* **IN THE HIGH COURT OF DELHI AT NEW D**

ITA No. 51 of 2009 & CM No.15419

Reserved on: 06th November, 2009

% *Pronounced on : 23rd December, 2009*

The Commissioner of Income Tax – II . . . Appellant

through : Mr. Sanjeev Sabharwal, Advocate.

VERSUS

Jindal Equipments Leasing & Consultancy Services Ltd. . . .Respondent

through: Mr. Ajay Vohra with Ms. Kavita Jha and Mr. Sriram Krishna, Advocates.

CORAM :-
THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. The respondent (hereafter referred to as 'the assessee') is an investment company registered with RBI and NBFC. During the previous year relevant to the assessment year 2003-04, the assessee reflected a loan of Rs.6,80,31,189/- payable to M/s. Jindal Steel & Power Ltd. (JSPL). Out of the above, JSPL had written off a sum of Rs.1,46,53,065/- in its books of accounts. In the light of this, when the creditor had writ ten off this amount,

assessee and to this extent it was assessee's gain and a under Section 41(1) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'). Plea of the assessee that JSPL had done it unilaterally and without the knowledge of the assessee, did not convince the AO. The CIT (Appeals) confirmed the addition made by the AO in terms of Section 41(1) read with Section 28(i) of the Act.

2. On further appeal by the assessee, the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal) has, however, deleted the addition made by the AO/CIT(A). As per the Tribunal, the assessee had neither claimed nor it had been allowed deduction of the amount of outstanding loan availed from JSPL and therefore, Section 41(1) of the Act had no application. For this the Tribunal relied upon the judgment of this Court in the case of ***Commissioner of Income Tax*** Vs. ***Phool Chand Jiwan Ram*** [131 ITR 37] and the decision of the Gujarat High Court in the case of ***Commissioner of Income Tax*** Vs. ***Chetan Chemicals Pvt. Ltd.*** [267 ITR 770].

3. The Revenue has filed this appeal under Section 260A of the Act raising the following question of law:

> "Whether in the facts and circumstances of the case, the learned Income Tax Appellate Tribunal erred in holding

4. Thereafter, the Revenue filed amended memo of appeal raising the following question of law:

> "Whether the amount of loan written off by the sister concern of the assessee is income of the assessee within the meaning of Section 28 of the Income Tax Act, 1961?"

5. We heard learned counsel for the parties on the question raised in the appeal/amended memo of appeal. In fact, insofar as question of law raised initially in the appeal with regard to addition under Section 41 of the Act is concerned, learned counsel for the appellant/Revenue conceded that Section 41 has no applicability to the facts of this case. Precisely, this was the reason for amending the memo of appeal and as the attempt of the Revenue is that the aforesaid amount can still be treated as income at the hands of assessee within the meaning of Section 28 of the Act is not applicable. Therefore, it is this aspect which we are required to discuss in the present appeal. Before we venture into the arena where this controversy is fought between the parties on merits, it would be necessary to deal with the preliminary submission of the learned counsel for the respondent, who has argued that the Revenue is not entitled to take up this ground for the first time in this appeal. His submission was that addition for the amount of loan written off

terms of Section 41(1) read with Section 28(i) of the Ac Tribunal deleted the addition holding that Section 41(1) had no applicability since the loans obtained from JSPL had neither been claimed nor allowed deduction in the earlier assessments of the assessee. He thus argued that it is settled law that the basis of assessment as adopted by the AO cannot be varied by the Tribunal and/or by the High Court, which unlike the CIT(A) have no power to enhancement. The Revenue cannot be allowed to change the very foundation on which the assessment was bassed, to the prejudice and detriment of the assessee, as held by the Hon'ble Supreme Court in the case of ***MCorp Global Pvt. Ltd.*** Vs. ***Commissioner of Income Tax*** [309 ITR 434].

It was also pointed out that though the CIT(A) had sustained the addition in terms of Section 41(1) read with Section 28(i) of the Act, he had only invoked Clause (i) of Section 28 of the Act and not Clause (iv) thereof. In this behalf, further submission of the learned counsel was that clause (i) of Section 28 stipulates that the profits and gains of business or profession which was carried by the assessee during the previous year shall be treated as income chargeable to income tax under the head of "profits and gains of business or profession". The computation of profits and gains referred to in Section 28(i) has to be in terms of Sections

made by the AO under Section 41(1) of the Act read with the Act, which does not create any separate charge. On the other hand, Section 28(iv) deals with altogether different aspect, *viz.*:

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

6. The argument, therefore, was that different clauses of Section 28 are independent and mutually exclusive and it is not open to the Department to seek to justify the addition with reference to Section 28(iv) of the Act and altogether different provision.

7. We do not find any merit in this preliminary submission of the learned counsel for the assessee. The AO had made the addition in terms of Section 41(1) of the Act read with Section 28(i) of the Act, which was upheld by the CIT(A). No doubt, the Tribunal has held that Section 41(1) does not apply to which legal position is constituted by the learned counsel for the Revenue before us, the Revenue still wants that the addition be sustained under provisions of Clause (iv) of Section 28 of the Act. The Revenue is not disputing the facts on the basis of which decision of the Tribunal is based. Submission is that on these very facts, provisions of Section 28(iv) of the Act shall be attracted. It is a pure question of law and therefore, the amended ground as

transaction in question was treated as lease transaction in earlier assessment years and depreciation was granted on that basis. However, in the assessment year in question, the same very transaction was treated as financial transaction and depreciation was disallowed. It was in this backdrop, the Supreme Court opined that the depreciation given to the assessee could not be withdrawn, moreso when the finding of fact that the transaction in question was leased and not financial transaction had become final and had not been challenged.

8. With this, we proceed to examine this aspect on its own merit, *viz.*, whether provisions of Section 28(iv) of the Act are attracted in the given case. Thus, what is to be seen is that as to whether written off the amount of Rs.14653065/- in its books of accounts by JSPL amount to the value of any benefit or perquisite whether convertible into money or not can be treated as "profits and gains from business". The pre-requisites for attracting the said provisions are:

i) Benefit or perquisite arising in the course of business is of the nature, other than cash or money. It is for this reason expression "whether convertible into money or not" is mentioned in Clause (iv). Bombay High Court has

ITR 501] in the following manner:

> "…..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) does not apply to benefits in cash or money (see 130 ITR 168, Gujarat)….."

ii) Benefit or perquisite must be one arising in the course of business.

9. For this reason, we are not going into the question as to whether second requisite is fulfilled or not. In the present case, the Tribunal has held that the waiver/written off part of principal amount of loan by JSPL does not constitute income at the hands of the assessee. On the facts of this case and particularly having regard to the nature of business only, it will constitute capital receipt.

10. We thus answer the question in favour of the assessee and against the Revenue. As a consequence, we dismiss this appeal.

(A.K. SIKRI)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

December 23, 2009.