IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D", DELHI

BEFORE SHRI MAHAVIR SINGH, VICE PRESDIENT (THIRD MEMBER),
SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER,
SHRI N. K. CHOUDHRY, JUDICIAL MEMBER,
SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SMT. RENU JAUHRI, ACCOUNTANT MEMBER

ITA NO. 764/DEL/2014 (A.Y.2009-10)

Huntsman Investment [Netherlands] BV
P.O. Box No. 1021, 3180
AA Rozengurg, Netherlands
PAN: AACCH 0845 D .....**Appellant**

Vs.

The A.D.I.T,
International Taxation
Circle- 1(2), New Delhi .....**Respondent**

Appellant by : **Sh. Himanshu Sinha, Adv.,**
Sh. Utkarsh Mittal, Adv. [VC],
Sh. Yash Varmani, Adv. [VC]
Sh. Kshitiz Saxena, Adv.

Respondent by: **Shri Kalrav Mehrotra, Adv.**

Date of hearing : **09/03/2026**
Date of pronouncement : **25/03/2026**

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order dated 30.12.2013 framed u/s 143(3) r.w.s 144C(13) of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'].

2. The representatives of both the sides were heard at length, the case records carefully perused and relevant documentary evidences brought on record duly considered in light of Rule 18(6) of the ITAT Rules.

3. Briefly stated, the facts of the case are that the assessee is a company incorporated in Netherlands and is the holding company of Huntsman International [India] Private Limited [HIIPL]. HIIPL has two business units (a) Polyurethane products and (b) textiles effects. The assessee holds 99.98% of HIIPL.

4. In Assessment Year 2009–10, the assessee sold the shares held by it in HIIPL pursuant to an offer of buy-back made by HIIPL. Under the scheme of buy-back, the assessee sold 2,14,00,000 equity shares, which is 24%, @ Rs. 23.10 per share for a consideration of Rs. 49,43,40,000/–. The capital gains arising on sale of shares was offered to tax by the assessee in its return of income.

5. During the assessment proceedings, the assessee referred this international transaction to the Transfer Pricing Officer [TPO] for determination of Arm's Length Price [ALP]. The TPO determined the ALP of each share at Rs. 80.77 and proposed an upward adjustment of Rs.1,23,41,38,000/–.

6. The assessee raised objections before the DRP. The assessee also raised an additional ground of objection which reads as under:

> "*It is submitted in this regard that there has been an error on the part of the assessee in offering the same amount to capital gains tax on the following two accounts (without prejudice to each other):*

The buy-back of shares by HIPL qualifies to be a tax-neutral transaction under Section 47 of the Act. Under Section 47(iv), any transfer of an asset from a parent company to its subsidiary is not treated as transfer. **Since** *the equity shares have been purchased by HIIPL (a Subsidiary) from Its parent (the assessee), the requirements of Section 47(iv) are fulfilled.*

(b) *Under the India-Netherlands Double Tax Avoidance Agreement, Article 13(5), capital gain if any arising from a buy-back of share transaction can only be taxed in the Netherlands and not India. The assessee submits that under Section 90(2) of the Act would apply only to the extent it is more beneficial to the assessee. In this case, the DTAA provides for a more beneficial treatment and the Act would not apply."*

7. The DRP, in its direction, rejected the contention raised by the assessee including the additional ground of objection.

8. Before us, the learned counsel for the assessee vehemently stated that capital gains arising from buy-back of HIIPL shares cannot be taxed in India under Article 13(5) of India-Netherlands DTAA.

9. It is the say of the ld. counsel for the assessee that the DRP has grossly erred in not appreciating that buy-back of its own shares, by a company, is included within the ambit of Scheme of Amalgamation or demerger or arrangement under the Companies Act, 1956. The ld. counsel for the assessee vehemently objected to the observations of the DRP that the approval of the Hon'ble High Court was not taken for buy-back of shares and, therefore, it cannot be covered under the expression “corporate organization, reorganization, amalgamation or division or similar transactions”.

10. In support of his contention, the ld. counsel drew our attention towards Nigeria-Netherlands DTAA and to buttress, placed strong reliance on the United Nations Vienna Convention on the Law of Treaties and pointed out that the same has been accepted by the Hon'ble Delhi High Court in the case of New Skies Satellite BV 238 Taxman 577 and in the case of Ram Jethmalani Vs. Union of India in 399 ITR 107.

11. The ld. counsel further pointed out that the DRP has relied upon the AAR Ruling in the case of Perfetti Van Melle 342 ITR 200 which has been overruled by the Hon'ble Delhi High Court in 52 Taxmann.com 161.

12. Before proceeding further, let us consider Article 13 of India-Netherlands DTAA which reads as under:

> *"1. Gains derived by a resident of one of the States from the alienation of immovable property referred to in Article 6 and situated in the other State may be taxed in that other State.*
>
> *2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of one of the States has in the other State or of movable property pertaining to a fixed base available to a resident of one of the States in the other State for (the purpose of performing independent personal services, including such gains from the alienation of such permanent establishment (alone or with the whole enterprise) or of such fixed base, may be taxed in that other State.*
>
> *3. Gains from the alienation of ships or aircraft operated in international traffic or movable property pertaining to the operation*

of such ships or aircraft, shall be taxable only in the State in which the place of effective management of the enterprise is situated. For the purposes of this paragraph. the provisions of paragraph 3 of Article 8A shall apply.

4. Gains derived by a resident of one of the States from the alienation of shares (other than shares quoted on an approved stock exchange) forming part of a substantial interest in the capital stock of a company which is a resident of the other State, the value of which shares is derived principally from immovable property situated in that other State other than property in which the business of the company was carried on, may be taxed in that other State. A substantial interest exists when the resident owns 25 per cent or more of the shares of the capital stock of a company.

5. Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3 and 4 shall be taxable only in the State of which the alienator is a resident.

However, gains from the alienation of shares issued by a company resident in the other State which shares form part of at least a 10 per cent interest in the capital stock of that company, may be taxed in that other State if the alienation takes place to a resident of that other State. However, such gains shall remain taxable only in the State of which the alienator is a resident if such gains are realised in the course of a corporate organisation, reorganization, amalgamation, division or similar transaction, and the buyer or the seller owns at least 10 per cent of the capital of the other.

6 The provisions of paragraph 3 shall not affect the right of each of the States to levy according to its own law at tax on gains from the alienation of shares or 'jouissance' rights in a company, the capita! of which is wholly or partly divided into shares and which under the laws of that State is a resident of that State. Derived by an individual who is a resident of the other state and has been a resident of the first

mentioned state in the country of the last five years preceding the alienation of the shares or jouissance rights."

13. A perusal of the afore-stated Article 13 shows that point No 5 is the "Cause of Concern" in the present appeal. It has been specifically mentioned therein that such gain shall remain taxable only in the state of which the alienator is a resident if such gains are realized in the course of corporate organization, reorganization, amalgamation, division or similar transaction and the buyer or seller owns at least 10% of the capital of the other.

14. The undisputed facts are that all the conditions mentioned herein are fully satisfied by the assessee. Only cause of concern is whether buyback is a form of corporate re-organization. The judicial diction dictionary of P. Ramanatha Aiyar Advanced Law Lexicon defines "Reorganization of a Company" as:

"Reorganization of a company is amalgamation or readjustment when one company acquires another by way of merger or a single company divides into two or more entities or a company makes a substantial change in its capital structure".

15. The Hon'ble Bombay High Court in the case of S.E B.I Sterlite Industries 53 CLA 41 has held that:

"a company could buy back its own shares as a part of reorganization scheme under section 391 r.w.s 100 to 104 of the Companies Act 1956."

16. Similar view was taken by the Hon'ble Andhra Pradesh High Court in the case of Shareholders of TCI Industries Limited Vs TCI Industries Limited 60 CLA 382. These decisions of the Hon'ble High Court show that the scheme of buy-back of shares by a company has been recognized as a scheme of reorganization.

17. At this point, it would be pertinent to mention that buy back can be carried out under the aegis of the Hon'ble High Court u/s 391 of the Companies Act or without the intervention of the High Court under section 77A. However in our considered view, the manner and procedure adopted to carry out a buy-back does not determine as to whether it amounts to corporate re-organization.

18. It is also pertinent to mention here that Protocol to Netherlands-Nigeria DTAA provides the meaning of corporate organization /reorganization/amalgamation/division or similar transactions which is pari materia to the expression used in India-Netherlands DTTA. In the protocol at clause (vi) Ad Article 13, it has been mentioned

> *"It is understood that the terms corporate organization, reorganization, amalgamation, division or similar transaction refer to a transfer of shares within a group of associated enterprises. In that case, shares will be evaluated for transferee at the book value of the transferor."*

19. The phrase "It is understood" makes it amply clear that this stipulation in the Nigeria Netherlands DTAA is mere clarifactory in nature and not a new concession agreed upon in the DTAA. The guidance issued by the Institute of Chartered Accountants of India [ICAI], which is the highest accounting body of the country, created by an Act of the Parliament, in respect of Accounting for Corporate Restructuring has explained as under:

> *"BASIC CONCEPTS*
>
> *Corporate restructuring (CR) is a broad term to denote significant reorientation or realignment of the investment (assets) and/or financing*

(liabilities) structure of a company through conscious management action with a view to drastically alter the quality and quantum of its future cash slow streams. This broad definition includes such corporate actions as mergers, acquisitions/ amalgamations/ absorption, divestitures, demergers (spin-offs and debt-equity changes.

The different methods of restructuring and their implications are discussed below:

(1) External Restructuring

(a) *Asset-based (portfolio) restructuring*

(b) *Financial or capital restructuring*

(2) Internal Restructuring

(a! Portfolio restructuring (Cost reduction through closure of units, redundancy programmes etc.)

(b) Organisational restructuring (Management or organisational restructuring involving decentralisation, delayering, product-market based divisionalisation, matrix structure etc.)

(3) Amalgamation, absorption or external reconstruction.

Asset-based Restructuring

(i) Mergers and Acquisitions (M & A)

In the Indian context the term merger is used to denote consolidation of separate legal entities, not necessarily of similar sizes, into one through a statutory process of amalgamation. The motives oi merger or acquisition are the same and both involve transfer of ownership and control of assets and the right to manage corporate cash flows For Example-Reliance Natural and Reliance Power Merger

(ii) Divestitures and Asset Swaps

Divestiture refers to disposal (in favour of third party) of business units, subsidiary companies or significant holdings in associates, often for cash.

Asset swap, on other hand, entails simultaneous divesting and acquisition of each others' business by two companies, settling the difference in valuation, if any in cash.

iii) Demergers or Spin-offs

Demerger involves spinning off (profitable or robust) parts of a diversified company into a new company and undertaking free distribution of the shares of the new (spun-off) company to the shareholders of the original company. For Example-RIL gets split among several companies between two brothers-Mukesh and Anil Ambani.

Unlike in a divestiture, the "parent" company or group does not receive any proceeds from a demerger as the demerged company's shares are directly distributed to the "parent" company's shareholders.

Capital and Financial Restructuring

This type of restructuring includes buy back shares debt sto equity conversions, etc."

20. Considering the facts of the case in the light of the discussion made hereinabove, we are of the considered view that the DRP has interpreted the expression used in Article 13(5) of the India Netherlands DTAA in a very narrow and a restrictive manner. In our humble opinion, such interpretation would defeat the purpose of Article 13(5).

21. Considering the meaning given by the Hon'ble Bombay High Court and the Hon'ble Andhra Pradesh High Court [supra[and the definition in the Judicial Dictionary of P. Ramanatha Aiyer and considering the guidance note of the Institute of Chartered Accountants of India, we are of the considered view that the buy-back of shares falls very much within the ambit of Article 13(5) of India-Netherlands DTAA and, therefore, the DRP erred in the not allowing the additional ground of appeal raised before it. We, accordingly, direct the Assessing Officer to delete the impugned addition.

22. Since we have held that the buy-back of shares is very much within the ambit of Article 13(5) of India - Netherlands DTAA, all other issues raised in the memo of appeal become infructuous.

23. In the result, the appeal of the assessee in ITA No. 764/DEL/2014 is allowed.

PER N.K. CHOUDHRY, JM

Having perused the draft order passed by Hon'ble Accountant Member, with due respect, I am not in agreement with the same, hence passing this dissenting order in the following terms:

2. The brief facts, relevant for adjudication of the instant appeal, are that in the instant case, the Assessee Company (Appellant herein) being incorporated in the Netherlands, by filing its return of income electronically on dated 17.09.2009, declared total income at Rs.6,17,15,404/- for the assessment year 2009-10.

2.1 The case of the Appellant was selected for scrutiny and therefore the Learned Assessing Officer (in short "Ld. AO") initially issued a notice dated 07.09.2010 u/s. 143(2) of the Income Tax Act 1961 (in short "the Act") and thereafter notice u/s. 142(1) of the Act along with questionnaire, to the Appellant. In response, the Appellant claimed that it was not engaged in any operation/activities in India during the aforesaid assessment year, however, it had tendered 2,14,00,000 equity shares of its holding company i.e. Huntsman International (India) Private Limited (in short "HIIPL") in response to the buy-back offer made by 'HIIPL'. Accordingly, HIIPL paid Rs.48,13,08,792/- after deducting TDS of Rs.1,30,31,208/- to the Appellant as consideration.

2.2 The Appellant also submitted its computation of capital gains, wherein, the long-term capital gain of Rs.6,17,15,404/- was claimed.

2.3 Considering the claim of the Appellant, the Id. AO made a reference to the Transfer Pricing Officer (TPO) to determine the Arm's Length Price qua international transactions entered into by the Appellant during the financial year 2008-09 relevant to the assessment year under consideration. The TPO, by passing an order u/s. 92CA of the. Act on dated 30.01.2013 calculated the FMV of the shares at Rs.80.77 instead of Rs.23.10 as adopted by the Appellant and accordingly determined the FMV of shares sold at Rs.1,72,84,78,000/-(80.77/- x 2,14,00,000/-) instead of Rs.49,43,40,000/- as computed by the Appellant. Consequently, the total capital gain of the Appellant was increased by Rs. 1,23,41,38,000/- (difference between 1,72,84,78,000/- and Rs.49,43,40,000/- .

The AO ultimately by completing the draft assessment, computed the capital gain of the Appellant at Rs.1,29,58,53,404/- (1,23,41,38,000/- 4- 6,17,15,404/- long term capital gain offered for taxation by the Appellant) chargeable to tax @ 20% plus surcharge and education cess on the ground that the sale consideration has to be taken at Rs. 1,72,84,78,000/- instead of Rs.49,43,40,000/- shown by the Appellant.

3. The Appellant, being aggrieved with the draft assessment order, preferred its objections before the Id. Dispute Resolution Panel (in short "Ld. DRP") and during the proceedings before the Id. DRP, by raising the following additional ground of objection, also changed its stand qua long term capital gain of Rs.6,17,15,404/- which was initially offered for taxation:

"It is submitted in this regard that there has been an error on the part of the assessee in offering the same amount to capital gains tax on the following two accounts (without prejudice to each other):

(a) The buy-back of shares by HIPL qualifies to be a tax-neutral transaction under Section 47 of the Act. Under Section 47(iv), any transfer of an asset from a parent company to its subsidiary is not treated as transfer. Since the equity shares have been purchased by HIIPL (a Subsidiary) from its parent (the assessee). the requirements of Section 47(iv) are fulfilled.

(b) Under the India-Netherlands Double Tax Avoidance Agreement, Article 13(5), capital gain if any arising from a buy-back of share transaction can only be taxed in the Netherlands and not India. The assessee submits that under Section 90(2) of the Act would apply only to the extent it is more beneficial to the assessee. In this case, the DTAA provides for a more beneficial treatment and the Act would not apply."

4. The Id. DRP vide its order dated 27.11.2013, dismissed the additional ground of objection raised by the Appellant, by holding that the provisions of section 47(iv) of the Act would not be applicable to the case of the Appellant . The case of the Appellant is not covered by said beneficial provision in Article 13(5) of the Treaty. The Id. DRP further directed the Assessing Officer to complete the assessment as per the directions of the Panel.

5. Consequently, the Assessing Officer passed the impugned order dated 30.12.2013.

6. The Appellant being aggrieved with the assessment Order dated 30.12.2013, preferred the instant appeal under consideration on the following grounds of appeal.

"1. The order passed by the Ld. AO passed u/s 143(3) read with Section 1140(13) is erroneous and bad in law on the facts and circumstances of the case.

2. The Ld. AO and the Ld. DRP have erred in holding that buy-back of

equity shares by the Appellant's Indian subsidiary from the Appellant is not covered by Section 47(iv) of the Act.

3. The Ld. AO and the Ld. DRP have erred in rejecting the Appellant's claim that any capital gain arising from the aforesaid buyback transaction is not taxable in India in terms of Double Tax Avoidance Agreement entered into between India and the Netherlands.

4. The Ld. A.O, Ld. Transfer Pricing Officer ("TPO") and the Ld. DRP erred in determining the arm's length price of the equity shares bought back by the Appellant's Indian subsidiary from the Appellant under Chapter X of the Act despite there being no income arising from the said transaction.

5. The Ld. TPO and Ld. DRP erred in law and in facts in making an adjustment of Rs. 1,234,138,000/- to the value of international transaction of the buy-back of shares by its Indian subsidiary from the Appellant by disregarding valuations reports of two independent experts who had determined the valuation based on two methods - Profit Earning Multiple Method and Discounted Cash Flow Method.

The Ld. AO, Ld. TPO and the Ld. DRP erred in re-computing the FMV of the equity shares sold by the Appellant to its Indian subsidiary under a buy-back arrangement after having accepted the valuation carried out by independent experts using Discounted Cash Flow Method by merely alleging defects in the Profit Earning Multiple Method disregarding the accepted preference for Discounted Cash Flow Method in transfer pricing as laid down by the Hon'ble Income-tax Appellate Tribunal.

6. The Ld. AO, Ld. TPO and the Ld. DRP erred in rejecting the fair market value (FMV) of equity shares adopted by the Appellant using Price Earning Multiple Method at Rs 23.10 per share by:

6.1 Restricting the use of data only to the periods FY 2006-07 and FY 2007-08 and not using data range from FY 2001-02 to FY 2006-07 for deriving the FMV.

6.2 Using the results of the Polyurethane unit (PU unit) for FY 2007-08 without considering the impact of economic factors affecting the results for the said period.

6.3 Annualizing the results of Textile effects unit (TE unit) for FY V2006-07 disregarding the fact that Textile Effects (“TE”) unit was acquired

only in July 2006.

6.4 Disregarding the adjustment for corporate service costs amounting to Rs. 5,04,00,000/- in computing the adjusted earnings before interest and tax ("EBIT") of the TE unit.

6.5 Rejecting 3 comparable companies selected by Appellant for deriving the valuation multiple without assigning cogent reasons.

6.6 Conducting a fresh search without demonstrating defect in the Appellant's search process to select additional 6 comparable companies merely based on National industry classification (NIC) of the database and not on the basis of functional analysis. Further, the Ld. DRP erred in fact in observing that no objections to the comparable companies selected by the TPO has been filed by the Appellant.

7. The Ld. AO, Ld. TPO and the Ld. DRP erred in determining the FMV of the shares under the buy-back transaction at Rs 80/-,as against Rs 23.10 adopted by the appellant as per the regulations of the Reserve Bank of India and the applicable provisions of the Companies Act.

8. The learned AO erred in initiating penalty proceeding u/s 271(1)(c) of the Act.

9. The learned AO erred in initiating penalty proceeding u/s 271G of the Act.

The Appellant submits that each grounds of appeal are without prejudice to one another.

The Appellant craves leave to add, to alter, amend, substitute and/or modify in any manner whatsoever all or any of the foregoing grounds of appeal at or before the hearing of the appeal. "

7. The Ld. AR at the outset contended that the buy-back of shares by HIIPL qualifies to be a tax-neutral transaction as the requirements of Section 47(iv) are fulfilled, consequently the said transaction is not liable for any tax in India, though offered for taxation in India by the Appellant.

7.1 The Id. AR by referring to second part of clause 13(5) of the Indo Netherlands Treaty (in short "Treaty"), which prescribes "However, such gains shall remain taxable only in

the State of which the alienator is a resident, if such gains are realised in the course of a corporate organization, reorganization, amalgamation, division or similar transaction, and the buyer or the seller owns at least 10 per cent of the capital of the other submitted that the same would apply to the instant case and therefore the capital gain arising from buy-back of HIIPL shares is not taxable in India under Article 13(5) of the India-Netherlands DTAA.

7.2 The Id. AR further submitted that buy-back is a form of corporate re-organization under the Companies Act, 1956 and the capital gain has arisen to the Appellant company in the course of a transaction which is covered within the meaning of the expressions "corporate organisation, reorganisation, amalgamation, division or similar transactions", occurring in that Article. The expression "or similar transactions" appearing immediately after the terms like" corporate organisation, reorganisation, amalgamation and division" which have a common genus implies that buy-back would be covered there under on the principles of 'ejusdem generis'.

7.3 The Id. AR further emphasised that for defining the term "re-organisation" the inference could have been drawn by the Ld. DRP, from Article 13 (page 150 of the paper book) of the Treaty between Kingdom of Netherlands and Federal Republic of Nigeria or SEBI Guidelines or the guidance notes issued by Institute of Chartered Accountants of India (in short 'ICAI'), wherein definition is given to the Capital and Financial restructuring.

7.4 The Id. AR further contended that as per Article 30(1) of the Vienna Convention on the law of Treaties, 1969 and the judgment passed by the United Kingdom Supreme Court in the case of Anson vs. HMRC (2015) UKSC 44, decided on 01.07.2015 a Treaty

is required to be interpreted in good faith in accordance with the ordinary meaning to be given in terms of the Treaty in this context and in the light of its objects and purpose.

7.5 The Id. AR further submitted that the Id. DRP while rejecting the additional grounds of the Appellant also relied upon the judgment of Authority for Advance Ruling (AAR) in the case of Perfetti Van Melle Holding BV, 342 ITR 200, which, in fact, has been overruled by the Hon'ble Delhi High Court in the case of Perfetti Van Melle Holding BV vs. Authority for Advance Ruling, (2014) 52 taxmann.com 161 (Delhi).

7.6 At last, the Id. AR submitted that the Id. DRP has given narrow interpretation in a restrictive manner to the expression used in Article 13(5) of the Treaty between India and Netherlands, therefore the order impugned, which is based on directions of the Id. DRP is perverse and liable to be set aside.

8. The Id. DR, on the other hand, vehemently supported the impugned order as well as the directions of the Id. DRP given u/s. 144C(5) of the Act on dated 27.11.2013, by submitting that the case of the Appellant is neither covered under section 47(iv) of the Act nor under article 13(5) of the Treaty. Even the directions of the Id. DRP are not only based on the factual aspects of the case, but also based on thorough analysis of the clauses of the Treaty under consideration and the laws applicable thereto. Hence, the order under challenge does not require any interference as the same is neither perverse nor suffers from any perversity or impropriety. Consequently, the appeal filed by the Appellant is liable to be dismissed.

9. Heard the parties and perused the orders under consideration and the documents/case laws referred to. The Ld. AR instead of arguing its case on merits of the case, mainly focussed and restricted its arguments on the rejection of the additional ground of objection referred to above which was dismissed by the Id. DRP, therefore I am constrained to decide the validity of rejection of additional ground of objection, without going into the merits of the case.

