
(2011) 08 DEL CK 0328

In the Delhi High Court

Case No : IT Appeal No. 127 of 2011 & ITA 127 of 2011

Rollatainers Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 30-08-2011

Acts Referred:

Income Tax Act, 1961 — Section 2(24), 28, 28(1), 28(4), 4

Citation : (2012) 250 CTR 25 : (2011) 203 TAXMAN 31

Hon'ble Judges : M.L. Mehta, J;A.K. Sikri, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

A.K. Sikri, J.—This appeal was admitted on 8th July, 2011 on the following substantial question of law:

Whether on the facts and circumstances of the case, the Tribunal erred in law in holding that Rs. 2,05,42,468/- being the principal amount of working capital loans granted in the form of cash credit limits by the bank and subsequently waived off, constitutes taxable income of the appellant?

The appellant is a public limited company, which is engaged in the business of, inter alia, manufacturing of Lined and Flexible Cartons/packing material, automatic packing machines, weighing machines, trading of machines, spares and leasing of machines.

During the relevant previous year, due to poor financial position and erosion of entire net worth, the appellant company approached Board of Industrial Financial Reconstruction (BIFR) for being declared as a sick company in terms of provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA). In pursuance thereof, the appellant company was declared sick by BIFR under the said Act. Due to adverse financial position, the company also approached the Corporate Debt Restructuring Cell (CDR Cell) for settlement of outstanding dues of various financial Institutions/Banks. The CDR Cell approved

the reworked Restructuring Package, pursuant to which different financial institutions and Banks waived off the part of their respective out standings, comprising of principal and interest dues.

2. According to the appellant, during the course of assessment proceedings, the appellant realized that it had wrongly credited the total waiver received from banks/financial institutions, to the profit and loss account, under the head "miscellaneous income. Therefore, in order to arrive at the correct taxable income, revised the original wrong claim by making a request before the assessing officer for revision of the computation of income originally filed, by reduction of principal amount of loans (term loans as well as working capital loans) waived by the banks from the taxable income. The assessing officer denied the aforesaid request of the appellant on the ground that revision of claim made in the original return of income could not be entertained otherwise than by way of revised return, which was required to be filed within the time limit prescribed u/s 139(5) of the Act.

3. On further appeal by the assessee, the CIT (A) entertained the aforesaid revised claim preferred by the appellant and decided the issue on merits, inter alia, holding that the principal amount of loans waived by the banks, including waiver of principal amount of Rs. 2,05,42,468 against working capital loans in the form of cash credit limits, did not constitute taxable income. On further appeal filed by the Revenue before the Tribunal, the Tribunal partly allowed the appeal filed by the Revenue.

4. The Tribunal has held that waiver of working capital loan utilized towards day to day business operation (and not for capital assets) resulted in manifest in the revenue field and hence taxable in the year of waiver. On arriving at this view, the Tribunal referred to and relied upon the decision of the Bombay High Court in the case of Solid Containers Ltd. Vs. The Deputy Commissioner of Income Tax, Spl. Range I and The Commissioner of IncomeTax I, . The Madhya Pradesh High Court in the case of Commissioner of Income Tax Vs. Aries Advertising Pvt. Ltd., The Tribunal first found as a fact that insofar as term loans are concerned, these were taken for the purchase of capital assets from time to time. In respect of these term loans, the Tribunal concluded that these monies did not come in the possession of the assessee on account of any trading transaction; the receipt were capital in nature, being loan payable over a period of time alongwith interest. Therefore, on writing off the loans, any benefit or perquisites arises to the assessee in the revenue field. Thus waiver of these loans is not treated as income of the assessee. However, the Tribunal has taken different view in the case of loan written off in cash credit account.

5. Thus, on writing off the said loans/part loans, benefit had arisen to the assessee. As per the Tribunal, when the money/loan was received in the course of carrying on business even if it was treated as loan at the time of receipt which was of capital nature on the waiver had become assessee's own money which was even taken to profit and loss account. This benefit was in the revenue field

as the money had been borrowed for day to day affairs and not for the purchase of machinery. Thus, the loans were for the circulating capital and not the fixed capital.

6. In this appeal filed by the assessee, we are concerned with the waiver of the loan in respect of cash credit which is stated income in revenue field by the Tribunal and the appeal has been admitted on this question of law. Mr. Vohra, learned counsel appearing for the appellant/assessee fairly stated that the issue is answered against the assessee by a decision dated 18th February, 2011 of this Court in the case of Logitronics Pvt. Ltd. Vs. Commissioner of Income Tax & Anr. (ITA 1623/2010). He, however, made a benevolent plea that the said decision required reconsideration as it was in conflict with the earlier decision rendered by this Court.

7. Before we consider the submissions of Mr. Vohra on this aspect, it would be apposite to discuss the judgment of this Court in Logitronics (supra). That was also a case where certain amount of loan and interest was waived by the financial institution as it had become Non Performing Asset (NPA) for the bank in view of the guidelines of the Reserve Bank of India. On waiver the principal amount written off was directly taken to balance sheet under the head capital reserve, was not offered for taxation. The Assessing Officer treated the said waiver of principal amount of loan as "income within the meaning of section 2(24) of the income tax Act, exigible to tax. The CIT (A) deleted the addition holding that it was not an income and provisions of section 28(iv) as well as section 41(1) of the Act were not applicable. The Tribunal, however, reversed the decision of the CIT (A) giving inter alia following reasons:

(a) Since the Tribunal in the case of Tosha International Ltd. (supra) proceeded to decide the issue on the premise that loan was utilized to acquire capital assets, decision of the Tribunal as upheld by this Court would apply to the cases where the loan obtained is utilized for acquiring capital assets.

(b) In the case of Mahindra and Mahindra Ltd. Vs. Commissioner of Income Tax, loan was to purchase plant and machinery " dies, tools, etc., i.e., capital assets. It was on these facts that waiver of principal amount of loan was held to be neither covered by section 28(iv) nor section 41(1) of the Act.

(c) In the case of Tosha International Ltd. (supra), neither the Tribunal nor this Court considered the issue from the stand point of principal laid down by the Supreme Court in the case of Commissioner of Income Tax, Madurai Vs. T.V. Sundaram Iyengar and Sons Ltd.,

(d) In Solid Containers Ltd. Vs. The Deputy Commissioner of Income Tax, Spl. Range I and The Commissioner of IncomeTax I, the Bombay High Court applying the decision in T.V. Sundaram Iyengar and Sons Ltd. (supra) distinguished its decision in Mahindra & Mahindra Ltd. (supra) and has held that on waiver of loan taken for business purposes, the amount is retained in the business and as such, the amount that initially did not have the character of income becomes income

liable to tax.

(e) Decisions rendered in Commissioner of Income Tax Vs. P. Ganesa Chettiar, and Commissioner of Income Tax, New Delhi Vs. Phool Chand Jiwan Ram, were of no assistance to the appellant because the same were rendered prior to judgment of the Supreme Court in T.V. Sundaram Iyengar and Sons Ltd. (supra).

8. Against the orders of the Tribunal, appeal was preferred by the said assessee and this Court vide orders dated 18th February, 2011 affirmed the order of the Tribunal.

9. The Court first discussed the scheme of the Act on this aspect and observed that u/s 4 of the Act, the charging section, the charge of income tax is upon the "total income of the previous year". The term "income is defined u/s 2(24) of the Act. 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 by the creditor, some benefit accrues to the assessee. Question is what would be the character of waiver of part of 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 gain tax would be chargeable u/s 45 of the Act. Or else, whether remission of loan is no income at all?

10. In this context, section 41(1) read with section 59 of the Act would become relevant and these provisions have been brought within the sweep of taxation even the remission of debt/liability as income of the order in remission or such waiver amounts to provide or gains of business or provision liable to be taxed u/s 28 of the Act. The Court thereafter took into consideration various decision in extenso discussing the ration of those judgments and summarized the principle laid down in those judgments in the following manner:

In the context of waiver of loan amount, what follows from the reading of the aforesaid judgment is that the answer 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. On the other hand, if this loan was for trading purpose and was treated as such from the very beginning in the books of account, as per Sundaram Iyengar (T.V.) and Songs Ltd. (supra), the waiver thereof may result in the income moreso when it was transferred to Profit and Loss account.

11. The Submissions of Mr. Vohra was that the aforesaid extracted passage did not state the correct principle of law. According to him, it is settled law that all receipts are not income. Receipt of loan is a transaction on capital account i.e. the receipt of sum of money by way of loan which is repayable does not amount to income. Therefore, waiver of loan would be of capital account with no indicia of income. He further submitted that section 41 (1) of the Act was not applicable as following conditions need to be satisfied before this section is invoked:

(i) An allowance or deduction has been claimed in any earlier assessment year(s) with respect to a trading liability;

(ii) Benefit by way of remission or cessation is obtained in respect of such trading liability in succeeding year (s).

12. According to him in case of waiver of principal amount of loan, no income accrues as the transaction is of capital account and does not constitute income. He referred to the judgment of this Court in *Commissioner of Income Tax, New Delhi Vs. Phool Chand Jiwan Ram*, and *CIT v. Tosha International Ltd.* 176 Taxman 187 (del.) in support of this proposition.

13. His further submission was that section 28(iv) of the Act was equally not applicable. According to him, in terms of the aforesaid section, the value of any benefit or perquisite arising from business, whether convertible into money or not, is taxable under the head "profits and gains of business or profession" The said section does not contemplate bringing to tax benefits in cash or money. The waiver of principal amount of loan, being benefit received in cash would, at the threshold do not constitute income u/s 28(iv) of the Act and for that reason, it was not necessary to go into the purpose for which the loan was utilized. Further, in order that section 28(iv) of the Act is attracted, the benefit must be arising from business and not in the course of business. The said section is intended to bring to tax the benefit in the kind of arising from business and not any and every benefit which arises in the course of carrying on business. The appellant is engaged in the business of manufacturing and trading of packing materials. The appellant cannot be said to be in the business of borrowing money. The moneys borrowed constitute source of funds from which the business of the appellant is carried on. The waiver of loan outstanding did not arise from the business of the appellant. Consequently, since the business carried on by the appellant was not the source of alleged benefit, section 28(iv) of the Act has no application. He also argues that the judgment of Supreme Court in *Commissioner of Income Tax, Madurai Vs. T.V. Sundaram Iyengar and Sons Ltd.*, was not applicable. Likewise, the decision of Bombay High Court in *Solid Containers* (supra) had no application.

14. All the arguments advanced by the learned counsel were raised before this Court in *Logitronics* (supra) as well. Predicated on the same judgments on which Mr. Vohra has now relied upon. The judgment in *Logitronics* (supra) is rendered by this very Bench. Therefore, it is not necessary to repeat the discussion all over again. Suffice to state that after considering the aforesaid submissions of Mr. Vohra, we are unable to agree with the same and find no reason to deviate the view we have taken in the aforesaid decision in *Logitronics* (supra). We would, however, like to add that the Tribunal in the impugned judgment has discussed at length both the decision of this Court in *CIT Vs. Phool Chand* and *CIT v. Tosha International Ltd* (supra) and held that they are not applicable in the instant case. In the case of *Phool Chand* (supra) the relevant facts are that the assessee had purchased goods in an earlier year from M/s Narsinghdass

Banarsidass, the payment in respect of which was made by M/s Janaki Dass Banarasi Dass. The amount was subsequently waived. The case of the revenue was that the amount so paid should be taken towards purchase of cloth and, therefore, it represents a trading liability. This Court came to the conclusion that this conclusion was far rather fetched. The cloth was purchased from M/s Narsinghdass Banarsidass and the debt represented a trading debt. However, so far as M/s Janaki Dass Banarasi Dass is concerned, the payment made by it was not for the purpose of purchase of stock-in-trade. Therefore, it was held that the liability was not a trading liability and the amount waived could not be brought to tax in the hands of the assessee.

15. Thus, the entire judgment rested on the premise that the liability in question was not a trading liability. Coming to the case of Tosha International Ltd. (supra) the facts are that the assessee was engaged in manufacturing of black and white picture tubes. It ran into huge losses and ultimately became a sick company and was so registered with the BIFR. Under one time settlement Scheme, the banks and financial institutions required the assessee to pay 60% of the amount towards the principal and waived the entire interest amount. The question before the Court was whether waiver of the principal amount of amount Rs. 10.48 crore, credited to the capital reserve account, constituted income? The Court came to the conclusion that the amount is not covered by the provision contained in section 41(1). It was also mentioned that the principles enunciated in the case of Mahindra and Mahindra Ltd. are fully applicable. Again, it was a case where the loan was on capital account and not for trading purposes. Even in the instant case, as far as term loans are concerned, waiver thereof by the financial institutions has not been treated as income at the hands of the assessee. It is only the writing off loans on cash credit account which was received for carrying out the day to day operations of the assessee which is treated as "income" in the hands of the assessee. The judgment of the Bombay High Court in "Solid Containers and that of Madras High Court in "Aries Advertisement are directly on this issue. The Tribunal has rightly applied the said judgments wherein the view taken is the same as taken by this Court in Logitronics.

16. Insofar as the decision in Jindal Equipment Leasing & Consultancy Services Ltd. is concerned, that was a case where the assessee was an investment company registered with the Reserve Bank of India as a Non Banking Financial Company (NBFC). In the return for the assessment year 2003-04, it had shown a loan of Rs. 6,80,31,189 payable to M/s Jindal Steel & Power Ltd. (JSPL). It is the JSPL which had return of a sum of Rs. 1,46,53,065 in its books of account. On that premise, the Assessing Officer had treated the same as income of the assessee on the ground that the creditor had written off the said amount and, therefore, it was no more the liability of the assessee and to this extent it was the assessee's gain and added the same u/s 41(1) of the Act. The plea of the assessee in that case was that JSPL had done it unilaterally and without the knowledge of the assessee. The CIT (A) confirmed the addition made by the Assessing Officer in term of section 41(1) read with section 28(i) of the Act. The

ITAT deleted the addition holding that section 41(1) of the Act had no application. In the appeal preferred by the Revenue, it did not press the applicability of section 41(1) of the Act or section 28(i) of the Act but took a totally different stand namely the said waiver was to be treated as income u/s 28(iv) of the Act. No doubt, this Court held that the amount written of in the books of accounts by JSPL was in the nature of value of any benefit or perquisites, whether convertible into money or not and, therefore, could not be treated "profits and gains from business. However, no other aspects were looked into or discussed. The nature of loan taken by the said assessee, which was waived by the JSPL, namely whether it was on capital account or in the trading field was not the aspect looked into. In fact, neither there was any material on this aspect nor it was argued. This Court had relied upon the judgment of Bombay High Court in Mahindra and Mahindra Ltd. Vs. Commissioner of Income Tax, When we go through the said judgment of the Bombay High Court, it becomes clear that in that case, the loan arrangement in its entirety was not obliterated and more importantly the purchase consideration related to capital asset.

17. In any case, even if we hold that section 28(iv) of the Act is not applicable, section 41(i) of the Act is clearly applicable. We, therefore, answer the question in the negative i.e. against the assessee and dismiss this appeal.