

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 19.06.2012

Coram

The Honourable Mrs. Justice CHITRA VENKATARAMAN

and

The Honourable Mr. Justice K.RAVICHANDRA BAABU

TC(A). No. 1023 of 2005

Commissioner of Income Tax - III
Chennai

... Appellant

-vs-

M/s. PVP Ventures Limited
T.Nagar, Chennai
[Cause title amended as per
order in memo dated 6.6.2012)

... Respondent

Tax Case Appeal against the order of the Income Tax Appellate Tribunal, Madras 'B' Bench dated 3.12.2004 in ITA.No. 1384/Mds/2004 for the assessment year 2001-02.

For Appellant: Mr.T. Ravikumar Standing Counsel

For Respondent: Mr.Jehangir, Senior Advocate for Mr.R.Sivaraman

JUDGMENT

(Judgment of the Court was made by CHITRA VENKATARAMAN,J)

The Revenue is on appeal as against the order passed by Income Tax Appellate Tribunal relating to the assessment year 2000-01. Following are the questions of law raised for consideration:-

(i) Whether in the facts and circumstances of the case, the Tribunal was right in holding that the receipts on account of exchange fluctuations should be treated as capital receipts?

(ii) Whether on the facts and circumstances of the case, the Tribunal was right in holding that the expenditure on issue of shares under the Employees Stock Option could be allowed as staff welfare expenditure?

(iii) Whether on the facts and circumstances of the case, the Tribunal was right in holding that the Commissioner cannot partially revise the assessment order?

(iv) Whether on the facts and circumstances of the case, the Tribunal was right in holding that the Commissioner does not have the power to record his opinion, and direct the assessing officer to redo the assessment, but has to give final conclusions to the controversy?"

2. The assessee is engaged in the business of computer training and software development. While completing the assessment, the Assessing Officer treated the receipts on account of exchange fluctuation as a capital receipt and the same was reduced from the profits and gains while working out the relief under Section 80HHE. Apart from this, the Assessing Officer also allowed

the Staff Welfare expenditure incurred in terms of accounting policies prescribed in SEBI guidelines. While allowing the shares to the employees, the difference in the value was credited to the account of the company to be allowed as an expenditure.

3. The Commissioner of Income Tax initiated proceedings under Section 263 of the Income Tax Act to revise the order of the Assessing Authority. Among the various other issues which were the subject matter of revision, we are concerned in this Tax Case about the character of the receipts on account of exchange fluctuation and the expenditure on the issue of shares under the Employees Stock Option.

4. As far as the revision proceedings were concerned, the assessee objected to the invoking of jurisdiction under Section 263 of the Income Tax Act by contending that while passing of the assessment order, the Assessing Authority examined the details filed by the assessee and arrived at the conclusion. Hence, there was nothing to hold the assessment as erroneous or prejudicial to the interest of the Revenue. The Commissioner of Income Tax however held that Income Tax Officer had passed the order without application of mind and the assessment was made in a casual manner, and crucial issues were not looked into. In the circumstances, he justified the invoking of the jurisdiction under Section 263 of the Income Tax Act.

5. As far as the issue of income derived from the exchange fluctuation is concerned, it is seen that the said income related to issue of shares in the form of GDS. The assessee kept a part of the money abroad. When the money was brought to India, due to strong dollar position, the assessee gained on the repatriated amount. This was claimed as a capital receipt, the fact which was not disputed by the Commissioner of Income Tax. Thus, the amount had direct nexus with the capital raised and consequently the assessee contended the same was a capital receipt. The Commissioner of Income Tax pointed out that there was no dispute with regard to the fact that the exchange fluctuation income related to the deposit of money raised by the assessee from the GDS issue. Pointing out the printed prospectus to the issue of GDS, the Commissioner viewed that the aggregate net proceeds received were used principally to fund the establishment of offshore software development and the balance was used for working capital and for other general corporate purposes. The Commissioner viewed that the assessee had kept FDs of the GDS proceeds on its own and not because of any compulsion. Consequently, the amount received on account of exchange fluctuation to the tune of Rs.16,35,77,977/- was to be treated as revenue receipt and the Assessing Officer erred in reducing it in the income of the assessee while computing the deduction under Section 80HHE. As far as this issue is concerned, as already pointed out, the Commissioner did not dispute the fact that the amount received on account of exchange fluctuation was capital receipt. However, he felt in the computation of deduction under Section 80HHE, the Assessing Officer should have restricted it to 90% of the receipt. Consequently, the relief granted under Section 80HHE was bad in law.

6. Referring to the decision reported in 222 ITR 344 TVS SUNDARAM IYENGAR & SONS v. CIT., the Commissioner of Income Tax held that profits on account of exchange fluctuation would ordinarily be trading profits if the foreign currency was held by the assessee on a revenue account or as a trading asset or as part of circulating capital embarked in the business. Thus, he held that the entire amount was to be assessed as revenue receipt and the relief granted under Section 80HHE had to be recomputed. The Assessing Officer was directed to examine this and pass orders.

7. On the issue of Staff Welfare expenditure, the Commissioner pointed out that the assessee had debited a sum of Rs.66.82 lakhs under the head of Staff Welfare expenditure. The said sum was incurred by the assessee in respect of Employees Staff Option Plan and Employees Staff Purchase

Scheme Guidelines. As per SEBI guidelines, the difference between the market value of the shares and the value at which the shares were allotted to the employee is allowable as an expenditure. The Commissioner of Income Tax revised this claim accepted by the Officer and held that the accounting treatment prescribed by SEBI, nowhere suggests that it was a revenue expenditure to be debited to the Profit and Loss Account as it was only a notional and contingent expenditure. In the circumstances, the Commissioner of Income Tax held that the shares allotted under Employees Staff Option Plan and Employee Staff Purchase Scheme Guidelines, 1999, having not stated anything about the manner of treatment to this expenditure, the difference in the value at which the shares were allotted and the market value of the shares did not warrant any allowance as expenditure. Ultimately, the Commissioner of Income Tax passed an order directing the Assessing Officer to revise the assessment. Thus, holding that the revision proceedings were validly initiated, the income received on account of exchange fluctuation was held as a revenue receipt and be taxed as such and the Staff Welfare expenditure was to be disallowed.

8. Aggrieved by this disallowance, the assessee went on appeal before the Income Tax Appellate Tribunal contending that the exchange fluctuation being on the capital field, the resultant receipt on account of exchange fluctuation was rightly held by the Assessing Officer as a capital receipt and excluded the same in computing the profits of the business for the purposes of deduction under Section 80HHE. It is seen that in the revisional proceedings the Commissioner himself had not questioned the character of the receipt as not a capital receipt. The only issue raised in the revisional proceedings was as regards the computation of relief under Section 80HHE with reference to the receipt on account of the exchange fluctuation. Thus, the Commissioner of Income Tax in proceedings under Section 263 of the Act did not deal with the issue regarding the character of the receipt on exchange fluctuation that it was a revenue receipt. The Tribunal pointed out that the show cause notice under Section 263 of the Act issued was concerned about the inclusion of the receipt on account of exchange fluctuation in the context of computation of the relief under Section 80HHE. The Commissioner of Income Tax (Appeals) himself admitted that exchange fluctuation arose out of the deposit of money raised by the assessee from the GDS issue and the show cause notice required an explanation as to why the said receipt should not be reduced to the extent of 90% in computing the deduction under Section 80HHC. On receipt of explanation from the assessee that increase due to exchange fluctuation was not included in the total income of the assessee for the purpose of claiming relief under Section 80HHE, the Commissioner changed his view through a letter to hold that the receipt is revenue in nature. In the context of the reasons given in show cause notice, while exercising with jurisdiction under Section 263 and the changed ground taken in the order, the Tribunal held that considering the scope of jurisdiction under Section 263 of the Act, the letter written by the Revenue on 21.1.2004 treating the receipt as one of revenue receipt, could not be treated as second show cause or as fresh proceedings or even as continuation of the earlier notice. The Tribunal pointed out that the letter was not signed by the Commissioner of Income Tax but by some other Officer on his behalf and this mistake was not curable one. Thus, the admitted fact is that the basis of the show cause notice issued did not rest on the view that the increase caused by exchange fluctuation was of a revenue nature and so had to be taxed as income. On the other hand, only after the receipt of the objection from the assessee, by letter dated 21.1.2004, the assessee was asked for the reasons as to why the receipt should not be treated as revenue receipt. This showed conflict in the mind of the Commissioner as to the basis on which the order was sought to be revised on the ground that the assessment made was erroneous and hence prejudicial to the interest of the Revenue. Consequently, on the ground that the proceedings were not properly initiated in the manner known to law, the revisional proceedings was accordingly set aside.

9. On the scope of jurisdiction under Section 263 of the Act, the Tribunal relied on the decision of the Karnataka High Court reported in 192 ITR 547 COMMISSIONER OF INCOME TAX v. LF D'SILVA, wherein the Karnataka High Court held that "the scope of the proceeding has to be ascertained with reference to the purpose and the basis of the initiation of proceedings". The Karnataka High Court held that the proceedings under Section 263 of the Income Tax Act is not in the nature of granting a second innings to the department to enter upon fishing expedition. Thus, in the circumstances the Tribunal agreed with the assessee as to the total absence of jurisdiction to proceed on the different angle from the one which was the basis for the initiation of proceedings under Section 263 of the Act.

10. As regards the merits of the case, the Tribunal held that there was nothing on record to show that the retention of GDS proceeds in FDs were later on brought into to India only for a gain. The Tribunal pointed out that the increase in the value was not due to any activity of the assessee but due to the change in the exchange rate of the Indian rupee to the US Dollar. The receipt on the issue of GDS being capital in nature, the amount received on account of exchange fluctuation also had the character of a capital receipt. Consequently, the Tribunal on facts held against the Revenue and set aside the order of the Commissioner of Income Tax. The Tribunal further pointed out that while the Officer took the view as to the receipt on the amount of increase in the exchange fluctuation as capital, the Commissioner changed his view taken initially at the time of initiation of proceedings under Section 263 of the Income Tax Act, and that in exercise of jurisdiction under Section 263 of the Act, there was no scope for substituting one view for the other while passing order under Section 263 of the Act.

11. As regards the second issue which is now canvassed before this Court viz., on the issue of expenditure of 66.82 lakhs towards the issue of shares to the Employees Stock Option is concerned, the Tribunal pointed out that the shares were issued to the employees only for the interest of the business of the assessee to induce employees to work in the best interest of the assessee. The allotment of shares was done by the assessee in strict compliance of SEBI regulations, which mandate that the difference between the market prices and the price at which the option is exercised by the employees is to be debited to the Profit and Loss Account as an expenditure. The Tribunal pointed out that what had been adopted was not notional or contingent as had been submitted by the Revenue. Pointing out to the Employees Stock Option Plan, the Tribunal in its order stated that it was a benefit conferred on the employee. So far as the company is concerned, once the option was given and exercised by the employee, the liability in this behalf got ascertained. This was recognised by SEBI and the entire Employees Stock Option Plan was governed by guidelines issued by SEBI. On the facts thus found, the Tribunal held that it was not a case of contingent liability depending on the various factors on which the assessee had no control. The expenditure in this behalf was an ascertained liability, thus the expenditure incurred being on lines of the SEBI guidelines, there could be no interference in the relief granted by the Assessing Authority for the expenditure arising on account of Employees Stock Option Plan. This expenditure incurred as per SEBI guidelines and granted by the Officer could not be considered as erroneous one calling for exercise of jurisdiction under Section 263 of the Act.

12. In considering the other issues, the Tribunal ultimately pointed out the various grounds raised by the assessee as regards invoking of jurisdiction under Section 263 of the Act on the plain language of the said provision. The assessee contended that all that the Commissioner could do in exercise of power under Section 263 of the Act was either to enhance the assessment or modify the assessment or cancel the assessment and to give a direction for fresh assessment. Considering the words of "enhancing or modifying" as well as the use of word 'or' which is a disjunction thereafter, the Commissioner could only enhance or modify the assessment and it would not be possible for the Commissioner to do both this under the jurisdiction of Section 263 of the Act.

The Tribunal agreed with the assessee's contention and held that the entire order stood vitiated by reason of fact that the Commissioner had not gone into the assessment in toto to set aside the order of assessment nor enhanced or modified the assessment in full. Since the order passed by the Commissioner is unworkable, the order of the Commissioner had to be set aside. However, the Tribunal further pointed out that since on merits, the Commissioner was also not justified in examining the content of the jurisdiction under Section 263, a detailed examination on this aspect was purely academic. Thus it left the question as it is. Aggrieved by this, the Revenue in on appeal.

13. As far as the first question of law viz., whether the receipt on account of exchange fluctuation is treated as capital receipt or not is concerned, learned standing counsel for the Revenue pointed out that the Commissioner was compelled to initiate proceedings under Section 263 of the Income Tax Act on account of the fact that the Officer had not made proper enquiry. Therefore, the Commissioner had invoke his powers under Section 263 of the Act.

14. In this connection he placed reliance on the decision reported in 260 ITR 599 - ASHOK LEYLAND LTD. v. CIT, 277 ITR 346 MANNULAL MATADEEN v. CIT and [2011] 51 DTR (Madras) 228 TTK LIG LIMITED v. ASSISTANT COMMISSIONER OF INCOME TAX. He also referred to the decision reported in 33 ITR 546 - GEMINI PICTURES CIRCUIT LIMITED v. COMM. OF INC. TAX and 242 ITR 490 CIT v. SESHASAYEE PAPER AND BOARD LIMITED, on the wide amplitude of the jurisdiction of the Commissioner of Income Tax under Section 263 of the Act and submitted that the Tribunal had not taken into consideration, the various facts discussed in the order of the Commissioner, thus, the Tribunal committed serious error in granting the relief to the assessee.

15. Countering the said contention of the Revenue, learned senior counsel for the assessee pointed out that the Revenue had not raised any question of law held in favour of the assessee on the jurisdictional aspect. Thus, without raising any dispute on this, that being the case, the question raised on the merits of the case as regards the cancellation of the Commissioner's order on exchange fluctuation; on the issue of shares and on the issue of Employees Stock Option Plan could only be seen as an academic exercise by the Revenue.

16. As far as questions Nos. 3 and 4 are concerned, in the light of the order passed by the Tribunal on merits as well as in the absence of jurisdiction, the question is purely academic and this Court need not go into that. On the question of receipt on account of exchange fluctuation, learned senior counsel for the assessee pointed out that on a consideration of material and the purpose of issue of GDS, to widen the capital, the Assessing Authority rightly held that receipts on exchange fluctuation being capital in nature the same could not be considered while working out the relief under Section 80HHE. Apparently, the Commissioner did not find fault with that nature of receipt being treated as capital one. He submitted that however, for the reasons best known to him, after receipt of the objection from the assessee on the grounds of reasoning to the inclusion of 90% of the income in working out the relief under Section 80HHE, suddenly, the Commissioner shifted his stand to treat the receipt as revenue receipt, which is not the basis for initiating proceedings under Section 263 of the Act. Hence, the order suffers from illegality and rightly the Tribunal held that the proceedings initiated under Section 263 of the Act is debatable one and hence, the order could not be sustained.

17. Emphasising the scope of jurisdiction under Section 263 of the Act, which is available only on the issues which are prejudicial to the interest of the Revenue and which are given the show cause notice, learned senior counsel for the assessee submits that the issue which is a debatable

one cannot be a good ground to hold that the decision of the Officer would call for interference as the same was prejudicial to the interest of the Revenue.

18. Pointing out to the first notice and the second letter issued, consequent on the objection filed by the assessee, which is on conflict with the show cause notice, learned senior counsel for the assessee submits that as is evident from the above two proceedings, the Commissioner of Income Tax could not deny the fact that he himself entertained two proceedings under Section 263 of the Act. In this connection, learned senior counsel for the assessee placed reliance on the decision of Bombay High Court reported in 203 ITR 108 CIT v. GABRIEL INDIA LIMITED, the Apex Court decision reported in 243 ITR 83 MALABAR INDUSTRIAL CO., LTD v. CIT., and 295 ITR 282 CIT v. MAX INDIA LIMITED. Thus in the absence of any jurisdiction, as found by the Tribunal, which had not been challenged by the Revenue before this Court, consideration of other grounds on merits of the assessment in the order passed under Section 263 of the Act would only be an academic exercise.

19. As regards the receipts arising on account of exchange fluctuation, learned senior counsel for the assessee placed reliance on the decision of the Apex Court reported in 116 ITR 1 SUTLEJ COTTON MILLS LIMITED v. CIT as well as decision of this Court reported in 174 ITR 11 EID PARRY LIMITED v. CIT., and decision of the Delhi High Court reported in 337 ITR 21 CIT v. JAGATJIT INDUSTRIES LIMITED and submitted that the enquiry as to the character of the receipt on account of exchange fluctuation is to be seen with reference to the purpose of money received in foreign exchange and the circumstances in which fluctuation arose. Thus, considering the character of the receipt, and the purpose for raising the same, it was totally unnecessary for one to embark on the purpose for which the amount is spent. In the circumstances, learned senior counsel for the assessee submits that the Commissioner committed serious error in looking at how the amount raised on the issuance of offered shares was spent on other corporate expenses.

20. As regards the staff welfare expenditure, the assessee reiterated the stand taken before the authority concerned. Learned senior counsel for the assessee submitted that when the assessee had acted in compliance of SEBI requirements, which is also a statutory body, question of Revenue's feeling prejudicial by this act could not arise.

21. As regards questions 3 and 4, learned senior counsel for the assessee pointed out that the Tribunal itself held that the questions are merely academic one. Having regard to the fact that the issue on jurisdiction as well as on merits the Tribunal answered the questions in favour of the assessee, there is no fault in the order of the Tribunal in holding that these questions are purely academic in nature.

22. Heard learned standing counsel for the Revenue as well as learned senior counsel for the assessee and perused the records.

23. As far as the jurisdiction issue raised on the Commissioner shifting the very base of the ground on revision is concerned, we agree with the learned senior counsel for the assessee, that once the Commissioner of Income Tax (Appeals) had based his show cause notice on a particular ground to treat a receipt as having particular character, any subsequent change on receipt of a reply to the show cause notice strikes at the very base of the grounds for exercising the authority under Section 263 of the Act. In the decision reported in 243 ITR 83 MALABAR INDUSTRIAL CO., LTD v. CIT., explaining to the scope of the expression 'prejudicial to Revenue', the Apex Court pointed out that the prerequisite for the exercise of jurisdiction by the Commissioner suo moto under Section 263 of the Act is that the order of the Income Tax Officer is erroneous in so

far as it is prejudicial to the interests of the Revenue. The Apex Court pointed out that the said provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. Thus, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, the order of assessment cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income Tax Officer is unsustainable in law. The said decision was reiterated again in 295 ITR 282 CIT v. MAX INDIA LIMITED in the context of claim under Section 80HHC and held that when two views are possible on the word "profits" it is not permissible in law for the Revenue to substitute one view over the another view of the Officer so as to treat the view of the Officer as erroneous and prejudicial to the interest of the Revenue. In the decision reported in 203 ITR 108 CIT v. GABRIEL INDIA LIMITED, the Bombay High Court considered at length the scope of jurisdiction under Section 263 of the Act and pointed out that the power of suo motu revision under sub-section (1) is in the nature of supervisory jurisdiction and the same can be exercised only if the circumstances specified therein exist. Erroneous means involving error, deviating from the law, therefore invalid. Thus, an order cannot be termed as erroneous unless the same is not in accordance with law. If an Income Tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner. The Bombay High Court pointed out that the provisions under Section 263 of the Act does not visualise a case of substitution of the judgment of the Commissioner for that of the Income Tax Officer, who passed the order. The said view was reiterated by the Apex Court in the decision referred to above. Thus, any and every erroneous order cannot be the subject matter for revision under Section 263 of the Act, unless the second requirement of it being prejudicial to the interest of the Revenue exists. For this, there must be prima facie material on record to show that tax which is lawfully exigible has not been imposed or that by the application of the relevant statute, on an incorrect or incomplete interpretation a lesser tax than what is just has been imposed. The Bombay High Court further held that the Commissioner can direct further enquiry or fresh determination only after coming to the conclusion that the earlier finding of the Income Tax Officer is erroneous and prejudicial to the interests of the Revenue. Without doing so, the Commissioner does not have jurisdiction to set aside the assessment. In the said case the Income Tax Officer had made enquiries in regard to the nature of the expenditure incurred by the assessee. The Bombay High Court answered the question in favour of the assessee.

24. In contrast to this decision, following are the decisions cited by the Revenue viz., 260 ITR 599 - ASHOK LEYLAND LTD. v. CIT, 277 ITR 346 MANNULAL MATADEEN v. CIT and [2011] 51 DTR (Madras) 228 TTK LIG LIMITED v. ASSISTANT COMMISSIONER OF INCOME TAX. We do not find that these decisions come to the aid of the Revenue for the simple reason that in each of the decision, there is definite finding by this Court as well as by Allahabad High Court for quashing the assessment that the Officer did not do proper enquiry at the time of assessment. Thus this warranted exercise of jurisdiction under Section 263 of the Act. As far as the decisions reported in 33 ITR 546 - GEMINI PICTURES CIRCUIT LIMITED v. COMM. OF INC. TAX and 242 ITR 490 CIT v. SESHASAYEE PAPER AND BOARD LIMITED relied on by the learned standing counsel for the Revenue is concerned, there is no quarrel over the proposition laid down that while assuming jurisdiction under Section 263 of the Act, the Commissioner has to satisfy himself, out of statutory compulsion that as the order passed by the Officer is an erroneous one and prejudicial to the Revenue warranting exercise of power under Section 263 of the Act.

25. A reading of the order of the Tribunal as well as the Commissioner of Income Tax shows that there was no dispute that a proceedings under Section 263 of the Act was initiated as regards exchange fluctuation receipt. We agree with the assessee as well as with the Assessing Authority's view that the receipt was capital in nature. The Commissioner of Income Tax (Appeals) also originally viewed that the receipt as capital only. In the sixth paragraph of the order of the Commissioner of Income Tax, he admitted that the nature of receipt on exchange fluctuation was definitely a capital receipt and the profits and gain of the business was arrived at after reducing a sum of Rs.16,35,77,977/- pertaining to additional income derived on account of exchange fluctuation. Having thus agreed with the assessee as well as with the Assessing Officer, the Commissioner of Income Tax however issued a letter dated 21.1.2004 taking the view that the receipt arising on account of exchange fluctuation was revenue in character. There are no reasons indicated as to why he suddenly shifted his stand as regards the character of the receipt from capital to revenue.

26. Leaving this aside, the fact remains that there is no proper initiation of proceedings under Section 263 of the Act and there are no grounds for shifting the stand of the Commissioner which are different from the one which prompted him to initiate proceedings under Section 263 of the Act. Even though learned standing counsel for the Revenue submitted that the said letter dated 21.1.2004 should be construed as a second show cause notice, as pointed out by the Tribunal in its order, there was nothing on record to show that the letter was in continuation of proceedings already initiated under Section 263 of the Act and the letter was not signed by the Commissioner and the same was signed by some other Officer on his behalf and it was only a letter and not a show cause notice. Thus, apart from the fact that there is no specific grounds raised on this aspect, there being no challenge to the order of the Tribunal by the Revenue, we have no hesitation in applying the decision of the Apex Court referred to above to the facts herein that there are no materials to show that as to how the order of the Officer was erroneous to become prejudicial to the Revenue to initiate jurisdiction under Section 263 of the Act.

27. As regards the merits on the character of the receipt as capital in nature, we agree with the Tribunal's view and the submission made by learned senior counsel for the assessee placing reliance on the decision reported in 116 ITR 1 SUTLEJ COTTON MILLS LIMITED v. CIT as well as in 174 ITR 11 EID PARRY LIMITED v. CIT., As far as this aspect is concerned, a perusal of the order of the Commissioner of Income Tax shows that evidently receipt of Rs.69,44,440/- related to the issue of global depository shares by the assessee. The said shares were issued for widening its capital base. The Commissioner pointed out that printed prospectus showed that the object of issuance was with reference to the establishment of offshore software development centre at Chennai. The remainder of the net proceeds was to be used for working capital and for other general corporate purposes. On the deposit on account of exchange fluctuation, the assessee received further sum. The fact remains what was remitted was equivalent to what was received in US dollars. Thus, the receipt on account of exchange fluctuation being related to the money received on capital issue, rightly the assessee contended that the receipt was only capital in nature. In the decision reported in 174 ITR 11 EID PARRY LIMITED v. CIT., this Court pointed out on account of exchange fluctuation, if the assessee receives further money, the same represented capital receipt. Considering the fact that the surplus amount which arose was on account of the exchange fluctuation on the money received on capital account and not on account of any transaction by the assessee, as a trading asset or as part of circulating capital, this Court held that the surplus amount arising on account of exchange fluctuation has to be treated as capital receipt. In the decision reported in 337 ITR 21 CIT v. JAGATJIT INDUSTRIES LIMITED, the Delhi High Court considered the similar situation. Referring to decision reported in 116 ITR 1 SUTLEJ COTTON MILLS LIMITED v. CIT it held that for the purpose of determination of the character of the receipt, one has to know whether the amount was held by the

assessee on capital account or in any other account. Thus receipts on account of exchange fluctuation on the money held on the allotment of shares has to be held as capital only. The Delhi High Court pointed out that the money was received on allotment of shares by way of GDR and the amount was collected in US Dollars. The gain on account of exchange fluctuation was attributable to the share capital and such gain on capital account. Referring to the fact that 21% of the gain was taken as revenue receipt, since the same was utilised for general corporate uses, the Delhi High Court held that the entire money collected in foreign exchange represented share capital. Thus the use of this share capital, ie. how this money is to be utilised, would be of no consequence. It pointed out that even if money is raised by issuance of equity shares domestically, the money thus collected as share capital is to be treated as capital receipt. Merely because part of the share capital is used as a working capital, the character of the receipt would not become a revenue receipt. Thus, 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, hence is only capital receipts and 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.

28. We are in respectful agreement with the judgment of the Delhi High Court 337 ITR 21 CIT v. JAGATJIT INDUSTRIES LIMITED, which in turn had applied the decision of the Apex Court. In the circumstances, going by the reasoning of the Tribunal, quite apart from the jurisdictional aspect, we have no hesitation in accepting the conclusion arrived at by the Tribunal that the character of the receipt on account of exchange fluctuation is nothing but capital and hence, we do not have any hesitation in rejecting the first question of law.

29. As far as the Employees Stock Option Plan is concerned, as rightly pointed out by the Tribunal, the assessee had to follow SEBI direction and by following such direction, the assessee claimed the ascertained amount as liability for deduction. We do not find that there exists any error to disturb the order of the Tribunal and in turn the Assessing Authority. In the circumstances, we agree with the submission of learned senior counsel appearing for the assessee in this regard by upholding the order of the Tribunal.

30. As regards question Nos 3 and 4, in the light of the order passed above, we do not think that there exists any necessity to decide on the question as to whether the Commissioner under Section 263 of the Act could pass order partially modifying or enhancing or cancelling the assessment and directing investigation.

31. In the circumstances, without expressing any opinion on the question Nos. 3 and 4, holding that the view expressed by the Tribunal cannot be taken as precedent in future, to have binding effect, we dismissed the Revenue's appeal, thereby confirm the order of the Tribunal. No costs.

To

1. Commissioner of Income Tax - III, Chennai
2. Income Tax Appellate Tribunal, Madras 'B' Bench

CHITRA VENKATARAMAN J.
and
K.RAVICHANDRABAABU J.