IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION (ST) NO. 19262 OF 2018

Kingfisher Capital CLO Ltd.,]
87, Walker House, Mary Street,]
Grand Cayman, Cayman Islands]
KY 1-9002] ... Petitioner

Versus

1 Commissioner of Income Tax,]
(International Taxation)-3, Mumbai]
16th Floor, Room No.1601, Air India]
Building, Nariman Point,]
Mumbai – 400 021]

2 Deputy Commissioner of Income Tax]
(International Taxation) -3(1)(2)]
Room No.133, Scindia House,]
Ballard Estate, N.M. Road,]
Mumbai – 400 038.]

3 The Union of India, through the]
Secretary, Ministry of Finance,]
Government of India, North Block,]
New Delhi 110 101] ... Respondents

Mr. Porus F. Kaka, senior advocate with Mr. Divesh Chawala i/b Atul K. Jasani for the Petitioner.

Mr. Abhay Ahuja with P.A. Narayanan and Ms. Sangeeta Yadav for the Respondents.

CORAM : S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.

RESERVED ON : 23RD OCTOBER, 2018
PRONOUNCED ON : 27TH MARCH, 2019

JUDGMENT : *[Per S.C. Dharmadhikari, J.]*

1 By this writ petition under Article 226 of the Constitution of India, instituted on 6th July, 2018 the petitioner seeks to quash and set aside an order passed on 29th March, 2018. This order is passed by the respondent No.1. The second relief is that of a writ of mandamus or any other appropriate writ, order or direction under Articles 226 and 227 of the Constitution of India be issued directing the respondents to forthwith withdraw and/or cancel this order insofar as the cost of acquisition and period of holding in regards to the transfer of shares. That aspect of the matter has been held against the petitioner.

2 Since the writ petition was directed to be listed for admission with an intent to dispose it off finally, we proceed to issue Rule. The respondents waive service. By consent, Rule is made returnable forthwith.

3 The facts necessary to appreciate the challenge to the impugned order, briefly stated, are as under :

4 The petitioner entered into an agreement dated June 24, 2008 with Lehman Brothers Commercial Corporation Asia Limited (hereinafter referred to as "Lehman Brothers"), a non-resident company incorporated in Hong Kong, to purchase, inter alia, 352 Zero-Coupon Foreign Currency Convertible Bonds in Nava Bharat Ventures Limited (for short "NBVL") an Indian company listed on the National Stock Exchange of India Limited (for short "NSE").

5 NBVL issued the FCCBs on September 29, 2006, under the issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depositary Receipt Mechanism) Scheme, 1993 (for short "FCCB Scheme") to Lehman Brothers.

6 The FCCB Scheme was notified by the Central Government in 1993 and applicable with effect from April 1, 1992. It governed the issue of (i) Foreign Currency Convertible Bonds and (ii) Global Depositary Receipts (for short "GDRs")with equity shares of the Indian company as the underlying securities.

The relevant clauses of the FCCB Scheme that require consideration in the matter are reproduced below :

"7(4) For the purpose of conversion of Foreign Currency Convertible Bonds, the cost of acquisition in the hands of the non-resident investors would be the conversion price determined on the basis of the price of the shares at the Bombay Stock Exchange, or the National Stock Exchange, on the date of conversion of Foreign Currency Convertible Bonds into shares."

... ...

8(3) Conversion of Foreign Currency Convertible Bonds into shares shall not give rise to any capital gain liable to income-tax in India.

8(4) Transfers of For ign Currency Convertible Bonds made outside India by a non-resident investor to another non-resident investor shall not give rise to any capital gains liable to tax in India.

7 Dur ng the Financial Year 2011-12, the petitioner - assessee had entered into transactions pertaining to Foreign Currency Convertible Bonds (for short "FCCBs") issued by Nava Bharat Ventures Limited (for short "NBVL") an Indian company and the equity shares underlying these FCCBs. It had reported short-term capital gain of Rs.7,36,52,016 on the sale of 83,89,938 equity shares of NBVL which were acquired on conversion of the FCCBs held in NBVL. This short-term capital gain was shown as

taxable under section 111A of the Act at 15% plus applicable surcharge and education cess.

8 During the Assessment proceedings, the Assessing Officer (for short "AO") observed that the assessee had purchased 352 zero-coupon FCCBs of NBVL and on 18th August, 2011, 323 FCCBs were converted into 1,29,23,073 equity shares of NBVL out of which 83,89,938 equity shares were sold by the petitioner in the period January, 2012 to March, 2012 and the short-term capital gain arising on the same was duly shown in the Income tax return filed by the petitioner-assessee on 5th April, 2013. The remaining equity shares (45,33,125) were sold by the petitioner in November, 2012. The balance 29 FCCBs were redeemed by NBVL on 29th September, 2011 at a premium of 25.96% over the face value. While framing the assessment, the AO made reference to the petitioners contentions, but did not accept the same in view of the amended provisions of the Income-tax Act vide Circular No.1 of 2009 dated 27th March, 2009, Finance Act 2008 - Explanatory Notes to the provisions of the Finance Act 2008.

9 The assessment order was served on the assessee on 13th May, 2015, and being aggrieved thereby, the assessee-petitioner filed a Revision Petition under section 264 of the Income-tax Act on 12th May, 2016. The contention in that Revision Petition was that the entire sale proceeds of 83,89,958 equity shares of NBVL an Indian company, amounting to Rs.174,73,12,155/-had been treated as unexplained cash credit in the hands of the assessee by the AO in the final assessment order. After referring to the details of the transaction it is urged that the AO had added the entire sale proceeds received on sale of shares of NBVL which were received on conversion of FCCBs into shares on the presumption that the petitioner had subscribed to these FCCBs in September 2006 whereas it was incorporated in the Cayman Islands only on 2nd August, 2007. It was urged that this was a wrong presumption. On this premise only the AO added the sale proceeds of the shares received on conversion as an unexplained cash credit in the hands of the assessee. Based on these submissions made by the assessee, relief to the tune of Rs.174.73 crores was granted to the tax payer by the respondent No.1 on this account.

10 The second issue was that the cost of acquisition of the equity shares of NBVL taken by the AO in the assessment order is incorrect. In the return of income filed by the assessee, it had computed the short-term capital gain by considering the closing price of the equity shares of NBVL on the National Stock Exchange on the date of conversion of the FCCBs into NBVL equity shares. That is taken as a cost of acquisition of the shares (Rs.198.85). The assessee relied on clause 7(4) of the FCCB Scheme reproduced above. However the AO held that the provision of section 49(2A) of the IT Act should be considered for the purpose of computing the cost of acquisition of the shares of NBVL received from the conversion of the FCCBs. On this basis, the AO had considered the cost of acquisition of the equity shares at the price prevailing (Rs.113.9) on the date of issue of the FCCBs (September 2006) and computed the capital gains at Rs.78.9 crores as against Rs.7.9 crores computed by the assessee. It is claimed by the first respondent that during the course of the proceedings, these aspects were examined in detail and the Revisional Authority, after considering the amended provisions of section 49(2A), section 47(xa) and section 115AC (1)(a) of the Income-tax Act, calculated the capital gains as set out in

paragraph 11.11 of the order of the Revisional Authority. In paragraph 6.7 of the affidavit-in-reply, at running pages 168 and 169, the working made by the Revisional Authority is set out. That reads as under :

"Calculation of Capital gain by the Respondent No.1

6.7 It is clear that 323 FCCBs were acquired by the assessee on 24.06.2008 from LBCCA for a consideration of Japanese Yen 3230 million. The exchange rate as prevalent on 24.06.2008 was JPY 100 = Rs. 39.73 as per RBI website. Therefore, 323 FCCBs were purchased by KCLO on 24.06.2008 for Rs.128,32 79,000. These 323 FCCBs were converted into 1,29,23,073 equity shares of Rs.2 face value each of NBVL. Therefore, as per Section 49(2A), the cost of acquisition of the shares of NBVL will be equal to the total consideration paid by KCLO to LBCCA for purchase of 323 FCCBs on 24.06.2008 divided by No. of shares allotted to it on conversion i.e. 1,29,23,073 (Rs.993/share). The closing price of the shares of NBVL as on 07.09.2006 as taken by A.O. to be the cost of acquisition of shares for calculating the STCG is not as per Section 49(2A). As per Section 49(2A), capital gains on the sale of shares of NBVL should be calculated as given below :

Capital asset	-	*83,89,936 shares of NBVL*
Sale consideration (Jan-March 12)	-	*Rs.174,73,12,155*

Cost of acquisition of the capital asset

$$= \frac{Rs.128,132,79,000}{1,29,23,073} \times 83,89,938$$

$$= Rs.83,31,32,432$$

Brokerage paid = 26,20,968

Capital gains = Rs.174,73,12,155 – Rs.83,31,132,432-
Rs.26,20,968
= Rs.91,15,58,755"

11 In the affidavit-in-reply, therefore, the conclusions of the authorities as referred above have been supported and it is claimed that the order under section 264 of the Income-tax Act could not be prejudicial to the interest of the assessee, hence the order of the AO was not revised on this count and the contention of the assessee was rejected.

12 Thereafter, we find that in the affidavit-in-reply to this petition, the petition has been dealt with para-wise. The order of the Revisional Authority is thus challenged on several grounds in this petition. The petitioner has also referred to the legal provisions and set out the same in somewhat details. We reproduce them.

13 Prior to the introduction of the FCCB Scheme, section 115AC was introduced by the Finance Act, 1992 with effect from April 1, 1993, to govern the taxability of income arising from

FCCBs and GDRs. Section 115AC along with the footnote at the time of introduction of FCCB Scheme is reproduced below :

> *"Tax on income from bonds or Global Depository Receipts purchased in foreign currency or capital gains arising from their transfer.*
>
> *115AC (1) Where the total income of an assessee, being a non resident, includes -*
> *(a) income by way of interest or dividends on bonds or shares of an Indian company issued in accordance with such scheme as the Central Government may, by notification in the Official Gazette*, specify in this behalf and purchased by him in foreign currency; or*
>
> **The footnote to section 115AC(1)(a) is reproduced below "Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme has been notified – Notification No.SO 1032(E), dated 24-12-1993".*

14 The explanatory memorandum dealing with section 115AC at the time of introduction reads as under :

> *"The Government has approved, in principle, the scheme permitting issue abroad of foreign currency convertible bonds/equity by established Indian companies. These bonds have to be denominated in foreign currencies with a view to bringing in foreign exchange. It is, therefore, necessary that*

the tax regime for the non-resident investors of these bonds / equities is competitive vis-vis the tax regimes of other such instruments of investments available in the international market. Accordingly, it is proposed to insert a new section 115AC in the Income-tax Act to provide for special rates of tax applicable to income from such bonds or shares purchased in foreign currency or long-term capital gains arising from their transfer.

The income by way of interest or dividends in respect of the bonds issued by or shares in an Indian company purchased in foreign currency in accordance with the scheme notified by the Central Government in this behalf and income by way of long-term capital gains arising from transfer of such bonds or shares is proposed to be charged to tax at the rate of ten percent. However, this rate of tax will apply on gross income of the nature specified above without allowing deduction under section 28 to 44CC, 48 and 57 and Chapter VI-A. The provisions for protection from fluctuation of rupee value against foreign currency will not apply to the aforesaid shares. Further, when the said bonds or shares are transferred outside India, by a non-resident to another non-resident, it will not be regarded as a transfer for the purpose of capital gains tax."

The notes to clause dealing with section 115AC at the time of introduction reads as under :

"Sub-section (1) of the new section seeks to provide that in the case of a non-resident, the income tax payable shall be the

aggregate of (i) ten percent of the income by way of interest or dividends in respect of bonds issued by or, as the case may be, shares in respect of bonds issued by or, as the case may be, shares in an Indian company purchased in foreign currency in accordance with such scheme as the central government may, by notification in the Official Gazette, specify in this behalf, if any (ii) ten percent in case of long-term capital gains arising from the transfer of the aforesaid bonds or shares, if any, and (iii) the amount of income-tax on the total income as reduced by the income from the said bonds or shares.

Sub-section (2) of the new section seeks to provide that in the case of the aforesaid non-resident, no deduction shall be allowed under section 29 to 44C or clause (i) or clause (iii) of section 57 or under Chapter VI-A where the gross total income consists only of income from bonds or shares. However, where the gross total income includes income from shares or bonds, the reduction under Chapter VI-A shall be allowed as if the gross total income does not include the income from units."

15 Section 115AC deals with taxability of only certain types of income that could arise in respect FCCBs and GDRs.

a) Interest payments made to non-resident holders of FCCBs would be liable to tax in India at 10 percent.

b) Long-term capital gain realized from the transfer of FCBBs or shares to a resident would be liable to tax in India at 10 percent.

16 In light of the amendment to section 115AC of the Act, clause (x) of Section 47 was amended simultaneously to include "bonds" to address the taxability arising from the conversion into equity shares of the issuing company. Section 47 of the Act, specifies the cases in which transfer of a capital asset is not assessable to tax under the head "Capital Gains" Clause (x) of section 47 reads as under :

> *"(x) any transfer by way of conversion or debentures, debenture-stock or deposit certificates in any form, of a company into shares or debentures of that company."*

17 Section 49 of the Act specifies the cost with reference to certain modes of acquisition. Section 49(2A) of the Act was not amended to include "bonds". Section 49(2A) of the Act at the time of introduction to section 115AC and 47(x) of the Act read as under :

> *"(2A) Where the capital asset, being a share or debenture in a company, became the property of the assessee in consideration of a transfer referred to in clause (x) of section 47, the cost of acquisition of the asset to the assessee shall be deemed to be that part of the cost of debenture, debenture-stock or deposit certificates in relation to which such asset is acquired by the assessee."*

18 In 2008, the Central Government notified a new and separate scheme as Foreign Currency Exchangeable Bond Scheme, 2008 (for short "FCEB Scheme"). The footnote to section 115AC was amended. The relevant part of section 115AC including the amended footnote is reproduced as below :

> *"Tax on income from bonds or Global Depository Receipts purchased in foreign currency or cap tal gains arising from their transfer.*
>
> *115AC (1) Where the total income of an assessee, being a non-resident, includes -*
>
> *(a) income by way of interest on bonds of an Indian company issued in accordance with such scheme as the Central Government may, by notification in the Official Gazette* specify in this behalf or on bonds of a public sector company sold by the Government and purchased by him in foreign currency; or:"*
>
> **The footnote to section 115AC(1)(a) reads as under :*
>
> *66. See Issue of Foreign Currency Exchangeable Bonds Scheme,l 2008/Isssue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993/Depository Receipts Scheme, 2014".*

19 Section 47(xa) was introduced by the Finance Act, 2008, with effect from April 1, 2008. Clause (xa) of section 47 reads as under :

"(xa) Any transfer by way of conversion of bonds referred to in clause (a) of sub-section (1) of section 115AC into shares or debentures of any company."

20 Section 49(2A) as amended by the Finance Act, 2008 with effect from April 1, 2008. Clause (2A) of section 49 reads as under :

"(2A) Where the capital asset, being a share or debenture of a company, became the property of the assessee in consideration of a transfer referred to in clause (x) or clause (xa) of section 47, the cost of acquisition of the asset to the assessee shall be deemed to be that part of the cost of debenture, debenture-stock, bond or deposit certificate in relation to which such asset is acquired by the assessee"

21 The notes to clauses dealing with Section 47(xa) and 49(2A) at the t me of introduction read as under :

"47 (xa) It is proposed to insert a new clause (xa) to provide that any transfer by way of conversion of bonds referred to in clause (a) of sub-section (1) of section 115AC into shares or debentures of any company shall not be considered as transfer.

49(2A) Sub-section (2A) of the said section provides that where the capital asset, being a share or debenture in a company, became the property of the assessee in consideration of a transfer referred to in clause (x) of section 47, the cost of *acquisition of the asset to the assessee shall be deemed to be that part of the cost of debenture, debenture-stock or deposit certificates in relation to which such asset is acquired by the assessee.*

It is proposed to substitute the said sub-section to provide that where the capital asset, being a share or debenture of a company, became the property of the assessee in consideration of a transfer referred to in clause(x) or clause (xa) of section 47, the cost of acquisition of the asset to the assessee shall be deemed to be that part of the cost of debenture, debenture-stock, bond or deposit certificates in relation to which such asset is acquired by the assessee.

This amendment will take effect from 1st April, 2008 and will accordingly apply in relation the assessment year 2008-09 and subsequent assessment years."

22 The explanatory memorandum dealing with 49(2A) at the time of introduction reads as under :

"In 1992, the Government allowed established Indian companies to issue Foreign Currency Convertible Bonds (FCCBs), with special tax regime for non-resident investors, so as to encourage the flow of foreign exchange to India. The Government has now allowed established Indian companies to issue Foreign Currency Exchangeable Bond (FCEB). These are bonds expressed in foreign currency, the principal and interest in respect of which is payable in foreign currency. The FCEBs

differ from FCCBs in as much as the latter can only be converted into shares of the issuing company, whereas FCEBs can also be converted into or exchanged for the shares of a group company. With a view to providing a level playing field to FCEBs, it is proposed to provide that the conversion of FCEBs into shares or debentures of any company shall not be treated as a 'transfer' within the meaning of Income-tax Act. Further it is also proposed to substitute sub-section (2A) of section 49 to provide that the cost of acquisition of the shares received upon conversion of the bond shall be the price at which the corresponding bond was acquired.

23 The bonds issued to the Petitioner are under the FCCB Scheme of 1993. Under the FCCB Scheme, the cost of acquisition of equity shares upon conversion of FCCBs are to be determined in accordance with the provisions of clause7(4) and 8(3). It is submitted that

a. The provisions of the aforesaid clauses of the FCCB Scheme continue to operate; and

b. Section 49(2A) of the Act was amended by the Finance Act, 2008 and was to be read with the FCEB Scheme.

24 Prior to its substitution by the Finance Act, 2008, w.e.f. 1-4-2008, sub-section (2A) of section 49, as inserted by the

Finance Act (No.2) Act, 1991, w.e.f. 1-4-1962 did not contain any reference to "bonds". Under this circumstance, the cost of acquisition of equity shares upon the conversion of FCCBs was not governed by the provisions of section 49(2A) instead it was always to be determined in accordance with the special provisions of clause 7(4) read with clause 8(3) of the FCCB Scheme.

25 On the basis of the applicable provisions, and the amendment to the footnote of Section 115AC along with the notes to clauses along with the explanatory memorandum to the Finance Act, 2008 it is clear that Section 47(xa) and section 49(2A) was introduced in the Act to govern transactions pertaining to FCEBs and not FCCBs which are anyway governed by the FCCB Scheme from 1993 onwards.

26 The petitioner converted 323 FCCBs (out of 352 FCCBs) into underlying equity shares of NBVL on August 18, 2011. This conversion is exempt from tax in accordance with the clause7(4) read with 8(3) of the FCCB Scheme. Subsequently, the Petitioner sold 83,89,938 equity shares on the NSE in tranches during the Assessment Year 2012-13. The petitioner was liable to

securities transaction tax on such sale, that was duly paid by the petitioner. The balance 29 FCCBs were redeemed by NBVL on September 29, 2011, at a premium of 25.96 % over the face value of the FCCBs in accordance with the terms of the issue.

27 The petitioner filed its return of income for the Assessment Year 2012-13 on 5th April, 2013. The FCCB does not specify the manner of computing the period of holding of the equity shares received from the conversion of FCCBs. The petitioner computed the short-term capital gains by considering the equity shares of Nava Bharat Ventures Limited which have been held by it since the date of allotment of the shares upon conversion of the relevant FCCBs. The petitioner relied upon clause 7(4) of the Scheme and computed the short-term capital gain by considering the closing price of the equity shares of the above company on the National Stock Exchange on the date of conversion of FCCBs into NBVL equity shares. The petitioner reported a taxable income of Rs.7,63,52,016/- being the short-term capital gain arising from the sale of equity shares. The petitioner accordingly paid the required taxes in accordance with law. The petitioner's case was selected for scrutiny assessment

vide notice dated 5th September, 2014, issued under section 143(2) of the Income Tax Act, 1961 (for short 'IT Act"). The petitioner, on realising that the issuing company short paid the actual tax that ought to have been deducted and deposited in respect of the premium, voluntarily deposited this additional tax amount of Rs.1,91,198/-, including interest payable. Subsequently, the Assessing Officer passed an order dated 13th March, 2015, copy of which is at Exhibit-E to the petition and on receipt of this assessment order, the petitioner-assessee realised the mistake therein and sought to correct the same by filing a rectification application. The Assessment Officer passed a rectification order to rectify the defect and this order is dated 17th February, 2016, copy of which is at Exhibit-F to the petition.

28 The petitioner filed a Revision Application under section 264 of the IT Act before the Commissioner of Income Tax against the order of assessment, copy of which is Exhibit-G.

29 **The impugned order dated 29th March, 2018, copy of which is at Exhibit-A to the petition has been passed on this Revision Application**. It is aggrieved and dissatisfied with this order that the petitioner has filed the instant petition.

30 In the meanwhile, the Assessing Officer, acting on the order of the Commissioner, issued a notice of demand under section 156 of the IT Act dated 10th April, 2018. A copy of this order is annexed at Exhibit-H to the petition. A demand in the sum of Rs.22,40,46,220/- as also the interest under section 234-B of the Act came to be included in this demand, but without giving any credit for the taxes already paid. The petitioner was advised to file a rectification application with the second respondent, which it filed on 10th May, 2018.

31 However, in the meanwhile, the instant petition has been filed.

32 On this petition, we have heard Mr. Porus Kaka, learned senior advocate appearing on behalf of the petitioners and Mr. Abhay Ahuja, advocate for the Revenue / respondents.

33 Mr. Porus Kaka explained to us in great detail the Scheme, the transactions and thereafter took us through the relevant Schemes and the provisions of the amended as well as the unamended Act, the salient features of the FCCB and FCEB Schemes

and submitted that the Revisional Authority completely misread and misconstrued the legal provisions to arrive at a finding which is wholly illegal and perverse. It is submitted by Mr. Kaka that the FCCB Scheme as notified by the Central Government for facilitating issue of foreign currency convertible bonds and ordinary shares through Global Depository Receipt mechanism by Indian companies is titled as "The Foreign Currency Convertible Bonds and Ordinary Shares (Through Depositary Receipt Mechanism) Scheme, 1993". It shall be deemed to have come into force from 1st day of April, 1992. Inviting our attention to the definitions contained in clause (2) of the Scheme and particularly the words FCCBs, issuing company and clause (3) which is titled as Eligibility for Issue of Convertible Bonds or Ordinary Shares of Issuing Company', Mr. Kaka urged that this Scheme contains under the heading 'Transfer and Redemption', the relevant clauses relied upon, namely, clauses 7(1) and 7(4). Mr. Kaka would then submit that once a non-resident holder of Global Depositary Receipts may transfer those receipts, or may ask the Overseas Depositary Bank to redeem these receipts, then, there is a mechanism set out in clause 7(1), (1A), (2) and (3) for the purpose of conversion of FCCBs. Sub-clause (4) of clause 7 sets out that the cost of acquisition in the hands of the non-resident investors would be the conversion price determined on the basis of the price of the shares at the Bombay Stock Exchange or the National Stock Exchange, <u>on the date of conversion of Foreign Currency Convertible Bonds into shares</u>. Hence Mr. Kaka would submit that the taxation on shares issued under the Global Depositary Receipt Mechanism would denote that this is a completely distinct Scheme.

34 On 23rd September, 2008, Circular No.17 was issued and the attention of the authorised dealers was invited to the "Issue of Foreign Currency Exchangeable Bonds (FCEB) Scheme, 2008". That Scheme was notified by the Government of India, Ministry of Finance, Department of Economic Affairs vide Notification of G.S.R.89(E) dated 15th February, 2008. To operationalise this Scheme in order to facilitate the issue of FCEBs by Indian companies, the Scheme was specifically defined and FCEB means a bond expressed in foreign currency, the principal and interest in respect of which is payable in foreign currency and issued by an Issuing Company and subscribed to by a person who is resident outside India, in foreign currency. Mr.

Kaka says that this is exchangeable, into equity shares of another company to be called the Offered Company, in any manner, either wholly, or partly or on the basis of any equity related warrants attached to debt instruments. The FCEB may be denominated in any freely convertible foreign currency. Therefore, Mr. Kaka would submit that a whole new regime after the Notification was issued, bringing into effect the FCEB Scheme. It is clear that whenever there are distinct Schemes, those Schemes are notified and it is clear that when FCEB was repealed by Notification F.No.9/1/2013-ECB-Depository Receipts Scheme, 2014 on 21st October, 2014, the Central Government in clause 11 of this Scheme known as Depository Receipts Scheme, 2014 (for short "DRS 2014") inserted a repeal and saving clause and clarified the issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme 1993 shall be repealed except to the extent relating to FCCBs. Once this repeal and saving clause is taken into consideration, then, Mr. Kaka would submit the full picture becomes clear. Then, Mr. Kaka took us through the above referred provisions of the Income-tax Act, 1961 and urged that this understanding of the Scheme, together with the governing clauses is the focal point. If this understanding is wholly faulty and erroneous as is contended and elaborated in the writ petition, then, Mr. Kaka would submit that the conclusions of the Revisional Authority cannot be sustained. They are erroneous and contrary to law. We must then proceed to quash and set aside the said order.

35 Mr. Kaka has also taken us through the Memorandum explaining the provisions of the Finance Bill 1992, the Bill No.17/2008 which is a Bill to give effect to the financial proposals of the Central Government for the Financial Year 2008-09 and the Finance Act 2008 to urge that the said Bill purports to amend, *inter alia*, section 49 of the Income Tax Act, 1961 by adding sub-section (2A) and thus urged that in the Statement of Objects and Reasons, it is stated that the object of the Bill is to give effect to the finance proposals of the Central Government for the Financial Year 2008-09. Mr. Kaka then referred to the notes on clauses and urged that by clause 12 of the same, it was proposed to substitute the sub-section to provide that where the capital asset being a share or debenture of a company, became the property of the assesee in consideration of a transfer referred to in clause (x) or clause (xa) of section 47, the cost of acquisition of the asset to the

assesse shall be deemed to be that part of the cost of debenture, debenture stock, bond or deposit certificates in relation to which such asset is acquired by the assessee. This amendment will take effect from 1st April, 2009 and will, accordingly, apply in relation to the Assessment Year 2008-09 for subsequent assessment years. Mr. Kaka, therefore, submits that the petitioner rightly calculated the cost of acquisition in accordance with clause 7(4) of the FCCB Scheme so as to compute the short-term capital gain. Mr. Kaka submits that the first respondent calculated the cost of acquisition as per provisions of section 49(2A) of the Income-tax Act by taking the actual amount paid by the petitioner for purchase of each share of NBVL. Mr. Kaka submits that it is obvious that the petitioner did not purchase any shares of NBVL from the market, but received Rs.1,29,23,073 shares from NBVL on 18th August, 2011 upon conversion of 323 FCCBs. Hence Mr. Kaka would submit that if the cost of acquisition is considered in accordance with this amended Section 49(2A) of the Income-tax Act, it creates discrimination amongst assessees. The assessees who have sold their shares prior to the amendment cannot be put on par with those who have undertaken a similar transaction post the amendment.

36 Mr. Kaka also submitted that there are decisions in the field which would buttress the arguments of the petitioner that amendment to section 49(2A) to include bonds cannot and was not meant to retrospectively cover bonds issued prior to the date under the FCCB Scheme. Thereby, the cost of acquisition of equity shares upon conversion of FCCBs was not governed by the provisions of section 49(2A) of the Income-tax Act. Instead, the cost was to be determined in accordance with the specific provisions of clause 7(4) read with clause 8(3) of the FCCB Scheme read with section 115AC of the Income-tax Act.

37 Mr. Kaka argued that the provisions of section 115AC read with the FCCB Scheme should govern the FCCB related transactions to the extent that corresponding provisions are not repealed in the Act. Mr. Kaka once again highlights that the inclusion of section 47(xa) and the amendment to section 49(2A) to include bonds and a footnote in section 115AC was only to govern FCEBs and not FCCB transactions. Mr. Kaka states that correspondingly the conversion should be in accordance with the provisions of section 47(x) which was inserted contemporaneously with the introduction of the FCCB Scheme

and not section 47(xa) which was inserted contemporaneously with the introduction of the FCEB Scheme. Mr. Kaka was at pains to point out that the FCCB Scheme governs the FCCB transactions and has been notified in the Official Gazette by the relevant authorities and referred to in section 115AC of the Income-tax Act.

38 It is urged that we must look into all the grounds on which the Revisional Authority's order has been challenged in this petition so as to get a complete picture. Mr. Kaka submits that otherwise what we would be doing is to grant a discretionary power in the authorities to consider the cost of acquisition of capital asset on a particular date and subsequently disregard the same date for determining the period for holding of the capital asset. Mr. Kaka, therefore, submits that the gain arising from the sale of shares should be regarded as a long-term capital gain and should be exempt from tax under section 10(38) of the Act in the hands of the petitioner. Mr. Kaka finally submits that the respondent No.1 then should also consider the date of acquisition of FCCBs for determining the period of holding of shares and the period post the conversion. The failure of the respondent No.1 to

consider the same is wholly erroneous, arbitrary and contrary to law.

39 Mr. Kaka relied upon the decision in the case of *Commissioner of Income-tax vs Naveen Bhatia 287 ITR 587* rendered by the Punjab and Haryana High Court and *Commissioner of Income-tax vs. Manjula J. Shah* rendered by this Court and reported in *355 ITR 474*. The only ground on which these decisions have been brushed aside is that the same have not been accepted by the Department and an Appeal has been preferred in the Hon'ble Supreme Court of India in the case of *Manjula Shah*. Mr. Kaka took us through the summary of the conclusions which he terms as erroneous and to be found in the order of the respondent No.1 impugned in the writ petition and, according to him, paragraph 38 of the petition and the table below it would demonstrate as to how the factual and legal position has not been appreciated at all or has not been appreciated in its proper perspective. The correct factual and legal position should have been noticed and that having not been done, the impugned order is vitiated by an error of law apparent on the face of the record.

40 On the other hand, Mr. Ahuja appearing on behalf of the Revenue would support the impugned order. It is submitted by him that the petitioners are not disclosing or rather have not disclosed the true and correct facts. They have been succinctly set out both in the impugned order and in the affidavit-in-reply filed to this petition. Mr. Ahuja submits that it is correct that the FCCB Scheme notified by the Central Government in 1993 is applicable with effect from 1st April, 1992 and the same governed the issue of FCCBs and GDRs with equity shares of the Indian companies as underlying securities. Mr. Ahuja submits that a copy of the same has been enclosed as Exhibit-B to the writ petition, but the print-out of the FCCB Scheme 2003 has been taken from the official website of the Income Tax Department. It is a matter of record that FCCB Scheme is not a part of the Income tax Act and was not issued by the Income Tax Department. The FCCB Scheme is purely a Scheme of the Central Government of India and for facilitating raising of capital/loans by the Indian companies from non-resident investors. The clauses of this Scheme, therefore, ought to be construed and interpreted in the light of this objective. The objectives for facilitating the issue of FCCBs and GDRs by the Indian companies to the foreign

investors as discernible from various clauses of the Scheme do not override the express provisions of the Income-tax Act, 1961 with regard to the calculation of the capital gains and the cost of the acquisition in the hands of the non-resident investors unless specific provisions to that extent are made in the Income-tax Act. Mr. Ahuja then submits that the NBVL, an Indian company, came out with its offering circular for the FCCBs on 29th September, 2006 and the assessee purchased 352 zero-coupon FCCBs of NBVL from Ms. Lehman Brothers, a non resident company incorporated in Hong Kong vide an agreement dated 24th June, 2008. However, it is not correct to say that the capital gains on the sale of equity shares of NBVL would be the cost of conversion of FCCBs and to be determined in accordance with the FCCB Scheme. Mr. Ahuja submits that the capital gains arising from the transfer of capital assets are required to be calculated in accordance with the provisions of sections 45 to 54 of the Income-tax Act. The clauses of the FCCB Scheme cannot override the express provisions contained in the Income-tax Act for calculation of capital gains in various situations. It is submitted that though section 49(2A) was brought into effect from 1st April, 2008, it will not be correct to say that the same has to be read with the FCEB Scheme only. Mr. Ahuja submits that the provisions of the amended section 49(2A) read with section 47(xa) and 115AC(1)(a) also govern the cost of acquisition of shares in the case of FCCBs. Once the assessee purchased FCCBs on 24th June, 2008 and they were converted into shares of NBVL on 18th August, 2011, the amended provisions will be applicable. They will be applicable to calculate the cost of acquisition of the FCCBs which were converted into shares. In that behalf, Mr. Ahuja relied upon all the afore referred provisions, amended as also unamended, and some of the footnotes to buttress and support his argument that their combined reading would enable the Revenue to urge that in cases of conversion of bonds into shares and for subsequent sale by the tax payer, the cost of acquisition of such shares shall be deemed to be that part of the cost of bond / FCCB in relation to which such assets / shares were acquired by the assessee. It is in these circumstances and the Act containing clear provisions, no amount of reliance on the clauses of the Scheme will assist the petitioner-assessee.

41 Mr. Ahuja would submit that the petitioner had submitted before the Revisional Authority that given the lack of

clarity in the Act, provisions of the FCCB Scheme should govern FCCB related transactions to the extent that corresponding provisions are not explicitly included in the Act. However, these contentions were not found acceptable in the light of section 49(2A). The assessee has taken the closing price of the shares of NBVL as prevailing on the date of conversion from FCCBs to shares, namely, 18th August, 2011. Therefore, as per its version the appreciation while the security was FCCB has to be ignored. That means the appreciation from 24th June, 2008 to 18th August, 2011, in respect of these 323 FCCBs must be ignored, according to the petitioner-assessee. This is not the correct interpretation of law. In fact, the redemption of 25.96% over the face value on balance 29 FCCBs which were retained by NBVL on 29th September, 2011, has been offered to tax at 10% under section 115AC(1) by the assessee. Thus, retention premium is another name for the fixed interest income provided to the investors in FCCB.

42 Mr. Ahuja submits that there was an alternate argument during the course of the revisional proceedings and canvassed by the petitioner. That plea is reproduced in the

affidavit-in-reply at pages 172 and 173 of the paper-book. Mr. Ahuja would submit that given this alternate plea, the petitioner-assessee was aware of the above noted legal position and rather conceded to it. In such circumstances, the Revisional Authority has not done anything by which the petitioner can be said to be prejudiced. The revisional order cannot be said to be perverse at all. It is based on the factual position noticed by the Revisional Authority. The findings and conclusion in the Revisional Authority's order are consistent with the factual and legal position noted above. Once they are so, they cannot be termed as perverse. They are not vitiated by any error of law apparent on the face of the record either.

43 Mr. Ahuja then submits that the capital asset is the shares of the Indian company which were received by the tax payer only on 18th August, 2011, and the same were sold by it in January – March, 2012. Therefore, the period of holding of the shares of NBVL in the hands of the petitioner has to be counted from 18th August, 2011 to March, 2012. Mr. Ahuja has invited our attention to sub-clause (f) of clause (i) of Explanation-1 to section 2(42A) of the Income-tax Act which sets out the definition of the

words "short-term capital asset". After referring to it, Mr. Ahuja submits that the period of holding in cases like the one at hand has to be taken from the date of allotment of the financial asset. The Income Tax Commissioner (Revisional Authority) has followed the legal and procedural requirements laid down in the Income-tax Act and after giving due opportunity to the petitioner, has passed the impugned order. That cannot be said to be erroneous as urged. Once this is the position, then, the writ petition deserves to be dismissed.

44 In support of his arguments, Mr. Ahuja relied upon a compilation which contains the chronology of events and particularly the omitted events according to him. Then, he relies upon several judgments compiled in the compilation filed on behalf of the Revenue.

45 For properly appreciating the rival contentions, a reference will have to be made to the power conferred in the Revisional Authority by the law.

46 Pertinently, the Revisional Authority was approached by the petitioner. The copy of the Revision Application annexed to the writ petition denotes that the Assessing Officer had issued an order dated 13th May, 2015, under section 143(3) read with section 144C(3) of the Income-tax Act. This order of assessment was passed for the Assessment Year 2012-13. The argument was that this order is prejudicial to the interest of the assessee and, therefore, Revision is sought of the same by invoking section 264 of the Income-tax Act.

47 Section 264 of the Act confers upon the Principal Commissioner or Commissioner a power to call for either of his own motion or an application by the assessee for reviewing the record of any proceedings in the case of any order other than an order to which section 263 applies and such order is passed by an authority subordinate to the Principal Commissioner or Commissioner. Section 264 reads as under :

> "***264 Revision of other orders*** *(1) In the case of any order other than an order to which section 263 applies passed by an authority subordinate to him, the Commissioner may, either of his own motion or on an application by the assessee for revision, call for the record of any proceeding under this Act in*

which any such order has been passed and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit.

(2) The [Principal Commissioner} or Commissioner shall not of his own motion revise any order under this section if the order has been made more than one year previously.

(3) In the case of an application for revision under this section by the assessee, the application must be made within one year from the date on which the order in question was communicated to him or the date on which he otherwise came to know of it, whichever is earlier:

Provided *that the [Principal Commissioner or] Commissioner may, if he is satisfied that the assessee was prevented by sufficient cause from making the application within that period, admit an application made after the expiry of that period.*

(4) The [Principal Commissioner or] Commissioner shall not revise any order under this section in the following cases-

(a) where an appeal against the order lies to the [Deputy Commissioner (Appeals) or to the Commissioner (Appeals)] or to the Appellate Tribunal but has not been made and the time within which such appeal may be made has not expired or, in the case of an appeal to the Commissioner (Appeals) or] to the Appellate Tribunal, the assessee has not waived his right of appeal; or

(b) where the order is pending on an appeal before the Deputy Commissioner (Appeals)]; or

(c) where the order has been made the subject of an appeal to the Commissioner (Appeals) or] to the Appellate Tribunal.

(5) Every application by an assessee for revision under this section shall be accompanied by a fee of five hundred rupees.

(6) On every application by an assessee for revision under this sub-section, made on or after the 1st day of October, 1998, an order shall be passed within one year from the end of the financial year in which such application is made by the assessee for revision.

Explanation.- In computing the period of limitation for the purposes of this sub-section, the time taken in giving an opportunity to the assessee to be re-heard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded.

(7) Notwithstanding anything contained in sub-section (6), an order in revision under sub-clause (6) may be passed at any time in consequence of or to give effect to any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation 1-. An order by the Principal Commissioner or Commissioner declining to interfere shall, for the purposes of this section, be deemed not to be an order prejudical to the assessee.

Explanation 2.- For the purposes of this section, the Deputy Commissioner (Appeals) shall be deemed to be an authority subordinate to the Principal Commissioner or, Commissioner."

48 A bare perusal of this section would indicate that the Revisional Authority is invoked so as to seek a revision of other orders and while that jurisdiction is invoked, the authority can exercise the powers under section 264 and make an enquiry or cause an enquiry to be made to enable it to pass, subject to the provision of this Act, such order but not an order prejudicial to the assessee. The order that he thinks fit should be passed must, therefore, conform to the conditions set out in sub-sections (1), (2) and (3) of section 264.

49 In invoking this jurisdiction, the petitioner–assessee after summarising the facts alleged that the AO has committed serious errors and his order suffers from several legal infirmities. We are concerned here with with ground pertaining to incorrect cost of acquisition of the equity shares. The assessee's case was that for the purpose of computation capital gains arising from the sale of shares received by the assessee upon conversion of the

FCCBs, the assessee considered the cost of acquisition of the shares to be the closing price of the shares on the National Stock Exchange on the date of allotment of the shares to the assessee. The case of the assessee is that the Income-tax Act contains no specific provisions for the determination of the cost of acquisition in such circumstances. Instead, all such transactions are governed by the provisions contained in the FCCB Scheme. Relying upon the clauses of that Scheme, it was urged that cost of acquisition of equity shares received on conversion of FCCBs in the hands of non-resident investors, would be the conversion price determined on the basis of the price of the shares in the Bombay Stock Exchange and National Stock Exchange on the date of such conversion. The FCCB Scheme does not clarify whether the price that is to be considered for this purpose should be the opening price, the closing price and an average or any other price prevailing during the day. In the absence of any specific guide in the Act or the FCCB Scheme, the assessee considered the closing price of the shares on the National Stock Exchange. The assessee termed this as an accepted practice for Indian tax payers.

50 Now whether this understanding of the assessee is in accord with the provisions of law is, therefore, the main question for our determination.

51 For the purpose of determining this, we must note the FCCB Scheme.

52 As we have noted in the foregoing paragraphs, the FCCB is a Scheme notified by the Central Government. It shall be deemed to have come into effect from the 1st day of April, 1992. The definitions in the Scheme open with the words "Unless the context otherwise requires the foreign currency convertible bonds means bonds issued in accordance with the FCCB Scheme and subscribed by a non-resident in a foreign currency and convertible into ordinary shares of the issuing company in any manner, either in whole or in part, on the basis of any equity related warrants attached to that instrument". The word "issuing company" is defined to mean a company permitted to issue FCCBs or ordinary shares of that company against global depository receipts. Now, clause (2) sub-clause (f) of the Scheme very clearly says that the words and expressions not defined in the

Scheme, but defined in the Income-tax Act 1961 or the Companies Act 1956 or the Securities Exchange Board of India Act, 1992, or the Rules and Regulations framed under these Acts shall have the meaning respectively assigned to them, as the case may be, in the Income-tax Act, or the Companies Act or the SEBI Act.

53 Once we understand very clearly that FCCBs mean bonds issued in accordance with the FCCB Scheme and subscribed by a non-resident in foreign currency and convertible into ordinary shares of the issuing company, coupled with the definition of the term issuing company, then, the word "shares" having not been defined in the Scheme would carry the same meaning as is assigned to it in the laws or enactments referred in sub-clause (f) of clause (2) of the Scheme.

54 It is evident that the Scheme sets out the procedure and it has been set out in the Scheme itself that the FCCBs shall be denominated in any convertible foreign currency and the ordinary shares of an issuing company shall be denominated in Indian rupees. The salient features of the Scheme together with eligibility for issue of convertible bonds or ordinary shares of

issuing company are set out in clause 3. Thereafter clause 3A deals with issue of Global Depository Receipts and then there is a special provision clause 3B for Indian companies engaged in Information Technology Software and Information Technology Services. Then, there are several other companies registered in India, but engaged in the sectors/areas of operation referred to in clause 3C and by clause 4 there are limits set out of foreign investment in the issuing company. We shall not refer to the issue structure of the Global Depository Receipts, but would straight away come to clause 7 titled as Transfer and Redemption and it is stated in clause 7(1) that a non-resident holder of Global Depository Receipts may transfer those receipts or may ask the Overseas Depository Bank to redeem those receipts and thereafter the procedure following redemption is set out. However, for the purposes of conversion of FCCBs, the cost of acquisition in the hands of the non-resident investor would be conversion price determined on the basis of the price of the shares at the Bombay Stock Exchange or the National Stock Exchange on the date of the conversion of FCCBs into shares.

55 The arguments of the parties would necessitate a reference also to clause 8 of the FCCB which is reproduced hereinbelow :

> *"8 Taxation on Foreign Currency Convertible Bonds.*
>
> *8(1) Interest payments on the bonds, until the conversion option is exercised, shall be subject to deduction of tax at source at the rate of ten per cent.*
>
> *(2) Tax on dividend on the converted portion of the bond shall be subject to deduction of tax at source at the rate of ten per cent.*
>
> *(3) Conversion of Foreign Currency Convertible Bonds into shares shall not give rise to any capital gains liable to income-tax in India.*
>
> *(4) Transfers of Foreign Currency Convertible Bonds made outside India by a non resident investor to another non-resident investor shall not give rise to any capital gains liable to tax in India."*

56 By sub-clause (1) interest payments on the bonds until the conversion option is exercised shall be subject to deduction of tax at source at the rate of ten per cent. Conversion of Foreign Currency Convertible Bonds into shares shall not give rise to any capital gains liable to income-tax in India and transfers of FCCBs made outside India by a non-resident investor to another non-resident investor shall not give rise to any capital

gains liable to tax in India. Now, heavy reliance is placed on this clause and the clause pertaining to taxation on shares issued under Global Depository Receipt Mechanism in clause 9 to urge that whenever there is a liability to tax and in terms of the Indian Law (Income-tax Act) the FCCB Scheme has clearly spelt it out.

57 For dealing with that aspect of the matter, we must notice some of the provisions of the Income tax Act, 1961.

58 As is evident that this Act is enacted to consolidate and amend the law relating to income tax and super tax. The Act extends to the whole of India and save as otherwise provided in the Income-tax Act itself, it shall come into force on the 1st day of April, 1962. Section 2 contains several definitions and the word "assessee" is defined in section 2 clause (7) to mean a person by whom any tax or any other sum of money is payable under the Income Tax Act and includes every person set out in sub-clauses (a), (b) and (c) of clause (7) to section 2. Then, we have the definition of the word "Assessing Officer" and "assessment" to be found in section 2 clause (7A) and (8). The word "business" is defined in an inclusive manner in clause (13) of section 2. The

definition of "capital asset" is set out in section 2 clause (14) and reads as under :

"2 Definitions.-

(1) ... ...

(14) "capital asset" means—

(a) property of any kind held by an assessee, whether or not connected with his business or profession;

(b) any securities held by a Foreign Institutional Investor which has invested in such securities in accordance with the regulations made under the Securities and Exchange Board of India Act, 1992 (15 of 1992),

but does not include—

(i) any stock-in-trade [other than the securities referred to in sub-clause (b)], consumable stores or raw materials held for the purposes of his business or profession ;

(ii) personal effects that is to say, movable property (including wearing apparel and furniture) held for personal us by the assessee or any member of his family dependent on him, but excludes—

(a) jewellery;

(b) archaeological collections;

(c) drawings;

(d) paintings;

(e) sculptures; or

(f) any work of art.

Explanation 1.—For the purposes of this sub-clause, "jewellery" includes—

(a) ornaments made of gold, silver, platinum or any other precious metal or any alloy containing one or more of such

precious metals, whether or not containing any precious or semi-precious stone, and whether or not worked or sewn into any wearing apparel;

(b) precious or semi-precious stones, whether or not set in any furniture, utensil or other article or worked or sewn into any wearing apparel.

Explanation 2.—For the purposes of this clause—

(a) the expression "Foreign Institutional Investor" shall have the meaning assigned to it in clause (a) of the Explanation to section 115AD;

(b) the expression "securities" shall have the meaning assigned to it in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956);

(iii) agricultural land in India, not being land situate—

(a) in any area which is comprised within the jurisdiction of a municipality (whether known as a municipality, municipal corporation, notified area committee, town area committee, town committee, or by any other name) or a cantonment board and which has a population of not less than ten thousand; or

(b) in any area within the distance, measured aerially,—

(I) not being more than two kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten thousand but not exceeding one lakh; or

(II) not being more than six kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than one lakh but not exceeding ten lakh; or

(III) not being more than eight kilometres, from the local limits of any municipality or cantonment board referred to in item (a)

and which has a population of more than ten lakh.

Explanation.—For the purposes of this sub-clause, "population" means the population according to the last preceding census of which the relevant figures have been published before the first day of the previous year;

(iv) 6½ per cent Gold Bonds, 1977, or 7 per cent Gold Bonds, 1980, or National Defence Gold Bonds, 1980, issued by the Central Government;

(v) Special Bearer Bonds, 1991, issued by the Central Government ;

(vi) Gold Deposit Bonds issued under the Gold Deposit Scheme, 1999 [or deposit certificates issued under the Gold Monetisation Scheme, 2015] notified by the Central Government.

Explanation.—For the removal of doubts, it is hereby clarified that "property" includes and shall be deemed to have always included any rights in or in relation to an Indian company, including rights of management or control or any other rights whatsoever;

59 This definition excludes from its purview any stock-in-trade other than the securities referred to in sub-clause (b), consumable stores or raw materials held for the purposes of the assessee's business or profession, personal assets and then says in the Explanation-2 that when capital asset means property of any kind held by an assessee whether or not connected with his business or profession, any securities held by a foreign

institutional investor which he has invested in such securities in accordance with the regulations made under SEBI Act but excludes what is set out further and at the same time inserts in Explanation to define the expression "Foreign Institutional Investor" shall have the meaning assigned to it in clause (a) of the Explanation to section 115AD of the Income-tax Act, 1961, that expression carries the same meaning. Equally, the expression 'securities' has the same meaning assigned to it in clause (h) of section 2 of the Securities Contracts (Regulations) Act, 1956. If that definition is inclusive of shares, then, coupled with the definition of the term 'company appearing in section 2 clause 17, the definition of the term 'income' appearing in section 2, clause 24, the determination to be done by us is simpler. Pertinently, the definition as defined in section 2(24) includes any capital gains chargeable under section 45 of the Income-tax Act.

60 The definition of the term 'Indian company' is equally important and that is to be found in section 2, clause 26. That definition reads as under :

> *"2. Definitions.- In this Act, unless the context otherwise requires,-*

(1) … … … …

… … … …

(26) "Indian company" means a company formed and registered under the Companies Act, 1956 (1 of 1956), and includes —

(i) a company formed and registered under any law relating to companies formerly in force in any part of India [other than the State of Jammu and Kashmir and the Union territories specified in sub-clause (iii) of this clause;

(ia) a corporation established by or under a Central, State or Provincial Act;

(ib) any institution, association or body which is declared by the Board to be a company under clause (17);

(ii) in the case of the State of Jammu and Kashmir, a company formed and registered under any law for the time being in force in that State;

(iii) in the case of any of the Union territories of Dadra and Nagar Haveli, Goa, Daman and Diu, and Pondicherry, a company formed and registered under any law for the time being in force in that Union territory:

Provided that the registered or, as the case may be, principal office of the company, corporation, institution, association or body in all cases is in India;"

61 "Long-term capital asset" is defined in section 2 clause (29A) to mean a capital asset which is not a short-term capital asset and a "long-term capital gain" is defined in section 2(29B) to mean capital gain arising from the transfer of a long-term capital asset. Now, we have already seen the term "capital asset" and reproduced it. The next important definition is of the term "person" and that is to be found in section 2 clause (31).

62 The term "resident" is defined in section 2 clause (42) and the term "short-term capital asset" is defined in section 2 clause (42A). What we have before us is this definition and which refers to the share of a company. Now, this definition has undergone an amendment and we will not concern ourselves with the amendment that has been brought into effect post the controversy before us. Pertinently, by clause (hd) the expression "global depository receipt" is referred and then we have the definition of the term "short-term capital gain" to mean capital gain arising from the transfer of a short-term capital asset. That is the definition set out in section 2(42B). The term "tax" is defined in section 2 clause (43). It reads as under :

"(43) "tax" in relation to the assessment year commencing on the 1st day of April, 1965, and any subsequent assessment year means income-tax chargeable under the provisions of this Act, and in relation to any other assessment year income-tax and super-tax chargeable under the provisions of this Act prior to the aforesaid date [and in relation to the assessment year commencing on the 1st day of April, 2006, and any subsequent assessment year includes the fringe benefit tax payable under section 115WA];"

63 The term "transfer is defined in section 2 clause (47) and that reads as under :

"(47) "transfer", in relation to a capital asset, includes—

(i) the sale, exchange or relinquishment of the asset; or

(ii) the extinguishment of any rights therein; or

(iii) the compulsory acquisition thereof under any law; or

(iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment;] [or]

(iva) the maturity or redemption of a zero coupon bond; or

(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882); or

(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

Explanation 1.—For the purposes of sub-clauses (v) and (vi), —immovable property shall have the same meaning as in clause (d) of section 269UA.

Explanation 2.—For the removal of doubts, it is hereby clarified that —transfer includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated in India."

64 There is a definition of the term "zero-coupon bond" and which is inserted by the Finance Act 2005 with effect from 1st April, 2006 and section 2 clause (48), while defining these words by sub-clause (c) referred to a bond which the Central Government may, by Notification in the Official Gazette, specify.

65 We have then to refer to another section which the parties before us referred and the same, according to them, has a bearing on the issue at hand. Section 10 of the Act falls in Chapter III titled as "Incomes which do not form part of total income". There is a sub-heading 'Incomes not included in total income'. Section 10 says that in computing the total income of a previous year of any person, any income falling within any of the clauses in section 10 shall not be included. There the income arising from the transfer of a long-term capital asset being an equity share in a company or a unit of an equity oriented fund or unit of a business trust where the transaction of sale of such equity share or unit is entered into on or after the date of which Chapter VII of the Finance (No.2) Act 2004 comes into force and such transaction is chargeable to securities transaction tax under that chapter and with all the provisions shall be the income which does not form part of the total income of the assessee. Section 10 clause (38) reads as under :

"Section 10 (1) ... ...

(38) any income arising from the transfer of a long-term capital asset, being an equity share in a company or a unit of an equity oriented fund [or a unit of a business trust] where—

(a) the transaction of sale of such equity share or unit is entered into on or after the date on which Chapter VII of the Finance (No. 2) Act, 2004 comes into force; and

(b) such transaction is chargeable to securities transaction tax under that Chapter:

***Provided** that the income by way of long-term capital gain of a company shall be taken into account in computing the book profit and income-tax payable under section 115JB:*

***Provided also** that nothing contained in sub-clause (b) shall apply to a transaction undertaken on a recognised stock exchange located in any International Financial Services Centre and where the consideration for such transaction is paid or payable in foreign currency:*

***Provided also** that nothing contained in this clause shall apply to any income arising from the transfer of a long-term capital asset, being an equity share in a company, if the transaction of acquisition, other than the acquisition notified by the Central Government in this behalf, of such equity share is entered into on or after the 1st day of October, 2004 and such transaction is not chargeable to securities transaction tax under Chapter VII of the Finance (No. 2) Act, 2004 (23 of 2004).*

Explanation.—For the purposes of this clause,—
(a) "equity oriented fund" means a fund—

(i) where the investible funds are invested by way of equity shares in domestic companies to the extent of more than sixty-five per cent. of the total proceeds of such fund; and

(ii) which has been set up under a scheme of a Mutual Fund specified under clause (23D):

***Provided** that the percentage of equity share holding of the fund shall be computed with reference to the annual average of the monthly averages of the opening and closing figures;*

(b) "International Financial Services Centre" shall have the same meaning as assigned to it in clause (q) of section 2 of the Special Economic Zones Act, 2005 (28 of 2005);

(c) "recognised stock exchange" shall have the meaning assigned to it in clause (ii) of the Explanation 1 to sub-section (5) of section 43;"

66 The parties have made a detailed reference to section 47 and when that is referred we will reproduce it only to the extent it is relevant. Thus, there is a head E – Capital Gains in Chapter IV titled as Computation of income from capital gains and section 45 defines capital gains. Section 46 is not relevant for it deals with capital gains on distribution of

assets by companies in liquidation and section 46A deals with capital gains on purchase by company of its own shares or other specified securities. Section 47 says that nothing contained in section 45 shall apply to the transfers set out therein and one such transfer is by way of conversion of bonds or debentures, debenture-stock or deposit certificates in any form of a company into shares or debentures of that company and the word 'bond' has been inserted by Finance Act 1992 in this clause with retrospective ef ect from 1st day of April, 1962. Clause (xa) was inserted by Finance Act 2008 with effect from 1st day of April, 2008 and that deals with conversion of bonds referred to in clause (a) of sub-section 1 of section 115AC into shares or debentures of any company. Now, the difference between clauses (x) and (xa) is apparent. Both deal with transfer and by way of conversion, *inter alia*, of bonds of a company into shares or debentures of that company, but clause (xa) covers transfer by way of conversion of bonds referred to in clause (a) of sub-section (1) of section 115AC into bonds or debentures of any company.

67 Now, it is necessary to refer to section 49 as well and that deals with cost with reference to certain modes of acquisition. By sub-section (2A) of section 49 inserted by Finance Act 2008 with effect from 1st day of April, 2008, the Legislature deals with a capital asset being a share or debenture of a company. Sub-section (2A) of section 49 reads as under :

"49 (1) ... ...

(2A) Where the capital asset being a share debenture of a company, became the property of the assessee in consideration of a transfer referred to in clause (x) or clause (xa) of section 47, the cost of acquisition of the asset to the assessee shall be deemed to be that part of the cost of debenture, debenture-stock, bond or deposit certificate in relation to which such asset is acquired by the assessee.

... ..."

68 Therefore, if such a capital asset being a share or debenture of a company, became the property of the assessee in consideration of a transfer referred to in clause (x) or clause (xa) of section 47, the cost of acquisition of the asset to the assessee shall be deemed to be that part of the cost of debenture, debenture-stock, bond or deposit certificate in relation to which such asset is acquired by the assessee.

69 Ordinarily, in section 47 the clauses set out therein deal with transactions not regarded as transfers. That, *inter-alia*, includes transfer by way of conversion of bonds of a company into shares or debentures of that company and transfer by way of conversion of bonds referred to in clause (a) of sub-section (1) of section 115AC into shares or debentures of any company, but if it becomes the property of the assessee in consideration of a transfer set out in the aforesaid clauses, then, its cost of acquisition has to be computed The cost of acquisition of the asset to the assessee shall be deemed to be that part of the cost of the bond or deposit certificate in relation to which such asset is acquired by the assessee.

70 Then we come to section 115AC and what we find is Chapter XII of the Act deals with determination of tax in certain special cases. Section 115 which was appearing in the Act was omitted by Finance Act 1987 with effect from 1st April, 1988 and thereafter section 115A deals with tax on dividends, royalty and technical service fees in the case of foreign companies. Section 115AB deals with tax on income from units purchased in foreign

currency or capital gains arising from their transfer and section 115AC which has been substituted by Finance Act 2001 with effect from 1st April, 2002, deals with tax on income from bonds or Global Depository Receipts purchased in foreign currency from capital gains arising from their transfer. Section 115AC reads as under :

> *"115AC. (1) Where the total income of an assessee, being a non-resident, includes—*
>
> *(a) income by way of interest on bonds of an Indian company issued in accordance with such scheme as the Central Government may, by notification in the Official Gazette, specify in this behalf, or on bonds of a public sector company sold by the Government, and purchased by him in foreign currency; or*
>
> *(b) income by way of dividends, other than dividends referred to in section 115-O,on Global Depository Receipts—*
>
> *(i) issued in accordance with such scheme as the Central Government may by notification in the Official Gazette, specify in this behalf, against the initial issue of shares of an Indian company and purchased by him in foreign currency through an approved intermediary; or*
> *(ii) issued against the shares of a public sector company sold by the Government and purchased by him in foreign currency through an approved intermediary; or*
>
> *(iii) issued or re-issued in accordance with such scheme as the Central Government may, by notification in the Official Gazette, specify in this behalf, against the existing shares of an Indian company purchased by him in foreign currency through an approved intermediary; or*
>
> *(iv) * * * * **
>
> *(c) income by way of long-term capital gains arising from the transfer of bonds referred to in clause (a) or, as the case may be, Global Depository Receipts referred to in clause (b),*

the income-tax payable shall be the aggregate of—

(i) the amount of income-tax calculated on the income by way of interest or dividends, other than dividends referred to in section 115-O, as the case may be, in respect of bonds referred to in clause (a) or Global Depository Receipts referred to in clause (b), if any, included in the total income, at the rate of ten per cent;

(ii) the amount of income-tax calculated on the income by way of long-term capital gains referred to in clause (c), if any, at the rate of ten per cent; and

(iii) the amount of income-tax with which the non-resident would have been chargeable had his total income been reduced by the amount of income referred to in clauses (a), (b) and (c).

(2) Where the gross total income of the non-resident —

(a) consists only of income by way of interest or dividends, other than dividends referred to in section 115-O in respect of bonds referred to in clause (a) of sub-section (1) or, as the case may be, Global Depository Receipts referred to in clause (b) of that sub-section, no deduction shall be allowed to him under sections 28 to 44C or clause (i) or clause (iii) of section 57 or under Chapter VI-A;

(b) includes any income referred to in clause (a) or clause (b) or clause (c) of sub-section (1), the gross total income shall be reduced by the amount of such income and the deduction under Chapter VI-A shall be allowed as if the gross total income as so reduced, were the gross total income of the assessee.

(3) Nothing contained in the first and second provisos to section 48 shall apply for the computation of long-term capital gains arising out of the transfer of long-term capital asset, being bonds or Global Depository Receipts referred to in clause (c) of sub-section (1) (4) It shall not be necessary for a non-resident to furnish under sub-section (1) of section 139 a return of his income if—

(a) his total income in respect of which he is assessable under this Act during the previous year consisted only of income referred to in clauses (a) and (b) of sub-section (1); and

(b) the tax deductible at source under the provisions of Chapter XVII-B has been deducted from such income.

(5) Where the assessee acquired Global Depository Receipts or bonds in an amalgamated or resulting company by virtue of his holding Global Depository Receipts or bonds in the amalgamating or demerged company, as the case may be, in accordance with the provisions of sub-section (1), the provisions of that sub-section shall apply to such Global Depository Receipts or bonds.

Explanation.—

For the purposes of this section,—

(a) —approved intermediary‖ means an intermediary who is approved in accordance with such scheme as may be notified by the Central Government in the Official Gazette;

(b) —Global Depository Receipts shall have the same meaning as in clause (a) of the Explanation to section 115ACA."

71 The provision, therefore, enables the Revenue to bring to tax the income from bonds or global depository receipts purchased in foreign currency or capital gains arising from their transfer. If one sees the later part of it, with which we are concerned, then, what emerges from a reading of this provision is that by sub-section (3), it is clarified that nothing contained in the first and second provisio to section 48 shall apply for the computation of long-term capital gains arising out of the transfer of long-term capital asset, being bonds or global depository receipts referred to in clause (c) of sub-section (1). Thus, section

115AC(1)(c) deals with such income which is earned from the transfer of bonds referred to in clause (a) or, as the case may be, the GDRs referred to in clause (b) and by sub-section (3) what is clarified is that provisos 1 and 2 to section 48 shall not apply for the computation of long-term capital gains arising out of the long-term assets being bonds or GDRs referred to in sub-section (1).

72 Pertinently, section 48 is a provision which sets out the mode of computation. The income chargeable under the head capital gains shall be computed by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset, the amounts mentioned in clauses (i), (ii) and thereafter the two provisos.

73 We reproduce this part of section 48 only to note that where the assessee is a non-resident, capital gains arising from the transfer of a capital asset being shares in, or debentures of, an Indian company shall be computed by converting the cost of acquisition, expenditure incurred wholly and exclusively in connection with such transfer and the full value of the consideration received or accruing as a result of the transfer of

the capital asset into the same foreign currency as was initially utilised in the purchase of the shares or debentures. Thereafter, capital gains are computed. Such foreign currency shall be reconverted into Indian currency so as to bring the result outlined in the first proviso and when the second proviso comes into play, it is providing for a long-term capital gain arising from the transfer of a long-term capital asset other than capital gain arising to a non-resident from the transfer of shares in or into debentures of an Indian company referred to in the first proviso. It is in these circumstances that we find that there is a mechanism, set up and eventually Chapter IV deals with computation of income from capital gains, whereas Chapter XII is dealing with determination of tax in certain special cases.

> *"48. Mode of computation.— The income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely:—*
>
> *(i) expenditure incurred wholly and exclusively in connection with such transfer;*
>
> *(ii) the cost of acquisition of the asset and the cost of any improvement thereto:*

Provided *that in the case of an assessee, who is a non-resident, capital gains arising from the transfer of a capital asset being shares in, or debentures of, an Indian company shall be computed by converting the cost of acquisition, expenditure incurred wholly and exclusively in connection with such transfer and the full value of the consideration received or accruing as a result of the transfer of the capital asset into the same foreign currency as was initially utilised in the purchase of the shares or debentures, and the capital gains so computed in such foreign currency shall be reconverted into Indian currency, so, however, that the aforesaid manner of computation of capital gains shall be applicable in respect of capital gains accruing or arising from every reinvestment thereafter in, and sale of, shares in, or debentures of, an Indian company:*

Provided further *that where long-term capital gain arises from the transfer of a long-term capital asset, other than capital gain arising to a non-resident from the transfer of shares in, or debentures of, an Indian company referred to in the first proviso, the provisions of clause (ii) shall have effect as if for the words "cost of acquisition" and "cost of any improvement", the words "indexed cost of acquisition" and "indexed cost of any improvement" had respectively been substituted:*

… … … "

74 Now we find that in the impugned order, the Commissioner had before him the petition of the assessee and

which sets out the afore referred facts. The Commissioner then refers to the relevant materials including the Revenue Circulars and findings of the Assessing Officer and he comes to the conclusion that the AO proceeded on completely baseless presumptions that FCCBS were allocated to the assessee even before its date of incorporation. In paragraph 7 of the impugned order, he grants a relief to the assessee-petitioner before us on the following factual findings.

> *"From the facts narrated above and from the chronology of events and from the documents furnished during the Section 264 proceedings, it is clear that the A.O. proceeded on completely baseless presumption that the FCCBs were allocated to the assessee even before its date of incorporation. As already been pointed out, the company was incorporated on 02.08.2007 and 352 FCCBs of NBVL were purchased by it from LBCCA, another foreign company vide agreement dated 24.06.2008. It is also clear that the assessee company had only invested in FCCBs of NBVL, an Indian Company on 24.06.2008, payment for the same was made in the foreign currency and the shares received on the conversion of its FCCBs in September, 2011 were sold by the assessee during the period January to March, 2012. The Short Term Capital Gains arising on the sale of these shares has been shown in the return of income filed by the assessee though the A.O. has disputed the computation of STCG also. Therefore, the action of the A.O. in treating the*

> *total sale proceeds of Rs.174,73,12,155/- as unexplained cash credit in the hands of the assessee is not sustainable and the revision application of the assessee is not sustainable and the revision application of the assessee u/s 264 to this extent is allowed."*

75 We are really not concerned with this conclusion because the Assessee is satisfied with it and obtained the relief it sought from the Commissioner.

76 As already stated above, it is the second issue and in that regard the Revisional Authority reproduced paragraphs 16 and 18 of the assessment order and in paragraphs 9 and 10, the Commissioner says that the assessee has considered the cost of acquisition of the shares to be the closing price of the shares of NBVL on the National Stock Exchange on the date of allotment of the shares to the assessee i.e. on 18th August, 2011, but the AO faulted it. The Revisional Authority then, in paragraph 11, reproduces section 49(2A) and says that this provision refers to the transfers mentioned in clause (xa) of section 47 of the Income-tax Act, which was inserted by the Finance Act 2008 with effect from 1st April, 2008. Upon reproducing this provision in paragraph 11.4, the Revisional Authority comes to the conclusion

that it is a combined reading of the three provisions which enable him to reject the contentions of the petitioner.

77 Firstly, we will see only the main conclusion and what we find is that section 115AC(1) clearly refers to income by way of interest on bonds of an Indian company issued in accordance with such Scheme as the Central Government may, by notification in the Official Gazette, specify in this behalf. Section 49(2A), to which we have already made detailed reference above, deals with a capital asset being a share or debenture of a company becoming the property of the assessee in consideration of a transfer referred to in clause (x) or (xa) of section 47 and section 47(x) under a transfer by way of conversion of bonds or debentures and (xa) by way of conversion of bonds referred to in clause (a) of sub-section (1) of section 115AC into shares or debentures of any company. The assessee may maintain that there is nothing in the Act which enables the authorities to deal with a situation and it is only clause 7 dealing with transfer and redemption and particularly sub-clause (4) thereof, as spelt out in the Scheme, which will apply. We are of the clear opinion that it is the conversion of foreign currency convertible bonds that the cost of

acquisition in the hands of non-resident Indian investors would be the conversion price determined on the basis of the price of the shares as in this case, the National Stock Exchange, on the date of conversion of foreign currency convertible bonds into shares. This is the cost of acquisition in the hands of a non-resident investor. That would be the conversion price determined on the basis of the price of the shares at the National Stock Exchange and, therefore, conversions of FCCBs would be done accordingly.

78 Section 47 is a provision which keeps out certain transactions from the purview of section 45 and section 45 deals with capital gains. One such transaction is the transfer by way of conversion of bonds or debentures or debenture-stock or deposit certificates in any form of a company into shares or debentures of that company and the other is transfer by way of conversion of bonds referred to in clause (a) of sub-section (1) of section 115AC into shares or debentures of that company. This is, therefore, not a transfer as is evident from the reading of section 47. However, the cost with reference to certain modes of acquisition is a matter dealt with by section 49 and where the capital asset becomes the property of the assessee on any distribution of assets on the total

or partial partition of a Hindu undivided family or under a gift or will, by succession, inheritance or devolution, then, that is an aspect dealt with by sub-section (1). Where the capital asset being a share or shares in an amalgamated company which is an Indian company and that becomes property of the assessee in consideration of a transfer referred to in clause (vii) of section 47, the cost of acquisition of the asset shall be deemed to be the cost of acquisition to him of the share or shares in the amalgamating company and by (2A) where the the capital asset being a share or debenture of a company became the property of the assessee in consideration of a transfer referred to in clause (x) or (xa) of section 47, then the cost of acquisition of the asset to the assesee shall be deemed to be that part of the cost of bond or deposit certificate in relation to which such asset is acquired by the assessee.

79 Prior to the substitution, sub-section (2A) as inserted by Finance Act No.2 of 1991 with retrospective effect from 1st April, 1962, read as under:-

> *"(2A) Where the capital asset, being a share or debenture in a company, became the property of the assessee*

in consideration of a transfer referred to in clause (x) of section 47, the cost of acquisition of the asset to the assessee shall be deemed to be that part of the cost of debenture, debenture-stock or deposit certificates in relation to which such asset is acquired by the assessee."

80 A bare perusal of the unamended provision denotes that insofar as on introduction of clause (xa) of section 47 effective from 1st April, 2008 by the 2008 Finance Act, this sub-section (2A) of section 49 was also amended. Simultaneously, with the introduction of clause (xa) in section 47, this amendment has been effected. Therefore, though section 47 opens with the words "nothing contained in section 45 shall apply to the following provisions" section 49 provides for determination of cost with reference to certain modes of acquisition. Earlier, where the capital asset being a share or debenture in a company, became a property of an assessee in consideration of a transfer referred to in section 47, the determination of the cost of that acquisition was provided for. By the substituted sub-section (2A) of section 49, the cost of acquisition of the asset of the assesee shall be deemed to be that part of the cost of debenture, debenture-stock bond or deposit certificate in relation to which such asset is acquired by

the assessee. The introduction of the word 'bond' and the word 'or' before the words "deposit certificate" with effect from 1st April, 2008 is thus crucial.

81 All this came once Chapter XII titled as "Determination of Tax in Certain Special Cases" had, by virtue of amendment with effect from 1st April, 2002 enabled imposition of tax on income from bond or global depository receipt purchased in foreign currency or capital gains arising from their transfer. Now, even in that part, while clauses (a) of sub-section (1), which deals with the total income by an assesse, being a non-resident, including what is provided by in clause (a) of sub-section (1) of section 115AC of the Income Tax Act, 1961 the legislature had in mind the scheme. In these circumstances, it is evident that any scheme prior thereto and particularly the one involved before us, namely, the FCCB Scheme notified by Central Government in 1993 and applicable with effect from 1st April, 1992 and enabling the computation of cost of acquisition, in terms thereof, was held to be unaffected. It was, therefore, possible to compute the cost in terms of the clauses of that scheme and which was admittedly an earlier scheme.

82 To our mind, therefore, Mr.Kaka is right in his contention that the revisional authority fell in clear error in taking assistance of the amendments made by the Finance Act, 2008. To our mind, Mr. Kaka is right in urging that the cost of acquisition of the shares was to be determined with reference to the date of acquisition of the FCCBs, then, the period for which the shares should be regarded as having been held by the petitioner-assessee should also be reckoned to the date of acquisition. He is right in urging that the second respondent failed to consider the scheme and therefore, once these clauses are included in the FCCB Scheme itself, then, they would govern the FCCB related transactions to the extent the corresponding provisions are not made in the Act. The authority was not right in holding that the cost of acquisition of the shares as per clause 7(4) of the FCCB Scheme is not tenable. Thus, the Government of India notified Scheme effected from 1992 held the field and was the applicable one. The FCEB Scheme has equal status but is admittedly a later one.

83 The reliance placed by Mr.Kaka on the compilation tendered by him is thus accurate. In the compilation, there is an order passed by the High Court of Punjab and Haryana at Chandigarh in Income Tax Appeal No. 153 of 2008 (*Commissioner of Income Tax-I, Ludhiana vs. Shri Naveen Bhatia*) decided on 19th August, 2015. There, the substantial question as raised was as under:-

> "Whether on the facts and in law the Hon'ble Income Tax Appellate Tribunal was justified in reckoning the period for long term capital gains from the date of purchase of convertible debentures instead of actual date of allotment of shares on conversion from debentures?"

84 In para 2 of the judgment, the facts have been noted as also the submissions and thereafter, the discussion has been made in paras 7 and 8, which read as under:-

> *"7. Section 2(42A) of the Act defines a short term capital asset and in case of shares where the assessee holds the said shares for 12 months or less than 12 months, it shall be short term capital asset. Clause (f) of Explanation I(i) to Section 2(42A) of the Act states that in case of capital asset being a financial asset, allotted without any payment and on the basis of holding of any other financial asset, the period shall be reckoned from the date of the allotment of such financial asset. Section 47(x) and 49(2A) were inserted by the Finance (No.2) Act, 1961 with retrospective effect from 1.4.1962. Section 47(x) provides that any transfer by way of*

conversion of bonds or debentures, debenture-stock or deposit certificates in any form, of a company into shares or debentures of that company shall not mean transfer within the meaning of Section 45 of the Act. Further, sub-section 2A of Section 49 provides that the cost of acquisition of the asset to the assessee shall be deemed to be that part of the cost of debenture, debenture-stock, bond or deposit certificate in relation to which such asset is acquired by the assessee. In other words, the original cost at the time of allotment would be taken to be cost of acquisition.

8. A plain reading of Section 47(x) would indicate that the conversion of convertible debentures into shares would not constitute transfer for the purposes of computation of income under the head 'capital gains'. Similarly, Section 49(2A) of the Act clarifies that for computing the capital gains on sale of shares received on conversion of convertible debentures, the cost of acquisition of shares shall be the cost of convertible debentures and thus it shall be deemed to be the cost of such shares received on conversion. In such a situation, as a necessary corollary, it would be but logical to reckon the date of acquisition of the convertible debentures as the date of acquisition of such shares received on conversion of convertible debentures. Now examining the factual matrix herein, the assessee was allotted 27160 convertible debentures of TELCO Limited on 20.12.2001 which were converted into equal number of shares on 31.3.2002. The assessee sold the said shares between 23.12.2002 to 10.3.2003 in different lot. This shall result in long term capital gains as the shares shall be deemed to have been held for a period exceeding 12 months by the assessee."

85 We do not think that this view of the High Court of Punjab and Haryana at Chandigarh is in any way inaccurate. Similarly, Mr.Kaka laid emphasis on certain observations in the case of *Commissioner of Income Tax vs. Manjula J. Shah* (supra) and to our mind, though the principle laid down in this judgment may be of some assistance to the petitioners, still, merely because the judgment in the case of *Commissioner of Income Tax vs. Naveen Bhatia*, reported in 287 ITR 587 of the High Court of Punjab and Haryana at Chandigarh is not accepted by the Department and a Special Leave Petition is pending, its persuasive value is not lost. More so, when it is dealing with an identical issue.

86 We are aware of the fact that Mr.Ahuja has also tendered a compilation and he has given certain list of dates, but, once we find that the reliance on these dates and events and particularly the date of conversion would not in any manner dilute the clauses of the FCCB Scheme of 1993, then, these dates and events as compiled by the Revenue are of no assistance.

87 In the compilation tendered on behalf of the Revenue, several other materials are also introduced, including the Budget Speech of the Finance Minister. It also contains the new Industrial Policy, 1991 and relevant part of Taxmann's Foreign Exchange Management Manual. These may also make reference to the FCCB, but what we find is that an attempt is made to read the provisions of the Income Tax Act and introduced with effect from 1st April, 2008 in relation to Foreign Currency Exchangeable Bond Scheme, 2008 and apply it to the FCCB Scheme of 1993. That is not correct.

88 Then, Mr.Ahuja invited our attention to the judgments of the Hon'ble Supreme Court in *Gainda Ram and Ors. vs. Municipal Corporation of Delhi and Ors,* reported in (2010) 10 SCC 715. He relied upon this judgment to urge that a provision of law cannot be disregarded or brushed aside by making references to a scheme or understanding of it particularly of the executive. The principle that was pressed into service is that the schemes that are framed and referred in this judgment were later on not totally endorsed by the Hon'ble Supreme Court. In any event, neither the policy nor the scheme can be called law and ignored in

preference to the clear statutory provisions. Hence, the scheme framed under the direction of the court cannot be said to be framed under the power to frame Byelaws which flows from the statute. The scheme, therefore, does not have the status of law or even subordinate legislation.

89 Mr.Ahuja also then invited our attention to the judgment of the Hon'ble Supreme Court in the case of *Ispat Industries Ltd. vs. Commissioner of Customs, Mumbai,* reported in (2006) 12 SCC 583 to urge that rules framed under a statute stand on a different footing. Therefore, they can be considered as binding. We do not think that there is any quarrel about this principle, but its application will depend on the facts and circumstances of an individual case. Hence, we are not dealing with other judgments cited by him, including *Smt.Taralata Shyam and Ors. vs. Commissioner of Income Tax*, reported in (1977) 108 ITR 345. The other judgments on similar point also need not be referred in further details.

90 As a result of the above discussion, we are of the firm opinion that this writ petition deserves to succeed. Rule is,

therefore, made absolute in terms of prayer clauses (a) and (b). In the facts and circumstances of the case, there will be no order as to costs.

B.P. COLABAWALLA, J. ***S.C. DHARMADHIKARI, J.***