IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH, NEW DELHI [THROUGH VIDEO CONFERENCE]

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND SHRI AMIT SHUKLA, JUDICIAL MEMBER

ITA No. 8084/DEL/2018
[A.Y 2015-16]

Augustus Capital PTE Ltd 24, Raffles Place 10-5, Clifford Centre Singapore	Vs.	The Dy.C.I.T Circle 1(1) International Taxation New Delhi
PAN: AABCG 4223 D		
[Appellant]		[Respondent]

Assessee by : Shri Kanchan Kaushal, Adv
Shri K.M. Gupta, Adv
Shri Rishab Malhotra

Revenue by : Shri Satpal Gulati, CIT-DR

Date of Hearing : 12.10.2020
Date of Pronouncement : 15.10.2020

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the assessee is preferred against the order dated 30.10.2018 pertaining to A.Y 2015-16 framed u/s 143(3) r.w.s 144C(13) of the Income tax Act, 1961 [hereinafter referred to as 'the Act' for short].

2. The sum and substance of the grievance of the assessee is that the Assessing Officer erred in assessing the total income at Rs. 36,33,15,970/-, as against NIL returned income, thereby denying applicability of provisions of Explanation 7 to Section 9(1)(i) of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'] holding that the applicability of the said Explanation is prospective.

3. Briefly stated, the facts of the case are that the appellant company is in the business of incubation of companies i.e. providing new businesses, with necessary financial support and technical services. During the course of its business, the appellant made investments in Accelyst Pte Ltd, being company incorporated in and resident of Singapore.

4. The appellant made investment at total cost of Rs. 4,91,20,000/- in the following manner:

- 10,000 equity shares purchased on January 9, 2013
- 13,80,000 preference shares purchased on January 9, 2013
- 394,782 preference shares purchased on March 14, 2014

5. On 27.03.2015, the appellant sold its entire shareholding in Accelyst to an Indian company, namely, Jasper Infotech Private Limited. The sale consideration was Rs. 41,24,35,969/-. The buyer, Jasper Infotech Private Limited, withheld taxes at source amounting to Rs. 17,84,19,800/- being 43.26% on the entire sales consideration.

6. Keeping in view the amended provisions of section 9(1)(i) of the Act, read with Explanations 5, 6 and 7, the assessee was of the firm belief that the transaction involving sale of shares of foreign company, which held investment in India, was not taxable.

7. During the course of assessment proceedings, the Assessing Officer asked the assessee to explain as to why capital gains arising from sale of shares from Accelyst to Jasper Infotech Private Limited should not be brought to tax in India u/s 9(1)(i) of the Act.

8. In response, the appellant company submitted detailed reply, which has been incorporated by the Assessing Officer in his assessment order. The main contention of the assessee was that Explanation 7 to Section 9(1)(i) of the Act states that the impugned transaction is not taxable.

9. The Assessing Officer disregarded the submissions of the assessee as the Assessing Officer was of the firm belief that operation of Explanation 7 to section 9(1)(i) of the Act is prospective, since it has been inserted by the Finance Act, 2015 and made effective from 01.04.2016 and, therefore, not applicable in the year under consideration.

10. The relevant para of the assessment order reads as under:

> "As is clear from the above, that the provisions as contained in Explanation-7 are provisions introduced into the Act to bring only such part of capital gain into the ambit of the income deemed to accrue or arise in India as is reasonably attributable to assets located in India and determined in the prescribed manner. This explanation is not applicable to the cases of assessment years prior to AY2016-17 as it is made effective only from 01.04.2016. If the legislature has intentionally made certain provisions effective from specific date, there should not be any speculation or doubt about its applicability from certain date in the past. If the Parliament has intended to introduce Explanation-7 with retrospective effect it would have made it so as it has done in case of Explanation4 & 5 of Section- 9(1)(i) of the Act. Therefore, it is clear that provisions of Explanation- 7 are not applicable the assessee's case as these are not applicable to AY 2015-16."

11. Accordingly, the Assessing Officer computed the long term capital gains arising from the transfer of shares of Accelyst as under:

Particulars	Amount (in INR)
Total sale consideration of shares	41,24,35,969
Less: Cost of acquisition	4,91,20,000
Long term capital gain	36,33,15,969

Accordingly, addition of Rs. 36,33,15,969/- was proposed.

12. Aggrieved by the draft assessment order, the appellant filed objections before the DRP and the DRP, vide directions dated 14.09.2018, confirmed the order of the Assessing Officer by holding as under:

> "4.2 The assessee has made detailed submission to state that the amendments were brought by the Finance Act, 2012 (Explanation 4 & 5 to Section 9(1)(i)) with regard to sale of shares by the foreign company, where the underlying assets are in India. Further, the Explanation 6 and 7 were introduced by the Finance Act, 2015 would have retrospective effect from FY 2012-13, when the

Explanation when the Explanation 4 & 5 were introduced with w.r.e.f 01-04-1962.

4.2.2 The AO has considered the detailed submission in this regard and has referred (in para 14 of the Draft order) to the CBDT Circular no 19 /2015 dated 27-11-2015, explaining the provision of Finance Act, 2015 and the amendments introduced by the Finance Act, 2015, which clearly brings of the fact that the amendments shall take effect from 01-04-2016 and will accordingly apply in relation to the AY 2016-17 and subsequent assessment years.

4.3 Having considered the submission of the assessee we are of the view that this Explanation is not applicable to the cases of assessment years prior to AY 6 2016-17 as it is made effective only from 01-04-2016. If the legislature has intentionally made certain provision effective from specific date, there should not be any speculation or doubt about its applicability from any date in the past. If the Parliament has intended to introduce Explanation-7 with retrospective effect it would have made it so as it has done in case of Explanation -4 & 5 of Section - 9(1)(i) of the Act. Therefore, the AO has correctly held that provision of Explanation-7 are not applicable the assessee's case as these are not applicable to AY 2015-16."

13. Aggrieved by this, the appellant is before us.

14. The ld. counsel for the assessee vehemently stated that Explanation 5 was introduced by Finance Act of 2012 with retrospective effect from 01-04-1962. On the introduction of Explanation 5 to Section 9(1)(i) of the Act, representations were made to the Government of India regarding the ambiguities surrounding the said Explanation with respect to the phrase 'any share or interest in a company' and also the word 'substantially'. The Government referred the representations so received to the Shome Committee, to look into the introduction of the concept of taxability of indirect transfer.

15. The ld. counsel for the assessee continued by stating that the Government of India, in line with the recommendation of the Shome committee vide Finance Act of 2015, introduced 'Explanation 6 and Explanation 7 to Section 9(1)(i) of the Act with effect from 01-04-2016.

16. It is the say of the ld. counsel for the assessee that Explanation6 and Explanation 7 have to be tagged with Explanation 5 and have to be considered of having retrospective effect.

17. Per contra, the ld. DR strongly supported the assessment order. The ld. DR stated that if the Legislature had the intention to give

retrospective effect to Explanations 6 and7, then it would have made it specifically as was done when Explanation 5 was inserted which was specifically given retrospective effect from 01.04.1962.

18. Referring to Explanation 7, the ld. DR stated that it carves out 'exemption' from the applicability of Explanation 5 to small investors holding no right of management or control of such company / entity and holding less than 5% of the total voting power, share capital, interest of the company/entity that directly or indirectly owns the assets situated in India. It is the say of the ld. DR that it is a substantive amendment, as it carves out certain class of taxpayers from the ambit of taxation on account of indirect transfer of property.

19. The ld. DR further stated that it is not a declaratory/clarificatory provision, but it is providing new set of exemption to small taxpayers for their benefit and therefore, it cannot be stated that it is not a case of any omission or error or vague term in the existing provision which has been clarified vide Explanation 7.

20. We have carefully considered the orders of the authorities below qua the relevant provisions in dispute. Explanation 5 to section 9(1)(i) of the Act was introduced by Finance Act of 2012 with retrospective effect from 01-04-1962. At this point, it would be pertinent to mention that provisions of section 9(1)(i) of the Act were amended to obviate the decision of Supreme Court in the case of Vodafone International Holdings B.V. 341 ITR 1 (SC).

21. Explanation 5 reads as under:

> "Explanation 5.—For the removal of doubts, it is hereby clarified that an asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India"

22. The language is very clear as it is provided "For the removal of doubts" which means that this Explanation has clarified as to when any share or interest in a company incorporated outside India shall be deemed to be situated in India when directly or indirectly its value was substantially derived from assets located in India.

23. After the insertion of Explanation 5, the stake holders were apprehensive about ambiguities surrounding the said Explanation and therefore, representations were made to the Government of India and the Government was pleased to constitute the Shome committee, to look into the apprehensions/grievances of the stake holders.

24. After considering the recommendations made by the stake holders, the committee recommended as under:

> "Recommendations
>
> In view of the above, it is recommended that where share or interest in a foreign company or entity derives, directly or indirectly, its value substantially from assets located in India, then transfer of such share or interest in the company or entity outside India would not be subject to tax in India under section 9(1)(i) of the Act, if, (i) in case such company or entity is the immediate holding company, the voting power or share capital of the transferor along with its associated enterprises in such company or entity does not exceed 26% of total voting power or share capital of the company or entity during the preceding 12 months; or (ii) in other cases, the voting power or share capital of the transferor in such company or entity along with its associated enterprises during the preceding 12 months does not exceed such percentage

> which results in 26% of total voting power or share capital of the immediate holding company having underlying assets in India."

25. Before the recommendations of the Shome Committee could be accepted by the Government, the Hon'ble High Court of Delhi in the case of Copal Market Research Limited 49 Taxmann.com 125 was seized with similar quarrel wherein the share purchase agreement was dated 03.11.2011 [prior to amendment] and following the question, inter alia, needed to be adjudicated:

> "Whether on facts and in law, the applicant is justified in its view that capital gains arising on the sale of shares of Exevo Inc., US ('Exevo Inc') by Copal Market Research Ltd. ("CMRL") to the applicant would not be chargeable to tax in India in the hands of CMRL?"

26. As mentioned elsewhere, when the decision of the Hon'ble High Court of Delhi [supra] came, only recommendations were made by Shome Committee and the Act was amended. The Hon'ble High Court held as under:

"26. It is apparent from the above that only a fraction of the value of shares of Copal-Jersey was derived indirectly from the value of the shares of CRIL and Exevo-India. The question, thus, arises is whether the sale of shares of an overseas company which derives only a minor part of its value from the assets located in India could be deemed to be situated in India by virtue of Explanation 5 to Section 9(1)(i) of 399 of 691 the Act. This question can be answered by reference to the express language of Section 9(1)(i) of the Act as well as by applying the principle that income sought to be taxed under the Act must have a territorial nexus with India. By virtue of Section 9(1)(i) of the Act all income arising from transfer of a capital asset situated in India would be deemed to accrue or arise in India and would thus be exigible to tax under the Act. A share of a company incorporated outside India is not an asset which is situated in India and, but for Explanation 5 to Section 9(1)(i) of the Act, the gains arising out of any transaction of sale and purchase of a share of an overseas company between non-residents would not be taxable in India. This would be true even if the entire value of the shares of an overseas company was derived from the value of assets situated in India. This issue arose in the case of Vodafone International Holdings BV v. Union of India [2012] 341 ITR 1/204 Taxman 408/17 taxmann.com 202 (SC) and the Supreme Court held that the transaction of sale and purchase of a share of an overseas company between two non-residents would fall outside the ambit of Section 9(1)(i) of the Act. Subsequently, Section 9(1) was amended by virtue of Finance Act, 2012 by introduction of Explanations 4 & 5 to Section 9(1)(i) of the Act, which read as under:— 'Explanation 4.—For the removal of

doubts, it is hereby clarified that the expression "through" shall mean and include and shall be deemed to have always meant and included "by means of", "in consequence of" or "by reason of". Explanation 5.-For the removal of doubts, it is hereby clarified that an asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India;'

27. The notes to clauses explained the introduction of the Explanations 4 and 5 to Section 9(1)(i) of the Act as being clarificatory. A plain reading of Explanation 5 also indicates that the given reason for its introduction was for removal of any doubts. In other words, the language of the said legislative amendment suggests that it was always the intention of the legislature that an asset which derives its value from assets in India should be considered as one which is situated in India. The clear object of Section 9(1)(i) of the Act is inter alia to cast the net of tax also on income which arises from transfer of assets in India irrespective of the residential status of the recipient of the income. Since the assets are situated in India, the entire income arising from their transfer could be said to arise in India. Explanation 5 introduced a legal fiction for the limited purpose of imputing that assets which substantially derive their value from assets situated in India would also be deemed to be situated in India.

28. It is trite law that a legal fiction must be restricted to the purpose for which it was enacted. The object of Explanation 5 was not to extend the scope of Section 9(1)(i) of the Act to income, which had no territorial nexus with India, but to tax income that had a nexus with India, irrespective of whether the same was reflected in a sale of an asset situated outside India. Viewed from this standpoint there would be no justification to read Explanation 5 to provide recourse to section 9(1)(i) for taxing income which arises from transfer of assets overseas and which do not derive bulk of their value from assets in India. In this view, the expression "substantially" occurring in Explanation 5 would necessarily have to be read as synonymous to " principally", "mainly" or at least "majority". Explanation 5 having been stated to be clarificatory must be read restrictively and at best to cover situations where in substance the assets in India are transacted by transacting in shares of overseas holding companies and not to transactions where assets situated overseas are transacted which also derive some value on account of assets situated in India. In our view, there can be no recourse to Explanation 5 to enlarge the scope of Section 9(1) of the Act so as to cast the net of tax on gains or income that may arise from transfer of an asset situated outside India, which derives bulk of its value from assets outside India.

29. It is also relevant to refer to the draft report submitted by the expert committee appointed by the 400 of 691 Prime Minister in 2012 to report on the retrospective amendment relating to indirect transfer of assets (Shome Committee). The said

Committee had, in its draft report, considered the import of the expression 'substantially' as used in Explanation 5 to Section 9(1)(i) of the Act. The Committee considered the submissions of stakeholders that the expression 'substantially' did not have any fixed meaning and was vague. After analysis, the Committee noted that it was necessary to pin down a definition of the said expression and for that purpose, there were no reason to depart from the Direct Tax Code Bill, 2010 (DTC) that had been put in the public domain. Under the DTC, gains from the sale of assets situated overseas, which derived more than 50% of their value from assets situated in India, were liable to be taxed in India. The Shome Committee in its draft report recommended as under:—

'The word "substantially" used in Explanation 5 should be defined as a threshold of 50 per cent of the total value derived from assets of the company or entity. In other words, a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be situated in India, if the share or interest derives, directly or indirectly, its value from the assets located in India being more than 50% of the global assets of such company or entity. This has been explained through the above illustration.'

30. In addition to the above, the 'United Nations Model Double Taxation Convention between Developed and Developing Countries' and the 'OECD Model Tax Convention on Income and on Capital' may also be referred to since the said conventions deal with a regime whereunder the right to tax capital gains can be fairly and reasonably apportioned between contracting States. Since the

models propose a regime which is generally accepted in respect of indirect transfers, the same, although not binding on Indian authorities, would certainly have a persuasive value in interpreting the expression 'substantially' in a reasonable manner and in its contextual perspective. The 'United Nations Model Double Taxation Convention between Developed and Developing Countries' and the 'OECD Model Tax Convention on Income and on Capital' provide that the taxation rights in case of sale of shares are ceded to the country where the underlying assets are situated only if more than 50% of the value of such shares is derived from such property.

31. Paragraph (4) of Article 13 of the United Nations Model Double Taxation Convention between Developed and Developing Countries provides that a Contracting State is allowed to tax a gain on alienation of shares of a company or on alienation of interests in other entities the property of which consists principally of immovable property situated in that State. For this purpose, the term 'principally' in relation to the ownership of an immovable property means the value of such immovable property exceeding 50 per cent of the aggregate value of all assets owned by such company, partnership, trust or estate. It is also relevant to note that India has signed a treaty with Korea incorporating this clause. The relevant portion of Article 13 of the said UN Convention is quoted below:— 'Article 13 CAPITAL GAINS ** ** ** 4. Gains from the alienation of shares of the capital stock of a company, or of an interest in a partnership, trust or estate, the property of

which consists directly or indirectly principally of immovable property situated in a Contracting State may be taxed in that State. In particular: (1) Nothing contained in this paragraph shall apply to a company, partnership, trust or estate, other than a company, partnership, trust or estate engaged in the business of management of immovable properties, the property of which consists directly or indirectly principally of immovable property used by such company, partnership, trust or estate in its business activities. 401 of 691 (2) For the purposes of this paragraph, "principally" in relation to ownership of immovable property means the value of such immovable property exceeding 50 per cent of the aggregate value of all assets owned by the company, partnership, trust or estate.'

32. The 'OECD Model Tax Convention on Income and on Capital' provides a means of settling on a uniform basis the most common problems that arise in the field of international juridical double taxation. Article 13 of the said Convention deals with the taxes on capital gains. Article 13(1) provides that the gains derived by a resident of a Contracting State from the alienation of immovable property situated in another Contracting State may be taxed in that other State. Article 13(4) of the said Convention provides that the 'gains derived by a resident of a Contracting State from the alienation of shares or comparable interests deriving more than 50 per cent of their value directly or indirectly from immovable property situated in the other Contracting State may be taxed in that other State.'

33. In view of the above, gains arising from sale of a share of a company incorporated overseas, which derives less than 50% of its value from assets situated in India would certainly not be taxable under section 9(1)(i) of the Act read with Explanation 5 thereto.

34. Thus, in the present case, even if the transaction had been structured in the manner as suggested on behalf of the Revenue, the gains arising to the shareholders of Copal-Jersey from sale of their shares in Copal-Jersey to Moody UK would not be taxable under Section 9(1)(i) of the Act, as their value could not be stated to be derived substantially from assets in India. In this view, the contention of the Revenue that the entire transaction of sale of Copal-Jersey shares has been structured in a manner so as to include the sale of shares in CRIL and Exevo-US by the Mauritian companies only to avoid the incidence of tax and take benefit of the DTAA is ex facie flawed."

27. Pursuant to this decision of the Hon'ble High Court, the Act was amended and Explanations 6 and 7 were inserted wherein 5% has been mentioned whereas the Hon'ble High Court of Delhi [supra] has considered a case where shares derived less than 50% of its value from assets situated in India would certainly not be taxable u/s 9(1)(i) of the Act read with Explanation 5.

28. Explanations 6 and 7 read as under:

"Explanation 6.—For the purposes of this clause, it is hereby declared that—

(a) the share or interest, referred to in Explanation 5, shall be deemed to derive its value substantially from the assets (whether tangible or intangible) located in India, if, on the specified date, the value of such assets—

(i) exceeds the amount of ten crore rupees; and

(ii) represents at least fifty per cent of the value of all the assets owned by the company or entity, as the case may be;

(b) the value of an asset shall be the fair market value as on the specified date, of such asset without reduction of liabilities, if any, in respect of the asset, determined in such manner as may be prescribed;

(c) "accounting period" means each period of twelve months ending with the 31st day of March:

Provided that where a company or an entity, referred to in Explanation 5, regularly adopts a period of twelve months ending on a day other than the 31st day of March for the purpose of—

(i) complying with the provisions of the tax laws of the territory, of which it is a resident, for tax purposes; or

(ii) reporting to persons holding the share or interest,

then, the period of twelve months ending with the other day shall be the accounting period of the company or, as the case may be, the entity:

Provided further that the first accounting period of the company or, as the case may be, the entity shall begin from the date of its registration or incorporation and end with the 31st day of March or such other day, as the case may be, following the date of such registration or incorporation, and the later accounting period shall be the successive periods of twelve months:

Provided also that if the company or the entity ceases to exist before the end of accounting period, as aforesaid, then, the accounting period shall end immediately before the company or, as the case may be, the entity, ceases to exist;

(d) "specified date" means the—

(i) date on which the accounting period of the company or, as the case may be, the entity ends preceding the date of transfer of a share or an interest; or

(ii) date of transfer, if the book value of the assets of the company or, as the case may be, the entity on the date of transfer exceeds the book value of the assets as on the date referred to in sub-clause (i), by fifteen per cent. 11

Explanation 7.— For the purposes of this clause,—

(a) no income shall be deemed to accrue or arise to a non-resident from transfer, outside India, of any share of, or interest in, a company or an entity, registered or incorporated outside India, referred to in the Explanation 5,—

(i) if such company or entity directly owns the assets situated in India and the transferor (whether individually or along with its associated enterprises), at any time in the twelve months preceding the date of transfer, neither holds the right of management or control in relation to such company or entity, nor holds voting power or share capital or interest exceeding five per cent of the total voting power or total share capital or total interest, as the case may be, of such company or entity; or

(ii) if such company or entity indirectly owns the assets situated in India and the transferor (whether individually or along with its associated enterprises), at any time in the twelve months preceding the date of transfer, neither holds the right of management or control in relation to such company or entity, nor holds any right in, or in relation to, such company or entity which would entitle him to the right of management or control in the company or entity that directly owns the assets situated in India, nor holds such percentage of voting power or share capital or interest in such company or entity which results in holding of (either individually or

along with associated enterprises) a voting power or share capital or interest exceeding five per cent of the total voting power or total share capital or total interest, as the case may be, of the company or entity that directly owns the assets situated in India;

(b) in a case where all the assets owned, directly or indirectly, by a company or, as the case may be, an entity referred to in the Explanation 5, are not located in India, the income of the non-resident transferor, from transfer outside India of a share of, or interest in, such company or entity, deemed to accrue or arise in India under this clause, shall be only such part of the income as is reasonably attributable to assets located in India and determined in such manner as may be prescribed; (c) "associated enterprise" shall have the meaning assigned to it in section 92A;"

29. In his budget speech dated 28,02,2015, the Hon'ble Finance Minister as stated as under:

"114. The provision relating to indirect transfers in the Income-tax Act which is a legacy from the previous government contains several ambiguities. This provision is being suitably cleaned up. Further, concerns regarding applicability of indirect transfer provisions to dividends paid by foreign companies to their shareholders will be addressed by the Central Board of Direct Taxes through a clarificatory circular. These changes would eliminate the scope for discretionary exercise of power and

provide a hassle free structure to the taxpayers. I reiterate what I had said in the last Budget that ordinarily retrospective tax provisions adversely impact the stability and predictability of the taxation regime and resort to such provisions shall be avoided."

30. The CBDT came out with Circular No. 41 of 2016 for giving clarifications on Indirect Transfer Provisions under I.T. Act. Explanatory Notes to the provisions of Finance Act 2015 has further brought clarity relating to Indirect Transfer Provisions and the same read as as under:

"8. Clarity relating to Indirect transfer provisions

8.1 The provisions of section 9 of the Income-tax Act deal with cases of income which are deemed to accrue or arise in India. Sub-section(1) of the said section creates a legal fiction that certain incomes shall be deemed to accrue or arise in India. Clause(i) of said sub-section (1) provides a set of circumstances in which income accruing or arising, directly or indirectly, is taxable in India. The said clause provides that all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India shall be deemed to accrue or arise in India.

8.2 The Finance Act, 2012 had inserted certain clarificatory amendments in the provisions of section 9. The amendments, inter alia, included insertion of Explanation 5 in section 9(1)(i) w.r.e.f. 1.04.1962. The Explanation 5 clarified that an asset or capital asset, being any share or interest in a company or entity registered or incorporated 256 of 691 outside India shall be deemed to be situated in India if the share or interest derives, directly or indirectly, its value substantially from the assets located in India.

8.3 Considering the concerns raised by various stakeholders regarding the scope and impact of these amendments, an Expert Committee under the Chairmanship of Dr.Parthasarathi Shome was constituted by the Government to go into the various aspects relating to the amendments.

8.4 The recommendations of the Expert Committee were considered and a number of recommendations (either in full or with partial modifications) were accepted for implementation either by way of an amendment of the Act or by way of issuance of a clarificatory circular in due course. In order to give effect to the recommendations, the provisions of section 9 relating to indirect transfer have been amended by the Act to provide that:-

(i) the share or interest of a foreign company or entity shall be deemed to derive its value substantially from the assets (whether tangible or intangible) located in India, if on the specified date, the value of Indian assets,-

(a) exceeds the amount of ten crore rupees; and

(b) represents at least fifty per cent. of the value of all the assets owned by the company or entity.

(ii) value of an asset shall mean the fair market value of such asset without reduction of liabilities, if any, in respect of the asset.

(iii) the specified date of valuation shall be the date on which the accounting period of the company or entity, as the case may be, ends preceding the date of transfer.

(iv) however, if the book value of the assets of the company on the date of transfer exceeds by at least 15% of the book value of the assets as on the last balance sheet date preceding the date of transfer, then instead of the date mentioned in (iii) above, the date of transfer shall be the specified date of valuation.

(v) the manner of determination of fair market value of the Indian assets vis-a vis global assets of the foreign company shall be prescribed in the rules.

(vi) the taxation of gains arising on transfer of a share or interest deriving, directly or indirectly, its value substantially from assets located in India will be on proportional basis. The method for determination of proportionality shall be prescribed in the rules.

(vii) the exemption shall be available to a non-resident from transfer, outside India, of a share of, or interest in, a foreign company or entity if such foreign company or entity directly owns the assets situated in India and the transferor along with its associated enterprises, at any time in twelve months preceding the date of transfer,

(a) neither holds the right of control or management in relation to such company or entity,

(b) nor holds voting power or share capital or interest exceeding five per cent. of the total voting power or total share capital or total interest, in the foreign company or entity .

(viii) in case the transfer is of shares or interest in a foreign company or entity which holds the Indian assets indirectly, then the exemption shall be available to the transferor if he along with its associated enterprises, at any time in 12 months preceding the date of transfer,-

(a) neither holds the right of management or control in relation to such company or the entity,

(b) nor holds any right in, or in relation to, such company or entity which would entitle him to the right of control or management of the direct holding company or entity, nor holds such percentage of voting power, or share capital or interest in such company or entity which entitles him to the

voting power, or share capital or interest exceeding five percent. in the direct holding company or entity.

(ix) exemption shall be available in respect of any transfer, subject to certain conditions ,in a scheme of amalgamation, of a capital asset, being a share of a foreign company which derives, directly or indirectly, its value substantially from the share or shares of an Indian company, held by the amalgamating foreign company to the amalgamated foreign company.

(x) exemption shall be available in respect of any transfer, subject to certain conditions, in a demerger, of a capital asset, being a share of a foreign company which derives, directly or indirectly, its value substantially from the share or shares of an Indian company, held by the demerged foreign company to the resulting foreign company.

(xi) there shall be a reporting obligation on Indian concern through or in which the Indian assets are held by the foreign company or the entity. The Indian entity shall be obligated to furnish information relating to the off-shore transaction having the effect of directly or indirectly modifying the ownership structure or control of the Indian company or entity. In case of any failure on the part of Indian concern in this regard a penalty shall be leviable under section 271GA. The penalty shall be-

(a) a sum equal to two percent of the value of the transaction in respect of which such failure has taken place if such transaction had the effect of directly or indirectly

transferring the right of management or control in relation to the Indian concern; and

(b) a sum of five lakh rupees in any other case."

31. To recapitulate our discussion hereinabove, Section 9(1)(i) of the Act was amended and Explanation 5 was inserted by the Finance Act, 2012 giving retrospective effect from 01.04.1962 because of apprehensions and ambiguities in the said Explanation Shome Committee was constituted and on the recommendations of Shome Committee, Explanations 6 and 7 were inserted by the Finance Act, 2015.

32. Both the Explanations 6 and 7 start with "For the purposes of this clause". In our understanding, the reference to "this clause" is to Section 9(1)(i) of the Act and Explanation 5 starts with "For removal of doubts". In our understanding of the law, Explanations 6 and 7 have to be read with Explanation 5 to understand the provisions of Section 9(1)(i) of the Act. Since Explanation 5 has been given retrospective effect and Explanations 6 and 7 have been inserted in furtherance of the object of insertion of Explanation 5, these two explanations cannot be read in isolation, but have to be tagged alongwith Explanation 5 so that both the Explanations have to be given a retrospective effect,

keeping in mind the decision of the Hon'ble High Court of Delhi in the case of Copal [supra].

33. We, accordingly, direct the Assessing Officer to read Explanation 7 as applicable for the year under consideration and delete the impugned addition.

34. In the result, appeal of the assessee in ITA No. 8084/DEL/2018 is allowed.

The order is pronounced in the open court on 15.10.2020.

Sd/-	**Sd/-**
[AMIT SHUKLA**]**	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 15th October, 2020

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	08.10.2020
Date on which the final order is uploaded on the website of ITAT	08.10.2020
Date on which the file goes to the Bench Clerk	08.10.2020
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	