

IN THE INCOME-TAX APPELLATE TRIBUNAL "E" BENCH MUMBAI
BEFORE SHRI G.S. PANNU, VICE-PRESIDENT AND
SHRI PAWAN SINGH, JUDICIAL MEMBER
ITA No. 6089/Mum/2014 (Assessment Year 2010-11)

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| ITO-7(3)(2), Room No.616, 6 th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020. | Vs. | M/s. Topical Builders P. Ltd. (Now known as M/s. Mahindra World City (Maharashtra Ltd.), 5 th Floor, Mahindra Tower, P.K. Kurne Chowk, Worli, Mumbai-400018. PAN: AABCT2713M |
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Appellant

Respondent

Appellant by

: Shri D.G. Pansari (DR)

Respondent by

: Shri H.P. Mahajani with
Shri Prasad Bapat (AR)

Date of Hearing

: 23.01.2019

Date of Pronouncement

: 29.03.2019

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER:

1. This appeal by revenue is directed against the order of Id. Commissioner of Income-tax (Appeals)-6, Mumbai (the Id. CIT(A) dated 03.06.2014 for Assessment Year 2010-11. The revenue has raised the following grounds of appeal:

On the facts and in circumstances of the case and in law the learned CIT(A) has erred in allowing relief to the assessee extent impugned in the grounds enumerated below:

1. On the facts and in circumstances of the case and in law the learned CIT(A) erred in holding that loan liability written off of Rs. 521.60 lacs cannot be taxed u/s 28(iv) without appreciating the fact that the assessee had taken loans for the expansion of its business by acquiring a controlling stake in

M/s Deep Mangal Developers Pvt. Ltd. engaged in the similar real estate business and as such the same were for the purpose of business.

2. On the facts and in circumstances of the case and in law the learned CIT(A) erred in holding that loan liability written off of Rs. 521.60 lacs cannot be taxed u/s 28(iv) without taking into consideration the decision of the Bombay High Court reported in 308 ITR 417.
2. Brief facts of the case are that the assessee is a Builders and Developers filed his return of income on 08.09.2010 declaring total income Loss Rs. (-) 3,309/-.
3. The return of income was selected for scrutiny and the assessment was completed on 25.03.2013 under section 143(3). During the assessment, the Assessing Officer noted that the assessee has taken a loan of Rs. 661.74 Lakhs from Mahindra Realty and Infrastructure Developers Limited (MRIDL) during the year 1997-98 to 1999. The assessee has been carrying on this liability in its books of account for almost 10 years. The assessee was asked to substantiate the reasons for existence of liability. The assessee furnished its explanation and contended that the assessee has taken a loan of Rs. 661.74 Lakhs from MRIDL. The loan was realized for acquisition of share of Deep Mangal Developers Pvt Ltd.(Deep Mangal). The assessee acquired 740 shares of Rs. 100/- each of Deep Mangal Developers and paid a total cost of Rs. 828.29 Lakhs. The Realty and Infrastructure Division of MRIDL was demerged and amalgamated with Gesco Corporation Limited, which is known as Mahindra Lifespace Developers Limited (MLDL). The Assessing Officer

issued notice under section 133(6) to MLDL. In response to the notice under section 133(6), M/s MLDL confirmed the balance loan liability of loan of Rs. 140.14 Lakhs only. M/s MLDL further confirmed that had written off the amount due from the assessee to the extent of Rs. 5,01,93,000/- in Financial Year (FY) 2000-01 and Rs. 19,76,000/- in FY 2002-03. The Assessing Officer, therefore, held that the assessee's balance loan liability of Rs. 521.06 Lakhs was not in existence as lender had written of the same in its books of account. The Assessing Officer brought the difference of Rs. 521.60 Lakhs for taxation in the income of assessee as non-existing liability by treating it as income of the assessee.

4. On appeal before the Id. CIT(A), the entire addition was deleted. The Id. CIT(A) deleted the addition holding that, when creditors had waived the repayment of loan amount, it amounted to capital receipt and not revenue receipt. The waiver cannot be constitute income of the assessee. The Id. CIT(A) also held that for the purpose of applicability of section 28(iv), the benefit or perquisite must relate to the revenue account of the assessee. The liability of assessee was a capital liability and loan was taken for the purpose of investment in share to Deep Mangal. The Id. CIT(A) also held that the cessation of liability is also not taxable under any other provision of the Act as the said liability does not pertain to the year under consideration. Thus, aggrieved by the order of Id. CIT(A), the revenue has filed the present appeal before us.

5. We have heard the submission of Id. Departmental Representative (DR) for the revenue and Id. Authorized Representative (AR) of the assessee and perused the material available on record. The Id. DR for the revenue supported the order of Assessing Officer. The Id. DR further submits that the creditor has written off in their books of account due from the assessee-company to the extent of Rs. 5,01,93,000/- for Financial Year 2000-01 and Rs. 19,67,000/- sometime in Financial Year 2002-03 and the amount due from the assessee-company is only Rs. 1.40 Crore. The assessee creditor, thus, write of the liability to the extent of Rs. 5.21 Crore. There was no justification on the part of assessee to continue its liability which is already written off by the creditor. No claim whatsoever has been made by the creditor for such a long time. The so-called unsecured loan does not any more take a character of loan but in reality, the same partakes the character of income. The assessee has taken a loan and invested in share of Deep Mangal at an abnormal price by making payment of huge premium on which the assessee has not received any dividend. The Id. DR for the revenue in support of his submission relied upon the decision of Hon'ble Bombay High Court in Solid Container vs. DCIT (308 ITR 417 (Bom), Madras High Court in CIT vs. Ramaniyam Homes (P.) Ltd. (384 ITR 530 (Madras) and the decision of Hon'ble Supreme Court in CIT vs. T.V. Sundaram Iyengar & Sons Limited (222 ITR 344).

6. On the other hand, the Id. AR of the assessee supported the order of Id. CIT(A). The Id. AR of the assessee submits that during the year 1997 to 1999, the assessee availed a loan of Rs. 6.61 Crore from group company i.e. MRIDL. The entire loan amount was invested in the share of other group company namely Deep Mangal for purchase of share. The total consideration was paid for purchase of share of Rs. 8.28 Crore. The payment on purchase of share was financed by the loan of Rs. 6.61 Crore availed from MRIDL and the balance of Rs. 1.66 Crore was financed from other borrowings. The share of Deep Mangal was purchased as the huge premium because the said company owned a huge piece of land at Murud, however, the project of Deep Mangal takes off for technical reasons. Therefore, during the Financial Year 2000-01 MRIDL wrote off substantial portion of loan of Rs. 5.01 Crore in the books of account of MRIDL, the loan amount remains only of Rs. 1.59 Crore (Being Rs. 6,61,74,000/- minus Rs. 5,01,93,000/-). The assessee made no corresponding change in its books of account, the loan in the books of account continued as it is. The Realty and Infrastructure Division of MRIDL was demerged and amalgamated with Gesco Corporation, which is now known as MLDL. During the financial year 2002-03 MLDL also write of Rs. 19.67 Lakhs in its books of accounts, thus, the balance receivable from the assessee is only 1.40 Crore. Still no corresponding change was made by assessee in its books of account. The liability in the

books of account of assessee continued at Rs. 6.61 Crore. During the assessment proceeding of current Assessment Year, the Assessing Officer made enquiries under section 133(6). In response to the notice under section 133(6) MLDL responded with balance receivable from assessee at Rs. 1.40 Crore against the liability of Rs. 6.61 Crore. The difference of Rs. 5.21 Lakhs was added by Assessing Officer to the income of assessee as non-existing liability.

7. The Id. AR of the assessee further submits that the observation of Assessing Officer that loan was borrowed for business purpose for acquiring control in Deep Mangal is factually incorrect because year after year, the department has been accepted as a pure investment. In share and denying this to be business activities. The Id. AR of the assessee submits that he has filed a copy of assessment order for Assessment Year 2001-02 wherein this fact has been observed by Assessing Officer. The Id. AR of the assessee further submits that in the balance sheet of assessee's share holding has been treated as a long term investment which has been remained unchanged in 10 years.
8. During the period under consideration, no taxable event and in absence of any such event, income cannot be assessed or brought to charge to tax. For the year under consideration there is no change in books of account. The Id. AR of the assessee further submits that the revenue has raised the grounds for taxing the taxability of loan benefit in the nature of write off

by lender itself. The provision of section 28(iv) is not applicable to the financial transaction under consideration. This has been held so by Hon'ble jurisdictional High Court in case of Mahindra & Mahindra Ltd. 9261 ITR 501). Section 28(iv) brings to charge to tax value of any benefit or perquisite, whether convertible into money as or not arising from business or exercise of profession. The benefit derived by assessee is not arising out of business or any benefit or perquisite. The assessee has received benefit which a character of capital and cannot be charged to tax.

9. The ld. AR of the assessee submits that the decision of Solid Container (supra) is not applicable. In case of Solid Container, the waiver of loan was taken for trading activities and the assessee has credited such a waiver to the Profit & Loss Account claimed to be a capital receipt. The ratio in case of T.V. Sundaram Iyengar & Sons Limited (supra) is also not applicable on the facts of the present case. In T.V. Sundaram Iyengar & Sons Limited (supra), the loan/advance constituted a trading liability or was taken under trading account, therefore, the facts of this case are differ to the present case.

10. The ld. AR of the assessee further submits that decision of Hon'ble Bombay High Court in Mahindra and Mahindra (supra) has been affirmed by Hon'ble Apex Court in ITA No. 6949/6950/2004 dated 24.04.2018.

The Id. AR of the assessee finally submits that the write off of Rs. 521.06 Lakh cannot be taxed either under section 28(iv) or under section 41(1).

11. We have considered the rival submission of the parties and have gone through the orders of authorities below. We have also deliberated on various case laws relied by lower authorities and the Id. Representative of the parties. During the assessment the assessing officer made investigation about carrying the loan liability in its books of account for almost 10 years. The Assessing Officer issued notice to the creditors. On receipt of confirmation from MLDL that the creditor has write off of Rs. 5.01 Crore in Financial Year 2000-01 and Rs. 19.67 Lakhs in Financial Year 2002-03 treated the amount as unclaimed deposit and time barred deposit as trading receipt on the basis of decision of T.V. Sundaram Iyengar & Sons Limited (supra). Before the Id. CIT(A), the assessee urged that liability to refund the loan continued since liability still exist and also reflected in the financial statement of the assessee. The assessee also contended that provision of section 41(1) are also not applicable as it is not the remission of liability and not claimed on allowance for deduction made in the assessment of any earlier years. The assessee also explained that loan was taken on capital account for making investment in share of Deep Mangal (supra). Further, no loan was taken during the year under consideration and even in the last 10 years, the loan balance has been carried forward in the accounts of assessee. The said balance

was always accepted by revenue, the Assessing Officer in Assessment Year 2001-02 while passing the assessment order has considered the loan transaction as a colorable device and not allowance or deduction of loan was made in any earlier years. The Id. CIT(A) after perusing the record and considering the submission of assessee framed three question for his consideration (i) Whether liability of Rs. 5.21 Crore having seized to exist, was a capital liability and whether at present it can be considered to have changed its character and has taxable in the hand of assessee as a revenue receipt (ii) Whether the said amount can be taxed under the provision of section 41(1) or else under section 28(iv) of the Act and or (iii) Whether the said amount can be taxed under any other provision of the Act.

12. The Id. CIT(A) examined the facts of the case with the facts of decision in T.V. Sundaram Iyengar & Sons Limited (supra) and find that the assessee in that case received benefit on account of cessation of liability in respect of the sum/deposit received on account of trading transaction, the liability shall seized to exist, became the income of assessee under section 41 or section 28. In case of assessee, the liability was a capital liability and loan was taken on account of capital account for the purpose of investment in share. No loan was taken during the year or even in last 10 years. The loan balance has been carried forward in the account of assessee for more than 10 years. The balance was always accepted by

Assessing Officer while passing the assessment order even in Assessment Year 2001-02. The assessee has not claimed any allowance or deduction of loan amount in earlier years. Thus, cannot be taxed under section 41(1) of the Act. The Id. CIT(A) further concluded that assessee has capital liability and the loan was utilized for purchase of share of sister concern, having seized to exist cannot be taxed as a revenue receipt, the liability seized to exist, was a capital account and hence same is not in the hands of the assessee.

13. The Id. CIT(A) by following the decision of Hon'ble Bombay High Court in Mahindra and Mahindra (supra), wherein it was held that loan received for purpose of capital asset would not constitute a trading liability and accordingly section 41(1) was not attracted. Since the capital liability has not changed its character at the time when it seized to exist, therefore, the Id. CIT(A) finally concluded that the provision of section 41(1) or section 28(iv) are not attracted, therefore, the Assessing Officer was not justified in making the addition to the total income of assessee and directed to delete the entire addition.

14. We have noted that Hon'ble Supreme Court in CIT vs. Mahindra and Mahindra (supra) while dismissing the appeal of revenue held as under:

“13. On a plain reading of Section 28 (iv) of the IT Act, prima facie, it appears that for the applicability of the said provision, the income which can be taxed shall arise from the business or profession. Also, in order to invoke the provision of Section 28 (iv) of the IT Act, the benefit which is received has to

be in some other form rather than in the shape of money. In the present case, it is a matter of record that the amount of Rs. 57,74,064/- is having received 'as cash receipt due to the waiver of loan. Therefore, the very first condition of Section 28 (iv) of the IT Act which says any benefit or perquisite arising from the business shall be in the form of benefit or perquisite other than in the shape of money, is not satisfied in the present case. Hence, in our view, in no circumstances, it can be said that the amount of Rs 57,74,064/- can be taxed under the provisions of Section 28 (iv) of the IT Act.

14) Another important issue which arises is the applicability of the Section 41 (1) of the IT Act. The said provision is re-produced as under:

"41. Profits chargeable to tax.- (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; or

xxx"

15) On a perusal of the said provision, it is evident that it is a sine qua non that there should be an allowance or deduction claimed by the assessee in any assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee. Then, subsequently, during any previous year, if the creditor remits or waives any such liability, then the assessee is liable to pay tax under Section 41 of the IT Act. The objective behind this Section is simple. It is made to ensure that the assessee does not get away with a double benefit once by way of deduction and another by not being taxed on the benefit received by him in the later year with reference to deduction allowed earlier in case of remission of such liability. It is undisputed fact that the Respondent had

been paying interest at 6 % per annum to the KJC as per the contract but the assessee never claimed deduction for payment of interest under Section 36 (1) (iii) of the IT Act. In the case at hand, learned CIT (A) relied upon Section 41 (1) of the IT Act and held that the Respondent had received amortization benefit. Amortization is an accounting term that refers to the process of allocating the cost of an asset over a period of time, hence, it is nothing else than depreciation. Depreciation is a reduction in the value of an asset over time, in particular, to wear and tear. Therefore, the deduction claimed by the Respondent in previous assessment years was due to the depreciation of the machine and not on the interest paid by it.

16) Moreover, the purchase effected from the Kaiser Jeep Corporation is in respect of plant, machinery and tooling equipments which are capital assets of the Respondent. It is important to note that the said purchase amount had not been debited to the trading account or to the profit or loss account in any of the assessment years. Here, we deem it proper to mention that there is difference between 'trading liability' and 'other liability'. Section 41 (1) of the IT Act particularly deals with the remission of trading liability. Whereas in the instant case, waiver of loan amounts to cessation of liability other than trading liability. Hence, we find no force in the argument of the Revenue that the case of the Respondent would fall under Section 41 (1) of the IT Act.

17) To sum up, we are not inclined to interfere with the judgment and order passed by the High court in view of the following reasons:

(a) Section 28(iv) of the IT Act does not apply on the present case since the receipts of Rs 57,74,064/- are in the nature of cash or money.

(b) Section 41 (1) of the IT Act does not apply since waiver of loan does not amount to cessation of trading liability. It is a matter of record that the Respondent has not claimed any deduction under Section 36 (1) (iii) of the IT Act qua the payment of interest in any previous year.

18) In view of above discussion, we are of the considered view that these appeals are devoid of merits and deserve to be dismissed. Accordingly, the appeals are dismissed. All the other connected appeals are disposed off accordingly, leaving parties to bear their own cost.”

15. In view of the above factual and legal discussion, we do not find any illegality in the order passed by Id. CIT(A). The case law relied by Id. DR for the revenue is distinguishable on the facts of the present case.

16. In Solid Container (supra), the assessee has taken a loan for the purpose of business and was right back in the relevant Assessment Year. The Hon'ble Bombay High Court in Solid Container (supra), relied upon the case of T.V. Sundaram Iyengar & Sons Limited (supra), wherein the loan/advance constituted a trading liability and was taken under the trading account. Thus, in our humble opinion, the ratio of said decision is not applicable. Moreover, the decision of Hon'ble Bombay High Court in Mahindra and Mahindra (supra) has been affirmed by the Hon'ble Apex Court.

17. In view of the above discussion, we do not find any merit in the grounds of appeal raised by revenue.

18. In the result, appeal of the revenue is dismissed.

Order pronounced in the open court on 29/03/2019.

Sd/-
G.S. PANNU
VICE-PRESIDENT
Mumbai, Date: 29.03.2019
SK

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "E" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

**Dy./Asst. Registrar
ITAT, Mumbai**