# SATURDAY INTERNATIONAL TAX GYAN !!!
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## SITG No. 218

## Nikesh Arora

## v.

## Deputy Commissioner of Income tax

Non- Resident acquired the right or interest in the CCPS of Indian companies and subsequently transfer of rights will not attract capital gain in India as citus outside India

10.08.2024

[2024] 165 taxmann.com 195 (Delhi - Trib.)[18-07-2024]

Jain Shrimal & Co.

# Facts of the Case

- Assessee is an Non-resident individual and employed with a US company SB Internet and Media Inc. (SIMI US), filed his return of income for the Assessment Year under consideration i.e. A.Y 2017-18 on 31.07.2017 declaring a total income of Rs. 431,21,34,020 and claiming a refund of Rs. 102,14,67,220.

- In the return of income during the year assessee has offered long term capital gain from transfer of rights in Compulsorily Convertible Preference Shares (CCPS) of two Indian companies i.e. Jasper Infotech Pvt. Ltd. (in short "Snapdeal") valued at USD 2,50,05,379 and ANI Technologies Pvt. Ltd. (in short "Ola") at USD 1,50,05,296.

# Assessee's Contention

- Assessee contended that right to acquire the title over shares were acquired on 29.12.2024 vide employment agreement. Further, such rights acquired in the shares of Indian companies were terminated vide agreement dated 01.02.2017 in exchange of cash payment.

- Further, assessee contended that right to acquire shares arose outside India and the transfer of rights over shares was also done outside India and hence capital gain is not taxable in India.

- Although assessee had offered the capital gain income to tax in his return of income, however while presenting the case before DRP, he stated that the situs of transfer is outside India and hence not taxable in India.

- Assessee stated that since the value in relation to transfer of rights over shares was not taxable in India then the disallowance of cost of acquisition under section 49(2AA) was ineffective.

# Revenue's Contention

- The revenue contented that rights over the shares were transferred to assessee after agreement dated 20.05.2015 and no share certificate demonstrate that shares were transferred to assessee in December 2014 and assessee has never been registered as shareholder.

- Revenue further contented that compensation received by assessee were never offered to tax in India as perquisite under section 17(2)(vi). When assessee offered capital gain then cost of acquisition claimed by the assessee in the income tax return to the amount of Rs. 267,86,47,829 should not be allowed.

- Revenue stated that date of acquisition of shares cannot be taken on the second employment agreement which was executed on 17.12.2014 because it is draft agreement for transfer of rights and same was amended in 2015.

- The revenue further referred the provision of section 2(42A) of the Act and considered the same as short term capital gain from transfer of rights held in shares as the period of holding is less than 36 months.

# Legal provisions

**Section 17(2)(vi) of the Act:**

2. perquisite includes,—

(vi) the value of any specified security or sweat equity shares allotted or transferred, directly or indirectly, by the employer, or former employer, free of cost or at concessional rate to the assessee.

**Section 49(2AA) of the Act:**

Where the capital gain arises from the transfer of specified security or sweat equity shares referred to in sub-clause (vi) of clause (2) of section 17, the cost of acquisition of such security or shares shall be the fair market value which has been taken into account for the purposes of the said sub-clause.

**Section 2(42A) of the Act:**

short-term capital asset" means a capital asset held by an assessee for not more than thirty-six months immediately preceding the date of its transfer.

Provided also that in the case of a share of a company (not being a share listed in a recognised stock exchange in India), or an immovable property, being land or building or both, the provisions of this clause shall have effect as if for the words "thirty-six months", the words "twenty-four months" had been substituted.

# Legal provisions

**Section 9 (1)(i) of the Act:**

The following incomes shall be deemed to accrue or arise in India :—

(i) 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.

Explanation 1.—For the purposes of this clause—

(a) in the case of a business, other than the business having business connection in India on account of significant economic presence, of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India ;

**Section 112 of the Act:**

Where the total income of an assessee includes any income, arising from the transfer of a long-term capital asset, which is chargeable under the head "Capital gains", the tax payable by the assessee on the total income shall be the aggregate of,

# Legal provisions

in the case of a non-resident (not being a company) or a foreign company,—

(i) the amount of income-tax payable on the total income as reduced by the amount of such long-term capital gains, had the total income as so reduced been its total income ; and

(ii) the amount of income-tax calculated on long-term capital gains [except where such gain arises from transfer of capital asset referred to in sub-clause (iii)] at the rate of twenty per cent; and

(iii) the amount of income-tax on long-term capital gains arising from the transfer of a capital asset, being unlisted securities or shares of a company not being a company in which the public are substantially interested, calculated at the rate of ten per cent on the capital gains in respect of such asset as computed without giving effect to the first and second proviso to section 48;

# Ruling

- It is evident from the facts that shares were never transferred in the name of assessee and assessee is not a legal owner of shares.

- From the facts submitted above, there is reason to believe that assessee entered into employment agreement on 17.12.2014 and on 29.12.2014 SIMI US assigned the rights and benefits of Snapdeal and Ola shares in favour Arora Trust, a pass through entity whose sole beneficiary is the assessee.

- Tribunal held that to qualify as long term capital asset, the assessee should have held it for a period exceeding 36 months. Factually, the rights and interests acquired by the assessee under the assignment deed were held for a period less than 36 months. Therefore, the **capital asset transferred by the assessee has to be treated as short term capital asset.**

- Further, assessee has acquired such right by virtue of the assignment agreement entered with SIMI US outside India and subsequently transferred such rights in the USA. Therefore, as per section 9 of the Income Tax Act **income derived from transfer of such capital asset is not taxable in India** and the tribunal relied on the decision of following case laws:
  - A & F Harvey Ltd. v. Commissioner of Wealth-tax [1977] 107 ITR 326 Madras
  - CWT v. Mrs. O.M.M. Kinnison [1986] 28Taxman 8A/161 ITR 824 (SC)

# Our Comments

- It is important to note that while dealing with any such situation we need to check as to what rights were received by assessee during the employment for which it had paid tax in USA.

- Further, the shares received by assessee were not ESOP but shares of other company and the compensation was received by way other than by cash.

- Further, could this not be taxable in India considering that the rights were deriving it's value from Indian shares and as per explanation 5 of section 9, if any share or interest derives its value from an Indian asset then such share or right will be deemed to be in India. Although Vodafone case was discussed in the judgement but it was not discussed at length and as to why explanation 5 was not attracted in this case or was it falling under other proviso which contains exception to explanation 5 being portfolio investor or institutional investor.

- 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:

# Tax in Pic

Indian company shares of snapdeal and Ola

Ownership of share transferred to SIMI US from its sister concern on 27.12.14

SB Internet and Media INC. (SIMI US)


company transfer the rights of assessee to the Arora Trust on 29.12.14 i.e. Assessee became the beneficial owner of trust

Company entered into agreement with assessee for transfer certain rights in Indian co. shares on 29.12.14 → Date of acquisition as per Assessee

Company entered into another agreement on 20.05.15 for assigning duty to assessee with regard to the UK company → Date of acquisition as per AO

on 1.02.17 vide termination agreement assessee has relinquished his rights or interest

Assessee i.e.. Mr. Nikesh Arora Non-Resident and employed with US company

- Assessee considered the transfer of rights as long term nature and the AO considered the same as short term capital gain as held for less than 36 months.
- Tribunal held that as assessee had acquired and relinquished rights of shares in Indian co. outside India. So, capital gain arise from such transfer will not be taxable in India.

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|---|---|
| **Section/Article** | Section 2(42A) read with 112 of IT Act |
| **DTAA/Country** | India USA |
| **Court** | Delhi Tribunal |
| **Date of decision** | 18.07.2024 |

**Note:** Case law name in Red- in favor of the revenue, Green-In favor of the Assessee, Orange = Partial


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