

ITA No. 770/KOL/2010 (AY 2006-07)-R.K.B.K. Fiscal Services Pvt. Ltd.
ITA No. 771/KOL/2010 (AY 2006-07)-Shri Suresh Kumar Neotia
ITA No. 772/KOL/2010 (AY 2006-07)-M/s. Likhani Commercial Co. Ltd.
ITA No. 773/KOL/2010 (AY 2006-07)-M/s. Govind Commercial Co. Ltd.
ITA No. 774/KOL/2010 (AY 2006-07)-Smt. Bimala Devi Poddar

**IN THE INCOME TAX APPELLATE TRIBUNAL,
'C' BENCH, KOLKATA**

**Before Shri Rajpal Yadav, Vice-President (KZ)
&
Shri Girish Agrawal, Accountant Member**

**I.T.A. No. 770/KOL/2010
Assessment Year: 2006-2007**

***Assistant Commissioner of Income Tax,.....Appellant
Circle-7, Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square, Kolkata-69
-Vs.-***

***M/s.R.K.B.K. Fiscal Services Pvt. Limited,.Respondent
[Now known as Ambuja Neotia Holdings P. Ltd.]
Block-4B, 3rd Floor,
Ecospace Business Park,
Premises No.11F/11, Action Area-II,
New Town, Kolkata-700160
[PAN:AABCR5623E]***

&

**I.T.A. No. 771/KOL/2010
Assessment Year: 2006-2007**

***Deputy Commissioner of Income Tax,.....Appellant
Circle-7(1), Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square, Kolkata-69
-Vs.-***

***Smt. Gayatri Neotia,.....Respondent
(Legal Heir of Late Suresh Kumar Neotia)
7/2, Queen's Park, Ballygunge, Kolkata-19
[PAN:ABKPN2315E]***

&

**I.T.A. No. 772/KOL/2010
Assessment Year: 2006-2007**

ITA No. 770/KOL/2010 (AY 2006-07)-R.K.B.K. Fiscal Services Pvt. Ltd.
ITA No. 771/KOL/2010 (AY 2006-07)-Shri Suresh Kumar Neotia
ITA No. 772/KOL/2010 (AY 2006-07)-M/s. Likhmi Commercial Co. Ltd.
ITA No. 773/KOL/2010 (AY 2006-07)-M/s. Govind Commercial Co. Ltd.
ITA No. 774/KOL/2010 (AY 2006-07)-Smt. Bimala Devi Poddar

Assistant Commissioner of Income Tax,.....Appellant
Circle-7, Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square, Kolkata-69

-Vs.-

M/s. Likhmi Commercial Co. Ltd.,.....Respondent
(Amalgamated into Choicest Enterprises Ltd.)
Vishwakarma, 86C, Topsia Road (S),
Kolkata-700046
[PAN:AABCC5005F]

&

I.T.A. No. 773/KOL/2010
Assessment Year: 2006-2007

Assistant Commissioner of Income Tax,.....Appellant
Circle-7, Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square, Kolkata-69

-Vs.-

M/s. Govind Commercial Co. Ltd.,.....Respondent
216, AJC Bose Road, 3rd Floor, Kolkata-17
[PAN:AABCG1643D]

&

I.T.A. No. 774/KOL/2010
Assessment Year: 2006-2007

Assistant Commissioner of Income Tax,.....Appellant
Circle-7, Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square, Kolkata-69

-Vs.-

Smt . Bimala Devi Poddar,.....Respondent
7/2, Queens Park, Ballygunge, Kolkata-19
[PAN:AEYPP3823Q]

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Appearances by:

*Shri N.S. Saini, A.R. and Smt. Priyanka Salarpuria, A.R.
appeared on behalf of the assesseees
Shri Biswanath Das, CIT, appeared on behalf of the
Revenue*

Date of concluding the hearing : January 17, 2023

Date of pronouncing the order : January 30, 2023

O R D E R

Per Rajpal Yadav, Vice-President (KZ):-

The present five appeals are directed at the instance of Revenue against the orders of Id. Commissioner of Income Tax (Appeals) dated 03.02.2010, 01.02.2010, 02.02.2010, 01.02.2010 and 03.02.2010 passed on the respective appeals of the respondents in Assessment Year 2006-07.

2. These appeals were decided by the Tribunal vide order dated 03.02.2011. Dissatisfied with the order, assesseees have filed Miscellaneous Applications bearing Nos. 42, 43, 44, 45 & 46/KOL/2011. In these Applications, it was contended by the assesseees that while dealing with the issue regarding taxability of capital gain on sale of shares, Tribunal has observed that in the share purchase agreement, a provision has been made that Rs.15/- per share would be allocated towards non-compete fee and, therefore, this non-compete fee was not required to be assessed under the head "long-term capital gain", rather it is to be assessed separately as a business income. For this finding, it

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was contended that it amounts to enhancement of the income and this has been recorded without giving any specific notice to the assessee. The ITAT has dealt with as decided in these Miscellaneous Applications vide its order dated 28.03.2012. The Tribunal has observed that as far as alleged arguments of the assessee that action at the end of the Tribunal for assessing Rs.15/- per share towards non-compete fee amounts to enhancement of tax liability is concerned, the Tribunal has not committed any apparent error. Thus the ITAT in M.A. order rejected this argument. Similarly the ITAT found that non-grant of specific opportunity on this aspect amounts to an apparent error, therefore, partly Tribunal has restored the limited issue for re-adjudication. The finding of the Tribunal on the Miscellaneous Applications of the assessee deserves to be taken note, which reads as under:-

"5. After hearing the rival submissions and on careful perusal of materials available on record, we consider it fit to abstract the relevant portion of the Tribunal order which is disputed by the ld. Counsel for assessee. While disposing of five appeals the Tribunal has discussed the facts upto paragraph 15 from page nos. 1 to 37. At para 16 the Tribunal has summarized the ld. DR's submissions. After they have summarized the written submissions filed by the ld. DR dated 18.06.2010, 29.06.2010 and 15.09.2010. The relevant portion of the dispute is as under :

"IX Non compete fee of Rs.15 per share, which forms part of the full value of consideration of Rs.105/- per share as per said agreement dated 28-01-06, is also taxable as per provision of [section 28\(va\)](#) inserted by the [Finance Act'02](#) w.e.f. 01-04- 2003."

Again at para 17 the Tribunal has observed that

17. It was, therefore, contended that the order of the AO be upheld." At para 18 the Tribunal has summarized the submissions made by the ld. Counsel for assessee. At para 20 the Bench requested the respondent- assessee to furnish the following documents

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a. Evidence of Holicim complying with Regulations-7 of SEBI Regulations 1997.

b. Copy of D-mat a/c of the assessee portraying transfer of impugned shares.

c. -Copy of Exhibit-B of agreement dated 28-01-06 being power of attorney and Board's Resolutions d. Annual reports of the company ending in 2005 and 2006. e. Memorandum of Article of Association of M/s. GACL f. Composition of Board of Directors prior and subsequent to share sale agreement.

20.1 However, the assessee has shown his inability to furnish the following documents:

a.. Copy of D-Mat account b. Power of Attorney & Board's Resolutions being Exhibit-B of agreement dated 28.01.06.

It has also failed to furnish any evidence of Holicim complying with Regulations -7 of SEBI Regulations 1997.

.After taking into consideration of the above, the Tribunal has given its findings at para 22.1. which is as under :-

"22.1 At the outset we would like to clarify that even though the revenue has taken various grounds of appeal, the subject matter of appeal before the tribunal is the transactions entered into by the parties as per share purchase agreement dated 28- 01-06. It is very unusual that neither the AO nor the ld.CIT(A) has taken note of [article 5](#) of the said agreement, where has been clearly stated that Rs. 15/- per share is being paid per sale share towards Non-Compete Undertaking, which is included in the sale consideration payable to the sellers in terms of [article 2.2](#) of the agreement. In such peculiar circumstances, we will give our factual findings on the issue of capital gains or any other income arising out of the transactions entered into by the concerned parties as per share purchase agreement dated 28-01-06. Thus, the contention of the assessee that there is no dispute that Controlling Interest was transferred together with shares is not accepted by us. We will give our findings on this basis."

Again at para 22.5.the Tribunal supported the action of the action proposed to take in para 22.1. by stating at para 22.5. which is as under :-

"22.5. It is a well settled principle of law that while analyzing a document what is expressly written therein and the surrounding circumstances are required to be taken

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into consideration. Nature and character of transactions entered into through such a document could not be determined by the label, which the parties may ascribe to the transaction. As such the Hon'ble Bombay High Court in their judgement in the case of Vodaphone International (supra) in para 140 have analysed the above position of law.

