

**(2002) 05 DEL CK 0075**

**In the Delhi High Court**

**Case No : Civil Writ No. 1335 of 2002**

Reliance Industries Ltd. and Another

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

**Date of Decision : 31-05-2002**

**Acts Referred:**

Income Tax Act, 1961 — Section 10, 10(15), 109, 52(2)

**Citation :** (2002) 258 ITR 143 : (2002) 124 TAXMAN 246

**Hon'ble Judges :** S.B. Sinha, C.J.;A.K. Sikri, J

**Bench :** Division Bench

**Advocate :** Ashok H. Desai, J.J. Bhatt, Anjali Chanderkar, R. Sasi Prabhu, Manish Garg and Anshu Mahajan, for the Appellant; Soli J. Sorabjee, Attorney General of India and Jayant Bhushan, for the Respondent

## Judgement

S.B. Sinha, C.J.—The 1st petitioner is a Public Limited Company. It carries on business of manufacture of petrochemicals. The 1st petitioner sought for permission to raise External Commercial Borrowing (in short "ECBs") amounting to US \$ 300 million to finance their projects where for they filed an application before the 2nd Respondent on 15th March 1993. On that application "in-principle" approval was issued by a letter dated 5th June 1995. The first and second approval were issued for a sum US \$ 150 million each bearing Nos. 6(50)/93-ECB and 6(358)/95-ECB by the 2nd respondent in terms of their letter dated 19th July 1995 and 22nd August 1995 respectively. Pursuant to and in furtherance thereof the 1st petitioner entered into a syndicated loan agreement with foreign lenders to the tune to US \$ 150 million. It raised balance against US \$ 150 million through a Bond Issue. However, during the period the matter was pending the 1st petitioner expended an aggregate sum of approximately US \$ 325 million towards project costs from its rupee resources. However, in relation to the said approvals the 1st petitioner applied for exemption from withholding tax. Pursuant to or in furtherance thereof such exemption had been granted in terms of Section 10(15)(iv)(f) of the Income Tax Act (hereinafter referred to as the "said Act"). On or about 3rd November 1995 the 1st petitioner again applied

before the 2nd respondent for raising ECBs for a further sum of US \$ 600 million which had subsequently been increased to US \$ 642 million. The 1st petitioner thereafter made an application for exemption u/s 10(15)(iv)(f) of the said Act. On or about 15th February 1996 pursuant to or in furtherance thereof such exemption had been granted in relation to the first and second approvals. The said amount, allegedly had already been spent. The amounts, according to the petitioner, of the loan/Bond Issue under the said two approvals were drawn out and deposited in bank accounts abroad in terms of the guidelines issued by the Reserve Bank of India, where for quarterly returns were also filed from time to time. Third approval had been granted by the Central Government on 28th May 1996. Clause 5 thereof is in the following terms:

"5. The payment of interest is exempted from withholding tax u/s 10(15)(iv)(f) of the Indian Income Tax Acts, 1961"

2. Further approval for raising of further ECBs of US \$ 100 million by issue of Bonds was granted on 30th July 1996 by a letter bearing No. 6(578)95-ECB-Sanction No. 61. Clause (4) of the said approval is as under:

"The payment of interest is exempt from withholding tax u/s 10(15)(iv)(f) of the Indian Income Tax Act, 1961"

3. While granting such approval it was laid down:

1. The amount in respect of the Bond Issues raised under the third and fourth approvals was drawn down by the 1st petitioner and Offering Memoranda were taken on record by the 2nd respondent.

2. Pending the grant of the approvals, in order not to delay the implementation of the 1st Petitioner's projects, the 1st Petitioner expended its rupee resources for financing the import of plant and equipment in accordance with law.

4. Out of the total amount of US \$ 642 million the 1st petitioner again applied to the 2nd Respondent for raising the balance ECBs of US \$ 342 million on or about 13th September 1996 in response where to particulars regarding utilisation of ECBs by the 1st petitioner were elicited by the 1st Respondent. The 1st Petitioner requested that the expenditure incurred by it prior to such approvals the draw down of the ECBs should be treated as part utilisation of ECB proceeds in response where to the 2nd Respondent by its letter dated 26th November 1996 contended:

(i) The foreign currency expenditure of USD 25.47 million, reported to be incurred prior to 21.06.1993, may not be eligible expenditure for utilisation of ECB unless this expenditure has been incurred after 15.03.1993. You are Therefore requested to clarify how much of this expenditure was incurred after 15.03.1993.

(ii) The second trench of USD 150 million from the initial ECB of USD 300 million approved to you was drawn on 22.09.1995 whereas prior to this date, you have

reported expenditure aggregating to USD 324.61 million. Out of this expenditure, expenditure up to USD 300 million can be adjusted against the ECB approved to you. In this regard, you are required to submit documentary evidences supported by Auditors' Certificate indicating that the expenditure has been incurred on the items for which ECB was proposed and that this expenditure has been met from your own resources.

(iii) Similarly, foreign currency expenditure of USD 230.21 million is reported to be incurred during 28.9.1995 to 28.5.1996, was also incurred prior to the drawn down of ECB of USD 300 million approved during 1996. In this regard also you are requested to submit documentary evidences supported by Auditors' Certificate indicating that the expenditure has been incurred on the items for which ECB was proposed and that this expenditure has been met from your own resources.

(iv) Rupee expenditure on captive power project equivalent to USD 62.38 million cannot be adjusted against the ECB raised by you because the ECB has been approved only for financing the foreign currency capital expenditure."

5. According to the petitioners, Therefore, by reason of the said letter the respondents had categorically accepted that moneys drawn against ECBs were fungible and could be adjusted towards expenditure incurred for import of plant and equipment by the 1st petitioner out of its rupee resources.

6. The 2nd Respondent again granted approval bearing Sanction No. 666 dated 6th January 1997 permitting the petitioner to raise further ECBs of a sum of US \$ 100 million by issue of Bonds. Similar approval had been granted again on 6th January 1997 in respect of US \$ 214 million. The said two approvals contain the following clause:

"The payment of interest and fees is exempted from withholding tax u/s 10(15)(iv)(f) of the Indian Income Tax Act, 1961."

7. Yet again an application was filed by the petitioner to raise further ECBs of US \$ 150 million and GB 150 million by issue of Bonds and raising of loan respectively where for approval was granted on 21st July 1997. By a letter dated 16th December 1998 a proposal was made for utilisation of ECB proceeds retained abroad as they had already imported plants and equipments; the relevant portion whereof reads thus:-

"4. Proposal for utilisation of ECB proceeds retained abroad.

The consequence of the above reduction in project cost and change in the financing pattern, is that RIL's ECB proceeds have not been substantially utilised and have instead been retained abroad.

These ECB proceeds are no longer required for the specified end-uses as the projects, for which the borrowing were made, have all been implemented with rupee resources.

In this situation, there being no avenue left for utilisation of the off-shore ECB proceeds for the specified end-uses, RIL seeks approval for permission to utilise the same for prepayment/buyback of its outstanding ECBs of \$ 1.3 bn."

8. However, the 2nd Respondent referred to all the approvals granted to it and stated:

"Please refer to your letter No.RIL:DLH:305(a) dated 21/4/1998 and letter dated 16/12/1998 on the above mentioned subject for payment of 20% and 1000% of outstanding ECBs, respectively, by utilising ECB proceeds parked abroad. The matter has been examined. Since the above requests for the repayment from ECB proceeds held abroad were not found to be in conformity with the existing guidelines, these cannot be acceded to.

2. Further, it has been noted that the ECB funds raised above had not been utilised for the specified end-uses which is one of the essential terms of the ECB approval for availing relevant exemptions u/s 10(15)(iv)(f) of Income tax Act, 1961. You are, Therefore, not entitled to any tax benefits in terms of the above provision of the Income Tax Act, 1961."

9. To that the petitioners filed a detailed reply by a letter dated 3rd May 1999, inter alia, contending:

16. It is submitted that having approved the Loan Agreement as contemplated in Sub-section (f) reproduced above, it is not open to the Government to subsequently withdraw and cancel such approval in cases such as that RIL, merely on the ground that an application for modification of such approval was made. As stated above, RIL has, and will fully and completely abide by the approval granted to the loan agreement unless pursuant to the application made by IRL, such approvals are amended. If no amendment is granted. RIL will continue to operate within the earlier approvals without any modification. In our respectful submission, a mere application for modification in a subsisting approval cannot justify a total withdrawal and/or cancellation of the existing approval in the manner sought to be done."

10. The petitioners, however repatriated the ECB funds to India and replenished its rupee resources earlier utilised to finance the import of capital goods and services pursuant to various permissions granted. A notice was issued on 8th June 2001 to the petitioner asking it to show cause as to why the exemption granted u/s 10(15)(iv)(f) of the Act shall not be withdrawn, inter alias stating:

"3. One of the requirements for granting the tax exemptions u/s 10(15)(iv)(f) of the Income Tax Act, 1961 is that the borrowing company would comply with terms and conditions of the loan approval. Conditions stipulated in the approval letters issued by this Department and those of RBI create "a continuing obligation" on the part of the borrowing company to comply with them in order to avail themselves of the benefit of tax exemption u/s 10(15)(iv)(f) of Income Tax Act, 1961. Therefore, utilisation of ECB funds for specified end uses is one of

the essential terms of ECB approvals for availing relevant exemption.

4. Your attention is invited to your letter No.RIL:DLHL;305(a) dated 16.12.1998, wherein you have stated".....that RIL's ECB proceeds have not been substantially utilised, and have instead been retained abroad. These proceeds are no longer required for the specified end uses - as the projects for which the borrowing were made have all been implemented with rupee resources."

5. Thus, there has been a breach of the condition of the ECB approvals by you.

6. Accordingly the Government proposes to withdraw tax exemption granted to you u/s 10(15)(iv)(f) of the Income Tax Act, 1961."

11. The petitioner filed a detailed reply thereto on 29th June 2001 and also prayed for a personal hearing.

12. The impugned order by the 2nd respondent was passed on 5th February 2002 holding:

"One of the requirements for granting the tax exemptions u/s 10(15)(iv)(f) of the Income Tax Act, 1961 is that the borrowing Company would comply with terms and conditions of the loan approval conditions stipulated in the approval letters issued by this Department and those by RBI which create "a continuing obligation" on the part of the borrowing company to comply with them in order to avail themselves of the benefit of tax exemption u/s 10(15)(iv)(f) of Income Tax Act, 1961. Therefore, utilisation of ECB funds for specified end uses is one of the essential terms of ECB approvals for availing relevant exemption.

11. Your attention is invited to your letter No.RIL:DLHL:305(a) dated 16.12.1998, wherein you have stated ".....that RIL's ECB proceeds have not been substantially utilised, and have instead been retained abroad. These proceeds are no longer required for the specified end uses- as the projects, for which the borrowing were made, have all been implemented with rupee resources."

12. Thus, there has been a breach of the condition of the ECB approvals by you.

13. Accordingly, after careful consideration of the Explanations submitted vide your letter dated 28.06.2001, it has been decided that the tax exemptions granted to you u/s 10(15)(iv)(f) of the Income Tax Act, 1961 in respect of ECBs detailed in part 1 above, stands withdrawn from the date of issue of this letter."

13. The petitioners, however, filed an application for grant of No Objection Certificate before the Deputy Director of Income Tax (International Taxation) to remit interest on ECB without deducting tax at sources which was due on 14th February 2002 but the same was rejected by order dated 13th February 2002 relying on or on the basis of the impugned order dated 5th February 2002. An appeal preferred there against to the Commissioner of Income Tax, Mumbai was also rejected by an order dated 5th February 2002.

14. Mr. Ashok Desai, learned Senior Counsel, appearing on behalf of the petitioner inter alia submitted that having regard to the fact that the petitioners have fulfilled all the conditions for grant of exemption as required under the said Act it was not required to deduct tax at source in terms of Section 109 thereof. Mr. Desai would urge that the Section 109 thereof. Mr. Desai would urge that the allegation in there impugned order to the effect that there had been alleged breach of the conditions of the ECBs approval by the 1st petitioner cannot be upheld having regard to the fact that the petitioner had fulfilled all the said four ingredients. In the terms afore-mentioned, learned counsel would contend that, purported withdrawal of such exemption is clearly illegal. Learned counsel has submitted that the petitioner his all along kept the 1st Respondent as also the Reserve Bank of India informed about course of action to be taken by them, although and a such the petitioner cannot be said to have committed any illegality. If it had imported plant and equipment from their rupee resources pending grant of permission to raise ECBs, particularly when a part of the ECBs has specifically been allowed to be set off against the owned resources of the petitioner, thus, the question violation of any terms of the approval would not arise. In any event, learned counsel would contend that since money was fungible it was neither possible nor property allocate expenditure incurred on import of capital goods and services at Patalganga, Hazira and Jamnagar, as originating from different funding sources. It was submitted that Section 10(15)(iv)(f) of the Act is a "stand alone" provision and keeping in view the fact that the Assessing Authorities in relation thereto are to exercise their quasi judicial powers, the 1st respondent had no jurisdiction to issue the impugned order.

15. Reliance, in this connection, has been placed on Orient Paper Mills Ltd. Vs. Union of India (UOI), ; Orient Paper Mills Ltd. Vs. Union of India (UOI), and Sirpur Paper Mills Ltd. Vs. The Commissioner of Wealth Tax, Hyderabad, . The expression used in Section 10(15)(iv)(f) is absolutely clear submits Mr. Desai and by reason thereof, an implied jurisdiction in the Central jurisdiction cannot be read. Reliance, in this connection, has been placed on Hemraj Gordhandas v. H.H. Dave, Assistant Collector of C.E.& Customs Surat and Ors. reported in 1978 ELT 350 and M/s. Gujarat State Fertilizers Co. Vs. Collector of Central Excise, .

16. Learned Attorney General on the other hand, would contend that Section 10(15)(iv)(f) intends to serve a definite public purpose and achieve a special objective viz. industrial development of India. Paramount consideration for approval of the loan agreement, according to the learned Attorney General, is that the foreign exchange, viz., the External Commercial Borrowing would be used for financing import of capital goods and related services. Having regard to the fact that specified end-uses of each of the ECBs. were to finance import of capital goods and services, in the event of any breach thereof the respondents were entitled to withdraw such exemption. Our attention, in this connection, has been drawn to a Press Note dated 5th January 1995 wherein the purpose of grant of exemption from Income Tax was categorically stated. It was contended that if ECBs. are not used for the specified purpose the basic object would be

defeated having regard to the fact that there exists a cap on foreign exchange borrowing. Once the limit is exceeded the country gets into debt trap and only on that account the exemptions had been discontinued. But on representations made by financial unsteadiness and others they were resumed. Only where after the applications filed by the petitioners herein were entertained. The learned Attorney General would contend that the provisions of Section 10(15)(iv)(f) of the Act must be read having regard to this object. There does not exist any bar in the Central Government for grant of approval in respect of loan agreement stipulating that the amounts borrowed should be utilised only for specified industrial purposes and none other. The words "moneys borrowed...under a loan agreement approved by the Central Government, learned Attorney General would contend, must be given a purposive and meaningful constriction to advance the basic object of this Section. Reliance in this connection has been placed upon M/s. Oxford University Press etc. Vs. Commissioner of Income Tax, . It has been urged that the obligations to comply with the terms and conditions of the approval being an internal part of the loan agreement is a continuing obligation. Reliance in the connection, has been placed upon Mediwell Hospital and Health Care Pvt. Ltd. Vs. Union of India and others, . The petitioner, learned Attorney General, would submit, having obtained the exemption and having not questioned is authority at any pint of time now cannot be permitted to approbate and reprobate. Strong reliance has been placed on New Bihar Biri Leaves Co. and Others Vs. State of Bihar and Others, . It has been pointed out that the petitioners have also not question the order passed by the Revenue Authorities in this regard.

17. Section 10 of the said Act occurs in Chapter III of the Income Tax Act. It deals with income which do not form part of the total income. Clause 10(15)(iv)(f) of the Act reads thus:-

"10 In computing the total income of a previous year of any person, any income falling within any of the following clause shall not be included-

(15) .....

(iv) interest payable

(f) by an industrial undertaking in India on any moneys borrowed by it in foreign currency from resources outside India under a loan agreement approved by the Central Government having regard tot eh need for industrial development of India, to the extent to which such interest does not exceed the amount of interest calculated at the rate approved by the Central Government in this behalf, having regard to the terms of the loan and its repayment"

18. It may be true that the matter relating to assessment of tax is within the exclusive domain of the Assessing Authority. A hierarchy of officers have been provided in terms of the provisions of the Income Tax Act. It is not a case as has been submitted by Mr. Desai where the Central Government has interfered with the quasi Judicial function of the Assessing Authority or the Appellate Authority.

By reason of the afore-mentioned provisions of the interest payable by industrial undertaking in India on any moneys borrowed by it in foreign currency from sources outside India under a loan agreement has to be approved by the Central Government having regard to the need for industrial development of India to the extent to which such interest does not exceed the amounts of interest calculated at the rate approved by the Central Government in this behalf. Having regard to the terms of the loans and that the payments would not be income an amendment has been made after June 9, 2001 in terms whereof interest approved would not be excluded from the total income.

19. The question as to whether payment of any interest on fulfillment of any contingency would be computed towards income or not is thus wholly dependent upon the fulfillment of the contingencies specified therein. From the contextual acts, as noticed hereinbefore, before the Secretary, Department of Economics Affairs, Ministry of Finance in its letter dated 15th March 1993 the petitioner stated:

"5. To part finance foreign exchange requirement, we propose to raise External Commercial Borrowing.

7. Since we had already raised US \$ 150 million through GDRs/GDSs (foreign equity), we propose to raise USD 300 million as External Commercial Borrowing to part finance foreign exchange requirements of our slated expansions."

20. In its letter dated 5th June 1995 the petitioner was informed as regards the proposal for availing of a foreign currency loan from a group of international banks to be arranged by Bank of America NT & SA for financing the import of capital goods. Similar approval was also granted on 19th July 1995. There is no dispute whatsoever that the ECBs were required to be used for financing import of capital goods and related services. The approval letter contains the terms and conditions, some of which are:-

"3. One of the requirements for granting the tax exemptions u/s 10(15)(iv)(f) of the Income Tax Act, 1961 is that the borrowing company would comply with terms and conditions of the loan approval. Conditions stipulated in the approval letters issued by this Department and those of RBI create "a continuing obligation" on the part of the borrowing company to comply with them in order to avail themselves of the benefit of tax exemption u/s 10(15)(iv)(f) of Income tax Act, 1961. Therefore, utilisation of ECB funds for specified end uses is one of the essential terms of ECB approvals for availing relevant exemption.

6. Accordingly, the Governor proposes to withdraw tax exemption granted to you u/s 10(15)(iv)(f) of the Income Tax Act, 1961."

21. It may not be necessary for us to refer to each one of the applications for grant of approval of the ECBs as also the order of approval passed thereupon. The petitioners are not correct in contending that they were compelled to approach the Government only because in one of the letters which was

addressed to a wrong authority, the petitioner had been asked to file their applications before Ministry of Finance.

22. On 16th December 1998 the petitioners in their letter to the Foreign Ministry inter alias requested for approval to retain ECBs proceeds abroad for utilisation thereof for prepayment/buyback of outstanding ECBs.:

"Specified end-uses for ECB proceeds:

The specific end-use, for each of the ECBs. referred to above, was to part-finance import of capital goods and services for RIL's integrated petrochemicals complexes at Hazira and Jamnagar, Gujarat.

The current status of these projects is that the Hazira petrochemicals complex has been fully commissioned and is operating at rated capacity. All major capital commitments for the Jamnagar petrochemicals complex have also been made, and the complex is slated to be commissioned in 1999.

The total cost for these projects, at Hazira and Jamnagar, as appraised by ICICI, was estimated at Rs. 14,973 crores.

This included the aforesaid foreign exchange (FX) debt component of \$ 1.3 bn (equivalent to approximately Rs. 4500 crores at then prevailing rates of exchange), and the balance Rs. 10,500 crores approximately by way of internal accruals, equity and rupee debt.

2.....RIL has ploughed in substantial incremental rupee resources into the projects, in substitution of the corresponding amount of foreign exchange debt earlier contemplated to be utilised for this purpose....."

23. In paragraph 3 of the same it purported to have stated rationale for change in financing pattern, which reads thus:

"RIL's decision to implement its projects, substantially by deployment of rupee resources, was a recognition of the changed conditions in the global economic scenario, and was crucial for its overall competitiveness and growth under the new economic order."

The extended downturn in the global petrochemicals industry has severely impaired the ability of domestic industry to bear incremental FX risks. The factors contributing to this situation are:

- \* Over supply of products in Asia Pacific region, arising from excess capacity creation
- \* Sharp reduction in product selling prices by more than 40%-50% selling prices are now at 25 years lows
- \* Increased competition from imports, owing to reduction in import tariffs - which are now substantially below WTO bound levels, and lower than many competing Asian countries

- \* Slowdown in economic activity in the country
- \* Higher raw material costs, on account of depreciation of the rupee
- \* Inelasticity of demand, leaving no room to pass on increased costs to consumers
- \* Unfair competition (dumping) from Asia Pacific producers, as a result of negative demand growth in their respective countries
- \* Increased competitiveness of Asia Pacific producers, owing to sharpen relative depreciation of their respective currencies.

The Asian economic crisis of the past 18 months has also provided many important lessons.

The strongest of petrochemicals companies in the region, in the countries such as Thailand, Indonesia and South Korea, have run into severe financial difficulties, and virtually become insolvent.

Their underlying weakness has been their large FX exposures - arising from borrowing made in hard currencies, to create domestic assets and no subsequent mechanism to over FX risks/exposures.

RIL's ability, to not just survive, but grow, in this challenging environment reflects the soundness of its decision to implement its projects with rupee resources, and not carry open FX exposures.

Proposal for utilisation of the ECB proceeds retained abroad were:

#### 4. PROPOSAL FOR UTILISATION OF ECB PROCEEDS RETAINED ABROAD:

The consequence of the above reduction in project cost, and change in the financing pattern is that RIL's ECB proceeds have not been substantially utilised and have instead been retained abroad.

These ECB proceeds are no longer required for the specified end-uses - as the projects for which the borrowing were made, have all been implemented with rupee resources.

In this situation, there being no avenue left for utilisation of the offshore ECB proceeds for the specified end-uses. RIL seeks approval for permission to utilise the same for prepayment/buyback of its outstanding ECBs of \$ 1.3 bn."

SUMMARY: 9.1 We request that RIL may kindly be granted approval to utilise its offshore ECB proceeds to prepay/buyback up to 20% of its outstanding ECBs each year, with the entire programme to be completed within a period of up to 5 years.

9.2 We further request that, pending such utilisation RIL kindly be granted approval to retain the ECB proceeds abroad in offshore instruments of Indian PSUs, FIs and nationalised Banks, in addition to the specified assets as per extant RBI guidelines.

This proposal will yield optimal monetary and other benefits to the country and have a positive impact on current and future FX reserves of the country, reduction of external debt and improvement in sentiment of international ratings agencies and investors.

According to the respondents not only such request was contrary to the grant of such approval but it was contrary to the obligations for grant of approval. Keeping the balance proceeds offshore, according to the respondents, is a breach of the conditions for approval. Similarly its assertion that it had not substantial international rupee resources in the project in subsequent foreign policy contemplated to be utilised for the said purpose was not in conformity with the conditions for approval.

24. The said proposal was turned down by a letter dated 3rd April 1999 stating:

"Please refer to your letter dated 21st December 1998 on the above subject. It has been decided in consultation with the Government not to accede to your request for retaining the ECB proceeds abroad for further period. You are Therefore advised to repatriate the ECB proceeds of US \$ 1.3 billion (approximately) held abroad immediately under advice to us as required in our letter EC.CO.IMD(II) 2097/03.02.192 (Policy) 98-99 dated 30th November 1998. Documentary evidence in support of the repatriation of these funds may be submitted to our Mumbai Regional Office within a period of one month from the date of receipt of this letter. This also disposes of your representation dated 16.12.1998 to Government of India."

25. The respondent by a letter dated 12th April 1999 inter alia stated:

"Please refer to your letter no.RIL:DLH:305(a) dated 21/04/1998 and letter dated 16/12/1998 on the above mentioned subject for prepayment of 20% and 100% of outstanding ECBs, respectively, by utilising ECB proceeds parked abroad. The matter has been examined. Since the above requests for the prepayment from ECB proceeds held abroad were not found to be in conformity with the existing guidelines, these cannot be acceded to.

2. Further, it has been noted that the ECB funds raised above had not been utilised for the specified end-uses which is one of the essential terms of the ECB approval for availing relevant exemptions u/s 10(15)(iv)(f) of Income Tax Act, 1961. You are, Therefore, not entitled to any tax benefits in terms of the above provision of the Income Tax Act, 1961."

26. In its reply only para 2 of the said letter had been dealt with in the following terms:

"4. The exemption has been sought to be denied purportedly on the ground that the ECB funds raised by RIL have allegedly to been utilised for the specified end uses. Without prejudice to any of our legal contentions including, without limitation, the following:-

(a) that utilisation of ECB proceeds is not a condition precedent to the availability of exemption u/s 10(15)(iv)(f) of the Act;

(b) that utilisation of rupee resources for the import of capital goods and services constitutes proper utilisation of ECB proceeds, towards the specified end-uses, as confirmed in correspondence exchanged between RIL and the MOF (as detailed hereinafter); and

13. As stated above, RIL has already applied to the RBI, on the matter relating to future utilisation of these ECB proceeds; and the specific time frame for which the said proceeds are still required to be held offshore. It is evident that RIL will hold the ECB proceeds abroad, only to the extent and for the time frame approved by the RBI.

16. It is submitted that having approved the Loan Agreement as contemplated in Sub-section (f) reproduced above, it is not open to the Government to subsequently withdraw and cancel such approval in case such as that of RIL, merely on the ground that an application for modification of such approval was made. As stated above, RIL has, and will fully and completely abide by the approval granted to the loan agreement unless pursuant to the application made by RIL, such approvals are amended. If no amendment is granted, RIL will continue to operate within the earlier approvals without any modification. In our respectful submission a mere application for modification in a subsisting approval cannot justify a total withdrawal and/or cancellation of the existing approval in the manner sought to be done.

17. Without prejudice to the foregoing, we respectfully submit that once a loan agreement has been approved by the Government having regard to the need for industrial development in India, there is no provision in law for the subsequent cancellation or withdrawal of the exemption available u/s 10(15)(iv)(f) of the Act so long as the approval of the loan continues.

20. It is submitted that the provisions of Section 10(15)(iv)(f) of the Act in fact clearly indicate that the entire matter concerning the utilisation of the ECB proceeds, is wholly extraneous and irrelevant, for the purposes of granting or disallowing an exemption under that section, and the same is not a condition precedent for the grant of exemption under that section. In other words, approval or grant of an exemption under that section is not conditional upon any particular end use that the proceeds have to be put to or even conditional on that proceeds being utilised for approved end use only. Both these conditions operate in totally different spheres.

27. Therein also the authority of the Central Government has not been questioned. The contention of the petitioners that grant of an exemption under that section was not conditional upon any particular end use that the proceeds have to be put to or even conditional on that proceeds being utilised for approved end use only would be contrary to the grant of such approvals inter alia on the ground that ECBs had not been substantially utilised for the specified period nor

have they been holding any foreign current account in India. Petitioners have also accepted that the balance proceeds of approximately US \$ 1.3 billion also have been retained offshore. The benefits of the exemptions were granted for a period of six years. The petitioners have obtained substantial tax relief. It, Therefore, in our considered opinion does not lie in the mouth of the petitioner now to contend that respondents have absolutely no jurisdiction to grant approval to the petitioners' request for grant of exemption.

28. Learned Attorney General, in our opinion, has rightly submitted that the matter has to be considered having regard to the purport and object of the legislative scheme contained in Section 10(15)(iv)(f) of the Act, viz., need for Industrial Development in India. The borrowing from abroad thus were required to be strictly extended for the aforementioned purpose. If the petitioners in a position to raise such funds from other sources, it was not necessary for it to raise ECBs. Such borrowing were required to be utilised for specified industrial purposes.

29. A provision of a statute must be interpreted having regard to the purport and object thereof. In *M/s. Oxford University Press etc. Vs. Commissioner of Income Tax*, the law is stated in the following terms:

"10. In *Varghese* case the assessed owned a house which he had purchased in 1959 for the price of Rs. 16,500. In 1965 he sold the house for the same price of Rs. 16,500 to his daughter-in-law and five children. It was not disputed that this sale was an honest and bona fide transaction and that the consideration was in fact Rs. 16500. However, after completion of the assessment for the year 1966-97 in the normal course in this manner, the ITO issued a notice to reopen the assessment on the basis that Section 52(2) of the 1962 Act was attracted because the fair market value of the property as on the date of the transfer exceeded the consideration of Rs. 16,500 by not less than 15%. the ITO proposed, accordingly, to fix the fair market value of the house at Rs. 65,000 and assess the difference of Rs. 48,500 as capital gains in the hands of the assessed. The assessed filed a writ petition. It was allowed, but in appeal, the Full Bench allowed of the Kerala High Court accepted as correct the ITO's view. This Court reversed the Full Bench decision, and it said that if Sub-section (2) of Section 52 was literally construed, as applying to cases where the consideration in respect of the transfer was correctly declared and there was no understatement of consideration, it would result in amounts being taxed which had neither accrued to the assessed nor were received by him and

"which from no viewpoint can be rationally construed as capital gains or any other type of income. It is a well-settled rule of interpretation that the court should as far as possible avoid that construction which attributes irrationality to the legislature". (SCCp.192, para 17)

It was also found that, so construed, Sub-section (2) was violative of the Constitution and the court "must obviously prefer a construction which renders

the statutory provision constitutionally valid rather than that which makes it void" (SCC p. 193 para 17). The Court said in the course of the judgment: (SCC p.181, para 6)

"It is now a well-settled rule of construction that where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the legislature, the court may modify the language used by the legislature or even "do some violence" to it, so as to achieve the obvious intention of the legislature and produce a rational construction."

Accordingly, the Court read into Section 52(2) the condition that it would apply only where the consideration for transfer was understated and it would have no application in the case of a bona fide transaction when the full value of the consideration was correctly declared by the assessed."

30. The submission of Mr. Desai to the effect that the purpose of grant of such approval stands fulfilled is stated to be rejected.

31. In Mediwell Hospital and Health Care Pvt. Ltd. Vs. Union of India and others, it is held

"13. While, Therefore, we accept the contentions of Mr. Jaitley, learned Senior Counsel appearing for the appellant that the appellant was entitled to get the certificate from Respondent 2 which would enable the appellant to import the equipment without payment of customs duty but at the same time we would like to observe that the very notification granting exemption must be construed to cast continuing obligation on the part of all those who have obtained the certificate from the appropriate authority and on the basis of that have imported equipments without payment of customs duty to give free treatment at least to 40 per cent of the outdoor patients as well as give free treatment to all the indoor patients belonging to the families with an income of less than Rs. 500 per month. The competent authority, Therefore should continue to be vigilant and check whether the undertakings given by the applicants are being duly complied with after getting the benefit of the exemption notification and importing the equipment without payment of customs duty and if on such enquiry the authorities are satisfied that the continuing obligations are not being carried out then it would be fully open to the authority to ask the persons who have availed of the benefit of exemption to pay the duty payable in respect of the equipments which have been imported without payment of customs duty. Needless to mention the Government has granted exemption from payment of customs duty with sole object that 40% of all outdoor patients and entire indoor patients of the low income group whose income of less than Rs. 500 per whose income is less than Rs. 500 per month would be able to receive free treatment in the Institute. That objective must be achieved at any cost, and the very authority who have granted such certificate of exemption would ensure that the obligation imposed on the persons availing of the exemption notification are being duly carried out

and on being satisfied that the said obligations have not been discharged then can enforce realisation of the customs duty from them."

32. Mr. Desai, however, submits that the Supreme Court subsequently in *A.P. State Financial Corporation Vs. Vajra Chemicals and others*, has taken a contrary view. The Apex Court in its later decision clarified that the two different Division Benches had taken contrary views only on one question as has been stated to have not laid down the correct law, i.e., the benefit of exemption notification was extended to the petitioner therein on a wrong premise.

33. The petitioner in the instant case has taken inconsistent and contrary stand. It accepts that it has approached the Government of India and obtained the exemptions. It also accepted that such exemptions had been subject to certain terms and conditions. It, Therefore, in our opinion, has rightly been submitted by the learned Attorney General that the petitioner cannot now be permitted. to turn round and contend that the Government of India had no jurisdiction in relation thereto.

34. The question which survives for consideration now is as to whether by reason of the impugned order the Central Government issued any direction to the statutory authorities. In the instant case no action had been taken as a result whereof the quasi judicial authorities became denuded of their quasi judicial power. Merely communicating the impugned judgment to the effect that such exemption had been withdrawn is communication of a foundation of fact. If according to the petitioner the order of the quasi judicial authority suffers from any illegality they could have carried the matter higher up.

35. Let us now examine the decisions cited by Mr. Desai. In *Hemraj Gordhandas v. H.H. Dave. Assistant Collector of C.E. and Customs, Surat and Ors.* reported in 1978 E.L.T. 350 the Apex Court stated that there is no room for intendment as regard to taxing statute.

36. The said decision cannot be said to have any application in the instant case.

37. In *Gujarat State Fertilizers Co. (supra)*, it was held that in the fact situation the scope and ambit of the notification in question therein could not be curtailed on the basis of some supposed intention in relation to the said notification. In the instant case the intention for grant of permission is explicit as would appear from the press notification issued by the Government of India as also the provisions contained in Section 10(15)(iv)(f) of the said Act.

38. There cannot be any doubt whatsoever that the assessing authority and the appellate authority are quasi judicial authorities. By reason of the order impugned in the writ petition the Central Government has in no way curtailed the power of judicial or quasi judicial authority.

39. It is well known that the jurisdiction of judicial review of this Court is limited. Having regard to the facts and circumstances, we do not find that there exists any illegality, irrationality or procedural impropriety in the decision. This Court in

not concerned with the merit of the decision.

For the aforementioned reasons, we do not find any merit in this petition which is dismissed. However, in the facts and circumstances of this case there shall be no order as to costs.