IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "A" KOLKATA

Before **Shri Waseem Ahmed, Accountant Member** and
Shri S.S.Viswanethra Ravi, Judicial Member

ITA No.1009/Kol/2013 Assessment Year:2009-10

DCIT, Circle-4, P-7, Chowringhee Square, Kolkata-700 069	बनाम / **V/s.**	M/s Kalyanapur Cement Ltd., 2&3, Clive Row, Kolkata-700001 [**PAN No.AABCK 1273 H**]
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

अपीलार्थी की ओर से/By Appellant	Shri Sallong Yaden, Addl. CIT-DR
प्रत्यर्थी की ओर से/By Respondent	Shri Soumitra Choudhury, Advocate
सुनवाई की तारीख/Date of Hearing	28-03-2017
घोषणा की तारीख/Date of Pronouncement	-05-2017

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the Revenue is directed against the order of Commissioner of Income Tax (Appeals)-IV, Kolkata dated 30.01.2013. Assessment was framed by JCIT(OSD), Circle-4. Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 26.12.2011 for assessment year 2009-10. Shri Sallong Yaden, Ld. Departmental Representative represented on behalf of Revenue and Shri Soumitra Choudhury, Ld. Advocate appeared on behalf of assessee.

2. First issue raised by Revenue in this appeal is that Ld. CIT(A) erred in deleting the addition made by the Assessing Officer for ₹32,44,228/- on account of major repair expense.

3. Briefly stated facts are that assessee in the present case is a limited company and engaged in the manufacturing business of cement. The assessee in the year under consideration has claimed an expense of ₹ 32,44,228/- under the head "major repairs" by debiting in profit and loss a/c. The assessee has treated such expenses as current

repairs and claimed the deduction in the profit and loss a/c. However, the AO was of the view that the major repair expenses require the replacement of the components used in the machinery to keep them under good running condition. Thus, the instant major repair expenses are capital in nature and same cannot be claimed as deduction u/s 30 or 37 of the Act. Accordingly the AO treated the major repair expense of ₹ 32,44,228/- as capital in nature and added to the total income of assessee.

4. Aggrieved, assessee preferred an appeal before Ld. CIT(A). The assessee before Ld. CIT(A) submitted that the expense was classified under the head major repair and maintenance on the ground that the large expense was spent on repair and maintenance but the fact is that there was no enhancement in the capacity of the plant and machinery as well as no increase in the efficiency. There was no purchase of any new equipment under the category of plant and machinery. Thus no enduring benefit was created by the assessee out of the aforesaid expense. Ld. CIT(A) after considering the submission of assessee deleted the addition made by AO by observing as under:-

> *"3.4 Similar issue also came put in the case of the appellant for A.Y 2007-0 wherein my predecessor in appeal No. 200/CIT(A)-IV/2009-10 dated 29.06.2011 has held that the entire expenditure was revenue in nature and thereby allowable. As the facts and circumstances of the previous year are similar to that of A.Y 20087-08, I am of the view that the expenses under the head '**Major Repair & Maintenance**' for an amount of Rs.32,44,228/- are allowable as revenue expenses."*

The Revenue, being aggrieved, is in appeal before us on the following ground:-

> *"That on the facts and circumstances of the fact that L. CIT(A) erred in law in directing the AO to allow the expenditure of Rs.32,44,228/- incurred on account of major repairs and maintenance without appreciating the fact that the assessee company will get the enduring benefit from the said expenditure for a number of years to come."*

5. Both the parties relied on the order of the Authorities Below as favourable to them. Ld. AR for the assessee filed paper book which is running pages from 1 to 325.

6. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset, it was observed that similar issue was decided by the Co-ordinate Bench of this Tribunal in assessee's own case in its favour in **ITA No.1396 & 1397/Kol/2011** for A.Y. 2006-07 & 2007-08 dated 14.10.2014. The relevant extract of the order is reproduced below:-

"10. We have heard rival submissions and gone through facts and circumstances of the case. The assessee has filed complete details of repair and maintenance expenses and also a certificate from Chartered Engineer dated 15.12.2008, who has certified that the expenses under the head repairs and maintenance during the year ending 31.03.2007 has been procurement of worn out components and certain capital assets or group of assets. According to him, these worn out parts are in the context of capital asset where these are used and also form a small fraction of the total value of corresponding capital asset in each case. He certified the expenses and summarized section wise as under:-

' 1. Lime Stone Captive Quarry	Rs. 27.15 lacs
2. Crushing Section	Rs. 45.53 "
3. Raw Mill Sections	Rs.224.90 "
4. Kiln	Rs. 79.89 "
5. Coal Mill	Rs. 25.10 "
6. Clinker Grinding Section	Rs. 60.24 "
7. Slag Grinding Section	Rs. 53.39 "
8. Packing Plant	Rs. 4.63 "
9. Miscellaneous	Rs. 5.64 "
Total	Rs.526.46 "

*Ld. counsel for the assessee before us contended that due to unsatisfactory financial position of the company for few years in the past, it could not undertake the repair and maintenance of plant and machinery and its capacity utlisation was n the range of 37.46% against the industry average of 90. According to him to make the situation improve, the assessee company in FY 2006-07 relevant to AY 2007-08 undertook the overdue repairs and maintenance for plant and machinery and repair and replacement of internal control purpose was started. The assessee company has not increased in the rated capacity of any of the plant/equipment by virtue of this repair and maintenance. Factually, the assessee has carried out repairs and maintenance, as is evident from the above discussion. In similar circumstances, Hon'ble Bombay High court in the case of CIT vs. Chowgule & Co. Pvt. Ltd. (1995) 214 ITR 523 (Bom) has considered the expression '**current**' preceding '**repairs**' as under:*

"i) The amount should be paid on account of repairs.

*(ii) '**Current repairs**' means repairs undertaken in toe normal course of user for the purpose of preservation maintenance or proper utilisation or for restoring it to its original condition.*

*(iii) '**Current repairs**' do not mean only petty repairs or repairs necessitated by wear and tear during the particular year.*

(iv) Such repairs should not bring into existence nor obtain a new or different advantage.

(v) The quantum of expenditure nor the fact that in the process of repairs, there was substantial replacement of the parts of machine or ship is decisive of the true nature of the expenditure.

> *(vi) The original cost of the asset is not at all relevant of or ascertainment of the true nature of the expenditure on repairs.*
> *(vii) The replacement cost of the asset may however, at times may be used as indicator of the true character of the expenditure. If the expenditure on repairs added to the written down value or disposal value exceeds the replacement cost of the asset, a presumption is possible that it is not a revenue expenditure but expenditure of capital nature. Such presumption, of course, would be rebuttable.*
>
> *(viii). The expression '**current**' preceding '**repairs**' appears to have been used by the legislature with a view to restricting the allowance to expenditure incurred for preservation and maintenance thereof in its current state in contradiction to that incurred on any improvement or an addition thereto [CIT v. Chowgule & Co. Pvt. Ld (1995) 125 CTR (Bom) 442, 448 = (1995) 214 ITR 523 (Bom). In the facts of that case, the Tribunal, on investigation of the nature of the repairs undertaken by the assessee, recorded a categorical finding of fact that it did not result in emergence of a new ship but amounted, in substance, to current repairs to the existing ship. The act that old parts of the ship were replaced by new pats was not relevant for determining whether the expenditure was on '**current repairs**' or not. Therefore, the expenditure claimed by the assessee amounted to '**current repairs**', allowable as a deduction under section 31."*

Hon'ble Supreme Court in the case of CIT v. Saravana Spinning Mills (P) Lt. (2007) 7 SCC 298 has held unambiguously that 'each machine in a segment of a textile mill has an independent role to play in the mill and the output of each division is different from the other."

Respectfully following the precedent as above we hold that there is no infirmity in the order of the Ld. CIT(A). Accordingly, we uphold the same. This ground of Revenue's appeal is dismissed.

7. Next issue raised by Revenue in this appeal is that Ld. CIT(A) erred in deleting the addition made by AO for ₹5.66 crores on account of debts written back .

8. The assessee in the year under consideration has settled its loan from the M/s Asset Reconstruction Company Ltd. (ARCL for short) wherein waiver of loan for an amount of ₹5.66 crores was allowed to it. The assessee has credited its profit and loss a/c by the amount of loan which was waived off by the ARCL. However, the assessee at the time of assessment proceedings filed revised computation of income wherein the amount of loan which was waived off was deducted from the profit of the assessee. The assessee also submitted that the aforesaid amount of waived loan has

never been claimed as deduction in its profit and loss a/c and the same was wrongly credited in the profit and loss a/c. However, the AO disregarded the contention of assessee and treated the liability written off by the assessee as its income which was originally shown in the computation of income. Thus, the AO disallowed the amount of loan waived off for ₹ 5.66 crores and added to the total income of assessee.

9. Aggrieved, assessee preferred an appeal before Ld. CIT(A). The assessee before Ld. CIT(A) submitted that the amount of loan waived off by ARCL was never claimed as expenditure in the profit and loss a/c and therefore, the same cannot be treated as income of the assessee. Ld. CIT(A) after considering the submission of assessee deleted the addition made by the AO by observing as under:-

> *"5.2 I have gone through the relevant accounts and the audit report of the appellant. I find that the following things are clearly established:*
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> i. That as on 31.03.2008 the appellant company's total dues to ARCL amounted to Rs.4516.30 lakhs
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> ii. That on 2011.2008 the appellant has entered into a MoU with the lender M/s ARCL in accordance to which as per clause 7(i) of Part-I of Preamble, the total dues were settled at Rs.3950 lakhs and the balance amount of rs.566.30 lakhs was waived off as remission of liabilities under capital account.
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> iii. That the said amount of Rs.5,66,31,916/- has not been shown in the main part of the P & L A/c.
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> iv. That unless an amount is allowed as deduction in previous year as expenditure, its remission or cessation cannot be brought to tax as income either u/s 28(iv) or u/s 41(1) of the IT Act, 1961. This principle has been held in the case of CIT vs. Choudhury Cotton Ginning & Pressing Factory (2004) 271 ITR 17 (Punjab & Hariyana). The principle that debt for given cannot be treated as income has also been held in the case of CIT vs. Ganesha Chettiar (1982) 133 ITR 103.
>
> *5.3 Based on the above facts as well as the judicial decisions quoted, I am of the view that disallowances of Rs.5,66,31,916/- made by the AO towards remission of liability on capital account cannot be upheld. The same is deleted."*

The Revenue, being aggrieved, is in appeal before the Tribunal on the following ground:-

> *"2. That on the facts and circumstances of the fact the Ld. CIT(A) erred in law in directing the AO to delete the disallowance of Rs.5,66,31,916/- as write back as debt though the claim was not made in the return of income."*

10. Before us both parties relied on the order of Authorities Below as favourable to them.

11. We have heard the rival contentions of both the parties and perused the materials available on record. The issue in the instant relates to the gain which assessee has received on account of settlement of the loan. It is undisputed fact that the amount of loan waived off by ARCL represents the principal amount. The assessee treated waiver off of the principal amount of loan non-taxable item on the ground that it was utilized for the capital transaction and it does represent the trading liability. However the AO treated the same as income of the assessee in terms of the provisions of section 28(iv) of the Act. Now the question arises for our adjudication so as to whether the loan amount written off is income as per the provisions to section 28(iv) of the Act which reads as under :

28(iv) of the Act which reads as under:-

> *"Profits and gains of business or profession.*
> *28. The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession",-*
> *(i) ... ...*
> *(ii) ... ...*
> *(i) ... ..*
> *[(iv) the value of any benefit or perquisite, whether convertible to money or not, arising from business or the exercise of a profession;]*

From the plain reading of the above provision it can be inferred that when loans availed for capital transactions have been waived off, the waiver cannot be treated as value of any benefit or perquisite arising from business or exercise of profession so as to be treated as assessable income by invoking the provisions of section 28*(iv)* of the Act. Such waiver cannot also be brought to tax u/s 41(1) of the Act, as no part of the waiver would have been allowed as a deduction in earlier year(s). However, waiver off of interest portion out of loan taken for trading activities and other expenditure allowed as deduction in the earlier year(s) would be brought to tax under section 41(1) of the Act in the year(s) of write-back.

The provisions of section 28 of the Act deals with profits and gains of business or profession and clause (iv) thereof says that the value of any benefit or perquisite,

whether convertible into money or not, arising from business or the exercise of a profession shall be chargeable as income under the head "Profits and gains of business or profession". In the instant case the fact that the loan was utilized for the capital transactions has not been disputed by the AO. Thus it is clear that the instant loan was not utilized for the trading liability of the assessee and therefore the waiver off the same cannot amount to income which is chargeable to tax. In holding so we find guidance & support from the judgment of Hon'ble Delhi High Court in the case of *CIT* v. *Tosha International Ltd.* [2011] 331 ITR 440/[2009] 176 Taxman 187 wherein it was held as under :

> *"The assessee was engaged in the manufacturing of black and white picture tubes. The assessee-company ran into huge losses and it ultimately became a sick company and registered with the BIFR. Under the one time settlement scheme, the financial institutions and banks required the assessee to pay 60 per cent of the amount due towards principal and waived the entire interest payment. There is no dispute with regard to the waiver of interest payment. The only objection raised by the Assessing Officer is with regard to the waiver of the principal amount to the extent of Rs. 10,47,93,857 which the assessee had directly credited to the Capital Reserve Account. According to the Assessing Officer the assessee had derived benefit on the basis of either depreciation or utilizing the working capital which would have formed part of the earlier years income. According to the Assessing Officer since the loans ceased to exist, this amounted to cessation of liability and, therefore, it has to be treated as an income. Consequently, the Assessing Officer added the said sum of Rs. 10.47 crores in the income of the assessee. The Commissioner of Income-tax (Appeals) deleted the addition by observing that the remission of the principal amount of loan did not amount to income under section 41(1) nor under section 28(iv) nor under section 2(24) of the Income-tax Act, 1961 (hereinafter referred to as the 'said Act').*
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> ***3.*** *The revenue went in appeal before the Tribunal against the order of the Commissioner of Income-tax (Appeals) with regard to the deletion of the said sum of Rs 10.47 crores. We note that the Tribunal has examined the case in detail and particularly from the standpoint of the provisions of section 41(1) of the said Act. The Tribunal has observed as under:—*
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> *"As per our considered view, for attracting the provisions of section 41(1), the first requisite condition to be satisfied is that the assessee should have got deduction or benefit of allowance in respect of loss, expenditure or trading liability incurred by it and subsequently during any previous year, the assessee should have received any amount in respect of such loss, expenditure or trading liability by way of remission or cessation thereof. The remission would become income only if the assessee has claimed deduction in respect of expenditure or trading liability. In Mahindra & Mahindra Ltd. v. CIT [2003] 261 ITR 501, Hon'ble High Court of Bombay held that no allowance or deduction having been allowed in respect of loan taken by assessee for purchase of capital assets, section 41(1) was not attracted to remission of principal amount of loan. In the instant case, the assessee has not got any deduction on account of acquisition of*

capital assets as the same has been reflected in the balance sheet and not in the P and L account, and also the remission of the principal amount of loan so obtained from the bank and financial institution had not been claimed as expenditure or trading liability in any of the earlier previous year. So far as waiver of interest is concerned, the assessee-company itself has treated the same either as income or has not claimed the same as expenditure in the computation of income filed before the lower authorities."

4. *We see no reason to interfere with the conclusions of the Tribunal as the same have been rendered on a correct appreciation of law. The principles enunciated in Mahindra & Mahindra Ltd. v. CIT [2003] 261 ITR 501 (Bom.) are fully applicable and we see no reason to take a different view.*

5. *Consequently, no substantial question of law arises for our consideration. The appeal is dismissed."*

Thus, from the aforesaid legal discussion and facts of the case before us, we find that the order passed by the Ld. CIT(A) is well reasoned and based on correct legal position and, therefore, no interference is called for in his order. Thus, the same is upheld. Ground raised by the Revenue is dismissed.

12. **In the result, Revenue's appeal stands dismissed.**

Order pronounced in open court on 03/05/2017

Sd/-	Sd/-
(S.S.Viswanethra Ravi)	(Waseem Ahmed)
Judicial Member	Accountant Member

*Dkp, Sr.P.S

दिनांकः- 03/05/2017 कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-DCIT, Circle-4, P-7, Chowringhee Square, Kolkata-69
2. प्रत्यर्थी/Respondent- M/s Kalyanpur Cement Ltd., 2&3, Clive Row, Kolkata-01
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता