

**IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC-B” BENCH : BANGALORE**

BEFORE SHRI JASON P BOAZ, ACCOUNTANT MEMBER

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| ITA No.2348/Bang/2018 |
| Assessment year : 2007-08 |

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| Shri. N. R. Ravikrishnan, 11, Dwaraka, RBI Layout, J P Nagar 8 th Phase, Bengaluru – 560 078. PAN : AAIPR 6210 P | Vs. | Assistant Commissioner of Income Tax, Circle 3(3)(1), Bengaluru. |
| APPELLANT | | RESPONDENT |

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| Assessee by | : | Shri. Sudheendra B. R, Advocate |
| Revenue by | : | Smt. H. L. Soumya Achar, Addl. CIT |

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| Date of hearing | : | 20.09.2018 |
| Date of Pronouncement | : | 31.10.2018 |

ORDER

Per Jason P Boaz, Accountant Member

This appeal by the assessee is directed against the order of the CIT(A)-3, Bengaluru dated 13.07.2018 for Assessment Year 2007-08.

2. Briefly stated, the facts of the case are as under:

2.1 The assessee, an employee of Infosys BPO Ltd., during the year under consideration, filed his return of income for Assessment Year 2007-08 on 29.07.2007 declaring total income of Rs.25,03,015/-. The case was selected for scrutiny and the order of assessment was completed u/s 143(3) of the Income Tax Act, 1961 (in short ‘the Act’) vide order dated 31.12.2009, wherein the assessing officer (‘AO’) treated

the Long Term Capital Gains ('LTCG') arising on transfer of ESOP options amounting to Rs.20,41,672/- as Short Term Capital Gains ('STCG') and consequently denied the assessee deduction u/s 54 EC of the Act amounting to Rs.20,41,672/-. The assessee's appeal was dismissed by CIT(A) vide order dated 06.01.2017. On further appeal by the assessee, the Tribunal in order in ITA No. 590/Bang/2017 set aside the order of assessment passed by the AO consequent to the directions of the Addl. CIT, as the assessee was not provided any opportunity of being heard in the matter by the Addl. CIT before issuing such directions to the AO u/s 144A of the Act.

2.2 Subsequent thereto, the AO passed the order of assessment u/s 43(3) r.w.s. 254 of the Act dated 07.09.2013. In this order, the AO once again held that the LTCG on transfer of ESOP options amounting to Rs.20,41,672/- are to be treated as STCG and consequently denied the assessee deduction of Rs.20,41,672/- claimed u/s 54EC of the Act. On appeal, the CIT(A) dismissed the assessee's appeal vide the impugned order 13.07.2018.

3. Aggrieved by the order of CIT(A)-3, Bengaluru dated 13.07.2018 for Assessment Year 2007-08, the assessee has preferred this appeal before the Tribunal, wherein the following grounds are raised.

1.1 The learned Assistant Commissioner of Income tax, Circle 3(3)(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) -3, 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 Assistant Commissioner of Income tax, Circle 3(3)(1), Bengaluru has erred in

- (i) Treating 3750 options transferred to Infosys Technologies Limited as 'short term capital asset' instead of 'long term capital asset' 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)-3, Bengaluru has erred in confirming the aforesaid treatment.

1.3 The learned Assistant Commissioner of Income tax, Circle 3(3)(1), Bengaluru and Commissioner of Income tax (Appeals) -3, 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'.*

1.4 The learned Commissioner of Income tax (Appeals) -3, Bengaluru has erred in concluding that the period of holding of options cannot be counted from the date of granting of options as prior to vesting date, the appellant himself could not have exercised any such right.

1.5 The learned Commissioner of Income tax (Appeals) -3, Bengaluru has erred in not appreciating that the holding period of options should be considered from the date of grant of such options and the right to exercise options, right to transfer options, vesting date are all not relevant for ascertaining the holding period of the options.

1.6 The learned Commissioner of Income tax (Appeals) -3, Bengaluru has erred in not appreciating that the options were not transferred to an outsider but it was taken back by Infosys Technologies Ltd itself.

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 The learned Assistant Commissioner of Income tax, Circle 15(1), Bengaluru has erred in levying interest under section 234B and 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 234B and 234D.

1.9 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 3(3)(1), Bengaluru and as affirmed by Commissioner of Income tax (Appeals) -3, 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 234B and 234D be deleted.*

4.0 Ground Nos. 1.2 to 1.6

4.1 The learned AR for the assessee submitted that the issues for consideration in the aforesaid grounds (supra) relate to the treatment by the authorities below of LTCG on transfer of ESOP options amounting to Rs.20,41,672/- as STCG and consequent denial of deduction claimed by the assessee u/s 54EC amounting to Rs.20,41,672/-. Referring to Table 4 at Page 12 of the impugned order of the CIT(A), it was submitted by the learned AR that 6000 ESOP options were transferred to Infosys Technologies Ltd., out of which 3750 options were long term and 2250 options were short term in nature and the dispute in this appeal is in respect of 3750 options; out of which 1250 options were granted on 28.02.2003 and another 2500 options were granted on 02.02.2004. These 3750 options were transferred to Infosys Technologies Ltd., vide Option Transfer Agreement dated 07.03.2007. According to the learned AR, since the holding period for these 3750 options were more than 3 years, the gains are long term in nature and consequently, deduction u/s 54EC of the Act claimed by the assessee should also be allowed. In support of the above arguments/contentions that the transfer of 3750 options were long term in nature, the learned AR placed reliance on the following decisions of the ITAT, Delhi Benches:

- (i) ACIT Vs. Ambrish Kumar Jhamb in ITA No. 4107/Delhi/2011 dated 05.10.2012;
- (ii) Gopi G. Nambiar in ITA No. 1083/Delhi/2010 dated 27.06.2013
- (iii) Abhiram Seth in ITA No. 2302/Delhi/2010 dated 30.09.2011.

4.2 Per contra, the learned DR for Revenue placed reliance on the impugned order of the CIT(A) and submitted that the period of holding of these options for

computation of capital gains cannot be counted from the date of grant of ESOP options as prior to the vesting date, the assessee himself could not have exercised any such right. Therefore, according to the learned DR, the authorities below were justified in treating the capital gains on transfer of ESOP options as 'STCG' and thereby denying the deduction claimed by the assessee u/s 54EC of the Act.

4.3 In rejoinder, the learned AR submitted that the vesting and exercise of options are not relevant as in the case on hand, the ESOP options were transferred to Infosys Technologies Ltd., as such, without any exercise and since the period of holding was long term; therefore, it was a case of 'LTCG'. It is contended that the learned DR's argument would have been relevant had it been a case where ESOP options were exercised, shares allotted and subsequently if those shares are sold, then the gain from sale of shares would be 'STCG'.

4.4.1 I have considered the rival submissions and perused and carefully considered the material on record; including the judicial pronouncements cited. On an appraisal of the material on record it is not disputed that the assessee, an employee of Infosys BPO Ltd., was granted ESOP options, of which 6000 options were subsequently vide Option Transfer Agreement dated 07.02.2007 transferred to/bought back by Infosys Technologies Ltd., with Infosys BPO Ltd., as a confirming party. These 6000 options comprised of 1250 options granted on 28.02.2003; 2500 options granted on 02.02.2004 and 2250 options granted on 01.06.2005. The options granted on 28.02.2007 and 02.02.2004 were held for a period of more than 3 years before their transfer on 07.03.2007 and therefore the assessee treated the gains as 'LTCG' and claimed exemption u/s 54EC of the Act. The AO, however, held that the options have no value without their exercise and the gains derived by the assessee by transfer thereof, essentially represents the exercise by the assessee of the rights that the options had rendered to him. The CIT(A) held that as prior to the date of vesting the assessee himself could not have exercised right, the gains were short term in nature

i.e., 'STCG'. It is seen that both the authorities below have ignored the important fact that 3750 options were sold to Infosys Technologies Ltd., without any exercise of option. If ESOP options had been exercised, and the shares allotted thereby would have been sold after their allotment, then undisputedly the gains arising therefrom would have to be treated as STCG. In the case on hand, however, the 3750 options have been transferred as such, without any exercise of options. In the absence of exercise of options, no shares were allotted to the assessee. It is a case of buy back of ESOP options by Infosys Technologies Ltd., with Infosys BPO Ltd., the assessee's employer, as a confirming party. It is not in dispute that ESOP options provided valuable right to the assessee to exercise and have allotment of shares. They were thus 'capital asset' held by the assessee from the date of grant i.e., 28.02.2003 and 02.02.2004 for which a consideration was paid to the assessee under the option Transfer Agreement. The contention that the assessee cannot exercise option in the absence of vesting is not relevant as the options were transferred without any exercise in the case on hand.

4.4.2 On similar facts, the ITAT – Delhi Bench in the case of ACIT Vs. Ambrish Kumar Jhamb in ITA No. 4107/Del/2011 dated 05.10.2012 at paras 9 to 11 thereof held as under:

"9. Rival contentions heard. On a careful consideration of the facts and circumstances of the case, material on record and various case laws cited, we hold as follows:- The undisputed fact is that the assessee acquired the right in the form of employees stock option plan (ESOP) from Gillette Co. ESOP are cashless. The assessee surrendered these rights and obtained certain amount, being the difference of the price of shares between the date of grant and the date of surrender. On these facts, in our opinion the issues covered in favor of assessee by the decision of the Delhi Bench of the Tribunal in the case of Abhiram Seth vs. JCIT in ITA no.2302/Del/10 for Assessment Year 2004-05 (supra) wherein at para 7 it was held as follows:-

"7. We have heard rival submissions and gone through the entire material available on record. The facts have been narrated in detail above. A perusal of the clauses of

allotment clearly reveals that the particular number of shares were allotted to assessee in different years at different prices; only distinctive numbers were not allotted which has not been disputed by dept. The apparent benefit to assessee out of ESOPs scheme was that it had not to pay the purchase price immediately at the time of allotment but the same was to be deducted at the time of sale or redemption of shares. Since there was an apparent fixed consideration of ESOPs shares, the right to allotment of particular quantity of shares accrued to the assessee at relevant time. The benefit of deferment of purchase price cannot lead to an inference that no right accrued to assessee. The sales of such valuable rights after three years are liable to be taxed under the head long term capital gains and not short term capital gains. Commissioner of Income Tax (Appeals) out of conflicting ITAT judgements has preferred to rely on only favourable to revenue ie Jaswinder Singh Ahuja (supra), overlooking others and without commenting about the relevant facts. It has not been dealt on that acquisition of valuable rights in a property amounts to a capital asset. In case of Jaswinder Singh (supra), the shares were of the same company, whereas in this case there are group companies held through trustee and there were certain RBI guidelines about non payment of price of shares and the option being exercised by assessee on the date of sale of shares.

There was no trustee whereas in assessee's case there was a fixed price of allotment of rights to fixed quantity of shares and the indistinctive shares were held by a trust on behalf of assessee. Non-allotment of distinctive number of shares by trust cannot be detrimental to the proposition that assessee's valuable right of claiming shares was held in trust and stood sold by Pepsico. Therefore, there was a definite, valuable and transferable right which can be termed as a capital asset in favour of the assessee.

7.1. In our view, the assessee's claim of taxability of gains on the transfer of such rights under the head 'long term capital gains' is justified and deserves to be accepted. If we accept Assessing Officer's stand, then there will be no capital gain, if the date of allotment of share and sale thereof is the same, the price of purchase of shares cannot be the price paid for right which is not held as purchase, which becomes unascertainable. According to Assessing Officer, the earlier right of allotment does not constitute a purchase of shares and thus leads to a presumptive situation. In that case, as rightly observed by the ITAT in the case of Bomi S. Billimoria (supra), the purchase price will be unascertainable. If we apply the case of Dhurjati Gupta (supra), then allotment constitutes new right of purchase and the price will be same as the sale consideration. In both situations there will be no taxability.

7.2. In our view, these propositions are of no avail in so far as we have held that the assessee acquired a valuable and transferable right on these shares as on the respective dates in 1995-96 to 1999-2000, as mentioned above. The cases of Bomi S Billimoria (supra) and Dhurjati Gupta (supra), are squarely applicable in favour of

assessee. The right of shares constitute capital assets and the gains should be taxed as long term capital gains as the holding period is more than 3 years. We reverse the orders of lower authorities on this issue, treating the gains as short term capital gains. The ground is allowed."

10. Coming to the decisions relied upon by the Ld. DR in the case of Giridhar Krishna M vs. ACIT, Bangalore B Bench (2008) 117 ITJ (Bang.) 965; 307 ITR (AT) 0068, the assessee had first exercised the option to purchase shares on 7th November, 2002 and thereafter transferred these shares so acquired in April, 2003. In these circumstances the Tribunal has held that the right conferred by means of a grant and indicating the period within which the employee could subscribe to the shares are indicators of the fact that the assessee could exercise the option within the specific period and to the extent indicated in that period. On the expiry of the period, the option automatically lapses unless the employee agrees to extend the period. It held that the dates of grant and vesting are relevant because they do not result in any share acquisition and that acquisition of shares happens only when the assessee exercises his option and is allotted the specific number of shares. In the case on hand the assessee has not been allotted any shares nor has he acquired them. He had surrendered the right to exercise the option for purchase of shares. Thus the case law is not applicable.

11. In the case of Vijay Jindal (supra), the assessee was issued equity warrant certificates and the assessee made payments for acquiring of shares in lieu of warrants. The same is not the position in the case on hand. The First Appellate authority has in an Annexure to his order analysed the period of holding. We uphold the findings based on this analysis and dismiss the appeal to the Revenue."

4.4.3 Similarly, in the case of Gopi G. Nambiar Vs. JCIT, the ITAT Delhi in its order in ITA No. 1083/Del/2010 dated 26.07.2013, at paras 9 and 10 thereof has held as under:

"10. On merits the date of grant of stock options was 11.02.2002 and 17.12.2002 respectively and these stock options were sold by the assessee on 13.04.2006 and 02.02.2007 respectively. The issue is whether the gain in question is a short term capital gain or long term capital gain. The Tribunal in the case of Mr. Purwez Rusi Patel (supra) followed the decision of the Coordinate Bench of the Tribunal in the case of Param Paul Uberoi (supra) and held that the date of acquisition of ESOP is to be taken as the date when the option was given to the assessee. In other words the Tribunal in these decisions has held that the assessee acquired a valuable right on the date of grant and this valuable right, which is capital asset, when sold after 3 years, was liable to be taxed under the head "Long term capital Gain". The valuable right which is a capital asset is held for more than 36 months by the assessee making it a

long term capital asset. The decision in the case of Shri Jaswinder Singh Ahuja (supra) relied upon by the revenue was considered by the Bench in the case of Abhiram Seth (supra). At para 7.1 and 7.2 the Tribunal in the case of Abhiram Seth Vs. JCIT, held as follows:-

"7.1. In our view, the assessee's claim of taxability of gains on the transfer of such rights under the head 'capital gains' is justified and deserves to be accepted. If we accept Assessing Officer's stand, then there will be no capital gain; if the date of allotment of share and sale thereof is the same, the price of purchase of shares cannot be the price paid for right which is not held as purchase, which becomes unascertainable. According to Assessing Officer, the earlier right of allotment does not constitute a purchase of shares and thus leads to a presumptive situation. In that case as rightly observed by the ITAT in the case of Bomi S Billimoria (supra), the purchase price will be unascertainable if we apply the case of Dhurjati Gupta (supra), then allotment constitutes new right of purchase and the price will be same as the sale consideration. In both situations there will be no taxability.

7.2. In our view, these propositions are of no avail insofar as we have held that the assessee acquired a valuable and transferable right on these shares as on the respective dates in 1995-96 to 1999- 2000, as mentioned above. The cases of Bomi S.Billimoria (supra) and Dhurjati Gupta (supra), are squarely applicable in favour of assessee. The right of share constitute capital assets and the gains should be taxed as "Long term capital gains", as the holding period is more than 3 years. We reverse the orders of lower authorities on this issue, treating the gains as short term capital ;gains. The ground is allowed."

10. Respectfully following the same we allow this ground of the assessee and direct the AO to tax the gain in question under the head "long term capital gain"."

4.4.4 In view of the facts and circumstances of the case, as discussed above, I hold that the capital gain arising from the transfer of 3750 options amounting to Rs.20,41,672/- should be considered as LTCG. The AO is accordingly directed. Consequently, grounds 1.2 to 1.6 are allowed.

5. Ground No. 1.7 - Deduction u/s 54EC of the Act

5.1 This ground is raised in respect of the assessee's claim for deduction u/s 54EC of the Act. There is no dispute in the matter that the deduction claimed u/s 54EC of

the Act is to be allowed to the assessee as the AO in the original order of assessment for Assessment Year 2007-08 passed u/s 143(3) of the Act vide order dated 31.12.2009 on page 2 at para 5 thereof has recorded that the Assessee's claim for deduction u/s 54EC of the Act is to be allowed. The relevant portion at para 5 of the order of assessment is extracted hereunder:

"05 He has claimed exemption u/s 54EC and the same is accepted as the requisite proof for investment in REC Bonds is placed in the file."

6. Ground No. 1.8 – Charging of Interest u/s 234B and 234D

6.1 In this ground, the assessee denies itself liable to be charged interest u/s 234B and 234D of the Act. The charging of interest is consequential and mandatory and the AO has no discretion in the matter. This proposition has been upheld by the Hon'ble Apex Court in the case of Anjum H. Ghaswala (252 ITR 1) (SC) and I therefore uphold the AO's action in charging the same. The AO is however directed to re-compute the interest chargeable u/s 234B and 234D of the Act, if any, while giving effect to this order.

7. In the result, the assessee's appeal for Assessment Year 2007-08 is allowed.

Pronounced in the open court on this 31st day of October, 2018.

Sd/-

(JASON P BOAZ)
Accountant Member

Bangalore.

Dated: 31st October, 2018.

/NS/*

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore.