

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'F' : NEW DELHI)**

**BEFORE HON'BLE VICE PRESIDENT, SHRI G.D. AGRAWAL
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.2626/Del./2016
(ASSESSMENT YEAR : 2008-09)**

ACIT, Circle,
Haridwar.

vs. M/s. Kirby Building Systems India
(Uttaranchal) Pvt. Ltd.,
Plot No.2, Sector 11, IIE, SIDCUL,
Haridwar.

(PAN : AACCK5926G)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Naveen Agarwal, FCA
REVENUE BY : Shri Surender Pal, Senior DR

Date of Hearing : 12.06.2019

Date of Order : 14.06.2019

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Appellant, ACIT, Circle, Haridwar (hereinafter referred to as the 'Revenue') by filing the present appeal sought to set aside the impugned order dated 01.02.2016 passed by the Commissioner of Income-tax (Appeals), Dehradun qua the assessment year 2008-09 on the grounds inter alia that :-

“The Ld. CIT(A) has erred in law and on facts in deleting addition of Rs.64,04,165/- on account of foreign exchange fluctuation on the ground that the same was a capital receipt because the loan was taken for the purpose of setting of the plant of the assessee company and not for its revenue expenditure,

ignoring the facts of the case and also not considering the fact that the amount of Rs.64,04,165/- was not eligible for deduction U/S 800IC of the Income-tax in the light of Hon'ble Supreme Court decision in the case of Liberty India Vs CIT 183 Taxman 349 (2009) as per which "the income derived from industrial undertaking" has been held to be. eligible for the said deduction and not "the income attributable to industrial undertaking."

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : The assessee is engaged in the manufacture of pre-engineered building having manufacturing facilities at Plot No.2, Sector 11, IIE, SIDCUL, Hardwar. Assessee has filed return of income for the first time claiming deduction under section 80IC of the Income-tax Act, 1961 (for short 'the Act') at Rs.22,19,00,333/- as per audit report in 10CCB. AO made addition of Rs.64,04,165/-/- on account of foreign exchange fluctuation on the ground that the same was capital receipt as the loan was taken for the purpose of setting of plant of the assessee company and not for its revenue expenditure which was not eligible for deduction u/s 80IC.

3. Assessee carried the matter by way of an appeal before the Id. CIT (A) who has deleted the addition by partly allowing the appeal. Feeling aggrieved, the Revenue has come up before the Tribunal by way of filing the present appeal.

4. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and

orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

5. Ld. DR for the Revenue challenging the impugned order passed by the ld. CIT (A) relied upon the assessment order passed by the AO. However, on the other hand, ld. AR for the assessee relied upon the impugned order passed by the ld. CIT (A) and also relied upon the decision of *Hon'ble Supreme Court in CIT vs. Woodward Governor India (P.) Ltd. 312 ITR 254 (SC) and Sutlej Cotton Mills Ltd. vs. CIT 188 ITR 255 (SC)*.

6. Ld. CIT (A) deleted the addition made by the AO on account of foreign exchange fluctuation by returning following findings :-

“6. With regard to the gain on account of foreign exchange fluctuation on ECB Loans, it is observed from the loan agreements furnished before the undersigned that the loan agreement dated 28.02.2006, 30.06.2006 and 12.12.2006 between the assessee and M/s Alghanim Industries (Mauritius) Ltd. have been entered into for the purposes of capital expenditure in setting up the plant for manufacture of pre engineered steel buildings and on account of project cost overrun of this plant and expansion of this plant. Thus, the loan was quite clearly taken on capital account. The Hon'ble Supreme Court has quite clearly laid down in the case of Sutlej Cotton Mills Vs. CIT 116 ITR 1 that the nature of the loss would depend on whether the loss was on account of trading asset or capital asset. It was further observed that if the foreign currency was to be utilized for trading or revenue purposes than the loss from such fluctuation would be a revenue loss but if the amount was held as a capital asset than the loss arising from depreciation would be a capital loss. Further, in the case of CIT Vs. Tata Locomotive & Engineering Ltd. (1996) 60 ITR 0405, the Hon'ble Supreme Court held that where consideration that was received in foreign exchange was retained abroad for the purchase of capital assets, the gain on account of subsequent devaluation of rupee would be a capital accretion. In the case of Union carbide India Ltd. Vs CIT (1994) 116 CTR 0596 the Hon'ble Calcutta High Court held

that where dollar loan was taken for purchase of machinery which is a capital asset, excess liability towards loan on account of devaluation of Indian Rupee was a capital expenditure. On account of the findings of all these judgments it is quite clear that any gain (even if notional) arising on account of restatement of ECB loans for compliance with AS 11, would be a capital receipt because the loan was taken for the purposes of setting up the plant of the assessee company and not for its revenue expenditures. It is seen during the assessment proceedings the AO himself considered the unrealized foreign exchange gain of Rs.6406165/- on account of restatement of ECB loan as a capital receipt. In the circumstances, the AO was required to reduce the cost of the decreased liability from the actual cost of the asset, for various admissible deductions as per the Act. However, he could not include the foreign exchange gain in the total income of the assessee and tax the same. In the circumstances, the addition made in this regard is deleted.”

7. When we examine the findings of Id. CIT (A) in the light of the settled principle of law laid down by Hon'ble Supreme Court in *Sutlej Cotton Mills and CIT vs. Tata Locomotive & Engineering Ltd.* (supra) relied upon by the Id. CIT (A), the ratio of which is when the foreign currency was to be utilized for trading or revenue purposes then the foreign currency fluctuation loss would be treated as revenue loss but, in case, the amount was held as a capital asset then the loss would be treated as capital loss. In the instant case, AO himself treated the unrealized foreign exchange gain of Rs.64,06,165/- on account of restatement of ECB loan as a capital receipt. AT the same time, AO has not disputed accounting method continuously being followed by the assessee. Moreover, in *Woodward Governor India (P.) Ltd.* (supra) case, the Hon'ble Apex Court held that loss suffered by the assessee on account of

foreign exchange itself as on date of balance sheet is an item of expenditure u/s 37(1) of the Act. So, we are of the considered view that Id. CIT (A) has rightly deleted the addition by giving a direction to the AO that he was required to reduce the cost of the decreased liability from the actual cost of the asset for admissible deduction under the Act and the AO was not empowered to include the foreign exchange gain in the total income of the assessee and taxed the same because any gain on account of foreign exchange acquired was capital receipt as the loan was undisputedly taken for the purpose of setting up the plant by the assessee. Moreover, the assessee has not claimed any deduction u/s 80IC on the amount of gain on account of foreign exchange fluctuation. So, finding no illegality or perversity in the impugned order passed by the Id. CIT (A), present appeal filed by the Revenue is dismissed.

Order pronounced in open court on this 14th day of June, 2019.

**Sd/-
(G.D. AGRAWAL)
VICE PRESIDENT**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 14th day of June, 2019
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A), Dehradun.
- 5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.