IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.05/Coch/2017 : Asst.Year 2009-2010

M/s.Geojit Investment Services Limited 34/659p, Civil Line Road Padivattom Cochin – 682 024. **PAN : AACCG2328J**	Vs.	The Joint Commissioner of Income-tax (OSD) Circle 12) Ernakulam.
(Appellant)		(Respondent)

Appellant by : Sri. Ajay Vohra / Ms.Shaily Gupta
Respondent by : Sri. Shantom Bose.

Date of Hearing : 11.07.2018		**Date of Pronouncement : 03.08.2018**

O R D E R

Per George George K., JM

This appeal at the instance of the assessee is directed against the order of the CIT(A) dated 11.11.2016. The relevant assessment year is 2009-2010.

2. The solitary issue that arises for our consideration is whether Rs.40 crore received by the assessee for discontinuing its business of commodity trading is a taxable receipt?

3. Briefly stated the facts of the case are as follows:

3.1 Assessee was a company engaged in the business of commodity trading. For the assessment year 2009-2010, the

return of income was filed on 29.09.2009 disclosing total income of Rs.7,75,65,578. During the relevant assessment year, the assessee had received an amount of Rs.40 crore from BNP Paribas, a French company, as compensation for agreeing to discontinue the assessee's business in commodity trading. The factual background for payment of compensation by BNP Paribas to the assessee, are as follows:

3.2 BNP Paribas is a French Bank, who had invested 27.18% stake in the parent company of the assessee, viz., M/s.Geojit Financial Services Limited (GFSL). The GFSL, the parent company of the assessee, is a listed public limited company. BNP Paribas, the French company had sought to increase its shareholding in GFSL by giving an open offer to the existing shareholders. The approval for open offer had to be obtained from Securities Exchange Board of India (SEBI). Since BNP Paribas is a French company, operating in India under RBI license, the SEBI directed it to get clearance from RBI. The RBI for granting clearance, insisted the parent company and its subsidiary companies to withdraw from the commodity trading business, because as per the RBI guidelines no bank should have interest in commodity trading business. Pursuant thereto, BNP Paribas approached GFSL to consider discontinuing the commodity brokerage business undertaken by its subsidiary, i.e., the assessee in order to comply with the requirements prescribed in the Indian Banking Regulation Act, 1949, being enforced by the RBI. In lieu of the assessee discontinuing the commodity brokerage business, BNP

Paribas offered compensation of Rs.40 crore based on a valuation report obtained by BNP Paribas from Ernst & Young. Thereafter resolution was passed by the Board of Directors of the assessee-company accepting the offer made by BNP Paribas. BNP Paribas vide its letter dated 23.05.2008 confirmed making payment of Rs.40 crore to the assessee as compensation for shutting down the commodity brokerage business and for surrendering its membership in various commodity exchanges. The assessee-company was originally called M/s.Geojit Commodities Limited. After the receipt of the compensation and discontinuation of business in commodity trading, name of the assessee was changed to M/s.Geojit Financial Services Limited.

3.2 In the return of income filed for the assessment year concerned, the entire compensation of Rs.40 crore received by the assessee from M/s.PNB Paribas for agreeing to discontinue its business in commodity trading was claimed as exempt as capital receipt.

3.3 The assessment was taken up for scrutiny by issuance of notice u/s 143(2) on 31.08.2010. In response to the Assessing Officer show causing the assessee as to why the compensation of Rs.40 crore should not be subject to tax, the assessee submitted that the receipt was capital receipt on account of loss of source of profit consequent to agreeing to refrain from carrying on business in commodities trading. The assessee relied on various judicial pronouncements for the proposition

that the amount received for loss of source of income is a capital receipt. The Assessing Officer, however, rejected the contentions raised by the assessee. The Assessing Officer noticed that the assessee-company had not lost profit making apparatus and the commodity business of the assessee though discontinued, was carried on by another company having similar shareholding pattern. Further it was held by the A.O. that even otherwise the amount of Rs.40 crore was liable to be taxed u/s 28(va) of the I.T.Act.

4. Aggrieved by the order of the Assessing Officer, the assessee filed appeal to the first appellate authority. The CIT(A) confirmed the view taken by the Assessing Officer. Apart from the same, the CIT(A) also held the amount to be taxable u/s 28(ii)(c) of the I.T.Act. The conclusion of the CIT(A) are summarized as follows:-

> *"**K. Compensation received: Final summarization and conclusions***
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> *qqq) From all the above, the following principal positions, decisions, findings and conclusions in the disputed matter above are extracted and listed in the interests of convenient overview.*
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> *(i) There is an agreement that holds good. There is nothing on hand that that de- legitimizes the documents being the offer letters and the acceptability resolutions exchanged as above from being held as agreements.*
>
> *(ii) Transfer Pricing mandates need to be complied with. If the statutory mandates u/s 92A, 92B and 92CA of the Act have not been followed, the AO may ask the Appellant as to the reasons for the said*

default(s) and why penal action under the statute may not be taken thereupon. The AO may thereafter take the necessary steps to ensure that the Arm's Length Price of the compensation received by the Appellant (of which the internally set Transfer Price is Rs. 40 crores) is computed by the TPO and the adjustments, if any, that result be incorporated in the taxable income assessed for the A.Y. 2009-10. The AO may also inform the respective AOs holding jurisdiction over the cases of GFSL and GCL to ask similar questions and take similar measures as and in tandem with the above to ensure that the Arm's Length Prices in respect of the international transactions entered into by GFSL and GSL in connection with the matters in reference in this Appeal are computed by the TPOs concerned, and the adjustments, if any, that result, incorporated in their respective taxable incomes assessed for the A.Y. 2009-10. This may be done so that the interests of Revenue and the public are protected.

(iii) Section 28(iic) is attracted. The taxing provisions of the charging section 28(iic) of the Act are fully attracted and applicable in the instant case, the Appellant being shown up and proved to be an agent of GSHL and the compensation received of Rs. 40 crores taxable in the hands of the Appellant.

(iv) The corporate veil has been pierced. There is every need in the present case to pierce the corporate veil, which has been done, and the true nature of the collusive transactions beneath stands revealed. Any argument that the original reason for carrying out the transactions in the manner as provided and for incorporating and setting up GCL was because of statutory reasons (SEBI/RBI requirements) is of no avail. The Hon'ble Supreme Court in its decision in the case of Balwant Rai Saluja & Anr. vs Air India Limited & Ors (supra) has cited, accepted and emphasized the 6-point formulaic findings of Hon'ble Justice Munby in the case of Ben Hashem v. Ali Shayif (supra), one of which leads us to hold that the

company (GCL) is a 'facade' (to evade tax) even though it was not originally incorporated with any deceptive intent, since it has been being used for the purpose of deception (tax evasion) at the time of the relevant transactions.

(v) Compensation towards loss of agency is taxable. What the Appellant has ultimately lost in the impugned set of transactions and events is only its agency to carry out the commodities trading on behalf of the Appellant as well as to receive the compensation under reference for the loss of the agency. The compensation received towards the loss of the agency is taxable. The Hon'ble Supreme Court supports this position.

(vi) Compensation in lieu of lost opportunity and revenue streams is taxable. Following the loss of agency to carry out the business of commodities trading as above, the compensation received by the Appellant of Rs. 40 crores is simultaneously held to be for the transition/movement of business opportunity, the concomitant revenue streams and the appurtenances required thereof and for facilitating the same from one business entity of the Group to another. [NB: From the consolidated perspective of the Group, there is no real loss of any kind, as such losses within the group would be momentary and non-existent in nature].

(vii) Compensation to agent for facilitating intra-Group movement of opportunity, conduct, assets and earnings of business is taxable. A payment received for facilitating the movement of revenue streams is operational and business exigent/expedient in nature and cannot be considered to be a capital receipt. Taken together, the receipt by the Appellant of the compensation was therefore towards its loss of agency and the stipulated consequent actions to facilitate the smooth transition and continuing conduct of the business in another financial premises. Such rendering of assistance is revenue in nature.

(viii) Compensation for temporary loss of business rights, conduct and earnings is taxable. The loss of business or business opportunity or of the right thereof for the Appellant is only temporary as well as pre-provided, pre-insured and pre-primed for resuscitation and eventual revival if and when favourable conditions come to prevail. This is also substantiated and buttressed by the fact that GFSL has reserved its right to re-start the commodities trading business. Therefore, any compensation received towards such loss is revenue in nature. The Hon'ble Supreme Court supports this position.

(ix) No enduring benefits created for anyone. Only the technical need to fulfill statutory (RBI/SEBI) requirements has taken place. Nothing of enduring benefit has been created or lost to the Geojit Group or in corollary to the Appellant through the receipt of the compensation of Rs. 40 crores from BNPP. The receipt thus cannot be held to be capital in nature. BNPP by making the payment has not received any enduring benefit, being absolutely uninterested and divorced from the commodities trading business. The Hon'ble Supreme Court supports this position

(x) Payments received for movement from one premises to another are revenue in nature. The Appellant's (the Group's actually) business was transferred from its financial premises (the Appellant's) to another (GCL's). The Hon'ble Supreme Court has held that any payment received from the person responsible for the said denouement of movement is revenue in nature.

(xi) Section 28(va) is attracted. All things considered therefore, if the compensation is held to be a return transfer to the payer of the compensation of the right to carry on commodities trading business, then it would also be taxable as business income 28(va) of the Act as it has been shown to be revenue in nature. This is both because the piercing of the corporate veil that reveals the agreement-driven quid pro

between payer and the receiver of the compensation as well as because the payment received is for acting as an agent, towards loss of agency, towards loss owing movement between premises and for facilitating the movement of business rights /opportunity/assets/future earnings between AEs within the Group. Also, then no enduring benefit generated for anyone that would attract the classification of compensation as being capital or being visited by the prospects or provisions of Cap Gains taxation.

rrr) Any errors/omissions deemed to have been committed by the AO, including non-application of Section 28(iic) of the Act for the purpose of assessment, are now held as having been corrected and cured by me through the analyses above. This has been done in exercise of concurrent and coexistent powers of assessment conferred on me by the statute as also sanctified by the ratio of the Hon'ble Supreme Court of India in the case of M/s Jute Corporation of India Limited vs. Commissioner of Income Tax and Anr [1991] AIR 241, 1990 SCR Sup!. (1) 340. In the cited ratio, the Hon'ble Apex Court held inter alia that "the declaration of law is clear that the power of the Appellate Assistant Commissioner is co-terminus with that of the Income Tax Officer. If that be so, there appears to be no reason as to why the appellate authority cannot modify the assessment order on an additional ground even if not raised before the Income Tax Officer. No exception could be taken to this view as the Act does not place any restriction or limitation on the exercise of appellate power. Even otherwise an Appellate Authority while hearing appeal against the order of a subordinate authority has all the powers which the original authority may have in deciding the question before it subject to the restriction or limitation if any prescribed by the statutory provisions. In the absence of any

statutory provisions to the contrary the Appellate Authority is vested with all the plenary powers which the subordinate authority may have in the matter". Consequently, all actions of the AO including the computation of assessable and taxable income in the instant case will be those of this office determined in consonant and congruent supersession of those carried out by the AO. The above would mean that this assessment can now be taken to be one completed as discussed in the body of the order above and as summarized below. There is nothing the AO has done which is not curable through this action.

sss) The Appellant's arguments that the compensation received of Rs. 40 crores towards the loss of its profit-earning rights/apparatus/business of commodity brokerage was a capital receipt therefore are seen to lack merit. Therefore, based on the above arguments and reasoning, under and in accordance with the provisions of Section 28(iic) r.w.s 28(va) r.w.s 92A r.w.s 92B of the Income-tax Act, and taking alongside, inter alia, the principles of piercing the corporate veil and dominated agency, the surrogatum rule, the concepts of commercial expediency and operational necessity versus that of enduring benefit, the NPV formulaic approach to valuing future revenue streams, and the decisions of the Hon'ble Supreme Court as held, inter alia, in the cases of State of Rajasthan v. Gotan Lime Stone Khanji Udyog Pvt. Ltd. (supra), CIT Vs Manna Ramji and Co (supra); CITICEPT Vs Shamsher Printing Press (supra), and Guffic Chemical Pvt. Ltd. vs CIT (supra), the ratios of the Hon'ble Madras High Court in the cases of CIT vs T.I &M Sales Ltd (supra) and CIT v. Seshasayee Brothers P. Ltd. (supra) the compensation received by the Appellant of RS.40 crores from BNPP is held to be correlated to the value of the opportunity benefits being revenue streams derived by GeL (the principal on whose behalf BNPP is held to be acting as an agent) an therefore received by the Appellant on behalf of its holding company

GFSL as its agent) and therefore taxable as business income in the hands of the Appellant for the impugned A.Y. 2009-10. It is also held that owing to the collusive and colourable nature of the transactions following the lifting of the corporate veil, no transfer of rights or extinguishment of rights or loss of business or earnings or potential revenue streams have taken place. The compensation is also held to be paid by BNPP to only to facilitate the movement of the revenue streams from the Appellant to GeL within the financial domain of the Group. Grounds Numbered 2 to 6 are accordingly dismissed.

ttt) The AO may also take steps to reopen the assessment proceedings of GFSL for the A.Y. 2009-10 and assess protectively the receipts of compensation totalling Rs. 40 crores 3 above in the hands of GFSL as the principal instigator, manager, controller, recipient of the said compensation. It may be recollected that the agreement that led to the quid pro quo of compensation being received from BNPP for the facilitation of the movement of the impugned business alongside its rights, earnings and appurtenances to GeL as well as the creation and incorporation of GeL was orchestrated, fed and concluded by GFSL. The Appellant was a dominated and therefore compromised and complicit agent, although as an incorporated and assessed entity, it is held (as also evidenced through the resolution passed) to have the ability and means to author and follow up decisions favourable to its own commercial interests."

5. Aggrieved by the order of the CIT(A), the assessee has *filed the present appeal raising following grounds:-*

"1. The order of the Commissioner (Appeals) is against facts and law.

2. The AO should have appreciated that, the

amount of Rs 40,00,00,00/- was paid to the appellant by BNP Paribas, due to the fact that as per the regulations of Securities and Exchange Board of India and Reserve Bank of India, who were Regulators as per the applicable legislations, the group in which the incremental investment was proposed to be made was not allowed to have any exposure in commodity trading business. The appellant who was earning income from the business in commodity trading was paid the amount by BNP Paribas as compensation for discontinuance of the business in commodity trading .There was no prior agreement between the appellant or BNP Pari bas and it was only due to the regulatory restrictions that the surrender or commodity business had to be made by the appellant. It was compensating the loss of revenue on account of surrender of the source of income, the amount was paid by BNP Paribas – the foreign investor in the holding company. The conclusions of the learned Commissioner (Appeals) that the amount was paid by BNP Paribas as an agent of the company which had started the commodity trading business after it was discontinued by the appellant is based on surmises.

