

**IN THE AUTHORITY FOR ADVANCE RULINGS (INCOME TAX)
NEW DELHI**

A.A.R. No.788 of 2008

Name & address of the applicant	DANA CORPORATION (Through its successor, Dana Companies LLC a subsidiary of Dana Holding Corporation) 4500, Dorr Street, P.O. Box 1000 Toledo, Ohio 43697
Commissioner concerned	DIRECTOR OF INCOME-TAX (International Taxation), Mumbai
Present for the applicant :	Mr. A.V. Sonde, Sr. Advocate Mr. Achin Goel, Advocate Mr. Rahul Yadav, Advocate Mr. Rajan Vora, C.A. Ms. Sheetal Shah, C.A.
Present for the Department	Mr. Parag A. Vyas, Advocate

P V Reddi (Chairman)

Dated : November 30, 2009

Dana Corporation(DC), a company incorporated in USA filed for bankruptcy. It owned shares in two US entities namely, Dana World Trade Corporation and Dana Global Products, Inc. It also had three subsidiaries in India and used to hold their shares in varying proportions. As part of the bankruptcy proceedings, a plan was submitted to the Bankruptcy Court in USA in terms of which a reorganisation plan was submitted. A new holding company(DHC) and a limited liability company(DCLLC) was formed as part of the plan. Thereafter, DC transferred the equity shares held by it in two of the Indian Companies to Dana World Trade Corporation and the shares of the other Indian Company were transferred to Dana Global Products Inc. The transfer was without consideration in terms of the share transfer agreements.

As a part of bankruptcy transfers, an independent private equity concern infused Capital into DHC in exchange for shares of DHC, additional shares of DHC were distributed as settlement for certain claims made against DC, DC transferred shares held in Dana World Trade Corporation and Dana Global Products Inc to DHC and finally, DC merged into DCLLC as per the Articles of Merger. In effect, the indirect control over the Indian Companies was transferred to DHC. It was stated that the liabilities taken over by DHC from DC were more than the assets.

On the basis of these facts, ruling was sought from the AAR as to whether the transfer of shares of the Indian companies by DC was taxable under the Income-tax Act. It may be mentioned that advance tax was paid on the transaction by abundant caution.

On behalf of the applicant, it was argued that the transfer of shares was without consideration, as specifically stated in the Transfer Agreement and that even if the transfer was only a part of the overall restructuring / reorganization of DC under Chapter 11 of US Bankruptcy Code, no consideration could be attributed to the transfer of shares and in the absence of consideration or indeterminability of

full value of consideration, the computation provision in Section 48 fails and consequently, the charging provision under Section 45 cannot be invoked. It was also argued that the fair market value of the shares in question could not be taken as representing the amount of consideration for the transfer of shares. Further, since there is no income chargeable under the Act, the transfer pricing provisions also cannot be made applicable.

Revenue argued that there was consideration for the transfer of shares as a part of reorganization scheme and that it was immaterial that the consideration flowed from a third party. The taking over of the liabilities by DHC can be taken as the consideration for the transfer of shares. The expression 'transfer' includes even transfer by operation of law and/or under orders of Court. Once it is held that there was a transfer, income therefrom has to be calculated as provided under Section 45 read with Section 48 and the provisions contained in Chapter X (Section 92 to 92F). As the transfer of shares is for fair consideration (irrespective of whether the applicant has identified the consideration for transfer of shares or not), it cannot be said that there is no income. *Even if the consideration for transfer of shares is not identifiable or indeterminable, the arm's length price can be arrived at by taking resort to the transfer pricing provisions under Section 92 etc. of the Act as it is admittedly an international transaction between two or more related entities. Therefore, the computational provisions do not fail.*

The AAR referred to the decisions of the Supreme Court in *CIT vs. B.C. Srinivasa Setty* and *Sunil Siddharthbhai vs. CIT, Ahmedabad* to hold that it is settled law that Section 45 must be read with Section 48 and if the computation provision cannot be given effect to for any reason, the charge under Section 45 fails.

Referring to a number of decisions, the AAR held that the profit or gain envisaged by Section 45 is not something which remains ambivalent or indefinite or indeterminable. *The profit or gain or the full value of the consideration, cannot be arrived at on notional or hypothetical basis.* The profit or gain to the transferor must be a distinctly and clearly identifiable component of the transaction. The consideration for the transfer of shares in terms of money or money's worth is not something which can be implied or assumed. No profit or gain in the form of consideration for transfer can be inferred by a process of deeming or on presumptive basis and that there must be a causal nexus between the transfer of capital asset and the profit or gain accruing to or received by the assessee and that hypothetical benefit cannot be taxed under S. 45

As for Revenue's argument that the liabilities taken over can be considered as consideration, the AAR observed: "One cannot find consideration for the transfer by means of conjectures and assumptions, as said earlier. When the entire assets and liabilities of DC (applicant) have been taken over by DHC (which is neither transferor nor transferee) in order to reorganize the business, it is difficult to envisage that a proportion of liabilities constitutes consideration for transfer, notwithstanding the fact that such consideration was never defined nor identified. No commercial or accountancy principle supports such inference. *It is difficult if not impossible to predicate that a given part of the liabilities represents the consideration for transfer and such consideration has been passed on to the transferor (applicant).* I cannot indulge in an exercise of speculation and far-fetched deduction. I cannot keep out of consideration the entire purpose and substratum of reorganization as a part of bankruptcy proceedings. I cannot import artificial notions of consideration. Thus, viewed from any angle, the take over of the

liabilities by DHC under the reorganization plan cannot be treated as the consideration for the transfer of the Indian company shares by the applicant. Nor can it be said that the applicant had, by transferring such shares to its subsidiaries, derived a profit or gain. *The fact that the applicant put forward the reorganization plan in the overall interests of its business and that there is certain business advantage to the applicant has no bearing on the point whether any consideration has in fact been received or accrued on the transfer of shares. In fact, such benefit or advantage in the larger sense is incapable of being computed in monetary terms as representing the valuable consideration for transfer.* The recital in the Shares Transfer Agreement that the transfer was effected without consideration therefore reflects the correct position."

Revenue argued that the entire assets of the applicant company as well as DHC would have been valued and the shares also would have been valued and the applicant and the transferee Companies must be well aware of the fair value of shares. The full value of consideration for the transfer of shares is therefore determinable. In this context, reference has been made to the Annual Report of DHC and it was contended that the value of individual assets including transferred shares which forms part of the total enterprise i.e. \$ 3563 (million) constitutes consideration for the transfer.

Countering the same, it was held that these statements in the Annual Report of DHC do not in any way support the proposition that a definite or agreed consideration has been received by the applicant in transferring the shares of the Indian companies to its subsidiaries and thereby the applicant made a profit or gain by transferring the shares. *Shares may have been notionally valued for the purpose of preparing the financial statements or to facilitate the reorganization process. For that reason, it cannot be reasonably said that the book value or the market value of the shares really represents the consideration for the transfer or the profit arising from the transfer.* It was clarified by the applicant that the sum of \$ 3563 (millions) represents the value of reorganized entity, namely, DHC and has nothing to do with the value of assets and liabilities of the entity under reorganization i.e. DC and that the reorganization value has been determined in view of the statutory requirement so that the creditors and other stakeholders can take an informed business decision.

It was therefore held that the facts on record judged in the light of reorganization plan lead to a reasonable inference that there was no consideration for the transfer or at any rate the consideration is indeterminable and therefore the charging provision – Sec. 45 becomes inapplicable.

The Revenue also argued that the transaction is an international transaction between two or more associated enterprises as defined in Section 92A of the Act and hence the income has to be necessarily computed on arm's length basis "irrespective of whether the applicant has identified the consideration for transfer of shares or not". The computational provisions do not therefore fail, according to the Revenue.

In this regard, it was held that this argument is based on the obvious assumption that the transfer of shares is for fair consideration or at least there is some consideration. *If no consideration had passed from or on behalf of the transferee Companies to the transferor company and the charge under Section 45 fails to operate for want of consideration or determinable consideration, obviously, the provisions in Section 92 etc. do not come to the aid of the Revenue. It*

must be noted that Section 92 is not an independent charging provision. As the Section heading itself shows, it is a provision dealing with "Computation of income from international transactions". The opening part of Section 92 says that "any income arising from an international transaction shall be computed having regard to the arm's length price". *The expression 'income arising' postulates that the income has arisen under the substantive charging provisions of the Act.* In other words, the income referred to in Section 92 is nothing but the income captured by one or the other charging provisions of the Act. In such a case, the computation aspect is taken care of by Section 92 and other related provisions in Chapter X.

The income in the present case, if at all, is traceable to 'Capital gains' which is one of the heads of income and If by application of the provisions of Section 45 read with Section 48 which are integrally connected with each other, the income cannot be said to arise, Section 92 of the Act does not come to the aid of Revenue, even though it is an international transaction. The expression 'income' in Section 92 is not used in a sense wider than or different from its scope and connotation elsewhere in the Act. Section 92 obviously is not intended to bring in a new head of income or to charge the tax on income which is not otherwise chargeable under the Act. The interpretation sought to be placed by Revenue would amount to reading words into S.92.

Decision in favour of the applicant.

Cases relied on: *CIT vs. B.C. Srinivasa Setty* ([2002-TIOL-587-SC-IT-LB](#));

Sunil Siddharthbhai vs. CIT, Ahmedabad ([2002-TIOL-186-SC-IT](#));

CIT vs. Lake Palace Hotels ([2008-TIOL-312-HC-RAJ-IT](#));

PNB Finance Ltd. Vs CIT ([2008-TIOL-206-SC-IT](#));

Vanenburg Group B.V., In re ([2007-TIOL-07-ARA-IT](#))

Case distinguished: Decision of AAR in Canoro Resources Limited ([2009-TIOL-10-ARA-IT](#))

RULING

Per : P V Reddi (Chairman) :

1. Dana Corporation (for short DC) "through its successor company DCLLC is the applicant herein. Dana Corporation (DC) was incorporated in USA in the Commonwealth of Virginia. DHC (Dana Holding Corporation) and Dana Companies Limited Liability Company (DCLLC) are the companies established as part of reorganization of DC. DHC is 100% holding company of DCLLC. Dana merged with DCLLC. Thus, DCLLC being successor to DC, has to bear the tax liability of DC.

1.1. DC owned shares of two US entities namely, Dana World Trade Corporation and Dana Global Products, Inc. and also shares of various companies outside the US (subsidiaries of DC) including shares in three Indian companies i.e. (1) Dana India Pvt. Ltd. (2) Spicer India Pvt. Ltd. and (3) Dana India Technical Centre Pvt. Ltd. The percentage of shares held by DC in these three Indian Companies were – 54.65%, 74.9% and 100% respectively. It may be stated that the third company was the wholly owned subsidiary of DC.

1.2. DC had undergone bankruptcy proceedings initiated under the Bankruptcy Code of US (Title 11 Chapter 11). In the course of such proceedings DC submitted a plan for reorganization in October, 2007 before the Court. The same was confirmed by the Bankruptcy Court in the Southern district of New York by an order dated 26th December, 2007. The 'Plan for Reorganization', according to the applicant, envisaged the following:

"i. In respect of certain liabilities of DC, DHC (newly formed company) would issue its shares/make cash payment equivalent to the actual/impaired (i.e. discounted) amount of the liability.

ii. All properties of DC including shares held in Indian Companies and any property acquired by DC would vest subject to Restructuring Transactions, in DHC.

iii. The Plan endows an authority to DC and DHC to enter in to such Restructuring Transactions and take such actions/steps as they may determine as necessary to effect a corporate restructuring of their respective businesses or simplify the overall corporate structure of DHC, to the extent such actions/steps are not inconsistent with the terms of the Plan.

iv. The Restructuring Transactions provide for:

- Further transfer of subsidiary limited companies within each product line by DC and transfer of active properties, entities and/or interests associated with each product line to the appropriate product line limited liability company; and

- Transfer of product line limited liability companies to the appropriate business unit limited liability holding company.

1.3. The applicant filed a copy of the reorganization plan and the court order and also enclosed a chart showing the pattern of reorganization.

1.4. The applicant states that before the implementation of transactions contemplated in the Plan, the following steps were taken on 28th January, 2008:

- Two US entities, namely DHC and DCLLC were formed by DC.

- DC transferred the shares held by it in various companies outside US including Indian Companies in the following manner:

- Equity shares held in Dana India Private Limited, Spicer India Limited and other non US companies were transferred to Dana World Trade Corporation.

- Equity shares held in Dana India Technical Centre Private Limited and other non US companies were transferred to Dana Global Products Inc.

Share Transfer Agreements were executed on the said date, according to which the transfer was without consideration.

1.5. The applicant further states that as a part of bankruptcy transfers the following steps/transactions have taken place:

- An independent private equity concern infused funds (Capital) into DHC in exchange for shares of DHC.

- Additional shares of DHC were distributed as settlement for certain claims made against DC in the bankruptcy. DHC is, therefore, publicly held.

- DC transferred shares held in Dana World Trade Corporation and Dana Global Products Inc to DHC.

- Finally, DC merged into DCLLC as per the Articles of Merger dt.31st Jan 2008.

1.6. It is stated in the written submissions filed that the liabilities taken over by DHC from DC were more than the assets.

2. On the basis of the above stated facts, the applicant desires to have a ruling on the question whether the transfer of shares of Indian companies by DC to Dana World Trade Corporation (Dana WTC) and Dana Global Products, Inc. (Dana Global) is taxable in India. The following questions are framed by the applicant for the purpose of seeking advance ruling from this Authority:

"1. In the facts and circumstances of the case whether the transfer of shares of Dana India Technical Centre Private Limited, Dana India Private Limited and Spicer India Limited, by Dana Corporation, is not taxable under the Income-tax Act, 1961?"

2. If the answer to the question 1 is in the affirmative, whether advance tax paid as an abundant caution, be refunded as per provisions of the Income-tax Act, 1961?"

3. On 3rd March, 2006 Dana Corporation (DC) and 40 of its US subsidiaries filed petitions for Reorganization under Chapter 11 of the US Bankruptcy Code. The bankruptcy contemplated by Chapter 11 is known as Reorganization Bankruptcy as opposed to liquidation bankruptcy. In the case of former, while the business continues, the Bankruptcy Court supervises the re-organization of the Company's contractual and debt obligations. The debtor can propose a plan of reorganization. The Petitioning debtor continues to have control of its business as a debtor in possession subject to the supervision of the Court. The debtor in possession acts in fiduciary capacity. The US trustee is responsible for monitoring and ensuring the compliance of obligations which the debtor in possession is required to discharge. The preparation, confirmation and implementation of the plan of re-organization is the essence of Chapter 11 proceedings.

3.1. Various steps taken from 28th January, 2008 onwards i.e. before the implementation of the re-organization plan, have already been narrated above. As per the Shares Transfer Agreement dated 28th January, 2008, the Dana Corporation (DC) transferred its equity interest in the two Indian Companies, namely, Dana India Pvt. Ltd (54.65%) and Spicer Limited (India) (74.9%) to the transferee i.e., Dana World Trade Corporation. The equity interests held in various other Companies outside India were also transferred under the same Agreement to Dana WTC. By a similar Agreement of the same date, DC transferred its 100% shareholding in Dana India Technical Centre Ltd. to Dana Global Products Inc, another subsidiary of DC. The equity interests in two other non-Indian Companies was also transferred to Dana Global. One of the reasons for transfer of shares by DC to the said US companies/subsidiaries of DC is said to be to achieve homogeneity of business in the same or similar products dealt with by the group entities.

3.2. As a result of these transactions, DC which was holding the shares of the Indian companies directly now held shares through the two US Companies/subsidiaries to whom the shares were transferred. Subsequently, the shares held by DC in those two companies (Dana WTC and Dana Global) were transferred to DHC. The said two companies, however, continued to hold the shares of the Indian companies. In effect, DC which was holding shares in Indian companies directly, post restructuring, held them indirectly through the US subsidiary companies. Later, when DC transferred shares of the US companies (DWTC and Dana Global to DHC), it effectively transferred its indirect control over the Indian companies to DHC.

3.3. The US Bankruptcy Court passed an order on 26th December, 2007, confirming the "third amended joint plan of re-organisation of debtors and debtors in possession. In paragraph W, under the heading "Restructuring Transactions", the Court observed thus:

W. Pursuant to Article V of the Plan and Exhibit V.B.1 to the Plan, the transfer of assets to the Operating Subsidiaries and the assumption of certain Liabilities of Debtor Dana Corporation by the Operating Subsidiaries in exchange for the shares of New Dana Holdco Common Stock to be distributed to the creditors of Dana Corporation is a transfer for fair value and fair consideration inasmuch as Dana Corporation will be transferring more liabilities than assets to New Dana Holdco. [see 12/10 Transcript, at 163:15 – 165:10; Debtors' Exhibit 2 (at 3)]. After such transfers, New Dana Holdco, the Operating Subsidiaries, Reorganized Dana Corporation and each of the other Reorganized Debtors will be solvent and left with sufficient assets, liquidity and capital to satisfy their obligations as they come due for the foreseeable future.

It was stated in the order that the primary purpose in effecting the Restructuring transactions is the rationalization of the reorganized debtors' corporate structure.

3.4. By the Plan and Agreement of Merger executed on 30th January, 2008, DC merged with Dana Companies, LLC, a Virginia Limited Liability Co. The merger was a sequel to the Court's order confirming the plan of reorganization. This was preceded by DC transferring shares held in Dana WTC and Dana Global to DHC.

Summary of arguments:

4. The applicant's counsel contends that the transfer of shares is without consideration, as specifically stated in the Transfer Agreement. Even if the transfer is only a part of the overall restructuring / reorganization of DC under Chapter 11 of US Bankruptcy Code, no consideration can at all be attributed to the transfer of shares. In the absence of consideration or indeterminability of full value of consideration, the computation provision in Section 48 fails and consequently, the charging provision under Section 45 cannot be invoked by the Revenue to charge the capital gains tax. The fair market value of the shares in question cannot be taken as representing the amount of consideration for the transfer of shares. The transfer pricing provisions contained in Chapter X of the Income Tax Act (Section 92 etc) cannot be made applicable to a case like the present one as there is no chargeable income under the Act.