9.1 For brevity and ready reference, the additional ground of objection raised by the Appellant before the Id. DRP, is again reproduced herein below:

"It is submitted in this regard that there has been an error on the part of the assessee in offering the same amount to capital gains tax on the following two accounts (without prejudice to each other):

> *(a) The buy-back of shares by HIPL qualifies to be a tax-neutral transaction under Section 47 of the Act. Under Section 47(iv), any transfer of an asset from a parent company to its subsidiary is not treated as transfer. Since the equity shares have been purchased by HIIPL (a Subsidiary) from its parent (the assessee), the requirements of Section 47(iv) are fulfilled.*
>
> *(b) Under the India-Netherlands Double Tax Avoidance Agreement, Article 13(5), capital gain if any arising from a buy-back of share transaction can only be taxed in the Netherlands and not India. The assessee submits that under Section 90(2) of the Act would apply only to the extent it is more beneficial to the assessee. In this case, the DTAA provides for a more beneficial treatment and the Act would not apply."*

9.2 By raising the 1st limb of additional ground of objection, the Appellant outrightly claimed that buy-back of shares of HIIPL qualify to be a tax-neutral transaction under Section 47 (iv) of the Act, because as per the provisions of section 47(iv) of the Act,

any transfer of an asset from a parent company to its subsidiary is not to be treated as transfer. In the instant case since the equity shares have been purchased by HIIPL (a Subsidiary) from its parent (the Appellant), therefore the requirements of Section 47(iv) are fulfilled.

9.3 From the 1st limb of additional ground of objection, the question emerge, as to whether the Appellant in the transaction of selling of shares/buy back of shares by HIIPL, has fulfilled the requirement of Section 47(iv) of the Act and therefore is entitled to get the benefit of same.

9.3.1 I observe that the Id. DRP while considering the claim of the Appellant with regard to the fulfilling of requirement of section 47(iv) of the Act, analysed the provisions of section 46A and 47(iv) of the Act, Section 77A of the Companies Act 1956 (in short 'Companies Act) and Explanatory Circular No. 779 dated 14.09.1999 issued by the Central Board of Direct Taxes (In short "CBDT"), while introducing section 46A of the Act. For ready reference, the Explanatory Circular No. 779 (relevant part) is reproduced herein below:

> ***"Clarification of tax issues arising out of the provision to allow buy-back of shares by the companies***
> *28.1 The Companies (Amendment) Ordinance, subsequently enacted as the Companies (Amendment) Act, 1999), inserted section 77A in the Companies Act, 1956,* ***which allows a company to purchase its own shares subject to certain conditions.*** *The shares bought back have to be extinguished and physically destroyed and the company is precluded from making any further issue of securities within a period of 24 months from such buy-back.*
>
> *28.2 The above newly introduced provisions of buy-back of shares threw up certain issues in relation to the existing provisions of the Income-tax Act. The two principal issues are whether it would give rise to deemed*

dividend under section 2(22) of the Income-tax Act and whether any capital gains would arise in the hands of the shareholder. The legal position on both the issues were far from clear and settled and there was apprehension that there will be unnecessary litigation unless the issues are clarified with finality.

28.3 The Act, therefore, has amended clause (22) of section 2 of the Income tax Act by inserting a new clause to provide that dividend does not include any payment made by a company on purchase of its own shares in accordance with the provisions contained in section 77A of the Companies Act, 1956. ***It has also inserted a new section, namely, section 46A in the Income-tax Act, to provide that any consideration received by a shareholder or a holder of other specified securities from any company on purchase of its own shares or other specified securities shall be, subject to provisions contained in section 48, deemed to be the capital gains.***

28.4 This amendment will take effect from 1st day of April, 2000, and will, accordingly, apply in relation to the assessment year 2000-2001 and subsequent years.

(Highlighted by me)

9.3.2 The Id. DRP perused the aforesaid provisions and held that *buy-back provision, being a special provision, prevails over the main charging provision. The exemption applies only to the transfers covered under the charging provisions and does not cover transfers envisaged under the special provision relating to buy-back. Further, the buy-back provisions were introduced into the Income-tax Act in the context of permitting buy-back under the Companies Act and therefore, the provisions relating to buy-back would be applicable.*

9.3.3 Further, the Id. DRP also observed that vide Finance Act 1999, a new section namely section 46A in the Act has been inserted to provide that any consideration received by a shareholder or a holder of other specified securities from any company on purchase of its own shares or other specified securities shall be, subject to the provisions

contained in section 48, deemed to be capital gains. It is clear beyond doubt that the provisions of section 46A would be applicable and that the provisions of section 47(iv) would not be applicable.

9.3.4 I have given thoughtful consideration to the determination made by the Id. DRP and observe that for getting benefit under section 47(iv) of the Act on account of transfer of a capital asset to its subsidiary company, the Appellant was supposed to follow following 02 conditions as enshrined u/s 47(iv) of the Act.

First condition is that the parent company or its nominees hold the whole of the share capital of the subsidiary company and Second condition is that the subsidiary company should be an Indian Company.

9.3.5 No doubt, the subsidiary company (HIIPL) to whom the Appellant sold its shares, is an Indian Company and therefore second condition of section 47(iv) of the Act was fulfilled, however, for claiming the benefit of Section 47(iv) of the Act, the provision also mandates that the Appellant company or its nominees hold the whole of the share capital of the subsidiary company in case of any transfer of capital asset by a company to its subsidiary company. Since the Appellant or its nominee(s) was admittedly holding only 99.98% of share capital of its subsidiary company (HIIPL) and not the whole/100% of the share capital of its subsidiary company (HIIPL), hence, 1st condition as prescribed in section 47(iv) of the Act was not fulfilled.

Even otherwise it is not the case of the Appellant that it was not required to follow the first condition. Though the Appellant in 1st limb of ground of objection claimed that the

requirements of Section 47(iv) are fulfilled, however it is a fact that 1st condition as prescribed in section 47(iv) of the Act remained unfulfilled.

Consequently the Appellant is not entitled for any kind of benefits as claimed in 1st limb of additional ground of objection under consideration, by taking refuge of section 47(iv) of the Act. **Thus the rejection of the claim of the Appellant u/s 47(iv) by the Ld. DRP can not be faulted with and hence needs no interference**.

9.4 Coming to the second limb of additional ground of objection raised, by which the Appellant claimed that under Article 13(5) of India-Netherlands Double Tax Avoidance Agreement, capital gain if any arising from a buy-back of share transaction can only be taxed in the Netherlands and not India. Further under Section 90(2) of the Act, the Act would apply only to the extent it is more beneficial to the Assessee. In this case, the DTAA provides for a more beneficial treatment and the Act would not apply.

9.4.1 The Appellant also claimed that the capital gain has arisen to the Appellant company in the course of a transaction which is covered within the meaning of the expression "corporate organisation, reorganisation, amalgamation, division or similar transactions", occurring in proviso of Article 13(5) of the Treaty. As the seller, i.e., the Appellant owns more than 10% of the capital of the buyer, l.e., the Indian Company, therefore the Appellant is entitled to the benefits of Article 13(5).

9.4.2 The Id. AR further submitted that buy-back is a form of corporate "re-organization" under the Companies Act, 1956 and the capital gain has arisen to the Appellant company in the course of a transaction which is covered within the meaning of the expressions "corporate organisation, reorganisation, amalgamation, division or

similar transactions", occurring in that Article. As the seller, i.e., the Appellant owns more than 10% of the capital of the buyer, i.e., the Indian Company, therefore the Appellant is entitled to benefits of Article 13(5).

9.4.3 The Id. AR further emphasised that re-organisation has nowhere been defined, therefore, the inference could have been drawn by the Ld. DRP, from Article 13 (page 150 of the paper book) of the Treaty between Kingdom of Netherlands and Federal Republic of Nigeria, wherein it is prescribed *"it is understood that the terms corporate organisation, re-organisation, amalgamation, division or similar transactions refer to a transfer of share within a group of Associated Enterprises. In that case, the shares will be evaluated for transferee at the book value of the transferor".*

9.4.4 The Id. AR further contended that the expression "or similar transactions" appearing immediately after the terms like" corporate organisation, reorganisation, amalgamation and division" which have a common genus implies that buy-back would be covered there under on the principles of ejusdem generis.

9.5 On the contrary, the Ld. DR refuted the claim of the Appellant and submitted that the case of the Appellant is not covered under proviso to Article 13(5) of the Treaty.

9.6 I have given thoughtful consideration to the aforesaid contentions raised by the Id. AR and Ld. DR. I observe that the Id. DRP also considered the said claims of the Appellant with regard to the treatment of buy-back of shares as 'corporate reorganisation'. Relevant paras/parts of DRP order are reproduced as under:

> *"That the corporate organisation, reorganisation and division have not been defined in the Act. As per section 2(1B) "amalgamation" means the merger of one or more companies with another company or the merger of two or more companies to form one company in*

such a manner that it results in transfer of all properties and liabilities of amalgamated company to the amalgamating company; shareholders holding not less than 3/4th in the value of the shares of the amalgamating company would become the shareholders of the amalgamated company."

"The term "de-merger" has been defined in the Act in section 2(19AA) and refers to the transfer pursuant to a scheme of arrangement u/s. 391 to 394 of the Companies Act, 1956. Thus, it is to be considered if the case of the Appellant is actually covered by the expressions "corporate organisation, organisation, amalgamation, division or similar transaction" occurring in Article 13(5) of the Treaty or not."

"The Indian Company (HIIPL) issued its 6,91,24,424 equity shares of Rs.10/ each face value at a premium of Rs.11.70 per share to the Appellant company in the F.Y. 2006-07. Pursuant thereto the Appellant paid total consideration of Rs.150 crores to the Indian company. The said issue of shares is stated to be for the acquisition of the 'Textile Effects Business' of Ciba Specialties Chemicals (India) Limited and its subsidiary Diamond Dy-chem Ltd. in June 2006 by the Indian Company from CIBA Group. The said acquisition is stated to be a part of world-wide acquisition of certain divisions of CIBA Group by Huntsman Group, India.

Subsequently, during the F.Y. 2008-09, the Indian company bought back the equity shares (2.14 crores in numbers) of Rs.10/ each at a price of Rs.23.10 per share from the Appellant cor company. It resulted into capital gains in the hands of the Appellant. Total consideration for this transaction shown in the audited accounts is for Rs.49.43 crores. For this purpose, as per note to Schedule 17 of the audited accounts for F.Y. 2008-09 of the Indian Company, a sum of Rs.28.03 crores has been utilized from the share premium account and balance Rs.21.4 crores is utilized out of the book profits."

Buy-back of shares by an Indian company of its own shares is governed by the provisions of section 77A of the Companies Act**. It is evident that the buy-back of shares by a company of its own shares is governed by several statutory restrictions and observance of various conditions given in the above section. **One of the conditions prescribed in the proviso below section 77A(1) is that buy-back of any kind of shares shall not be made out of the

proceeds of an earlier issue of the same kind of shares. The purchase consideration to the extent of Rs. 28.03 crores paid by the Indian company is out of the proceeds of the issue of same kind of shares in the year 2006 *and on this account, it appears that the buy-back of shares by the Indian company from the Appellant company is in contravention of the provisions of the Companies Act.*

"It is to be understood what is meaning of the entire expression "corporate organisation, re-organisation, amalgamation, division or similar transaction". The said expressions or its components cannot be seen in isolation to the relevant statutory provisions either under the Income-tax Act or the Companies Act because any action covered by the expressions mention above, shall be with reference to the statutory provisions of the respective statutes."

As mentioned above, the terms such as "amalgamation" and "demerger" has been defined in the Act, whereas the terms "arrangement", "buy-back of shares", "winding up" find reference in the Companies Act. ***The action of buy-back of own shares by a company is not included in the scheme of amalgamation or demerger or arrangement or winding up etc****. Therefore, it is difficult to accept the Appellant's arguments that its case is included in the expressions referred to in the Treaty.* ***The expression contained in the Treaty cannot operate in vacuum and permit the Appellant to take a meaning which does not satisfy the relevant statutory provisions thereby making the entire procedure and instructions non-existent.***

"That the Companies Act permits any new arrangement or reorganisation to be approved by the High Court as prescribed in the relevant Rules. ***Admittedly, the Appellant has not followed any of these rules or sought approval of the High Court for the new arrangement. On this account also, the case of the Appellant is not covered by the expressions under consideration."***

"That the reorganization of the group shall be the reference to some court appointed mechanism and/or statutory scheme. ***No such compliance is seen in the case of buy-back of shares in the instant case. In the instant case, there is no reorganisation of the group either."***

(highlighted by me)

6.1 The Id. DRP also considered the minutes of meeting of the Board of Directors dated 28.05.2008 of the HIIPL and observed as under:

> *"It is seen that the said minutes of meeting do not have any reference about any scheme of organisation or re-organisation of the Indian Company or the Huntsman Group as a whole. No reason whatsoever has been found in the said minutes of meeting which prompted the Indian Company to pursue the scheme of buy-back of its own shares. During the course of hearing before the ld. DRP, the Appellant could not highlight any reason for which buy-back which could classify the Appellant's case as covered by the expression "a corporate organisation, re-organisation, amalgamation, division transaction", occurring in Article 13(5) of the Treaty."*

9.6.2 The Id. DRP by considering all the afore-stated facts and circumstances of the case, ultimately declined to accept the claim of the Appellant to the effects that buy-back is a form of corporate "re-organization" under the Companies Act, 1956 and the capital gain arisen to the Appellant company in the course of a transaction, is covered by such beneficial provision in Article 13(5) of the Treaty.

9.6.3 Admittedly, the terms 'corporate organisation, re-organisation, amalgamation, division and similar transaction' have not been defined in the Treaty. The Article 3 of the Treaty specifically prescribes as under:

> ***"As regards the application of convention by one of the State any term not defined herein shall, unless the context otherwise requires, have the meaning which it has under the law of that State concerning the taxes to which the convention applies".***

Therefore as per Article 3 of the Treaty, the interpretation to the said terms is required to be given under the law of that State concerning the taxes to which the Convention applies, meaning thereby, the applicable laws of India which are having meaning of the said terms, would be applicable.

9.6.4 The Legislature in its wisdom by inserting Sec. 46A in the Act introduced the special provision/statutory framework for tax mechanism which deals with the capital gains on purchase by a company of its own shares and other specified securities.

Further by explanatory circular No. 779 dated 14.09.2019 (supra), the CBDT clarified qua tax issues arising out of the purchases to allow buy-back of shares by the companies, under the Companies (Amendment) Act, 1999, by which section 77A in the Companies Act, 1956 was inserted, which allows a company to purchase its own shares, but subject to certain conditions.

9.6.5 According to section 77A of the Companies Act, one of the conditions/parameters prescribed in the proviso to section 77A(1) of the Act is **"that buy-back of any kind of shares shall not be made out of the proceeds of an earlier issue of the same kind of shares."** The Appellant has not controverted the facts that the purchase consideration to the extent of Rs.28.03 crores paid by the Indian Company was out of the proceeds of the issue of same kind of shares in the year 2006 and even otherwise it is also not the case of the Appellant that it has either duly followed the conditions of section 77A of the Act by doing the transaction of buy back of shares or such condition is not applicable to the Appellant's case. **Therefore, on the forgoing discussions, it has become clear that buy-back of shares by the Indian Company from the Appellant company was in contravention of the provisions of the Companies Act.**

9.6.6 Even the Hon'ble Coordinate bench in the case of **M/s Accordis Beheer B V Versus Director of Income Tax Officer (International Taxation)**-1(1) ITA 4688 and 5025/Mum/2010 decided on 13-01-2016) dealt with interpretation of terms "reorganization" as mentioned in the **Article 13(5) of the same Treaty as involved in**

this case and as given in the Dictionary titled as "Dictionary for Accountants" by Eric L Kohler, wherein the term "reorganization" is defined as under:-

> ***"reorganization 1. A major change in the financial structure of a corporation or a group of associated corporations resulting in alterations in the rights and interests of security holders; a recapitalization, merger or consolidation."***

The Hon'ble co-ordinate bench ultimately held as under:

> ***"That "reorganization" means a major change in the financial structure of a corporation or a group of associated corporations resulting in alterations in the rights and interests of security holders; a recapitalization, merger or consolidation. That arrangement entered by the Assessee in selling part of its shareholding to the company in the scheme of buy back does not fall under the definition of "reorganization" given in the dictionary cited above."***

9.6.6.1 For ready reference the concluding part of the order is reproduced below:

> *We notice that the assessee, in the instant case, is pleading for relief on the basis of its own interpretation of Article 13(5) of the DTAA. The fact that it has tendered the shares to the M/s Century Enka Ltd under a scheme of arrangement approved by Honble Calcutta High Court is not disputed. Hence we do not see any colourable device in the claim made by the assessee and accordingly we are of the view that the observations made by Ld CIT(A) may not be relevant to the facts prevailing in the instant case.*
>
> *11. The Ld A.R contended before us that the assessee has transferred the shares under a scheme of arrangement approved by the Hon'ble High Court of Calcutta and the same falls in the category of "reorganization" specified in Article 13(5) of the DTAA entered between India and Netherlands. There should not be any dispute that the contention of the assessee, if found to be correct, then the impugned capital gains is not taxable in India. Hence, transfer of shares by assessee to the company would fall in the category of "reorganization" mentioned in Article 13(5).*

12. The Ld A.R invited our attention to the meaning of "reorganization" given in the Dictionary titled as "Dictionary for Accountants" by Eric L Kohler, wherein the term "reorganization" is defined as under:-

> ***"reorganization 1. A major change in the financial structure of a corporation or a group of associated corporations resulting in alterations in the rights and interests of security holders; a recapitalization, merger or consolidation."***

We notice that the assessee has transferred a part of shares held by it to the company, M/s Century Enka Ltd and accordingly earned Capital gain, Subsequently, the above said company has reduced its paid up capital and reserves by cancelling the shares bought by it. As per the definition given above, there should be a major change in the financial structure and the same should result in alteration in the rights and interest of security holders. However, in the instant case, there is reduction in share capital and in our view, the same cannot be considered as a major change in financial structure. Further, the security holders continue to enjoy the same type of rights and interests even after the reduction of share capital and hence there is no alteration in the rights and interests of security holders. ***Accordingly, we are of the view that arrangement entered by the assessee in selling part of its share holding to the company in the scheme of buy back does not fall under the definition of "reorganization" given in the dictionary cited above.***

9.6.6.2 The Hon'ble Coordinate bench also dealt with the study material published by Board of Studies of the Institute of Chartered Accountants of India **(as also relied upon by the Appellant in this case)** on "Strategic Financial Management" and held as under:

13. The Ld A.R also placed reliance on a study material titled as ***"Strategic Financial Management" issued by the Board of Studies of the Institute of Chartered Accountants of India,*** *especially following observations made therein:-*

"On the other hand, the term arrangement" means and includes all modes of reorganizing the share capital, take over of shares of one company by another including interference with preferential and other special rights attached to shares".....

"Generally where only one company is involved in a scheme and the rights of the shareholders and creditors are varied, it amounts to reconstruction or reorganization or scheme of arrangement"...

"The aspects relating to expansion or contraction of a firm's operations or changes in its assets or financial or ownership structure are known as corporate re-structuring. While there are many forms or corporate restructuring, mergers, acquisitions and takeovers, financial restructuring and re-organisation, divestitures de-mergers and spin-offs, leveraged buyouts and management buyouts are some of the most common forms of corporate restructuring."....

In our view, these discussions made by the ICAI only explains various forms of financial management. We have already noticed that there is no change in the rights and interests of the shareholders. Only change that occurred on reduction of share capital through writing off of the shares purchased from the assessee is the change in the shareholding pattern of the promoter groups, i.e., the percentage of shareholding of the promoter group has gone up. The same, in our view, cannot be considered as the change in the rights and interests of shareholders. Before and even after the reduction of share capital, the promoter groups continued and continues to remain as promoter groups with the same rights and interests. At this stage, we feel it pertinent to refer to the definition of the term "arrangement" given under sec. 390 of the Companies Act:-

"390 (α)....

(b) the expression "arrangement" includes reorganisation of the share capital of the company by consolidation of shares of different classes, or by the division of shares into shares of different classes or by both those methods."

So the reorganization contemplated in sec. 390 consists of either consolidation of shares of different classes or division of the shares into different classes or both.

14. The Ld A.R also relied upon the decision rendered by the Hon"ble Bombay High Court in the case of Securities and Exchange Board of India & Union of India Vs. Sterlite Industries (India) Ltd (Order dated 15-07-2002 given in Appeal Lodging No. 520 of 2002 in Company petition No.203 of 2002 in Company Application No. 18 of 2002 & other) (113 Company cases 273) rendered under the Companies Act. We have gone through the said decision and we notice that the issue considered therein was whether the Court can sanction buy back of its shares under a scheme of arrangement prescribed in sec. 391 of the Companies Act, when a specific section 77A is available for that purpose. Thus, we notice that the emphasis was given by the Hon'ble High Court with regard to the scope of sec. 391 of the Act and it was not a case of finding out the meaning of the term "reorganization". Hence, we are of the view that the above said decision may not help to support the contentions of the assessee.

15. From the decision taken by Ld CIT(A), it can be noticed that the Ld CIT(A) has observed that the scheme of arrangement framed by M/s Century Enka Ltd was only with the purpose of providing an exit route to the non-resident share holders. Thus, the objective of the scheme was to enable the assessee to transfer its shareholding. Further the Ld CIT(A) has observed that the subsequent cancellation or writing off the shares is nothing to do with the transfer made by the assessee, even though the same has resulted in reduction of paid up share capital of the company, M/s Century Enka Ltd. We agree with the above said observations made by Ld CIT(A). As observed by him, two different activities have been combined with the scheme of arrangement. The first one was to buy back shares belonging to non-resident share holders and the second one was to cancel the shares so purchased. We agree with the view taken by Ld CIT(A) that they are two different actions and both should not be clubbed together, even though M/s Century Enka Ltd has combined the same, for the sake of its convenience, in the scheme of arrangement. The assessee herein, in our view, should in no way

concerned by the action of cancellation of share resulting in reduction of share capital. Accordingly, we are of the view that the attempt of the assessee to bring the transferring of shares within the ambit of the term "reorganisation" may not be correct, since the object of the arrangement was not financial restructuring, but to provide an exit route to the non-resident shareholders.

16. In view of the above, we are of the view that the Ld CIT(A) was justified in upholding the view taken by the AO on this issue. Accordingly we uphold his order on this issue.

9.6.7 In the instant case as well, no major change in the financial structure of the Appellant and its associated company (HIIPL) has occurred, and even the transaction of buy back also not resulted in alterations in the rights and interests of security holders.

9.6.8 It is admitted fact that HIIPL in its minutes of meeting/resolution for buyback of shares, neither made any reference about any scheme of organisation or re-organisation of the Indian Company (HIIPL) or the Huntsman Group as a whole nor given any reason whatsoever in the said minutes of meeting, which prompted the HIIPL to pursue the scheme of buy-back of its own shares. Even during the course of hearing before the Id. DRP, and this Court as well, the Appellant could not highlight any reason for buy-back, which could classify the Appellant's case as covered by the expression "a corporate organisation, re-organisation, amalgamation, division or similar transaction", occurring in Article 13(5) of the Treaty."

9.6.9 The legislature in its wisdom consciously did not give interpretation to the terms used in Article 13(5) of the Treaty and by Article 3 of the Treaty, left open the interpretation to the said terms under the law of that State i.e. India herein, concerning the taxes to which the Convention applies. Since buy-back of shares by the Indian Company from the Appellant company was in contravention of the provisions of the

Companies Act, and the Appellant also failed to demonstrate any relevant document or reason for 'reorganization' which resulted into selling of its share or buy back of shares by HIIPL, consequently the transaction in this case can not be considered as "organization or reorganization". Even any other interpretation of the terms of treaty contrary to statutory mandate, the provisions of section 46A of the Act and 77A of the Companies Act shall render nugatory and otiose. Hence I am in agreement with conclusion drawn by the Ld. DRP to the effects that the actions of buy-back of own shares by the company (Appellant) are not included in the scheme of amalgamation or demerger or arrangement or winding up etc. The expression contained in the Treaty cannot operate in vacuum and permit the Appellant to take a meaning which does not satisfy the relevant statutory provisions thereby making the entire procedure and instructions non-existent. The Companies Act permits any new arrangement or reorganisation to be approved by the High Court as prescribed in the relevant Rules. Admittedly, the Appellant has not followed any of these rules or sought approval of the High Court for the new arrangement and on this account also, the case of the Appellant is not covered by the expressions under consideration. The reorganization of the group shall be the reference to some court appointed mechanism and/or statutory scheme. No such compliance is seen in the case of buy-back of shares in the instant case. In the instant case, there is no 'reorganisation' of the group either.

9.7 The Ld. AR also raised the contention that expression "or similar transactions" appearing immediately after the terms like" corporate organisation, reorganisation, amalgamation and division" which have a common genus implies that buy-back would be covered there under on the principles of ejusdem generis. The Ld. AR further claimed that for defining the term "reorganization" inference could have been drawn

from external factors or the Treaty between Netherlands and Nigeria or guidance notes issued by ICAI or SEBI guidelines.

9.7.1 I have given thoughtful consideration to the contention of the Ld. AR. Universally there are many rules for the interpretation of the statutes. One of them is "the doctrine of Ejusdem Generis" which is a Latin term and the meaning of it is ***"of the same kind and nature"***. It is settled law that the rule of ejusdem generis is to be applied "with caution" and "not pushed too far". It may not be interpreted too narrowly or unnecessarily if broad based genus could be found. It is also settled law that a taxation statute in particular has to be strictly construed and there is no equity in a taxing provision as held by the Hon'ble apex Court in **H.H. Lakshmi Bai v/s. CIT {(1994) 206 ITR 688, 691 (SC)}.** It is alos settled law that while interpreting tax statute, the function of the Court of law is not to give words in the statute, a strained and unnatural meaning to cover and extent its applicability to the areas. not intended to be covered under the said statute. It is also not permissible to construe any provision of a statute, much less a taxing provision, by reading into it more words than its contains as held in the case of **CIT v/s. Vadilal Lallubhai [(1972) 86 ITR 2 (SC)] by the Hon'ble Apex Court.** Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. It is also cardinal principle of interpretation of statute, when internal aids to interpretation do not work properly, then only the Court uses the external aids to interpretation. The external aids can be used for the interpretation, but external aids cannot prevail over the clear and unambiguous applicable provisions of the Acts.

9.7.2 Therefore, it is imperative, first to see the meaning available to the terms, in the Treaty or Statute itself and if not available, then only the reference can be made to the

other Treaty I.e. between Kingdom of Netherlands and Federal Republic of Nigeria or the Guidance Notes of ICAI or the SEBI guidelines, as referred to by the Id. AR, but not otherwise. Here in the instant case, specific provisions of the Acts are available which especially deals with almost all the terms as referred in Article 13(5) of the Act. The terms "amalgamation" and "demerger" have been defined in the Income Tax Act, and the terms "arrangement", "buy-back of shares", "winding up" have been defined under Companies Act. Admittedly the actions of buy-back of own shares by a company are not included in the scheme of amalgamation or demerger or arrangement or winding up etc., therefore the expression contained in the Treaty cannot be allowed to interpret in vacuum, isolation and contraventions to the relevant statutory provisions of the Acts, thus I do not find any merit of the contention raised by the Ld. AR that to the effects that 'doctrine of ejusdem generis' is applicable in the instant case for interpreting the term "similar transaction" and for defining the term "reorganization", inference could have been drawn by the Ld. DRP or can be drawn by this Court from the Treaty between Kingdom of Netherlands and Federal Republic of Nigeria or the Guidance Notes of ICAI or the SEBI guidelines, referred to. The Id. DRP also categorically held "that the arguments of the Assessee that the buy-back of shares is included in the SEBI guidelines on restructuring cannot entitle the Assessee the benefits it is seeking for the reason that the restructuring in the perspective of the SEBI cannot be equated with the term used in the taxing statutes and the Companies Act. Moreover, the meaning ascribed under the SEBI Law could be at variance to the other statutes in so far as the implications thereof are concerned." Even otherwise I am of the considered view that the material published by the ICAI and SEBI guidelines haspersuasive value and can be used as guiding factor for decision of the case,

however, it cannot be used as binding law and in parlance with or contravention to the provisions of the applicable laws.

9.8 Coming to Article 26 of the Vienna Convention (supra) and judgment passed by the United Kingdom Supreme Court in the case of Anson vs. HMRC by which the Appellant claimed that Treaty or Convention is required to be interpreted in good faith in accordance with the ordinary meaning given to the terms of treaty in the light of its objects and purpose. Further as per section 90(2) of the Act the provisions would apply to the extent it is more beneficial to the Appellant and the Act would not apply. I observe that the Hon'ble Apex Court in the case of McDowell & Co. Ltd. vs. CTO (1985) 154 ITR 148 (SC) analysed the role of tax authorities and held as under:

> *"The taxing authority is entitled and is indeed bound to determine the true legal relation resulting from a transaction. If the parties have chosen to conceal by a device the legal relation, it is open to the taking authorities to unravel the device and to determine the true character of relationship. The proper way to construe a taking statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally, or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it.*
>
> *It is neither fair nor desirable to expect the legislature to intervene and take care of every device and scheme to avoid taxation. It is upto the Court to take stock to determine the nature of the new and sophisticated legal devices to avoid tax and consider whether the situation created by the devices could be related to the existing legislation with the aid of 'emerging techniques of interpretation as was done in Ramsay, Burma Oil and Dawson, to expose the devices for what they really are and to refuse to give judicial benediction."*

9.8.1 I am of the considered view that the art of correct Interpretation would depend on the ability to read, what is stated in plain language, between the lines, through the

provision(s), examining the intent of the Legislature and case laws and internal and external aids to interpretation. Rules of interpretation are applied only to resolve the ambiguities. The object and purpose of Interpretation is to ascertain the intention of the law, as exhibited in the statute. Wherever it is possible to do so, the provision must be harmoniously constructed by avoiding a conflict. A construction which reduces the statute to a futility has to be avoided. A statute or any enabling provision therein must be so construed as to make it effective and operative. The provisions of two enactments must be read harmoniously so as not to subject them to any strained construction giving rise to an artificial inconsistency or repugnance. No doubt as per Article 26 of the Vienna Convention (supra), every Treaty or Convention in force is binding upon the parties to it and must be performed by them in good faith. Further, as per Article 31, a Treaty or Convention is required to be interpreted in good faith in accordance with the ordinary meaning given to the terms of treaty in the light of its objects and purpose. Further, when the terms used in the Treaty or Convention has not been given meaning, then the ordinary meaning is liable to be given, by giving meaning, which it has under the law of that State concerning the taxes to which the convention applies as per India Netherlands Treaty. However the Interpretation to the clauses of any Treaty or Convention cannot be given contrary to or in breach of any law in force in India.

9.8.2 Further I am of the considered view that certainly as per section 90(2) of the Act, the benefits of the beneficial provisions of the Act would be applicable, but only in harmonize way and in a case where there is no contravention of the provisions of laws of the Land applicable thereto and/or Treaty is clear with regard to the subject in issue and/or when two Interpretations are possible while considering the relevant clauses of Treaty and the Acts as applicable, but not otherwise. Here in the Treaty under

consideration, the definitions to the terms as enshrined under Article 13(5) of the Treaty are not available and therefore the said terms necessities definitions but in harmonious way and without violating any provisions of laws applicable as done in this case by the Ld. DRP and therefore I endorse the same.

9.8.3 With regard to the contention of the Appellant qua non-applicability of the Act, I observe that the Appellant by raising additional ground of objection, admitted itself to be covered under the provisions of section 47(iv) of the Act, meaning thereby subjected itself to the Income-Tax Act of India and on the contrary claimed that the Act (Income Tax Act 1961) would not apply, therefore, in my considered view can not be allowed to blow hot and cold at the same time and consequently cannot evade from the applicable provisions of laws of India, hence the contention of the Appellant is untenable.

9.9 With regard to the contention qua overruling of the judgment of the Ld. Authority for Advance Ruling (AAR) in the case of Perfetti Van Melle Holding BV, (supra), I observe that in fact, the Hon'ble High Court by considering the peculiar facts that the amendment dated 30.08.1999 by notification No. SO 693(E) reported in (1999) 239 ITR (STAT) 56, as incorporated into Indo Netherlands conventions, has not been considered by the AAR, set aside the said Ruling and remitted back the matter to the AAR to consider the entire matter afresh uninfluenced by any observation made in the impugned Ruling. In the instant case, the Id. DRP not only relied on the judgment referred to above by the AAR, but also taken into consideration many other aspects of the case and the laws applicable, therefore the conclusion of the Id. DRP cannot be set aside or faulted with on the overruling of judgement alone. Consequently in my considered view, the said contention of the Ld. AR is untenable.

9.10 At last, it was submitted by the id. AR that the Id. DRP has given narrow interpretation in a restrictive manner to the expression used in Article 13(5) of the Treaty between India and Netherlands, therefore the order impugned, which is based on directions of the Id. DRP is perverse and liable to be set aside. I observe that the Ld. DRP thoroughly considered all the aspects of the case and laws applicable thereto and then only interpreted the terms used in Article 13(5) of the Treaty by applying the relevant provisions of the Acts therefore can not be said that the Ld. DRP interpreted the said terms in narrow and restrictive manner.

9.11 No doubt the basic purpose of DTTA is to avoid double taxation. Though for claiming benefits under DTTA it is not mandatorily required, however the Appellant before the Id. DRP and the Bench as well, failed to show that it has already paid the taxes In Netherlands qua transaction under consideration. The Hon'ble Apex Court in the case of McDowell & Co. Ltd. vs. CTO (supra) reminded "That tax planning may be legitimate provided it is within the framework of law. Colorable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honorable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges." As per section 46A of the Act, any consideration received by a shareholder or a holder of other specified securities from any company on purchase of its own shares or other specified securities shall be, subject to provisions contained in section 48, deemed to be the 'capital gains'. It is also a fact that the Appellant initially itself offered the 'Long Term Capital Gain' earned from selling the shares/buy back scheme, however later on turned its stand and claimed contrary, which was not allowable in the given facts, as

per the Acts applicable to the case in hand and therefore rightly disallowed by the authorities below.

9.12 On the aforesaid discussions, analyzations determination it is clear that the definitions have not been given in the Treaty with regard to the terms used under Article 13(5) of the Treaty. Admittedly in the 'Minutes of meeting of (HIIPL)' there is no reference about any scheme of organisation or re-organisation of the Indian Company or the Huntsman Group as a whole and also there is no reasons whatsoever which prompted the HIIPL to pursue the scheme of buy-back of its own shares and even could not highlight any reason for buy-back of shares, which could classify the Appellant's case as covered by the expression "a corporate organisation, re-organisation, amalgamation, division or similar transaction", occurring in Article 13(5) of the Treaty. Moreover no Court appointed mechanism /statutory scheme was adopted by the subsidiary company (HIIPL) for buy-back of shares and even there is no reorganisation of the group either. Further by selling of shares or purchase of share, no major and substantive change has been occurred in the status of Appellant or HIIPL and even not resulted into any alteration in the rights and interest of security holders. It is also clear that in the transaction of buy back of share, there was contravention of the provisions of section 47(iv) of the Act and section 77A of the Companies Act and it is a fact that the said provisions were applicable to the Appellant's case. The interpretation to the terms can not be given in contravention of the provisions of laws applicable and interpretation if any necessitate then it should be in harmony with the provisions applicable to the subject in issue as given by the Id. DRP in this case. Therefore, in my considered view, the Ld. DRP rightly interpreted the provisions of Article 13(5) of the Treaty in its right perspective by considering and referring the

relevant provisions of Treaty, the Income-tax Act the Companies Act and Case laws as applicable to the case in hand.

I find that the case laws referred to by the Appellant are factually dissimilar and hence not applicable to the instant case.

Hence in cumulative effects on the foregoing discussions, observations and determinations, I am in concurrence with the findings of the Id. DRP that the case of the Appellant is not covered by section 47(iv) of the Act and the said beneficial provision in Article 13(5) of the Treaty. Consequently the Appeal of the Appellant is liable to be dismissed.

10. As the Ld. AR argued this case, in context of additional ground of objection referred to above, only, therefore the Appellant would be at liberty to argue the case on merits.

11. In the result, appeal of the Appellant, to the extent of challenge, on the rejection of additional ground of objection by the Ld. DRP or under the refuge of section 47(iv) of the Act and the Article 13(5) of the Treaty, is dismissed.

PER: MAHAVIR SINGH, VICE PRESIDENT AS THIRD MEMBER

By the order of President, ITAT vide U.O. No.F.28-Cent.Jd(AT)/2025 dated 10th January, 2025, the undersigned has been nominated to adjudicate the difference of opinion between the learned Accountant Member and learned Judicial Member.

2. On the point of difference learned Accountant Member has framed the following question:-

"Whether on the facts and in the circumstances of the case the Assessing Officer and DRP erred in holding that buy-back of

equity shares by subsidiary of the assessee from the assessee is not covered by section 47(iv) of the Act, thereby rejecting the assessee's claim that any capital gain arising from buy-back transaction is not taxable in India in terms of Article 13(5) of DTAA entered into between India and Netherlands?"

3. On the point of difference learned Judicial Member has framed the following questions:-

"1. *Whether the AO and DRP erred in holding that for buy back of shares by 'HIIPL' [a subsidiary company of the appellant] from the appellant, the provisions of section 46-A of the Act would be applicable and that the provisions of section 47(vi) would not be applicable?*

2. Whether the AO and DRP erred in holding that buy back of shares by 'HIIPL' from the appellant, is not covered by the beneficial provisions of Article 13(5) of the Treaty [DTAA between India and Netherlands], thus the Assessee's claim on this account is also not acceptable?

4. The then Third Member, vide his Order dated 31.05.2023 in terms of Section 255(4) of the Act, and with the concurrence of the both the sides, has reframed the following question to address the precise point of difference in the two dissenting orders:-

"Whether or not the gains arising to the assessee company in the instant case from the buy-back of shares by 'HIIPL' is covered by Article 13(5) of the DTAA between India and Netherland?"

5. Brief facts of the case are that the assessee, a Company incorporated in the Netherlands, holds 99.98% shareholding of its subsidiary, Huntsman International (India) Private Limited (hereinafter referred to as 'HIIPL'). During the period under consideration, assessee sold a part of its shareholding in Indian subsidiary in pursuance to an offer of buy-back by 'HIIPL'. Under the scheme of buy-back, assessee sold 2,14,00,000equity shares @Rs.23.10 per share for a total consideration Rs.49,43,40,

000/- and the resultant capital gains was offered to tax in the return of income. The Assessing Officer (AO) referred the matter to the Transfer Pricing Officer (TPO) for determination of Arms Length Price (ALP) of the transaction, which was computed by the TPO at Rs.80.77 per share as against the stated consideration of Rs. 23.10 per share, thereby leading to an adjustment of Rs.123,41, 38,000/- to the returned income. In the objections raised before the Ld. DRP, the assessee resisted the impugned adjustment and inter-alia, raised a plea that the transaction of sale of shares by the assessee company being the holding company to its subsidiary, i.e. 'HIIPL' was not taxable under the Act in view of Section 47(iv) of the Act and further that even in terms of Article 13(5) of the Double Tax Avoidance Agreement (DTAA) between India and Netherland, the capital gain was not taxable in India. On both these aspects, the Ld. DRP has ruled against the assessee. When the matter reached the Tribunal, the assessee Company raised both the aspects, namely, the rejection of claim of exemption u/s 47(iv) by way of Ground of Appeal No. 2 in the Memo of Appeal and the application of Article 13(5) of the DTAA between India Netherland so as to make the impugned capital gains not taxable India by way of Ground No. 3 in the Memo of Appeal. When the matter was heard by the Ld. Members constituting the Division Bench, the Ld. Accountant Member upheld the claim of the assessee qua the Ground of Appeal No. 3 to the effect that the capital gain arising from the buy-back of shares in the instant case fell within the purview of Article 13(5) of the DTAA and was taxable only in the State of Netherland, as it results from an exercise of ‘Corporate reorganisation'. However, the Ld. Judicial Member has differed with the Ld. Accountant Member qua this aspect in as much as according to him the instant buy back of shares does not amount to 'Corporate reorganisation' and therefore, it does not attract Article 13(5) of the DTAA. Additionally, the Ld. Judicial Member has also dealt with the claim of assessee in Ground of Appeal No. 2, namely, exemption u/s. 47(iv) of the Act, wherein the stand of the Revenue has been upheld.

6. Ld Counsel for the assessee Sh Himanshu Sinha, at the outset, stated that in relation to exemption u/s. 47(iv) of the Act was not pressed by the assessee during the course of hearing of this appeal and thus there was no occasion for the Bench to adjudicate on it. He stated that Ld. Accountant Member does not record any argument advanced by the assessee in relation to this ground. The Ld. AM also not recorded in

the finding or observations in respect of applicability of the provisions of section 47(iv) of the Act. Therefore, only issue remains for adjudication in the present proceeding was the applicability of Article 13(5) of the India-Netherlands DTAA to the buy-back of shares carried by HIIPL during the relevant assessment year 2009-10. Ld. Counsel for the assessee stated the facts that the proceeds from issuance of equity shares by HIIPL to the assessee were utilized by HIIPL to acquire the Textile Effects (herein after "TE") business of Ciba Specialities Chemicals (India) Limited and its subsidiary Diamond Dye-Chem Limited for a total consideration of Rs. 166,05,00,000/- as on 30.06.2006. He narrated the entire history of transactions and stated the fact that HIIPL in the financial year 2006-07 received a sum of Rs. 18 crores as proceeds from long term and other borrowings. Further, HIIPL received a sum of Rs. 168 crores from financing activities i.e. equity shares issued to the assessee undertaken during financial year 2006-07 and assessee also drew my attention towards cash flow statement enclosed at page no. 1 of the audited financial statements. He further stated that in the same financial year, HIIPL utilized the cash flow generated from its financing activities for acquiring the Textile Effects (TE) business from Ciba Specialities Chemical (India) Limited and its subsidiary Diamond DyeChem Limited for a total consideration of Rs. 168 crores as on 30.06.2006. He referred to the cash flow statement at page no. 1 and Note No. 12 to the audited financial statements for AY 2006-07. He narrated that after the purchase of TE business, there was an increase in the profits generated by HIIPL and it generated a profit of Rs. 36,10,99,991/- in the FY 2006-07 as compared to a profit of Rs. 26,78,91,347/- in the FY 2005-06. He drew my attention to the financial statement for the FY 2007-08 and 2008-09 and profit generated by HIIPL of Rs. 73,01,61,119/- in FY 2007-08 and Rs. 74,82,40,665/- in FY 2008-09. In financial year 2008-09 relevant to assessment year 2009-10 the assessment year, the year under consideration, the HIIPL bought back 2,14,00,000 fully paid equity shares of Rs. 10 each at Rs. 23.10 per share (i.e., at a premium of Rs. 13.10 per share) for an aggregate consideration of Rs. 49,43,40,000/-. From the above facts, Ld. Counsel for the assessee explained that the proceeds for issuance of equity shares to the assessee could not have been uilitised by HIIPL for the buy-back. These funds were used for acquiring of TE business in FY 2006-07. He further referred to financial account for the financial year 2008-09 particularly page no. 1-12 and 22 of the audited financial statements for FY 2008-09. From the above factual statement, Ld. Counsel for the assessee explained that the buy

back of shares undertaken out of the profit declared from the TE business and free reserves of HIIPL, which includes the security premium amount and the same is allowable u/s. 77 of the Companies Act. This fact was duly certified in the audited financial statements for the AY 2009-10.

7. In view of the above, Ld. Counsel for the assessee stated that there is no violation of section 77 of the Companies Act, since proceeds for the issuance of equity shares by HIIPL to the assessee were not utilized for the purpose of the buy back. Ld. Counsel for the assessee in support of the same relied upon the decision in the case of Cholamandalam Ms General Insurance Co. Ltd. vs. DCIT [2019] 411 ITR 386 (Madras). He further relied upon the decisions in the case of (i) CIT vs. Paradise Holidays [2010] 325 ITR 13 (Delhi HC); (ii) CIT vs. Kohinoor Foods (formerly known as M/s Satnam Overseas Ltd. [2015] 373 ITR 682 (Delhi HC), (iii) ITO vs. Amit Verma 2012 (12) TMI 1210 (ITAT, Delhi), (iv) CIT vs. Amit Kumar and Co. [2016] 386 ITR 702 [Karnataka HC) and (v) RamjiwanLal vs. CIT [1980] 123 ITR 319 (Allahabad HC).

8 Ld. Counsel for the assessee stated that assessee's case is covered by Article 13(5) of the India-Netherlands DTAA and benefit u/s. 13(5) of the DTAA is available to the assessee as the present buyback of shares falls within the scope of expression 'corporate reorganisation'. Ld. Counsel for the assessee, at this stage referred to the context in which the expression 'reorganisation' has been used under the Act. He explained that while the expression 'reorganisation' has not been defined under the Act, however, this expression has been utilized in the context of 'business reorganisation' in the various provisions of the Act such as Sections 35DDA (4), 35DDA (4A), 72A (6) of the Act].

9. It was contended that the aforementioned sections, clearly laid down that when a partnership firm is converted into a company and vice-versa, while there is a change in the form of ownership, there is no change in the actual ownership of the entity, because the same persons who were the partners in the firm, are now the shareholders in the company. He explained that in other words, there is continuity of ownership and in the present case as well, while there is continuity of ownership resulting from the buy-back of the shares of HIIPL by the assessee. Ld. Counsel further explained that in the present case as a result of the buy back of shares held by the assessee in HIIPL gets

reduced, the actual ownership in percentage terms remains the same i.e. the assessee continues to be the owner of HIIPL. That is, the form of assessee's ownership in HIIPL get changed by (i) reduction in the financial interest and (ii) there being a major change (-24.15%) in the financial structure of HIIPL. However, the actual ownership of HIIPL remained the same. Ld. Counsel for the assessee also argued that the decision of the ITAT Mumbai Bench in the case of Accordis Beheer BV vs. DIT (International Tax) [2016] 157 ITD 373 (Mumbai) strongly supports the case of the assessee. In Accordis Beheer BV (supra), the Dutch investor had exited its investments in the Indian Company namely Century Enka by way of the buy back leading to the increase in ownership percentage of the Indian promoters. Upon exit, the Dutch shareholder had realized a significant capital gain. The tribunal rightly negated the claim of benefit of Article 13(5) on the ground that an exiting shareholder cannot claim to be a part of any corporate reorganisation of a group. Ld. Counsel for the assessee further relied on para 15 of the of the decision of Accordis Beheer BV (supra), he observed that the Tribunal examined the term re-organization from the "Dictionary for Accountants" which defined the term 'reorganisation' as under:-

> *"Reorganisation : A major change in the financial structure of a corporation or a group of associated corporations resulting in alterations in the rights and interests of security holders; a recapitalization, merger or consolidation."*

10. Ld. Counsel for the assessee submitted that the Tribunal held that for fulfilment of two conditions for a transaction to qualify as 'corporate reorganization' i.e., (a) there should be a substantial change in the financial structure of the organization, and (b) there is an alteration in the rights and interests of security holders. He submitted that since the Dutch shareholder had completely sold off its shareholding in the Indian company, it was essentially an exit given by the Indian promoters to the Dutch investors under a court sanctioned scheme of buy-back. Relying on Accordis Beheer, Ld. Counsel for the assessee submitted that the Assessing Officer/DRP in this case observed that the buy-back of shares by HIIPL did not result in an alternation in the rights and interests of the Assessee, and thus, the buy-back cannot be characterized as 'reorganisation'.

