessable only in the hands of ITI Limited (old) now renamed as HFCL Infotel Limited (new), but not in the hands of ITI Limited (New) without appreciating fact that whole process of

amalgamation of HFCL Infotel Limited with ITI Limited is only to avoid taxes payable on capital gain arising from sale of shares. The Id. Sr. Standing Counsel further submitted that M/s ITI Limited has adopted colourable device to avoid payment of taxes on gains arising out of sale of shares of Kothari Pioneer AMC Limited in the name of amalgamation and slump sale. The Id. CIT(A) completely erred in not understanding the legality and merit of each event in isolation and failed to appreciate the larger picture and motive behind the transactions. The Id. CIT(A) ought to have appreciated that notwithstanding the alleged amalgamation, in fact the ITI Limited (old) and HFCL Infotel Limited continued to carry on their respective business of finance cum leasing and telecommunication services respectively in their new identities viz., ITI Limited (New) and HFCL Infotel Limited (New) and the intended purpose of amalgamation was never put in to

action. The Id. CIT(A) failed to appreciate that almost all of the sale consideration including balance receivable from escrow account on sale of shares was ploughed back by ITI Limited (Old) to ITI Limited (New) in the guise of optionally fully convertible debentures (OFCD) and other assets. The Id. Sr. standing counsel further referring to dates and events submitted that if you go through date of amalgamation of ITI Limited (old) and HFCL Infotel Limited (old) and slump sale of entire finance and investment business of ITI (old) to Rajam finance and Investment India Limited, it is very clear that so called slump sale of NBFC business was not genuine, because M/s Rajam became subsidiary of ITI Limited only a week before the alleged slump sale and further, the business including all assets were transferred at values much lower their then market values. This fact clearly shows effectively there is no change of ownership even after slump sale.

11. The Id. Sr. standing counsel Shri. M Swaminathan further referring to business transfer agreement between ITI Limited and Rajam Finance and Investment India Limited submits that as per clause (b) of para 6 of slump sale agreement, the transferor will continue to carry on the business on behalf of the transferee and further the transferor shall continue to assist in carrying on the operations of the business at the risk of the transferee. Further, majority of employees of the transferor will be continued to be employees of the transferee. From the above, it is very clear that there is no effective transfer of business in real sense, but the same was transferred in paper so as to give colour of genuineness to the transaction so as to derive tax benefit. The Id. Sr. standing counsel further referring to findings of Id. AO in remand proceedings submits that entire exercise of amalgamation and slump sale was an afterthought to

save tax on capital gain arising out of sale of shares and, further, the process of amalgamation and slump sale was begun only after February 2003, although the same was effective from 1-9-2002, because the debentures was allotted only in February 2003, when the slump sale had allegedly taken place on 1-9-2002. The Id. CIT(A) failed to appreciate the facts in right perspective of law in as much as the Revenue authorities can look into amalgamation, even if it is approved by Hon'ble Jurisdictional High court, if it was for the purpose of avoidance of tax. This fact was very clearly explained by the Hon'ble Supreme Court in the case of Marshall and Sons Company (India) Limited vs. ITO (223 ITR 809) that it would be open to the tax authorities to question the amalgamation if the purpose is evasion of tax. The Id. Sr. standing counsel further referring to the decision of Hon'ble Supreme Court in the case of Mc Dowell Co Ltd vs CTO (1985) 154 ITR

148, submits that if the series of transactions in the instant case are examined, in light of above decision of Hon'ble Supreme Court, clearly one thing is emerging that it is a case of colourable devise adopted by the assessee's to evade payment of taxes on capital gain arising out of sale of shares of Kothari Poiner AMC Limited, because even though the objective of amalgamation of two Companies was to utilize and synergize both NBFC and Telecom business, but this objective had not been achieved as revealed by subsequent events after amalgamation and slump sale. He, further, submitted that once the fact that whole series of transactions represented only a devise to avoid tax and was meticulously executed as pre-planned then even if such transactions are seems to be genuine and are within four corner of law, the tax authorities are authorized to go into real purpose of such transactions by lifting the corporate veil. In this

case, the AO has brought out various reasons to hold entire transactions as a colourable device, but the Id. CIT(A) only on the ground that said amalgamation was approved by respective High courts has negated observations of the AO without appreciating the facts in right perspective. Therefore, the order of the Id. CIT(A) should be reversed and the assessment order should be upheld.

12. The Id. AR for the assessee Shri. R Vijayaraghavan, Advocate strongly supporting order of the Id. CIT(A) submitted that the Id. CIT(A) after considering relevant facts has rightly held that income of holding company cannot be taxed in the hands of subsidiary company, because the transaction of sale of shares was happened before the NBFC business was hived off to M/s Rajam Finance and Investments India Limited and hence, capital gain is rightly taxable in the

hands of ITI Limited (Old) new renamed as HFCL Infotel Limited (new). He, further submit that M/s ITI Limited (old) was the owner of shares and said shares had been sold in July 2002, much before the date of slump sale of NBFC business to M/s Rajam Finance and Investment India Limited. As the sale of shares was made by the erstwhile ITI, prior to hiving of the finance business and consideration was received by the erstwhile ITI, on 27-07-2002, capital gain on sale of shares was rightly offered by the erstwhile ITI, Limited now renamed as HFCL Infotel Limited in their return of income filed at Chandigarh jurisdiction. The Id. AR further submitted that the assets transferred by erstwhile ITI Limited, to Rajam Finance and Investment India Limited forming part of finance business did not include shares of Kothari Pioneer AMC Limited as the said shares have already been sold by the transferor before transferring the finance business. He, further

submit that as the shares were owned, sold and sale consideration was received by erstwhile ITI Limited, the transferor has rightly offered capital gain in their return of income filed for Asst. year 2003-04. Although, the AO of erstwhile ITI, Limited assessed the income on protective basis, but the Id. CIT(A) vide his order dated 28-02-2007 for the detailed reason has very clearly held that the amalgamation of HFCL Infotel Limited with ITI Limited is genuine transaction between two Companies and the same was approved by respective jurisdictional High Court of Punjab and Haryana and Madras and further, capital gain arising out of sale of shares of Kothari Pioneer AMC Limited by ITI Limited in July, 2002 is rightly assessable in the hands of ITI Limited (old), now renamed as HFCL Infotel Limited(new).

13. The Id. AR for the assessee further referring to the scheme of amalgamation between ITI Limited (old) and HFCL Infotel Limited (old), submits that the AO has made fundamental mistake in assuming that ITI Limited is amalgamated with HFCL Infotel Limited and went on to discuss the issue in light the decision of Hon'ble Supreme Court in the case of Mc Dowell Co Ltd CTO(Supra) without understanding the fact that when amalgamation was approved by respective jurisdictional High Courts, the Revenue authorities cannot question such amalgamation by bringing into operation the principles of colourable devise. He, further, submits that no doubt the Hon'ble Supreme court has clearly held that the Revenue authorities are very much empowered to look into arrangement between parties in light of tax evasion. However, fact remains that each and every tax planning cannot be tested under the principles of colourable devise, because everyone is

having right to arrange its affairs to best suit their requirements, but such planning should not be a tool for evading taxes payable to Government. In this case, the scheme of amalgamation was approved by all concerned including two High Courts and further the purpose and intent of the scheme was put in place. Therefore, it is highly incorrect on part of the Id. AO to hold that the scheme of amalgamation was arranged to avoid payment of taxes on capital gain arising out of sale of shares. He, further submits that ITI Limited (old) sold shares on 23-7-2002. The NBFC business was hived off on 1-9-2002. Amalgamation was with effect from 1-9-2002 and further, the scheme was also had reference to slump sale of NBFC business. Further, the assets transferred as part of slump sale did not include shares held by ITI Limited (old) in Kothari Pioneer AMC Limited. The sale consideration was received by ITI Limited (Old). Under these facts, how and under what

provisions of Income Tax Act, 1961, the AO can bring into tax income of holding company in the hands of subsidiary company by holding that scheme of amalgamation was a sham transaction and colourable device to evade payment of taxes on capital gain derived from sale of shares. If at all scheme of amalgamation was a sham transaction, it is for the AO of erstwhile ITI Limited to take a call on the issue, but the AO of ITI Limited (new) does not have any role to play, because the shares of Kothari AMC was owned and sold by erstwhile ITI Limited, but not present assessee. The Id. CIT(A) after considering relevant facts has rightly held that capital gain is not taxable in the hands of assessee and his order should be upheld.

14. The Ld. Authorized representative appearing for M/s HFCL Infotel Limited submits that the Id. CIT(A) has rightly assessed capital gain arising out of sale of

shares in the hands of HFCL Infotel Limited, on substantive basis, because the shares was owned and sold by erstwhile ITI Limited, now renamed as HFCL Infotel Limited(New). He, further referring to various arguments of Id. Sr. standing counsel arguing for the Revenue submits that Shri R Vijayaraghavan, Advocate argued for M/s ITI Limited has answered all quires raised by the Revenue in light of various facts and hence, he wish to reiterate his arguments in support of findings of the Id. CIT(A) to hold that capital gain is rightly offered and so taxed in the hands of erstwhile ITI Limited. He, therefore, submits that there is no merit in arguments of Id. Sr. standing counsel for the revenue and hence, the order of the Id. CIT (A) should be upheld.

15. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below including various case laws

relied upon by both parties. We have also carefully considered various facts brought out by the Assessing Officer in light of arguments advanced by both sides. The facts and arguments of counsels for both sides are kept in juxtaposition, the sole question that arises for our consideration from given facts and circumstances of the case is who is liable to pay taxes on capital gain arising out of sale of shares of Kothari Pioneer AMC Limited, weather ITI Limited (old), now renamed as HFCL Infotel Limited or Rajam Finance and Investment India Limited now renamed as ITI Limited (new). The first and foremost reason for assessing capital gain on sale of shares in the hands of Rajam Finance and Investment India Limited, now renamed as ITI Limited(new) is on the wrong assumption that the ITI Limited had amalgamated with HFCL Ltd and not vice versa. The Assessing Officer has accepted that while framing the original assessment, he had erred in

presuming that ITI Limited (old) had amalgamated with HFCL Infotel Limited (old). He has further admitted that even the authorities in Chandigarh had also committed the same error. Therefore, when the AO had not even understood as to who had amalgamated with whom, the consequent Assessment Order would have been passed on wrong assumptions and without application of mind. This error is extremely fundamental to the issue because while framing the assessment the Assessing Officer felt all along that he was assessing ITI Limited (Old) whereas, in actual fact, the AO was assessing RAJAM Finance & Investment India Ltd, which was renamed as ITI Limited (new). As a matter of fact, HFCL Infotel Limited (old) had merged with ITI Limited (old) w.e.f. 1. 9-2002 and subsequently, ITI Limited (old) had renamed itself as HFCL Infotel Limited (new) and had shifted its registered office to Chandigarh after obtaining all the approvals from all the concerned

authorities including the Income- tax department at Chennai and Chandigarh. It is also a matter of fact that ITI Limited (old), later renamed as HFCL Infotel Limited (new) filed its return of income for the relevant assessment year 2003-04 at Chandigarh which included, besides its own income, the post merger income of HFCL Infotel Limited (old) for the period 1-9-2002 TO 31-3-2003. It is also an undisputed fact that RAJAM later renamed as ITI Limited (new) filed its return of income in Chennai which included, besides its own income from 1 4-2002 to 31-3-2003, the post hiving off income of finance business of ITI Limited (old) from 1-9-2002 to 31-3-2003.

16. In this factual matrix and candid admissions of the Id. AO, that he had made a fundamental mistake in assuming certain facts, if one go though reasons given by the AO to assess capital gain arising out of sale of

shares of Kothari Pioneer AMC in the hands of Rajam, now renamed as ITI Limited (new), we are of the considered view that the Id. AO should have desist himself from trying to frame an assessment on another assessee namely ITI Limited (old) later renamed as HFCL Infotel Limited (new) who has filed a valid return of income at Chandigarh. Moreover, ITI Limited (old) later renamed as HFCL Infotel Limited (new) has already been assessed in respect of said return of income and even the appellate order has been passed in respect of the said assessment by the CIT (A) Chandigarh. Thus, in the first place, the AO had No Jurisdiction to assess said income in the hands of RAJAM, now renamed as ITI Limited (new) at Chennai, because, ITI Limited (old) had acquired shares in Kothari Pioneer AMC between 1993 to 1999-2000 and had sold the same in July 2002. Further, ITI Limited (old) included the income from this sale in its return of

income filed in Chandigarh. The Id. AO at Chandigarh, having not understood as to who had merged with whom, assessed the income from sale of these Shares in the hands of ITI Limited (old) at Chandigarh on 'protective' basis. But fact remain that on an appeal against the said assessment order before the CIT (A), Chandigarh, the CIT (A) Chandigarh has held in his Appellate Order dated 28.2.2007 that ITI Limited (old) had acquired, held and sold the shares of Kothari Pioneer AMC Limited., and hence, income from sale of shares of Kothari Pioneer rightly belonged to ITI Limited (old) now renamed as HFCL Infotel Limited (new) and was assessed in the hands of ITI Limited(old) now renamed as HFCL Infotel Limited (new) on 'substantive basis. Similarly, on account of not understanding as to who had merged with whom, the Id AO at Chennai, presumed that he was assessing ITI Limited (old). Hence, while framing the assessment

of RAJAM, later renamed as ITI Limited (new), he tried to assess the income from sale of shares of Kothari Pioneer AMC in the hands of ITI Limited (new) on 'substantive' basis. It is an established fact that same income cannot be taxed at two places in the hands of two different persons. Hence, once said income has been taxed in the hands of ITI Limited (old) now renamed as HFCL Infotel Limited (new) at Chandigarh, the same income cannot be taxed once again in the hands of RAJAM, now renamed as ITI Limited (new) at Chennai.

17. The sole reason for the AO to conclude the scheme of amalgamation was an afterthought to circumvent tax liability arising out of sale of shares of Kothari Pioneer AMC Ltd, held by ITI Limited (old). The AO held that the assessee has arranged a scheme of amalgamation and slump sale, whereby avoided payment of taxes on

capital gain arising out of sale of shares and thus, he was of the opinion that said income is assessable in the hands of Rajam, now renamed as ITI Limited (new). Since, entire assessment is based on the foundation of *Mc Dowell Co Ltd vs. CTO* (supra) and *Ramsay Ltd (WT) v. RIC 54 TC 101*. *IRC vs. Burmah Oil Co. Ltd.* (54 TC 200), it would be appropriate to at least briefly discuss the evolutionary path of McDowell line of interpretation of taxation statute. Tax avoidance and tax evasion, both emanate from the same motive to keep one's money out of the taxation, but yet one is tolerated while the other gets punitive treatment. That is why always the latter tries to garb itself under the clothes of the former and the success depends on how ably it has put on the garb of the former. Actually, *Mc. Dowell Vs. CTO* (154 ITR 148), followed by the Supreme Court in *Workmen Vs. Associated Rubber India* (157 ITR 77), *Neroth Vs. CIT* (166 ITR 418) and *CIT Vs. Minal* (167

ITR 507), appears to be inspired by three decisions of the House of Lords — Ramsay Vs. IR (54 TC 10), IR Vs. Burma Oil (54 TC 200) and Furniss Vs Dawson (55 IC 324) and the Supreme Court frowned upon tax avoidance so heavily and strongly as to scare and send a shiver to the cases of even tax avoidance. But, even in that judgment of the McDowell (supra) it has been categorically ruled that “tax planning may be legitimate provided it is within the framework of law (P.171). Of course, dubious methods, colourable devices or subterfuge under the guise of tax planning was not to be spared. But, in fact, very soon in its judgment in CWT II Ahmedabad Vs. Arvind Narottam (173 ITR 479), it was held that where the true effect on the construction of the deeds is clear, the appeal to discourage tax avoidance is not a relevant consideration, thereby held that each and every tax planning is not hit by Mc Dowell Co Ltd vs. CTO(supra).

18. But, it may be worthwhile to note that again the perception of Ramsay itself, has undergone a change and the recent House of Lord's decision in the case of *Macniven Vs Westmoreland and Investment Ltd.* (255 ITR 612) after exhaustively considering all the tax avoidance cases, decided the issue with fresh perspective. Mainly it said that Ramsay was not a judicial super legislation or overriding legal principle without any regard to the language or purpose of any particular provision. Actually, it was held that Courts have no such constitutional authority to impose such an overlay upon the tax legislation nor had the House of Lord attempted to do so. In India also, the Courts had taken such a view even after considering *Mc Dowell* (supra). For example, in *Valliappan Vs ITO* (170 ITR 238) the Hon'ble Madras High Court itself had opined that *Mc. Dowell Co Ltd vs CTO* (supra) does not hit tax

planning. Further, in the case of Union of India vs. Azadi Bachao Andolan (263 ITR 706) the Supreme Court observed as under:

“We may in this connection usefully refer to the judgment of the Madras High Court in M.V. Valliappan v. ITO (1988) 170 ITR 238, which has rightly concluded that the decision in McDowell (1985) 154 ITR 148 (SC) cannot be read as laying down that every attempt at tax planning is illegitimate and must be ignored, or that every transaction or arrangement which is perfectly permissible under law, which has the effect of reducing the tax burden of the assessee, must be looked upon with disfavour. Though the Madras High Court had occasion to refer to the judgment of the Privy Council in RC v. Challenge Corporation Ltd. (1987) 2 WLR 24, and did not have the benefit of the House of Lords’ pronouncement in Cravens case (1983) 3 All ER 495 (HL): (1990 183 ITR 216 (HL), the view taken by the Madras High Court appears to be correct and we are inclined to agree with it.”

19. Further, the Hon’ble Gujarat High Court has also very unambiguously and elaborately dealt with the issue in Banyan and Berry Vs. CIT (222 ITR 831) and said that:

“The court has nowhere said that every action or inaction on the part of the taxpayer which results in reduction of tax liability to which he may be subjected in future, is to be viewed with suspicion and be treated as a device for avoidance of tax irrespective of legitimacy or genuineness of the inference which

unfortunately, in our opinion, the Tribunal apparently appears to have drawn from the enunciation made in McDowell's case (1958) 152 ITR 148 (SC). The ratio of any decision has to be understood in the context it has been made. The facts and circumstances which lead to McDowell's decision leave us in no doubt that the principle enunciated in the above case has not been affected the freedom of the citizen to act in a manner according to his requirements his wishes in the manner of doing any trade activity or planning his affairs with circumspection within the framework of law unless the same fall in the category of colourable device which may properly be called a device or a dubious method or a subterfuge clothed with apparent dignity (page 850) And in Azadi Bachao Andolan case (supra) the Supreme Court this accords with our own view of the matter."

20. Further, in Union of India V Azadi Bachao Andolan (Supra), the Hon'ble Supreme Court has not left any scope for confusion and misunderstanding. In that case, the Delhi High Court having regard to the law laid down by the Supreme Court in McDowell and Co. Ltd. v. CTO (1985) 154 ITR 143, held that it is open to the Income tax Officer in a given case to lift the corporate veil to find out whether the purpose of amalgamation or any other scheme is avoidance of tax or not. It is one

of the functions of the Assessing Officer to ensure that there is no conscious avoidance of tax by an assessee and such function being quasi judicial in nature, cannot be interfered with as prohibited. Setting aside the judgment of the Delhi High Court, Hon'ble Supreme Court held that an Act which is otherwise valid in law can be treated as non est merely on the basis of some underlying motive supposedly resulting in some economic detriment or prejudice to the national interests, as perceived by the respondents. In a nutshell, Azadi Bachao Andolan case puts the McDowell case in a proper perspective and dispels the confusions and misunderstanding surrounding it.

21. Now in the instant case also, more or less similar situation has arisen, in the sense that both the amalgamation of HFCL Infotel Limited into ITI Limited (Old) as well as the hiving off of financial business of

ITI Limited (Old) to Rajam Finance and Investment Ltd., i.e., ITI Limited (new) are part of the same scheme of amalgamation sanctioned by Hon'ble Madras High Court as well as Hon'ble Punjab and Haryana High Court. The scheme presented for amalgamation has mentioned this fact of the sale of share in July, 2002 as well as the sale of hire purchase, leasing and securities trading business as, a going concern to Rajam Finance and Investment (India) Ltd. i.e. ITI Limited (new) and after reading the affidavit of Regional Director Southern Region, Department of Company Affairs dt. 19.03.2003 filed before the Hon'ble Madras High Court on 20.03.2003 wherein the Central Government had no objection for the approval of the scheme of amalgamation, the Hon'ble High Court sanctioned the scheme of amalgamation. Hence, prior to examining the contention of the AO that since ITI Limited (new) is the real ITI Limited (old) because of

transfer of assets and liabilities and several other things from the latter to the former, it is essential here to consider that if for the sake of argument it is accepted that ITI Limited (new) is the real ITI Limited (old), is it within the power of the Assessing Officer of the instant case even after Azadi Bachao Andolan case (supra) to ignore the effects of amalgamation of HFCL Infotel Ltd regarding set off of carried forward loss and depreciation and tax the income of the ITI Limited (old), on the basis of his observation regarding transfer of assets and liabilities and utilization of fund, in the hands of ITI Limited(new). In our opinion, the AO of the instant case has exceeded his jurisdiction in the sense that he is trying to deny the benefit of amalgamation to the ITI Limited (old) by ignoring the consequence of amalgamation scheme sanctioned by the Hon'ble High Courts at Madras and Chandigarh and trying to tax the income of the ITI Limited (old) who

was the owner and seller of shares in the hands of the ITI Limited (new) which till the date of sale of share had nothing to do with such sale, only on the ground that in his opinion assets and liabilities as well as the business has passed on to the ITI Limited (new), the appellant, even though this hiving off of financial business of ITI Limited (old) to ITI Limited (new) as a going concern was also sanctioned by the High Court itself.

22. Now, coming to various observations of the AO to come to the conclusion that the scheme of amalgamation is a colourable devise and slump sale of NBFC business is nothing but demerger. We have gone through the reasons given by the AO to held amalgamation as a tool for evasion of tax and after going though said reasons, we ourselves do not subscribe to view taken by the AO, because, it is

vehemently denied that the entire amalgamation was an afterthought. This was a scheme which was duly approved by two High Courts and shareholders, creditors and bankers of both the companies, Registrar of Companies and Regional Directors of Dept. of Companies Affairs of Chandigarh and Chennai after giving due notice by publication in newspapers. Due process of law was fully followed and nothing was done in a hush-hush manner. The Id. AO has failed to notice that the petition for amalgamation were filed before the Hon'ble High Court at Chennai on 23.01.2003 and before the Punjab & Haryana High Court on 28.01.2003 and it was to be effective from 1.9.2002, subject to approvals from all authorities. In the light of this fact how can the Id. AO allege that the entire scheme was an afterthought? Moreover, HFCL Infotel Limited (old) had merged into ITI Limited (old), but, RAJAM did not merged into any Company and nor did any Company

merged into RAJAM. Therefore, we are of the considered view that the AO is completely erred in holding that the scheme of amalgamation is an afterthought.

23. The observation of the Id. AO regarding alleged non-certification of assets and liabilities of ITI Limited (old) as on 31.8.2002 is also entirely uncalled for. Moreover, the Id. AO should have at least taken the trouble of quoting some provisions of some law which is in force in our country that requires such certification. Nonetheless, it may be on record that the Auditors of ITI Limited (old), now renamed as HFCL Infotel Limited (new) had duly certified the assets and liabilities transferred under the slump-sale agreement. The said Certificate was duly deliberated upon during the course of assessment proceedings of ITI Limited (old) at Chandigarh. Hence, once again, the Id. AO has got his

facts absolutely wrong. The Id. AO has again failed to remember two fundamental principles of Corporate Law. Firstly, Company has a separate legal entity. Secondly, a Company is constituted by its Shareholders and its assets and liabilities do certainly not determine its identity. Assuming, though not admitting, even where substantial assets and liabilities of Co 'A' are transferred to Co 'B' will it be right to hold that Co 'A' has become Co 'B' and Co 'B' should be assessed as if it were Co 'A'. By adducing such arguments the Id. AO has tried to dispense with the fundamentals of accountancy and canons of corporate law. Fortunately, the law of the land does not give such discretion to the assessing officers. As a matter of fact and as is apparent from all records, ITI Limited(old) continued albeit with a changed name viz., HFCL Infotel Limited(new) and this change of name was also duly approved by none other than the competent authority

as empowered by the Govt. of India. ITI Limited (old) and HFCL Infotel Limited are two independent companies, which are assessed in Chandigarh and are not assessed with the AO at Chennai. HFCL Infotel Limited has merged with ITI Limited (old). None of these companies have merged with RAJAM later renamed as ITI Limited (new). We fail to see as to what is the relevance of the former shareholders of these two companies in making the assessment in the case of RAJAM. Moreover, all the shareholders had agreed to the scheme that was duly approved by the two concerned High Courts. Hence, observation of the AO regarding certification of assets and liabilities is not relevant to decide the taxability of capital gain on sale of shares and thus, it is irrelevant.

24. As regards the assets and liabilities that remained with ITI Limited (old) as on 31.8.2002 also is not

relevant while finalizing the assessment/ appellate proceedings of RAJAM later renamed as ITI Limited (new). The Id AO is again trying to comment upon the composition of assets and liabilities of HFCL Infotel Limited (new) as on 31.3.2003. This is also not relevant to the instant assessment. The Id AO has alleged that the Profit & Loss Account of HFCL Infotel Limited (new) for the period 1.4.2002 to 31.3.2003 includes only one item pertaining to ITI Limited (old) namely profit on sale of investment of Rs 93,30,15,689/-. This allegation is factually incorrect. The said Profit & Loss Account includes all items of Income and Expenditure of ITI Limited (old) for the period 1.4.2002 till 31.8.2002, i.e. till the date of hiving-off of finance and investment business to RAJAM. The allegations about ITI Limited (old) and HFCL Infotel Limited making balancing acts without there being any evidence of any funds of ITI Limited (old) being used in the business of HFCL Infotel

Limited are also factually incorrect and uncalled for due to reasons explained above.

25. The AO has made yet another observation that the purchaser of shares Templeton India Pvt. Ltd never paid any money to HFCL India Ltd or the amalgamated company, but all payments were made to ITI Limited (old) even after the alleged amalgamation. Firstly, HFCL India Ltd is an independent co. that was the holding company of HFCL Infotel Ltd (old). When HFCL India Ltd and HFCL Infotel Ltd (old) had never bought, held or sold these shares, does the Id. AO expect that Templeton India Pvt Ltd should have made the payments to HFCL Infotel Ltd.? This expectation only belies lack of understanding of rudimentary principles of trade and commerce. Further, the Id. AO has himself admitted that payments were made to ITI Limited(old). It is pertinent to mention here that the said Shares

were transferred to the purchaser on 26.7.2002 and ITI Limited (old) later renamed as HFCL Infotel Limited (new) got the gross sale consideration of Rs 104,07,05,229/- (net Rs.97,42,55,022/-). This fact has been admitted by none other than the Id. AO. Further, only additional consideration of Rs 17,11,42,382/- was received by ITI Limited(new). This too was received on behalf of ITI Limited (old) in accordance with the rights and obligations contained in the Escrow Agreement. Hence, this allegation is factually incorrect and uncalled for to decide taxability of capital gain.

26. Similarly, the allegation of Id. AO that no investment was made by ITI Limited (old) in the telecom business of HFCL Infotel Limited (new) is also factually incorrect. The Id. AO has himself admitted that out of Rs 104 crores only Rs 44 was invested by ITI Limited (old) in RAJAM Finance and Investment India

Limited, now renamed as ITI Limited (new). It is but obvious that remaining amount of about Rs 60 crores remained with ITI Limited (old) later renamed as HFCL Infotel Limited. It is also beyond dispute that ITI Limited (old) hived-off the finance and investment business w.e.f 1.9.2002 and took over the telecommunications business of HFCL Infotel Limited LTD (old) and renamed itself as HFCL Infotel Limited (new). Thus, two things are established beyond any doubt namely, after investing about Rs 44 crores in RAJAM Finance & Investment India Limited, ITI Limited (old) was left with about Rs 60 crores; and ITI Limited (old) after merger of HFCL Infotel Limited (old), a company engaged in telecom business, ITI Limited (old) continued to carry on the telecom business with remaining amount. Hence, this allegation of AO is also fails.

27. The fundamental observation of the Id. AO is amalgamation of ITI Limited (old) and HFCL Infotel Ltd (old) was not genuine and should be ignored for the purpose of taxation. Therefore, he went on to make assessment as if no amalgamation took place between two companies and even if there is amalgamation, but it is sham transaction or colourable devise to avoid payment of taxes on capital gain arising out of sale of shares. The Id. AO has alleged that there is no evidence that the merger actually took place on 1.9.2002. The Id. AO has further alleged that, on the other hand, there is enormous evidence which shows that the merger was retrospective. In support of his contention, the Id. AO has put forth several reasons. We have gone through reasons given by the AO to hold amalgamation as a colourable devise and find that there is no substance in the reasons, because, Annual Report (prepared on 31.7.2002), Auditor's Report

(dated 2.9.2002) and the Income Tax return (filed on 29.10.2002) for year ending 31.3.2002 were not required to contain any reference to the merger as they pertain to the period 01.04.2001 to 31.3.2002. Further, the CIT (Appeals), Chandigarh, vide his appellate order passed in the appeal of ITI Limited (old), later renamed as HFCL Infotel Limited (new) dated 28.2.2007 has categorically held that the merger was perfectly legal and valid. He has further held that the merger was not a 'device' used for avoidance of tax and that the merger that was duly approved by two High Courts was final and binding on all the parties. Further, amalgamation cannot take place without obtaining approvals from board of Directors, Shareholders, Creditors, Bankers, concerned High Courts, Registrar of Companies, Regional Directors of Company and such other authorities. Besides, Public Notice was also given in the newspapers. It is always the case that an in principle

decision is taken to amalgamate w.e.f. an 'appointed date' and applications/ petitions filed before the above mentioned authorities once all approvals are received, then the amalgamation is given effect to wet the 'appointed date'. Further, no company is authorized to amalgamate on its own without approval of the concerned High Court. The High Courts, as well as all the authorities afore mentioned have a right to reject the scheme of amalgamation. Hence, on the date of conceiving the scheme of amalgamation, it is not certain whether it will be approved by all the parties and, if yes, then by what time the scheme would be finally approved. Thus, till the time of receipt of all approvals, both the companies carry on their respective activities as if no amalgamation has taken place. Finally, when all approvals are received, this can take months or even years, both the companies give effect to amalgamation w.e.f. the 'appointed date'. Thus, the

effect of amalgamation is always retrospective. In the instant case, the amalgamation was very much in sight as on 1.9.2002. In fact, the first step in this direction was taken by ITI Limited (old) on 19.8.2002 when it had made RAJAM its subsidiary company. Thus, the observation of the Id. AO is factually incorrect.

28. The Id. AO has made one more allegation that the business of ITI Limited (old) was sold as a going concern before the date of amalgamation to ITI Limited(new) and the amalgamation had no effect whatsoever on the old NBFC business carried on by the ITI Limited(new). We have gone through the reasons given by the AO and we do not ourselves in agreement with view taken by the AO, because, making RAJAM a subsidiary and hiving-off of finance business was part of the scheme of amalgamation. Further, there was a complete change in the entire ownership of NBFC

business. Earlier, i.e. before hiving-off, it was being owned and run by ITI Limited (old) and after hiving-off it was being owned and run by RAJAM, now renamed as ITI Limited (new). He has also conveniently forgotten that ITI Limited (old) carried on the NBFC business till the time it was hived off to RAJAM w.e.f. 1.9.2002. In the year under assessment, ITI Limited (old) owned and ran the NBFC business from 1.4.2002 till 31.8.2002. These Shares were transferred on 26.7.2002, which is well within the period in which the NBFC business was owned and ran by ITI Limited (Old). We fail to appreciate the logic by which this amount can be taxed in the hands of RAJAM later renamed as ITI Limited (new) who acquired the NBFC business w.e.f. 1.9.2002 when these Shares had already been sold by ITI Limited (old) on 26.7.2002 and ITI Limited (old) had also received almost ninety percent of payment. How RAJAM can be asked to pay taxes on a transaction

that had taken place even before their date of acquisition of business. As regards, remaining portion of Rs 17 crores of sale proceeds, received by Rajam now renamed as ITI Limited (New), we find that the total sale consideration was about Rs 114 crores. Out of this, about Rs 97 crores was received by ITI Limited (old) in July 2002. The balance amount of Rs 17 crores was also part of the sale consideration payable to ITI Limited (old), which was withheld in an Escrow account and was finally released in 2004. Even this amount of Rs 17 crores was duly included by ITI Limited (old) in their revised return of income for the year under appeal. This view has already been upheld by the CIT (Appeal) Chandigarh. Since, receivable from Escrow account is part of business transfer agreement, the said sum had been received by Rajam, now renamed as ITI Limited (New) along with interest. In any way said fact

does not alter the legal position of taxation of capital gain in the hands of ITI Limited (old).

29. The Id. AO has referred to contemporaneous newspaper reports showing that as on 1.9.2002, the appointed date for amalgamation, the HFCL Infotel Ltd had been contemplating to disinvest its subsidiary HFCL Infotel Ltd. By bringing this vital fact on record, he has contradicted his own earlier made allegation that amalgamation was never contemplated as on 1.9.2002. This only confirms the appellant's contention that the merger was not an afterthought. The Id. AO has alleged that merger of HFCL Infotel Limited (old) with ITI Limited (old) was not with the motive of reviving the business of provision of telephony services but to avoid payment of taxes on Rs 107 crores profit on sale of shares. As we have already stated in earlier paragraph, merger was a genuine corporate exercise. The motive/

objects were duly disclosed in the scheme of amalgamation filed before the Hon'ble High Courts and were duly accepted by both the Hon'ble High Courts. Similarly, the allegation that ITI Limited (old) did not infuse fresh capital in the business of HFCL Infotel Limited is also factually incorrect as has already been repudiated in earlier paragraphs. The Id. AO has referred some remarks in the Annual Report of ITI Limited (old) for the year ended 31.3.2002 dated 31.7.2002 relating to developments after 31.3.2002. In this regard it was clarified that ITI Limited (old) suspended its business with effect from 1.7.2001 and concentrated on recoveries. Further, the company is embarking on new business activities. These facts only contradict the earlier allegation of Id. AO that merger was an afterthought with the sole intention of avoiding payment of taxes on income earned on sale of shares of Kothari Pioneer AMC Ltd. By citing the above

remarks, the Id. AO has helped the appellant to prove two things. Firstly, ITI Limited (old) had decided to exit from NBFC business as early as 1.7.2001. Thus, hiving-off of finance and investment business by ITI Limited (old) to RAJAM w.e.f 1.9.2002 cannot be considered as an afterthought. Secondly, the management of ITI Limited (old) had disclosed their intention of "embarking on new business activities" as early as 31.7.2002. This fact completely demolishes the allegation of Id. AO that merger w.e.f.1.9.2002 was an afterthought. This fore warning by the management came true by their later actions when ITI Limited (old) entered into telecommunication business by taking the merger route. Hence, allegation of Id. AO is baseless and incorrect.

30. The Id. AO has alleged that the slump sale or hiving-off of business was not genuine. Assuming,

though not admitting, Slump-sale was not genuine, then the logical course of action would be ignore the Slump-sale and revert to the original position as if no Slump sale had taken place. Even then the taxability of income from sale of Shares of Kothari Pioneer AMC limited remains in the hands of ITI Limited (old). Because, said Shares had been bought, held and sold by ITI Limited (old). Thus, even if the Slump-sale was not genuine, the income from sale of Kothari Pioneer Shares cannot be taxed in the hands of RAJAM, now renamed as ITI Limited (New). Further, it is a fact that RAJAM was not a subsidiary of ITI Limited (old) till 18.8.2002. The appellant or the ITI Limited (old) has nowhere claimed that RAJAM was a subsidiary of ITI Limited (old) prior to 18.8.2002. The return of income filed by RAJAM on 6.9.2002 was relating to the year ending on 31.3.2002. There was no legal requirement for RAJAM to refer to the agreement, which took place

about six months after the expiry of the relevant period for which the return was filed. The Id. assessing officer of RAJAM had all the opportunity to verify the veracity of the agreement during the course of assessment proceedings but he chose not to do so. As regards Mr. Simon Soloman, we fail to see the relevance of his being a Manager or a Director, in the context of slump-sale or hiving-off of business. Nevertheless, the factual position is that Mr. Solomon has been an employee Director of the appellant company and thus, this fact would not alter the position of law on taxation of capital gain.

31. We further noted that the Id. AO is making some unsubstantiated allegations about the valuation of assets transferred under the slump-sale agreement by ITI Limited (old). He is referring to the book value of fixed assets as Rs 292.13 lacs, while their market value

was stated as Rs 149.72 lacs. Firstly, Mr. Vishwanathan, Chartered Accountant has clearly stated in the certificate that he is taking the 'market value' and not the 'book value. There was no requirement to transfer the assets on their book value. It is only prudent business practice to transfer an asset on its market value. Market value is what is realizable in the event of its sale in the open market. It is only fair and prudent to transfer an asset on its market value and no adverse inference can be drawn there from. The Id. AO is now trying to find some fault in the old and new shareholding of RAJAM. It is an admitted position that RAJAM was just like any other company doing independent business till 19.8.2002 when it became a subsidiary of ITI Limited (old). Who were the owners of shares of RAJAM before that and what were they doing, has no relevance or bearing on the Slump-sale. The Id. AO has made a very serious allegation here alleging

that there is absolutely no record of sale of shares by the shareholders of Rajam Finance and Investments India Limited to ITI Limited (old). The said allegation is completely falls. Firstly, the said record is available with the company in the form of Register of Members and Share Transfer Register. We would like to know whether the Id. AO called for any of these records and, if so, did the assessee refuse or fail to produce the same, or the assessee produced these records and the Id. AO found that there was no record of transfer of shares of RAJAM in these statutory registers. The fact of the matter is that the complete records were available with the company and the Id. AO never called for any of these records let alone examine the same. We presume that the Id. AO would be aware that the record of transfer of shares is available at places other than the company also. For instance, every company is required to disclose the position of its shareholders as

on the date of each Annual General Meeting as well as all the changes that have taken place in its shareholdings during the relevant year. The Id. AO did not try to even verify the Annual Return of the company which is filed with the Registrar of Companies. Without doing any spadework, the Id. AO has chosen to make such wild allegations which are absolutely false and without any basis.

32. In the remand report, the Id. AO stated that the amalgamation did not fulfill the conditions of Sec.72A of the Income Tax Act, 1961. In this regard, we find that Ld. AO of amalgamated company has not raised any objection in so far compliance of Sec. 72A is concerned. In the appeal order of the amalgamated company, it has been held that the amalgamated company fulfilled all the conditions of Sec.72A of the Act. We further noted that there is a due compliance of provisions of

Sec.2 (1B) Of Income Tax Act, 1961. It is a fact that 75% of the shareholders holding not less than 3/4th in value of the shares of the amalgamating company became the shareholders of the amalgamated company. Further, the company is in the process of getting the immovable assets registered in its own name by operation of law. In consideration of the transfer of the undertaking of HFCL India Limited, the company shall issue 432,000,250 equity shares of Rs. 10/- each to the equity shareholders of HFCL India Limited as on the issue date (June 12, 2003), credited as fully paid-up in the ratio of one equity share in the company for every one equity share held in HIL. This allotment will constitute 98.02% of the total paid up share capital (post merger) of the company. Since the shares have not been allotted by the Balance Sheet date, the consideration payable appears as "Share Capital Suspense" in the balance sheet". From the

above, two things are crystal-clear viz. (i) since the shares were allotted to the shareholders of the amalgamating company on 12.6.2003 and not by the balance sheet date of 31st March 2003, amount of the shares appears under the head "share capital suspense account" in the balance sheet; (ii) the allotment will constitute 98.02% of the total paid-up share capital (post merger) of the company and thus, there is a due compliance of provisions of Sec.2(1B) of the I.T.Act, 1961 which requires that 75% of the shareholders holding not less than 3/4th in value of the shares of the amalgamating company should be shareholders of the amalgamated company.

33. In the remand report, the Id. AO further stated that the amalgamating company, in terms of Sec.72A of the Act, should have carried on the business for period of 2 years prior to amalgamation and

amalgamating company did not fulfill this condition. In this regard, we find that this condition was not applicable for assessment year 3003-04. Further, sub-section (2) of Sec.72A as applicable for assessment year, 2003-04 reads as under:-

(2)Notwithstanding anything contained in sub-section (1), the accumulated loss shall not be set off or carried forward and the unabsorbed depreciation shall not be allowed in the assessment of the amalgamated company unless the amalgamated company — holds continuously for a minimum period of five years from the date of amalgamation at least three-fourths in the book value of fixed-assts of amalgamating company acquired in a scheme of amalgamation; Continues the business of amalgamating company for a minimum period of five years from the date of amalgamation; Fulfils such other conditions as may be prescribed to ensure the revival of the business of the amalgamating company or to ensure that the amalgamation is for genuine business purpose.

In this regard, it is a matter of record that the amalgamating company was carrying on the business of telecommunication for more than two years before its merger with Investment Trust of India Ltd. As per information provided to us, erstwhile HFCL Infotel Ltd.

has been providing basic telephonic services pursuant to the licence for Punjab Circle being granted by the Department of Telecommunication (DOT), Government of India on Nov. 7, 1997. Further, the amalgamated company in the previous year relevant to assessment year 2003-04 was holding at least 3/4th of the book value of fixed assets of the amalgamating company acquired in a scheme of amalgamation. In this connection, certificate of the Accountant is obtained and filed before the AO. Therefore, this allegation of the AO is totally incorrect and baseless.

34. The Ld.AO has agreed in the remand report that the scheme of amalgamation is to be operative from the 'appointed date' but shall be effective from the effective date. The Appointed Date is 1st September 2002 and the effective date is when the Order of the High Court was filed in the office of ROC. The Order was

filed with ROC Chandigarh on 23.4.2003 and with ROC Madras on 31.3.2003. Further, Slump sale MOU was entered into on 26.8.2002 and agreement was entered into on 28.3.2003. As per clause 5 & 6(a) of the said agreement, transfer of business shall be effective from 1st September 2002 subject to the proposed merger between HFCL Infotel Ltd and Investment Trust of India Ltd. being approved by the shareholders and also by the appropriate High Courts. There was rational in linking the sale of hire purchase business with amalgamation, because ITI Limited (old) wanted to enter into the business of telecommunication by acquisition of existing business of HFCL Infotel Ltd. by way of merger. HFCL Infotel Ltd., an amalgamating company, was enjoying the benefit of Sec.10 (23G) of the I.T.Act, 1961 which was very important benefit to the investors of such company. This benefit could he availed off by the amalgamated company subject to the

condition that it was wholly engaged in the business of telecommunication and not in the existing business of hire purchase and leasing. Had the merger not been approved by the institutions and banks or by the shareholders, creditors and ultimately by the Court, the amalgamated company had no option but to continue to carry on the business of hire purchase and leasing. This was the rationale to make the sale of business effective from the same date of 1st September 2002 on which date the merger came into operation. Therefore, it is incorrect to say that amalgamated company had transferred its business as a going concern even before the merger. It is very clearly written in clause 5 and 6(a) of the agreement dated 28.3.2003 that sale will be effective on and from 1st September 2002 and subject to the merger being approved by the respective High Courts. What is relevant is the date of transfer of the business and that was 1<sup>st</sup> September 2002 only. It is

also mentioned in the remand report that there was no change in the activities of the amalgamated company. This statement is not correct. Before merger, the company was engaged in the business of hire purchase and leasing but after merger it was wholly engaged in the business of telecommunication. Perhaps, the Ld. AO is equating the business of subsidiary company with that of holding company. However, both cannot be equated. Both are separate legal entities under the Companies Act and are separate assessee's under the Income Tax Act, 1961. Holding company has the prerogative to decide as to which business it should carry on in holding company and which business in subsidiary. Keeping this hard reality into consideration and also the legal position, Hon'ble CBDT granted exemption u/s. 10(23G) of the I.T.Act, 1961 to ITI Limited (old). Therefore, the AO is totally incorrect in

observed that there is no change in business even after amalgamation.

35. The Ld.AO has also mentioned in the remand report that pre-merger shareholders in the amalgamated company were no more holding the shares in the amalgamated company after amalgamation. It is not a point of relevance whether pre-merger shareholders in the amalgamated company continue to be the shareholders in that company after amalgamation or not. What is significant and recognized by law is that 3/4th of the shareholders in value of the amalgamating company should become the shareholders of the amalgamated company and this condition has been complied with. Thus, 100% of the shareholders both in terms of number and value of the amalgamating company became the shareholders of the amalgamated company. It is also mentioned in the

remand report that consent of the creditors was not obtained by erstwhile HFCL Infotel Ltd. In this connection, our attention is invited to second para at page 7 of the Order of Punjab & Haryana High Court, wherein it is mentioned that by a separate Order dated 30.1.2003, Hon'ble High Court dispensed with the requirement of holding the meeting of creditors, when HFCL Infotel Ltd filed an affidavit before the Court that consent of 98.88 of the shareholders and consent of 79.32% of the unsecured creditors is obtained. It is also mentioned in the remand report that capital base of the amalgamated company was much narrower than that of HFCL Infotel Ltd. Capital base of the amalgamated company though significant point for consideration but cannot be taken as the sole criterion for acquisition of another company. But, it is for the two companies to decide as to whether they want to merge or not. Further, Financial institutions and Banks,

who had considerable stake in amalgamating company and who did their due diligence had every right to reject the amalgamation if they would have found that the same was detrimental to the interest of the company financed by them. As already mentioned, they had a stake of Rs.577.16 crore in the amalgamating company and further, they had given their approval for amalgamation. Hence, observation of the AO is fails on this count as well.

36. The Id. AO, in remand report has taken support from the Bombay High Court decision in a recent case where it was held by relying on the decision of the Hon'ble Supreme Court in the case of Mihir H Maftlal v/s. Maftlal Industries Ltd. that amalgamation can be rejected on grounds of tax evasion and that Court can verify whether amalgamation was a genuine corporate exercise or a device to evade taxes due to the

government. He, further, commented that the Supreme Court in the case of Marhsal & Sons 223 ITR 809 has clearly stated that they have not expressed any opinion on the plea of the learned Counsel for Revenue that the amalgamation itself is a device design to evade the taxes legitimately payable by the subsidiary company. The Income Tax Authorities, if they so think that they are entitled to raise this question in the proceedings under the Income Tax Act, 1961, it is open to them to do so by way of a separate proceeding according to law. We have gone through observations of Id. AO and find that the Hon'ble Bombay High Court is said to have directed the Regional Director of the Department of Company Affairs to inform the Court of taxes payable by the merging companies. The Court has not given any direction to the Regional Director to inform the taxes payable by the amalgamated company and there is a logic behind

this as the merging companies are going to be dissolved whereas amalgamated companies remain very much in existence and they will have to pay tax, if any payable as per provisions of law. Thus, in our opinion, facts of the case as considered by the AO as reported in ET have not been correctly placed in the remand report and have no application to this case.

37. The Id. AO has further noted that transfer of business as a going concern by ITI Limited (old) to Rajam should be considered as transfer of an undertaking in a scheme of demerger and the provisions of Sec. 72A should be applied. In this regard, we find that 'demerger' and slump sale' are two different things. The Companies Act, 1956 does not define demerger but, it has been defined in Sec.2 (19AA) of the Income Tax Act, 1961. Demerger must satisfy the specific requirement of Sec. 2(19AA).

As per clause (19AA) of Sec.2 of the Act, 'Demerger', in relation to companies, means the transfer, pursuant to a scheme of arrangement under section 391 to 394 of the Companies Act by a demerged company of its one or more undertakings to any resulting company in such manner that (a) all the property of the undertaking, being transferred by the demerged company, immediately before the demerger, becomes the property of the resulting company by virtue of the demerger. (b) all the liabilities relating to the undertaking, being transferred by the demerged company, immediately before the demerger, become the liabilities of the resulting company by virtue of the demerger. (c) the property and the liabilities of the undertaking or undertakings being transferred by the demerged company are transferred at values appearing in its books of account immediately before the demerger. (d) the resulting company issues, in

consideration of the demerger, its shares to the shareholders of the demerged company on a proportionate basis. (e) the shareholders holding not less than 3/4th in value of the shares in the demerged company (other than shares already held therein immediately) become shareholders of the resulting company or companies by virtue of the demerger, otherwise than as a result of the acquisition of the property or assets of the demerged company or any undertaking thereof by the resulting company. (f) the transfer of the undertaking is on a going concern basis. (g) the demerger is in accordance with the conditions, if any, notified under sub-section (5) of Sec.72A by the Central Government in this behalf. Similarly, Slump sale has also not been defined in the Companies Act, but it has been defined in clause (42C) of Sec.2 of the Income Tax Act, 1961. Slump sale under this clause means the transfer of one or more undertakings as a

result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales. Choice is with the companies to decide as to whether they want to transfer the undertaking by way of demerger or by way of slump sale. In case of demerger, as mentioned above, the companies have to draw the scheme of arrangement within the meaning of Sec.392. & 394 of the Companies Act, 1956 where there is a long drawn process viz, approval of shareholders by 3/4" majority, approval of the creditors, report of the ROC, report of the Regional Director, Company Law Board, report of the Official Liquidator, publication of notices in two newspapers, holding of the meetings of the shareholders and creditors and last but not least approval of jurisdictional High Courts having jurisdiction over 'demerged company' and 'resulting company'. It is also a condition that consideration for transfer of undertaking has to be

settled by issue of shares of the resulting company to the shareholders of demerged company. In case of slump sale, there is a simple procedure under which the transferor company has to pass an ordinary resolution of its shareholders u/s.293 (1)(a) of the Companies Act, 1956. Provisions of Sec.72A are applicable in case of demerger but not in case of slump sale. In case of slump sale, capital gain is computed as per provisions of Sec.50B of the I. T. Act, 1961. In the present case, both the transferor and transferee companies had decided to go for slump sale instead of demerger. Since as per law, the transaction was a slump sale, the alternative plea of the Ld.AO to treat the transaction as a demerger cannot be accepted.

38. It has also been contended by the Id. AO that ITI Limited (new) is the successor of the ITI Limited (old) and hence income from sale of shares should be taxed

in hands of ITI Limited (new) in accordance with provisions of section 170 of The Income Tax Act, 1961.

Therefore, it would be appropriate to refer to S. 170 (1) and (2) of the Act:

(1) Where a person carrying on any business or profession (such person hereinafter in this section being referred to as the predecessor) has been succeeded therein by any other person (hereinafter in this section referred to as the successor who continues to carry on that business or profession:-

(a) the predecessor shall be assessed in respect of the income of the previous year in which the succession took place up to the date of succession;

(b) the successor shall be assessed in respect of the income of the previous year after the date of succession.

(2) Notwithstanding anything contained in sub-section (1) when the predecessor cannot be found, the assessment of the income of previous year in which the succession took place up to the date of succession and of the previous year preceding that year shall be made on the successor in like manner and to the same extent as it would have been made on the predecessor, and all the provisions of this Act shall so far as may be, apply accordingly.

Even if S. 170(1) is invoked in respect of the income up to the date of succession, the predecessor only shall be liable to be taxed. Now, in the instant case, since it is an undisputed fact that income on sale of share accrued before amalgamation / slump sale, therefore, this income has to be taxable in the hands of

ITI Limited (old) only. So far as S. 170(2) is concerned, this section will apply when the predecessor cannot be found. But in this case ITI Limited (old) very much exists even as on today as per the records of the various government authorities. Hence the contention of the AO does not make any sense. In fact, the entire confusion emanated from misunderstanding, as admitted by the AO himself in the remand report that ITI Limited (old) amalgamated with HFCL Infotel Limited due to which the AO invoked succession theory under the impression that ITI Limited (old) no more exist while the fact is other way round. It is HFCL Infotel Limited which merged with ITI Limited (old) which is amalgamated company today and HFCL Infotel Limited was amalgamating company. Therefore, on this count also the finding of the AO is incorrect.

39. In this view of the matter and considering facts and circumstances of this case, we are of the considered view that capital gain arising out of sale of shares of Kothari Pioneer AMC Limited by ITI Limited (old) is taxable only in the hands of ITI Limited (old) now renamed as HFCL Infotel Limited (new). Although, the Id. AO of ITI Limited (old) now renamed as HFCL Infotel Limited (new) assessed the income on protective basis, but the Id. CIT(A), Chandigarh after considering relevant facts has rightly assessed capital gain arising out of sale of shares on substantive basis in the hands of ITI Limited (old). Similarly, although the Id. AO of Rajam Finance and Investment (India) Limited now renamed as ITI Limited (New) assessed capital gain on sale of shares in the hands of ITI Limited (new), but the Id. CIT(A), after considering relevant facts has rightly held that capital gain on sale of shares is taxable only in the hands of ITI Limited (old), but not

in the hands of ITI Limited (new). We do not find any error in the orders of Id. CIT(A)'s Chandigarh and Chennai and hence, we are inclined to uphold findings of Id. CIT(A)'s and reject grounds taken by the Revenue on this issue in both appeals.

40. The next issue that came up for our consideration is provisions for premium on Redemption of Debentures. During the year under consideration, the appellant issued 6996709 debentures of Rs. 100 each to ITI Limited (Old). The terms of issue of these debentures inter-alia provided for redemption of debentures after ten years at a premium of Rs.60 per debenture. The appellant in its accounts provided sum of Rs.57,73,355 towards premium payable having accrued during the impugned assessment year on the redemption of the above mentioned debentures. The calculation provided by the appellant is as under:

Date of issue of debentures	No. of debentures issued	Total period of debentures	Amount of premium payable per debenture	No. of months for which premium payable has accrued upto 31.03.2003	Amount of premium
	(Quantity)	(months)	rs.	(months)	Rs.
15.02.03	45,50,000	120	60	2	45,50,000
31.03.03	24,46,709	120	60	1	12,23,355
	69,96,709				57,73,355

The assessee did not claimed deduction of provisions for Redemption of Debentures in original return of income filed for the year. However, realizing that it has not claimed the above mentioned premium payable as deduction, it has filed a revised return wherein it claimed the above mentioned premium as deductible. The AO disallowed provision for premium on redemption of debentures on the ground that this is only a provision which was accordingly disallowed by the assessee company itself in the statement filed along with the return of income. On appeal before Id. CIT(A), the Id. CIT(A), by following the decision of Hon'ble Supreme Court in case of Madras Industrial

Investment Corporation Ltd. vs. CIT,(225 ITR 802) and CIT vs. SM. Holding and Finance Pvt. Ltd, (264 ITR 370 ), deleted addition by holding that premium attributable to the year under consideration is deductible expenditure and hence the same should be allowed.

41. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. At the time of hearing, Id. AR for the assessee submitted that the issue is squarely covered in favour of the assessee by the decision of ITAT, Chennai bench in assessee own case for Asst. year 2008-09, for which the Id. Sr. standing counsel has agreed. We have gone through the order of Co-ordinate bench of ITAT, Chennai in ITA. No. 2438/Mds/2016 for Asst. year 200809 and find that the Co-ordinate Bench by following the decision of Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation

Ltd vs. CIT (225 ITR 802), held that premium payable on redemption of debentures has to be spread over the period and further, amount pertains to relevant period is deductible u/s 37 of the Income Tax Act, 1961, even though same is paid on redemption. Facts remain unchanged. The revenue fails to bring on record any contrary decisions against the decision of Hon'ble Supreme court to support its arguments. Therefore, we are of the considered view that there is no error in the findings of the Id. CIT(A) to delete additions made towards disallowance of provision made for premium payable on redemption of debentures and hence, we are inclined to uphold findings of the Id. CIT(A) and reject grounds taken by the revenue.

**42. In the Result both appeals filed by the revenue for Asst. year 2003-04 are dismissed.**

**ITA. No. 728/Mds/2008-Asst. Year 2004-05**

43. The first issue that came up for our consideration is provision for premium on Redemption of Debentures. We find that an identical issue has been considered by us in assessee own case in ITA. No. 80/Mds/2008 for Asst. year 2003-04, where, we, by following the decision of Hon'ble Supreme Court decision in case of Madras Industrial Investment Corporation Ltd vs. CIT (225 ITR 802), held that premium payable on redemption of debentures has to be spread over the period of debenture and further, amount pertains to relevant period is deductible u/s 37 of the Income Tax Act, 1961, even though same is paid on redemption. The facts in the present case are identical to facts which we have considered in ITA. No. 80/Mds/2008 for Asst. year 2003-04. The reasons given by us in preceding paragraph no 40 of this order shall mutatis mutandis apply to this appeal as well. Therefore, for

similar reasons we are inclined to uphold findings of the Id. CIT(A) and reject ground taken by the revenue.

44. The next issue that came up for our consideration is addition towards provision for premium on redemption of debentures to book profit u/s 115JB of the Income Tax Act, 1961. The Id. AO has made addition to book profit towards premium on redemption of debentures on the ground that it is an unascertained liability. The Id. CIT(A) has by following the decision in case of Madras Industrial Investment Corporation Ltd vs. CIT (225 ITR 802), held that it is ascertained liability and further deductible u/s 37 of the Act. The Id. CIT(A) further held that it cannot be added back to book profit computed u/s 115JB(2)(c) of the Act. Facts remain unchanged. The revenue has failed to counter findings of facts recorded by Id. CIT(A) with any contrary decision. Therefore, we are of the considered

view that provision created for premium payable on redemption of debentures is ascertained liability and hence, it cannot be added to book profit u/s 115JB of the Income Tax Act, 1961. The CIT (A) has rightly deleted addition to book profit and hence, we are inclined to uphold findings of the Id. CIT(A) and reject ground taken by the revenue.

**45. In the Result appeal filed by the revenue for Asst. year 2004-05 is dismissed.**

**ITA. No. 1377/Mds/2008-Asst. Year 2005-06**

46. The first issue that came up for our consideration from ground no. 2 of Revenue appeal is deletion of addition made towards amount received from Escrow account for Rs. 17,11,42,382/-. The fact with regard to impugned dispute are that as per the MOU entered into between ITI Limited (old) and Templeton Asset

Management India Pvt. Ltd., ITI Limited (old) agreed to sell the shares of Kothari Pioneer AMC Ltd to Templeton Asset Management India Pvt. Ltd. and pursuant to the above mentioned MOU, ITI Limited (old) sold shares to Templeton Asset Management India Pvt. Ltd. by executing a share purchase agreement dt.23.07.2002 for a basic consideration Rs.104,07,05.229/-. Apart from the share purchase agreement, an escrow agreement was also entered into on 23.07.2002 among Templeton Asset Management India Pvt. Ltd., ITI (old) and the escrow agent. As per the escrow agreement, Templeton Asset Management India Pvt. Ltd. deposited a sum of Rs. 22,08,62,634/- in an escrow account out of sale consideration for meeting various expenses and liability as specified in the escrow agreement and balance amount after meeting above expenses and liability was to be paid to ITI Limited (old) at the end of specified period. Meanwhile, as per the slump sale

agreement, M/s Rajam Finance and Investment India Limited now renamed as ITI Limited (New) acquired the NBFC business of ITI Limited (old) with effect from 01.09.2002 whereby it acquired all the assets and liabilities of ITI Limited (old) related to that business. Consequently, the rights and the obligations attached to the escrow account in respect of the sale of shares in Kothari Pioneer AMC Ltd. were also transferred to the assessee. In June 2004, the assessee received Rs.18,92,97,693 i.e., Rs.17,11,42,382 as the balance of the principal retention amount kept with the escrow amount and Rs. 181,55,311 as interest thereon i.e. net of TDS etc. The gross interest income was Rs. 2,02,16,126/ and the appellant claimed that a sum of Rs. 20,60,815 was the amount of tax deducted by the bank on the said interest. This interest income pertains to the period from Sept. 2002 to June 2004. It has been the contention of the appellant that until the

escrow period was over and until all the expenses and potential liabilities were met from the escrow account it was not known whether and to what extent the amount would be received from the escrow agent. Thus, it has been contended by the appellant that till June 2004 right to receive the interest income had not crystalized, and hence, the appellant offered the entire interest income of Rs.2,02,16,102 to tax for assessment year 2005-06. Against this, the AO has assessed the above mentioned net interest income of Rs. 1,81,55,311 as income of the appellant for the assessment year 2003-04 under the head income from other sources. As regards, balance sale consideration of sale of shares and kept in escrow account, the AO has made addition on the ground that capital gain is taxable in the hands of the assessee for Asst. year 2005-06.

47. On first appeal, the Id. CIT(A), deleted addition made towards amount received from escrow account by holding that said income is taxable only in the hands of ITI Limited (old), now renamed as HFCL Infotel Limited(new), because the shares were held and sold by ITI Limited (old) before hiving off NBFC business to Rajam Finance and Investment India Limited, now renamed as ITI Limited (new). As regards, taxability of interest income is concerned, the Id. CIT (A) held that it has to be taxed as interest income. By offering the same to tax for assessment year 2005-06 the appellant has also confirmed the taxability of the same. But there is no logic in taxing the net interest income exclusive of TDS and the AO's action of taxing only the net and not the gross interest income is not correct. The interest income had accrued prior to June 2004 and in my opinion it was taxable in financial year 2002-03 on the amount accruing from Sept. 2002 to March, 2003. The

fact that it has been received subsequently because of the internal agreement as per the escrow account agreement is immaterial so far as the taxability of this interest income from Sept. 2002 to March, 2003 is concerned because in the escrow account interest has been accruing and it would have been taxable even if the entire amount was utilized to meet the ultimate liabilities. Since the income had accrued in that period from Sept 2002 to March 2003, the AO is directed to compute the gross interest income on the amount kept in escrow account and bring it to tax under income from other sources in Assessment Year 2003-2004. Since, the entire amount cannot be taxed in assessment year 2003-04, the remaining interest income will be taxed in the year to which it pertains.

48. We have heard both the parties, perused materials available on record and gone through orders of the

authorities below. As for as interest income is concerned, both parties have accepted findings of the Id. CIT(A) and hence, it is final. As regards amount received from Escrow account, the revenue has challenged findings of the Id. CIT(A) on the ground that it is taxable in the hands of the assessee, i.e. ITI Limited (new). We have carefully considered facts and arguments of both sides and find that full consideration received on account of sale of shares of Kothari Pioneer AMC Limited is taxed in the hands of ITI Limited (old) and hence, amount received from Escrow account being part of sale consideration which is already suffered tax in the hands of ITI Limited (old) cannot be once again taxed in the hands of the assessee, i.e. ITI Limited (New). The Id. CIT(A) after considering relevant facts has rightly deleted addition made by the AO. Hence, we are inclined to uphold findings of the Id. CIT(A) and reject grounds taken by the revenue.

49. The next issue that came up for our consideration is provision for premium on Redemption of Debentures. We find that an identical issue has been considered by us in assessee own case in ITA. No. 80/Mds/2008 for Asst. year 2003-04, where, we, by following the decision of Hon'ble Supreme Court decision in case of Madras Industrial Investment Corporation Ltd vs. CIT (225 ITR 802), held that premium payable on redemption of debentures has to be spread over the period and further, amount pertains to relevant period is deductible u/s 37 of the Income Tax Act, 1961, even though same is paid on redemption. The facts in the present case are identical to facts which we have considered in ITA. No. 80/Mds/2008 for Asst. year 2003-04. The reasons given by us in preceding paragraph no 40 of this order shall mutatis mutandis apply to this appeal as well. Therefore, for similar

reasons we are inclined to uphold findings of the Id. CIT(A) and reject ground taken by the revenue.

**50. In the Result appeal filed by the revenue for Asst. year 2005-06 is dismissed.**

**ITA. No. 1809/Chen/2014-Asst. Year 2009-10**

51. The first issue that came up for our consideration is disallowance u/s 14A r.w.r 8D of Income Tax Rules, 1962. The facts with regard to impugned dispute are that during the year, the assessee has earned dividend income of Rs. 16,21,894/-, but did not made any disallowances towards expenditure relatable to said exempt income. The AO has computed disallowances of Rs. 53,31,619/- u/s 14A, by invoking rule 8D of I.T. Rules, 1962, but restricted disallowances to Rs. 31,77,333/-, being total expenditure debited in to Profit and Loss Account.

52. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below. After considering arguments of both sides, we find that the AO has erred in computing disallowances of interest u/r 8D(2)(ii), because for the impugned year the assessee has not incurred any interest on loans, except bank charges which is not at all related to exempt income. Therefore, we are of the considered view that no disallowance could be made u/r 8D(2)(ii) and hence, we direct the AO to delete disallowances made towards interest u/r 8D(ii) of Income Tax Rules, 1962. As regards other expenses u/r 8D(2)(iii), it is a well settled principles of law that only those investments which earned exempt income needs to be considered for computing average value of investments, as held by ITAT, Special Bench Delhi, in the case of ACIT vs. Vireet Investments Pvt Ltd.(165 ITD 27)(Del). We, are therefore of the opinion that the

AO is erred in considering those investments which does not earned any exempt income for the year. Hence, we direct the AO to consider only those investments which earned exempt income for the year for computing disallowances of other expenses @0.5% of average value of investments.

53. The next issue that came up for our consideration is provision for premium on Redemption of Debentures. We find that an identical issue has been considered by us in assessee own case in ITA. No. 80/Mds/2008 for Asst. year 2003-04, where, we, by following the decision of Hon'ble Supreme Court decision in case of Madras Industrial Investment Corporation Ltd vs. CIT (225 ITR 802), held that premium payable on redemption of debentures has to be spread over the period and further, amount pertains to relevant period is deductible u/s 37 of the Income Tax Act, 1961, even

though same is paid on redemption. The facts in the present case are identical to facts which we have considered in ITA. No. 80/Mds/2008 for Asst. year 2003-04. The reasons given by us in preceding paragraph no 40 of this order shall mutatis mutandis apply to this appeal as well. Therefore, for similar reasons we set aside findings of the Id. CIT(A) and direct the AO to delete addition made towards disallowance of provision made for premium payable on redemption of debentures.

**54. In the result appeal filed by the assessee for Asst. Year 2009-10 is partly allowed.**

**55. As a result appeals filed by the revenue for Asst. years 2003-04, 2004-05 and 2005-06 are dismissed and appeal filed by the assessee for Asst. year 2009-10 is partly allowed.**

ITA Nos. 80, 728 & 1377/Chny/2008,  
498/Chd/2007 & 1809/Chny/2014

**Order pronounced in the open court on 17<sup>th</sup> May, 2021**

Sd/-  
(महावीर सिंह)  
(Mahavir Singh)  
उपाध्यक्ष/ Vice-President  
चेन्नई/Chennai,

Sd/-  
(जी.मंजुनाथ)  
(G.Manjunatha)  
लेखा सदस्य / Accountant Member

दिनांक/Dated: 17<sup>th</sup> May, 2021

DS

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. Appellant
2. Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF.