IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'D' NEW DELHI

SHRI G.S. PANNU, VICE-PRESIDENT
AND
SHRI SAKTIJIT DEY, VICE-PRESIDENT

ITA No.1008/Del/2022
Assessment Year: 2017-18

Sh. Nikesh Arora, Dhruva Advisors LLP, 101-102, Tower 4B, MG Road, DLF Corporate Park, Gurgaon, Haryana	**Vs.**	DCIT, International Taxation, HSIIDC Building, Vanijya Nikunj, Udyog Vihar, Phase-V, Gurgaon, Haryana
PAN :ATPPA9880Q		
(Appellant)		**(Respondent)**

Assessee by	Sh. Ajay Vohra, Sr. Adv. Sh. Vijay Mehta, CA Ms. Asmita Dsovza, CA Sh. Dinesh Kanabar, CA
Department by	Sh. Vijay B. Vasanta, CIT(DR)

Date of hearing	19.04.2024
Date of pronouncement	18.07.2024

ORDER

PER SAKTIJIT DEY, VICE-PRESIDENT

Captioned appeal has been filed by the assessee challenging the final assessment order dated 14.03.2022 passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (in short 'the Act'), pertaining to assessment year 2017-18,

in pursuance to directions of learned Dispute Resolution Panel (DRP).

2. Before we proceed to deal with the substantive issues arising in the appeal, it is necessary to observe, a complaint dated 07.04.2023 addressed to the President, Income Tax Appellate Tribunal was received from one Sh. Babloo Chawhan, wherein, he has alleged bogus evasion and fraudulent transaction by the assessee concerned and bogus refund claimed on misrepresentation of facts. Copy of the complaint was handed over both to the assessee and the Revenue to offer their comments. While the assessee has completely denied the allegations made in the complaint, the Assessing Officer has furnished a report through letter dated 22.05.2023 addressed to learned CIT(DR). The report furnished by the Assessing Officer is in two parts. The first part contains the details of assessment proceedings, whereas, in the second part, the Assessing Officer has offered para-wise comments on the complaint, which read as under:

> "Bogus refund claim of Rs.102 crores and misrepresentation of facts by Nikesh Arora:- In this para the applicant stated the brief history of Sh. Nikesh Arora, his employer and transactions related to shares of M/s

Jasper Infotech Pvt. Ltd. (SNAPDEAL) and ANI Technologies Pvt. Ltd. (Ola). Therefore, no comments are required.

1. Transaction in the shares of ANI through SIMI PACIFIC:- The main contention of the applicant in this para is that the transactions related to acquiring shares of ANI Technologies are covered u/s 2(42A) of the Income Tax Act, 1961 and gain accrued is short term capital gain. In this regard, it is to state that while passing the assessment order, the AO disallowed the claim of the assessee and held gain on transactions of shares as short term capital gain which is stated above in brief facts of the case.

2. Fraudulent nature of the share transaction and evasion on tax in USA by Nikesh and Soft Bank:- In this para, the applicant alleged for tax evasion by the assessee and Soft Bank in USA which is out of jurisdiction. Therefore, no comments are required.

3. Evasion of tax by SIMI PACIFIC in India :- In this para, the applicant has made allegations on SIMI PACIFIC for tax evasion in India for said transactions which is not related to the assessee. Therefore, no comments are required.

4. Transaction by Nikesh in Jasper (SNAPDEAL) Shares :- The main contention of the applicant in this para is that the transactions related to acquiring shares of Jasper (SNAPDEAL) are covered u/s 2(42A) of the Income Tax Act, 1961 and gain accrued is short term capital gain. In this regard, it is to state that while passing the assessment order, the AO disallowed the claim of the assessee and held gain on transactions of shares as short term capital gain which is stated above in brief facts of the case.

5. Fradulent nature of transaction in JASPER (SNAPDEAL):- In this para, the applicant alleged for tax evasion by the assessee in USA which is out of jurisdiction. Therefore, no comments are required.

6. Income Tax evasion by STARFISH1PTE Ltd. Singapore :- In this para, the applicant has made allegations on STARFISH1PTE Ltd. Singapore for tax evasion in India for said transactions which is not related to the assessee. Therefore, no comments are required."

3. Having taken note of the comments of the Assessing Officer, we are of the view that no further action needs to be taken on the complaint. Accordingly, we proceed to dispose of the appeal on merits.

4. On going through the grounds of appeal raised by the assessee, it is observed that the following two core issues arise for consideration:

(i) What is the nature of capital gain, whether long term or short term.

(ii) Whether the capital gain is taxable in India.

(iii) Whether the deduction on account of cost of acquisition in relation to transfer of capital asset is allowable or not.

5. For deciding these issues we need to discuss the relevant facts. Briefly stated, the assessee is a Non Resident Indian(NRI) individual and a resident of United States of America (USA). For the assessment year under dispute, the assessee filed his return of income on 31.07.2017 declaring total income of Rs.431,21,34,020/- and claiming refund of Rs.102,14,67,220/-.

Assessee's case was selected for scrutiny. In course of assessment proceedings, the Assessing Officer made a reference to FT & TR Division seeking further information. After receiving such information as well as other details called from the assessee, the Assessing Officer proceeded with the assessment proceedings. While verifying the return of income filed and other details furnished by the assessee, he noticed that the assessee has offered long term capital gain from transfer of Compulsorily Convertible Preference Shares (CCPS) of two Indian companies, viz., Jasper Infotech Pvt. Ltd. (in short "Snapdeal") valued at USD 25,005,379 and ANI Technologies Pvt. Ltd. (in short "Ola") at USD 15,005,296. He further noticed that these shares were received by the assessee through a share transfer agreement executed on 17th December, 2014. He observed that the assessee has treated the capital gain as long term by considering the period of holding exceeding 24 months from December, 2014 to 1st February, 2017. Accordingly, he has computed the capital gain and resultant tax liability in accordance with section 112(1)(c)(iii) of the Act read with Rule 115.

6. From the details furnished by the assessee, he observed that the assessee has computed the period of holding by taking into consideration the Second Amended and Restated Executive Employment Agreement dated 17.12.2014 and Termination Agreement dated 1st February, 2017. On perusing the agreements, the Assessing Officer observed that the Second Amended and Restated Executive Employment Agreement dated 17.12.2014 is only a draft agreement, hence, cannot be considered as final agreement for transfer of shares. He further observed that the actual transfer of shares happened by a Third Amended and Restated Executive Employment Agreement dated 20th May, 2015.

7. Thus, according to the Assessing Officer, the period of holding of shares was less than 24 months. Hence, the gain derived from the transfer of shares has to be treated as short term capital gain. In similar lines, he issued a show-cause notice to the assessee to explain, why the gain derived from transfer of shares should not be taxed as short term capital gain. In response to the said show-cause notice, the assessee furnished a detailed reply reiterating its position that the period of holding of the assets

being more than 24 months, the gain derived has to be treated as long term capital gain. The Assessing Officer, however, did not accept assessee's submission. He observed that the agreement dated 17.12.2014 is merely a draft agreement, hence, cannot be considered as final agreement. Thus, he observed that the assessee did not acquire the shares through agreement dated 17.12.2014.

8. Further, according to the Assessing Officer, on 27th December, 2014, even assessee's employer company SB Internet and Media Inc., USA (in short "SIMI US") did not have ownership of the shares as the shares were transferred to SIMI US on 27th December, 2014 by its sister concerns SIMI PACIFIC and Starfish1. He observed, the third agreement between SIMI US and the assessee executed on 20.05.2015 is the last and final properly executed agreement. Hence, is applicable to the transaction for grant of shares. He observed, the transfer of right over the shares to the assessee was given after agreement dated 20.05.2015. While coming to such conclusion, the Assessing Officer alleged that the assessee has not produced any share transfer certificate to demonstrate that shares were transferred to him in December,

2014. In this context, he observed that in response to the notices issued under section 133(6) of the Act, the Indian companies have confirmed that the assessee was not a registered shareholder during the period December, 2014 to May, 2015. He observed, no document evidencing transfer of shares w.e.f. 29.12.2014 has been produced by the assessee. Thus, ultimately the Assessing Officer concluded that the gain derived from sale of shares has to be treated as short term capital gain.

9. Having held so, he proceeded further to hold that no cost of acquisition can be allowed while computing capital gain in view of the provisions contained under section 49(2AA) read with section 17(2)(vi) of the Act. According to the Assessing Officer, the salary compensation received by the assessee amounting to USD 40,009,677 from SIMI US was offered to tax in the tax return in US, whereas, no tax has been offered in India. Thus, he held that there is no tax base in India for claiming cost of acquisition. He observed, as per section 49(2AA) of the Act, for claiming cost of acquisition of shares, the value should be fair market value, which has been taken into account as per section 17(2)(vi) of the Act under the head 'income from salary'. Referring to section 15

read with section 17 of the Act, the Assessing Officer observed that salary includes perquisites for taxation in India. He observed, the salary income of the assessee has been taxed in USA. Therefore, it has no tax base in India.

10. That being the case, according to the Assessing Officer, the assessee has not offered any tax in India, as per section 17(2)(vi) of the Act. Hence, it cannot claim benefit of cost of acquisition as per section 17(2)(vi) read with section 49(2AA) of the Act. Thus, he disallowed cost of acquisition claimed by the assessee to the tune of Rs.267,86,47,829/-. Accordingly, he framed the draft assessment order. Against the draft assessment order, the assessee raised objections before learned DRP. However, learned DRP did not interfere. Accordingly, the Assessing Officer passed the final assessment order.

11. Before us, learned counsel appearing for the assessee submitted that the Employment Agreements dated 16.07.2014, 17.12.2014 and 20.05.2015 merely record the terms of employment and do not record acquisition of any asset by the assessee. He submitted, the agreements contain a promise by the employer to assessee for employment compensation and do not

establish the transfer of any consideration either by cash or through shares. He submitted, it is the assignment deed dated 29.12.2014 with SIMI US which creates certain rights in favour of the assessee. Therefore, he submitted, whatever capital assets acquired by the assessee, whether shares or rights in the shares, were acquired by the assessee on 29.12.2014. He submitted, the Employment Agreement dated 20.05.2015 was entered into for assigning duty to the assessee with regard to UK affiliated company. He submitted, other clauses of the Agreement including the clause pertaining to shares of Indian Companies were merely copied from the earlier employment agreements. He submitted, since, there are no other agreements transferring any right to the assessee before or after 29.12.2014, it cannot be said that date of acquisition of shares was 20.05.2015 or thereafter.

12. He submitted, the fact that the capital gain has arisen on account of transfer vide Agreement dated 01.02.2017 has not been disputed by the departmental authorities. He submitted, the agreement dated 01.02.2017 clearly says that the assessee has relinquished his rights being interest, which has been defined as right to acquire the legal title of shares. He submitted, the right to

acquire the legal title over shares was acquired by the assessee vide assignment deed dated 29.12.2014, which is specifically mentioned in the Termination Agreement dated 01.02.2017. Thus, he submitted, once it is accepted that the capital gain has arisen on account of transfer of rights in respect of shares, the date of acquisition has to be 29.12.2014, as there is no other date, event or document correlating the acquisition.

13. Learned counsel submitted, as per section 2(42A) of the Act, a short term capital asset is an asset held by an assessee for not more than 36 months immediately preceding the date of its transfer. However, he submitted, as per the third proviso to section 2(42A) of the Act, in respect of unlisted security, asset will qualify as short term capital asset if it is held for less than 24 months. He submitted, the expression 'held' used in section 2(42A) of the Act does not refer to legal ownership of the capital asset. He submitted, as per the meaning of the expression 'held', the date on which the assessee acquired the interest in the capital asset would be reckoned as the starting point for determining the period of holding, notwithstanding that the assessee may not have acquired prefect legal title over the capital asset in the

absence of registration/conveyance in favour of the assessee, as required under the applicable law. In support of such contention, he relied upon a decision of the Hon'ble Bombay High Court in case of CWT v. C. Rai [1979] 119 ITR 553. In this context, he also relied upon a decision of Special Bench of the Tribunal in case of Des Raj Nagpal Vs. ITO, 13 ITD 800. He submitted, the expression 'held' cannot be equated with ownership. In this context, he relied upon a decision of the Hon'ble Supreme Court in case of Mysore Minerals Ltd. Vs. CIT, 239 ITR 775. Learned counsel submitted, the assessee enjoyed complete bundle of rights attached to the CCPS. He submitted, SIMI USA/Singapore entities merely held the shares in their names. However, they could not have alienated the shares to others. Therefore, the assessee, being the beneficial owner of the shares, should be construed to have held the capital asset from 29th December, 2014 till the date of its transfer, which exceeds the period of 24 months.

14. Without prejudice, learned counsel submitted, what is the nature of capital asset transferred by the assessee needs to be examined. He submitted, the fact that the capital asset was

transferred by virtue of Termination Agreement dated 01.02.2017, thereby giving rise to capital gain, has not been disputed either by the assessee or by the Assessing Officer. The Termination Agreement dated 01.02.2017 clearly says that assessee's interest in the direct investment equity award will be fully and completely extinguished in exchange for cash payment from the Soft Bank group. Thus, he submitted, the Termination Agreement clearly speaks of payment towards extinguishment of interest and not sale or transfer of shares. Thus, he submitted, the assessee had not acquired any ownership of the shares, nor he has acquired any rights in the shares or right to proceed against the Indian companies.

15. He submitted, the assessee has only acquired the rights to proceed against the non-resident US company, which arises out of agreements entered into outside India. He submitted, as per section 9(1) of the Act, capital gain through the transfer of a capital asset situated in India is deemed to accrue and arise in India. He submitted, all the Employment Agreements pursuant to which assessee's right to acquire or right to obtain shares arose were entered outside India and were subject to the US

jurisdiction. Therefore, situs of assessee's interest or rights to acquire shares, which is a capital asset, is outside India. He submitted, since, the assessee has transferred his interest/rights over the shares, which is situated outside India, capital gain is not taxable in India. In support of such contention, he relied upon the following decisions:

(*1) Vodafone International Holding B.V. Vs. Union of India [2012] 17 taxmann.com 202 (SC)*

(2) A & F Harvey Ltd. Vs. CWT (107 ITR 326)

(3) CWT Vs. O.M.M. Kinnison [1986] 161 ITR 824 (SC)

16. However, he submitted, if the asset is held as shares, as the Assessing Officer has held, the assessee does not have any objection to suffer tax liability of long term capital gain arising out of sale of shares.

17. As regards the issue of denial of cost of acquisition, learned counsel submitted, the purpose of section 49(2AA) read with section 17(2)(vi) is to restrict the quantum of deduction to the amount taxed under the Act at the time of receipt of specified security. However, it is not the purpose that the cost of acquisition has to be denied completely. He submitted, the

assessee, being a non-resident at the time of acquisition of shares and the acquisition having taken place outside India, is not taxable, at all. Accordingly, the cost of acquisition, being consideration paid by him in terms of the Employment Agreement, is allowable to the assessee as per the provisions of section 48 of the Act. He submitted that since the value of shares was not taxable at all, the question of finding out the correct amount of deductible cost based on section 49(2AA) and section 17(2)(vi) of the Act is futile.

18. Learned Departmental Representative submitted, the date of acquisition of shares cannot be taken to be the Second Employment Agreement executed on 17.12.2014 as it is merely a draft agreement. He submitted, from the Third Employment Agreement executed on 20.05.2015 till the date of its transfer on 01.02.2017, the period of holding is less than 24 months. Therefore, the gain derived from sale of such asset has to be treated as short term capital gain. Without prejudice, learned Departmental Representative submitted, the assessee never had any legal ownership right or title over the share. He submitted, the shares were never transferred to the name of the assessee. He

submitted, in the records of the Indian companies, whose shares the assessee claims to have acquired; the assessee has never been registered as a shareholder. He submitted, the assessee has not furnished any evidence to demonstrate that the shares were transferred to assessee's name. Thus, he submitted, the claim of the assessee that it had acquired the shares is totally misconceived. He submitted, what the assessee had acquired through the employment agreement and assignment deed is a certain right in shares, which stood extinguished on transfer of such rights through the termination deed. He submitted, though, such right is a capital asset, however, it cannot be equated to share/security of a company. Therefore, it has to be treated as short term capital asset if it is not held for a period exceeding 36 months immediately preceding the date of transfer. He submitted, in the facts of the present case, admittedly, the capital asset held by the assessee, being certain rights and interest in the shares, were held by the assessee for a period less than 36 months. Therefore, the asset has to be treated as short term capital asset.

19. As regards the contention of assessee that since what the assessee has transferred is merely interest/right in shares and

not the shares itself, therefore, situs of such interest/right over the shares being situated outside India is not taxable in India, learned Departmental Representative drew our attention to Explanation-2 to section 2(47) of the Act and submitted, since the underlying assets are shares of Indian companies, the capital gain is taxable in India. So far as the issue of deduction of cost of acquisition, learned Departmental Representative relied upon the observations of the Assessing Officer and learned DRP.

20. We have considered rival submissions, both oral and in writing, in the light of decisions relied upon and perused the materials on record. Undisputedly, the assessee is a NRI and a resident of USA. On 16.07.2014, the assessee entered into an Employment Agreement with Soft Bank Corp., a Japanese Co. and was employed with one of its group entities in USA, being SIMI US, as President and Chief Executive Officer and most Senior Executive Officer. On 17.12.2014, the assessee entered into a Second Amended and Restated Executive Employment Agreement with Soft Bank Corp. As per clause (2) of the said agreement, in addition to base salary of USD 9 Million, the assessee, amongst others, was to receive some other

award/benefits including USD 55 million in the form of cash and equity comprising of USD 15 million in lump sum cash payment and fully vested shares of Jasper Infotech Pvt. Ltd. (Snapdeal) having aggregate value of USD 25 million and fully vested shares of ANI Technologies Pvt. Ltd. (Ola) having aggregate value of USD 15 million with number of shares determined based on USD per shares purchase price of those shares originally paid by the company or its affiliates. On 29.12.2014 SIMI US assigned the rights and benefits of Snapdeal and Ola shares in favour of Arora Trust, a pass through entity whose sole beneficiary is the assessee.

21. As could be seen from the aforesaid Employment Agreements and the Assignment Deed of SIMI US, the shares of Snapdeal and Ola were held through investment by two other Soft Bank Group companies located in Singapore, viz., Starfish 1 Pte Ltd. and SIMI Pacific Pte Ltd. Starfish 1 Pte Ltd. undertook to hold 2905 CCPS of Snapdeal in Escrow account for the benefit of SIMI US. Similarly, SIMI Pacific Pte Ltd. undertook to hold 1679 G series CCPS of Ola cabs in an Escrow account for the benefit of SIMI US. As per the terms of the Employment Agreement between

SIMI US and the assessee executed on 17th December, 2014, the assessee was to get certain benefits in addition to salary, which include CCPS of Snapdeal and Ola aggregating to USD 40 million. In December, 2014, SIMI US acquired the CCPS from Singapore entities at the same price at which investment was made by Singapore entities. On 29th December, 2014 SIMI US assigned the rights and interest in CCPS of Snapdeal and Ola to Nikesh Arora trust at the same price at which it was acquired by SIMI US.

22. It is a fact on record that the assessee has offered to tax the compensation value of CCPS in its US tax return. Subsequently, the assessee entered into a Third Employment Agreement with Soft Bank Corp. on 20.05.2015 modifying certain terms of Employment. However, the terms of allotment of shares of Indian companies remained unchanged. Finally on 01.02.2017, the assessee entered into a termination agreement with SIMI US for termination of his Employment. Pursuant to which, the assessee was paid USD 50.32104 million, subject to which, assessee's interest in the CCPS would stand fully extinguished. It is a fact on record that the assessee has offered the compensation received on

extinguishment of his interest in the CCPS as long term capital gain in the return of income filed in India.

23. However, the dispute is with regard to the nature of such capital gain, whether short term or long term. While the assessee has claimed the gain as long term capital gain pleading that the period of holding of interest in CCPS was more than 24 months, the Assessing Officer has treated it as short term capital gain by holding that the assessee had acquired the shares or rights in the shares on or after 20.05.2015, the date on which the Third Employment Agreement was executed. While coming to such conclusion, the Assessing Officer has held that the Second Employment Agreement dated 17.12.2014, being a mere draft agreement does not vest any right in the assessee, hence, cannot be considered for the purpose of period of holding of CCPS.

24. As discussed earlier, on 16.07.2014, the assessee had entered into an Employment Agreement with Soft Bank Corp on certain terms and conditions. Subsequently, the assessee entered into a Second Employment Agreement with Soft Bank group on 17.12.2014, wherein, certain terms of employment were modified including terms of financial benefits. Financial benefits to the

assessee include, in addition to lump sum cash payment, vesting of certain shares of two Indian companies, Snapdeal and Ola cabs on or before 31st December, 2014. Thus, the Agreement dated 17.12.2014 is the starting point of financial benefits by way of shares of Jasper Infotech Pvt. Ltd. and ANI Technology Pvt. Ltd.

25. Though, the assessee entered into a third Employment Agreement with Soft Bank Corp on 20.05.2015, however, on careful perusal of the said agreement, it is observed that the terms and conditions relating to the receipt of CCPS of Jasper Infotech Pvt. Ltd. and ANI Technology Pvt. Ltd. on or before 31st December, 2014 remained identical to similar terms and conditions mentioned in Second Employment Agreement dated 17.12.2014. The modifications in the third Employment Agreement were only in respect of some other terms and conditions not affecting the terms relating to allotment of shares of Indian companies.

26. Be that as it may, the second and third employment agreements merely speak of certain financial benefits to the assessee and do not by themselves vest any right or interest in such shares, nor they record acquisition of shares by the

assessee. It is only in the nature of a promise by the employer to the assessee to pay employment compensation. Rights/interests of the assessee in the shares flow from the assignment deed dated 29.12.2014, in terms of which, SIMI US assigned the rights and interests in the CCPS in favour of the assessee through Arora Trust. Thus, according to us, whether the Second Employment Agreement Dated 17.12.2014 is a draft or a final agreement has no relevance at all for reckoning period of holding as neither has it conferred any right or interest in CCPS to the assessee, nor through the said agreement the assessee has acquired any shares. For the very same reason, the Third Employment Agreement Dated 20.05.2015 cannot be reckoned to be the agreement based on which the assessee acquired the shares or right and interest in the shares.

27. In our view, the Assessing Officer has selectively used the Third Employment Agreement to restrict the period of holding of asset to less than 24 months. Paragraph 3 of clause (B) of part 2 of the agreement dated 20.05.2015 not only incorporates similar terms as mentioned in the Second Employment Agreement dated 17.12.2014, but also says that on or prior to December 31st, 2014

the assessee shall receive the CCPS. In fact, the preamble of the Third Employment Agreement refers to the Second Employment Agreement dated 17th December, 2014. The chain of events starting from the first Employment Agreement and ending with the Termination Agreement dated 01.02.2017 do establish that the assessee did not acquire the shares physically but acquired certain rights and interest in the shares by virtue of assignment deed dated 29.12.2014

28. That being the factual position emerging on record, it cannot be said that the shares or right and interest in the shares were acquired by the assessee on 20.05.2015 or thereafter. In our view, the Assessing Officer has misdirected himself by placing much reliance on the Third Employment Agreement dated 20.05.2015. Whereas, the said document neither confers any right or interest on the assessee qua the CCPS, nor the assessee can be said to have acquired the CCPS pursuant to that agreement. In fact, the said agreement itself makes it clear that shares have to be delivered to the assessee by 31st December, 2014. Thus, in our considered opinion, whatever rights and interests in respect of CCPS accrued to the assessee was by virtue of the assignment

deed dated 29.12.2014. In fact, the termination agreement dated 01.02.2017 makes it absolutely clear that the shares were never physically transferred to the assessee. By virtue of the termination agreement, the rights and interests in CCPS accrued to the assessee got transferred and extinguished in terms of section 2(47) of the Act.

29. It is relevant to observe, the compensation of CCPS as per the assignment deed was offered to tax by the assessee in his US tax return. This is evident from the copies of the US tax return filed before us. We, therefore, have no hesitation in holding that the rights and interests in the CCPS of Snapdeal and Ola cab were acquired by the assessee by virtue of assignment deed dated 29th December, 2014.

30. However, the crucial issue is, what is the capital asset held by the assessee. Whether the capital asset held by the assessee and subsequently transferred is any share/security of an Indian company or some other asset. Though, in the return of income filed as well as in course of assessment proceedings, the assessee had claimed that he has derived long term capital gain from sale of shares of two Indian companies, however, factually it is not so.

In course of assessment proceedings, the Assessing Officer has called upon the assessee to prove legal ownership of the shares. The Assessing Officer has recorded a categorical factual finding that assessee was unable to furnish any documentary evidences to prove the legal ownership of these shares. In fact, inquiry conducted by the Assessing Officer under section 133(6) of the Act with the Indian companies, viz., Snapdeal and Ola Cab, elicited response indicating that asssesse's name neither appears as shareholder in the records of the company, nor any dividend has been issued to the assessee. Even, learned DRP has also recorded a categorical finding that the assessee failed to prove that shares of the Indian companies were transferred to his name.

31. The aforesaid factual position remains uncontroverted even before us. The facts discussed elsewhere in the order do indicate that in terms with second amended employment agreement dated 17th December, 2014, the assessee as part of its employment benefit was supposed to receive certain lump sum amount in money terms and some further amount by way of fully vested equity shares of two Indian companies. However, it is a fact that the shares of Indian companies were never transferred in the

name of the assessee. By virtue of assignment agreement dated 29th December, 2014, what the assessee acquired was certain rights and interests of SIMI US in the shares of the two Indian companies. From the date of assignment deed dated 29th December, 2024 till the Termination agreement dated 1st February, 2017, under which the assessee transferred its rights and interests in the shares, the ownership of the shares never stood in the name of the assessee. Even, the assessee never appeared as a shareholder in the records of the two Indian companies. In fact, in submission dated 29.12.2023 filed before the Tribunal, the assessee has conceded to the aforesaid factual position.

32. Though, it may be a fact that both the Assessing Officer and learned DRP, despite observing that no evidence has been brought on record by the assessee to establish that he is the legal owner of the shares, however, they have proceeded to treat the gain derived as short term capital gain from sale of shares.

33. Be that as it may, it is a proved fact on record that assessee never became the legal owner of the shares as the shares were never transferred in assessee's name. The assessee also accepts

the fact that he could not have instituted any actionable claim against the two Indian companies, viz, Snapdeal and Ola had SIMI USA not transferred the shares in his name. Thus, what the assessee held is certain rights and interests in the shares, which got extinguished by virtue of termination agreement. Considered in the aforesaid context, the contention of learned Senior Counsel for the assessee that the argument made by learned Departmental Representative that the asset transferred is not share but some other asset, cannot be accepted at this stage, in our view, is unacceptable. This is so because, the Tribunal, being the last fact finding authority, has to examine all the facts and materials on record and record a correct finding of fact.

34. Even, otherwise also, before learned DRP, by way of an alternative contention, the assessee did submit that if the asset transferred is held to be not share but certain rights and interests, then the situs of asset is outside India, hence, not taxable in India under Article 9(1). Though, learned DRP has side-stepped the issue stating that it did not arise out of draft assessment order, however, we intend to deal with at a later stage.

35. We may further observe that learned Senior Counsel appearing for the assessee has submitted that the expression 'held' appearing in section 2(42)A, does not mean legal ownership. In this context, he has relied upon a decision of the Hon'ble Bombay High Court in case of CWT Vs. C. Rai (supra). However, on carefully going through the judgment, we are of the view that it is factually distinguishable, hence, would not apply to assessee's case. In the facts of the case before the Hon'ble Bombay High Court, the assessee has transferred certain shares to the name of wife. However, in the return of wealth, the assessee claimed exemption under section 5(1)(xx) of the Act in respect of such asset. The issue which arose for consideration before the Hon'ble Court was whether in respect of shares transferred in the name of wife, the assessee can claim exemption under section 5(1)(xx) of the Act. After interpreting the provisions of sections 4(1) and 5(1) of the Wealth Tax Act, the Court concluded that the assessee can claim exemption in respect of shares transferred in the name of the wife. This is so because, section 4(1) provides for clubbing of wealth transferred directly or indirectly otherwise than for adequate consideration to the name of the spouse of the

individual, who is assessed to wealth tax. Thus, by operation of such specific provision permitting clubbing of wealth, the Hon'ble High Court allowed assessee's claim of exemption.

35. However, facts are totally different in assessee's case. Even, other decisions relied upon by the assessee including that of the Hon'ble Supreme Court in case of Mysore Minerals Ltd. Vs. CIT (supra) are factually distinguishable and do not fit into the facts of the present case.

36. At this stage, we may refer to the Circular no.704, dated 28.04.1995 issued by the Central Board of Direct Taxes (CBDT) to explain the meaning of period of holding under section 2(42A) of the Act. It has been clarified by the Board that the date of broker note or date of contract of sale shall be relevant for determining period of holding subject to actual delivery of share subsequently. Since, in the facts of the present appeal the shares were never delivered in the name of the assessee, it cannot be said that the assessee had held any capital asset in the nature of share or security of an Indian company so as to get the benefit of the third proviso to section 2(42A) of the Act. In our view, the capital asset held by the assessee, which is subject to capital gain, would not

fall within the exceptions provided under section 2(42A) of the Act at all. Therefore, 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.

37. Having held so, the next issue which arises for consideration is the taxability of such asset in India. As discussed elsewhere in the order, before learned DRP the assessee has pleaded that capital asset transferred, being certain rights and interests and not any shares and securities, situs of such asset lies outside India as the assessee has acquired such right by virtue of the assignment agreement entered with SIMI US outside India. It is the case of the assessee that as per section 9(1)(i) of the Act, which is a deeming provision, income accruing or arising whether directly or indirectly through the transfer of capital asset situated in India has to be taxed in India.

38. In the earlier part of the order, we have held that capital asset transferred by the assessee is certain rights and interests

arising/accruing to the assessee in respect of shares of two India companies and not shares per se. Even the termination agreement acknowledges the aforesaid position while recording the following facts:

> *"WHEREAS, Mr. Arora resigned his employment with SBG US effective as on June 30, 2016, and as part of separation discussions SBG US, SBG Corp. and Mr. Arora contemplated a settlement of Mr. Arora's interests in the Directed Investment Equity Awards in exchange for a cash payment from SBG Corp., but no such transaction was consummated as the parties continued to negotiate regarding the appropriate form and terms of a transaction to extinguish such interests.*
>
> *NOW, THEREFORE, for good and valuation consideration, the receipt and sufficiency of which are hereby acknowledged, SBG US, Starfish I, SIMI Pacific, Mr. Arora and the Trust hereby agree as follows:*
>
> *1. Cash Payments; Extinguishment of Interests.*
>
> *(a) Subject to the terms and conditions of this Agreement. (i) Starfish I shall make a lump sum payment to the Trust of USD 50,320,177.60 (the "Starfish I Payment"), and (ii) SIMI Pacific shall make a lump sum payment to the Trust of USD 54,078,761.57 (the "SIMI Pacific Payment", and together with the Starfish I Payment, the "Cash Payments"), subject in each case to applicable Indian tax and withholdings as provided in Section 2(a) Starfish I and SIMI Pacific shall make the Cash Payments no later than February 9, 2017.*
>
> *(b) Effective on completion of the Cash Payments, all of the Trust's (and, as applicable, Mr. Arora's)* ***Interests*** *will be fully and completely extinguished, and Mr. Arora, on his*

own behalf and on behalf of the Trust, agrees not to assert to the contrary."

39. Thus, it is established on record, what the assessee transferred by virtue of the termination agreement is a capital asset in the nature of certain rights and interests and not any shares of Indian companies. This is so because, at no point of time the assessee was holding any shares of Snapdeal or Ola Cab. Therefore, it cannot be said that the capital gain derived by the assessee was through transfer of capital assets situated in India. Patently, the capital asset in the nature of rights and interests accrued to the assessee as part of employment benefit and was acquired by him through assignment deed dated 29th December, 2014. Thus, the source of assessee's rights and interests constituting a capital asset was through aforesaid agreement, executed in USA. It is further relevant to observe that the amended employment agreement dated 16.07.2014 says that any legal action or suit related in any way to the agreement shall be brought exclusively in the Federal State Court of California.

40. Considered in the aforesaid perspective, the situs of capital asset in the nature of rights and interests acquired by the

assessee, which were subsequently transferred and subjected to capital gain, was in USA and not located in India. Therefore, in terms of section 9(1)(i)(a) of the Act, the income derived from transfer of such capital asset is not taxable in India. While coming to such conclusion, we have drawn support from the following decisions:

1. *A & F Harvey Ltd. Vs. Commissioner of Wealth-tax [1977] 107 ITR 326 (Madras)*
2. *CWT Vs. Mrs. O.M.M. Kinnison, 161 ITR 824*

41. Thus, in the ultimate analysis, we hold that the location of the asset transferred by the assessee, being situated outside India, the capital gain derived would not be taxable in India. However, it is a fact that the assessee had filed a return of income in India voluntarily offering to tax the capital gain derived by treating it as long term capital gain. In fact, before the Assessing Officer as well as before learned DRP, the assessee had pleaded for treating the gain derived as long term capital gain taxable in India. Therefore, the alternative contention made by the assessee for the first time before learned DRP and before us as well, to the effect that the asset transferred, being certain right and interest

located outside India, is not taxable in terms of section 9(1)(i) would be available to the assessee only as a defense to support the claims made by him in the return of income and not for claiming any extra benefit beyond the return of income.

42. In this context, we must observe that in the termination agreement dated 1st February, 2017, a copy of which is placed at page 293 of the paper-book, it has been clearly stipulated that the payments to be received by the assessee towards transfer of his right and interests will represent capital gain taxable under the domestic law of India and has to be offered to tax by the assessee by filing a return of income in India. The return of income filed by the assessee offering to tax the long term capital gain is strictly in compliance with the terms of termination agreement. Therefore, the assessee is entitled for relief only to the extent of claims made in the return of income.

43. In view of the aforesaid, we direct the Assessing Officer to accept the capital gain offered by the assessee in the return of income filed for the impugned assessment.

44. In view of our decision above, the ancillary issue relating to claim of cost of acquisition has become academic.

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

Order pronounced in the open court on 18th July, 2024

Sd/-	***Sd/-***
(G.S. PANNU)	**(SAKTIJIT DEY)**
VICE-PRESIDENT	**VICE-PRESIDENT**

Dated: 18th July, 2024.
RK/-

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi