IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E', NEW DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER

ITA No.3402/Del/2016
Assessment Year: 2011-12

M/s. OK Play India Ltd. 17-18, Roz-Ka-Meo Industrial Estate, Tehsil Nuh, District-Mewat, Haryana	**Vs.**	JCIT, Range-II, Gurgaon
PAN :AAACO2623G		
(Appellant)		**(Respondent)**

Appellant by	Shri Gautam Jain, Adv. & Shri Lalit Mohan, CA
Respondent by	Ms. Pramita M. Biswa, Sr. DR

Date of hearing	31.10.2019
Date of pronouncement	13.01.2020

ORDER

PER O.P. KANT, AM:

This appeal by the assessee is directed against order dated 31/03/2016 passed by the ld. Commissioner of Income-tax (Appeals)-1, Gurgaon [in short 'the ld. CIT(A)'] for assessment year 2011-12 raising following grounds:

1 *That the learned Commissioner of Income Tax (Appeals) 1, Gurgaon has grossly erred both in law and on facts in upholding an addition of Rs. 9,46,73,015/- representing discount on buy back on Foreign Currency Convertible Bonds ("FCCB")*

1.1 That the learned Assessing Officer has failed to appreciate that the loan raised by way of FCCB was for capital purposes and therefore any discount on buy back is capital receipt and thus not taxable.

1.2 That the conclusion of the learned Commissioner of Income Tax (Appeals) that FCCB was neither debt and nor shares in the instant year but hybrid instrument is factually and legally misconceived and therefore untenable.

1.3 That various judgments relied upon by the learned Commissioner of Income Tax (Appeals) to bring to tax the aforesaid capital receipt are wholly inapplicable to the facts of the case of the appellant company.

2. That the learned Commissioner of Income Tax (appeals) has further erred both in law and on facts in upholding the disallowance of claim of deduction of following business expenditure incurred by the appellant company by invoking section 40(a)(ia) of the Act:

Sr. No.	*Particulars*	*Amount (Rs.)*
i)	*Interest and processing charges paid to Indian Overseas Bank, Hongkong*	*98,41,570/-*
ii)	*Loan processing charges paid to HSIIDC Ltd.*	*2,28,370/-*
	Total	*1,00,69,940/-*

2.1 That the learned Commissioner of Income Tax (Appeals) while upholding the disallowance has failed to appreciate that sum of Rs. 98,41,570/- represented payment made to a banking company to which Banking Regulation Act was applicable and was a resident and therefore section 195 of the Act had no application and thus invocation of section 40(a)(i) of the Act was perse misplaced, misconceived and untenable.

2.2 That even otherwise the learned Commissioner of Income Tax (Appeals) has failed to appreciate that section 40(a)(ia) of the Act has no application viz-a-viz alleged default of non deduction of TDS u/s 195 of the Act.

2.3 That the finding of the learned Commissioner of Income Tax (Appeals) that appellant has not explained the nature of transaction with HSIIDC because if the same is processing charges paid, then TDS provision would apply and disallowance of expense for non deduction of TDS was justified" is factually and legally erroneous and overlooks the submission of the appellant that HSIIDC Ltd. is a financial corporation which is covered as exempted from tax deduction as per section 194A(3)(iii)(b) and therefore no disallowance was warranted.

3. That the learned Commissioner of Income Tax (Appeals) has erred both in law and on facts is not specifically deleting the disallowance of Rs. 5,82,825/- and Rs. 4,80,480/- made by invoking section 194C read with section 40(a)(ia) of the Act.

It is therefore prayed that addition/disallowances made and sustained by the learned Commissioner of Income Tax (Appeals) may kindly be deleted and appeal of the appellant company be allowed.

2. Briefly stated facts of the case are that the assessee was engaged in manufacturing and trading of plastic moulded toys, school furniture, playground equipment, infrastructure and automotive products etc. The assessee filed return of income on 26/09/2011, declaring loss of ₹ 9,10,87,560/-. The case was selected for scrutiny assessment. The scrutiny assessment under section 143(3) of the Income-tax Act, 1961 (in short 'the Act') was completed on 07/03/2014, wherein certain addition/disallowance were made. Aggrieved, the assessee filed appeal before the ld. CIT(A), who partly allowed the appeal of the assessee. Aggrieved with the addition sustained by the Ld. CIT(A), the assessee is in appeal before the Tribunal raising the grounds as reproduced above.

3. The first ground raised by the assessee is against upholding the addition of ₹ 9,46,70,015/- for a discount on buy-back of Foreign Currency Convertible Bonds (FCCB).

3.1 The brief facts related to this issue are that, the assessee raised an amount of ₹ 40,41,71,000/-by way of issue of Foreign Currency Convertible Bonds (FCCB) in financial year 2007-08 relevant to assessment year 2008-09 from two overseas entities. As a result of exchange fluctuation, the FCCB loan at the beginning of the instant year stood at ₹ 44,97,59,000 (Rs.40,41,71,000 + ₹ 4,55,88,000). During the previous year relevant to the assessment year, the assessee bought back the FCCB at a discount of 24% of the face value of the FCCB and

thus, repaid a sum of ₹ 33,45,96,810/-. The discount on buy-back of FCCB was of ₹ 9,46,73,015/-which was credited to reserve and surplus account as " discount on FCCB bought back". According to the assessee, the loan through the FCCB being a capital receipt, the discount thereon was also capital receipt and therefore, the discount on FCCB was not chargeable to tax. It was also contended that FCCB was not claimed or allowed as deduction in any previous year, thus, it was not covered under section 41(1) of the Act and it is not income chargeable to tax in the year under consideration. But according to the Assessing Officer, the FCCB are convertible into equity shares and intention and the motive of the company in issue of the FCCB was to raise funds as part of capital of the company for the purpose of the business of the company and such funds were utilized for the purpose of the business. According to him, transactions relating to FCCB were adventure in the nature of trade and thus the discount on the FCCB was business income. The Assessing Officer also rejected the contention of the assessee that discount on buy-back of FCCB was capital receipt. The Assessing Officer observed that funds were raised through FCCB by the assessee with the clear intention or motive to earn profit from discount on buy-back of FCCB and thus, essentially the discount on FCCB is a trading receipt. Alternatively, the Assessing Officer also held that the discount was unexplained credit under section 68 of the Act. On further appeal, the Ld. CIT(A) relied on the decision of the Hon'ble Delhi High Court in the case of **Logitronics (P) Limited Vs CIT (2011), 197 Taxman 394 (Delhi)**, wherein it is held that if the loan was taken for

acquiring the capital asset, any waiver thereof would not amount to any income exisable to tax, but on the other hand, if the loan was taken for trading purposes and was treated as such from very beginning in the books of accounts, the waiver may result in the income.

3.2 The ld. CIT(A) also relied on the decision of the Hon'ble Bombay High Court in the case of **Solid Containers Ltd. versus Dy. CIT (2009) 308 ITR 417 (Bom.)** and decision of the Hon'ble Madras High Court in the case of **CIT Vs. Aries Advertising Private Limited (2002) 255 ITR 510**.

3.3 In view of the decisions relied upon, the ld. CIT(A) held that amount of gain on discount of FCCB has to be subjected to tax in the year in which such instrument has been discounted and consequent gain resulted would be income.

3.4 Before us, the Ld. counsel of the assessee filed paper-book in two Volumes, containing pages 1 to 132 and 133 to 310. The Ld. counsel refered to page 235 -241 to demonstrate how the FCCB has been utilized for acquisition of capital assets. He submitted that in view of the FCCB utilized for capital expenditure, the amount received on discount of such FCCB was not taxable even according to the decisions relied upon by the ld. CIT(A).

3.5 The Ld. counsel refered to the decision of the Hon'ble Supreme Court in the case of CIT Vs Mahindra and Mahindra Ltd. reported in 404 ITR 1 in the context of section 28(iv) of the Act and submitted that benefit received in form other than the shape of the money arising from the business could only be considered under section 28(iv) of the Act. According to the Ld.

counsel in the instance case, sum brought to tax represents loans outstanding at the beginning of the year and also outstanding at the close of the year thus, it was apparent that there was no benefit and in absence of any benefit, there can be no income that can referred to tax under section 28(iv) of the Act. The Ld. counsel submitted that the debt waved or foregone cannot partake the effect of income either under section 41 (1) or section 28 of the Act, as held in the case of CIT Vs Mahindra and Mahindra Ltd (supra). He also relied on the decisions of the Hon'ble Delhi High Court in the case of CIT Vs Phool Chand Jiwan Ram, 131 ITR 37 (Del).

3.6 The Ld. DR, on the other hand, also filed a paper book containing pages 1 to 329 and relied on the finding of the lower authorities. He submitted that expenses on raising the FCCB has been claimed as revenue expense, then the discount on repayment of FCCB should also be treated as revenue receipt.

3.7 We have heard rival submissions and perused the relevant material on record. The assessee raised FCCB in the earlier year and during the year repaid with discount of ₹ 9,46,73,015/- received. According to the assessee, the discount received is in the nature of capital receipt but according to the Revenue the discount is in the nature of trading receipt. The Assessing Officer has alleged the activity of raising FCCB as an adventure in the nature of trade. This finding of the Assessing officer is without any basis. The assessee is not engaged in raising the FCCB with motive of any trading and discounting and thereby earning profit on the same. The allegation by the Assessing Officer of motive and intent of earning profit by the assessee are unsubstantiated with

any evidences. On the contrary, the assessee has substantiated that it raised the FCCB for funding its acquisition of assets. Further, the Ld. CIT(A) has relied on the decision of the Hon'ble Delhi High Court in the case of Logitrinics (P) Ltd (supra), wherein it is held as under:

> *"27..... We, therefore, restore this issue back 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 information are 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 in case the assessee wants to have the benefit of decision of Hon 'ble Delhi High Court in the case of Tosha International Ltd. (supra) as well as the decision of Hon'ble Bombay High Court in the case of Mahindra & Mahindra Ltd. (supra). If on an enquiry and verification, it transpires that the assessee has utilized the loan for the purpose of its business activity or trading activity, the amount of loan to the extent it has been waived by the bank shall be deemed to be the assessee's income chargeable to tax as per the decision of Hon'ble Bombay High Court in the case of Solid Containers Ltd. (supra), where the principle laid down by the Hon'ble Supreme Court in the case of TV. Sundaramlyengar& Sons Ltd. (supra) has been applied and followed.*
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> *Under section 4 , the charging section, the charge of income-tax is upon the 'total income of the previous year'. The term 'income' is defined under section 2(24). In general, all receipts of revenue nature, unless specifically exempted, are chargeable to tax. Loan taken is not normally a kind of receipt which will be treated as income. However, when a part of that loan is waived off by the creditor, some benefit accrues to the assessee. Question is what would be the character of waiver of part of the loan at the hands of tHe assessee? Waiver definitely gives some benefit to the assessee. Whether it is to be treated as capital receipt? If it is so, then only capital gains tax would be chargeable under section 45 or else, whether remission of loan is no income at all? The answer to these questions would depend upon the purpose for which the said loan was taken. If the loan was taken for acquiring the capital asset, waiver thereof would not amount to any income exigible to tax, but on the other hand, if the loan was taken for trading purpose and was treated as such from the very beginn ing in the books of*

account, the waiver thereof may result in the income, more so when it was transferred to the profit and loss account. [Para 23]"

3.8 The Hon'ble High Court has laid down test for holding the amount of waiver of loan as capital or trading receipt. If the amount of the loan has been utilized for capital expenditure, then the waiver amount is in the nature of the capital receipt and if the amount of the loan has been utilized for trading purposes then the waiver amount received would be in the nature of trading receipt.

3.9 Before us, the assessee has demonstrated how the FCCB amount has been utilized towards capital expenditure. The assessee submitted entire list of capital asset acquired through the funds of FCCB, which is available on page 235 to 241 of the paper book. The assessee has shown capital expenditure of more than Rs.21 Crores upto March, 2008. The Ld. DR could not controvert this factual aspect of utilization of the FCCB toward capital expenditure. In instant case, once it is undisputed that FCCB amount has been utilized toward capital expenditure, in view of the decision of the Hon'ble Delhi High Court in the case of Logotronics (P) Ltd (supra), the discount on FCCB falls in the nature of capital receipt not exigible to tax. The Ld. CIT(A) has given his finding on wrong assumption of the fact that FCCB funds were utilized for trading or revenue expenditure, without verifying the books of account of the assessee.

3.10 The Hon'ble Apex Court in the case of CIT Vs. Mahindra and Mahindra Ltd. (supra) on the issue of benefit taxable under section 28(iv) has held as under:

"10. The term "loan" generally refers to borrowing something, especially a sum of cash that is to be paid back along with the interest decided mutually by the parties. In other terms, the debtor is under a liability to pay back the principal amount along with the agreed rate of interest within a stipulated time.

11. It is a well-settled principle that creditor or his successor may exercise their "Right of Waiver" unilaterally to absolve the debtor from his liability to repay. After such exercise, the debtor is deemed to be absolved from the liability of repayment of loan subject to the conditions of waiver. The waiver may be a partly waiver i.e., waiver of part of the principal or interest repayable, or a complete waiver of both the loan as well as interest amounts. Hence, waiver of loan by the creditor results in the debtor having extra cash in his hand. It is receipt in the hands of the debtor/assessee. The short but cogent issue in the instant case arises whether waiver of loan by the creditor is taxable as a perquisite under Section 28 (iv) of the IT Act or taxable as a remission of liability under Section 41 (I) of the IT Act.

12. The first issue is the applicability of Section 28 (iv) of the IT Act in the present case. Before moving further, we deem it apposite to reproduce the relevant provision herein below:—

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

13. On a plain reading of Section 28 (iv) of the IT Act, prima facie, it appears that for the applicability of the said provision, the income which can be taxed shall arise from the business or profession. Also, in order to invoke the provision of Section 28 (iv) of the IT Act, the benefit which is received has to be in some other form rather than in the shape of money. In the present case, it is a matter of record that the amount of Rs. 57,74,064/- is having received as cash receipt due to the waiver of loan. Therefore, the very first condition of Section 28 (iv) of the IT Act which says any benefit or perquisite arising from the business shall be in the form of benefit or perquisite other than in the shape of money, is not satisfied in the present case. Hence, in our view,in no circumstances, it can be said that the amount of Rs 57,74,064/- can be taxed under the provisions of Section 28 (iv) of the IT Act. [Emphasis supplied]"

3.11 In the instant case, the benefit has been received in the shape of the money and thus, the said benefit cannot be held as taxable even under section 28(iv) of the Act.

3.12 In view of the discussion above, we set aside the finding of the Ld. CIT(A) on the issue in dispute and hold that the discount received on FCCB is not taxable in the hands of the assessee. The Ground No. 1 of the appeal of the assessee is accordingly allowed.

4. The ground No. 2 of the appeal relates to disallowance under section 40(a)(ia) of the Act for non-deduction of tax at source on certain payments made.

4.1 Out of the disallowances made by the Assessing Officer on this account, the ld. CIT(A) upheld disallowance of ₹ 98,41,570/- for payment to Indian overseas Bank (IOB) Hong Kong and payment Rs.2,28,370/- to HSIIDC Ltd. According to the Assessing Officer, the payment made to IOB Hong Kong in India or through any branch of IOB in India, was liable for tax at source in India under section 195 of the Act. Regarding payment to HSIIDC, the Assessing Officer held that payment was for services and HSIIDC is not a financial company/corporation established by the state and was not exempt from TDS under section 194A of the Act. The ld. CIT(A) upheld the disallowances observing as under:

> *"7.2 I have considered each and every disallowance above in the light of contention in respect of each expense as under:-*
>
> *a) Payment to Indian Overseas Bank Hong Kong:- The assessing Officer contended that TDS was to be deducted u/s 195 on interest of Rs.58,79,570/- and processing fees payment of Rs.39,62,000/-*
>
> *The appellant contends that the Learned Assessing Officer has erred in disallowing a sum of Rs. 98,41,570.00 on account of interest and charges paid to Indian Overseas Bank,*

Hong Kong, on the ground that no tax has been deducted on the same. That it was submitted to him that the payment has been made to the bank and hence is out of the ambit of tax deduction. That however, the Learned Assessing Officer relying on his own interpretation, has observed that the same was covered in the tax deduction. That it is submitted that the payment has been made to a branch of an Indian Bank on which neither the provisions of Section 194 or those of Section 195 are applicable. That in support of the appellants averments, a copy of the confirmation from the bank is also enclosed (page 60 attached) herewith mentioning that the payment is made to a branch of the Indian Bank and hence the provisions of Tax deduction are not applicable. That it is accordingly submitted that the disallowance has been incorrectly made.

I have considered the argument above and find that the certificate issued by the bank is dated 19.01.2011 which nowhere mentions the nature of transaction with the bank and the payment made is either interest charges or processing charges paid to an Indian Bank. Even otherwise the expense is in relation to extending External Commercial Borrowing (ECB) facility provided to the appellant for discounting of FCCB which has connotation of service and as such making payment to the bank for any kind of contractual services is liable for deduction at source. The payment made even if it is assumed is to an Indian Bank, still it would be covered under the provisions of TDS. The disallowance is upheld.

b) *HSIIDC Limited: The Assessing Officer did not agree that the payment to HSIIDC for loan processing charges is not liable for TDS.*

The appellant contends that the Learned Assessing Officer has further erred in adding a sum of Rs.2,28,370.00 being amount of interest paid to HSIIDC Limited on the ground that no tax was deducted at source by the aggrieved appellant. That it was submitted during the course of assessments and reiterated now that HSIIDC Limited is a financial corporation which is covered as exempted from Tax Deduction as per Sec 194A (3) (iii) (b) and hence any payment of interest to them can be made without deduction of tax and hence there is no default on the part of the appellant. That it is accordingly submitted that the disallowance be reversed.

I have given careful consideration and find that appellant has not explained the nature of transaction with HSIIDC because if the same is processing charges paid, then TDS provision would apply and disallowance of expense for non-deduction of TDS was justified."

4.2 Before us, the Ld. counsel of the assessee submitted that lower authorities has adjudicated the issue without proper appreciation of the facts. He submitted that interest payment has been made to the bank, on which the assessee is not required to deduct payments. He submitted that the matter may be restored to the file of the Assessing Officer and before him the assessee can submit all the necessary documentary evidence to support that the assessee was not liable for deduction of tax at source on those payments.

4.3 On the other hand, Ld DR though relied on the order of the lower authorities, did not object for restoring matter to the Assessing Officer for verification of nature of payment and entities in accordance with the provisions of the Act.

4.4 We have heard the rival submission and perused the relevant metal on record. The issue involved is regarding liability of deduction of tax at source. The contention of the assessee is that the payments are not liable for deduction of tax at source and the lower authorities has decided without verifying the nature of the payment and constitution of the entities. The Ld. counsel submitted before us that in case the matter is restored back to the Assessing Officer, all necessary documentary evidences will be submitted to substantiate its claim that payments are not liable to tax deducted at source. In our opinion, lower authorities have not verified the exact nature of payments and constitution of the entities. In view of the undertaking given by the assessee, we feel it appropriate to restore the issue back to the Assessing Officer for deciding the same afresh. Accordingly, the issue is restored

back to the Assessing Officer to decide the issue afresh, after affording adequate opportunity of being heard to the assessee. Thus, this Ground no. 2 of the appeal is allowed for statistical purposes.

5. The ground no. 3 of the appeal was not pressed before us, thus it is dismissed as infructuous.

6. In the result, the appeal is allowed partly for statistical purposes.

Order is pronounced in the open court on 13th January, 2020.

Sd/-	***Sd/-***
(BHAVNESH SAINI)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 13th January, 2020.
RK/-(D.T.D.)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi