आयकर अपीलीय अधिकरण "K" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI

BEFORE SHRI AND SHRI AMIT SHUKLA, JUDICIAL MEMBER AND MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 6169/Mum/2011

(**निर्धारण वर्ष /** Assessment Year: 2007-08)

आयकर अपील सं./I.T.A. No. 6541/Mum/2011

(**निर्धारण वर्ष /** Assessment Year: 2007-08)

M/s Garware Polyester Limited, 50 A, Swami Nityanand Marg, Western Express Highway, Vile Parle (East), Mumbai – 57.	**बनाम**/ v.	Dy. CIT- 8(1), Mumbai.
स्थायी लेखा सं./ PAN : AAACGO571D		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by	Shri Saurabh Deshpande
Revenue by :	Shri Anuj Kisandwala

सुनवाई की तारीख /**Date of Hearing : 12-01-2017**

घोषणा की तारीख /**Date of Pronouncement : 18-01-2017**

आदेश / O R D E R

PER, AMIT SHUKLA, JUDICIAL MEMBER:

The aforesaid cross appeals have been filed by the assessee as well as by the Revenue against the impugned order dated 28th July, 2011, passed by the ld. CIT(Appeals) – 15, Mumbai for the quantum assessment passed u/s 144(C)(4) r.w.s. 143(3) of the Income Tax Act, 1961, for the assessment year 2007-08.

2. First, we will take up assessee's appeal in ITA No. 6169/Mum/2011, wherein the assessee has raised various grounds of appeal for challenging the following issues:-

(i) Transfer Pricing Adjustment of Rs. 1,34,84,283/- on account of international transactions of sale of Polyester film products to AEs (ground no. 1).

(ii) Addition of Rs. 3,52,78,000/- made u/s 28(iv) r.w.s. 41(1) on account of waiver of principal loan stated to be for acquisition of capital asset and hence capital receipt is not chargeable to tax (ground no. 2).

(iii) Disallowance of interest u/s 36(1)(iii) amounting to Rs. 17,57,732/- on the ground that such interest is attributable to capital work-in-progress (ground no. 3).

(iv) Amount of Rs. 2,71,000/- u/s 14A while calculating the book profit u/s 115JB (ground no. 4).

3. Before us, the ld. Counsel for the assessee, Shri Anuj Kisandwala at the outset submitted that, issues raised in ground nos. 3 & 4 are not pressed, accordingly, these grounds are treated as dismissed as not pressed.

4. Regarding transfer pricing adjustment, the ld. Counsel submitted that the transaction in dispute on which the T.P adjustment has been made is on account of sale of Polyester film products to its Associated Enterprises (AE); 'Global Pet Films Inc.' and 'Garware Polyester International Ltd.', a US and UK based company respectively. The assessee has benchmarked the said transaction by applying CUP method wherein average price charged by the AE were compared with the average price of these products charged to local customers of the assessee. The TPO noted that the assessee has been selling the films to non-AEs located in different countries including Latin America, Asia, Europe, Australia etc., but there are no non-AE sale to USA and UK where the AE's are operating as sole selling agent. He observed that there are geographical differences between US and UK market on one hand where the AEs are operating and the other countries where assessee is selling on the other hand. However, such geographical differences are taken care when multiple country non-AE sales are considered. Based on the aforesaid, the TPO proceeded to compare the product, quality-wise, average non-AE export price where the price charged to AE, GPF (US) and GPIL (UK) and thereby computed the transfer pricing adjustment at Rs. 2,76,45,771/-. In the first appeal, the ld. CIT(A) confirmed the action of the A.O., however, gave the benefit of (+/-) 5% as standard deduction.

5. Before us, the ld. Counsel submitted that similar issue had come up for consideration before this Tribunal in assessee's own case for A.Y. 2005-06 and 2006-07. In the said order passed, the Tribunal has set aside the matter to the file of the TPO/AO to apply TNMM as the most

appropriate method for determining the ALP of the transaction and carry out fresh analysis. Therefore, following the same precedence, this issue should also be restored back to the file of the TPO/AO.

6. The ld. D.R., also admitted that the TP issue involved in this year as well as in the earlier year are exactly same and in the earlier year the Tribunal has set aside this matter back to the file of the TPO/AO for fresh analysis.

7. After considering the aforesaid submissions and on perusal of the impugned order as well as the Tribunal order for assessment year 2005-06 in ITA No. 4444/Mum/2011 (order dated 19-12-2012), we find that the Tribunal has discussed this issue in detail after observing and holding as under:-

> *"17. We have carefully considered the rival contentions of the parties, perused the findings given by the TPO as well as by the Commissioner (Appeals). The assessee is engaged in the business of manufacture and sale of various types of polyester films and sun control films. For exporting its products, the assessee has two types of set-ups for export sales - firstly, independent agents (for short "non-A.E. Agents") operating in Asian countries, African countries, Middle East, Far East, Russia and other CIS countries, which are mostly developing markets and secondly, through two subsidiary companies which are termed as "A.E" and are operating in American and European markets which are developed markets. The assessee has bench marked its international transactions with its A.Es by applying CUP method, wherein average price charged to A.Es have been compared with the average export prices charged to local customers in India. The TPO has rejected the assessee's comparison of export sales charged to A.Es with local sales price and compared the average non-A.E. export price with the price*

charged to two A.Es. The learned Commissioner (Appeals) accepted the contentions of the assessee that the TPO has failed to take into consideration the geographical, economical market differences where the A.E and non-A.E. agents are carrying out their business activities. He also appreciated that the export price of the proceeds varies considerably from country to country and specifically in a developed market of U.S. and U.K. in comparison to Asian and African countries. He analysed the prices and also the nature of market which has been advertum discussed in detail in the foregoing paragraphs. However, after having come to the conclusion that the TPO's approach is not correct and he has not taken into account the vital factor of geographical, economical market differences, held that even the assessee's approach is also not acceptable as the geographical difference does exists between the Indian market on one hand and American & European markets on the other hand. Thus, on the same logic, he rejected the assessee's approach for bench marking the ALP of its transactions with the A.E. This has been discussed in- Para-3.32 as reproduced above.

18. After having rejected the approach of the TPO as well as the assessee, he admitted that there are no direct comparable un-control transactions to bench mark the ALP of the A.Es as their market prices prevailing in the concerned geographical countries i.e., U.S.A. and Europe has to be seen subject to certain adjustment of expenses. The sale prices charged to such third party unrelated customers represents comparable un-control prices on aggregate basis in the respective comparable market under comparable circumstances. He even went to analyse the profit ratio and operating expenses of the A.Es and held that these A.Es are running into losses and no third party will carry such business at loss. In this manner, the learned Commissioner (Appeals) has made these A.Es as tested parties and without looking into the independent comparables operating in the same kind of products in the said countries, he accepted the operating margin of the A.Es. This is where the learned Commissioner (Appeals) went on a wrong footing and incorrect approach. Once the learned Commissioner

(Appeals) accepted that the CUP is the appropriate method, then he has to examine whether there are any internal comparables or any external comparables. In the present case, once he has held that there are no internal comparables, he was required to look into external comparables operating or dealing with the similar products under similar terms in a similar market conditions where these A.Es are operating, which he failed to do so and simply accepted the trading results of the A.Es. Under the CUP method, the price of the goods or services is directly compared with the price in uncontrolled transactions under similar conditions. Internal CUP would be available if the assessee or its group entity enters into a comparable transaction with unrelated party where the goods or services under consideration are same or similar. On the other hand, there could be an external CUP if a transaction between two independent enterprises involves comparable goods or services under comparable conditions. The CUP method also requires a very high degree of comparability with regard to the quality. of products or services, contractual terms, level of the market, geographical market in which the transaction takes place and host of other factors.

19. Once the learned Commissioner (Appeals) found that there are so much of variables for applying either internal CUPs and has not applied external CUP, probably, due to this factor, then the entire application of CUP fails in this case. The learned Commissioner (Appeals) cannot go to examine, independently the operating expenditure and operating profits of the A.Es for determining the ALP. A comparability analysis has to be carried out for determining the ALP. Provisions of section 92C provides computation of ALP and envisages that the ALP in relation to an international transaction shall be determined by any of the methods prescribed therein, being the most appropriate method having regard to the nature of transactions or class of transactions or class of associated persons or functions performed to such persons. For this purpose, six methods have been spelt out. Sub-section (2) of section 92C provides that the most appropriate method referred to in sub-

section (1) shall be applied for determination of ALP. Thus, for computation on examining of ALP, one of the most appropriate methods has to be applied. Once the CUP method fails in this case, then it was required by the learned Commissioner (Appeals) to look into for other appropriate methods. Now, the question is what should be the most appropriate method. At the time of hearing, both the parties agreed that in case CUP method is failed, then TNMM can be adopted as most appropriate method, wherein the ALP is determined by comparing the operating profit relative to appropriate base viz. cost as well as asset of the tested party with the operating profit of an uncontrolled party engaged in comparable transactions. Accordingly, we set aside the impugned order passed by the learned Commissioner (Appeals) and restore the matter to the file of the TPO and direct him to examine the ALP after adopting TNMM and carry out fresh comparability analysis. The assessee will provide all the necessary information and search analysis for the comparables. The TPO will also provide due and effective opportunity of hearing to the assessee to represent its case. Accordingly, ground No. l is treated as allowed for statistical purposes."

This decision has been further followed by the Tribunal in the case of the assessee in the A.Y. 2006-07 in ITA No. 7820/Mum/2010 (order dated 19-12-2012). Thus, respectfully following earlier years precedence of the co-ordinate bench, we also set aside the matter of transfer pricing adjustment back to the file of the TPO/AO with similar direction to examine the ALP of the said transaction by adopting the TNMM as the most appropriate method and carry out fresh comparability analysis. The assessee would be at liberty to furnish all the necessary information and provide search analysis of external/internal comparables to benchmark the margin earned by the assessee on its

sale transaction with the AE. Accordingly, ground No. 1 is treated as allowed for statistical purpose.

8. Coming to the issue of addition of Rs. 3,52,78,000/- as raised in ground No. 2, the relevant facts qua this issue are that, the assessee company had availed financial assistance of Rs. 125 crores from IDBI Bank during the financial year 1996-97 for setting up a continuous poly-condensation facility at Aurangabad and also for expansion of company's polyester firm manufacturing capacity by setting up new facilities. The sanction letter has been placed at pages 5 to 9 of the paper book. Later on, in order to repay the loan taken from IDBI Bank, the assessee company has taken loan from Vijaya Bank during the financial year 1998-99. During the relevant previous year of A.Y. 2007-08, with a view to reduce the burden on account of huge loan and interest liability, the assessee entered into negotiation with Vijaya Bank for one time settlement package. As a part of OTS agreement, the assessee company was made to pay lump-sum amount of Rs. 7 crores against the total amount due of Rs. 12,81,12,110/- as on 31st March, 2006. The total waiver of Rs. 5,81,12,110 was bifurcated into; principal amount of loan of Rs. 3,52,78,000/-; and on account of interest payable at Rs. 2,28,33,410/-. The waiver of principal amount of Rs. 3,52,78,000/- was transferred to 'capital reserve'. The assessee treated the said amount as capital receipt as the loan was on capital account and accordingly, was not shown as income of the year. Before the A.O., in response to the show cause notice the assessee had filed detailed reply, the contents of which have been incorporated in the impugned assessment order from pages 3 to 7. Apart from explaining the entire

facts and reiterating that the credits on account of waiver of principal is capital in nature and, therefore, is capital receipt not chargeable to tax even in the deeming provisions of section 41(1), strong reliance was placed on the decision of **Hon'ble Bombay High Court** in the case of **Mahindra & Mahindra v. CIT reported in 261 ITR 501**. When the A.O. confronted with another decision of Hon'ble Bombay High Court in the case of **Solid Containers Limited reported in 308 ITR 417,** the assessee submitted that the same is not applicable on the facts of the present case, because in that case the assessee has taken a loan as a trading receipt and the same was credited to the P&L account and that is why it was held as assessable as business income. The Hon'ble Bombay High Court observed that since the money forfeited by the assessee was treated as deposit, therefore, by efflux of time, the money had become assessee's own money. Here the assessee had taken loan for acquisition of capital assets and therefore, waiver of loan will not fall within the nature of trading liability.

9. The A.O. rejected the contentions of the assessee and held that the waiver amount is a profit/benefit within the meaning of section 28(iv) r.w.s. 41(1). Strong reliance was placed on the decision of Hon'ble Apex Court in the case of T.V. Sundaram Iyengar & Sons Ltd. reported in 212 ITR 344 (SC). The A.O. also noted that the assessee has credited waiver of interest liability to the P&L account, however, had not credited the waiver amount in P&L account and instead has credited the same to the General reserve account. The A.O. held that such treatment in the account will not change the character or receipt. Strong reliance was placed by him on the decision of Hon'ble Bombay High Court in the

case of Solid Containers (supra) and held that the income of the assessee is assessable u/s 28(iv) as well as 41(1). However, so far as the interest component was concerned, the A.O. accepted that the interest amount of Rs. 2,28,33,410/- has been disallowed in the earlier years u/s 43B and, therefore, such an amount cannot be added back again. Finally, the A.O. made addition on account of waiver of principal loan amount of Rs. 3,52,78,700/-. On first appeal, the ld. CIT(A) confirmed the action of the A.O, however, he made certain observation in para No. 20, 21 & 26 of his appellate order which for sake of ready reference are reproduced hereunder:-

" 20:- It is the facts emanating from the case of' the appellant and pointed above that the VRFL loan taken by the appellant from the Vijaya Bank is for the purpose of pro rata reduction in the Rupee Term Loan liability with the IDB!, where the principal amount was to the tune of Rs.125 crores. There could be sizeable quantum of interest specially linked to the rate of interest at 19% at the time of issue of letter to the appellant. Further the assets created by such loans from the IDBI must have been charged to P&L a/c by way of' their depreciation and also interest on the amount of loan .after the commencement of production. It is towards such charge of interest and depreciation that the VFRL taken from the Vijaya Bank can only be considered to be have been utilized. Accordingly, the loan so taken from Vijaya Bank is clearly towards the expenditure by way of interest and depreciation charged to P&L a/c which has been made I incurred by the appellant and subsequently by way of one time settlement, the liability to the extent of Rs. 5,81,12,110/- has ceased by way of remission thereof, which constituted or Rs. 3,52,78,000 as principal and Rs. 2,28,33,410 towards interest.

21. It is the fact of the case that the cessation of such business liability to the extent or addition made of Rs. 35278,0001- has been

credited to the General Reserve without passing it through the P&L alc. Without any amount getting reflected in the P&L A/c, cannot directly be taken to the General Reserve and that extent, there is inconsistency with regard to the accounting principles as well.

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26. In the case of CIT Vs. Tosha International Ltd. the principle annunciated in the case of Mahindra & Mahindra Ltd. has been upheld. It has been held that for attracting the provision of section 4I (l), the first requisite condition to be satisfied is that the assessee should have got deduction or benefit of allowance in respect of loss, expenditure or trading liability incurred by it and subsequently during any previous year, the assessee should have received any amount in respect of such loss, expenditure or trading liability by way of remission or cessation thereof. The issue on hand and facts of the case conform to this principle announced in the case relied upon by the appellant. There is benefit of allowance/deduction in the shape of interest on loan of IDBI after commencement of production and allowance of deprecation, the loan taken from the Vijaya bank was to repay such loan of IDBI, which constituted interest and principal and accordingly it is the case where deduction/allowance has been given to the appellant."

From the reading of the above observations of the ld. CIT(A), it is seen that the ld. CIT(A) has decided the issue on the footing that the waiver of loan procured from Vijaya Bank pertains to the portion of loan which was procured by the assessee company towards the payment of interest amount on IDBI Term Loan. He has further distinguished the decision of Mahindra & Mahindra.

10. Before us, the ld. Counsel after explaining the entire facts as discussed above submitted that, *firstly,* the ld. CIT(A) has misconstrued himself in coming to the conclusion that the loan taken from Vijaya

Bank was towards repayment of interest amount on the IDBI Term Loan; and *secondly*, if ha held so then he has not even quantify how much was towards the principal loan amount and interest. Before us, he filed a chart reflecting the position of IDBI Term Loan as well as Vijaya Bank term loan, which for the sake of ready reference is reproduced below:-

Period of receipt of IDBI loan – May to September 1996:- Rs.12,450 lacs

Date of receipt of Vijaya Bank Loan – 26.03.1998:- Rs.1,750 lacs

Repayment of Vijaya Bank loan	Amount (Rs. in lacs)	Amount (Rs. in lacs
Amount of loan taken from Vijaya Bank		1,750.00
Payment of interest on IDBI accrued till 31.12.1997	(549.95)	
Interest accrued for 3 months @ 19% (16% + 3%) from 31.12.1997 to 31.03.1998 on 9950 lakhs. Balance amount of Vijaya Bank Term Loan utilized to pay off IDBI Term Loan Principal	(472.63)	1,022.58 727.43

Thereafter, the ld. Counsel drew our attention to the entries in the balance sheet and pointed out that the interest amount as on 31st December, 1997 on IDBI Term Loan was Rs. 5.5 crores. From this he pointed out that, out of the amount taken from Vijaya Bank of Rs. 17.50 crores, the interest on IDBI Term Loan as on 31st December, 1997 was approximately Rs. 5.50 crores. Even if for the argument sake, interest accrued for 3 months is taken into consideration, i.e., for the period between 31.12.97 to 31.3.98 on Rs. 99.50 crores, then the balance amount of Vijaya Bank term loan which has utilized to pay IDBI principal amount of term loan would come to Rs.7.27 crores. Here,

the assessee had credited the principal loan amount of Rs. 3.52 crores only, which is much below the principal amount of term loan payable to IDBI. Thus, the ld. Counsel submitted that the observation of the ld. CIT(A) cannot be held to correct.

11. The ld. Counsel further pointed out that the decision of Hon'ble Bombay High Court in the case of Mahindra & Mahindra (supra) clearly clinches with the issue in favour of the assessee, wherein their Lordships observed that the loan taken for import of capital asset was is capital in nature and categorically held that, on waiver of loan amount, neither the provisions of section 28(iv) is applicable nor the provisions of section 41(1). Regarding the applicability of the decision of Hon'ble Bombay High Court in the case of Solid Containers (supra)., he pointed that there was a clear cut finding that the amount which was written off pertained to the amount payable to the customers which was credited to the P&L account and, hence, it was clearly a trading liability. He pointed out that in a subsequent decision by the Hon'ble Bombay High Court in the case of **Softworks Computers Pvt. Ltd., reported in 354 ITR 16** considered the proposition laid down by the Hon'ble Court in the case of Mahindra & Mahindra as well as Solid Containers Limited (supra). Their Lordships have made a clear distinction between the loan taken for waiver of capital asset which cannot be taxed u/s 41(1) being capital on nature and waiver of amount which is on account of trading liability.

12. The ld. D.R. on the other hand strongly relied upon the order of the ld. CIT(A) and submitted that, the principle laid down by the

Hon'ble Apex Court in the case of CIT v. T.V. Sundaram Iyengar & Sons Ltd. (supra) would be clearly applicable. Apart from that he submitted that the decision by the Hon'ble Madras High Court in the case of CIT vs. Subramaniyam Homes Pvt. Ltd. in Tax Case (Appeal) No. 278 of 2014 order dated 22.4.2016 would apply, wherein the Hon'ble High Court after considering the decision of Hon'ble Bombay High Court in the case of Mahindra & Mahindra and other decision of Hon'ble Delhi High Court held that they are not in agreement with these judgments. This decision is primarily based on the decision of Hon'ble Apex Court in the case of T.V. Sundaram Iyengar & Sons Ltd. (supra). Thus, the decision of Hon'ble Madras High Court should be followed.

13. In the rejoinder, the ld. Counsel submitted that the decision of Hon'ble Madras High Court had come up for consideration before this Tribunal in the case of ITO v. Santogen Silk Mills Ltd. in ITA No. 1700/Mum/2013 for A.Y. 2009-10, dated 22.6.2016, wherein it has been held that the decision of Hon'ble Bombay High Court in the case of Mahindra & Mahindra (supra) will apply in the jurisdiction Bombay High Court.

14. We have carefully considered the rival submissions and also perused the relevant material placed on record including the judicial decisions cited by both the parties. It is an undisputed fact that the assessee have availed term loan from IDBI Bank for a sum of Rs. 125 crores for acquisition of capital assets and setting up of manufacturing plant. Such nature of loan was primarily on capital account. Later on, the assessee in the financial year 1997-98 had taken loan from Vijaya

Bank purely for the repayment of loan taken from IDBI Bank. It has been brought on record before us that payment of IDBI term loan, accrued till 31-12-1997 was approximately Rs. 5.50 crores. The amount of loan taken from Vijaya Bank was Rs. 17.50 crores which was taken on 26-3-1998. Thus, till that period, the accrued loan was approximately Rs. 5.50 crores (or say Rs. 7.73 crores, if we include interest for the period 3 months from 31-12-1997 to 31-3-1998). The waiver of loan under OTS agreement was Rs. 5.81 crores after the assessee had made the lump-sum payment of Rs. 7 crores as against the outstanding amount of Rs. 12.81 crores. This amount of Rs. 5.81 crores has been stated to be partly out of principal amount of loan of Rs.3,52,78,000/- and partly on account of interest payable of Rs. 2,28,33,410/-. Since the A.O. has not made any addition on account of interest amount, because the same has been disallowed in the earlier years u/s 43B, the only dispute before us pertains to principal amount of loan only.

15. Now, the moot question for our adjudication is, whether the waiver of principal amount of loan of Rs. 3,52,78,000/- can be held to be taxable in this year either u/s 28(iv) or u/s 41(1). We will first take up the applicability of section 41(1) on the waiver of principal amount of loan which was admittedly taken for acquisition of a capital asset. Generally, the waiver of remission of a liability cannot be regarded as income in the hands of the assessee unless it is a trading liability and if the waiver of a loan is on capital account then certainly it cannot be reckoned as income or revenue, which is clearly evident from the relevant provisions of section 41 (1) which reads as under:

"(1) Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee (hereinafter referred to as the first-mentioned person) and subsequently during any previous year,-

(a) the first-mentioned person has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits and gains of business or profession and accordingly chargeable to income- tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not; ……."

From the plain reading of above section it is quite ostensible that before this section can be invoked it is sine-qua-non that assessee should establish that first of all an allowance or deduction has been granted during the course of assessment for any year in respect of, (i) loss; (ii) expenditure; or (iii) trading liability, which is incurred by the assessee; and subsequently during any previous year the assessee obtains, whether in cash or in any other manner, whatsoever; (i) any amount in respect of such loss or expenditure, or (ii) some benefit in respect of such trading liability by way of remission or cessation of such liability. Thus, a remission or cessation of liability which can be deemed to be as an income must be a trading liability for which an allowance or deduction has been made in the assessment for an earlier year. Assessee's liability on account of the principal amount of loan borrowed on a capital account, i.e., for acquisition of a capital asset cannot be

reckoned as a nature of trading liability as envisaged in section 41(1), therefore, its remission cannot be deemed as income under the said provision. Here, in this case admittedly the pre-requisite condition for invoking the provision of section 41 (1) has not been satisfied / fulfilled at all for the reason that the pre-component of the borrowing for acquisition of capital asset has neither been allowed as allowance nor as deduction in the earlier years and being for the purpose of acquisition of a capital asset any waiver thereof will not constitute income under section 41(1).

16. Before us, the ld. D.R. has placed heavy reliance on the decision of Hon'ble Supreme Court in the case of CIT vs. T.V. Sundaram Iyengar & Sons Ltd. (supra). In this case, the assessee had received certain deposits from the customers in the course of carrying on its business which was originally treated as capital receipts. Since these credit balances standing in favour of assessee's customers, were not claimed by the customers, the assessee transferred such amount to its P&L account. In this context the Hon'ble Court held that if an amount is received in the course of trading transaction, even though it is not taxable in the year of receipt as being of revenue character, the amount changes its character when the amount becomes the assessee's own money because of limitation and hence it is to be treated as income of the assessee. In that case, there was a clear cut finding by the lower court as well as also noted by the Hon'ble Apex Court that the amount was received in the course of trading transaction and, therefore, at the time of writing it back after a lapse of time, certainly amounts to benefit u/s 28. A distinction has to drawn in the cases where an amount of

loan is for the acquisition of capital asset and the cases where it has been for trading purpose; the former cannot be reckoned as revenue receipt whereas later can. This aspect of the matter has been clarified by the **Hon'ble Bombay High Court in the case of Mahindra & Mahindra vs. CIT reported in 261 ITR 501**. The relevant observation, for the sake of ready reference, is reproduced below:-

> *"The income which can be taxed under Section 28(iv) must not only be referable to a benefit or perquisite, but it must be arising from business. Secondly, Section 28(iv) does not apply to benefits in cash or money. Secondly, in this case we are concerned with the purchase consideration relating to capital asset. The toolings were in the nature of dies. The assessee was a manufacturer of heavy vehicles and jeeps. It required these dies for expansion. Therefore, the import was that of plant and machinery. The consideration paid was for such import. In the circumstances, Section 28(iv) is not attracted. In our case, the most fundamental fact which is required to be borne in mind is that there was no deduction given to the assessee in earlier years and, therefore, Rs.57,74,064 could not be included as income under Section 41(1) of the Act. Lastly, it is important to bear in mind that the tooling constituted capital asset and not stock-in-trade. Therefore, taking into account all the above facts, Section 41 (1) of the Act is not applicable".*

Moreover, the Hon'ble Bombay High Court in the subsequent decision in the case of **CIT vs. Softworks Computers Pvt. Ltd. reported in 354 ITR 16** have considered both the decisions of Mahindra & Mahindra (supra) and **Solid Containers Ltd. Reported in 308 ITR 417** and gave the following categorical findings:-

> *"We find that the decision of this court in the matter of Solid Containers Ltd. (supra) has also considered the earlier decision in the matter of Mahindra and Mahindra Ltd. (supra) and distinguished the same by holding that in that case the*

> *loan was given for purchase of capital assets unlike in the case of Solid Containers Ltd. (supra) where waiver was of a loan taken for trading activity and thus considered to be of a revenue nature. In the present case, the amount which was advanced as a loan to the respondent-assessee was for the purposes of relocating its office premises. The loan taken was utilized for the purposes of acquiring a office at Godrej Soap Complex, Vikroli, Mumbai. Therefore, the loan in the present fact was taken for acquisition of capital asset and not for the purposes of trading activity as in the case of Solid Containers Ltd. (supra). The present case is, therefore, covered in favour of the respondent-assessee by the decision of this court in the matter of Mahindra and Mahindra Ltd. (supra)."*

Thus, from the aforesaid decision, it is ostensibly clear that, if the loan amount have taken for the purpose of acquisition of capital asset, then it remains in the capital feild even at the time of remission and such a capital receipt cannot be taxed wither u/s 28(iv) or u/s 41(1). Accordingly, the order of the ld. CIT(A) is reversed and the grounds raised by the assessee are allowed.

17. In the result, appeal of the assessee is partly allowed.

Now, we shall take up the Revenue's appeal in ITA No. 6541/Mum/2011 for A.Y. 2007-08.

18. In this appeal the revenue has raised the following grounds:-

> *"1. "On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in restricting 'the Transfer Pricing adjustment made by the TPO/AO to the extent of Rs. 1,34,84,283/- and allowing a relief of Rs. 1,41,61,488/- without considering the fact that the amendment to Proviso to section 92C(2) of the Act shall apply in relation to all cases in which proceedings are pending before the TPO on or after 01-10-2009, and hence was applicable in the case of the*

assessee as the proceedings for A. Y. 2007-08 were pending as on 01-10-2009.

The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the A.O. be restored.

19. It has been admitted by both the parties that the observations and findings of the ld. CIT(A) that *proviso* to section 92C(2) does not provides for standard deduction of (+/-) 5% range. Such a proposition is untenable in law, because the statute does not provide for any type of standard deduction, therefore, such observation of the ld. CIT(A) is reversed. Since we have already set aside the matter of transfer pricing adjustment to the file of the A.O., therefore, the A.O. is at liberty to make fresh ALP after taking the TNMM in the most appropriate method. Accordingly, the appeal of the Revenue is treated as allowed.

20. In the result, appeal filed by the assessee company in ITA No. 6169/Mum/2011 is partly allowed and the appeal filed by the Revenue in ITA No. 6541/Mum/2011 is allowed.

Order pronounced in the open court on 18th January, 2017.

आदेश की घोषणा खुले न्यायालय में दिनांकः 18 जनवरी 2017 को की गई ।

sd/-	sd/-
(MANOJ KUMAR AGGARWAL)	(AMIT SHUKLA)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated **18/01/2017**

व.नि.स./ *R.K.*, Ex. Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai k Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**