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

\+ **ITA Nos. 166/2001, 161/2004 & 320/2004 &**
ITR Nos. 30 - 33/1997

Judgment reserved on: 20th December, 2011
% **Date of Decision: 20th March, 2012**

Commissioner of Income Tax Delhi ....Appellant
Through Mr. Sanjeev Sabharwal, Sr. Standing Counsel

Versus

D.T.T.D.C. Ltd. …Respondent
Through Mr. R.P. Garg, Mr. Rajiv Tyagi &
Mr. S.K. Bansal, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA, J.

This common order will dispose of Income Tax Reference Nos. 30 – 33/1997 under Section 256(1) of the Income Tax Act, 1961 (Act, for short) which relate to assessment years 1990-91 and 1991-92; as well as ITA Nos. 166/2001, 161/2004 and 320/2004 under Sections 260A of the Act, which relate to assessment years 1996-97, 1994-95 and 1992-93.

2. In Income Tax Reference Nos. 30 – 33/1997, the following questions of law have been raised and referred to this Court for adjudication at the instance of the Revenue:

> "1. Whether on facts and circumstances, the Tribunal was right in law in concluding that the sum of Rs.24.17 crores for the assessment year 1990-91 and a sum of Rs. 28.86 crores for the assessment year 1991-92 constituted a diversion by overriding charge?
>
> 2. Whether on facts and circumstances, the Tribunal was right in law in directing the Assessing Officer to allow the expenditure incurred by the assessee on construction of flyovers and pedestrian facilities as revenue expenditure?"

3. The following questions of law have been raised and referred for adjudication of this Court at the instance of the assessee Delhi Tourism and Transport Development Corporation Ltd. in Income Tax Reference Nos. 30 - 33/1997:

> "Whether on the facts and circumstances of the case, the Income-tax Appellate Tribunal was justified in holding that the sum of Rs.2,04,35,870/- in assessment year 1990-91 and Rs.5,39,02,166/- in assessment year 1991-92 did not stand diverted by overriding title and therefore, constituted taxable income in the hands of the assessee?"

4. ITA Nos. 166/2001, 161/2004 and 320/2004, have been filed at the instance of the Revenue and there are no cross-appeals or cross-objections by the assessee. The substantial questions of law raised by the Revenue in these three appeals were admitted to hearing vide orders dated 20th March, 2002, 17th May, 2007 and 17th May, 2007, respectively. The aforesaid substantial questions of law in the three ITAs read as under:-

"ITA No. 166/2001

1. Whether ITAT was correct in holding that the amount of Rs.8,28,86,180/- transferred to Transport Infrastructure Utilization Fund was diversion of income and not application of income and the ratio of the Hon'ble Supreme Court's judgment in the case of Motilal Chhandami Lal Jain v. CIT, (1991) 190 ITR (SC) was applicable to this case?

2. Whether the ITAT was correct in holding that the amount of Rs.43.08 lakhs interest earned and transferred to Transport Infrastructure Utilization Fund was not the income of the assessee company?

ITA 161/2004

"Whether the Income Tax Appellate Tribunal was correct in holding that the amount of Rs.13,48,20,984/- transferred to Transport Infrastructure Utilisation Fund amounts to diversion of income and not application of income by relying upon its earlier orders passed in assessment years 1990-91 and 1991-92?"

ITA 320/2004

"Whether the Income Tax Appellate Tribunal was correct in law holding that the amount of Rs.5,83,37,236/- transferred to Transport Infrastructure Utilisation Fund and Rs.48,77,357/- transferred to Delhi Administration – Other General Economic Services were not application of income but diversion of income thereof by overriding title?"

5. The facts found and recorded by the tribunal are as under:-

(i) The assessee is a corporation established and set up by the Government of NCT of Delhi. It is a Government Company within the meaning of Section 617 of the Companies Act, 1956. The assessee is

engaged in the business of providing tourism and transportation services/facilities, catering and running of liquor shops.

(ii) In a meeting held on 24th April, 1989, it was observed that the Articles of Association and objectives of the assessee should be expanded to include investments in transport infrastructure particularly bridges, grade separators, underpasses and pedestrian cross, over bridges or sub-ways. It was also noticed that there was substantial shortage of funds being faced for creation of the said infrastructure in Delhi. There was a need to establish separate mechanism whereby resources, apart from the plan resources, were tapped and a major programme mounted. Retail trade in country liquor and 50 degree U.P. Rum was then undertaken by Excise Department, Delhi Administration. It was decided that this retail trade should be transferred to the assessee w.e.f. 15th May, 1989. The minutes of the said meeting record that this would generate a surplus of Rs. 100 crores in three financial years from 1989 to 1992 and enable construction of 20 flyovers and a substantial number of pedestrian facilities. The relevant portion of the minutes read as under:-

> "a) The Articles of Association and objectives of the Delhi Tourism Development Corporation (DTDC) be expanded so as to include investments in transport infrastructure, particularly bridges, grade separators, underpasses and pedestrian cross over bridges or subways. The Corporation be renamed as the Delhi Tourism & Transportation Development Corporation (DTTDC).

b) The retail trade in country liquor and 50 degree U.P. Rum which has so far been undertaken departmentally by the Excise Department, be transferred to DTTDC w.e.f. 15th May, 1989. That will give DTTDC a surplus of over Rs.100 crores in the three financial years, 1989 to 1992 which will enable it to construct about 20 road flyovers and a fairly substantial number of pedestrian facilities. The Corporation will also derive pay back from the road owning authorities (as explained hereunder) whereby it will be possible to expand the programme further. The shift of retail trade from the department to the Corporation (as it already obtains for Indian Made Foreign Liquor) apart from delivering funds to DTTDC for transportation infrastructural development, is desirable on other grounds also. There must be a separation of the retail business by corporate bodies such as DTTDC, the latter should continue to be the functions of the departmental authorities who have the requisite legal sanctions. The operational details of the transfer of retail trade from the department of DTTDC have been examined and are easy to negotiate. The 10 vends being currently operated by the department will be transferred to DTTDC. Bulk of the staff managing the country liquor trade is composed of deputationists, who from the date of their transfer to DTTC will continue to be treated as working on deputation under DTTC. There are a few other employees working on ad hoc basis, who will be absorbed in the Corporation. As a consequence of transfer of retail trade from the department to DTTC no difference will be caused either in the procurement of wholesale supplies or in the manner or procedure of retailing. The department will continue to call tenders and to take the requisite decisions for procurement of wholesale supplies.

c) DTTDC will award the construction of bridges to a reputed public sector construction company at pre-negotiated turnkey prices. For successfully executing such an important operation we would need to entrust the work to an agency which should inter-alia, posses the following attributes:-

i) It should have adequate experience of executing such projects in Delhi.
ii) It should have financial and technical capacity for undertaking the scale of projects contemplated.
iii) It should be able to mobilize men, machinery & equipment within the time frame contemplated.

iv) It should be prepared to use prefabrication technology to ensure that there is minimum disruption to traffic during construction.

Evaluation of the various construction agencies in view has led us to the conclusion that the body best suited to take up our work is the U.P. Bridges Corporation, which possesses all the above mentioned attributes. It has already constructed three good flyovers in Delhi. It has been sounded and has indicated its readiness to take the construction contract from us. It is proposed to establish a group of officers consisting of E-in-C, MCD, CE(I) PWD, a representative of the Roads Wing of the Ministry of Surface Transport and a representative of Finance to negotiate with the U.P. Bridges Corporation, the most advantageous turnkey prices and other terms and conditions. All important consideration will be to lay down a short time frame for construction and a substantial penalty for delay. Construction of at least four flyovers will be commenced in June, 1989. With subsequent batches taken up at intervals of three to four months."

(iii) In terms of the said minutes, the assessee took over retail trade for sale of country liquor and 50 degree U.P. Rum in Delhi. However, the requisite details were left undetermined. For the assessment years 1990-91 and 1991-92, the assessee filed its return of income on 31st December, 1990 and 31st December, 1991, declaring income of Rs.90,11,968/- and Rs.91,79,000/- respectively. Returns of incomes were without audited accounts. Return of income for the assessment year 1990-91, was revised on 27th December, 1991 to Rs.1,28,83,340/- but again audited accounts were not submitted. Audited accounts were submitted on 17th September, 1992 and Tax Audit Report was filed on 5th March, 1993.

(iv) In the assessment year 1991-92, Tax Audit Report under Section 44AB was filed subsequently in the course of assessment proceedings after notice under Section 143(2) was issued.

(v) During the course of assessment proceedings, it was noticed that the assessee had not treated the two accounts as "income" or "receipts" and not included the same in the profit & loss account for the purposes of tax. These accounts were "Transport Infrastructure Utilisation Fund (TIUF, for short)" of Rs.2,39,07,659/- and Rs.6,55,05,785/- and "Other General Economic Service (OGES, for short)" of Rs.24,17,65,160/- and Rs.28,86,02,020/- for the assessment years 1990-91 and 1991-92, respectively. Entries/ transactions in these two accounts were excluded from the profit and loss account.

(vi) The stand of the assessee was that the TIUF represents the amount which is mandated and required to be spent on construction of road infrastructure in Delhi i.e. bridges, flyovers etc. The amount under OGES represented the amount that was to be credited/paid to the Delhi Administration and the same was credited and paid to Delhi Administration subsequently in terms of the letter dated 5th February, 1992. Relevant portion of this letter dated 5th February, 1992, reads as under:-

"Sub: payment of Sales Proceeds of Country Liquor.

Sir,

This has reference to the Executive Council's decision dated 25.4.1989 as amended from time to time according to which you were required to pay the difference between the retail sale price not covered by specific duties, taxes and margins as allowed to you by the Delhi Administration and the whole sale price w.e.f. 15.5.1989 to 8.4.1991 to the credit of Major Head 1475 "other General Economic Services" Minor Head 109, "Sale Proceeds of Liquor".

You are requested to make arrangement to deposit the same.

Yours faithfully

(ALKA DIWAN)
DY. SECRETARY (FINANCE)"

(vii) There was another letter dated 5th February, 1992, with regard to TIUF and the same reads as under:-

"Sub: Country Liquor Trade – DTTDC

Sir,

Delhi Administration has decided to entrust retail sale of Country Liquor to Delhi Tourism & Transport Development Corporation Ltd. (DTTDC) on a retail margin which will be determined from time to time. As a continuing and ongoing consideration for DTTDC be obliged to construct fly-overs and substantial number of pedestrian facilities etc. as per directions issued by Delhi Administration to the DTTDC from time to time, and, on competition of such infrastructure facilities, DTTDC shall be obliged to hand over same to the appropriate Government office's on a FOC basis, subject to execution of a deficiency charge report.

Yours faithfully

(ALKA DEWAN)
DY. SECRETARY (FINANCE)"

TRANSPORT INFRASTRUCTURE UTILISATION FUND (TIUF)

6. The tribunal has held that the amount deposited in TIUF Fund was income of the assessee and accordingly has to be included in the profit and loss account. Receipts were income/earnings. It has also been held that the expenditure incurred by the assessee on construction of flyovers, pedestrian facilities etc. was expenditure incurred by the assessee under Section 37 of the Act and accordingly have to be reduced/deducted for computing taxable income. In ITR Nos. 30 – 33/1997, at the instance of the assessee the question of law raised is whether the aforesaid amount stands diverted at source by way of overriding title to the Government of Delhi. The question raised at the instance of the Revenue in ITR Nos. 30 – 33/1997, is whether the tribunal has erred and should not have treated the expenditure incurred by the assessee on construction of flyovers and pedestrian facilities as a revenue expenditure. It was a capital expense.

7. Firstly, we take up the question raised by the Revenue. The contention of the Revenue is that the construction of flyovers, pedestrian facilities etc. was capital expenditure as the facilities being constructed had an enduring benefit and had resulted in creation of permanent facilities. The reasoning given by the Assessing Officer was that the right to do business in country liquor had resulted in virtually

no gain to the assessee. Delhi Administration had permitted and allowed the assessee to retain a small margin @ .05 p. per bottle. In these circumstances, any expenditure incurred from TIUF cannot be regarded as a business expense. The Assessing Officer had recorded that there was a conscious effort to siphon off the profits from the country liquor business. The immovable structures after completion had to be handed over to the Delhi Administration etc. and this fact was known from the beginning. The findings recorded by the Assessing Officer read:-

> "(ii) The assessee's second contention is that the expenditure of Rs.2.39 crore is revenue and not capital in nature as no asset had come into existence in the hands of the assessee also dos not appear to be correct. As a result of the application of this amount a Capital asset has come into existence and the amount which goes into the creating of such an asset is capital expenditure. The fact that the Assessee Company has not created an asset (WIP at present) in its own books is itself incorrect. The Letter of Delhi Administration clearly says that "…….. on completion of such infrastructure facilities, D.T.T.D.C. offices on a Free of Cost basis ……." The clearly intention is that till the time of completion, the structures would be assets in the hands of Delhi Administration from the very beginning, then the question of their being Hence, the assessee's contention that no asset had come into existence in its hand and hence the amount should be allowed as revenue expenditure cannot be accepted. The position regarding allowability of depreciation on such assets would however be considered in view of the fact that at present the assessee can only show Work in Progress and Whether the assessee would derive any income from their construction, so as to entitlte it to claim depreciation on them.

8. Both the CIT (Appeals) and tribunal have disagreed with the aforesaid findings and held that the expenditure incurred out of TIUF was revenue expenditure and not capital expenditure. They are correct. The assessee was entitled to a specified amount towards administrative and other expenses from the sale proceeds. The amount which was retained and kept in TIUF was for construction of the flyovers. The assessee was required and mandated to make the said expenditure as a condition for undertaking the country liquor trade. The assessee was given license to conduct and carry on liquor trade in Delhi on the basis of the minutes of the meeting held on 24th April, 1989. Construction of flyovers etc was a pre-condition or an obligation imposed and had to be complied with to enable the assessee to conduct business of sale of country liquor in Delhi. The minutes mandated and required the assessee to construct the flyovers/pedestrian facilities. Prior to that sale of country liquor was carried on by Delhi Administration itself through the excise department. Delhi Administration permitted and granted license to the assessee to carry on the said trade but subject to the conditions imposed. The assessee could not have changed or amended the conditions and had to comply with the same. Whether or not the assessee should have undertaken the liquor trade, whether or not it was financially beneficial etc., is a decision which had to be taken

by the assessee. The decision taken by the assessee may not have been correct or commercially viable, it may not have resulted in income/substantial income but the Revenue cannot question and challenge the decision. The assessee being a corporation established by the Government of NCT of Delhi and a government company under Section 617 of the Companies Act, 1956, may have accepted and taken the decision pursuant to the decision of the Delhi Government but this cannot be a ground to recomputed the profits ignoring the expenditure incurred as long as requirements of Section 37 of the Act are satisfied and the expenditure is not a capital expenditure. Revenue expenditure will not become a capital expenditure merely because the assessee corporation was obliged and required to construct and incur expenditure on construction of flyovers etc by the Delhi Administration.

9. The flyovers and pedestrian facilities have resulted in creation of infrastructure facilities in Delhi. The physical structures were/are of enduring nature, but this in the present case cannot be the determinative factor/reason for deciding whether or not the expenditure incurred in the hands of the assessee was capital or revenue expenditure. The assessee was not the owner of the said structure and was not to utilize the said infrastructure for the purpose of its business. The task and the obligation assigned and undertaken by

the assessee was to get the flyovers and pedestrian facilities constructed and pay for the same. After constructions these flyovers, pedestrian facilities were to be transferred to the Delhi Government or the respective departments. As far as the assessee was concerned no enduring benefit or advantage was accruing to them. For the assessee, no capital or revenue earning asset came into existence. Activity/expenditure on construction of immovable structure of enduring nature, is not universally capital expense in all cases. The contention of the Revenue that as an immovable superstructure of enduring benefit has come into existence and, therefore, expenditure incurred is of capital nature, is flawed. A contractor/builder who constructs a building for sale to third parties is creating or creates an immovable asset but in the hands of the said builder the said asset, is stock in trade, though in the hands of the purchaser/buyer it may be a capital asset. The expenditure incurred by the assessee, therefore, is a revenue expense and not a capital expense. The tribunal has rightly pointed out that the minutes of the meeting dated 24th April, 1989 stipulated and provided that the exact modalities would be worked out subsequently. These minutes were not final. This is also apparent from the letter dated 5th February, 1992, with reference to sale proceeds of country liquor. The letter specifically states that the Executive Council's

decision dated 25th April, 1989 was amended from time to time. The second letter dated 5th February, 1992, with regard to TIUF is more erudite and states that the assessee was obliged to construct flyovers and substantial numbers of pedestrian facilities as per directions issued by Delhi Administration to the assessee from time to time and on completion of such infrastructure facilities, the assessee was obliged to hand over the same to the appropriate government on free of cost basis, subject to execution of a deficiency charge report.

10. We also agree with the findings recorded by the tribunal that the condition to construct the flyovers etc., to bear and pay costs of the flyovers was neither self imposed or gratuitous. The condition was imposed by the Delhi Administration with the approval of Lt. Governor of Delhi. Sale of liquor or alcohol in union territory of Delhi at that time was regulated and controlled under the Punjab Excise Act, 1914. As per the provisions of the said Act, liquor could not be bottled for sale and no intoxicant could be sold in Delhi except and subject to terms and conditions of the licence granted in that behalf. Under Section 34 of Punjab Excise Act, 1914, Delhi Administration was entitled to fix the fee etc. and stipulate the terms and conditions for sale of liquor. Under the Liquor License Rules, 1976, Lt. Governor of Delhi was the authority empowered to grant license for retail vending of country liquor. In the

present case, as noticed above, retail trade of country liquor was transferred to the assessee w.e.f. 15th May, 1989, but the terms and conditions and the margin of the assessee was to be determined later on. The tribunal has specifically referred to letter dated 25th June, 1991, issued by the Commissioner of Excise, Delhi to the Deputy Commissioner of Income Tax, Special Range-VI, New Delhi, stating inter-alia that due to administrative difficulties on the question of fixation of retail margin on sale of country liquor was still pending consideration, keeping in view the financial interest of Delhi Administration as well as the assessee.

11. In view of the aforesaid findings, it has to be held that the expenditure incurred on construction of flyovers etc was revenue expense and not capital expense. The expenditure has to be allowed under Section 37 of the Act. The second question raised by the Revenue in this regard in ITRs No. 30-33/1997, has to be answered in affirmative and in favour of the assessee and against the Revenue.

12. This brings us to the question raised by the assessee whether or not amount deposited under the TIUF fund stand diverted and therefore did not constitute taxable income in the hands of the assessee. In the present case, the factual findings recorded are that the assessee on the directions of the Delhi Administration had got flyovers

and infrastructure facilities constructed. The contract of construction of flyovers and other facilities was awarded by the assessee. It may be relevant to reproduce here the resolution of the Board of Directors of the assessee which has been quoted in the impugned order passed by the tribunal:-

> "Resolved that
>
> i) The action to create a Transportation Infrastructure Utilisation Fund in respect of margin equivalent to Rs. 1/- (Rupee one only) per bottle sold during the year as per the direction of delhi Admn. to the Company to manage the trade of country liquor and to construct flyovers and pedestrian facilities therefrom, and
>
> ii) The action to charge 5 paise (five paise) per bottle of the country liquor sold as administrative expenses towards its Corporate Office expenses against the Transportation Infrastrucutre Utilisation Fund.
>
> Be and are hereby approved."

13. The aforesaid resolution clearly shows that it was the obligation of the assessee to construct flyovers and pedestrian facilities out of 95 paise from Re. 1/- which the assessee was entitled to retain and keep. The balance 5 paise per bottle was to meet the administrative expenses including corporate expenses, but it does not mean that there was diversion of title of income by way of overriding title.

14. The concept of diversion of income by way of overriding title for the purpose of income tax was expounded and explained by the Supreme Court in ***CIT vs. Sitaldas Tirathdas,*** (1961) 41 ITR 367 (SC) as under:-

> "Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable."

15. Explaining the said paragraph, in ***Moti Lal Chhadami Lal Jain vs. CIT,*** (1991) 190 ITR 1 (SC), the Supreme Court elucidated that the expression "reaches the assessee" and "has been received" have not be used in the sense of the income being received in hands by one person or the other. The nature of obligation by reason of which income becomes payable to a person other than the one entitled to it, is the relevant and the determinative factor. Where the obligation flows out of an antecedent and independent title, the income get effectively sliced away and does not form part of the corpus of the assessee. Where however, there is an obligation which is self imposed on

gratuitous, then it is a case of application of income. In the case of ***Moti Lal Chhadami Lal Jain***'s case (supra), a part of the rental income was being paid to a trust which was running an educational institute as per the rent deed. The assessee, an HUF was the owner of that immovable property. The Supreme Court did not agree to exclusion of the rent receivable by the trust, from the income of the HUF on the ground that there was diversion of income at source. In the said decision, the Supreme Court noticed that cases of sub-partnership can be categorized as border line matters, for commercial compulsions that had resulted in formation of sub-partnerships. In ***Muralidhar Himatsingka vs. CIT***, (1996) 62 ITR 323 (SC), it has been held that profits received under sub-partnership can represent diversion of income at source. The Supreme Court observed that this analogy cannot be extended to the cases like the said one.

16. We fail to understand how the assessee can plead diversion of income at source as in the present case, the amount received remained with the assessee. It did not part away or pay the said amount to any third party. A part of the said amount i.e. 5 paise per bottle was retained by the assessee to meet their administrative and other corporate expenses and the other part of that was to be used for construction of flyovers and pedestrian facilities by the assessee. The

said 95 paise was not transferred or paid by the assessee to the [illegible] Administration.

17. The question of law raised by the assessee in ITR Nos.30-33/1997 therefore is answered in affirmative and it is held that the amount standing in TIUF was not diverted at source by way of overriding title and, therefore, was to be included in the taxable income of the assessee. This question of law is accordingly answered in favour of the Revenue and against the assessee.

18. We may at this stage refer to the questions of law raised by the Revenue in ITA Nos. 166/2001, 161/2004 and 320/2004. In the assessment years i.e. 1996-97, 1994-95 and 1992-93, the assessee was entitled to retain Rs.6/- from sale of each liquor bottle. Rs. 5/- was to be utilized for construction of flyovers, pedestrian facilities etc and balance amount of Re.1/- was to be retained and utilized by the assessee to meet its administrative and other costs in the liquor trade. The tribunal in the order dated 27th October, 2010, for the assessment year 1997-98, held that as per the Delhi Government's order dated 21st August, 1997, it specifically stipulated that retail margin of Rs.5/- per bottle would be utilized for construction of flyovers and pedestrian facilities and this amount was to be deposited in Consolidated Fund of India. Facts noticed above show that the assessee itself was getting

flyovers constructed and making payments for the same. In fact, the assessee had earned interest of Rs.43,08,000/- on TIUF funds. The decision of the tribunal in this year is contrary to the decision of the tribunal for the assessment years 1990-91 and 1991-92 which are subject matters of ITR Nos. 30 – 33/1997. For the assessment years 1994-95, the tribunal has not discussed the factual matrix but dismissed the appeal of the Revenue against the order of the CIT (Appeals) on the basis of tribunal's decision dated 31st August, 1995, in respect of assessment years 1990-91 and 1991-92. As noticed above, in the assessment years 1990-91 and 1991-92, the tribunal had in fact decided this aspect/issue in favour of the Revenue and against the assessee.

19. In the assessment year 1992-93, again the appeal of the Revenue had been dismissed following the decision dated 31st August, 1995 for the assessment years 1990-91 and 1991-92. This is misleading of the order of the tribunal for the assessment years 1990-91 and 1991-92. Interest earned on and transferred to TIUF is also income of the assessee and is accordingly taxable.

20. Decision of this Court in the case of the assessee reported in (2010) 324 ITR 234 (Del.) is not apposite. The assessee had filed preferred writ petition challenging the notices issued under Section 147/148 of the Act in respect of assessment years 1997-98, 1998-99

and 1999-2000. The writ petition was allowed on the ground of change of opinion recording, inter alia, that the Assessing Officer does not have power to review its earlier decision. Accordingly, it was held that the jurisdictional pre-condition for reopening was not satisfied and the action of the Assessing Officer was without jurisdiction. It was clarified that the Bench had dealt with point of jurisdiction i.e. whether or not pre-conditions for reopening under Sections 147/148 were satisfied and not the merits of the issue with regard to taxability of the amount transferred to TIUF. Thus, this decision does not help the assessee.

Thus the aforesaid questions of law in ITA Nos. 166/2001, 161/2004 and 320/2004 are decided in negative and in favour of the Revenue and against the assessee. The question No. 2 raised for ITR 166/2001 relates to taxability of interest of Rs.43.08 lacs earned and transferred to TIUF. The answer to the said question has to be given in affirmative and in favour of the Revenue and against the assessee in view of the findings recorded above.

TAXABILITY AND TREATMENT OF OTHER GENERAL ECONOMIC SERVICES (OGES)

21. Question No. 1 at the instance of the Revenue in ITR Nos.30-33/1997 has been only raised in assessment years 1990-91 and 1991-92, in respect of Rs.24.17 crores and Rs.28.86 crores. This question has not been raised in respect of other assessment years. It is apparent

that no addition on this account has been made in the assessment [illegible] 1996-97, 1994-95 and 1992-93, which are subject matters of ITA Nos. 166/2001, 161/2004 and 320/2004. Facts below will elucidate that the Revenue has rightly not raised this issue in respect of the other years.

22. The contention of the Revenue is that the entire sale proceeds received from the sale of liquor trade should be added and included as taxable receipts. The stand of the assessee on the other hand is that the entire receipts are not taxable in their hands either as income diverted at source or on the ground that the sale proceeds received and deposited in OGES were not income of the assessee.

23. We have noted the factual controversy. For the sake of convenience, it may be again briefly noticed. Vide meeting held on 24th April, 1989, the assessee was permitted and allowed retail vending of country liquor. Part of the sale proceeds were to be utilized for construction of flyovers, pedestrian facilities but the exact details and modalities were to be worked out. Subsequently, in terms of letter dated 5th February, 1992, the sale proceeds under the head OGES were transferred to the Delhi Administration. Till the said date, the amount under OGES was retained by the assessee. During the course of arguments before the tribunal, the counsel for the Revenue had submitted that the letter dated 5th February, 1992 was issued after the

end of the financial years 1990-91 and 1991-92 and, therefore, the transfer made should not and would not affect the taxability of the sale proceeds which were retained and kept under the head 'OGES'. He submitted that there cannot be transfer of income by way of overriding title retrospectively. The letter would be effective on or after 6th February, 1992.

24. We are in agreement with the Revenue that the question of diversion of income by way of overriding title till letter dated 5th February, 1992 was issued does not arise. However, till that date i.e. 5th February, 1992, the respondent assessee did not have any dominion or control over the aforesaid amount credited under the OGES head.

25. Every receipt or amount received/accounted, is not income. Amount received is income in the hands of the assessee if he has title/right over the said amount in form of dominion and right to use the said amount. When examining, the concept of 'income' one has to keep in mind, commercial reality, specialty of the situation rather than pure theoretical or doctrine aspects. The business aspect of the matter has to be viewed as a whole but without disregarding the statutory language. Depending upon the nature and character of the deposits/payments, treatment should be given to hold whether or not the amount received was income/profit.

26. The Supreme Court in ***Poona Electric Supply Co. Ltd. vs. CIT, Bombay,*** (1965) 57 ITR 521 (SC) had drawn a distinction between payments out of profits and payments to earn profits. Distinction was drawn between deduction made for ascertaining profits and the distribution made out of profits. In addition to the said distinction, difference was made between profits/income which arise to an assessee and profits/ income of a third person. Reference with approval was made to concept of 'real income' as expounded by Bombay High Court in ***H.M. Kashiparekh & Co. Ltd. vs. CIT,*** (1960) 39 ITR 706 (Bom.). The said principle as stated in the head note of ***H.M. Kashiparekh & Co. Ltd.*** (supra) was quoted. The said quote reads as under:-

> "The principle of real income is not to be so subordinated as to amount virtually to a negation of it when a surrender or concession or rebate in respect of managing agency commission is made, agreed to or given on grounds of commercial expediency, simply because it takes place sometime after the close of an accounting year. In examining any transaction and situation of this nature the court would have more regard to the reality and speciality of the situation rather than the purely theoretical or doctrinaire aspect of it. It will lay greater emphasis on the business aspect of the matter viewed as a whole when that can be done without disregarding statutory language. "

27. Therefore, a distinction has to be made between deductions for ascertaining profits made and distribution made out of profits; and

receipts which do not form part of the profit. The latter do not form part of the profit and loss account.

28. The nature and character of the receipt has to be looked from practical and a commercial point of view (see ***R.B. Jodha Mal Kuthiala vs. CIT (***1971) 82 ITR 570 (SC).

29. In ***Godhra Electricity Co. Ltd. vs. CIT,*** (1997) 225 ITR 746 (SC), reference was made to the following observations in ***CIT vs. Shoorji Vallabhdas & Co.*** (1962) 46 ITR 144 (SC)***:***

> "Income-tax is a levy on income. No doubt, the Income-tax Act takes into account two points of time at which the liability to tax is attracted, viz., the accrual of the income or its receipt; but the substance of the matter is the income. If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a hypothetical income, which does not materialize."

30. Thus, the aforesaid principle would equally apply to accounts maintained under cash system or mercantile system.

31. In ***State Bank of Travencore vs. CIT*** (1986) 158 ITR 102 (SC), the concept of 'real income' was elucidated and it was observed :-

> "An acceptable formula of co-relating the notion of real income in conjunction with the method of accounting for the purpose of the computation of income for the purpose of taxation is difficult to evolve. Besides, any strait-jacket formula is bound to create problems in its application to every situation. It must depend upon the facts and circumstances of each case. When and how does an income accrue and what are the consequences that follow from accrual of income are well-settled. The accrual must be real taking into account the actuality of the situation. Whether an accrual has taken place or not must, in appropriate cases, be judged on the principles of real income theory. After accrual, non-charging of tax on

> the same because of certain conduct based on the ipse dixit of a particular assessee cannot be accepted. In determining the question whether it is hypothetical income or whether real income has materialised or not, various factors will have to be taken into account. It would be difficult and improper to extend the concept of real income to all cases depending upon the ipse dixit of the assessee which would then become a value judgment only. What has really accrued to the assessee has to be found out and what has accrued must be considered from the point of view of real income taking the probability or improbability of realisation in a realistic manner and dovetailing of these factors together but once the accrual takes place, on the conduct of the parties subsequent to the year of closing an income which has accrued cannot be made " no income ".

32. In ***Siddeshwar Sahakari Sakhar Karkhana Ltd. vs. CIT & Ors.***, (2004) 270 ITR 1 (SC), the word 'income' or 'profit' was examined and interpreted. In the said case, issue arose whether deposits/payments made in different heads/parties was diversion of income at source or not and whether the deposits/funds have to be included in the income earned. The Supreme Court emphasized that the nature and character of the deposits/payments is determinative and relevant. Reference was made to the earlier decision in the case of ***CIT vs. Bazpur Coop. Sugar Factory Ltd.*** (1988) 172 ITR 321 (SC) where the amounts credited to loss equalization and capital redemption reserve fund were held to be income/profit. It was held in the said case that the assessee had proprietary interest over the fund and enjoyed dominion. It was observed that the line of enquiry must focus on ascertaining the true nature and character of the receipt and this does not stop at merely

determining whether the realization was in course of trade. realizations do not get impressed with the character of revenue receipts includable in the taxable income. The focus has to be into the true nature, character and purpose of realization. The amounts which are held as deposits and have to be returned at a specified point of time or happening of specified contingency, which is not otherwise uncertain; which are treated as someone's else money and when the assessee does not have unfettered dominion over the money, are good indicators not to categorize as the receipt as income. The Supreme Court expounded that the following questions should be raised and answered: (1) Do the receipts bear a character of income at the time it reached the hands of the assessee? (2) Does the title in the receipt vest with the assessee? (3) Does the assessee exercise complete dominion over the funds in question? (4) Does the assessee regarded the money as that of a third party or treat the money of that of a third party, with assessee having no unfettered dominion over the same? (5) Does the assessee stand in the position of debtor in relation to those funds/deposits? (6) What is the primary purpose of collection of said amount?

33. It was elucidated and explained in ***S. Shahakari Shakkar Karkhanna Ltd.*** (supra) :-

"These factors may broadly satisfy the first test applied in Bazpur Co-operative Sugar's case [1988] 172 ITR 321 (SC). The following are the relevant observations in this regard (page 329) :

> "It is clear that these amounts which were deducted by the respondent from the price payable to its members on account of supply of sugarcane were deducted in the course of the trading operations of the respondent and these deductions were a part of its trading operations. The receipts by way of these deductions must, therefore, be regarded as revenue receipts and are liable to be included in the taxable income of the respondent."

However, it needs to be clarified that the line of inquiry, in order to determine the true nature and character of the receipts, does not stop at ascertaining the mere fact whether the realisation was in the course of trading operations. The moment it is found that certain amounts were deducted by the assessee out of the price payable to its members who supplied the raw material, the conclusion does not necessarily follow that all such realisations get impressed with the character of revenue receipts, giving rise to taxable income in the hands of the assessee. It is not any and every receipt linked to the trading activity that acquires the quality of revenue receipt. The Tribunal or the court should go further and delve into the true nature, character and purpose of the realisations. If the amounts are meant to be held as deposits liable to be returned to the depositor at a specified point of time or on the happening of specified contingencies which are by no means uncertain or is otherwise treated as members' money—the depository having no unfettered dominion over the said funds, then, it is difficult to characterise them as the income of the assessee. The realisation of monies from the grower-members in the course of trading operations could as well be construed to be an occasion, mode or convenient point of time at which the "deposit" could be collected. Perhaps keeping this legal position in view, notwithstanding what has been stated in the earlier portion of the judgment, the learned judges proceeded to address the next question, i.e., whether the receipts by way of deductions could be regarded as deposits as described in the bye-laws. While answering that question in the negative, the court pointed out that it is the true nature and quality of the receipt that is material but not the head under which it is entered in

> the account books—a principle which is reiterated in a catena of decisions. The court then went on to conclude that the receipts by way of deductions from the purchase price were not in the nature of deposits. In this context, the reasoning of the Bench may be noticed (page 330 of [1988] 172 ITR) :
>
> "The essence of a deposit is that there must be a liability to return it to the party by whom or on whose behalf it is made on the fulfilment of certain conditions. Under the unamended bye-law, the amounts deducted from the price and credited to the said fund were first liable to be used in adjusting the losses of the respondent-society in the working year; thereafter in the repayment of initial loan from the Industrial Finance Corporation of India and then for redeeming the Government share and only in the event of any balance being left, it was liable to be converted to share capital. The primary purpose for which the deposits were liable to be used were not to issue shares to the members from whose amounts the deductions were made but for discharging of liabilities of the respondent-society. In these circumstances, the receipts constituted by these deductions were really trading receipts of the assessee-society. . ."

34. Thus it is the true nature of the receipt and purpose thereof is the determinative factor and the relevant principle to apply to decide whether or not an amount should be included or excluded from the profit/income. This requires examination of the question from various angles as noticed above, do the receipts bear a character of income at the time when it reaches the hands of the assessee? Does the money vest with the assessee once and for all? Whether the assessee exercises complete dominion over the fund or is it to be regarded as the money of the depositors or a third person. When an assessee does not have dominion over the fund it is difficult to categorise the same as income.

On consideration of the applicable byelaws, the Supreme Cou... **Siddheshwar Sahakari Sakhar Karakhana Ltd. (supra)** allowed the appeal of the assessee holding inter-alia that it was difficult to hold that the assessee exercised complete dominion over the "deposits" or had title over the same. We may note that in the same decision there were certain other categories of deposits which were retained by the assessee in order to remit them to the Government. These included Prime Minister's Relief Fund, Late Y.B. Chavan Memorial Fund and Hutment Fund. It was held that these funds were required to be remitted to the Government and Trusts and assessee had merely acted as an agent to collect the amount and remit the same and therefore not profit/income. These funds were, however, distinguished from the "Area Development Fund" in the following manner:-

> "The Area Development Fund, as we see from the various communications placed in the paper-book, is meant to enable the co-operative sugar factories to render socio-economic services in the area of operation. The area development programmes may cover agricultural extension, irrigation facilities, educational and medical services, development of animal husbandry and poultry, drought relief work and so on. By doing so, the sugar co-operatives will be supplementing the efforts of the Government in promoting the socio-economic development of the area. The board of directors of the co-operative society are required to pass a resolution specifying the details of expenditure proposed to be incurred from out of the area development fund. They should obtain the sanction of the Director of Sugar for incurring such expenditure. Such information is also

> required to be placed before the general body of the society and the approval to be obtained from the general body. On June 21, 1988, the Agriculture and Co-operation Department of the Government of Maharashtra framed certain directive principles laying down the modalities of utilization of Area Development Funds. The said order was issued in exercise of the power under section 79A of the Maharashtra State Co-operative Societies Act. This order passed during the middle of the last assessment year relevant to these appeals gives statutory basis for the already existing practice. It is difficult to equate this fund to the other categories of funds, as has been done by the Tribunal and affirmed by the High Court. Unlike the other funds like Chief Minister's Relief Fund, the amount collected towards Area Development Fund is retained by the sugar factory itself and utilized as per the guide lines issued by the Government or the National Co-operatives Development Corporation. The collective body of the society and its elected representatives take the decision as to how much amount has to be spent and for what purposes. The Director of Sugar or other designated official, no doubt acts in a supervisory capacity to oversee that the funds are properly utilized. On that account, it cannot be said that the collection is made by the society as an agent of the Government or the proprietary interest in the funds is vested with the Government. The conclusion has been reached by the Tribunal mainly on the basis of the requirement of prior sanction of the Director of Sugar for incurring the expenditure. Such restriction prescribed in the larger interest of the society itself does not in any way detract from the fact that the societies con cerned do exercise dominion over the fund and deal with that money subject of course to the guidelines and restrictions evolved by the Government. The Tribunal failed to approach the question in proper perspective on an analysis of the relevant circulars and orders. The High Court too fell into an error in invoking the theory of diversion of income at source. The crux of the matter is that there has never been a diversion of income to a third party (Government) before it reached the assessee. The receipts in the form of Area Development Fund always remained with the assessee."

35. Similarly, the Supreme Court referred to the sugarcane development fund and observed that the case of the Revenue was on

stronger footing. The beneficiaries were none other than the members of the sugar cooperative society and the Directors were to ensure that the benefit accrues to the members in form of augmentation of sugarcane production. The assessee had dominion over the said fund but the only restriction was in the manner and mode of using the said fund. A supervisor role was played by the Directorate of Sugarcane.

36. Mere fact that the amount was retained in the bank account of the assessee under the head 'OGES', does not show or prove that it was the income of the assessee. Mere realization of an amount in course of trading was not determinative whether the amount received was income. The court/authorities must determine the nature and character of the receipts before the amount can be taxed as income. This part of the sale consideration i.e. OGES was kept in a deposit unrelated to the business of the respondent assessee. The assessee did not exercise dominion over the said fund/deposit and deal with the said fund/deposit. Keeping in view the aforesaid elucidation of law and applying the same to the factual matrix, noting the nature and character of the OGES, it has to be held that the same was not taxable income of the assessee. The same has to be excluded from the profit. The aforesaid receipts were not income earned and do not have

character of income earned by the assessee over which it had dominion or right.

37. In view of the aforesaid findings, the aforesaid appeals are disposed of. The two questions of law raised in ITR Nos. 30-33/1997, on behalf of the Revenue, have been answered in affirmative i.e. against the Revenue and in favour of the assessee. The question of law raised in paragraph 3 and on behalf of the assessee in ITR Nos. 30-33/1997, is also answered in affirmative i.e. in favour of the Revenue and against the assessee.

38. The questions of law raised in ITA Nos. 166/2001, 161/2004 & 320/2004, mentioned in paragraph 4 are answered in negative i.e. in favour of the Revenue and against the assessee. In the facts of the case, there will be no orders as to costs.

(SANJIV KHANNA)
JUDGE

(R.V. EASWAR)
JUDGE

March 20th, 2012
kkb