

**IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC-A" BENCH : BANGALORE**

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER

ITA No.590/Bang/2017
Assessment year : 2007-08

Mr. N. R. Ravikrishnan, 11, Dwaraka, RBI Layout, J. P. Nagar, 8 th Phase, Bengaluru-560078. PAN: AAIPR6210P	Vs.	The Assistant Commissioner of Income Tax, Circle 15(1), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri. B. Sudheendra, CA
Revenue by	:	Smt. Swapna Das, JCIT

Date of hearing	:	18.05.2017
Date of Pronouncement	:	26.05.2017

ORDER

Per Sunil Kumar Yadav, Judicial Member

This appeal is preferred by the assessee against the order of the CIT(A), interalia, on following grounds:

1.1 The learned Assistant Commissioner of Income tax, Circle 15(1), Bengaluru ("assessing officer") has erred in passing the assessment order in the manner passed by him and the learned Commissioner of Income tax (Appeals) -5, Bengaluru has erred in sustaining the addition made by the

learned assessing officer. The order passed by the lower income tax authorities are bad in law and liable to be quashed.

1.2 The learned Additional Commissioner of Income tax, Range 15, Bangalore has erred in issuing directions under section 144A without satisfying the legal requirements. The impugned directions issued under section 144A being bad in law, the order passed under section 143(3) in accordance with the said directions is also bad in law and liable to be quashed. The learned Commissioner of Income tax (Appeals) -5, Bengaluru has erred in not adjudicating on this matter.

1.3 Even otherwise and without prejudice, the learned Additional Commissioner of Income tax, Range 15, Bangalore has erred in issuing directions prejudicial to the appellant without giving an opportunity of being heard and in violation of the proviso to section 144A. Further, the impugned directions having been issued after the last date of hearing, The impugned directions so issued and the order passed in accordance with the said invalid directions is bad in law and liable to be quashed. The learned Commissioner of Income tax (Appeals) -5, Bengaluru has erred in not adjudicating on this matter.

1.4 In any case and without prejudice, the learned Assistant Commissioner of Income tax, Circle 15(1), Bengaluru has erred in

- (i) Treating 6000 options transferred to Infosys Technologies Limited as short term capital asset instead of 2250 options as declared by the appellant in his return of income;*
- (ii) Assuming that the options were "exercised";*
- (iii) Construing date of transfer of options as the date of exercise of options;*
- (iv) Treating long term capital gains of Rs.20,41,672 from transfer of options as short term capital gains; and*
- (v) Denying exemption claimed under section 54EC in respect of long term capital gains of Rs. 20,41,672.*

The learned Commissioner of Income tax (Appeals) -5, Bengaluru has erred in confirming the aforesaid treatment.

1.5 The learned Assistant Commissioner of Income tax, Circle 15(1), Bengaluru and Commissioner of Income tax (Appeals) -5, Bengaluru have erred in not appreciating that

- (i) The options transferred to Infosys Technologies Ltd were transferred as such without 'exercising' the said options;*
- (ii) Factum of 'exercise' cannot be presumed or deemed to have taken place;*
- (iii) The options transferred were "capital asset" held by the appellant since the date of grant of options. Such options were transferred on the date on which the said options were transferred to Infosys Technologies Limited as a result of which the options*

were long term in nature and resulted in long term capital gains'.

1.6 The learned Commissioner of Income tax (Appeals) -5, Bengaluru has erred in stating that the appellant has received 7,250 shares from the employer Company M/s Infosys BPO Ltd on various dates at grant price under ESOP Scheme. This is factually incorrect as the appellant received 7,250 options (not shares) on different dates, out of which 1,250 options were exercised on 16.11.2005 and the remaining 6000 options were transferred as such (without exercising the options) under the option transfer agreement dated 07.03.2007.

1.7 On facts and in the circumstances of the case and law applicable, the assessment of capital gains of Rs.20,41,672 as short term capital gains is to be deleted and the gains are to be taken as long term capital gains and further exemption claimed u/s 54EC should be allowed as claimed in the return of income.

1.8 Without prejudice to the above, the learned Commissioner of Income tax (Appeals) - 5, Bengaluru has observed that 'exercise' of an option is the process by which an option is converted into shares by payment of exercise price. In the absence of any conversion of such nature in the present case, there is no occasion to reckon the period of holding from the date of exercise.

1.9 Without prejudice to the above, the learned Commissioner of Income tax (Appeals) - 5, Bengaluru has observed that since the date of exercise of option as well as date of sale is the same, there was no difference between the deemed cost of acquisition and the actual price realized by the appellant and thus there was no taxable gain. The capital gain on transfer of options is therefore not chargeable to tax.

1.10 The learned Assistant Commissioner of Income tax, Circle 15(1), Bengaluru has erred in levying interest under section 234D of the Act. On facts and in the circumstances of the case and law applicable, interest under section 234D is not leviable. The appellant denies its liability to pay interest under section 234D.

1.11 In view of the above and other grounds to be adduced at the time of hearing, the appellant prays that the order passed by the Assistant Commissioner of Income tax, Circle 15(1), Bengaluru and as affirmed by Commissioner of Income tax (Appeals) -5, Bengaluru be quashed and be held as bad in law or in the alternative

- (i) Capital gains of Rs. 20,41,672 be held as "long term capital gains"
- (ii) Exemption under section 54EC be allowed; and
- (iii) Interest under section 234D be deleted.

2. During the course of hearing, the learned Counsel for the assessee has assailed the assessment order computing the capital gains pursuant to the directions of the Additional CIT issued under section 144A of the IT Act (hereafter called the "Act"). The learned Counsel for the assessee further contended that as per provisions of Section 144A, the Additional CIT is required to afford an opportunity of being heard to the assessee before issuing such directions which are prejudicial to the assessee. The claim of the assessee with regard to the long term and short term capital gain was not accepted by the Additional CIT and the AO was directed to compute the short term capital gain on transfer of stock options by the assessee of the appellant company. The assessee has been granted stock options by the employer which was later on transferred to the employer against certain amount. The assessee claimed the long term capital gain on such transfers but the revenue has treated as short term capital gain. Since the directions of the Additional CIT was prejudicial to the interest of the assessee, an opportunity of being heard should have been afforded to him but it was not done. Therefore, the assessment framed consequent to the directions of the Additional CIT is not proper and deserves to be set aside.

3. The learned DR placed reliance upon the orders of the CIT(A) who has confirmed the orders of the AO after rejecting the contentions of the assessee.

4. Having carefully examined the orders of the lower authorities, in the light of the rival submissions, we find that under section 144A of the Act, a Joint Commissioner may on his motion or on reference being made to him by the AO or on the application of assessee, call for and examine the record of any proceedings in which an assessment is pending and, if he considers that, having regard to the nature of the case or the amount involved or for any other reasons, it is necessary or expedient so to do, he may issue such directions as he thinks fit for the guidance of the AO to enable him to complete the assessment and such directions shall be binding upon the assessing officer. The proviso to section says that no direction which are prejudicial to the assessee shall be issued before an opportunity is given to the assessee to be heard. Admittedly, the assessment was framed consequent to the directions issued by the Additional CIT and as per the directions, claim of the assessee for computing the long term capital gain was to be rejected and it was to be computed as a short term capital gain, meaning thereby that the directions of the Additional CIT was prejudicial to the assessee and before the issue of the same, an opportunity of being heard should have been afforded to the assessee as per the proviso to section 144A of the Act. Unfortunately the Additional CIT has not afforded any opportunity of being heard before issuing such directions. Thus I am of the view that capital gain computed pursuant to the directions of the Additional

CIT deserves to be set aside. I accordingly set aside the order of the AO passed consequent to the directions of the Additional CIT for computing the capital gain and restore the matter to the file of the AO to recompute the capital gain after affording an opportunity of being heard to the assessee. If the AO feels that the direction of Additional CIT is to be complied with, he may place the matter before the Additional CIT to first afford opportunity of being heard to the assessee and then readjudicate the issue afresh and directions be issued thereafter. Accordingly, the appeal of the assessee is allowed for statistical purposes.

5. In the result, the appeal of the assessee is allowed for statistical purposes.

Pronounced in the open court on 26th May, 2017.

Sd/-
(SUNIL KUMAR YADAV)
Judicial Member

Bangalore.
Dated: 26th May, 2017.
/NShylu/*

Copy to:

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| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR, ITAT, Bangalore. | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.