Consequently, it was necessary for the opponent to obtain a licence from the Municipality under by-law 1. He was, therefore, wrongly acquitted. We set aside his acquittal, convict him under by-law 3 of the by-laws made by the Thana Municipality for "Licensing of Milk Shops and Milk Product Shops" and impose upon him a fine of Rs. 10.

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STATE v. MANSI

Chainani J.

Appeal allowed.

M. W. P.

INCOME-TAX REFERENCE

1953 *Mar.* 12

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Tendolkar.

PROVIDENT INVESTMENT CO., LTD., BOMBAY, APPLICANTS *v.* THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY, RESPONDENT.*

Indian Income-tax Act (XI of 1922), s. 12B—Capital gains—Profits arising from sale or transfer of capital assets—Original contract requiring transfer of managing agency along with sale of shares of Mills—Subsequent modification in terms of contract—No transfer of managing agency but Managing Agents required to resign from their office—True nature of transaction—Whether it is open to Court to look at substance of the matter ignoring true legal position—Difference between Sale and Relinquishment—Compensation paid to Managing Agents—Whether such compensation liable to tax under s. 12B.

P. I. Ltd. were the Managing Agents of certain Mills. The Mills had issued conversion shares all of which were owned by P. I. Ltd. On September 14, 1946 D. Co. made an offer of purchase of all the conversion shares at a certain rate, the offer stipulating for the transfer of the managing agency to them along with the sale and transfer of the shares. The Board of Directors of P. I. Ltd. accepted the offer and resolved that out of the amount received on the sale of shares a sum of Rupees one crore should be paid to P. I. Ltd. as compensation for the loss of managing agency of the Mills. The contract was modified on October 7, 1946 and the modification was to the effect that the Managing Agents should resign from their office on the sale of shares taking place instead of transferring the managing agency to D. Co. On the sale and transfer of shares to D. Co., P. I. Ltd. resigned their office of Managing Agents and on their resignation being accepted, received the sum of Rupees one crore as compensation for the loss of managing agency. On the question whether compensation paid to P. I. Ltd. resulted in capital gains liable to tax under s. 12B of the Indian Income-tax Act, 1922,

Held, that P. I. Ltd. by resigning their office of Managing Agents relinquished their rights in the managing agency. There was no transfer or sale of their managing agency and therefore compensation received by them did not result in capital gains in respect of any profits or gains

*Income-tax Reference No. 43 of 1952.

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arising from sale or transfer of a capital asset and hence was not liable to tax.

Difference between a sale or transfer and a relinquishment is well settled. A sale or transfer pre-supposes the existence of the property sold or transferred, and the transference of the right in the property from one person to another. On the other hand relinquishment means the extinction of a right or the destruction of property and if the right is extinguished or the property is destroyed, there is nothing left to transfer or to sell.

In construing s. 12B the Court must not give to the expression 'sale or transfer' its technical meaning nor must it attribute to the expression as used in this section a transaction clothed with all its legal formalities. But the Court cannot look to the substance of the matter independently of the real transaction arrived at between the parties. While it is open to the Court to ignore the form and ascertain the real nature of the transaction, the Court cannot overlook the true legal position that arises out of a document or documents which embody the transaction.

The same result may be achieved by two entirely different transactions. Whereas one transaction could be subjected to tax, the other might not be. A citizen is perfectly entitled to exercise his ingenuity so to arrange his affairs as may make it possible for him legally and lawfully not to pay tax and if his ingenuity succeeds, however reluctant the Court may be to acknowledge the cleverness of the assessee, the Court must give effect to the letter of the taxation law rather than strain the letter against the assessee.

In re *Hickens, Dashwood* v. *Hickens,*[1] *Bank of Chettinad Ltd.* v. *Commissioner of Income-tax, Madras,*[2] *Duke of Westminster* v. *Commissioner of Inland Revenue,*[3] *Secretary of State in Council of India* v. *Scoble*[4] and *Inland Revenue Commissioners* v. *Wesleyan and General Assurance Society.*[5] referred to.

The Provident Investment Co. Ltd. (Applicants) is a private limited Company whose shares are held by H. H. Maharajah of Gwalior and his nominees. Prior to October 19, 1946 the Company was the Managing Agents of Madhawji Dharamsi Manufacturing Co. Ltd. and Sir Shaporji Broach Mills Ltd. It also held all the conversion shares of the former Mills and a substantial majority of the conversion shares of the latter Mills. (At the hearing of the Reference in the High Court, it was stated, as appeared to be a fact, that these shares were really held by the Gowalior Darbar but were controlled by the Company). The Dalmia Investment Co. Ltd. wishing to acquire these conversion shares of these two Mills along with their managing agencies wrote two letters dated September 14, 1946 offering to purchase 28,328 conversion shares of the former Mills at Rs. 500 per share

(1) [1921] 1 Ch. 475.
(2) [1940] 8 I. T. R. 522 at p. 526
(3) (1934) 19 T. C. 490,
(4) [1903] A. C. 299.
(5) (1948) T. L. R. 173.

and 75,212 conversion shares of the latter Mills at Rs. 300 per share, together with the managing agencies of the two Mills. The Dalmia Investment Co. Ltd. offered to pay Rs. 20 lacs and Rs. 30 lacs as and by way of Earnest Money on the acceptance of the said offers. They also stipulated that within a certain time each of these two Mills had to arrange to get the sanction of the general body of its respective share-holders to such transference of the managing agency to them and agreed to pay the balance of the purchase price as soon as such sanction of the shareholders was obtained. On September 26, 1946, a meeting of the Board of Directors of the Provident Investment Company Ltd. was held at which the Board accepted the offer of Dalmia Investment Co. Ltd. in regard to conversion shares and managing agencies of both the above Mills. The Board further resolved that out of the total amount received from the sale of the shares a sum of Rupees one crore should be paid to the Provident Investment Co., Ltd., as compensation for the loss of the managing agency of the two Mills. The acceptance of their offer was conveyed to the Dalmia Investment Company Ltd. on September 30, 1946. On October 7, 1946 the Dalmia Investment Co. Ltd. wrote a letter to the Provident Investment Co. Ltd. recording an agreement arrived at between the parties which modified the original agreement and the modification was as follows: "In our letters of offer which has been accepted by you, it was arranged that the managing agency will be transferred either to us or to our nominees. Now, instead of doing so by you, you as the present Managing Agents will give their resignation, so that at the time of the delivery of shares and payment of moneys your managing agency will have come to an end. In view of the above, it is not necessary to obtain any sanction of general meeting." On October 19, 1946 the Provident Investment Company Ltd. tendered their resignation of their office as Managing Agents of both the Mills. The resignations were accepted by the Mills. The Provident Investment Company Ltd. thereafter received a sum of Rupees one crore as compensation for the loss of managing agency of the two Mills. The Income-tax department computed the value of the managing agency at Rs. one crore and the capital gain at Rs. 81,81,900. The Appellate Assistant Commissioner and the Income-tax Appellate Tribunal both held that the Provident Investment Co. Ltd. was liable to pay tax under s. 12 B of the Indian Income-tax Act 1922. At the instance of the applicants the Income-tax Appellate Tribunal referred the following question to the High Court.

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Chagla C. J.

"Whether the assessee Company made a capital gain amounting to Rs. 81,81,900 within the meaning of s. 12B of the Indian Income-tax Act?"

The reference was heard.

Sir Jamshedji B. Kanga with *N. A. Palkhivala* and *D. H. Dwarkadas,* for the applicants.

Sir Nusserwanji P. Engineer with *G. N. Joshi* for the respondent.

Chagla C. J. A very interesting and by no means easy question arises in this reference with regard to the interpretation of s. 12B of the Income-tax Act. The assessee company is a private limited company and at the material time, which is the assessment year 1947-48, the company was the managing agents of Madhowji Dharamsi Manufacturing Co. Ltd. and also of Sir Shapurji Broacha Mills Ltd. The assessee company held the bulk of the 'conversion' shares of the Sir Shapurji Broacha Mills and practically all the 'conversion' shares of the Madhowji Dharamsi Mills. It is mentioned in the statement of the case that these shares were held by the assessee company, but we have been told—and that appears to be the fact—that really these shares were held by the Gwalior Darbar, but were controlled by the assessee company. On September 14, 1946, Dalmia Investment Co. Ltd. wrote a letter to the assessee company making a certain offer and the offer was that they agreed to purchase all the conversion shares of Sir Shapurji Broacha Mills at Rs. 300 per share together with the managing agency of the Mills. The letter further stated that on the assessee company accepting the offer the Dalmia Co. would pay the assessee company Rs. 30 lakhs as and by way of earnest money and the assessee company will have to arrange to get the transfer of the managing agency sanctioned by the general body of the share-holders within the period of 40 days from the date of acceptance; and the letter went on to state: "As soon as the transfer is sanctioned, we will pay the balance of the purchase price." The letter also stated that at the time of the transfer the assessee company will arrange that all the existing directors will resign from the board. On the same day a similar offer was made with regard to the shares of the Madhowji Dharamsi Co. and the only difference in the offer was that Rs. 500 per share was offered in place of Rs. 300 per share offered for the shares of Sir Shapurji Broacha Mills Ltd. On September 26, 1946, a meeting was held of the board of

Directors of the assessee company and the letters of the Dalmia Co. were placed before the board, and the board, in so far as the offer related to the shares belonging to the Darbar, resolved that the offer of Dalmia Investment Co. Ltd. as set out in these two letters should be accepted. It was further resolved that out of the total amount received from the sale of the shares a sum of Re. one crore should be paid to the Provident Investment Co. Ltd. i.e. the assessee company, as compensation for the loss of the managing agency of the two Mills. On September 30, 1946, the assessee company communicated to the Dalmia Co. their acceptance of the offer made by the Dalmia Co. On October 7, 1946, a letter was received by the assessee company from the Dalmia Co. and that letter recorded an agreement arrived at which modified the original agreement and the modification was to the following effect:

"In our letters of offer which have been accepted by you, it was arranged that the managing agency will be transferred either to us or to our nominees. Now instead of doing so by you, you as the present managing agents will give their resignation, so that at the time of delivery of the shares and payment of moneys, your managing agency will have come to an end. In view of the above, it is not necessary to obtain any sanction of general meeting."

Thereafter the assessee company tendered its resignation as managing agents, the resignation was accepted, and the assessee company ceased to function as the managing agents. On these facts the question that arises is whether the sum of Rs. one crore which was paid by Dalmia Co. as part of the consideration for the purchase of the shares of Sir Shapurji Broacha Mills and the Madhowji Dharamsi Mills and which was paid to the assessee company as compensation for the loss of the managing agency of the two Mills, resulted in a capital gain liable to tax under s. 12B of the Income Tax Act. The taxing authorities computed the capital gain at Rs. 81,81,900 and the Tribunal has upheld the assessment made by the taxing authorities.

Turning to s. 12B, it provides that the tax shall be payable by an assessee under the head "capital gains" in respect of any profits or gains arising from the sale, exchange or transfer of a capital asset effected after March 31, 1946, and before April 1, 1948. Therefore it is not in respect of every capital gain that the tax can be levied. The capital gain must be in respect of profits or gains arising from the sale, exchange or transfer of a capital asset. In this case there is no dispute that the managing agency which the assessee company had was

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a capital asset, nor is there any dispute that the sum of Rs. 1 crore which the assessee company received was a capital gain, but the controversy centres round the question as to whether this capital gain was in respect of the sale or transfer of the managing agency. No question arises with regard to exchange because it is nobody's case that there was an exchange in this case. But whereas the taxing authorities contend that the managing agency was sold or transferred and by result of the sale or transfer the assessee received capital gains, the contention of the assessee company is that there was neither a sale nor a transfer and the capital gain arose out of a transaction which does not fall within the ambit of s. 12B. In construing s. 12B we must not give to the expression "sale or transfer" its technical meaning, nor must we atrribute to "sale or transfer" as used by the Legislature in s. 12B a transaction clothed with all its legal formalities. But even giving to the expression its plain ordinary meaning, we must have before us a transaction, the real nature of which is that it is a transaction of sale or transfer, and looking to the correspondence in which the transaction is embodied we must be in a position to say that the transaction between the assessee company and the Dalmia Co. was a transaction of sale or transfer.

Now, as we shall presently point out, the authorities make it clear that it is not competent to the Court to look to the substance of the matter independently of the real transaction arrived at between the parties. If a transaction creates certain legal rights and obligations, then the Court must give effect to those legal rights and obligations and must not, overlooking these rights and obligations, try and fathom what was in substance the nature of the transaction entered into by the parties. The Court is not confined merely to looking to the form of the transaction. It is open to the Court to ignore the form and ascertain the real nature of the transaction. But while it is open to the Court to ignore the form, it is not open to the Court to overlook or to ignore the true legal position that arises out of a document or documents in which the parties have chosen to embody the transaction or transactions. The Court may even look at the surrounding circumstances in construing a document, but the Court in looking at the surrounding circumstances must be anxious all the time to determine what is the true nature of the transaction. It has also been stated that the same result may be achieved by two entirely different transactions and it may be that whereas one

transaction could be subjected to tax the other might not be and it is not open to the Court to tell the assessee that he should rather have entered into a transaction which subjected him to taxation rather than a transaction which permitted him to escape taxation. A citizen is perfectly entitled to exercise his ingenuity so to arrange his affairs as may make it possible for him legally and lawfully not to pay tax, and if his ingenuity succeeds, however reluctant the Court may be to acknowledge the cleverness of the assessee, the Court must give effect to the letter of the taxation law rather than strain that letter against the assessee.

Now, these principles have been enunciated and have now been accepted as well settled canons of interpretation and of determination of the nature of a transaction when the question arises whether a particular transaction is subject to tax or not. The first case to which reference might be made is a decision of the Privy Council in *Bank of Chettinad Ltd.* v. *Commissioner of Income Tax, Madras*[1]. At p. 526 their Lordships of the Privy Council say:

"Their Lordships think it necessary once more to protest against the suggestion that in revenue cases the substance of the matter may be regarded as distinguished from the strict legal position."

Therefore, if the strict legal position is clear, the Court is not permitted to look at the substance of the matter and ignore the true legal position. The Privy Council in enunciating this principle relied on the leading case of *Duke of Westminister* v. *Commissioner of Inland Revenue,*[2] and Lord Tomlin at p. 520 makes the following observations in a case, the facts of which were rather striking. The assessee in that case by executing a number of deeds agreed to make payment to persons who had been in his employment, and the question that arose before the Court was whether the amount which the assessee had agreed to pay constituted salary or wages or were annual payments which were deductible for the purpose of income tax, and the question mainly turned on the construction of this deed, and Lord Tomlin at p. 520 states:

"Apart, however, from the question of contract with which I have dealt it is said that in revenue cases there is a doctrine that the Court may ignore the legal position and regard what is called "the substance of the matter."

[1] (1940) 8 I. T. R. 522.

[2] (1934) 19 T. C. 490.

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And he goes on to say:

"This supposed doctrine seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled and the supposed doctrine given its quietus the better it will be for all concerned, for the doctrine seems to involve substituting 'the uncertain and crooked cord of discretion' for 'the golden and straight mete wand of the law.'"

He further goes on to say:

"Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be."

And he scathingly condemns this doctrine of "the substance" in the following words:

"This so-called doctrine of 'the substance' seems to me to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable."

The learned Law Lord then refers to the case of *Helby* v. *Mathews*,[1] and he says that the principle emerging from that case was that the substance of a transaction embodied in a written instrument is to be found by construing the document as a whole. He then refers to the case of *Secretary of State in Council of India* v. *Scoble*,[2] and he says that the indisputable rule that is deducible from that decision is that the surrounding circumstances must be regarded in construing a document. He also quotes the remarks of Lord Justice Warrigton in *In re Hinckes, Dashwood* v. *Hinckes*,[3] (p. 489):

"It is said we must go behind the form and look at the substance. I do look at the substance, but, in order to ascertain the substance, I must look at the legal effect of the bargain which the parties have entered into." And he winds up by saying that (p. 521) "here the substance is that which results from the legal rights and obligations of the parties ascertained upon ordinary legal principles."

Then there is the judgment of the House of Lords in *Inland Revenue Commissioners* v. *Wesleyan General Assurance Society*,[4] and there also the facts were very striking. An Insurance Co. by a policy agreed to pay on the death of the person insured a certain sum measured by an amount fixed for each month, and the policy provided that the assured can obtain as a loan from the Insurance Co. an amount not exceeding the sum fixed for every month, and in accordance with these conditions the Insurance Co. lent various sums to the assured, and the question that arose for the decision of the House of

[1] (1895) A. C. 471.
[2] [1903] A. C. 299.
[3] (1921) 1 Ch. 475.
[4] (1948) 16 I. T. R. 101.

Lords was whether the sums paid to the assured were loans or were really in the nature of annuities, and the House of Lords held that the payments were loans, and Lord Simon at p. 103 deals with two propositions which he says are well established in the application of the law relating to income tax. The first proposition is that the name given to a transaction by the parties concerned does not necessarily decide the nature of the transaction, and the second proposition is that the transaction which on its true construction is of a kind that would escape tax, is not taxable on the ground that the same result could be brought about by a transaction in another form which would attract tax, and in support of the second proposition he cites with approval the statement of the Master of Rolls that (p. 104):

"in dealing with income tax questions, it frequently happens that there are two methods at least of achieving a particular financial result. If one of those methods is adopted, tax will be payable. If the other method is adopted, tax will not be payable.

Now, applying these principles to the facts before us, what we have to consider is the true nature of the transaction effected between the assessee company and the Dalmia Co. There is no doubt that under the original contract the assessee company was to have received a sum of Rs. one crore for transferring or selling the managing agency of the two companies to the Dalmia Co. If that transaction had gone through there could not have been the slightest doubt that the assessee company would have been liable to tax. But the difficulty arises because there was a modification brought about on October 7, 1946, and the real question that arises for our determination is, what was the effect of that modification? The nature and effect of the modification is clear. The Dalmia Co. did not want the assessee company to transfer their managing agency to the Dalmia Co. Instead of that the Dalmia Co. wanted the assessee company to resign as managing agents. Sir Nusserwanji's contention is that all that the letter of October 7, 1946, did was to change or alter the mode of performance. He says that essentially the original contract remained unaltered. But the Dalmia Co. instead of getting the contract performed in a particular manner, wanted it to be performed in another manner, and therefore, says Sir Nuserwanji, it makes no difference to the nature of the transaction and it makes no difference to the liability of the assessee company to pay tax on the capital gain. Sir Nusserwanji says that there was a concluded contract under which the assessee

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company was to cease to be the managing agents of these two companies and the Dalmia Co. was to become the managing agents and in substance the effect of the modification was the same. The assessee company was to cease to be the managing agents and as far as the Dalmia Co. was concerned it had the option or choice whether to accept a transfer or to accept a resignation of the managing agents. It is further contended on behalf of the Commissioner that this is a matter between the assessee company and the Revenue Department, and the Dalmia Co. by exercise of its option or choice cannot determine the taxability of any part of the sum of Rs. one crore paid to the assessee company for the managing agency. It is further pointed out that as far as the assessee company was concerned, at all times it was ready and willing to transfer or assign the managing agency to the Dalmia Company, but the Dalmia Co. preferred a different mode of performance and therefore asked for resignation rather than transfer. But Sir Nusserwanji says that that does not alter the nature of the transaction which was the sale of the managing agency and nothing else. He points out that the resolution of the Board of Directors makes it clear that the assessee company was to receive Rs. one crore as compensation for the loss of the managing agency of the two Mills. That was the identical consideration which they ultimately received and that resulted in a capital gain arising out of the sale by the assessee company of its managing agency.

Now, put that way, it is difficult to resist the argument. But the matter is not as simple as that. We are inclined to agree with Sir Nusserwanji that if the letter of October 7, 1946, constituted a mere alteration in the mode of performance and the contract of sale or transfer originally arrived at remained unaffected, then the assessee could be liable to tax because the consideration was received by him out of a transaction of sale. If a sale takes place it is open to the vendee to tell the vendor that he would want the sale to be effected in a particular manner or that he should deal with or do with the object or article sold whatever the vendee desired him to do. The exercise of the right by the vendee to determine the mode of performance or to alter the mode of performance would not and could not change the essential nature of the transaction. But in our opinion the letter of October 7, 1946, does not merely alter the mode of performance, but it substitutes an entirely different contract for the original contract entered into and the transac-

tion that would have been effected by reason of the original contract is an entirely different transaction from the one which was ultimately effected by reason of the modified contract arrived at on October 7, 1946. Whereas under the original contract the Dalmia Co. wanted the managing agency to be transferred, which means that it wanted the benefit of that contract to be vested in it, and also it was prepared to accept the burden of the obligations that went with that contract, under the substituted contract, it did not want the managing agency to be assigned to it at all. On the contrary it wanted the assessee company to relinquish their rights in the managing agency of the two Mills by resigning. It is not necessary to point out the well settled difference between a transfer or a sale and a relinquishment. A sale or a transfer presupposes the existence of the property which is sold or transferred. It presupposes the transfer from one person to another of the right in property. On the other hand, relinquishment means the extinction of a right or the destruction of a property and if the property is destroyed or the right is extinguished there is nothing left to transfer or to sell. Under the first contract the managing agency, which is the capital asset with which we are concerned, would have continued to subsist and would have been vested in Dalmia Co. It could only have been vested by a deed of assignment executed by the assessee company and by getting the consent of the shareholders, and these were the two conditions which the Dalmia Co. had insisted upon in their first letter. Under the substituted contract the managing agency which had been vested in the assessee company would cease to exist and no question would arise of that managing agency being transferred to or being vested in the Dalmia Co.

It has been suggested by Sir Nusserwanji that Dalmia Co. chose to get the benefit of the managing agency by a different method. It was open to him to get himself appointed by the two companies as he held the bulk of the shares, or perhaps he preferred to control the two companies without the intervention of any managing agents. But this argument ignores the very important and basic fact that what we are concerned with is not any other benefit accruing to the Dalmia Co. but the particular benefit which the assessee company had under the managing agency agreements with the two companies. The original contract was with regard to the benefits under those agreements and no other benefit. The assessee company received Rs. one crore because they lost those benefits and the Dalmia Co.

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was prepared to pay Rs. one crore because it wanted those benefits. But when the transaction ultimately went through and the assessee company resigned, those benefits had been extinguished or destroyed and they never vested in the Dalmia Co. If the two companies had appointed the Dalmia Co. as managing agents, that would have been a fresh appointment and a fresh agreement would have to be entered into between the Companies and the Dalmia Co. That managing agency would have been entirely different from the managing agency which vested in the assessee company. Therefore it is clear that as a result of the transaction by which the assessee company obtained Rs. one crore the assessee company ceased to be the managing agents of the two companies; but no one else obtained the benefits of those two agreements. In other words, the property which was vested in the assessee company in the shape of the managing agency was destroyed and ceased to exist. That property was never transferred in favour of any one else, nor did it ever vest any one else. Even if Sir Nusserwanji was right that the Dalmia Co. brought about the same result by a different transaction, it was open to the parties to select one transaction rather than another, to select a transaction which avoided tax rather than a transaction which attracted tax. But if the two transactions were in the essence different, if they created different legal rights and obligations, it is not open to the taxing authorities to say, "Treat one transaction as if it was the same as the other transaction." As we have just pointed out, on the authorities, what we have to consider is whether the transaction which would have resulted if the first contract had not been modified, and the transaction which was ultimately carried out by result of the modification, are they same or are they different, different in the sense that they give rise to different legal positions and different legal rights and obligations. In our opinion it seems to be fairly clear that these two transactions are not identical. In the one case the result would be the sale or the transfer of property in favour of Dalmia Co.; in the other case there is no sale or transfer, there is only the relinquishment of rights by the assessee company or destruction of property by the assessee company at the instance of Dalmia Co.

Now, the result of our decision may be unfortunate, but it is clear, and Sir Nusserwanji does not contest the position, that s. 12B does not subject to tax capital gains arising to an assessee by reason of the fact that he has relinquished some

property belonging to him or some rights vested in him. It may be a lacuna, but the Legislature, for reasons best known to it, has not chosen to tax such a transaction, and Sir Nusserwanji also concedes that if we take the view that Rs. one crore which the assessee company received was received by it for resigning the managing agency and not for selling the managing agency, and if resignation means relinquishment of the assessee company's rights as managing agents, then the assessee company would not be liable to tax. Shorn of extraneous and irrelevant matters, the position really narrows itself down to this. Originally, the assessee company agreed to sell or transfer its managing agency to Dalmia Co. for a consideration of Rs. one crore. That agreement was altered and for the same consideration the assessee company agreed to relinquish its rights in the managing agency commission by resigning as managing agents. The consideration remained the same, the result as far as the assessee company was concerned was the same, but the legal position that emerged was entirely different from the legal position that would have arisen if the first contract had stood. We are unable to accept the view taken by the Tribunal that the assessee company transferred the managing agency to the managed companies and that therefore there was a transfer which resulted in capital gains to the assessee company. It is difficult to understand how by resigning the managing agency the assessee company transferred the agency to the two companies. Sir Nusserwanji himself has not attempted to support this view which has been given expression to by the Tribunal in its order.

In our opinion, therefore, the answer which we must give to the question submitted to us is in the negative.

The Commissioner must pay the costs.

Attorneys for applicant: *Kanga & Co.*

Attorney for respondent: *N. K. Petigara.*

Answer accordingly.

P. M. P.