

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 770 of 2007

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI

and

HONOURABLE MR.JUSTICE K.J.THAKER

- =====
- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?
- =====

TORRENT PHARMACETICALS LIMITED....Appellant(s)

Versus

ASSISTANT COMMISSIONER OF INCOME TAX....Opponent(s)

Appearance:

MR SN SOPARKAR, SR. ADVOCATE, with MR BS SOPARKAR, MRS SWATI SOPARKAR, ADVOCATE for the Appellant(s) No. 1

MR NITIN K MEHTA, ADVOCATE for the Opponent(s) No. 1

CORAM:

HONOURABLE MR.JUSTICE KS JHAVERI

and

HONOURABLE MR.JUSTICE K.J.THAKER

Date : 22/12/2014

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. This is an appeal by the appellant- assessee, challenging the order of the learned

ITAT, Ahmedabad Bench 'C', Ahmedabad ('the Tribunal, for short), Dated : 29.12.2006, rendered in ITA No. 856/Ahd/1999 for the A.Y.1994-95, whereby, the Tribunal partly allowed the appeals filed by the assessee.

2. The brief facts of the case are that the assessee filed its return of income for the A.Y.-1994-95 on 30.11.1994, declaring his total income at Rs.7,36,21,130/-. However, the respondent-Revenue assessed the income of the assessee at Rs.21,18,68,970/- vide its order dated 20.03.1997. The assessee challenged the same before the learned CIT(A), which, partly allowed the same. It, however, appears that as the assessee was not satisfied with the same, it carried the matter before the Tribunal by filing two separate appeals, wherein, the Tribunal passed the impugned order. Hence, the present appeal.

3. At the time of admitting this matter, following question of law was framed;

"Whether, in the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that expenditure on the issue of convertible debentures is a capital expenditure?"

4. In connection with the question of law

framed in this Tax Appeal, Mr. Soparkar, learned Sr. Advocate for the appellant-assessee, invited our attention to the decisions of different High Courts, wherein, the questions of laws are answered in favour of the appellant, herein, which are as under;

(1) **"COMMISSIONER OF INCOME-TAX VS. SOUTH INDIA CORPN. (AGENCIES) LTD."**, [2007] 290 ITR 217 (Madras High Court);

(2) **"COMMISSIONER OF INCOME-TAX VS. FIRST LEASING CO. OF INDIA LTD."**, [2008] 304 ITR 67 (Madras High Court);

(3) **"COMMISSIONER OF INCOME-TAX, UDAIPUR VS. SECURE METERS LTD."**, [2010] 321 ITR 611 (Rajasthan High Court);

(4) **"COMMISSIONER OF INCOME-TAX VS. SUKHJIT STARCH & CHEMICALS LTD."**, [2010] 326 ITR 29 (Punjab & Haryana High Court);

(5) **"COMMISSIONER OF INCOME-TAX VS. ITC HOTELS LTD."**, [2011] 334 ITR 109 (Karnataka High Court) ;

(6) **"COMMISSIONER OF INCOME-TAX VS.**

SOUTH INDIA CORPN. (AGENCIES) LTD.,
[2013] 352 ITR 376 (Delhi High Court) ;

5. Mr. Soparkar submitted that in all the aforesaid matters different Courts have taken different views, viz. (i) the Madras High Court in ***"COMMISSIONER OF INCOME-TAX VS. SOUTH INDIA CORPN. (AGENCIES) LTD."*** (Supra) held that the Tribunal was justified in holding that the issue of shares was a future event which may or may not happen, and as in instant case, expenditure incurred was on issue of debenture only, such expenditure was revenue expenditure.

(ii) The Madras High Court ***"COMMISSIONER OF INCOME-TAX VS. FIRST LEASING CO. OF INDIA LTD."***(Supra), held that expenses of issue of debentures are allowable.

(iii) The Rajasthan High Court in ***"COMMISSIONER OF INCOME-TAX, UDAIPUR VS. SECURE METERS LTD."*** (Supra), held that expenses incurred in relation to issue of debentures are allowable as revenue expenditure.

(iv) The Punjab & Haryana High Court in ***"COMMISSIONER OF INCOME-TAX VS. SUKHJIT STARCH & CHEMICALS LTD."***(Supra) that expenditure on issue of debentures was incurred in process of carrying

on business, as raising of funds, itself, is necessary for running the business, and therefore, it is allowable.

(v) In **"COMMISSIONER OF INCOME-TAX VS. ITC HOTELS LTD."**, the Karnataka High Court took a view that expenditure incurred on issue of convertible debentures is liable to be allowed as a revenue expenditure.

(vi) The Delhi High Court in **"COMMISSIONER OF INCOME-TAX VS. ITC HOTELS LTD."** (Supra) held that in order to fall within second exception provided in section 9(1)(vii)(b), source of income, and not source of receipt, should be situated outside India.

6. Mr. Soparkar, therefore, submitted that there is unanimity in the views expressed by the different High Courts on the aforesaid aspect, except, the view of this High Court, which takes contrary view to that of the aforesaid High Courts decisions. He, therefore, requested that this matter be referred to the Larger Bench.

7. Mr. Soparkar, in the alternative, prayed that if the Court is inclined to follow the judgment of this Court, then, he may be given the certificate of fitness so as to enable him to carry the matter before the Hon'ble Apex Court.

8. As against this, Mr. Mehta, learned Advocate for the respondent-revenue, submitted that in Tax Appeal Nos. 481 & 482 of 1999 in the case of **"INCOME TAX OFFICER VS. VXL LTD."**, the Division Bench of this Court (Coram : Hon'ble the Chief Justice K.S. Radhakrishnan, as His Lordship then was, and Hon'ble Mr. Justice, Akil Kureshi) answered the aforesaid question in favour of the Revenue, observing and holding that expenditure incurred by the company in connection with issue of shares with a view to increase its share capital, is directly related to the expansion of the capital base of the company, and is capital expenditure, even though it may incidentally help in the business of the company and in the profit-making, and therefore, the present appeal be dismissed as being without merit.

9. Heard, Mr. Soparkar, learned Sr. Advocate for the assessee, and Mr. Mehta, learned Advocate for the Revenue, at length on the issue involved in this appeal. Having heard them, two things clearly emerge, i.e. firstly, it is no doubt true that, as recorded herein above, there does not appear to be unanimity in the views expressed by the different High Courts on the issue involved in this appeal, and therefore, the submission made by Mr. Soparkar that the matter be referred to the Larger Bench looks attractive, but, for the reason we do not think that the

matter requires to be referred to the larger Bench, as we held that the view taken by this Court does not call for any interference nor is it diametrically opposite to any Supreme Court decision and the same is plausible view.

10. However, if, the decision of the Division Bench of this Court in Tax Appeal Nos. 481 & 482 of 1999, which is heavily relied on by Mr. Mehta, is examined carefully, then, the earlier Division Bench has given careful consideration to the matter and after giving detailed findings has answered the issue in favour of the Revenue by observing as under in Paras-7, 8 and 9;

7. We heard learned Senior Counsel appearing for either side at length. Facts would clearly indicate that assessee company had issued convertible debentures of Rs. 125/each of which Rs. 45/each was to be converted into three shares on 1.7.1983 during the assessment year 1984-85 and had incurred expenses to the tune of Rs. 19,00,925/-. According to the assessee, the expenses incurred are in respect of issuance of convertible debentures. Facts would further clearly indicate that major portion of the convertible debentures was converted into equity shares, and thereby assessing company had got enduring benefit. Debenture under the Company law means a document which either creates or acknowledges a debt. Debentures, wholly secured or unsecured are also used as convertible debentures with

the option of being subsequently converted into shares. Share is a right to a special amount of the Share Capital of a company. Capital can be raised by converting debentures into equity shares. Expenditure incurred by the assessee on conversion of convertible debentures into equity shares would have to be treated as capital expenditure. Normally, in a company there are two kinds of share capital; preferential share capital and equity share capital. Generally, all share capital not falling within the description of preference capital is equity capital. Equity share capital is that part of share capital which confers a right either to the whole or part of any residue of any profits or to the whole or part of any residue of any assets remaining for distribution after satisfying the claims of any other shareholders whose right to participate therein is limited. Equity shareholders are 7. We heard learned Senior Counsel appearing for either side at length. Facts would clearly indicate that assessee company had issued convertible debentures of Rs. 125/each of which Rs. 45/each was to be converted into three shares on 1.7.1983 during the assessment year 1984-85 and had incurred expenses to the tune of Rs. 19,00,925/-. According to the assessee, the expenses incurred are in respect of issuance of convertible debentures. Facts would further clearly indicate that major portion of the convertible debentures was converted into equity shares, and thereby assessing company had got enduring benefit. Debenture

under the Company law means a document which either creates or acknowledges a debt. Debentures, wholly secured or unsecured are also used as convertible debentures with the option of being subsequently converted into shares. Share is a right to a special amount of the Share Capital of a company. Capital can be raised by converting debentures into equity shares. Expenditure incurred by the assessee on conversion of convertible debentures into equity shares would have to be treated as capital expenditure. Normally, in a company there are two kinds of share capital; preferential share capital and equity share capital. Generally, all share capital not falling within the description of preference capital is equity capital. Equity share capital is that part of share capital which confers a right either to the whole or part of any residue of any profits or to the whole or part of any residue of any assets remaining for distribution after satisfying the claims of any other shareholders whose right to participate therein is limited. Equity shareholders are owners of the company, sharing its risks, profits, and losses and having a residual claim on the earnings and assets of a company and are paid their share of the company's profit after all other claims are met, and in the event of liquidation of the company, they share whatever is left of the company after all its creditors have been paid. They enjoy limited liability i.e. liability only to the extent of their share holding and they are only entitled to vote at

the company's meetings, thus controlling the management. If the company prospers, it is the equity shareholder who is the greatest gainer. Therefore, in our view, when the debentures are converted into equity shares, the assessing company has already got enduring benefit and the expenditure incurred by the conversion of equity shares has to be treated as capital expenditure.

8. Apex Court in India Cements Ltd. Vs. CIT, Madras (supra), held that the loan obtained is not an asset or advantage of an enduring nature, but obtaining capital by issuance of shares is different from obtaining loan by debentures. Above referred judgment was followed by the Apex Court in Brooke Bond India Ltd. Vs. CIT (supra) and took the view that expenditure incurred by the company in connection with issue of shares with a view to increase its share capital, is directly related to the expansion of the capital base of the company, and is capital expenditure, even though it may incidentally help in the business of the company and in the profit making.

9. In view of the above position, decisions cited by the learned counsel for the assessee have no application. Facts of the case clearly indicate that portion of the convertible debenture was converted into equity shares and assessee company had got enduring benefits and therefore, the expenditure incurred by the assessee on conversion of convertible debentures into equity shares has to be treated as capital

expenditure. It may be noted that the Assessing Authority disallowed expenditure only to the extent pertaining to the convertible portion of the expenditure which formed part of the capital. As such disallowance made by the Income Tax Officer, which was confirmed by the Commissioner (Appeals) has to be sustained. The question of law raised by the Revenue, though not happily framed, is accordingly answered in the negative in favour of the Revenue and against the assessee. Consequently, appeals are allowed and the order of the Tribunal is set aside. Owners of the company, sharing its risks, profits, and losses and having a residual claim on the earnings and assets of a company and are paid their share of the company's profit after all other claims are met, and in the event of liquidation of the company, they share whatever is left of the company after all its creditors have been paid. They enjoy limited liability i.e. liability only to the extent of their share holding and they are only entitled to vote at the company's meetings, thus controlling the management. If the company prospers, it is the equity shareholder who is the greatest gainer. Therefore, in our view, when the debentures are converted into equity shares, the assessing company has already got enduring benefit and the expenditure incurred by the conversion of equity shares has to be treated as capital expenditure.

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9. In view of the above position, decisions cited by the learned counsel for the assessee have no application. Facts of the case clearly indicate that portion of the convertible debenture was converted into equity shares and assessee company had got enduring benefits and therefore, the expenditure incurred by the assessee on conversion of convertible debentures into equity shares has to be treated as capital expenditure. It may be noted that the Assessing Authority disallowed expenditure only to the extent pertaining to the convertible portion of the expenditure which formed part of the capital. As such disallowance made by the Income Tax Officer, which was confirmed by the Commissioner (Appeals) has to be sustained. The question of law raised by the Revenue, though not happily framed, is accordingly answered in the negative in favour of the Revenue and against the assessee. Consequently, appeals are allowed and the order of

the Tribunal is set aside.

11. Having gone through the aforesaid judgment of the Division Bench of this Court, we do not find that any other view of the matter can be taken than the one taken by the Division Bench of this Court in its decision in Tax Appeal Nos. 481 & 482 of 1999, Dated : 02.07.2009, and therefore, we are of the opinion that the matter does not require to be referred to the Larger Bench and rather same deserves dismissal. However, while doing so we do agree with the submission of Mr. Soparkar that the assessee be given an opportunity to carry the matter before the Apex Court.

12. In the result, present appeal stands **DISMISSED**. However, in view of the fact that there are different views expressed by the different High Courts on the subject-matter of this appeal, we deem it fit to grant **CERTIFICATE** of fitness to the assessee to carry the matter before the Apex Court. No order as to costs.

(K.S.JHAVERI, J.)

(K.J.THAKER, J)

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