IN THE INCOME TAX APPELLATE TRIBUNAL
"I" Bench, Mumbai

Before Shri Ravish Sood, Judicial Member
and Shri N.K. Pradhan, Accountant Member

ITA No.7241/Mum/2018
(Assessment Year: 2015-16)

Sofina S.A. Rue de L'Industrie 31, B-1040, Brussels, Belgium	Vs.	The Asst. Commissioner of Income Tax (International Taxation)-4(2)(2) Room No. 1624, 16th Floor, Air India Building, Nariman Point, Mumbai 400021
PAN – AAKCS3013Q		
(Appellant)		**(Respondent)**

Appellant by:	Shri Porus Kaka, Senior Advocate & Shri. Manish Kanth
Respondent by:	Shri G.N. Makwana, D.R
Date of Hearing:	13.12.2019
Date of Pronouncement:	05.03.2020

O R D E R

PER RAVISH SOOD, JM

The present appeal filed by the assessee is directed against the assessment framed by the A.O under Section 143(3) r.w.s 144C(13) of the Income-tax Act, 1961 (for short 'Act'), dated 15.10.2018. The assessee has assailed the impugned order by raising before us the following grounds of appeal:

> "Based on the facts and circumstances of the case and in law, Sofina S.A. (hereinafter referred to as "Appellant"), respectfully craves leave to prefer an appeal against the Assessment Order (hereinafter referred to as the **"Order")** of the Assistant Commissioner of Income-tax (International Taxation) 4(2)(2), Mumbai (hereinafter referred to as the "learned AO") dated October 15, 2018 (which was received on October 31, 2018) after taking into account the directions of the Hon'ble Dispute Resolution Panel - 2, Mumbai (hereinafter referred to as the "Hon'ble DRP") dated

September 27, 2018, under Section 253 of the Income-tax Act, 1961 (hereinafter referred to as the "Act") on the following grounds:

General Grounds:

1. The Order of the learned AO is contrary to law, facts and circumstances of the case;

2. The Order passed by the AO has been passed in violation of the statutory provisions under the Act without compliance with the principles of natural justice, is bad in law and is liable to be set aside.

3. In the facts and circumstances of the case, the learned AO has grossly erred in law in holding that gains arising from the transfer of shares of Accelyst Singapore Pte. Ltd. ("Accelyst Singapore") is liable to tax in India under the India Belgium double taxation avoidance agreement ("Tax Treaty").

4. In the facts and circumstances of the case, the learned AO has grossly erred in law in concluding in the show cause notice dated 22.11.2017 as well as at the beginning of the Order that the transaction of sale of shares on which short term capital gains have been earned is chargeable to tax, wherein such an action is contrary to the settled law that an adjudicating authority cannot reach a definitive conclusion in a show cause notice as the same vitiates the whole purpose of issuance of a show cause notice and when a notice is issued with premeditation, such notice is bad in law and should be set aside.

5. In the facts and circumstances of the case, the Hon'ble DRP has failed to discuss each objection raised by the Appellant and as to why each such objection cannot be sustained and merely has reiterated the findings of the AO and has thus passed a cryptic order, which has been passed with non-application of mind.

Accelyst Singapore is wrongly been regarded as a company resident in India

6. In the facts and circumstances of the case, the learned AO and the Hon'ble DRP has erred by holding that the shares of Accelyst Singapore are deemed to be the shares of a company resident in India by virtue of Explanation 5 to Section 9(1)(i) of the Act without having regard to the fact that the deeming fiction created by Explanation 5 to Section 9(1)(i) of the Act deems shares of a foreign company to be situated in India and does not deem that the company itself becomes a resident in India.

7. In the facts and circumstances of the case, the learned AO and Hon'ble DRP has erred in treating a company incorporated under the laws of Singapore as a company resident in India, without having regard to the provisions of Act, which provides for specific provisions to regard a foreign company as a resident in India and the provisions under Section 9 do not suggest changing the residential status of a company.

8. In the facts and circumstances of the case, the Hon'ble DRP has erred in holding that Accelyst Singapore shall be deemed to be situated in India as per Explanation 5 to Section 9(1)(1), as it derives substantial value from the assets located in India, without considering the fact that how a share is valued is irrelevant for determining the situs of the shares.

9. In the facts and circumstances of the case, merely because the shares of Accelyst Singapore are deemed to be situated in India, would not make Accelyst Singapore a company resident in India.

10. In the facts and circumstances of the case, the learned AO and the Hon'ble DRP has grossly erred by wrongly reading the deeming fiction under Explanation 5 to Section 9(1)(1) of the Act as applicable to a company rather than to shares and accordingly treating a foreign company as a company resident in India.

11. In the facts and circumstances of the case, the learned AO has grossly erred in concluding at paragraph 5.4.9 of the Order that *"this deeming provision is attracted directly from the Income-tax Act, 1961, without taking recourse to the Belgium Treaty. Hence the transaction is chargeable to tax in India as per the Income-tax Act, 1961"* without having regard to the provisions of Section 90 of the Act, which provides that the beneficial provisions between the Act and double taxation avoidance agreement shall be made applicable to a non-resident, which would mean that the taxation of a non-resident cannot be determined solely on the reading of the provisions of the Act.

12. In the facts and circumstances of the case, the learned A.O erred in holding that transfer of shares of Accelyst Singapore by the assessee, shall be deemed to be a transfer of assets located in India which in turn implies that it shall be deemed to be the "transfer of capital stock of a company resident in India" and concluding that the transaction is chargeable to tax in India by virtue of Explanation 5 to Section 9(1)(i) of the Act.

Scope of deeming fictions cannot be extended

13. In the facts and circumstances of the case, the learned AO has erred in law in extending the scope of the deeming fiction under Explanation 5 to Section 9(1)(i) to deem a foreign company to be a resident in India rather than just deeming the shares of such foreign company to be deemed to be situated in India ignoring the settled law which provides that deeming fictions are to be applied for the purpose for which they are enacted and the scope of deeming fictions cannot be extended.

Transfer of shares of Accelyst Singapore cannot taxed under Article 13(5) of the India Belgium Tax Treaty

14. In the facts and circumstances of the case, the learned AO and the Hon'ble DRIP has erred in holding that the transfer of shares of Accelyst Singapore are taxable in India under Article 13(5) of the India-Belgium Tax Treaty, by erroneously stating that:

    (a) shares of Accelyst Singapore form a part of participation of the capital stock of Accelyst India, indirectly;
    (b) though Accelyst Singapore is not a resident of India, yet its shares are deemed to be situated in India by virtue of Explanation 5 to Section 9(1)(i). This means that shares of Accelyst Singapore are deemed to be the shares of a company resident in India;

(c) when the assessee transferred 11.34% shares of Accelyst Singapore, it has in essence transferred or deemed to have transferred 11.34% shares of Accelyst India. In other words, the assessee has transferred 11.34% capital stock of Accelyst Singapore, which is forming part of a participation of shares of at least 10% of capital stock of Accelyst India.

without having regard to the provisions of Article 13(5), which explicitly provides that the company whose shares are transferred should be a resident of one of the contracting states i.e. either India or Belgium.

15. In the facts and circumstances of the case, the learned AO and the Hon'ble DRP has erred in law by incorporating a deeming fiction, created by Explanation 5 to Section 9(1)(i), into the India Belgium Tax Treaty without there being an express provision to this effect and deeming Accelyst Singapore as a resident of India and concluding that the sale of Accelyst Singapore shares is taxable under the provisions of Article 13(5) of the India Belgium Tax Treaty.

16. In the facts and circumstances of the case, the learned DRP has erred in law in treating Accelyst Singapore as a company deemed to be situated in India and transfer of its capital stock comprising more than 10% of its capital shall be covered by Article 13(5) of the India Belgium Tax Treaty without having regard to the fact that Explanation 5 to Section 9 deems shares to be situated in India and not company to be situated in India.

17. In the facts and circumstances of the case, the learned AO and the Hon'ble DRP has erred in law in not appreciating that the amendments made either retrospective or prospective to the provisions of the I.T Act cannot be read into the provisions of the Treaty, unless specific provision has been made to this effect and to observe that the provisions under the Act and India Belgium Tax Treaty is the same and has no conflict.

18. In the facts and circumstances of the case, the learned AO and the Hon'ble DRP has erred in law in not appreciating that if a Tax Treaty does not provide for a particular levy, the same cannot be read as a part of the Tax Treaty and taxed accordingly, even though the said levy has been provided in the Act.

19. In the facts and circumstances of the case. the learned AO and Hon'ble DRP has erred in law by referring to the provisions of Article 3 of the India Belgium Tax Treaty, considering that there is no ambiguity in the provisions of Article 13(5) of the India Belgium Tax Treaty and in the absence of such ambiguity, invoking provisions under Article 3 is not warranted.

20. In the facts and circumstances of the case, the learned AO has erred in holding that under the provisions of Article 3 of India Belgium Tax Treaty, since the terms 'forming part of a participation' and 'alienation' are not defined therein, the same will have the meaning under the Act.

21. In the facts and circumstances of the case, the learned AO has erred in law in interpreting the word "participation" to mean "indirect participation" by referring

to provisions of Article 3(2) without considering the context in which it was used under the India-Belgium Tax Treaty.

22. In the facts and circumstances of the case, the learned AO has erred in law in referring to Article 3 of India-Belgium Tax Treaty, without taking into consideration that Article 3 only suggests that the terms not defined under the Tax Treaty shall have the same meaning under the Act and does not suggest incorporating the deeming fictions under the Act into the Tax Treaty.

23. In the facts and circumstances of the case, the learned AO erred in relying on the provisions of Section 2(18), 2(22)(e), 2(32) and 2(47) of the Act for the purposes of the meaning of the undefined terms in the Tax Treaty i.e. 'forming part of a participation' and 'alienation'.

No valid distinction between the present facts and Sanofi

24. In the facts and circumstances of the case, the Hon'ble DRP erred in law confirming the dissimilarities as pointed out by the AO between the facts of the present case and the judgment of the Hon'ble Andhra High Court in the case of Sanofi Pasteur Holdings SA Without considering the principle which has been laid down by the Hon'ble High Court and the manner in which ratio of the judgment can be made applicable to the facts of the present case.

25. In the facts and circumstances of the case, the Hon'ble DRP erred in law in observing the reasons as to why the judgment of the Hon'ble Andhra High Court in the case of Sanofi Pasteur Holdings SA cannot be applied to the facts of the present case by stating that in that case the company whose shares were sold was a French company whereas in the present case was Singapore company cannot be the reasoning to reject the binding nature of the applicability of the judgement of the Hon'ble High Court.

Substantive provision cannot be implemented without the procedural provisions

26. In the facts and circumstances of the case, the learned AO and the Hon'ble DRP erred in holding that explanations are clarificatory in nature and they aid and support the main section i.e. Section 9(1) and the absence of an explanation, will not render the existing section void or incapable of being administered, without taking into account that if the provision cannot be implemented in the absence of computation provisions, the income cannot be computed and charged to tax under that provision and without having regard to the settled law in this regard as laid down by the Hon'ble Supreme Court.

27. In the facts and circumstances of the case, the learned AO and the Hon'ble DRP erred in rejecting the Appellants plea that due to the absence of computation mechanism for deriving the value of shares or interest referred to in Explanation 5 to Section 9(1)(1) of the Act for Assessment year 2015-16, the computation mechanism fails and the capital gains cannot be determined.

28. In the facts and circumstances of the case, the Hon'ble DRP has erred in observing that *"The purchase value and sale value of these shares are already available with the AO.*

The entire purchase and sale value was clearly related to asset situated in India. Therefore, there as no difficulty in arriving at the value of sale and purchase consideration" on the issue being argued that the capital gains cannot be computed, without having to regard to the fact that the general computation mechanism cannot be applied to a provision which specifically intends to prescribe a computation mechanism and in the absence of such computation mechanism, the provision cannot be given effect.

29. Without prejudice, the learned AO erred in concluding that the entire short-term capital gains income of Rs.163,97,61,840/- arising from the indirect transfer of shares of Accelyst India is deemed to be accruing and arising in India under Section 9(1)(i) read with Explanation 5 thereto, without giving due consideration to actual income which could have been taxable in India."

2. Briefly stated, the assessee company which is a tax resident of Belgium is a venture capital investor listed on Euronext, Brussels and had invested into start ups of India like Myntra, Freecharge etc. As per the records, the assessee company had invested across nine countries in two continents. The assessee company had e-filed its return of income for Assessment Year 2015-16 on 25.09.2015, wherein it had declared its total income at Rs. Nil and claimed a refund of Rs. 70,93,60,000/-. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

3. In the course of the assessment proceedings it was observed by the A.O that the assessee had vide a share subscription agreement dated June 9, 2014 agreed to subscribe to 82,41,285 (Nos.) of Series B Preference shares of Accelyst Pte Ltd., a company which was a tax resident of Singapore. Further, the assessee company had vide a share subscription agreement dated December 12, 2014 agreed to subscribe to 31,34,624 (Nos.) of Series C Preference shares of Accelyst Pte. Ltd. Post subscription of Series C Preference shares the assessee had a stake holding of 11.34% in Accelyst Pte. Ltd., Singapore. On a perusal of the records, it was noticed by the A.O that Accelyst Pte Ltd., Singapore was holding 99.99% of the shares of M/s Accelyst Solutions Pvt. Ltd., an Indian company.

4. During the year under consideration the assessee had sold its entire 11.34% stake holding in Accelyst Pte Ltd., Singapore to M/s Jasper Infotech Pvt. Ltd., an Indian company, for a total consideration of USD 4,73,62,724. M/s Jasper Infotech Pvt. Ltd. while making the payment of the consideration for acquiring the shares of Accelyst Pte Ltd., Singapore to the assessee company had deducted TDS of Rs. 70,93,60,990/- under Sec. 195 of the Act. It was observed by the A.O that the assessee company had returned its income for the year under

consideration at Rs. Nil and had claimed a refund of the entire amount of TDS of Rs. 70,93,60,990/-. Being of the view, that the assessee by transferring the shares of the aforesaid company viz. Accelyst Pte Ltd, Singapore, had in fact carried out an indirect transfer of the shares of its subsidiary Indian company viz. M/s Accelyst Solutions Pvt. Ltd., the A.O worked out the 'Short Term Capital Gain' (for short 'STCG') at Rs. 163,97,61,840/-, which as per him was liable to be assessed in the hands of the assessee in India, as under :

Sr. No	Name of Co. and particulars of shares	Date of acquisition	No. of shares	Date of transfer/Sale	No. of shares	STCG
Accelyst Singapore Pte. Ltd.						
1						
1.1	Series B Preference Shares	9, June 2014	82,41,285	26, March, 2015	82,41,285	Rs.145,00,03,918/-
1.2	Series C Preference Shares	23, Dec 2014	31,34,624	26, March 2015	31,34,624	Rs. 18,97,57,921/-
					Total	Rs. 163,97,61,840/-

In the backdrop of his aforesaid observations the A.O called upon the assessee to explain as to why it had failed to offer the aforesaid amount of income from STCG on alienation of shares for tax in its return of income for the year under consideration. In reply, it was the claim of the assessee that as per Article 13(6) of the India-Belgium tax treaty which was applicable to the current fact pattern of the transaction under consideration, the gains arising from the alienation of the aforesaid shares of Accelyst Pte. Ltd., Singapore were to be taxed in the Contracting State of which the alienator was a resident. As such, it was submitted by the assessee that as it was a resident of Belgium, therefore, the taxability under Article 13(6) did arise in Belgium and not in India. In order to fortify its aforesaid claim the assessee had also relied upon the judgment of the Hon'ble High Court of Andhra Pradesh in the case of Sanofi Pasteur Holding SA Vs. Department of Revenue, Ministry of Finance (2013) 30 taxmann.com 222 (Andhra Pradesh).

