

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "I", MUMBAI**

**BEFORE SHRI PRAMOD KUMAR, HON'BLE VICE PRESIDENT AND**

**SHRI SAKTIJIT DEY, HON'BLE JUDICIAL MEMBER**

**ITA No. 7322/MUM/2019  
Assessment Year: 2011-12**

Jefferies International Limited, C/o Ernst & Young LLP, 17 <sup>th</sup> Floor, The Ruby, 29 Senapati Bapat Marg, Dadar (West), Mumbai - 400028 PAN: AABCJ7041C	<b>Vs.</b>	Assistant Commissioner of Income Tax (International Taxation), Cir-3(1)(1), Room No. 1605, 16 <sup>th</sup> Floor, Air India Building, Nariman Point, Mumbai - 400021
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by : S/Shri Nishant Thakkar/  
Hiten Chande (ARs)

Revenue by : Shri S.S. Iyengar (Sr.DR)

Date of Hearing : 27/07/2021  
Date of Pronouncement: 16/08/2021

**ORDER**

**PER SAKTIJIT DEY, JM**

Captioned appeal of the assessee arises out of assessment order dated 27.09.2019 passed under section 147 r.w.s. 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 for the assessment year 2011-12, in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. The core issue arising for consideration is concerning addition of Short Term Capital Gain of Rs. 19,42,466/- arising out of transfer of equity shares.

3. Briefly the facts are, the assessee is a non-resident company incorporated in the United Kingdom (UK) and a tax resident of that country.

During the year under consideration, the assessee had acquired Global Depository Receipts (GDRs) and Foreign Currency Convertible Bonds (FCCBs) of certain Indian Companies. Such FCCBs/GDRs were subsequently converted to equity shares. During the year under consideration, the assessee sold such equity shares for a consideration of Rs. 19,42,466/-. The Assessing Officer (AO) having received information that the assessee has neither filed any return of income nor offered the capital gain to tax, reopened the assessment under section 147 of the Act. In response to the notice issued under section 148 of the Act, the assessee submitted that it has not earned any income from India, hence, not required to file any return of income. However, subsequently, after communication of reasons recorded for reopening of assessment, assessee filed return of income on 07.09.2018 declaring loss of Rs. 12,88,155/-. In course of assessment proceedings, the AO called for the details of FCCBs/GDRs of the Indian Companies purchased by the assessee and their conversion into equity shares. In response, the assessee furnished the details of purchase of FCCBs/GDRs and their conversion to equity shares. On perusing the details filed and the computation of capital gain, the AO observed that the cost of acquisition has been adopted according to assessee's own choice. Even, the sale consideration has been shown by adopting the value from Form 15CB and has accordingly, computed capital gain/loss. After calling for further details, the AO ultimately took sale consideration of Rs. 19,42,466/-. Whereas, he took the cost of acquisition per share at Rs. 1/-. Accordingly, he computed short term capital gain of Rs. 19,42,466/-.

4. Against the computation of capital gain as aforesaid, the assessee raised objection before learned DRP. The primary contention of the assessee before learned DRP was, cost of acquisition of underlying shares acquired through the redemption of GDRs and FCCBs has to be taken, as provided under clauses 7(3) and (4) of 1993 scheme and FCCB scheme notified by the Government of India. Learned DRP, however, was not impressed with the contention of the assessee. Learned DRP observed, the cost of acquisition of equity shares acquired by the assessee on conversion of FCCBs/GDRs would be governed by

the provisions of section 49(2A) as well as section 47(x) or 47(xa), read with section 115AC of the Act. Accordingly, learned DRP upheld AO's computation of short term capital gain. However, learned DRP disapproved the adoption of cost of acquisition of Rs. 1/- per share by the Assessing Officer. Learned DRP directed the assessee to provide necessary details for enabling the AO to determine the cost of acquisition shares on redemption of FCCBs/GDRs.

5. Learned counsel for the assessee submitted, the departmental authorities have not disputed the fact that the FCCBs/GDRs which were ultimately converted to equity shares relate to the 1993 scheme. Drawing our attention to the Issue of Foreign Currency Convertible Bonds and ordinary shares (through depository receipt mechanism) scheme 1993, learned counsel submitted, as per clause 7(3) of the scheme, on redemption, the cost of acquisition of the shares underlying the GDRs shall be reckoned as the cost on the date on which the Overseas Depository Bank advises the Domestic Custodian Bank for redemption. He submitted, the price of the ordinary shares of the issuing company prevailing in the Bombay Stock Exchange (BSE) or the National Stock Exchange (NSE) on the date of the advice of the redemption shall be taken as the cost of acquisition of underlying ordinary shares. Further, he submitted, clause 7(4) prescribes that the cost of acquisition of shares on conversion of FCCBs would be the conversion price determined on the basis of price of the shares at the BSE or NSE on the date of conversion of FCCBs into shares. He submitted, the assessee has computed capital gain following the method prescribed in clause 7(3) and 7(4) and has adopted the cost of share as available in public domain. Further, he submitted, since the GDRs/FCCBs were issued in terms of 1993 scheme, section 49(2A), introduced to the Act w.e.f 1.4.2008, would not be applicable. In support of such contention, he relied upon the following decisions:

1. *Kingfisher Capital CLO Ltd. vs. CIT (2019) 413 ITR 1 (Bom)*
2. *DIT vs. Intel Capital (Cayman) Corpn. (2020) 429 ITR 45 (Kar.)*

6. Thus, he submitted, the issue is squarely covered by the decision of the Hon'ble jurisdictional High Court.

7. Though, learned Departmental Representative fairly agreed that the issue is covered by the decision of the Hon'ble jurisdictional High Court, however, he relied upon the observations of the AO and DRP.

8. We have considered rival submissions in the light of decisions relied upon and perused the materials on record. The core issue arising for consideration is, whether capital gain has to be computed by adopting the cost of acquisition of the GDRs/FCCBs under clause 7(3) and 7(4) of the 1993 scheme, referred to above, or it has to be computed under section 49(2A) r.w.s. 47(x) and 47(xa) of the Act, as held by the Departmental Authorities. It is a common point between the assessee and Departmental Authorities that the FCCBs/GDRs held by the assessee and subsequently redeemed to equity shares, have been issued under the 1993 scheme, referred to above. Clause 7(3) and 7(4) of the 1993 scheme are as under:-

*“(3) On redemption, the cost of acquisition of the shares underlying the Global Depository Receipts shall be reckoned as the cost on the date on which the Overseas Depository Bank advises the Domestic Custodian Bank for redemption. The price of the ordinary shares of the issuing company prevailing in the Bombay Stock Exchange or the National Stock Exchange on the date of the advice of redemption shall be taken as the cost of acquisition of the underlying ordinary shares.*

*(4) For the purposes of conversions of Foreign Currency Convertible Bonds, the cost of acquisition in the hands of the non-resident investors would be the conversion price determined on the basis of the price of the shares at the Bombay Stock Exchange, or the National Stock Exchange, on the date of conversion of Foreign Currency Convertible Bonds into shares.”*

9. On a careful reading of these clauses, it becomes clear that the cost of acquisition of underlying shares of GDRs shall be the price of the ordinary shares of the issuing company prevailing in the BSE or the NSE on the date of the advice of redemption by the Overseas Depository Bank to the Domestic Custodian Bank. Similarly, the cost of acquisition of underlying shares of FCCBs would be the conversion price determined on the basis of the price of shares at the BSE or NSE on the date of conversion of FCCBs. In case of

Kingfisher Capital COL Ltd. vs. CIT (supra), the Hon'ble Bombay High Court has held that the cost of acquisition of equity shares on conversion from FCCBs/GDRs has to be determined as per clause 7(3) and 7(4) of the 1993 scheme. The observations of the Hon'ble jurisdictional High Court in this regard is reproduced hereunder.:

*“77 Firstly, we will see only the main conclusion and what we find is that section 115AC(1) clearly refers to income by way of interest on bonds of an Indian company issued in accordance with such Scheme as the Central Government may, by notification in the Official Gazette, specify in this behalf. Section 49(2A), to which we have already made detailed reference above, deals with a capital asset being a share or debenture of a company becoming the property of the assessee in consideration of a transfer referred to in clause (x) or (xa) of section 47 and section 47(x) under a transfer by way of conversion of bonds or debentures and (xa) by way of conversion of bonds referred to in clause (a) of sub-section (1) of section 115AC into shares or debentures of any company. The assessee may maintain that there is nothing in the Act which enables the authorities to deal with a situation and it is only clause 7 dealing with transfer and redemption and particularly sub-clause (4) thereof, as spelt out in the Scheme, which will apply. We are of the clear opinion that it is the conversion of foreign currency convertible bonds that the cost of acquisition in the hands of non-resident Indian investors would be the conversion price determined on the basis of the price of the shares as in this case, the National Stock Exchange, on the date of conversion of foreign currency convertible bonds into shares. This is the cost of acquisition in the hands of a non-resident investor. That would be the conversion price determined on the basis of the price of the shares at the National Stock Exchange and, therefore, conversions of FCCBs would be done accordingly.*

*78 Section 47 is a provision which keeps out certain transactions from the purview of section 45 and section 45 deals with capital gains. One such transaction is the transfer by way of conversion of bonds or debentures or debenture-stock or deposit certificates in any form of a company into shares or debentures of that company and the other is transfer by way of conversion of bonds referred to in clause (a) of sub-section (1) of section 115AC into shares or debentures of that company. This is, therefore, not a transfer as is evident from the reading of section*

47. However, the cost with reference to certain modes of acquisition is a matter dealt with by section 49 and where the capital asset becomes the property of the assessee on any distribution of assets on the total or partial partition of a Hindu undivided family or under a gift or will, by succession, inheritance or devolution, then, that is an aspect dealt with by sub-section (1). Where the capital asset being a share or shares in an amalgamated company which is an Indian company and that becomes property of the assessee in consideration of a transfer referred to in clause (vii) of section 47, the cost of acquisition of the asset shall be deemed to be the cost of acquisition to him of the share or shares in the amalgamating company and by (2A) where the the capital asset being a share or debenture of a company became the property of the assessee in consideration of a transfer referred to in clause (x) or (xa) of section 47, then the cost of acquisition of the asset to the assessee shall be deemed to be that part of the cost of bond or deposit certificate in relation to which such asset is acquired by the assessee.

79 Prior to the substitution, sub-section (2A) as inserted by Finance Act No.2 of 1991 with retrospective effect from 1st April, 1962, read as under:-

"(2A) Where the capital asset, being a share or debenture in a company, became the property of the assessee in consideration of a transfer referred to in clause (x) of section 47, the cost of acquisition of the asset to the assessee shall be deemed to be that part of the cost of debenture, debenture-stock or deposit certificates in relation to which such asset is acquired by the assessee."

80 A bare perusal of the unamended provision denotes that insofar as on introduction of clause (xa) of section 47 effective from 1st April, 2008 by the 2008 Finance Act, this sub- section (2A) of section 49 was also amended. Simultaneously, with the introduction of clause (xa) in section 47, this amendment has been effected. Therefore, though section 47 opens with the words "nothing contained in section 45 shall apply to the following provisions", section 49 provides for determination of cost with reference to certain modes of acquisition. Earlier, where the capital asset being a share or debenture in a company, became a property of an assessee in consideration of a transfer referred to in section 47, the determination of the cost of that acquisition was provided for. By the substituted sub-section (2A) of section 49, the cost of acquisition of the

*asset of the assessee shall be deemed to be that part of the cost of debenture, debenture-stock bond or deposit certificate in relation to which such asset is acquired by the assessee. The introduction of the word 'bond' and the word 'or' before the words "deposit certificate" with effect from 1st April, 2008 is thus crucial.*

*81 All this came once Chapter XII titled as "Determination of Tax in Certain Special Cases" had, by virtue of amendment with effect from 1st April, 2002 enabled imposition of tax on income from bond or global depository receipt purchased in foreign currency or capital gains arising from their transfer. Now, even in that part, while clauses (a) of sub-section (1), which deals with the total income by an assessee, being a non-resident, including what is provided by in clause (a) of sub-section (1) of section 115AC of the Income Tax Act, 1961 the legislature had in mind the scheme. In these circumstances, it is evident that any scheme prior thereto and particularly the one involved before us, namely, the FCCB Scheme notified by Central Government in 1993 and applicable with effect from 1st April, 1992 and enabling the computation of cost of acquisition, in terms thereof, was held to be unaffected. It was, therefore, possible to compute the cost in terms of the clauses of that scheme and which was admittedly an earlier scheme.*

*82 To our mind, therefore, Mr. Kaka is right in his contention that the revisional authority fell in clear error in taking assistance of the amendments made by the Finance Act, 2008. To our mind, Mr. Kaka is right in urging that the cost of acquisition of the shares was to be determined with reference to the date of acquisition of the FCCBs, then, the period for which the shares should be regarded as having been held by the petitioner- assessee should also be reckoned to the date of acquisition. He is right in urging that the second respondent failed to consider the scheme and therefore, once these clauses are included in the FCCB Scheme itself, then, they would govern the FCCB related transactions to the extent the corresponding provisions are not made in the Act. The authority was not right in holding that the cost of acquisition of the shares as per clause 7(4) of the FCCB Scheme is not tenable. Thus, the Government of India notified Scheme effected from 1992 held the field and was the applicable one. The FCEB Scheme has equal status but is admittedly a later one."*

10. Same view has been expressed by the Hon'ble Karnataka High Court in case of DIT vs. Intel Capital Corporation (supra).

11. It has been submitted before us by the learned counsel for the assessee that the assessee has adopted the cost of acquisition in terms of clause 7(3) and 7(4) of 1993 scheme, based on the data available in public domain. Thus, respectfully following the decision of the Hon'ble jurisdictional High Court noted above, we direct the AO to compute capital gain by following the method prescribed under clause 7(3) and 7(4) of the 1993 scheme (supra). In view of our decision above, other grounds including the additional grounds raised by the assessee challenging the validity of reopening of assessment having either become academic or consequential, do not require adjudication, hence dismissed.

12. In the result, appeal is allowed in the terms indicated above.

Order pronounced in the open court on 16<sup>th</sup> August, 2021.

Sd/-  
(PRAMOD KUMAR)  
VICE PRESIDENT

Sd/-  
(SAKTIJIT DEY)  
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 16/08/2021  
Alindra, PS

**आदेश 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
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /  
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai