



itxa-896-2017

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

INCOME TAX APPEAL NO. 896 OF 2017

The Pr. Commissioner of Income Tax-12 .. Appellant.
v/s.
M/s. Colour Roof (India) Ltd., .. Respondent.

Mr. N. C. Mohanty, for the Appellant.
Dr. K. Shivram, Sr. Advocate i/b. Mr. Rahul Hakani, for the Respondent.

**CORAM: M.S.SANKLECHA &
NITIN JAMDAR, JJ.
DATE : 25th SEPTEMBER, 2019.**

PC:-

This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 10th August, 2016, passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order dated 10th August, 2016 is in respect of Assessment Year 2009-10.

2 Revenue urges the following questions of law, for our consideration:

“(a) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in law in deleting the addition of Rs.4,11,27,086/- as income under Section 41(1) of the Act?

“(b) Whether on the facts and in the circumstances of the case and in law, the Tribunal has erred in not upholding the addition of Rs.4,11,27,086/- as taxable income under Section 28 of the Act on account of cessation of loan liability in view of decision of this Court in the case of Solid Containers Ltd. v/s. DCIT 308 ITR 471?

(c) Whether on the facts and in the circumstances of the case and in law, the Tribunal being the final fact finding authority, is justified in not examining the unproven credit entries in the Balance-Sheet and in not invoking the correct provision of Section 28(iv) of the Act, if Section 41(1) invoked by the Assessing Officer, was found by the Tribunal not to be the appropriate provision to tax the impugned amount of Rs.4,11,27,086/-?

Brief facts leading to this Appeal are as under:-

3 Respondent is engaged in the business of manufacturing steel profiles and coils. For the subject Assessment Year, the Respondent filed its return of income on 29th September, 2019, declaring loss of Rs.13.07 Crores. The Assessment was taken up for scrutiny and the Assessing Officer found that loan amounting to Rs.4.11 Crores had been waived and added the same to the income of the Respondent under Section 41(1) of the Act. Thus, determined the Appellant's income by Assessment Order dated 23rd December, 2011 at Rs.14.68 Crores.

4 Being aggrieved, the Respondent filed an Appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. By an order dated 23rd July, 2012, the CIT (A) held on fact that the loan taken were on capital account and not on account of purchase of merchandise. It further held Section 41(1) of the Act, would have no application. This as the un-secured loan taken by the Respondent, was not on account of trading transaction and neither the same was claimed as deduction in any earlier return of income i.e. no benefit in tax was obtained in respect of the loan waived. In these circumstances, it deleted the addition of Rs.4.11 Crores made under Section 41(1) of the Act.

5 Being aggrieved with the order dated 23rd July, 2012 of the CIT(A), the Revenue filed an appeal to the Tribunal. The impugned order

dated 10th August, 2016 of the Tribunal while dismissing the appeal of the Revenue, records the fact that, loan transactions are on capital account and not on purchase of any merchandise from any of the parties. It refers to Section 41(1) of the Act and hold that it could only apply in respect of remission or cessation of trading liabilities, the allowance or deduction of which had been made in an earlier Assessment Year. In fact, the Revenue had before the Tribunal, conceded/ accepted the fact that Section 41(1) of the Act will have no application to the present facts. Thus, the Tribunal held the waiver of loan in these facts is not covered under Section 41(1) of the Act.

6 Being aggrieved with the impugned order dated 10th August, 2016 of the Tribunal, the Revenue is in appeal before us. We shall now deal with each of the questions urged in seriatum.

7 **Re. Question (a):-**

- (i) Mr. Mohanty, learned Counsel for the Revenue states that on waiver of the loan, its character undergone a change and it becomes on revenue account. Therefore, taxable under Section 41(1) of the Act. In support, reliance was placed upon the decision of this Court in ***Solid Containers Ltd., v/s. Dy. Commissioner of Income Tax [2009] 308 ITR 417.*** It is submitted that the loan was taken from agents/ dealers has necessarily to be on revenue account;
- (ii) Firstly we note that the Revenue had conceded the position before the Tribunal that Section 41(1) of the Act will have no application in these fact. Thus, in view of the decision of this Court in ***CIT v/s. Mahalaxmi Glass Works Ltd., 318 ITR 116,*** it is not open to the Revenue to urge this issue as a substantial question of law. In any

case, the decision of the Solid Containers Ltd., (supra) relied upon by the Revenue was not in the context of Section 41(1) of the Act but rendered in respect of Section 28 (iv) of the Act. In fact, Solid containers Ltd. (supra) does not even remotely deal with Section 41(1) of the Act. Besides on fact, the Tribunal has rendered a finding therein that the amount which were received by the Assessee therein were on trading account. Thus, it would have no application to the present case. In this case, we are dealing with the Section 41(1) of the Act. The Supreme Court in the case of ***Commissioner v/ s. Mahindra and Mahindra Ltd., [2018] 404 ITR 1*** has held that *sine-qua-non* for application of Section 41(1) of the Act, is that there should have been allowance or deduction claimed by the Assessee in any Assessment Year as a loss, expenditure or trading liability incurred by the Assessee. Subsequently, if any remission or waiver is granted in respect of which such an allowance/deduction has been claimed, then the Assessee is liable to pay tax on the amount waived/ remitted under Section 41(1) of the Act. This, as the Court held is only to ensure that Assessee does not keep double benefit – one by way of deduction and another by waiver of the amount, which has already been deducted in computing the tax;

- (iii) In this case admittedly, no benefit in respect of the loan has been claimed by the Respondent in respect of Rs.4.11 Crores, in an earlier Assessment Year;
- (iv) In view of the above, the question as framed does not give rise to any substantial question of law. Thus, not entertained.

8 Re. Questions (b) & (c):-

- (i) We find that these two questions are being urged for the first time only before us. At no point of time before the authorities under the Act, was it the Revenue's case that the waiver of loan should be brought to tax under Section 28 (iv) of the Act. No such claim was made either as a principal submission or even in the alternative. Therefore, it is not open for the Revenue to urge an issue which was not urged before the Tribunal. On this limited ground, the two questions as proposed are liable to be dismissed;
- (ii) In any case, it must be pointed out that the decision of this Court in Solid Container Ltd., (supra), will have no application to this case. In the above case, the Tribunal had come to a finding of fact that transaction was on Revenue's account and not on capital account. Therefore, the waiver of loan was chargeable to tax. In this case, the CIT(A) as well as the Tribunal have both come to a finding of fact that loan taken was on capital account and not on trading account. Thus, the decision of the Solid Container Ltd., (supra) would have no application;
- (iii) In any view of the matter, the issue now stands concluded by the decision of the Apex Court in Mahindra and Mahindra (supra). In the above case, the Apex Court has held that, Section 28 (iv) of the Act can only apply where any benefit arises from a business or profession and such benefit is received other than in the shape of money;



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(iv) In this case, the waiver of loan is, in fact, found is on capital account. Thus, these two questions as proposed do not give rise to any substantial questions of law. Thus, not entertained.

9 Accordingly, **Appeal dismissed.** No order as to costs.

(NITIN JAMDAR,J.)

(M.S.SANKLECHA,J.)