

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.11.2020

CORAM:

THE HON'BLE MR.JUSTICE N.KIRUBAKARAN

and

THE HON'BLE MR.JUSTICE P.VELMURUGAN

T.C.A.Nos.133 and 135 of 2019

M/s.Kothari International Trading Limited
Kothari Buildings
No.115, M.G.Road
Chennai-600 034

..Appellant/Appellant
in TCA.133/2019

M/s.Kothari Biotech Limited
Kothari Buildings, No.115, M.G.Road
Chennai-600 034

..Appellant/Appellant
in TCA.135/2019

-Vs-

The Assistant Commissioner of Income-tax/
Corporate Circle -4(2)
Chennai-600 034

..Respondent/Appellant
in both TCAs.

Prayer: Tax Case Appeals filed under Section 260 A of the Income Tax Act, 1961, against the common order of the Income Tax Appellate Tribunal, "A" Bench, Chennai, dated 6th day of September, 2017 in ITA.No.352/Mds/17 and ITA.No.353/Mds/2017.

For Appellants : Mr.R.Vijayaraghavan
for Subbaraya Aiyar Padmanabhan

For Respondent : Mr.Karthik Ranganathan

COMMON JUDGMENT

P.VELMURUGAN,J.

The above Tax Case Appeals are filed against the order of the Income Tax Appellate Tribunal, “A” Bench, Chennai, dated 6th day of September, 2017 in ITA.No.352/Mds/17 and ITA.No.353/Mds/2017.

2.1. The appellants/assesseees are M/s.Kothari International Trading Ltd., in TCA.133 of 2019 and M/s.Kothari Biotech Ltd., in TCA.135 of 2019. Both assesseees filed the return of income for the Assessment Year 2004-05 on 29.10.2004 claiming a loss of Rs.3,62,12,799/- in TCA.133/2019 and on 31.10.2004, claiming a loss of Rs.2,02,92,732/- respectively. The return was processed u/s.143(1) of the Income Tax Act (hereinafter called as “Act”), which resulted in a refund of Rs.3,07,086/- in the case of M/s.Kothari Biotech Limited. The case was selected for scrutiny as per norms and notice was issued u/s.143(2) and notice calling for certain information was also sent. After furnishing of information by the assessee, Assessment order was passed on 30/08/2006 in both assesseees case. As the assessment completed was considered to be erroneous and prejudicial to the interests of revenue, notice under Section 263 was issued to the assessee on 15.01.2009. The reasons for issue of notice u/s.263 are as under:-

Insofar as TCA.133 of 2019 - M/s.Kothari International Trading Limited is concerned, the reasons are :- (i) The assessing officer erred in not bringing to tax the amount of Rs.2,72,10,113/- out of Rs.2,81,20,950/- being the relief to the assessee under the compromise settlement with the ICICI Bank. The Assessing Officer failed to verify the details of the write off and how the original liability was treated in accounts. The A.O., also failed to examine whether the amount could be brought to tax under section 28(iv) applying the decision of the Supreme Court in the case of T.V.Sundaram Iyengar & Sons Ltd. V.CIT 222 ITR 344.

(ii) The Assessing Officer erred in allowing the claim of bad debts of Rs.3,68,76,832 without verifying whether the same arose out of business transaction and fulfil the requirements of Section 36(1)(vii) read with Section 36(2). Under Section 36(2), no deduction shall be allowed unless such debt or part thereof has been taken into account in computing the income of the assessee of the previous year in which the amount of such debt or part thereof is written off represents money lent in the ordinary course of business of banking or money lending which is carried on by the assessee. The amount written off includes principal amount of Rs.151.28 lakhs due from Sivananda Steels and Rs.27.10 lakhs due from Nutech Organics Ltd., The A.O. neither called for the account copies of these persons or examined how the amount of principal could

be allowed as deduction under Section 36(1)(vii). He also failed to examine whether the interest portion has been taken into account in the computation of income of earlier years.

2.2 Insofar as TCA.135 of 2019 – M/s.Kothari Biotech Limited, is concerned, the reasons for issue of notice u/s.263 are as under:-

(i) The assessee has claimed preoperative expenses of Rs.1,81,54,653 which was accepted by the assessing officer without any verification and details of the same. The preoperative expenses as on 31.3.2003 was Rs.2,36,27,733 and as on 31.3.2004 was Nil.

(ii) The assessing officer erred in not bringing to tax the amount of Rs.2,83,94,314 being the relief to the assessee under one time settlement by the banks. The A.O., failed to verify the details of the write off and how the original liability was treated in accounts. The A.O., also failed to examine whether the amount could be brought to tax under Section 28(iv) applying the decision of the Supreme Court in the case of T.V.Sundaram Iyengar & sons Ltd., Vs. CIT 222 ITR 344.

(iii) The A.O., erred in allowing depreciation on machinery and other assets without examining whether the machinery and assets were actually used in business. In the annual report as well as auditor's report it has been clearly stated that the assessee did not carry out any operations during the previous

year.

3. In response to notice, assessee/M/s.Kothari International Trading Ltd., given their reply. According to the assessee, the assessee has written back in profit and loss account as relief on one time settlement of debts, comprising principal and interest. The assessee/M/s.Kothari Biotech charged the preoperative expenses like interest, exchange fluctuation losses to the profits and loss account.

(b) As far as bad debts written off for Rs.3,68,76,832/- by M.Kothari International Trading Ltd., is concerned, the assessee has replied that the amounts were not recoverable from these companies either because they have approached BIFR or civil suits and suits filed under Section 138 of Negotiable Instrument Act has not yet yielded results. According to the assessee, once the amounts are written off in the books, the same should be allowed as deduction and it is not necessary to prove that the debts had become bad.

4.1. The Commissioner of Income Tax, Chennai-1 vide order dated 27.03.2009 passed order under Section 263 of the Act, and viewed that the debt could be written off only if the condition given in Section 36(1) which states no deduction towards bad debts shall be allowed "unless such debt or part thereof has been taken into account in computing the income of the assessee of the

previous year in which the amount of such debt or part thereof is written off or of previous year, or represents money lent in the ordinary course of the business of banking or money-lending which is carried on by the assessee"

4.2. The CIT(Appeals) set aside the order passed by the assessing officer and remitted the matter back to the assessing officer with direction to call for the account copies of these creditors, analyse the transactions and examine whether the bad debt claimed by the assessee fulfils the conditions laid down under the Act.

5. Likewise, in respect of assessee/M/s.Kothari Biotech Ltd., (i) Pre-operative expenses of Rs.1,81,54,653/-, (ii) Debts written back in the profit and loss account deducted from the total income of Rs.2,83,94,314/- and (iii) Depreciation of machinery and other aspects not put to use, the CIT by proceedings dated 27.03.2009, directed the Assessing Officer to call for necessary details and examine the claim.

6. (a) The Assessing officer, on 30.11.2009 and 13.11.2009, after reconsidering the issue, passed the Assessment Order. As far as Waiver of loan is concerned, the assessee company/M/s.Kothari International Trading Ltd.,

claimed that waiver of loan does not constitute income as it is a capital receipt. While the Assessing Officer considering the claim and the decisions relied on by the assessee, held that the case quoted by the assessee has no relevance to the assessee's case and held that as per Section 28(iv) of the Act, "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 Profit and Gains of business. Further, the AO observed that information was called for from the ICICI Bank u/s.133(6) of the Income Tax Act, 1961, for which no reply has been received from them. Further, no materials like books and documents and any other proof were filed to prove the same in response to the questions asked vide letter dated 13/7/2009. Moreover the Banker also not supplied any information in this regard. Thus, the AO observed that since the Authorised Representative could not furnish any other material to substantiate the claim by production of books, the only fact available on record is the receipt of money.

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(b) As far as Bad Debts written off is concerned, the assessee submitted that the bad debts written off of Rs.3,68,76,832/- are the amounts due from three companies. The A.O., pointed out that the assessee has neither furnished account copies of the creditors nor proof for steps taken for recovery of the

debts. Further, the Assessee has written off bad debts to the tune of Rs.1,07,77,432.56 as on 31/3/2003 whereas as on 31/3/2004 the bad debts written off has increased to Rs.3,68,76,832/-.

(c) Finally, the Assessing Officer held that the assessee could not produce any material for verification to substantiate that the debts were actually written off. Considering the fact that papers filed by the assessee in relation to legal proceedings taken against the parties does not help the assessee much, a sum of Rs.3,68,76,832/- is disallowed and added back to the return of income.

7. In the case of assessee/M/s.Kothari Biotech Ltd., (i) Pre-operative Expenses claim was disallowed; (ii) Debts written back in the P&L Account deducted from total income, as observed above in the case Kothari International Trading Ltd., viewed that though it was of capital nature, at the point of time it was received, since the assessee company has not utilized the amount for business purpose, it attains the nature of revenue receipt. The assessee itself has treated this money as its revenue receipt and taken the amount to the Profit and Loss Account and stating so, disallowed the interest claimed. (iii) Depreciation claimed on plant and machinery is concerned, during the financial year there was no business activity and the assets were not in use and in such view, the

entire depreciation of Rs.20,80,639/- claimed by the assessee was disallowed.

8. Aggrieved by the said order of Assessment passed by the Assessing Officer, the assessee filed appeal to the Commissioner of Income-tax (Appeals)-III.

9. The CIT (Appeals)-8, by order dated 24.11.2016, for the two issues (a) disallowance of Principal amount waived by Bank Rs.2,72,10,113/- and (b) disallowance of write off advances Rs.3,68,76,832/-, confirmed the findings of the assessing officer and rejected the ground raised by the assessee and dismissed the appeal filed by the assessee/Kothari International Trading Ltd.

10. Secondly, the CIT (Appeals)-8, by order dated 24.11.2016, partly allowed the appeal filed by assessee/Kothari Biotech Ltd. The CIT (Appeals), answered the three issues in the appeal viz., a) Disallowance of Principal amount waived by Bank Rs.1,73,66,319. (b) Disallowance of depreciation for Rs.20,80,639/- and (c) Disallowance of pre operative Exps.Rs.1,81,54,653.

11. (a) In respect of issue (a), disallowance of waiver of principal amount of loan, is concerned, the CIT (Appeals) followed the decision of this

court in the case of *Ramaniyam Homes (P) Lrs, [2016]384 ITR 530 (Mad)* and held that even the waiver of principal amount would constitute income falling under Section 28(iv) being a benefit arising for the business and that the Assessing Officer rightly included the amount of Rs.1,73,66,319/- to the income of the appellant and confirmed the same.

(b) With regard to disallowance of Rs.20,80,639/- claimed as depreciation of land and machinery, the Assessing Officer disallowed the entire depreciation claimed stating that there was no business activity and therefore, the assets were not put to use in the previous year relevant to the assessment year under consideration. The assessee relying on the decision of the Chennai D Bench of the ITAT in the case of Kothar Sugars & Chemicals Ltd., in ITA No.1917/Mds/2017 dated 26.06.2009 for the assessment year 2003-04, contended that no disallowance is warranted. It is observed in the decision of Kothari Sugars Chemicals Ltd., that the Delhi Bench of the Tribunal in the case of *ACIT Vs. SRF Ltd (supra)* confirmed that once the asset introduced into a block and is used in the first year and even if the same is not used later, depreciation has to be allowed on the basis of block concept. However, the user criteria has to be fulfilled only when as asset formed part of the block of assets and once the asset is part of the block of assets, it would lose its individual cost

or written down value and thereafter depreciation has to be allowed on the entire block of assets. This concept was introduced with effect from 01.04.1988. The Assessing Officer acknowledged the fact that these assets were part of the block of assets earlier and that the business of the appellant has been suspended since September 1999. Therefore, following the decision of ITAT Bench, the disallowance of depreciation of Rs.20,80,639/- is deleted.

(c) With regard to disallowance of pre operative expenses, it is held that since the appellant had not commenced its commercial business operations during the previous year relevant to the assessment year under consideration, the Assessing Officer disallowed the claim of pre-operative expenses. The appellant contended that preoperative expense may be allowed in view of the fact that these expenses were neither capitalized nor any depreciation was claimed on the same. The CIT (Appeals) held that the business of the appellant was suspended since September 1999 and no manufacturing activity was undertaken thereafter. The assessee has been earning only interest income and agricultural income ever since the suspension of its business activities in September 1999, there is no way the appellant claim deduction of pre-operative expenses as per the provisions of the Income Tax Act; even if certain preliminary expenses as enumerated in section 35D(2) are involved they can

only be allowed to be amortised after the commencement of the business, as rightly observed by the Assessing Officer, hence, disallowance of pre-operative expenses of Rs.1,81,54,653/- made by the Assessing Officer is confirmed.

12. Before the Income Tax Appellate Tribunal, the two independent assesseees M/s.Kothari International Trading Ltd., and M/s.Kothar Biotech Ltd., filed appeals against the order of the CIT (Appeals) dated 24.11.2016, pertaining to the assessment year 2004-05. The Income Tax Appellate Tribunal, considered the identical issue in *Ramaniyam Homes (P) Ltd.*, wherein the Madras High Court, referring to earlier judgment in *Iskraemeco Regent Ltd.*, observed in para 42 and 43 held that the loan amount waived by ICICI Bank has to be necessarily considered as revenue receipt, hence it is taxable.

(b) Towards Preoperative expenses, the Tribunal held that there is no material available on record to suggest that the assessee has commenced the business operation and hence the expenditure like interest, losses due to exchange rate fluctuation cannot be allowed and therefore, confirmed the order of the CIT (Appeals) who rightly confirmed the order of the assessing officer.

(c) As far as the disallowance towards depreciation, no further appeal filed by the Revenue and therefore, the issue does not arise out of the order of the CIT (Appeals) and thus, the Tribunal dismissed both the appeals of the assesseees.

13. Aggrieved by the order of the Income Tax Appellate Tribunal, the assesseees have filed the present Tax Case Appeals.

14. The learned counsel for the assesseees have raised the following grounds:-

(a) The Tribunal erred in holding that the loan amount waived by ICICI Bank has to be necessarily considered as revenue receipt.

(b) The Tribunal erred in not appreciating that the waiver of loan cannot be considered to be income either u/s.28(iv) or u/s.41(1) of the Act.

(c) It is incorrect to say that just because an item is credited by the assessee to Profit & Loss account it becomes an income under the Income Tax Act.

(d) The Tribunal erred in holding that loans received from ICICI Bank are indeed capital in nature and therefore, the waiver of such loans would constitute a capital receipt. Thus, neither Section 41(1) which talks of remission

or benefit in respect of loss, expenditure or trading liability nor sec 28 (iv) will have application in the instant case.

(vi) The decision of the Madras High Court in the case of CIT Vs. Ramaniyam Homes (P) Ltd., 384 ITR 530 (Mad) relied on by the Tribunal has not become final and a Review Application has been admitted by this Court in Review Appeal No.63 of 2018 and the same is pending.

15. After hearing the learned counsel for the assessee/appellants and also the learned Standing counsel for the Revenue, this court framed the following substantial question of law:-

“Whether the Tribunal was right in law in holding that the Principal amount of loan waived by the ICICI Bank should be taxed as income under Section 28(iv) of the Act.”

16. The assessee has credited the loan, written back in the profit and loss account. Subsequently loss was added to the business. The assessee claimed before the Assessing Officer that the waiver of the loan by the bank does not constitute income and it is a capital receipt, therefore, it is not taxable in the hands of the assessee. All the receipts in connection with the business are not Trading Receipts. Since the assessee company has not utilized the

amount for business purpose, waiver of the loan cannot be considered to be income either under Section 41(1) of the Act or Section 28(iv) of the Act.

17. The learned counsel for the assessee would submit that the controversy in the present case is covered by the decision in ***CIT Vs. Mahindra and Mahindra Limited ((2018) 404 ITR 1 (SC)*** in which the Honourable Supreme Court has held that waiver of the loan by the Bank is not taxable either under Section 28(iv) of the Act or under Section 41(1) of the Act as it is not a trading liability on which some deduction was claimed in the earlier year which is being remitted or waived by the Bank.

18. The learned Standing counsel for the Revenue would submit that the assessee borrowed loan and loan was waived by the ICICI/lender. The assessee claimed that it is a capital receipt in the hands of the assessee. Further it was claimed before the Assessing Officer that it is neither income under Section 28(iv) of the Income Tax Act nor it can be assessed under Section 41(1) of the Act. The Assessing Officer, however, found that the waiver of the loan taken by the assessee is a benefit arising out of the business and hence, it is assessable as income. But when the Assessing Officer called for the particulars and also called for the records, the assessee has not produced the same before

the Assessing Officer. Further to verify in this regard, the Assessing Officer, vide letter dated 08.10.2009, called for information from the ICICI u/s.133(6) of the Income Tax Act, for which, no reply has been received from them. Even during the hearing, it was raised with the Authorised Representative of the assesseees to show cause as to why claim cannot be disallowed as the decisions in which he relied upon were not applicable to their case and added that no materials like books and documents and any other proof to prove the same in response to the questions asked vide letter dated 13.07.2009, were filed. Moreover, the Bank also not furnished any information sought for in this regard. Hence, even after granting time and opportunity, the Authorised Representative did not furnish any other materials to substantiate the claim by production of books. The only facts available on record is that the receipt of money by the assesseees. Therefore, since the assesseees had not furnished any particulars or documents to substantiate their case, the Assessing Officer found that the waiver of the loan is the income and is taxable based on the decision of the Apex Court in the case of *M/s.T.V.Sundaram Iyengar & Sons Ltd., Vs. CIT (222 ITR 344)*.

19. The learned Standing Counsel further submits that the order of the Assessing Officer has been challenged before the CIT (Appeals). The CIT

(Appeals) also observed and referred to the order of Assessing Officer and found that the assessee failed to furnish any material to substantiate that the debts were actually written off. Further, in the absence of books and materials, the waiver of the loan by the Bank, is added as taxable income. The assessing officer, CIT(Appeals) and also the Income Tax Appellate Tribunal, based on the earlier decisions rendered by this court, Honourable Supreme Court and also the Appellate Tribunal, came to the conclusion that the waiver of the interest is an income taxable u/s.28(iv) of the Act and also Section 41(1) of the Income Tax Act.

20. The only ground raised in the present appeals is that the waiver of the loan cannot be considered to be an income either u/s.28(iv) or under Section 41(1) of the Act. The learned counsel for the assessee has placed reliance on the following decisions:-

- (i) CIT Vs. Mahindra and Mahindra Limited ((2018) 404 ITR 1 (SC))
- (ii) Tirunelveli Motor Bus Service Co Ltd., Vs. CIT 78 ITR 55 SC
- (iii) CIT VS Rayala Corporation Ltd 218 Taxman 11 (Mad)
- (iv) CIT Vs. Bhawan Va Path Nirman (Bohra) & Co. 258 ITR 440 Raj
- (v) CIT R.Radhika TCA 1224 of 2008 (Mad)
- (vi) Narayan Chettiar Industries Vs ITO 277 ITR 426 Mad.

21. A careful perusal of the entire materials placed before this court, would go to show that the appellants are Income Tax assesseees. The return of income was submitted by the assesseees on 29.10.2004. The case was selected for scrutiny under Computer Aided Scrutiny Selection (CASS) and notice u/s.142(1) calling for certain information was sent and the Assessing Officer completed the assessment on 30.08.2006 u/s.143(3) of the Act and since the assessment completed was considered to be erroneous and prejudicial to the interest of revenue, notice under Section 263 was issued by the Commissioner of Income Tax by proceedings dated 27.03.2009 to the assessee on 15.10.2009. In this regard the Commissioner found that the Assessing Officer has not applied his mind while completing the assessment and no information has been called for on the application of Section 41(1) or Section 28(iv) of the Act. So directed the Assessing Officer to call for necessary details from the bank. Thereafter, case was posted for hearing on 14.07.2009 and the Asst. Commissioner of Income-Tax passed the Assessment Order on 13.11.2009, holding that the Principal amount waived by ICICI should be taxed u/s.28(iv) or Section 41(1) relying on the decision of *CIT Vs. T.V.Sundaram Iyengar & Sons 222 ITR 344*. The said order was challenged before the Commissioner of Income Tax (Appeals), Chennai-1. The CIT (Appeals) pointed out that no enquiry has been conducted in the course of assessment proceedings and there

is nothing on record to show that the explanation was called for from the assessee. Therefore, the CIT (Appeals) following the decision of Delhi High Court in *Logitronics (P) Ltd., Vs. CIT (2011) 333 ITR 386/197 Taxman 349/9 taxmann.com 302 and Rollatainers Ltd., Vs. CIT (2011) 339 ITR 54/15 taxmann.com 111 (Delhi)* which followed the decision of Madras High Court in *Iskraemeco Regent Ltd.*, and expounded the law that if a loan had been taken for acquiring a capital asset, waiver thereof would not amount to any income leviable to tax. In the said decision, it is further held that when the loan amount borrowed for acquiring an asset gets wiped off by repayment, two entries are made in the books of account, one in the profit and loss account where payments are entered and another in the balance sheet where the non-payment of loan amount is reflected on the side of the liability. But, when a portion of the loan is reduced, not by repayment, but by the lender writing it off (either under a onetime settlement scheme or otherwise), only one entry gets into the books, as a natural entry. A double entry system of accounting will not permit of one entry. Therefore, when a portion of the loan is waived, the total amount of loan shown on the liabilities side of the balance sheet is reduced and the amount shown as capital reserves is increased to the extent of waiver. Alternatively, the amount representing the waived portion of the loan is shown as a capital receipt in the profit and loss account itself. In view of the above, the

waiver of principal amount would constitute income falling under Section 28(iv) being the benefit arising for the business. Thus, the CIT (Appeals) held that even the waiver of principal amount would constitute income falling under Section 28(iv) being a benefit arising for the business. Accordingly, the CIT (Appeals) confirmed the order of the Assessing Officer including the waiver amount to the income of the assessee and dismissed the appeal in respect of disallowance being deduction claimed as debts written back in the Profit & Loss account.

22. The said dismissal order was challenged before the Income Tax Appellate Tribunal. The Tribunal also found that the waiver of the interest by the ICICI was benefitted by the assessee and so, taxable and waiver of the loan can be construed to be income under Section 28 (iv) of the Act and also it is income under Section 41(1) of the Act. Challenging the same, the assessee has filed the present appeal.

23. Now the point for consideration is that as to whether the waiver of the loan can be considered to be income either under section 28(iv) or under section 41(1) of the Income Tax Act. The learned counsel for the appellant relied on the decisions in *CIT Vs. Mahindra & Mahindra reported in (2018) 404 ITR 0001 (SC)*.

24. The Income Tax Appellate Tribunal held that the loan amount waived by the ICICI Bank is necessarily to be considered as revenue income and hence it is taxable. This has been based on the earlier decisions of this court in the case of *Ramaniyam Homes Pvt. Ltd (2016) 384 ITR 530 and Iskraemeco Regent Ltd., Vs, CIT (2011) 331 ITR 317*. However, the learned counsel for the assesseees have relied on the decisions of the Honourable Supreme Court in the case of *CIT Vs. Mahindra and Mahindra*, decided on 24th April 2018, wherein, it is held that the waiver of the loan by the creditor is neither taxable as the very first condition of Section 28(iv) of the 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 said case and therefore, the waiver of the loan amount cannot be taxed under Section 28(iv) of the Act.

25. However, it is pertinent to mention herein the points considered by the Honourable Supreme Court in the above said case (*CIT Vs. Mahindra & Mahindra*) as to in what circumstances, the order passed holding Section 28(iv) and Section 41(1) of the IT Act does not apply in the said case. In such situation, extraction of Paragraphs 9 to 18 has become necessary, which is as under:-

”9.Further, it was also submitted that it is very clear that

the amount of \$650,000 provided by KJC was in fact a loan on which interest was being paid regularly from time to time. It is also pointed out that in the books of account of the Respondent, this loan has been shown in the Balance Sheet under the heading "Loans-unsecured." Hence, it is submitted that the said sum could not be brought to tax as it represents the waiver of a loan liability which was on the capital amount and is not in the nature of income. Accordingly, the High Court rightly upheld the order of the Tribunal and, hence, these appeals deserve to be dismissed.

DISCUSSION:-

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 of Taxable as a remission of liability under Section 41 (1) 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 of profession

-- The following income shall be chargeable to income-tax under

the head "Profits and gains of business profession":-

xxx

(iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession.

xxx

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.

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
xxx"

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 the 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.”

26. Based on the above said facts, in paragraph 15 of the said judgment, the Honourable Supreme Court also observed that 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. Therefore, deduction amount was not claimed by the assessee for the payment of interest in respect of plant, machinery and tooling equipments which are capital assets of the assessee viz., Mahindra and Mahindra. The facts therein are very clear that the interest amount was paid regularly from time to time and also the said purchase effected had not been debited to the trading account or to the profit or loss account in any of the

assessment years. The loan amount has been shown in the balance sheet in the heading of “loans unsecured”. Hence, it is submitted that the said sum cannot be brought to tax as it represents the loan and also not in the nature of income.

27. So based on the above said factual aspects, the Honourable Supreme Court held that it is not income under Section 28(iv) or Section 41(1) of the IT Act. But whereas in the present cases on hand, the Commissioner of Income Tax, Chennai I, who considered the assessment completed was erroneous and prejudicial to the interest of revenue, issued notice under Section 263 of the IT Act and in his order dated 27.03.2009, while setting aside the order of the assessing officer, remitted back the issues to the assessing officer to reconsider the issues with a direction to the Assessing Officer to get full details from the Bank and collect information from the past records and decide the issue in accordance with law.

28. Therefore, the assessing officer, while considering the matter, gave fresh opportunity and issued show cause notice to the assessee calling for certain particulars from the assessee and asked to explain (i) the circumstances under which the loan has been taken from ICICI Bank and whether any interest has been paid (ii) Details of advances made by the assessee, the year in which it

was made. (iii) Account copies of the creditors viz., Anusha International, Nutech Organics Ltd and steps taken for recovery. (iv) Any provision has been made for bad debts in the earlier years preceding to the previous year. Subsequently, the Manager (Taxation) of the assessee appeared and filed certain details. But during the hearing, the assessing officer raised questions to the Authorised Representative and issued show cause notice that he has not furnished required particulars and the particulars furnished was not sufficient to consider their case. Even after granting sufficient time and opportunities, the Authorised Representative could not furnish any other materials to substantiate the claim by production of books. Further the Assessing Officer has held that the only fact available on record is the receipt of money by the assessee. Therefore, based on the available records, found that the waiver of the loan is the taxable income. Therefore, challenging the order of the Assessing Officer, once again, the assessee filed the appeal before the CIT (Appeals). He also found that the assessee have not produced sufficient materials, so too, the Income Tax Appellate Tribunal.

29. Now coming to the conclusion, the only point to be decided herein is whether the loan amount waived by the bank is taxable income or not. As already stated, in the decision referred by the learned counsel for the appellants

in the case of *CIT Vs. Mahindra and Mahindra*, the assessee has submitted entire records and books of accounts. Therefore, from the facts, the Tribunal found that the loan amount has been shown in the Balance Sheet under the head “Loans-unsecured”, and hence, could not be brought to tax as it represents the waiver of a loan liability which was on the capital amount and is not in the nature of income. The said view was rightly upheld by the High Court and when the appeals along with Reference filed as Special Leave Petition, the Honourable Supreme Court has held that Section 28(iv) of the IT Act and Section 41(1) of the IT Act does not apply since waiver of loan does not amount to cessation of trading liability.

30. However, in this case, as already stated, the Assessing Officer has given opportunity to the assessee. But the assessee has not furnished the books and also details of the accounts in the previous year. Moreover, the Bank also not supplied any information in this regard. Therefore, in the absence of the particulars, the Assessing Officer, under Order u/s.143(3) read with Section 263 of the Act, found that it is taxable income.

31. In any event, the decision in the case of *CIT Vs. Mahindra & Mahindra* was held on 24th April 2018. The Income tax Appellate Tribunal, by

order dated 06th September 2017, while dismissing the assessee's appeals, confirmed the order of the CIT (Appeals) and held in Paragraph 9 as follows:-

“ 9. The Madras High Court subsequently had another occasion to consider an identical issue in Ramaniyam Homes P.Ltd (supra). After referring to its earlier judgment in Iskraemeco Regent Ltd.,(supra), the High Court has observed as follows at paras 42 and 43 of its order:-

“42. But, [Section 36\(1\)\(iii\)](#) makes a distinction. The amount of interest paid in respect of capital borrowed for the purpose of business or profession is allowed as deduction under [Section 36\(1\)\(iii\)](#), in computing the income referred to in [Section 28](#). But, the proviso thereunder states that any amount of interest paid in respect of capital borrowed for acquisition of an asset for extension of existing business or profession, whether capitalised in the books of account or not for any period beginning from the date on which the capital was borrowed for the acquisition of the asset, till the date on which such asset was put to use, shall not be allowed as deduction. सत्यमेव जयते

43. Therefore, it is clear that the moment the asset is put to use, then the interest paid in respect of the capital borrowed for acquiring the asset, could be allowed as deduction. When the loan amount borrowed for acquiring an asset gets wiped off by repayment, two entries are made in the books of account, one in the profit and loss account where payments are entered and another in the balance sheet where the amount of unrepaid loan is

reflected on the side of the liability. But, when a portion of the loan is reduced, not by repayment, but by the lender writing it off (either under a one time settlement scheme or otherwise), only one entry gets into the books, as a natural entry. A double entry system of accounting will not permit of one entry. Therefore, when a portion of the loan is waived, the total amount of loan shown on the liabilities side of the balance sheet is reduced and the amount shown as Capital Reserves, is increased to the extent of waiver. Alternatively, the amount representing the waived portion of the loan is shown as a capital receipt in the profit and loss account itself. These aspects have not been taken note of in Iskraemeco Regent Ltd.”

The Income Tax Appellate Tribunal, after referring to the decision of this Court in ***CIT Vs Ramaniyam Homes P.Ltd., (2016) 384 ITR 530***, pointed out in clear terms that the loan amount borrowed for acquiring an asset gets wiped off by repayment. But when a portion of the loan is reduced, not by repayment, but by the lender writing it off either under a one time settlement scheme or otherwise, only one entry gets into the books, as a natural entry. When a portion of the loan is waived, the total amount of loan shown on the liabilities side of the balance sheet is reduced and the amount shown as capital reserves, is increased to the extent of waiver.

32. A careful perusal of the Assessment order and the subsequent orders of the Appellate Authority show that in the absence of particulars sought for by

the Assessing Officer and substantiating records and books of accounts with regard to the previous assessment orders for the previous years, they have arrived at the decision that waiver of the loan is based on the receipt and the income is taxable under section 28(iv) and 41(i) of the Act. Therefore, it is the duty of the assesseees to furnish all the particulars including the accounts of the previous years. Unless the entire books of accounts of the assesseees are submitted in the previous years, it is difficult to say how the assesseees had treated the amount in their books of accounts. Therefore, under these circumstances, the decision relied on by the Honourable Supreme Court based on the factual aspects involved in that case, cannot be applied to the cases on hand. Here, the assesseees have not submitted the particulars sought for by the Assessing Officer. Therefore, in the absence of any particulars pertaining to the previous years books of accounts, it is difficult to arrive at a decision and therefore, in order to grant one more opportunity for production of books and accounts to substantiate their case, we are inclined to remit the matter back to the Assessing Officer. Accordingly, the order of the Income Tax Appellate Tribunal is set aside and the matter is remitted back to the Assessing Officer and the appellants/assesseees are directed to submit the entire particulars including books of accounts for the year 2003-2004 and also of the previous years. Further, the ICICI bank also shall submit the entire particulars regarding

the loan transaction with the assesseees. The Assessing Officer, after giving reasonable opportunity to the assesseees as well as the Bank, for submission of the entire particulars, is directed to consider all the particulars and pass orders in accordance with law. However, if the appellants/assesseees failed to submit all the particulars within one month from the date of receipt of the order, the order passed by the Income Tax Appellate Tribunal shall stand confirmed and the appeals stand dismissed without any further reference.

33. The Tax Case Appeals are disposed of on the above terms. No costs.

Consequently,

INDEX: Yes/No

Internet: Yes/No

nvsri

[N.K.K.,J]

[P.V.,J]

10.11.2020

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To

- 1.The Commissioner of Income Tax, Chennai-1
- 2.The Commissioner of Income Tax (Appeals)-8
Room No.222, Aayakar Bhavan, Main Building, II Floor,
121, Mahatma Gandhi Road, Nungambakkam, Chennai-34.
- 3.The Income Tax Appellate Tribunal
“A” Bench, Chennai.

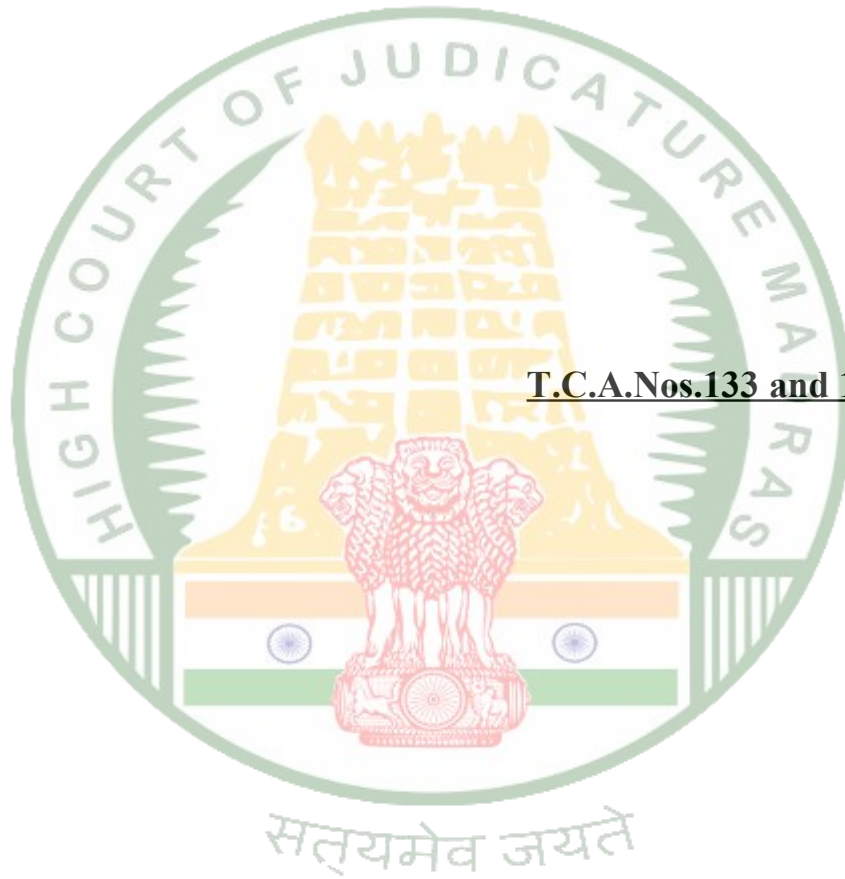


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TCA.133 & 135 of 2019

N.KIRUBAKARAN, J.
and
P.VELMURUGAN, J.

nvsri



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