2024:DHC:4574-DB

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

% **Judgment reserved on: 13 May 2024**
Judgment pronounced on: 30 May 2024

\+ W.P.(C) 11155/2023

SANJAY BAWEJA ..... Petitioner
Through: Mr. Tarun Gulati, Sr. Adv. with Mr. Kishore Kumar, Ms. Ankita Prakash & Mr. Mahesh Singh, Advs.

versus

DEPUTY COMMISSIONER OF INCOME TAX
TDS CIRCLE, 77 (1), DELHI & ANR. ..... Respondents
Through: Mr. Prashant Meharchandani, SSC with Mr. Akshat Singh, JSC, Ms. Ritika Vohra & Mr. Utkarsh Kandpal, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

J U D G M E N T

PURUSHAINDRA KUMAR KAURAV, J.

1. The petitioner, *vide* the instant petition, seeks to assail the order dated 15.07.2023 passed under Section 197 of the Income Tax Act, 1961 ["**Act**"], whereby, the Revenue rejected the petitioner's application seeking 'Nil' deduction at source certificate.

2. The brief facts relevant to appreciate the controversy at hand would reveal that the petitioner is an ex-employee of the company namely Flipkart Internet Private Limited **["FIPL"]** which is a wholly-

owned subsidiary of Flipkart Marketplace Private Limited **["FMPL"].** In addition thereto, the FMPL is the wholly-owned subsidiary of Flipkart Pvt. Ltd., Singapore **["FPS"].**

3. In 2012, the FPS rolled out an Employee Stock Option Plan ["**ESOP**"] called as Flipkart Stock Option Plan ["**FSOP**"], wherein, the FPS granted certain stock options to the eligible persons, including employees of its subsidiaries. As per the clauses of FSOP, the petitioner was granted 1,27,552 stock options on and from 01.11.2014 to 31.11.2016 with a vesting schedule of 4 years.

4. On 23.12.2022, FPS announced the disinvestment of its wholly-owned subsidiary called PhonePe. Thereafter, the value of the stock options of FPS fell pursuant to the disinvestment and subsequent remittances to the shareholders of FPS on account of dividend payments, buy-back etc.

5. Consequently, on 21.04.2023, the petitioner received a communication from FPS stating that as a one-time measure, FPS had decided to grant the option holders a payment of USD 43.67 per option as compensation towards loss in the value of the options and it was based on the number of options held by the petitioner as on 23.12.2022. Furthermore, it was also stated that the FPS would be withholding tax on the said compensation.

6. Subsequently, on 29.04.2023, the petitioner preferred an application under Section 197 of the Act seeking a 'Nil' declaration certificate on the deduction of TDS by FPS. On 23.05.2023, the petitioner preferred a revised application under Section 197 of the Act.

7. Thereafter, on 15.07.2023, the Revenue passed the impugned

order rejecting the petitioner's application on the score that the amount received would be in the nature of perquisite under Section 17(2)(vi) of the Act.

8. Aggrieved thereby, the petitioner has invoked the writ jurisdiction of this Court to ventilate his grievance.

9. Mr. Tarun Gulati, learned Senior Counsel, appearing on behalf of the petitioner submitted that the Revenue has misconstrued the one-time payment made on behalf of FPS as perquisite and characterized it as income chargeable to tax under Section 17(2)(vi) of the Act. He argued that ESOPs merely constitute a right, not an obligation to buy the underlying instrument and represent a right to subscribe to the shares of a company. He contended that on vesting, the option holder had acquired an unfettered right to exercise the option and got allotment of shares. He argued that ESOPs are taxable only in two contingencies– *firstly*, when the employee exercises his option and *secondly*, when the shares are sold by an employee. He iterated that in the present case, the stock options were merely held by the petitioner and the same had not been exercised till date.

10. Furthermore, he argued that the one-time voluntary payment made by FPS was not in relation to the employment of the petitioner with FIPL and thus, cannot partake the character of salary which was liable to be taxed under Section 15 of the Act. It is, therefore, submitted that since the payment made by FPS cannot be construed as perquisite, the direction for deduction of TDS cannot be countenanced in law. In order to substantiate his submissions, he placed reliance on the

decisions of **Empire Jute Co. Ltd. v. CIT,**[1] **Shrimant Padmaraje R. Kadambande v. CIT,**[2] **Godrej and Co. v. CIT**[3] and **Empire Jute Co. Ltd. v. CIT** [4]**.**

11. *Per contra*, Mr. Prashant Meherchandani, learned Senior Standing Counsel appearing on behalf of the Revenue, vehemently opposed the submissions. He argued that the present writ petition has become infructuous as the transaction already took place on 31.07.2023. He submitted that proceedings under Section 197 of the Act are not a fact-intensive exercise and rather, it is an administrative exercise and therefore, the AO was not obligated to dive into the matter to determine whether the stock option was exercised with the petitioner or not. He further argued that all the relevant facts pertaining to the FSOP were not produced before the authority earlier. In order to substantiate his arguments, he placed reliance on the decision of this Court in **National Petroleum Construction Co. v. CIT** [5].

12. We have heard the learned counsels appearing on behalf of the parties and perused the record.

13. The short controversy that emerges for resolution in the present case is whether the one-time payment made on behalf of FPS formed a part of salary under Section 17 of the Act or not? The consequential question of taxability of such payment is contingent upon the aforesaid issue and shall be answered as a corollary of the same.

14. For the sake of convenience, the relevant extracts of the order

[1] (1980) 4 SCC 25.
[2] (1992) 3 SCC 432.
[3] 1959 SCC OnLine SC 101.
[4] (1980) 4 SCC 25.
[5] 2019 SCC OnLine Del 12353.

impugned before us are reproduced herein for reference:-

> "After perusal of the facts of the case and the written submissions of the Assessee, following observations are made.
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> 1. The assessee has contended that the amount receivable by him for FPS does not constitute income u/s 2 (24) of the Income Tax Act, 1961. In this regard, it is observed that section 2 (24) of the Act provides an inclusive definition of "Income" and it is not an exhaustive definition. Thus even if a nature of receipt is not specifically mentioned under this section, it may still be includible in the taxable income of the assessee, depending upon the facts of the case.
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> 1. General rule is that every amount received by an assessee is taxable unless it is specifically exempt under any provisions of the Act. The assessee has contended that this receipt is not taxable but he has failed to quote any express provisions of the Income Tax Act under which this receipt would be exempt from tax.
> 1. The assessee has himself stated that M/s FPS intends to withhold full tax on the said payment, which is why he has applied for issuance of a Nil TDS certificate. If the amount receivable by the assessee is not an "income" and not taxable under the Income Tax Act, then why the payer intends to withhold tax on the same. It implies that the payer is satisfied that the payment being made by it is subject to withholding tax. Thus the assessee should have contended before the payer company that this payment would not be subject to withholding tax but interestingly, the assessee has not challenged the deduction of tax at source by the payer but instead he has chosen to request for issuance of a Nil TDS certificate.
>
> 1. The assessee has not been able to satisfactorily prove that the amount receivable by him would be exempt under any express provisions of the Act.
> 1. The assessee has stated that he would be reporting this income as exempt in his ITR. Since the quantum of income sought to claimed as exempt is quite substantial, there is a high probability that this ITR would selected for scrutiny assessment and if the claim of the assessee is not accepted by the assessing officer, it may result in creation of tax demand. Hence issuance of a Nil TDS certificate at this stage would be detrimental to the interest of revenue and recovery of taxes.
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> 1. Section 17 (2) (vi) of the Act states that Perquisite includes

"…the value of any specified security or sweat equity shares allotted or transferred, directly or indirectly, by the employer or former employer , free of cost or at concessional rate to the assessee.." The phrase "directly or indirectly" used in the above clause implies that the amount receivable by the assesse in the instant case would be covered under the purview of "Perquisite", which is included in the salary as per section 17 (1) (iv) of the Act.

Compensation payable for the diminution of the intrinsic value of ESOPs held by an employee including an ex-employee would be in the nature of income, and the same is not specifically exempt under the Act.

The compensation is linked to the vested ESOPs in the instant case. ESOPs result in a taxable perquisite on the allotment of shares equivalent to the fair market value less the exercise price of the shares so allotted under section 17(2)(vi) and is taxable under the head 'Salaries' in hands of the employee or ex-employee, as the case may be. Consequently, the compensation receivable on the said ESOPs, even though from a former employer, directly or indirectly, on account of diminution of fair value of the underlying shares, should also have the same characterization and tax treatment and hence, in my view, is taxable under the head 'Salaries'. It also does not matter whether the said amount is being paid by the former employer directly to the assessee or through any of its group companies indirectly and the amounts would remain taxable as salary. Further, this amount would have been taxable as salary if the assessee would have been in current employment with the payer or its group companies and hence, the amounts would remain taxable as salary even if the assessee is no longer employed with the payer or its group companies. Having come to the conclusion that the compensation should be chargeable to tax under the head 'Salaries', provisions of section 192 of the Act would apply and accordingly, the employer is under an obligation to deduct tax while making the payment of the compensation to the Assessee. The taxability under the other heads of income is not relevant since the same is taxable under the head 'Salaries'.

In view of the above discussion, it is proposed that, if approved, the application of the Assessee for issuance of a Nil TDS certificate may be rejected."

15. A bare perusal of the impugned order would reveal that the Revenue characterized the one-time payment made by FPS to the

petitioner under the head of a perquisite, as defined in Section 17(2)(vi) of the Act, on the ground that the payment received was linked to ESOPs as a form of compensation for diminution of the fair market value of stocks.

16. At the outset, it is relevant to point out that this Court *vide* order dated 23.08.2023 directed the petitioner to file an affidavit apprising about the number of options held by him as on the record date. Pursuant to the said order, the petitioner filed an affidavit stating that out of the total number of shares i.e., 1,27,552 allotted to him, he holds 33,482 stock options as on the record date of 23.12.2022. The detailed calculation as appended in the tabular chart is reproduced herein for reference:-

S No.	**Particulars**	**No. of stock options/compensation**
i.	Options granted	**1,27,552**
ii.	Vested options (25% of the total options granted) after 1 year i.e.01.11.2015	[25% of (i)] = **31,888**
iii.	Remaining 75% stock options to be vested in next 36 months	[(i)-(ii)] = **95,664** 95,664/36= (2657/ month)
iv.	Vested Options upto 31.10.2016	(2657x12 months) = **31,884**
v.	Total vested options upto 31.10.2016	[(i)+(v)] = **63,772**
vi.	Cancelled options on account of termination of employment on 31.10.2016	[(i)-(v)] = **63,780**

vii.	Options repurchased by Walmart in the year 2017 (25% of the total vested stock options)	[25% of (v)] = **15943**
viii.	Remaining vested stock options after repurchase by walmart	[(v)-(vi)] = **47,829**
ix.	Options repurchased by Walmart in the year 2018 (30% of the total remaining vested stock options)	[30% of (viii)] = **14,347**
x.	Balance as on record date	[(viii)-(ix)] = **33482**
xi.	Compensation	[(x) x Compensation per stock options x USD conversion rate] 33,482 x 43.67 x 82 = Rs. 11,98,97,033/-

17. As the facts of the matter suggest, undisputedly, the petitioner has not exercised his vested right with respect to stock option under FSOP till date, which signifies that the right of holding the stocks under his name had not been exercised. Therefore, the moot question is only limited to the extent whether the one-time voluntary payment made on behalf of FPS to the petitioner can be pegged as perquisite under Section 17(2)(vi) of the Act.

18. It is germane to point out that the perquisites, as defined in Section 17(2) of the Act, constitute a list of benefits or advantages, which are made taxable and are incidental to employment and received in excess of salary. Furthermore, as per Section 17(2)(vi) of the Act, perquisite refers to value of any specified security or sweat equity

shares allotted or transferred, directly or indirectly, by the employer, or former employer, free of cost or at concessional rate to the petitioner. The explanation appended to Section 17(2)(vi) of the Act also clarifies that the value of any specified security shall be the difference in the amount of fair market value of the specified security on the date on which the option was exercised and the actual amount paid by the petitioner. For the sake of convenience, Section 17(2)(vi) of the Act and the explanation thereto is reproduced herein for reference:-

> 17. **"Salary", "perquisite" and "profits in lieu of salary" defined.—**For the purposes of Sections 15 and 16 and of this section.—
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> ***
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> (2) "Perquisite" includes—
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> ***
>
> [(vi) the value of any specified security or sweat equity shares allotted or transferred, directly or indirectly, by the employer, or former employer, free of cost or at concessional rate to the assessee.
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> Explanation.— For the purposes of this sub-clause,—
>
> (a) "specified security" means the securities as defined in clause (h) of Section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and, where employees' stock option has been granted under any plan or scheme therefor, includes the securities offered under such plan or scheme;
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> (b) "sweat equity shares" means equity shares issued by a company to its employees or directors at a discount or for consideration other than cash for providing know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called;
>
> (c) the value of any specified security or sweat equity shares shall be the fair market value of the specified security or sweat equity shares, as the case may be, on the date on which the option is exercised by the assessee as reduced by the amount actually paid by, or recovered from the assessee in respect of such security or shares;
>
> (d) "fair market value" means the value determined in accordance with the method as may be prescribed;

> (e) "option" means a right but not an obligation granted to an employee to apply for the specified security or sweat equity shares at a predetermined price"

19. At this juncture, it is imperative to point out that the determination as to whether a particular receipt would tantamount to a capital receipt or revenue receipt is dependent upon the factual scenario of a particular case. This position was also fructified in the decision of **CIT v. Saurashtra Cement Ltd.**[6] The relevant paragraphs of the said decision are reproduced herein for reference:-

> "14. The question whether a particular receipt is capital or revenue has frequently engaged the attention of the courts but it has not been possible to lay down any single criterion as decisive in the determination of the question. Time and again, it has been reiterated that answer to the question must ultimately depend on the facts of a particular case, and the authorities bearing on the question are valuable only as indicating the matters that have to be taken into account in reaching a conclusion.
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> 15. In Rai Bahadur Jairam Valji [AIR 1959 SC 291 : (1959) 35 ITR 148] it was observed thus: (AIR pp. 292-93, para 2)
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> "2. The question whether a receipt is capital or income has frequently come up for determination before the courts. Various rules have been enunciated as furnishing a key to the solution of the question, but as often observed by the highest authorities, it is not possible to lay down any single test as infallible or any single criterion as decisive in the determination of the question, which must ultimately depend on the facts of the particular case, and the authorities bearing on the question are valuable only as indicating the matters that have to be taken into account in reaching a decision. [Vide Van Den Berghs Ltd. (Inspector of Taxes) v. Clark [1935 AC 431 : (1935) 3 ITR (Eng Cas) 17 (HL)] .] That, however, is not to say that the question is one of fact, for, as observed in Davies (Inspector of Taxes) v. Shell Co. of China Ltd. [(1951) 32 TC 133 : (1952) 22 ITR Supp 1 (CA)] :
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> 'these questions between capital and income, trading profit

[6] (2010) 11 SCC 84.

> or no trading profit, are questions which, though they may depend no doubt to a very great extent on the particular facts of each case, do involve a conclusion of law to be drawn from those facts.' "

16. In Kettlewell Bullen and Co. Ltd. [AIR 1965 SC 65] dealing with the question whether compensation received by an agent for premature determination of the contract of agency is a capital or a revenue receipt, echoing the views expressed in Rai Bahadur Jairam Valji [AIR 1959 SC 291 : (1959) 35 ITR 148] and analysing numerous judgments on the point, this Court laid down the following broad principle, which may be taken into account in reaching a decision on the issue: (Kettlewell Bullen and Co. Ltd. case [AIR 1965 SC 65] , AIR p. 79, para 36)

> "36. … Where on a consideration of the circumstances, payment is made to compensate a person for cancellation of a contract which does not affect the trading structure of his business, nor deprive him of what in substance is his source of income, termination of the contract being a normal incident of the business, and such cancellation leaves him free to carry on his trade (freed from the contract terminated) the receipt is revenue: where by the cancellation of an agency the trading structure of the assessee is impaired, or such cancellation results in loss of what may be regarded as the source of the assessee's income, the payment made to compensate for cancellation of the agency agreement is normally a capital receipt."

20. As per the understanding of the Revenue, the said one-time voluntary payment at the discretion of the management of FPS shall be pegged under the head of perquisite as per Section 17(2)(vi) of the Act. It is thus pertinent to point out the observations made by the Supreme Court in the case of ***Shrimant Padmaraje R. Kadambande*** *(supra)*, wherein one-time voluntary cash allowance was given to the assessee and the Court held that such monetary receipts, rather it was a capital receipt and thus, not liable to tax. The relevant paragraphs of the said decision are reproduced as under:-

> "15. A case similar to the one on hand is H.H. Maharani Shri

Vijaykuverba Saheb of Morvi [(1963) 49 ITR 594 (Bom)] wherein the High Court held that a voluntary payment without consideration cannot fall in the category of income. The position here is exactly the same. There is no compulsion on the part of the Government to give any allowance. It is purely discretionary. It cannot be got over by saying that after the order is passed the assessee gets a right. That has nothing to do in determining the question.

16. In S.R.Y. Sivaram Prasad Bahadur [(1971) 3 SCC 726, 732 : (1971) 82 ITR 527, 535] in no uncertain terms it was laid down that it is the quality of the payment that is decisive of the character of the payment and not the method of payment or its measure which will make it fall within the category of capital or revenue. Undoubtedly, the High Court had not kept these important aspects before rendering the decision whether it is a revenue receipt or not. The judgment of the High Court requires to be interfered with.

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27. Therefore, in this case, the maintenance allowance was qualified by the statute and it was a nomenclature peculiarly suited to payments of the nature of income. The learned counsel for the Revenue would state if the payments in this case do not constitute windfall and the right to payment of these cash allowances in the case on hand, could be enforced in a civil court, as laid down in this ruling, there is no other way than to hold this to be an income. But, as we have pointed out just now, maintenance allowance is qualified by statute unlike the present case which is purely a discretionary payment. It is no use contending as also observed by the High Court that after the order is passed an enforceable right arises. On the contrary the question would be whether the statute gives an enforceable right. We think, in such of those cases falling under clause (d) of the proviso to Section 15(1) of the Act, no statutory right is created. This is unlike those cases falling under clauses (i), (ii) and (iii) of sub-section (1) of Section 15. These constitute different clauses as has already been pointed out by us. The fact that the assessee has applied for a grant for maintenance, nor again, the periodicity of payment, would be conclusive as we will demonstrate later.

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35. There is no compulsion on the part of the Government to make the payment nor is the Government obliged to make the payment since it is purely discretionary. A case similar to the one on hand is H.H. Maharani Shri Vijaykuverba Saheb of Morvi [(1963) 49 ITR 594 (Bom)] head-note of which is extracted:

> "A voluntary payment which is made entirely without consideration and is not traceable to any source which a practical man may regard as a real source of his income but depends entirely on the whim of the donor cannot fall in the category of income.
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> The ruler of a native State abdicated in favour of his son in January, 1948. From April, 1949, onwards his son paid him a monthly allowance. The allowance was not paid under any custom or usage. The allowance could not be regarded as maintenance allowance, as the assessee possessed a large fortune.
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> Held, that as the payments were commenced long after the ruler had abdicated, they were not made under a legal or contractual obligation. As the allowances were not also made under a custom or usage or as a maintenance allowance, they were not assessable."

> 36. The position is exactly the same. The payment made by the Government is undoubtedly voluntary. However, it has no origin in what might be called the real source of income. No doubt Section 15(1) proviso clause (d) enables the applicant to seek payment but that is far from saying that it is a source. Therefore, it cannot afford any foundation for such a source. Further, it is a compassionate payment, for such length of period as the Government may, in its discretion, order.
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> 39. As a result of the above discussion, we hold that the amounts received by the assessee during the financial years in question have to be regarded as capital receipts and, therefore, are not income within the meaning of Section 2(24) of the Income Tax Act. Accordingly, we set aside the judgment of the High Court and allow the appeals with no order as to costs."

21. It is also significant to place reliance on the decision of the Supreme Court in the case of ***Godrej and Company*** *(supra*), wherein, one-time payment was given to an assessee company in lieu of a change in contractual terms between the assessee company and the management company. In the light of such facts, such monetary

receipts were also clubbed under the head of capital receipt and not under the revenue receipts and thus, not liable to tax. The relevant paragraph no. 8 of the said decision is reproduced herein for reference:-

> "8. This sum of Rs 7,50,000 has undoubtedly not been paid as compensation for the termination or cancellation of an ordinary business contract which is a part of the stock-in-trade of the assessee and cannot, therefore, be regarded as income, as the amounts received by the assessee in CIT and Excess Profits Tax v. South India Pictures Ltd [(1956) SCR 223, 228] and in CIT v. Rai Bahadur Jairam Valji [(1959) 35 ITR 148 : (1959) SCR Supp 110] had been held to be. Nor can this amount be said to have been paid as compensation for the cancellation or cessation of the managing agency of the assessee firm, for the managing agency continued and, therefore, the decision of the Judicial Committee of the Privy Council in CIT v. Shaw Wallace and Co. [(1932) LR 59 IA 206] cannot be invoked. It is, however, urged that for the purpose of rendering the sum paid as compensation to be regarded as a capital receipt, it is not necessary that the entire managing agency should be acquired. If the amount was paid as the price for the sterilisation of even a part of a capital asset which is the framework or entire structure of the assessee's profit making apparatus, then the amount must also be regarded as a capital receipt, for, as said by Lord Wrenbury in Glenboig Union Fireclay Co. Ltd. v. IRC [(1922) 12 TC 427] "what is true of the whole must be equally true of part"— a principle which has been adopted by this Court in CIT v. Vazir Sultan and Sons [Civil Appeal No. 346 of 1957, decided on March 20, 1959;(1959) 36 ITR 175] . The learned Attorney-General, however, contends that this case is not governed by the decisions in Shaw Wallace's case [(1932) LR 59 IA 206] or Vazir Sultan and Son case [Civil Appeal No. 346 of 1957, decided on March 20, 1959;(1959) 36 ITR 175] because in the present case there was no acquisition of the entire managing agency business or sterilisation of any part of the capital asset and the business structure or the profit-making apparatus, namely, the managing agency, remains unaffected. There is no destruction or sterilisation of any part of the business structure. The amount in question was paid in consideration of the assessee firm agreeing to continue to serve as the managing agent on a reduced remuneration and, therefore, it bears the same character as that of remuneration and, therefore, a revenue receipt. We do not accept this contention. If this argument were correct, then, on a parity of reasoning, our decision in Vazir Sultan and Sons case [Civil Appeal No. 346 of 1957, decided on March 20, 1959;(1959) 36 ITR 175] would have been different, for, there also the agency continued as before except that the territories

were reduced to their original extent. In that case also the agent agreed to continue to serve with the extent of his field of activity limited to the State of Hyderabad only. To regard such an agreement as a mere variation in the terms of remuneration is only to take a superficial view of the matter and to ignore the effect of such variation on what has been called the profit-making apparatus. A managing agency yielding a remuneration calculated at the rate of 20 per cent of the profits is not the same thing as a managing agency yielding a remuneration calculated at 10 per cent of the profits. There is a distinct deterioration in the character and quality of the managing agency viewed as a profit-making apparatus and this deterioration is of an enduring kind. The reduced remuneration having been separately provided, the sum of Rs 7,50,000 must be regarded as having been paid as compensation for this injury to or deterioration of the managing agency just as the amounts paid in Glenboig case [(1922) 12 TC 427] or Vazir Sultan case [Civil Appeal No. 346 of 1957, decided on March 20, 1959;(1959) 36 ITR 175] were held to be. This is also very nearly covered by the majority decision of the English House of Lords in Hunter v. Dewhurst [(1932) 16 TC 605] . It is true that in the later English cases of Prendergast v. Cameron [(1940) 23 TC 122] and Wales Tilley [(1943) 25 TC 136] the decision in Hunter v. Dewharst [(1932) 16 TC 605] was distinguished as being of an exceptional and special nature but those later decisions turned on the words used in Rule 1 of Schedule E. to the English Act. Further, they were cases of continuation of personal service on reduced remuneration simpliciter and not of acquisition, wholly or in part, of any managing agency viewed as a profit-making apparatus and consequently the effect of the agreements in question under which the payment was made upon the profit making apparatus, did not come under consideration at all. On a construction of the agreements it was held that the payments made were simply remuneration paid in advance representing the difference between the higher rate of remuneration and the reduced remuneration and as such a revenue receipt. The question of the character of the payment made for compensation for the acquisition, wholly or in part, of any managing agency or injury to or deterioration of the managing agency as a profit-making apparatus is covered by our decisions hereinbefore referred to. In the light of those decisions the sum of Rs 7,50,000 was paid and received not to make up the difference between the higher remuneration and the reduced remuneration but was in reality paid and received as compensation for releasing the company from the onerous terms as to remuneration as it was in terms expressed to be. In other words, so far as the managed company was concerned, it was paid for securing immunity from the liability to pay higher remuneration to the assessee firm for the rest of the term of the

> managing agency and, therefore, a capital expenditure and so far as the assessee firm was concerned, it was received as compensation for the deterioration or injury to the managing agency by reason of the release of its rights to get higher remuneration and, therefore, a capital receipt within the decisions of this Court in the earlier cases referred to above."

22. It is also apposite to deal with the contention of the Revenue that the facts pertaining to the exercise of the options held by the petitioner were not apprised to the AO in the proceedings referrable to Section 197 of the Act. On the said aspect, it was contended that in such a scenario, only the facts which were before the AO should be kept in mind while deciding the present controversy. However, a bare perusal of the application dated 29.04.2023 made by the petitioner under Section 197 of the Act, which has been appended in the petition as *Annexure-P4*, would reveal that the petitioner had duly placed the pertinent details alluding to FSOP.

23. Furthermore, the record available before us would reflect that the AO had never enquired or asked for clarification from the petitioner regarding any other significant details pertaining to FSOP. In addition thereto, the reliance placed by the Revenue in the case of ***National Petroleum Construction Co*** *(supra)* is also misplaced as in that case, the issue pertained to the determination of permanent establishment in Section 197 proceedings. However, in the present case, the relevant facts pertaining to the ESOP and details alluding to one-time voluntary payment made by FPS to the petitioner were placed on the desk of the concerned AO, while making an application under Section 197 of the Act.

24. Interestingly, the reasoning appended in the impugned order also hinges upon the fact that since FPS intended to deduct tax before

making the payment, therefore, the amount was liable to be taxed. It is pertinent to note that the manner or nature of payment, as comprehensible by the deductor, would not determine the taxability of such transaction. It is the quality of payment that determines its character and not the mode of payment. Unless the charging Section of the Act elucidates any monetary receipt as chargeable to tax, the Revenue cannot proceed to charge such receipt as revenue receipt and that too on the basis of the manner or nature of payment, as comprehensible by the deductor. Such a position was also settled in the decision of the Supreme Court in the case of ***Empire Jute Co. Ltd.*** *(supra)*, wherein, it was held as under:-

> "4. Now an expenditure incurred by an assessee can qualify for deduction under Section 10(2)(xv) only if it is incurred wholly and exclusively for the purpose of his business, but even if it fulfils this requirement, it is not enough; it must further be of revenue as distinguished from capital nature. Here in the present case it was not contended on behalf of the Revenue that the sum of Rs 2,03,255 was not laid out wholly and exclusively for the purpose of the assessee's business but the only argument was and this argument found favour with the High Court, that it represented capital expenditure and was hence not deductible under Section 10(2)(xv). The sole question which therefore arises for determination in the appeal is whether the sum of Rs 2,03,255 paid by the assessee represented capital expenditure or revenue expenditure. We shall have to examine this question on principle but before we do so, we must refer to the decision of this Court in Maheshwari Devi Jute Mills case [AIR 1965 SC 1974 : (1965) 3 SCR 765 : (1965) 57 ITR 36] since that is the decision which weighed heavily with the High Court, in fact, compelled it to negative the claim of the assessee and hold the expenditure to be on capital account. That was a converse case where the question was whether an amount received by the assessee for sale of loom hours was in the nature of capital receipt or revenue receipt. The view taken by this Court was that it was in the nature of capital receipt and hence not taxable. It was contended on behalf of the Revenue, relying on this decision, that just as the amount realised for sale of loom hours was held to be capital receipt, so also the amount paid for purchase of loom hours must be held to be of capital nature. But this argument suffers from a double fallacy.

> **5. In the first place it is not a universally true proposition that what may be capital receipt in the hands of the payee must necessarily be capital expenditure in relation to the payer. The fact that a certain payment constitutes income or capital receipt in the hands of the recipient is not material in determining whether the payment is revenue or capital disbursement qua the payer.** It was felicitously pointed out by Macnaghten, J., in Racecourse Betting Control Board v. Wild [22 TC 182 : (1938) 4 All ER 487] that a "payment may be a revenue payment from the point of view of the payer and a capital payment from the point of view of the receiver and vice versa". Therefore, the decision in Maheshwari Devi Jute Mills case [AIR 1965 SC 1974 : (1965) 3 SCR 765 : (1965) 57 ITR 36] **cannot be regarded as an authority for the proposition that payment made by an assessee for purchase of loom hours would be capital expenditure. Whether it is capital expenditure or revenue expenditure would have to be determined having regard to the nature of the transaction and other relevant factors."**
>
> [Emphasis supplied]

25. Pertinently, as per Section 17(2)(vi) of the Act, the perquisites include value of any specified security allotted or transferred, directly or indirectly, by the employer, or former employer, free of cost or at concessional rate to the petitioner. The most crucial ingredient of this inclusive definition is - determinable value of any specified security received by the employee by way of transfer/allotment, directly or indirectly, by the employer. As per Explanation (c) to Section 17(2)(vi) of the Act, the value of specified security could only be calculated once the option is exercised. A literal understanding of the provision would provide that the value of specified securities or sweat equity shares is dependent upon the exercise of option by the petitioner. Therefore, for an income to be included in the inclusive definition of "perquisite", it is essential that it is generated from the exercise of options, by the employee. The facts of the present case suggest that the petitioner has

not exercised his options under the FSOP till date. Under the facts of the present case, the stock options were merely held by the petitioner and the same have not been exercised till date and thus, they do not constitute income chargeable to tax in the hands of the petitioner as none of the contingencies specified in Section 17(2)(vi) of the Act have occurred.

26. Moreover, the compensation was a voluntary payment and not transfer by way of any obligation. Notably, the present is not a case where the option holder has exercised his right. Rather, the facts suggest that the petitioner has not exercised his options under the FSOP till date. It appears that due to the disinvestment of the PhonePe business from FPS, the Board of Directors of FPS had decided to provide a one-time voluntary payment to all the option holders pursuant to FSOP. It is imperative to point out that the management proceeded by noting that there was no legal or contractual right under FSOP to provide compensation for loss in current value or any potential losses on account of future accretion to the ESOP holders. It was further noted that FPS, on its own discretion, has estimated and decided to pay USD 43.67 as compensation for each stock option as held on the record date. The relevant extract of the said communication dated 21.04.2023 is reproduced herein for reference:-

> "Dear All,
> As you are aware, the Board of Directors (BoD) of Flipkart Private Limited, publicly announced the complete separation of PhonePe business, by selling off its entire shareholding, in Dec 2022. With this announcement, the value of ESOPs granted to all stakeholders (including present and former employees in our subsidiaries in India, Israel, US, Singapore, Saudi Arabia, Egypt, UAE, China etc.) will drop, along with loss of opportunity to share in future accretion in the value of Phonepe

shares. **While there is no legal or contractual right under FSOP 2012, to provide compensation for loss in current value or any potential losses on account of future accretion to our ESOP holders, the BoD on its own discretion, has decided to pay US$43.67 as compensation for each ESOP subject to applicable withholding taxes and other tax rules in respective countries of various ESOP holders**"

27. Therefore, it is elementary to highlight that the payment in question was not linked to the employment or business of the petitioner, rather it was a one-time voluntary payment to all the option holders of FSOP, pursuant to the disinvestment of PhonePe business from FPS. In the present case, even though the right to exercise an option was available to the petitioner, the amount received by him did not arise out of any transfer of stock options by the employer. Rather, it was a one-time voluntary payment not arising out of any statutory or contractual obligation.

28. Thus, the reasoning appended to the impugned order, holding that the amount in question tantamount to perquisite under Section 17 (2)(vi) of the Act, cannot be countenanced in law, as the stock options were not exercised by the petitioner and the amount in question was one-time voluntary payment made by FPS to all option holders in lieu of disinvestment of PhonePe business.

29. Accordingly, we set aside the impugned order dated 15.07.2023. We, however, note that since the transaction already took place on 31.07.2023, we, accordingly, accord liberty to the petitioner to file an application for refund of TDS amount before the Revenue. It is further directed to the Revenue to consider the application of the petitioner in view of the observations made hereinabove and as per extant

regulations.

30. In view of the aforesaid, the writ petition is allowed in the above terms and disposed of, alongwith pending applications, if any.

PURUSHAINDRA KUMAR KAURAV, J.

YASHWANT VARMA, J.

MAY 30, 2024/MJ