



Reportable

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

1) **ITA No. 369 of 2007**

% *Judgment Reserved on: 26th August, 2009.*
Judgment Pronounced on : 25th September, 2009.

COMMISSIONER OF INCOME TAX . . . Appellant
through : Ms. Prem Lata Bansal with Mr. Paras
 Chaudhary and Ms. Anshul Sharma,
 Advocates.

VERSUS

JAGATJIT INDUSTRIES LTD. . . . Respondent
through: Mr. M.S. Syali, Sr. Advocate with Mr.
 Satyen Sethi and Mr. Johnson Bara,
 Advocates.

WITH

2) **ITA No. 364 of 2007**

COMMISSIONER OF INCOME TAX . . . Appellant
through : Ms. Prem Lata Bansal with Mr. Paras
 Chaudhary and Ms. Anshul Sharma,
 Advocates.

VERSUS

JAGATJIT INDUSTRIES LTD. . . . Respondent
through: Mr. M.S. Syali, Sr. Advocate with Mr.
 Satyen Sethi and Mr. Johnson Bara,
 Advocates.

3) **ITA No. 365 of 2007**

COMMISSIONER OF INCOME TAX . . . Appellant
through : Ms. Prem Lata Bansal with Mr. Paras
 Chaudhary and Ms. Anshul Sharma,
 Advocates.

VERSUS

JAGATJIT INDUSTRIES LTD. . . . Respondent



through: Mr. M.S. Syali, Sr. Advocate with Mr. Satyen Sethi and Mr. Johnson Bara, Advocates.

4) **ITA No. 368 of 2007**

COMMISSIONER OF INCOME TAX . . . Appellant
through : Ms. Prem Lata Bansal with Mr. Paras Chaudhary and Ms. Anshul Sharma, Advocates.

VERSUS

JAGATJIT INDUSTRIES LTD. . . . Respondent
through: Mr. M.S. Syali, Sr. Advocate with Mr. Satyen Sethi and Mr. Johnson Bara, Advocates.

5) **ITA No. 370 of 2007**

COMMISSIONER OF INCOME TAX . . . Appellant
through : Ms. Prem Lata Bansal with Mr. Paras Chaudhary and Ms. Anshul Sharma, Advocates.

VERSUS

JAGATJIT INDUSTRIES LTD. . . . Respondent
through: Mr. M.S. Syali, Sr. Advocate with Mr. Satyen Sethi and Mr. Johnson Bara, Advocates.

6) **ITA No. 923 of 2008**

COMMISSIONER OF INCOME TAX . . . Appellant
through : Ms. Prem Lata Bansal with Mr. Paras Chaudhary and Ms. Anshul Sharma, Advocates.

VERSUS

JAGATJIT INDUSTRIES LTD. . . . Respondent
through: Mr. M.S. Syali, Sr. Advocate with Mr. Satyen Sethi and Mr. Johnson Bara, Advocates.



THE HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. Common question which arises for consideration in all these appeals filed by the Revenue is as to whether the receipt on account of exchange rate fluctuation of foreign exchange receipt is a capital receipt or revenue receipt irrespective of the source of the said income. An alternate plea was also taken by the Revenue to the effect that 22% of the funds were utilized for working capital, which is in a nature of circulating capital and therefore, 22% of the gain on account of exchange rate fluctuation is to be held as revenue receipt.
2. The assessee is the same in all these appeals and the aforesaid issue arose in various Assessment Years, under the following facts and circumstances.
3. The assessee is a multi-product company engaged in the business of alcoholic beverages, malted milk food, dairy products, etc. During the assessment year 1997-98, the assessee company had issued 2,52,10,000 equity shares overseas by way of GDR and collected USD 1,57,17,000 as share capital. It was equivalent to Rs.55 Crores (net of



share capital as raised had to be mandatorily retained overseas and was to be repatriated into the country as and when required for approved end uses. Therefore, the entire share capital of Rs.55 Crores was kept in fixed deposits with Standard Chartered Bank in UK and funds were repatriated out of the share capital as and when required for implementing various projects approved by the Ministry of Finance and Ministry of Industry. The assessee company as required by the Ministry of Finance, Government of India had informed them at the time of issue of share capital, the end use of the share capital in acquisition of fixed assets at 79% and General Corporate uses at 21%. The assessee company had also filed the audited statements of share capital repatriated at various intervals and used in the above-said manner to the Ministry of Finance, Government of India. The fixed deposits kept in U.K. and made out of share capital received in US Dollars had to be shown in Indian rupees in the balance sheet for each year at the exchange rate prevailing on 31st March. The assessee company during the year under appeal has accounted for in its balance sheet gain arising from exchange rate fluctuation of foreign currency.

4. As per the facts emerging from ITA No. 369/2007, in the relevant assessment year, there was a fluctuation gain amounting to



exchange rate fluctuation as revenue receipt exigible to tax. The assessee filed appeal against this addition before the CIT(Appeals). This appeal was partly allowed. The first Appellate Authority treated proportionate ratio of share capital raised for acquisition of fixed assets at 79% as arising on account of capital receipt and the balance 21% gain was treated as revenue receipt. In a nutshell, the CIT (A) went by the end user of the said share capital. Since 79% of the share capital was to be used for the fixed capital assets, the gain on exchange fluctuation to this extent was treated as capital gain. On the other hand, as 21% of the share capital raised was to be utilized for other business expenses and not for acquiring capital assets, this much gain was treated as revenue receipt exigible to tax.