11. Ld. Counsel further stated that the term 'Reorganisation of a company' provided in the judicial dictionary of P. RamanathaAiyar's Major Law Lexicon can be considered

for the interpretation of this term and the guidance issued by the ICAI to its fellow members, which states that the definition of capital and financial restructuring includes buy back of shares. Similarly, the guidance issued by the ICSI also provides that buy back is a part of corporate restructuring of a company. Ld. Counsel also relied upon the decision of the Hon'ble Supreme Court in the case of Punjab Stainless Industries (SC) [2014] 15 SCC 129 wherein, it has been held that when a recognized body of Accountants, after due deliberations and consideration publishes certain material for its members. Therefore, the revenue instead of relying upon merely one dictionary for accountants should have placed reliance upon meaning of the phrase "corporate re-organization" in various legal dictionaries cited before the ITAT and the guidance issued by ICAI and ICSI.

12. Ld. Counsel for the assessee further submitted that assessee argued that principle laid down by the Hon'ble Supreme Court in the case of HH Lakshmi Bai vs. CIT (1994) 206 ITR 688 (SC) supports the case of the assessee. It is submitted that the assessee relying on the natural and ordinary meaning of the expression "corporate reorganization" under Article 13(5) of the India-Netherlands DTAA. It was further submitted that the buy-back has been carried out in full compliance to the companies Act.

13. Ld. Counsel further submitted that the revenue failed to take note of Vienna Convention which is *inter alia* recognized aid for treaty interpretation. Ld. Counsel for the assessee further submitted that a hyper-technical meaning of the terms *'corporate organization'* cannot be adopted to defeat the intent and purpose of the DTAA. Instead, the terms present in a treaty have to be given a purposive interpretation rather than a literal one with the view to implement the intention of both the countries involved in the treaty. He further submitted that a literal or legalistic interpretation must be avoided when the basic object of the treaty might be defeated or frustrated insofar as the particular item under consideration is concerned. It was submitted that treaties are to be interpreted in their context and in the light of its object and purpose, and the intention of countries who are party to such treaties.

14. Ld. Counsel for the assessee further submitted that instead of relying on a dictionary that is not widely known, the reliance should be placed on the meaning provided in the widely accepted judicial reference of P. RamanathaAiyar's Major Law Lexicon which defines the term *'Reorganisation of a company' to* mean:

> *"Reorganization of a company is amalgamation or readjustment when one company acquires another by way of merger or a single company divides into two or more entities or a company makes a substantial change in its capital structure."*

Ld. Counsel further submitted that, in view of above, the guidance issued by ICAI to its fellow members, which states that the definition of *"Capital and Financial Restructuring"* includes buy-back of shares be considered. Similarly, the guidance issued by the Institute of Company Secretaries of India **(ICSI)** for its fellow also provides that buy-back is a part of corporate restructuring of a company.

15. Ld. Counsel further submitted that the intention of the contracting parties i.e., India and the Netherlands with respect to Article 13(5) of the India-Netherlands DTAA is to provide taxation rights to the home country in relation to gains arising in the course of a corporate reorganisation wherein there is a transfer of shares within the same corporate group. In the present case as well, since the transaction of buy back-back by HIIPL from the assessee results in transfer of shares within the same corporate group, this transaction of buy-back should qualify as a corporate reorganization that is eligible to claim the benefit of Article 13 (5) of the India-Netherlands DTAA.

16. Ld. Counsel placed reliance in this respect on Klaus Vogel's commentary on Double Tax Conventions (5thEdn.) where the "importance of parallel treaties" has been explained. The learned author has cited instances of international practice where parallel treaties are interpreted in a harmonious manner if the provisions are analogous and one of the countries is common and fall in the same category. He further submitted that the text of the Ld. Author's commentary provides that "Thus for instance when interpreting the DTC between the US and Italy, the Tax Code quite properly reverted to the legislative history of the earlier DTAA between the US and Canada. Similarly, while discussing the provisions of the DTAA between the UK and the UK in Union Texas Petroleum Co. vs.Critchley, Harman J. drew comfort from the provisions of the /DTAA

between the UK and Finland.

17. Ld. Counsel for the assessee further stated that in that situation the provisions of capital gains arising in course of corporate reorganization in Article 13(5) of the DTAA between the Netherlands and India on one hand, and Article 13(4) of the DTAA between the Netherlands and Nigeria on the other are identical. Since both were negotiated in close proximity with each other (the India-Netherlands DTAA came into force in the year 1989 and the Netherlands and Nigeria DTAA came into force in the year 1992 and both involved developing countries, reliance on the protocol in the Nigerian treaty to interpret a term in the Indian treaty is apt and suitable.

18. Ld. Counsel for the assessee further submitted that the Bombay High Courtin the case of SEBI vs. Sterlite Industries (India) Limited [2003] 53 CLA 41 (Bombay) held that a company could buy-back its own shares as part of a 'reorganization scheme' under section 391 read with sections 100 to 104 of the Companies Act, 1956. This judgement of the Bombay High Court was followed by the Andhra Pradesh High Court in the case of Shareholders of TCI Industries vs. TCI Industries Limited (2004) 60 CLA 382. Thus, he submitted that the scheme of buy-back of shares by a company has been recognized as a scheme of reorganisation by the Hon'ble High Courts in the aforesaid judgement.

19.Ld. Counsel further submitted arguments on the aspect of assessee not paying any tax in the Netherlands, it could not claim any benefit under the India-Netherlands DTAA. In this regard, it was submitted that it is a settled law that claiming benefits under a tax treaty is not dependent on whether tax is actually paid in the state of residence. That is, the expression *"liable to tax"* in a contracting state does not necessarily imply that the person should actually be liable to tax in that contracting state and it is enough if that contracting state has the right to tax such person, whether or not such a right is exercised. Consequently, in the present case, in determining the availability of the beneficial provisions of Article 13 (5) of the India-Netherlands DTAA to the Assessee, it is irrelevant whether tax was actually paid by the assessee on the buyback of shares by HIIPL in the Netherlands.

20. Ld. Counsel for the assessee stated that the buy back of shares was vide Special Resolution dated 5.6.2008 and Revenue wrongly noted that the HIIPL did not highlight

any reason for buy back of shares. Further, he stated that the HIIPL was not required to take approval of any High Court for it to be a valid buy back. For this, he argued that the provision of section 77A of the Companies Act nowhere states that the approval from High Court is required. He further clarified that section 77A was introduced by Companies Amendment Act, 1999 as an alternate procedure devoid of the requirement to take sanction from the High Court for such a scheme of arrangement, when the shares brought back are equal to or lesser than the 25% of the total paid up capital and free reserves of the company or less. In the present case, according to him, since the shares bought back by HIIPL from the assessee constituted only 24% of the issued shares capital of HIIPL, there was no requirement to approach the Hon'ble High Court for such buy back. In terms of the above, Ld. Counsel for the assessee argued that assessee's case squarely fall in four corners of the term 'corporate reorganisation' and assessee is eligible for claim of benefit under Article 13(5) of the India-Netherlands DTAA.

21. On the other hand, Shri G.C. Srivastava, Special Counsel for the Revenue submitted that Article 13(5) of the India-Netherlands Double Taxation Avoidance Agreement (hereinafter referred to as 'DTAA') allocates the taxing rights of all kinds of capital gains (except those mentioned in the paras 1-4 of Article 13 of the DTAA) to the resident state (Netherlands in this case). It was submitted that an 'exception' to this general rule is that if the alienator holds 10% or more shares in a company which is incorporated in the source state, the source state (India in this case) gets the right of taxation. An 'exception to this exception' is that if the capital gain arises 'in the course of a 'corporate organisation, reorganization, amalgamation, division or similar transaction, and the buyer or the seller owns at least 10 per cent of the capital of the other', the capital gains would again be taxed in the resident state i.e., Netherland.

The term 'in the course of, occurring in the last limb of Article 13(5) of the DTAA, would mean in common English that the capital gain arising to the alienator, should be a 'necessary fallout OR in the duration OR in the span of OR in the passage of a corporate organization, reorganization, amalgamation, division or similar transaction. It was submitted that the underlying intent of this 'exception to exception' is that where the capital gain arises in consequence of a global reorganization or reorganization of the parent company, the capital gains so arising should not be taxed in the source state but in the resident state. A reading of different limbs of Article 13(5)

would indicate that in allocating the taxing rights, due regard is being given to the degree of territorial nexus of the gains with the country which has larger economic activity in giving rise to such income. It would mean that the intent is to cover gains arising from corporate reorganization at the group level or at the level of the entity which realises the gains and not merely at the level of the subsidiary company buying the shares on a standalone basis. There would be no rationale for the negotiators to grant exemption from taxation to the resident from source state taxation if the activities during the course of which gains are realised are confined to source state (which further strengthens the economic nexus of the transaction with the source state).

22. Ld. Special Counsel submitted that the expression 'corporate reorganization' is not defined in the DTAA. By virtue of Article 3(2) of the DTAA and Explanation 4 below Sub-section (5) of Section 90 of the Act, this term will derive its meaning from the tax laws of India. If the term is not explained in the tax laws, support can be had from other applicable laws of India. In this regard, it is submitted that while the terms 'amalgamation' and 'demerger' have been defined in the Act, the terms 'corporate organization, reorganization or division have not been defined either under the Act or even the Companies Act'. However, the term 'arrangement' finds place in Section 230 of the Companies Act, 2013 and takes within its scope the forms of organization/reorganization. The expression has to be understood in its common legal parlance. The term 'reorganization' has been defined in the 'Dictionary for Accountants' by Eric L. Kohler to mean a major change in the financial structure of a corporation or a group of associated corporations resulting in alterations in the rights and interests of security holders; a recapitalization, merger or consolidation. Similarly, the term 'Reorganization of a Company' has been defined in the judicial dictionary of P. RamanathaAiyar's Advanced Law Lexicon to mean the amalgamation or readjustment when one company acquires another by way of merger or a single company divides into two or more entities or a company makes a substantial change in its capital structure. Accordingly, in the absence of any major change in the capital structure of the company taking place in the course of buy-back of shares, the transaction cannot be termed in any manner as corporate reorganization. Even the reliance on the guidance issued by the Institute of Chartered Accountants of India is flawed for the reason that corporate reorganization has been defined in a very broad

sense therein to mean significant realignment of the investment and/or financial structure of a company through a conscious management action with a view to drastically alter the quality and quantity of its future cash flow streams. In the case at hand, there is neither any conscious management action reflected in the Board Minutes nor any alteration in the quality of future cash flow streams. Moreover, the reliance of the Assessee to bring buy-back within the ambit of divestiture and asset swaps is incorrect since there is no disposal of business units or significant holdings in favour of third party, as stipulated in the said guidance. Further, reliance on the protocol by the resident country (Netherland) signed with a third country (Nigeria), where India is not a party, cannot be imported for the interpretation of the terms of the agreement in the applicable treaty. Reliance in this regard is placed on the decision of the ITAT in the case of ONGC v. ACIT, Dehradun, (2006) 9 SOT 8 (Delhi) (SMC) as well as the decision of the Authority for Advances Ruling (hereinafter referred to as 'AAR') in the case of Perfetti Van Melle Holding B.V., In re (AAR 2011-TII-30-ARA-Intl). The observations of the AAR have not been reversed by the Hon'ble High Court of Delhi, even though the order has been set aside on other grounds.

23. Ld. Special Counsel submitted that the claim of the Assessee is based on the fundamental premise that buy-back is necessarily a part of corporate reorganization and therefore it would be covered under the third limb of Article 13(5) of the DTAA. It is submitted that whether or not a transaction is undertaken in the course of a corporate organisation, reorganization, amalgamation, division or similar transaction, is essentially a matter of fact and would be determined with reference to the facts and circumstances of each case. There is nothing in law to presume that every buy-back of share is necessarily the result of a corporate reorganization. The onus will be on the assessee to establish that the transaction of buy-back of shares was a part of corporate reorganization. Any reference to the definitions of corporate reorganization, would at best establish that buy-back can also be a part of corporate reorganization, but that would not mean that in the case of the assessee the transaction was undertaken in the course of a corporate organisation, reorganization, amalgamation, division or similar transaction. Whether or not any such corporate organization or reorganization had taken place in the case of the assessee, is a fact which has to be established by the person who made claim because such onus has not been discharged in this case. The factum of a

capital gain arising in the course of a ‘corporate, reorganization’ cannot be a matter of sheer argument. It has to be factually established.

24. Ld. Special Counsel submitted that the assessee did not advance any claim 'in their return of income that the capital gains were not liable to tax in India by virtue of exemption available to such gains under Article 13(5) of the DTAA. No such claim was advanced before the Transfer Pricing Officer. No claim of exemption under Article 13(5) was made during the course of entire proceedings before the AO. It was submitted that it was never the case that any corporate reorganization had taken place. The grounds on which objections to the draft order were filed also did not contain any plea that the capital gains were not chargeable by virtue of Article 13(5). It was only by way of an additional ground, that this claim was advanced for the first time before the' DRP. While the right of the assessee to raise legal issues at any stage is not being questioned by the Revenue, the factual foundation by way of intent or action of the transacting parties to demonstrate the fact of a corporate reorganization does not exist at all. Merely on the basis of a suggestion, which is academic in nature, that buy-back can be a part of corporate restructuring, it cannot be said that the conditions stipulated in Article 13(5) that gains must arise in the course of ‘corporate organisation, reorganization, amalgamation, division or similar transaction’ are fulfilled. The buying back of 24% of the share-holding at the rate of Rs. 23.10 per share for a consideration of Rs. 49,43,40,000/- from the assessee and cancellation thereof has only resulted in the diminution of the paid-up share capital of Indian subsidiary. There is literally no change either in the capital or holding or financing structure or any change in the controlling interest, rights /obligations of the shareholders and any assets and liabilities. With the reduction in the paid-up capital, the assessee still continues to remain the holding company off Indian subsidiary. The rights and obligations of the Assessee has not undergone any change because it still continues to hold more than 99 % shares of its Indian subsidiary. Even otherwise, the Companies Act, 2013 under Section 66(6) specifically provides that reduction in share capital is not applicable in the case of buy-back of shares. Thus, even from a company law perspective, a buy-back of shares does not result in any change in the capital structure of the company. The buy-back merely provides for an exit route for the investor/shareholder who held the securities in a particular company and such exit route therefore cannot be termed as corporate

organisation, reorganisation, amalgamation, division etc. The payment for buy-back having been made out of share premium account and the profits of the year, also indicates that the transaction was undertaken to transfer the profits to the parent without payment of Dividend Distribution tax/Dividend tax. It is, therefore, submitted that the arrangement entered into by the assessee in selling a part of its shareholding to the Indian subsidiary in the scheme of buy-back simplicitor is bereft of any element of corporate reorganization or transaction of similar nature.

25. I have heard the Ld. Special Counsel for the Revenue, Shri G.C. Srivastava and Ld Counsel for the assessee Shri Himanshu Sinha, Advocate at length. Admittedly, the short point for adjudication before me is whether or not the gains arising to the assessee company in the instant case from the buy-back of shares by HIIPL is covered by Article 13(5) of the DTAA between India and Netherlands. Out of the above, now further short point remains, in the given facts and circumstances, for adjudication is the buy-back of shares by HIIPL would classified under the exception 'corporate reorganisation', 'reorganisation', 'amalgamation', 'division or similar transaction' under Article 13(5) of the India Netherlands DTAA. Both sides admitted that Article 13(5) of the India Netherlands DTAA allocates the taxing rights of the all kinds of capital gains, except those mentioned in the paras 1-4 of the Article 13 of the DTAA to the resident state i.e. Netherlands in the present case. An 'exception' to this rule is that if the alienator holds 10% or more shares in a company which is incorporated in the source state, the source state gets the right of taxation i.e. India in the present case. Further, there is no dispute that an 'exception to this exception' is that if the capital gain arises in the course of corporate organization, reorganization, amalgamation, division or similar transaction, and the buyer or the seller owns at least 10 percent of the capital of the other, the capital gains would again be taxed in the resident state i.e. Netherlands in the present case. Both sides also admitted that under lying intent of this 'exception to exception' is that where the capital gain arises in consequence of a global reorganization or reorganisation of the parent company, the capital gains so arising should not be taxed in the source state but in the resident state. Both sides also admitted the fact that the proceeds from issuance of equity shares by HIIPL to the assessee were utilized by HIIPL to acquire the Textile Effects(hence fort "TE") business of Ciba Specialities Chemicals (India) Limited and its subsidiary Diamond Dye-Chem Limited

for a total consideration of Rs. 166,05,00,000/- as on 30.06.2006. I note that the entire history of transactions and the fact that HIIPL in the financial year 2006-07 received a sum of Rs. 18 crores as proceeds from long term and other borrowings. It is further noted that HIIPL received a sum of Rs. 168 crores from financing activities i.e. equity shares issued to the assessee undertaken during financial year 2006-07 and assessee also drew my attention towards cash flow statement enclosed at page no. 1 of the audited financial statements. It is noticed that in the same financial year, HIIPL utilized the cash flow generated from its financing activities for acquiring the TE business from Ciba Specialities Chemical (India) Limited and its subsidiary Diamond DyeChem Limited for a total consideration of Rs. 168 crores as on 30.06.2006. He referred to the cash flow statement at page no. 1 and Note No. 12 to the audited financial statements for AY 2006-07. After the purchase of TE business, there was an increase in the profits generated by HIIPL and it generated a profit of Rs. 36,10,99,991/- in the FY 2006-07 as compared to a profit of Rs. 26,78,91,347/- in the FY 2005-06. Perused the financial statement for the FY 2007-08 and 2008-09 and profit generated by HIIPL of Rs. 73,01,61,119/- in FY 2007-08 and Rs. 74,82,40,665/- in FY 2008-09. It is observed that in financial year 2008-09 relevant to assessment year 2009-10 the assessment year, the year under consideration, the HIIPL bought back 2,14,00,000 fully paid equity shares of Rs. 10 each at Rs. 23.10 per share (i.e., at a premium of Rs. 13.10 per share) for an aggregate consideration of Rs. 49,43,40,000/-. From the above facts, it is noted that the proceeds for issuance of equity shares to the assessee could not have been uilitised by HIIPL for the buy-back. These funds were used for acquiring of TE business in FY 2006-07. After perusing the financial account for the financial year 2008-09 particularly page no. 1-12 and 22 of the audited financial statements for FY 2008-09, it is understood that the buy back of shares undertaken out of the profit declared from the TE business and free reserves of HIIPL, which includes the security premium amount and the same is allowable u/s. 77 of the Companies Act. This fact was duly certified in the audited financial statements for the AY 2009-10. Further, there is no violation of section 77 of the Companies Act, since proceeds for the issuance of equity shares by HIIPL to the assessee were not utilized for the purpose of the buy back.

26. In view of the above facts, now it is to be seen whether or not the assessee's case covered by Article 13(5) of the India Netherland DTAA and benefit under Article 13(5)

of the same is available to the assessee as the present buy-back of shares falls within the scope of expression corporate reorganization. I have noticed that in the present case, as a result of the buy back shares, while there is a reduction in quantum of shareholding (i.e., the number of shares held by the assessee in HHIIPL gets reduce), the actual ownership in percentage terms remains the same (i.e., the assessee continues to be the owner of HIIPL). That is, the form of assessee's ownership in HIIPL gets changed by : (i) reduction in the financial interest, and (ii) there being a major change (-24.15%) in the financial structure of HIIPL. However, the actual ownership of HIIPL remained the same.

27. The term 'reorginisation' as provided in the widely accepted judicial reference of P. Ramanatha Aiyar's Major Law Lexicon which defines the term 'Reorganisation of a company' to mean:

> *"Reorganisation of a company is amalgamation or readjustment when one company acquires another by way of merger or a single company divides into two or more entities or a company makes a substantial change in its capital structure."*

The guidance issued by ICAI to its fellow members, which states that the definition of "Capital and Financial Restructuring" includes buy-back of shares. Similarly, the guidance issued by the Institute of Company Secretaries of India (ICSI) for its fellow also provides that buy back is a part of corporate restructuring of a company.

28. In view of the above, the intention of the contracting parties i.e., India and the Netherlands with respect to Article 13(5) of the India-Netherlands DTAA is to provide taxation rights to the home country in relation to gains arising in the course of a corporate reorganization wherein there is a transfer of shares within the same corporate group. In the present case as well, since the transaction of buy back by HIIPL from the assessee results in transfer of shares within the same corporate group, this transaction of buy back should qualify as a corporate reorganisastion that is eligible to claim the benefit of Article 13(5) of the India Netherlands DTAAA.

29. Accordingly, I agree with the view taken by Ld Accountant Member that transaction of buy-back of shares by HIIPL from the assessee results in transfer of shares within the same corporate group and hence, qualifies as a corporate

reorganization and is eligible to claim the benefit under Article 13(5) of the India Netherlands DTAA.

30. In terms of the above discussion, now I will answer the questions referred, as under :-

Question framed	Answer to the Question framed
"Whether or not the gains arising to the assessee company in the instant case from the buy-back of shares by 'HIIPL' is covered by Article 13(5) of the DTAA between India and Netherland?"	In the given facts and circumstances of the case and in view of the above discussions, the gain arising to assessee in the instant case from the buy-back of shares by 'HIIPL' is covered by Article 13(5) of the DTAA between India and Netherland and hence, allowable.

31. In view of the above answer to the question framed and discussions carried out on facts and circumstances of the case, I agree with the view taken by the learned Accountant Member.

32. The matter shall now be placed before the regular Bench for passing appropriate order in accordance with the majority opinion.

PER RENU JAUHRI:

1. The assessee's appeal was filed against the assessment order dated 30.06.2022 for A.Y. 2017-18, passed u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961. Substantive issue involved in the appeal is regarding the taxability of capital gains on buy back of shares and the dissenting orders were passed by the two members. Hence the issue was referred to Third Member by the Hon'ble President vide order dated 10.01.2025.

2. The Third Member has concurred with the view of the Accountant Member that the gain arising to the assessee from the buy back of shares by its subsidiary company

HIIPL is covered by Article 13(5) of the DTAA between India and Netherlands. In view of above, the appeal of the assessee is hereby allowed.

3. Order is pronounced in the open Court on 25.03.2026

Sd/-	**Sd/-**
(VIKAS AWASTHY)	**(RENU JAUHRI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 25.03.2026

Pooja Mittal, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi