

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES 'E, 'MUMBAI**

**BEFORE SHRI RAJENDRA, HON'BLE ACCOUNTANT MEMBER AND
SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER**

**ITA No. 8323/MUM/2010
(Asst. Year : 2006-07)**

DCIT-2(3), Room No. 555, Vs. Telecom Investment India Pvt. Ltd.,
Mumbai. Mechant Chambers, 5th Floor,
R.K. Marg, Ballard Estate,
Mumbai.

(Appellant) PAN : AABCT 1955 F
(Respondent)

Assessee by	:	Shri Nageswar Rao – Adv.
Department By	:	Shri N. Sathya Moorthy - DR
Date of hearing	:	21/07/2016.
Date of pronouncement	:	19/10/2016.

ORDER

PER C.N. PRASAD, JUDICIAL MEMBER

This appeal is filed by the Revenue against the order of the Id.CIT(A)-6, Mumbai dated 22/09/2010 for the Assessment Year 2006-07 arising out of the assessment order passed under section 143(3) of the Act.

2. The only grievance of the Revenue in its appeal is that the Id.CIT(A) erred in deleting the addition of Rs. 2,42,50,527/- on account of foreign exchange gain on repayment of loan.

3. Brief facts of the case are that the assessee is engaged in the business of investment and finance, filed its return of income on 30/11/2016 declaring total income of Rs. 2,96,80,630/-. The

assessment was completed on 08/12/2008 under section 143(3) of the Act determining the income of the assessee at Rs. 5,51,46,180/-. While completing the assessment, the Assessing Officer disallowed foreign exchange gain of Rs.2,42,50,527/- and added to the income of the assessee by observing that the assessee has credited this amount to the profit & loss account and this was not offered to tax. He also observed that there is no supporting proof of foreign exchange loan claimed to have been borrowed in earlier years and was invested in shares. Thus, the Assessing Officer treated this foreign exchange gain as 'income from other sources.'

4. On appeal, Id. CIT(A) after obtaining the remand report from the Assessing Officer held that the foreign exchange loans obtained by the assessee were partly utilized towards capital assets, therefore, the difference in foreign exchange rate on repayment of loan during the year under consideration would be treated as capital receipt. Against this order, the Revenue is in appeal before us.

5. Departmental Representative supported the order of the Assessing Officer and submitted that in the course of assessment, nothing was placed on record to suggest that the assessee has obtained foreign exchange loan for making investment in shares. Thus, the Assessing Officer is adjusted in treating the difference in foreign exchange as 'income from other sources.'

6. Authorized Representative of the assessee strongly placed reliance on the order of the Id. CIT(A) and submitted that the assessee obtained loan in foreign exchange for purchase of shares during this year. The Authorized Representative of the assessee further submitted that it is settled legal position that if the foreign exchange liability was on account of capital, corresponding gain/loss would be of capital in nature. He further submitted that in the present case, the assessee had

used borrowed funds for making long term investment into HEL and for repayment of preference share application money to CGP investments. He submitted that utilization of loan being on capital account, any gain arising from such loan would also be on capital gain and accordingly, would not be taxable.

7. We have heard rival submissions and perused the orders of the authorities below. We find that in the course of the assessment proceedings, the Assessing Officer found no proof of foreign exchange loan claimed to have been borrowed for utilization of the same in purchase of shares. Thus, he treated the foreign exchange gain as income from other sources. In the course of appellate proceedings, remand report was called for by the Id. CIT(A) and in the remand report, the Assessing Officer admitted that the loan was obtained for investment in shares. Considering the remand report, Id. CIT(A) held that foreign exchange gain is on account of capital receipt as the investment was made in purchase of shares, hence he partly apportioned the foreign exchange between capital and revenue based on the investment made by the assessee by observing as under:-

"5.7 I have considered the facts, submissions and legal position discussed above by the AR. Earlier, the additional evidence filed by the appellant was admitted during the appellate proceedings after considering the importance the said evidence to the issues on hand and the same was forwarded to the AO for his comments. The report of the AO was also made available to the AR who offered his comments thereon. After considering all these documents, it is noted that out of the said loan of Rs. 83,00,13,900/- obtained in foreign exchange, a sum of Rs. 82 crores was invested as share application money in M/s. Hutchison Max Telecom Ltd. on the same date. Further, it has been confirmed by M/s. Vodafone Essar Ltd (successor t M/s. Hutchison Max Telecom Ltd.) that the appellant invested Rs. 82 crores towards subscription in their equity share capital. This fact has also been confirmed by the AO in his remand report on the additional evidence filed by the appellant. Further, the contention of the appellant that a further sum of Rs. 39,95,685/- was utilized towards repayment of reference shares application money has also been found to be correct. Thus, the foreign exchange loans

were utilized towards 'capital account' to that extent of Rs. 82,39,95,685/- while the remainder amount Rs.60,18,215/- has not been utilized towards capital account. There is merit in the submissions of the AR that the treatment given by the appellant in the books is not the determining factor regarding the taxability or otherwise of a sum. Taking into consideration the legal position brought out by the AR, it is held that the foreign exchange gain due to difference in foreign exchange rate on repayment of loan during the year under consideration would be treated as capital receipt and revenue receipt in the proportion of Rs.82,39,95,685/- (utilized on capital account) vis-a-vis Rs.60,18,215/- (not utilized on capital amount). Hence, this ground is partly allowed."

8. Since, Id. CIT(A) has decided based on the findings of the Assessing Officer in the remand report that the foreign exchange loan was utilized for purchase of shares and therefore it is of capital account, we do not find any valid reason to interfere in holding that the foreign exchange gain due to difference in foreign exchange rate of repayment of loan during the year under consideration should be treated as capital receipt and revenue receipt in the proportion of utilization. Hence, we sustain the order of the Id. CIT(A) and reject the ground of the Revenue.

9. In the result, appeal of the Revenue is dismissed.

Order Pronounced in the open Court on 19th October, 2016

Sd/-
(RAJENDRA)
Accountant Member

sd/-
(C.N. PRASAD)
Judicial Member

Dated : 19th Oct., 2016.

vr/-

Copy to:

1. *The Assessee.*
2. *The Revenue.*
3. *The CIT*
4. *The CIT(A)*
5. *The D.R.*
6. *Guard file.*

By order

//True Copy//

Assistant Registrar
I.T.A.T., Mumbai.