

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B', NEW DELHI
BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SH. PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No.1882 & 1883/Del/2013
(Assessment Year: 2009-10 & 2008-09)

Encorp E – Service Ltd. Office No.303, 3 rd Floor DLF Courtyard, Saket New Delhi -110017 PAN: AABCE3129L (APPELLANT)	Vs	Assistant Commissioner of Income Tax Circle – 10 (1) New Delhi (RESPONDENT)
--	----	---

Appellant by	Sh. M. K. Giri, Advocate Shri Satish Khosla, Adv
Respondent by	Shri Jagdish Singh, Sr. DR

Date of hearing:	26/03/2021
Date of Pronouncement:	23/06/2021

ORDER

PER PRASHANT MAHARISHI, AM:

1. These are the two appeals of one assessee Messer's Encorp E- Services Ltd for two different assessment years[AY 2008-09 and 2009-10] involving similar issues, parties argued them together, therefore both these appeals are disposed of by this common order.
2. ITA number 1883/Del/2013 is an appeal filed by the assessee against the order of the Commissioner Of Income Tax (Appeals) – XIII, New Delhi (the learned CIT – A) dated 29th of January 2013 for assessment year 2008 – 09 wherein by that order the learned CIT – A disposed of the appeal filed by the assessee against the order of assessment passed u/s 143 (3) of The Income Tax Act, 1961 (The Act) dated 21 December 2010 by the Asst Commissioner of income tax, Circle – 10 (1), New Delhi (the learned AO) partly allowing that appeal. However the learned CIT – A confirmed the addition of ₹ 99,512,500, upheld the disallowance of depreciation of ₹

89,311 and upheld the addition of ₹ 1,654,200 on account of interest income. Therefore assessee is aggrieved and has preferred this appeal raising following grounds of appeal:-

- “1. a) *In upholding the addition of Rs.99,512,500/- merely on the basis of presumptions and suspicions, treating the amount as revenue in nature, ignoring the various judicial pronouncements and material on record.*
 - b) *in upholding that the amount of Rs.99,512,500/- [US dollars 51,25,000/- remitted by Tabcorpon account of unconditional and irrevocable standby letter of credit issued by National Australian Bank and adjusted against loan received from GECSI, was revenue receipt and that the amount had been utilized for the repayment of loans and giving loans for the purpose of business and not for acquiring any capital asset.*
 - c) *in upholding that amount of Rs.99,512,500/- on account of waiver/ remission of loan in terms of Deed of Termination and Release dated 12th October,2007 executed by the assessee with Tabcorp is revenue receipt instead of capital receipt claimed by the assessee, ignoring the fact that provisions of sec. 41(1) of the Act are not applicable to waiver of such loans nor any allowance or deduction has been made in the assessment for any year in respect of such loan.*
 2. *In upholding the disallowance of Rs.89,311/- on account of depreciation on assets in the premises sealed by the Government due to ban on lottery.*
 3. *In upholding the addition of Rs. 16,54,200/- on account of interest on ICD given to MAC Solutions Pvt. Ltd.*
 4. *In confirming initiation of penalty proceedings u/s 271(1)(c) of the Income Tax Act, 1961 by the ld AO.”*
3. Brief facts of the case shows that the assessee is a company engaged in the business of e-lottery in Karnataka and Maharashtra under brand name of LOTTUS. It is also engaged in providing training, education, development and support services for software and consultancy and liaisoning services. The assessee filed its return of income declaring Rs. Nil income after setting off brought forwarded loss of Rs. 8,70,76,010/-. Return of income was subjected to scrutiny and assessment u/s 143(3) of the Act was passed on

21/12/2010 determining income of the assessee at a total income of Rs. 19,60,59,499/- after setting off against the losses brought forward and finally assessed at Rs. Nil. The ld AO made several additions/ disallowances, which was contested before the ld CIT (A), who passed an order on 29/01/2013 partly allowing the appeal of the assessee. However, the ld CIT(A)

- a. upheld the addition of Rs. 9,95,12,500/- being 5125000 US \$ remitted by Tabcorpon account of unconditional and irrevocable standby letter of credit issued by National Australian bank and adjusted against loan received from GECSI holding that this receipt is revenue in nature.
 - b. Upheld the disallowances on depreciation on assets in the premises sealed by the government of India due to ban of lottery business.
 - c. upheld the addition of Rs. 16,54,200/- on account of interest on inter corporate deposit given to MAC Solution Pvt Ltd.
4. On the first ground of appeal with respect to the sum received Rs. 99,512,500/- from Tabcorpon, only argument of the ld AR is that issue is squarely covered by the decision of the Hon'ble Supreme Court in case of Mahindra and Mahindra Ltd and therefore the matter may be set aside to the file of the ld AO to decide the issue in accordance with that decision.
 5. The ld DR vehemently supported the orders of the lower authorities and submitted that the whole of the amount received on account of waiver of loan is revenue receipt in nature.
 6. We have carefully considered the rival contentions and peruse the orders of the lower authorities. Coming to the Ground No. 1 the ld AO noted that in the tax audit report in form 3CD the assessee has disclosed that sum of Rs. 9,95,12,500/- as capital receipt which is not credited in the profit and loss account. The facts relating to the above sum shows that MS Apollo International Ltd was a company engaged in the business of export etc. Encorp e services was a division of Apollo International Ltd engaged in the lottery business. In terms of the various resolution passed a subsidiary

company of Apollo International formed in the name of Encorp E Services company engaged in the business of internet services etc. on 20/05/2013 Apollo International Ltd entered into business agreement with M/s Jupiter International Pvt. Ltd, an Australian company with a purpose to establish online lottery business and several agreements were signed and Australian company supplied and installed lottery terminals at retail outlets of AIL. The lottery business of AIL was demerged 31/03/2004 into the assessee company. The Australian company was also taken over by another company Tabcorpon. However, the business agreement between the Australian entity and the assessee get terminated. Suddenly explore the new business and loan of Rs. 21.50 cross was arranged by the Taabcorpon for the assessee through GE Capital services. The claim of the assessee is that this loan is for capital expenditure. The business even between the assessee and Tabcorp once again failed and deed of termination and release dated 12/10/2007 was entered into. According to this a sum of Rs. 99,512,500/- was paid by Tabcorp to GE Capital Services International towards part payment of loan availed by the assessee. The balance loan was to be taken by the assessee. Rs. 9,95,00,000/- was repaid by Tabcorp to GE Capital Services International on behalf of the assessee which has been treated by the assessee is capital receipt and has not offered for taxation. The ld AO exempt the above claim of the assessee and noted the assessee has credited the above sum in capital reserve. The assessee has also received compensation against the loss incurred which is a revenue receipt. In view of this he held that as the assessee has received the above sum towards the compensation of loss, it is a revenue receipt and chargeable to tax. Thus, he negated the claim of the assessee that sum is capital receipt. The assessee agitated this issue before ld CIT(A) who referred to the decision as per paragraph NO. 6.2 of his order as under:-

“6.2 Decision

I have considered the submission of the appellant, observation of the Assessing Officer and facts of the case. It is seen that appellant is a subsidiary of Apollo International which was set to run E-Business under the name Encorp E- Services with an authorized capital of Rs.5.0 Crore.

On 28th May 2002, AIL entered into a business agreement with M/s Jupiter International Pvt.ltd., an Australian company to establish its new online business.

Business operation of Encorp E- Services were started and M/s Jupiter International Supplied and installed Lottery Terminals in India as retail outlets of AIL. Encorp E-Services commenced its business operations w.e.f 01.12.2003. During the course of business operations it came to the notice of the appellant company that the Lottery terminals installed by M/s Jupiter International Pvt.ltd have failed due to one hardware and software fault or the other. The problem of failure of the terminals was discussed in detail at the meeting held between M/s Jupiter International and Encorp at Sydney on 29.04.2004 and 30.04.2004 at Melbourne. Both the parties agreed to take actions to rectify the situations.

As per Para-2 of Minutes of dated 30.4.2004 it was agreed by M/s Jupiter International Pvt.ltd that under the current circumstances, Apollo can source other compatible terminals from other manufacturers in consultation with M/s Jupiter International Pvt.ltd. In return for this, Jupiter International Pvt.ltd will charge fee as per terminals which will compensate Jupiter International Pvt.ltd. for its investment in the terminal software and hardware and loss of profit on sale of the extra 4000 J 6000 Terminals. Apollo suggested that Jupiter International Pvt.ltd quote minimum fee in the interest of business in India. Various other business proposals were also explored between the parties from time to time to overcome the above problem but the same did not materialize.

On account of disputes arising between the contracting parties in respect of the business agreements, it was agreed to terminate the said business agreement subject to terms and conditions laid down in the termination agreement dated

03.08.2005.

Again the options were kept open between the contracting parties to explore the new E-Business alongwith the earlier business activities in India and a loan of Rs. 21.50 crore was arranged by the Tabcorp (Business of Jupiter International was taken over by Tabcorp) for the appellant company through G.E. Capital Services India.

The purpose of the loan was to Repayment of existing debt and license fee payment and installation of additional POS Terminals. It was mentioned in the loan agreement that the appellant shall apply all amounts raised by it hereunder in or towards satisfaction of such obligations and for no other purpose. For raising this loan M/s Tabcorp gave unconditional and irrevocable stand by letter of credit from National Australian Bank in a format acceptable to the lender towards the entire principal plus four month interest.

On 03.08.2005, it was agreed with the Tabcorp to terminate the business of the appellant as per terms and conditions laid down in the termination agreement. In pursuant to this both the group ultimately decided to terminate joint venture businesses and a deed of termination and release dated 12.10.2007 was entered into which interalia provided that no liability would be attach to the appellant company for the payment under the letter of credit made by Tabcorp to the G.E. Capital. As per termination deed G.E. Capital Services, India (GEC SI) will provide full and complete release in respect of their respective securities under the loan facility including the NAB stand by letter of credit. The standby credit amount of US\$ 51,25000 was paid by the Tabcorp to the National Australian Bank and the appellant company has been discharged of its liability from the loan amount to the extent of Rs.9,95,12,500/-. The appellant company credited this amount to the reserve and surplus account in its books. The auditors have mentioned in the Audit Report that the amount represents capital receipts and has been credited to the capital reserve account.

The appellant claims that loan was taken from GEC SI for capital purposes i.e. installation of additional POS terminals and repayment of existing debts. The loan from GEC SI was not connected with the running of business of the appellant. It is not a trading transaction. Any surplus arising out of capital transactions would necessarily be capital in nature. Therefore, such receipts have been treated as capital receipts.

The submission of the appellant as well as the copy of the loan agreement entered into with G.E. Capital Services India Ltd. has been gone through, it is seen that loan was raised to re-finance the existing debt and to make payment of license fee and installation of additional POS. It was also mentioned in the purpose that borrower shall apply all amounts raised by it hereunder in or towards satisfaction of such obligations and for no other purposes.

The loan raised by the appellant was credited to the overdraft account of the appellant in ICICI Bank and which was utilized for repayment of overdraft of Rs.1215 lacs. The loan was also utilized for repayment of loan of Bank of Rajasthan of Rs.505 lacs. The appellant has also paid Rs.430 lacs to MAC Solutions (a sister concern of the appellant as

loan). This payment has been described as paid to business associates. It is seen from the balance sheet of the appellant for A.Y. 2005-06 and 2006-07 that during the year under consideration the appellant has not purchased any POS terminals. This fact has also been admitted by the appellant that no further POS terminals were purchased after 03.08.2005. Therefore, the claim of the appellant that loan received from G.E. Capital Services was partly utilized for purchase of POS terminals is not correct. It is seen from the balance sheet of the appellant that appellant has taken term loan from Bank of Rajasthan to be used for plant and machinery, however, no evidence has been submitted that this loan was used for acquisition of any capital asset. The Overdraft facility was taken for business purposes and no evidence has been placed on record in spite of opportunity given to the appellant, at appellant stage, to show that Overdraft facility was used for capital purposes. Therefore, the amount of Rs. 9,95,12,500/- which is waiver loan is purely towards the loan taken for business purposes and hence it is revenue receipt in the hands of the appellant.

Though the appellant claims that an amount of Rs. 5,05,00,000/- have been used for paying the term loan of Bank of Rajasthan but in the absence of any evidence placed on record, the benefit of the same cannot be given to the appellant. However, assuming but not admitting that a sum of Rs. 5,05,00,000/- is used for repayment of term loan of Bank of Rajasthan (considering it as capital payment), even then the benefit of waiver of loan on capital account can be considered only to the extent of Rs. 2,33,73,866/- $(50500000/21500000*99512500)$ having used proportionately for the purposes of capital payment. Even in such a scenario, the waiver of loan to the extent Rs.7,61,37,634/- $(99512500 - 23373866)$ would be an item of revenue receipt as the amount of loan to the extent of Rs. 16,45,00,000/- $(Rs. 12,15,00,000/-$ repayment of OD facility taken for business purposes + Rs. 43000000/- loan to Sister concern) is used for the repayment of the loan and giving loan for the purposes of business and not for acquiring any capital assets.

In view of the above discussion, it is held that appellant has not produced any evidence to show that an amount of Rs.5,05,00,000/- was used for repayment of term loan of Bank of Rajasthan. Accordingly, the whole of the amount of Rs. 9,95,12,500/- received on account of waiver of loan is treated as revenue receipt in the hands of the appellant which was on account of loan taken for business purposes.

It is also seen that remission of loan was in connection with the business agreement entered with the Tabcorp and the discharge was related to the non functioning of the lottery business properly.

Therefore, the surplus received on account of remission was intriguingly connected with the business of the appellant and such receipts are revenue receipts in the hands of the appellant. Therefore, the Assessing Officer was justified in treating the remission of loan to the extent of Rs.9.95.12.500/-as revenue receipts and taxed the same in the hands of the appellant.

In the result, this ground of appeal is dismissed.

In this regard, reliance is placed on following judicial pronouncements;-

Express Newspapers Pvt. Ltd. v. Commissioner of Income-tax 119971 227 ITR

0325-BUSINESS INCOME OR INCOME FROM OTHER SOURCES-ASSEESSEE DISCONTINUING BUSINESS OF PUBLISHINGNEWSPAPERS—MACHINERY AND VEHICLES LET TO SISTERCONCERN-LETTING DOES NOT RELATE TO BUSINESS-MACHINERY AND VEHICLES NOT EXPLOITED AS COMMERCIALASSET-HIRE CHARGES ASSESSABLE AS INCOME FROM OTHERSOURCES-NOT AS BUSINESS INCOME-INCOME-TAX ACT, 1961,S. 56(2)(II).

PROFITS CHARGEABLE TO TAX-REMISSION OF TRADINGLIABILITY—BENEFIT BY WAY OF REMISSION NEED NOT BE INCASH-CAN BE BY BOOK ADJUSTMENT-ASSEESSEE DEALING INSHARES—PROVISION MADE BY ASSESSEE FOR INTERESTPAYABLE ON SUMS BORROWED FROM SHAREBROKERS-LOWERSUM FOUND DUE AT TIME OF SETTLEMENT OF ACCOUNTS-DIFFERENCE WRITTEN BACK IN ACCOUNTS-IS A REMISSION OFLIABILITY—TAXABLE UNDER SECTION 41(l)-INCOME-TAX ACT, 1961, S.41(1U,)

BUSINESS INCOME OR INCOME FROM OTHER SOURCES- ASSESSEE OWNING PROPERTY AND LETTING PORTIONS TO VARIOUS TENANTS-RENTAL AGREEMENT PROVIDING FOR PAYMENT OF RENT AND AIRCONDITIONING CHARGE-ASSEESSEE NOT DOING BUSINESS OF LETTING PROPERTY-PROVISION OF AMENITIES NOT A SEPARATE BUSINESS VENTURE- AIRCONDITIONING CHARGES SHOWN IN GENERAL RENT RECEIPT—NOT SEPARATELY TAXABLE AS BUSINESS INCOME- TAXABLE AS INCOME FROM OTHER SOURCES.

The assessee was a private limited company publishing newspapers. From the year 1969 it discontinued that activity, but got the newspapers published through its sister concerns. Its own printing machinery and motor vehicles were given on hire to those concerns and the income received by way of hire charges was shown as income from "other sources" and the Department also accepted it. But for the assessment year 1976-77 the assessee changed the head of income from "other sources" to "business". This was not accepted by the

Income-tax Officer who taxed the hire charges as income from other sources. This was confirmed by the Tribunal. On a reference:

Held:- that the assessee must show that it was doing the business and the income was earned in the course of doing such business. Admittedly, the assessee had discontinued its business of printing and publishing newspapers from 1969 onwards and the business of publishing newspapers done by the sister concerns could not be considered to be the business done by the assessee. Therefore, the income derived by the assessee by letting out the machinery and the motor vehicles would be as the owner of the same and the letting would not in any way relate to the business. When the income was not earned in the course of the business, it could not be assessed under the head "Business income". It could not also be said that the assessee was doing any business and exploiting the assets in the said business. Therefore the printing machinery and the motor vehicles could not be considered to be commercial assets. The income derived by letting the machinery and the motor vehicles was income from other sources.

In the course of the assessee's business as a dealer in shares, the assessee borrowed moneys from various sharebrokers. The interest provided for in the accounts in respect of such borrowals was claimed as a deduction and was allowed as such in computing the income of the assessee in the earlier years. Subsequently, at the time of settlement of accounts with the sharebrokers, the amount due to them on account of interest was settled at a figure lower than the figure provided in the accounts. As a result, the amounts thus given up were written back in the accounts as income. These sums were brought to tax under section 41(1) of the Income-tax Act, 1961. This was confirmed by the Tribunal. On a reference:

Held:- that there were two basic requirements for the application of section 41(1) of the Act. One was that there must be an allowance or deduction in the assessment for any year in respect of loss or expenditure or trading liability incurred by the assessee. The other was that subsequently during the previous year the assessee must have obtained either in cash or any other manner whatsoever an amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation, so that the remission or cessation so obtained on the value of the benefit accruing could be deemed the income of the assessee. The benefit could be by way of a book adjustment also. Admittedly though the assessee obtained benefit in the earlier years on account of the amount due to the sharebrokers in a larger amount, this was reduced to a considerable extent on account of subsequent settlement and consequently the accounts were also adjusted in this regard. It was

not always necessary that the assessee should get benefit by way of cash for application of the provisions of section 41(1) of the Act. Since this was a trading liability, which was written back in the year under consideration, application of the provisions of section 41(1) was perfectly justified.

CIT v. Rashmi Trading [1976] 103 ITR 312 (Guj) and CIT v. Bharat Iron and Steel Industries [1993] 199 ITR 67 (Guj) [FB] applied.

The assessee was the owner of a property, portions of which were let to various companies. There was a tenancy agreement between the tenants and the assessee, providing for rent but specifically for the charges payable for air-conditioning, the building being centrally air-conditioned. The assessee worked out the amount receivable towards hire charges for air-conditioning and also allocated the consolidated rent received from the tenants towards air-conditioning. The air-conditioning charges were separately reckoned and offered by the assessee as business income, whereas the balance was treated as rental income, assessable under the head "Property". The assessee's claim that the air-conditioning charges should be taxed as business income was rejected. This was confirmed by the Tribunal. On a reference:

Held:-that the assessee was not doing business in letting out the premises. There was no separate agreement for payment for the supply of air conditioning facility. In the common rental receipt, the charges for supplying air-conditioning facility were shown separately. The air-conditioning facility was supplied along with other amenities, like electricity, lifts, water, etc. When premises are let, the various amenities provided by the owner of the premises cannot be considered to be under a separate business venture. The supply of air-conditioning facility alone could not be separated from other amenities provided by the assessee to the tenants and considered as a business venture done by the assessee. The charges received for supplying the air-conditioning facility had to be assessed under the head "Other sources", instead of under the head "Business income".

Logitronics P. Ltd. v. Commissioner of Income-tax 120111333ITR 0386-

INCOME—BUSINESS INCOME-WAIVER OF LOAN TAKEN BY ASSESSEE FOR BUSINESS ACTIVITY-ASSESSABLE AS BUSINESS INCOME—INCOME-TAX ACT, 1961, SS. 2(24), 28(IV), 41(1).

INCOME—BUSINESS INCOME—INVESTMENT COMPANY TAKING LOAN AND INVESTING FOR LONG-TERM IN SHARES-NO COMMUNICATION AND NO CLAIM FOR MANY YEARS BY LENDER AND UNSECURED LOAN WRITTEN BACK-REMISSION OF LIABILITY—

*NO DEDUCTION CLAIMED IN RESPECT OF LOAN-- NOT INCOME—
INCOME-TAX ACT, 1961, S. 41(1).*

If a loan was taken for acquiring a capital asset, waiver thereof would not amount to any income exigible to tax. On the other hand, if the loan was for trading purpose and was treated as such from the very beginning in the books of account the waiver thereof may result in income more so when it was transferred to the profit and loss account.

Under a one-time settlement with the bank, the assessee discharged Rs. 1,85,00,000 against the principal amount of loan of Rs. 4,76,92,213 and the remaining sum of Rs. 1,90,42,295 was waived. The Assessing Officer taxed the principal amount of loan waived as income. The Commissioner (Appeals) deleted the addition holding that the provisions of sections 2(24), 28(i), (iv) and 41(1) were not applicable and the Assessing Officer was not justified in making the addition of Rs. 2,91,42,213 being the principal amount of loan waived. The Tribunal reversed the order of the Commissioner (Appeals). On appeal :

Held:- dismissing the appeal, that the Tribunal had found that nothing was brought on record to show that the loan taken by the assessee from the bank was utilised for the purpose of acquiring capital assets. On the contrary, the material on record indicated that the assessee had obtained the loan or credit facility by way of hypothecation of finished goods, semi-finished goods, raw material, book debts, receivable claims, securities and rights by way of first charge which indicated that the assessee had obtained the loan facility for its business activity or trading operations. On the question whether the whole amount of the loan had been utilised either for the purpose of acquiring a capital asset or for the purpose of business activity or trading activity the Tribunal remitted the matter to the Assessing Officer for fresh adjudication. The Tribunal had rightly culled out the principle laid down from the various judgments and had given an opportunity to the assessee to prove its case before the Assessing Officer. Therefore, there was no reason or occasion for the assessee to feel aggrieved by the order of the Tribunal.

The assessee was an investment company engaged in the business of sale/purchase of shares and business of taking loans and further providing loans to parties. The Assessing Officer made an addition of Rs. 25 lakhs on account of unsecured loan written back relating to the assessment year 2004- OS. The Commissioner (Appeals) confirmed this. The Tribunal deleted the addition on the ground that since the assessee had not claimed any deduction in respect of the loan, section 41(1) would not be attracted. On appeal :

Held:- dismissing the appeal, that in pursuance of the business of financing, the assessee advanced loans at interest. Such loans were

advanced out of interest free own funds available with the assessee in the form of share capital and reserves or out of borrowed funds in the form of loans. The loans borrowed were to augment the funds available with the assessee to be advanced on interest. Such loans borrowed were a source of funds. It could not be said that the assessee was in the business of borrowing and advancing loans. The money borrowed was only a source of funds. The Tribunal found as a fact that the amount of loan was not used in financing business. Thus, the addition of Rs. 25 lakhs made by the Assessing Officer on account of unsecured loan written back was rightly deleted by the Tribunal.

*Deputy Commissioner of Income-tax * Circle 4(1), New Delhi v. Logitronics (P.) Ltd. [20101127ITD 16 (DELHI)*

Section 41(1), read with section 28(iv), of the Income-tax Act, 1961 – Remission or cessation of trading liability - Whether where capital assets are acquired by obtaining a loan and subsequently, loan amount is waived by other party, principal amount of loan waived by other party cannot be brought to tax under section 28(iv) or under section 41(1) - Held, yes - Assessee had taken loan of Rs. 4.76 crores from 'S' bank - Subsequently, entire principal amount of loan was settled at Rs. 1.85 crores giving a benefit of Rs. 2.91 crores to assessee by way of waiver - Assessing Officer was of view that assessee had derived benefit by way of waiver of loan in course of carrying on business activity; therefore, amount to extent it was waived by bank was includible in assessee's hands as business income - Whether since aforesaid aspect of matter, i.e., whether whole of loan amount had been utilized either for purpose of acquiring capital asset or for purpose of business activity or trading activity, had not been looked into or examined by authorities below nor the assessee had established that loan amount was utilized only for purpose of acquiring capital asset, matter was to be remanded back to Assessing Officer for his fresh adjudication with a direction to assessee to furnish all details and particulars of loan, and purpose for which loan taken from bank was utilized - Held, yes

FACTS

The assessee filed its return of income declaring certain income. During the course of the assessment proceedings, the assessee explained before the Assessing Officer that one time settlement with 'S' bank by paying Rs. 1.85 crore against the entire outstanding principal amount of Rs. 4.76 crore was made, and the company wrote back the outstanding provision for bank interest amounting to Rs. 1,90,42,295 to the profit and loss account and offered the same as income. However, the principal amount of loan waived by the bank to the extent of Rs. 2.91 crore was not taken to the profit and loss account but was taken directly to the balance sheet by creating a capital

reserve. The principal outstanding loan amount of Rs. 4.76 crore was settled for Rs. 1.85 crore, and the balance outstanding principal amount of Rs. 2.91 crore had been written off by the bank after accepting the payment of Rs. 1.85 crore against total outstanding principal amount of Rs. 4.76 crore. It was claimed by the assessee that this principal amount written off by the bank did not fall within the ambit of 'cessation of liabilities' as contemplated under section 41 and, therefore, it was not chargeable to tax. The Assessing Officer held that since loan amount was related to the business of the assessee, the same would be assessable under the head 'business'. He, therefore, brought the amount of Rs. 2.91 crore to tax as income includible in the assessee's total income. On appeal, the Commissioner (Appeals) decided this issue in favour of the assessee by holding that the provisions of section 28(i) or 28(iv) or section 41(1) were not applicable to the assessee's case.

On revenue's appeal :

HELD :

In the instant case, it was not in dispute that the assessee had taken or obtained loan from the 'S' bank and later, as a result of compromise between the assessee and 'S' Bank, the outstanding liability of Rs. 1.90 crores towards interest payable on loan amount was waived, and since the assessee had obtained a deduction on account of interest payable on loan amount in the assessment of earlier years, the assessee credited the said amount of interest to the profit and loss account and also included the same in the total income in the return of income filed by it. Thus, there was no dispute with regard to the waiver of interest includible in the total income of the assessee for the year under consideration. However, a dispute had arisen between the department and the assessee with regard to waiver of the principal amount to the extent of Rs. 2.91 crores. The entire outstanding principal amount of Rs. 4.76 crores was settled at Rs. 1.85 crores giving a benefit of Rs. 2.91 crores to the assessee by way of waiver. Now, the question arose whether the waiver of the principal amount to the extent of Rs. 2.91 crores which had been credited to the capital reserve account, was an income chargeable to tax under the Act. According to the Assessing Officer, the assessee had derived benefit by way of waiver of loan in the course of carrying on business activity and, therefore, the amount to the extent it was waived by the bank was includible in the assessee's hands as business income. [Para 13]

In the audit report, it was stated that the loan amount was utilized or applied for the purpose for which loans were raised and the loan was secured against hypothecation of finished goods and semi-finished goods, raw materials, book debts, receivable claims, securities rights and other rights by way of first charge.

It is well settled that where capital assets are acquired by obtaining a loan, and subsequently, the loan amount is waived by the other party, the principal amount of loan waived by the other party cannot be brought to tax under section 28(iv) or under section 41(1). [Para 21]

In the instant case, the assessee had not brought any material or evidences on record to show that the loan was taken by it from bank in cash credit account. On the other hand, the material available on record including the notes to the accounts indicated that the assessee had obtained the loan or credit facility by way of hypothecation of finished goods, semi-finished goods, raw material, book debts, receivable claims, securities, and rights by way of first charge, which indicated that the assessee had obtained the loan facility for its business activity or trading operations. However, this aspect of the matter, whether the whole of the loan amount had been utilized either for the purpose of acquiring capital asset or for the purpose of business activity or trading activity, had neither been looked into nor examined by the authorities below nor the assessee had established that the loan amount was utilized only for the purpose of acquiring capital asset.

In the aforesaid circumstances, the issue was to be restored to the file of the Assessing Officer for his fresh adjudication with a direction to the assessee to furnish all the details and particulars of loan, and the purpose for which the loan taken from bank was utilized. All these informations were within the control and specific knowledge of the assessee and, therefore, it would be the duty of the assessee to prove and establish that the amount of loan taken from the bank was utilized for the purpose of acquiring capital assets.

If on enquiry and verification, it transpired that the assessee had utilized the loan for the purpose of its business activity or trading activity, the amount of loan to the extent it had been waived by the bank, would be deemed to be the assessee's income chargeable to tax.

The Assessing Officer would provide reasonable opportunity of being heard to the assessee. Be it mentioned here that, in case, the assessee failed to produce or furnish details or particulars about the purpose for which the loan amount was utilized, the Assessing Officer would draw adverse inference against the assessee, and would decide the issue in the light of the fact that the loan amount was obtained by the assessee in cash credit account, CTL and WCTL account by way of hypothecation of finished, semi-finished goods, book debts, receivable claims, securities, rights by way of first charge implying thereby that the amount was utilized for the purpose of business or trading activity of the assessee (Para 27)."

7. The only argument of the learned authorised representative is that the issue squarely covered in favour of the assessee by the decision of the honourable Supreme Court in case of Commissioner versus Mahindra and Mahindra Ltd (2018) (404 ITR 1 (SC) and therefore the issue may be set-aside to the file of the learned assessing officer with a direction to consider the claim of the assessee in view of this decision. The learned departmental representative did not have any objection to this aspect if the matter may be examined once again in the light of the decision of the honourable Supreme Court. Moreover, the assessee also needs to establish that the purpose of the loan was for purchase of terminals. There is another twist in the case of the assessee, which shows that the loan amount has been paid by Tabcorp Ltd to GE capital services India Ltd on behalf of the assessee, and further the original loan was credited to the overdraft account of the assessee. The learned and CIT – A has categorically stated that assessee has not produced any evidence that the assessee has purchased any terminals. Therefore, there was no evidence available that whether the loan was used for the acquisition of any capital asset or not. Moreover, the learned assessing officer while making the addition has also not stated that under which provisions of the act the above income is treated as business income of the assessee. Therefore, we set-aside the whole issue back to the file of the learned assessing officer with a direction to the assessee to justify its claim in view of the decision of the honourable Supreme Court in 404 ITR 1. Learned assessing officer may examine the claim of the assessee and decide the issue afresh. Accordingly, ground number 1 of the appeal is allowed with above direction.
8. The second ground of appeal is with respect to the depreciation on assets lying in the premises, which has been sealed by the government of India. The ld AR stated that identical issue arose in case of the assessee for assessment year 2007-08 wherein this claim was allowed on identical facts and circumstances of the case hence; this issue is squarely covered in

favour of the assessee. The ld DR supported the orders of the lower authorities. We have carefully considered that the above issue is squarely covered in favour of the assessee by the decision of the coordinate bench in ITA number 4460&4461/del/2011 for assessment year 2006 – 07 and 2007 – 08 wherein in paragraph number 23 the coordinate bench has dealt with this issue and in paragraph number 30 – 31 allowed the claim of the assessee following the decision of the honourable jurisdictional High Court in CIT versus Oswal Agro Mills Ltd 341 ITR 467. Therefore respectfully following the decision of the coordinate bench in assessee's own case we also direct the learned assessing officer to allow the depreciation of ₹ 89,311/- on assets in the premises sealed by the government of India due to ban on lottery business. Accordingly, ground number 2 of the appeal of the assessee is allowed.

9. With respect to ground No. 3 wherein the addition of Rs. 16,54,200/- on account of interest ICD given to MAC Solution Pvt Ltd was made. Fact shows that the assessee company is along with other parties entered into a joint venture agreement and formed a company for marketing of lottery. For the purpose of the business of that company, assessee was to invest Rs. 5.30 crores as unsecured loan. The assessee ultimately withdrew from the joint venture company and terminated the repayment of unsecured loan. At the time of withdrawal, the assessee also raised claim of interest @ 8% on the above loan. In the notes on accounts, the assessee has shown that it has claimed interest on unsecured loan @ 8% from above party. Assessee took stand that the joint venture company MAC Solutions never agreed for the payment of interest and even the loan is still not repaid, therefore, The interest has not accrued to the assessee and therefore interest income cannot be taxed in the hands of the assessee. The ld AO rejected the claim and made an addition of Rs. 16,54,200/- on account of interest. On appeal before the learned CIT – A he considered the notes on accounts in schedule 12 and held that from the Notes the interested the rate of 8% is due to the appellant from the above company. He therefore

held that what has been stated to have been accrued and forms part of notes on account cannot be now claimed to have not accrued. He held that assessee is following the Mercantile system of accounting and interest accrued on the intercorporate deposits given held to be accounted for in the year in which it has accrued and it is to be taxed in the year of accrual. He noted that AO has calculated interest at the rate of 8% on the amount of loan given to this company of ₹ 180 lakhs and also 9% on the amount due from another company the total interest amount accrued to the assessee is of ₹ 1,654,200 is the income accrued to assessee in financial year 2007 – 08 and same is to be taxed during this year only therefore he confirmed the action of the AO. Thus, assessee is aggrieved.

10. The ld AR stated that assessee is governed by the proposition of accounting standard and accounting standard 9 which relates to revenue recognition which clearly says that where the ability to assess the collection with reasonable certainty is lacking at the time of receiving the claim, but the revenue recognition is required to be postponed to the extent of uncertainty involved. Therefore, as there is no certainty looking to the facts and circumstances of the case of the above income, it was not recognized and it is not taxable as no revenue accrued to the assessee. Per Contra, the ld DR submitted that assessee is following mercantile system of accounting, which is not permitted. According to mercantile system of accounting, the assessee is duty bound to recognize the income of interest.
11. We have carefully considered the rival contentions and peruse the orders of the lower authorities. The assessee has placed its audit and annual accounts at page number 66 onwards of the paper book. As per the report of the auditor the balance sheets, profit and loss account and the cash flow statement comply with the accounting standards referred to in subsection (3C) of Section 211 of the companies act, 1956. As per schedule – 12, significant accounting policies and notes on accounts, the basis of accounting is mentioned that the accounts are prepared on historical cost convention based on accrual method of accounting and applicable

accounting standards. As per note number 12 the company has mentioned as Under:-

“12. The company had given an intercorporate deposit (ICD) of ₹ 5 30 lakhs to MAC solutions private limited at the rate of 8% per annum interest rate in which the company also holds 10% equity shares. The company has received back ₹ 250 lakhs during the year 2005 – 2006, ₹ 25 lakhs in the year 2006 – 2007 and ₹ 75 lakhs in year 2007 – 2008. The balance amount of ₹ 180 lakhs as on the date of signing of the balance sheet is outstanding along with interest at the rate of 8% per annum, which has accrued and become overdue.

The company had given an intercorporate deposit ICD of ₹ 23.80 lakhs to assessee be distributors private limited at the rate of 9% per annum interest rate on which the company also holds 2000 equity shares. The balance amount of ₹ 23.80 lakhs as on the date of signing of the balance sheet is outstanding along with interest at the rate of 9% per annum, which is accrued and become overdue.

In view of the precarious financial position of the lonee companies, the said interest would be accounted as and when received/Henri realisation basis and hence, has not been accounted for in the books. However efforts are being made for realisation of the outstanding loan amount.”

12. Thus the notes on accounts clearly says that assessee is maintaining its books of account on accrual basis and the interest has accrued to the assessee and has become overdue but not received. The auditor in its auditors report has also qualified inviting attention to note number 12 of schedule 12 Re: outstanding intercorporate deposit of ₹ 203.80 lakhs which relates to the interest. Therefore, the above interest income has accrued to the assessee might not have been received. Assessee being a company is required to maintain its books of accounts only on accrual basis. The receipt of the consideration/interest is irrelevant as far as accrual of the interest income is concerned. We have also considered the agreement

dated 8 July 2005 between assessee and other parties wherein as per clause number 3 (d) there is a stipulation of interest. Therefore, it cannot be said that there was no stipulation of payment of interest on loan given to the maximum is private limited. There cannot be two meanings of the word accrual when interpreting for maintaining the books of accounts which is also amended of the law of the companies act u/s 209 of the companies act 1956, as well as for the purpose of taxation.

13. Assessee before us and stated that there is an uncertainty of recovery of the original amount of advances (ICD) and therefore in absence of any reasonable certainty of the recovery of the principal sum the interest cannot be said to be accrued to the assessee. The assessee has not produced any document/resolution/financial position of the companies to move the assessee has given ICD. Further paragraph number 8.2 of the accounting standard says that Interest accrues, in most circumstances, on the time basis determined by the amount outstanding and the rate applicable. Further in note number 12 of schedule 12 assessee itself has disclosed that company out of the total advance of ₹ 530 lakhs has received back ₹ 250 lakhs in financial year 2005 – 2006, ₹ 25 lakhs in the year 2006 – 2007 and ₹ 75 lakhs in the year 2007 – 2008. We are dealing with the case for the assessment year 2008 – 09 in which year the assessee has already recovered 75 lakhs. Further out of the total advance of ₹ 503 lakhs assessee has already recovered ₹ 3 00 lakhs. Therefore, we do not find any evidence placed before us or before the lower authorities to even remotely suggest that assessee is not able to recover the above sum.
14. In view of this we do not find any infirmity in the orders of the lower authorities in holding that interest has accrued to the assessee of ₹ 1,654,200/-. Accordingly, ground number 3 of the appeal of the assessee is dismissed.
15. Ground number 4 is with respect to the initiation of the penalty proceedings which is premature at this particular stage and therefore the same is dismissed.

16. In the result ITA number 1883/del/2013 for the assessment year 2008 – 09 filed by the assessee is partly allowed.
17. For assessment year 2009 – 10 the assessee has filed an appeal against the order of the CIT – A –XIII dated 16 January 2013 wherein appeal filed by the assessee against the order passed u/s 143 (3) of the income tax act by the income tax Officer, Ward 11 (1), New Delhi was partly allowed. The facts in this case are identical to the facts in the case of the assessee for assessment year 2008 – 09. The arguments of the parties are also similar.
18. The assessee has raised the following grounds of appeal in ITA No. 1882/Del/2013 for the Assessment Year 2009-10:-
 - “1. *in upholding the disallowance of Rs.75,914/- on account of depreciation on assets in the premises sealed by the Government due to ban on lottery.*
 2. *in upholding the addition of Rs. 16,54,200/- on account of interest on ICDs given to MAC Solutions Pvt. Ltd.&SGB Distributors Pvt. Ltd..*
 3. *On the facts & in law, the Ld. CIT (A) grossly erred in confirming initiation of penalty proceedings u/s 271(l)(c) of the Income Tax Act, 1961 by the Ld. AO.”*
19. In view of our decision in appeal of the assessee for assessment year 2008 – 09 wherein respectfully following the decision of the coordinate bench in assessee’s own case we have directed the lower authorities to delete the disallowance of depreciation on assets lying in the premises sealed by the government due to ban on lottery business, we allow ground number one of the appeal and direct the lower authorities to delete the disallowance of depreciation of ₹ 75,914/-.
20. Ground number 2 is with respect to the chargeability of interest on intercorporate deposits given to various parties, the identical issue has been dealt with us in the appeal of the assessee for assessment year 2008 – 09 wherein we have upheld the action of the lower authorities. For similar

reasons we uphold the actions of the lower authorities in bringing to tax the sum of ₹ 1,654,200/- on account of interest given on ICDS which is accrued to the assessee but not received.

21. The ground number 3 is with respect to the initiation of penalty proceedings, which is premature at this particular stage, and hence it is dismissed.
22. In view of this appeal of the assessee for assessment year 2009 – 10 is also partly allowed.

Order pronounced in the open court 23/06/2021

-Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

AK KEOT
Date: 23.06.2021

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI