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

INCOME TAX APPEAL NO. 450 OF 2013

WITH
INCOME TAX APPEAL NO. 762 OF 2013
WITH
(NOTICE OF MOTION NO. 453 OF 2013)

The Commissioner of Income Tax-8,	}	
Room No. 214, Ayakar Bhavan,	}	
M. K. Road, Mumbai – 400 020	}	Appellant
versus		
M/s. Sulzer India Limited,	}	
Sulzer House, Baner Road,	}	
Aundh, Pune – 411 007	}	
PAN: AAACS 7876 D	}	
(A. Y. 2003-04)	}	Respondent

WITH
INCOME TAX APPEAL NO. 452 OF 2012
WITH
INCOME TAX APPEAL NO. 1556 OF 2013

The Commissioner of Income Tax-8	}	
Room No. 214, Aayakar Bhavan,	}	
M. K. Road, Mumbai – 400 020	}	Appellant
versus		
Hardoli Paper Mills Limited	}	
having its registered office at C-8	}	
Saroj Apartments, Opp. Holy Spirit-	}	
Hospital, Mahakali Caves Road,	}	
Andheri (E), Mumbai – 400 093,	}	
PAN AAACH1472N	}	Respondent

WITH
INCOME TAX APPEAL NO. 3418 OF 2010

Commissioner of Income Tax,	}	
Central – IV, R. No. 660, 6th floor,	}	
Aayakar Bhavan, M. K. Road,	}	
Mumbai – 400 020	}	Appellant

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Bombay High Court

versus

M/s. Associated Capsules Pvt. Ltd., }
131, Kandivali Industrial Estate, }
Kandivali (East), Mumbai – 400 067 }
PAN: AAACA4769K } Respondent

WITH

INCOME TAX APPEAL NO. 909 OF 2012

The Commissioner of Income Tax LTU }
Mumbai, 29th floor, Centre – 1, }
World Trade Centre, Cuff-Parade, }
Mumbai – 400 005 } Appellant

versus

M/s. K. S. B. Pumps Ltd., }
126, Maker Chamber III, }
Nariman Point, Mumbai – 400 021 } Respondent

WITH

INCOME TAX APPEAL NO. 271 OF 2012

WITH

INCOME TAX APPEAL NO. 358 OF 2012

Commissioner of Income Tax }
(Large Tax Payer Unit) }
29th floor, Centre – 1, }
World Trade Centre, Cuff-Parade, }
Mumbai – 400 005 } Appellant

versus

M/s. S. I. Group India Ltd. }
(Earlier known as M/s. Schenectady }
Herdillia Ltd.) }
Plot No. 2/1, TTC Industrial Area, }
Thane Belapur Road, Navi Mumbai }
PIN 400 705, PAN: AABCH7323L } Respondent

WITH

INCOME TAX APPEAL NO. 2016 OF 2011

The Commissioner of Income Tax-10 }
Aayakar Bhavan, M. K. Road, }
Mumbai – 400 020 } Appellant

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versus

M/s. Godrej Consumer Products Limited } Pirojeshanagar, Eastern Express } Highway, Vikhroli, Mumbai – 400 079 } PAN: AABCG3365J } Respondent

WITH

INCOME TAX APPEAL NO. 1777 OF 2011

The Commissioner of Income Tax-1 } Mumbai, Aayakar Bhavan, M. K. Road } Mumbai – 400 020 } Appellant

versus

M/s. Grindwell Norton Ltd. } C/o. Kalyaniwalla & Mistry, } Army & Navy Bldg., 3rd floor, 148 } Mahatma Gandhi Road, } Mumbai – 400 020 } Respondent

WITH

INCOME TAX APPEAL NO. 506 OF 2012

Commissioner of Income Tax – 1, } Mumbai, Aayakar Bhavan, M. K. Road, } Mumbai – 400 020 } Appellant

versus

M/s. Grindwell Norton Ltd. } Leela Business Park, 5th floor, } Andheri-Kurla Road, Marol, Andheri (E) } Mumbai – 400 059 } Respondent

Mr. Vimal Gupta-Senior Advocate with Mr. Arvind Pinto for the Revenue in ITXA/450/2013 and ITXA/762/2013.

Mr. Soli Dastur-Senior Advocate with Mr. Niraj Seth i/b. Mr. A. K. Jasani for the Assessee in ITXA/450/2013 and ITXA/762/2013.

Mr. Vimal Gupta-Senior Advocate i/b. Ms. Padma Divakar for Revenue in ITXA/3418/2010.

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Mr. J. D. Mistri-Senior Advocate i/b. Mr. A. K. Jasani for the Assessee in ITXA/3418/2010.

Mr. Tejveer Singh for Revenue in ITXA/452/2012 and ITXA/1556/2013.
Mr. Vimal Gupta-Senior Advocate i/b. Ms. Padma Divakar for the Revenue in ITXA/909/2012.

Mr. R. Murlidhar i/b. M/s. Rajesh Shah and Co. for the Assessee in ITXA/909/2012.

Mr. Vimal Gupta-Senior Advocate with Ms. Padma Divakar for Revenue in ITXA/1777/2011.

Mr. Suresh Kumar for Revenue in ITXA/2016/2011 and ITXA/506/2012.

Mr. A. R. Malhotra with Mr. N. A. Kazi for Revenue in ITXA/271/2012 and ITXA/358/2012.

Mr. A. K. Jasani for the Assessee in ITXA/1777/2011, ITXA/2016/2011, ITXA/271/2012, ITXA/358/2012 and ITXA/506/2012.

CORAM :- S.C.DHARMADHIKARI & A.K.MENON, JJ.

Reserved on :- October 10, 2014
Pronounced on :- December 5, 2014

JUDGMENT :- (Per S.C.Dharmadhikari, J.)

These Appeals by the Revenue under Section 260A of the Income Tax Act, 1961 (for short "the I.T. Act") challenge the order dated 7th September, 2012 (in ITXA/450/2013) of the Income Tax Appellate

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Tribunal (ITAT), Bench at Mumbai. The Tribunal dealt with two Appeals, one by the Assistant Commissioner of Income Tax, 8(III), Mumbai being Income Tax Appeal No. 2871/Mum/2007 and another by the Assessee being Income Tax Appeal No. 2944/Mum/2007. The assessment year is 2003-04. These were cross Appeals against the order of the Commissioner of Income Tax (XIX) dated 19th January, 2007.

2) Mr. Gupta, the learned Senior Counsel submits that the Appeals raise substantial questions of law and as formulated at page 8 of the paper book (ITXA/450/2013). In all fairness to him, he has also invited our attention to the orders passed by a Division Bench of this Court in Income Tax Appeal No. 1777 of 2011, Income Tax Appeal No.2016 of 2011, Income Tax Appeal No. 358 of 2012 and Income Tax Appeal No. 271 of 2012, wherein, according to him, similar question has been admitted. He submits that therefore, the Appeals be admitted.

3) Since Mr. Gupta has referred to the facts in Income Tax Appeal No. 450 of 2013, we would prefer to state them in brief.

4) The Assessee M/s. Sulzer India Ltd. filed return of income for the assessment year 2003-04 on 27th November, 2013 declaring total income at Rs.10,59,76,986/-, claiming deduction under section 80HHC of the I.T. Act in the sum of Rs.82,48,864/-.

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5) During the assessment proceedings, the Assessing Officer observed that the Assessee had credited amount of Rs.4,14,87,985/- to the capital reserve contending that the said amount was a remission of loan liability. The Assessee stated that under the Industrial Backward Area Scheme of the Government of Maharashtra, it was entitled to defer the Sales Tax liability for a period of 7 years under the Deferral Scheme of 1983 and for a period of 6 years under the Deferral Scheme of 1988. In response to a Notification issued by the Government of Maharashtra regarding premature repayment of deferral Sales Tax at Net Present Value (NPV), the Assessee made a repayment of Rs.3,37,13,393/- against the total liability of Rs.7,52,01,378/-. The Assessee remitted the balance amount of Rs.4,14,87,985/- and credited the said amount to its capital reserve account. The Assessing Officer asked the Assessee to show cause as to why the said amount should not be taxed in the hands of the Assessee as a revenue receipt. Relying on Circulars of the Central Board of Direct Taxes being Nos. 496 and 674, the Assessee claimed that the deferral Sales Tax under the Deferral Scheme was required to be treated as actually paid for the purposes of section 43B of the I.T. Act. Further, the conversion of Sales Tax liability into loans would be taken as discharge of the liability of Sales Tax and therefore, the deferral amount was in the form of a loan and not a trading receipt. On this basis, the Assessee contended that the remission of a loan cannot be

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treated as a revenue receipt and taxed as its income. The Assessing Officer rejected this claim and by holding that the Board's Circular is in the context of section 43B of the Income Tax Act and therefore not relevant for the present issue.

6) The Memo of Appeal refers in detail to the Assessing Officer's findings. Aggrieved by the Assessment order dated 6th March, 2006, the Assessee preferred an Appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax passed an order on 19th January, 2007 and he sustained the additions.

7) As far as the Tribunal's order goes, what is really material for our purpose, is that the Appeals preferred by the Assessee, before the Tribunal, to challenge the Commissioner's order, were decided by following a Special Bench order comprising of the President, the Judicial Member and the Administrative Member. It decided a question which was forwarded to it for its opinion. That question reads as under:

> "Whether on the facts and in the circumstances of the case and in law, the sum of Rs.4,14,87,985/- being the difference between the payment of Net Present Value of Rs.3,37,13,393/- against the future liability of Rs.7,52,01,378/- has rightly been charged to tax u/s 41/(1) of the I. T. Act, 1961."

8) The Special Bench passed an order on 10th November, 2010 holding therein that the deferred Sales Tax liability of Rs.4,14,87,985/-

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being the difference as noted above and credited by the Assessee under the capital reserve account in its books was an actual receipt and cannot be termed as remission/cessation of liability. Consequently, no benefit has arisen to the Assessee in terms of section 41(1)(a) of the Income Tax Act. Accordingly, the opinion was rendered and the matters were sent back to the regular Bench for disposal in accordance with this opinion.

9) A Miscellaneous Application was filed before the Special Bench, which was dismissed on 3rd August, 2012.

10) In view of the opinion of the Special Bench, the Appeals of the Revenue and that of the Assessee were disposed of by the Tribunal on 7th September, 2012. The issue being answered in favour of the Assessee and against the Revenue in terms of the larger Bench's decision, the Revenue has brought these Appeals under section 260A of the I.T. Act. The substantial questions of law arising from the orders referred to above are formulated at page 8 of the paper book. We proceed to admit these Appeals on the following substantial questions of law:

> "(a) Whether on the facts and in the circumstances of the case and in law, the Tribunal is justified in not upholding the finding of the Income Tax Authorities below that the deferred sales tax liability is chargeable to tax as business income of the assessee u/s. 41(1) on remission thereof and instead treating the same as exempt from tax as capital receipt being remission of loan liability?

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(b) Whether in the facts and circumstances of the case and in law, the Tribunal is justified in deleting the addition on account of remission/cessation of sales of sales tax liability relying on the CBDT Circular No. 496 dated 25th September, 1987 and Circular No. 674 dated 29th December, 1993 which are not applicable to the instant issue?"

11) Respondents waive service. With the consent of Mr. Gupta and Mr. Dastur so also other Advocates, we dispose of these Appeals finally.

12) Mr. Gupta-Senior Counsel appearing in support of these Appeals submits that there is a difference in the language of section 41(1) and section 43B of the I.T. Act. Section 43B comes into play on actual payment. In the present case, we are concerned with two Sales Tax deferral schemes. Mr. Gupta submits that there is 1983 Scheme under which the Assessee was obliged to pay Rs. 3.89 crores and under the 1988 Scheme Rs. 4.22 crores. Mr. Gupta submits that the payment of Sales Tax under these Schemes was deferred up to 12 years. These Schemes are different and cannot be equated with exemption from the liability to pay tax. This is not akin to a tax holiday either. The liability to pay Sales Tax is merely deferred. However, from 1st November, 1989 to 31st October, 1996, the Assessee collected Rs.7.52 crores as Sales Tax from third parties. There was an obligation to pay this amount in the Government Treasury/Sales Tax Department, within a period of 30 days. However, that obligation and in law was not required to be

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performed and fulfilled in this case. This amount collected from the third parties can be paid after 7 to 12 years. Thus, this is a facility to use the amount and which belongs to the Government/Revenue and for all this duration and period. The Board Circular Nos. 496 and 674 dated 25th September, 1987 and 29th December, 1993 respectively are referred to by Mr. Gupta and he submits that they come into play or are attracted only in the event section 43B of the Income Tax Act is applicable. Both Circulars, according to Mr. Gupta, contemplate deemed payment of Sales Tax dues.

13) Mr. Gupta submitted that the provisions of section 38 of the Bombay Sales Tax Act, 1959 (BST) mandate that the amount of tax shall be paid by the Dealer or the person liable therefor, into the Government Treasury, within 30 days from the date of service of notice issued by the Commissioner in respect thereof. Mr. Gupta submits that if payment of Sales Tax collected by the Assessee in this case is made earlier than 7 to 12 years, that will discharge the Assessee of the liability. However, if the payment of lesser amount discharges the Assessee in full, then, the remission is taxable. If that deduction has been granted, that will have to be withdrawn.

14) The submission of Mr. Gupta appears to be that from the total liability of Rs.7.52 crores, the amount which has been remitted to

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the Government is not this entire sum but a part thereof. However, it is not in dispute that entire sum of Rs.7.52 crores is collected. If that is not remitted, then, within the meaning of section 41(1), there is a benefit derived by the Assessee. The Assessee has enjoyed that money and has utilized it. Mr. Gupta submits that the Assessee's calculation overlooks the fact that the case will fall within the first part of section 41(1) of the Income Tax Act, 1961. The sum of Rs.4.14 crores is an amount received by the Assessee. The Net Present Value amount has been paid early and hence, the benefit accrues in the assessment year concerned. Mr. Gupta submits that the deduction in terms of section 43B is not of the same category. There deemed payment as urged above is covered. In the present case, the Assessee is deemed to have received the amount of Rs.4.14 crores. The Income Tax Department is not concerned with the Assessee's understanding, if any, with the State Industrial Corporation of Maharashtra Ltd. (SICOM).

15) Mr. Gupta submits that Rs.7.52 crores does not belong to the Assessee, but to the State. There is no adjustment permissible as far as this liability is concerned under the I.T. Act. Mr. Gupta submits that the Special Bench of the Tribunal committed obvious error and in that regard, he invited our attention to the findings of the Tribunal in its Special Bench decision to the effect that the first requirement of section

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41(1) has not been fulfilled in the facts of the present case. The Tribunal has confused itself between the concept of deemed date of payment and deemed payment. Mr. Gupta therefore submits that the order of the Tribunal is erroneous and should be set aside.

16) Mr. Pinto appearing for the Revenue in some Appeals adopted the arguments of Mr. Gupta and submitted that the Sales Tax is always trading receipt. He further submits that the accounting entries do not necessarily decide the issue of taxability.

17) Mr. Gupta has relied upon the Circular and a Judgment of the Hon'ble Supreme Court in the case of ***Pollyflex (India) Pvt. Ltd. vs. Commissioner of Income Tax*** reported in **(2002) Vol. 257 ITR 343**. He also relied upon a Judgment of the Hon'ble Supreme Court in the case of ***Chowringhee Sales Bureau P. Ltd. vs. Commissioner of Income Tax, West Bengal*** reported in **(1973) Vol. 87 ITR 542**. Mr. Gupta has also relied upon an order passed by the Hon'ble Supreme Court in the case of ***Commissioner of Income Tax, Mumbai vs. Reliance Industries Ltd.*** in **Civil Appeal No. 7769 of 2011** along with the connected Appeals, decided on 9th September, 2011. Finally he relied upon a Judgment of a Division Bench of this court in the case of ***Solid Containers Ltd. vs. Deputy Commissioner of Income Tax and Anr.*** reported in **(2009) 308 ITR 417 (Bom.)**.

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18) On the other hand, Mr. Dastur-Senior Counsel appearing on behalf of the Assessee submitted that if the facts and circumstances are taken into consideration, then, these Appeals do not raise any substantial question of law. Mr. Dastur submits that the Schemes of 1983 and 1988 should be perused in their entirety. If the benefit under the Scheme is taken into consideration, then, there was no liability in presenti. The Sales Tax was not payable. There was no option to pay earlier, but later on, such option was given does not mean any benefit accrued to the Assessee. The liability has been ascertained and determined in terms of the rules. The Net Present Value is taken into consideration. Thus, the liability is not wiped out but its present value is ascertained and determined. That has been paid. There was no concession. There is absolutely no settlement negotiated or otherwise. The statutory mode of recognized deferred dues was adopted and hence no benefit is derived by the Assessee. There is no question of any remission. Mr. Dastur was at pains to point out that for example Rs.100/- was a liability and which had to be discharged on the expiry of the period specified in the Scheme. If that amount is to be received by the State after 12 years and its worth today has been ascertained and determined means there is no benefit at all. Today if Rs.60/- has been paid it does not necessarily mean that there is any benefit or remission. The entire liability is discharged. In such circumstances, the Sales Tax

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dues have been paid, the liability has been discharged and if the State of Maharashtra and the Assessee understood the transaction in a particular way, the Central Government cannot dispute or question it. For these reasons, he submits that the Appeals be dismissed.

19) Mr. Dastur relies upon a Judgment of a Division Bench of Karnataka High Court dated 2nd September, 2014 in **Income Tax Appeal No. 899 of 2008** in the case of the ***The Commissioner of Income Tax and Anr. vs. M/s. McDowell and Co. Ltd.***

20) With the assistance of the learned Senior Counsel, we have perused the Memo of Appeals and the Annexures to it so also the orders impugned therein. We have also perused the relevant statutory provisions and the decisions construing or interpreting them brought to our notice.

21) At the outset, it is necessary to refer to some basis facts, at the cost of repetition. The Assessing Officer made additions of Rs.4,14,87,985/- to the income of the Assessee, being remission of loan liability for premature payment of the same at Net Present Value by invoking section 41(1) of the I.T. Act. That section reads as under:

> "**S. 41(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, -

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(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

(b) the successor in business has obtained, whether in cash or in any other manner whatsoever, any amount in respect of which loss or expenditure was incurred by the first-mentioned person or some benefit in respect of the trading liability referred to in clause (a) by way of remission or cessation thereof, the amount obtained by the successor in business or the value of benefit accruing to the successor in business shall be deemed to be profits and gains of the business or profession, and accordingly chargeable to income-tax as the income of that previous year.

Explanation 1 - For the purposes of this sub-section, the expression "loss or expenditure or some benefit in respect of any such trading liability by way of remission or cessation thereof" shall include the remission or cessation of any liability by a unilateral act by the first mentioned person under clause (a) or the successor in business under clause (b) of that sub-section by way of writing off such liability in his accounts.

Explanation 2 - For the purposes of this sub-section, "successor in business" means, -

(i) where there has been an amalgamation of a company with another company, the amalgamated company;
(ii) where the first-mentioned person is succeeded by any other person in that business or profession, the other person;
(iii) where a firm carrying on a business or profession is succeeded by another firm, the other firm;
(iv) where there has been a demerger, the resulting company."

22) A perusal thereof indicates that wherein allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the Assessee (referred

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to as the first mentioned person) and subsequently during any previous year, this 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. That irrespective whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not. That is what is stipulated in clause (a) of sub-section (1) of section 41 of the I.T. Act and for purposes of the sub-section, the explanation (1) defines the term "loss or expenditure or some benefit in respect of any such trading liability by way of remission or cessation thereof" to include the remission or cessation of any liability by unilateral act by the first mentioned person or his successor by way of writing of such liability in his accounts.

23) In this case, the Assessee argued before the Commissioner that the Assessing Officer failed to appreciate that the remission is made pursuant to "premature repayment of loan", which is on account of capital and not on account of revenue. The provisions of section 41(1)

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would only apply when the Assessee receives, either in cash or otherwise in respect of loss, expenditure or trading liability, any benefit which was allowed as deduction in the earlier assessment year. The loan liability in the present case was never charged to profit and loss account by the Assessee and as such this question did not arise in past, the loan in question was never debited to P. and L. Account and such question of invoking section 41(1) does not arise. Thus, there was a without prejudice argument. The Commissioner of Income Tax (Appeals), in his order of 19th January, 2007, held that the Assessee was beneficiary of Sales Tax Deferral Scheme of the Government of Maharashtra. It was allowed to defer payment of Sales Tax liability for a period of 7 years and 6 years respectively under the two Schemes. Subsequently, the State Government introduced a Scheme of premature repayment of deferral Sales Tax at some amount, on the payment of which, balance amount was allowed to be remitted. Therefore, against the total liability of Rs.7,52,01,378/-, the Assessee paid a sum of Rs.3,37,13,393/- and the Department allowed him to keep the amount of Rs.4,14,87,985/-. The Assessee did not offer the remitted amount as income and credited the same to the capital reserve account stating that this is a remission of capital receipt. The Assessing Officer held that the Assessee did not furnish any document or order in terms of which the Sales Tax liability was treated as a loan or converted into a loan at any

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subsequent stage. The Assesse's claim that the liability was a loan by the State Government and which came to be remitted was therefore doubted and questioned. The Assessing Officer held that the amount was nothing but deferred Sales Tax liability and since this was already allowed under section 43B of the I.T. Act, the remission was covered by section 41(1) of the Act. He therefore held that the amount was taxable under section 41(1) of the I.T. Act.

24) If the industry was established in the backward area and the benefit of the scheme to defer the liability of Sales Tax for a period of 7 years was obtained, then, the Commissioner, after noting all these facts and the terms of both Schemes, the Trade Circular No.PST/2002/91/ADM-13/B-1041, dated 12th December, 2002, held that there is a letter addressed to M/s. SICOM Ltd., which is the Nodal Authority. This letter has been reproduced by the Commissioner in his order at internal page 14 and running page 60 of the paper book. Relying on the contents of this letter, the Commissioner held that till 8th October, 2002 deferred Sales Tax was not converted into loan. The Assessee also filed supplementary agreement under the 1983 Scheme dated 10th October, 2002 to the principal agreement dated 16th September, 1989 requesting conversion of the Sales Tax deferral into loan. M/s. SICOM Limited forwarded the Assessee's application to the

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Deputy Commissioner of Sales Tax on 21st October, 2002. The Assistant Commissioner of Sales Tax addressed a letter dated 30th October, 2002 to the Assessee seeking additional information in this regard. Another document filed by the Assessee is a copy of the letter dated 11th October, 2002 submitting the required details. After this, there is no communication. From the above, according to the Commissioner, it is apparent that there were no official communication to the Assessee that his request for conversion of deferred Sales Tax into loan has been accepted and to that extent, the finding of the Assessing Officer is correct. The Assessee indeed made a misleading statement that it had availed a loan and not benefit of deferral Sales Tax liability. This claim was found to be not supported and by any documentary material.

25) Therefore, proceeding on these lines, the Commissioner examined the claim of the Assessee that this is nothing but premature repayment of loan and which is on account of capital and therefore, not exigible to tax.

26) The commissioner proceeded to hold as under:

> "..... However, appellant never got this deferred payment of sales tax liability converted into loan as no evidence in this regard has been produced. Appellant's letter dated 8th October, 2002 addressed to M/s. SICOM Limited has already been reproduced above. This is also factually incorrect on the part of appellant to state that the amount of Rs.7.52 crores was never claimed u/s. 43B. Appellant has claimed this amount in the years of accrual of liability on the basis of CBDT's Circular Nos. 496 and 674 as

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pointed above. In fact, appellant has made note on non-taxability of this amount, which appears on page 151 of paper book, which was the submission made by appellant before A.O. This note is enclosed as Annexure 2 of this order. In this note at para 3, appellant has stated that although the sales tax collected from the customers was a trading receipt due to the deferral scheme the same is deemed to have been paid to the Government, thereby discharging the liability. It is, therefore, absolutely misleading on the part of appellant to state that amount of Rs.7,52,01,378/- was never claimed u/s. 43B in earlier years. Thus factual position is that appellant had collected sales tax, opted for deferral scheme of the State Government and claimed the sales tax so collected but not paid u/s. 43B in view of the Board's Circulars referred above. Now when there has been part remission of the same liability, appellant cannot turn around and try to alter the facts with sole intention to evade payment of legitimate tax.

Even presuming that at later stage, permission has been granted to the appellant to convert that deferral tax to loan, the fact cannot change that the initial receipt was in the form of trading receipt. We have already noted the undisputed facts that what had been collected by the appellant was sales tax which was not paid to the Sales Tax Department. Reference may be made to various eligibility certificates issued by Sales Tax Department. One such certificate, which is dated 06.02.1997 for period between 01.03.1997 to 28.02.2003 states that:

> *"the holder of this Eligibility Certificate will be entitled to the benefits as sanctioned by the Government of Maharashtra under the 1988 Scheme, (the Resolution referred to above), as modified from time to time. In particular, the Sales Tax Incentive under Part-I will be admissible by way of Deferral of the Sales Tax Liability."*

This amount was liable to tax under Income-tax u/s. 43B but it was not so taxed because of the above referred Board's Circulars. Yet they were deemed to have been paid in view of the amendments made in Sales Tax Act. Therefore, the initial nature of receipt was trading receipt which is undisputed. We have already noted that it was only in 2002 that the appellant had sought to convert this deferred sales tax liability to loan.

.....

In para 3 of the note referred above as also in written submission reproduced above, appellant has admitted that the sales tax collected from customers was a trading receipt. It is, therefore, every strange on the part of appellant to state now that the sales tax collected was a loan in the first place.

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It is undisputed that sales tax so collected was not paid but was allowed through a legal fiction on the basis of Board's Circular Nos. 496 and 674. These circulars are reproduced below:

> *"a. The scope of application of provisions of section 43B to the sales tax collected but not actually paid under deferral schemes of the State Governments was considered in Board's Circular No. 496, dated 25-9-1987 (Clarification 2), and it was decided that, where the State Government make an amendment in the Sales-tax Act to the effect that the sales tax deferred under the scheme shall be treated as actually paid, the statutory liability shall be treated as discharged for the purposes of Section 43B.*
> *b. It has since been brought to the notice of the Board that some Governments, instead of amending the Sales-tax Act, have issued Government Orders notifying schemes under which sales tax is deemed to have been actually collected and disbursed as loans. Such Government accounts giving effect to deemed collections by crediting the appropriate receipt-heard relating to sales-tax collections and debiting the heads relating to disbursal of loans. It has, therefore, been represented that, as such conversion of the sales-tax liability into loans have similar statutory effect as can be achieved through amendments of the Sales-tax Act, the amounts covered under the scheme should be allowed as deduction for the previous year in which the conversion has been permitted by the State Governments. (emphasis supplied)"*

Therefore, sales tax collected was not paid to the Sales Tax Department and was taxable u/s. 43B of I. T. Act. But it was not taxed because it was deemed to have been paid on the basis of amendments made in Sales Tax Act. It is a settled law that full effect must be given to the legal fiction and all consequences emanating from such legal fiction must be visited.

.....

In the case of appellant, a legal fiction was created when sales tax was deemed to have been paid and appellant was given benefit. Now when remission of liability has occurred, the appellant cannot escape logical consequences of the initial legal presumption.

Now further presuming that sales tax so collected by the appellant was converted into loan at the initial stage itself, even then it would not affect the taxability of the amount u/s. 41(1) at this stage.

Section 38 and its 3rd proviso of Sales Tax Act refer to payment of tax as follows:

> ***"S. 38 Payment of tax [and deferred payment of tax, etc.] -*** *(1) Tax shall be paid in the manner herein provided, and at such intervals as may be prescribed.*

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provided also that, notwithstanding anything contained in this Act or in the rules made thereunder but subject to such conditions as the State Government or the Commissioner may by general or special order specify, where a dealer to whom incentives by way of deferment of sales tax or purchase tax or both under the 1979 Scheme the 1983 Scheme or as the case may be, the Electronic Scheme falling under the Package Scheme of Incentives designed by the State Government or of the tax under the 1988 or the 1993 Package Scheme of Incentives designed by the State Government have been granted by virtue of eligibility Certificate, and where a loan liability equal to the amount of any such tax payable by such dealer has been raised by the SICOM or the relevant Regional Development Corporation or the District Industries Centre concerned then such tax shall be deemed, the public interest, to have been paid."

This provision of Sales Tax Act read with Circular No. 674 reproduced above makes it very clear that conversion into loan of any tax collected would also be deemed payment of tax u/s. 43B.

Thus the deferral of sales tax or conversion into loan are on the same footing so far section 43B is concerned. In fact, the said section says that even where a loan liability has been raised, equal to the amount of tax payable, this loan amount also shall be deemed in the public interest to be payment of sales tax. Therefore, even if it is presumed that deferred sales tax liability was converted into loan, the same would be remission within the ambit of revenue/trading receipt/expenditure and would attract provisions of section 41.

There are various other documents which show that appellant, itself, has treated the repayment of deferred sales tax on account of repayment of tax and not as repayment of loan. In this regard, the complete set of documents which show the repayment of this amount are at page nos. 153 to 196 of paper book. A letter dated 08.09.2003 by one, Mr. Mahendra Kulkarni, Deputy Manager of the appellant addressed to Joint Director of Industries is very relevant.

…..

Then another letter dated 10.02.2003 addressed by the appellant to the Dy. Commissioner of Sales Tax (Adm.) wherein appellant has requested Dy. Commissioner of Sales Tax (Adm.) to issue **"Certificate of Payment of deferred tax at the Net Present Value"**. Copy of this letter is also enclosed as **Annexure 4** of this order. There are several such letters covering all the payment wherein appellant has requested for issue of certificate that it has paid sales tax liability and the Sales Tax Department has issued the certificate that the appellant has paid the deferred sales tax liability. None of these documents mentioned the word '**loan**'. All

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these documents only mentioned '**deferred sales tax liability**'. The combined reading of these documents proves beyond a shadow of doubt that appellant had collected sales tax which was not paid earlier and which remained as deferred sales tax liability. It was never converted into loan. What was paid was Net Present Value of the deferred sales tax liability resulting into remission of balance amount. In view of these undisputed facts, it is not open to the appellant to claim that what it had received was a loan and the remission of the same was on capital account. The appellant has also made a plea that it has not gained any benefit on the remission of liability. In its written submission, it has given an analogy of X & Y wherein if X pays his dues of Rs.500/- prematurely valued at Rs.100/-, the gain of Rs.400/- would be only notional. This analogy is completely baseless and intended to mislead. In the case of appellant, the liability is not increasing with efflux of time. The Sales Tax Department is not charging any interest on the deferred tax. The amount of Rs.7.52 crores have actually been collected and appropriated by the appellant. It has been given the benefit to use this money for a period without any cost. The amount of Rs.7.52 crores is not a notional figure but actually collected and determined in Sales Tax Orders. Net Present Value (NPV) refers to value as it would accrue to Sales Tax Department. According to Deferral Scheme, the Sales Tax Department has to wait for a number of years to recover its own money. However, if the Sales Tax Department realizes a part of that money in presenti, it would be value-wise same as full amount due after 12 years. In the present example, the NPV means that Rs.3,37,13,393/- is same as Rs.7.52 crores after 12 years so far as Sales Tax Department is concerned. For appellant, it is only a remission of an actual liability of Rs.4,14,87,985/-. The question is if it is only a notional figure, why the appellant has taken the amount to reserve. **Therefore, this ground of appeal is dismissed and it is held that the amount of Rs.4,14,87,985/- has been correctly brought to tax u/s. 41 of the I. T. Act.**"

27) Thus, the Assessing Officer's order was upheld by dismissing the Appeal. In the meanwhile, what one finds is that there was a Special Bench constituted to resolve the divergence of views of coordinate Benches of the Tribunal. In the case of ***Deputy Commissioner of Income Tax vs. Sterlite Optical Technologies Ltd***.

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and vice-versa in **Income Tax Appeal Nos. 7136 and 7177/M/2004** for assessment year 2001-02, an order was passed by the Tribunal on 8th January, 2008 treating the difference between the deferred Sales Tax and its present value as capital receipt, not chargeable to tax, whereas, in another case, the Special Bench of the Tribunal has referred to in para 2, it was held that the same was chargeable under section 41(1). Then, reference was made to an order passed by this Court in the case of ***SI group India Ltd. vs. Assistant Commissioner of Income Tax*** **(2010) 326 ITR 117**, answering the question subsequently framed and reproduced in para 2 of the Tribunal's order in favour of the Assessee. The requirement spelt out for applicability of section 41(1)(a) has not been fulfilled in the facts of the present case. The argument before the Tribunal was since there was divergence of views, once the Hon'ble High Court has decided in favour of the Assessee, hence, no reference is required to be made to the larger Bench. However, the departmental representative argued that this Court has not decided the issue but has kept it open for being adjudicated and at an appropriate stage and in appropriate proceedings. Therefore, the issue remains alive and there is indeed divergence in views of the Tribunal. That is how the Special Bench framed the question on which its opinion was sought in para 5. Thereafter, it noted the facts as are available on record, including in the order of the Commissioner of Income Tax (Appeals). The special Bench

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noted all the arguments of the Assessee as also that of the departmental representative. The facts and these arguments are noted up till para 61 of the order.

28) The Special Bench, in para 62 held thus:

> "62. We have carefully considered the submission of the parties and perused the material available on record. We find that the material facts are not in dispute. The assessee company obtained incentive by way of sales tax deferral scheme under the package scheme of incentive 1983 (the 1983 scheme) and package scheme of incentive 1988, (the 1988 scheme) notified by the Government of Maharashtra. Under 1983 scheme the assessee's Unit at Kondhapuri, Tal Shirur Dist. Pune which at the relevant time a notified backward area was entitled to defer the payment of sales tax collected during the period 1.11.1989 to 31.10.1996 (7 years) up to the maximum of Rs.666.94 lacs being 85% of the fixed capital investment of Rs.874.64 lacs. The assessee collected sales tax in 7 years Rs.3,29,93,863/- which was to be repaid after 12 years in 6 equal annual instalments. Under the "1988 scheme", which is similar to "1983 scheme", the amount of tax actually deferred under the "1988 scheme" was Rs.4,22,07,515/-. Thus aggregate deferral amount under 1983 and 1988 schemes was Rs.7,52,01,338/- (Rs.3,29,93,863/- + Rs.4,22,07,575/-). We further find that it is also not in dispute that the sales tax collected by the assessee during the aforesaid period was allowed by the Assessing Officer u/s. 43B as actually paid in view of the CBDT Circular No. 496 dated 25.09.1987. We further find that there was an amendment made under the Bombay Sales Tax Act, 1959, (the Sales tax Act) by insertion of the third provision to sec. 38(4) of the Sales Tax Act, wherein SICOM or the relevant Regional Development Corporation or the District Industries Centre concerned was to convert the deferred sales tax into a loan and thereafter as per 2002 amendment, fourth proviso to sec. 38(4) of the Sales Tax Act by which the earlier 4th proviso was substituted, which provides that where the NPV of deferred tax as may be prescribed was paid, the deferred tax was deemed, in public interest, to have been paid. We further find that the assessee following the aforesaid amendment under the Bombay Sales Tax Act, 1959 has made repayment of loan of Rs.3,37,13,393/- (Rs.1,76,02,272/- of 1983 scheme + Rs.1,61,11,121/- of 1988 scheme) on 30.12.2002 as per NPV of the deferred tax as prescribed under Circular No. 39T of 2002 of Trade Circular dated

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12.12.2002 appearing at Pg. 174-186 to the assessee's paper book. The assessee claimed Rs.4,14,87,985/- being the difference between the deferred sales tax Rs.7,52,01,378/- and its Net Present Value amounting to Rs.3,37,13,393/- as capital receipt, credited in the books of account of the assessee in the capital reserve account. However, the Assessing Officer keeping in view that the assessee has obtained the benefit of payment of whole amount of Rs.7,52,01,378/- as deduction u/s. 43B of the Act in view of CBDT Circular No. 496 dated 25.09.1987, therefore, he brought the difference of Rs.4,14,87,985/- to tax u/s. 41(1) of the Act. The ld. CIT(A) on an appeal filed in this regard has also upheld the addition made by the Assessing Officer."

29) The Tribunal then referred to the decisions interpreting section 41(1). It concluded in para 70 that in order to invoke section 41(1), the three conditions required to be fulfilled are these:

"i. In the assessment of the assessee, an allowance or deduction has been made in respect of loss, expenditure or the trading liability incurred by the assessee.

ii. The assessee must have subsequently (i) obtained any amount in respect of such loss or expenditure or (ii) obtained any benefit in respect of such trading liability by way of remission or cessation thereof. In case either of these events happen, the deeming provision enacted in closing part of sub-sec. 1 comes into play.

iii. The amount obtained by the assessee or the value of benefit accruing to him is deemed to be profit and gains of the business or profession and it becomes chargeable to income tax as an income of that previous year."

30) Thereafter, the Tribunal proceeded to hold that section 41(1) does not make any distinction between the contractual trading liability or any statutory trading liability. Even in the case of statutory liability there is a remission or cessation of any amount whether in cash or in any other manner has been obtained in respect of the expenditure

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of this nature, the same would be deemed to be profit and gains of the business of the Assessee and accordingly be chargeable to income tax as the income of that year in which the benefit of amount is obtained. In para 72, the Tribunal reproduced section 38 of the Bombay Sales Tax Act and which was applicable at the relevant time. Particularly it emphasises sub-sections 1, 2, 3 and 4 and holds that the manner as to how the payment of Sales Tax, penalty and interest is to be made is found in these sub-sections. The provisos are referred to and particularly whether if premature payment in place of the amount of tax deferred is made in terms of the 4th proviso to sub section 4 of section 38. The Tribunal also refers to the dictionary meaning of the term "Net Present Value". On analysis of the definition of the term Net Present Value it is the conclusion of the Tribunal that the positive NPV means a better return and negative NPV means a worse return.

31) In the present case, it is not in dispute that the Assessee collected the total amount towards the Sales Tax of Rs.7,52,01,378/- and in para 76, the Tribunal holds that it was collected from 1989-90 to 2001-02. The Assessee treated this liability as unsecured loans in its books of account. After amendment to section 38 of the Bombay Sales Tax Act, a Notification was issued by the State Government on 16th November, 2002 introducing Rule 31D in the Bombay Sales Tax Rules,

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1959. That laid down the procedure for determination of NPV. Once the proviso was inserted and the Rules were published, the deferral units can exercise the option and of paying prematurely the Sales Tax. There was a table provided in Rule 31D of the Bombay Sales Tax Rules. The Tribunal extensively referred to this aspect in para 77 of the order under challenge and found that the payment of Sales Tax was deposited in some period four months before the due date and that is how the discounted percentage of deferred Sales Tax to be paid as NPV was prescribed. The NPV amount of Bombay Sales Tax dues and Central Sales Tax dues was worked out as per Certificate dated 27th December, 2002. The amount under the Certificate was paid on 30th December, 2002. That is also evident by a further Certificate dated 25th August, 2003. This amount was paid by the Assessee as per the offer made by the State Government and after the State appointed SICOM for settlement of deferred Sales Tax liability by immediate one time payment. The Assessee paid a sum of Rs.3,37,13,393/-, which, according to the Assessee, represented the NPV as determined by SICOM. This amount was paid by the Assessee, as evidenced by the above Certificates. The Revenue placed no material on record to show that the value does not reflect the NPV or that the NPV is yet to be calculated. The Tribunal found that the Revenue has not put up a case that there is no conversion provided under the BST or the table

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provided for determination of NPV is not applicable to the case of the Assessee. It is in these circumstances that it accepted the contentions of the Assessee and rejected that of the departmental representative.

32) The Tribunal made detailed reference to the decided cases and brought to its notice by both, the Assessee and the Revenue. The Tribunal found that the principle in the decided cases pertains to the subsidy received by the Assessee and whether it is capital receipt or revenue in nature. The controversy before the Tribunal is entirely different. That is whether the difference of deferred Sales Tax liability is chargeable to tax as business income under section 41(1) being remission or cessation of trading liability or the same is exempted as capital receipt. Therefore, the Tribunal held that the cases cited by the Revenue are distinguishable and on facts.

33) In para 85, a detailed reference is made to the decision of the Hon'ble Supreme Court in the case of ***Pollyflex (India) Pvt. Ltd.*** (supra). The Tribunal also referred to the Judgments of the Karnataka High Court, Rajasthan High Court, Panjab and Haryana High Court, Madras High Court and equally the Judgment of this Court in the case of ***Solid Containers Ltd.*** (supra). The Tribunal also referred to certain orders passed by its coordinate Benches. The Tribunal therefore held, when the entire loan amount, which was payable after 12 years in 6

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annual/equal installments, was repaid as per NPV prescribed by the State Government and no refund was received by the Assessee, it means, it did not get any benefit in respect of the trading liability by way of remission or cessation thereof. The Tribunal referred to the case of ***Mahindra and Mahindra Ltd. vs. Commissioner of Income Tax*** reported in **(2003) 261 ITR 501 (Bom.)**. This is a Judgment of this Court. It also referred to another Judgment of Delhi High Court in the case of ***Commissioner of Income Tax vs. Tosha International Ltd.*** reported in **(2009) 176 Taxman 187 (Del.)**. It also referred to a Judgment in the case of ***SI group India Ltd.*** (supra) of the Bombay High Court, its Special Bench decision in ***Reliance Industries*** reported in **(2004) 88 ITD 273 (Mum.) (SB)** and other Tribunal decisions and that continues up-to para 103 of its order.

34) In paragraph 104, the Tribunal held as under:

> "104. Having regard to the aforesaid law laid down by the Hon'ble Supreme Court and High Courts, we find that to invoke the provisions of section 41(1) of the Act, the first requirement is as to whether in the assessment of the assessee, an allowance or deduction has been made in respect of loss, expenditure or the trading liability incurred by the assessee. In the case of the present assessee the revenue's plea is that the assessee has obtained the benefit of deduction of sales tax liability u/s. 43B of the Act as per CBDT Circular No. 496 dated 25.9.1987. However, we find that in the said circular it has been clearly stated vide para 5 that "the statutory liability shall be treated to have been discharged **for the purposes of Section 43B**" (emphasis supplied). Thus, the benefit of deduction was allowed for the purpose of section 43B of the Act only and not under any other provisions of the Act. There

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> is no dispute that the Assessing Officer has also applied the aforesaid Board Circular while giving the benefit of deduction u/s. 43B of the Act. It is settled law that the circulars are binding on the department vide number of decisions of the Hon'ble Apex Court [see in Navnit Lal C. Jhaveri vs. K. K. Sen, AAC (1965) 56 ITR 198 (SC), Ellerman Lines Ltd. vs. CIT (1971) 82 ITR 913 (SC), K. P. Varghese vs. ITO (1981) 131 ITR 597 (SC) and UCO Bank vs. CIT (1999) 237 ITR 889 (SC)]. It is also settled law that the Court cannot add words to statute or read words into it which are not there vide Union of India vs. Deoki Nandan Aggarwal (1992) Supp. 1 SCC 323(80). The similar view has been reiterated recently in CIT vs. Tara Agencies (2007) 292 ITR 444 (SC). This being so we are of the view the first requirement of section 41(1) has not been fulfilled in the facts of the present case."

35) A perusal of these findings shows that the Tribunal concluded that it is incorrect or erroneous to hold that the Assessee obtained benefit of reduction of Sales Tax liability under section 43B of the I.T. Act as per Central Board of Direct Taxes' Circular No. 496 dated 25th September, 1987.

36) A copy of this Circular was produced before us by Mr.Gupta. That Circular refers to the issue of Sales Tax liability converted into loans and whether that may be allowed as deduction in assessment for previous year in which such conversion has been permitted by or under Government orders. In paras 1 and 2 of this Circular, the Department refers to the introduction by Finance Act, 1983 w.e.f. 1st April, 1984 of section 43B. Then, in para 3, it refers to several representations received from various State Governments and others that cases of deferred Sales Tax payments should be excluded from the

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purview of section 43B as the operation of this provision has the effect of diluting the incentive offered by the deferral schemes. In para 4, the Circular refers to the consultation with the Ministry of Law, Government of India and the various State Governments and very opinion of the Law Ministry. It has also made reference to the Bombay Sales Tax (Amendment) Act, 1987 and directs that where amendments are made in the Sales Tax laws on the lines indicated in the Circular, the statutory liability shall be treated to have been discharged for the purpose of section 43B of the I.T. Act. Section 43B of the I.T. Act reads as under:

> "**S. 43B.** Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of -
>
> (a) any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, or
>
> (b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees, or
>
> (c) any sum referred to in clause (ii) of sub-section (1) of section 36, or
>
> (d) any sum payable by the assessee as interest on any loan or borrowing from any public financial institution or a State financial corporation or a State industrial investment corporation, in accordance with the terms and conditions of the agreement governing such loan or borrowing; or
>
> (e) any sum payable by the assessee as interest on any loan or advances from a scheduled bank in accordance with the terms and conditions of the agreement governing such loan or advances, or
>
> (f) any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee,
>
> shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him:
>
> ….. "

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37) Thus, notwithstanding anything contained in any provision of the Income Tax Act, a deduction otherwise allowable under the Act in respect of any sum payable by the Assessee by way of tax, duty, cess or fee by whatever name called under any law for the time being in force, shall be allowed irrespective of the previous year in which the liability to pay such sum was incurred by the Assessee according to the method of accounting regularly employed by him only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him.

38) The Tribunal also refers to another Circular No. 674 dated 29th December, 1993 and that is in relation to the steps taken to issue Government orders notifying Schemes under which Sales Tax is deemed to have been actually collected and disbursed as loan. Besides amendments to the Sales Tax Act, if any, such Government orders are issued, then, they are also brought within the purview of the Circular.

39) In relation to this aspect, the Tribunal held that the benefit of deduction was allowed for the purpose of section 43B only and not under any other provisions of the Act. The Tribunal held that the Assessing Officer applied the Circular while giving benefit of deduction under section 43B of the I.T. Act. Thus, if the sum is actually paid by the Assessee in the previous year, then, in computing income referred to

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in section 28 of that previous year, the deduction under section 43B shall be allowed. Mr. Gupta relies upon this Circular and to urge that this Circular contemplates deemed payment of Sales Tax dues. That is on the footing that the payment was made earlier than 7 to 12 years, it will discharge the Assessee of the liability. If payment of lesser amount discharges the Assessee of his liability in full, then, the argument of Mr.Gupta is this is deemed payment of Sales Tax dues.

40) It is not possible to agree with Mr. Gupta. Because, premature payment of Sales Tax already collected but its remittance to the Government, as Mr. Gupta envisages, is not covered by this provision else the sub-sections and particularly section 43B(1) would have been worded accordingly. Therefore section 43B has no application. Insofar as applicability of section 41(1)(a), there also the applicability is to be considered in the light of the liability. It is a loss, expenditure or trading liability. In this case, the scheme under which the Sales Tax liability was deferred enables the Assessee to remit the Sales Tax collected from the customers or consumers to the Government not immediately but as agreed after 7 to 12 years. If the amount is not to be immediately paid to the Government upon collection but can be remitted later on in terms of the Scheme, then, we are of the opinion that the exercise undertaken by the Government of Maharashtra in

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terms of the amendment made to the Bombay Sales Tax Act and noted above, may relieve the Assessee of his obligation, but that is not by way of obtaining remission. The worth of the amount which has to be remitted after 7 to 12 years has been determined prematurely. That has been done by finding out its NPV. If that is the value of the money that the State Government would be entitled to receive after the end of 7 to 12 years, then, we do not see how ingredients of sub section (1) of section 41 can be said to be fulfilled. The obligation to remit to the Government the Sales Tax amount already recovered and collected from the customers is in no way wiped out or diluted. The obligation remains. All that has happened is an option is given to the Assessee to approach the SICOM and request it to consider the application of the Assessee of premature payment and discharge of the liability by finding out its NPV. If that was a permissible exercise and in terms of the settled law, then, we do not see how the Assessee can be said to have been benefited and as claimed by the Revenue. The argument of Mr.Gupta is not that the Assessee having paid Rs.3.37 crores has obtained for himself anything in terms of section 41(1), but the Assessee is deemed to have received the sum of Rs.4.14 crores, which is the difference between the original amount to be remitted with the payment made. Mr. Gupta terms this as deemed payment and by the State to the Assessee. We are unable to agree with him. The Tribunal

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has found that the first requirement of section 41(1) is that the allowance or deduction is made in respect of the loss, expenditure or a trading liability incurred by the Assessee and the other requirement is the Assessee has subsequently obtained any amount in respect of such loss and expenditure or obtained a benefit in respect of such trading liability by way of a remission or cessation thereof. As rightly noted by the Tribunal, the Sales Tax collected by the Assessee during the relevant year amounting to Rs.7,52,01,378/- was treated by the State Government as loan liability payable after 12 years in 6 annual/equal installments. Subsequently and pursuant to the amendment made to the 4th proviso to section 38 of the Bombay Sales Tax Act, 1959, the Assessee accepted the offer of SICOM, the implementing agency of the State Government, paid an amount of Rs.3,37,13,393/- to SICOM, which, according to the Assessee, represented the NPV of the future sum as determined and prescribed by the SICOM. In other words, what the Assessee was required to pay after 12 years in 6 equal installments was paid by the Assessee prematurely in terms of the NPV of the same. That the State may have received a higher sum after the period of 12 years and in installments. However, the statutory arrangement and vide section 38, 4th proviso does not amount to remission or cessation of the Assessee's liability assuming the same to be a trading one. Rather that obtains a payment to the State prematurely and in terms of the correct

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value of the debt due to it. There is no evidence to show that there has been any remission or cessation of the liability by the State Government. We agree with the Tribunal that one of the requirement of section 41(1)(a) has not been fulfilled in the facts of the present case.

41) The alternate argument which was noted in para 106 of the Tribunal's order has not been canvased before us. We have also not been taken through the entire procedure by which the conversion of deferred Sales Tax liability into interest free loan takes place. In such circumstances, we do not think that the amount of Sales Tax collected from 1st November, 1989 to 31st October, 1996, payments of which were deferred under the Scheme and the amounts were payable after 12 years in 5 equal installments commencing from 1st May, 2003, means that the liability was a future one. Assuming it to be so, later on, the State Government came with a Scheme and by which it gave an option to parties like the Assessee of payment of that liability at a discounted value or NPV immediately. In this case, and in such a situation, the exercise cannot be construed as remission of liability. The State Government has not waived the liability as noted by us above. The State Government would have received the money from 1st May, 2003 to 1st May, 2008. However the amount of Rs.3,37,13,393/- was paid to SICOM on 30th December, 2002. An amount which could have been

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received only between 5 years from 2003 to 2008 having been paid on 30th December, 2002, this is not a case of a remission. Therefore, we do not see how the reasons assigned by the Tribunal in para 108 would enable us to hold otherwise.

42) In such circumstances, the Tribunal's conclusion in para 109 that the difference between the NPV Rs.3,37,13,393/- against the future liability of Rs.7,52,01,378/- credited by the Assessee under the capital reserve account in its books of account, is a capital receipt is correct. It cannot be termed as remission or cessation of a trading liability and subsequently no benefit has arisen to the Assessee in terms of section 41(1) of the I.T.Act.

43) We agree with the Tribunal's conclusion also because in a recent Judgment brought to our notice, the Hon'ble High Court of Karnataka has taken a similar view. In its Judgment delivered in the case of ***McDowell and Co. Ltd.*** (supra) the Karnataka High Court determined and decided a similar controversy. A similar scheme was availed of by M/s. McDowell, the Assessee before the Karnataka High Court under the BST, wherein, it paid the NPV against premature payment of the amount of the deferred tax under a incentive Scheme and settled the amount. As against a higher sum, which was due and payable and afterwards, the Assessee paid the lesser sum of

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Rs.,25,79,684/- to the Sales Tax Department on 29th March, 2004 and the amount got settled.

44) In relation to this very controversy and the very provision namely section 41(1), the High Court of Karnataka noted the rival contentions in para 5 and 6. Those were admittedly raised on the factual background that deferred Sales Tax was to be paid in the year 2007. The State Government itself determined the NPV of the amount, which was receivable in 2017, calculated the same and treated it as payment of deferred tax.

45) In dealing with the rival contentions, the High Court framed one identical substantial question of law as was dealt with by the Tribunal in the present case before us and held as under:

> "....
>
> 8. As per the incentive scheme announced by the Government of Maharashtra, the assessee entered into an agreement with the Governor of Maharashtra to avail the benefits under deferral/1993 scheme which provides for deferment of payment of taxes. This agreement not only determines the eligibility of the assessee but also lays down the terms and conditions under which the agreement exists. The quantification of this deferment was made by Sicom Limited, a Government of Maharashtra Undertaking, which was an agent for the package scheme of incentives. M/s. Sicom Limited quantified the entitlement of deferral of sales tax to the assessee. As against the total amount of Rs.20,21,64,149/- collected by the assessee towards Bombay Sales Tax and Central Sales Tax, the maximum entitlement of sales tax incentives by way of deferment was determined at Rs.13,78,41,600/-. The validity period of the deferral was determined as 1.4.2002 to 31.3.2017, thereby the assessee

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could retain the amount of sales tax collected to the extent of Rs.13,78,41,600/- up to 31.3.2017. Accordingly, a certificate of entitlement was issued by the Deputy Commissioner of Sales Tax (Incentives and Enforcement) dated 1.4.2002. consequent to the assessee opting for the scheme of deferment of sales tax, an amount of Rs.13,78,41,600/- was deemed to have been paid for the purpose of Section 43B of the Act and, therefore, while concluding the assessment for the assessment year 2003-04, the same was allowed as a deduction. The Maharashtra Government by way of Maharashtra Tax Laws (Levy and Amendment) Act, 2002 inserted the proviso to Section 38 of the Bombay Sales Tax Act, 1959 which came into effect from 1.5.2002. The proviso provided that notwithstanding anything to the contrary contained in the Act or in the Rules or in any of the package scheme of the incentives or in the Power Generation Promotion Policy 1998, the eligible unit to whom the entitlement certificate has been granted for availing of the incentives by way of deferment of sales tax, purchase tax, additional tax, turn over tax or surcharge as the case may be, may, in respect of any of the periods during which, the said certificate is valid, at its option, prematurely in place of the amount of tax deferred by it an amount, equal to the net present value of the deferred tax as may be prescribed and on making such payments, in the public interest, the deferred tax shall be deemed to have been paid.

9. In view of the proviso to Section 38 of the Bombay Sales Tax Act, 1959, the net present value was determined at Rs.4,25,79,684/-. It was paid on 2.4.2004 in Form No. 25. Consequent to the payment of the net present value, the Deputy Commissioner of Sales Tax has issued a certificate on 14.4.2004 waiving the balance of the amount payable. It is thereafter the assessee did not offer Rs.9,52,61,916/- for tax.

…..

11. As could be seen from the aforesaid provision, if the assessee obtains, whether in cash or in any other manner in respect of such loss or expenditure or some benefit in respect of 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 the previous year. Therefore, the assessee should obtain benefit, before it is deemed to be profits and gains of business or profession.

J.V.Salunke,PA

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> 12. In the instant case, as per the scheme he was allowed to retain the sales tax as determined by the competent authority and pay the same 15 years thereafter. The tax collected was deemed to have been paid and, therefore, the tax so collected cannot be construed as income in the hands of the assessee. The tax so retained by the assessee is in the nature of a loan given by the Government as an incentive for setting up the industrial unit in a rural area. The said loan had to be repaid after 15 years. Again it is an incentive. However, by a subsequent scheme, a provision was made for premature payment. when the assessee had the benefit of making the payment after 15 years, if he is making a premature payment, the said amount equal to the net present value of the deferred tax was determined at Rs.4,25,79,684/- and on such payment the entire liability to pay tax/loan stood discharged. Again it is not a benefit conferred on an assessee. Therefore, Section 41(1) of the Act is not attracted to the facts of this case. Hence, the Tribunal was justified in holding that there is no liability to pay tax. Under these circumstances, we do not see any error committed by the Tribunal in passing the impugned order. The substantial question of law is answered in favour of the assessee and against the revenue."

46) We respectfully concur with the above view of the High Court of Karnataka.

47) Once we concur, then, we do not deem it necessary to deal with the other Judgments cited by Mr. Dastur. They are essentially cited so as to urge that what has taken place as between the Assessee, the State Government and SICOM could not be questioned by the Revenue.

48) The other order which has been brought to our notice is delivered by a Division Bench of this Court in the case of ***Commissioner of Income Tax vs. Xylon Holdings Pvt. Ltd.*** in **Income Tax Appeal No. 3704 of 2010** decided on 13th September, 2012. That is on the point as

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to whether Assessee's loan liability is capital receipt not taxable as income. In relation to that the Division Bench held as under:

> ".....
> 8) We have considered the submissions. The issue arising in this case stand covered by the decision of this Court in the matter of Mahindra & Mahindra (supra).The decision of this court in the matter of Solid Containers (supra) is on completely different facts and inapplicable to this case. In the matter of Solid Containers (supra) the assessee therein had taken a loan for business purpose. In view of the consent terms arrived at, the amount of loan taken was waived by the lender. The case of the assessee therein was that the loan was a capital receipt and has not been claimed as deduction from the taxable income in the earlier years and would not come within the purview of Section 41(1) of the Act. However, this Court by placing reliance upon the decision of the Apex Court in the matter of CIT v. T.V. Sundaram Iyengar and Sons Ltd. 222 ITR 344 held that the loan was received by the assessee for carrying on its business and therefore, not a loan taken for the purchase of capital assets. Consequently, the decision of this Court in the matter of Mahindra and Mahindra Limited (supra) was distinguished as in the said case the loan was taken for the purchase of capital assets and not for trading activities as in the case of Solid Containers Limited (supra). In view of the above, the decision of this Court in the matter of Solid containers Limited (supra) will have no application to the facts of the present case and the matter stands covered by the decision of this Court in the matter of Mahindra & Mahindra Limited (supra). The alternative submission that the amount of loan written off would be taxable under Section 28(iv) of the Act also came up for consideration before this Court in the matter of Mahindra & Mahindra Limited (supra) and it was held therein that Section 28(iv) of the Act would apply only when a benefit or perquisite is received in kind and has no application where benefit is received in cash or money.
> ....."

49) These observations of the Division Bench have been reproduced only to distinguish the Judgment of an another Division Bench of this Court in the case of ***M/s. Solid Containers Ltd.*** (supra), which is relied upon by Mr. Gupta.

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50) Further, our view finds support from the above observations. In ***Mahindra and Mahindra Ltd. vs. commissioner of Income Tax*** **(2003 261 ITR 501,** the Bench speaking through His Lordship the Hon'ble Mr. Justice S. H. Kapadia, as his Lordship then was, held as under:

> " Alternatively, it was argued on behalf of the Department that in this case waiver constituted remission of trading liability and, therefore, section 41(1) stood attracted. We do not find any merit in this argument. Firstly, in the present case, the prerequisite of section 41(1) is not applicable. In order to apply section 41(1), an assessee should have obtained a deduction in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee. In this case, the assessee has not obtained such allowance or deduction in respect of expenditure or trading liability. It is not disputed that the assessee has paid interest at 6 per cent. over a period of ten years to KJC on Rs.57,74,064/. In respect of that interest, the assessee never got deduction under section 36(1)(iii) or section 37. In the circumstances, section 41(1) was not applicable because such deduction was not in respect of loss, expenditure or trading liability. In order to get over this alternative argument, it was argued by the Department that the loan was used to buy toolings on which assessee got depreciation allowance of Rs.27,29,585 and, therefore, the amount of Rs.27,29,585 should be set off against Rs.57,74,064. We do not find any merit in this argument. The Department's case is that the assessee got remission of Rs.57,74,064. Remission for depreciation is not in issue before us. The only argument of the Department throughout has been that the waiver constituted remission of Rs.57,74,064. In the circumstances, we cannot direct set off of Rs.27,29,585 against Rs.57,74,064. It is important to bear in mind that before section 41(1) came to be enacted, various judgments as reported in *Mohsin Re4hman Penkar v. CIT (1948) 16 ITR 183 (Bom) and Orient Corporation v. CIT (1950) 18 ITR 28 (Bom)* had laid down that remission was not income and in order to get over those judgments section 41(1) came to be enacted. In the case of *Phool Chand Jiwan Ram (1981) 131 ITR 37 (Delhi),* the assessee firm had purchased goods. They had also obtained loans from a party, accounts were settled and the balance was credited to the partners' account. It was held by the Delhi High Court that the amount referable to loans was not a trading liability. That, only amounts allowed as deduction in earlier years could be treated as a trading liability. In other words, unless the amounts heave been allowed as deduction in earlier years they cannot be

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> treated as trading liability. In the circumstances, section 41(1) was not applicable. This case applies to the facts of our case also. In the case of CIT v. A.V.M. Ltd. (1984) 146 ITR 355 (Mad), it has been held by the Madras High Court that every deposit money does not constitute trading receipt. That, although such a receipt may be in connection with business, it could not be dealt with by the assessee as a receipt of its trade. Therefore, the amounts referable to loans received for purchase of capital asset would not constitute a trading liability and accordingly section 41(1) was not attracted.
>
> In our case, the most fundamental fact which is required to be borne in mind is that there was no deduction given to the assessee in earlier years and, therefore, Rs.57,74,064 could not be include as income under section 41(1) of the Act. Lastly, it is important to bear in mind that the toolings constituted capital asset and not stock-in-trade. Therefore, taking into account all the above facts, section 41(1) of the Act is not applicable.
>
> In the circumstances, the above questions are all answered in the affirmative, i.e., in favour of the assessee and against the Department.
>
> This disposes of Reference Application No. 1709 of 1982 filed by the Department."

51) In the final analysis, we find that Mr. Gupta can derive no assistance from the Judgment of ***Pollyflex (India) Pvt. Ltd.*** (supra). There, the Assessee paid excise duty on certain goods. Pursuant to the decision of the Customs, Excise and Gold Control Appellate Tribunal, a sum of Rs.9,64,206/- was refunded in September, 1988. The Excise Department filed an Appeal to the High Court but it was dismissed. A Petition for special leave to Appeal before the Hon'ble Supreme Court was filed, but fate of that Petition was not known. For the assessment year 1989-90, the Assessing Officer brought to tax the amount by invoking section 41(1) of the I.T. Act, but the Appellate Authority and the Appellate Tribunal held that there was no remission or cessation of trading liability so long as the Petition for special leave to appeal was

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pending in the Supreme Court. A reference was made to the High Court, but it held that the amount was assessable to tax. However, on the basis of the Counsel's argument that the Tribunal ought to consider the question whether the excise duty was actually refunded to the Assessee or not, the case was sent back to the Tribunal. This was a clear case, in our view, as held by the Supreme Court, the statutory levy being discharged by the Assessee, the amount thereunder was refunded to him. That will definitely be a case where he obtains an amount in respect of the expenditure within the meaning of section 41(1) of the I.T. Act. It will not be a case of "benefit by way of remission/cessation of trading liability". It is in these circumstances that the Judgment of the Hon'ble Supreme Court was rendered. We do not find that the observations and conclusions at pages 346 and 347 of the report, which are relied upon heavily by Mr.Gupta, would have any application in the facts and circumstances of the present case. The Judgment of the Hon'ble Supreme Court is therefore distinguishable on facts.

52) We are of the opinion that the Revenue's argument really misses the point. The Incentive to establish a unit or factory in a industrially backward or hilly area is the core of the Sales Tax Deferral Scheme. Some time has to be given to the unit to establish itself before it starts giving corresponding benefit to the state. That opportunity is

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granted by deferring the remittance of the Sales Tax collected by the unit like the Assessee. In that regard, we have perused the compilation of admitted documents placed on record by Shri. Dastur. From a perusal thereof, it is apparent that the Government Resolution dated 4th May, 1983 evolves a package of incentives to disperse the industries from Bombay–Thane–Pune belt and to attract them to underdeveloped and developing areas of the State of Maharashtra. This package evolves several measures to achieve this object. Then, there is a New Package Scheme of incentives, 1988. Both Schemes have clauses and paras containing Sales Tax deferral incentives. To carry this object further and also to achieve the purpose of early remittance of deferred Sales Tax collected by the units availing of the Schemes, the statutory option was incorporated in section 38 by substituting the 4th proviso to sub-section 4 of section 38 of the Bombay Sales Tax Act, 1959. That is informed by the Trade Circular dated 12th December, 2002 issued by the Commissioner of Sales Tax, Maharashtra. A combined reading of the Schemes and this Circular reveals the legislative intent as noted above. In such circumstances, a proper understanding of all this by the Tribunal cannot be termed as perverse. The view taken by it is imminently possible. Once this conclusion is reached, the other Judgments cited by the Revenue are obviously distinguishable and on facts.

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53) As a result of the above discussion, we find that the questions of law formulated by us and termed as substantial will have to be answered in favour of the Assessee and against the Revenue. Those are answered accordingly. The Appeals are dismissed. Insofar as Income Tax Appeal No. 909 of 2012 is concerned, at page 4 of the paper book in that Appeal, two additional questions in para 4(B) and 4(C) are termed as substantial questions of law. However, the Counsel appearing for the parties conceded that questions (B) and (C) are covered by two Judgments noted by the Tribunal, namely, in the case of ***Associated Capsules Pvt. Ltd. vs. Deputy Commissioner of Income Tax and Anr.*** reported in **(2011) 332 ITR 42 (Bom)** and ***Commissioner of Income Tax vs. Saumya Finance and Leasing Co. Pvt. Ltd.*** reported in **(2008) 300 ITR 422 (Bom).** These are Judgments which are rendered in favour of the Assessee by this Court and against the Revenue. Therefore, the additional questions also cannot be termed as substantial questions of law. That Appeal is also dismissed accordingly. However, in the facts and circumstances, there would be no order as to costs.

(A.K.MENON, J.) **(S.C.DHARMADHIKARI, J.)**

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