5. Both the Revenue as well as the assessee preferred appeals against the aforesaid order to the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal'). The Tribunal has dismissed the appeal of the Revenue, but allowed the appeal preferred by the assessee. Effect is to delete the entire gain from the income treating the same as capital receipt. The Tribunal has held that this issue under the controversy is covered by the judgment of Madras High Court in the case of *EID Parry Ltd. Vs. CIT*, 174 ITR 11, wherein it was held that if foreign currency is held as capital asset or as fixed capital, profit or



in the value of foreign currency, would be in the nature of capital receipt.

6. It is, in these circumstances, the order of the Tribunal is challenged by the Revenue. According to the Revenue, following questions of law need to be determined:

a) Whether the Income Tax Appellate Tribunal was correct in law in directing the Assessing Officer to treat the entire gain on account of exchange rate fluctuation as arisen to the assessee is not liable to tax?

b) Whether the order of the Income Tax Appellate Tribunal is perverse as it has ignored the relevant facts on record as well as ignored the relevant provisions of law?

7. It would be relevant to point out at this stage that initially for the Assessment Year 1997-98, the entire gain on the foreign exchange fluctuation was treated by the Assessing Officer as capital gain and, therefore, the amount was not added to the income of the assessee. However, this order was revised by the Commissioner of Income Tax in exercise of his powers under Section 263 of the Income Tax Act, pointing out that part of the share capital raised was to be utilized for working capital, which aspect was not considered by the Assessing



consideration. Thereupon, the AO passed the orders treating 78% share as capital receipt and 22% as revenue receipt of the gain on receipt rate fluctuation. However, for subsequent years, the AO had treated the entire receipt as revenue receipt exigible to tax.

8. Insofar as the orders of the two authorities below treating gain on exchange rate fluctuation at 79% is concerned, it was not seriously debated or disputed by the learned counsel for the Revenue. Even otherwise, up to this stage there is hardly any issue inasmuch as the assessee had raised share capital by issuing equity shares overseas by way of GDR and collected the money in US Dollars. This was done with the prior permission of the Ministry of Finance, Government of India. Since the money thus raised represented share capital in foreign exchange, the gain on account of exchange rate fluctuations was attributable to the said share capital, such a gain would obviously be a capital gain.
9. The only argument which, in these circumstances, needs consideration is as to whether 21% of the said gain should be treated as revenue receipt because of the reason that 21% of the capital was to be utilized for general corporate uses. In this respect, it is difficult to accept the submission of the learned counsel for the appellant. It is



represented was share capital. Even use of this share capital raised, i.e., how this money is to be utilized, would be of no consequence? Even if money is raised by issuance of equity share domestically, the money thus collected as share capital is treated as capital receipt. Obviously, for setting up or for expansion of business, part of the said share capital raised can be utilized for acquiring assets and from other part, the other expenses can be met treating the same as 'working capital'. Merely because the part of the share capital is used as 'working capital' that has never been treated as revenue receipt. Once this aspect becomes clear and the entire money raised through issue of equity shares is to be treated as share capital, the gains on account of foreign exchange fluctuations, in the event such share capital collected in foreign exchange, the determination as to whether it is to be treated as capital receipt or revenue receipt cannot depend upon the end use of the share capital.

10. Learned Tribunal has rightly held that relevant consideration would be to see the source of funds under which it was held and not the ultimate utilization of the funds, relying upon the following judgments:

- i) **Commissioner of Sales Tax, Delhi v. The Motor & General Finance Ltd.**, 94 ITR 582.
- ii) **The Travencore Rubber & Tea Co. Ltd. v. C.I.T.**,
Tribunal, 242 ITR 152.



11. The leaned counsel for the Revenue had relied upon the judgment of the Supreme Court in the case of **Sutlej Cotton Mills Limited v. Commissioner of Income-tax Calcutta**, 116 ITR 1 and **Sahney Steel and Press Works Ltd., Hyderabad etc. v. Commissioner of Income-tax, Andhra Pradesh-I, Hyderabad** 228 ITR 253. These are not applicable in the present case inasmuch as in the case of **Sutlej Cotton Mills Limited** (supra), profits were earned by the company in Pakistan. There was devaluation of rupee by Pakistan and when subsequently those profits were remitted to India, there was loss due to exchange fluctuation. The question was as to whether such a loss was business loss or not. The Supreme Court opined that this question as to whether the loss suffered by the appellant was a trading loss or a capital loss could not be answered unless it was first determined whether the amounts were held by the appellant on capital account or on revenue account. This judgment rather goes against the revenue inasmuch as in the present case, funds kept in UK were raised by issuing capital, thus it was held on capital account. Applying this test given due to exchange fluctuation would be capital gain. Likewise, in **Sahney Steel and Press Works Ltd., Hyderabad** (supra), the amounts received were production incentive and operational subsidy and not capital subsidy and therefore, the subsidy payments were treated as revenue and not capital.



12. It is also to be kept in mind that in the present case even the utilization of the share capital in the ratio of 79% : 21% was as per the approval granted by the Ministry of Finance, Government of India. We thus, decide the aforesaid questions against the Revenue and in favour of the assessee. As a consequence, all these appeals are dismissed with costs.

(A.K. SIKRI)
JUDGE

(VALMIKI J. MEHTA)
JUDGE

September 25, 2009.
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