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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR. JUSTICE SYAM KUMAR V.M.

TUESDAY, THE 13TH DAY OF AUGUST 2024/22ND SRAVANA, 1946

I.T.A.NO.16 OF 2019
AGAINST THE ORDER DATED 03.08.2018 IN I.T.A.NO.5/COCH/2017 OF I.T.A.TRIBUNAL, COCHIN BENCH

APPELLANT/APPELLANT/ASSESSEE:

GEOJIT INVESTMENT SERVICES LTD.,
(EARLIER KNOWN AS 'GEOJIT COMMODITIES LIMITED'),
34/659-P, CIVIL LINE ROAD, PADIVATTOM,
ERNAKULAM-682 024.

BY ADV.SRI.AJAY VOHRA (SR.)
BY ADV SRI.S.ARUN RAJ

RESPONDENT/RESPONDENT/REVENUE:

COMMISSIONER OF INCOME TAX,
CENTRAL REVENUE BUILDING, I S PRESS ROAD,
ERNAKULAM-682 018.

BY SRI.JOSE JOSEPH, SC, INCOME TAX DEPARTMENT
BY ADV.SRI.CYRIAC TOM(K/830/2011)

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 09.08.2024, THE COURT ON 13.08.2024 DELIVERED THE FOLLOWING:

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"C.R."

J U D G M E N T

Dr. A.K. Jayasankaran Nambiar, J.

This I.T. Appeal is preferred by Geojit Investment Services Limited [earlier known as "Geojit Commodities Limited"], aggrieved by the order dated 03.08.2018 of the Income Tax Appellate Tribunal, Cochin Bench, in I.T.A.No.5/Coch/2017 pertaining to the assessment year 2009-10.

2. The brief facts necessary for disposal of the I.T. Appeal are as follows:

The appellant was incorporated on 25.01.1995 and was primarily engaged in the business of commodity broking. The main objects for which the appellant company was incorporated read as under:

> (A-1) To carry on the business of all type of Commodities trading as members or brokers of various exchanges for clients.
>
> (A-2) To carry on the business of insurance agents, brokers, third party administrators, surveyors, consultants, or other wise deal in all incidental and allied activities relating to life and life insurance business."

The appellant was a wholly owned subsidiary of Geojit Financial Services Ltd. [GFSL], a public listed company, which was primarily

engaged in the business of equity and derivatives brokerage. In March 2007, BNP Paribas S.A. [BNP Paribas], a French Bank, acquired 27.18% equity stake in GFSL, through a preferential issue. In order to further increase its stake in GFSL, BNP Paribas was informally intimated by the Reserve Bank of India [RBI] in December, 2007 that before approval could be given to BNP Paribas for acquiring further shares through making an open offer, it was necessary that the appellant, being a wholly owned subsidiary of GFSL, should discontinue the commodity brokerage business. Pursuant thereto, BNP Paribas vide letter dated 23.05.2008 approached GFSL to consider discontinuing the commodity brokerage business undertaken by its subsidiary, i.e. the appellant, in order to comply with the requirements prescribed in the Indian Banking Regulation Act, 1949, being enforced by the RBI. In lieu of the appellant discontinuing the commodity brokerage business, BNP Paribas offered compensation of Rs.40 crores, based on a valuation report obtained by BNP Paribas from an independent advisor, Ernst & Young. Pursuant thereto, in a meeting held on 23.05.2008, resolution was passed by the Board of Directors of the appellant accepting the said offer.

3. Thereafter, vide Annexure C letter dated 27.05.2008 BNP Paribas confirmed making payment of Rs.40 crores to the appellant as compensation for shutting down the commodity brokerage

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business and for surrendering its membership in various commodity exchanges. Taking note of this, the RBI, vide letter dated 18.11.2008, granted conditional permission to BNP Paribas to acquire additional equity shares in GFSL through an open offer, in accordance with the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997. The conditions laid down by RBI in the said letter, read as under:

> *"3. Our no-objection is however, subject to the following conditions:*
>
> *a) Geojit Commodities Ltd., the subsidiary of Geojit Financial Services Limited., discontinue its commodity broking business and surrender its membership of commodities exchange by latest December 31, 2008, as sought by the company in its letter dated August 21, 2008. No further extension of time will be given for this purpose.*
>
> *b) BNP Paribas S.A. and Geojit Financial Services Limited should ensure that the new company which is proposed to be incorporated by the current promoters of Geojit Financial Services Limited for seeking membership and licenses of the commodities exchanges in India is not a subsidiary/joint venture of Geojit Financial Services Limited. Geojit Financial Services Limited or its subsidiaries/step down subsidiaries should not directly or indirectly undertake commodities broking business which would be violative of the spirit of the provisions of Section 8 of BR Act, 1949."*

The appellant accordingly filed application(s) for surrender of membership licenses in the following commodity exchanges:

– National Commodity & Derivatives Exchange Limited

– Multi Commodity Exchange of India Limited

– National Multi Commodity Exchange of India Limited.

which were subsequently approved by the said commodity exchanges. Consequently, the appellant stopped the commodity

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brokerage business w.e.f 01.01.2009. Subsequently, the objects clause of the appellant was amended, followed by name change from 'Geojit Commodities Limited' to 'Geojit Investment Services Limited' with effect from 02.04.2009. Objects clause (A-1) was omitted and (A-2) was retained in the revised Memorandum of Association, i.e., limited to carrying on insurance business.

4. The compensation of Rs.40 crores paid by BNP Paribas to the appellant was credited to the Profit & Loss account of the appellant for the year ending 31.03.2009 and disclosed as an 'extra-ordinary item'. In the income tax return, the appellant included the compensation of Rs.40 crores while computing book profit and paid tax thereon as per provisions of Section 115JB of the Income tax Act, 1961 [hereinafter referred to as the 'Act']. For the purpose of computing tax under the normal provisions of the Act, the appellant excluded such compensation, considering the same to be in the nature of non-taxable 'capital receipt'. In the assessment framed under Section 143(3) of the Act, the assessing officer held that the appellant continued the commodity business in the name of a newly incorporated company, viz., Geojit Comtrade Limited [GCL] that was incorporated by common promoters and there was, therefore, no loss of the profit making apparatus of the appellant. Alternatively, the assessing officer held that even if it was assumed that the profit making apparatus of the appellant was impaired, the compensation

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received by the appellant was taxable in terms of provisions of Section 28(*va*) of the Act.

5. Aggrieved by the said assessment order, the appellant preferred an appeal before the Commissioner of Income Tax (Appeals) [CIT(A)], who not only confirmed the order of the assessing officer but furthermore, invoked Section 28(*ii*)(*c*) of the Act to sustain the addition. The CIT(A) held that the compensation received by the appellant was taxable as income under the normal provisions of the Act for the following alternative reasons:

> a) There was no loss of source of income since the business was getting transferred to a new company;
>
> b) The appellant was allegedly an agent of GFSL and therefore provisions of Section 28(ii)(c) of the Act were attracted; and
>
> c) The compensation, nevertheless, was taxable as business income under Section 28(va) of the Act.

6. In the second appeal before the Income Tax Appellate Tribunal, Cochin Bench, the contention that the compensation was in the nature of a capital receipt received towards impairment of the existing business structure of the appellant, and that provisions of Sections 28(*va*) and 28(*ii*)(*c*) of the Act were not applicable on the facts of the case was reiterated on behalf of the appellant. The Revenue, on the other hand, laid stress on the Note dated 11.11.2011 received from GCL, and argued that there was no sterilization of commodities business inasmuch as the same business was carried on

by another company, GCL with the same customers and from the same premises and having the same promoters. It was further submitted before the Tribunal that provisions of Section 28(*va*) could also not be invoked in the instant case since the impugned receipt could be brought to tax as a revenue receipt only under newly inserted Section 28(*ii*)(*e*), applicable prospectively from assessment year 2019-20, which being a specific provision, would override the provisions of Section 28(*va*) of the Act.

7. Before the Tribunal, the appellant raised an additional contention that the compensation of Rs.40 crores should also be excluded from the calculation of book profit under Section 115JB of the Act being in the nature of capital receipt, notwithstanding the same having been credited to the Profit & Loss Account. The Tribunal, however, sustained the addition of Rs.40 crores holding that there is no sterilisation of profit earning apparatus for the appellant since the new company, GCL, set up by the same promoters, continued to carry on the same business by obtaining new licenses, for which all the existing clients as well as their credit balance were transferred by the appellant to GCL. The Tribunal further found that the GCL carried out business in the same premises by using trademark, administrative set up, equipments, manpower, etc. of the appellant's parent company. Accordingly, the contention that the compensation was in the nature of capital receipt was rejected by the

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Tribunal by concluding that there was no real loss from the consolidated perspective of the Group. The Tribunal also denied the alternate plea of the appellant qua reduction of compensation from calculation of book profit under Section 115JB, on the ground that the issue did not survive since the compensation received by the appellant was held to be taxable as per provisions of Section 28(*va*) of the Act.

8. In the appeal before us, the appellant raises the following substantial questions of law:

1. Whether on the facts and in the circumstances of the case, the Tribunal erred in law in not holding that the amount of Rs.40 crores having been received as compensation towards impairment of profit earning apparatus / source of income was in the nature of capital receipt not liable to tax ?

2. Whether on the facts and in the circumstances of the case, the Tribunal erred in law in observing that “there is no sterilization of income/profit earning apparatus from the consolidated perspective of the group concerns, viz, Geojit”, without appreciating that the appellant is a separate and distinct legal entity ?

3. Whether on the facts and in the circumstances of the case, the Tribunal erred in law in holding the impugned compensation as income taxable under Section 28(va) of the Act ?

4. Whether on the facts and in the circumstances of the case, the Tribunal erred in law in not holding that Section 28(ii)(e) of the

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Act being a specific provision inserted in the statute w.e.f. 01.04.2018 to bring to tax payments for sterilization of income/profit earnings apparatus, would apply in the facts of the case ?

5. Whether, on the facts and in the circumstances of the case, the Tribunal erred in law in not directing reduction of compensation of Rs.40 crores while computing book profit as per provisions of Section 115JB of the Act ?

9. We have heard Sri.Ajay Vohra, the learned senior counsel duly assisted by Sri.Arun Raj, the learned counsel for the appellant/asessee as also Sri.Jose Joseph, the learned Standing counsel for the respondent Income Tax Department.

10. The submissions made on behalf of the appellant by the learned senior counsel can be summarised as follows:

● Under the existing business model, 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:

a) the appellant had to surrender all the licenses held in various commodity exchanges;
b) the appellant had to completely stop trading in commodity exchanges on behalf of its clients/customers;
c) the appellant had to change its corporate name from 'Geojit Commodities Limited' to 'Geojit Investment Services Limited';
d) the appellant had to alter its main objects clause in the Memorandum of Association.

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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, 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 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 was placed on the following decisions, namely, **CIT v. Vazir Sultan & Sons – [(1959) 36 ITR 175 (SC)]; Kettlewell Bullen and Co. Ltd. v. CIR – [(1964) 53 ITR 261 (SC)], CIT v. Bombay Burmah Trading Corporation – [(1986) 161 ITR 386 (SC)], Oberoi Hotel Pvt. Ltd. v. CIT – [(1999) 236 ITR 903 (SC)], CIT v. Prabhu Dayal – [(1971) 82 ITR 804 (SC)]; CIT v. Parle Soft Drinks (Bangalore) P. Ltd. - [(2018) 258 Taxman 61 (SC)]; CIT v. Mrs. Tara Sinha – [(2018) 305 CTR 522 (Del)]; CIT v. Ambadi Enterprises Ltd. - [(2004) 267 ITR 702 (Madras)],** 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.

- In the decisions of the Supreme Court in the cases of Kettlewell Bullen (supra), Bombay Burmah Trading Corporation (supra), Oberoi Hotels (supra), it was held that the test for deciding whether the receipt in question is in the nature of capital receipt not liable to tax or taxable revenue receipt is whether the same is received for destruction / immobilization of source of income (whether total or

partial) and not whether the assessee recipient continues to carry on business. Where there was extinction of the source of income, the Hon'ble Supreme Court in the aforesaid cases held the payment received therefor was capital receipt not liable to tax, notwithstanding that the assessee(s) therein continued to carry on the same or any other business.

- The provisions of Section 28(*va*) are applicable where an 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. Such payment restrains the recipient payee from carrying on competitive business for the period for which non-compete agreement is to last, in order to protect the profitability of the payer who is a competitor / rival in the same business. Such payment of non-compete fees creates rights in personam in favour of the payer qua the payee. On the facts of the present case, BNP Paribas, a French Bank, was in terms of the Banking Regulation Act, 1949 barred in law from carrying on, directly or indirectly, commodity brokerage business and did not, in fact, carry on such business in India. In that view of the matter, the payment of compensation to the appellant to discontinue the commodity brokerage business, in order to enable BNP Paribas to enhance its equity stake in GFSL, could not be said to be in the nature of non-compete fees to ward off competition, to be caught within the ambit of Section 28(*va*) of the Act.

- It is pointed out that simultaneous with the insertion of Section 28(*va*), Section 55(2)(a) of the Act was amended to deem Nil cost of acquisition in case of transfer of right to carry on business. There is a difference between undertaking a restrictive/negative covenant for not carrying on any activity in relation to the business and the

transfer *per se* of the right to carry on any business. While the former category requires taking on a negative obligation qua any activity in relation to the business, the latter encompasses a positive action of absolute transfer of right to carry on business in favour of another. In the former situation, the right of doing business remains with the person undertaking the restrictive/negative covenants but is suspended during the period of non-compete, whereas in the latter situation, the said right *per se* is transferred lock, stock and barrel.

● Where the assessee transfers the right to carry on the business, and as a consequence of such transfer undertakes certain restrictive covenants not to engage in that business for no separate consideration, the provisions of Section 45 would be applicable and Section 28(*va*) of the Act cannot be resorted to, in view of clause (*i*) of the proviso to the said section. Conversely, where the assessee goes out of business in lieu of receipt of compensation, the automatic consequence that would follow is that the assessee would not carry on any activity in relation to that particular business, and in such a case, the assessee who has received compensation has permanently gone out of business, resulting in complete destruction / annihilation of its profit making apparatus insofar as that business is concerned; Section 28(*va*) of the Act inserted w.e.f. assessment year 2002-03 is not intended to cover payment of compensation for permanent loss of source of income.

● Section 28(*va*) uses the word 'any' as opposed to 'all' before "activity in relation to any business". The word 'any' is used in the singular and does not refer to all / total activities encompassing the business, non-carrying out of which may result in the total destruction of the business, implying thereby that the scope and width of the said Section restricted to payments received for non-competition for the term / duration of the non-compete agreement,

while the business continues in existence. If the said section sought to tax termination payments, then Section 28(va) of the Act would not have used the word 'any' and would have simply restricted the carrying out of business altogether.

- Section 28(*ii*)(*e*) has been inserted in the statute w.e.f. assessment year 2019-20 to negate the judgments of the Supreme Court holding payment for loss of source of income / sterilization of profit making apparatus as capital receipt, by making such payments liable to tax in the hands of the payee. The said section enacts a specific provision dealing with cases like the present one where compensation is paid for termination of the business. Section 28(ii)(e) being a special / specific provision would override the provisions of Section 28(va) of the Act, invoked by the assessing officer / CIT(A) as held by the Supreme Court in the case of **Britannia Industries Ltd. v. CIT - [[2005] 278 ITR 546 (SC)]**.

- Section 28(*ii*)(*e*) of the Act introduced by the Finance Act, 2018 is intended to plug the loophole of termination payments not being subjected to tax, being in the nature of capital receipt as held by successive judicial precedents. In case, Section 28(va) was intended to cover termination payments as well, as is the case set up by the assessing officer / CIT(A) and then upheld by the Tribunal, Section 28(*ii*)(*e*) of the Act would become otiose, reduntant and surplusage. Such an intendment cannot be attributed to the Legislature.

- Section 28(*ii*)(*e*) inserted in the statute by the Finance Act, 2018 is wide in its sweep and ambit. The said provision applies to any and every type of compensation received for modification of the terms and conditions of any contract relating to the business of the payer. In the present case, in lieu of compensation of Rs.40 crores, there was termination of the contract between the appellant and (i) the

commodity exchanges with respect to membership licenses; (ii) the customers on whose behalf the appellant was carrying on the commodity business; and (iii) the appellant company and its employees engaged in the said business, etc. Payment of Rs.40 crores would, therefore, be covered within the mischief of newly inserted Section 28(*ii*)(*e*) of the Act that would operate prospectively from assessment year 2019-20 only.

● The learned senior counsel also relied on the following decisions to substantiate his contentions on merits, namely, **Kettlewell Bullen & Co. Ltd. v. CIT – [(1964) 53 ITR 261 (SC)], Commissioner of Income-tax v. Bombay Burmah Trading Corporation – [(1986) 161 ITR 386 (SC)], Oberoi Hotel (P.) Ltd. v. Commissioner of Income-tax – [(1999) 236 ITR 903 (SC)], Commissioner of Income-tax, Central Circle, Bangalore v. Sapthagiri Distilleries Ltd. - [(2014) 366 ITR 270 (Karnataka)], Commissioner of Income-tax v. Sapthagiri Distilleries Ltd. - [(2015) 229 Taxman 487 (SC)], Khanna & Annadhanam v. Commissioner of Income-tax – [(2013) 351 ITR 110 (Delhi)], Commissioner of Income Tax, Special Range v. M/s. Khanna and Anndhanam – [SLP CC.No.18904/2013], Commissioner of Income-tax v. Ambadi Enterprises Ltd. - [(2004) 267 ITR 702 (Madras)], Commissioner of Income-tax, Delhi v. Sharda Sinha – [(2016) 237 Taxman 111 (Delhi)], Pr. Commissioner of Income Tax – 11 v. Satya Sheel Khosla – [I.T.A.No.289/2016 of Delhi High Court], Satya Sheel Khosla v. Income-tax Officer, Ward-24(3), New Delhi – [(2015) 63 Taxmann.com 293 (Delhi – Trib.)], Commissioner of Income-tax v. T.I. & M. Sales Ltd. - [(2003) 259 ITR 116 (Madras)], Commissioner of Income-tax v. Mediworld Publications (P.) Ltd. - [(2011) 337 ITR 178 (Delhi)], Commissioner of Income-tax-III, Chennai v. Metal & Chromium Plater (P.) Ltd. - [(2019) 415 ITR 123], Best**

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Trading and Agencies Ltd. v. Deputy Commissioner of Income Tax, Circle-11(2), Bangalore – [(2020) 428 ITR 52 (Karnataka)], Principal Commissioner of Income-tax, Central-2, Kolkata v. Ankit Metal & Power Ltd. - [(2019) 416 ITR 591 (Calcutta)], Principal Commissioner of Income-Tax v. Krishi Rasayan Exports (P.) Ltd. - [(2023) 290 Taxman 567 (Calcutta)], Shiv Raj Gupta v. Commissioner of Income-tax, Delhi – [(2020) 425 ITR 420], Arun Toshniwal, Mumbai v. Deputy Commissioner of Income-tax – [(2015) 375 ITR 270 (Bombay)], Commissioner of Income-tax-8, Bombay v. Bisleri Sales Ltd. - [(2015) 377 ITR 144 (Bombay)], Commissioner of Income-tax, Attavara Mangalore v. Sunil Kini K. - [(2013) 354 ITR 623 (Karnataka)].

11. Per contra, it is the submission of Sri.Jose Joseph, the learned Standing Counsel for the Income Tax Department, that a perusal of Section 28(*va*) of the Act would clearly indicate that any sum, whether received or receivable, in cash or kind, under an agreement for not carrying out any activity in relation to any business or profession would be chargeable to income tax under the head “Profits and gains of business or profession”. It is pointed out that the statutory provision does not use the word “non-compete fee” and therefore, so long as the amount received by the assessee is under an agreement for not carrying out any activity in relation to any business that was carried on by the assessee, it would attract the provisions of Section 28(*va*)(*a*) of the Act and make the receipt chargeable to income tax under the head of “Profits and gains of business or profession”. Referring to the first proviso to Section

28(*va*)(*a*) of the Act, he submits that the amounts received by the appellant/assessee in the instant case are not in the nature of amounts received on account of transfer of the right to manufacture, produce or process any article or thing or for the transfer of the right to carry on any business. He clarifies that if the receipt was of the nature of receipts mentioned in the proviso they would be chargeable under the head "capital gains". It is his argument that while it may be a fact that the receipt of the amounts by the assessee in the instant case, if received prior to 01.04.2003 would have been treated as capital receipts and therefore not chargeable to tax under the Act based on the decisions relied upon by the learned senior counsel for the assessee, the situation was entirely different with the introduction of Section 28(*va*) with effect from 01.04.2003. In response to the contention of the learned senior counsel for the assessee that the amounts received by the assessee would at best attract tax only with effect from 01.04.2019 when, by Finance Act, 2018, clause (*e*) was inserted under Section 28(*ii*) of the Act, it is his submission that Section 28(*ii*)(*e*) is attracted in an entirely different scenario where payment in the nature of compensation or otherwise is received by a person at or in connection with the termination or the modification of the terms and conditions of any contract relating to his business. It is his submission that for attracting Section 28(*ii*)(*e*), the amounts should have been received by the assessee from a person with whom he had entered into a contract and the payment

made by that person to him had to be in connection with the termination or the modification of the terms and conditions of that contract. On the facts of the instant case, he submits the payment was made in terms of an agreement that required the assessee to stop a particular line of business with a view to enabling the payer of the amounts to enhance its shareholding in the parent company. Inasmuch as the said amount was paid to the assessee for not carrying out an activity in relation to his business, it was chargeable to tax in terms of Section 28(*va*) of the Act alone.

12. We have considered the rival submissions and also gone through the records of the case. We note from the facts in the instant case that M/s.Geojit Financial Services Ltd. [GFSL] is the parent company of the assessee in which BNP Paribas, a French bank, had a 27.18% stake. When BNP Paribas sought to increase its shareholding in the parent company by giving an open offer to the existing shareholders, the Securities Exchange Board of India [SEBI] opined that approval for the open offer could be granted only if BNP Paribas obtained clearance from the RBI. The RBI, on its part, offered to grant clearance only if the parent company and its subsidiary companies withdrew from the commodity trading business because, as per the RBI guidelines, no bank could have interest in commodity trading business. It was therefore that BNP Paribas had approached the parent company to consider discontinuing the

commodity brokerage business undertaken by its subsidiary, that is, the assessee herein, so as to comply with the requirements under the Banking Regulation Act, 1949. It was as consideration for the assessee discontinuing the commodity brokerage business that BNP Paribas offered it a compensation of Rs.40 crores. It is not in dispute that the assessee received the said amount under the above arrangement and that after receipt of the compensation and discontinuation of the business in commodity trading, it changed its name to “GISL”.

13. The issue that we are called upon to consider in these appeals is whether the amounts so received by the assessee company would attract the provisions of Section 28(*va*)(*a*) of the Act. Section 28(*va*)(*a*) of the Act reads as under:

> **“28. Profits and gains of business or profession.**
>
> - The following income shall be chargeable to income-tax under the head "Profits and gains of business of profession",-
>
> (*va*) any sum, whether received or receivable, in cash or kind, under an agreement for-
> (*a*) not carrying out any activity in relation to any business or profession;
>
> **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, or profession, 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.

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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;"

A reading of the aforesaid provision makes it very clear that any sum, whether received or receivable, in cash or kind, under an agreement for not carrying out any activity in relation to any business, is chargeable to income tax under the head "Profits and gains of business or profession". Prior to this amendment, which came into effect from 01.04.2003, the said amount was not chargeable to tax either under Section 28 or under any other provisions of the Act. This was because, prior to the amendment, the receipt itself would have qualified as a capital receipt since it would have been viewed as a payment received by an assessee for parting with his revenue earning opportunity in relation to a particular line of business. The judgments relied on by the learned senior counsel for the assessee which pertain to the assessment years prior to 01.04.2003, make this position abundantly clear. The amendment brought in with effect from 01.04.2003, however, made a radical departure from the position that obtained earlier and specifically brought to tax under the head of "Profits and gains of business or profession" any amount received under an agreement for not carrying out <u>any</u> activity in relation to <u>any</u> business. In our view, the

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specific provision that was introduced with effect from 01.04.2003 was with a view to bring to tax under the head “Profits and gains to business or profession” amounts received by an assessee in a situation where the receipt was a consideration for the assessee desisting from carrying out some of many activities in relation to its businesses. In other words, if there was a loss of earning opportunity in relation to only one of many lines of business and the said loss of business opportunity was duly compensated by the person who required the assessee to sacrifice/give up that line of business, and the assessee continued to carry on other lines of business, then the amount received by the assessee from the person at whose instance he subjected himself to a negative covenant would be liable to tax under Section 28(*va*)(*a*) of the Act. This, in our view, would be the correct interpretation to be placed on the provisions of Section 28(*va*)(*a*) of the Act.

14. We also find, as noticed by the Appellate Tribunal in the order impugned before us, that Section 28(*va*)(*a*) of the Act does not restrict the operation of the said provision to only amounts received by way of non-compete fee. The words used in the said provision do not admit of any such restricted meaning. So long as the amount received by the assessee was received for not carrying out any activity in relation to any business and the amount received was not on account of transfer of the right to manufacture, produce or

process any article or thing or on account of the transfer of the right to carry on any business, which receipts would have been chargeable under the head “capital gains”, there was no reason to interfere with the order of the Assessing Authority that brought the amounts received by the assessee from BNP Paribas to tax under the head “Profits and gains of business or profession”.

15. We are also not impressed with the submission of the learned senior counsel that a specific provision to subject to tax under the Act, amounts akin to those received from BNP Paribas, was introduced only with effect from 01.04.2019 through the Finance Act, 2018 that introduced sub clause (*e*) to Section 28(*ii*) of the Act. It is apparent from a reading of the said provision that it is attracted only to payments received by a person at or in connection with the termination or the modification of the terms and conditions of any contract relating to his business. In the instant case, there was no subsisting agreement between BNP Paribas and the assessee, the terms and conditions of which agreement were modified in consideration of the receipt of the payment from BNP Paribas. On the contrary, the arrangement between BNP Paribas and the assessee required the assessee to give up his business in commodity trading so as to enable BNP Paribas to increase its shareholding in the parent company of the assessee. In our view, as discussed above, the said payments would have to be seen as payments received in

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connection with a negative covenant imposed on the assessee and, therefore taxable under Section 28(*va*)(*a*) of the Act.

We are, therefore, of the view that this I.T. Appeal requires to be dismissed, and we do so, by answering the questions of the law raised therein against the assessee and in favour of the Revenue.

Sd/-
DR. A.K.JAYASANKARAN NAMBIAR
JUDGE

Sd/-
SYAM KUMAR V.M.
JUDGE

prp/

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APPENDIX OF I.T.A.NO.16/2019

PETITIONER'S ANNEXURES:

ANNEXURE A	**TRUE COPY OF OFFER LETTER DATED 23.05.2018.**
ANNEXURE B	**TRUE COPY OF BOARD RESOLUTION DATED 23.05.2008.**
ANNEXURE C	**TRUE COPY OF THE LETTER DATED 27.05.2008.**
ANNEXURE D	**TRUE COPY OF THE NO OBJECTION CERTIFICATE DATED 18.11.2008.**
ANNEXURE E	**TRUE COPY OF EXTRACTS OF MEMORANDUM OF ASSOCIATION AND CERTIFICATE OF CORPORATION BEFORE AND AFTER DISCONTINUATION OF COMMODITY BUSINESS.**
ANNEXURE F	**TRUE COPY OF THE ASSESSMENT ORDER DATED 12.12.2011 FOR THE ASSESSMENT YEAR 2009-10.**
ANNEXURE G	**TRUE COPY OF THE COMMISSIONER (APPEALS) ORDER DATED 11.11.2016 FOR THE AY 2009-10.**
ANNEXURE H	**TRUE COPY OF THE IMPUGNED ORDER DATED 03.08.2018 OF THE INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH FOR THE AY 2009-10.**

RESPONDENT'S ANNEXURES: NIL.

//TRUE COPY//

P.S. TO JUDGE