

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL (IT) NO.201 OF 2002

M/s Essar Shipping Limited ... Appellant
V/s.
Commissioner of Income-tax,
City III, Mumbai. ... Respondent

Mr.Subhash S. Shetty with Mr.P.C.Tripathi, Advocate for the
Appellant.
Mr.P.C.Chhotaray, Advocate for the Respondent.

**CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.
DATE : MARCH 5, 2020**

P.C.:-

1. Heard Mr.Subhash S. Shetty, learned counsel for the
appellant; and Mr.P.C.Chhotaray, learned standing counsel
revenue for the respondent.

2. This appeal under Section 260A of the Income Tax Act,
1961 (briefly "the Act" hereinafter) has been preferred by the
assessee assailing the order dated 16th August, 2001 passed
by the Income Tax Appellate Tribunal, "A" Bench, Mumbai
(briefly "the Tribunal" hereinafter) in Income Tax Appeal
No.144/Ban/91 for the assessment year 1984-85.

3. The appeal was admitted on the following substantial question of law:-

“Whether on the facts and in the circumstances of the case and in law, provisions of Section 28(iv) of the Act are attracted where alleged benefit or perquisite is other than cash?”

4. The above question has arisen in the backdrop of the following factual matrix.

5. Appellant is a resident company assessed under the Act. Earlier it was known as M/s Karnataka Shipping Corporation Limited and carrying on the business of shipping. During the relevant previous year because of certain developments the company was amalgamated with M/s Essar Bulk Carriers Limited, Madras whereafter it came to be known as M/s Essar Shipping Limited.

6. In the assessment proceeding for the assessment year 1984-85 following amalgamation it filed a revised return of income wherein an amount of Rs.2,52,00,000/- was claimed as a deduction being the amount of loan given by the Government of Karnataka which was subsequently waived. Assessing Officer by the assessment order dated 27th March, 1987 passed under section 143(3) of the Act disallowed the above claim of the appellant. It was claimed on behalf of the appellant that Government of Karnataka had written off the said loan advanced to the appellant as the said amount had become irrecoverable. Assessing Officer did not accept the claim of the appellant. Assessing Officer observed that

waiver of loan benefited the appellant in carrying on its business and in terms of the provisions contained in Section 28, the said benefit enjoyed by the appellant should constitute income in its hand. Accordingly, the aforesaid amount was added to the total income of the assessee.

7. Aggrieved by the above, assessee preferred appeal before the Commissioner of Income Tax (Appeals)-III, Bangalore (referred to hereinafter as the first appellate authority). By the appellate order dated 26th September, 1990, the first appellate authority considered the requirement of Section 28(iv) of the Act and returned a finding that waiver of loan could not be treated as a benefit or perquisite because it was clearly a cash item. Amount would be includible under Section 28(iv) only if it is a non-cash item and that cash item cannot be treated as a perquisite. It was further held that what can be assessed under Section 28 are only items of revenue nature and not items of capital nature. Therefore, waiver of loan cannot partake the character of income to be includible for assessment. Accordingly, the addition made by the Assessing Officer was deleted.

8. The matter was carried forward in further appeal before the Tribunal by the revenue. Tribunal took the view that written off of the loan was inseparably connected with the business of the assessee and therefore this benefit had arisen out of the business of the assessee. Amount written off was nothing but an incentive for the business of the assessee. It

was held that the benefit was received by the assessee in the form of writing off of the liability to the extent of the loan. Therefore, it could not be said that the assessee received cash benefit. By the order dated 16th August, 2001 Tribunal opined that Assessing Officer had correctly made the addition considering the waiver of loan as revenue receipt of the assessee and therefore, set aside the finding of the first appellate authority thereby restoring the order of the Assessing Officer.

9. Hence, the present appeal by the assessee under Section 260A of the Act.

10. Mr.Shetty, learned counsel for the appellant at the outset has referred to the provisions contained in Section 28(iv) of the Act and contends that to be an income chargeable to income tax under the head "profits and gains of business and profession", the value of any benefit or perquisite has to arise from business or the exercise of a profession and it should not be in cash. He submits that this court in **Mahindra and Mahindra Vs. CIT, 261 ITR 501** has held that the income which can be taxed under Section 28(iv) must not only be referable to a benefit or perquisite but it must be arising from business. Secondly, Section 28(iv) would not apply to benefits in cash or money. This was following judgment of the Gujarat High court in **CIT Vs. Alchemic (P) Ltd, 130 ITR 168**. He submits that revenue had questioned the finding of the Bombay High Court before the Supreme Court in **CIT Vs. Mahindra & Mahindra**

Limited, 404 ITR 1 wherein Supreme Court had affirmed the finding of the Bombay High Court and has declared that for applicability of Section 28(iv) of the Act, the income should arise from the business or profession and that the benefit which is received has to be in some other form rather than in the shape of money. He further submits that reliance placed by the revenue before the Tribunal in **Sahney Steel & Press Works Limited Vs. CIT, 228 ITR 253** is wholly misplaced in as much as in that case Supreme Court was considering the question as to whether subsidy received by the assessee from the Andhra Pradesh Government was taxable as a revenue receipt or not. He therefore submits that the issue raised in this appeal is squarely covered by the Supreme Court decision in the case of **Mahindra & Mahindra Limited (supra)** and therefore, the question framed may be answered in favour of the assessee and against the revenue.

11. On the other hand, Mr.Chhotaray, learned standing counsel submits that after a loan is waived or written off it partakes the character of a subsidy, more particularly operational subsidy. He has laid emphasis on the expression “operational subsidy” to contend that the action of the Government of Karnataka in writing off of the loan provided was an act of providing operational subsidy to the assessee thus extending a helping hand to the assessee to salvage its losses thereby benefiting the assessee to the extent of the loan waived and it is in this context that he placed reliance on the decision of **Sahney Steel & Press Works Limited**

(supra). In the course of his arguments he also placed reliance on an earlier decision of this court in **Protos Engineering Company Private Limited Vs. CIT, 211 ITR 919** also referred to by the Tribunal. Adverting to the decision of the Supreme Court in **Mahindra & Mahindra Limited (supra)** he submits that facts of the present case are distinguishable from the facts of that case. Therefore, he prays for dismissal of the appeal.

12. Submissions made by learned counsel for the parties have been considered.

13. At the outset, we may refer to the provisions contained in Section 28(iv) of the Act. For ready reference, Section 28(iv) is extracted hereunder:-

“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:-

* * * * *

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

14. As would be evident from the above, Section 28 deals with profits and gains of business or profession. It says that the incomes mentioned therein shall be chargeable to income tax under the head “profits and gains of business or profession”. Clause (iv) refers to the value of any benefit or perquisite whether convertible into money or not arising from business or the exercise of a profession.

15. In **Mahindra & Mahindra Limited (supra)** Supreme Court was examining whether the amount due by Mahindra & Mahindra to Kaiser Jeep Corporation which was later on waived off by the lender constituted taxable income of Mahindra & Mahindra or not. Briefly it may be stated that Mahindra & Mahindra for the purpose of expansion of its business had entered into an agreement with Kaiser Jeep Corporation whereby the latter agreed to sell certain equipments to Mahindra & Mahindra. The price of the equipments was finally estimated at \$ 6,50,000. Kaiser Jeep Corporation agreed to provide loan to Mahindra & Mahindra for procurement of the equipments at the rate of 6% interest repayable after 10 years in installments. Subsequently, Kaiser Jeep Corporation was taken over by American Motor Corporation which agreed to waive off the principal loan amount advanced by Kaiser Jeep Corporation to Mahindra & Mahindra. It is in this factual background that the aforesaid provision first cropped up before the Bombay High Court and thereafter, travelled to the Supreme Court in consideration of the question as to whether the loan amount which was waived off by the lender constituted taxable income of Mahindra & Mahindra. Supreme Court discussed the meaning of the term “loan” and also the right of the creditor to exercise its right of waiver. It was held as under :-

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

It is a well-settled principle that the 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.

16. Having discussed the above, Supreme Court posed a question as to whether waiver of loan by the creditor is taxable as perquisite under Section 28(iv) of the Act and in this connection referred to the provisions of Section 28(iv) of the Act. Thereafter Supreme Court held as under:-

“On a plain reading of section 28(iv) of the Income-tax 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 provisions of section 28(iv) of the Income-Tax 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.57,74,064.00 is having received as cash receipt due to the waiver of loan. Therefore, the very first condition of section 28(iv) of the Income-Tax 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.57,74,064.00 can be taxed under provisions of section 28(iv) of the Income-tax Act.”

17. From the above it is quite evident that according to the Supreme Court for applicability of Section 28(iv) of the Act, the income which can be taxed has to arise from the business or profession. That apart, the benefit which is received has to be in some other form rather than in the shape of money. In the facts of that case it was found that the amount of Rs.57,74,064.00 was received as cash receipt due to waiver of loan. Therefore, it was held that Section 28(iv) of the Act was not satisfied in as much as the prime condition of Section 28(iv) that any benefit or perquisite arising from the business or profession shall be in the form of benefit or perquisite other than in the shape of money was absent. Therefore, it was held that the said amount could not be taxed under Section 28(iv) of the Act in no circumstances.

18. Facts and issue in the present case are identical to that in **Mahindra & Mahindra (supra)**. Here also loan of Rs.2.52 cores was given by the Karnataka Government to the assessee which was subsequently waived off. Therefore, this amount would be construed to be cash receipt in the hands of the assessee and cannot be taxed under Section 28(iv). In view of the Supreme Court decision in **Mahindra & Mahindra (supra)**, the earlier decision of this court in **Protos Engineer Company Private Limited (supra)** would no longer hold good.

19. In so far the decision in **Sahney Steel & Press Works Limited (supra)** is concerned, we find that the issue

involved in the said case pertained to subsidy received by the assessee from the Andhra Pradesh Government. Question was whether such subsidy received was taxable as revenue receipt or not. In the facts of that case it was held that such subsidies were of revenue nature and not of capital nature.

20. In so far the argument of Mr.Chhotaray that upon waiver of loan the amount covered by such loan would partake the character of operational subsidy, we are unable to accept such a contention. Conceptually, “loan” and “subsidy” are two different concepts. As per the *Concise Oxford English Dictionary, Indian Edition*, the term “loan” has been explained as a thing that is borrowed, especially a sum of money that is expected to be paid back with interest; the action of lending. *Black’s Law Dictionary, Eight Edition*, describes “loan” as an act of lending; a grant of something for temporary use; a thing lent for the borrower’s temporary use, especially a sum of money lent at interest; to lend, especially money. In *Supreme Court on Words and Phrases*, it is stated that “loan” necessarily supposes a return of the money loaned; in order to be a loan, the advance must be recoverable; “loan” is an advance in cash which includes any transaction which in substance amounts to such advance. Having noted the above, we may revert back to what the Supreme Court has said regarding “loan” in **Mahindra & Mahindra (supra)**. It is stated that “loan” generally refers to borrowing something, especially a sum of cash which is to be paid back alongwith interest decided by the parties. Therefore, the loanee or

debtor is under a liability or obligation to pay back the loan amount i.e. the principal amount alongwith the interest agreed upon within a stipulated time frame. It is in this context that Supreme Court acknowledged the well settled principle that the creditor has the right to waive off the loan or the debt either partly or fully, thus absolving the debtor from the liability of repayment of loan.

21. In contra-distinction, “subsidy” has been explained in the *Concise Oxford English Dictionary, Indian Edition*, as a sum of money granted from public funds to help an industry or business keep the price of a commodity or service low; a sum of money granted to support an undertaking held to be in the public interest i.e., a grant or contribution of money. As per *Black’s Law Dictionary, Eight Edition*, “subsidy” has been defined as a grant usually made by the Government to any enterprise whose promotion is considered to be in the public interest; although Governments sometimes make direct payments (such as cash grants), subsidies are usually indirect. A subsidy granted for production or bringing into existence any new asset of the assessee would be construed to be a capital receipt whereas a subsidy granted for the purpose of assisting the assessee to carry on its already existing business would be in the nature of revenue receipt and thus taxable. Therefore, when a subsidy is given, the character thereof in the hands of the recipient - whether revenue or capital - would have to be determined having regard to the purpose for which it is given. In **Sahney Steel and Press Works Ltd. (supra)**, Supreme Court held that subsidy provided by

the Andhra Pradesh Government was basically an endeavour of the state to extend a helping hand to the newly set up industries to enable them to be viable and competitive.

22. Thus, from a careful analysis, it is evident that there is a fundamental difference between “loan” and “subsidy” and the two concepts cannot be equated. While “loan” is a borrowing of money required to be repaid back with interest; “subsidy” is not required to be repaid back being a grant. Such grant is given as part of a public policy by the state in furtherance of public interest. Therefore, even if a “loan” is written off or waived, which can be for various reasons, it cannot partake the character of a “subsidy”.

23. From the discussions and reasons aforementioned, we find sufficient force in the contention of the appellant. The substantial question of law therefore is answered in favour of the assessee by holding that waiver of loan cannot be brought to tax under Section 28(iv) of the Act.

24. Appeal is accordingly allowed but there shall be no order as to cost.

(MILIND N. JADHAV, J.)

(UJJAL BHUYAN, J.)

....