4.1. The Revenue's counsel has contended that there is consideration for the transfer of shares as a part of reorganization scheme. It is immaterial that the consideration flows from a third party. The taking over of the liabilities by DHC can be legitimately taken as the consideration for the transfer of shares. The US Court also observed that there is fair consideration for the transfer of assets. Further, the applicant has not come forward with the details whether the individual assets including shares have been valued and whether those values have been considered by DC while agreeing to the reorganization. The expression 'transfer' includes even transfer by operation of law and/or under orders of Court. Once it is held that there was a transfer, income therefrom has to be calculated as provided under Section 45 read with Section 48 and the provisions contained in Chapter X (Section 92 to 92F). As the transfer of shares is for fair consideration (irrespective of whether the applicant has identified the consideration for transfer of shares or not), it cannot be said that there is no income. Even if the consideration for transfer of shares is not identifiable or indeterminable, the arm's length price can be arrived at by taking resort to the transfer pricing provisions under Section 92 etc. of the Act as it is admittedly an international transaction between two or more related entities. Therefore, the computational provisions do not fail. It is

finally submitted that the transaction of transfer of shares in Indian companies of DC is taxable in India and the exact amount of tax payable may be left open to be computed based on the determination of the arm's length price under the transfer pricing provisions. It is further pointed out that the applicant has voluntarily paid advance tax by way of 'abundant caution' and claimed the refund in the event of favourable ruling of AAR.

5. First, I shall address the contentious issue whether the charge to capital gains tax is attracted in relation to the transfer of shares of the Indian companies by the applicant, having regard to the provisions of Section 45 and 48 of the Income Tax Act, 1961. Section 45 charges the profits or gains arising from the transfer of a capital asset to income tax and it shall be deemed to be the income of the previous year in which the transfer took place. Section 48 provides for "Mode of computation" of capital gains. It lays down that the income chargeable under the head "capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer (i) the expenditure incurred in connection with such transfer and (ii) the cost of acquisition of the asset and the cost of any improvement thereto. It is settled law that Section 45 must be read with Section 48 and if the computation provision cannot be given effect to for any reason, the charge under Section 45 fails. The interplay and relative scope of the two Sections has been succinctly explained by the Supreme Court in two decisions *CIT vs. B.C. Srinivasa Setty (1981) 128 ITR 294 = (2002-TIOL-587-SC-IT-LB)* and *Sunil Siddharthbhai vs. CIT, Ahmedabad (1985) 156 ITR 509 = (2002-TIOL-186-SC-IT)*. In Srinivasa Setty's case, the legal position was explained thus:

"Section 45 is a charging section. For the purpose of imposing the charge, Parliament has enacted detailed provisions in order to compute the profits or gains under that head. No existing principle or provision at variance with them can be applied for determining the chargeable profits and gains. All transactions encompassed by s.45 must fall under the governance of its computation provisions. A transaction to which those provisions cannot be applied must be regarded as never intended by s.45 to be the subject of the charge. This inference flows from the general arrangement of the provisions in the IT Act, where under each head of income the charging provision is accompanied by a set of provisions for computing the income subject to that charge. The character of the computation provisions in each case bears a relationship to the nature of the charge. Thus, the charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section. Otherwise, one would be driven to conclude that while a certain income seems to fall within the charging section there is no scheme of computation for quantifying it. The legislative pattern discernible in the Act is against such a conclusion. It must be borne in mind that the legislative intent is presumed to run uniformly through the entire conspectus of provisions pertaining to each head of income. No doubt there is a qualitative difference between the charging provision and a computation provision. And ordinarily the operation of the charging provision cannot be affected by the construction of a particular computation provision. But the question here is whether it is possible to apply the computation provision at all if a certain interpretation is placed on the charging provision. That pertains to the fundamental integrality of the statutory scheme provided for each head."

5.1. In tune with the above exposition of law, a question was posed by the court "whether if the expression 'asset' in section 45 is construed as including the goodwill of a new business, is it possible to apply the computation sections for quantifying the profits and gains on its transfer"? The said question was answered against the Revenue by holding inter alia that in the case of goodwill generated in a new business, it would be impossible to determine the cost of acquisition under Section 48 and therefore goodwill

cannot be described as an asset within the terms of Section 45 and the transfer was not liable to be taxed under the head 'capital gains'.

5.2. In Sunil's case, the Supreme Court held that the assessee, a partner of a firm who transferred his shares to the firm received no 'consideration' within the meaning of Section 48 of the Income Tax Act, nor did any profit or gain accrue to him for the purposes of Section 45 of the Act. The interpretation placed on Sections 45 and 48 in Srinivasa Setty's case was reiterated and the conclusion was recorded as follows:

"Inasmuch as we are of opinion that the consideration received by the assessee on the transfer of his shares to the partnership firm does not fall within the contemplation of Section 48 of the Income Tax Act and further that no profit or gain can be said to arise for the purposes of the Income Tax Act, we hold that this case falls outside the scope of Section 45 of the Act altogether".

5.3. Though the Act was amended in order to supersede the law laid down in the above cases, legal proposition laid down by the Supreme Court that the two provisions, namely, Section 45 and Section 48 must be read together as a part of the integrated code remains unaffected.

6. The two questions that need to be answered to resolve the issue are: (i) did any profit or gain within the meaning of Section 45 arise to the transferor (the applicant) on account of transferring the shares in the Indian companies? and (ii) was any amount received by or accrued to the applicant by way of consideration resulting from the transfer of capital asset (shares)? In other words, whether the ingredient of full value of consideration as contemplated in Section 48 is present in the instant case?

6.1. In our view, both these questions can only be answered in the negative. In Sunil Siddharthbhai's case (supra), the Supreme Court approvingly referred to the principle laid down in earlier cases that the profits or gains under the Income Tax Act must be understood in the sense of real profits or gains, on the basis of ordinary commercial principles on which the actual profits are computed. Referring to the decision in Ms. Dhun Dadabhai Kapadia vs. CIT, the Supreme Court observed:

"The court proceeded on the basis that in working out capital gain or loss the principles which had to be applied are those which are a part of commercial practice or which an ordinary man of business would resort to when making computation for his business purposes"

6.2. The profit or gain envisaged by Section 45 is not something which remains ambivalent or indefinite or indeterminable. The profit or gain or the full value of the consideration, cannot be arrived at on notional or hypothetical basis. The profit or gain to the transferor must be a distinctly and clearly identifiable component of the transaction. The consideration for the transfer of shares in terms of money or money's worth is not something which can be implied or assumed. No profit or gain in the form of consideration for transfer can be inferred by a process of deeming or on presumptive basis. There must be a causal nexus between the transfer of capital asset and the profit or gain accruing to or received by the assessee (as pointed out by Gujarat High Court in *CIT, Gujarat-II vs. Vania Silk Mills Ltd.* 107 ITR 300.

6.3. As observed by the Supreme Court in *CIT, Calcutta Vs. Gillanders Arbuthnot & Co.* 87 ITR 407, the test is "what is the consideration bargained for" or the consideration agreed to be paid. In *CIT vs. George Henderson & Co.* 66 ITR 672, it was held that the expression "full value of consideration" does not take within its ambit the fair market value of the asset transferred. As succinctly stated by Bombay High Court in *Bajjnath Chaturbhuj vs. CIT* 31 ITR 643 says: "full value must be the true value, not any artificial value which

parties for any purpose may assign to a particular Capital asset". Hypothetical benefit cannot be taxed under S. 45, as pointed out by Rajasthan High Court in *CIT vs. Lake Palace Hotels* 219 ITR 578 = ([2008-TIOL-312-HC-RAJ-IT](#)).

7. The liabilities of the applicant which DHC took over as a part of reorganization cannot, in our view, be legitimately treated as consideration nor can it adopted as a measure of consideration for the transfer of shares. The profit arising from the transfer or the consideration for the transfer cannot be equated to a part of the liabilities assumed by DHC. True, the consideration can also flow from a third party like DHC, as contended by Revenue. But the question is whether DHC, in taking over the liabilities together with the assets of DC (the applicant) can be said to have passed on consideration for the transfer of shares? Did the parties intend that a specified extent of liabilities taken over by DHC should be treated as the consideration for the transfer of shares? I think not. One cannot find consideration for the transfer by means of conjectures and assumptions, as said earlier. When the entire assets and liabilities of DC (applicant) have been taken over by DHC (which is neither transferor nor transferee) in order to reorganize the business, it is difficult to envisage that a proportion of liabilities constitutes consideration for transfer, notwithstanding the fact that such consideration was never defined nor identified. No commercial or accountancy principle supports such inference. It is difficult if not impossible to predicate that a given part of the liabilities represents the consideration for transfer and such consideration has been passed on to the transferor (applicant). I cannot indulge in an exercise of speculation and far-fetched deduction. I cannot keep out of consideration the entire purpose and substratum of reorganization as a part of bankruptcy proceedings. I cannot import artificial notions of consideration. Thus, viewed from any angle, the take over of the liabilities by DHC under the reorganization plan cannot be treated as the consideration for the transfer of the Indian company shares by the applicant. Nor can it be said that the applicant had, by transferring such shares to its subsidiaries, derived a profit or gain. The fact that the applicant put forward the reorganization plan in the overall interests of its business and that there is certain business advantage to the applicant has no bearing on the point whether any consideration has in fact been received or accrued on the transfer of shares. In fact, such benefit or advantage in the larger sense is incapable of being computed in monetary terms as representing the valuable consideration for transfer. The recital in the Shares Transfer Agreement that the transfer was effected without consideration therefore reflects the correct position.

7.1. The learned counsel for the Revenue further submitted that the entire assets of the applicant company as well as DHC would have been valued and the shares also would have been valued and the applicant and the transferee Companies must be well aware of the fair value of shares. The full value of consideration for the transfer of shares is therefore determinable. In this context, reference has been made to the Annual Report of DHC for the period ending 31st December, 2007. Note 23 refers to "Reorganisation and Fresh Start Accounting proforma adjustments (unaudited)". It is stated therein that "Dana's compromise total enterprise value is \$ 3563 (millions). Under fresh start accounting, the compromise total enterprise value was allocated to our assets based on their respective fair values in conformity with the purchase method of accounting for business combinations in SFAS No.141..... Such valuation specialists are updating the valuation of certain of our assets as of January 31, 2008". It is further stated that the compromise total enterprise value represents the amount of resources available or that become available for the satisfaction of post-petition liabilities and allowed claims, as negotiated between the debtors and the creditors". Then, after broadly referring to the method adopted to arrive at the compromise valuation, it was stated : "This value is viewed as the fair value of the entity before considering liabilities.....".

7.2. On the basis of these statements in the Annual Report, the Revenue seeks to contend that the value of individual assets including transferred

shares which forms part of the total enterprise i.e. \$ 3563 (million) constitutes consideration for the transfer. I am unable to accept this extreme contention. These statements in the Annual Report of DHC do not in any way support the proposition that a definite or agreed consideration has been received by the applicant in transferring the shares of the Indian companies to its subsidiaries and thereby the applicant made a profit or gain by transferring the shares. Shares may have been notionally valued for the purpose of preparing the financial statements or to facilitate the reorganization process. For that reason, it cannot be reasonably said that the book value or the market value of the shares really represents the consideration for the transfer or the profit arising from the transfer. In this context, it is clarified by the applicant (vide written submissions dated 10.8.2009) that the sum of \$ 3563 (millions) represents the value of reorganized entity, namely, DHC and has nothing to do with the value of assets and liabilities of the entity under reorganization i.e. DC and that the reorganization value has been determined in view of the statutory requirement so that the creditors and other stakeholders can take an informed business decision. As stated by the applicant, the objective behind the determination of such value is not to determine the consideration for the transfers effected on the sidelines of reorganization.

7.3. I am, therefore, of the view that the facts on record judged in the light of reorganization plan lead to a reasonable inference that there was no consideration for the transfer or at any rate the consideration is indeterminable and therefore the charging provision – Sec. 45 becomes inapplicable.

7.4. The counsel for the Revenue has drawn our attention to the observation of the Bankruptcy Court that there was fair consideration for the transfer. These observations of the Bankruptcy Court in paragraph W extracted earlier do not in any way support the Revenue's stand. The fair value and fair consideration referred to in the said paragraph is in relation to the creditors of DC and not referable to the DC or its shareholders. As part of the reorganization, the claims of the creditors were compromised and as a sequel to such compromise, the creditors of DC received certain shares of DHC. In that context, the said expression was used. It can only mean that qua the creditors of DC, the issuance of shares of DHC was for a fair value and consideration, as rightly pointed out by the applicant's counsel.

7.5. Before parting with the discussion on this aspect, I may refer to a recent decision of Supreme Court in *PNB Finance Ltd. Vs CIT 307 ITR 75 = (2008-TIOL-206-SC-IT)*. While reiterating the principle that the charging Section (Section 45) and the computation provisions are "inextricably linked" and "together constitute an integrated code", the Court held thus:

"In the present case, the banking undertaking, inter alia, included intangible assets like, goodwill, tenancy rights, man power and value of banking licence. On the facts, we find that item-wise earmarking was not possible. On the facts, we find that the compensation (sale consideration) of Rs.10.20 crores was not allocable item-wise as was the case in Artex Manufacturing Co. (1997) 227 ITR 260

8. The Revenue then endeavored to bring the transaction within the fold of Section 92 and the allied provisions contained in Chapter X. Once there is a transfer and there is a "fair consideration" for the transfer, it cannot be said there is no income, submits the counsel for Revenue. The income needs to be computed under Section 92 of the Act having regard to the arm's length price. The transaction, it is pointed out, is an international transaction between two or more associated enterprises as defined in Section 92A of the Act. The international transaction is defined by Section 92B as to mean a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property or provision of services etc. or any other transaction

having a bearing on the profits, income, losses or assets of such enterprises. The computation of arm's length price is provided by Section 92C. Relying on these provisions, it is submitted on behalf of the Revenue that the income has to be necessarily computed on arm's length basis "irrespective of whether the applicant has identified the consideration for transfer of shares or not". The computational provisions do not therefore fail, according to the Revenue. This argument is based on the obvious assumption that the transfer of shares is for fair consideration or at least there is some consideration. If no consideration had passed from or on behalf of the transferee Companies to the transferor company and the charge under Section 45 fails to operate for want of consideration or determinable consideration, obviously, the provisions in Section 92 etc. do not come to the aid of the Revenue. It must be noted that Section 92 is not an independent charging provision. As the Section heading itself shows, it is a provision dealing with "Computation of income from international transactions". The opening part of Section 92 says that "any income arising from an international transaction shall be computed having regard to the arm's length price". The expression 'income arising' postulates that the income has arisen under the substantive charging provisions of the Act. In other words, the income referred to in Section 92 is nothing but the income captured by one or the other charging provisions of the Act. In such a case, the computation aspect is taken care of by Section 92 and other related provisions in Chapter X. It must be noted that the income chargeable under the Act is divided into various heads under Section 14. The heads of income specified in that Section are:

14.	Heads	of	Income
A	-		Salaries
B	-	[Omitted by the Finance Act,	1988]
C	-	Income from house	property
D	- Profits and gains of business or profession		E - Capital gains
F	- Income from other sources		

8.1. The income in the present case, if at all, is traceable to 'Capital gains' which is one of the heads of income. If by application of the provisions of Section 45 read with Section 48 which are integrally connected with each other, the income cannot be said to arise, Section 92 of the Act does not come to the aid of Revenue, even though it is an international transaction. The expression 'income' in Section 92 is not used in a sense wider than or different from its scope and connotation elsewhere in the Act. Section 92 obviously is not intended to bring in a new head of income or to charge the tax on income which is not otherwise chargeable under the Act. The interpretation sought to be placed by Revenue would amount to reading words into S.92. I have, therefore no hesitation in rejecting the Revenue's contention.

8.2. In the case of *Vanenbury Group B.V., In re 289 ITR P 464 at 472 = (2007-TIOL-07-ARA-IT)*, this Authority while referring to the provisions in Chapter X, observed: "These are again machinery provisions which would not apply in the absence of liability to pay tax".

8.3. The learned counsel for the Revenue has relied on a recent decision of this Authority in the case of *Canoro Resources Limited = (2009-TIOL-10-ARA-IT)*, wherein it was held that the transfer pricing provisions contained in Chapter X of the Act will override the computational provision in sub-section (3) of Section 45 in the case of an international transaction. I do not think that the ruling in *Canoro Resources* runs counter to the view expressed by AAR as regards the applicability of Section 92 of the Act. The fact situation in *Canoro Resources* case is materially different and the real question which fell for consideration in that case is discernible from the following lines in para 10.1. "It is the common stand of both - the applicant and the Revenue, that the nature of income arising from the transfer of the applicant's participating interest in Amuguri block to the proposed partnership firm, shall be capital

gains. Where they differ is regarding the mode of computation of that income”.

9. As a result of the foregoing discussion, this Authority is of the view that the transfer of shares of the three Indian companies by Dana Corporation to US Dana WC and Dana Global is not chargeable to tax as capital gains under the Income-tax Act, 1961. The first question is accordingly answered in the affirmative. The second question is answered by observing that the applicant can seek appropriate remedies under the Act for the refund of advance tax paid.

10. Before closing the case, there are two points I would like to mention. Firstly, the applicant submitted, after the first hearing, as many as 10 questions which merely narrate the specific points or aspects integrally connected with the wider question formulated in the original application. I considered it unnecessary and inappropriate to split up the Question originally framed and answer them in seriatim. Moreover, the learned authorized representative stated in the course of brief hearing on 17th November, 2009 that the answer to the first question as originally framed would suffice. Secondly, though there were some arguments on the point that there was no transfer of shares in the eye of law in the background of re-organization of entire business, that argument was not seriously pursued at the subsequent hearing, probably for the reason that there is a specific Share Transfer Agreement here. Hence, this contention is not being dealt with.

Accordingly, the Ruling is given and pronounced on this the 30th day of November, 2009.