

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 14 of 2004
WITH
TAX APPEAL NO. 6 of 2004
WITH
TAX APPEAL NO. 1295 of 2010

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI

and

HONOURABLE MR.JUSTICE K.J.THAKER

- =====
- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?
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C.I.T.-I....Appellant(s)

Versus

BHARAT V. PATEL....Opponent(s)

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Appearance:

MR KM PARIKH, ADVOCATE for the Appellant(s) No. 1
 MR BS SOPARKAR, ADVOCATE WITH MRS SWATI SOPARKAR,
 ADVOCATE for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**
 and
HONOURABLE MR.JUSTICE K.J.THAKER

Date : 23/12/2014

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. Being aggrieved and dissatisfied with the impugned judgment and order passed by the Income Tax Appellate Tribunal, Ahmedabad Bench (hereinafter referred to as 'the Tribunal'), the revenue/assessee have preferred the present Tax Appeals assailing the following orders

Tax Appeal No.	At the Instance of	Date of Tribunal's order	ITA No.	Assessment Year
14 of 2004	Revenue	27.06.2003	2241/Ahd/2002	1998-99
06 of 2004	Assessee	27.06.2003	2241/Ahd/2002	1998-99
1295 of 2010	Revenue	18.01.2010	1645/Ahd/2006	2002-03

1.1 These appeals were admitted by this Court for consideration of the following substantial questions of law:

Tax Appeal No. 14 of 2004

"Whether the Income Tax Appellate Tribunal was correct in treating the sum of Rs.6,80,40,724/- being the amount received on

redemption of Stock Appreciation Rights (SARs) as capital gain as against treated as perquisite under Sec.17(2)(iii) of the I.T. Act or under Sec. 28(iv) of the Act purportedly on the ground that the employer - employee relationship did exist between the assessee and Procter & Gamble Co., U.S.A. (PG - USA)."

Tax Appeal No. 6 of 2004

"Whether in the facts and on the circumstances of the case, the ITAT was right in law in holding that capital gain arose to the appellant on redemption of Stock Appreciation Rights which were having no cost of acquisition?"

Tax Appeal No. 1295 of 2010

"Whether the Appellate Tribunal is right in law and on facts in treating the sum of Rs.20,33,916/- being the amount received on exercising the option of Employee's Stock Option Plan (EOSP) as long term capital gains instead of treating the same as short term capital gains?"

2. The common facts involved in these appeals are that while filing the return of income, the assessee made addition of amount received on redemption of Stock Appreciation Rights as a perquisite u/s. 17(2)(iii) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'). The moot question involved in these appeals is as to whether the gain arising out of such transactions is to be considered as

short term capital gain or long term capital gain. The Tribunal in these appeals has opined that stock options are capital assets and assets acquired for consideration and gain therefrom is liable to capital gain tax which is challenged by the assessee in these appeals. The revenue is aggrieved by the finding of the Tribunal that the amount in question was not taxable as salary and perquisite under section 17(2)(iii) of the Act or even alternatively under section 28(iv) of the Act.

3. Mr. B.S. Soparkar, learned advocate appearing on behalf of the assessee has submitted that as such the questions of law raised in the present Tax Appeals are now not *res integra* in view of the decision of the Honble Supreme Court in the case of **Commissioner of Income Tax, Bangalore vs. Infosys Technologies Ltd reported in (2008) 297 ITR 167 (SC)** wherein the Hon'ble Supreme Court has held as under.

“7. During the assessment years 1997-98, 1998-99 and 1999- 2000 there was no provision in the said 1961 Act which made the benefit by way of ESOP taxable as income specifically. It became specifically taxable only with effect from 1.4.2000 when Section 17(2)(iiia) stood inserted.

9. The question for consideration is whether perquisite could be said to accrue at the time when warrants were granted or at the time when the option vested in the employee or at the time when the options stood exercised or at the time when the lock-in conditions were removed or at the time when the shares were to be sold in the share market. According to the AO, the perquisite value was the difference between the total amount paid by the employee(s) consequent to the exercise of option amounting to Rs. 6.46 crores on which date the market value of the shares was in all Rs. 171 crores. Therefore, according to the AO, the benefit arose on the date when the options stood

exercised. In this case we are concerned with the period prior to 1.4.2000.

12. We also do not find merit in the contention advanced on behalf of the Department that Section 17(2)(iiia) inserted by Finance Act, 1999 w.e.f. 1.4.2000 was clarificatory and, therefore, retrospective in nature.

15. In the case of [Commissioner of Income-Tax, Bangalore v. B.C. Srinivasa Setty](#) [(1981) 128 ITR 294 (SC)] this Court held that the charging section and computation provision under the 1961 Act constituted an integrated code. The mechanism introduced for the first time under the Finance Act, 1999 by which cost was explained in the manner stated above was not there prior to 1.4.2000. The new mechanism stood introduced w.e.f. 1.4.2000 only. With the above definition of the word cost introduced vide clause (iiia), the value of option became ascertainable. There is nothing in the Memorandum to the Finance Act, 1999 to say that this new mechanism would operate retrospectively. Further, a mechanism which explains cost in the manner indicated above cannot be read retrospectively unless the Legislature expressly says so. It was not capable of being implemented retrospectively. Till 1.4.2000, in the absence of the definition of the word cost, value of the option was not ascertainable. In our view, clause (iiia) is not clarificatory. Moreover, the meaning of the words specified securities in section (iiia) was defined or explained for the first time vide Finance Act, 1999 w.e.f. 1.4.2000. Moreover, the words allotted or transferred in clause (iiia) made things clear only after 1.4.2000. Lastly, it may be pointed out that even clause (iiia) has been subsequently deleted w.e.f. 1.4.2001. For the aforesaid reasons, we are of the view the clause (iiia) cannot be read as retrospective. “

3.1 Thus, in the aforesaid decision the Hon'ble Supreme Court has held that in the absence of legislative mandate a potential benefit could not be considered as 'income' of the

employee(s) chargeable under the head 'Salaries'.

4. Mr. K.M. Parikh, learned advocate on behalf of the Department is not in a position to dispute the above and is not in a position to show and/or point out any contrary decision.

5. Having heard Mr. Parikh, learned advocate appearing on behalf of the Department and Mr. Soparkar, learned advocate appearing on behalf of the assessee and the questions posed for consideration before us reproduced hereinabove and considering the decision of the Hon'ble Supreme Court in the case of **Infosys Technologies Ltd. (Supra)**, the questions, which are raised in the present appeals are required to be answered in favour of the assessee. We are not giving further elaborate reasons for the same as in the case of **Infosys Technologies Ltd. (Supra)** it is held by the Hon'ble Supreme Court that the revenue had erred in treating amount being difference in market value of shares on the date of exercise of option and total amount 'paid' by employees consequent upon exercise of the said options as perquisite value as during the lock-in period there was no cash inflow to employees to foresee future market value of shares and the benefit if any which arose on date when option stood exercised was only a notional benefit whose value was unascertainable.

6. In view of the above, the questions raised for consideration in the present appeals are answered in favour of the assessee and against the revenue. The Tribunal was correct in treating the amount received on redemption of Stock Appreciation Rights as capital gain as against treated as

perquisite under Sec.17(2)(iii) of the I.T. Act and in treating the amount received on exercising the option of Employee's Stock Option Plan (EOSP) as long term capital gains instead of treating the same as short term capital gains. However, the Tribunal was not justified in holding that capital gain arose to the assessee on redemption of Stock Appreciation Rights which were having no cost of acquisition. Tax Appeals stand disposed of accordingly.

(K.S.JHAVERI, J.)

(K.J.THAKER, J)

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