

आयकर अपीलीय अधिकरण "C" न्यायपीठ मुंबई में

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

श्री महावीर सिंह, उपाध्यक्ष एवं श्री एम. बालगणेश, लेखा सदस्य के समक्ष
BEFORE SHRI MAHAVIR SINGH, VP AND SHRI M. BALAGANESH, AM

आयकर अपील सं./ ITA No. 402/Mum/2014

(निर्धारण वर्ष / Assessment Year 2003-04)

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| Owens-Corning (India) Pvt. Ltd. Alpha Building, 7 th floor, Hiranandani Gardens Powai, Mumbai-400 076 | बनाम/ Vs. | The Income-Tax Officer Ward 7(1)(1) Mumbai-400 076 |
| (अपीलार्थी / Appellant) | | (प्रत्यर्थी/ Respondent) |
| स्थायी लेखा सं./PAN No. AAACO1739M | | |

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|------------------------------------|---|-------------------------|
| अपीलार्थी की ओर से/ Appellant by | : | Shri Jehangir Mistry |
| प्रत्यर्थी की ओर से/ Respondent by | : | Shri Alok Singh, CIT DR |

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|---|------------|
| सुनवाई की तारीख / Date of hearing: | 23.06.2021 |
| घोषणा की तारीख / Date of pronouncement: | 25.06.2021 |

आदेश / ORDER

एम. बालगणेश, लेखा सदस्य के द्वारा /

PER M. BALAGANESH, AM:

This appeal of assessee is arising out of the order of Commissioner of Income Tax (Appeals)-20, Mumbai [in short CIT(A)], dated 03.10.2013. The assessment was framed by the Income-tax Officer -7(1)(1), Mumbai (in short ITO/ AO) for the A.Y. 2003-04 vide order dated 20.03.2006 under section 143(3) of the Income-tax Act, 1961 (hereinafter 'the Act').

2. The Ground Nos.1:0 to 1:3 raised by the assessee is with regard to challenging the sustenance of disallowance on amortization of the premium paid for the lease hold land.



3. We have heard the rival submissions and perused the materials available on record. We find that the learned AR fairly stated that this issue is covered against the assessee by the order of this tribunal in its own case for assessment year 2004-05 in ITA No.461 & 849/Mum/2009 dated 16.03.2011, wherein this Tribunal by placing reliance on the Special Bench decision of the Tribunal in the case of Mukund Limited reported in 106 ITD 23 had decided the issue in Paras 7, 7.1 & 8 of the said Tribunal order dated 16.03.2011 against the assessee. Since this fact is not disputed by the parties before us, the operative portion of the said tribunal order is not reproduced herein for the sake of brevity. Respectfully, following the said order, the ground No.1:0 to 1:3 raised by the assessee are dismissed.

4. The Ground Nos. 2.1 to 2.3 raised by the assessee is with regard to challenging the addition made under section 41(1) of the Act.

5. We have heard the rival submissions and perused the materials available on record. The brief facts relevant with regard to this addition and the treatment given by the learned Assessing Officer with regard to the same, are that in the earlier years i.e. on 26 May 2000, the assessee had raised a rupee loan facility of ₹90 crores from 'Bank of Nova Scotia;. This loan was obtained to finance capital expenditure and also to fund its general working capital requirements. During the year under consideration, the assessee entered into an Amended and Restated Rupee Facility Restructuring Agreement dated 29 August 2002 with the said "Bank of Nova Scotia'. In terms of the said Restructuring Agreement, the Bank had agreed to



convert the said rupee loan facility into Secured Redeemable Convertible Debentures aggregating to ₹33.80 crores. In terms of the said agreement, the assessee was to issue Secured Redeemable Convertible Debentures of ₹33.80 crores to Bank of Nova Scotia ; make a payment of ₹9.70 crores (equivalent to USD 2 million) to the Bank ; and there was a remission of the balance rupee loan to the extent of ₹46.50/- crores. The said remission was credited to the Capital Reserve Account of the assessee during the year under consideration. The same was not offered to tax by the assessee while preparing and filing its return of income since the same was a reversal of a capital liability which is not taxable.

6. During the course of the assessment proceedings, the Assessing Officer had inter-alia called upon the assessee to produce all relevant details of the rupee loan facility availed from Bank of Nova Scotia and the restructuring agreement as income of the assessee company under section 41(1) of the Income-tax Act, 1961. The said explanation was filed with the Assessing Officer vide letter dated 6.2.2006.

7. The Assessing Officer however, disregarded the above and made an addition of ₹46,50,60,000/- under section. 41(1) on the ground that in the absence of the breakup of the loan it is not clear whether the loan of ₹90 crores was solely on account of principal amount or some interest element was also embedded into it. That the assessee company has not been able to discharge the onus of reconciling and explain the remission of loan and the break-up of the same. The assessee has failed to prove that remission of rupee loan results into remission of



trading liability or otherwise. The company has failed to prove that the remission of such liability is not taxable.

8. The assessee submitted that the amount written back in the sum of ₹46,50,60,000/- does not contain any element of interest and hence, the action of the learned Assessing Officer making the impugned assessment on the basis of an alleged interest element being involved in the said amount is factually incorrect. The assessee also pleaded that there was no claim of deduction made by assessee in the earlier year in respect of principal portion of the loan and since, the amounts written back in the instant case represent only waiver of principal portion of the loan, the provision of Section 41(1) of the Act does not come into operation at all. The assessee had also filed a reconciliation of the liability involved and restructured through the restructuring agreement before the lower authorities. The aforesaid facts could be summarized by way of following table with the relevant figures for the sake of better appreciation of facts:-

| Particulars | Amount (Rs.) |
|---|----------------|
| Loan taken from Bank of Nova Scotia (Principal) | 90,00,00,000/- |
| Less: Conversion into Secured Redeemable Convertible Debentures | 33,80,00,000/- |
| Less: Settlement payment | 9,69,40,000/- |
| Balance Loan Remission | 46,50,60,000/- |

9. From the above table, it can be safely concluded that the amounts written back in the sum of ₹46.50 crores purely represent principal portion of the loan and does not contain any interest element thereon. Admittedly, no deduction has been claimed by the assessee in earlier years in respect of the



principal portion of the loan liability. Hence, the provisions of Section 41(1) of the Act cannot come into operation at all. We find that the issue in dispute before us is no longer *res integra* in view of the decision of the Hon'ble Supreme Court in the case of CIT vs. Mahindra And Mahindra Ltd. reported in [2018] 93 taxmann.com 32 (SC), wherein it was held as under:-

"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

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 deprecation 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.”

10. We find that the learned DR placed heavy reliance on the decision of Hon'ble Jurisdictional High Court in the case of Solid Containers Ltd. Vs. CIT reported in 308 ITR 471 (Bom). We find that the Hon'ble Jurisdictional High court in subsequent case in the case of PCIT vs. Colour Roof (India) Ltd. ITA No.896/2017 dated 25.09.2018 had occasion to consider the decision of Solid Containers Ltd. (supra) and ultimately decided the very same issue in dispute before us, in favour of the assessee, by following the decision of Hon'ble Supreme Court in the case of Mahindra And Mahindra Ltd. referred to (supra). Hence, the reliance placed by the learned DR does not advance the case of Revenue.

11. We find that the learned DR vehemently argued that assessee had not given any details of the utilization of the loan borrowed by it, whether for purchase of capital assets or for its working capital purposes. In our considered opinion, this aspect is absolutely irrelevant as the issue in dispute before us is as to whether any waiver of principal portion of the loan would amount to remission of liability so as to make it taxable under section 41(1) of the Act, which issue has already been decided in favour of the assessee by the decision of Hon'ble Supreme Court in the case of Mahindra And Mahindra Ltd. referred to (supra). Hence, we deem it fit not to get into this aspect of utilization of borrowed funds. Moreover, the said utilization of borrowed funds have absolutely got no relevance for deciding the issue in dispute before us on the taxability under section



41(1) of the Act. Accordingly, grounds Nos. 2.1 to 2.3 raised by the assessee are allowed.

12. The last issues to be decided vide ground Nos. 3:1 to 3:3 raised by the assessee are with regard to disallowance of swap charges on loans obtained by the assessee.

13. We have heard the rival submissions and perused the materials available on record. It is not in dispute, the assessee has availed loan from US Bank on floating rate of interest. The assessee choose to convert the said loan carrying floating rate of interest into fixed rate of interest. The assessee was asked to pay certain swap charges for the said conversion from floating to fixed rate. This swap charges liability had been duly incurred by the assessee during the year. The assessee had characterized the said swap charges in the nature of interest. This was sought to be disallowed by the learned Assessing Officer on the ground that the said expenditure is capital in nature. We find that the learned CIT(A) has also given categorical finding that assessee converting the loan from floating rate of interest to fixed rate of interest has derived enduring benefit and hence, the expenditure incurred by the assessee falls in the capital field warranting capitalization thereon and hence, cannot be allowed as deduction under section 37(1) of the Act.

14. At the time of hearing, the learned AR drew our attention to the relevant documents enclosed at pages 290, 290A and 296 of the factual paper book. There is no dispute that these documents were already placed before the lower authorities.



The learned AR also drew our attention to page 80 of the case law paper book wherein, the calculation of this swap charges had been reproduced as under:-

| From | To | Notional Principal | No. of days | Fixed rate | Floating rate | Difference | Loss(gain) |
|-----------|-----------|--------------------|-------------|------------|---------------|------------|------------|
| Dec-00 | 15-Jun-01 | 1,95,00,000 | 182 | 6,485% | 6,464% | 0.021% | 2,033 |
| 15-Jun-01 | 17-Dec-01 | 1,62,00,000 | 185 | 6,485% | 3.880% | 2,605% | 2,16,866 |
| 17-Dec-01 | 17-Jun-02 | 1,29,00,000 | 182 | 6,485% | 1,918% | 4.568% | 2,97,877 |
| | | | | | | USD INR | 5,16,776 |
| | | | | | | INR | 249,13,779 |

15. From the above, it can be seen that the swap charges which the assessee has incurred for conversion from floating to fixed rate of interest, would necessarily partake the character of interest. The interest paid by the assessee when the loan was in floating rate, was duly allowed by the learned Assessing Officer. Hence, the character of the transaction does not change pursuant to this swap from floating to fixed rate. The utilization of the loans for the purposes of business has not been disputed by the learned DR before us, hence, there is no question of disallowance of any interest, whether nomenclature as interest or swap charges. The nomenclature of the transaction is absolutely irrelevant than the substance of the transaction.

16. We find that the assessee also placed reliance on the decision of the case of Hon'ble Jurisdictional High Court in the case of CIT vs. D. Chetan & Co reported in 390 ITR 36 in support of its contention. The relevant operative portion is enclosed in Para 7 of the said decision, which read as under:-



"7. The impugned order of the Tribunal has, while upholding the finding of the CIT (Appeals), independently come to the conclusion that the transaction entered into by the Respondent assessee is not in the nature of speculative activities. Further the hedging transactions were entered into so as to cover variation in foreign exchange rate which would impact its business of import and export of diamonds. These concurrent finding of facts are not shown to be perverse in any manner. In fact, the Assessing Officer also in the Assessment Order does not find that the transaction entered into by the Respondent assessee was speculative in nature. It further holds that at no point of time did Revenue challenge the assertion of the Respondent assessee that the activity of entering into forward contract was in the regular course of its business only to safeguard against the loss on account of foreign exchange variation. Even before the Tribunal, we find that there was no submission recorded on behalf of the Revenue that the Respondent assessee should be called upon to explain the nature of its transactions. Thus, the submission now being made is without any foundation as the stand of the assessee on facts was never disputed. So far as the reliance on Accounting Standard-11 is concerned, it would not by itself determine whether the activity was a part of the Respondent-assessee's regular business transaction or it was a speculative transaction. On present facts, it was never the Revenue's contention that the transaction was speculative but only disallowed on the ground that it was notional. Lastly, the reliance

placed on the decision in S. Vinodkumar Diamonds (P.) Ltd. (supra) in the Revenue's favour would not by itself govern the issues arising herein. This is so as every decision is rendered in the context of the facts which arise before the authority for adjudication. Mere conclusion in favour of the Revenue in another case by itself would not entitle a party to have an identical relief in this case. In fact, if the Revenue was of the view that the facts in S. Vinodkumar (supra) are identical/similar to the present facts, then reliance would have been placed by the Revenue upon it at the hearing before the Tribunal. The impugned order does not indicate any such reliance. It appears that in S. Vinodkumar Diamonds (P.) Ltd. (supra), the Tribunal held the forward contract on facts before it to be speculative in nature in view of Section 43(5) of the Act. However, it appears that the decision of this court in CIT v. Badridas Gauridu (P.) Ltd. [2003] 261 ITR 256/[2004] 134 Taxman 376 (Mum.) was not brought to the notice of the Tribunal when it rendered its decision in S. Vinodkumar Diamonds (P.) Ltd. (supra). In the above case, this court has held that forward contract in foreign exchange when incidental to carrying on business of cotton exporter and done to cover up losses on account of differences in foreign exchange valuations, would not be speculative activity but a business activity."



17. In view of the above, we hold that the assessee is entitled for deduction towards swap charges. Accordingly, the ground Nos.3:1 to 3:3 raised by the assessee are allowed.

18. Ground No.4 is general in nature and does not require any adjudication.

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

Order pronounced in the open court on 25.06.2021.

Sd/-
(महावीर सिंह / MAHAVIR SINGH)
(उपाध्यक्ष / VICE PRESIDENT)

Sd/-
(एम बालगणेश / M BALAGANESH)
(लेखा सदस्य / ACCOUNTANT MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 25.06.2021

सुदीप सरकार, व.निजी सचिव / *Sudip Sarkar, Sr.PS*

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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