3. The conclusion of the Commissioner (Appeals) that the impugned amount of Rs.40,00,00,000/- was actually paid by BNP Paribas to the holding company and was only received by the appellant is without any basis. The amount was paid to the appellant and on receipt the appellant discontinued the commodity trading business carried on by it. The Commissioner (Appeals) should have appreciated that when any amount is received in lieu of any source of income or in consideration of extinguishment of any source of income such receipt would be a capital receipt and not exigible to income tax. The Commissioner (Appeals) is not justified in

treating the loss of source of income viz., commodity trading business as temporary shifting by comparing it with the shifting of the plant and machinery from one premises to another premises. The comparison by trying to link all the entities in the group on the ground of piercing the corporate veil is unwarranted as all the group companies were having different shareholding patterns and were individually assessed to income tax. There being no complete identity between the shareholders of the different entities, the conclusion of the Commissioner(Appeals) that the amount received by the appellant is a taxable revenue receipt to compensate for temporary losses and shifting of business from the appellant is wholly unjustified.

4. Commissioner of Income Tax (Appeals) erred in his conclusion that the receipt of Rs.40,00,00,000 is taxable as revenue receipt under section 28(iic) read with 28(va) of the Act. Section 28(iic) and section 28(va) are applicable in different circumstances and both sections cannot become simultaneously applicable to a single receipt. Commissioner of Income Tax (Appeals) has not concluded which section is applicable, if at all it is taxable.

5. The powers of the Commissioner (Appeals) are co-terminus with that of the AO. It is now well settled that what the AO is authorised to do, the Commissioner (Appeals) has also the powers to do. The AO had powers to refer a return filed by the appellant to the Transfer Pricing Officer only when the time limit for issue of notice u/s 143(2) had not expired. In the instant case the assessment proceedings are not pending before the AO and hence the direction of the Commissioner(Appeals) to the AO to refer the appellant's assessment to the Transfer Pricing Officer is without the authority of law and is not sustainable. Moreover, the appeal pertains to the assessment year 2009-10 and hence any proceedings regarding determination of Arm's Length

Price by the Transfer Pricing Officer in the assessment at this stage is barred by limitation.

Prayer

For these grounds and such other grounds as may be urged at the time of hearing it is prayed that the addition of the capital amount received may be deleted."

5.1 The assessee has filed two paper books, one enclosing the case laws in support of its submissions, and other, enclosing the financial statement for the year ending 31.03.2009, tax audit report, various correspondences between BNP Paribas, the assessee's parent company and the assessee, etc. The learned Counsel for the assessee has also submitted the brief written submission. The content of the same we shall consider and elaborate in the course of adjudicating the issues raised in this appeal.

5.2 The learned Departmental Representative filed brief written submission, the same read as follows:-

"It is submitted that Rs.40 crores which BNP paid to the assessee for stopping commodity business was a colourable transaction because no rational businessman will pay such a huge amount for buying into a truncated business, especially when the commodity business continued to be conducted from the same premises using the highly sophisticated infrastructure (LAN, WAN, etc) of the assessee itself. This requires us to pierce the corporate veil involved in this particular transaction, and hold that the amount of Rs.40 crore was paid for some unknown purpose and was not related to the stoppage of the commodity

business. This gains further support from the fact that the assessee itself has shown Rs.40 crores as extraordinary income in its P&L A/c, thereby treating it as a 'revenue receipt'.

2. Alternatively, the amount should be taxed u/s 28(va) of the Act which covers negative/ restrictive covenants of the sort involved in the impunged appeal. It is submitted that S.28(va) has wide application and cannot be restricted to non-compete fees.

3. Further, S.28 (ii) (e) effective w.e.f. 01.04.19 cannot be said to be expanding the scope of S. 28(va) from 01.04.2019 only, since the said S.28(ii) (e) is relatable to contracts exclusively and any wider import cannot be imputed to this newly introduced sub-section."

6. We have heard the rival submissions and perused the material on record. The solitary issue for our consideration is whether Rs.40 crore received by the assessee for discontinuing its commodity trading business is a taxable receipt? The compensation of Rs.40 crore paid by BNP Paribas to the assessee was credited to the profit and loss account of the assessee for the year ending 31.03.2009 and disclosed as an "extraordinary item". In the income-tax return, the assessee included the compensation of Rs.40 crore while computing book profit and paid tax thereon as per the provisions of section 115JB of the I.T.Act. For the purpose of computing tax under normal provisions of the Act, the assessee excluded the said compensation as not liable to tax. According to the assessee, compensation received was capital receipts for loss of source of income / profit earning apparatus and hence not liable to tax. The Assessing Officer

held that the assessee's source of income / profit earning apparatus was not impaired, since a new company under the same group `Geojit' was incorporated by common promoters and in essence there was no loss of profit making apparatus or source of income. Alternatively the Assessing Officer held that even it is assumed that the profit making apparatus of the assessee was impaired, the compensation received by the assessee was taxable in terms of the provisions of section 28(va) of the I.T.Act. The CIT(A) on his part, apart from affirming the order passed by the Assessing Officer, also held that the compensation received by the assessee was taxable u/s 28(ii)(c) of the I.T.Act.

6.1 The learned Counsel for the assessee reiterated the submissions made before the lower authorities that the loss of source of income is in the nature of capital receipt, and therefore, the compensation cannot be brought to tax. The relevant portion of the written submissions submitted by the learned AR reads as follows:-

> *"..... the appellant was engaged, inter alia, in commodity brokerage business. Pursuant to accepting the offer from BNP Paribas, the appellant discontinued the commodity brokerage business. Resultantly, the profit earning apparatus was impaired in as much as:*
>
> *- the appellant had to surrender all the licenses held in various commodity exchanges; the appellant had to completely stop trading in commodity exchanges on behalf of if clients/customers;*
>
> *- the appellant had to change its corporate name from 'Geojit Commodities Limited' to 'Geojit Investment*

Services Limited';

- the appellant had to alter its main objects clause in the Memorandum of Association.

Even though, the appellant continued in business, viz, carrying on a completely different activity, i.e. insurance business, the source of income in the form of commodity brokerage business was sterilized. There was thus impairment of the profit making apparatus with the cessation of the commodity brokerage business. The discontinuation of the aforesaid business and surrendering of all licenses in commodity exchanges altered the aforesaid basic structure of carrying on business by the appellant, in as much as the appellant could not have continued the commodity brokerage business and accordingly, had to forego its main source of revenue.

To reiterate, post settlement with BNP Paribas, the appellant had completely stopped the commodity brokerage business. The said settlement, therefore, resulted in immobilization sterilization, destruction and loss of the existing profit earning apparatus/ business of that appellant and the amount received to compensate the aforesaid loss of source of income/business was in the nature of capital receipt, which was not subject to tax under the provisions of the Act.

It is a settled law that compensation received against loss of source of income/profit earning apparatus as opposed to loss of income, is in the nature of capital receipt, which is not liable to tax under the provisions of the Act. Reliance is placed in this regard on the following decisions wherein it has been held that consideration received in lieu of an extinction of a source of income or profit earning apparatus is in the nature of non-taxable capital receipt.

CIT v. Vazir Sultan & Sons : 36 ITR 175 (SC)

Kettlewell Bullen and Co. Ltd. v. CI'I' : 53 ITR 261 (SC) - refer Page 1-12 of case' law PB
CIT V. Prabhu Dayal: 82 ITR 804 (SC)
CIT vs. Bombay Burmah Trading Corporation: (1986) 161 ITR 386 (SC) - refer Page 13-23 of case law PB
Oberoi Hotel Pvt. Ltd. v. CIT: 236 ITR 903 (SC) - refer Page 24-27 of case law PB CIT & Anr. vs. Sapthagiri Distilleries Ltd.: 275 CTR 532 (Kar) [Revenue's SLP has been dismissed by the Supreme Court in 229 Taxman 487] - refer Page 28-31, 32 of case law PB
Khanna & Annadhanam vs. CIT : [2013] 351 ITR 110 (Del) [Revenue's SLP has been dismissed by the Supreme Court in SLP CC 18904/2013] - refer Page 33-35, 36 of case law PB
CIT v. Sharda Sinha: 237 Taxman 111 (Del) - refer Page 39-41 of case law PB
Pri CIT vs. Satya Shee1 Khosla: ITA 289/2016 (Del) [confirmed decision of Delhi Tribunal in the case of Satya Sheel Khosla vs. ITO in ITA 882/Del/20 15] - refer Page 42-46,47-64 of case law PB
CIT v. Ambadi Enterprises Ltd.: 267 ITR 702 (Madras) - refer Page 37-38 of case law PB."

6.2 Further it was submitted that the A.O. and the CIT(A) has erred in holding that there is no impairment of the profit making apparatus. It was submitted that an independent company by the name Geojit Commodities Limited (GCL), having its own set of shareholders, Directors and employees was incorporated for carrying the business of commodity trading and the said company was assessable in its own right qua the commodity brokerage business. It was submitted that the findings of the A.O. in this regard is based on extraneous

consideration and not on relevant material. It was stated that GCL had taken membership license from various commodity exchanges and many customers of assessee had voluntarily decided to continue their business with GCL. In the context of the above submission of the assessee, it is imperative for us to extract the finding of the Assessing Officer as regards whether there was impairment of source of income or sterilization of profit making apparatus of the assessee-company. The A.O. categorically held that there was no impairment of source of income. The relevant finding of the Assessing Officer in this regard reads as follows:-

> *"(a) The assessee company has been engaging in quite a lot of activities including that of trading in commodities. The Memorandum of Association of the Company has been amended after the receipt of the impugned compensation. Copies of the original Memorandum of Association and its amended version were obtained from the assessee and perused. It is seen therefrom that the assessee has deleted from its main objects only the following:*
>
> *"A-1 To carrying on the business of all types of commodities trading as Members of Brokers of all various exchangers clients."*
>
> *Following main object has been retained even after the amendment.*
>
> *"To carryon the business of Insurance Agents, Brokers, Investment agents, Third Party Administrators or surveyors, consultants, or otherwise deal in all incidental and allied activities relating to life and non-life Insurance business."*

(b) In addition to the above main objects, there are four other incidental or ancilliary objects which remains unchanged before and after the amendment consequent to the receipt of compensation. Therefore, when the assessee is engaged in other business activities, it cannot be said that the assesee's entire , profit making apparatus has been impaired.

(c) The assessee, in the guise of discontinuance of business in commodities trading, has floated another Company M/s Geojit Comtrade Ltd. and transferred its commodities business alongwith its entire clientele. The promoters of M/s.Geojit PNB Paribas Financial Services namely, Mr. C.J. George and Ms. Shiny George are the promoters of Mis Geojit Comtrade Ltd.

(d) While Mrs. Shiny George, who is the wife of Shri C.J. George holds 53.13% in the new Company M/s. "Geojit Comtrade Ltd., Shri C. J George and Mrs. Shiny George together hold 20.42% in M/s. Geojit BNP Peribas Financial Services Ltd., the holding company of the assessee.

(e) The assessee company has surrendered its License with the commodity exchanges namely MCX, NCDEX and NMCE in the month of December, 2008. At the same time, just before its surrender, the company M/s. Geojit Comtrade Ltd. has obtained Licences by becoming a member in Mis. Commodity Exchanges namely MCX, NCDEX and NMCE.

(f) The entire clientele of the assessee company consisting of about 6000 clients were transferred in toto to M/s Geojit Comtrade Ltd. In this connection, a note submitted by Mis. Geojit Comtrade Ltd. vide its letter dated 11-11-2011, is reproduced hereunder:

"NOTE ON CLIENT FUND TRANSFER ENTRY IN CLIENT

When Geojit Commodities Ltd stopped its commodities broking business they had about 3298 clients who had open positions at the three Commodities Exchanges namely MCX, NMCE & NCDEX. These clients had a credit balance of Rs.16,56,00,471.14 with Geojit Commodities Ltd. At the instance of these clients, Geojit Commodities Ltd paid this amount to us with an instruction that the amount should be credited to these clients who will open their trading account with us. Geojit Commodities also gave a list of these 3298 clients to whom the credit should be given. Accordingly the amount received from Geojit commodities was deposited t our bank accounts and credit given to the respective client.

We are attaching a CD which contains the ledger of this account and which captures the fund transfer from Geojit Commodities Ltd. and its onward transfer to respective client accounts".

From the above, it can be 'seen that credit balances to an 'extent of Rs.16.56 crores in respect of 3298 clients having open positions as on the date of closure of business were transferred by the assessee company to the books of M/s. Geojit Comtrade Ltd. In other words, there has been no discontinuance of business, but only the transfer of entries relating to the commodity broking business from the assessee company's books to the books of M/s. Geojit Comtrade Ltd.

(g) M/s. Geojit Comtrade Ltd has entered into an agreement with the assessee's parent company for use of trademark "Geojit". Therefore, in the eyes of the clients, the business is carried on in the same name.

(h) M/s. Geojit Comtrade Ltd. has also entered into a service agreement with the assessee's parent Company for the use of its premises, equipments,

and their manpower alongwith administrative set up. In other words, the services are rendered by the same company with only a change in name. M/s Geojit Comtrade Ltd. (newly floated Company) makes use of the premises of the assessee's parent company using its Telephone, Fax, fixed assets, Courier Services, Information Technology services including LAN, WAN, ISDN, leased line, Biometric systems, VPN, Internet Platforms, etc.

Thus, it is business as usual at the ground level whereas the accounts are maintained in the name of the new company M/s. Geojit Comtrade Ltd.

(i) The franchisees of the assessee company before the discontinuance of commodity broking business, continue to be the franchisees of the new company M/s. Geojit Comtrade Ltd. There are around 86 franchisees who continue to be the franchisees of the newly formed company M/s. Geojit Comtrade Company."

6.3 From the above finding of the Assessing Officer, it is clear that the assessee's commodity trading was transferred entirely along with its clientele to the new floated company M/s.Geojit Comtrade Limited. The new company, though not a subsidiary of the assessee or its parent company, was promoted by the promoters of M/s.Geojit BNP Paribas Financial Services Limited, the holding company of the assessee. In the new company, 53.13% of the share belongs to the wife of Shri C.J.George, who is the promoter of the holding company of the assessee. Though the assessee-company had surrendered its license with various commodity exchanges in the month of December 2008, at the very same time, the new company GCL had obtained license, as a

member of commodity exchanges where the assessee had surrendered its license. The entire clientele consisting of 6000 clients were transferred in toto to the new company GCL. The credit balance in respect of the clients of the assessee-company were transferred to the books of account of the GCL. The new company, GCL had entered into an agreement with the assessee's parent company for the use of trademark "Geojit" and therefore, as rightly pointed out by the Assessing Officer, in the eyes of the clients, the business is carried on in the same name. Moreover, the business of the new company was carried out in the same premises of the parent company, making uses of the administrative set up, the equipments and the manpower etc. of the parent company of the assessee. This categorical finding of the Assessing Officer has not been dispelled by the assessee by placing any contra evidence. In this context, the Assessing Officer had come to a conclusion that there is no impairment in the loss of commodity trade to the group concern namely `Geojit'. Therefore, it was held that the profit making apparatus of the assessee-company / the group company was not impaired by the discontinuance of commodity trade business of the assessee per se. Since there is no sterilization of income / profit earning apparatus from the consolidate perspective of the group concerns, viz., `Geojit', the amount so received by the assessee as compensation cannot be termed as a capital receipt not liable to be taxed under the provisions of the I.T.Act. Therefore, the finding of the Assessing Officer in this context is upheld.

6.4 As regards the issue whether the amount was taxable u/s 28(va) of the I.T.Act, the learned AR referring to CBDT Circular No.8/2002 reported in 258 ITR (St.) 13, submitted that the said provision is only applicable to a situation wherein the assessee receives payment from a competitor in the same business in lieu of accepting restrictive / negative covenant not to carry any particular activity in relation to the business, without there being any transfer of right to carry on the business. It was submitted that such payment restrains the recipient payee from carrying on competitive business for the period for which non-compete agreement was to last, in order to protect the profitability of the payer who is a competitor / rival in the same business. In other words, it was submitted that the amount of compensation would be taxable under the provisions of section 28(va) of the I.T.Act only if it is found that the compensation is paid as a non-compete fee. For the above said proposition, the learned AR relied on the order of the Delhi Bench of the Tribunal in the case of Satya Sheel Khosla v. ITO [ITA No.882/Del/2015 – order dated 10.11.2015]. It was submitted that the aforesaid order of the Tribunal was affirmed by the Hon'ble High Court in the case reported in 237 Taxman 111.

6.5 Section 28(va) of the I.T.Act, which was inserted by the Finance Act, 2002 with effect from 01.04.2003, reads as follows:-

"(va) any sum, whether received or receivable in cash or kind, under an agreement for–

(a) not carrying out any activity in relation to or profession ; or

(b) not sharing any know-how, patent, copyright, trade-mark, licence, franchise or any other business or commercial right of similar nature or information or technique likely to assist in the manufacture or processing of goods or provision for services.

Provided that sub-clause (a) shall not apply to—(i) any sum, whether received or receivable, in cash or kind, on account of transfer of the right to manufacture, produce or process any article or thing or right to carry on any business, which is chargeable under the head 'Capital gains' ;

(ii) any sum received as compensation, from the multilateral fund of the Montreal Protocol on Substances that Deplete the Ozone Layer under the United Nations Environment Programme, in accordance with the terms of agreement entered into with the Government of India.

Explanation For the purposes of this clause,–
(i) "agreement" includes any arrangement or understanding or action in concert,–
(A) whether or not such arrangement, understanding or action is formal or in writing ; or
(B) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings ;

(ii) 'service' means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial nature such as accounting, banking, communication, conveying of news or information, advertising, entertainment, amusement, education, financing, insurance, chit funds, real estate, construction, transport, storage,

processing, supply of electrical or other energy, boarding and lodging.

6.6 The assessee-company in the instant case, had received the compensation for not carrying on any activities in relation to its commodity trading business. The compensation so paid for not carrying any activity in relation to any business (commodity trading business) would be taxable going by the plain meaning of section 28(va)(a) of the I.T.Act. Section 28(va) of the I.T.Act was introduced w.e.f. 01.04.2003. Though there was no written agreement for payment of compensation, the letters of BNP Paribas dated 23.05.2008 and 27.05.2008 and the Board Resolution of the assessee-company stating that it would discontinue the commodity trading business of the assessee on receipt of compensation of Rs.40 crore, would come within the ambit of an arrangement / undertaking / action in concert, whether or not, the same was formal or in writing or it was intended to be enforceable by legal proceedings and that would tantamount to an agreement for the purpose of section 28(va) of the I.T.Act. The wordings of section 28(va) of the I.T.Act is unambiguous and clear. The said section does not restrict, the bringing to tax only the non-compete fee but any sum that was received or receivable in cash or kind for not carrying out any activity in relation to any business. The exception for such taxation is only the cash received on account of transfer of right to manufacture, produce or process any article or thing or right to carry on

any business, which is chargeable under the head “Capital gains”.

6.6 The learned AR also contended that payment of Rs.40 crore would be covered within the mischief of newly inserted section 28(ii)(e) of the I.T.Act, which is prospectively introduced from the assessment year 2019-20 and therefore, not taxable u/s 28(va) of the I.T.Act. This contention of the learned AR is devoid of any merits, since we find that the payment of compensation to the assessee was for not carrying on its commodity exchange business and going by the literal interpretation of section 28(va) of the I.T.Act, all payment of compensation for discontinuance of a business activity would be covered under the said provision unless the same was liable to be taxed under the head `capital gains’. For these reasons, we hold that the amount of compensation received is liable to be taxed u/s 28(va) of the I.T.Act. The judicial pronouncement relied on by the learned AR in the case of Satya Sheel Kohsla v. ITO (supra) is distinguishable on facts. In the said case the amount of compensation was received (Rs.1.32 crore) by the assessee, an ex-Managing Director of the payer. The payment was for not providing the benefit of his knowledge of regulatory matters, negotiating skills and strategic planning expertise to any other person in India in the two wheeler segment for a period of two years from the date of the Agreement. The payment was brought to tax as revenue receipt. The Tribunal held, provisions of section

28(va) of the I.T.Act would not have application since the amount was received by the assessee on account of restrictive covenant while carrying on his profession and not business. The Hon'ble High Court of Delhi, while confirming the Tribunal order, held that amendment to section 28(va) of the I.T.Act, w.e.f. 01.04.2017 would have treated receipt as taxable in view of insertion of word 'possession'. However, the Hon'ble High Court held that since the assessment year concerned was prior to the amendment, receipt cannot be taxed u/s 28(va) of the I.T.Act. Therefore, the fact in the case of Satya Sheel Khosla (supra) is distinguishable from the facts of the instant case and reliance on the same by the learned AR is misplaced.

6.7 Before concluding it has to be mentioned that the CIT(A) has also held that the amount of compensation received by the assessee is also taxable u/s 28(ii)(c) of the I.T.Act. On reading of section 28(ii)(c) of the I.T.Act, it is clear that the pre-requisite condition for applicability of the said section is that there must be an agency relationship between the payer and the payee. The tests for determining existence of principal – agent relationship have been laid down in the Hon'ble Apex Court judgment in the case of Bhopal Sugar Industries Ltd. v. STO [3 SCC 147 (SC)]. The judgment of the Hon'ble Apex Court in the case of Bhopal Sugar Industries Ltd. (supra) was followed by the judgment of the Hon'ble Rajasthan High Court in the case of Hindustan Coca Cola Beverages (P.) Ltd. v. CIT

[402 ITR 539]. In the present case, there does not exists any principal-agent relationship between the assessee and GFSL (parent company). The assessee-company as well as GFSL was engaged in distinct and separate business and were functioning as independent business entities. The assessee was not under the control and supervision of the parent-company while carrying out its business activity. On the facts of the given case, there is no arrangement between the assessee and the parent company wherein it can be concluded that there was a principal and agent relationship as alleged by the CIT(A). Moreover, the compensation received by the assessee was not in lieu of surrender of any agency and secondly when such compensation was received from BNP Paribas and not from GFLS with whom the agency relationship has been alleged by the CIT(A), we are of the view that the compensation does not fall within the ambit of taxation u/s 28(ii)(c) of the I.T.Act. Further we are of the opinion that the CIT(A)'s direction to the A.O. to refer the matter to the Transfer Pricing Officer is also devoid of merits. The Assessing Officer has to refer the case to the TPO within the time limit for issuance of notice u/s 143(2) of the I.T.Act. Since the time limit for issuance of notice u/s 143(2) had already expired, any proceedings regarding the determination of Arm's Length Price by the TPO at this stage of the proceedings is barred by limitation. The learned AR also contended that the compensation of Rs.40 crore received should also be excluded from the calculation of book profit u/s 115JB of the I.T.Act, in view of the legal position set out

in various judicial pronouncements, wherein it was held that the capital receipt even if it is credited to the Profit & Loss Account had to be reduced while computing the book profit under the said provision. The above contention raised by the learned AR does not survive since we have already held the amount of compensation received by the assessee was taxable by virtue of the provisions of section 28(va) of the I.T.Act. For the aforesaid reasons, we dismiss the appeal filed by the assessee. It is ordered accordingly.

7. In the result, the appeal filed by the assessee is dismissed.

Order pronounced on this 03rd day of August, 2018.

Sd/-	Sd/-
(Chandra Poojari)	**(George George K)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Cochin ; Dated : 03rd August, 2018.
Devdas*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT (Appeals)-I, Kochi.
4. The Pr.CIT –I, Kochi.
5. DR, ITAT, Cochin
6. Guard file.

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin