INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 1532/Del/2019
(Assessment Year: 2015-16)

Lokvir Kapoor, C-8, Ground Floor, Pashimi Marg, Vasant Vihar, New Delhi PAN: AJLPK0736H	Vs.	ACIT, Circle-19(2), New Delhi
(Appellant)		(Respondent)

ITA No. 1964/Del/2019
(Assessment Year: 2015-16)

ACIT, Circle-19(2), New Delhi	Vs.	Lokvir Kapoor, C-8, Ground Floor, Pashimi Marg, Vasant Vihar, New Delhi PAN: AJLPK0736H
(Appellant)		(Respondent)

Assessee by :	Shri Ajay Vohra, Sr. Adv Shri Deepesh Jain, CA
Revenue by:	Smt Deepali Chandra, CIT DR
Date of Hearing	22/08/2019
Date of pronouncement	20/11/2019

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These are the cross appeals filed by the assistant Commissioner of income tax, circle – 19 (2), New Delhi (learned Assessing Officer) as well as the assessee for assessment year 2015 – 16 against the order of the learned CIT (Appeals) – 7, New Delhi [The Ld CIT (A)] dated 28/12/2018.

2. The assessee has raised the following grounds of appeal in ITA No. 1532/Del/2019 for the Assessment Year 2015-16:-

"1. Ground No. 1: That the Learned Commissioner of Income tax (Appeals) ["Ld CIT(A)"] has erred in law and on facts in upholding the addition of INR 20,49,007 made by the Learned Assistant Commissioner of Income-tax Circle 19(2), New Delhi ("Ld. AO") on account of wrong denial of benefit of indexation for the purpose of computing capital gain from the Financial Year ("FY") 2005-06.

2 *Ground No. 2: That the Ld. CIT(A) has erred on facts in holding that indexation was done by Appellant from FY 2007-08, when the Appellant has calculated the same from FY 2005-06 in the original income tax return.*

3. *Ground No. 3: That Ld. CIT(A) has erred in law and on facts, in splitting the total consideration received on sale of shares allotted to the Assessee under an Employee Stock Option Plan, and taking the sale value above fair market value as "Income from other sources" under section 56(2)(vii) of Income-tax Act, 1961 ("the Act")*

4 *Ground No. 4: That Ld CIT(A) has erred in consequently denying benefit under section 54F of the Act on the amount which has been taken as Income from Other Sources, thus making an addition of INR 19,92,66,923 on this account."*

3. The assessee has raised the following grounds of appeal in ITA No. 1964/Del/2019 for the Assessment Year 2015-16:-

"1. "Whether the Ld. CIT (A) has erred in law and on facts and in circumstances of the case in treating income on account of sale of shares of M/s Pine Labs Pvt. Ltd., to the extent of Rs. 16,07,32,76.76 as long term capital gains and remaining income of Rs. 19,92,66,923/- as income from other sources u/s 56(2)(iii) of the Income Tax Act, 1961 in the hands of the assessee?

2. Whether the Ld. CIT (A) has erred in law and on facts and in circumstances of the case, in not treating the income of Rs. 35.75.03.326/- on account of sale of majority shares of M/s Pine Labs Pvt Ltd by the assessee to a foreign entity-M/s Pine Labs Pvt Ltd. formerly M/s Progress Investments Pvt Ltd.] ~as "income from business or profession" of the assessee, as there was transfer of majority shareholding along with indirect transfer of control and management of the company and in view of the CBDT letter issued vide F.No. 225/12/2016/IT All dated 2.5.2016?"

4. Facts of the case shows that assessee is an individual who filed his return of income on 31/8/2015 declaring total income of INR 125444150/–. Assessment u/s 143 (3) of The Income Tax Act, 1961[The Act] was passed on 29/12/2017 by The Assistant Commissioner Of Income Tax, Circle 19 – (2), New Delhi at INR 40,50,86,536/–. Assessee aggrieved with the order of the learned AO preferred an appeal before the learned CIT – A, who partly allowed the appeal of the assessee and therefore the parties, the learned assessing officer as well as the assessee are in appeal before us.

5. There are two issues involved in this appeal. The first issue is with respect to the computation of the capital gain on sale of residential properties. Second issue involved is whether the profit arising on sale of shares of Pine

labs private limited is chargeable to tax under the head capital gain or as a business income. The assessee offered it is a capital gain; the learned assessing officer treated it as a business income. Consequently, the benefit of section 54F of the act was also denied to the assessee.

6. The learned CIT – A upheld the addition made by the learned AO with respect to the capital gain on sale of the property. With respect to the sale of shares of Pine labs Ltd, he split the total consideration received on sale of shares under the head income from other sources applying provisions of section 56 (2) (Vii) of the act. Consequently, he confirmed denial of benefit u/s 54F of The Act.

7. Coming to the 1st issue of computation of capital gain in respect of residential property sold by the assessee, facts shows that assessee declared a long-term capital gain of INR 30762604/– on sale of residential property 264, Espace Nirwana Country, Sector 70 at Gurgaon. The cost of acquisition of the above property was taken at INR 10808674, indexed from financial year 2007 – 08 taking the cost inflation index of 551. During the course of assessment proceedings, assessee filed a revised computation of income and claimed indexation benefit from financial year 2005 – 06 on part of the cost paid during that FY. 2005 – 06. Assessee computed indexation on the basis of the date of payments i.e. date of booking of house, made in respect of the said property stating that legal right had been accrued to the assessee on the date of payment of the 1st installment. It was further stated that assessee had acquired a right to get a particular property and that right of the assessee itself is a capital asset. Therefore, according to assessee, benefit of indexation has to be granted to the assessee from the year it booked the residential property and not the year in which it was registered in the name of the assessee or the year in which possession is given to assessee.

8. The learned assessing officer rejected contention of assessee stating that as per agreement dated 27/05/2005, there was just a layout plan that too of land and building plans are under preparation on that date. Therefore according to the learned assessing officer where a asset is in itself not in the possession of seller, how he can transfer that to buyer else. According to the assessing officer, it was nothing but the mere promise to sale the same

in future for seller and right to acquire the same in future from the buyer, which cannot be held to be a capital asset. He further noted that what has been transferred during the assessment year is a residential house property and not merely booking rights as residential property was handed over to assessee in financial year 2007 – 08 and on that date, booking rights get extinguished. Therefore, what are transferred by the assessee is a 'residential property' and not the 'booking rights'. According to the learned assessing officer the booking rights extinguished on the date on which the residential property was handed over to the assessee therefore for computing the capital gain the cost of acquisition of the residential house property should be considered from the date the assessee 'held such property'. Even otherwise according to the learned assessing officer, as assessee filed a mere revised computation of capital gain, without revising return of income u/s 139 (5) of the act, therefore , it is not admissible. Accordingly he computed the long-term capital gain by taking the cost of acquisition of the assessee at INR 10808674 and indexed it by applying the cost inflation index of 551 for financial year 2007 – 08, instead of financial year 2005 – 06. Therefore, he computed the long-term capital gain at INR 32811611 against the long-term capital gain offered by the assessee at INR 30762604 and thereby making an addition of INR 2049007 to the total income of the assessee under the head capital gains.

9. The learned CIT – A, applying the ratio of the decision of the honourable Supreme Court in case of Goetz (India) Ltd vs CIT [258 ITR 323] , held that claim need not be accepted by the learned assessing officer when made by the assessee through a letter if same is not claimed in the return filed u/s 139 of the act. Accordingly, he upheld the action of the learned AO in rejecting the claim of the assessee.

10. Against this decision of the learned CIT – A , assessee is in appeal before us. In ground number 1 of the appeal stating that the learned CIT – A has erred in law and on facts in upholding the addition of INR 2049007/– made by the learned assessing officer on account of wrong denial of benefit of indexation for the purpose of computing capital gain from the financial year 2005 – 06 instead of 2007 – 08 as claimed by the learned AO.

11. We have heard the rival parties on this issue. Short issue involved before us is whether the assessee is entitled to the indexation of the cost of acquisition from the date of allotment of the property or from the date of registration of the conveyance deed or handing over the possession to the assessee. The learned assessing officer rejected the claim of the assessee, as assessee did not furnish it through a return of income but by way of a letter. In fact, according to us it was not a fresh claim of the assessee but merely correction of a computation of capital gain. This issue is squarely covered in favour of the assessee by the decision of the honourable Delhi High Court in 102 taxmann.com 196 Principal Commissioner of Income tax *v.* Oracle (OFSS) BPO Services Ltd.* wherein it is held as under:-

> **"15.** Decision in Goetz (*India) Ltd.'s* (*supra*), barring an assessee from making a claim for deduction by filing revised computation has to be examined in two judgments of this court in *Influence's* case (*supra*) and *E-Funds International India (P.) Ltd's* case (*supra*). In Influence's case (supra) after referring to the earlier case law, it was held as under:
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> '7. A similar controversy had arisen before the Delhi High Court in the case of *Commissioner of Income Tax* v. *Sam Global Securities Ltd.* [2014] 360 ITR 682 (Delhi), wherein judgment in the case of *CIT* v. *Jai Parabolic Springs Ltd.* [2008] 306 ITR 42 (Delhi) was quoted. In *Jai Parabolic Springs Ltd.* (*supra*),decision in Goetz *(India) Ltd.* (*supra*) was distinguished in the following words:—
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> "In Goetz *(India) Ltd.* v. *CIT* [2006] 284 ITR 323 (SC) wherein deduction claimed by way of a letter before the Assessing Officer, was disallowed on the ground that there was no provision under the A ITA 261/2002 Page 4 of 6 the return without filing a revised return. Appeal to the Supreme Court, as the decision was upheld by the Tribunal and the High Court, was dismissed making clear that the decision was limited to the power of the assessing authority to entertain claim for deduction otherwise than by a revised return, and did not impinge on the power of the Tribunal."
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> 8. In *Sam Global* (*supra*)reference was also made to the decision of the Supreme Court in *National Thermal Power Co. Ltd.* v. *CIT* [1998] 229 ITR 383 (SC). Reliance was placed on an earlier decision of the Supreme Court in *Jute Corporation of India Ltd.* v. *CIT*, [1991] 187 ITR 688 (SC), in which it has been observed:—

"An appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessed in seeking modification of the order of assessment passed by the Income Tax Officer. This Court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The Appellate Assistant Commissioner must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The Appellate Assistant Commissioner should exercise his discretion in permitting or not permitting the assessed to raise an additional ground in accordance with law and reason. ITA 261/2002 Page 5 of 6 The same observations would apply to appeals before the Tribunal also."

9. This High Court in *CIT* v. *Natraj Stationery Products (P) Ltd.,* (2009) 312 ITR 222, had observed that Goetz *(India) Ltd.* (*supra*) would not apply if the assessee had not made a 'new claim' but had asked for re-computation of deduction. Reference can also be made to the decision in *Commissioner of Income Tax* v. *Rose Services Apartment India P. Ltd.,* [2010] 326 ITR 100 (Delhi), wherein a Division Bench of this Court rejected the contention of the Revenue that the Tribunal could not have entertained the plea, holding that the tribunal was empowered to deal with the issue and was entitled to determine the claim raised.'

16. Thus a distinction was drawn between a new claim, which is barred and not permissible and a request or prayer made by the assessee for re-computation of the deduction already claimed. Latter was permissible and not barred in terms of the decision in the case of Goetz *(India) Ltd.* (*supra*)."

12. Thus, Where assessee had filed a revised computation of income requesting allowance of certain amounts as deduction from capital gain, since it was not a case where any new claim for deduction was made and there was merely recomputation of claim already made by assessee, such revised computation was to be accepted in the assessment proceedings.

Honourable High Court has held that there has to be a distinction to be drawn between a new claim and recomputation of the already existing claim. Accordingly respectfully following the decision of the honourable Delhi High Court, we reverse the finding of the learned CIT – A and learned assessing officer holding that the learned AO should have considered recomputation of the claim of the assessee of capital gain.

13. Coming to the 2nd issue whether the indexation of the property shall be allowed to the assessee from the date of allotment of property or from the date on which the possession was given to the assessee/the date of registration. Fact shows that assessee entered in to a purchase agreement on 27/5/2005 with M/s Pioneer profin Ltd [the builder] for purchase of a built-up house in 'Espace' bearing number 284 block ES, having super area of approximately 378.67 m² (407 6 ft²) to be constructed on plot of land and made 300 m² (358.80 yd²) in Niravan Country , Gurgaon. Total consideration of above property was 10278774/–. At the time of executive the buyers agreement the assessee was to pay a sum of INR 1 594890/–. Possession of the above property was tentatively to be given within 18 months from the date of the buyers agreement. The sale deed was to be exact and get registered in favour of the purchaser after the premises has been completed and receipt of total sale consideration. According to that agreement, Assessee paid a sum of INR 1594890/– to the developer by agreement dated 27/05/2005. Subsequently in the financial year ending on 31st of March 2006, assessee paid the consideration of INR 9 764832/–, including the initial payment made at the time of entering into the buyers agreement. In the next financial year i.e. FY 2007 2008 assessee paid a further sum of INR 1 043842/–. Therefore the total cost of acquisition to the assessee was INR 1 0808674/–. At the time of filing of the return of income assessee index the total cost of acquisition of INR 1 0808674 by applying the cost inflation index for financial year 2007 – 2000 date of 551. Thus the indexed cost of acquisition was claimed at rupees 22136270/–. Consequently the long-term capital gain on sale of the above property was derived at INR 3 0762604/–. During the course of assessment proceedings by letter dated 1/12/2017 assessee submitted at serial number 4 details of revised calculation of income under the head capital gain. In that letter,

assessee indexed the cost of 9764832 paid in financial year 2005 – 2006 by applying the cost inflation index of 497 applicable to that financial year resulting into indexed cost of 20119091/–. It further indexed INR 1 043842/– paid in financial year 2007 – 2008 by applying the cost inflation index of 551, thereby indexed cost of acquisition of 1939917/– for that financial year was computed. Accordingly total cost of acquisition of INR 1 0808674 was calculated at RS. 22059008/–. Accordingly, the long-term capital gain on the sale of property was determined at INR 3 0839866/– against the original capital gain shown in the return of income by assessee of INR 3 0762604/–. The learned assessing officer as assessee did not filed revised return, ignored the computation of capital gain, upheld by the learned CIT – A. According to the provisions of section 48 of the income tax act, from the sale consideration, assessee is granted deduction of the cost of acquisition of the asset. If the asset is required prior to a specified date, then such cost of acquisition is further indexed to tax only the real income of the assessee. Indexed cost of acquisition is defined in explanation to section 48 as under:-

> "(iii) "indexed cost of acquisition" means an amount which bears to the cost of acquisition the same proportion as the Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the first year in which the asset was held by the assessee or for the year beginning on the 1st day of April, 1981, whichever is later ;"

Therefore, the issue involved is whether in financial year 2006 – 2007 'such asset", which has been sold by the assessee was 'held' by the assessee or not.

14. Learned authorised representative submitted that issue is squarely covered in favour of the assessee by the decision of the honourable Delhi High Court in 363 ITR 59 wherein it has been held that in order to determine the taxability of the capital gain arising from sale of property it is the date of allotment of property which is relevant for the purpose of computing holding period and not the date of registration of conveyance deed. He further relied upon the plethora of decisions stating that assessee's claim of indexation

should be considered from the date of allotment of the property on payment basis. For this proposition he referred to the reply of the assessee dated 1/12/2017 filed before the learned assessing officer as well as the copy of the buyers agreement dated 27/5/2005 entered by the appellant with the builder for purchase or allotment of the above residential house property. Therefore according to him the cost of acquisition should be allowed to the assessee to be indexed from financial year 2006 – 2007, that is the financial year in which the assessee for entered into the buyers agreement for the property sold.

15. The learned departmental representative vehemently supported the order of the learned assessing officer and the learned CIT – A. On the merits of the issue he submitted that assessee should only be granted the deduction of the cost of acquisition of the property from the date on which the property was first ' held' by the assessee.

16. We have carefully considered the rival contention and perused the orders of the lower authorities. Honourable Delhi High Court in case of CIT vs Ramakrishnan 363 ITR 59 has held that in order to determine the taxability of capital gain arising from sale of property, it is date of allotment of property which is relevant for the purpose of computing holding period and not date of registration of conveyance deed. Though the above decision was with respect to the provisions of section 2 (42A) of the income tax act 1961 where the plot was allotted and the plot was sold. Therefore, the same asset, which was allotted, was existing on the date of allotment and on the date of conveyance deed. Thus, admittedly the above decision was with respect to competition of the holding period with respect to the same property. The assessee also relied upon the decision of the honourable Punjab and Haryana High Court in case of Vinodkumar Jain vs CIT 344 ITR 501 where there was an allotment of flat on 27/2/1982 and allotment and position was on 15/05/86, sold on 23/7/87, it was held that holding period of the property was to be computed from the date of allotment of the flat. The other all decisions relied by the learned authorised representative also dealt with the issue that whether the property is a long-term capital asset or a short-term capital asset. It does not matter in deciding the above issue that here issue is required to be decided whether the cost of acquisition

incurred by the assessee prior to the date of possession/registration of that property in the name of the assessee should be indexed from that date on which part consideration was paid or from the later date on which the registration was made of the property in favour of the assessee. Like section 2 (42A) of the act, the indexed cost of acquisition also says that it is to be computed from the date when the asset was first 'held' by the assessee. It does not require the indexed cost of acquisition from the date on which the property was acquired/purchased/registered in the name of the assessee. Therefore according to us the date on which the assessee paid the booking money for allotment of the house, he 'held' the property from that date, he might have 'acquired/ purchased' the property on later date. The basic reason for granting indexation of the cost of acquisition, which is linked with the cost inflation index, is to tax only the real income of the assessee and not the capital gain being appreciation of the property including inflation in the price (increase in the cost of living). Therefore, as the intention is to tax only the appreciation in the property excluding the appreciation in the price of the property due to inflation, the assessee must be granted the indexation of the cost in the financial year in which it has incurred/paid, irrespective of the fact that house property is subsequently registered in the name of the assessee or the possession is granted to the assessee of that property later on. In view of this, we are of the view that assessee must be granted indexed cost of acquisition on INR 9 764832 of the sum paid in financial year 2005 – 2006 by applying the cost inflation index applicable to financial year 2005 – 2006 of 497 instead of cost inflation index of 551 applicable for financial year 2007 – 2008 (the year in which the possession of the property was given) to the assessee. Therefore, we reverse the finding of the lower authorities and allow ground number 1 and 2 of the appeal of assessee.

17. The ground number 3 of the appeal of the assessee as well as ground no 1 & 2 of appeal of ld AO is with respect to the decision of the learned CIT – A in splitting the total consideration received on sale of shares allotted to the assessee under employee stock option plan[ESOP] and taking the sale value above fair market value as income from other source u/s 56 (2) (vii) of the act. The fact shows that during the year the assessee has transferred

719999 equity shares of Pine labs private limited to Pine Labs Pte Ltd at a consideration of INR 3 59999500/–. The appellant has offered the above income under the head income from capital gains and claimed exemption under section 54F of the income tax act of INR 277593383 on account of investment of the sale proceeds in purchase of residential house. The assessee was an employee of Pine labs private limited, therefore by virtue of being an employee of that company certain employee stock option plans were granted to the assessee. Accordingly 682500 shares were allotted as ESOP to the assessee during the financial year 2006 – 07 and 37499 shares were allotted during the financial year 2011 – 12. When the shares were offered as employee stock option plan in financial year 2006 – 07, it was not chargeable to tax in the hands of the assessee as a perquisite and not in the hands of the employer as fringe benefit. However, ESOP allotted of 37499 shares in financial year 2011 – 12, assessee offered the same as income. The assessee offered gain arising on the sale of above shares under the head capital gain. During the course of assessment proceedings, the learned assessing officer asked the assessee as to why the transfer of shares should not be made taxable under the head profits and gains of business and profession instead of under the head capital gain shown by the assessee. The assessee reiterated its stand that the transfer of the above share and consequent gain arising to the assessee is chargeable to tax under the head capital gain only. The learned assessing officer noted that assessee was carrying on his business through the company, which is being held by the assessee and his relatives. The AO was also of the view that since the equity rights were transferred by the appellant along with the control and management of the underlying business, the income from transfer thereof shall be characterized as a business income and shall not qualify as capital gain. As the learned assessing officer has treated the gain arising on transfer of such shares as business income, consequently the deduction claimed by the assessee u/s 54F of the act was also denied.

18. The assessee approached the learned CIT – A, he held that the book value of the shares that were transferred is INR 1 22/– per share, value of the share as per the valuation report on the discounted cash flow method is INR 2 23.24 per share and the sale price of the share is INR 500 per share.

Therefore he held that the payment over and above the fair market value shall be covered u/s 56 (2) (vii) of the income tax act. Thus he held that capital gain will be worked by taking the value of the share of INR 2 23.24 per share, the difference in price above the fair market value of the share i.e. Rs. 500 minus Rs. 223.24 = Rs 276.76 per share shall be treated as income from other sources u/s 56(2) (vii) of the act.

19. The learned authorised representative vehemently reiterated the facts as stated by us hereinabove and submitted that the shares were received as employee stock option, they were transferred after holding for substantial period of 3 to 7 years and offered as capital gain. He referred to circular number 4 of 2007 dated 15/6/2007 to say that the shares were held as investment by the assessee. Thus he submitted that as assessee was an employee of the company, held shares for substantial period of time, gain arising on sale of such there should be chargeable to tax as capital gain only. He further referred to letter dated 02/05/2016 [F. No. 225/12/2016/ITA – II] wherein with a view to reduce litigation and maintain consistency in approach in assessment the CBDT instructed that the income arising from transfer of listed shares in securities, which are held for more than 12 months would be taxed under the head capital gain unless the taxpayer itself treats these as stock in trade and transfer thereof as its business income. Similarly for determining the tax treatment of income arising from transfer of unlisted shares for which no formal market exist for trading, and need was felt to have a consistent view in assessment pertaining to such income. Therefore it was decided that the income arising from transfer of unlisted shares would be considered under the head capital gain irrespective of. Of holding, with a view to avoid dispute and litigation and to maintain uniform approach. He submitted that the genuineness of the transaction is not questioned, transfer of shares was not pertaining to lifting of corporate veil and the transfer of unlisted shares is not made along with the controlled and management of underlying business. He submitted that the shares are not sold along with the controlling interest and management of the underlying company. He referred to page number 31 of the paper book to state that even after the transfer of the shares there is no change in the board of directors of the impugned company. He submitted

that the assessee remained the whole time director before transfer of shares and also after transfer of shares. Therefore there is no transfer of any controlling interest in the shares. It was further stated that assessee was only holding 21.28% at stake in the ownership of the above company which does not result into any controlling interest. Therefore, according to him, the income should have been chargeable to tax under the head capital gain only on transfer of the shares. With respect to the provisions of section 56 (2) (vii) of the act he submitted that the provisions of those sections do not apply on the facts of the case because assessee has sold the shares and has not received any other property but it is transferred its own property to somebody else. Therefore he submitted that the order of the lower authorities disturbing the claim of the capital gain of the assessee deserves to be decided in favour of the assessee.

20. The learned departmental representative vehemently supported the order of the lower authorities and submitted that the income of the assessee is required to be taxed under that business income only. He extensively referred to finding of learned assessing officer as well as learned CIT – A. According to that, it was submitted that the income of the assessee should be chargeable to tax under the head business income as assessee has entered into a share purchase agreement which is placed at page number 89 – 115 of the paper book. It was further claimed that if the assessee has not transferred the controlling interest of such company then there was no need for the assessee to enter into such a deed. It was further stated that circular cited by the learned authorised representative dated 29/2/2016 does not apply to the facts of the case because it is stated in para number 3 (Iii) that where the transfer of unlisted shares is made along with the control and management of the underlying business and the assessing officer would take appropriate view in such a situation and therefore the present case the learned assessing officer has taken a correct view about the taxability of the sale of such sales and consequent gain arising there from, is chargeable to tax under the head business income only.

21. We have carefully considered the rival contention and perused the orders of the lower authorities. The facts are not in dispute that assessee was an employee of Pine labs private limited and received shares of that company

as part of employee stock option plans. Those shares were held by the assessee for substantially long period. On 02/05/2014, share purchase agreement was entered into by Assessee with the buyer, the company whose shares were transferred was also party to that agreement. On careful reading of the share purchase agreement, there was no reference to any control and management being transferred along with the shares. Clause number 1 refers to definition and interpretation, clause number 2 refers to agreement to sale and purchase the sale of shares, clause number 3 is with respect to closing date between the purchase and the seller with respect to completion of the conditions of purchase of shares, clause number 4 are with respect to representation and warranties between the parties, clause 5 referred to the governing laws, clause 6 refers to the notices to the various parties and clause 7 referred to the miscellaneous provisions. The agreement was signed by the assessee because assessee was the seller of the share. On reading of all clauses we did not find anything which even remotely referred to the control and management transferred along with the shares. In view of this the above issue is squarely covered by the CBDT instruction number 29/2/2016 which provides as under:-

CIRCULAR NO.6/2016 [F.NO.225/12/2016-ITA-II], DATED 29-2-2016

Sub-section (14) of section 2 of the Income-tax Act, 1961 ('Act') defines the term "capital asset" to include property of any kind held by an assessee, whether or not connected with his business or profession, but does not include any stock-in-trade or personal assets subject to certain exceptions. As regards shares and other securities, the same can be held either as capital assets or stock-in-trade/trading assets or both. Determination of the character of a particular investment in shares or other securities, whether the same is in the nature of a capital asset or stock-in-trade, is essentially a fact-specific determination and has led to a lot of uncertainty and litigation in the past.

2. Over the years, the courts have laid down different parameters to distinguish the shares held as investments from the shares held as stock-in-trade. The Central Board of Direct Taxes ('CBDT') has also, through Instruction No. 1827, dated August 31, 1989 and Circular No. 4 of 2007 dated June 15, 2007, summarized the said principles for guidance of the field formations.

3. Disputes, however, continue to exist on the application of these principles to the facts of an individual case since the taxpayers find it difficult to prove the intention in acquiring such

shares/securities. In this background, while recognizing that no universal principal in absolute terms can be laid down to decide the character of income from sale of shares and securities (i.e. whether the same is in the nature of capital gain or business income), CBDT realizing that major part of shares/securities transactions takes place in respect of the listed ones and with a view to reduce litigation and uncertainty in the matter, in partial modification to the aforesaid Circulars, further instructs that the Assessing Officers in holding whether the surplus generated from sale of listed shares or other securities would be treated as Capital Gain or Business Income, shall take into account the following—

(*a*) Where the assessee itself, irrespective of the period of holding the listed shares and securities, opts to treat them as stock-in-trade, the income arising from transfer of such shares/securities would be treated as its business income,

(*b*) In respect of listed shares and securities held for a period of more than 12 months immediately preceding the date of its transfer, if the assessee desires to treat the income arising from the transfer thereof as Capital Gain, the same shall not be put to dispute by the Assessing Officer. However, this stand, once taken by the assessee in a particular Assessment Year, shall remain applicable in subsequent Assessment Years also and the taxpayers shall not be allowed to adopt a different/contrary stand in this regard in subsequent years;

(*c*) In all other cases, the nature of transaction (i.e. whether the same is in the nature of capital gain or business income) shall continue to be decided keeping in view the aforesaid Circulars

issued by the CBDT.

4. It is, however, clarified that the above shall not apply in respect of such transactions in shares/securities where the genuineness of the transaction itself is questionable, such as bogus claims of Long Term Capital Gain/Short Term Capital Loss or any other sham transactions.

5. It is reiterated that the above principles have been formulated with the sole objective of reducing litigation and maintaining consistency in approach on the issue of treatment of income derived from transfer of shares and securities. All the relevant provisions of the Act shall continue to apply on the transactions involving transfer of shares and securities.

22. Further in letter dated 2/5/2016, CBDT has clarified with respect to the consistency and taxability of income or loss arising from transfer of unlisted shares also which provides that:-

LETTER F.NO.225/12/2016/ITA.II, DATED 2-5-2016

Regarding characterisation of income from transactions in listed shares and securities, Central Board of Direct Taxes ('CBDT') had issued a clarificatory Circular no. 6/2016 dated 29th February, 2016, wherein with a view to reduce litigation and maintain consistency in approach in assessments, it was instructed that income arising from transfer of listed shares and securities, which are held for more than twelve months would be taxed under the head 'Capital Gain' unless the taxpayer itself treats these as its stock- in-trade and transfer thereof as its business income. It was further stated that in other situations, the issue was to be decided on the basis of existing Circulars issued by the CBDT on this subject.

2. Similarly, for determining the tax-treatment of income arising from transfer of unlisted shares for which no formal market exists for trading, a need has been felt to have a consistent view in assessments pertaining to such income. It has, accordingly, been decided that the income arising from transfer of unlisted shares would be considered under the head 'Capital Gain', irrespective of period of holding, with a view to avoid disputes/litigation and to maintain uniform approach.

3. It is, however, clarified that the above would not be necessarily applied in the situations where:

i. the genuineness of transactions in unlisted shares itself is questionable; or

ii. the transfer of unlisted shares is related to an issue pertaining to lifting of corporate veil; or

iii. the transfer of unlisted shares is made along

with the control and management of underlying business and the Assessing Officer would take appropriate view in such situations.

4. The above may be brought to the notice of all for necessary compliance.

23. Therefore, according to us the issue squarely covered by the circular number 6/2016 of the CBDT and letter dated 2/05/2016 the above transaction of the sale of the shares and consequent gain arising therefrom should be chargeable to tax under the head capital gains only. Accordingly we direct the learned AO to tax gain arising on the sale of about shares under the head capital gain only. Thus as we have already held that the profits on sale of shares would be chargeable to tax under the head capital gain, the ground number 3 of the appeal of the assessee is allowed and ground number 1 and 2 of the appeal of AO are dismissed.

24. The ground number 4 of the appeal of assessee is with respect to grant of benefit under section 54F of the act. As we have already held that the gains arising on the sale of the shares would be chargeable to tax under the head of capital gain, we direct learned assessing officer to grant deduction u/s 54F of the act. Accordingly ground number 4 of the appeal of the assessee is also allowed.

25. In the result appeal filed by the assessee is allowed and appeal filed by the learned assessing officer is dismissed.

Order pronounced in the open court on 20/11/2019.

-Sd/-	-Sd/-
(KULDIP SINGH)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 20/11/2019
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR