



ITA No.847/Mum/2014
M/s. Ashok Alco-chem Ltd.
Assessment Year-2007-08

आयकर अपीलीय अधिकरण "ऐ" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, MUMBAI

श्री शक्तिजीत दे, न्यायिक सदस्य एवं
श्री मनोज कुमार अग्रवाल, लेखक सदस्य के समक्ष।
BEFORE SHRI SAKTIJIT DEY, JM AND
SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ I.T.A. No.847/Mum/2014
(निर्धारण वर्ष / Assessment Year:2007-08)

DCIT-(1)(1) Room No.579, Aaykar Bhavan Mumbai-400 020.	बनाम/ Vs.	M/s. Ashok Alco-chem Ltd. 406, Sharda Chambers,33 New Marine Lines, Mumbai-400 020.
स्थायी लेखासं./जी आइ आर सं./PAN/GIR No. AAACA-6876-H		
(पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

पीलार्थीकी ओरसे/ Appellant by	:	Dr. K. Sivaram and Sh. Sashank Dundu- Ld. ARs
प्रत्यर्थीकी ओरसे/ Respondent by	:	Shri Udaya Jakke-Ld. DR

सुनवाईकी तारीख/ Date of Hearing	:	05/09/2019
घोषणाकी तारीख / Date of Pronouncement	:	13/11/2019

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member): -

1. Aforesaid appeal by revenue for Assessment Year [AY] 2007-08 contest the order of Ld. Commissioner of Income-Tax (Appeals)-1, Mumbai,



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[in short referred to as 'CIT(A)'], *Appeal No. CIT(A)-I/IT-36/2012-13* dated 18/11/2013 on following grounds of appeal: -

1. On the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in deleting the addition made u/s 41(1) of the I.T. Act on account of utilization of working capital towards capital expenditure in respect of waiver of loans stated to be working capital loan/term loan.
 - 1.1 Whether on the facts and circumstances of the case whether the CIT(A) is right in holding that the loans which have been waived were granted for capital purpose merely relying on the sanction letter of the term loan issued by the SICOM without appreciating the fact that the loan was taken for the purpose of working capital' and not established the same was utilized for acquiring capital assets".
 - 1.2 On the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in deleting the addition made u/s 41(1) of the I.T. Act on account of utilization of working capital towards capital expenditure in respect of waiver of loans relying upon the decision of Padamaraje R. Kadam bande Vs CIT 195 ITR (SC) which is different to the fact of the assessee".
2. On the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in deleting the addition made on account of waiver of interest on borrowing on the basis of statement and submissions received from Dena Bank stating that the waiver of interest to the tune of 148.33 lacs unilaterally levied by the Dena Bank and company had not provided the same in the books of accounts".

2.1 Facts in brief are that the assessee being resident corporate assessee was assessed u/s 143(3) r.w.s. 263 on 16/08/2012 wherein the income of the assessee was determined at Rs.809.14 Lacs as against income of Rs.195.59 Lacs determined as per order u/s 154 dated 21/11/2011. The assessment was originally framed u/s 143(3) on 24/12/2009 which was subjected to revisional proceedings u/s 263 by the order of Ld. Commissioner of Income Tax-1 on 29/02/2012 in view of the fact that- (i) waived-off interest of Rs.851.54 Lacs as claimed by the assessee was actually Rs.1440.34 Lacs as per Bank's Letter; (ii) taxability of principal amount loan waiver of Rs.334 Lacs out of borrowed NCDs for Rs.600 Lacs;



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(iii) Working capital loan of Rs.3.948 Crores out of total working capital loan of Rs.7.298 Crores claimed to be utilized for capital expansion though the amount was sanctioned for trading operations / working capital requirements for running the business.

To verify the claims made by the assessee during the year under consideration, notices u/s 143(2) & 142(1) were issued to the assessee during assessment proceedings calling for requisite details.

2.2 In response to show-cause notice, the assessee explaining the difference in interest amount, submitted that borrowing from Dena Bank include non-convertible debentures (NCD) for Rs.600 Lacs for financing expansion in FY 1997-98 whereas working capital facilities were increased by approx. Rs.500 Lacs in FY 1998-99. However, due to adverse financial conditions being faced by the assessee, the account became non-performing asset (NPA) and the assessee approached the bank for one-time settlement of dues. The time gap between the two events was stated to be 6-7 years during which there was either no interest repayment or little interest payment. The Bank stopped debiting the interest to assessee's Bank account but kept the same in defaulter memorandum register. It was further submitted that while working out one-time settlement, the bank would list all the sacrifices made by it on account of bad loan which would include overdue interest, penal interest, expenses incurred on behalf of borrower which may not be reflecting in assessee's bank account. Therefore, there would always be a difference in interest / charges etc. shown as sacrifices by the bank and actual write-off by the assessee in its



books of accounts. What could be written back by the assessee would be what was provided in the books of accounts.

2.3 Regarding utilization of working capital loans towards capital expenditure, it was submitted that total capital expenditure of Rs.1880 Lacs was financed by utilizing the loans obtained in the shape of NCD & working capital loan from Dena Bank and term loan from SICOM Limited whereas the balance amount was financed by utilizing the funds available in the shape of unsecured loans / internal accruals etc. and all these funds were diverted for capital expansion.

2.4 To verify assessee's claim, notice u/s 133(6) was issued to Dena Bank who furnished the details of one-time settlement as follows: -

Ledger Outstanding (including amount prudentially written off) amount pertains to working capital limits at our New Marine Lines Branch, Mumbai.	Rs.729.81 Lacs
Investments (NCDs)	Rs.600.00 Lacs
TOTAL	Rs.1329.81 Lacs
Interest not charged from 30/03/1999 to 31/08/2005 on working capital limits	742.18 Lacs
Interest not charged from 30/03/1999 to 31/08/2005 on NCDs	236.50 Lacs
TOTAL	978.69 Lacs
TOTAL DUES (Principal + Interest payable)	2308.49 Lacs
Amount paid towards the above dues	Rs.669.00 Lacs
Sacrifice by way of a) Write off	Rs.660.81 Lacs
b) Waiver of Interest	Rs.978.68 Lacs
TOTAL	Rs.2308.49 Lacs

In its books of accounts, the assessee had written back waiver-off of interest of Rs.851.54 Lacs in the profit & loss account and offered the same to tax but credited the waiver-off of principal amount of Rs.660.81 Lacs to Capital reserve account and did not offer the same to tax. Upon perusal of



details furnished by Dena Bank, it was observed that waiver-off of interest was Rs.978.68 Lacs and not Rs.830.35 Lacs as offered by the assessee and therefore, the differential amount of Rs.148.33 Lacs was added to the income of the assessee while framing the assessment.

2.5 Regarding utilization of loan funds, the assessee argued that entire loan amount was for the purpose of capital expansion and therefore, the waiver thereof would not constitute income u/s 41(1) since there would be no remission or cessation of a trading liability. However, the assessee failed to substantiate the same by way of funds flow statement and merely relied upon figures reflected in the Balance Sheet. The Ld. AO, in terms of decision of Hon'ble Delhi High Court rendered in **Logitronics Private Limited 333 ITR 386**, opined that if the loan was taken for the purpose of capital asset, the waiver thereof would not constitute income and on the other hand, if the loan was taken for trading purposes, the waiver of the same would become income of the assessee. Since, the assessee failed to establish the said fact of utilization of loan for capital purposes, the waiver of principal amount of Rs.660.81 Lacs would become income of the assessee u/s 41(1). Finally, the same was also added to the income of the assessee.

3.1 Aggrieved, the assessee agitated both the additions with success before first appellate authority vide impugned order dated 18/11/2013. Regarding waiver-off of principal amount, the assessee submitted that NCD loan of Rs.600 Lacs from Dena Bank and fixed period term loan of Rs.550 Lacs was taken in the year 1996-97 for setting-up of projects for



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manufacturing and the said loan was taken for the purpose of acquisition of capital assets. The total cost of the project was estimated to be Rs.1500 Lacs as against actual expenditure of Rs.1880 Lacs. The balance funding was stated to have come from working capital loan as promoters' contribution. Therefore, it was the submissions of the assessee that since all the funds (NCD, term loan as well as working capital loans) were diverted for capital projects, the waiver thereof would constitute waiver-off of capital liability not taxable either u/s 28(iv) or u/s 41(1) as per the decision of Hon'ble Bombay High Court rendered in **Mahindra & Mahindra Ltd. (2003 261 ITR 501)**.

3.2 Regarding addition of interest differential of Rs.148.33 Lacs, the assessee submitted that the said amount was never provided for in the books of accounts and therefore, the question of claiming the deduction of the same would not arise.

3.3 The Ld. CIT(A), after considering factual matrix, concurred with assessee's submissions by observing as under: -

4.4 I have considered the facts and circumstances of the case, submissions of the appellant, the findings and discussion of the AO in the assessment order on this issue. The AO has made the addition for want of evidence for-utilization of loan funds, which are availed and related to be for capital expansion as claimed by the appellant. However it is noted by the AO that extracts of addition to fixed assets and increase in capital work-in-progress was furnished before him. The AO also wanted fund-flow statement in support of contention of the appellant that loan was utilized for capital expansion of business. In absence of such evidence for establishing the loan utilization for capital expansion, the AO has applied section 41(1) of the I.T. Act, 1961 and added Rs.6,60,81,000/- as income of the appellant.

4.5 From the facts and circumstances, of the case, it is on record that the income/credits sought to be taxed as received by the appellant are by way of waiver of loans from Dena Bank under 'One Time Settlement Scheme'. First of all, the accrual/credits given by the bank to the appellant are in the nature of 'waiver of the loan'



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which is discretionary and on which there was no claim of the appellant even either by way of any contractual or business obligation. Prima-facie "such payments which are not contractual but only discretionary" are held to be of capital nature as also laid out in the decision in the case of CIT Vs. Rajlaxmi Venkatakrishnan (1995) 215 ITR (Mad). More specifically *Discretionary payments received by assessee on compassionate grounds was held to be capital in nature and non-taxable*" is decided in the case of Padmaraje R. Kadambande Vs. CIT 195 ITR (SC) which is applicable to the facts of the case. The AO has failed to appreciate that the credits/accruals received by the appellant are out of "One Time Settlement" (OTS) for waiver of loans. Hence, the issues of cessation or remission of liability, and whether such loan was utilized for capital and/or revenue is not relevant to the waiver of such loans if same are part of the Balance Sheet and capital account of the appellant. In this case, as on record, the borrowings were sanctioned and linked to non-convertible debentures, term loan taken in the year 1997-98 and 1998-99 to finance the capital projects. The relevant record proving such nature of loans i.e. for capital projects and for non-convertible debenture is available in the instruments of sanction, auditor's report and such other material, which was available before the AO also. It has been clarified and distinguished in the decision in the case of Mahindra and Mahindra Ltd. Vs. CIT (2003) 261 ITR 501 (Bom), relied by the appellant also that waiver of loan is a capital receipt and cannot be brought to tax u/s 28 r.w.s. 41 of the I.T. Act. I would also observe that under the facts and circumstances of the case, there is no material and evidence brought on record by AO to disprove the prima-facie nature of transaction that –

(i) the One Time Settlement Scheme and waiver of loan by the bank was discretionary and compassionate thereby liable to be considered as Capital in the hands of the appellant which is non-taxable unless specifically provided under the provisions of the computation of 'Profit and gains of business or profession', u/s 41 of the I.T. Act, in reference to decisions of Hon. Apex Court cited above,

(ii) The appellant has been able to provide the nature of loan which has been waived, which comprises of amounts for non-convertible debentures, cost of expansion/diversification for the manufacture of Ethyl in district Raigad. In fact, the further details contained in the annexure of the sanction letter of term loan of Rs.270 Cr. from SICOM show that-

"the company and such of the Directors and shareholders of the company as may be decided by the SICOM, shall undertake to arrange for additional funds by way of additional share capital/unsecured loans/deposits as may be decided by the SICOM, to cover any shortfall that may arise in financing the project and/or working capital.

The company shall submit the sanction letter for subscription to the Non-convertible Debentures (NCD) issue of Rs.600 lacs proposed to be made and shall also comply with all statutory compliance and approvals pertaining to the same."

The company shall obtain the building plan approvals from the MIDC for the expansion project.



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The company shall obtain the clearance from MPCB and the Department of Environment, Government of Maharashtra for the expansion project.

The disbursement of the loan shall be placed at the disposal of the company in a separate bank account and the bank shall not to exercise its lien on it. (page-4 & 5 of annexure-1 of sanction letter of SICOM)

4.6 The above documents and facts clearly show that the loans which have been waived were granted for capital purposes and there are mechanisms in place like separate bank account, verification/certification from the third party like Auditors to ensure that it is utilized in the manner provided.

In view of above, documents, evidence and material in this behalf, It is found that the amounts waived were on capital account hence non-taxable as income from business of appellant and also as per law (being discretionary and compassionate) as discussed above.

4.7 It is also considered that section 41 of the I.T. Act is applicable to the taxability for the amounts which accrue due to cessation/remission of liability arising out of the business and revenue transactions - more precisely 'trading liability'. The remission of liability for the purpose of section 41 is confined to trading liability particularly section 41(1) and section 41, is not applicable to the "waiver of loan" because as such no allowances or deduction are admissible and allowed for such loans in the computation of income under the head 'Profit and gains of business or profession' except the interest on such loans after commencement of business which is claimed in such way and had been allowed as such. However, such interest amounts falling within the waiver of loan or included therein has been already accounted in the profit and loss account of the appellant which is also not disputed by the Revenue. The appellant has submitted such bifurcations and accounting in its books of accounts, as reproduced above. Such bifurcation is not disputed and is accepted by AO, as noted in the assessment order also.

4.8 In context of addition made by AO in respect of principal amount of such loan, the other requirement is that "it must be proved that allowance or deduction was given in an earlier year in assessment. It, is not open to the-revenue to refer to section 41(1) for charging the tax on receipts". Tirunelveli Motor Bus Service Co. Pvt. Ltd. Vs. CIT 78 ITR (SC). Section 41(1) introduced a fiction and cannot be enlarged by introducing another fiction. This position is laid down in CIT Vs. Bharat Iron and Steel Industries 199 ITR (Guj) (FB); It is also obvious that AO has not brought on record any material to discharge the onus that amounts under question have been allowed and/or deducted from earlier assessment years as required under law in this behalf and laid down in decision in the case of Steel and General Mills Co. Ltd. Vs. CIT 96 ITR (Del.)

In view of above discussion and for the reasons therein, the AO is directed to delete the addition. Accordingly, Ground No. 1 is allowed.

5. The appellant has contested addition of Rs.1,48,33,000/- held by AO as relating to waiver of interest on borrowings based on the statement received from Dena Bank. The AO has made the addition by observing that -



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From the aforementioned details furnished by M/s Dena Bank it is clear that an amount of Rs.978.68 lacs was waived off as interest. The assessee's explanation for offering Rs.851.54 lacs is that while working out OTS the bank will list all sacrifices made on account of bad loan which include overdue interest, penal interest, expenses incurred on behalf of the borrower etc. Clearly, the explanation provided by the assessee is not acceptable as the actual interest payable to the bank as on the date of OTS was Rs.978.68 lacs and the assessee was liable to pay the same to the bank there been no OTS.

In its computation of income, the assessee had deducted an amount of Rs.5,34,87,350/- under the head "Expenses Paid Disallowed u/s 43B" and offered the remaining amount of Rs.2,95,48,234/- to tax. The assessee did not offer Rs.5,34,87,350/- to tax as the same had been disallowed, u/s 43B in earlier years as the same was not actually paid. The contention of the assessee in this context is acceptable, as it is a prerequisite u/s 41(1); that an allowance or deduction should have been made in the first place in respect of the said amount that has been waived off. Since, the amount of Rs.5,34,87,350/-, though debited in the profit and loss account, was never allowed as a deduction, thus the same cannot be treated as income in the hands of the assessee after it has been waived off by the bank. However, the assessee 'had credited only an amount of Rs.830.35 lacs to its profit and loss account whereas, as per the reply received from M/s Dena Bank, the actual amount of interest waived off was Rs.978.68 lacs. Thus, the difference in the amount of interest waived off by the bank and the interest credited by the assessee to its profit and loss account has to be treated as income of the assessee. Thus, an amount of Rs.148.33 lacs is being treated as income of the assessee.

5.1 The relevant submissions on this issue submitted during the appellate proceedings as reproduced in para-4.3 of this order is also further supplemented that-

Assessee has reflected all these years the principle and interest on these loans in its books of accounts. To the extent of liability booked "towards interest same is accounted as waiver of interest in profit and loss account and principal waiver is shown as capital reserve in the balance sheet. The assessing officer overlooked the facts and wrongly added difference in the interest based on bankers' letter and assessee's books of accounts.

The balance in the company's books of accounts on account of Loans gets reduced to Zero after accounting for loan waivers and interest waiver. This clearly 'indicates that what is accounted as interest is only recorded as waivers in the Company's book. There is some misconception on the part of assessing officer which needs to be corrected and we are before you for the adjudication of this claim. We are enclosing guidance from Institute of Chartered Accountants in relation to accounting for interest for NPAs for perusal which will substantiate the discussion above.

5.2 I have considered the facts and circumstances of the case and the submissions of the appellant on this issue. The detailed discussion in respect of waiver of loan and interest thereon under the OTS, being in the nature of accrual/benefit on capital



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account, also being discretionary and as such not forming part of trading liability, is not liable to be brought to tax u/s 41 of the " I.T. Act. However, to the extent, interest on such amounts having been claimed and allowed to the appellant is liable to be adjusted against accruals of its benefit of waiver of amounts under OTS. The appellant has already apportioned such amount and same has been considered by the AO vide para-2.4 of the assessment order acknowledging that –

"The contention of the assesses in this context is acceptable, as it is a prerequisite u/s 41(1) that an allowance or deduction should have been made in the first place in respect of the said amount that has been waived off. Debited in the profit and loss account, was never allowed as a deduction, thus the same cannot be treated as income in the hands of the assesses after it has been waived off."

5.3 The reason for addition of balance amount of Rs.148.33 lacs made by the AO is the letter from bank which has shown waiver of interest at Rs.978.68 lacs, The appellant has contended that Rs.148.33 lacs was unilaterally levied by Dena Bank and company had not' provided/charged the same in its books of account. Under the circumstances, since the amount is neither recorded nor charged in the P&L account of the appellant, it cannot be brought to tax under the provisions of section 41(1) of the I.T. Act as done by the AO. The necessary documents and record was available with the AO in the nature of accounts of the appellant and it was required that the balance amount of interest Rs.148.33 lacs, sought to be taxed should have been verified and proved to be debited and allowed to the appellant in the current year or in the earlier assessments, as also discussed in detail in the foregoing paragraphs of this order. Briefly, it is held that the 'onus' has not been discharged by the AO for this purpose. In fact, prima-facie there is no such case of allowance of this amount as it was not taken in the books of the appellant and was taken unilaterally by Bank towards 'penal interest' etc. as explained by appellant.

Accordingly, under the facts and circumstances of the case and in view of the discussions as above, Ground No.2 & 3 of appeal is allowed.

Aggrieved, the revenue is under appeal before us.

4. We have carefully heard the rival submissions advanced by respective representatives, perused relevant material on record including documents placed in the paper-book and deliberated on various judicial pronouncements as cited before us.

5. Upon perusal of impugned order, we find that learned first appellate authority failed to clinch the issue in the correct perspective since it was the observation in the impugned order that discretionary payment on



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compassionate grounds would be capital in nature and therefore, not taxable in the hands of the assessee, which was not the case of revenue. It was also observed that the purpose of utilization of the funds were not, at all, relevant for the determination of the taxability of the waiver. Rather it is the prime argument of Ld. Sr. Counsel for assessee that since working capital loan was utilized for the purpose of capital expansion and therefore, the same would not constitute trading liability within the meaning of Sec.41(1). Further, the terms of term loan granted by SICOM were referred to while providing the relief, ignoring the fact that one-time settlement was done by the assessee with Dena Bank and the matter was related with determination of taxability of principal amount of working capital loan waived by Dena Bank. Further, nothing was brought on record to justify the conclusion that the provisions of Section 41(1) were not applicable to the case of the assessee overlooking the fact that the assessee was claiming as well as allowed deduction of interest on working capital loans in earlier years. Rather onus was placed on Ld. AO to establish this fact. Therefore, we find ourselves unable to subscribe to the view of learned first appellate authority, in this regard.

6. Proceeding further, it transpires that the assessee obtained certain loans in the shape of non-convertible debentures and working capital loans in earlier years from Dena Bank. The working capital loan was secured by hypothecation of inventories, book debts and documentary DA bills and third-party cheques drawn in assessee's favor. The assessee has claimed as well as allowed the deduction of interest on working capital loan, which is



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evident from its financial statements for various years, as placed on record. The arguments of Ld. Sr. Counsel would revolve around the fact that since the amount of working capital was used for capital expansion, the waiver thereof would constitute capital receipts not taxable either u/s 28(iv) or u/s 41(1). Reliance has been placed on several judicial pronouncements including the recent decision of Hon'ble Supreme Court in **CIT V/s Mahindra and Mahindra Ltd. (404 ITR 1)**. To support the said fact of utilization, our attention has been drawn to the financial documents of various years as placed in the paper-book. It has been submitted that total expenditure on capital expansion was Rs.1880 Lacs which was financed out of NCD, term loan, working capital loan and internal accruals etc. as evidenced by addition to fixed assets, cash flow statements, statement of utilization of funds for capital expansion etc. This is contrary to the observation of Ld. AO that the assessee failed to prove such nexus despite being provided with adequate opportunity. Regarding differential interest amount of Rs.148.33 Lacs, Ld. Sr. Counsel has submitted that such amount was never provided for in the books of accounts and therefore, the cessation of the same would not be covered u/s 41(1).

7. Keeping in view the entirety of facts and circumstances, we deem it fit to set-aside the order of Ld. CIT(A) on stated issues and direct Ld. AO to re-adjudicate the same de novo in the light of submissions made by Ld. Sr. Counsel, before us. The assessee, in turn, is directed to substantiate his stand, in this regard with documentary evidences including reconciliation of the interest differential.



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8. The appeal stand allowed for statistical purposes in terms of our above order.

Order pronounced in the open court on 13th November, 2019.

**Sd/-
(Saktijit Dey)**

न्यायिक सदस्य / **Judicial Member**

**Sd/-
(Manoj Kumar Aggarwal)**

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 13/11/2019
Sr.PS:-Jaisy Varghese

आदेश की प्रतिलिपि □ प्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त/ CIT– concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

**उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai.**