* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on: 23.05.2012
Judgment pronounced on: 09.07.2012

\+ ITA No.183/2012

SHRI UDAY PUNJ ..... Appellant

versus

COMMISSIONER OF INCOME TAX, CENTRAL-III,
NEW DELHI ..... Respondent

**Advocates who appeared in this case:**

For the Petitioner : Mr. O.S. Bajpai, Sr. Adv. with Mr. V.N. Jha and Ms. Manasvini Bajpai.
For the Respondent : Mr. Sanjeev Sabharwal.

**CORAM:**
**HON'BLE MR. JUSTICE BADAR DURREZ AHMED**
**HON'BLE MR. JUSTICE V.K.JAIN**

**V.K. JAIN, J.**

1. The appellant/assessee is a promoter/director of M/S Punj Lloyd Limited (PLL), which came out with an Initial Public Offering (IPO) of its shares in December, 2005. Alongwith the Public Issue, the existing shareholders, including the appellant/assessee, also offered shares held by them in PLL, to the public. The appellant before this Court offered 5,99,693 shares to the general public through the said offer. Red-Herring Prospectus, with Securities and Exchange Board of India (SEBI), was filed on 29.11.2005, after provisional approval from Bombay Stock Exchange on 04.11.2005 and National Stock Exchange (NSE) on 14.11.2005. An Escrow Agreement between the company, and selling shareholders on the one hand and bankers to the issue, Registrars to the issue and

managers to the issue on the other hand, was signed on 03.12.2005. The offer opened on 13.12.2005 and closed on 16.12.2005. The basis of allocation of the shares was approved by the BSE on 28.12.2005 and on the same date, the money was transferred from the account of the bankers to the public offer account. On the very same date, the shares were also transferred from promoter's demat account to the account of the Registrar to the issue. On 30.12.2005, the company filed an application for listing and trading approval, after it had completed all formalities, including the commencement of dispatch of the refunds of excess bid amount to the applicants. The Listing Approval by the NSE and BSE was granted on 04.01.2006, whereas the Trading Approval from both the Stock Exchanges was received on 05.01.2006. The trading in the Stock Exchange commenced on 06.01.2006, followed by transfer of money to the bank account of the sellers.

2. The main issue involved in this appeal is as to whether capital gains tax is payable by the assessee or not, on the income earned by him from sale of SEBI shares which he sold through the public offer, and if payable, whether at lower rate of 10% or at the normal rate of 20%.

3. Section 10(38) of the Income Tax Act exempts, from payment of tax, any income which arises from transfer of equity shares in a company, where the transaction is chargeable to Securities Transaction Tax, under chapter VII of the Finance (No.2) Act, 2004. To the extent it is relevant, Section 98 of Finance (No.2) Act, 2004 provides for charging of Securities Transaction Tax on sale of an

equity share in a company, where the transaction of such sale is entered into in a recognized stock exchange (emphasis supplied). Therefore, the question which comes up for our consideration is as to where the transaction of sale of shares by the appellant, through the public issue, was entered into in a recognized stock exchange or not. If the transaction was entered into, in the stock exchange, STT was chargeable on the transaction and in that case, it would be immaterial whether STT has been actually charged or not. On the other hand, if the transaction was not entered into in the stock exchange, it would be out of the purview of Section 98 of Finance (2) Act, 2004 and consequently, would not be eligible for exemption under Section 10(38) of the Income Tax Act.

4. The Assessing Officer took the view that the transaction of sale of shares did not take place in the stock exchange and consequently, was not eligible for exemption from payment of capital gains tax. The order passed by the Assessing Officer was challenged by the appellant before the Commissioner of Income Tax (Appeals). The CIT (Appeals) noted that the shares of the company were listed on BSE w.e.f. January 06, 2006 as was evident from notification No.20060105-12 issued by the stock exchange on 05.01.2006, whereas the demat account of the appellant was debited in respect of shares offered for sale, on 29.12.2005 and, therefore, had sold the shares at the time when they were not listed on the recognized stock exchange. The view taken by the Assessing Officer in this regard was accordingly upheld. The appellant took the matter, therefore, to Income Tax

Appellate Tribunal (herein after referred to as the 'Tribunal'). By the impugned order dated 30.09.2011, the Tribunal held that the shares were transferred on 29.12.2005 or had passed on 30.12.2005, at the time when they were not listed on any recognized stock exchange, the approval from listing having been obtained on 04.01.2006 and, therefore, the appellant was not entitled to exemption from payment of capital gains tax. It was held that since the shares were not 'listed securities' at the time of transaction, the tax was payable at normal rate and not at the lower rate.

5. The learned senior counsel for the appellant has assailed the order of the Tribunal primarily on the following grounds:-

(i) The sale price of the shares having been transferred to the account of the appellant only on 06.01.2006, it cannot be said that the sale transaction was complete before 06.01.2006 and since the trading commenced in the stock exchange, in the morning of 06.01.2006, it cannot be said that the transaction did not take place in a recognized stock exchange,

(ii) As per the Escrow Agreement signed between the company, selling shareholders on the one hand and bankers to the issue, Registrars to the issue and managers to the issue on the other hand, the money in the account of the appellant could not have been transferred without completing the prescribed procedure and in view of the provisions

contained in Section 73(2) of Companies Act, 1956, in the event of the company not applying or being refused permission for trading of shares in the stock exchange, the company was required to refund the money received from the applicants and since the appellant had no dominion or control over the money till 06.01.2006, when the money was transferred from the Escrow account to his account, it cannot be said that the transaction was complete prior to 06.01.2006.

6. It is an admitted position that the shares in question were transferred from the demat account of the appellant to the account of the Registrars to the issue on 29.12.2005. It is also not in dispute that shares to the applicants in the public offer were allotted on 30.12.2005. The appellant himself has stated in the appeal that on 30.12.2005, application was filed for listing and trading approvals after completing all formalities including identification of allottees, commencement of dispatch of refunds of excess bid amount etc. It is also not in dispute and is also noted in the assessment order that the shares had been transferred to the account of the allottees by 05.01.2006. Once, the money had been received from the applicants, allotments were made to them, excess money was refunded to them and the shares were transferred to their demat accounts, it is difficult to accept that the ownership of the shares in question had not vested in the applicants in the public issue, by 05.01.2006. It is the appellant's own case that the provisional approval for listing

was received from BSE on 04.11.2005 and NSE on 14.11.2005. It is also his case that the final listing approval from BSE as well as NSE was received on 04.01.2006. It is also stated in the appeal that trading approval from BSE and NSE was received on 05.01.2006. We fail to appreciate how it can be said that the ownership of shares in question did not vest in the applicants or continued to vest in the appellant even after 05.01.2006, by which date, not only the shares had been transferred to the demat accounts of the applicants but the listing as well as trading approvals had also been granted by both the stock exchanges. There was absolutely no legal impediment in the applicants selling the shares, on or after 05.01.2006.

7. Admittedly, trading of these shares in the stock exchanges commenced only in the morning of 06.01.2006. At the time of commencement of trading in the stock exchange, the ownership in the shares vested either in the applicants in the public issue or in the appellant. The shares having already been transferred from the demat account of the appellant to the demat account of the Registrar to the issue and then to the demat against of the applicants, by 05.01.2006, it is difficult to dispute that at the time of commencement of trading on 6.1.2006, the ownership in the shares vested in the applicants/allottees, and not in the appellant. The applicants alone could have sold these shares in the stock exchange, on commencement of trading in the morning of 06.01.2006. Credit of the sale consideration in the bank account of the appellant on 06.01.2006 would in such circumstances be wholly

irrelevant, since after credit of shares in the demat account of the applicants, the bankers were holding the share money for the benefit of the appellant and not for and on behalf of the applicants. Once the listing as well as trading approvals had been received from BSE and NSE and the shares were transferred to the demat account of the applicants on 05.01.2006, the applicants in the public issue had no right or lien over the money which they had paid for acquiring these shares. Similarly, after transfer of shares from his demat account, the appellant had no dominion or control over them. Therefore, it would be immaterial whether the sale consideration, to the bank account of the appellant was credited on 05.01.2006 or 06.01.2006 or even at a later date. On credit of shares to their demat account and, in any case, on receipt of listing approvals and trading approvals from the stock exchanges on 05.01.2006, the applicants in the public issue had an absolute right to sell these shares to any person of their choice and the appellant had no right, title or interest left in these shares.

8. Section 2(a) of the Depositories Act, 1996 defines "beneficial owner" means a person whose name is recorded as such with a depository. In view of the provisions contained in Section 10 of the said Act, the depository has no right in respect of the shares held by it and it is the beneficial owner alone who is entitled to all the rights and benefits and is subjected to all the liabilities in respect of his securities held by a depository. The moment the shares in questions were credited in the demat accounts of the applicants in the public issue, they became beneficial

owners of the shares credited to their account and, consequently, they alone were entitled to exercise all the rights and receive all the benefits in respect of the shares of (PPL) credited in their demat accounts.

9. Section 19 of the Sale of Goods Act, to the extent it is relevant, provides that where there is a contract for sale of specific or ascertained goods, the property in them is transferred to the buyer at such time, as the parties to the contract intend it to be transferred. It further provides that to ascertain the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. It also provides that unless a different intention appears, the rules contained in Sections 20 to 24 are the rules for ascertaining the intention of the parties, as to the time at which the property in the goods is to pass to the buyer.

Section 20 of the Sale of Goods Act, provides that where there is an unconditional contract for the sale of specific goods in deliverable state, the property in goods passes to the buyer when the contract is made and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both is postponed. Section 21 of the Act provides that where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer had notice thereof.

10. In the case before us, once the shares were transferred from the demat account of the appellant to the demat account of Registrar to the issue, they were in a deliverable state and, therefore, on allotment of shares to the applicants in the public issue, or in any case on credit of shares in their demat account, the property i.e. ownership rights in the shares stood transferred to the applicants in the public issue. The fact that transfer of money which the applicants in the public issue had already paid alongwith the share application, to the bank account of the appellant took place on 06.01.2006 was wholly irrelevant as far as passing of property in the shares was concerned. The fact that the sale consideration had not been transferred to the bank account of the appellant by 05.01.2006 did not have the effect of postponing the passing of property in the shares to the applicants in the public issue.

11. Since the trading in the stock exchange commenced only in the morning of 06.01.2006 and the property in the shares had already passed to the applicants in the public issue by 05.01.206, it cannot be said that the transaction of sale of shares took place on 6.1.2006. Since the trading in the stock exchange i.e. through the system of stock exchange commenced only in the morning of 06.01.2006, it cannot be said that the transfer of ownership in the shares which was complete by 05.01.2006, had taken place through the trading system of the stock exchange.

12. It was submitted by the learned Senior Counsel for the appellant that in view of the stipulation in para 3.2.2 of the Escrow Agreement, the Banker to the offer

and the Registrar were required to refund the share application money to the applicants in the public issue, in the event of listing of the shares not taking place in the manner stipulated in the Red Herring Prospectus. Admittedly, in the case before us, not only the listing approval but also trading approval had been granted by the NSE as well as by BSE by 5.1.2006 and once these permissions were granted, neither there was any occasion nor was it permissible for the Bankers/Registrars to refund the application money to the applicants in the public issue.

13. It was next contended by the learned Senior Counsel for the appellant that contract for sale of shares was in the nature of a contingent contract, dependent upon the listing of shares on the stock exchanges and, therefore, it cannot be said that the transaction was complete on 5.1.2006. We, however, find no merit in the contention. Even if, we proceed on the assumption that the sale of shares was contingent upon grant of listing approvals by the stock exchange, the transaction was complete and the contract became enforceable once the listing and trading approvals were granted by the stock exchanges on 5.1.2006. It cannot be said that the contract for sale of shares was also contingent or credit of the sale consideration in the bank account of the appellant. There is no such stipulation either in the Red Herring Prospectus or in the Escrow Agreement. As stated earlier, once the shares had been credited in the demat accounts of the applicants in the public issue and listing and trading approvals had been granted by the stock exchange, the bankers

were holding the money for and on behalf of the appellant and, therefore, the date on which this money was credited to the bank account of the appellant would not be a material consideration.

14. Relying upon the circular issued by SEBI on 19.1.2006, whereby, it was directed by SEBI that ISIN would be activated only on the day of trading, the learned Senior Counsel for the appellant contended that since the shares could not have been sold prior to the activation of the ISIN, it cannot be said that the transaction was complete by 5.1.2006. We find no merit in this contention. Firstly, the circular relied upon by the learned Senior Counsel for the appellant has been issued much after the trade in the shares of Punj Lloyd Limited commenced on 6.1.2006. We do not know when the ISIN was actually activated in this case. Secondly, the activation of ISIN is required only for trading through the system of the stock exchange. There was no legal bar on sale of the shares, without using the system of stock exchange, between receipt of listing and trading approval on 5.1.2006 and commencement of trading in stock exchange in the morning on 6.1.2006. No ISIN was necessary for such a transaction.

15. Indisputably, some of the allottees would have actually sold shares, on commencement of trading on 6.1.2006. It cannot be said that the ownership in the shares, immediately prior to commencement of trading in the stock exchange, did not vest in the allottees? It is only because of ownership in the shares held by them that such allottees/shareholders were able to sell the shares through the system of

stock exchanges, on commencement of trading in the morning of 6.1.2006. It cannot be said that these allottees were competent to sell the shares in the stock exchange, on commencement of trading in the morning of 6.1.2006 without the transaction for sale of shares to them, by the appellant being complete and property in the shares vesting in them. To put it another way, can it be said that between 5.1.2006 and 6.1.2006 or on commencement of trading in these shares on 6.1.2006, the appellant could have sold these shares. The obvious answer is in the negative. In fact, the appellant could not have sold these shares, once they were transferred from his demat account.

16. The expression 'transfer' in relation to a capital asset has been defined in Section 2(47) of the Income Tax Act and includes the extinguishment of any rights therein. The term 'transfer', having been given a wide meaning in the Income Tax Act, cannot be interpreted with reference to other statutes, which apply in different contexts and for different purposes. In any case no such statutory provision has been brought to our notice, which could mean that transfer of shares was not complete before the sale consideration was actually credited to the bank account of the appellant/assessee. Once the shares were transferred first from the demat account of the appellant to the account of the Registrar to the Issue and then to the demat accounts of the applicants/allottees, consequent to allotment made in consultation with the stock exchanges, the transfer was complete in terms of Section 2(47) of the Act. In any case, the transfer for the purpose of Income Tax

Act being complete prior to 6.1.2006 and the trading in stock exchange having commenced only on 6.1.2006, it cannot be said that the transaction involved in this case had taken place in the stock exchange.

Transfer in the Stock Exchange would necessarily imply use of the trading system of the stock exchange for the purpose of sale/purchase of shares. Admittedly, the trading system of the stock exchange, which provides for online trading was not at all used for the purpose of sale of these shares to the applicants in the public issue. Therefore, by any stretch it cannot be said that the shares to the allottees/applicants in the Public Issue were sold in the stock exchange.

17. The learned Senior Counsel for the Appellant has relied upon the decision of the Supreme Court in ***M/s Rishyashringa Jewellery Ltd. And Anr. v. the Stock Exchange Bombay And Ors.:*** **AIR 1996 SC 480**, where the Supreme Court referring to the provisions of Section 73(1A) of the Companies Act, held that if the application for permission to deal in the shares is made to more than one stock exchange, the permission has to be obtained from each of such stock exchange and in the event of such permission not being granted by all the stock exchanges from which it was sought, the entire allotment would be void. The requirement of obtaining listing permission from the stock exchanges does not mean that the sale of these shares to the applicants in the Public Issue on 30.1.2005 or on 5.1.2006 was void ab initio. The transaction would have become void only in case the

requisite permission was not granted. But, since requisite permission was granted by both, NSE as well as BSE by 5.1.2006, the event which would have rendered the transaction void never took place. Hence, the reliance upon this decision or for that matter on the provisions of Section 73(1A) of the Companies Act is wholly misplaced.

18. Yet another issue involved in this appeal is as to whether the capital gain tax, in this case, would be leviable at the normal rate of 20% or at the rate of 10%. Admittedly, capital gain tax at the rate of 10% was payable only in case of 'listed securities'. Since, these shares had been transferred to the applicants in the public offer, by 5.1.2006 before they were actually listed on the stock exchanges on 6.1.2006, they were not 'listed securities' at the time of sale by the appellant and consequently, the transaction would not be eligible for payment of capital gain tax at the lower rate of 10%.

19. For the reasons stated hereinabove, we are of the view that no substantial question of law arises for our consideration in this matter. The appeal is accordingly dismissed. There shall be no order as to costs.

**V.K.JAIN, J**

**BADAR DURREZ AHMED, J**

**JULY 09, 2012**
**rb/vn**