
(2010) 12 GUJ CK 0010
In the Gujarat High Court

Case No : Company Petition No. 183 and Company Application No. 254 of 2009

In Re: Vodafone Essar Gujarat Limited

Date of Decision : 09-12-2010

Acts Referred:

Bombay Stamp Act, 1958 — Section 20
Companies Act, 1948 — Section 206(2)
Companies Act, 1956 — Section 391
Contract Act, 1872 — Section 25
Income Tax Act, 1961 — Section 281, 45, 47, 80(I)(A)
Telegraph Act, 1885 — Section 4
Transfer of Property Act, 1882 — Section 122

Citation : (2011) 101 CLA 25 : (2011) 161 CompCas 144 : (2011) 2 CompLJ 352 : (2011) 239 CTR 229 : (2011) 105 SCL 301

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : S.N. Soparkar, Mihir Joshi, Sandip Singhi, Amit M. Panchal, Niti Dixit, Shankhsen Gupta and Shivani Rajpurohit, for the Appellant; Mihir J. Thakore Iqbal I. Shaikh, Nitin K. Mehta and Ritu Dalal, for the Respondent

Final Decision : Dismissed

Judgement

K.A. Puj, J.—The Petitioner Company has filed this petition to obtain the sanction of this Court to a Scheme of Arrangement under Sections 391 - 394 and other applicable provisions of Companies Act, 1956, whereby Passive Infrastructure Assets of the Petitioner Company together with the Passive Infrastructure Assets of other Companies shall vest in and become the right, property and assets of Vodafone Essar Infrastructure Ltd., transferee Company.

2. The Board of Directors of the Petitioner Company has approved the Scheme by Resolution passed in a meeting held on 21.9.2007 and further modified by a Resolution dated 30.4.2008. The Board of Directors of the transferee Company has also approved the Scheme by a Resolution dated 21.9.2007.

3. The Scheme envisages the demerger of the Passive Infrastructure Assets of each of the transferor Companies. Upon sanction of the Scheme, the Passive

Infrastructure Assets of the transferor Companies will be transferred from each of the transferor Companies and shall vest in the transferee Company.

4. By an order dated 8.7.2009 in Company Application No. 254 of 2009 this Court has dispensed with the requirement of holding meetings of the shareholders, secured creditors and the unsecured creditors of the Petitioner Company, for the purpose of considering, and if thought fit, with or without modification, approving the Scheme. On substantive petition having been filed by the Petitioner before this Court, this Court has admitted the petition on 11.8.2009 and notice was issued to the Central Government to be served through the Regional Director, Ministry of Corporate Affairs, Mumbai. Notice was also issued to the Official Liquidator for examination of the affairs of the petitioning Company. The Official Liquidator was at liberty to engage Chartered Accountant for such purpose at the cost of the petitioning Company. The Court has also directed to issue public advertisement in Times of India, English daily, Ahmedabad edition and Gujarat Samachar, Gujarati daily, Ahmedabad edition, keeping 21 days clear notice. Pursuant to the notice, public advertisements were issued and affidavit to this effect was filed before this Court. In response to the notice served on the Regional Director an affidavit is filed by the Regional Director, Western Region, Ministry of Corporate Affairs, Mumbai on 27.11.2009, to which rejoinder-affidavit was filed on behalf of the Petitioner Company on 12.1.2010. Though notice was issued to the Official Liquidator on 11.8.2009, since it was a Scheme of demerger and transferor Company will not come to an end, on a note for speaking to minutes filed on behalf of the Petitioner Company, the Court has passed further order on 26.8.2009 clarifying that no notice to the Official Liquidator is required to be issued.

5. Pursuant to the public notice, objections were raised on behalf of the Income Tax Department on 8.10.2009, to which counter affidavit was filed on behalf of the Petitioner on 30.12.2009. Further objections-cum-rejoinder affidavit was filed on behalf of the Income Tax Department on 3.3.2010.

6. On completion of pleadings, petition was heard at length.

7. Pursuant to the notice issued to the Regional Director, an affidavit is filed by Shri Rakesh Chandra, Regional Director, stating that the Petitioner Company may be directed to furnish the latest financial statement before this Court at the time of hearing and that the Petitioner Company may also be directed to obtain necessary approval of the concerned regulatory authorities of the Ministry of the Telecommunications in respect of the present scheme of arrangement if applicable and that the Regional Director had received letter dated 7.9.2009 from Assistant Commissioner of Income Tax, Ahmedabad on tax aspects in respect of the Petitioner Company wherein it is stated that they are going to represent the same before the High Court of Gujarat through their advocate.

8. In response to these objections and observations, an affidavit is filed on behalf of the Petitioner Company and submitted that the latest audited financial

statement of the Petitioner Company for the financial year ended on 31.3.2009 were filed alongwith the Company Petition. The latest unaudited financial statements of the Petitioner Company as on 31.9.2009 are placed on record alongwith this affidavit. With regard to the second issue raised by the Regional Director, it is submitted that the Petitioner Company is a mobile telecommunication service provider and holds a Unified Access Services License for the Gujarat Service Area, with effect from 20.10.2008 issued by the Department of Telecommunications. The Petitioner Company is not transferring the license to the transferee Company pursuant to the scheme, hence condition No. 6.3 of the license is not applicable. The Petitioner Company shall continue to hold its license and to provide the licensed telecommunications services even after the completion of the demerger. Therefore, there is no requirement for the Petitioner Company to seek approval of the Department of Telecommunications for the Scheme. Lastly it is submitted that the transferee Company is registered as an Infrastructure Provider Category - 1 by the Department of Telecommunications which permits the transferee Company to establish and maintain Passive Infrastructure Assets to lease, rent or sell such assets to licensees of Telecom Services licensed u/s 4 of the Indian Telegraph Act, 1885. With regard to third objection, it is submitted that the Dy. Commissioner of Income Tax, Circle-8, Ahmedabad has filed certain objections to the scheme before this Court. The Petitioner Company has filed its response to such objections before this Court for its consideration. The Petitioner Company has submitted that the objections filed by the Income Tax Department are not maintainable.

9. Mr. Mihir J. Thakore, learned Senior Counsel appearing with Mr. Nitin Mehta, learned advocate for the objector i.e. Income Tax Department has submitted that the Income Tax Department has huge demand of revenue pending against the Petitioner Company. The objector had raised a demand of Rs. 70,11,06,474/- for assessment years 2005-06 out of which Rs. 28,65,92,370/- is pending recovery. The part of the said demand to the extent it was confirmed by the first appellate authority being Commissioner of Income Tax (Appeals) has been confirmed by the Income Tax Appellate Tribunal vide its order of January 2009 which has been challenged by the Petitioner before this Court. For the part of the demand deleted by CIT(A) the objector had preferred the appeal before ITAT which has been dismissed by its common order dated 9.1.2009. Against the said common order of ITAT, to the extent of dismissal of its Appeal, the objector has challenged the same before this Court. Similarly a demand of Rs. 118,99,33,185/- was raised for assessment years 2006-07 out of which Rs. 87,99,42,566/- is pending recovery. To the extent of the said demand raised and confirmed by CIT(A), the Petitioner has preferred an appeal before ITAT, in which stay has been granted against recovery on the condition of the Petitioner depositing Rs. 30 crores. Further the objector has raised a penalty demand of Rs. 210,33,19,341/- for the year 2005-06 which entirely is pending recovery. Accordingly, sum of around Rs. 326,98,54,277/- is pending recovery from the Petitioner. The aforesaid claim

shall further be increased on addition of interest recoverable on the aforesaid amount. Mr. Thakore further submitted that for assessment years 2007-08 and 2008-09 the assessments are pending finalization and the objector apprehends demand amounting to hundred of crores, pursuant to issues similar to previous assessment year. Moreover the objector upon going through the scheme submitted to it, is of the view that same is, inter alia, for the purpose of evasion of tax and is against public interest. He has further submitted that Income Tax Department opposes the Scheme on the ground stated in its objections which are without prejudice to each other and other grounds raised during the course of hearing.

10. Mr. Thakore further submitted that u/s 391 of the Act, the jurisdiction of this Court can be invoked only for sanction of the Scheme of Compromise or Arrangement. The present Scheme is neither arrangement nor a compromise as contemplated u/s 391. He has further submitted that under the present Scheme the Passive Infrastructure Assets are sought to be transferred without any corresponding liabilities and free from all encumbrances to the transferee Company without any consideration. There is also no provision under the Scheme of any allotment of shares to the members of the Petitioner Company. Post the de-merger, the transferee Company is sought to be amalgamated/merged to Indus Towers Ltd. However, it is further contemplated that the transferee Company before the proposed merger shall be made a substantially owned company of a new company to be formed by all or some of the shareholders of transferee Company. He has further submitted that underlined transaction in the Scheme is the transfer of the said assets without any consideration to the transferee Company. Since no consideration is involved, the same is ultravires the Company and Companies Act and is not a valid contract. Even otherwise, the same cannot be approved by this Court u/s 391 of the Act. He has further submitted that even if it is assumed that the transaction embodied in the scheme is a arrangement or a compromise, the same is not between the Company and its shareholders or between the Company and its creditors or between any of their class. The onus to prove that the scheme is such which the Court has the jurisdiction to sanction u/s 391 of the said Act, is on the Petitioner and the same is not discharged by it. He has further submitted that the scheme is nothing but a garb to legitimize a simple transaction of transfer between two separate commercial legal entities in order to evade the legitimate taxes which would be payable, if the transaction would have been effected by way of simplicitor transfer. It would have attracted Central Sales Tax or Gujarat Value Added Tax, capital gains tax, other provision of Income Tax Act, 1961 and stamp duty if the same were by way of transfer. Thus, by way of the said scheme these taxes are sought to be evaded, which is clearly against public interest.

11. Mr. Thakore further submitted that sole purpose of the scheme is to defraud and usurp the right of the Income Tax Department by diluting the assets available to it for recovering the said demand without in any manner consulting the Income Tax Department. He has further submitted that judicial process and

the assistance of the Court are being used to approve the proposed scheme to defeat the provisions of law, in particular the provisions of Income Tax Act. He has further submitted that hidden agenda and the apparent corporate purpose of the scheme appears to defeat and evade tax liabilities including that payable to the Income Tax Department on the transaction by camouflaging it under the proposed scheme and legalizing it by obtaining the sanction of this Court. One of such purposes is to transfer the said assets to the transferee Company for enabling it to claim benefit under various provisions of Chapter VIA of the Income Tax as and when available, once again on the same assets on which the Petitioner Company has already claimed and exhausted the benefit. This would be clearly against public interest. He has further submitted that the facts further reveal that the Petitioner Company is trying to evade the liability under Income Tax Act which would occasion if the said assets are transferred directly from the Petitioner Company to the Company in which the transferee Company is sought to be finally merged. Reliance is placed on the decision of this Court In the case of Wood Polymer Ltd., In re. Vol. 47 Company Cases 597, this Court has held that if the only purpose discernible behind the amalgamation is defeating tax by creating a paper company and transferring an asset to such company which can without consequence be amalgamated with another company to whom the capital asset was to be transferred so that on amalgamation it may pass on to the amalgamating company, it would distinctly appear that the provisions for such a scheme of amalgamation was utilised for the avowed object of defeating tax. It is true that if the parties so arranged their affairs that it may amount to avoidance of tax liability and not evasion of tax, law frowns upon tax evasion and not on tax avoidance. But such a benefit cannot be permitted to be enjoyed when it could not be done without the aid of the Court. The Court is charged with a duty before it finally permits dissolution of the transferor-company dissolving it without winding up, to ascertain whether its affairs have been carried on, not only in a manner not prejudicial to its members but in even public interest. The expression "public interest" must take its colour and content from the context in which it is used. The context in which the expression "public interest" is used, enables the Court to find out why the transferor-company came into existence, for what purpose it was set up, who were its promoters, who were controlling it, what object was sought to be achieved through creation of the transferor company and why it was being dissolved by merging it with another company. That is the colour and content of the expression "public interest" as used in the second proviso to Section 394(1) of the Act which have to be enquired into. If the only purpose appears to be the require certain capital asset through the intermediary of the transferor-company created for that very purpose to meet the requirement of law, and in the process to defeat tax liability which would otherwise arise, it could not be said that the affairs of the transferor company sought to be amalgamated, created for the sole purpose of facilitating transfer of capital asset through its medium, have not been carried on in a manner prejudicial to public interest. Public interest looms large in this background and the machinery of judicial process is sought to be utilised for defeating public

interest and the court would not lend its assistance to defeat public interest. The Court would, therefore, not sanction the scheme of amalgamation.

12. Mr. Thakore further submitted that there exists substantial liabilities in the books of the Petitioner Company, part of which are relatable to the assets under transfer. Since liabilities of the said assets would remain with the Petitioner Company there would be a continuous charge of interest and other liabilities with respect to the said assets in its hands. This would reduce the taxable profit in the hands of the Petitioner Company in the succeeding years. On the other hand, the books of the transferee Company would show exorbitant and inflated income and since the same is infrastructure Company, it may ultimately claim deductions under various provisions of Chapter VIA of the Income Tax Act on its inflated profits, leading to great loss of revenue to the exchequer. Moreover, pursuant to the scheme the Petitioner Company will be required to pay access charges or some other charges to the transferee Company for using the said assets, which it is not paying before the scheme. This would further reduce the taxable profit of the Petitioner Company. By transferring the said assets at the book value the Petitioner Company is trying to evade capital gain which otherwise would be payable at the market value. He has further submitted that the sanction of the scheme is sought to be taken by misrepresenting the same to be a scheme of demerger with the ulterior motive to foist the same on the Income tax Department and claim the benefit under the Income Tax Act. For the purpose of Income Tax Act, the present scheme is not a scheme of demerger.

13. While dealing with these objections, Mr. Mihir Joshi and Mr. S.N. Soparkar, learned Senior Counsels appearing with Mr. Sandip Singhi, learned advocate for the Petitioner Company, have submitted that the objections raised by the Income Tax Department must fail for several reasons. At the out set, it is submitted that similar Scheme of Arrangement have been filed on behalf of mobile telecommunication operators before several High Courts including this High Court to demerge their tower assets, and these Schemes have been approved by the Court. The Bombay High Court by an order dated 16.3.2007 passed in Company Petition No. 68 of 2007 sanctioned a scheme of arrangement for the demerger of the Passive Infrastructure of Reliance Communications Ltd., and Reliance Telecom Ltd., into Reliance Telecom Infrastructure Ltd., a subsidiary of Reliance Communications Ltd., for "nil" consideration. Similarly, this Court also approved a nearly identical scheme of arrangement by a mobile telecommunications operator for the demerger of tower assets for "nil" consideration whereby Idea Cellular Ltd., demerged its tower assets into its wholly owned subsidiary, Idea Cellular Towers Infrastructure Ltd. Mr. Joshi further submitted that in those schemes, no objections were filed by the Income Tax Department.

14. Mr. Joshi further submitted that under the Scheme the Petitioner has not transferred the liabilities. The liabilities, if any, towards income tax dues of the Petitioner company will remain as liabilities of the Petitioner Company and will not be demerged pursuant to the approval of the scheme as such, and hence the

alleged outstanding tax liabilities will remain unaffected by the approval of the scheme. He has further submitted that the scheme contemplates the restructuring of the Passive Infrastructure Assets of all the transferor Companies and for the vesting of such assets in the transferee Company. The Scheme, therefore, involves several entities in the Vodafone Essar Group of Companies other than just the Petitioner Company. He has further submitted that the estimated net worth of the transferor Companies even after the completion of the demerger, will be approximately Rs. 10078 crores as on 31.3.2009. The estimated net worth of the Petitioner Company after the completion of the demerger will be approximately Rs. 2,476 crores as on 31.3.2009. As against this, the alleged tax liabilities of the Petitioner Company cited by the objector to stall this restructuring are in a cumulative amount of approximately Rs. 327 crores only. He has, therefore, submitted that the Petitioner Company is more than able to meet any liability towards the Income Tax Act.

15. Mr. Joshi further submitted that the transferor Companies are part of the Vodafone Essar Group of Companies, one of the largest telecommunication service providers in the country. The Vodafone Essar Group of Companies is a part of the larger group of mobile companies controlled by Vodafone Group which is among the fifteen largest companies in the world. The Companies in the Vodafone group have invested billions of dollars in developing mobile telecommunication services in India. It, therefore, seems incongruous for the Income Tax Department to allege that the transferor Companies have proposed the present scheme to evade an alleged tax liability of approximately Rs. 327 crores. He has further submitted that the Vodafone Essar Group of Companies hold licenses issued by the Department of Telecommunications to establish, install, maintain and operate cellular mobile telecommunication services in the Circles of Mumbai, Kolkata, Maharashtra, Tamil Nadu, Kerala, Gujarat, Delhi Chennai, Karnataka, Andhra Pradesh, Punjab, West Bengal, Uttar Pradesh (West), Rajasthan, Haryana and Uttar Pradesh (East). The principal business of the transferor Companies is providing telecommunication services to customers in India. For the purposes of providing such mobile telecommunication services, the transferor Companies own certain passive infrastructure assets in these circles and it is only such passive infrastructure assets which are proposed to be demerged pursuant to the scheme. The transferor companies including the Petitioner Company shall continue to exist and generate revenue from their telecommunication operations even after the scheme becomes effective. As such, transferor Companies will continue to meet all their obligations, including obligations to the Income Tax Department, if any, even after the scheme is approved by this Court. He has further submitted that there is no intention to evade any tax liabilities that may be due and payable and the existing tax liabilities, if any, of the Petitioner Company will remain unaffected by the approval of the scheme.

16. Mr. Joshi further submitted that the allegation in the objections that the scheme is intended to evade, inter alia, capital gains tax is without any basis in

law and contrary to the provisions of the Income Tax Act itself. In this context, he refers to the provisions of Section 45 of the Income Tax Act, 1961. He has further submitted that Section 47 of the Income Tax Act provides that Section 45 of the Income Tax Act will not apply to certain transactions. Section 47(iii) says that, nothing contained in Section 45 shall apply to any transfer of capital asset under a gift or will or an irrevocable trust. He has, therefore, submitted that the scheme is intended to restructure the holding of certain capital assets of the transferor Companies within the group of Companies held by Vodafone Essar Ltd., the transferor Company No. 1 and does not involve any movement of assets or liabilities to any company outside the Vodafone Essar Ltd., Group. The transferee company and all the transferor companies, except transferor Companies Nos. 5 and 6 are wholly owned subsidiaries of Vodafone Essar Ltd. Since the capital assets of the transferor companies are being demerged into an entity within the Vodafone Essar Ltd., Group, it is proposed that the transferee Company shall not be required to issue any shares or pay any consideration to any of the transferor Companies or their respective shareholders. Accordingly, upon the scheme of demerger, the relevant capital assets of the transferor companies will be transferred to the transferee company for "nil" consideration. Such a transfer is exempt from payment of capital gains tax u/s 47 Sub-section (iii) read with Section 45 of the Income Tax Act. Mr. Joshi further submitted that the Income Tax Department fails to identify the relevant provisions of the Income Tax Act, the Central Sales Tax Act or the Gujarat Value Added Tax Act upon which it relies to support its allegation that the scheme results in the "evasion" of capital gains tax or any other tax referred to above. He has, therefore, submitted that these provisions have no application to the transfer of Passive Infrastructure Assets.

17. With regard to the objector's allegation about loss of revenue Mr. Joshi submitted that the Petitioner Company is entitled to arrange its affairs in any legitimate manner permitted under law. It is permissible for assesses to minimize their tax liability by way of a legitimate arrangement. Such avoidance of tax in a legally permissible manner is not objectionable or illegal. He relied on the decision of the Apex Court in the Case of Commissioner of Income Tax, Gujarat Vs. A. Raman and Company, wherein it is held that it is accepted principle of law that an Assessee can so arrange its affairs as to minimize its tax burden, including by starting a subsidiary Company and foregoing part of its own profits and at the same time enabling such subsidiary to earn some profits. Such a course of action is not impermissible under law. Mr. Joshi further submitted that Passive Infrastructure Assets are being vested in the transferee Company which will be able to independently generate employment and revenues from such capital assets. The capital assets proposed to be demerged by the transferor Companies do not generate any income at present. Upon the transfer of the assets to the transferee Company, the transferee Company will employ these assets to provide services and facilities to consumers. The proposed segregation of such capital assets would enable further growth and maximize value in each of

the businesses independently, a valuable and significant contribution to the income of this country.

18. Mr. Joshi further submitted that the Petitioner Company qualifies as an "eligible undertaking" under the provisions of Section 80IA of the Income Tax Act and it is eligible to claim certain deductions in respect of the profits and gains earned by it. The transferee Company, on the other hand, does not qualify as an "eligible undertaking" for the purpose of Section 80IA of the Income Tax Act. Accordingly, while profits generated by the transferee Company from the use of Passive Infrastructure Assets will be taxable in the hands of the transferee Company. The Petitioner Company would be eligible to claim deduction in respect of such profits if such transfer is not effected. He has, therefore, submitted that the proposed transfer does not result in any loss of revenue to the exchequer.

19. With regard to the objector's objection about the scheme being contrary to public interest, Mr. Joshi submitted that the scheme is consistent with the report of the working group on the Telecom Sector for the Eleventh Five Year Plan (2007 - 2012) prepared by the Government of India through the Department of Telecommunication which recommended sharing of passive infrastructure assets by mobile operators. He has further submitted that the Income Tax Department has not considered the fact that the mobile telecommunication operators in India have begun the demerger of their respective passive infrastructure assets into separate entities to enable the segregation and development of a vital infrastructure asset. The sharing of passive infrastructure assets among telecommunication operators will, among other benefits, reduce the unnecessary replication of passive infrastructure by mobile telecommunication operators and facilitate investment in developing such infrastructure in rural areas. He has further submitted that the objective sought to be achieved, inter alia, is to segregate the Passive Infrastructure Assets and transfer these assets to a separate entity which is in the specific business of providing developing and operating telecommunication infrastructure services. Upon receiving these assets, the transferee Company will be in a position to offer infrastructure services to all mobile telecommunication operators. He has further submitted that the demerger of the Passive Infrastructure Assets into a separate entity will enable the generation of income from assets which do not presently generate revenue. The proposed segregation of such capital assets would enable further growth and maximize value in each of the businesses independently. The demerger is intended to facilitate the development of a vital component in telecommunication infrastructure and the objector completely fails to recognize the significant social and economic benefits which will result from the ability of telecommunication services providers to share passive infrastructure.

20. Mr. Joshi further submitted that even otherwise the objections raised by the Income Tax Department are not maintainable. Without prejudice to the Petitioner Company's contention that the transfer of the Passive Infrastructure Assets is exempt from payment of capital gains tax, he has submitted that in view of

several decisions of, inter alia, the Supreme Court, the Bombay High Court and this Court, there is no basis for income tax authorities to object to a scheme of arrangement. He submitted that in a recent decision of the Bombay High Court in *Jindal Iron and Steel Company Ltd., v. Assistant Commissioner of Income Tax* in Company Application No. 123 of 2004 connected with Company Petition No. 76 of 2004 with Company Application No. 562 of 2003, it is held that the income tax authorities do not have locus standi in proceedings for approval of a scheme of arrangement under Sections 391 - 394 of the Companies Act.

21. With regard to the further objections raised by the Income Tax Department on 3.3.2010 and even by Mr. Thakore at the time of hearing of this petition, Mr. Joshi has dealt with the same at great length. With regard to the objection and/or allegation of the Income Tax Department about the sole object of the Scheme of Arrangement is of defeating tax and as per the ratio of *Wood Polymer Ltd., (Supra)*, such a Scheme ought not to be sanctioned, Mr. Joshi submitted that there is no liability for payment of tax on capital gains since there would be a transfer of capital asset under a gift as envisaged u/s 47(iii), which excludes application of Section 45. There is a clear rationale for nil consideration since the Petitioner - Transferor Company and the Transferee Company are both wholly owned subsidiaries of Vodafone Essar Ltd. Even a transfer at book value would not have resulted in capital gains. Therefore the Scheme in any case is not for the purpose of avoiding capital gains. The fact that it is presently under contemplation by Bharti, Idea and Vodafone to merge the tower infrastructure assets into a JV - Indus Towers Ltd. has no bearing on the issue of taxability under the present Scheme.

22. Mr. Joshi further submitted that Transferee Company is ineligible to claim deductions u/s 80IA, which is also accepted by the Department, but the objection is taken on the basis that in the event there is an amendment to the Act in future based on the recommendations of the Working Group, such benefit may become available. Such an objection is ex-facie unsustainable.

23. Mr. Joshi further submitted that payment of MAT u/s 115JB is subject to an Assessee preparing its profit and loss account for the relevant previous year in accordance with the provisions of Part II and III of Schedule VI to the Companies Act, 1956 and therefore if any entry is not in accordance with the provisions, the effect of the same would be denied. In any case the objection regarding reduced MAT overlooks the revenue neutrality, since tax credit of MAT payment is available u/s 115JAA. Therefore reduced payment of MAT will reduce credit availability and higher actual payment, while higher payment of MAT will increase credit availability and consequently reduced actual payment of tax. In any case this objection is hypothetical and conjectural.

24. With regard to avoidance of stamp duty, Mr. Joshi has submitted that, Stamp duty on conveyance so far as it relates to reconstruction of companies by an order of the High Court is liable for stamp duty under Article 20(d) of the Schedule to the Bombay Stamp Act, 1958. The Scheme of Arrangement was

necessitated for reasons set out in Clause 1.4 thereof and was required so as to provide for specific consequences in addition to the transfer, interalia, regarding quotas, rights, entitlement, licences etc. in relation to the Passive Infrastructure assets being transferred to the Transferee Company; assignment, transfer and vesting of licences, permissions, approvals, registrations etc. in favour of the Transferee Company; continuation of legal proceedings in relation to PI assets against the Transferee Company; transfer of tax credits etc. Therefore it cannot be said that the purpose of the Scheme is to avoid stamp duty.

25. Mr. Joshi has further submitted that the Scheme seeks to achieve a commercial purpose and object interalia being segregating the Passive Infrastructure business and the telecommunication service business to enable further growth and maximise value in each of the businesses; improved quality of services to customers by establishing high service standards and delivering services in an environment friendly manner; increase in the speed of roll out and efficiency through sharing of infrastructure; converting the Passive Infrastructure assets from non-revenue generating to revenue generating assets; improved network quality and greater coverage etc. Moreover the segregation of telecommunication services and telecommunication infrastructure business reflects the global trend and has been adopted by telecommunication companies in India without objection. In fact the Working Group under the Planning Commission has recommended sharing of infrastructure, which is presently under contemplation by Vodafone and the present Scheme reserves a flexibility to it for easing such process when required. The Central Government has not raised any objection to the Scheme and even the Department has not contended that the aforesaid objectives are imaginary. Therefore it cannot be said that the Scheme has no purpose or object and that it is a mere device/subterfuge with the sole intention to evade taxes, particularly when even the incidence of tax purportedly sought to be evaded is not established on facts.

26. Reliance is placed on the decision of this Court in the case of *Banyan and Berry Vs. Commissioner of Income Tax*, for the proposition that every Act which results in tax deduction, exemption of tax or not attracting tax authorised by law cannot be treated as a device of tax avoidance and the real question to be asked is whether the act of the Assessee falls in the category of a colourable device, a dubious method or subterfuge which the judicial process may not accord approval.

27. Reliance is also placed on the decision of the Apex Court in the case of *Union of India (UOI) and Another Vs. Azadi Bachao Andolan and Another*, for the proposition that McDowell cannot be read as laying down that every transaction or arrangement perfectly permissible under law, which has the effect of reducing the tax burden of the Assessee must be looked upon with disfavour. The observations of this Court in the case of *Banyan and Berry (Supra)* are quoted with approval.

28. Reliance is also placed on the decision of this Court in the case of *Nirmay*

Properties (P) Ltd., in Re 150 Comp. Cases 538 , for the proposition that refusal to accord sanction to a Scheme can only be upon evidence that the whole scheme was proposed by the Petitioner only with a view to avoid tax.

29. Reliance is also placed on the decision of this Court in the case of IDEA Cellular Ltd. (Company Petition No. 167 of 2009 dated 31.8.2009) sanctioning similar Scheme of Arrangement.

30. Reliance is also placed on the decision of Delhi High Court in the case of Bharti Airtel Ltd. (Company Petition No. 233 of 2007 dated 26.11.2007) sanctioning similar Scheme of Arrangement.

31. Reliance is also placed on the decision of Bombay High Court in the case of Reliance Telecom Infrastructure Ltd. (Company Petition No. 68 of 2007 dated 16.3.2007) sanctioning similar Scheme of Arrangement.

32. With regard to the further objection raised by the Income Tax Department to the effect that the scheme of arrangement is neither an arrangement properly so called since it did not involve any element of give and take and in fact amended the confiscation of rights of the Income Tax Department which could not be considered as an arrangement as per the ratio of NFU Development Trust Ltd., (Supra) nor could it be said to be reconstruction since only assets were being transferred, Mr. Joshi submitted that the Scheme is for reconstruction of the company since it contemplates the carrying on of the business in an altered form, by dividing the telecommunication services business and the telecommunication infrastructure business being carried on by the Petitioner, in a manner that the telecommunication infrastructure business would be carried on by the Transferee Company. The said business will be continued and carried on by substantially the same persons who are presently carrying on the consolidated business since both the Transferor and the Transferee Companies are wholly owned subsidiaries of Vodafone Essar Ltd. which will continue to carry on the businesses. Since reconstruction of this nature is statutorily recognised as an arrangement u/s 394, the objection that the Scheme is outside the ambit of S. 391 is misconceived.

33. Reliance is placed on the decision of South African Supply and Cold Storage Company, 1904 Ch.D 268 for the proposition that reconstruction involves substantially the same business being carried on and substantially the same persons carrying it on and it is immaterial whether the liabilities are taken over by the new company or not.

34. Reliance is also placed on the decision of this Court in the case of IDEA Cellular Ltd., the decision of Delhi High Court in the case of Bharti Airtel Ltd. And decision of Bombay High Court in the case of Reliance Telecom Infrastructure Ltd., the decision of Calcutta High Court in the case of Vodafone Essar East Ltd., decision of Bombay High Court in the case of Vodafone Essar Ltd., and decision of Madras High Court in the case of Vodafone Essar Cellular Ltd.

35. Mr. Joshi further submitted on behalf of the Petitioner that the Scheme is an "arrangement" between the company and its shareholders since it involves a bifurcation of the businesses being carried on by the company and a rearrangement of its affairs and the way the businesses would be carried on in the future. The term "arrangement" is of wide import which is evident from the inclusive definition u/s 390(b) of the Companies Act, 1956. There is an element of give and take since a substantial business is being taken out of the company but substantially the same persons would be carrying it on in the future. There is no reason to restrict the ambit of the term "arrangement" particularly since the legislature has not done so.

36. The objection that the Scheme confiscates the rights of the Income Tax Department and therefore is not an arrangement, relying on *NFU Development Trust Ltd.*, (1972) 1 WLR 1548 overlooks the fact that there is neither any arrangement with the Income Tax Department nor confiscation of its rights. In the case referred to, there was complete extinguishment of the rights of the members, which was not accepted as being an arrangement. In the present case the rights of the Income Tax Department of assessing, levying and collecting tax from the Petitioner are not confiscated or expropriated so as to extinguish such rights. A contention that the recovery of outstanding tax may be affected by transfer of PI assets, apart from being incorrect, cannot be equated with expropriation/confiscation /extinguishment of rights of the Department.

37. Mr. Joshi further submitted that the contention has no basis since the Petitioner would continue to be profitable after the demerger of Passive Infrastructure assets and its net worth after giving effect to the same would be Rs. 2476 crores. On the other hand the outstanding demand as per the Department is Rs. 604.59 crores, which comprises of a sum of Rs. 233.16 crores for A.Y. 2007-2008 which issue has been decided in favour of the Petitioner for A.Y. 2005-2006; a sum of Rs. 87.99 crores for A. Y.2006-2007 which issue has been decided in favour of the Petitioner as stated above; a sum of Rs. 28.65 crores for A.Y. 2005-2006 which was decided against the Petitioner by the Tribunal against which appeal has been admitted by the Gujarat High Court and bank guarantee of Rs. 32.55 crores has been furnished by the Petitioner; a sum of Rs. 1.67 crores for A.Y. 2004-2005 which is now refundable since Tribunal has held in favour of the Petitioner; a sum of Rs. 11.89 crores for A.Y. 2007-2008 and Rs. 14.39 crores for A.Y. 2008-2009 regarding non-deduction of TDS on roaming and prepaid commission which orders were received on 15.3.2010 and appeals have been filed in this Court; and a sum of Rs. 20.95 crores for A.Y. 2005-2006 which has been set aside by the Tribunal by its order dated 18.3.2010. Therefore the outstanding demand in respect of issues which have not been settled is Rs. 54.94 crores against which the Petitioner has given bank guarantee of Rs. 32.55 crores and is entitled to refund of Rs. 9.38 crores for amounts paid against demand of tax in respect of issues decided in favour of the Petitioner.

38. The next objection of the Income Tax Department with regard to transfer of assets under the Scheme of Arrangement is void u/s 281 and therefore the Scheme cannot be sanctioned, Mr. Joshi submitted that the transfer of assets during the pendency of any proceedings under this Act is not void or ineffective at the time of transfer and the legal consequences of the transfer, namely of divesting the owner of title and vesting the purchaser with the title to the subject property would ensue. There is no prohibition against the transfer nor is such transfer void ab initio. Therefore the sanction of the Scheme by the Court is not for an illegal transaction/transfer as alleged. It is further submitted that the declaration u/s 281 that a transfer during the pendency of the proceedings is void is restricted both as to time and purpose. Such transfer will be void only as against a claim in respect of tax or other sum payable by an Assessee and that too when such sum is ascertained as payable upon completion of the proceedings.

39. Reliance is placed on the decision of Punjab and Haryana High Court in the case of B.M. Kapoor (HUF) Vs. Deputy Commissioner of Income Tax, for the proposition that the transaction or the transfer is not void ab initio but is void against the claims of the revenue in respect of the tax finally determined in the subject proceedings and the title of the Transferee is not lost by the declaration u/s 281.

40. Reliance is also placed on the decision of the Karnataka High Court in the case of B.A. Basith Vs. Income Tax Officer, Central Circle-I, Bangalore, for the proposition that there is no question of adjudication of validity of the transfer prior to the stage of actual recovery of any amount that may become due consequent upon the pending proceedings being completed.

41. Reliance is also placed on the decision of the Bombay High Court in the case of Gangadhar Vishwanath Ranade (No. 1) and others Vs. Income Tax Officer, for the proposition that S. 281 either before or after its amendment merely has the character of an expression of an intention to treat the transfers as affected by S. 281 as void and therefore not standing in the way of recovery proceedings to be taken by the Tax Recovery Officers. This judgment has been approved by the Supreme Court in the case of The Tax Recovery Officer II, Sadar, Nagpur Vs. Gangadhar Vishwanath Ranade (Dead) Through Mrs. Shobha Ravindra Nemiwant,

42. The next objection of the Income Tax Department was that the resolution of the Board of the Petitioner approving the Scheme of Arrangement on 21.9.2007 is ultra vires since the Scheme of Arrangement is essentially giving of a gift, which object was not enlisted in the Memorandum of Association of the Petitioner at that time but was subsequently inserted as Clause 9(A) vide Special Resolution passed at the Extraordinary General Meeting of the Company held later on the same day and therefore the proposal being void ab initio, the same could not be sanctioned by the Court, relying on Dr. A. Lakshmanaswami Mudaliar and Others Vs. Life Insurance Corporation of India and Another, . While dealing with this objection Mr. Joshi submitted that a Scheme of Arrangement cannot be equated merely with the giving of a gift since such transfer is an

incident of the reconstruction of the company by bifurcating its businesses. Since reconstruction of the company is a statutory right under the Companies Act, 1956 there is no requirement of any specific power in the Memorandum for this purpose. Alternatively it is contended that the transfer of Passive Infrastructure assets which have been set up by the Petitioner is even otherwise contemplated under the Main Objects in the Memorandum of Association as (A-2); would also be covered under (B-40) as being necessary, suitable or proper for the accomplishment of the main business or the attainment of the Main Objects of the Company. It is also alternatively contended that the resolution of the Board is not a completed act in itself and the Scheme of Arrangement would be efficacious and effective only upon sanction being granted by the High Court, at which time the Memorandum of Association had been amended so as to include the giving of a gift and therefore the Scheme cannot be said to be ultra vires the company. It was further alternatively contended that the resolution of the Board is clearly in anticipation of the amendment and subject to the same being approved by the shareholders. By the time the shareholders gave consent to the Scheme on 21.1.2009 the Memorandum of Association had been amended and the arrangement between the company and its shareholders was valid at the time it was entered into. Therefore when the Scheme comes up for sanction before the High Court the same is not ultra vires the company and there is no bar to its sanction by the Court.

43. With regard to the further objection of the Income Tax Department that the Scheme of Arrangement is void u/s 25 of the Contract Act since it is an arrangement without consideration, Mr. Joshi submitted that a Scheme of Arrangement cannot be equated with an agreement between parties. u/s 391 an arrangement can be proposed between a company and its members. The section contemplates a meeting to be called of the members to ascertain whether they agree to the arrangement. Members can conceivably be divided into different classes. It may happen that certain class of members approve the Scheme while others do not. Even within the class certain members may agree to the Scheme while others do not and it is only if the Scheme is approved by the requisite majority u/s 391(2) that it can be placed for sanction of the Court. The assent of all the members or the requisite majority thereof to the Scheme does not result into an agreement between the parties as contemplated under the Contract Act, 1872. It remains a Scheme which has been approved by the statutory majority which then can be placed for sanction of the Court. It has no other legal effect or consequence apart from being qualified for the purpose of seeking sanction of the Court. The terms of the arrangement cannot be enforced by or against the company or its members even if many of them have agreed to the Scheme. It is only upon the sanction of the Scheme, that the same becomes binding on all the members and also on the company and legal consequences ensue including those provided u/s 394. The contention that the approval/acceptance of the Scheme by the members constitutes an agreement, which then must be held to be void in the absence of consideration, overlooks the statutory provisions in

relation to arrangements under the Companies Act, 1956 and is misconceived.

44. Without prejudice to the above, Mr. Joshi submitted that the "agreement" between the company and its members is not without consideration. Consideration is defined u/s 2(d) of the Contract Act and is equated with valuable consideration in the sense of the law which may consist either in some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. *Chidambaram and Others Vs. P.S. Renga Iyer and Others*, Even the most trifling benefit can be consideration so as to avoid the impact of Section 25. There is no requirement of monetary consideration and even a promise to induce the company to carry on its business has been treated as sufficient consideration in the case of *Ledingham and Ors. v. Bermejo Estancia Co. Ltd.* Agar and Ors. (1947) 1 All. E.R. 749. In the present case the reconstruction involves give and take and mutual/reciprocal promises and obligations which are consideration for each other and it cannot be said that the "agreement" is without consideration.

45. Mr. Joshi further submitted that there is no agreement between the Petitioner and the transferee Company to give a gift of the PI assets to the Transferee Company. The ambit of S. 25 being restricted to avoiding such agreements as is evident from the illustrations to the said section, the same has no application to the present case. Upon the sanctioning of the Scheme and the passing of necessary orders, the transfer of assets takes place by virtue of S. 394 and the Passive Infrastructure assets would stand vested in the Transferee Company in a manner known to law and the transaction is not void on any count as alleged.

46. Except the objections raised by the Income Tax Department and the observations made by the Regional Director, no parties have raised any objection to the proposed scheme of arrangement. It is, therefore, submitted by Mr. Joshi that the scheme deserves to be approved and the objections raised by the Income Tax Department as well as Regional Director, if any, deserve to be overruled.

47. Having heard the learned Counsels appearing for the parties and having considered their rival submissions in light of the provisions contained in Companies Act, 1956 and decided case law on the subject and having carefully examined the provisions of the scheme of arrangement by demerger, the Court is of the view that there is enough force in the objections raised by the Income Tax Department and that the explanations given and/or submissions made on behalf of the Petitioner Company are not convincing so as to accord the Court's sanction to the scheme. The main thrust of the arguments canvassed on behalf of the Income Tax Department is that the Petitioner company has to invoke the jurisdiction of this Court u/s 391 of Companies Act 1956, which contemplates not all kinds of schemes but only the schemes that are either a compromise or an arrangement with creditors or members or any class of them. Thus, if the present scheme is not falling within the parameters of S. 391, the same cannot be sanctioned as a scheme u/s 391. The onus to satisfy that the present scheme

is one that can be sanctioned u/s 391 is upon the Petitioner Company. The Petitioner Company has pleaded that the transaction is without consideration and is in the nature of a gift. It is further claimed that the scheme is a restructuring of assets and therefore is an arrangement with the members. The instant transaction does not fall within the expression "make arrangement with members", as sought to be claimed, for at least two reasons, which are independent of each other:

(a) The expression restructuring is not used anywhere in Ss. 391 or 394. Further restructuring of assets is not the same as reconstruction of any company or companies. Therefore also restructuring of assets is not contemplated u/s 391 or 394. Assuming that restructuring is treated as reconstruction, which expression is used u/s 394(1)(a), even then the instant case is not reconstruction as recognized by courts. The important criterion for restructuring being that same persons carry on the same business. In the present case it is an admitted position that the passive infrastructure company (transferee company) will be merged with Indus Towers Ltd. ("Indus"), which admittedly is an independent passive infrastructure company. Moreover the principal business of the transferor company was to provide mobile services to their customers, which is not being carried out by the transferee company. Indus like the Transferee Company also would be in the business of providing infrastructure services to other mobile service providers. Hence, it is not a reconstruction since the same persons are not carrying on the same business.

(b) Assuming that the said scheme tantamounts to reconstruction, the same still does not fall within the ambit of the phrase "arrangement has been proposed for the purpose of, or in connection with, a scheme for the reconstruction of any company or companies". The word "Reconstruction" not being used under the main Section 391 and is used only in Section 394 that too in conjunction with words "arrangement" or "compromise", what is proposed has to be an arrangement which may be for the purpose of or in connection with a scheme for reconstruction. Thus, the scheme of reconstruction cannot be independently proposed even u/s 394 but can only be subservient to a scheme of arrangement. Thus reconstruction to be covered u/s 394 must be an arrangement. The expression "arrangement" contemplates give and take between the parties as against something in nature of gift which has to be without consideration. In the present case there being admittedly no consideration and therefore no give and take between parties, the same is not an arrangement u/s 391 and therefore not a reconstruction capable of being sanctioned u/s 391. Further the claim in the petition and in the scheme made by the Petitioner is that it is the scheme of arrangement and thus even otherwise it needs to satisfy the test of being an arrangement. Reliance is placed on the following decisions.

(i) In the case of N.F.U. Development Trust Ltd., (1972) 1 WRL 1548 (Chancery Division) the Court held that although a majority of three-fourths in value members in favour of the scheme as required by Section 206(2) of the

Companies Act, 1948 had been obtained, nevertheless the section dealt with a "compromise" or "arrangement" between a company and its members which implied accommodation on both sides and could not apply to the present scheme whereby members rights were totally surrendered without compensation and, since the scheme was one which no member voting in the interests of members as a whole could reasonably approve, the petition would be dismissed.

(ii) In *re South African Supply and Cold Storage Company Wild v. Same Company* 1904 Ch.D 268, the Court held that neither "reconstruction" nor "amalgamation" has any definite legal meaning. Each word is a commercial and not a legal term, and even as a commercial term has no exact definite meaning. Where an undertaking is being carried on by a Company, and is in substance preserved and transferred, not to an outsider, but to another company, consisting substantially of the same shareholders, with a view to its being continued by the transferee company, that is a reconstruction; and it is nonetheless a reconstruction because all the assets do not pass to the new or resuscitated company, and all the shareholders of the transferor company are not shareholders in the transferee company, and the liabilities of the transferor company are not taken over by the transferee company.

48. It is also the major contention of the Income Tax Department that the gift or an agreement to gift by its very nature cannot be contemplated to be covered within rigours of Section 391 of the Act. Gift is defined u/s 122 of Transfer of Property Act which clearly reveals that the transfer is made voluntarily and without consideration. One of the pre-requisite characteristics of gift is that it should be voluntarily given by donor with his free consent. While the main purpose of Section 391 is to have one agreement with all the members and / or creditors and to foist the decision of statutory majority upon the dissenting minority. Section 391(2) clearly provides that upon the court sanctioning the scheme it shall bind all including the company, its members and the creditors even if some of them may have not approved or even opposed the same. Thus Section 391 contemplates a forced agreement on the dissenting minority which is contrary to the basic requirement of the gift which being a voluntary action. Hence the section does not contemplate any action which as its pre-requisite has to be a voluntary action with free consent like gift even in its widest scope.

49. The scheme itself contemplates that it shall not be effective unless both the High Courts, having jurisdiction over Transferor and Transferee Company respectively, sanction the same and further states that it shall fail if even one of the High Courts does not sanction it. The Court will only sanction it when it is approved by all the parties" concerned atleast by the prescribed statutory majority of 75%. Thus the scheme is required to be approved by all the concerned parties being (i) the Transferor company, (ii) members and/ or creditors of the Transferor company, (iii) the Transferee company and (ii) members and/ or creditors of the Transferee company. Thus the scheme is nothing but a composite agreement between all the above concerned parties to

transfer the Passive Infrastructure assets without consideration by the Transferor Company to the Transferee Company. Further the agreement embodied in the scheme is an executory agreement and not a concluded contract. The present scheme being an agreement admittedly without consideration may be held to be void u/s 25 of Contract Act. Thus the court would not exercise its jurisdiction to sanction an agreement which may otherwise to be held as void in law and non-enforceable between parties. Moreover it runs contrary to the purpose of Section 391 which is enacted to bringing into force an agreement which can be legally enforceable even against the dissenting minority.

50. It is also the contention of the Income Tax Department that the response of the Petitioner is completely fallacious, misleading and untenable in law and contrary to its own admission especially when it claims that there exists a consideration for the company law purpose for sanctioning the scheme while for availing the income tax exemption there is no consideration and is gift u/s 47(iii). The Petitioner cannot, therefore, be allowed to blow hot and cold at the same time.

51. The third objection raised by the Department is that, assuming that the said scheme is one which is considered as arrangement and falls within the four corners of Section 391, then also it fails since it is not approved by the statutory majority of creditors. It is not the members who are affected since they continue to enjoy the assets, but instead it is the creditors whose rights are confiscated and are vitally affected as only the assets are being sought to be transferred without any consideration. Substantial assets available to effectuate recovery of debts are lost. Some of the other transferor companies will admittedly have a negative net worth post transfer of the Passive Infrastructure assets. Neither the consent of creditors including unsecured creditors or statutory creditors is taken nor their meeting is conducted. Thus the scheme fails on jurisdiction as the statutory majority required to sanction the scheme is not achieved, since the meeting was sought to be dispensed with.

52. The fourth contention raised on behalf of the Income Tax Department is that the transaction embodied in the scheme, is ultravires the Petitioner company and the Companies Act. The scheme which contemplates the transaction of gift was approved by the company through its Board of directors' resolution dated 21.9.2007 at 3.30 p.m. At the time of such approval there was admittedly no power to gift under the memorandum of association (MA) of the Petitioner company. It was only thereafter that by way of an extraordinary general meeting of shareholders held at 7.20 p.m. on 21.9.2007 that MA was amended to incorporate a power of gift. Accordingly the proposed scheme being based on an ultra vires resolution of Board of Directors is void, which cannot be ratified even if all the shareholders agree. Even on this ground the jurisdiction u/s 391 is not available for want of authority to company to gift and the scheme is void.

(i) The reliance placed during the argument on the clause A(2) and B(40) of the memorandum to show the power of gift are an after thought and baseless. The

clause A(2) relates to an object to undertake BOLT (build, operate, lease and transfer) contract which essentially contemplates a pre-existence of another party with whom or for whom the BOLT contract is executed. The word transfer used in clause A(2) is preceded with words build, operate, lease and is further connected to them with conjunction "and". Thus in the present context in which word transfer is used, it does not contemplate a transfer without consideration in nature of gift. Memorandum being a commercial document and the Petitioner company not being a Section 25 company running for no profits, the phrase BOLT has to be given a meaning which is commercially known to the industry and which has a commercial implication unlike gifts. Clause B(40) is not applicable to the present transaction as it deals with the relationship with subsidiaries while in present case the transferor and transferee companies are not holding or subsidiary companies. Further B(40) even otherwise does not provide any specific power to gift. The argument is merely an eyewash and the Petitioner company had no power to gift is clear from the very fact that it was required to carry out an amendment of its memorandum to provide for the power to gift which is clear from the resolution passed and the explanatory statement attached to Form.

(ii) Further the argument that no power under memorandum is specifically required to float a scheme of demerger in light of it being statutory power u/s 391, is contrary to basic tenets of company law that the company can only perform what it is empowered under its memorandum and in the manner stated therein. In the entire petition and in the scheme, the Petitioner has claimed the proposed scheme to be a scheme of demerger and relied upon cl B(15) for the same. Clause B(15) clearly contemplates a scheme of demerger only if it satisfies two conditions cumulatively (i) it is the demerger of the entire unit and (ii) it is with consideration. In the present case none of the conditions are fulfilled as since only the assets are transferred. Neither the entire unit is transferred nor is it with consideration. Thus when a power is specifically provided and is required to be exercised in a special manner, the same shall not be given a go-by at the whims and fancy of the Petitioner. The cardinal principle of interpretation is that like any other commercial document the memorandum shall also be interpreted to give effect to the wordings therein rather than interpreting them as redundant. Thus assuming that even if statutory power to demerge is provided u/s 391, the same has to be exercised in the manner stated in the memorandum of the Petitioner company which is to demerge the entire unit only with consideration. The reference is made to Dr. A. Lakshmanaswami Mudaliar and Others Vs. Life Insurance Corporation of India and Another, wherein it is held that, Where a Company does an act which is ultra vires, no legal relationship or effect ensues therefrom. Such an act is absolutely void and cannot be ratified even if all the shareholders agree.

53. The Fifth contention raised by the Income Tax Department is that the scheme is solely for the purpose of avoiding taxes. According to the Department, the sole purpose/ object of the said scheme is to evade taxes including income tax, stamp

duty, VAT and to defraud the Income Tax department for its legitimate right to recover its dues out of the assets of the transferor companies. The court's seal cannot be obtained to legitimize a devise to evade tax. It is also the contention of the Department that the purpose of scheme allegedly being to fulfill the government policy based on the recommendations by working committee is nothing but eyewash. The kind and nature of the present scheme is not contemplated by any Government policy and the scheme is nothing but a conduit for tax evasion which is sought to be passed under the garb of Government policy. It is distinctly pointed out that;

(i) The recommendation of working committee is with respect to rural expansion and penetration at lower cost and not transfer of urban infrastructure.

(ii) The recommendation further relates to pooling of future infrastructure which are to be rolled out by infrastructure service providers. It does not suggest pooling of existing past infrastructure of the existing players.

(iii) Assuming that the recommendation is for sharing of the present urban infrastructure, it nowhere suggests the transfer of the existing Passive Infrastructure assets into a separate company much less that the same should be done by way of a scheme u/s 391 as a demerger or by a transaction of gift.

(iv) Further even if the present scheme is, for the sake of argument, considered to be floated to achieve the recommendation, no objective or recommendation is achieved by the said scheme. The transfer of Passive Infrastructure assets under the scheme is not achieving the purpose of having common infrastructure since Transferee Company is not a commonly owned entity of different operators. It may only happen upon the Passive Infrastructure assets being transferred to common pool of different operators in a company like INDUS, which is not happening as a consequence of this scheme. Like in this scheme creating common pool of assets in different circles between companies having license of different circles will not achieve the policy objective nor will it lower the cost of infrastructure usage. None of transferor companies will reduce cost by such sharing pursuant to the scheme as all of them are in different circles. On the contrary it will increase the cost for each company since it will be required to pay access charges to the transferee company even for using the Passive Infrastructure assets which it earlier owned. The sharing of infrastructure assets takes place even today and access charges are paid by one to other. So by the present scheme nothing new is going to happen.

54. It is also alleged by the objector that the tax is sought to be evaded by giving accounting treatment to this transaction in respect of different Transferor Companies in two different ways, which is referred to by the objector for convenience as Treatment "A" and Treatment "B". Since the Petitioner is under MAT regime, by this planning they will artificially reduce the book profits for payment of income tax under MAT provisions.

(i) Treatment "A" is that the assets based on its valuation in the Balance Sheet

(the exact valuation remains undisclosed) are written off. These assets so transferred are then taken to the Profit and Loss Account. The result is that the Taxable Income in the subsequent years will be reduced till such time as the entirety of the value of the assets is claimed as a revenue deduction.

(ii) In Treatment "B", the assets are not carried to the Profit and Loss Account but are simply brought down on the Asset Side of the Balance Sheet from the Asset Block as Deferred Revenue Expenditure which is then amortized and therefore there is again a write off of the entirety of the value of the assets, though spread over a period of time, depressing the taxable income.

(iii) The Transferee company will take depreciation on the same block of Passive Infrastructure assets, so transferred to it, which is being taken as deduction under treatments A or B above, as the case may be. Hence it is resulting in double deduction. The Petitioner made an attempt to convince this Court that it does not result in double deduction. The Court is, however, not convinced with the explanation.

55. The Transferee company shall be claiming benefit u/s 80IA once again on same set/ block of assets, on which the transferor Companies have already claimed the benefit u/s 80IA, in future once it becomes "eligible undertaking", which is likely to happen in light of the recommendations in the working committee report.

56. The transaction may be held to be void u/s 281 of Income Tax Act and if it is so, the court will not exercise its jurisdiction, if any, to sanction a transaction which is pointed out to be void under law. Thus the scheme appears to be a camouflage to circumvent the mandatory provisions of Income Tax Act. The judgments relied upon by the Petitioners pertain to pre-amendment of 1975. The present section doesn't require any proceedings to be initiated by the department for the transaction to be declared as void. The section is a self declaratory one.

57. Since no liabilities are transferred including the employees relating to the Passive Infrastructure assets, the expenses will continue to be borne by the Transferor companies which would artificially deplete the taxable profit and will not give a true and fair view of the accounts, thus affecting adversely the taxable profits.

58. The entire tax payable on the market value of assets to be transferred to Indus is sought to be evaded by present scheme. Had the transaction been done directly with Indus, the same would not be exempt as it would have been at market value for exchange of consideration and since the liabilities are not taken over, it would not tantamount to a demerger u/s 2(19AA) nor gift u/s 47(iii). While similar to other companies whose schemes have been sanctioned, the transferor and transferee companies are not holding and subsidiary and therefore are not exempt u/s 47(iv). Further since the liabilities are not to be taken over nor any shares are supposed to be issued, it could not satisfy the condition of

demerger. Hence the only option was to transfer it as a gift as a tax planning devise. By doing so it is creating a conduit avoiding the capital gain tax at this stage. Further in the next stage the transferee is sought to be merged with Indus which transaction will again be exempt u/s 47 and thus would be avoiding capital gain tax at that stage as well. Thus the income tax amounting to the tune in excess of Rs. 3,500 cr as alleged by the Income Tax Department is sought to be evaded only if the present scheme is sanctioned by this Court.

59. Stamp duty is sought to be evaded to the tune to Rs. 600 cr. Had the sale directly been made to Indus the stamp duty payable would have been @ 6%. Moreover the same rate of stamp duty is to be paid even if the said transaction of gift was conveyed through registered gift deed. If the court sanctions the present scheme in the guise of demerger u/s 391, the stamp duty shall be paid @ 1% and thus avoiding legitimate payment of stamp duty to the extent of 5% (6%-1%) on the amount of Rs. 15,000 crores being the conservative estimate of the market value of Passive Infrastructure assets being transferred.

60. No VAT shall be payable on the movable assets transferred under the scheme if the same is sanctioned u/s 391 which otherwise would have been payable.

61. Considering all these aspects, it is foregone conclusion that the avoidance of tax is taking place only if the present scheme is sanctioned by the Court, otherwise not. The transferee company is nothing but a paper company being only intermediate for transferring Passive Infrastructure assets from transferor companies to Indus for the purpose of tax evasion. This is clear from the fact that it has only paid up capital of Rs. 5 lacs especially when it is to hold assets worth Rs. 15,000 cr post sanction of the scheme. Reliance is placed on the decision of McDowell and Co. Ltd. Vs. Commercial Tax Officer,

62. The next contention raised on behalf of the Income Tax Department is the scheme is against public interest and policy inasmuch as that it is ultravires the company's Memorandum, void u/s 25 of Contract Act and Section 281 of Income Tax Act. Further the scheme is nothing but a device and a conduit having the sole purpose of avoiding and evading taxes including income tax, stamp duty, registration charges and VAT. The purpose being tax avoidance is explicit from the facts that different accounting treatments are accorded to transferor companies having a positive net worth in comparison to ones which have negative net worth with an intention to maximize tax avoidance. Further the explanatory statement note 2 annexed to Form 21 clearly state that the systematic amendment in memorandum is also done for treating it as gift solely for tax purposes. Further the conduct shows that no where in the original petition, the fact that it is a transaction of GIFT was mentioned. It was only after objections were filed by the present objector that for the first time in rejoinder, the case of GIFT was made out. It was otherwise suppressed and was sought to be passed away as a demerger. Thus the scheme is unreasonable, unfair and unjust.

63. It is further contended that there is no identical scheme sanctioned after considering objections raised. Reliance is placed on schemes sanctioned by courts in case of other operators is ill founded as all of them are distinctly dissimilar with the present one. They have further failed to show any identical scheme which has been sanctioned. Further sanction by other High Courts of this very scheme does not create any estoppel on or waiver by the objector since no decision is cited to show that the objections similar to those raised in the present scheme have been decided by any court. Some of the dissimilarities between various schemes of other companies are shown by way of a chart presented by the objector. It is revealed therefrom, (i) Whether transferee Company is wholly subsidiary of the transferor Company, the answer in the present case is "No", whereas in the case of IDEA, Bharti and Reliance the answer is "Yes". (ii) Whether there is any issue of shares or payment of consideration to the shareholders, the answer in the case of Reliance is "Yes" and shares worth Rs. 100 crores to be issued so that there is no change in the share holding pattern of its own shareholders but not to the shareholders of the demerged Company. The answer in the case of Idea is "No", since the transferee Company is 100% subsidiary of the transferor Company. (iii) As to whether there is transfer of debts, liabilities or obligations of transferor Company to transferee Company, the answer in the case of Idea is "No", since the liabilities remain with Idea. The answer in the case of Bharti is "Yes", except loans taken for acquisition of assets. The answer in the case of Petitioner is "No", since the liabilities including contingent liabilities remain with the transferor Company. In the case of Reliance it is not specified. (iv) Whether the employees of the transferor Companies become the employees of transferee Company, the answer in the case of Idea and the Petitioner is "No" whereas in the case of Bharti and Reliance the answer is "Yes". (v) Whether objection raised by Income Tax Department are dealt with by the courts sanctioning the scheme, the answer in the case of Idea, Bharti and Reliance is "No" whereas in the case of Petitioner is "Yes".

64. The next contention raised on behalf of the Income Tax Department is that the petition shall be dismissed for suppression and misrepresentation of material details from the Court. The following instances are pointed out.

1 In the entire petition the scheme is sought to be shown as a scheme of demerger. Only after the objections were filed that for the first time the argument of gift was sought to be canvassed.

2 That the power of gift was conferred after amending the Memorandum and Articles consequent to the resolution passed by the Board of Directors. This fact was suppressed in the petition and was further not disclosed during the course of hearing even after the said suppression was specifically pointed out by the objector during the arguments.

3 The memorandum of association of Transferor Company and Transferee company and the balance sheet of transferee company is not annexed with the petition, though the same were filed with the Company Application.

4 That the transaction stated to be with or without consideration, as was argued during hearing, was suppressed in the petition and in reply by the Petitioner company. Either way, the effort was to mislead the court by taking contrary stands in argument and in pleading which is on oath. One of them has to be wrong.

65. In view of the foregoing discussion, the Court finds itself unable to accord its sanction to the scheme. The petition is, therefore, dismissed with no order as to costs.

On pronouncement of the judgment, Mr. Amit Panchal, learned advocate appearing for the Petitioner requests the Court to suspend this order for some time so as to enable the Petitioner to approach the higher forum. Mr. Nitin Mehta, learned advocate appearing for the Income Tax Department has objected to grant any relief with regard to suspension of the order. Considering the facts of the case, the judgment and order pronounced today is suspended for the period of two weeks from today.