आयकरअपीलीयअधिकरण, 'सी' न्यायपीठ,चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं श्री
एस जयरामन, लेखा सदस्य केसमक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI S. JAYARAMAN, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. Nos. 1415 & 1416/Mds/2017

निर्धारण वर्ष/Assessment Years : 2012-13 & 2014-15

Shri Ramesh Nagarajan, O.No. 51, New No. 121, 12 BBC Thallam Gardens, New Avadi Road, Kilpauk, Chennai – 600 010.	Vs.	Assistant Commissioner of Income Tax, Non-Corporate Circle -17, Chennai.
[PAN: ADSPR 4514M]		
(अपीलार्थी/Appellant)		**(प्रत्यर्थी/Respondent)**

अपीलार्थीकीओरसे/Appellant by	**:**	Shri. N. Suresh, CA
प्रत्यर्थीकीओरसे/Respondent by	**:**	Shri. N. Madhavan, JCIT
सुनवाईकीतारीख/Date of Hearing	:	17.08.2017
घोषणाकीतारीख/Date of Pronouncement	:	31.10.2017

आदेश /O R D E R

PER S. JAYARAMAN, ACCOUNTANT MEMBER:

The assessee filed these appeals against the orders of the Commissioner of Income Tax (Appeals)-5, Chennai, in ITA Nos085& 209 CIT(A)-5/16-17 dated 08.5.17 for ays 2012-13 & 2014-15, respectively.

2. Shri Ramesh Nagarajan, the assessee, an employee of Cognizant Technologies Solutions India Pvt Ltd was granted ESOPs in Oct 2002 & Jan 2006 during his stay in the US. He exercised the options in Feb/Mar 2012& in Sep 2013 and sold the shares on the same date of exercising the options. Since, he was a Resident under the Income Tax Act, 1961 for AYs 12-13& 14-15, the difference between the Grant Price and the Sale price (which was also the Fair Market Value of these shares) was added as Perquisites in his salary and taxed as such. The gains on the sale of ESOP shares was also subjected to tax in the US for the period of the assessee's residence in the US between the Grant date and Vesting date of the option. The assessee was paid the balance of the sale consideration after deduction of both the US and the Indian withholding taxes. As his income from the sale of ESOP shares had suffered double taxation, the assessee sought relief u/s 90.Subsequently,when the assessee filed a return for US tax compliance , he had to pay additional tax on the income from sale of ESOPs to the US authorities, which was paid on 03.10.2013. At which point of time, the proceedings u/s 143(2) for ay 2012-13 had commenced and hence the assessee made a claim for the enhanced relief u/s 90 directly to the AO as part of the 143(2) proceedings. The DCIT NCC 17(1) (AO) had in the order u/s 143(3) dated 28.3.2015 allowed the relief u/s 90 albeit with a mistake in the quantification but negated the refund with an erroneous charge of interest

u/s 234B. When the assessee filed a petition u/s 154 dated 10.4.2015 against this order, he was given to understand that the mistake was rectified and the consequential refund was put up for approval to the supervisory authority to the AO, the JCIT NCC 17.The assessee was subsequently given to understand that the JCIT NCC 17 had rejected the refund claim on the ground that the relief u/s. 90 was not tenable. No order u/s. 154 was furnished to the assessee in this regard as mandated by the Act and also by the directive of the CBDT in this regard (instructions 01/2016 & 02/2016 both dated 15.02.2016).The case for the ay 2012-13 was reopened u/s. 147 vide a notice u/s. 148 dated 30.03.2016 by the ACIT NCC 17(1), followed by a notice u/s. 143(2) dated 13.04.2016. Copies of all the records in support of the claim for relief u/s. 90 which were filed before the DCIT NCC 17(1) during the earlier proceedings u/s. 143(2) were filed once again with the ACIT NCC 17(1) tosubstantiate the claim. The reassessment was completed by an order u/s. 143(3) r.w.s. 147 dated 28.04.2016 denying the relief u/s.90. The relief sought u/s.90 was refused for similar reason in the scrutiny assessment made for ay 2014-15 also. On appeals, the learned CIT(A)-5 by his orders dated 08.05.2017 confirmed the orders of the ACIT NCC 17(1) denying the relief u/s. 90 for both the ays. Aggrieved, the assesse filed these appeals with following common grounds for both the ays.

1. The order of the learned CIT(A)-5 is bad in law and contrary to the facts of the case.

2. The learned CIT(A)-5 has wrongly concluded that the profit on sale of Esop Shares has neither been disclosed in the return of income nor taxed in India while his order clearly confirms the fact that the same has been offered to tax and duly taxed in India.

3. The learned CIT(A)-5 has committed a factual error while stating that proof of tax paid on the sale of Esop shares in USA has not been furnished while the same has been furnished to the learned CIT(A)-5 during the appeal proceedings and the A.O during the assessment proceedings.

4. The order of the learned CIT(A)-5 is based on incorrect inferences drawn from the Delhi ITAT decision cited in his order as the facts of that case are totally different from the facts of the present case.

For the ay 2012-13, theassessee made the following ground also

5. The learned CIT(A)-5 has not adjudicated on the ground raised during the appeal proceedings of the tenabilityof the of the 147 proceedings.

6. In light of the above and such other grounds as may be adduced at the time of the hearing it is prayed that the order of the learned CIT(A)-5 be set aside and the learned ACIT be directed to grant the relief u/s 90 along with the consequential refund of tax as claimed.

3. The AR submitted that the assessee is an employee of Cognizant Technology Solutions India Private Limited. For the period between 2002 and 2008, he was sent on deputation to Cognizant Technology Solutions US Corporation, a company registered and existing in the US. On various dates during the period of such deputation, non- qualified stock options were granted by Cognizant Technology Solutions US Corporation to him. These options are for US$ designated shares of the said US Corporation listed in the US Stock Exchanges. These options were exercised and income for the sale of the resultant shares was realised by the assessee during ays 2012-13 and

2014-15. The income from these options are primarily taxable in the US under their tax laws as is clearly stated in the certificate of grant of option given to the assessee employee. The said certificate also mentions that the federal withholding tax required under US tax laws on exercise or sale of these shares would be recovered from the payments due to the assessee from the US Corporation. Accordingly, when the assessee exercised and sold the shares under this ESOP scheme, the US corporation which handled the sale and made the payment of the proceeds to the assessee withheld the tax due under the US tax laws from the sale proceeds. This was duly reported by them to the US tax authorities under Form W2 a copy of which was also issued to the assessee. It is then, the duty of the assessee to file the tax return to the US authorities under Form 1040NR and discharge the additional tax liability,if any ,or get the refund of excess tax withheld. Thus, the assessee has also filed returns with the US tax authorities for the relevant assessment years, and has also discharged an additional tax liability for ay 2012-13. The payment of this income, i.e. proceeds from the sale of the ESOP shares, was made by the US Corporation to the assessee towards services rendered overseas when the assessee was on their payroll. The income pertaining to the time span between the Grant date and Vesting date (pertaining to the duration that the assessee was on the payroll of the US Corporation) is taxable under US laws only at the point of exercise and sale of the shares from these options as mentioned in the certificate of grant of option, and

accordingly, the US Corporation deducted the applicable tax and remitted the same to the US tax authorities at the time of exercise cum sale. The right of the US tax authorities to levy tax on this income is clearly covered under Article 2 read with Article 16 of the Indo US DTAA. The income in the present case has been paid and borne by Cognizant Technology Solutions US Corporation, which is registered and existing in the US, and thus, a resident of that country. Article 16(2) of the Indo US DTAA will therefore, not operate to restrict the right to tax this income only to India. In any event, the income in question has arisen in the US inasmuch as the exercise cum sale of the options took place in the US, and has been duly taxed there. Thus, the case falls squarely within the purview of and is entitled to the benefit of Article 25 (2) of the Indo US DTAA.

3.1 The fact that the income from sale of ESOP Shares of Rs.1,37,10,290/- has been offered to tax as part of Salary and has indeed duly suffered tax in India is confirmed by the ACIT NCC 17(1) in his order u/s 143(3) r.w.s 147 dt. 28.04.2016.In light of this, the assessee's employer has considered the difference between the Grant Price and the sale value of the shares (which also happened to be the FMV) as Perquisite in the hands of the assessee and deducted tax on the same. This fact is evidenced by the transaction advice letters given to the assessee for each such transaction which clearly indicate:-

i) the number of shares sold, ii) the grant price, iii) the sale price, iv) India withholding tax, v) Recovery of the US tax, vi) the net amount paid to the assessee and vii) the Perquisite Value in INR for taxation purposes. The copies of the transaction advice letters (which were available on the record of the learned CIT (A)-5 and to which his attention was also drawn during the submissions made in the appeal proceedings) are included at pages 9 to 15 of the paper book enclosed herewith. It can be seen from these advices that the exercise amount (being the FMV of the shares) is the same as the Sale price of these shares as the exercise of option and sale took place on the same day. Under such circumstances:

i. the entire gain from the sale of ESOP shares was taxed as perquisite (as part of salary); and

ii. there was no Capital Gain on the sale, as the Sale price and FMV were the same.

This has been duly disclosed in the return of the assessee and was also clearly explained to the learned CIT (A)-5 during the appeal proceedings. However, the learned CIT (A)-5 has made an erroneous observation and concluded that no gain on the sale of ESOP has been disclosed in the return, contrary to the fact that the entire gain on sale of ESOP shares has been offered to tax in the return as part of salary and has been duly taxed in India.

3.2 The copies of the transaction advice letters for the sale of ESOP shares (at pages 9 to 15 in the enclosed paper book) clearly show that the employer Company has withheld tax to be remitted by the employer Company to Tax Authorities (both the Indian and US tax regimes). That the tax withheld by the Employer Company has indeed been remitted to the respective tax authorities in India and the US is evidenced by the Form 16 (for taxes paid in India) and Form W2 (for taxes paid in the us), both of which are also on record.

b. It is pertinent to note that the Form W2 (equivalent of Form 16 under the IT Act, 1961) is the Earnings Summary issued by the Employer company to the assessee under the US tax laws which discloses the total amount of income of the assessee which is taxed under US laws as also the Federal Income tax that is withheld against this income. The amounts disclosed in the Form W2 of the assessee for the relevant period (which is included at page 16 of the enclosed paper book) are the income from the sale of ESOP shares which is taxed in the US and the aggregate tax withheld against the same under the US laws.

c. Further, the Income-tax return of the assessee in Form 1040NR (included at pages 17 to 21 of the enclosed paper book) is the return submitted by the assessee to the US tax authorities for the relevant period. This form clearly discloses the total income to be taxed and the Federal tax withheld which tallies with the details in the Form W2. This Form 1040NR also shows the total tax payable, tax withheld and the balance tax payable to the

US authorities. The copy of the challan for payment of this balance tax is also included at page 22 of the enclosed paper book.

d. The above Form W2 and Form 1040NR were also available on the record of the learned CIT(A)-S. It can be clearly seen from these Forms that the ESOP sale income of the assessee was indeed taxed in the US. These are the standard documents that evidence details of the income assessed and taxed in the US. It is submitted that the US tax authorities do not issue any separate certificate stating that the same income was subjected to tax in USA. In fact, the issue of any such certificate from the US tax authorities was not raised either during the assessment proceedings or during the appeal proceedings nor was the adequacy of the Forms W2 and 1040NR as supporting documents for the tax paid in the USA questioned at any earlier stage. The findings and conclusion of the learned CIT(A)-5 on this issue are thus, erroneous.

3.3 The assessee did not claim any such specific deduction from the income from sale of ESOP shares taxed in India which was also taxed in the US, as can be seen from the Form ITR 1 filed for the AY and the Computation of Income sheet (included at pages 1 to 3 of the enclosed paper book). In fact, the order of the ACIT, NCC 17(1) reproduced in page No.5 of the impugned order clearly confirms the fact that the entire income from the sale of ESOP shares of Rs. 1,37,10,290/- has been offered to tax as part of salaries and

there is no mention of any claim for any deduction against the same either in the order of the ACIT, NCC 17(1) or the impugned order of the learned CIT(A)-5. Even otherwise the decision in Manpreet Singh's case is not against the relief u/s 90 in toto and it strengthens the case for full relief u/s 90 where the same quantum of income is taxed in India and the US. This being so ,the inference drawn by the learned CIT(A)-5 is incorrect and the decision based on such incorrect inference is bad in law.

3.4 The learned CIT(A)-5 has neither considered nor adjudicated the issue of the maintainability of section 147 proceedings, which has been raised by the assessee. In the order u/s 143(3) dated 28.3.2015, the DCIT, NCC 17(1) had granted relief u/s 90 based on the material furnished during the assessment proceedings. The invocation of the proceedings u/s 147 has been the result of just a change of opinion on the part of the AO and not based on any tangible material which was not available with the AO earlier. It is well settled law that invoking the provisions of sec 147 should be based on tangible material and not exercised mechanically or arbitrarily based on a mere change of opinion. [MJ. Pharmaceuticals Ltd. vs. DCIT (297 ITR 119 (Bom.)); Asteroids Trading and Investments P. Ltd. vs. DCIT (308 ITR 190 (Bom.)); Purity Techtextile (P) Ltd. vs. ACIT (230 CTR 157 (Bom.))] Under such circumstances, the notice u/s 148 and the consequential order u/s 143(3) r.w.s 147 are bad in law, and the non-consideration of this issue by

the learned CIT(A)-5 and renders the impugned order bad in law, since this is an issue that goes to the root of the matter.

3.5. Per contra, the DR supported the orders of the AO and the CIT (A).

4. We heard the rival contentions, gone through relevant orders and the material. Though, the assessee raised specific grounds challenging the validity of reopening the assessment for ay 2012-13, we find that the CIT(A) has not adjudicated this matter. Hence we deem it fit to restore the matter to the file of the CIT (A). The CIT (A) after giving due opportunity to the assessee would decide the case for ay 2012-13 in accordance with law. On merits for both the assessment years, it is submitted that the assessee is an employee of Cognizant Technology Solutions India Private Limited. For the period between 2002 and 2008, he was sent on deputation to Cognizant Technology Solutions US Corporation, a company registered and existing in the US. On various dates during the period of such deputation, non-qualified stock options were granted by Cognizant Technology Solutions US Corporation to him. These options are for US$ designated shares of the said US Corporation listed in the US Stock Exchanges. These options were exercised and income for the sale of the resultant shares was realised by the assessee during ays 2012-13 and 2014-15. The income from these options are primarily taxable in the US under their tax laws as is clearly stated in the certificate of grant of

option given to the assessee employee. The said certificate also mentions that the federal withholding tax required under US tax laws on exercise or sale of these shares would be recovered from the payments due to the assessee from the US Corporation. If the assessee lays material to prove that he was an employee of Cognizant Technology Solutions US Corporation during the period between 2002 and 2008, then he is entitled for the relief sought u/s 90 on the taxes paid in the US. Since the matter regarding the validity of reopening of the assessment for ay 2012-13 is being remitted back to the CIT(A), we are of the view that these issues be re-examined by the CIT(A). After giving adequate opportunity to the assessee, the CIT (A) shall pass speaking orders on these issues too.

5. In the result, the assessee's appeals for the ays 2012-13 & 2014-15 are treated as allowed for statistical purposes.

Order pronounced on 31st October, 2017 at Chennai.

Sd/-	**Sd/-**
(एन.आर.एस. गणेशन)	**(एसजयरामन)**
(N.R.S. GANESAN)	**(S. JAYARAMAN)**
न्यायिकसदस्य/Judicial Member	**लेखासदस्य/Accountant Member**

चेन्नई/Chennai,
दिनांक/Dated: 31st October, 2017
JPV

आदेशकीप्रतिलिपिअग्रेषित/Copy to:

1. अपीलार्थी/Appellant 2. प्रत्यर्थी/Respondent 3. आयकरआयुक्त (अपील)/CIT(A)
4. आयकरआयुक्त/CIT 5. विभागीयप्रतिनिधि/DR 6. गार्डफाईल/GF