

**IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH, MUMBAI**

**BEFORE SHRI PRASHANT MAHARISHI, AM AND  
MS. KAVITHA RAJAGOPAL, JM**

ITA No. 2545 /Mum/2011  
(Assessment Year: 2007-08)

&

ITA No. 2732/Mum/2014  
(Assessment Year: 2007-08)

Citicorp International Finance Corporation C/o. A. F. Ferguson & Co., Maker Towers, E Wing, 4 <sup>th</sup> Floor, Cuffe Parade, Mumbai-400 005	Vs.	The Addl. DIT (International Taxation) Range-1, Mumbai
PAN/GIR No. AACCC 2105 R		
<b>(Appellant)</b>	:	<b>(Respondent)</b>
<b>Assessee by</b>	:	Shri Farrokh V. Irani
<b>Revenue by</b>	:	Shri Krishna Kumar
<b>Date of Hearing</b>	:	17.11.2023
<b>Date of Pronouncement</b>	:	14.02.2024

**ORDER**

**Per Kavitha Rajagopal, JM:**

The captioned appeals have been filed by the assessee, challenging the order of the learned Commissioner of Income Tax (Appeals)-10, Mumbai ('ld.CIT(A) for short), passed u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2007-08.

2. As these appeals are on identical facts, we hereby pass a consolidated order in both these appeals, taking ITA No. 2545/Mum/2011 as the lead case for the sake of convenience.

**ITA No.2545/Mum/2011**

3. The assessee has challenged the order of the Id. CIT(A) in upholding that the capital gain of Rs.428,96,85,892/- on sale of equity shares in Progeon Ltd. is short term capital gain (STCG for short) as held by the Id. A.O. without considering the fact that the said shares were held by the assessee for more than 12 months preceding the date of transfer.

4. The brief facts are that the assessee company incorporated under the laws of the state of Delaware, USA is a tax resident of the United States of America. The assessee company is engaged in maintaining foreign direct investment (FDI) account and has its main source of income in India from income from capital gains. The assessee filed its return of income dated 29.10.2007, declaring total income at Rs.428,96,85,892/- and the same was processed u/s. 143(1) of the Act. The assessee's case was then selected for scrutiny and notice u/s. 143(2) and 142(1) of the Act were issued and served upon the assessee. The assessee, pursuant to share purchase agreement dated 14.06.2002 with Progeon Ltd. was holding 87,50,000 equity shares of Progeon Ltd. It was original subscription of CCPS converted later on into equity shares. On 20.04.2006, assessee entered into an agreement to sale above shares to Infosys Technologies Ltd. for a consideration of rupee equivalent to USD 115,131,000/-. This consideration was subject to terms and conditions of that agreement which are mentioned as condition precedent to the agreement as per clause 4 of the agreement. If such conditions are not fulfilled there was a right to rescind the contract as per clause 4.3.7 of agreement. Clause 5 of agreement also specifies 'closing date' of transaction. There was also an escrow

agreement and consideration was to be released after share transferred to depository account and Infosys Ltd. On 30.06.2006, shares of Progeon Ltd. (now Infosys BPO Ltd.) was transferred to ICICI Bank Ltd. On 23.06.2006, there was an amendment to the share purchase agreement dated 20.04.2006 for certain reference. On 30.06.2006, assessee received payment of Rs.308,65,86,584/- from Infosys Tech. Ltd. through Escrow account pursuant to transfer of shares on 30.06.2006 from demat account of assessee. The assessee had shown capital gain on sale of shares as long term capital gain as date of acquisition of shares at 30.06.2005 (on the date of conversion of CCPS into Equity) and date of sale as 20.06.2006, being such shares held for more than 12 months.

5. The Id. Assessing Officer ('A.O.' for short) observed that the assessee has computed long term capital gain (LTCG for short) on sale of shares of Progeon Ltd. amounting to Rs.428,96,85,892/- and had paid tax on the same @ 20.91%. The assessee has also declared LTCG of Rs.1415,04,15,499/- on sale of shares of Indian companies claiming exempt u/s. 10(38) of the Act and dividend income of Rs.19,99,95,035/- claiming as exempt income u/s. 10(34) of the Act. The Id. AO held that date of sale is date of agreement to sale which was entered on 20.04.2006 and, therefore, shares are held for less than 12 months, so it is short term capital gain referring to section 2(29B) of the Act. He relied on Circular No. 704 dated 28.04.1995 and decision of co-ordinate bench in *Max Telecom Ventures Ltd. Vs. ACIT* (114 ITD 46). The Id. A.O. taxed the same @ 30%. The Id. A.O. passed the draft assessment order dated 26.02.2010 u/s. 143(3) r.w.s. 144C(1) of the Act.

6. The assessee was in appeal before the Id. CIT(A) challenging the impugned order of the Id. A.O.

7. The Id. CIT(A) confirmed the order of the Id. A.O. on the ground that the share purchase agreement was dated 20.04.2006, the consideration was duly fixed then and that there was no change in purchase price subsequently. The Id. CIT(A) also held that it was merely transfer of share that took place on 30.06.2006 where the sale was completed on 20.04.2006 as only procedural requirements were to be completed after 20.04.2006 to 30.06.2006. It was also observed that the shares were dematerialized in the account of assessee on 20.06.2006 where shares were held in demat account from 20.06.2006 to 30.06.2006 which also corroborates the fact that the shares are short term capital assets.

8. Aggrieved, the assessee is in appeal before us, challenging the order of the Id. CIT(A) in upholding the order of the Id. A.O.

9. The learned Authorised Representative ('Id. AR' for short) for the assessee contended that the sale of shares in dispute by the assessee would be covered under the provision of section 2(29B) of the Act and that the assessee had entered into an agreement for sale of shares with Infosys Technology Ltd. on 20.04.2006 but the date of transfer of shares was only on 30.06.2006. The Id. AR further stated that the lower authorities have relied on the CBDT Circular No. 704 dated 28.04.1995 for determining the date of transfer which the Id. AR contends that will not be binding on the assessee. The Id. AR further stated that even otherwise the CBDT Circular states that the date of contract as declared by the parties will be treated as date of transfer and in this case it has

to be considered as 30.06.2006 being the date when the transfer was effected. The ld. AR reiterated that the lower authorities have erroneously considered the date of agreement to be date of sale. The ld. AR also stated that as per the agreements the assessee has dematerialized the shares on 20.06.2006 and the sale had takes place on 30.06.2006, thereby qualifying the same as LTCG. The ld. AR further to this submitted that as per the terms of the agreement, the sale was conditional only on the happening of the certain events specified in clause (4) of the said agreement. The ld. AR relied on the decisions of the Hon'ble Delhi High Court in the case of *Bharti Gupta Ramola vs. CIT* (in Income Tax Appeal No. 1234/2011 vide order dated 12.04.2012) and the Tribunals' decision in the case of *Periar Trading Company Private Ltd. vs. ITO* (in ITA No. 1944/Mum/2018 vide order dated 09.11.2018) along with the decision in the case of *Mrs.Hami Aspi Balsara vs. The ACIT* (in ITA No. 6402/Mum/2008 vide order dated 22.05.2009) and in the case of *Suresh K Jajoo vs. Asst. CIT* (in ITA No. 2617/Mum/09 vide order dated 21.01.2010). The ld. AR has also placed on the decision of Hon'ble Delhi High Court in the case of *CIT vs. Bharati Nidhi Ltd.* 133 ITR 447.

10. The learned Departmental Representative ('ld.DR' for short), on the other hand, controverted the said facts and stated that the purchase agreement has to be construed as the date of sale. The ld. DR further stated that the price of the shares in which the assessee had agreed to sell was determined by the agreement dated 20.04.2006 which was the date of transfer notified by the parties. The ld. DR brought our attention to the CBDT Circular No. 704 according to which the date of transfer of shares was 20.04.2006 and not when the actual delivery of shares was effected. The ld. DR stated that the assessee in

its paper book at pg. no. 1 (Annexure 1) has filed details which were not before the lower authorities and stated that these are in the nature of additional evidences. The Id. DR also contended that the arguments advanced by the Id. AR was not raised before the lower authorities and were in the nature of fresh arguments. The Id. DR vehemently opposed the arguments made by the Id. AR. The Id. DR then relied on the decision of the Tribunal in *Max Telecom Ventures Ltd. vs. Asst. CIT* [2008] 114 ITD 46 (Amritsar).

11. We have heard the rival submissions and perused the materials available on record. It is observed that the assessee had entered into a share purchase agreement with Infosys Technologies Ltd. on 20.04.2006 for a consideration equivalent to USD 115,131,000 (US Dollar) convertible at the Bombay Stock Trade which was prevailing on the closing date. The assessee's preposition before us is that the period of holding of equity shares to be taken from original allotment of CCPS, through which it was converted into equity shares that were sold by assessee. Reliance was placed on Circular No. 20D dated 07.07.1964 and decision of co-ordinate bench of *Periar Trading Company Private Ltd.*(supra). Further on 20.04.2006, the assessee entered into the agreement to sale which was subjected to fulfillment on certain condition which was fulfilled and shares were transferred on 30.06.2006. The assessee contended that 30.06.2006 is the date of transfer of shares which were held for more than 12 months making it a long term capital assets. Reliance is placed on the decision of the co-ordinate bench in the case of *Mrs.Hami Aspi Balsara* (supra) and *Suresh K Jajoo* (supra). We hereby reproduce the agreement with a condition precedent as per clause (4) and (5) wherein the recitals of the said clause in the agreement are cited hereunder for ease of ready reference:

#### 4. CONDITIONS PRECEDENT

##### 4.1 Conditions to be fulfilled by the Vendor

4.1.1 *The obligations of the Purchasers hereunder shall be subject to the Vendor complying with or fulfilling the following conditions precedent ("Conditions Precedent").*

4.1.1.1 *Corporate Proceedings: The performance and fulfillment in all material respects of all corporate and shareholder proceeding of the Vendor necessary to authorize and approve the sale of the Shares, such as, if applicable, Resolutions by the Board of Directors of the Vendor approving and authorizing sale of the Shares as contemplated herein to the Purchaser. Certified true copies of a power of attorney authorizing the execution of this Agreement on behalf of the Vendor, in a form reasonably acceptable to the Purchaser, shall have been provided to the Purchaser.*

4.1.1.2 *FCTRS: The Vendor shall have completed the draft of the Form FCTRS and the following documents:*

- (a) consent letter to the transfer duly signed by the Vendor indicating the details of transfer i.e. number of shares to be transferred, the name of the Company and the price at which shares have been transferred.*
- (b) No- Objection/Tax Clearance Certificate from Income Tax Authority and/or Chartered Accountant.*

4.1.1.4 *Warranties: No breach of the representations or warranties of the vendor hereto shall have occurred and the representations and warranties of the Vendor shall continue to be true with reference to the facts and circumstances as on Closing (as defined below).*

4.1.1.5 *Governmental Approvals and Consents. All Governmental Approvals, if any, required to be obtained by the Vendor in connection with the execution and delivery of this Agreement and the consummation of the transactions contemplated herein (save and except those to be completed or obtained on Closing) shall have been applied for and if so required under law, obtained prior to the Closing. The Vendor shall have provided the Purchaser with a legal opinion from Wadia Ghandy and Co. in a form reasonably satisfactory to the Purchaser, as to the sufficiency of such Required Governmental Approvals. Complete and correct copies of such Required Governmental Approvals and any applications made in this regard, shall have been provided to the Purchaser.*

4.1.2 *The Vendor shall exercise its best endeavors to fulfill the Conditions Precedent mentioned in Section 4.1.1 above. The Vendor shall on fulfillment of its Conditions Precedent certify such fulfillment to the Purchaser together with evidence thereof.*

##### 4.2 Conditions to be Fulfilled by the Purchaser

4.2.1 *The obligations of the Vendor hereunder shall be subject to the purchaser, and/or the Company (as applicable) complying with or fulfilling the following conditions precedent ("Conditions Precedent").*

4.2.1.1 *Corporate Proceedings: The performance and fulfillment in all material respects of all corporate and shareholder proceedings of the Purchaser necessary to authorize and approve the purchase of the Shares, such as, if applicable, resolutions by the Board of Directors of the Purchaser approving and authorizing purchase of the Shares as contemplated herein from the vendor and the purchase thereof by the Purchaser. Certified true copies of the abovementioned.*

resolutions or other similarly effective documents, in a form reasonably acceptable to the Vendor, shall have been provided to the Vendor.

4.2.1.3 *FCTRS*: The Purchaser shall have provided to the Vendor the following documents:

- (a) Consent letter duly signed by the Purchaser indicating the details of transfer i.e. number of shares to be transferred, the name of the Company and the price at which shares have been transferred.
- b) Certificate from a Chartered Accountant indicating fair value of shares.
- c) Undertaking from the Purchaser to the effect that the pricing guidelines specified in the RBI AP. (DIR Series) Circular No, 16 dated October 4, 2004 have been adhered to.
- d) The shareholding pattern of the Company after the acquisition of shares by the Purchaser.

4.2.1.4 *Warranties*: No breach of the representations or warranties of the Purchaser hereto shall have occurred and the representations and warranties of the Purchaser shall continue to be true with reference to the facts and circumstances as on Closing, as defined below.

4.2.1.5 *Governmental Approvals and Consents*. All Governmental Approvals, if any, required to be obtained by the Purchaser in connection with the execution and delivery of this Agreement and the consummation of the transactions contemplated herein shall have been applied for and if so required under law, obtained prior to the Closing. The Purchaser shall have provided the Vendor with a legal opinion from Crawford Bayley & Co. in a form reasonably satisfactory to the Purchaser, as to the sufficiency of such Required Governmental Approvals. Complete and correct copies of such Required Governmental Approvals and any applications made in this regard, shall have been provided to the Purchaser.

4.2.2 The Purchaser shall exercise its best endeavors to fulfill the Conditions Precedent mentioned in Section 4.2.1 above. The Purchaser shall, on fulfillment of its Conditions Precedent certify such fulfillment to the Vendor together with evidence thereof.

4.3 The obligations of the Vendor and the Purchaser shall be subject to the fulfillment of the following Conditions Precedent:

4.3.1 *Waiver of Rights under Share Subscription Agreement*: The Vendor, the Purchaser and the Company shall enter into a Waiver and Termination Agreement in the form attached hereto as Exhibit A.

4.3.2 *Citibank N.A. (being an authorized dealer)* shall have confirmed that the form *FCTRS* and all enclosures thereto (prepared as per Sections 4.1 and 4.2 above) are in order and that, subject to the same being executed, they shall on Closing, confirm the same and remit the Purchase Price to the Vendor.

4.3.3 *Consummation of the transactions contemplated herein shall not have been and shall not have been threatened to be) restrained, enjoined or otherwise prohibited or made illegal by any applicable law.*

4.3.4 All actions required under the terms of the Articles of Association for the transfer of the Shares under the terms hereof shall have been taken.



4.3.5 *The Shares shall have been dematerialized for which purpose each of the Company and the Vendor shall render its reasonable assistance.*

4.3.6 *The Purchaser and the Vendor shall have entered into an escrow agreement (the "Escrow Agreement") in a mutually agreed form, with a mutually agreed escrow agent (the "Escrow Agent"). Upon the Company notifying the Vendor that it is possible to dematerialize the Shares, the Vendor shall, pursuant to Section 3.1 (a) of the Escrow Agreement, notify Citi Bank N.A., Hong Kong to instruct the Vendor DP (as defined therein) to proceed to arrange for the completion of the dematerialization of the Share and the credit of the same to the depositary account of the Vendor.*

*The Purchaser and the Vendor shall exercise their best endeavors to fulfill the Conditions Precedent mentioned in this clause 4.3.*

4.3.7 *In the event all the Conditions Precedent are not fulfilled or the satisfaction of the Purchaser and the Vendor within 120 days from the date of this Agreement or such additional period as agreed to by the Parties then either of the Purchaser and the Vendor shall have the right to rescind this Agreement. Any such rescission shall be without prejudice to any accrued rights of the Parties hereunder.*

#### 44 *Fulfillment of Conditions Precedent*

*Immediately upon the fulfillment of the Conditions Precedent in accordance with the above, the Parties shall agree upon the Closing Date in the manner specified in Section 5*

#### **CLOSING**

5.1 *The closing by delivery of Shares to the Purchaser (the "Closing") shall be as soon as practicable after the satisfaction of all Conditions Precedent as set forth in Section 4 above but in any event after July 3, 2006 and no later than 120 (one hundred and twenty) days from the date of execution of this Agreement (such date on which Closing occurs is hereinafter referred to as the "Closing Date") and at the offices of the Purchaser to at such location as is mutually agreed to in writing by the Parties.*

5.2 *At the Closing, the Vendor shall file form FCTRS with the Authorized Dealer, being Citibank N.A. and upon certification of the said Form FC-TRS by the Authorized Dealer and delivery thereof to the Company (with a copy thereof to the purchaser and the Vendor), the following actions shall take place:*

(a) *the Purchaser shall transfer the Purchase Price to such account of the Vendor as the Vendor may specify and shall provide evidence thereof to the Escrow Agent and to the Vendor by way of (i) a confirmation from ICICI Bank Limited had a payment of the NR equivalent of USD 115,131,000 (US dollars One Hundred and Fifteen Million One Hundred and Thirty One Thousand only) (converted at the Bombay Spot Rate and less any taxes required to be withheld under law), has been made to the Vendor and (ii) an acknowledgement of receipt of such confirmation from the Vendor;*

(b) *thereupon in accordance with the terms of the Escrow Agreement, the Escrow Agent shall release the transfer instructions in respect of the Shares in accordance with the Escrow Agreements so that the Shares are transferred to the account maintained by the Purchaser's DP.*

12. The assessee's contention was that the sale was affected only on 30.06.2006 which is when the shares were transferred by the assessee to Infosys Technologies Ltd. It is pertinent to point out that the date of purchase agreement of the shares was on 20.04.2006. The department's argument was that the transaction would amount to a STCG wherein the assessee had not held the shares in Progeon Ltd. for a period beyond 12 months as per the provisions of section 2(42A) of the Act when considering the date of transfer to be the same date when the share purchase agreement was executed on 20.04.2006. The case of the assessee is that the date of transfer was on 30.06.2006 when the shares were actually transferred by the assessee. The Revenue relied on the CBDT Circular No. 704 dated 28.04.1995 which is cited hereunder for ease of reference:

*Circular: No. 704, dated 28-4-1995.*

*22. Instructions regarding determination of the 'date of transfer' and holding period for purposes of capital gains qua transactions in securities*

*1. Under the provisions of clause (42A) of section 2 of the Income-tax Act, 1961, the shares held in a company or any other security listed in a recognised stock exchange in India or units of the Unit Trust of India or units of a mutual fund specified under section 10(23D) shall be regarded as short-term capital assets if they are held by an assessee for not more than 12 months immediately preceding the date of its transfer. Clarifications have been sought as to which date should be regarded as the date of transfer and also about the date from which the holding period of the securities should be reckoned. Clarifications have also been sought as to how the holding periods will be computed for the purposes of capital gains when the securities, purchased in several lots at different points of time and which are taken delivery of in one lot, are subsequently sold in parts and no correlation of the dates of purchase and sale is available.*

*2. When the securities are transacted through stock exchanges, it is the established procedure that the brokers first enter into contracts for purchase/sale of securities and thereafter, follow it up with delivery of shares, accompanied by transfer deeds duly signed by the registered holders. The seller is entitled to receive the consideration agreed to as on the date of contract. The Board are of the opinion that it is the date of broker's note that should be treated as the date of transfer in cases of sale transactions of securities provided such transactions are followed up by delivery of shares and also the transfer deeds. Similarly, in respect of the purchasers of the securities, the holding period shall be reckoned from the date of the broker's note for purchase on behalf of the investors. In case the transactions take place directly between the parties and not through stock exchanges the date of contract of sale as declared by the parties shall be treated as the date of transfer provided it is followed up by actual delivery of shares and the transfer deeds.*

*3. As regards the second issue, where securities are acquired in several lots at different points of time, the First-in-first-out (FIFO) method shall be adopted to reckon the period of the holding of the security, in cases where the dates of purchase and sale could not be correlated through specific numbers of the scrips. In other words, the assets acquired last will be taken to be remaining with the assessee while assets acquired first will be treated as sold. Indexation, wherever applicable, for long-term assets will be regulated on the basis of the holding period determined in this manner.*

13. The above Circular specifies that when the transaction takes place directly between the parties and not through stock exchanges, the date of contract of sale as declared by the parties shall be treated as the date of transfer, provided the same is followed by the actual delivery of shares and the transfer deeds.

14. On the factual matrix of the case, the moot question here would be what would be the effective date of transfer of shares whether the date of agreement or the date when the transfer was effected. The answer to the same would determine whether the assessee would be liable to long term capital gain or short term capital gain on the impugned transaction.

15. On perusal of the share purchase agreement, it is observed that there exists a clause for condition precedent to the sale which has to be fulfilled by both the vendor and the purchaser as specified in clause (4) of the said agreement. It is also evident that clause 4.3.7 of the said agreement either the purchaser or the vendor can rescind the said agreement within 120 days from the date of the agreement where either of the parties have failed to fulfill the conditions precedent to the satisfaction of either of the parties. It is also evident that sub clause 1 specified in clause 5 for delivery of shares to the purchaser is also fixed by the parties to be after the satisfaction of all the condition precedent but in any event has to be after 03.07.2006 and not later within 120 days from

the date of execution of the said agreement. These clauses have categorically specified the date of contract of sale as declared by the parties which has been mandated by the board in Circular No. 704 which has been heavily relied upon by the lower authorities.

16. The above position has justified the fact that the date of the agreement by no stretch of imagination could be the date of sale of the shares by the assessee to the purchaser. As per the decision of *Bharti Gupta Ramola v. CIT* [2012] 20 taxmann.com 762 the date of transfer is 30.06.2006 for computing the holding period of assets from both the date, i.e., of acquisition and sale are not to be excluded. We would also like to draw our support from the decisions relied upon by the Id. AR where in case of *Mrs. Hami Aspi Balsara* (supra), the co-ordinate bench on identical facts have decided that the date of contract of sale would be the date of fulfillment of the conditions specified in the share purchase agreement and only upon the fulfillment of the said conditions, the date of contract of sale is said to have crystallized. The relevant extract of the said decision is reproduced hereunder for ease of reference:

9. *We have considered the rival submissions and perused the record of the case. The facts as noted earlier in detail in the arguments of ld. counsel for the assessee are not disputed. Admittedly, it is a case of sale of shares. In this regard, share purchase agreement was entered into on 27-1-2005 and final delivery of shares took place on 1/15-4-2005. In the share purchase agreement, detailed provisions were made restricting the vendors from exercising various rights in relation to shares. Revenues' main contention is that on account of substantial extinguishment of rights in pursuance to share purchase agreement, the transfer took place on 27-1-2005. Per contra, the assessee's claim is that when the delivery of shares was over and all the covenants contemplated in the share purchase agreement became irrevocable on 1-4-2005 then only transfer was complete and, accordingly, the investment made by the assessee in the specified securities within six months reckoned from 1-4-2005 entitled the assessee for exemption under section 54EC. In the first place, we are in agreement with the contention of ld. counsel for the assessee that sale as contemplated under section 2(47)(i) and extinguishment of rights as contemplated under section 2(47)(ii) are not mutually interchangeable. If a particular transaction is the transaction of sale then unless the sale is complete, no transfer can be said to have taken place because, as rightly pointed out by ld. counsel for the assessee, there will always be extinguishment of rights in case of sale and if a single right out of the entire bundle of property in capital asset is extinguished, then, the transfer would be taken as complete. This will lead to*

*absurd situation. Had it been the intention of Legislature to treat the transfer on the basis of extinguishment of any right in capital asset then there was no necessity of including sale and exchange in the definition of transfer under section 2(47). It is well-settled principle of interpretation that no word in a statute is superfluous and each word has to be assigned specific meaning in the context in which it is used. We further find lot of substance in the argument of ld. counsel in this regard with reference to inclusion of clause (v) in the definition of transfer under section 2(47) only with reference to immovable property and not with reference to movable property. In the present case when final delivery of shares took place on 1/15-4-2005 and, therefore, in view of the decision in the case of M. Ramaswamy (supra) and Rajgiri Rubber & Produce Co. (supra), in our opinion, transfer of shares took place on 1/15-4-2005. This view is fully supported by the decision of the Hon'ble Supreme Court in the case of V.R. Shelat (supra) wherein, it was held that procedure required by law was to be complied with and, accordingly, delivery of share certificate along with transfer deed had to be handed over to purchaser in order to complete the transfer.*

10. *Now coming to the revenue's plea regarding extinguishment of rights. We have already held that a case of sale and that of extinguishment of right are mutually exclusive. However, in any view of the matter, we are of the opinion that it could not be said that there was extinguishment of rights on 27-1-2005 because extinguishment of rights implies that the right cannot be revived. However, till the time the right is revocable, it could not be said that there was extinguishment or rights. At best it can be said to be a case of suspension of rights till all the requirements for completing the sale were over. It was only on execution of second amendment to share purchase agreement on 1-4-2005 that the Escrow agreement and the power of attorney became incapable of being revoked, modified or altered unilaterally by the sellers. Therefore, prior to this date, the sellers had the right to revoke the share purchase agreement. Further section 372A clause (c) of the Companies Act mandates that a company cannot acquire by way of subscription, purchase or otherwise the securities of any other body corporate unless previously authorized by the special resolution passed in a general meeting. Admittedly, this special resolution was passed by the Dabur India Ltd. on 28-3-2005. Therefore, in any case, prior to this date, it cannot be said that shares of assessee were acquired by Dabur India Limited. The share is a movable property and is governed by Sale of Goods Act. Section 4 of the Sales of Goods Act reads as under:—*

*"Sale and agreement to sell.—1. A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one pat-owner and another.*

*2. A contract of sale may be absolute or conditional.*

*3. Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.*

*4. An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."*

*From the above definition, it is evident that agreement to sell becomes complete when the conditions contemplated in the agreement are fulfilled. The definition of sale as per Sale of Goods Act assumes significance because the term 'sale' has not been defined in the Income-tax Act.*

11. *The Assessing Officer has pointed out that assessee had received substantial part of sale consideration at time of share purchase agreement which was not refundable. In this regard, ld counsel has referred to section 65 of Indian Contract and Specific Relief Act, which reads as under:*

*"Section 65. Obligation of person who has received advantage under void agreement or contract that becomes void.—When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."*

*This section makes it very clear that if, for any reason, the terms of contract cannot be fulfilled then assessee is bound to restore the benefits she had received including consideration to the purchaser.*

*12. Now coming to the decision of the Amritsar ITAT in the case of Mactelcom Ventures (supra). We are of the opinion that the said decision was rendered with reference to K.N. Narayanan's case (supra) without considering the subsequent decision of the same High Court in the case of Rajgiri Rubber & Produce Co. (supra). Moreover, said decision has not taken into consideration the ratio laid down by the Hon'ble Supreme Court in the case of V.R. Shelat (supra). In this case the Supreme Court has clearly laid down that where, as between the transferor and the transferee, all formalities have been gone through, such as the execution of document of transfer and a physical handingover of the shares by the transferors to the transferee, the shares should be taken to have been transferred to the transferee, though until the transfer of share is registered in accordance with the Companies Law, the transfer could not enable the transferee to exercise rights of the shareholder vis-a-vis the company. Thus, in sum and substance, the transfer of share is complete when the share certificate along with duly executed transfer deed is handed over to the transferee. Therefore, we, respectfully, do not agree with the proposition laid down in the said decision.*

*13. Now coming to the Circular No. 704 dated 28-4-1995. This circular deals with two situations. Firstly, shares listed on stock exchange and transfer taking place through brokers. Secondly, transactions taking place directly between the parties and not through stock exchange. We are concerned with the second situation. In this regard, it is mentioned in the circular as under :*

*"In case the transactions take place directly between the parties and not through stock exchanges the date of contract of sale as declared by the parties shall be treated as the date of transfer provided it is followed up by the actual delivery of shares and the transfer deeds."*

*This clearly shows that the date of contract of sale will be the date which the parties have agreed to. No other date can substitute the date as declared by the parties. In the present case, the date of contract of sale as understood by the parties is 1-4-2005 and the same cannot be substituted by the date of share purchase agreement because completion date was specified in Article 6 of the share purchase agreement, which was not later than 4-4-2005 or such other later date that was mutually agreed in writing. As per article 6, on the completion date the attorney was to receive letters of discharge from the lenders recording the unconditional and irrevocable discharge of the guarantees and cancelled the original guarantees. This occurred on 1-4-2005. Therefore, the date of contract of sale as declared by the parties in the share purchase agreement was 1-4-2005. The directors resigned on the date as per the said Article. Therefore, the contract was completed on fulfilment of conditions contemplated in Article 6 which took place on 1-4-2005. Thus, from the very beginning, the parties had declared the date of contract of sale subject to fulfilment of conditions and, therefore, on the date of fulfilment of above conditions, the date of contract of sale crystallized. We are, therefore, of the opinion that this circular in no way prejudice the assessee's claim. It is pertinent to note that Dabur India Limited, the purchaser has also recognized the purchase of shares in financial year 2005-06 and not financial year 2004-05. The ld. CIT(A) has observed that the entire sale consideration was Rs. 10,65,06,753 but the fact is that it was not the entire sale consideration as the assessee had received Rs. 5 lakhs on completion of sale. In view of the above discussion, we are of the opinion that as the transfer of shares of target companies was completed on 1/15-4-2005, the capital gains were to be taxed in assessment year 2006-07 and there is no merit in including the income from capital gain on sale of shares of target companies in the assessment year 2005-06. Ground Nos. 1, 2 and 3 stand allowed.*

From the above observation, it is evident that the co-ordinate bench in the above case has dealt with the identical issue after duly considering the decision of the *Max Telecom Ventures Ltd.* (supra) relied upon by the Id. DR and had decided the said issue in favour of the assessee.

17. The Id. DR's reliance on the decision of the co-ordinate bench in the case of *Max Telecom Ventures Ltd.* (supra) is distinguishable on the facts where in that case the share purchase agreement was acted upon immediately on the execution of the said agreement and it was not a conditional sale as in the case of the assessee. Therefore, the said decision relied upon by the lower authorities does not support the department's view. On the above observation, we hold that there is merit in the submission of the assessee and, therefore, we deem it fit to hold that the sale of shares by the assessee would attract LONG TERM CAPITAL GAIN (LTCG FOR SHORT) and, hence, allow the grounds raised by the assessee.

**ITA No. 2732/Mum/2014**

18. This appeal has been filed by the assessee challenging the penalty levied Rs.44,84,86,660/- levied u/s. 271(1)(c) of the Act by the Id. A.O. and upheld by the Id. CIT(A) on the ground of wrong disclosure of capital gain as LTCG by the assessee. As we have deleted the impugned addition in ITA No. 2545/Mum/2014 holding that the assessee is liable only to LTCG and not the STCG, the corresponding penalty has no legs to stand when the addition on quantum has been deleted. We, therefore, allow the assessee's appeal on this observation.

19. In the result, both the appeals filed by the assessee are allowed.

*Order pronounced in the open court on 14.02.2024.*

Sd/-

Sd/-

(Prashant Maharishi)  
Accountant Member

(Kavitha Rajagopal)  
Judicial Member

Mumbai; Dated : 14.02.2024

Roshani, Sr. PS

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent
3. CIT - concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt. Registrar)  
ITAT, Mumbai