

## Gain arising on sale of ESOP issued by erstwhile employer not taxable as perquisite: ITAT

**Summary – The Chennai ITAT in a recent case of Dr. Muthian Sivathanu, (the Assessee) held that where on assessee's leaving job of Google-USA and joining Indian subsidiary Google-India, Google-USA realized Stock held by assessee under ESOP and remitted same to assessee through Google-India, gain on such sale could not be treated as perquisite; it was capital gains**

### Facts

- The assessee was an individual earning income from salary. The Assessing Officer observed as follows:—
  - The assessee had claimed short-term capital gain of Rs. 1.45 crores and offered an amount of Rs. 1.45 crores. The claim of assessee could not be accepted because the employer had treated an amount of Rs. 1.45 crores as perquisite and the same would come under the head salary.
  - During the said financial year the assessee received perquisite of Rs. 1.45 crores by sale of Employee Stock Option Plan, which was added to salary in Form-16, issued by the employer and tax deducted at source.
  - The assessee in his return of income offered Rs. 4.18 crores as income from salaries which includes perquisite value of Rs. 1.45 crores arising on ESOP. The uncontroverted fact was that the assessee was a resident in India during the relevant previous year. The perquisite arising on exercise of stock option plan was taxable as 'Salary income' in India.
  - The factual panorama of the case was that various lots of shares had been sold on behalf of the assessee by employer, Google-USA's. Employee's Stock Option Plan during the previous year relevant to the assessment year 2011-12. With effect from 1-4-2010, the value of any specified security or sweat shares allotted or transferred directly or indirectly shall constitute a perquisite in hands of the employees.
- Thereafter relying on the provisions of section 17(2)(vi), the Assessing Officer, assessed the total income of the assessee at Rs. 4.20 crores disregarding the assessee's claim of assessable capital gain of Rs. 8.14 lakhs and salary income of Rs. 2.7 crores by observing as follows:
  - These shares were sold in various lots during the financial year relevant to the assessment year 2011-12.
  - In this case, neither the capital gain calculation nor the return filed with claims long-term capital gain by the assessee, was acceptable, as the perquisite was the part of salary and it could not be treated as capital gain. Hence, the assessee's claim was not correct.
  - In the light of such situation, the assessee's claim of capital gain was not acceptable, and it was perquisite and rightly to be taxed under the head salaries.
- On appeal, the Commissioner (Appeals) upheld the order of the Assessing Officer.
- On appeal to the Tribunal:

### Held

- The entire stock option was exercised by the assessee when he was a non-resident during the earlier assessment year. 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, i.e., the subsidiary 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 Assessing Officer as well as the Commissioner (Appeals) 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 enumerated hereinabove is correct, then it is obvious that the findings of the Assessing Officer as well as that of the Commissioner (Appeals) 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.
- As pointed out by the assessee, there is discrepancy in the observation made by the Assessing Officer in his order and the return of income filed by the assessee. In the assessment order, the Assessing Officer has mentioned that the assessee had claimed short-term capital gain of Rs. 1.45 crores; however, as observed from the return of income, the short-term capital gain earned by the assessee is stated as Rs. 8.14 lakhs. It is further stated in the assessment order that the assessee had offered income as Rs. 4.18 crores; however, in the return of income, the assessee has declared Rs. 2.74 crores, as income from salary Rs. 8.14 lakh short-term capital gain and Rs. 9,705 as income from other source, thus, the total income returned by the assessee was Rs. 2.83 crores.
- Since there is discrepancy with respect to facts observed by the Assessing Officer and the return of income filed by the assessee, in the interest of justice, the entire matter is to be remitted back to

the file of Assessing Officer to verify the facts from the records and thereafter decide the matter in accordance with merit and law and as per observations made hereinabove.