After discussing the various clauses of this sale agreement this Tribunal has finally concluded at para 22.12. which is as under :-

"22.12. From the recital in the said agreement, relevant portions of which have been reproduced by us hereinabove, it is crystal clear that the sale of share was completed on 28.01.06. The object of sale was the share and full value of share sale consideration was Rs.90/- per share. Rs.15/- per share was paid by the purchaser on account of non-compete undertaking. Thus, total sale consideration of Rs.105/- per share consisted of above two items. It did not relate to transfer of any controlling interest as claimed by the assessee. As such what the assessee is claiming to be 'controlling interest' is nothing, but fulfillment of non-compete undertaking. We note that even when the ld. AR for the assessee was asked to address the Bench on the issue of 'non compete undertaking' as enumerated in the said agreement dated 28-01- 2006, the ld. AR for the assessee did not address the bench on the issue. We have also noted that the agreement dt. 28.01.2006 have not been amended in any way as stipulated in the said agreement. In the facts and circumstances of the case, we are of the considered opinion that the amount received by the assessee for the said non- compete undertaking is squarely covered by [section 28\(va\)](#) of the Act. It has nothing to do with transfer of controlling interest. We, therefore, hold that in terms of said agreement Rs.15/- per share is assessable as income under the head 'business' as per provision of [section 28\(va\)](#) of the Act."

And again at para 22.18 the tribunal has expressed its opinion on Rs.15/- per share which is as under :

"b. Rs.15/- per share is to be assessed as income under the head 'business' as per [section 28\(va\)](#)."

Similarly, at para 25 this Tribunal has observed as under :-

"b. Rs.15/- per share is to be assessed as income under the head 'business' as per [section 28\(va\)](#)."

5.1 After careful perusal of the written submissions made by both the parties and on perusal of the above observations made

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by the Tribunal, the contention of the assessee that Tribunal unilaterally could not enlarge the scope of the appeal is not accepted. While dealing this issue this Tribunal itself has observed at para 22.1. which is as under :-

"22.1 At the outset we would like to clarify that even though the revenue has taken various grounds of appeal, the subject matter of appeal before the tribunal is the transactions entered into by the parties as per share purchase agreement dated 28- 01-06. It is very unusual that neither the AO nor the ld.CIT(A) has taken note of [article 5](#) of the said agreement, where has been clearly stated that Rs. 15/- per share is being paid per sale share towards Non-Compete Undertaking, which is included in the sale consideration payable to the sellers in terms of [article 2.2](#) of the agreement. In such peculiar circumstances, we will give our factual findings on the issue of capital gains or any other income arising out of the transactions entered into by the concerned parties as per share purchase agreement dated 28-01-06. Thus, the contention of the assessee that there is no dispute that Controlling Interest was transferred together with shares is not accepted by us. We will give our findings on this basis."

We find that there is no mistake apparent from record as pointed out by the ld. Counsel for assessee. In this regard the Tribunal itself has clarified its position at para 22.5. which was abstracted in the preceding paragraphs. 5.2. In addition to the above, it is observed that in the case of [Indian Management Advisors and Leasing \(P\) Ltd. vs Commissioner of Income Tax](#) as reported in 289 ITR 179 (Del) the Hon'ble Delhi High Court while dealing with the powers of the Tribunal has observed as under :-

"Deviation from findings of lower authorities vis-a-vis nature of document--Where the Tribunal finds that some document is crucial to allow or refuse the claim made by the assessee, it cannot ignore the real nature of the document and it is not barred in coming to a different conclusion than the AO and the CIT(A) about the true meaning and nature of the document--Assessee relying upon lease agreements entered into by it with the lessees to claim depreciation on leased assets--AO and the CIT(A) having not looked into the lease agreements and considered the claim of the assessee only on the face of it, no fault can be found with the Tribunal for analysing the lease agreements by looking into its different clauses and finding its true import."

5.3. As regarding the second contention i.e. enhancement of tax liability we are of the view that the Tribunal being the last fact

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finding body and we are of the view that in deciding the issue of non compete fee of Rs.15 the Tribunal has not exceeded its jurisdiction as indicated in para 5.1 and 5.2. then the tax liability is a consequential effect and has not come as a mistake apparent from record. In this connection we rely on the decision of Hon'ble Himachal Pradesh High Court in the case of [CIT vs H.P.State Forest Corporation Ltd. \(2010\) 230 CTR 284](#) wherein the Hon'ble Himachal Pradesh High Court while commenting upon the powers of the Tribunal has observed that "Direction to restrict income while setting aside assessment--While remanding the matter to do assessment on the basis of audited accounts, Tribunal, however, had no jurisdiction, whatsoever, to have further given a direction that the income of the assessee could not be assessed at less than the amount of income returned by it in the returns which were treated to be "non est" by the AO--Further, the Tribunal could not have given a direction, while disposing of the rectification applications, that the income or fresh assessment should not be assessed at an amount above the income assessed under s. 144--AO shall assess the income afresh without being bound by any lower or upper limit as laid down by the Tribunal"

5.4. Keeping in view of the above ratio laid down by Hon'ble Himachal Pradesh High Court and the observations made by this Tribunal at paras 5.1. and 5.2. the second contention of the assessee is not acceptable and cannot consider the same as a mistake apparent from record.

5.5 .However, as regarding the third contention that the assessee has not been given proper opportunity of being heard, that the Tribunal has not exceeded its jurisdiction. However, we further observe that the Tribunal has given its opinion on non compete fee of Rs.15/- per share without giving proper opportunity of being heard to assessee which is apparent from the above recording of the findings at para 20.1. and from the order sheet wherein the first hearing of this case before the Bench who passed the order was on 10.01.2011. The same has been kept as part heard and adjourned to 11.01.2011 and again the same has been adjourned on 12.01.2011. That means they have completed the hearing of the case within three days and nowhere it was recorded that the assessee has asked to address on non compete fee. Even at para no.20 where the Bench requested the respondent-assessee to furnish the relevant documents the same has not been appearing in the tribunal order. Regarding the non-compete fee except the observations made by the Tribunal that the ld. AR of the assessee was asked by the Bench on the issue of non-compete fee of Rs.15/- as narrated in the said agreement dated 28.01.2006 which was recorded at para 22.12. of the tribunal order. Keeping in view of the above facts, we are of the view that this Tribunal while deciding the taxability of non compete fee has not given sufficient opportunity of being heard to the assessee. In our considered view while deciding the issue afresh which was neither before the AO nor before the ld.

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CIT(A) the Tribunal should have given sufficient opportunity of being heard to the assessee. At this juncture we would like to mention the decision of Hon'ble Supreme Court's observations made in the case of Honda Siel Power Products Ltd. reported in 295 ITR 466 which reads as under :-

"The purpose behind enactment of Sec. 254(2) is based on the fundamental principle that no party appearing before the Tribunal should suffer on account of any mistake committed by the Tribunal. This fundamental principle has nothing to do with the inherent power of the Tribunal. One of the important reasons for giving the power of rectification to the Tribunal is to see that no prejudice is caused to either of the parties appearing before it by its decision based on a mistake apparent from the record. When prejudice results from an order attributable to the Tribunal's mistake, error or omission then it is the duty of the Tribunal to set it right. Atonement to the wrong party by the Court or the Tribunal for the wrong committed by it has nothing to do with the concept of inherent power to review."

5.6. Respectfully following the above proposition of the Hon'ble Supreme Court the Hon'ble Delhi High Court in the case of Lachman Dass Bhatia Hingwala (P) Ltd. vs ACIT (2011) 330 ITR (Del) 243 has observed that "Fundamental principle is that no party appearing before the Tribunal should suffer on account of any mistake committed by the Tribunal and no prejudice is caused to either of the parties before the Tribunal which is attributable to the Tribunal's mistake, omission or commission and if the same error is a manifest error, then the Tribunal would be justified to recall its order-- While exercising the power of rectification under s. 254(2), Tribunal can recall its order in entirety if it is satisfied that prejudice has resulted to the party which is attributable to the Tribunal's mistake, error or omission and which error is a manifest error and it has nothing to do with the doctrine or concept of inherent power of review."

5.7. Keeping in view of the above propositions of the Hon'ble Apex Court and Hon'ble Delhi High Court and the facts of the present case, we are of the view that in this case while deciding the non-compete fee of Rs.15/- per share the Tribunal has not given sufficient opportunity of being heard to the assessee. In our considered view this will tantamount to a mistake apparent from record. Therefore, in the interest of justice, we would like to keep in abeyance the following observations made by the Tribunal on account of non compete fee till the disposal of the same afresh by the Tribunal.

5.8. In para 22.12
".....
....."

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.....
..... We, therefore, hold that in terms of said agreement Rs.15/-
per share is assessable as income under the head 'business' as
per provision of [section 28\(va\)](#) of the Act."

5.9. At para 22.18 (b)

".....
.....
..... b. Rs.15/- per share is to be assessed as income under the
head 'business' as per [section 28\(va\)](#)"

5.10. At para 25(b)

".....
.....
.....

b. Rs.15/- per share is to be assessed as income under the head
'business' as per [section 28\(va\)](#)"

5.11. Since we have kept in abeyance the above observations of
the Tribunal for want of fresh hearing on non compete fee of
Rs.15/- per share we direct the Registry to fix the case in due
course in order to dispose of the issue in respect of non-compete
fee of Rs.15/- per share.

6. In the result the Miscellaneous applications of all the assessee
are allowed in part as indicated above.

Order pronounced in the court on 28.03.2012".

3. The facts on all vital points are common in all these
appeals, therefore, for the facility of reference, we are taking up
the facts from the first appeal i.e. **ITA No. 770/KOL/2010** (M/s.
R.K.B.K. Fiscal Services Pvt. Limited, (now known as Ambuja
Neotia Holdings Pvt. Limited).

4. The assessee has filed its return of income on 21.11.2006 disclosing total income of Rs.65,98,29,430/-. On scrutiny of the accounts, it revealed to the ld. Assessing Officer that assessee has disclosed long-term capital gain on sale of shares of Gujarat Ambuja Cement Limited. It has sold its shares to Holcim pursuant to an agreement between them at a price of Rs.105/- per share in an off-market transaction. The assessee had contended that out of the total value received per share, Rs.70.20/- represents the value of the share itself and rest of the amount, i.e. Rs.30.80 is a consideration received for parting with the managerial control. The ld. Assessing Officer has noted the details of the shares held by this concern and the alleged long-term capital gain. Such details read as under:-

Name	No. of shares	Rate of sale	Total consideration	Total cost	LTCG
GACL	8976925	Rs.105/-	Rs.94,25,77,125/-	Rs.2,04,92,874/-	Rs.92,20,84,251/-

5. The ld. Assessing Officer after going through the submissions made by the assessee in this connection did not accept the claim made by the assessee for segregation of the sale price and allocating it @ Rs.30.80 per share towards managerial control. He assessed the whole consideration as a long-term capital gain.

6. Dissatisfied with the assessment order, the assessee carried the matter in appeal. The ld. CIT(Appeals) accepted the contention of the assessee and held that long-term capital gain

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would be computed only on the portion of Rs.74.20 per share and rest of the contention i.e. Rs.30.80 would represent the managerial control relinquished by the assessee. In other words, this amount was treated as a capital receipt and not taxable in the hands of assessee.

7. Dissatisfied with the order of the ld. CIT(Appeals), Revenue has come up in appeal before the Tribunal. The Tribunal after long deliberation has concluded as under:-

(a) "The full value of consideration for transfer of impugned share is Rs.90/- per share for the purpose of calculation of capital gains;

(b) Rs.15/- per share is to be assessed as income under the head "business" as per section 28(va)".

The assessee filed Miscellaneous Applications, which have been partly allowed by the Tribunal in the finding extracted supra.

8. Thus in the present round of litigation, we are only called upon to decide whether this Rs.15/- per share is to be assessed as a business income or long-term capital gain. Ld. Counsel for the assessee on the strength of Hon'ble Gujarat High Court's decision in the case of Fidelity Shares And Securities Limited [390 ITR page 267] and Hon'ble Supreme Court's decision in the

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case of Mcorp Global P. Limited [390 ITR page 434] contended that neither the Assessing Officer nor the CIT(Appeals) has bifurcated this Rs.15/- and assessed it and treated it as business income, therefore, by changing the character of the income, Tribunal has enhanced the tax liability and the Tribunal does not have such powers.

9. We have duly considered this contention of the ld. Counsel for the assesseees but it is to be appreciated that in the Miscellaneous Applications, Tribunal did not find merit in this contention and held that it is not an apparent error. Therefore, this aspect has not been restored for re-consideration. Hence it is out of our purview to record any finding on the issue of powers of the Tribunal on the alleged enhancement of income. Specifically we would like to put emphasis on the finding of the Tribunal available in paragraph no. 5.1 and 5.3 of the Miscellaneous Applications order extracted supra.

10. The ld. Counsel for the assesseees in his next fold of argument contended that at the most value of share at Rs.105/- is to be taken for computing the long-term capital gain instead of business income. In this connection, we have directed the ld. Counsel for the assesseees to place on record copy of the share purchase agreement dated 28.01.2006 entered by these assesseees with different entities for sale of shares of Gujarat

Ambuja Cement Limited. A value of Rs.15/- per share is allocated towards Non-Compete Undertaking. This clause is available on page 17 of the agreement and it reads as under:-

“5. Non-Compete Undertaking

In consideration of RMIL and each of the Other Sellers jointly and severally undertaking, for a period of three years after the Closing Date, not to enter or engage, directly or indirectly, into any business activity in India or from or out of India that is in the field of manufacturing, marketing and trading of cementitious material clinker, concrete, concrete products, aggregates, mortar and asphalt or related activities and services (each, a Restricted business) without the prior written consent of Holcim Mauritius acting reasonably, Holcim Mauritius shall pay to RMIL and the Other Sellers an amount of Rs.15/- (Rupees Fifteen) per Sale Share, aggregating to Rs.300,00,00,000 (Rupees Three Hundred Crores), which amount constitutes part of the Sale Consideration payable to the Sellers in terms of Article 2.2 (the Non-Compete Component).

For purposes of this art. 5, RMIL and/or the Other Sellers shall not be deemed to engage in the Restricted Business only by virtue of the fact that

(a) any of them invests, directly or indirectly, up to (but not more than) 10% of its net worth in, or that RMIL and/or the Other Sellers collectively acquire, directly or indirectly, up to (but no more than) 10% of the shares or ownership interests in, any company or entity or other business association engaged in whole or in part in a Restricted Business other than GACL;

(b) any of the Other Sellers (except for those Other Sellers who are currently serving or have in the past been serving on the GACL board of directors or executive management) assume a position as non-executive director, consultant, or adviser of a Restricted Business. It is understood and agreed that (i) none of the Other Sellers shall assume any executive directorship or employment position in a Restricted Business and (ii) in addition to the foregoing, those Other Sellers who are currently serving or have in the past been serving on the GACL board of directors or executive management shall not assume a position as non-executive director, consultant, or adviser of a Restricted Business. It is understood and agreed that nothing in this Article 5 shall restrict any of the Sellers from assuming any directorship (executive or otherwise) or employment position in,

ITA No. 770/KOL/2010 (AY 2006-07)-R.K.B.K. Fiscal Services Pvt. Ltd.
ITA No. 771/KOL/2010 (AY 2006-07)-Shri Suresh Kumar Neotia
ITA No. 772/KOL/2010 (AY 2006-07)-M/s. Likhmi Commercial Co. Ltd.
ITA No. 773/KOL/2010 (AY 2006-07)-M/s. Govind Commercial Co. Ltd.
ITA No. 774/KOL/2010 (AY 2006-07)-Smt. Bimala Devi Poddar

or entering into any consultancy or advisory arrangement with, Ambuja Cement India Limited. The Associated Cement Companies Limited, Ambuja Cement Eastern Limited or any other entity in India controlled by Holcim Mauritius or its Affiliates.

The Non-Compete Component shall be paid to the Sellers in the proportion set out in Annex 2.2 hereto, and shall be paid as set out in art. 2.4.2”.

11. We also deem it appropriate to take note of section 28(va) of the Income Tax Act. It reads as under:-

“Profits and gains of business or profession:

28. The following income shall be chargeable to income tax under the head “Profits and gains of business or profession”,-

(i) the profits and gains of any business or profession which was carried on by the assessee at any time during the previous year;

x x x x x x x x x

(va) any sum, whether received or receivable, in cash or kind, under an agreement for-

(a) not carrying out any activity in relation to any business or profession; or

(b) not sharing any know-how, patent, copyright, trademark, licence, franchise or any other business or commercial right of similar nature or information or technique likely to assist in the manufacture or processing of goods or provision for services;

Provided that sub-clause (a) shall not apply to-

(i) any sum, whether received or receivable, in cash or kind, on account of transfer of the right to manufacture, produce or process any article or thing or right to carry on any business or profession, which is chargeable under the head ‘Capital Gains;’

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- (ii) *any sum received as compensation, from the multilateral fund of the Montreal Protocol on substances that Deplete the Ozone layer under the United Nations Environment Programme, in accordance with the terms of agreement entered into with the Government of India.*

Explanation- For the purposes of this clause,-

- (i) *“agreement” includes any arrangement or understanding or action in concert,-*

(A) Whether or not such arrangement, understanding or action is formal or in writing; or

(B) Whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;

- (ii) *“service” means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial nature such as accounting, banking, communication, conveying of news or information, advertising , entertainment, amusement, education, financing, insurance, chit funds, real estate, construction, transport, storage, processing, supply of electrical or other energy, boarding and lodging;*

12. The Id. Counsel for the assessee was unable to give any explanation as to why this sum of Rs.15/- per share is not taxable as a business income? How it can be assessed under the head “Capital Gain”? It is allocation of an amount for future restriction on the seller for doing activity in the same line of business. The Income Tax Act has provided a specific treatment under section 28(va) for assessing such a receipt under the head “profits and gains of business or profession”. It is also observed that Tribunal has only assigned the heads of income from the already taxable amount under the head “Capital Gain”.

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Therefore, we do not find any force in the alternative contention of the Id. Counsel for the assesseees that this should be treated as a part of total sale consideration received by these assesseees i.e. Rs.105/- per share and it is to be computed as a long-term capital gain. We do not find any merit in the contention of the Id. Counsel for the assesseees. It is an item, which has to be assessed under the head "profits and gains of business or profession". Therefore, the contentions of the assesseees are rejected on the issue for which Tribunal has restored for re-consideration.

13. In the result, the appeals of the Revenue are treated as allowed for statistical purposes.

Order pronounced in the open Court on 30 January, 2023.

Sd/-
(Girish Agrawal)
Accountant Member
Kolkata, the 30th day of January, 2023

Sd/-
(Rajpal Yadav)
Vice-President (KZ)

*Copies to :(1) Assistant Commissioner of Income Tax,
Circle-7, Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square, Kolkata-69*

*(2) Deputy Commissioner of Income Tax,
Circle-7(1), Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square, Kolkata-69*

(3) M/s.R.K.B.K. Fiscal Services Pvt. Limited,

ITA No. 770/KOL/2010 (AY 2006-07)-R.K.B.K. Fiscal Services Pvt. Ltd.
ITA No. 771/KOL/2010 (AY 2006-07)-Shri Suresh Kumar Neotia
ITA No. 772/KOL/2010 (AY 2006-07)-M/s. Likhmi Commercial Co. Ltd.
ITA No. 773/KOL/2010 (AY 2006-07)-M/s. Govind Commercial Co. Ltd.
ITA No. 774/KOL/2010 (AY 2006-07)-Smt. Bimala Devi Poddar

[Now known as Ambuja Neotia Holdings P. Ltd.]
Block-4B, 3rd Floor,
Ecospace Business Park,
Premises No.11F/11, Action Area-II,
New Town, Kolkata-700160

(4) *Smt. Gayatri Neotia,*
(Legal Heir of Late Suresh Kumar Neotia)
7/2, Queen's Park, Ballygunge, Kolkata-19

(5) *M/s. Likhmi Commercial Co. Ltd.,*
(Amalgamated into Choicest Enterprises Ltd.)
Vishwakarma, 86C, Topsia Road (S),
Kolkata-700046

(6) *M/s. Govind Commercial Co. Ltd.,*
216, AJC Bose Road, 3rd Floor, Kolkata-17

(7) *Smt . Bimala Devi Poddar,*
7/2, Queens Park, Ballygunge, Kolkata-19

(8) *Commissioner of Income Tax (Appeals)-8,*
Kolkata;

(9) *Commissioner of Income Tax- ;*

(10) *The Departmental Representative*

(11) *Guard File*

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By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata

Laha/Sr. P.S.