

आयकर अपीलीय अधिकरण “आई” न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL “I” BENCH, MUMBAI

**श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं श्री संजय अरोड़ा, लेखा सदस्य के समक्ष ।
BEFORE SHRI JOGINDER SINGH, JM AND SHRI SANJAY ARORA, AM**

आयकर अपील सं./I.T.A. Nos. 5581/Mum/2004 & 3691/Mum/2005

(निर्धारण वर्ष / Assessment Years: 2002-03 & 2004-05)

Asst. CIT, Room No. 447, 4 th Floor, Aayakar Bhavan, Mumbai-400 020	बनाम/ Vs.	Pramod H. Lele, 5/7, Chandrashekhar Co-op Soc., Swami Nityanand Road, Andheri (E), Mumbai-400 069
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAAPL 6012 B		
(अपीलार्थी / Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थी की ओर से / Appellant by	:	Shri Ganesh Bare
प्रत्यर्थी की ओर से/Respondent by	:	Shri Rajeev Waglay
सुनवाई की तारीख / Date of Hearing	:	20.07.2015
घोषणा की तारीख / Date of Pronouncement	:	06.11.2015

आदेश / ORDER

Per Sanjay Arora, A. M.:

This is a set of two Appeals by the Revenue directed against the Order by the Commissioner of Income Tax (Appeals)-XI, Mumbai ('CIT(A)' for short) arising out of separate orders, partly allowing the Assessee's appeal contesting its assessment u/s.143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment years (A.Ys.) 2002-03 and 2004-05.

2. The only issue arising in the instant appeal is the taxability of the gain on the transfer of sweat equity shares during the relevant previous years allotted to the assessee. While the Revenue seeks to bring the entire gain to tax as short-term capital

gain, the assessee concedes it to be income by way of capital gains, albeit long term in nature and, accordingly, exempt u/s.10(38) of the Act. The Revenue's alternate claims are of the income being assessable as speculation income u/s. 43(5) or even as income from other sources u/s. 56.

3. The basis of the assessee's case is the sweat equity offer to the assessee by his employer, M/s. Parke Davis, of shares in it's parent, a foreign company, on 20.2.1998, which was accepted by him forthwith. This, it is claimed, gives him a right in the said shares, i.e., 1100 in number, at an acquisition cost of US \$ 1, which the assessee could acquire within a period of ten years. It is this right that translates into equity shares on the exercise of the option by the assessee on 19.10.2001, on which date the shares were, both, allotted and sold, resulting in the impugned gain. The details of the acquisition of shares, including the manner in which the same stood increased in numbers over time, along with the cost incurred toward their acquisition, is as under:

Grant Date	Date of acceptance of the Grant	No. of shares of Park Davis U.S.A.	Bonus Shares	Total shares of Pfizer
20.2.1998	27.2.1998	1100	2200	9075
18.2.1999	25.2.1999	3000	-	8250
25.1.2000	1.2.2000	9000	-	24750
				42075

Note:1. Of the above 4075 shares were sold in the F.Y. 2001-02 & 38000 shares were sold in F.Y. 2003-04.

2. Grant was originally given by Warner Lambert which got merged with Parke Davis thereafter & ultimately Parke Davis got merged with Pfizer.

4. We have heard the parties, perused the material on record, and given our careful consideration to the matter.

In our considered view, the assessee's stand cannot be accepted. What the assessee's employer-company did on 20.2.1998, was to make an offer to its employees, including the assessee, and what the assessee, by endorsing his signature

thereon, assuming it to have been at the relevant time, did was to acknowledge having received the offer and, at best, convey his intention to accept the offer in future. The offer was even otherwise valid for a period of 10 years, so that the assessee's 'acceptance', as it is stated to be, is of little consequence. The so called 'acceptance' is in fact a promise to accept (in future). A promise to offer or, as the case may be, to accept, is not 'offer' or 'acceptance' *per se*, and no binding contract or even contractual relationship comes into existence at this stage. The said endorsement thus does not signify anything and no right crystallizes in favour of the assessee thereat. It is only when the assessee exercises the option thereto, much later, which the Offer entailed, complying with the terms and conditions thereof, including the payment of cost of US \$ 1 (Rs.42/-), that a right in terms of shares or rights therein accrued to the assessee. In fact, in-as-much as the assessee, under the extant RBI Rules, could not transmit any payment, only upon effecting which the shares could be allotted to him under the Sweat Equity Scheme, the sale of shares becomes a concomitant of allotment. This is as only the sums realized on the sale of shares would be utilized, in part, to meet the cost of the shares. *This, rather, is a contradiction, as only shares already allotted could be transferred/ sold, while in the facts of the case the payment of cost, a precondition for allotment, stands met through the application of the sale proceeds, with only the excess, the net gain, transmitted to the assessee.* We believe this would be consistent with the terms and conditions of the Offer - which has not been placed on record, or perhaps in pursuance to an understanding/arrangement with the employees in modification of the terms and conditions of the offer, i.e., upon considering that in the absence of a relaxation of the condition of payment of cost - which is otherwise secured, for allotment of shares, the scheme shall become inoperable in view of the bar on remittance (of foreign exchange by the RBI), required for payment of the cost. We are conscious that payment may not be an essential ingredient for allotment of shares in a company, as is the case under the Indian law, i.e. as per the law of the relevant country. Yet, the same must permit allotment of shares against a debt, presumably secured and, further, without interest. Even

considering so, a contractual relationship would only fructify on the exercise of the option by the employee, resulting in a debt, non-interest bearing, permissible by law, crystallizing in favour of the employer- company.

Clearly, therefore, it is only upon allotment and transfer of shares, which *per force* the circumstances had to be simultaneous, that a benefit in terms of excess of sale price over cost, or net gain, arises to the assessee. The allotment/acquisition and sale of shares being (almost) simultaneous, the capital gain arising would only be a short term capital gain (STCG). *What, then, we wonder, is the controversy about?* The right, which is by definition a capital asset, arose to the assessee only upon exercise of the option under a Scheme, with we in fact further observing that it is only a flexibility *qua* payment of cost, presumably permissible under the law governing share allotment of the relevant country, provided in the terms of the Scheme, or by way of a separate arrangement, that led to the Scheme being operable for, at least, employees, like the assessee, residing in India.

What the assessee had on offer is a contingent right, which may or may not be availed, depending on the market value of the shares at the relevant time, as well as the foreign exchange regulation in-as-much as the cost had to be remitted in foreign exchange, which could not be under the existing regime. Sure, one can conceive of an option in terms of a right and not an obligation, as in fact stood defined u/s. 17(2)(iii), *vide proviso* thereto, i.e., prior to its omission, excluding the perquisite value of the benefit/concession. *However, whether it shall translate into or become a right, as where the market value exceeds the offer cost, or not, lies in the womb of future.* We have already noted absence of any contractual relationship upon the assessee being made the offer, i.e., prior to his actually availing the same (option). No right inures to the assessee at that point of time, which would only be on the translation into shares upon exercise of the option.

In our foregoing analysis, we find ourselves as being in agreement with the decision by the tribunal in the assessee's own case on an earlier occasion (in ITA No. 4699/Mum/2004 dated 10.08.2011 for A.Y. 1998-999/copy on record). Each of the

difference aspects of the transaction, representing a part of the sophisticated plan of compensation to its employees, stands discussed in detailed. In essence and substance though, as afore-stated, the co-ordinate Bench express the same opinion, i.e., that the rights to the assessee, undoubtedly a capital asset, vests on the exercise of the option/s by the assessee, and not at any time earlier, who, at best, could be considered as having held the shares for a single day (para 14). In fact, it states this in the alternative, observing that the assessee did not become the owner of the shares at any point of time. This is also precisely what the A.O. states in the alternative (as did the assessing authority in that case). The shares were not intended to be held in-as-much as the payment of cost, a precondition for their acquisition, could not be made. The assessee's account was accordingly settled, for all intents and purposes, otherwise than through delivery, yielding speculative gain, assessable u/s. 43(5), and which could itself fall under any head of income, including 'capital gains'.

Again, the tribunal also upheld the Revenue's view that the benefit arising is in the nature of income, assessable as income from other sources, with reference to the decisions in the case of *Emil Webber vs. CIT* [1993] 200 ITR 483 (SC) (affirming the decision by the Hon'ble jurisdictional High Court reported at [1978] 114 ITR 515 (Bom)) and of the Hon'ble Allahabad High Court in *Kedar Narain Singh vs. CIT* [1938] 6 ITR 157 (All). *The entire order merits careful reading; it concluding as under:*

'20. For the reasons set out above, we vacate the impugned relief granted by the CIT(A) and restore the order of the Assessing Officer to the extent that the gains on exercise of stock options, on the admitted facts of the case, is taxable as short term capital gains. The reasoning adopted by the CIT(A), in treating the gains on sale of stock option shares as 'long term capital gain, is, for the detailed reasons set out earlier in this order – particularly in paragraph 10 above, erroneous and it does not meet our approval. In this view of the matter, and as we are dealing with limited issue in appeal as raised by the Revenue, it is not really necessary for us to deal with other aspects of the matter.'

In so holding, reliance was placed on the decision in the case of *Summit Bhattacharya vs. Asst. CIT* [2008] 112 ITD 1 (Mum) (SB) and *Shripad S. Nadkarni* (in ITA No. 4698/Mum/2004 dated 20.01.2009). The assessee's reliance on the decision in *Bomi S. Billimoria vs. Asst. CIT* (in ITA No. 2120/Mum/1998 dated 30.06.2009), a subsequent decision, was also met by it (refer paras 15-19 of its order). The assessee has also before us relied on several decisions by the tribunal. So, however, he himself admits to the same being without reference to the decision by the tribunal in the case of *Shripad S. Nadkarni* (supra) and himself (supra) (refer para 6 of the written submissions dated 21.11.2013), even as found earlier by the tribunal in the assessee's own case vide its order dated 10.8.2011 for A.Y. 1998-99 with reference to the reliance by the assessee on the decision in *Bomi S. Billimoria* (supra). The said decision by the tribunal in the assessee's own case can thus be said as covering the present case as well. The decisions relied upon are to the effect that the right vesting in the assessee is a capital asset. The same is in fact not denied; rather, confirmed. The question, however, is a point of time when the said right vests in the assessee, and which we have found to be on the exercise of the option/s, leading to a legally enforceable right, which in fact represents settled law. This principle also emanates from the decision in the case of *CIT vs. Bharat V. Patel* (Tax Appeal No. 14 of 2004 and others dated 23.12.2014), as well as by the Hon'ble Apex Court in *CIT vs. Infosys Technology Ltd.* [2008] 297 ITR 167 (SC). The decision in *Bharat V. Patel* (supra), rendered upon consideration of *Infosys Technology Ltd.* (supra), in-as-much as it confirms the income received on the redemption of the stock appreciation rights as capital gains, is consistent with and, in fact, supports the case of the Revenue. The issue at large can thus be said to be principally factual, i.e., determination of the time, based on the contractual relationship and other incidents, when the right, a capital asset, vests in the assessee.

5. For the reasons stated in this order, as well as the separate reasons recorded by the tribunal in the assessee's own case for A.Y. 1998-99 dated 10.8.2011 (supra), we

confirm the assessment of income on the sale of shares, as short-term capital gain or, in the alternative, as income from other sources, not liable for exemption u/s.10(38) or s. 54EC of the Act. We decide accordingly.

6. In the result, the assessee appeals are dismissed.
परिणामतः निर्धारिती की अपीलें खारिज की जाती हैं ।

Order pronounced in the open court on November 06, 2015

Sd/-
(Joginder Singh)

न्यायिक सदस्य / Judicial Member

Sd/-
(Sanjay Arora)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 06.11.2015

व.नि.स./Roshani, Sr. PS

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

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

आदेशानुसार/ BY ORDER,

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

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai