

**IN THE INCOME TAX APPELLATE TRIBUNAL “H”
BENCH, MUMBAI**

**BEFORE HON’BLE SH. G. S. PANNU, AM &
HON’BLE SH. SANDEEP GOSAIN, JM**

आयकरअपीलसं./ I.T.A. No. 4431/Mum/2016
(निर्धारणवर्ष / Assessment Year: 2007-08)

ITO- 1 (2) (3), 527, Aayakar Bhavan, M. K. Road, Mumbai-400 020	बनाम/ Vs.	Meher Synthetics Pvt. Ltd. 412-A, Lotus House, 32A, New Marine Lines, Mumbai-400020.
स्थायीलेखासं ./जीआइआरसं ./PAN No. AACCM1573H		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri Ashish Kumar, DR
प्रत्यर्थीकीओरसे/ Respondent by	:	Shri M. M. Joshi, AR

सुनवाईकीतारीख/ Date of Hearing	:	23.05.18
घोषणाकीतारीख / Date of Pronouncement	:	27/07/2018

आदेश / ORDER

Per Sandeep Gosain, Judicial Member:

The present Appeal filed by the revenue is against the order of Ld. CIT (Appeal) – 2, Mumbai dated 23.03.16 for AY 2007-08 on the grounds mentioned herein below:-

“Whether on facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of unsecured loan of Rs.70,00,000/- from Rajhans Merchandise (P) Ltd, and also the addition on account of loan of Dena Bank of Rs. 7,73,566/-, without appreciating the Assessing Officer's findings that the assessee failed to furnish any evidence to establish that the loans were taken and utilized in acquisition of the asset and that the loans were taken for the purpose of business and were utilized by the assessee in business for earning the income. On account of the waiver of the amounts by the creditors assessee had become richer by the amount which it accumulated in the form of profit under the head "Capital Reserve" and as such remission of said loans becomes benefit accrued to the assessee”.

The appellant craves leave to add to, amend or withdraw the aforesaid grounds of appeal.

2. The brief facts of the case are that the assessee company is engaged in the business of Spinning, weaving, twisting, crimping and converting any kind of yarn into final products and dealing in synthetic fibres. The assessee company filed its return of income on 15/14/2007 declaring loss at (-)Rs.87,89,302/-. Thereafter, an assessment order u/s. 143(3) of the I.T. Act, 1961 was passed on

14.12.2009 and the AO has arrived at loss of (-)Rs.10,15,736/-.In the assessment order, AO has made the addition on account of Waiver amount treated as Income u/s 28(iv) of Rs. 77,73,566/-.

Aggrieved by the order of AO, assessee preferred appeal before Ld. CIT(A) and Ld. CIT(A) after considering the case of both the parties,partly allowed the appeal of the assessee and deleted the addition.

Now before us, the revenue has preferred the present appeal by raising the above grounds.

3. The solitary ground raised by the revenue relates to challenging the order of Ld. CIT(A)in deleting the addition of unsecured loan of Rs.70,00,000/- from Rajhans Merchandise (P) Ltd, and also the addition on account of loan of Dena Bank of Rs. 7,73,566/-, without appreciating the AO's findings that the assessee failed to furnish any evidence to establish that the sloans were taken and utilized in acquisition of the asset and that the loans were taken for the purpose of business and were utilized by the assessee in business for earning the income.

4. We have heard counsels for both the parties at length and we have also perused the material placed on record as well as the orders passed by revenue authorities.

Before we decide the merits of the case, it is necessary to evaluate the orders passed by Ld. CIT(A). The Ld. CIT(A) has dealt with the above grounds raised by the revenue in para no. 4 to 7 of its order. The operative portion of the order of Ld. CIT(A) is contained in sub-para no. 7 of its order and the same is reproduced below:-

Decision:

7. Ground No. 1.

The AO has added sum of Rs.77,73,566/- u/s 28 (iv) of the Income-tax Act stating the reasons that the principle amount waived by Dena Bank and Rajhans Merchandise Pvt. Ltd.. However, the appellant company has offered interest component of Rs.73,881/- out of total waiver given by the Dena Bank of Rs. 8,47,447/- and strongly argues that the capital component wherein the contract character of income on the interest waiver given by the Bank. Having income character duly offered for taxation. On perusal of the submission given by the AR of the appellant company, I am of the opinion that company has

already offered interest component to the extent of Rs..73,881/- With regard to principle component of Rs. 7,73,566/- being in a capital nature, it may not be a fair totreat that as income and accordingly I direct the AO the delete Rs.7,73,566/-. The appeal is allowed.

Further, sum ofRs. 70,00,000/- loan is stated to be received from M/s Rajhans Merchandise Pvt. Ltd. as unsecured loan. The AR of the appellant explained that the said amount of Rs.70 lacs has been waived by Rajhans Merchandise Pvt. Ltd.. The nature of loan is interest free loan. The assessee company has not claimed any interest expenditure intheProfit and loss A/c. Accordingly, I am of the opinion that being a capital nature, this cannot be treated as income in the hands of the appellant company and the lender has waived of the loan. Hence, I direct the AO to delete the addition of Rs.70,00,000/-. This ground of appeal is allowed.

After having gone through the facts of the present case as well as considering the orders passed by revenue authorities and submissions made by both the parties, we find as per the facts of the present case, the assessee company had taken 'term loan' from Dena Bank in the Financial Year 1998-99. Subsequently, in

the previous year relevant to the assessment year under consideration, the assessee company had entered into 'One time Settlement' of its dues of the Dena Bank by way of payment of Rs.4,62,525/and the balance amount of Rs.8,47,447/- was waived by the Bank which consisted of principal component of Rs.7,73,566/- and interest component of Rs.73,881/-. The principal component was transferred to capital reserve and the interest component was credited to interest account. We also find that the assessee also had a loan outstanding to Rajhans Merchandise Pvt. Ltd. of Rs.70,00,000/- which was waived by the said party in the previous year under consideration and the AO treated the waiver of these loans as income of the assessee u/s. 28(iv) of the Act and accordingly added an amount of Rs.77,73,566/- to the total income of the assessee.

We also find that the main contention of the AO in adding the said 'waiver of loan' is that the loan was taken for acquiring a business asset and is covered in the term "for the purposes of the business" and hence the loan having been utilized by the assessee in its business and now waived, it accrued in benefit to the assessee and the loan taken by the assessee was for the purposes

of the 'business' and was inextricably linked with the 'business operations of the assessee' and that the assessee became richer on account of waiver by the lenders.

We also find that the loan was taken by the assessee for capital expenditure i.e. acquisition of land and building and plant and machinery is evident from the loan sanction letter dated 31.03.1998 issued by Dena Bank. Hence, the fact that the said loan was taken for capital purposes and not for revenue purposes stands established.

Moreover, such waiver of loan cannot be treated as assessable income under the provisions of section 28(iv). Since the original receipt was undoubtedly on account of 'capital nature', its waiver does not have the quality of changing the same into a 'revenue receipt'. Section 28(iv) of the Income-tax Act, 1961, reads as under:

'28. The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession",-

[(iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession;]"

Section 28 is a charging section for profits and gains of business or profession and it takes into account the receipts of specified categories as income as well as the receipts which can be generally construed as income in the ordinary sense. But Section 28(iv) is a specific section which says, the value of any benefit or perquisite arising from business, which means that such benefit or perquisite should be in the nature of income from the very beginning or it must have characteristics of income before it becomes chargeable at a later stage, if the original transaction is completed as designed. Here, in the instant case, no material had been brought on record to show that the loan agreement provided for such waiver at subsequent stages although it happened due to unavoidable circumstances. For the purpose of invoking the provisions of section 28(iv) it is first and foremost necessary that the benefit should arise due to any business or profession carried on by the assessee. For example, where a salesman receives a car for generating high sales for his agent, the value of car received will be treated as business income in view of section 28(iv). In the instant case, it will be appreciated that the appellant is not in the business of obtaining and granting loans and therefore the waiver of loans cannot be treated as income. Hence, this

receipt could not be construed as a benefit within the meaning of section 28(iv).

Further, the words 'benefit' or 'perquisite' have been used in this sub-section, which have to be read together and would draw colour from each other. Normally, the term 'perquisite' denotes meeting out of an obligation of one person by another person either directly or indirectly or provision of some facility or amenity by one person to another person and from the very beginning, the person providing such facilities or concessions knows that whatever is being done is irretrievable to him as it has been granted to a person as a privilege or right of that person. Therefore, the word 'benefit' has also to be interpreted in the same manner, i.e., at the time of execution of the business transaction, the one party should give to the other party some irretrievable benefit or advantage.

Thus, as per section 28(iv), the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession shall be considered as income in the hands of the assessee and be chargeable to income-tax under the head "Profits and gains of business or profession." Accordingly, non-monetary benefits arising from business or the exercise of a profession is chargeable to income-tax as part of the income

from business/profession under this section and it is deemed to be income under section 2(24) of the Act. However, in the instant case the loan amounts are monetary transactions and hence cannot be hit by section 28(iv).

We have also gone through the judgment passed by Hon'ble Bombay High Court in the case of **Mahindra & Mahindra Ltd. v. CIT [2003] 261 ITR 501/128 Taxman 394**, wherein it has been explained that section 28(iv) seeks to charge the value of any benefit or perquisite, meaning thereby that the benefit must be in kind, the court further held that waiver of loan is in respect of money transaction and, therefore, would not be in nature of any benefit or perquisite as construed in section 28(iv). Hence, for the purpose of section 28(iv), the loan waiver amount credited by the assessee in its general reserve account is covered by the judgment of the Bombay High Court in the case of **Mahindra & Mahindra Ltd. (supra)** and, therefore, the said waiver amount cannot be held as taxable.

We have also considered the decisions on which the Ld. AO had relied upon but the same are distinguishable from the case of assessee:-

1.9.1 In case of T.V. Sundaram Iyengar & Sons 222 ITR 344 (S.C.), deposits were collected from customers/creditors and later on the deposits of those customers/creditors remained unpaid to them and those moneys were treated by the assessee as its own and also credited the same to its Profit and Loss Account thereby offering the same as income of the assessee. The assessee itself offered these amounts for assessment as its income. The amount so taxed was later sought to be agitated too, without success. Therefore, it is to be seen that in the case of T. V. Sundaram Iyengar and Sons Ltd. (supra), the assessee's own conduct as well as accounts showed the amount as income offered for taxation and the assessee was not in a position to justify a contrary position in appellate proceedings.

Thus, in the above case it was held that any amount received in course trading transaction and upon its subsequent waiver it was liable for taxation. Whereas in the appellant's case the loan amount originally obtained by the appellant was not in the nature of

trading transaction but of capital nature. The same were term loan was obtained from Dena Bank for acquisition of Fixed Assets and Rs.70,00,000/- towards Share Application money (subsequently transferred to interest free unsecured loan). Your goodself will appreciate that the year in which such loans were obtained, the same were duly treated as capital liability not any trading liability. Therefore, it can be concluded that since the original receipt was undoubtedly on account of capital nature, its waiver does not have the quality of changing the same into a revenue receipt.

Therefore, facts of the instant case are quite different from appellant's case, since the loan amount was not received by the appellant in course of trading transaction and therefore the said decision on which learned assessing officer heavily relied upon is not applicable.

*1.9.2 The learned assessing officer has also relied on judgment of the Bombay High Court in the case of **Solid Containers Ltd. Vs. DCIT (308 ITR 417)** to support his argument that even the waiver of loan would amount to taxable under section 28(iv). in this context we have to submit that while delivering its judgment in the case of **Solid Containers Ltd.** the court has also considered the earlier decision of the Bombay*

High Court in the case of Mahindra and Mahindra Ltd. (supra), which squarely covered the case of the appellant. The Bombay High Court in case of Solid Containers took a view different from the view taken in the case of Mahindra and Mahindra Ltd., after distinguishing the facts of the case in Solid Containers Ltd. In respect of that, the Court held as follows:-

"...Secondly, the purchase consideration related to capital assets. The toolings were in the nature of dyes and the assessee was a manufacturer of heavy vehicles. The import was that of plant and machinery and the waiver could not constitute business. The facts of the present case are entirely different inasmuch it was a loan taken for trading activity and ultimately, upon waiver the was retained in business by the assessee."

Therefore, it is clear that the High Court while delivering its judgment in the case of Solid Containers Ltd. has not dissented in any way from the earlier decision in the case of Mahindra and Mahindra Ltd. On the other hand, the Court further reiterated the ratio laid down in the judgment of Hon 'ble High Court of Bombay in the case of Mahindra and Mahindra Ltd., that the loan availed for acquiring capital assets, when waived, cannot be treated as assessable income. Therefore, it is not possible to hold that as far as the

loan waiver of capital account is concerned, the decision of the Bombay High Court in the case of Solid Containers Ltd., clashes with the judgment of the same Court in the case of Mahindra and Mahindra Ltd.

*Therefore, it will be appreciated that for the purpose of section 28(iv), the loan waiver amount credited by the assessee in its capital reserve account is covered by the judgment of the Bombay High Court in the case of **Mahindra and Mahindra Ltd.(supra)**, and, therefore, the said waiver amount cannot be held as taxable.*

After analyzing the aforementioned judgments as well as orders passed by revenue authorities, we find that Ld. CIT(A) while appreciating the facts of the case and also while following the judicial pronouncements had rightly concluded that waiver of principle amount of loan by Dena Bank and Rajhans Merchandise Pvt. Ltd being a 'capital nature', cannot be treated as income.

Moreover, no new facts or contrary judgments have been brought on record before us in order to controvert or rebut the findings so recorded by Ld. CIT(A). Therefore, there are no

reasons for us to interfere into or deviate from the findings recorded by the Ld. CIT(A). Hence, we are of the considered view that the findings so recorded by the Ld. CIT (A) are judicious and are well reasoned. Resultantly, this ground raised by the revenue stands **dismissed**.

5. In the net result, the appeal filed by the revenue stands **dismissed**.

Order pronounced in the open court on 27th July, 2018

<i>Sd/-</i> (G. S. Pannu)	<i>Sd/-</i> (Sandeep Gosain)
लेखासदस्य / Accountant Member	न्यायिकसदस्य / Judicial Member
मुंबई Mumbai; दिनांक Dated : 27.07.2018	
<i>Sr.PS. Dhananjay</i>	

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

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(Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai