आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL , 'D' BENCH, CHENNAI
श्री एन.आर.एस. गणेशन,न्यायिक सदस्य एवं ए. मोहन अलंकामणी, लेखा सदस्य के समक्ष
BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI A.MOHAN ALANKAMONY, ACCOUNTANT MEMBER

आयकरअपीलसं./**I.T.A.No.553/CHNY/2018**
(निर्धारणवर्ष / Assessment Year: 2011-12)

Dr.Muthian Sivathanu, 19/136 Babanagar 6th Street, Villivakkam, Chennai – 600 049.	Vs	The ACIT, Non-Corporate Circle – 17, Chennai - 6
PAN: CBSPS6453G		
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से /Appellant by	:	Shri M. Sivathanu, Advocate
प्रत्यर्थी की ओर से /Respondent by	:	Ms. S. Vijayaprabha, JCIT

सुनवाई की तारीख/Date of hearing	:	16.08.2018
घोषणा की तारीख /Date of Pronouncement	:	24.10.2018

आदेश / O R D E R

Per A. Mohan Alankamony, AM:-

This appeal by the assessee is directed against the order passed by the Ld. Commissioner of Income Tax (Appeals)-5, Chennai dated 12.12.2017 in ITA No.50/CIT(A)-50/2016-17 for the assessment year 2011-12 passed U/s.250(6) r.w.s. 143(3) & 147 of the Act.

2. The assessee has raised several grounds in his appeal, however the lone issue arising out of the appeal is that the Ld.CIT(A) has erred in upholding the order of the Ld.AO, who had treated the sale proceeds of the shares allotted in the ESOP (Employees Stock Option Plan) scheme during the earlier assessment years when the assessee was non-resident, as perquisites, for the relevant assessment year, instead of assessing only the gain resulting from such transaction as capital gain, viz., short term or long term as the case may be.

3. The brief facts of the case are that the assessee is an individual earning income from salary, filed his return of income for the assessment year 2011-12 on 30.07.2011. The Ld.AO in his order has further observed as follows:-

> *"The assessee had admitted total income of Rs.4,18,23,600/-. The same was processed u/s.143(1) of the Income Tax Act, 1961 determining total income at Rs. 4,18,23,600/-. The case was re-opened u/s.147 and notice u/s.148 was issued to the assessee, which is duly served to the assessee.,*
>
> *2. The notice u/s.143(2) and u/s.142(1) of the IT Act 1961 alongwith the questionnaire was issued and subsequently on various dates. In response to the notices, Shri Muthian Sivathanu, assesssee, attended and submitted various details as called for. The same were scrutinized.*
>
> *3. The assessee has claimed Short Term Capital Gain of Rs.1,45,19,170/- and offered an amount of Rs. 1,45,19,170/-. The claim of the assessee cannot be accepted because the employer has treated an amount of Rs. 1,45,19,170/- as perquisite and the same comes under the head salary.*

4 During the said financial year the assessee received perquisite of Rs. 1,45,19,170/- by sale of Employee Stock Option Plan, which was added to salary in Form-16, issued by the employer and tax deducted at source.

4.a The assessee in his return of income offered Rs. 4,18,23,600/- as income from salaries which includes perquisite value of Rs. 1,45,19,170/- arising on ESOP. The uncontroverted fact is that the assessee is a resident in India during the relevant previous year. The perquisite arising on exercise of stock option plan is taxable as "Salary Income" in India.

4.b The factual panorama of the case is that various lots of shares have been sold on behalf of the assessee by employer, Google Inc Employee's Stock Option Plan during the previous year relevant to the A.Y. 2011-12. With effect from 01.04.2010, the value of any specified security or sweat shares allotted or transferred directly or indirectly shall constitute a perquisite in the hands of the employees. At this juncture it is apt to reproduce the provisions of section 17(2) (vi) of the Income-tax Act, 1061."

Thereafter relying on the provisions of Section 17(2)(vi) of the Act, the Ld.AO assessed the total income of the assessee at Rs.4,20,21,097/-, disregarding the assessee's claim of assessable capital gain of Rs.8,14,232/- and salary income of Rs. 2,74,92,222/- by observing as follows:-

"5. These shares were sold in various lots during the financial year relevant to the assessment year 2011-12.

6 In this case, neither the capital gain calculation nor the return filed with claims long term capital gain by the assessee, is acceptable, as the perquisite is the part of salary and it cannot be treated as capital gain. Hence, the assessee claim is not correct.

7. In the light of such situation the assessee claims of capital gain is not acceptable, and it is perquisite and rightly to be taxed under the head salaries."

4. On appeal the Ld.CIT(A) upheld the order of the Ld.AO. The relevant portion of the order of the Ld.CIT(A) is reproduced herein below for reference:-

6.4 In the present case, stock option was given to the employees of the Indian company. It is true that the American parent company is making this offer. This is with a view to give an incentive to employees of the Indian Company. There would have been no problem had the stock option been offered by the Indian Company. But the position in law will not be different only because the stock option is offered not by the Indian Company but by its parent company. If the 'salary' is paid for or on behalf of the employer that will also have to be included in the 'salary' income by virtue of sub-clause (b) of section 15. In this case stock option was offered to the employees of the Indian Company. If and when the option is exercised by the employee, share will be allotted and thereafter sold. The resultant profit will be taxable in the hand of the employee. The amount that the employee will receive will come to him in addition to the salary which the employee will get from the Indian Company. It is something more than what is due to him under the contract of employment. Therefore, this additional amount will clearly come within section 15(b) of the Income Tax Act.

Salary has been defined in s. 17(iv) to include perquisites or profits in lieu of or in addition to any salary or wages. The employees, who accept the offer of ESOPS, are going to receive something in addition to their salary and wages. The stock option scheme will enable them to get something in addition to their remuneration. This addition will clearly come within the definition of the expression "salary". Whether it is paid by the employer or by somebody else for or on behalf of the employer will not make any difference. This has been made clear by clause (b) of section 15.

6.5 The next question is whether the amount was paid for or on behalf of the employer? To answer this question, we have to bear in mind that the offer was made to the employees of the Indian company which is a fully owned subsidiary of the parent American Company. Its business is completely controlled by the parent company. The object of making such offer can only be the desire to give a benefit to the employees of the Indian Company and at the same time, to enhance their interest in the company. The parent company has made such an offer to the employees of the subsidiary company only because it regards its subsidiary and itself as the same concern. It wants to reward and encourage the employees of the subsidiary company. Even if the subsidiary is treated as a separate juristic entity, the stock option offered by the American company must be treated to have been made for and on behalf for the Indian company. Otherwise, there is no reason why an independent and altogether separate American company will try

to give encouragement to the employee of an Indian company. It is the employer's job to look after its employees by paying salary and giving other benefits. If some other company pays additional benefits to the employees, then it must be held to have been done for and on behalf of the employer. Moreover, in a case like this the corporate veil will have to be lifted to see the real nature of the transaction. The only possible explanation for the offer of stock option by the American company to the employees of the Indian company can be that it regards its business and the business of the Indian company as one. There is no difficulty in law in recognising the reality of the transaction and treating the benefit to be given to the Indian employees as one by the employer himself or by the American company for or on behalf of the employer. In either view of the matter, this additional remuneration or profit will have to be treated as income from "salary". Te Supreme Court in the case of State of UP vs Renusagar Power Co. AIR 1988 SC 1737 observed that the doctrine of lifting the corporate veil was expanding in the context of modern jurisprudence. The court held on fact of that case that —"the holding company and the subsidiary were to be treated as one and the same because the subsidiary was created to generate and supply energy and power to the holding company in order to enable it to maintain its production commitments to the state and therefore generation of power was considered for the purposes of excise to be the holding company's own source of supply and not supply from a separate company".

6.6 In the instant case, the American company has floated an Indian subsidiary. It has devised a scheme to give encouragement and pecuniary incentive to the employees of the Indian company by offering to them an option to purchase its own shares at a predetermined price. This sort of transaction is not possible unless the parent company treats its own business and the business of the Indian company as one. Perquisite or any other profit of employment will clearly come within the ambit of the definition of the expression 'salary' given in section 17(1). Moreover, 'perquisite' has also been broadly defined in section 17(2) and will include the value of any benefit or amenity provided at a concessional rate.

6.7 From the above discussion it is clear that the Employer has correctly shown the gain on ESOPs option as perquisite in Form 16.

6.8 In the case of the appellant Form-16 was issued by his employer Google India and not by the Google Inc, USA.

Form-16 shows the Value of perquisite u/s 17(2) [as per Form No. 12BA wherever applicable] at Rs 29,824,047.00

Form No. 12BA shows Perquisite due to "Stock Options" at Rs 29,797,127.00.

The appellant did not file revised Form-16 in support of his contention that the income of Rs.1,37,04,938/- for which exemption was claimed pertains to income that accrued during the period prior to Nov. 2008 i.e. when the assessee was a non-resident working in USA for Google Inc.

6.9 It is pertinent here to refer to the decision of the hon'ble jurisdictional ITAT Chennai in ITA No 390/Mds/2016 and ITA No 335 & 2 09/M ds/2 016.

In the common order for the cases of Shri Soundarajan Parthasarathy vs DCIT (ITA No 90/Mds/2016) for A.Y 2011-12 and Shri Kummathi Rameswar Reddy vs DCIT (ITA No 335 & 209/Mds/2016) for A.Y. 2011-12 & 2012-13 the hon'ble ITAT "A" bench Chennal held —

"Coming to the next contention of the assessee that during the vesting period, the assesses were non-residents and rendered services outside India, therefore not taxable in India, this Tribunal is of the considered opinion that the benefit was conferred on the assessee in the form of Stock Appreciation Rights for the services rendered to the subsidiary company M/s Cognizant Technologies India Pvt Ltd. Therefore merely because the assessees were non-residents and rendered service outside India during the vesting period that cannot be a reason for claiming that the same was not taxable in India."

8. From the above facts and discussion, it is clear that the Employer has correctly shown the gain on ESOPs option as perquisite in Form-16. Hence, all the grounds of appeal are dismissed and the action of Assessing Officer to determine the total income as per Form-16 is upheld."

5. Before us the Ld.AR submitted that the observations of the Ld.AO in his order are factually incorrect which was further endorsed by the Ld.CIT(A). It was further argued that the assessee's status during the relevant assessment year is resident but NOR (Not Ordinary Resident) as defined in Section 6(6)(a) of the Act. It was further submitted that the stock option was exercised by the assessee during the earlier assessment year when he served abroad in the parent company and when he was a non-resident. Subsequently during the relevant assessment year the stock was sold by the parent company on behalf of the assessee and the sale proceeds were remitted to the assessee through the present employer which is the subsidy company. It was therefore argued that the entire value of the sale proceeds cannot be

treated as the perquisite in the hands of the assessee during the relevant assessment year, as the stock option was exercised by the assessee in the earlier assessment year when he was a non-resident and therefore only the capital gain accrued to the assessee during the relevant assessment year when he is a resident but NOR can be brought to tax during the relevant assessment year. On the other hand the Ld.DR argued in support of the orders of the Ld.Revenue Authorities.

6. We have heard the rival submissions and carefully perused the materials on record. From the facts of the case it appears that the entire stock option was exercised by the assessee when he was a non-resident during the earlier assessment years when he was non-resident. If that is so, the value of the shares allotted cannot be treated as the income of the assessee during the relevant assessment year or in the earlier relevant assessment year because it is the income accrued to the assessee outside India and for services rendered outside India when he was a non-resident. It further appears that subsequently the assessee took up employment in the subsidiary company in India and was a resident but not ordinary resident. In such period the assessee's earlier employer realized the stock held by the

assessee under the ESO scheme and remitted the same to the assessee through his present employee the subsidy company. If that being so, only the gain arising out of the sale of the stock can be treated as the income of the assessee under the head capital gain viz., long term or short term as the case may be, as per the provisions of the Act because the assessee has earned profit from sale of the asset owned by him during the relevant assessment year. Therefore the view of the Ld.AO as well as the Ld.CIT(A) that the entire amount received during the relevant assessment year from the sale proceeds of the stock option has to be taxed under the head 'perquisites' in the hands of the assessee is erroneous. The assessee had already acquired the asset viz., "stock" from the employee's stock options scheme when he was serving abroad in the parent company and during that assessment year, the assessee was non-resident. Therefore during the beginning of the relevant assessment year, the stock viz., the asset was already vested on the assessee. Any gain on sale arising out of such asset during the relevant assessment year when he is a resident but NOR has to be necessarily treated as capital gain in the hands of the assessee as per the provisions of the act, needless to mention that the value of the stock allotted to the assessee shall be treated as the cost of acquisition of the stock. Therefore if the facts understood by us and enumerated herein

above is correct, then it is obvious that the findings of the Ld.AO as well as that of the Ld.CIT(A) and their decision to treat the entire amount receive on liquidation of the stock held by him under the ESO scheme as perquisites under the head income from salary is erroneous. It is further pertinent to mention that the income should be assessed in the hands of the assessee not in accordance with what is stated in the Form 16 issued by the employer but only based on the actual facts and as per the provisions of the Act.

7. As pointed out by the Ld.AR we find that there is discrepancy in the observation made by the Ld.AO in his order and the return of income filed by the assessee. In the assessment order, the Ld.AO has mentioned that the assessee had claimed short term capital gain of Rs.1,45,19,170/-, however as observed from the return of income, the short term capital gain earned by the assessee is stated as Rs.8,14,232/-. It is further stated in the assessment order that the assessee had offered income as Rs.4,18,23,600/- however in the return of income, the assessee has declared income from salary as Rs.2,74,92,222/-, short term capital gain Rs.8,14,232/-, and income from other source Rs.9,705/-, thus the total income returned by the assessee was for Rs.2,83,16,159/-.

8. Since there is discrepancy with respect to facts observed by the Ld.AO and the return of income filed by the assessee, in the interest of justice, we hereby remit the entire matter back to the file of Ld.AO to verify the facts from the records and thereafter decide the matter in accordance with merit and law and as per our observations made herein above.

9. In the result, the appeal of the assessee is allowed for statistical purposes as indicated herein above.

Order pronounced on the 24th October, 2018 at Chennai.

Sd/-	Sd/-
(एन.आर.एस. गणेशन) (N.R.S. Ganesan) न्यायिक सदस्य/Judicial Member	(ए. मोहन अलंकामणी) (A. Mohan Alankamony) लेखा सदस्य/Accountant Member

चेन्नई/Chennai,
दिनांक/Dated 24th October, 2018

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant	2. प्रत्यर्थी/Respondent	3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT	5. विभागीय प्रतिनिधि/DR	6. गार्ड फाईल/GF