आयकर अपीलीय अधिकरण "एल" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "L", MUMBAI

श्री जी.एस. पन्नू, लेखा सदस्य एवं
श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष।

BEFORE SHRI G S PANNU, ACCOUNTANT MEMBER
AND SHRI AMIT SHUKLA, JUDICIAL MEMBER

ITA No. : 4313/Mum/2011
(Assessment year: 2002-03)

श्री प्रफुल चंदेरिया Shri Praful Chandaria, 27-01 UIC Bldg, 5 Shenton way, Singapore, Mumbai – स्थयी लेखा सं. PAN: **AAIFM 0810 A**	**Vs**	ADDIT(IT) 1(1), Mumbai
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)

ITA No.: 4717/Mum/2013
(Assessment year: 2002-03)

पुरसे होल्डिंग्स इंडिया प्राइवेट लिमिटेड Purse Holdings India P Ltd. C/o. Gujarat Nippon International Private Limited 27-01 UIC Bldg, 5 Shenton way, Singapore, Mumbai – स्थयी लेखा सं. PAN: **AACCP 2854 N**	**Vs**	ADDIT(IT) 1(1), Mumbai
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Appellant by	:	श्री जे पी शाह Shri J P Shah
Respondent by	:	श्री जसबीर चौहान Shri Jasbir Chouhan

सुनवाई की तारीख /Date of Hearing : 16-08-2016
घोषणा की तारीख /Date of Pronouncement : 26-08-2016

आदेश
ORDER

श्री अमित शुक्ला, न्या स:
PER AMIT SHUKLA, JM:

The aforesaid appeals have been filed by the aforementioned assessees against separate impugned orders dated 31.03.2011 and 19.03.2010 passed by different CIT (Appeals) Mumbai for the quantum of assessment passed under section 143(3) r.w.s. 147 for the assessment year 2002-03. Since similar facts are permeating through in both the appeals, therefore same were heard together and are being disposed off by way of this consolidated order.

2. We will first take up appeal of Shri Praful Chandaria, which is against order dated 19.03.2010 passed by Ld. CIT (Appeals)-12, Mumbai for the quantum of assessment passed under section 143(3) r.w.s. 147 for the assessment year 2002-03, wherein following grounds have been raised:-

"1. The CIT(Appeals) erred in upholding the validity of section 147 notice and section 147 assessment order.

2. The CIT(Appeals) erred in holding that income of Rs.11,71,00,000/- has arisen to the assessee and is taxable in the hands of the assessee as income from other sources and not as capital gain.

3. The CIT(Appeals) failed to appreciate that there was no transfer of shares or any transfer of any sort in Asst. Year 2002-03, and therefore, there is no question of any income arising before that event and in any case even if there was transfer the income will not be taxable on revenue account but will be taxable as capital gain, and therefore, will be exempt under Double Taxation Avoidance

Agreement between the Republic of India and the Government of The Republic of Singapore.

4. *The CIT(Appeals) failed to appreciate that the residential status of the assessee is "non-resident" and all the documents have been executed abroad, and therefore, even if income has arisen, it has not arisen in India nor through or from any property in India, any asset or source of income in India or transfer of capital asset situated in India.*

5. *The CIT(Appeals) failed to appreciate that call option agreement does not result into any income by itself; the income or loss if at all will arise when the option of purchase is exercised and the fact is that the option has not been exercised in Asst. Year 2002-03.*

6. *The CIT(Appeals) failed to appreciate the written submissions that were given to him and the evidence in paper book No.1 and 2 in proper perspective".*

3. Brief facts *qua* the issue involved are that, the assessee, Mr. Praful Chandaria is a non-resident (NRI) residing in Singapore and is also tax resident of Singapore. He had acquired 56,60,026 Equity Shares in an Indian based company, 'Purse Holding (India) Pvt. Ltd.' (hereinafter referred to as PHIL) for sum of Rs.5,66,00,260/-. PHIL was established as a Special Purpose Vehicle (SPV) along with ING Barring Mauritius, a company registered in Mauritius (hereinafter referred to as ING BM). Both PHIL and ING BM had invested in an Indian company named as ING Barring India Pvt. Ltd (hereinafter referred to as BI) having 2 directors, Mr. Ajay Sanghavi and Mr. Rajaraman. The BI was mainly established as NBFC dealing in investment banking,

brokerage business etc. in India. The ING BM held 75% of the shareholding (2,54,23,680 shares), whereas PHIL held 25% of the shareholding (85,74,560 shares) in BI. The assessee's share in PHIL was more than 99% and it had two other directors also, one Mr. Ajay Sanghavi and other Mr. Jatin Pandya who were having one equity share each in PHIL. On 19.11.2009, the assessee along with other two directors entered into "Call Option Agreement" between BM and first shareholders to sell their shares held in PHIL to BM. The call / strike price was agreed at US $ 1. As per Article 3.1, of the said agreement the entire consideration for grant of 'call option' was at US $ 24,50,000 which was to be paid by BM to the first shareholders in their bank accounts. The right of 'call option' was to be exercised within the period of 150 years and it was agreed that, upon the receipt of call notice and the payment of call value, the first shareholders shall be obliged to transfer the shares to BM within one month of the payment of call value. There was another "Call Option Agreement" dated 14.12.2001, between PHIL and BM, whereby PHIL agreed for giving BM an option to purchase the entire shares held by PHIL in BI and the consideration for this option was agreed at strike value/ call price at Re.1 and period of option was again for 150 years.

4. Later on, the Department received the information that assessee had received the payments of US $ 24,50,000 in pursuance of aforesaid call option however, the said income was not offered to tax in India. Accordingly, a notice under

section 148, dated 26.03.2009 was issued for reopening the case under section 147. The reasons recorded for reopening the case were as under:-

> *"Mr. Praful Chandaria is a non-resident and a tax resident of Singapore. It is seen that he has invested in the shares of the Indian company M/s Purse Holding India Pvt. Ltd (PHIL), a company registered in India and having its office at 402, Vyom Arcade, Tejpal Scheme, Road No.5, Subhash Road, Vile Parle (E), Mumbai. He has purchased 56,60,026 equity shares for Rs.5,66,00,260/- M/s PHIL was a special purpose vehicle to make investment in ING Baring India Pvt. Ltd and held 25% shareholding (i.e. 84,74,560 shares). The other 75% was held by ING Baring India Mauritius Ltd, a company registered in Mauritius.*
>
> *Subsequently, on 14.12.2001, PHIL entered into a "call option agreement" with ING Baring Mauritius Ltd (BM) giving them an option to purchase all the shares held by PHIL in ING Baring @ Re.1, with option period of 150 years. Simultaneously, Mr. Praful Chandaria and the other two nominee share holders of PHIL entered into another "call option agreement" with ING Baring Mauritius (BM) for "call option" of US$ 1. Mr. Praful Chandaria received US $ 24,50,000/- towards writing these options. It is seen that Mr. Praful Chandaria has given an undertaking dated 19.12.2001 stating that on account of valuable consideration already received an irrecoverable POA dated stating that on account of valuable consideration already received an irrevocable POA dated 14.12.2001 was executed in favour of ING Bank NV in respect of his shares held in PHIL and that he would not at any time revoke the undertaking. He has also given an*

undertaking not to transfer the shares held in PHIL other than as stated above and not to have any further issue of shares in PHIL. Thus, it can be seen that Mr. Praful Chandaria has disposed off its shareholding in PHIL in US $ 24,50,000.

The gains arising to Mr. Praful Chandaria on account of these transfer of shares held in Indian company is taxable in India as per the provisions of section 5 & 9 of the I.T. Act.

It is seen that income which has arisen in India in terms of section 5(2) r.w.s. 9(1) has not been offered to tax and no return of income was filed for the said assessment year 2002-03 by the Praful Chandaria. In the light of the above information and material on record, I have reason to believe that income chargeable to tax has escaped assessment for the AY 2002-03. Apparently, the gains arising on transfer of such shares is more than one lakh of rupees. I have reason to believe that such income in the form of capital gain has escaped assessment and that is a fit case for issue of notice u/s 148".

5. The assessee's case before the Assessing Officer was that the said transaction was never actually entered by him and neither any money on that account was ever received by him nor any money has been credited to his account. He has not transferred his shareholding in PHIL to BM till date and hence there is no question of receiving any amount of US $24,50,000. The AO however after taking note of the facts as narrated in foregoing paragraph and information received, further noted that, in pursuance of 'call option agreement' as

above, M/s DSK Legal Mumbai were appointed as 'Escrow Agent' in respect of shares of PHIL under call option agreement between BI and PHIL. He observed that the Escrow agreement dated 14.12.2011 clearly shows that the original shares certificates have been deposited with the Escrow Agent, that is, have been handed over to them and this Escrow Agreement has been signed by one of the shareholders of the PHIL and Mr. Ajay Sanghavi. That apart, the assessee had given a notarized undertaking dated 19.12.2001, wherein the assessee has clearly stated "*for valuable consideration already received by each of the Purse Shareholders"*. The relevant fact mentioned in the said undertaking has been summarized in the assessment order in the following manner:-

(i) Mr. Praful Chandaria holds 99.9% shares; Mr. Ajay Sanghavi holds one share and Mr. Jatin Pandya also holds only one share, who were the shareholders of PHIL.

(ii) For valuable consideration already received, each of the PHIL shareholders have agreed with Barring Mauritius to execute and abide by the call option agreement dated 14.12.2001 entered into by the PHIL shareholders with BM in respect of all their shares in PHIL.

(iii) For valuable consideration already received, each of the PHIL shareholders have agreed with BM to cause to be executed the agreement contained in

the following documents executed by PHIL and to cause PHIL to abide by these agreements.

(a) Shareholders agreement executed on December 14, 2001 by and between barring Mauritius Limited, Purse Holding (India) Private Limited and ING Barring India Private Limited.

(b) Call option agreement dated December 14, 2001 entered into by us with Barring Mauritius Ltd in respect of all the shares held by PHIL in ING Barring India Private Limited

(c) Escrow agreement dated December 14, 2001 entered into by us with Barring Mauritius Ltd and DSK legal (Escrow Agent) in respect of the shares held by PHIL in ING Barring India Private Limited.

(iv) For valuable consideration already received, the assessee has agreed with Barring Mauritius Ltd to execute the irrecoverable power of attorney dated 14.12.2001 in favour of ING Bank NV in respect of all your shares in PHIL and confirmed that he will not at any time purport to revoke the same.

(v) For valuable consideration already received, the assessee has agreed with Barring Mauritius Ltd to cause PHIL to execute the irrecoverable power of attorney dated 14.12.2001 in favour of ING bank NV in respect of all your shares held by PHIL in

ING barring and you shall not at any time permit PHIL to revoke shares of PHIL.

(vi) The assessee has agreed and undertaken not to any manner act otherwise than in accordance with the said undertaking and not told transfer the PHIL shares other than pursuant to the document set out above or to issue any further shares of PHIL.

6. After noting down the aforesaid facts, AO arrived to the conclusion that already consideration has been received by the assessee in pursuance of call option agreement. He further noted that, assessee had given irrevocable power of attorney dated 19.12.2001 to ING Bank NV to act as his lawful attorney. In the said POA, it was mentioned that, assessee has irrecoverably nominated ING Bank for value received and assessee has given powers to attend otherwise take part in all the meetings held in connection with PHIL in relation to all the shares in the company held by him from time to time. Thus, the bank had all the powers *qua* the shares of PHIL held by the assessee. The AO further brought on record that, assessee had issued a letter of the same date, that is, 19.12.2001 to the Chairman of BM regarding remittance proceed of US $ 24,50,000 by which the assessee had authorized the Chairman of BM to remit the proceed on behalf of the Purse Finance Ltd with specific details of bank account in which the said amount was to be remitted. The

relevant fact on this point as noted by the Ld. AO is as under:-

A/C Baring India Investment Ltd (Fund I).	US$ 1,000,000.00
A/C Baring India Investment Ltd (Fund II).	US$ 1,232,173.61
A/C The Baring Asia Private Equity Fund.	
- Amount due on 18/06/2001 ...	US$ 150,000.00
- Amount due on 05/09/2001	US$ 67,826.39
	US$2,450,000.00

Thus from the facts and material which came on record before the AO, he conclusively held that, assessee had received the money, that is, US $ 24,50,000 under the 'call option agreement' entered with BM which is equivalent to Rs.11,71,00,000/-. Accordingly, he confronted the assessee as to why the said amount should not be treated as income assessable to tax in India under the provisions of section 5(2) r.w.s. 9(1). In response to the show cause notice, the assessee had first objected to the validity of reopening under section 147, which as per the noting in the assessment order, AO has disposed off the said objection vide his order dated 16.12.2009. On merits, the assessee vide letter dated 18.12.2009, submitted that he is not tax resident of India and, therefore, he is not assessable in India. Assessee again reiterated that, he has not actually transferred any of his shares in PHIL to BM and, therefore, there is no question of earning any capital gain from transfer of shares and in any case no income has accrued or arisen to him under section 9(1)(1). However, the Ld. AO rejected the assessee's

contention and taxed the said amount finally after observing and holding as under:-

> *"Thus, it is evident that the assessee had effectively alienated his shares in PHIL by way of irrevocable undertaking and power of attorney for which consideration was already received. From the material information as discussed earlier, it was evident that the assessee had received income through or from property in India / through or form an asset/source of income in India, through or from an asset/ source of income in India, through or from transfer of capital asset situated in India, therefore the consideration of USD 24,50,000/- equivalent to Indian Rupees 11,71,00,000/- (47.80 x 24,50,000) received by the assessee is taxable in India as per sec.5(2) r.w.s 9(1) of the I T Act. The amount received by the assessee is treated as income from other sources and included in the total income of the assessee".*

7. In the first appeal, the Ld. CIT(A) too has confirmed the said addition on the same reasoning and on the basis of facts and material as discussed by the AO. Before the ld. CIT(A), another important submission which was made by the assessee was that, if at all the said amount is held to be taxable then it can be taxed as 'capital gain' and same cannot be brought to tax in India by virtue of Article 13 of India-Singapore-DTAA. Even under the Domestic Law such 'capital gain' cannot be taxed because, there is no cost while giving the rights on the shares by virtue of call option agreement. However the assessee reiterated its stand that, no money on account of call option agreement was received. It was contended that the said shares of PHIL could not have been

sold for Rs.11,17,00,000/- because, perusal of Balance sheet of PHIL and BI will reveal that they were incurring huge losses and PHIL had no asset other than shares of BI. In the case of the BI as against the capital of Rs.33.90 crores, there were huge accumulated losses as on 31.12.2001 which approximately stood at Rs.28.7 crores. Thus, about 85% of the paid up capital gain of BI was wiped out, therefore, on such a state of affairs, the call agreement are only make belief arrangement and no actual transaction in pursuance thereof has actually been taken.

7. The Ld. CIT(A) after retreating the facts and materials as discussed by the AO, confirmed the order of the AO that the amount in question is to be taxed as "income from other sources" in terms of section 9(1)(i). As regards the assessee's contention with regard to taxing of the income as 'capital gain' and then giving benefit of Article 13 of India-Singapore DTAA his relevant observation are as under:-

> *"The contention of the Ld. AR, that if all anything is taxable than it is capital gain only which is not taxable because of Article 13 of DTAA is not acceptable due to the fact that the appellant has received valuable consideration in lieu of transfer of the property situated in India through or from an asset and source of income in India from the capital asset situated in India. Therefore, this was not a capital gain in the hands of the appellant as the appellant received valuable consideration in lieu of call option agreement entered into as discussed above*

8. Before us, the Ld. Counsel for the assessee, Mr. J P Shah after narrating the entire facts, gave his detailed submissions not only with regard to validity of notice under section 148 but also on merits. His main contention on validity of notice under section 148 is that, the notice has been issued after obtaining the necessary approval of Additional Director of Income-tax, Mumbai who is not the competent authority for granting approval on the satisfaction of the AO before issuing notice under section 148 in terms of section 151, because the competent authority in the case of the assessee should have been Joint Commissioner and not Addl. DIT. On merits he submitted that, the assessee in fact has not received any amount in pursuance of 'call option agreement' and that to be a huge sum of Rs.11,17,00,000/- when 85% of the paid-up capital of BI has been wiped out on account of accumulated losses and there is no worth an asset in the Balance sheet of PHIL and why would a company will give such a huge amount to the assessee on mere 'call option' which far exceeds net worth of the company. The entire substance of the transaction has to be looked into and not merely picking up the facts from here and there. He pointed out that from the perusal of the terms of 'call option agreement' it is clear that shares have not been transferred albeit mere right has been given on such shares. It is also an admitted fact that till date shares had not been transferred to BM and, therefore, why a company would will pay such a huge amount on the basis of call option agreement. During the course of the proceedings before the authorities below, the

assessee has filed an affidavit that, he has not received any amount from BM and such an affidavit has not been controverted or rebutted by the Department. A call option is kind of advance and is not an incidence of taxation. It cannot be taxed at the point of call option but only when shares are actually transferred. One has to look, whether there is any taxable event at the time of call option agreement or not. He emphatically stated that, it cannot be the case here because no alienation of shares has been done. He further drew our attention that in the call 'option agreement' between BM and PHIL and then between PHIL and BI, there is no mention about consideration of US $ 2.45 million has been received. He thus submitted that, here in this case, one should not go by the terms of agreement but in terms of actual state of affairs as well as Balance sheet, that is, the substance of the entire transaction. Regarding the remittance of the proceeds as alleged by the AO, he submitted that, the same is on behalf of the Purse Finance, which is different company and entity altogether. He further pointed out that, in the assessment year 2009-10, the AO in the case of PHIL has taxed the amount as capital gain and such an assessment in the case of PHIL has been accepted as per his instruction. From this fact, he contended that the transfer of shares if at all is held to be taxed, then same should be in one year and not in two different years.

9. Without prejudice, Mr. Shah submitted that, if at all the alleged consideration of Rs.11,17,00,000/- is held to be

taxable in the hands of the assessee, then same has to be treated as "capital gain" because valuable right has been assigned by the assessee in favour of BM to transfer the shares which is nothing but a transfer of property within the ambit of section 2(14) r.w.s. 2(47). He pointed out that, this fact is clearly borne out from the following clauses / articles of the "call option agreement". The relevant clauses from the agreement as highlighted by him are reproduced hereunder:-

"(i) clause (c) of Recitals states:

"Whereas the Purse Shareholders are desirous of granting an option to Barings under which Barings shall be entitled to call upon the Purse Shareholders to sell all their shares of Purse to Barings",

(ii) By Clause 2.1, sub-clause (iv) states:

"Barings has sufficient funds available to purchase the Shares at its option, pursuant to and in accordance with this Agreement;"

(iii) By Article 3.2 states:

"Within a period of 150 years Barings shall have the right to exercise the Call Option and acquire the Shares at the Call Value, subject to any regulatory approval",

(iv) By Article 3.3 states:

"(i) To exercise the right set forth in Article 3.1, Barings shall send a written notice to the Purse Shareholders ("Call Notice"), with a copy to the Board, stating that Barings requires the Purse Shareholders to transfer the Shares to Barings.",

(v) By Article 3.4 states:

"Upon receipt of the Call Notice and payment of the Call Value, the Purse Shareholders shall be obligated to transfer the Shares to Barings within one month of the payment of the Call Value."

(vi) By Article 3, 5(i) states:

"The completion of the purchase and sale of the Shares shall take place at such time and at such place, as shall be designated by Barings, which date must not be later than one month from the receipt of the Call Value."And

(vii) By Article 3.5(ii) states:

"An amount equivalent to the Call Value has been deposited by Barings with the Purse Shareholders as and by way of a deposit and/ or advance payment towards the Call Value, which shall stand appreciated as Call Value upon delivery to Barings of duly executed transfer forms of the Shares to be sold, accompanied by the relevant share-certificate(s) "

Hence, he submitted that, if it is a transfer of the property then in terms of Article 13(6), the same cannot be held to be taxable in India but only in Singapore. He clarified that, here it is not the case of gains from alienation of shares *albeit* there is a alienation of transfer of interest in shares which has to be reckoned as property in terms of Article 13(6) of the DTAA.

10. On the other hand, Ld. CIT DR after referring to the various observations and findings given by the ld. CIT(A) in the impugned order, submitted that the facts and material

clearly point out that, assessee did receive the money in terms of "call option agreement" and if such money has been received by the assessee, then it has to brought to tax under section 9(1)(1), because the same is arising out of transfer of property situated in India or from an asset and source of income in India. Hence it has been rightly taxed as "income from other sources" and not as "capital gain". In a nutshell, he strongly relied upon the order of the CIT(A). As regards, the approval of notice under section 148 by Addl. CIT/DIT, he submitted that under the Income Tax Act, Jt. Commissioner and Addl. Commissioner are inter-changeable authorities and they cannot be reckoned as two different hierarchies or authorities. This is clarified by the statute itself in sub-section (28c) of section 2 as well as sub-section (7A) of section 2. Thus, the satisfaction of the Addl. DIT who also acts as Addl. CIT under the Act is well within his competence to give approval in terms of section 151.

11. We have heard the rival submissions and considered the entire gamut of facts as culled out from the material on record. The subject matter of dispute before us on merits is, whether the sum of US $2,450,000 which in terms of INR is 11,71,00,000/- can be held to be taxable in hands of the assessee in India. Admittedly, the assessee is tax resident of Singapore and is non-resident Indian. In case of non-resident, while taxing any income accrued or arising in India has to be seen from the perspective of the Treaty, which here in this case India-Singapore DTAA and if any benefit is provided in

the DTAA, then same has to be seen. As culled out in our earlier part of the order, the assessee is having more than 99% of shareholding in an Indian company, PHIL which in turn holds 25% of shares in another Indian Company called ING Barring India (BI). One Mauritius based company namely; ING Barring Mauritius (BM) holds 75% of shares in ING Barring India. Both assessee as well as PHIL vide separate "call option agreement" entered with Barring Mauritius granted an option to BM to call upon the PHIL shareholders to sell their entire shareholding in PHIL. The strike price or the call option was agreed for US $ 1 and the consideration mentioned was US $ 2,450,000 and such a call option spread into period of 150 years. In common parlance, a *call option* is reckoned as a contract in which the holder (buyer) has the right (but not an obligation) to buy a specified quantity of a security/shares at a specified price (strike price) within a fixed period of time. For the writer (seller) of a call option, it represents an obligation to sell the underlying security at the strike price if the option is exercised. The call option writer is paid a premium for taking on the risk associated with the obligation. Here in the present case, there is very peculiar agreement/ arrangement, where the strike price has been mentioned as US $ 1 and the fixed period of time for exercising the call option has been fixed for 150 years. This factum itself means that the call option in the shares have been given for perpetuity. Not only that, an irrevocable power of attorney has also been executed in favour of the ING Bank in respect of all the shares in PHIL

confirming that, assessee will not at any time purport to revoke the same, which inter-alia shows that assessee has alienated a substantive and valuable rights as an owner of the shares in perpetuity, albeit without *dejure* alienating the shares itself. This aspect of the matter has also been highlighted by the Ld. AO in his order. From the perusal and analysis of the material on record he has concluded that *"it is evident that assessee had effectively alienated his shares in PHIL by way of irrevocable undertaking and power of attorney for which consideration was already received"*. Even the Ld. CIT(A) in his order has reconfirmed the same thing. Thus, here in this case if one goes by the 'call option agreement' and other materials facts on record, it is ostensibly clear that the a valuable and substantive right in the shares of PHIL, namely giving of right to sell shares at a determined price, has been alienated by the assessee and hence it cannot be held merely as a call option agreement simplicitor.

12. Now, the core issue/ question left to be decided is, as to how the amount is to be taxed and whether such an amount would be taxable in the hands of the assessee in India or not and under which head. The revenue's case is that, it is taxable as "income from other sources" and has been brought to tax in India by invoking the deeming provisions of section 9(1)(i). However, the departmental authorities concede the position that the shares have not been transferred and that is why the gain has been assessed as income from other sources and not as "capital gains". But while holding so, the revenue

has not made out a case as to how the "income from other sources" would be brought to tax under the clauses/articles of DTAA between India–Singapore. Here on the facts of the present case, though, there may not be any actual alienation of shares in terms of the 'call option agreement' which is evident from the various recitals and articles which have been incorporated and discussed above, but clearly a valuable and substantive right in the shares of an Indian company have been given to a non-resident company, that is Barring Mauritius. Under normal circumstances, no right in the shares is given away by way of 'call option', albeit only right to buy the shares at a strike price within a stipulated time period is given which may not be termed as "capital asset" under section 2(14), because, without exercising the option no actual asset is created. Here in the present case as discussed in our earlier part of our finding, the right in the shares has been given for an incredibly large period of 150 years. Not only that, the rights which are enjoyed by the assessee as shareholder have been exercised by the power of attorney holders to participate in the affairs of the company and it has been further provided that, assessee shall not at any time purport to revoke the same. Such a bundle of substantive rights are generally not given under normal "call-option agreements". In the peculiar facts of the present case, such an option right in the shares has to be reckoned as transfer/alienation of a valuable and substantive right, which would be a class of asset in itself, separate from shares which though continue to stand in the name of the assessee. Such a

valuable rights/ interest in shares would certainly be a 'capital asset'. Parting with any substantive interest in the asset or creating any substantive interest in any asset or extinguishment of a right/s in an asset, directly or indirectly would surely be reckoned as a 'transfer' of an asset / property even under the domestic law, that is, u/s 2(47).

13. Hence the consideration received has to be taxed under the head "capital gain" as there is a transfer of an asset/property. The taxability of a capital gain under India-Singapore DTAA has been given in Article 13, which reads as under:-

> *"1. Gains derived by a resident of Contracting State from the alienation of immovable property, referred to in Article 6, and situated in the other Contracting State may be taxed in that other State.*
>
> *2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a contracting State has in the other Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such fixed base, may be taxed in that other state.*
>
> *3. Gains from the alienation of ships or aircraft operated in international traffic or movable property pertaining to the operation of such ships or aircraft shall be taxable only in the Contracting State of which the alienator is a resident.*
>
> *4. Gains from the alienation of shares of the capital stock of a company the property of which consists principally, directly or indirectly, of immovable property situated in a Contracting State may be taxed in that state.*

> *5. Gains from the alienation of shares other than those mentioned in paragraph 4 in a company which is a resident of a Contracting State may be taxed in the State.*
>
> *6. Gains from the alienation of any property other than that mentioned in paragraphs 1, 2 3, 4 and 5 of this Article and paragraph 3(b) of Article 12 shall be taxable only in the Contracting State of which the alienator is a resident".*

So far as conditions and factors mentioned in paragraphs 1, 2 & 3 of the above Article, surely same would not be applicable here in this case. As regards the alienation of shares as mentioned in para 4 and 5, the same again will not be applicable because here no actual shares which has been transferred or alienated *albeit* a substantive and valuable right has been given in the shares, which has to reckoned as capital asset or property as per our discussion herein above. Hence, it is gains from the alienation of an asset or property and any gain from alienation of such kind of "property" will fall within the scope of Para 6 of Article 13, whereby, the taxing right has been given to the resident state, that is, the state of the alienator, which here in this case is Singapore. The allocation of taxing right under Article 13(6) cannot be attributed to India but to the resident state. Thus, on the facts and circumstances of the case as discussed above, we hold that, *firstly*, the consideration received by the assessee is arising from the assignment of substantive and valuable rights in the shares of an Indian company which is assessable under the head "capital gain"; and *secondly*, such a capital gain cannot be held to be taxable in India in terms of para 6

of para 13 of India-Singapore-DTAA. With these observation, the addition made by the AO and as confirmed by the CIT(A) is directed to be deleted.

14. In view of our finding given hereinabove, we do not feel it necessary to go into the other aspects of the arguments placed before us by the parties and also the arguments on the validity of the notice under section 148; as same are treated as academic.

15. In the result, appeal of the assessee is treated as allowed.

16. Now we shall take-up appeal filed by the assessee being ITA No.4717/Mum/2013. In the grounds of appeal (in case of Purse Holdings India P Ltd), following grounds have been raised:-

"1. The CIT(Appeals) erred in upholding the validity of section 147 notice and section 147 assessment order.

2. The CIT(Appeals) failed to appreciate that there is no transfer of any shares happened in Asst. Year 2002-03 and therefore, there is no question of any income arising before happening that event.

3. The CIT(Appeals) failed to appreciate that call option agreement does not result into any income by itself; the income or loss if at all will arise only when the option given under the agreement is exercised and the fact is that the option has not been exercised in Asst. year 2002-03.

4. The CIT(Appeals) erred in holding that income of Rs.11,75,26,500/- has arisen to the assessee and is taxable in the hands of the assessee as income from capital gain.

5. *The CIT(Appeals) erred in holding that the investment by the assessee-company in ING Bearings India Ltd was divested and that it was divested using NRI status of the majority shareholder to include into the said transaction in a manner so as to absolve the assessee company from taxation and accordingly the assessee is liable for capital gains tax on transfer of the rights in shares irrespective of the fact that assessee company has not received any amount held to be taxable in its hand.*

6. *The CIT(Appeals) erred in holding that irrespective of the fact that the assessee company has not received any amount, the alleged receipt of sales proceeds by a majority shareholder on relinquishment of the rights over the shares is taxable in the hands of the Company as the issue of taxability in the hands of the majority shareholder is challenged before higher tax authorities and has yet not reached finality*

7. *The CIT(Appeals) ought to have allowed the appeal in toto.*

8. *The assessee reserves its right to add, amend, alter, delete, change or modify any or all grounds of appeal before or at the time of the hearing".*

17. The facts of the present appeal is quite similar to the appeal as discussed and decided above, as here in this case also, however here in this case the revenue has sought to tax the entire amount of Rs.11.75 crores as "Long-term-capital-gain" in the hands of the assessee company. The assessee's case was also reopened by issuance of notice under section 148 dated 31.03.2009 on the following "reasons recorded":-

> *"**Reasons for the belief that income has escaped assessment:***
> *M/s Purse Holding (India) Pvt Ltd (PHIL) is assessed to be in this charge vide PAN AACCP 2854 N. In the AY 2002-03 the return was processed u/s 143(1) of the Act on 10.02.2003. No. scrutiny assessment has been completed in this case.*

In this case an information of tax evasion has been received from the Addl. DIT(IT), Range 1, Mumbai vide letter dated 30.03.2009. The context of the information is as under:

I. The assessee company (PHIL) had invested in the shares of ING Baring India Ltd (B1), a NBFC dealing in investment banking/brokerage business in India. The company (B1) had 2 share holders only, namely (1) Barings Mauritius Ltd (BM) a company registered in Mauritius having 75% shareholders and (ii) PHIL having 25% share holding. Thus BM was holding totally 25423680 shares (16864995 shares initially and 8558658 allotted under Rights issue) and PHIL was holding totally 8474560 shares. (5621665 shares initially and 2852895 shares allotted under Rights issue).

II. On Dec. 14, 2001, PHIL entered in to a call option agreement with Barings Mauritius giving them an option to purchase all the shares held by PHIL in ING-Barings India Ltd. The consideration for this option was Re.1, the period of option was 150 years.

However, on verification of returns filed by the assessee, it is noticed that the consideration accrued by the call option exercised by Investigation has further informed that the assessee has sold the shares @ 0.49/- as against to the striking rate of Re.1/- per share. Apparently there is a gross under valuation of shares which has resulted escapement of capital gains tax. Therefore, I have reason to believe that income of more than Rs.1 lac has been escaped assessment.

Therefore, a proposal to reopen the assessment for the AY 2002-03 is put up for kind consideration and approval".

18. At the outset, the Ld. Counsel for the assessee, Mr. J P Shah submitted that, here in this case, the notice under section 148 has been issued by obtaining the necessary satisfaction of 'Commissioner of Income-tax', who cannot be reckoned as competent authority, authorized to give approval for such satisfaction on the reasons recorded under section 151. Under the provisions of section 151, the necessary satisfaction on the notice has to be obtained from the Joint Commissioner of Income-tax.

19. On this issue, the revenue was asked by the bench to produce the necessary records so as to verify, whether the impugned proceedings u/s 148 have been initiated after obtaining the necessary approval of the competent authority as given under section 151 or not. In response, the Ld. CIT DR has filed a copy of approval in a printed format which has been signed by the Addl. Commissioner of Income Tax. However, on perusal of the same it is noticed that in Column 12 which states as under:-

> *"12. Whether the Addl. Commissioner / Board is satisfied on the reasons recorded by the Assessing Officer that it is a fit case for the issue of notice u/s 148".*

There is no comment or any satisfaction of Additional CIT. The column has been left blank. Thus, nothing turns out from the document furnished by the Ld. DR as there is no satisfaction of Addl. CIT at all. On the contrary, the notice under section 148 dated 31.03.2009 mentions that this notice is being issued after obtaining the necessary satisfaction of

'Commissioner of Income-tax'. The revenue could not produce any other document to show that the necessary approval of Joint Commissioner or Additional Commissioner has been taken, rather as found from the record submitted, the 'Form' for obtaining the approval of Joint Commissioner, in terms of section 151 does not mentions anything whether the Additional CIT has actually given his satisfaction on the reasons recorded or not. The column has been left blank. Hence from the records, it is ostensibly clear that the 'satisfaction' in terms of section 151(1)(2) for the issuance of notice have been given by the Commissioner of Income Tax, who is not an authority as mentioned in sub-section (2) of section 151. For the sake of reference section 151 is reproduced hereunder:-

> *"(1) No notice shall be issued under* section 148 *by an Assessing Officer, after the expiry of a period of four years from the end of the relevant assessment year, unless the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner is satisfied, on the reasons recorded by the Assessing Officer, that it is a fit case for the issue of such notice.*
>
> *(2) In a case other than a case falling under sub-section (1), no notice shall be issued under* section 148 *by an Assessing Officer, who is below the rank of Joint Commissioner, unless the Joint Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is a fit case for the issue of such notice.*
>
> *(3) For the purposes of sub-section (1) and sub-section (2), the Principal Chief Commissioner or the Chief Commissioner or the Principal Commissioner or the Commissioner or the Joint Commissioner, as the case may be, being satisfied on the reasons recorded by the Assessing Officer about fitness of a case for the issue of*

notice under section 148*, need not issue such notice himself".*

20. Admittedly, in this case, sub-section (1) and sub-section (3) are not applicable, *albeit* sub-section (2) applies which provides that, no notice shall be issued under section 148 by the AO who is below the rank of Joint Commissioner unless Joint Commissioner is satisfied on the reasons recorded by the AO that it is a fit case for issue of such notice. Here in this case, admittedly, Joint CIT has not given his satisfaction on the reasons recorded by the ITO 7(4)(1), Mumbai but Commissioner of Income Tax, who is not the authority in such case to grant approval on the satisfaction of the reasons recorded by the AO. This aspect of the matter is squarely covered by the decision of the Hon'ble jurisdictional High Court in the case of **Ghanshyam K Khabrani vs. ACIT**, reported in, [**2012] 346 ITR 443 (Bom),** that the powers which are conferred upon a particular authority have to be exercised by that authority alone and the satisfaction which the statute mandates of a distinct authority cannot be substituted by the satisfaction of another. Here, in this case also the satisfaction was given by the Commissioner of Income-tax instead of Joint Commissioner. The Hon'ble High Court has cancelled the reassessment proceedings and the notice u/s 148 after observing and holding as under:-

"6 The second ground upon which the reopening is sought to be challenged is that the mandatory requirement of Section 151(2) has not been fulfilled. Section 151 requires a sanction to be taken for the issuance of a notice under Section 148 in certain cases. In the present case, an assessment had not been made under Section 143(3) or Section 147 for A.Y.

2004-05. Hence, under sub section 2 of Section 151, no notice can be issued under Section 148 by an Assessing officer who is below the rank of Joint Commissioner after the expiry of 4 years from the end of the relevant Assessment Year unless the Joint Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is a fit case for the issue of such notice. The expression "Joint Commissioner" is defined in Section 2(28C) to mean a person appointed to be a Joint Commissioner of Income Tax or an Additional Commissioner of Income Tax under Section 117(1). In the present case, the record before the Court indicate that the Assessing Officer submitted a proposal on 28 March 2011 to the CIT(1) Thane through the Additional Commissioner of Income Tax Range (I) Thane. On 28 March 2011, the Additional CIT forwarded the proposal to the CIT and after recording a gist of the communication of the Assessing Officer stated that:

"As requested by the AO -Necessary approval for issue of notice u/s. 148 may kindly be granted in the case, if approved."

On this a communication was issued on 29 March 2011 from the office of the CIT (1) conveying approval to the proposal submitted by the Assessing officer. There is merit in the contention raised on behalf of the Assessee that the requirement of Section 151(2) could have only been fulfilled by the satisfaction of the Joint Commissioner that this is a fit case for the issuance of a notice under Section 148. Section 151(2) mandates that the satisfaction has to be of the Joint Commissioner. That expression has a distinct meaning by virtue of the definition in Section 2(28C). The Commissioner of Income Tax is not a Joint Commissioner within the meaning of Section 2(28C). In the present case, the Additional Commissioner of Income Tax forwarded the proposal submitted by the Assessing Officer to the Commissioner of Income Tax. The approval which has been granted is not by the Additional Commissioner of Income Tax but by the Commissioner of Income Tax. There is no statutory provision here under which a power to be exercised by an officer can be exercised by a superior officer. When the statute mandates the satisfaction of a particular functionary for the exercise of a power, the satisfaction must be of that authority. Where a statute requires something to be done in a particular manner, it has to be done in that manner. In a similar situation the Delhi High Court in Commissioner of Income Tax Vs. SPL'S

Siddhartha Ltd. (ITA No.836 of 2011 decided on 14 September 2011) held that powers which are conferred upon a particular authority have to be exercised by that authority and the satisfaction which the statute mandates of a distinct authority cannot be substituted by the satisfaction of another. We are in respectful agreement with the judgment of the Delhi High Court.

7 In view of the findings which we have recorded on submissions (i), (ii) and (iv), it is not necessary for the Court to consider submission (iii) which has been urged on behalf of the Assessee. Once the Court has come to the conclusion that there was no compliance of the mandatory requirements of Section 147 and 151(2), the notice reopening the assessment cannot be sustained in law.

8 For these reasons, we are of the view that the petitioner would be entitled to succeed. Rule is made accordingly absolute by quashing and setting aside the impugned notice dated 30 March 2011. There shall be no order as to costs".

21. Thus, from the ratio laid down by the Hon'ble jurisdictional High Court as above, we hold that the CIT was not the competent authority to give his satisfaction for issuance of notice under section 148 and the same could have been given only by Joint Commissioner of Income-tax. Thus, respectfully following the ratio and law laid down in aforesaid decision, we quash the proceedings initiated vide notice dated 31.03.2009 issued under section 418 and accordingly, the entire assessment order is cancelled and held as *void-ab-initio*. Hence the adjudication on merits of the issues raised has been rendered academic. Accordingly, the appeal of the assessee stands allowed.

To sum-up:

Both the appeals filed by the assessees are allowed.

Order pronounced in the open court on 26th August, 2016

Sd/-	**Sd/-**
(जी.एस. पन्नू)	**(अमित शुक्ला)**
लेखा सदस्य	**न्यायिक सदस्य**
(G S PANNU)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Date: 26th August, 2016

प्रति/Copy to:-

1) अपीलार्थी /The Appellant.
2) प्रत्यर्थी /The Respondent.
3) The CIT(A) –10/Concerned___, Mumbai.
4) The DIT(International Taxation)-I/CIT- Concerned____, Mumbai.
5) विभागीय प्रतिनिधि "एल", आयकर अपीलीय अधिकरण, मुंबई/
   The D.R. "L" Bench, Mumbai.
6) गार्ड फाईल \
   Copy to Guard File.

आदेशानुसार/By Order

/ / True Copy / /

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, मुंबई
Dy./Asstt. Registrar
I.T.A.T., Mumbai

*चव्हान व.नि.स
*Chavan, Sr.PS