

Sumit Bhattacharya vs Asstt. Commissioner Of Income Tax on 3 January, 2008

ORDER

Pramod Kumar, Accountant Member 1 This is an appeal filed by the assessee and is directed against the order dated 15th December 2004 passed by the (sic)(A) in the matter of assessment under Section 143(3) r.w.s. 254 of the Income Tax Act, (sic) [hereinafter referred to as 'the Act'] for the assessment year 1998-99. The assessee has challenged the impugned order on the following grounds:

GROUND I

1. The learned Commissioner of income Tax (Appeals)- Mumbai XVI ["CIT(A)"] erred in treating the sum of Rs. 4,79,13,851, being the amount received on redemption of 'Stock Appreciation Rights [SARs] by the appellant during the financial year 1997-98 as taxable perquisites under the head 'Salaries'.

2. He further erred in holding that:

i. Since the SARs were granted to the appellant by Procter & Gamble Inc USA ("parent company - grantor of SARs") on behalf of and by virtue of his being incumbent of Procter & Gamble India ("employer"), the same were taxable as perquisites, even though there was no employer-employee relationship between the appellant and the grantor of the SARs.

ii. The grant of SARs and its redemption is clearly linked with the appellant and arise because of his employment and to keep him employed with the Procter & Gamble group.

iii. The payment received by the appellant is intimately connected with his being in employment with Procter & Gamble group.

iv. Instead of paying profit in lieu of salary, Procter & Gamble has chosen to compensate the appellant through the arrangement of SARs, and this is just a mode of computation of profits to be paid to the appellant.

v. Actual benefit to the appellant arises on the redemption of, and not on the grant of, the SARs.

3. He failed to appreciate that, if at all amount could be taxed, the same could have been done at the time of grant of SARs.

4. The appellant prays that the action of the CIT(A) of taxing the amount received on redemption of SARs, as income from salary, be deleted.

GROUND II

1. The learned CIT(A) erred in rejecting the submission of the appellant that SARs were in the nature of a capital asset, and since the same were acquired without a cost, no capital gains would arise on transfer of the same.
2. He further erred in:
 - i. Not following the order of the Hon'ble ITAT, Ahmedabad bench, on the same issue, in the case of another executive of the same company.
 - ii. Holding that decision of the Hon'ble ITAT, Bangalore bench, in the case of Infosys Technologies and PSI Data Systems were not applicable to the appellant's case.
 - iii. Not granting exemption from capital gains under Section S4 EA of the Act.
3. The appellant prays that the SARs be considered as a capital receipt not chargeable to tax.

GROUND III

1. The CIT(A) erred in confirming the levy of interest under Section 234 B of the Act.
2. The appellant prays that interest under Section 234 B be deleted.

GROUND IV The appellant craves leave to add, alter and/ or amend all or any of the grounds of appeal.

2. When this appeal originally came up for hearing before a Division Bench, the issue in appeal was claimed to be covered by the order dated 27th June 2003 passed by a co ordinate bench of this Tribunal in the case of Bharat V Patel v. Additional Commissioner of Income Tax (ITA No. 2241/Ahd/2002: assessment year 1998-99). The Division Bench noticed that in the said decision, the co ordinate bench, in turn, had relied upon a decision of Bangalore bench in the case of Infosys Technologies Limited v. DCIT 78 ITJ 598 but then, in the case of this very assessee and in the first round of proceedings, another co ordinate bench had observed that "the decision of ITAT Bangalore bench in the case of Infosys Technologies Limited v. DCIT 78 TTJ 598 is not applicable to the facts of this case". It was also noticed by the Division Bench that in Bharat V Patel's case (supra), the co ordinate bench has proceeded on admittedly erroneous presumption that, in the case of the stock appreciation rights also, the assessee has an obligation to pay for the amount at which stock appreciation right grant is given. It was in this backdrop, and having noted that the CIT (A), in the impugned order, has also referred to these inconsistencies, the Division Bench recommended constitution of a larger bench, of three or more members, to decide the following question:

Whether or not the amount received by the assessee employee on redemption of stock appreciation rights constitutes income liable to tax in his hands, irrespective of the fact that no shares or stock are actually allotted to him and that the assessee does not have any rights to receive such shares and stock?

3. The recommendation so made by the Division Bench was accepted by the Hon'ble President, and, that is how this Special Bench, constituted by the Hon'ble President under Section 255(3) of the Income Tax Act, came to be in seisin of the matter to decide the aforesaid question. When the matter came up for hearing before us, learned Counsel for the assessee submitted that the above question, as framed by the division bench, and, as, therefore, referred by the Hon'ble President to the Special Bench, does not arise in this case. It was pointed out that the amount received by the assessee on redemption of stock appreciation rights has been taxed by the Assessing Officer under the head 'income from salaries', and, therefore, the short point before the Tribunal was whether or not its taxability under the head 'income from salaries' was sustainable in law. Learned Counsel made elaborate arguments in support of his stand that its not open to Tribunal to change the head of income, and even if Tribunal was of the view that the aforesaid sum was taxable in the hands of the assessee under some other head of income, Tribunal cannot direct the Assessing Officer to tax it as (sic) The use of expression 'assessee employee' was also objected to, inter alia, on the ground that the assessee did not receive the stock appreciation rights from the employer. Learned Counsel also submitted that the expression "irrespective of the fact that no shares are actually allotted to him and the assessee does not have any right to receive such stocks and shares" is also wholly inappropriate and it vitiates question framed for consideration. It was thus urged that at best what can be considered by the Special Bench is whether or not the CIT(A) was justified in holding that the amount received by the assessee, on redemption of stock appreciation rights, was taxable under the head 'income from salaries'. Learned Departmental Representative, on the other hand, opposed these arguments and submitted that, even at this stage, it is open to the revenue to take the alternate plea that the amount in question are at least taxable under the head 'income from other sources'. This stand was, of course, without prejudice to the main plea of the revenue that the amounts in question are taxable under the head 'income from salaries'. In response to the bench's suggestion that let the whole appeal be adjudicated by the Special Bench, none of the parties had any specific objection.

4. It was in this background, and realising that it was not desirable to, separately adjudicate the assessee's plea that change of head of Income by the Tribunal is not permissible under the Act, as such an exercise would lead to multiplicity of proceedings before the Special Bench, recommendation was made to the Hon'ble President to transfer whole of the appeal to the Special Bench, as against referring a limited question. It was also noted that open this question about the Tribunal's power to change head of an income is premature and academic at this stage because this question would be relevant only when the Special Bench reaches a conclusion that the amount received on redemption of stock appreciation rights is not taxable under the head 'income from salaries', and that is a hypothetical situation as at this stage. Hon'ble President in these circumstances, was pleased to refer the whole of the appeal for disposal by this Special Bench in accordance with the law. That is how we have come to be in seisin of this appeal.

5. Let us set out the relevant material facts first. The appellant taxpayer was, at the material point of time, i.e. in the previous year ending 31st March 1998, employed as Managing Director of the Procter & Gamble India Limited (hereinafter referred to as PGU) which is a part of the group of companies headed by Procter & Gamble Co., Inc., USA (hereinafter referred to as 'PGU') There is no dispute about the fact that in January 1998, the assessee received a sum of US \$ 12,38,084.02, which was equivalent to Rs. 4,79,13,851.58, from PGU on account of redemption of certain stock . appreciation rights granted in October 1997. The assessee's explanation was that these 5tock Appreciation Rights were granted to the assessee by the PSU in recognition of his continuing contributions to the long term success and development of the business of Procter & Gamble, and that these-grants were in accordance with and subject to the terms of the Procter & Gamble 1983 Stock Plan and the regulations of the Stock Options Committee of the Board of Governors. It was stated that PGU had decided to redeem all the stock appreciation rights by paying the difference between market price of shares and the grant price of the shares of the PGU. The stock appreciation rights were granted with respect to the common stock of the company from time to time on various dates as follows:

Date of grant	No. of shares	Grant Value (In US \$)	Expiration date
26.2.1991	1,400	1,17,250	26.2.2001
24.2.1992	1,300	1,32,763	24.2.2002
26.2.1993	2,200	1,13,438	26.2.2003
25.2.1994	2,300	1,30,669	25.2.2004
28.2.1995	2,400	1,59,000	28.2.2205

6. The manner in which these stock appreciation rights worked was like this. A grantee was allotted stock appreciation rights in respect of a specified number of shares of the PGU. The agreed price of the shares, which normally reflected the market price, as on the date of granting the rights was taken as grant value. The grantee could exercise the right to redeem the appreciation of these shares after one year from the date of the grant. The assessee had to use this redemption right within ten years from the date of grant of these rights-as evident from the chart given above. On redemption of stock appreciation, the grantee would get the excess of market, price of the shares as on the redemption date over the grant value of those Shares. No shares are actually allotted or given to the grantee. The rights of the grantee are confined to claim the appreciation of value in respect of shares in question. There are many other conditions attached to these stock appreciation rights, but we shall deal with those aspects, as and when necessary, at a later stage.

7. The assessee's stand, so far as taxability of this amount of Rs. 4,79,13,851 was concerned, was that this amount is not taxable in the hands of the assessee for more reasons than one. It was claimed that since the assessee did not have any employer employee relationship with PGU, i.e. the grantor of the SARs, the amount received on redemption of SARs could not be taxed as 'income from salaries'. The assessee further submitted that the right to receive stock appreciation was in the nature of a capital asset, and since this asset is without any ascertainable cost of acquisition, the

amount on sale of these rights would not be considered to be liable to taxation as per judicial pronouncement in the case of CIT v. B.C. Srinivas Shetty 128 ITR 294. The assessee also submitted that in the light of the contents of the CBDT circular No. 710, which was binding on the Assessing Officer under Section 119 of the Act, the grant of stock option was not liable to tax. The assessee also submitted that he was in employment with PGI, which was an ultimate subsidiary of the PGU, It was in recognition of assessee's long term association with the Procter & Gamble Group, and his continuing contribution to the development and success of the Group that PGU had granted him the SARs from time to time. The object of the SAR plan, as stated by the assessee in his submission before the Assessing Officer, was to enable the grantee of the SAR to benefit from future appreciation in market price of the shares, without requiring grantee to make any investments. It was again emphasized that money so received by the assessee from the PGU cannot be considered a perquisite in the hands of the assessee as there was no employer employee relationship between the assessee and the PGU. The assessee also pointed out that the PGU did not have more than 50% shares in the PGU in the first two years of SAR grants and it could not therefore be said that PGU in that period, was even a subsidiary company of the PGU. The assessee submitted that though the rights acquired by the assessee were capital in nature, these assets were without any cost, and, therefore, no capital gains could arise due to failure of machinery provisions under the Act. It was also pointed out that there was no contract for purchase or sale of any shares or stock and hence the transactions do not fall within the purview of Section 43(5) of the Act. The Assessing Officer, having considered these submissions, also required the assessee to show cause as to why the payment on redemption of SARs not be treated as 'Salary' within the meaning assigned to that expression under Section 17(iv) of the Act. The assessee reiterated the legal arguments and also submitted that at best the SARs could be taxed at the point of time when the same were granted but then since grant was at market value of shares, no advantage accrued to the assessee.

8. None of these erudite submissions impressed the Assessing Officer. While he agreed that the assessee was indeed not in employment of PGU, he also noted that the letter granting stock appreciation rights to the assessee itself makes mention of assessee's contribution to the long term success and development of business of Procter & Gamble. This letter, noted the Assessing Officer, does not mention whether the grant was made for PGU or PGU The Assessing Officer opined that "it would be appropriate to understand in this context that the meaning of Procter & Gamble was of Procter & Gamble group of companies which does include Procter & Gamble India (PGU) also". The Assessing Officer was of the view that "if that had not been the case, there was no reason for Procter & Gamble to give any SAR to the assessee" He also took note of the position that "the SAR was given to the assessee, as stated in the SAR grant letter itself, for assessee's continuing contribution to the long term success and development of the business of Procter & Gamble". Referring to the English case of Wright v. Boyce (1958) 1 WLR 832, the Assessing Officer observed that true test of any income in such cases is to see whether the amount has been received by the virtue of his (employee's) office. These payments were, according to the Assessing Officer, profits of the assessee's employment. It was thus held that the grant to the assessee was due to employer-employee relationship and so the same would form part of income from salaries, The Assessing Officer also observed that there was no gain to the assessee when SARs were granted and since the gain crystallises only in the year in which SARs are redeemed, the same can only be taxed in the year in which SARs are redeemed. The Assessing Officer also observed that that payment received by the

assessee maybe gratuitous but still the same is taxable under Section 17(1) of the Act. It was in this backdrop that the amount of Rs. 4,79,13,851 was taxed by the Assessing Officer under the head 'income from salaries'.

9. Aggrieved by the stand so taken by the Assessing Officer, the assessee carried the matter in appeal before the CIT(A) but without any success. Relying upon the ruling given by the Authority for Advance Ruling in the case of XYZ In Re (235 ITR 565) and stating that he entirely agrees with the Assessing Officer, he declined to interfere in the matter. The stand of the Assessing Officer was thus upheld and confirmed in the cryptic order passed by the CIT(A). The assessee was unsatisfied and the matter was, therefore, carried in further appeal before a Division Bench of this Tribunal. The Division Bench noted that the CIT(A) did not give any opportunity of hearing to the assessee on the ruling given by the Authority for Advance Ruling, on which the CIT(A) had relied, and that a number of documents, including the scheme under which stock appreciation rights were granted, were filed for the first time before the Tribunal. It was in this background that the matter _was remitted to the file of the CIT(A) by observing as follows:

For all these reasons, we are of the view that it will meet the ends of justice if the decision of the CIT(A) is set aside and he be directed to decide the issue recording the head of income under which the grant is taxable after examining the Procter & Gamble 1983 Stock Plan Scheme and Regulation of Stock Option Committee which were filed by the assessee before us for the first time.

10. In the remanded proceedings also, the CIT(A) confirmed the action of the Assessing Officer. He concluded that the payment has arisen to the appellant because of his employment with Procter & Gamble, and that the payment received by the appellant is nothing but profits in addition to salary and form part of the salary under Section 17(1)(iv) of the Act. He also relied upon, and discussed in detail, the ruling given by the Authority of Advance Ruling. The action of the Assessing Officer was thus upheld, and in fact fortified by the CIT(A) in this round of proceedings. The assessee is not satisfied and is in further appeal before us. This appeal originally came up before a Division Bench but has now, in the circumstances set out earlier in this order, has been referred to this Special Bench.

11. Shri Dastur, learned Counsel for the assessee, has multi-fold submissions, and all these lines of submissions are backed by his elaborate analysis of large number of judicial precedents as also the provisions of the Income tax Act.

12. Apart from reiterating what has been stated by the assessee before the authorities below, and which has been set out earlier in this order, and relying upon Division Bench decision of this Tribunal in the case of Bharat V. Patel (supra), learned Counsel's first submission is that since there is no employer employee relationship between the assessee and the PGU, grantor of the SARs, the amount on redemption of these SARs cannot be taxed as 'income from salaries' as has been held by the authorities below. He further submits that neither the grant of SARs are part of terms and conditions of assessee's employment, nor these grants can be said to be have been made for and on behalf of the employer. Learned Counsel laboriously took us through the provisions of the Procter &

Gamble 1983 Stock Plan Scheme, and pointed out that the assessee's employer had nothing to do with this scheme and these are independent direct receipts by the assessee from the Procter & Gamble Co. USA. It was also pointed out that the PGU did not have more than 50% shares in the PGI in the first two years of SAR grants and it could not therefore be said that PGU, in that period, was even a subsidiary company of the PGU. It is submitted that PGI and PGU are two legally distinct companies which are assessed separately and, therefore, these are required to be treated as such. No doubt the scheme of SAR is an incentive to the employee, but that aspect of the matter is not really relevant so far as taxability thereof is concerned; all that is to be seen is whether such an incentive, even if that be so, is chargeable to tax or not. Learned Counsel laboriously took us through the various provisions of the Income Tax Act in an attempt to demonstrate that the SAR receipts are not taxable under any of the provisions. He takes us through the provisions of Section 15 of the Act to emphasize the only thing which can be taxed under the head income from salaries, though not paid by the employer is (a) any salary paid or allowed to the assessee in the previous year by or on behalf of an employer or former employer, though not due or before it become due to the assessee [Section 15(b)], and (b) any arrears of salary paid or allowed to the assessee in the previous year by or on behalf of an employer or former employer, if not charged to income tax for any earlier previous years [Section 15(c)] learned counsel then takes us through Section 17(1)(iv) which states that Salary includes "any fees, commission, perquisites or profits in lieu of or in addition to any salary or wages". He thus submits that even if the amounts in question are held to be covered by Section 17(1)(iv), these amounts could be taxed as salary only when the conditions of Section 15(b) and 15(c) are satisfied. It is not that each and every amount which satisfies the terms of Section 17(1)(iv) and received from a person other than employer, can be taxed under Section 15. Learned Counsel submits that the only category the stock appreciation right redemption amount could at best fall is perhaps 'perquisites' but it is now settled legal position that stock options cannot be taxed as 'perquisites' except for the assessment year 2000-01. Referring to Hon'ble Supreme Court decision in the case of CIT v. LW Russel 53 ITR 91, it is contended that unless a vested interest accrues to the employee, no taxable perquisite can arise. Learned Counsel then invites our attention to the Tribunal's decision in the case of CIT v. Infosys Technologies Limited 86 ITD 342 and the judgment of Hon'ble Karnataka High Court in the case of CIT v. Infosys Technologies Limited 207 CTR 620 confirming the Tribunal's aforesaid decision. Our attention is also invited to Tribunal's decision in the case of Wipro Limited v. (sic) 80 TTJ 106. It is pointed out that it was only by the Finance Act, 1999, that provisions to tax benefit arising under an employee stock option plan was introduced for the first time w.e.f. 1-4-2000. Even these provisions were deleted by the Finance Act, 2000 w.e.f. 1-4-2001. The benefit to an employee from participating in ESOP plan is now taxable only under the head capital gains, provided the ESOP fulfils the guidelines laid down by the Central Government. The amendment brought about by the Finance Act, 1999, according to the learned Counsel, was not retrospective. Therefore, until the amendment bringing to tax the stock option benefit was put into force, i.e. 1st April 2000, the benefit of stock option was not taxable at all. A reference was made to the observations made by the Hon'ble Supreme Court in the case of V.M. Salgaonkar and Bros Pvt Ltd v. CIT 243 ITR 383 to the effect that subsequent omission of particular clause from the statute could also to be relied upon to interpret a law for an earlier charge would suggest that the law did not specifically desire the taxability of benefit arising to an employee under the stock options plan as perquisite under Section 17(2)(iii) of the Act, It was pointed out that in the Infosys case also, (i) the shares were not allotted by the employer but an outsider, though admittedly connected agency; (ii) it

was the case of the revenue that the outside agency was only a conduit of the employer ; and (iii) the revenue relied upon the ruling of the Authority Advance Ruling in XYZ In Re (supra), but all these contentions were rejected by the Tribunal as also by the Hon'ble High Court. It is also pointed out that since the value of the perquisite, even if the stock options be held as perquisite, could not be ascertained for want of a mechanism laid down in the statute, it could not be brought to tax. Learned Counsel for the assessee specifically invited our attention to the following observations made by the Tribunal in the case of Infosys Technologies Limited (supra):

When Section 17(2)(iiia) was introduced by Finance Act, 1999, w.e.f. 1-4-2000, the Hon'ble Finance Minister noted as under .

In some of the 'sunrise' sectors of the economy, the management is adopting a policy of offering stock options and Sweat Equity, to their employees. The tax Implications of such transactions are somewhat ambiguous. Therefore, I propose in this budget to make certain amendments in the law, to put it beyond doubt that such stock options will be taxed as a perquisite at the time of exercise of the option by the employee, and later as capital gains at the time of sale of the security. These amendments, I expect, will remove the grey areas which exist in the current law relating to such transactions.

The Notes on Clauses of Finance Bill, 1999, tends as under:

Clause 10 seeks to amend Section 17 of the income-tax Act relating to the definition of 'salary', 'perquisite' and 'profits in lieu of salary' It is proposed to insert a new Sub-clause (iiia) in Clause (2) of the said section. The proposed amendment seeks to include in the definition of perquisite the value of any specified security allotted or transferred, directly or indirectly, by any person free of cost or at concessional rate to an individual who is or has been in employment of that person in the year of exercise of option of such shares Explanation to the proposed Sub-clause (iiia) defines the expression 'cost', 'specified security', 'sweat equity shares' and 'value' used in that sub clause.

This amendment will take effect from 1st April, 2000, and will, accordingly, apply in relation to the assessment year 2000-2001 and subsequent assessment years.

It is, therefore, clear that but for the specific definition of perquisite under Section 17(2) which included the benefit under ESOP, prior to insertion to such Clause (iiia) to Section 17(2), there was either no specific provision or there were all sorts of ambiguity and uncertainty in taxing the benefit under ESOP as 'perquisite....

13. It is submitted that the views so expressed by the Tribunal have since been approved by the Hon'ble Karnataka High Court, in the case reported as CIT v. Infosys Technologies Limited 207 ITR 620 and, therefore, we have to proceed on the basis that until the assessment year 2000-01, stock options plan could not be taxed as a perquisite.

14 Learned Counsel further submits that the advance ruling given in the case of the XYZ In Re (supra), which has been heavily relied upon by the CIT(A), has been considered by the Hon'ble Karnataka High Court in the case of Infosys Technologies Ltd (supra) and, in the esteemed opinion of Their Lordships, "the facts in the said case would stand on a different footing" on the ground that "the company strictly had provided shares for the purpose of attraction (of talent) and the company has undertaken the responsibility". Learned Counsel contends that once a higher judicial forum has specifically disapproved application of this ruling in the context of stock option plan and unless the employer company provides shares for the purposes of attraction and undertakes the responsibility, it cannot be open to the Tribunal to follow the ruling given by the Authority for Advance Ruling. It is pointed out that the esteemed views of Hon'ble High Court, being a part of the hierarchy of judicial authorities, are binding on the Tribunal, whereas the views of the Authority for Advance Ruling are not binding on the Tribunal. Our attention 'is also invited to Tribunal's decision in the case of ADIT v. Green Emirates Shipping & Travels 100 ITD 203 in support of this proposition. We are thus urged not to be guided by the advance ruling referred to, and heavily relied upon by the CIT(A) as, besides other reasons, neither is it binding on us nor are the material facts the same as before the Authority for Advance Ruling.

15 Without prejudice to the submission that amount received by the assessee on redemption of stock appreciation rights is not at all taxable under the head 'income from salaries', learned Counsel submits that since event triggering the taxability is grant of stock appreciation right, the taxability has to be examined in the years in which such right are granted. In any event, therefore, if at all the stock appreciation rights can be taxed as assessee's income from salaries, the taxability can only arise in the year in which the stock appreciation rights are granted and since, beyond any dispute or controversy, these rights were granted in preceding previous years, the taxability of these SARs cannot arise in the year before us. Reliance is placed on the judgment of the House of Lords in the case of Abbot v. Philben, Inspector of Tax 44 ITR 144. It is thus submitted that the assessee cannot be held to be taxable in respect of amount received on redemption of stock appreciation rights in the year before us or under the head income from salaries'. We are urged to quash the impugned tax demand for this reason.

16. Learned Counsel also submits that what is to be examined by us is legality of the impugned tax demand raised which is sustained by the CIT(A). The impugned tax demand is on account of redemption value of stock appreciation rights being treated as 'income from salaries' and all that we can, therefore, deal with is whether or not the amount received on redemption of stock appreciation rights can be taxed under the head 'income from salaries'. It is not, according to the learned Counsel, open for us to go into the broader question of its taxability as income or its taxability under any other head of income. Learned Counsel submits that such an action would amount to making a new case for the Assessing Officer at this stage The proceedings before the Tribunal are not the stage at which the Assessing Officer can be allowed to improve his case or at which a new taxability issue can be taken up. He submits that, unlike in the proceedings before the first appellate authority, the powers of the Tribunal are confined to the issue in appeal before the Tribunal- A reference is made to the Hon'ble Supreme Court's judgment in the case of Mattulal v. Radhelal in support of the proposition that the powers of the second appellate authority are limited to deciding upon the issues which are in appeal before such an appellate authority. It is again emphasized that it is not the case

of the any of the authorities below that the amount received by the assessee on redemption of stock appreciation rights is anything other than taxable under the head 'income from salaries' We are thus urged not to venture into deciding the question whether or not the amount received on redemption of stock appreciation rights is in the nature of income and whether or not such an income can be taxed under any other head of income This question, according to the learned Counsel, does not arise on the facts of this case.

17. The next Tier of learned Counsel's armoury is that even if we have to decide the broader question of taxability of these stock appreciation rights under any other head of income, the only head under which the redemption value of these rights can be taxed is 'capital gains' He submits that the expression 'property', as held by the Hon'ble Bombay High Court in the case of CIT v. Tata Services Limited 122 ITR 594, includes property of all kinds and descriptions In terms of the provisions of Section 2(14), capital asset means 'property of any kind held by the assessee' except certain kind of properties specifically excluded from the scope of 'capital assets'. SARs are not covered by the exclusions clauses Our attention is also invited to the judgment of Hon'ble Punjab High Court in the case of Hari Brothers Pvt Ltd v. ITO 52 ITR 399 holding that even a right to subscribe for shares is a property, and, therefore, a capital asset. On the basis of this reasoning, according to the learned Counsel, stock appreciation rights are also In the nature of 'capital assets'. The proceeds of redemption of stock appreciation rights are nothing but consideration on transfer of the capital assets consisting of such rights. The amount received by the assessee can, therefore, only be taxed under the head 'income from capital gains' However, since the cost of acquisition of this capital asset cannot be ascertained, and following the Hon'ble Supreme Court's judgment in the case of BC Srinivasa Setty (supra), the computation provisions fail and, accordingly, the charge of capital gains fails. For this reason, according to the learned Counsel, the income on redemption of stock appreciation rights is in the nature of a capital gains which is not chargeable to tax under Section 45. He contends that, as specifically provided in Section 2(24)(vii) only such capital gains are includible in definition of income, as are taxable under Section 45. He thus contends that the receipt in question is a capital gain outside the ambit of taxability under the Income Tax Act.

18. Learned Counsel also submits that, in any event, the amount received by the assessee cannot be taxed under the head 'income from other sources'. He submits that under the scheme of Section 14 of the Act, all income, for the purpose of charge of income tax and computation of total income, are to be classified under the specified heads of income i. e. income from salaries, income from house property, income from business and profession, income from capital gains and income from other sources. He submits that after determination or classification of the head of income, it is to be seen whether such an income can be taxed under that head. Our attention is invited to the observations made by the Hon'ble Supreme Court in the case of CIT v. DP Sandhu Bros Chembur Pvt Ltd 273 ITR 1, at page 6 to the effect that heads of income provided for in the sections of the income.Tax Act are mutually exclusive and where any item of income falls under one head, it has to be charged under that head and under no other. He submits that in order that an income falls under the residuary head of income, i.e. income from other sources, it must not come under any other head or classification of income. In support of this proposition, our attention is also invited to Hon'ble Supreme Court's judgment in the case of Nalinkant Ambalal Mody v. CIT 61 ITR 428. Learned Counsel further submits that principles laid down by the Hon'ble Supreme Court were in the context

of Income Tax Act, 1922 but, as held by the Hon'ble Bombay High Court in the case of CIT v. DP Sidhwa 133 ITR 840. these principles are equally applicable in the context of the provisions of the Income Tax Act, 1961. Hon'ble Bombay High Court has observed that Section 56(1) of the 1961 Act is the same as Section 12(1) of the 1922 Act, and, therefore, what is held in the context of the provisions of Section 12(1) of 1922 Act by the Hon'ble Supreme Court will equally apply in the context of Section 56(1) of 1961 Act. Learned Counsel contends that the amount received on redemption of stock appreciation rights is in the nature of, to use the terminology used by the Hon'ble Supreme Court in the case of Nalinkant Ambalal Mody (supra), fruit of assessee's salaried employment, and, therefore, in case it cannot be taxed under the head income from salaries, it cannot be taxed at all. Since the amount in question, in view of the detailed arguments advanced by the learned Counsel against its taxability under the head 'income from salaries', cannot be taxed under the head 'income from salaries', it cannot be taxed at all. Learned Counsel thus submits that the amount received by the assessee on redemption of stock appreciation rights cannot be subjected to tax-either under the head 'income from salaries' or even under the head 'income from other sources' On the strength of, inter alia, these arguments, learned Counsel urges us to delete the addition of Rs. 4,79,13,851, on account of amount received by the assessee on redemption of stock appreciation rights.

19. learned Departmental Representative vehemently opposes the submissions of the learned Counsel, and submits that the impugned addition is fully justified on the facts of the present case It is submitted that the facts and circumstances of the case warrant a wider definition of the expression 'employer' which must not only include the assessee's direct employer in India, i.e. PGI, but also the parent company of the assessee's employer, i.e. PGU. It is contended that in today's complex World of multinational businesses, which operate through large number of subsidiaries at different geographical locations, the meaning of the expression 'employer' cannot be confined to the PGI i.e. the company with which the assessee has entered into the employment contract. It is submitted that the amount received on redemption of stock appreciation rights is received by the employee are directly as a result of his employment and are received through a group concern. Learned Departmental Representative also took us through the Procter & Gamble 1983 Stock Options Scheme and submitted that the assessee, the company which directly employs him and the PGU are important parties to the entire arrangement. According to the learned Departmental Representative, the amount received by the assessee on redemption of his stock appreciation rights is nothing but a reward of his employment Learned Departmental Representative submits that the amount in question is, therefore, required to be taxed as 'income from salaries'. Our attention is invited to the judgment of Hon'ble Madras High Court in the case of Late JR Daniel (by LR Yesumani Grace) v. CIT 248 ITR 174 wherein Their lordships have held that pension received by the assessee from British Government, in consideration of services rendered in Somali and Aden then under British rule, has to be regarded as salary even though, after independence of these countries, pension was paid by the British Government. The pension was thus received from a person other than, strictly speaking, the direct employer i.e. Government of Somalia It was thus submitted that merely because SAR redemption amount is received from parent company of the employer company, it cannot go out of the ambit of the income taxable under the head 'income from salaries' Learned Departmental Representative further submits that the nature of stock appreciation rights and stock options rights are materially different, and, for this reason, judicial precedents in the cases

of stock options cannot be very relevant in the case of stock appreciation rights. It is pointed out that in stock option cases, like the ones before the Banaglore bench of the Tribunal and before the Hon'ble Karnataka High Court in Infosys (supra) and Wipro (supra), the assessee is entitled to get shares of the employer company at a price lower than the prevailing market prices. A stock option is a scheme of employee's participation in the ownership of the employer company. On the other hand, in the case of the stock appreciation rights, the assessee does not get any shares at all; the right of the assessee is confined to getting an amount worked out on the basis of the appreciation in market value of company's shares. There cannot be a loss situation in the stock appreciation rights because the assessee has a right to redeem the appreciation. If there is no appreciation in the market value of the shares in the entire period in which the assessee's right to redeem the stock appreciation, the assessee gets nothing on that score and the stock appreciation rights are allowed to expire. This is an altogether different scheme in nature and scope. It is submitted that what is referred to as 'stock options scheme' in the judicial precedents cited by the learned Counsel for the assessee and in the amendments made in the Income Tax Act, does not include 'stock appreciation rights' because all the situations envisaged in these judicial precedents as also the legislative provisions in the Income Tax Act refer to actual allotment of the shares to the employees at the rates less than the prevailing market prices. Learned Departmental Representative thus argues that the judicial precedents in the cases dealing with stock options scheme, involving actual allotment of shares, and the legislative developments :dealing with these situations have no bearing on the facts of the present case. Learned Departmental Representative then submits that the ratio of the judgment in the case of Abbot v. Philben, Inspector of Tax (supra) has no application in the present case since in this case also actual allotment of shares was made, and, in any case, it is not a binding judicial precedent. Our attention was then invited to a Third Member decision of this Tribunal in the case of ACIT v. Tea Agency Trading Centre 88 ITD TM 96 wherein it is held that the Tribunal has the power to consider any aspect of taxability of an amount on the basis of existing facts on record notwithstanding the fact that such aspect was not considered by the lower authorities. Our attention was also invited to Hon'ble Calcutta High Court's judgment in the case of Steel Containers Limited v. CIT 112 ITR 995 which has been followed in the aforesaid Tribunal decision as well. Our attention was also invited to the Hon'ble jurisdictional High Court's judgment in the case of CIT v. Gilbert and Barkar Manufacturing Co. Inc, USA 111 ITR 529 wherein it is held that the Tribunal was competent to change the head of income from 'income from other sources' to 'income from business and profession' at the instance of the assessee even though the assessee was not in appeal. Our attention was also invited to Hon'ble Delhi High Court's judgment in the case of Bishamber Nath Ram Swarup v. 170 163 ITR 87. Learned Departmental Representative then invited our attention to the order dated 10th August 2005 passed by a Division Bench of this Tribunal in the case of DCIT v. Atco Healthcare Limited ITA Nos. 2427 to 2429/Mum/2003 Therein it is concluded that the Revenue can raise any plea to support the addition made by the Assessing Officer. It was thus contended that in case the Tribunal comes to the conclusion that the amount in question is not taxable under the head 'income from salaries', it is open to the Tribunal to decide on the alternative plea now being raised by the Revenue that it is taxable under the head 'income from other sources'. Learned Departmental Representative then invites our attention to the judgment of the Hon'ble Supreme Court in the case of CIT v. Emil Webber 200 ITR 483 which holds that when an assessee receives a benefit from his employment, from a person other than his employer, the same is taxable under the head 'income from other sources'. It is also pointed out that Hon'ble Supreme Court has, in Emil

Webber's case (supra), taken note of the earlier Supreme Court judgment in the case of Nalinikant Ambalal Mody (supra) and of the Hon'ble jurisdictional High Court's judgment in the case of TP Sidhwa (supra) and yet come to the said conclusion. Therefore, there is no substance in learned Counsel's argument that in the light of binding judicial precedents in the cases of Nalinikant Ambalal Mody (supra) and TP Sidhwa (supra), It must be held that when an employment related income cannot be taxed under the head 'income from salaries', it cannot be taxed as an income at all. Our attention is then invited to Hon'ble Patna High Court's judgment in the case of CIT v. Gaya Sugar Mills Ltd 160 ITR 933 wherein Their Lordships have distinguished the scheme of Section 6 of 1922 Act with the scheme of Section 14 of the 1961 Act, and held that Hon'ble Supreme Court's judgment in the case of Nalinikant Ambalal Mody (supra) is no longer good law in the light of a paradigm shift in the scheme of Income tax Act, 1961, so far as classification of income is concerned. It is pointed out that under Section 6 of the 1922 Act, which was subject matter of consideration by the Hon'ble Supreme Court in the case of Nalinikant Ambalal Mody (supra), it was stated that incomes mentioned therein are taxable, but Section 14 of the 1961 Act says that all incomes are taxable and then it classifies these incomes. Our attention is then invited to comments on legislative history of Section 14, as given in Chatuvedi & Pithisaria's commentary on the Income Tax Act, which states that Section 6 of 1922 Act provided that "save as otherwise provided by this Act, the following heads of income, profits and gains, shall be chargeable to income tax in the manner hereinafter appearing namely (i) Salaries, (ii) Interest on Securities, (iii) income from property, (iv) profits and gains of business, profession or vocation, (v) income from other sources, and (vi) capital gains". The commentary further states that "as the words 'shall be chargeable' in Section 6 of the old Act gave rise to some confusion as to this section being charging section, it was considered expedient to redraft the opening words of Section 14 to make it clear that Section 14 merely classifies the different heads for the purpose of computation under the succeeding sections". It is pointed out that Section 14 of the present Income Tax Act is unambiguous and it states that "save as otherwise provided by this Act, all incomes shall, for the purposes of charge of income tax and computation of total income, be classified under the following heads of income: A) Salaries, (B)...(C) income from house property, (D) profits and gains of business or profession, (E) capital gains and (F) income from other sources". It was thus contended that it is no longer the legal position that if an employment related income cannot be taxed under the head 'income from salaries', it cannot be taxed at all. As regards learned Counsel's reliance on certain observations in the Hon'ble Supreme Court's judgment in the case of CIT v. DP Sandhu Bros Chembur Pvt Ltd 273 ITR 1, it was pointed out that those observations have been quoted out of context. Our attention is invited to the specific observations in paragraph 13 of the said judgment wherein it is noted that "there is no dispute that a tenancy right is a capital asset surrender of which would attract Section 45 so that the value received would be a capital receipt and would be assessable if at all under item E (i.e. capital gains) of Section 14". It was in this background that Hon'ble Supreme Court had observed that "the argument of the appellant (revenue) that even if the income cannot be charged under Section 45, because of inapplicability of the computation provided under Section 48, it could still impose tax under the residuary head is thus unacceptable". Learned Departmental Representative submits that the observations made by the judges in the context of a particular question and a particular situation before them cannot be taken out of that context and given an interpretation as one would give to a legislative provision. It is thus submitted that the role of Section 14 is now only to allocate a classification to an income, and any income which cannot be allocated to any other head is treated as income from other sources. What is to be

decided is whether a particular receipt is income or not on the merits of the receipt. Once a receipt is held to be of income nature, the next thing to be seen is the head under which it can be assessed if .in income does not fit the description of the natures of income in 14 (A), (C), (D) or (E) , it is to be classified under the residuary head (F) i.e. income from. other sources. Our attention is invited to the Judgment of Hon'ble Calcutta High Court in the case of Reba Bose v. CIT 95 ITR 299 in support of the proposition that if an income can not be charged under any of the heads mentioned in clauses A to E of Section 14 of the 1961 Act, the same shall be chargeable to income tax under the head 'income from other sources' mentioned in clause F of the said Section 14. Our attention is also invited to various decisions, including Hon'ble Supreme Court's decision in the case of CIT v. GR. Karthikeya 201 ITR 866 in support of the proposition that income is to be given a wider meaning and anything which is in the nature of an income must be brought to tax. Learned Departmental Representative thus submits that even if we are to come to the conclusion that the receipt in question is of income nature but is not taxable under the head 'income from salaries', the same is to be held taxable under the head 'income from other sources'. That does not make any material change to the situation, and, under whichever head, the amount received on redemption of stock appreciation rights is to be taxed as an income. We are thus urged to confirm the addition of Rs. 4,79,13,851 to the income of the assessee, whether under the head 'income from salaries' or under the head 'income from other sources', and decline to interfere in the matter.

20. In rejoinder, the main points made by the learned Counsel are like this He submits that whatever be the change of wordings in Section 14 of 1961 Act vis-a-vis Section 6 of the 1922 Act, once Hon'ble jurisdictional High Court holds that there is no material change in Section 14 of the 1961 Act vis-a-vis Section 6 of the 1922 Act and once the Hon'ble jurisdictional High Court holds that Hon'ble Supreme Court's decision in the case of N.A. Mody (supra) constitutes good law even in the context of the legal position under 1961 Act , it is not open to this Tribunal to take any other view of the matter. It is submitted that in T.P. Sidhwa's case (supra), Hon'ble Bombay High Court has categorically held so. We are therefore urged to ignore the decisions of the non jurisdictional High Courts and follow the Bombay High Court decision in T.P. Sidhwa's case which squarely covers the case of the assessee before us. As regards the change of head of income, it is submitted that the Revenue is not in appeal or cross objection and that whether or not amount received on redemption of share appreciation rights is an income under any head other than 'income from other sources' is entirely a new issue which has not been considered by any of the authorities below. Reliance is once again placed on the Hon'ble Supreme Court's decision in the case of Mattulal v. Radhe Lal (supra). On Hon'ble Supreme Court's judgment in the case of Emil Webber (supra), learned Counsel submits that the said judgment is clearly per incuriam inasmuch as it does not follow the larger bench of three judges in N.A. Mody's case (supra). It is submitted that in N.A. Mody's case (supra), judgment was; given by a three judge bench whereas in Emil Webber's case (supra), the judgment is rendered by a two judge bench. Our attention is then invited to the judgment of Hon'ble Madras High Court in the case of CIT v. Sunderam Industries Limited 253 ITR 396 wherein it is held that when there are two apparently contradictory decisions of the Supreme Court, the decision of the larger bench is to be followed. Learned Counsel also submits that Emil Webber decision (supra) is on its own facts and it does not, expressly or impliedly, overrule decisions in the cases of N.A. Mody (supra) of T.P. Sidhwa (supra). According to the learned Counsel, Hon'ble Supreme Court's judgment in the case of Emil Webber (supra) has no bearing on the issue before us. We are again taken through Section 56

to highlight the contention that in order that an income can fall under the residuary head, it must not come under any other head of income from clause (A) to (E) which is not the case here. Learned Counsel for the assessee once again places strong reliance of Division Bench decision in the case of Bharat V. Patel (supra) which holds that the amount received on redemption of stock appreciation rights is not taxable. We are thus once again urged to delete the impugned addition.

21. We have carefully considered the rival submissions, perused the material on record and taken note of the legal position in the light of factual matrix. before us.

22. It is first of all necessary to understand the nature of stock appreciation rights on the redemption of which the assessee has received the amount of Rs. 4,79,13,851.

23. The Procter & Gamble 1983 Stock Plan, under which the assessee was granted the stock appreciation rights, is being reproduced below for ready reference:

THE PROCTER & GAMBLE 1983 STOCK PLAN (As adjusted for stock split effective October 20,1989 and amended effective January 8, 1991) ARTICLE A Purpose The purpose of The Procter & Gamble 1983 Stock Plan (hereinafter referred to as the "Plan") is to encourage those key employees of the Procter & Gamble Company (herein referred to as the "Company") and its subsidiaries who are largely responsible for the long-term success and development of the business to increase their proprietary and other interest in the Company's progress, and to remain in the employ of the Company and its subsidiaries, by the granting to them by the Company of options to purchase shares of the Common Stock of the Company and the granting to them by the Company and a subsidiary, if appropriate, of deferred awards related to the increase in the price of the Common Stock of the Company as provided in this Plan.

ARTICLE B-Administration.

1. The Plan shall be administered by the Stock Option Committee (herein referred to as the "Committee") of the Board of Directors of the Company (herein referred to as the "Board"). The Committee shall operate, administer, and interpret the Plan and shall be composed of three or more members of the Board to be appointed by the Board from time to time to serve until they resign, die, or are removed by resolution of the Board. No member of the (committee shall participate or be eligible to participate in this Plan, but he or: she (sic) stock options or stock appreciation rights previously granted to him or her in accordance with the terms of said stock options or stock appreciation rights.

2. It shall be the duty of the Committee to administer this; plan in accordance with its provisions, to report thereon not less than once each year to the Board and to make such recommendations of amendments or otherwise of it may deem necessary or appropriate. A decision by a majority of the Committee shall govern all actions of the

Committee.

3. Subject to the express provisions of this Plan, the Committee shall have authority to grant non-statutory and incentive stock options, to grant to recipients who are nonresidents of the United States on the date of grant stock appreciation rights either freestanding, in tandem with simultaneously granted stock options or in parallel with simultaneously granted Stock options; to determine all the terms and provisions of the respective stock option and stock appreciation right agreements including setting the dates when each stock option or stock appreciation right or part thereof may be exercised; and o make all other determinations it deems necessary or advisable for administering this Plan; provided, however, for recipients who are non-residents of the United States on the date of any grant, the Committee shall have the further authority to:

(a) woive the provisions of Article C, paragraph 1(b) and

(b) impose conditions in lieu of those set forth in Article (sic). paragraphs 4 through 7, for non-statutory stock options and stock appreciation rights grants which do not increase or extend the rights of the recipient.

to take into consideration the differences, limitations and requirements of local foreign laws of conditions including, but not limited to, tax regulations, exchange controls, investment restrictions, possible unenforceability of any part of this Plan and other similar matters deemed appropriate by it.

4. The Committee may establish from time to time such .regulations, provisions and procedures within the terms of this Plan, as in its opinion, may be advisable in the administration of this Plan.

5. The Committee may designate the Secretary of the Company or other employees of the Company to assist the Committee in the administration of this Plan and may grant authority to such persons to execute documents on behalf of the Committee.

ARTICLE C - Participation.

The Committee shall select those key employees of the Company and its subsidiaries who, in the opinion of the Committee, have demonstrated a capacity for contributing in a substantial manna to the success of such companies and shall determine the number of shares with respect to which stock options or stock appreciation rights are to be granted to each, the type of stock options or stock appreciation rights to be granted and the number af shares under each type. The Committee may consult with the Chairman of the Board or the President, but nevertheless the Committee has full authority to act, and the Committee's actions shall be final.

ARTICLE D - Number of Stock Options and Stock Appreciation Rights.

1. The aggregate number of shares of the Common Stock of the Company which may be issued or transferred under all stock options to be granted, or with respect to which stock appreciation rights may be granted, pursuant to this Plan shall not exceed 25,996,446 shares

2. With respect to stock options granted in tandem with or parallel to stock appreciation rights, the exercise of either such stock options or such stock appreciation rights will result in the simultaneous cancellation of the same number of tandem or parallel stock appreciation rights or stock options, as the case may be ARTICLE - Shores Subject to Use Under the Plan The shares to be delivered by the Company upon exercise of stock options or stock appreciation rights shall be either authorized but unissued shares or treasury shares, as determined by the Board. In the case of redemption of stock appreciation rights by one of the Company's subsidiaries, such shares shall be shares acquired by that subsidiary.

ARTICLE F - Price The exercise price for all stock options appreciation rights shall be established by the Committee at the time of their grant and shall be not less than one hundred percent (100%) of the fair market value of the Common Stock at the Company on the date of grant.

ARTICLE G - Agreement of Optionee and Conditions of Stock Options and Stock Appreciation Rights.

1. in addition to such other conditions as may be established by the Committee, in consideration of the granting of stock options or stock appreciation rights under the terms of this Plan, the recipient agrees as follows

(a) To remain in the employ of the Company or one of its subsidiaries for at least one (1) year following the date of granting of the stock option or stock appreciation right, and,

(b) In order to better protect the goodwill of the Company and prevent the disclosure of the Company's trade secrets and other confidential information and thereby help insure the long-term success and development of the business, the recipient will not engage in competitive employment for a period of three (3) years following the date of the granting of a stock option or a stock appreciation right without first obtaining written permission from the Company. "Engage in competitive employment" means rendering services, or becoming associated in any way or in any capacity in the manufacture, development, advertising, promotion at sole of any product which is the same as or similar to or competitive with any products of the Company or one of its subsidiaries (including existing products and products known to the recipient to be in development) with respect to which the recipient's work has been directly concerned of any time during the two (2) years preceding termination of employment with the Company or any of its subsidiaries or with respect to which during that period of time recipient acquired knowledge of trade secrets or other confidential information.

2. The fact that an employee has been granted a stock option or a stock appreciation right under this Plan shall not affect or qualify the right of the employee to terminate the recipient's employment at any time. In the event, the recipient, breaches or violates Section 1 above, the Company may seek

injunctive or other appropriate relief.

ARTICE H - Limitations.

1. More than one stock option or stock appreciation right may be granted to any employee under this Plan but the maximum number of shares with respect to which stock options or stock appreciation rights may be granted to any employee shall not exceed five percent (5%) of the number of shares which can be issued or transferred hereunder.
2. The aggregate fair market value (determined at the time of the grant of the stock option) of the shares for which any employee may be granted incentive stock options under this Plan and all other 'stock option plans of the Company and its subsidiaries in any calendar year shall not exceed \$100,000 plus any unused limit carry-over to such year as provided for in Section 422A(c)(4) of the internal Revenue Code of 1954, as amended. (This amount will automatically change to reflect the limits imposed by Section 422A(b)(8) of the internal Revenue Code of 1954 as It may be amended from time to time.)
3. If the Committee grants incentive stock options, all such stock options shall contain such provisions as permit them to qualify as "preventive stock options" within the meaning of Section 422 A of the Internal Revenue Code of 1954, as amended by the Economic Recovery tax Act of 1981, and as the same may from time to time be amended.
4. Resale by Directors and principal officers of the Company of securities offered under this Plan must be pursuant to a valid registration statement on other than Form S-8 or pursuant to an exemption from registration provided under the Securities Act of 1933, as amended Other employees of the Company or its subsidiaries are free to make resales of the securities offered hereunder, without further registration.

ARTICLE I- Adjustments.

Appropriate adjustments in the number of shares of stock options and stock appreciation rights which can be granted under this Plan and in the numbers and exercise prices covered by outstanding stock options and stock appreciation rights shall be made to give effect to any stock splits, stock dividends or other changes in the Common Stock of the Company (sic) after October 11, 1983, the date of approval of this Plant by the Company's shareholders.

ARTICLE J - Exercise of Stock Options and Stock Appreciation Rights.

1. All stock options and stock appreciation rights granted hereunder shall have a maximum life of no more than ten (10) years from the date of grant.
2. No stock options or stock appreciation rights shall be exercisable within one (1) year from their date of grant, except in the case of the death of the recipient.

3. During the lifetime of the recipient, stock options and stock appreciation rights may be exercised only by the recipient personally, stock options and stock appreciation rights are not assignable and are not transferable otherwise than by will or by the laws of descent and distribution.

4. In case a recipient of stock options or stock appreciation rights ceases to be an employee of the Company or any of its subsidiaries while holding an un-exercised stock option of stock appreciation right:

(a) Any un exercisable portions thereof are then void, except in the case of death of the recipient.

(b) Any exercisable portions thereof are then void, except in the case of death at (sic) of the recipient.

5 In the case of the death of a recipient of stock options or stock appreciation rights while on employee of the Company or any of its subsidiaries, the persons to whom the stock options or stock appreciation rights have been transferred by will or the laws of descent and distribution shall have the privilege of exercising remaining stock options, stock appreciation rights or parts thereof, whether or not exercisable or the date of death of such employee, at any time prior to the expiration date of the stock option or stock appreciation right

6. Stock options and stock appreciation rights are not transferable other than by will or by the law. of descent and distribution For the purpose of exercising stock options or stock appreciation rights after the death of the recipient, the duly appointed executors and administrators of the estate of the deceased recipient shall have the same rights with respect to the stock options and stock appreciation rights as legatees or distributees would have had after the distribution to them from the deceased recipient's estate.

7 When an employee retires in accordance with the provisions of any appropriate profit sharing or retirement plan of the Company or any of its subsidiaries, any exercisable portions of stock options or stock appreciation rights then held by the employee shall continue to be exercisable until the expiration date of the stock option or stock appreciation right. Termination of employment under the permanent disability settlement provision of such plan shall be deemed the same as retirement the death of an employee subsequent to retirement shall not render exercisable options of rights which were unexercisable at time of retirement.

8 Upon the exercise of stock appreciation rights, the recipient shall be entitled to receive a redemption differential for each such stock appreciation right which shall be the difference between the then fair market value of one share of the Common Stock of the Company and the exercise price of one stock appreciation right then being exercised. In the case of the redemption of stock appreciation rights by a subsidiary of the Company not located in the United States the redemption differential shall be calculated in United States dollars and converted to the appropriate local currency on the exercise date. As determined by the Committee, the redemption differential may be paid in cash, Common Stock of the Company to be valued at its fair market value on the date of

exercise, any other made of payment deemed appropriate by the Committee at any combination thereof. the number of shares with respect to which stock appreciation rights are being exercised shall not be available for granting future stock options of stock appreciation rights under this Plan.

9 The Committee may, in its sole discretion, permit a stock option which is being exercised either (a) by an optionee whose retirement is imminent or who has retired or (b) after the death of the optionee, to be surrendered, in lieu of exercise, for an amount equal to the difference between the stock option exercise price and the fair market value of shares of the Common Stock of the Company on the day the stock option is surrendered, payment to be made in shares of the Company's Common Stock which are subject to this Plan valued at their fair market value on such date, cash or a combination thereof, in such proportion and upon such terms and condition as shall be determined by the Committee. The difference between the number of shares subject to stock options so surrendered and the number of shares, if any, issued upon such surrender shall represent shares which shall not be available for granting future stock options under this Plan.

10. Time spent on leave of absence shall be considered as employment for the purpose of this Plan. Leave or absence means any period of time away from work granted to any employee by his or her employer because of illness, injury or other reasons satisfactory to the employer.

11. The Company reserves the right from time to time to suspend the exercise of any stock option or stock appreciation right where such suspension is deemed by it necessary at appropriate for corporate purposes. No such suspension shall extend the life of the stock option in the five (5) calendar days immediately preceding the expiration date.

ARTICLE K - Payment for Stock Options.

Upon the exercise of a stock option, payment in full of the exercise price shall be made by the optionee. As determined by the Committee, the stock option exercise price may be paid for by the optionee either in cash, shares of the Common Stock of the Company to be valued at their fair market value. on the date of exercise or a combination thereof ARTICLE L - Additional Provisions.

1. The Board, may, at any time, repeal this Plan and may amend it from time to time except that no such amendment may amend this paragraph, increase the aggregate number of shares subject to this Plan or reduce the price at which the stock options or stock appreciation rights may be granted, exercised or surrendered, or alter the class of employee, eligible to receive stock options. the (sic) of stock options and stock appreciations rights and the Company shall be bound by any such amendments as of their effective dates, but if any outstanding stock options at stock appreciation rights are affected, notice thereof shall be given to the holders of such stock options and stock appreciation rights and such amendments shall not be applicable to such holder without his or her written consent. If this Plan is repealed in its entirety, all therefore granted unexercised stock options or stock appreciation rights shall continue to be exercisable in accordance with their terms.

2. In case any stock option or stock appreciation right is surrendered before exercise or for any reason other than exercise ceases to be exercisable, except as specifically required by the terms of

this Plan, the shares reserved therefore shall continue to be set aside for, and be subject to, use under this Plan.

3. Subsidiary means any company in which fifty percent (50% or more of the total combined voting power of all classes of stock is owned, directly or indirectly, by the Company in addition, the Board may designate for participation in this Plan as a "subsidiary," except for the granting of incentive stock options, those additional companies affiliated with the Company In which the Company's direct or indirect stock ownership is less than fifty percent (50%) or the total combined voting power of all classes of such company's stock.

ARTICLE M-Consent Every recipient of a stock option or stock appreciation right granted under this Plan shall be bound by the terms and provisions of this Plan and of the stock option or stock appreciation right agreement referable, thereto, and the acceptance of any stock option or stock appreciation right agreement shall constitute a binding agreement between the recipient and the Company and its subsidiaries and any successors in interest to any of them.

ARTICLE N - Duration of the Plan.

This Plan will terminate on June 11, 1998 unless a different termination date is fixed by action of the Board, but all stock option or stock appreciation rights granted prior thereto may be exercised in accordance with their terms

ADDITIONAL INFORMATION 1 Tax Effects Incentive Stock Options

With regard to tax effects which may accrue to the optionee, counsel advised that if the optionee has continuously been on employee from the time an option has been granted until at least three months before it is exercised, under existing law no taxable income results to the optionee from the exercise of an incentive stock option at the time of exercise. However, the spread at exercise is a 'tax preference' item Any gain realised on the sale or other disposition of stock acquired on exercise of an incentive stock option is considered as long-term capital gain for tax purposes if the stock has been held more than two years after the date the option was granted and more than one year after the date of exercise of the option. Although the reduction for long-term capital gain has been repealed for tax years beginning after December 31, 1986, the designation of a portion of the sales realization as long-term capital gain can be important if the shares are ultimately used in charitable gift giving and may be important if the law on capital gains is ever amended. If the stock is disposed of within one year after exercise, the lessening of any gain on such disposition at the spread at exercise (i.e., the excess of the fair market value of the stock on the date of exercise over the option price) is treated as ordinary income, and any appreciation after the date of exercise is considered long term or short-term capital exercise (even if greater than the gain on the disposition) is treated as ordinary income if the disposition is one on which a loss, if sustained, is not recognized-(sic) a gift, a "wash" sale or a sale to a related party. the amount of ordinary income recognized by the optionee is treated as a tax deductible expense to the Company No other amount relative to an incentive stock option is a tax deductible expense to the Company.

Non statutory Stock Options With respect to tax effects which may accrue to the optionee, counsel advises that under existing tax law gain taxable as ordinary income to the optionee is deemed to be realized at the date of exercise of the option, the gain on each share being the difference between the

market price on the date of exercise and the option price. This amount is treated as a tax deductible expense to the Company at the time of the exercise of the option. Any appreciation in the value of the stock after the date of exercise is considered a long-term or short-term capital gain to the owner depending on whether or not the stock was held for the appropriate holding period prior to sale.

Stock Appreciation Rights With regard to tax effects which may accrue to the recipient, counsel advises that United States persons", as defined in the Internal Revenue Code of 1986 (the "R.C."), must recognize ordinary income as of the date of exercise equal to the amount paid to the recipient, i.e., the difference between the grant price and the value of the shares on the date of exercise, for non United States persons, the time when income is realized, the measurement of such income, and its taxation will depend on the laws of the particular country of which such persons are resident and/or citizens at the time of grant or the time of exercise, as the case may be. There may also be tax consequences with respect to an exercise by a United States person under the laws of the particular country other than the United States of which such a person is a resident and/or citizen. Optionees who are subject to Section 1G(b) of the Securities Exchange Act of 1934, as amended (the "Exchange Act") including officers of the Company, may not realize taxable income from the exercise of non statutory stock options for periods of up to six months after exercise. Similarly, the holding period for purposes of determining long-term capital gain upon sale of stock obtained by exercise of an option by such optionees may not commence for periods of up to six months after exercise. Optionees who are subject to Section 1G(b) should consult with their adviser as to the effects of option exercises under either of the above circumstances. Notwithstanding the above advice received by the Company, it is each individual recipient's responsibility to consult with his or her personal tax adviser as to the tax effects and proper handling of stock appreciation rights and Common Stock acquired.

24. In the case of stock appreciation rights, under Article J(8), "upon the ..exercise of stock appreciation rights, the recipient shall be entitled to receive a redemption differential for each such stock appreciation right which shall be the difference between the then fair market value of one share of the Common Stock of the Company and the exercise price of one stock appreciation right then being exercised". The redemption value of the stock appreciation right, therefore, is primarily a deferred wage or bonus payment, in cash or otherwise, measurable with reference to the appreciation of market price of company's shares. In contrast, the stock options scheme, the beneficiary of the same is allowed to buy the shares in the company, though subject to several conditions attached', at a price lower than the prevailing market price as at the point of time when the stock option is exercised. In the case of Stock Options, under Article K, "upon the exercise of a stock option, payment in full of the exercise price shall be made by the optionee". The above scheme clearly shows that connotations of the expressions "stock options" and "stock appreciation rights" are quite distinct, and that these two expressions cannot be used interchangeably. The tax implications of stock options and stock appreciation rights are also, as evident from the 'Additional Information' annexed to and forming part of the document reproduced above, are at variance. The very nature of acquisition of shares under the stock options scheme, i.e. 'Employees Stock Options Plan (ESOP, in short)' that the Hon'ble Karnataka High Courts and Bangalore benches of this Tribunal have dealt with in the cases of Wipro (supra) and Infosys (supra), and the redemption of stock appreciation rights is quite different in scope and application. ESOP refers to a situation in

which an employee is able to acquire shares, though subject to the conditions attached, at a price lower than the prevailing market price. The decisions by the Courts in India and the., legislative provisions deal with only this situation. On the other and, Stock Appreciation Rights (SAR) scheme does not envisage any such acquisition of shares of stocks by the beneficiary. All it involves is a payment, by way of cash or by way of such other made as may be specified in the scheme, which is computed with reference to the appreciation in market value of shares and the units of share appreciation rights which are notionally assigned to the beneficiary to our knowledge, there are no binding judicial precedents, by the larger benches of this Tribunal or by the higher judicial authorities, on the question of taxability of amount received by an assessee on redemption of share appreciation rights.

25. By way of stock appreciation rights, a person is allowed a reward contingent upon performance of the company in the stock market. By way of a stock option, on the other hand, a person is allowed to acquire the shares of a company at a price lower than prevailing market price. The exact quantum of benefit or reward is thus ascertained at the point of time when stock appreciation rights are redeemed, while the exact quantum of benefit, in the case of share acquisition at concessional rate i.e. stock plan, can only be ascertained when the shares are actually sold. However, from a theoretical point of view and assuming that the shares are acquired without any special conditions attached, which is seldom the case, the quantum of benefit can indeed be divided into two parts-reward for employment to the extent of excess of market price of shares as on the time of acquisition vis-a-vis the acquisition price of such shares, and capital gain or loss to the extent of difference in sale consideration of shares vis-a-vis the market price of shares as on the time of acquisition of such shares. The legal position regarding the amount received on redemption of stock appreciation rights and the value of benefit received by way of acquisition of shares at concessional prices, cannot, therefore, be decided by the same yardstick. These two benefits have several and significant distinguishing features. Exercise of a stock appreciation right involves payment to the beneficiary, while exercise of a stock option involves payment, albeit concessional, by the beneficiary. The former results in receipt of a reward, though measurable in terms of the money value by which the share price has gone up, to the beneficiary, while the latter results in acquisition of an asset at a concessional price by the beneficiary. There cannot be a loss situation in the stock appreciation right because the exercise of stock appreciation rights is not mandatory and the same can be allowed to expire at the option of the beneficiary. There can, however, be a loss situation in the acquisition of shares in the stock options scheme, because no matter how much below market price the shares are offered under the scheme, market forces can drive the shares to even lower levels. On a conceptual frame, thus, Stock Appreciation Rights plan can be said to be a method for companies to give their management or employees a bonus if the company performs well financially. It is however, very distinct from a typical stock options plan which involves allowing the employees to buy the shares of the company on a concessional or nominal price. SARs provide the employee with a cash payment based on the increase in the value of a stated number of shares over a specific period of time. As in the case before us, SARs generally do not have a specific settlement date and the employees have flexibility in when to choose to exercise the SAR-of course within an outer limit on the expiry of which the right would lapse in effect, therefore, SAR plans are nothing other than a form of deferred cash compensation which is contingent upon financial performance of the company. An SAR has many similarities with an ESOP [the stock option], but there is a very vital and

key difference. When a stock option is exercised, an employee has to pay the grant price and acquire the underlying security. However, when a SAR is exercised, the employee does not have to pay to acquire the underlying security. Instead, the employee would receive the appreciation value of the underlying security, which would equal the current market value less the grant price in character, therefore, a stock appreciation right is not the same thing as a typical stock option. Unlike: stock option plan, which aims .it what can be termed as employee's participation in ownership, a stock appreciation. right is a scheme of bonus payment which is on the basis of financial performance of the company. That is the reason perhaps of the stock appreciation right being generally confined to key personnel of the company who can make a significant contribution to financial success of the company.

26. This distinction between the nature of stock appreciation rights and the stock options is so fundamental and that it affects the tax treatment of these two benefits. While in stock option, the assessee gets a capital asset at a concessional or nominal price, what is to be taxed is the value of this benefit. In the case of the stock appreciation rights, what the assessee actually receives is a kind of cash bonus, which is in the nature of deferred wages and which is contingent upon the company doing well in financial terms. There is no need, as in the case of stock options, in converting the benefit into monetary terms because what is received by the assessee is itself in monetary terms. One cannot convert money into money. There cannot be a serious dispute about the point of time when the taxability is to be triggered because the redemption amount being, dependent on the market price of shares which can move in any direction at any time, the income arises only when the stock appreciation right is redeemed. As for learned Counsel's reliance on the decision of the House of Lords in the case of *Abbot v. Philben* (supra), it deals with the question as to in which year the benefit of purchasing shares in employer company is to be taxed-in the year in which the shares are purchased or on the year in which the right to do so was granted This question has no bearing on the issue before us. Not only we are dealing with redemption of stock appreciation right, which, as we have noted earlier, result in directly measurable cash benefit to the assessee, and as such, the point of time when benefit accrues is free from doubt, the nature of taxability of stock appreciation right and taxability of benefit of purchase or option to purchase shares at concessional or nominal price are materially different in character. Even if we are to proceed on the basis that grant of a stock appreciation right gives some benefit to the assessee, it is beyond dispute that such a benefit is contingent upon the market behaviour for value of shares in question, it is well settled, based on the principle of conservatism, that an anticipated income can not be brought to tax until it actually accrues or unless there is a specific provision to that effect. Learned Counsel's contention, therefore, that the benefit on account of stock appreciation right can only be taxed in the year of grant or vesting, and not in the year of redemption, is thus devoid of legally sustainable basis. The judicial precedents in the context of stock options, or legislative provision, in respect of the same, therefore, have no bearing on the facts of the case before.. us.

27. In view of the above discussion, we agree with the learned Departmental Representative that there are no judicial precedents or specific legislative provisions so far on the question of taxability of stock appreciation rights and that the distinction between the nature of stock options and stock appreciation rights is so fundamental that the decisions and legislative provisions in the context of stock options have no relevance to determine the taxability of amount received on redemption of

stock appreciation rights, The judicial precedents cited at the bar in the cases of Infosys Technologies (supra) and Wipro (supra) are thus not relevant to decide the issue in appeal before us. In both of these cases, the shares were actually allotted to the assessee, and these cases did not deal with the situation in which the amounts were received on redemption of stock appreciation rights.

28. We have also taken note of the fact that in Bharat V. Patel's case (supra), the points of distinction between the nature of stock options and stock appreciation rights were not highlighted before the Division Bench of the Tribunal. It was not pointed out to the Division Bench that the scheme of stock appreciation right and stock option plan are materially different and, therefore, these two things have materially different tax implications. The (Division Bench proceeded on the basis that SAR and ESOP are in materially the same - a hypothesis which, for the detailed reasons set out in this order, we are unable to accept. The conclusions arrived at by the Division Bench, therefore, do call for reconsideration. It is, in any event, nobody's case that the said decision is binding on this larger bench. We have carefully perused the said DB decision and, with respect, we are not persuaded by the same.

29. We have also taken note of the fact that in Article L(3) of the Procter & Gamble 1983 Stock Plan, the expression 'subsidiary' is defined as follows:

Subsidiary means any company in which fifty percent (50%) or more of the total combined voting power of all classes of stock is owned, directly or indirectly, by the company. In addition, the Board may designate for participation in this plan as "subsidiary", except for the granting of incentive stock options, those additional companies affiliated with the Company, in which direct or indirect ownership is less than fifty percent (50%) of the total combined voting powers of all classes of such company's stock.

30. it is thus clear that what is material for the purpose of PGI being is that fifty percent or more of the shares - whether directly or indirectly - are held by the PGU. It is therefore immaterial whether or not the shares are held directly by the PGU or through another company. We are thus unable to see any relevance of the assessee repeatedly highlighting the fact that PGU's shareholding in the PGI was through another company. As long as the shareholding was controlled by the PGU, as is the undisputed fact of this case, the mode of shareholding is not really relevant. We have also noted that so far as SARs are concerned, even this benchmark of fifty percent is not really relevant because the aforesaid clause also specifically provides that "the Board may designate for participation in this plan as "subsidiary", except for the granting of incentive stock options, those additional companies affiliated with the Company, in which direct or indirect ownership is less than fifty percent (50%) of the total combined voting powers of all classes of such company's stock". Stock Appreciation Rights, as we have noted (sic) are distinct from incentive Stock Options under the P & G 1983 Stock Plan, and the except for the purposes of 'incentive stock options', which admittedly is not the situation before us, even a company in which PGU has less than fifty percent ownership can be classified as 'subsidiary' for the purposes of the P & G 1983 Stock Plan. The very fact that the assessee, an employee of the PGI, was granted SARs in those two years indicates that PGI was designated as a 'subsidiary' for the purpose of P & G 1983 Stock Plan. Nothing, therefore, turns on the fact that in

the first two years in which SARs were granted, PGU had less than fifty percent Ownership of the PGI and that the ownership control of the PGU was not direct but through another intermediary corporate We are unable to find merits in this submission of the assessee.

31. The question then arises whether the receipt of money on account of redemption of stock appreciation rights is in the nature of income or not.

32. As observed by the Hon'ble Supreme Court, in the case of Emil Weber v. CIT 200 ITR 483 the definition of income, under Section 2(24), is an inclusive definition. It adds several artificial categories to the concept of income, but, on that account, the expression 'income' does not lose its natural connotation, indeed, it has been repeatedly said that it is difficult to define the expression 'income' in precise terms, anything which can be properly described as income is taxable under the Act, unless, of course, it is exempt under one or other provisions of the Act. As held by the Hon'ble Supreme Court's in the case of CIT v. G.R. Karthikeyan 201 ITR 866 the expression 'income' is of widest, amplitude so as this expression may be given its natural and grammatical meaning. It should be construed in the widest sense

33. The amount received by the assessee on redemption of share appreciation rights, as we have noted earlier in this order, is nothing but a deferred wage contingent upon performance of the company's shares in the market. The very preamble of the scheme, under which share redemption rights have been given to the assessee, also states that it is in the nature of referred awards related to the increase in the price of the Common Stock of the Company. It is thus clear that the amount received on redemption of stock appreciation rights is in the nature of consideration for services rendered by the assessee This amount is in the revenue nature because the consideration for the amount so received is the services rendered by the assessee. In our considered view, therefore, the amount received by the assessee or, redemption of stock appreciation rights is in the nature of income.

34. The next question then is the head of income under which the amount so received by the assessee is to be taxed.

35. There is no dispute that the amount received by the assessee is in the nature of, what learned Counsel for the assessee prefers to term as, 'fruits of employment' The natural corollary of this undisputed factual position is that the said income should be taxed under the head 'income from salaries', but one of the basic arguments of the assessee against such a taxability is that since there is no employer employee relationship between PGU and the assessee, the amount received by the assessee from PGU, on redemption of his stock appreciation rights, cannot be taxed under the head 'income from salaries', this argument rests on the assumption that taxability under the head 'income from salaries' is confined to what is received by an employee from his employer.

36. The aforesaid proposition, in our humble understanding, is no longer legally sustainable.

37. Hon'ble Supreme Court's five judge bench judgment in the case of Justice Deoki Nandan Agarwal v. Union of India 237 ITR 872 has, inter alia, observed as follows:

It is contended qua the fourth question that, in any event, a judge of the High Court and the Supreme Court has no employer and, therefore, what he receives is not salary; accordingly, what he receives as remuneration is not taxable under the 'salary' under the Income Tax Act. To our mind, there is a misconception here. It is true that High Court and Supreme Court judges have no employer, but that, ipso facto, does not mean that they do not receive 'salaries'.... It is not possible to hold that what judges receive are not 'salaries' or that such salaries are not taxable as income under the head of 'salary'....

38. As held by the five judge bench in the above case, a High Court or Supreme Court Judge has no employer, and yet the salary received by the Hon'ble judges is taxable under the head 'income from salaries'. When there is no employer, as admittedly is the position in this case, there cannot be any question of anything flowing from employer to the employee, and yet the salaries received by the Hon'ble Judges was held, to be taxable under the head 'income from salaries'. The theory of compensation for services rendered flowing from employer to the employee being sine qua non for taxability under the head 'income from salaries' is thus no longer valid. What is material is that the amount received by the assessee should be in the nature of salaries. In our humble understanding, the ratio decidendi of the said judgment is that what Hon'ble Judges receive, as salary, is reward for their services and it is for this reason that such reward is brought within the scope of salary. This decision thus has the effect of expanding the scope of head of income 'salary' as it holds that the what is relevant is the salary being a reward for employment rather than existence of an employer in conventional sense of the expression. The question of reward of employment flowing from employer to employee, in order to bring the same within the ambit of taxability under the head 'income from salaries', is thus redundant

39. As for the connotation of the expression 'salary' we can do no better than to quote the Stroud's Judicial Dictionary, which defines 'salary' as 'recompense or consideration given to a person for his pains bestowed upon another man's business'. It is not even assessee's case that the stock appreciation right that he has received are not in the nature of 'recompense or consideration' given to him for anything other than his employment. The only defence for its non taxability under the head 'income from salaries' is that the stock appreciation rights are not received from the employer, and, therefore, the same cannot be taxed under the head 'income from salaries', this plea, for the reason set out above, is not sustainable in law.

40. We would also like to briefly deal with the judgment of Hon'ble Madras High Court in the case of Late J.R. Daniel (by LR Yesumani Grace) v. CIT (supra) which is quite relevant in this context.

41. The undisputed facts set out in the statement of case were like this. The assessee, i.e. J.R. Daniel, was an employee of the Somali Government from 10th April 1926 to 8th April 1950, and of Aden Government from 9th April 1950 until his retirement on 24th August 1956. During the relevant period, these countries were under colonial rule of the British Government. When these countries became independent, the obligation to pay pensions devolved on the respective local Governments. An agreement was made between Somali Government and the British Government that pension to the retired employees should be made by the British Government's representative on behalf of

Somali Government the British Government agreed to fund such pensions by appropriate grants in aid. However, at a later stage and due to diplomatic ties between Britain and Somali being severed, certain payments were made directly by the British Government, though termed as advances recoverable from pension finally received from the Government of Somali. The amount of pension received by the assessee, on these facts, was held to be taxable under the head 'Income from salaries'.

42. There cannot be any dispute that the assessee was employed by the Governments of Somali and Aden, which were under colonial rule, and not directly by the British Government per se. Yet, amount flowing from British Government to the assessee, which did not have a direct employer-employee relationship, was held to be taxable under the head 'income from salaries'.

43. . It is not the case of the assessee that PGU is a rank outsider so far as PGI, i.e. the company with which the assessee has entered into contract of employment, is concerned. There is also no dispute that PGI is treated as a subsidiary of the PGU because unless it was so, the assessee could not have been granted stock appreciation rights in the first place. PGI is a party to the entire scheme of granting of stock appreciation rights, as evident from Article M of the P & G 1983 Stock Options Plan, which is reproduced below for ready reference:

Article M - Consent Every recipient of a stock option, or a stock appreciation right granted under this Plan, shall be bound by the terms and conditions of this Plan and of stock option or stock appreciation rights agreement referable thereto, and acceptance of any stock option or stock appreciation right agreement shall constitute a binding agreement between the recipient and the company and its subsidiaries including any successors to any of the interest to any of them.

(emphasis by underlining supplied by us)

44. The agreement for optionee and conditions of stock options and stock appreciation rights is set out in Article G of the aforesaid Plan. This Article provides as follows:

1. In addition to such other conditions as may be established by the Committee, in consideration of granting of stock options or stock appreciation rights under the terms of this Plan, the recipient agrees to as follows:

(a) To remain in the employ of the Company or one of its subsidiaries for at least one (1) year following the date of granting of the stock option or the stock appreciation right, and

(b) In order to better protect the goodwill of the company and prevent the disclosure of the company's trade secrets and other confidential information and thereby help insure the long term success and development of the business, the recipient will not engage in a competitive employment for a period of three (3) years following the date of granting of stock options or a stock appreciation right without first obtaining

written permission of the company. "Engage in competitive employment" means rendering services, or becoming associated in any way or in any capacity in the manufacture, development, advertising, promotion or sale of any product which is the same or is similar to, or competitive with, any product of the company or one of its subsidiaries (including existing products and products known to the recipient to be in development) with respect to which the recipient's work has been directly concerned at any time during the two (2) years preceding termination of the employment with the company or any of its subsidiaries or with respect to which during that period of time, recipient acquired knowledge of trade secrets and confidential information

2. The fact that an employee has been granted a stock option or stock appreciation right under this Plan shall not affect or qualify the right of the employer to terminate the recipient's employment at any time. In the event the recipient breaches or violates Section 1 above, the company may seek injunctive or other appropriate relief.

45. A plain reading of the above clauses shows that the assessee's employer has got valuable rights and protection under the scheme of allotment stock appreciation rights. It is in consideration of the assessee agreeing not to leave employment of the Procter & Gamble and any of its subsidiary company for a period of one year, and not to engage in competitive business for three years that the assessee got the SARs. The interest of the assessee's employer are also protected in this said scheme inasmuch as in case the assessee violates the said agreement, the employer company is entitled to injunctive or other appropriate relief. It is also agreed that this scheme shall constitute an agreement between the assessee and the PGU and its subsidiaries, including successors thereof. The PGI is all along an important and integral party to all these arrangements. The assessee has no other connection with PGU than the connection as an organisation connected with the company with which he has entered into an employment contract, and, therefore, anything that the assessee receives from PGU cannot be anything but the reward of his employment. As follows from the Hon'ble Supreme Court's judgment in the case of Justice Deoki Nandan Agarwal's case (supra), what is to be taxed under the head 'income from salaries' is whatever constitutes 'salary'. The expression 'salary', though not specifically defined under the Act, is the reward or consideration for services rendered by a person in employment. The assessee's receipts of whatever nature, in connection with his employment, are, therefore, to be treated as 'salaries'.

46. Even this aspect of the matter, however, is purely academic in the present context. It is so for the reason that, as held by the Hon'ble jurisdictional High Court in the case of CIT v. Gilbert and Barker Manufacturing Co. USA (supra), the Tribunal is competent to charge the head of income even at the instance of the respondent when all the relevant facts are already on record and as long as both the parties are heard on that issue. In the case before us, it has been the alternate contention of the learned Departmental Representative that in the event Tribunal comes to the conclusion that the amount in question is not taxable under the head income from salaries, the Tribunal may also adjudicate on the question whether or not the impugned amount be held as income from other sources. Both the parties have been heard on this aspect of the matter as also on the merits of whether or not the amount in question could indeed be taxed under the head 'income from other

sources'.

47. In the case of *Emil Weber v. CIT* 114 ITR 515 the question before the Hon'ble Bombay High Court was "whether, on the facts and in the circumstances of the case, the amount of tax paid by Ballarpur (a person other than assessee's employer) on behalf of the assessee...is income taxable under the head 'income from other source". The undisputed material facts were like this. Ballarpur Paper & Straw Boards Limited (Ballarpur, in short), undertook setting up of a caustic soda/ chlorine manufacturing plant, and. for that purpose, entered into an agreement, for purchase of certain plant and machinery, with Kerbs & Ste (Kerbs, in short), a French company. There was a further agreement between Ballarpur and Kerbs that Kerbs was to make available services of certain personnel, including engineers, for setting up of the said plant and machinery. Kerbs, on the other hand, entered into a further agreement with Escher Wyas, Zurich, for supply of certain machinery and plant, as also for making available the services of certain personnel, including engineers, for setting up the plant. It was in under these arrangements that Emil Webber, one of the engineers whose services were made available by Escher Wyas to Ballarpur, came to be in India to work for Ballarpur for setting up the plant and machinery imported by Ballarpur The question arose whether the amount of tax liability of the assessee, which was borne by Ballarpur, could be taxed in the hands of the assessee as 'income from other sources'. The Tribunal, following the views of Hon'ble Calcutta High Court in the case of *Roma Bose v. ITO* 95 ITR 229 came to the conclusion that such payment made on behalf of the taxpayer constituted income of the assessee. The Tribunal was further of the opinion that the proper head under which this income could be assessed was the final head to be found under Section 14 of the Act, i.e. 'income from other sources'. The correctness of this Tribunal decision was challenged before the Hon'ble Bombay High Court. It was in this context that Their Lordships of Hon'ble Bombay High Court, inter alia, observed as follows:

....We are afraid that we cannot accept (the) submission that, in the absence of a specific provision in Clause (24) of Section 2, such a benefit which the assessee has received from Ballarpur could not be regarded or considered to be his income which is liable to be assessed and taxed. The definition of "Income" in Section 2(24) is an inclusive definition and not an exhaustive one.

There remains for our consideration only one other argument which was rather faintly submitted by the learned Counsel for the assessee for our consideration. It was submitted that such a benefit is required to be considered under the head "Salaries". It was further submitted that since the relationship of employer-employee did not exist between Ballarpur and the assessee, it was not permissible for the revenue to claim that this income should be regarded as 'income from other sources'. Reliance was sought to be placed on the decision of the Supreme Court in *Nalinikant Ambalal Mody v. SAL Narayan Row*, CIT (1996) 61 ITR 428. The fallacy underlying this argument is the starting point thereof that such a benefit has to be regarded as pertaining to income from the head "salaries". There is no warrant for such an assumption. Unless this is assumed there is no basis in the second argument advanced....

48. The stand of the Tribunal was thus confirmed by the Hon'ble High Court and it was held that once an employment related benefit is found to be in the nature of income, it would not be outside the ambit of taxability merely because it was received from a person other than employer. Hon'ble Supreme Court's judgment in the case of Nalinkant Ambalal Mody (supra), though duly taken note of by the Hon'ble High Court, did not come to the rescue of the assessee either. Aggrieved by the stand so taken by the Hon'ble Bombay High Court, the assessee carried the matter before the Hon'ble Supreme Court, but without any success. Hon'ble Supreme Court, inter alia, observed as follows.

...It would be unrealistic to say that the said payment had no integral connection with the salary received by the assessee. We are, therefore, of the opinion that the High Court and the authorities under the Act were right in holding that the said tax amount is liable to be included in the income of the assessee during the said two assessment years....

...The question then arises as to under which head of income the said income should be placed. Inasmuch as the assessee is not an employee of Ballarpur which made the payment, it cannot be brought within the purview of Section 17 of the Act, It must necessarily be placed under Sub-section (1) of Section 56, "income from other sources". According to the said Sub-section, income of every kind which is not to be excluded from the total income under the Act shall be chargeable to income-tax under the head "Income from other sources", if it is not chargeable to income-tax under any of the other heads specified in Section 14, items A to E. It is not the case of the assessee that any provision of the Act exempts the said income from the liability to tax....

49. It was thus held by the Hon'ble Supreme Court that once it is concluded that an employment related benefit is in the nature of income and even if it is cannot be taxed under the head income from salaries', such an income can be taxed under the head 'income from other sources'. In other words, merely because an employment related benefit cannot be taxed under the head 'income from salaries', such a benefit cannot go outside the ambit of taxable income. Of course, Their Lordships were dealing with the legal position prior to the five judge bench decision in the case of Justice Deoki Nandan Agarwal's case (supra).

50. Hon'ble Supreme Court's judgment in the case of Nalinkant Ambalal Mody (supra) and Hon'ble Bombay High Court's judgment in the case of T.P. Sidhwa (supra) were duly taken note of, and yet the Hon'ble Supreme Court arrived at the above conclusion in Emil Weber's case (supra). We are thus of the view that even if the amount received by the assessee on redemption of share appreciation rights is held to be not taxable under the head 'income from salaries'. this fact, by itself would not take the same outside the ambit of taxable income, since, in such an eventuality and following Hon'ble Supreme Court's judgment in Emil Weber's case (supra), the said amount will be taxable under the head 'income from other sources'. To sum up, we are of the considered view that even if we are to hold that amount in question is received from a person other than the employer of the assessee, and that in order for an income to be taxed under the head 'income from salaries' it is a condition precedent that the salary, benefit or the consideration must flow from employer to the employee, the amount received by the assessee on redemption of stock appreciation rights will still be taxable-though under the head 'income from other sources'. The plea raised by the assessee that

the amount in question cannot be taxed as 'income from salaries' is thus irrelevant.

51. In the light of the discussions that we had earlier in this order, we have come to the conclusion that redemption of stock appreciation right is an employment related benefit, in the nature of deferred wages contingent upon financial performance of the ultimate employer i.e. parent company of the company with which the assessee has entered into employment contract, which is a purely monetary benefit. The same is directly of the income nature. As for the reliance placed by the learned Counsel for the assessee on the judgments in the cases of N.A. Mody (supra) and T.P. Sidhwa (supra), in support of the proposition that an employment related benefit cannot be taxed under a head other than 'income from salaries', we find that Hon'ble Supreme Court has duly considered these judgments and yet come to the conclusion that when an employment related benefit is received from a person other than the employer, the same is taxable under the head 'income from other sources'. In Emil Weber's case before Hon'ble Bombay High Court also, Hon'ble Bombay High Court had taken note of N.A. Mody's case, and yet concluded that the employment related benefit in question, though not received from the employer, was taxable as 'income from other sources' under the 1961 Act. It appears that the said decision was not brought to the notice of the Hon'ble Bombay High Court at the time of hearing in T.P. Sidhwa's case (supra). Be that as it may, the legal position as on now is that the view of the Bombay High Court in Emil Weber's case (supra) stands approved by the Hon'ble Supreme Court. We are also not inclined to uphold contention of the assessee that the judgment of the Hon'ble Supreme Court in the case of Emil Webber (supra) is per incuriam and is not, therefore, binding on us. The judgments of Hon'ble Supreme Court are binding on us under Article 141 of the Constitution of India. The words of Hon'ble Supreme Court are clear, categorical and unambiguous. It is not for us to question the reasoning adopted by the Hon'ble Supreme Court. Once Hon'ble Supreme Court comes to a conclusion, which is directly on the issue in appeal before us, we have to respectfully follow the same. Once Hon'ble Supreme Court comes to a conclusion that an employment related benefit which is received from a person other than the employer, the same is to be taxed as an income from other sources, it cannot be open to us to take any other view of the matter. In the case of Asstt. Collector of Central Excise v. Dunlop India Ltd., Hon'ble Supreme Court has, inter alia, observed as follows:

We desire to add and as was said in the *Cassell and Co. Limited v. Broome* [1972] AC 1027 (HL), we hope it will never be necessary to say so again that "in the hierarchical system of courts" which exists in our country, "it is necessary for each lower tier".... "to accept loyally the decisions of the higher tiers". "It is inevitable in a hierarchical system of courts that there are decisions of the supreme appellate Tribunal which do not attract unanimous approval of all the members of the judiciary.... But judicial system works only if someone is allowed to have the last word and that last word, once spoken, is loyally accepted" (See Observations of Lord Hailsham and Lord Diplock in *Broome v. Cassell*). The wisdom of the Court below has to yield to the higher wisdom of the Court above.

52. Coming back to the judgment of Hon'ble Supreme Court in N.A. Mody's case (supra) once again, it is perhaps difficult to miss, even on a plain reading of the relevant legal provisions, that the scheme of Section 14 of the 1961 Act has undergone a paradigm shift inasmuch as it now only deals

with classification of an income and not the chargeability of the income. The legal position under Section 6 of the 1922 Act, with which the N.A. Mody's decision (supra) was concerned, was not exactly the same as is the legal position under Section 14 of the 1961 Act, and, therefore, it could not be said that a different view could not have been taken by the Hon'ble Supreme Court in the case of Emil Webber (supra). There is thus no question of any conflict between these two decisions; these decisions are in the context of different legal positions. As we say so, we are also alive to the fact that Hon'ble jurisdictional High Court, in the case of T.P. Sidhwa (supra), have taken the view that there is no such change in the fundamental scheme of the 1961 Act. However, since contrary view expressed by the same High Court in Emil Weber's case stands specifically approved and since even after considering Hon'ble Bombay High Court's judgment in the case of T.P. Sidhwa (supra), Hon'ble Supreme Court has taken a view that an employment related benefit can indeed be taxed under the head 'income from other sources', the ratio laid down by the Hon'ble Bombay High Court in T.P. Sidhwa's case is no longer good law. Hon'ble Supreme Court may not have specifically overruled the same, but since a legal proposition directly opposed to what was laid down by the Bombay High Court in T.P. Sidhwa's case (supra) is approved by the Hon'ble Supreme Court, the decision of the Hon'ble Bombay High Court in T.P. Sidhwa's case, in our humble understanding, stands impliedly overruled. We are, therefore, unable to approve the stand of the learned Counsel for the assessee that an employment related benefit, in view of Hon'ble Bombay High Court's judgment in T.P. Sidhwa's case (supra), can only be taxed under the head 'income from salaries'.

53. As regards assessee's plea that the amount in question can only be taxed under the head 'capital gains' as the receipt is on account of transfer of a capital asset consisting of right to receive stock appreciation rights, we (sic) find no substance in the same for the simple reason that, as we have held earlier in this order and as the very preamble of Procter & Gamble (1983) Stock Plan itself states, the amount in question is in the nature of a deferred wages, in the genus of bonus, incentives and like, received as a fruit of employment related activity which is revenue receipt in nature, and it is only the quantification of this amount which is linked to a capital asset that is value of shares. The taxability is not in respect of the stock appreciation right per se but the amount received as a fruit of employment which is measured by way of a formula envisaged in the stock appreciation rights scheme.

54. For the reasons set out above, we are of the considered view that the assessee was indeed liable to tax in respect of the amount of Rs. 4,79,13,851 received on redemption of stock appreciation rights. The taxability of this amount is under the head 'income from salaries' but the assessee's plea that the amount in question is received from a person other than the de jure employer, even if it was to be accepted, would not have any material difference to the taxability per se, because in such an event and following Hon'ble Supreme Court's judgment in the case of Emil Webber's case (supra) this amount would have been taxed under the head 'income from other sources'. Ground Nos. 1 and 2 are, therefore, dismissed.

55. The only other issue agitated by the assessee in this appeal is relating to levy of interest under Section 234 B of the Act.

56. Learned representatives fairly agree that this issue is covered by the Special Bench decision in the case of *Motorola Inc v. (sic) 95 ITD 5B 269* wherein it is held that when all the monies received by the assessee are subject to tax deduction at source, he can not be said to have committed default in not paying the advance tax and he is entitled to take into account the tax which is deductible by the payer though not actually deducted. As there is no dispute about the fact that the assessee employer had a duty to deduct tax at source in respect of the entire amount taxable under the head 'income from salaries' and all the relevant facts were in the notice of the employer, the assessee is entitled to take into account the amount of tax deductible, though not actually deducted. In this view of the matter, we deem it fit and proper to direct the Assessing Officer to delete the impugned levy of interest under Section 234 B. The assessee gets the relief accordingly.

Ground No 3 is thus allowed.

57. In the result, the appeal is partly allowed in the. terms indicated above.

58. As we part with the matter, we would like to place on record the fact that though this appeal was finally heard in the month of April 2007, our decision thereon, could only be finalized only in the month of December 2007. The unusual delay in disposing of this Special Bench matter was due to the fact that shortly after the appeal was heard, one of the us (i.e. the author) was transferred out of Mumbai benches and the meeting of the Members constituting this Special Bench, to discuss and finalize the draft order, was inordinately delayed. There were certain aspects of the matter on which we could not immediately reach a consensus in the course of our discussions immediately after the hearing was over, and, therefore, need of further discussions on those issues was felt. However, due to certain reasons beyond our control, we could not meet to discuss these issues. It was only pursuant to Hon'ble President being kind enough to facilitate a meeting of all the three of us at Mumbai to finalize this draft order, and grant of tour to one of us for the said purpose, that the Members constituting this Special Bench could finally meet on 10th December 2007 to discuss those issues as also deliberate on the proposed draft order. It is in this backdrop that there is a delay in disposal of this appeal, which is regretted.

Order pronounced in the open court today on 3rd day of January 2008