4. The A.O after deliberating on the facts of the case was however not persuaded to subscribe to the claim of the assessee that the gain on the alienation of the shares was not exigible to tax in India. The A.O was of the view that Article 13(6) of the India-Belgium tax treaty did not give a blanket exemption to all types of capital gains arising in India, and was in fact conditional and applicable only where the other sub-clauses of Article 13 were not attracted.

Observing, that the gains from the alienation of the shares under consideration were liable to be assessed in India as per Article 13(5) of the India-Belgium tax treaty, the A.O called upon the assessee to put forth an explanation as regards the same. Also, the A.O observed that Accelyst Pte Ltd., Singapore did not have any other asset except for its investments in Accelyst Solutions Pvt. Ltd whose businesses were located and carried out in India. As such, the A.O was of the view that as the shares of Accelyst Pte Ltd., Singapore derived their value substantially from the assets of Accelyst Solutions Pvt. Ltd., therefore, as per 'Explanation 5' to Sec. 9(1)(i) of the Act, the preference shares of Accelyst Pte Ltd., Singapore sold by the assessee were to be deemed to be situated in India. It was observed by the A.O that transfer/alienation of the preference shares of Accelyst Pte. Ltd., Singapore was an indirect transfer of shares of Accelyst Solutions Pvt. Ltd. Also, the A.O was of the view that though Accelyst Pte. Ltd., Singapore may be a resident of Singapore, yet for the purposes of the Income-tax Act, 1961, as well as the India-Belgium tax treaty, and by virtue of 'Explanation 5' to Sec. 9(1)(i) of the Act, the preference shares of Accelyst Pte. Ltd., Singapore were to be deemed to be located in India and the STCG arising from transfer of the same to M/s Jasper Infotech Pvt. Ltd. was income deemed to accrue or arise, and also chargeable to tax in India. As regards the reliance that was placed by the assessee on the judgment of the Hon'ble High Court of Andhra Pradesh in the case of Sanofi Pasteur Holding SA Vs. Department of Revenue, Ministry of Finance (2013) 30 taxmann.com 222 (Andhra Pradesh), the A.O was of the view that the revenue had not accepted the said decision and had preferred a 'Special Leave Petition' (SLP) before the Hon'ble Supreme Court which was pending disposal. On the basis of his aforesaid observations, the A.O called upon the assessee to explain as to why the STCG from transfer of the preference shares of Accelyst Pte. Ltd., Singapore to M/s Jasper Infotech Pvt. Ltd. may not be brought to tax @40%.

5. The assessee in its reply submitted before the A.O that two fold conditions were cumulatively required to be satisfied for applicability of Article 13(5) of the India-Belgium tax treaty viz. (i). that, the transfer of shares should represent participation of at least 10% in the capital stock of the company; and (ii). that, the company whose shares are proposed to be transferred should be a resident of a Contracting state. It was submitted by the assessee that for applicability of Article 13(5) of the India-Belgium tax treaty and taxability of the transaction of transfer of shares in India, the foremost condition was that the company whose shares were

transferred should be a resident of India, and such shares should represent at least 10% of participation in the capital stock of the company. In the backdrop of the facts involved in its case, it was submitted by the assessee that as Accelyst Pte. Ltd., Singapore was not a resident of either of the Contracting states viz. India or Belgium, therefore, Article 13(5) of the India-Belgium tax treaty in the absence of satisfaction of the said condition would not be applicable to the current fact pattern of the transaction of transfer of shares under consideration. Accordingly, it was submitted by the assessee that the taxability of the gains, if any, on transfer of shares of Accelyst Pte. Ltd., Singapore by the assessee company would be regulated by the residuary provision viz. Article 13(6) of the India-Belgium tax treaty. Adverting to Article 13(6) of the India-Belgium tax treaty, it was submitted by the assessee that the same provided that the gains derived from alienation of any property would be taxed in the Contracting state of which the alienator was a resident. As such, it was submitted by the assessee that as the assessee company i.e the alienator was a resident of Belgium, therefore, the taxability of the gains on the transfer of the shares, if any, would arise only in Belgium and not in India. In order to buttress its aforesaid claim, the assessee once again relied on the judgment of the Hon'ble High Court of Andhra Pradesh in Sanofi Pasteur Holding SA Vs. Department of Revenue, Ministry of Finance (2013) 30 taxmann.com 222 (Andhra Pradesh). It was submitted by the assessee that the Hon'ble High Court in its aforesaid judgment while interpreting Article 14(5) of the India-France tax treaty which was similarly worded as Article 13(5) of India-Belgium tax treaty, had observed, that the same did not permit a 'see-through' approach, whereby if the shares of a holding company were transferred, such transfer could not be regarded as a transfer of shares of its subsidiary entity. In fact, the Hon'ble High Court had observed that accommodating a "see-through" approach in Article 14(5) of India-France tax treaty would transgress the negotiated terms of the DTAA.

6. However, the A.O after deliberating on the reply of the assessee did not find favour with the same. The A.O was of the view that though Accelyst Pte. Ltd., Singapore was not a resident of India, yet its shares were deemed to be situated in India by virtue of 'Explanation 5' to Sec. 9(1)(i) of the Act, and were deemed to be the shares of a company resident in India. On the basis of his aforesaid observations, the A.O was of the view that as the transfer of the shares of Accelyst Pte. Ltd., Singapore was an indirect transfer of assets situated in India, the same was to be deemed to be the "transfer of capital stock of a company resident of India." Accordingly,

the A.O was of the view that the transaction of transfer of shares under the current fact pattern was taxable as per the 'Explanation 5' to Sec. 9(1)(i) of the Income-tax Act, 1961. As regards the taxability of the STCG on transfer of shares under consideration as per the India-Belgium tax treaty, the A.O referring to Article 13(5) of the tax treaty, observed, that the term "forming part of a participation" therein used was not defined in the treaty. Accordingly, drawing support from Article 3 of the India-Belgium tax treaty the A.O interpreted the same by borrowing the meaning of the term "participate" as was used in Section 2(18), Section 2(22)(e) and Sec. 2(32) of the Income-tax Act, 1961. Observing, that the term "participate" had been used in the context of participation in the profits of a company, the A.O held a conviction that the term "participate" or "participation" was used in the Income-tax Act, 1961 in respect of shares or any interest in a company. Accordingly, on the basis of his aforesaid observations the A.O was of the view that the term "forming part of a participation" must be understood to be referring only to the share capital of a company. Further, observing that the term "alienation" had also not been defined in the India-Belgium tax treaty, the A.O for the purpose of construing the same transposed the meaning of the term "transfer" as envisaged in 'Explanation' to Sec. 2(47) of the Act [as was inserted by the Finance Act, 2012 w.r.e.f 01.04.1962]. On the basis of his aforesaid deliberations, the A.O concluded that the right to tax the transaction of transfer of shares under consideration was allocated to India under Article 13(5) of the India-Belgium tax treaty. Accordingly, the A.O observed that by reading Article 3 of the India-Belgium tax treaty with 'Explanation 5' of Sec. 9(1)(i) of the Act, even for the purposes of the India-Belgium tax treaty the shares of Accelyst Pte. Ltd., Singapore were to be deemed to be the shares of a company resident in India. It was thus observed by the A.O that as the transfer transaction of 11.34% shares of Accelyst Pte. Ltd., Singapore by the assessee company formed (indirectly) part of a participation of the capital stock of Accelyst Solutions Pvt. Ltd., therefore, the same was taxable in India as per Article 13(5) of the India-Belgium tax treaty. Also, the A.O as per his observations recorded in the assessment order declined to subscribe to the reliance placed by the assessee on the judgment of the Hon'ble High Court of Andhra Pradesh in Sanofi Pasteur Holding SA Vs. Department of Revenue, Ministry of Finance (2013) 345 ITR 316 (Andhra Pradesh), for the reason, that the same was distinguishable on facts. Accordingly, the A.O on the basis of his aforesaid deliberations, vide his draft assessment order passed under Sec.143(3) r.w.s 144C(1), dated 28.12.2017 proposed to assess the STCG of Rs.

163,97,61,840/- on transfer of the shares of Accelyst Pte. Ltd., Singapore as per Article 13(5) of the India-Belgium tax treaty in the hands of the assessee company.

7. Aggrieved, the assessee filed objections before the Dispute Resolution Panel-2, Mumbai [for short 'DRP']. However, the DRP did not find any infirmity in the view taken by the A.O as regards assessing of the STCG of Rs. 163,97,61,840/- on the transfer of shares of Accelyst Pte. Ltd., Singapore by the assessee company and rejected the objections filed by the assessee.

8. The A.O after receiving the order passed by the DRP under Sec. 144C(5) of the Act, dated 27.09.2018, therein gave effect to the same and vide his order passed under Sec. 143(3) r.w.s 144C(13), dated 15.10.2018 brought the STCG of Rs. 163,97,61,840/- on the transfer of shares of Acelyst Pte. Ltd., Singapore to tax in the hands of the assessee company @ 43.26%.

9. The assessee being aggrieved with the assessment framed by the A.O under Sec. 143(3) r.w.s 144C(13), dated 15.10.2018, has carried the matter in appeal before us. The ld. Authorised representative (for short 'A.R') for the assessee Shri. Porus Kaka, Senior Advocate took us through the facts of the case. It was submitted by the ld. A.R that the assessee company which was a venture capital investor listed on Euronext, Brussels was admittedly a tax resident of Belgium. In order to buttress the claim of residency of the assessee the ld. A.R took us through the Tax Residency Certificate (TRC) of the assessee company at Page 479 of the assesse's 'Paper book' (for short 'APB'). It was submitted by the ld. A.R, that the assessee had subscribed to the shares of Accelyst Pte Ltd., a company which was a tax resident of Singapore, on two occassions viz. (i). vide a share subscription agreement, dated June 9, 2014 the assessee had subscribed to 82,41,285 (Nos.) of Series B Preference shares; and (ii). vide a share subscription agreement, dated 23.12.2014 the assessee had subscribed to 31,34,624 (Nos.) of Series C Preference shares. It was submitted by the ld. A.R that the assessee had acquired a total stake holding of 11.34% in Accelyst Pte. Ltd., Singapore. It was submitted by the ld. A.R that the fact that Accelyst Pte. Ltd., was a resident of Singapore was admitted by the A.O at Page 22 – Para 5.4.7 of the assessment order. Also, the DRP at Page 20 – Para 12.13 of its order had accepted that Accelyst Pte. Ltd. was a Singapore based company. It was submitted by the ld. A.R that the assesse had vide an agreement dated March 26, 2015 transferred its entire 11.34% share holding of Accelyst Pte. Ltd., Singapore to M/s Jasper

Infotech Pvt. Ltd., New Delhi for a total consideration of USD 4,73,62,724. It was averred by the ld. A.R, that as in view of Article 13(6) of the India-Belgium tax treaty the aforesaid transaction of sale of shares of Accelyst Pte. Ltd., Singapore by the assessee to M/s Jasper Infotech Pvt. Ltd. was not taxable in India, therefore, the assessee had filed its return of income for the year under consideration declaring Nil income and had claimed the refund of the entire amount of TDS of Rs. 70,93,60,990/- that was deducted under Sec. 195 of the Act by M/s Jasper Infotech Pvt. Ltd. while making the payment of consideration for acquiring the shares of Accelyst Pte Ltd., Singapore to the assessee company. It was submitted by the ld. A.R that in view of the fact that Accelyst Pte. Ltd., Singapore was having a share holding of 99.99% in Accelyst Solutions Pvt. Ltd., the A.O/DRP had pursuant to 'Explanation 5' to Sec. 9(1)(i) of the Act treated the sale of shares of Accelyst Pte. Ltd., Singapore as an indirect transfer of shares of Accelyst Solutions Pvt. Ltd., and had therein brought the STCG of Rs. 163,97,61,840/- to tax @ 43.26% in the hands of the assessee. It was submitted by the ld. A.R that though the A.O/DRP had accepted that Accelyst Pte. Ltd., Singapore was not a resident of India, yet its shares were deemed to be situated in India by virtue of 'Explanation 5' to Sec. 9(1)(i) of the Act, despite the fact that there was no corresponding provision to so infer either in the India-Belgium tax treaty or India-Singapore tax treaty. Apart from that, it was the claim of the ld. A.R that the A.O/DRP had erroneously extended the applicability of the deeming 'Explanation 5' to Sec. 9(1)(i) of the Act, and had arrived at an absolutely baseless conclusion that Accelyst Pte. Ltd., Singapore was to be deemed to be a company resident in India, despite accepting that it was a resident of Singapore. Objecting to the view taken by the lower authorities, it was submitted by the ld. A.R that both of the lower authorities had failed to appreciate that a unilateral amendment in the domestic law could not override the provisions of the DTAA. As such, it was the claim of the ld. A.R, that the A.O/DRP by drawing support from the 'Explanation 5' to Sec. 9(1)(i) of the Act, had most whimsically treated Accelyst Pte. Ltd., a Singapore based company as a resident of India, despite the fact that there was no provision to the said effect either under the India-Belgium DTAA or the India-Singapore DTAA. It was submitted by the ld. A.R that the 'Explanation 5' to Sec. 9(1)(i) was made available in the Income-tax Act, 1961 by the legislature for the limited purpose of creating a deeming fiction, whereby for the purposes of taxation of capital gains under the I.T Act the shares of a foreign company were to be deemed to be situated in India, if it derived substantial value from India, but the same by no means could be

stretched beyond comprehension for treating a foreign company itself as a resident of India. In fact, it was averred by the ld. A.R, that despite 'Explanation 5' to Sec. 9(1)(i) of the Act, a foreign company could not be treated as a company resident in India even under the I.T Act, leave alone the tax treaty. It was submitted by the ld. A.R that backed by his aforesaid erroneous and illogical interpretation the A.O had wrongly concluded that since 11.34% shares of Accelyst Pte. Ltd., Singapore being transferred (which were more than 10% shares prescribed in the tax treaty) were forming (indirectly) part of a participation of capital stock of Accelyst Solutions Pvt. Ltd., i.e the Indian company, therefore, the alienation of such shares would be taxable as per Article 13(5) of the India-Belgium tax treaty. It was submitted by the ld. A.R, that the A.O had in effect erroneously read the deeming provisions of the I.T Act pertaining to indirect transfer of shares into the India-Belgium tax treaty, and had failed to appreciate that in the absence of any amendment to the provisions of the said tax treaty, an amendment in the I.T Act could not have been read into the same. As such, it was averred by the ld. A.R that the A.O by adopting the aforesaid interpretation had intended to treat the amendment of the domestic law as overriding the India-Belgium tax treaty, despite the fact, that there was no specific provision to the said effect in the treaty. Accordingly, it was submitted by the ld. A.R that as per the settled position of law amendments made either retrospective or prospective to the provisions of the IT Act could not be read into the provisions of the tax treaties, unless specific provisions had been made to the said effect in the DTAA. In order to buttress his aforesaid claim the ld. A.R relied on the judgment of the Hon'ble High Court of Delhi in Director of Income-tax Vs. New Skies Satellite BV (2016) 382 ITR 114 (Delhi) and that of the Hon'ble High Court of Bombay in CIT Vs. Siemens Aktiongesellschaft (2009) 310 ITR 320 (Bom). Apart from that, the ld. A.R in order to fortify his claim that the 'Explanation 5' to Sec. 9(1)(i) of the Act cannot override the provisions of the DTAA, therein drew support from the speech of the Finance Minister, dated May 7, 2012, as regards the introduction of the provisions relating to indirect transfer of shares that was made available on the statute vide the Finance Bill, 2012. The ld. A.R took us through the relevant extract of the aforesaid speech of the Finance Minister, wherein the latter explaining the intent and the reasoning behind introducing the indirect transfer provisions in the statute, had stated, that the same would not override the provisions of DTAA which India had with 82 countries. The ld. A.R by placing reliance on the judgment of the Hon'ble Supreme Court in the case of K.P Varghese Vs. ITO (1981) 7 Taxman 13 (SC),

submitted, that the Hon'ble Apex Court had observed that the speech made by the mover of the bill explaining the reason for introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief that was sought to be remedied by the legislation and the object and purpose for which the legislation was enacted. Adverting to Article 13(5) of the India-Belgium tax treaty, it was submitted by the ld. A.R that as Accelyst Pte. Ltd. was admittedly a company resident of Singapore, therefore, Article 13(5) of the India-Belgium tax treaty in the absence of any provision that would permit Accelyst Pte. Ltd., Singapore to be treated as a resident of India under the I.T Act or the DTAA could not have been applied to the transaction of transfer of shares of the said company. It was vehemently submitted by the ld. A.R that the claim of the revenue that the investments outside India of Belgium companies are taxable in India was absurd, illogical and contrary to the India-Belgium tax treaty. Further, it was submitted by the ld. A.R, that in case the aforesaid view of the revenue was to be accepted, then the same would render Article 13(5) and Article 13(6) of the India-Belgium tax treaty as infructuous. Also, it was averred by the ld. A.R that subscribing to the aforesaid view of the revenue would also render the DTAA between Singapore and Belgium as infructuous. In order to drive home his aforesaid claim, it was submitted by the ld. A.R that if the claim of the revenue deeming Accelyst Pte. Ltd., Singapore to be a resident of India or deeming its shares to be situated in India was accepted, then the protocol signed with respect to India-Singapore tax treaty on Articles relating to Capital gains would be rendered as redundant. Elaborating on his aforesaid contention, it was submitted by the ld. A.R that under the protocol between India and Singapore, it was specifically provided to the contrary, that all capital gains investments made prior to 2017 in India of Singapore residents would be taxable only in Singapore. As such, it was the claim of the ld. A.R that the India-Singapore tax treaty prior to 01.04.2017 allocated such rights to tax capital gains on sale of shares only to Singapore. On the basis of his aforesaid contention, it was averred by the ld. A.R that Singapore residents prior to 01.04.2017 despite directly holding shares in Indian companies were not permitted to be taxed in India. It was thus submitted by the ld. A.R that the action of the A.O in taxing the transfer transaction of shares of Accelyst Pte. Ltd., Singapore clearly militated against the India-Singapore tax treaty. As regards the support drawn by the A.O/DRP from 'Explanation 5' to Sec. 9(1)(i) of the I.T Act to conclude that Accelyst Pte. Ltd., Singapore was a resident of India, it was submitted by the ld. A.R that though the 'Explanation 5' to Sec. 9(1)(i) of the I.T Act only deemed the shares to

be situated in India, if such company derives its value substantially from the assets located in India, but the same did not deem a foreign company to become a resident in India, which was a pre-condition for invoking Article 13(5) of the India-Belgium tax treaty. It was vehemently submitted by the ld. A.R that the 'Explanation 5' to Sec. 9(1)(i) of the I.T Act did not define the residence of a person but only deemed shares to be located in India. It was submitted by the ld. A.R that if a foreign company was to be deemed to be a resident in India on the basis of its underlying assets situated in India, then an amendment was required to the definition of "resident" in Sec. 6(3) of the I.T Act and Article 4 of the India-Belgium tax treaty, neither of which was however made available. It was submitted by the ld. A.R that neither of the lower authorities had explained as to how the word "resident" defined under both the domestic laws and the India-Belgium DTAA gets amended by the 'Explanation 5' to Sec. 9(1)(i) of the I.T Act. It was vehemently submitted by the ld. A.R that if the version of the revenue was to be accepted then all the foreign companies having one asset out of the many, namely a share deriving value substantially from India and despite being located outside India and carrying on business outside India would become resident pursuant to 'Explanation 5' to Sec. 9(1)(i), that would result to taxability of their global income, which being extra territorial operation of the IT Act and contrary to the provisions of law would render the provision itself unconstitutional. It was the claim of the ld. A.R that as the applicability of Article 13(5) stood clearly excluded to the current fact pattern of the transaction of transfer of shares under consideration, therefore, the taxation of the capital gains under the India-Belgium tax treaty, as rightly claimed by the assessee was regulated by Article 13(6) i.e the residuary provisions of the tax treaty. It was further averred by the ld. A.R that unlike Article 13(4) of the India-Belgium tax treaty no "see-through" approach was provided for in Article 13(5). Also, the ld. A.R stressed on the fact that though the Hon'ble High Court of Andhra Pradesh in the case of Sanofi Pasteur Holding SA Vs. Department of Revenue, Ministry of Finance (2013) 30 taxmann.com 222 (Andhra Pradesh), had observed, in context of a similarly worded Article 14(5) of the India-France DTAA that the same did not permit a "see-through" approach, whereby if the shares of a holding company are transferred, such transfer cannot be regarded as a transfer of shares of its subsidiary entity, but the A.O/DRP had declined to follow the same, for the reason, that the SLP of the revenue in the said case was pending before the Hon'ble Supreme Court.

10. Per contra, the ld. Departmental representative (for short' D.R') relied on the orders of the lower authorities. It was submitted by the Ld. D.R that the assessee company viz. Sofina S.A, a Belgium based company was holding 11.34% shareholding in Accelyst Pte. Ltd., Singapore, which in turn held 99.99% shareholding of its Indian subsidiary i.e Accelyst Solutions Pvt. Ltd. It was submitted by the ld. D.R that on transfer by the assessee company of its entire 11.34 % shareholding of Accelyst Pte Ltd., Singapore to M/s Jasper Infotech Pvt. Ltd., the A.O taking cognizance of the fact that the shares derived their value substantially from the shares of its Indian subsidiary i.e Accelyst Solutions Pvt. Ltd had invoked the 'Explanation 5' to Sec. 9(1)(i) of the Act, and taxed the STCG arising from the sale of such shares in India. It was averred by the ld. D.R that the gain on transfer of the shares of Accelyst Pte. Ltd., Singapore had rightly been brought to tax as per Article 13(5) of the India-Belgium tax treaty. In order to drive home his aforesaid claim, it was submitted by the ld. D.R that the current fact pattern of the transaction of transfer of shares by the assessee company clearly brought the taxability of the gains arising therefrom to tax as per Article 13(5) of the India-Belgium tax treaty. Adverting to the term "forming part of a participation" used in Article 13(5) of the India-Belgium tax treaty, it was submitted by the ld. D.R that the term "participation" was to be construed as the interest that one company enjoyed by way of share in another company or any interest in the other company. It was submitted by the ld. D.R that as the term "participation" was not defined in the India-Belgium tax treaty, therefore, the A.O with the aid of Article 3(1) of the tax treaty had rightly interpreted the same by borrowing the meaning given to the said term in Sec. 2(18), Sec. 2(22)(e) and Sec. 2(32) of the Income-tax Act, 1961. On the basis of the aforesaid interpretative exercise, it was submitted by the ld. D.R that the A.O had rightly concluded that the word "participation" was the interest that one company enjoyed by way of shares in the other company. As regards the reliance placed by the assessee on the judgment of the Hon'ble High Court of Andhra Pradesh in the case of Sanofi Pasetur Holding SA Vs. Dept. Of Revenue, Ministry of Finance (2013) 345 ITR 316 (AP), it was averred by the ld. D.R that as the same was distinguishable on facts, therefore, the A.O had rightly declined to follow the same. Apart from that, it was submitted by the ld. D.R that the revenue had not accepted the aforesaid judgment of the Hon'ble High Court and had preferred a SLP with the Hon'ble Supreme Court. The ld. D.R had also placed on our record his "Written submissions", dated 20.09.2019.

11. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements relied upon by them. As observed by us at length hereinabove, the assessee company which is a tax resident of Belgium is a venture capital investor listed on Euronext, Brussels and had invested into start ups of India like Myntra, Freecharge etc. As is discernible from the records, the assessee company had vide a share subscription agreement, dated June 9,2014 agreed to subscribe to 82,41,285 (Nos.) of Series B Preference shares of Accelyst Pte Ltd., a company which was a tax resident of Singapore. Further, the assessee company had vide a share subscription agreement, dated December 23, 2014 agreed to subscribe to 31,34,624 (Nos.) of Series C Preference shares of Accelyst Pte. Ltd. Post subscription of Series C Preference shares the assessee had a stake holding of 11.34% in Accelyst Pte. Ltd., Singapore. As observed by us hereinabove, Accelyst Pte Ltd., Singapore was holding 99.99% of the shares of M/s Accelyst Solutions Pvt. Ltd., an Indian company. The assesee company had during the year under consideration sold its entire 11.34% stake holding in Accelyst Pte. Ltd., Singapore to M/s Jasper Infotech Pvt. Ltd., an Indian company, for a total consideration of USD 4,73,62,724. M/s Jasper Infotech Pvt. Ltd. while making the payment of the consideration for acquiring the shares of Accelyst Pte Ltd., Singapore to the assessee company had deducted TDS of Rs. 70,93,60,990/- under Sec. 195 of the Act. As the assessee company was of the view that as per Article 13(6) of the India-Belgium tax treaty which was applicable to the current fact pattern of the transaction of transfer of shares under consideration, the gains, if any, arising therefrom were exigible to tax only in Belgium, had thus filed its return of income declaring Nil income and claimed the refund of the entire amount of TDS of Rs. 70,93,60,990/-. On the contrary, the A.O held a conviction that as the assessee by transferring the shares of the aforesaid company viz. Accelyst Pte Ltd, Singapore, had indirectly transferred the shares of its subsidiary Indian company viz. M/s Accelyst Solutions Pvt., therefore, the gain arising from the said fact pattern of transaction of transfer of shares was exigible to tax in India, both as per 'Explanation 5' to Sec. 9(1)(i) of the Act and also Article 13(5) of the India-Belgium tax treaty. Accordingly, in the backdrop of his aforesaid deliberations the A.O had brought to tax STCG of Rs. 163,97,61,840/- in the hands of the assessee.

12. As can be gathered from a perusal of the aforesaid facts, we find that the controversy involved in the present case lies in a narrow compass viz. that as to whether the gain arising

from the current fact pattern of the transaction of transfer of shares of Accelyst Pte. Ltd., Singapore by the assessee to M/s Jasper Infotech Pvt. Ltd. is exigible to tax in India as per Article 13(5) of India-Belgium tax treaty and 'Explanation 5' to Sec. 9(1)(i) of the Act, as claimed by the revenue, or is regulated by Article 13(6) of the tax treaty and is chargeable to tax only in Belgium, as is the claim of the assessee.

13. Before proceeding any further, it would be relevant to cull out Article 13 of the India-Belgium tax treaty, which reads as under:

"Article 13

Capital Gains

1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be fixed in that other State.

2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such fixed base, may be taxed in that other State.

3. Gains from the alienation of ships or aircraft operated in international traffic or movable property pertaining to the operation of such ships or aircraft shall be taxable only in the Contracting State of which the alienator is a resident.

4. Gains from the alienation of shares of the capital stock of a company the property of which consists directly or indirectly principally of immovable property situated in a Contracting State may be taxed in that State.

5. Gains from the alienation of shares other than those mentioned in paragraph 4, forming part of a participation of at least 10 per cent of the capital stock of a company which is a resident of a Contracting State may be taxed in that State.

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

Admittedly, the provisions of Article 13(1), Article 13(2) and Article 13(3) of the India-Belgium tax treaty have no relevance to the facts of the present case, as the issue herein involved pertains to gains from alienation of shares. Article 13(4) is also not applicable, as the gains in the present case are from the alienation of preference shares of a company which is a tax resident of Singapore viz. Accelyst Pte. Ltd., the property of which does not consists directly or indirectly principally of immovable property situated in India. At this stage, we may herein

observe that Article 13(4) envisages a "see-through" provision, which however, is limited only in relation to immovable property. Controversy involved in the present case hinges around the applicability of Article 13(5) vis-à-vis Article 13(6) of the India-Belgium tax treat to the current fact pattern of the transaction of transfer of shares of Accelyst Pte. Ltd., Singapore by the assessee company. Article 13(5) of the India-Belgium tax treaty deals with alienation of shares [excluding those covered by the provisions of Article 13(4)] representing a participation of at least 10% of the capital stock of a company which is a resident of a Contracting State. In such a case, the right to tax is allocated to that Contracting State in which the company is a resident. Now, this takes us to the definition of the term "Contracting State", which is defined under Article 3(1)(c) of the India-Belgium tax treaty, and reads as under :

> "In this Agreement, unless the context otherwise requires:
> (a). ……
> (b). ……
> (c) the terms "a Contracting State" and "the other Contracting State" mean India or Belgium as the context requires."

On a perusal of the aforesaid definition of the term "Contracting state", it can safely or rather inescapably be gathered that the same in context of India-Belgium tax treaty would take within the sweep of its meaning either "India" or "Belgium".

14. For the purpose of applying Article 13(5) of the India-Belgium tax treaty two fold conditions are required to be cumulatively satisfied viz. (i). that, the transfer of shares should represent participation of at least 10% in the capital stock of company; and (ii). that, the company whose shares are transferred should be a resident of a contracting state. Accordingly, for the purpose of applying Article 13(5) of the tax treaty, one of the pre-condition that has to be satisfied is that the company whose shares are transferred should be a resident of a Contracting State viz. India or Belgium. As such, it is only if the shares transferred are of a company which is a resident of India and the same forms part of a participation of at least 10 per cent of the capital stock of the company, that the gains arising from alienation of such shares would be taxable in India as per Article 13(5) of the tax treaty. However, as the shares transferred by the assessee in the present case are of Accelyst Pte. Ltd., i.e a Singapore based company, therefore, in the absence of satisfaction of the pre-condition that the shares transferred should form part of the capital stock of a company which is a resident of a

Contracting State, the application of Article 13(5) stands excluded to the current fact pattern of the transaction of transfer of shares under consideration. At this stage, it would be relevant to point out that as per the indirect transfer of shares provisions contemplated in the 'Explanation 5' to Sec. 9(1)(i) of the Act, a see-through approach has been incorporated i.e if a person holds shares outside India, which derives its value substantially from the assets located in India, the legislation allows a see-through approach to deem such shares outside India to be located in India. On the contrary, the Article 13(5) of the India-Belgium tax treaty does not permit a see-through approach. Unlike Article 13(4) which is the only provision in the Article 13 of India-Belgium tax treaty that provides for a see-through approach, the Article 13(5) of the tax treaty in the absence of usage of words "directly or indirectly" does not provide for a see-through approach. Accordingly, in the absence of a see-through approach in Article 13(5), the transfer of shares of Accelyst Pte. Ltd., Singapore cannot be regarded as a transfer of shares of its Indian subsidiary viz. Accelyst Solutions Pvt. Ltd. Our aforesaid view is supported by the judgment of the **Hon'ble High Court of Andhra Pradesh** in the case of **Sanofi Pasteur Holding SA Vs. Department of Revenue, Ministry of Finance (2013) 30 taxmann.com 222 (Andhra Pradesh)**. In the aforesaid case, the Hon'ble High Court of Andhra Pradesh while adjudicating upon the scope of applicability of Article 14(5) of India France tax treaty (similarly worded as Article 13(5) of India-Belgium tax treaty), had ruled out a see-through approach in Article 14(5) of the India-France tax treaty, and had concluded that transfer of shares of the holding company could not be regarded as a transfer of shares of its subsidiary entity, observing as under :

> "Qua Art.14(5), where shares of a company which is a resident of France are transferred, representing a participation (shareholding – see Vodafone) of more than 10 percent in such entity, the resultant capital gain is taxable only in France. Even where the underlying value of such shares is located in the jurisdiction of the other contracting State (India), this fact is irrelevant under DTAA provisions; except where the alienation is of shares of a company the property of which consists principally (whether directly or indirectly) of immovable property and in the later circumstance the entitlement to tax stands allocated u/Art. 14(4) to the contracting State within whose jurisdiction such property is situate. To reiterate, the fact that the value of the shares alienated comprise underlying assets located in the other contracting State is irrelevant in the context of Art.14(5)."

Apart from that, the Hon'ble High Court in its aforesaid order had observed that under Article 14(5) of the India-France tax treaty, a transfer of shares of the holding company cannot be construed as a deemed alienation of shares of its Indian subsidiary. It was observed by the High Court as under:

> "It therefore cannot be, that the transaction in issue is permitted (under the DTAA regime) to be taxed in India on the basis that there is a deemed alienation of SBL shares; and in France on the basis that there is actual alienation of shares of ShanH shares. Neither the text nor the context of Art. 14(5) legitimize such interpretation."

15. We shall now advert to the observations of the lower authorities on the basis of which they had concluded that the gain arising from the transfer of shares of Accelyst Pte. Ltd., Singapore by the assessee would be taxable in India as per Article 13(5) of the India-Belgium tax treaty and 'Explanation 5' to Sec. 9(1)(i) of the Act. On a perusal of the orders of the lower authorities, we find that the A.O/DRP had concluded that though Accelyst Pte. Ltd. is a company resident in Singapore, yet its shares were to be deemed to be situated in India by virtue of 'Explanation 5' to Sec. 9(1)(i) of the Act. Apart from that, they had further extended the deeming 'Explanation 5' to Sec. 9(1)(i) of the Act to conclude that Accelyst Pte. Ltd., Singapore was to be deemed to be a company resident in India. We have given a thoughtful consideration to the aforesaid observations of the lower authorities and are unable to persuade ourselves to subscribe to the same. Admittedly, the 'Explanation 5' to Sec. 9(1)(i) had been made available in the Income-tax Act, 1961 by the legislature vide the Finance Act, 2012 w.r.e.f 01.04.1962 for creating a deeming fiction, whereby for the purposes of taxation of capital gains under the I.T Act the shares of a foreign company were to be deemed to be situated in India, if it derived substantial value from India. However, in the absence of any such corresponding provision in the India-Belgium tax treaty or India-Singapore tax treaty, the said deeming explanation cannot be read into the aforesaid tax treaties. Before adverting any further on the issue that as to whether or not the aforesaid observations of the A.O/DRP are sustainable, it would be relevant and pertinent to point out that a unilateral amendment in the domestic law cannot be allowed to override the provisions of a tax treaty. As per the settled position of law, amendments made either retrospectively or prospectively to the provisions of the I.T Act cannot be read into the provisions of a tax treaty. Also, the provisions of the I.T Act do not operate to modify or subject the provisions of the tax treaty to the provisions of the I.T Act. Our aforesaid view is fortified by the judgment of the **Hon'ble High Court of Delhi** in **Director of Income-tax Vs. New Skies Satellite BV (2016) 382 ITR 0114 (Delhi)** and that of the **Hon'ble High Court of Bombay in CIT Vs. Siemens Aktiongesellschaft (2009) 310 ITR 0320 (Bom)**. Be that as it may, drawing force from the judgment of the **Hon'ble Apex Court** in the case of **K.P Varghese Vs. ITO (1981) 7 taxman 13 (SC)** that the speech of the mover of the bill can certainly be used as a tool

for understanding the legislative intent and also the mischief sought to be rectified by the legislation, the fact that the aforesaid clarificatory amendment made available in the I.T Act as 'Explanation 5' to Sec. 9(1)(i) would not override the provisions of Double Taxation Avoidance Agreement (DTAA) which India has with 82 countries can safely be gathered from the speech of the Finance Minister, dated 07, May 2012 while introducing the Finance Bill, 2012, the relevant extract of which reads as under:

> "Hon'ble Members are aware that a provision in the Finance Bill which seeks to retrospectively clarify the provisions of the Income tax act relating to capital gains on sale of assets located in India through indirect transfers abroad, has been intensely debated in the country and outside. I would like to confirm that clarificatory amendments do not override the provisions of Double Taxation Avoidance Agreement (DTAA) which India has with 82 countries. It would impact those cases where the transaction has been routed through low tax or no tax countries with whom India does not have a DTAA."

On the basis of our aforesaid observations, we are of the considered view that the unilateral amendment made available in the I.T Act as 'Explanation 5' to Sec. 9(1)(i) of the Act, cannot be read into the India-Belgium tax treaty. Accordingly, in the absence of any such corresponding provision in the India-Belgium tax treaty, both the A.O/DRP were in error in concluding that the shares of Accelyst Pte. Ltd., Singapore were to be deemed to be situated in India.

16. We shall now advert to the observations of the lower authorities, wherein despite accepting that Accelyst Pte. Ltd. was a company resident in Singapore, they had on the basis of the 'Explanation 5' to Sec. 9(1)(i) of the I.T Act concluded that it was to be deemed to be a company resident in India. We have deliberated at length on the issue under consideration and find that the aforesaid view taken by the revenue is absolutely incorrect and fallacious. As observed by us hereinabove, the 'Explanation 5' to Sec. 9(1)(i) had been made available in the Income-tax Act, 1961 by the legislature vide the Finance Act, 2012 w.r.e.f 01.04.1962 for creating a deeming fiction, whereby for the purposes of taxation of capital gains under the I.T Act the shares of a foreign company were to be deemed to be situated in India, if it derived substantial value from India. As such, the purpose of incorporating the 'Explanation 5' to Sec. 9(1)(i) in the I.T Act was to deem the shares or interest of a foreign company to be situated in India, if it derived substantial value from India, for the purpose of taxation of capital gains under the I.T Act, and not for treating the foreign company itself as a resident of India. In our considered view, even under the I.T Act a foreign company despite 'Explanation 5' to Sec. 9(1)(i) of the I.T Act is not to be treated as a company resident in India. As observed by us

hereinabove, the limited purpose of incorporating the deeming fiction i.e 'Explanation 5' to Sec. 9(1)(i) in the I.T Act is to deem the shares of a foreign company to be situated in India, if it derived substantial value from India, for the purpose of taxation of capital gains. In sum and substance, the 'Explanation 5' to Sec. 9(1)(i) of the I.T Act does not define residence of a person and only deems shares of a foreign company to be located in India. We are in agreement with the claim of the ld. A.R that if the view taken by the A.O/DRP was to be accepted and a foreign company was to be deemed to be a resident in India on the basis of its underlying assets situated in India, then an amendment to Sec. 6(3) of the I.T Act and Article 4 of the tax treaty would have been undertaken, which however had not been carried out. Be that as it may, in the absence of any provision for deeming a company resident of Singapore as a resident of India either in the DTAA between India and Singapore or in the DTAA between India and Belgium, Accelyst Pte. Ltd., Singapore due to its holding of shares in an Indian company could by no means be held to be a company that was resident of India. In fact, we find that as per Article 4 of the India-Singapore tax treaty which deals with the provisions relating to residence, there is no such provision which deems a company incorporated in Singapore to be a resident of India on the basis of its underlying assets. Although, a standalone amendment in the I.T Act would have no bearing on the provisions of a tax treaty, but independent of that we still find it to be quite strange and absolutely beyond comprehension that neither of the lower authorities had explained, as to how the word "resident" which is defined under both domestic laws and the DTAA gets amended by the 'Explanation 5' to Sec. 9(1)(i) of the Act. On the basis of our aforesaid deliberations, we are of the considered view that as the assessee had transferred the shares of Accelyst Pte. Ltd., a company which is a resident of Singapore, therefore, one of the pre-condition for applying Article 13(5) of the India-Belgium tax treaty i.e the company whose shares are transferred should be a resident of a contracting state i.e India or Belgium, is not found to have been satisfied.

17. We shall now advert to the interpretative exercise carried out by the A.O/DRP for construing the term "forming part of participation" as is envisaged in Article 13(5) of the India-Belgium tax treaty. On a perusal of the assessment order, we find that as the term "forming part of a participation" used in Article 13(5) of the India-Belgium tax treaty was not defined in the tax treaty, therefore, the A.O with the aid of Article 3(1) of the tax treaty had attempted to interpret

the same by borrowing the meaning given to the said term in Sec. 2(18), Sec. 2(22)(e) and Sec. 2(32) of the Income-tax Act, 1961. As such, it is observed by the A.O/DRP that the term "participation" was to be construed as the interest that one company enjoyed by way of share in another company or any interest in the other company. We have given a thoughtful consideration to the aforesaid observations of the A.O/DRP and are unable to subscribe to the same. Admittedly, as per Article 3(1) of the India-Belgium tax treaty, any term not defined shall, unless the context otherwise requires, have the meaning which it has under the law of the State concerning the taxes to which the agreement applies. As such, the domestic law interpretation cannot be resorted to "unless the context otherwise requires", which means that neither the same can be resorted to in the first instance nor to tax contrary to the provisions of the tax treaty. In sum and substance, if a term is not defined in the tax treaty, the meaning of the same can be borrowed from the domestic law, only if the same is defined in the same context as that of the tax treaty and not otherwise. Article 13(5) of the India-Belgium tax treaty is applicable only if the company is resident of either of the contracting states. As the term "resident" and "Contracting State" are defined in the India-Belgium tax treaty, therefore, reference to the domestic law under Article 3(1) of the tax treaty did not arise. AS such, now when the term "forming part of participation" had been used in context of a company which is resident of either of the Contracting State i.e India or Belgium, and the term "resident" is a defined term, hence there was no requirement for reference to the domestic law. Apart from that, we find that as the term "participation" used in Sec. 2(18), Sec. 2(22)(e) and Sec. 2(32) of the Income-tax Act, 1961 are in context of participation in "profits of the company" and not in context to the shareholding of a company, therefore, the said interpretative exercise resorted to by the A.O defies the fundamental requirement contemplated in Article 3(1) of the India-Belgium tax treaty. In fact, we are in agreement with the claim of the ld. A.R, that both the A.O and the DRP had interpreted the term "participate" which is used in context of profits of the company in order to override the tax treaty, and to allow a see-through approach for rendering Article 13(5) workable in the current fact pattern of the transaction of transfer of shares under consideration. We are unable to accept the aforesaid approach adopted by the A.O/DRP. Accordingly, as observed by us hereinabove, as the term "forming part of participation" had been used in context of a company which is resident of either of the Contracting State, and the term

"resident" is a defined term, hence there was no requirement on the part of the A.O for reference to the domestic law.

18. In the backdrop of our aforesaid observations, we are of the considered view that Article 13(5) of the India-Belgium tax treaty would also not be workable to the current pattern of the transaction of transfer of shares of Accelyst Pte. Ltd., Singapore by the assessee company. Accordingly, the gain, if any, from the transfer of the aforesaid shares would be taxable under the residuary provisions i.e Article 13(6) of the India-Belgium tax treaty, which reads as under:

> "**6.** Gains from the alienation of any property other than that mentioned in paragraphs 1, 2, 3, 4 and 5 shall be taxable only in the Contracting State of which the alienator is a resident."

As per Article 13(6) of the India-Belgium tax treaty, gains derived from alienation of any property falling within its realm, would be taxable only in the Contracting State of which the alienator is a resident. As the transferor of the shares viz. Sofina S.A (assessee) is a resident of Belgium, therefore, the gain from the transfer of the shares would be taxable in Belgium, and not in India. At this stage, we may herein observe that involving identical facts the **Hon'ble High Court of Andhra Pradesh** in the case of **Sanofi Pasteur Holding SA Vs. Department of Revenue, Ministry of Finance (2013) 30 taxmann.com 222 (Andhra Pradesh),** had concluded that the transfer transaction of shares was exigible to tax as per Article 14(6) of the India-France tax treaty (similarly worded as Article 13(6) of the India-Belgium tax treaty). It was observed by the Hon'ble High Court, as under:

> "On the above analyses, considering the interplay between Article 14(4) and (5), gain from alienation of ShanH shares (by MA/GIMD) to Sanofi, if construed as falling beyond the contours of paragraphs (4) and (5) (paragraphs 1,2 and 3 being admittedly and clearly inapplicable) would fall within provisions of the residuary Article 14(6) and be clearly taxable only in France, wher at MA/GIMD is (are) resident."

At this stage, we may herein observe that we are unable to persuade ourselves to subscribe to the view taken by the lower authorities that the order of the **Hon'ble High Court of Andhra Pradesh** in the case of **Sanofi Pasteur Holding SA Vs. Department of Revenue, Ministry of Finance (2013) 30 taxmann.com 222 (Andhra Pradesh)** is distinguishable on facts. As a matter of fact, the A.O and the DRP had failed to appreciate the principle which has been laid down by the Hon'ble High Court, and also the manner in which ratio of the judgment was applicable to the facts of the present case. Apart from that, the view taken by the A.O that

the aforesaid judgment of the Hon'ble High Court was not to be followed because the SLP filed by the revenue against the order of the Hon'ble High court is pending before the Hon'ble Supreme Court, also does not find favour with us. On the basis of our aforesaid observations, we are of the considered view that both the A.O and the DRP are in error in concluding that the gains on the transfer of the shares of Accelyst Pte. Ltd., Singapore by the assessee company would be exigible to tax in India as per Article 13(5) of the India-Belgium tax treaty. As observed by us hereinabove, as the current fact pattern of the transaction of transfer of shares is assessable under the residuary provisions i.e Article 13(6) of the India-Belgium tax treaty, therefore, the gain, if any arising therefrom would only be taxable in Belgium i.e the Contracting State of which the alienator of the shares i.e the assessee company is a resident of. Before parting, we may herein observe that as we have concluded that the gains arising from the transaction of transfer of shares of Accelyst Pte. Ltd., Singapore by the assessee company are not chargeable to tax in India as per the India-Belgium tax treaty, therefore, we refrain from adverting to chargeability of the same under the provisions of the Income-tax Act, 1961, which having been rendered as academic in nature are thus left open. Accordingly, we 'set aside' the order passed by the A.O under Sec. 143(3) r.w.s 144C(13), dated 15.10.2018 and vacate the addition of STCG of Rs. 163,97,61,840/- made in the hands of the assessee.

19. Resultantly, the appeal filed by the assessee is allowed in terms of our aforesaid observations.

Order pronounced in the open court on 05/03/2020.

Sd/-	Sd/-
(N.K Pradhan)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 05.03.2020
PS. Rohit

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**