Special provisions relating to avoidance of tax law company business partnership ...

Law

The Finance Act, 2001 inserted a new chapter X in the Income Tax Act, 1961, by inserting the special provisions relating to avoidance of tax in international transactions[1]. These provisions came into effect from 1. 4. 2002. These provisions are contained in Section 92 to 94A of the Act. These Sections provide wide powers to the Assessing Officer and the Transfer Pricing Officer (TPO) to determine the income from international transaction by having regard to arm's length price. Section 92C provides for computation of arm's length price. Section 92CA provides for reference to TPO. These provisions deal with the avoidance of income tax by transactions resulting in transfer of income to non-residents[2]and also avoidance of tax by certain transactions in securities.[3]It also provides for special measures in respect of transaction with persons located in notified jurisdictional area.[4]Thus, we can see the Income Tax Act, 1961 contains a number of specific provisions which are meant to check the tax avoidance in a specific circumstances, by specific persons and in a specific transaction. However, these Specific Anti-Avoidance Rules are not sufficient to cover the abusive and contrived business arrangements. Therefore, it was felt necessary to introduce GAAR.

D. Importance of Statutory Interpretation of Tax Avoidance in India

Generally, successful tax avoidance relies on using the literal meaning of legislative provisions in ways that the legislature did not anticipate or intend. Therefore, in order to strike down a tax avoidance transaction, the literal effect of the legislation must be disregarded and some other interpretation must be given effect. In such a situation, the courts' approach to statutory interpretation is of primary importance because the interpretive exercise is

concerned with how to apply a legislative provision to a set of facts, taking into account considerations such as the meaning of the provision. A court deciding a tax avoidance case must choose between competing interrelations of the relevant provisions which would result in quite different tax consequences. Therefore, different approaches to statutory interpretation affect how restrictive or permissive the legal climate is with regard to tax avoidance. An approach that gives more weight to the underlying policy goals of Parliament, as it is expressed in the overall structure and scheme of the legislation, will be less likely to permit taxpayers to benefit from tax avoidance typically requires a literal application of the legislation without regard to overarching tax avoidance policy considerations. On the other hand, an approach that focuses on a literal interpretation of the legislation, but which does not consider the consequences of a literal interpretation in terms of normative policy considerations, will be more likely to permit tax avoidance. In most Western jurisdictions, such as the United States, the UK, and the major civil law countries of Western Europe, the Courts have developed a variety of judicial anti-avoidance doctrines to stop tax avoidance. Generally, those anti-avoidance doctrines provide a framework for rationalizing when to deny taxpayers the beneficial consequences resulting from a literal reading of the legislation in circumstances where no statutory provisions mandate the court to do so. Where courts have adopted a more policy-oriented approach to statutory interpretation, they have developed more vigorous anti-avoidance doctrines. The current approach to the interpretation and application of taxing statutes is summarized by Ribeiro PJ in the Arrowtown[5]case in the

Hong Kong Court of Final Appeal in a passage which was explicitly endorsed by the House of Lords in BMBF v. Mawson[6]-The driving principle in the Ramsay line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically. The court has to give effect to the language of the section when it is unambiguous and admits of no doubt regarding its interpretation, particularly when a legal fiction is embedded in that section. A legal fiction has a limited scope and cannot be expanded by giving purposive interpretation particularly if the result of such interpretation is to transform the concept of chargeability. However, 'by using purposive interpretation, and looking beyond the literal language of the particular provisions to seek the true meaning from their wider context, the Courts have frustrated many attempts to avoid tax which, pre Ramsay, would have succeeded.'[7]The most common anti-avoidance doctrines developed in Western jurisdictions are the sham transaction doctrine, the ineffective transaction doctrine, the business purpose test, the step transaction doctrine, the substance over form doctrine, and the abuse of rights doctrine. Each of these doctrines attempts to provides a rational justification for ignoring the literal application of the legislation to a tax avoidance transaction. Rather, they attempt to interpret the legislation in a manner more consonant with the legislative intent underlying the relevant statutory provisions. However, no jurisdiction employs all of these doctrines, nor are the doctrines themselves necessarily consistent from one jurisdiction to another. For instance, the sham

transaction doctrine has historically been formulated differently in the United States as compared to in Canada and the UK. Similarly, the abuse of rights doctrine is known only in civil law jurisdictions (although the GAAR appears to have been an attempt to import the concept of 'abuse' into Canadian law). In the application of a judicial anti-avoidance rule, the Revenue may invoke the substance over form principle or piercing the corporate veil test only after it is able to establish on the basis of the facts and circumstances surrounding the transaction that the transaction in question is a sham or tax avoidant[8]. It is clear from the above discussion that a tax avoidance transaction is an action taken by a taxpayer that attempts to put the taxpayer outside the literal wording of a provision but does not put him outside its spirit or intent.[9]

E. Vodafone Case[10]

This case has generated a lot of interest amongst tax practitioners, academicians and the taxpayers. The ruling in this case prompted the Ministry of Finance to amend the Act and introduce the GAAR in the Finance Bill of 2012. It will be useful to discuss this case in detail. The facts of the case are as under: The Hutchison group, Hong Kong, first invested in the telecommunications business in India in 1992 through a joint venture vehicle which came to be called Hutchison Essar Limited (HEL). In 1998, CGP was incorporated in the Cayman Islands, with limited liability, as an 'exempted company', and became a wholly owned subsidiary of a company which in turn became a wholly owned subsidiary of a Hong Kong company, HTL, which was later listed on the Hong Kong and New York Stock Exchanges in September, 2004. In February, 2005, all operating companies below HEL

were held by one holding company, HEL, with the approval of the Reserve Bank of India (RBI) and the Foreign Investment Promotion Board (FIPB). The ownership of HEL consisted of certain Mauritius based companies and certain Indian shareholders (AS and AG, individuals, holding shares through companies owned by them, and IDFC). On November 3, 2005, the Government of India enhanced the foreign direct investment ceiling from 49 per cent to 74 per cent in the telecommunications sector and proportionate foreign component held in any Indian company was also to be counted towards the ceiling of 74 per cent. The VIH, of the Vodafone group, acquired 5. 61 per cent shareholding in Bharti, a telecommunications company. GSPL, an Indian company under a Mauritius subsidiary of CGP obtained a call option to buy through TII an Indian company, in which AS and AG acquired shares through their group companies, with the credit support provided by HTL, to buy from companies under the control of AS and AG their entire shareholding in TII. Additionally, a subscription right was also provided allowing GSPL a right to subscribe to the shares of AG and AS companies. These agreements also contained clauses which imposed restrictions to transfer downstream interests, termination rights, subject to objection from any party, etc. On December 22, 2006, pursuant to an open offer from Vodafone, HTL issued a press release in the Hong Kong and New York Stock Exchanges that it had been approached by potentially interested parties regarding a possible sale of its equity interests in HEL. The Vodafone group made a revised offer on behalf of VIH to HTL for 66. 98 per cent interest and for loans given by the Hutch group, stating the consideration may be reduced to take account of the various amounts which would be payable

directly to certain existing legal local partners in order to extinguish HTL's previous obligations to them. The offer further confirmed that VIH had come to arrangements with HTL's existing local partners (AG, AS and IDFC) to maintain the local Indian shareholdings in accordance with the Indian FDI requirements. The offer also expressed VIH's willingness to offer Essar the same financial terms in HEL which stood offered to HTL. On February 11, 2007 the AG group of companies held 23. 97 per cent of the shares in TII, the AS group of companies held 38. 78 per cent in TII and SMMS (IDFI) held 54. 21 per cent in Omega. Consequently, the holding of AG in HEL through TII stood at 4. 68 per cent and the holding of AS in HEL through TII stood at 7. 577 per cent and the holding of SMMS(IDFI) in HEL through Omega stood at 2. 77 per cent, which added up to 15. 03 per cent in HEL. These holdings came under the option route, as GSPL, the Indian company indirectly owned by CGP, held call options and subscription options to be exercised in future under circumstances spelt out in framework agreements, keeping in mind the sectoral cap of 74 per cent. Thus, the position was that CGP held 42. 34 per cent in HEL through 100 per cent wholly owned Mauritius companies, 9. 62 per cent indirectly through TII and Omega (companies controlled by AS, AG and IDFI), and 15. 03 per cent through the GSPL route. On February 11, 2007, VIH and HTL entered into an agreement for sale and purchase of share and loans under which HTL agreed to procure the sale of the entire share capital of CGP for VIH and the assignment of loans owed by CGP and its subsidiary to a direct subsidiary of HTL. As part of its obligations, HTL undertook to procure that each wider group company would not terminate or modify any rights under any of its framework agreements or exercise any of

their options under any such agreement. On the next day Vodafone and HTL made announcements on the Washington, London and Hong Kong stock exchanges stating that HTL had agreed to sell its entire direct and indirect equity and loan interests held through subsidiaries, in HEL to VIH. On March 15, 2007, under a settlement agreement between HTL and the Essar group, HTL agreed to pay US $415 million to Essar for the acceptance of the share and loan purchase agreement, for waiving rights or claims in respect of management and conduct of affairs of HEL, giving up right of first refusal, tag along rights and shareholders rights and giving up its objections before the Foreign Investment Promotion Board. HTL agreed to dispose of its direct and indirect equity, loan and other interests and rights, in and related to HEL, to VIH. On the same day, a term sheet agreement was signed governing the relationship between Essar and VIH as shareholders of HEL including VIH's right as a share-holder of HEL to nominate eight directors out of twelve to the board of directors, the nominee of Vodafone had to be there to constitute the quorum, to get a right of first refusal over the shares held by Essar in HEL and if the Vodafone group shareholder should sell its shares in HEL to an outsider, Essar had a tag along right in respect of Essar's shareholding in HEL. A put option agreement of the same date was signed between VIH and the Essar group requiring VIH to buy from the Essar group shareholders all the option shares held by them. VIH applied for approval to the FIPB stating that CGP owned directly and indirectly through its subsidiaries an aggregate of 42. 34 per cent of the issued share capital of HEL and a further indirect interest in 9. 62 per cent of the issued share capital of HEL, that the transaction would result in VIH acquiring an indirect

controlling interest of 51. 96 per cent in HEL, a company competing with Bharti, which was why approval of the FIPB became necessary as VIH held 5. 61 per cent stake in Bharti. In replies to queries raised by the FIPB as to the manner of valuation of the 67 per cent interest, HEL clarified that HTL being listed on the New York stock exchange had to file statements in accordance with the U. S. generally accepted accounting principles (GAAP), and had to consolidate the assets and liabilities of companies even though not majority owned or controlled by HTL, because a U. S. accounting standard required it, and that this led to the reporting of an additional 19. 54 per cent in HEL, which lead to the figure of a combined holding of 61. 88 per cent. On the other hand, under Indian generally accepted accounting principles, the interest as of March, 2006 was 42. 34 per cent + 7. 28 per cent (rounded off to 49. 62 per cent). In reply to further queries by the FIPB to HEL as regards appointment of directors, HEL clarified that under the articles of HEL the directors were appointed by its shareholders in accordance with the provisions of the Indian company law but in practice the directors of HEL had been appointed pro-rata their respective shareholdings which resulted in four directors being appointed from the Essar group, six directors from the HTL group and two directors from TII (in practice, these were AS and AG). By a letter addressed by VIH to the FIPB, it confirmed that VIH's effective shareholding in HEL would be 51. 96 per cent. The FIPB asked VIH to clarify under what circumstances VIH agreed to pay US $11. 08 billion for acquiring 67 per cent of HEL when the actual acquisition was only 51. 96 per cent. VIH replied that VIH had agreed to acquire from HTL, interests in HEL which included 52 per cent equity shareholding for US $11. 08 billion, that the price

included a control premium, use and rights to the Hutch brand in India, a non-compete agreement with the Hutch group, the value of non-voting non-convertible preference shares, various loans obligations and the entitlement to acquire a further 15 per cent indirect interest in HEL, that all the above elements together equated to 67 per cent of the economic value of HEL. VIH diluted its stake in Bharti by 5. 61 per cent. In reply to the queries raised by the FIPB regarding break up of valuation, VIH confirmed that various assets and liabilities of CGP included its rights and entitlements, including subscription rights, call options to acquire in future a further 62. 75 per cent of TII, call options to acquire in future a further 54. 21 per cent of Omega which together would give a further 15. 03 per cent proportionate indirect equity ownership of HEL, control premium, use and rights to Hutch brand in India and a non-compete agreement with HTL. No individual price was assigned to any of the above items. It further stated that HTL had conducted an auction for sale of its interests in HEL in which HTL had asked each bidder to name its price with reference to the enterprise value of HEL. As a consequence of the transaction, Vodafone would effectively step into the shoes of HTL including all the rights in respect of its Indian investments that HTL enjoyed. The Indian joint venture partners would remain invested in HEL as the transaction did not involve the Indian investors selling any of their respective stakes. On May 7, 2007, the FIPB gave its approval to the transaction, subject to compliance with the applicable laws and regulations in India. On May 8, 2007, consequent upon board resolutions passed by CGP and its downstream companies, the directors of the Hutch group resigned, new directors of the Vodafone group were appointed, and resolutions were

passed by Indian holding companies accepting the resignation of HTL's nominee directors and appointing VIH's nominee directors. The same steps were taken by HEL and its subsidiaries. Other steps to complete the transfer were carried out. The Department raised a demand for tax of Rs. 11, 218 crores on capital gains arising out of the sale of the share capital of CGP on the basis that CGP, whilst not a tax resident in India, held the underlying Indian assets, and that the aim of the transaction was acquisition of a 67 per cent controlling interest in HEL, an Indian company. On a writ petition by VIH, the Mumbai High Court ordered a remand on the question whether the Indian tax authorities had jurisdiction to tax the transaction, and the Income-tax Department passed an order declaring that Indian tax authorities had jurisdiction to tax the transaction. VIH filed a writ petition against this which the High Court dismissed. On appeal, the Supreme Court reversed the decision of High Court and allowed the appeal. Per S. H. Kapadia, CJI and Swatanter Kumar, J - (i) It is the task of the court to ascertain the legal nature of the transaction and while doing so it has to look at the entire transaction as a whole and not adopt a dissecting approach.(ii) All tax planning is not illegal or illegitimate or impermissible.(iii) The Income-tax Act, 1961, in the matter of corporate taxation, is founded on the principle of the independence of companies as economic entities with legal independence vis-a-vis their shareholders or participants. Consequently, the entities subject to income-tax are taxed on profits derived by them on stand-alone basis, irrespective of their actual degree of economic independence and regardless of whether profits are reserved or distributed to the shareholders or participants. Furthermore, shareholders or participants, that are subject to (personal or

corporate) income-tax, are generally taxed on profits derived in consideration of their shareholding or participations, such as capital gains. It is fairly well settled that for tax treaty purposes a subsidiary and its parent are also totally separate and distinct taxpayers. The fact that a parent company exercises a shareholder's influence on its subsidiaries does not generally imply that the subsidiaries are to be deemed residents of the State in which the parent company resides. Whether a transaction is used principally as a colourable device for the distribution of earnings, profits and gains, is determined by a review of all the facts and circumstances surrounding the transaction.(iv) Holding structures are recognized in corporate as well as tax laws. Special purpose vehicles and holding companies have a place in legal structures in India, be it in company law, the takeover code under the Securities and Exchange Board of India or even under the income-tax law. When it comes to taxation of a holding structure, at the threshold, the burden is on the Revenue to allege and establish abuse, in the sense of tax avoidance in the creation and/or use of such structures. (v) The legal position of any company incorporated abroad is that its powers, functions and responsibilities are governed by the law of its incorporation. Though it may be advantageous for parent and subsidiary companies to work as a group, each subsidiary will look to see whether there are separate commercial interests which should be guarded. Whether the parent company has 'power' over the subsidiary depends on the facts of each case. The directors of the subsidiary under their articles are the managers of the companies. They are not to be dictated by the parent company if it is not in the interests of those companies (subsidiaries). The fact that the parent

company exercises share-holder's influence on its subsidiaries cannot obliterate the decision-making power or authority of its (subsidiary's) directors. The decisive criteria is whether the parent company's management has such steering interference with the subsidiary's core activities that the subsidiary can no longer be regarded to perform those activities on the authority of its own executive directors.(vi) A typical large business corporation consists of sub-incorporates. Such division is legal and recognized by company law, laws of taxation, takeover codes. The parent is the only group member that normally discloses financial results. Below the parent company are the subsidiaries which hold operational assets of the business and which often have their own subordinate entities that can extend layers. Subsidiaries are often created for tax or regulatory reasons. They at times come into existence from mergers and acquisitions. As group members, subsidiaries are financially interlinked. Such grouping is based on the principle of internal correlation.(vii) Every strategic foreign direct investment coming to India, as an investment destination, should be seen in a holistic manner. There is a conceptual difference between a preordained transaction which is created for tax avoidance purposes, on the one hand, and a transaction which evidences investment to participate in India. In order to find out whether a given transaction evidences a preordained transaction or investment to participate, one has to take into account the following factors: the concept of participation in investment, the duration of time during which the holding structure exists; the period of business operations in India; the generation of taxable revenues in India; the timing of the exit; the continuity of business on such exit. In short, the onus will be on the

Revenue to identify the scheme and its dominant purpose. The corporate business purpose of a transaction is evidence of the fact that the transaction is not undertaken as a colourable or artificial device. The stronger the evidence of a device, the stronger the corporate business purpose must exist to overcome the evidence of a device.(viii) The income dealt with in each sub-clause of section 9(1)(i) of the Income-tax Act, 1961 is distinct and independent of the other and the requirements to bring income within each sub-clause, are separately noted. Hence, it is not necessary that income falling in one category under any one of the sub-clauses should also satisfy the requirements of the other sub-clauses to bring it within the expression 'income deemed to accrue or arise in India' in section 9(1)(i).(ix) The last sub-clause of section 9(1)(i) which refers to income arising from 'transfer of a capital asset situate in India' consists of three elements, namely, transfer, existence of a capital asset, and situation of such asset in India. All three elements should exist in order to make the last sub-clause applicable. Further, section 45 enacts that such income shall be deemed to be the income of the previous year in which the transfer took place. Consequently, such transfer should exist during the previous year in order to attract the said sub-clause. Thus, income accruing or arising to a non-resident outside India on transfer of a capital asset situate in India is fictionally deemed to accrue or arise in India, which income is made liable to be taxed by reason of section 5(2)(b) of the Act.(x) The court has to give effect to the language of the section when it is unambiguous and admits of no doubt regarding its interpretation, particularly when a legal fiction is embedded in that section. A legal fiction has a limited scope and cannot be expanded by giving purposive

interpretation particularly if the result of such interpretation is to transform the concept of chargeability.(xi) Section 9(1)(i) cannot by a process of interpretation be extended to cover indirect transfers of capital assets situate in India. To do so would amount to changing the content and ambit of section 9(1)(i). The Legislature has not used the words 'indirect transfer' in section 9(1)(i). If the word 'indirect' is read into section 9(1)(i), it would render the express statutory requirement of the fourth sub-clause in section 9(1)(i) nugatory. This is because section 9(1)(i) applies to transfers of a capital asset situate in India. This is one of the elements in the fourth sub-clause of section 9(1)(i) and if indirect transfer of a capital asset is read into section 9(1)(i) then the words 'capital asset situate in India' would be rendered nugatory. Similarly, the words 'underlying asset' do not find place in section 9(1)(i). Further, 'transfer' should be of an asset in respect of which it is possible to compute a capital gain in accordance with the provisions of the Act. Moreover, even section 163(1)(c) is wide enough to cover the income whether received directly or indirectly. Thus, the words 'directly or indirectly' in section 9(1)(i) go with the income and not with the transfer of a capital asset.(xii) The question of providing 'look through' in the statute or in the treaty is a matter of policy. It is to be expressly provided for in the statute or in the treaty. Similarly, limitation of benefits has to be expressly provided for in the treaty. Such clauses cannot be read into the section by interpretation.(xiii) Therefore, section 9(1)(i) is not a 'look through' provision and the word 'through' in section 9 cannot be interpreted to mean that if transfer of a capital asset situate in India happens 'in consequence of' something which has taken place overseas (including transfer of a capital

asset), then all income derived even indirectly from such transfer, even though from abroad, becomes taxable in India.(xiv) Under the Indian Companies Act, 1956, the situs of the shares would be where the company is incorporated and where its shares can be transferred.(xv) Pending exercise, options are not management rights. At the highest, options could be treated as potential shares and till exercised they cannot provide right to vote or management or control.(xvi) Valuation cannot be the basis of taxation. The basis of taxation is profits or income or receipt.(xvii) Control' is a mixed question of law and fact. A controlling interest is an incident of ownership of shares in a company, something which flows out of the holding of shares. A controlling interest is, therefore, not an identifiable or distinct capital asset independent of the holding of shares. The control of a company resides in the voting power of its shareholders and shares represent an interest of a shareholder which is made up of various rights contained in the contract embedded in the articles of association. The right of a shareholder may assume the character of a controlling interest where the extent of the shareholding enables the shareholder to control the management. Shares, and the rights which emanate from them, flow together and cannot be dissected.(xviii) The tax consequences of a share sale would be different from the tax consequences of an asset sale. A slump sale would involve tax consequences which could be different from the tax consequences of a sale of assets on itemized basis.(xix) As a general rule, in a case where a transaction involves transfer of shares lock, stock and barrel, such a transaction cannot be broken up into separate individual components, assets or rights such as right to vote, management rights, controlling rights, control

premium, brand licences and so on as shares constitute a bundle of rights. (xx) Shareholding in companies incorporated outside India is property located outside India. Where such shares become the subject matter of an offshore transfer between two non-residents, there is no liability for capital gains tax. In such a case, the question of TDS would not arise.(xxi) Foreign direct investment flows towards location with a strong governance infrastructure which includes enactment of laws and how well the legal system works. Certainty is integral to rule of law. Certainty and stability form the basic foundation of any fiscal system. Tax policy certainty is crucial for taxpayers (including foreign investors) to make rational economic choices in the most efficient manner. Legal doctrines like 'limitation of benefits' and 'look through' are matters of policy. It is for the Government of the day to have them incorporated in the Treaties and in the laws so as to avoid conflicting views. Investors should know where they stand. It also helps the tax administration in enforcing the provisions of the taxing laws. Per K. S. Radhakrishnan, J. vide his separate but concurring judgment held as under: (i) The burden is entirely on the Revenue to show that the incorporation, consolidation, restructuring, etc., has been effected to achieve a fraudulent, dishonest purpose, so as to defeat the law.(ii) Moving offshore or using offshore finance centres does not necessarily lead to the conclusion that they involve activities of tax evasion or other criminal activities.(iii) It is often said that insufficient legislation in the countries where they operate gives opportunities for money laundering, tax evasion, etc., and, hence, it is imperative that the Indian Parliament would address all these issues with utmost urgency.(iv) Shares are to be regarded as situate in the country in

which the company is incorporated and/or the place where the shares can be dealt with by way of transfer.(v) Controlling interest forms an inalienable part of the share itself and cannot be traded separately unless otherwise provided by the statute. Control is an interest arising from holding a particular number of shares and cannot be separately acquired or transferred. Controlling interest is not an identifiable or distinct capital asset independent of holding of shares. It is inherently a contractual right and not a property right and cannot be considered a capital asset unless the statute stipulates otherwise. Controlling interest, which stood transferred to Vodafone from HTL accompanied the CGP share and cannot be dissected so as to be treated as transfer of controlling interest of Mauritian entities and then that of Indian entities and ultimately that of HEL.(vi) The Revenue cannot tax a subject without a statute to support and every taxpayer is entitled to arrange his affairs so that his taxes shall be as low as possible and he is not bound to choose that pattern which will replenish the treasury.(vii) The true nature of the transaction can be ascertained only by looking into the legal arrangement actually entered into and carried out.(viii) One of the tests to examine the genuineness of the structure is the 'timing test' that is timing of the incorporation of the entities or transfer of shares, etc. Structures created for genuine business reasons are those which are generally created or acquired at the time when investment is made, at the time where further investments are being made at the time of consolidation, etc. In international investments, corporate structures are designed to enable a smooth transition which can be by way of divestment or dilution. Once entry into the structure is honourable, exits from the structure can also

be honourable. Sale of the CGP share, for exiting from the Indian telecommunications sector cannot be considered as a pre-ordained transaction, with no commercial purpose other than tax avoidance. Sale of the CGP share was a genuine business transaction, not a fraudulent or dubious method to avoid capital gains tax.(ix) On transfer of the CGP share, HTL had transferred only the 42 per cent equity interest it had in HEL and approximately 10 per cent (pro rata) to Vodafone, the transfer was offshore, money was paid offshore, the parties were non-residents and hence there was no transfer of a capital asset situated in India. The loan agreements extended by virtue of transfer of the CGP share were also offshore and could not be termed to be a transfer of assets situated in India. Rights and entitlements referred to also could not be termed as capital assets, attracting capital gains tax and even after transfer of the CGP share, all those rights and entitlements remained as such, by virtue of agreements in which neither HTL nor Vodafone was a party.(x) Section 9 covers only income arising from a transfer of a capital asset situated in India and it does not purport to cover income arising from the indirect transfer of capital asset in India.(xi) Source in relation to an income has been construed to be where the transaction of sale takes place and not where the item of value, which was the subject of the transaction, was acquired or derived from. HTL and Vodafone were offshore companies and since the sale took place outside India, applying the source test, the source is also outside India, unless legislation ropes in such transactions.(xii) Capital gains are chargeable under section 45 and their computation is to be in accordance with the provisions that follow section 45 and there is no notion of indirect transfer in section 45.