

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**ITA No.187 of 2013 (O&M)
Date of decision: 23.1.2019**

Commissioner of Income Tax, Jalandhar I, Jalandhar

.....Appellant

Vs.

M/s Max India Limited

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL**

Present: Mr. Vivek Sethi, Senior Standing Counsel for the appellant.
Mr. Ajay Vohra, Senior Advocate with
Mr. Gaurav Jain, Advocate for the respondent.

Ajay Kumar Mittal,J.

1. This order shall dispose of ITA Nos. 187, 189 and 191 of 2013 as learned counsel for the parties are agreed that the issue involved in all these appeals is identical. However, the facts are being extracted from ITA No.187 of 2013.

2. ITA No.187 of 2013 has been preferred by the revenue under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 8.3.2013 (Annexure-3) passed by the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar (hereinafter referred to as "the Tribunal") in ITA No.151/(Asr)/2011, for the assessment year 2002-03 claiming following substantial questions of law:-

“a) Whether on the facts of the case, the ITAT was justified in law in holding that payment of compete fee is a revenue expenditure and an allowable deduction?

- b) Whether on the facts of the case, the ITAT was justified in law and in facts in allowing various expenses incurred for starting entirely different line such as health care division, Maxxon etc. as revenue expenditure?
- c) Whether the ITAT was justified in law and in facts in holding that various expenses incurred for expansion of business are revenue expenditure ignoring the fact that the same has been incurred on projects that were subsequently either shelved or were an entirely new line?
- d) Whether the ITAT was justified in law and in facts in holding that the assessee is at liberty to convert its stock into investment ignoring the wholistic picture where in the end result of the conversion is to escape provisions of explanation to section 73 of the Income Tax Act?
- e) Whether the ITAT was justified in law and in facts in not considering that the selective conversion of shares from stock in trade to investment has resulted in undue benefit to the assessee which falls within the purview of tax avoidance through colourable devices which has already been held to be not acceptable by the Hon'ble Supreme Court in the McDowell case?
- f) Whether the ITAT was justified in law and in facts in allowing the subsequent losses on the sale of investment as regular losses, ignoring the issue that the conversions were merely colourable devices to escape the provisions of explanation to section 73 and avoid tax?
- g) Whether the ITAT was justified in law and in facts holding that signing of negative covenant for not carrying out a speciality business does not amount to transfer of right to carry on business, the consideration of which is liable to be taxed as capital gain?"

3. In ITA No.189 of 2013, for the assessment year 2003-04, the

following additional question has been claimed:-

“Whether on the facts of the case and in law, the Hon’ble ITAT is right in holding that the legal and professional expenses are allowable ignoring the fact that the assessee has failed to discharge its onus with respect to rendering of services by the payee?”

4. In ITA No.191 of 2013, for the assessment year 2004-05, the following additional question has been claimed:-

“Whether on the facts of the case and in law, the Hon’ble ITAT was justified in holding that no expense is attributable to the exempted income as the revenue had failed to establish a direct nexus between the expenses incurred and the income earned ignoring that even indirect expenses are attributable under Section 14A as has been made clear by providing for Rule 8D(2) in subsequent assessment years?”

5. A few facts relevant for the decision of the controversy involved as narrated in ITA No.187 of 2013 may be noticed. The respondent-assessee company is in the business of manufacturing and sale of Pharmaceuticals, Health care services, leather finishing foils as also Treasury operation service to Joint Venture and Film based on Polymers of Propylene etc. The assessee company filed its return on 28.10.2002 declaring nil income and book profit of ₹ 68,02,790/- under Section 115JB of the Act and revised return also declaring nil income was filed on 27.11.2003. The same was processed under Section 143(1) of the Act. The case of the assessee was taken up for scrutiny. Notices under Section 143(2)/142(1) of the Act were issued and served on the assessee. The assessment was completed under Section 143(3) of the Act by the Assessing Officer on 30.3.2005 at assessed income under Section 115JB of the Act after setting off of brought forward losses. The Assessing Officer while making assessment made the following additions/disallowances:-

- i) Disallowance on account of non compete fee payment;

- ii) Disallowance of expenses on account of expansion of business of healthcare division;
- iii) Disallowance of expenditure on account of expansion of Maxxon business, Max Foil Division;
- iv) Disallowance of speculation loss in trading of shares.

Aggrieved by the assessment order, the assessee company filed an appeal before the Commissioner of Income Tax (Appeals) [CIT(A)]. Vide order dated 12.1.2011, Annexure A.2, the CIT(A) allowed the appeal and deleted the additional/disallowances made by the Assessing Officer. Not satisfied with the order, the revenue filed appeal before the Tribunal. Vide order dated 8.3.2013, Annexure A.3, the Tribunal dismissed the appeal. Hence the instant three appeals by the revenue before this Court.

6. We have heard learned counsel for the parties.

7. Firstly, while taking up ITA No.187 of 2013, question (a) as to whether payment of compete fee is a revenue expenditure and an allowable deduction, the same has already been considered and concluded against the revenue by this Court in ITA No. 193 of 2013, (*Commission of Income Tax, Jalandhar I, Jalandhar vs. M/s Max India Limited*), decided on 06.08.2018. The payment of non-compete fee was held to be allowable as revenue expenditure. Questions (b) & (c) are as to whether expenses incurred for starting entirely different line such as health care division and for expansion of business are revenue expenditure. The said issues have already been examined and concluded against the revenue by this Court in ITA No.426 of 2010 (*Commission of Income Tax, Jalandhar vs. M/s Max India Limited*), decided on 8.9.2015. Answered Accordingly.

8. Adverting to Questions (d) to (f), relating to the provisions of

Explanation to Section 73 of the Act with regard to conversion of stock into

investment, it may be noticed that Max Corporation Limited (MCL) incorporated on 12.9.1996 was merged with the assessee-company w.e.f 1.7.1999. Pursuant to the merger, all assets and liabilities of MCL including various shares held by it as stock in trade and as investments, vested in the assessee. As per management decision dated 3.7.2000, the shares were converted from stock in trade to investment. The assessee claimed a loss on account of difference in market value of such shares and cost price thereof, which was claimed as business deduction. Out of the converted shares, certain shares were sold by the assessee. The assessee computed loss from the aforesaid sale i.e. difference between the sale price and market price as on the date of conversion. The Assessing Officer did not accept the action of conversion of shares from stock in trade to investment in the books of account on the ground that even after merger, the company was taking decisions on day to day basis on sale and purchase of shares and therefore, the shares were continued to be held as stock in trade. The Assessing Officer thus disallowed the entire loss arising from the sale of shares. The CIT(A) decided the issue in favour of the assessee by holding that the assessee was at liberty to classify shares received on amalgamation as stock in trade or investment. The Tribunal held the aforesaid conversion from stock in trade to the investment as valid and upheld the order of the CIT(A) treating the loss on sale of investment arising in the assessment year 2001-02 as not speculative business loss. Explanation to Section 73 of the Act invoked by the Assessing Officer was held to be not applicable in relation to sale of investments in the appeal for the assessment year 2001-02. The relevant findings recorded by the Tribunal read thus:-

“14. First of all, we take up appeal of the Revenue in ITA No. 103 (Asr)/2006 for the assessment year 2001-02 as under:

- (i) The brief facts regarding first ground of Revenue, which are in three parts are that Max Corporation Limited (MCL), a wholly owned subsidiary of the assessee was incorporated on 12.09.1996 was merged with the assessee w.e.f. 1.7.1999, pursuant to a scheme of merger approved by the Hon'ble Punjab & Haryana High Court. Pursuant to merger, all assets and liabilities of Max Corporation Ltd; including various shares held by Max Corporation Ltd, as stock in trade and as investments, vested in the assessee. On 3.7.2000, as per the decision of management, shares of 11 companies, which were acquired by MCL and were held as 'stock in trade', prior to merger and which vested with the assessee post merger, were decided to be held as 'investment'. Accordingly, the said shares were converted from stock in trade to investment. On the date of conversion, the assessee claimed a loss on account of difference in market value of such shares and cost price thereof. The said loss was claimed as business deduction. Out of the aforesaid converted shares, certain shares were also sold by the assessee during the year. The assessee computed loss from the aforesaid sale, i.e. difference between the sale price and market price as on the date of conversion (3.7.2000) at ₹ 2.12 crores, which was disclosed under the head 'capital gains'. Further, during the relevant previous year, the assessee sold shares of three companies, which were held as stock in trade and acquired from erstwhile MCL, which resulted in business loss of ₹ 3.72 crores.
- ii) The AO did not accept the action of conversion of shares from stock in trade to investment in the books of account on the ground that even after merger, the company was taking decisions on day to day basis on sale and purchase of shares and therefore, the shares were continued to be held as stock in trade and conversion thereof into investment was a colorable device adopted to go out of Explanation to Section 73 of the Act. The AO further mentioned that the assessee company

arbitrarily picked up certain shares only for conversion from stock in trade to investment.

- iii) The AO therefore disallowed the entire loss arising from sale of shares (which were held as stock in trade and converted into investment), by treating the same as speculative in nature, by applying the deeming fiction contained in Explanation to Section 73 of the I.T. Act, 1961.
- iv) On appeal, the Ld. CIT (A) decided the issue in favour of the assessee by holding that:

the assessee was at liberty to classify shares received on amalgamation as stock in trade or investment, as per page 8 of Ld. CIT(A)'s order.

sale of shares held as investments were not covered by the provisions of Explanation to Section 73.

The Ld. CIT (A), however, held the loss arising on conversion of shares held as stock in trade into investment as notional loss and directed the AO to allow loss arising on sale of converted shares, as capital loss, by reducing the actual cost price from sale consideration, which amounted to ₹ 6.52 crores, as per para 3 of Ld. CIT (A)'s order.

Explanation to Section 73 was not applicable to loss arising from sale of shares (held as stock in trade), claimed by the assessee as business loss. The AO was directed to allow loss of ₹ 3.72 crores arising on sale of shares as normal business loss (Refer page 15 of Ld. CIT (A)'s order).

- 15. We may point out that the assessee has accepted the order of the Ld. CIT (A) disallowing notional loss arising on conversion of stock in trade into the investments on 3.7.2000 and no appeal has been filed by the assessee against the aforesaid decision of Ld. CIT (A).

- 16. The Revenue has challenged the aforesaid order of the Ld. CIT (A) accepting conversion of stock in trade into investments and

allowing loss arising during the relevant previous year on sale of part shares so converted and other shares held as stock in trade.”

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22. We have heard the rival contentions and perused the facts of the case. We are of the view that conversion of part of shares acquired from Max Corporation Ltd; as stock in trade into investments cannot be said to be a device for evading the tax and such conversion cannot be rejected. It is the prerogative of the assessee as to whether it wants to hold the shares as stock in trade or as an investment or partly as stock in trade or partly as an investment. Reference is made in this regard to the decision of Hon’ble Bombay High Court in the case of ***CIT Vs. Yatish Trading Co. Pvt. Ltd.*** (supra), wherein conversion of shares from stock in trade into investments in case of dealer of shares was upheld. Such decision of the assessee cannot be disregarded on hypothetical assumption that the same is motivated by the consideration of tax evasion. Reference is made in this regard to the decision of the Hon’ble Supreme Court of India in the case of ***Union of India vs. Azad Bachao Andolan and Another*** reported in 263 ITR 706. The bonafides of the assessee are demonstrated by the fact that only 1/3rd of the shares converted into investments only part of the shares so converted were sold during the previous year and even in respect of shares held as stock in trade, there was a loss on sale of such shares during the relevant previous year also. At the time of conversion of shares, the assessee could not have known that the prices would fall subsequently.

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- 22.2 The loss arising on the sale of shares held as investment is not only in any manner effected by the Explanation to Section 73 of the Act, which deals in relation to shares sold in the course of business. The various case laws cited by the assessee are in support of the above proposition. Accordingly, the loss of ₹

6.52crores arising on sale of investment has rightly been allowed as capital loss by the Id. CIT (A).

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79. As regards **ground No. 5** of the revenue, where the revenue has challenged the order of the Id. CIT (A) in not treating the loss arising on sale of investment as speculative loss.

80. We find that this issue has come up for our consideration in assessee's own appeal for the assessment year 2001-02 in ITA No. 103 (Asr)/2006 hereinabove. The loss in question relates to sale of shares held as investments including those shares which were received from MCL in the year 1999-2000 and were converted into investment by the assessee in the financial year 2000-01. We have held the aforesaid conversion from stock in trade to the investment as valid and upheld the order of Ld. CIT (A) treating the loss on sale of investment arising in the assessment year 2001-02 as not speculative business loss. The Explanation to Section 73 of the Act invoked by the AO was held to be not applicable in relation to sale of investments in the appeal for the A.Y. 2001-02. Therefore, being no change in the facts and position in law in the relevant previous year as compared to assessment year 2001-02 and in the absence of any new arguments having been raised by the parties, we dismiss this ground of appeal of the Revenue following our own order for the assessment year 2001-02 hereinabove."

9. Further in *Commissioner of Income Tax Vs. Yatish Trading Co. Private Limited*, [2013] 359 ITR 320 (Bom), it was held that the shares sold were held by the assessee as investments and the gains arising out of the sale of the investments were to be assessed under the head "Capital gains" and not under the head "Business profits". The relevant paras of the judgment read thus:-

"The assessee is engaged in the business of investments and also dealing in shares and securities. In the assessment year 2006-07, the assessee declared income under the heads 'profits and gains of

profession' and also under the head capital gains. The assessing officer noted that a part of the capital gains declared was in respect of transfer of shares / securities which were held by the assessee originally as stock in trade as a dealer in shares/securities. However, these share securities were converted into investment by the respondent-assessee on 1st April, 2002 and 1st October, 2004. Consequently, the assessing officer held that the short term and long term gains arising out of the sale of shares which were held originally as stock in trade and converted into investments was to be treated as business income. In first appeal before the CIT(A), it was pointed out that upto the date the shares were in its trading portfolio i.e. till the date of its conversion as investments the gain made was offered as business income and thereafter as capital gains till sale. This was held by the CIT(A) as reasonable and logical. Thus, CIT(A) has allowed the appeal of the assessee.

The Tribunal held that it is not in dispute that the conversion of its stock in trade into investment was accepted by the Department in assessment years 2003-04 and 2005-06. It is also not in dispute that the shares which were sold and gains from such sales were offered under the head capital gains from the date of conversion from stock in trade into investments and prior thereto as business profits. Further in its books of accounts the respondent-assessee showed the shares on which tax is levied under the head capital gain as investments. Further the fact that the assessee was trading in the shares would not estop the assessee from dealing in shares as investment and offer the gain for tax under the head capital gains. Thus, it is open to the trader to hold shares as stock in trade as well as investments. Once the finding of fact is recorded that the shares sold were held by respondent-assessee as investments, the gains arising out of the sale of investment were to be assessed under the head capital gains and not under the head business profits.”

10. In *Commissioner of Income Tax (Central) Vs. Express Securities*

Private Limited, [2014] 220 TAXMAN 365, the Assessing Officer held that

conversion of stock in trade into investment was done with an intention of not to pay taxes as Section 10(38) of the Act was introduced by Finance Act, 2004 with effect from 01.04.2005. It was held by the Assessing Officer that the entire amount was taxable as a 'trading receipt' and not under the head 'capital gains'. The Tribunal, however, allowed assessee's claim. It was noted from records that shares in question were sold nearly two years after conversion of stock in trade into investment with a specific declaration. Therefore, the Tribunal rightly set aside impugned assessment order. The Delhi High Court upheld the order passed by the Tribunal. The relevant paras of the judgment read thus:-

“3. The Assessing Officer has recorded that as per the business activities under taken by the assessee, they were dealing and trading in shares and financial securities in Bombay Stock Exchange, Delhi Stock Exchange and Calcutta Stock Exchange. The respondent-assessee was a registered broker with the said exchanges. The Assessing Officer held that the business of the assessee was not to invest in shares but to deal with the shares as a stock broker and trader. He observed that conversion of stock in trade into investment was done with the intention not to pay taxes as Section 10(38) was introduced by Finance Act, 2004 with effect from 1st April, 2005. Accordingly, he held that the entire amount was taxable as a “trading receipt” and not under the head “capital gains”.

4. The assessment order does not mention the date on which the shares in question were purchased. We also note that the assessment order records that the assessee had converted and transferred the shares in question under the head “investment” on 1st April, 2004. This factual position was not disputed or questioned. The shares in question were sold during the period ending 31st March 2006, nearly 2 years after the date of conversion of stock in trade into investment with a specific declaration. Mere fact that Section 10(38) was introduced in the statute by Finance Act, 2004 with effect from 1st April, 2005, does not mean that the said conversion

was improper or illegal. After the said Section was inserted, the assessee on noticing the tax benefit, was entitled to convert and change his holding from stock in trade into investment. Such conversion cannot be dealt with and rejected on the ground that Section 10(38) of the Act was introduced with effect from the said date. Conversion may be rejected for other reasons and grounds like the intention was not to convert and the assessee still continued to treat and regard the shares as stock in trade and not investment. But there is hardly any discussion in the assessment order in this regard. Justification and reasons have not been elucidated and brought on record to uphold the contention of the revenue that the shares were continued to be held as stock in trade and not as an investment.

5. The Commissioner (Appeals) noticed that the shares in question as held on 31st March, 2004 and their book value was as under:-

Scrip Name	Quantity	Book Value as on 31/03/2004
Global Tele	3,35,000	2,09,14,050/-
Himachal Futuristic	6,15,000	75,27,600/-
NIIT	20,000	33,97,200/-

6. The Commissioner (Appeals) has observed that in the balance sheet as on 31st March, 2005 the shares were shown under the head “inventories” and in the subsequent balance sheet as on 31st March, 2006, shares were again shown under the head “investment at book/fair value on 1st April, 2004”. Thus, the assessee converted the aforesaid stock in trade of ₹ 3,18,38,850/- to the head “investment at book/fair value on 1st April, 2004” and the said disclosure was made in the balance sheets as on 31st March, 2005 and 31st March, 2006. In the first year, the Assessing Officer did not disturb the aforesaid conversion and accepted the same. The Commissioner (Appeals) noticed that for the Assessment Year 2005-06 assessment was concluded under Section 143(3) vide order dated 27th November, 2007 but the Assessing Officer did not object to the said conversion. These shares were subsequently sold as detailed in paragraph 2.9 of the order of the Commissioner (Appeals) in August, 2005, September, 2005 and substantial portion was sold in

March, 2006 and long term capital gains was declared. He observed that statute did not reject or frown upon conversion of stock in trade into investment and the said conversion was permissible. Commissioner (Appeals) referred to the Circular No.4/2007 dated 15th June, 2007 issued by the Central Board of Direct Taxes, which stipulates that two portfolios one for stock in trade and one in respect of investments could be maintained by the same assessee. He took into account the period of holding by the assessee and the fact that the conversion into investment was made on 1st April, 2004 and outlay was disclosed in the audited accounts for the Assessment Year 2005-06. The sales made, as noticed above, were after considerable delay of approximately two years thereafter.

7. In view of the aforesaid factual findings recorded by the Commissioner (Appeals) and the tribunal, we do not see any reason to interfere and issue notice on the main appeal.”

11. In *Deeplok Financial of Calcutta Vs. Commissioner of Income Tax-II, Kolkata*, [2017] 80 taxman.com 51 (Calcutta), the issue was as to whether where assessee converted its shares held as stock in trade into investment and sold them at later stages, profit arising from sale of shares would be deemed to be long term capital gains and not as business income. The answer was given in the affirmative. The relevant para of the judgment reads thus:-

“11. That apart, this assessee lost its right of appeal to this Court on the question arising in the previous assessment year on account of delay in preferring the same. There was no adjudication on merits, of its claim of conversion, on appeal to the High Court. The only reason given by the Tribunal in rejecting the claim of the assessee for the previous assessment year, as would appear from its order dated 13th May, 2011 (copy handed up), is that to the Tribunal it appeared there is no provision in the Act in respect of conversion of stock-in-trade into investment and its treatment. Hence, it held that the lower authorities rightly

made the addition as there was understatement of income by analyzing the assessee's trading and investment account in shares. Thus, before us there is no impediment for the assessee to seek adjudication on the point. The question formulated is answered accordingly and in favour of the assessee."

12. Learned counsel for the appellant-revenue has not been able to show that the findings recorded by the Tribunal are illegal, erroneous or perverse warranting interference by this Court. Accordingly, questions (d) to (f) are answered in favour of the assessee and against the revenue.

13. As regards question (g), as to whether signing of negative covenant for not carrying out a speciality business does not amount to transfer of right to carry on business, the consideration of which is liable to be taxed as capital gain, it needs to be noticed that the assessee company divested its shareholding in Max Atotech Limited. The shares were sold on 29.6.2001 to M/s Atotech BV, Netherlands for ₹ 13.58 crores. Alongwith the signing of the agreement for sale of shares, the assessee had undertaken negative covenants of not entering into market of plating chemicals and processes for General Metal Finishing and Electronics Plating during the period 29.6.2001 to 28.6.2004 in lieu of receipt of consideration of ₹ 1.43 crores which was claimed as capital receipt not liable to tax. The Assessing Officer held that since the assessee extinguished its right to re-enter the market of plating chemicals and process for general metal finishing and electronics plating for consideration, the same amounted to transfer of right to carry on business and therefore the amount of consideration received was liable to be taxed under the head capital gains. The CIT(A) held that undertaking a restrictive covenant not to carry on business without transfer of any business was not in the nature of right to carry on business to be regarded as transfer of capital asset. The CIT(A) held non compete fees received as capital receipt not

exigible to tax under the provisions of the Act. Identical issue was considered by the Tribunal in assessee's own case for the assessment year 1998-99 and the Tribunal held that taking over a restrictive obligation did not amount to transfer of right in any business and therefore non compete fee could not be considered as resulting in capital gains. Even Section 55(2)(a) of the Act which was prospective in nature was not held to be applicable to the facts of the present case in the absence of any capital asset being transferred by the assessee in lieu of which the assessee had received the impugned amount of non compete fee. The relevant findings recorded by the Tribunal read thus:-

“81. As regards ground **No.6 of the revenue**, where the revenue has challenged the order of the Id. CIT (A) in holding that the amount received towards non-compete fee is not liable to tax under the head of capital gains.

81.1 The facts in relation to said ground of appeal are that during the relevant previous year, the assessee company divested its shareholding in Max Atotech Limited. The shares were sold on 29.6.2001 to M/s. Atotech BV, Netherlands for ₹ 13.58 crores. Alongwith the signing of the agreement for sale of shares, the assessee had undertaken negative covenants of not entering into market of plating chemicals and processes for General Metal Finishing & Electronics Plating during the period 29.6.2001 to 28.6.2004 in lieu of receipt of consideration of ₹ 1.43 crores. The same was claimed as capital receipt not liable to tax.

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82. We have heard the rival contentions and persued the facts of the case. We find that the identical issued was considered by this Bench of the Tribunal in assessee's own case for the assessment year 1998-99 and the Tribunal in that case categorically held that taking over a restrictive obligation does not amount to transfer of right in any business and therefore, non-compete fee cannot be considered as resulting in capital gains. There are

several other decisions of the Courts/ Tribunal on the issue in question which have been referred to by the Id. counsel for the assessee also support the contentions of the assessee. The contention of the Ld. DR that non-compete fee has to be considered as income under the head capital gains from the transfer of right in a business is without any factual or legal basis. We find that Section 55(2)(a), which is prospective in nature, is not applicable to the facts of the present case, in the absence of any capital asset being transferred by the assessee in lieu of which the assessee has received the impugned amount of non-compete fee. Our views are supported by the decision of the Special Bench of ITAT Hyderabad in the case of *ACIT vs. B.V. Raju* (supra).”

14. In *Guffic Chem. P. Ltd Vs. Commissioner of Income Tax and another*, [2011] 332 ITR 602 (SC), the assessee was carrying on the business of manufacturing, selling and distribution of pharmaceutical and medical preparations. It received ₹ 50 lakhs from Ranbaxy as non competition fee. It agreed to transfer its trade marks to Ranbaxy and in consideration for such transfer the assessee agreed that it shall not carry on directly or indirectly the business hitherto carried on by it. The agreement was for 20 years. The Tribunal held that the amount was a capital receipt, but the High Court reversed the decision. The Apex Court reversed the decision taken by the High Court holding that prior to April 1, 2003, when Parliament stepped in to specifically tax such receipts, the payment was in the nature of a capital receipt. The relevant para of the judgment reads thus:-

“7. Two questions arose for determination, namely, whether the amounts received by the appellant for loss of agency were in normal course of business and therefore whether they constituted revenue receipt? The second question which arose before this court was whether the amount received by the assessee (compensation) on the condition not to carry on a

competitive business was in the nature of capital receipt? It was held that the compensation received by the assessee for loss of agency was a revenue receipt whereas compensation received for refraining from carrying on competitive business was a capital receipt. This dichotomy has not been appreciated by the High Court in its impugned judgment. The High Court has misinterpreted the judgment of this Court in *Gillanders'* case (supra). In the present case, the Department has not impugned the genuineness of the transaction. In the present case, we are of the view that the High Court has erred in interfering with the concurrent findings of fact recorded by the Commissioner of Income-tax (Appeals) and the Tribunal. One more aspect needs to be highlighted. Payment received as non-competition fee under a negative covenant was always treated as a capital receipt till the assessment year 2003-04. It is only vide the Finance Act, 2002 with effect from April 1, 2003 that the said capital receipt is now made taxable (See Section 28 (va)). The Finance Act, 2002 itself indicates that during the relevant assessment year compensation received by the assessee under non-competition agreement was a capital receipt, not taxable under the 1961 Act. It became taxable only with effect from April 1, 2003. It is well settled that a liability cannot be created retrospectively. In the present case, compensation received under the non-competition agreement became taxable as a capital receipt and not as a revenue receipt by specific legislative mandate vide Section 28(va) and that too with effect from April 1, 2003. Hence, the said Section 28 (va) is amendatory and not clarificatory. Lastly, in *CIT v. Rai Bahadur Jairam Valji* reported in [1959] 35 ITR 148 it was held by this court that if a contract is entered into in the ordinary course of business, any compensation received for its termination (loss of agency) would be a revenue receipt. In the present case, both the Commissioner of Income-tax (Appeals) as well as the Tribunal, came to the conclusion that the agreement entered into by the assessee with Ranbaxy led to loss of source of business; that payment was received under the negative covenant and therefore the receipt of ₹ 50 lakhs by the

assessee from Ranbaxy was in the nature of a capital receipt. In fact, in order to put an end to the litigation, Parliament stepped in to specifically tax such receipts under non-competition agreement with effect from April 1, 2003.”

15. Learned counsel for the appellant has not been able to show that the findings recorded by the Tribunal are illegal or perverse warranting interference by this Court. Accordingly, question (g) is also answered against the revenue and in favour of the assessee.

16. In ITA No.189 of 2013, additional question as noticed hereinbefore has been claimed by the revenue. It was urged by learned counsel for the assessee that this question of law does not arise. However, we find that even otherwise, the said issue stands concluded by the pronouncement of this Court in ITA No.186 of 2013 (*Commissioner of Income Tax, Jalandhar-I Jalandhar Vs. M/s Max India Limited*) and connected appeals *i.e.* ITA Nos.188 and 194 of 2013 dated 6.9.2016. Similarly, in ITA No.191 of 2013, the contention of the learned counsel for the assessee in respect of the additional question was that it is not emanating from the impugned order of the Tribunal. We find that even otherwise, the issue has been set at rest by the decision of this Court in ITA No.190 of 2013 (*Commissioner of Income Tax, Jalandhar I Jalandhar vs. Max India Limited*), decided on 6.9.2016. The aforesaid additional questions are adjudicated accordingly.

17. In view of the above, all the three appeals are hereby dismissed.

(Ajay Kumar Mittal)
Judge

January 23, 2019
‘gs’

(Manjari Nehru Kaul)
Judge

Whether speaking/reasoned
Whether reportable

Yes
Yes