REPORTABLE

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

\+ **ITA No.1623 of 2010**

with

ITA No.503 of 2010

RESERVED ON: JANUARY 24, 2011
% PRONOUNCED On: FEBRUARY 18, 2011

1) ITA No.1623 of 2010

LOGITRONICS PVT. LTD . . . Appellant

through : Mr. Satyen Sethi with Mr. Arta Trana Panda, Advocates.

VERSUS

COMMISSIONER OF INCOME TAX & ANR. . . .Respondent

through: Mr. Kamal Sawhney, Sr. Standing Counsel.

2) ITA No.503 of 2010

COMMISSIONER OF INCOME TAX . . . Appellant

through : Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

VERSUS

JUBILANT SECURITIES PVT. LTD. . . .Respondent

through: Mr. Ajay Vohra with Ms. Kavita Jha and Mr. Somnath Shukla, Advocates.

CORAM :-
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

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. Having regard to the commonality in the legal question which

legal principle which is involved, we will take up the appeal separately applying principles to the situation appearing in each of the case.

ITA No.1623 of 2010

2. The issue in this case relates to the treatment which is to be given to the extent of amount of loan and interest waived by the financing institutions from where the loan was taken. The appellant is the assessee company, which is engaged in the business of manufacturing of electronic products. It was enjoying loan facility from State Bank of India (SBI). As the appellant could not discharge its liability for specific time, keeping in view the guidelines/directions of the SBI, the SBI categorized this loan as Non-Performing Asset (NPA). As on 31.03.1998, principal amount of loan due to the bank was ₹4,76,92,213 and outstanding interest was ₹1,90,42,295. Issue of recovery of loan was referred to Debt Recovery Tribunal in the year 2000. During the pendency of these proceedings, the assessee had settled the matter with the SBI. Pursuant to one time settlement with the bank, on payment of ₹1,85,00,000 against loan of ₹4,76,92,213 (principal amount), the remaining sum of ₹1,90,42,295 was waived. In the tax return filed by the assessee, it showed interest waived as income but not the amount of loan waived by SBI, though amount of interest written off i.e., ₹1,90,42,295 was credited to profit & loss account and was offered for taxation. However, relying upon the decision of this Court in the case of ***Commissioner of Income Tax Vs. Tosha International Ltd.*** **[176 Taxman 187]**, principal amount written off i.e. ₹2,91,42,213 that was directly taken to balance sheet

3. The AO framed assessment order dated 16.12.2006. For t following reasons, the Assessing Officer held that even waiver of principal amount of loan was also taxable:

   (a) When an assessee ceases to be liable to pay something that he was legally bound to pay, then in effect, he gains the amount that he was bound to pay. Therefore, principal amount of loan written off was nothing but gain/income in the hands of the appellant.

   (b) Income pursuant to waiver accrued on settlement because prior thereto claim of the bank was alive and that income must be recognized in the period during which settlement took place.

   (c) Judgment of this Court in ***Tosha International Ltd. (supra)*** was distinguishable because all that was decided was that the principal amount written off was not taxable under Section 41(1) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') and it was not held that such income was exempt.

   (d) Income was taxable under the head profit and gains of business and profession because loan was taken for the purpose of business and one time settlement was an integral part of the business.

4. A perusal of the definition of Section 2(24) of the Act, which defines "income" would include the value of any benefit or perquisite, whether convertible into money or not, that would arise from the business. In order to appreciate the issue involved, it is relevant to extract the necessary provisions of the Act.

(i)profits and gains;

(vd)the value of any benefit or perquisite taxable under Clause (iv) of Section 28;"

5. Section 28(iv) of the Act, comes under the heading "Profit and Gains of business or profession" and the same is extracted herein:

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

6. Similarly, Section 41(1) of the Act deals with "profits chargeable to tax" and the same is extracted herein:

"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

(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 case 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.]

(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;"

7. In the first appeal, the CIT (A), *inter alia*, relying upon the decision in ***Tosha International Ltd. (supra)*** deleted the addition holding that the provisions of Sections 2(24), 28(i), 28(iv) and 41(1) of the Act were not applicable and as such, the AO was not justified in making addition of ₹2,91,42,213 being waiver of principal amount of loan.

8. On second appeal filed by the Revenue, the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') by its impugned order dated 30.04.2010 reversed the order of the CIT (A) for the following reasons:

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

(b) In the case of ***Mahindra & Mahindra Ltd. Vs. Commissioner of Income Tax*** **[261 ITR 501(Bom.)]**, loan was to purchase plant and machinery – dies, tools, etc., i.e., capital assets. It was on these facts that waiver of principal amount of loan was held to be neither covered by

(c) In the case of ***Tosha International Ltd. (supra)*****,** neith the Tribunal nor this Court considered the issue from the stand point of principal laid down by the Supreme Court in the case of ***Commissioner of Income Tax Vs. T.V. Sundaram Iyengar and Sons Ltd.*** **[(1966) 222 ITR 344**.

(d) In ***Solid Containers Ltd. Vs. Deputy Commissioner of Income Tax*** **[(2009) 308 ITR 417]**, the Bombay High Court applying the decision in ***T.V. Sundaram Iyengar and Sons Ltd. (supra)*** distinguished its decision in ***Mahindra & Mahindra Ltd. (supra)*** and has held that on waiver of loan taken for business purposes, the amount is retained in the business and as such, the amount that initially did not have the character of income becomes income liable to tax.

(e) Decisions rendered in ***Commissioner of Income Tax Vs. P. Ganesh Chettiar*** **[(1982) 133 ITR 103 (Mad.)** and ***Commissioner of Income Tax Vs. Phool Chand Jiwan Ram*** **[(1981) 131 ITR 37 (Del.)** were of no assistance to the appellant because the same were rendered prior to judgment of the Supreme Court in ***T.V. Sundaram Iyengar and Sons Ltd. (supra)***.

9. Against the order of the Tribunal, the instant appeal is preferred and in the aforesaid circumstances, following substantial questions of law have arisen for consideration:

> "(1) Whether the Tribunal was right in law in holding that taxability of waiver of loan would be governed by the purpose for which the loan was

the purpose of business/trading activity gives rise to income taxable under the Act?

(2) Whether waiver of loan, a subsequent event has the effect of changing the nature and character of loan, a capital receipt into a trading receipt and therefore, ratio of judgment of Hon'ble Supreme Court in CIT v. T.V. Sundaram Iyengar & Songs Ltd. (1996) 222 ITR 344, wherein, unclaimed deposits received in the course of trading transaction were held to be taxable is applicable to waiver of loan?"

10. It is clear from the above that the issue relates to admissibility of waiver of loan. On the other hand, the assessee contends that the issue is covered in its favour by the two judgments of this Court in ***Tosha International Ltd. (supra)*** and ***Commissioner of Income Tax Vs. Jindal Equipments Leasing & consultancy Services Ltd.*** **[(2004) 325 ITR 57]**. The Tribunal has held that it is the ratio of the judgment of the Supreme Court in ***T.V. Sundaram Iyengar and Sons Ltd. (supra)***, which would be attracted in the instant case.

11. Before taking up all the decisions in the aforesaid cases, we may state the scheme of the Act on this aspect, in brief. Under Section 4 of the Act, the charging Section, the charge of income tax is upon the "total income of the previous year". The term 'income' is defined under Section 2(24) of the Act. In general, all receipts of revenue nature, unless specifically exempted are chargeable to tax. Loan taken is not normally a kind of receipt which will be treated as income. However, when a part of that loan is waived by the creditor, some benefit accrues to the assessee. Question is what would be the character of waiver of part of loan at the hands of the assessee? Waiver definitely gives some benefit to the assessee. Whether it is to be treated as capital receipt? If it is so,

then only capital gain tax would be chargeable under Section of the Act. Or else, whether remission of loan is no income at all?

12. In this context, Section 41(1) read with Section 59 of the Act would become relevant and these provisions have been brought within the sweep of taxation even the remission of debt/liability as income of the order in remission or such waiver amounts to provide or gains of business or provision liable to be taxed under Section 28 of the Act. Answer to these questions is provided in the case law cited by the parties.

13. Since the outcome of the appeal depends upon the ratio laid down by the Courts in the aforesaid cases and other cases stated before us, we may straightaway proceed to discuss the principle of law laid down in this case. The starting point of discussion, obviously would be the judgment in the case of ***T.V. Sundaram Iyengar and Sons Ltd. (supra)***, In the said case, the assessee in the course of trading transactions had collected deposits from customers. Since the customers did not claim the amounts standing to their credit, the assessee had transferred the unclaimed deposits to the profit and loss account. The view of the AO was that since the unclaimed deposits had arisen as a result of trading transactions, therefore, the same represented income of the assessee. In the first appeal, the CIT (A) held that the amount of unclaimed deposits were not revenue receipts but were capital receipts. This view of the CIT (A) was affirmed by the Tribunal. The Supreme Court while taking note of the facts observed that the deposits received by the assessee were in the course of

question, thus, which was posed was that even though t deposits were of capital in nature at the point of time of receipts of the assessee, could there character change by afflux of time. The Supreme Court answered this question in the affirmative holding that under certain circumstances, the deposits, even if were shown as capital receipts, had attained the character of trading receipts. The Supreme Court relying upon its judgment in the case of ***Punjab Distilling Industries Ltd. Vs. Commissioner of Income Tax*** **(1959) 35 ITR 519** did not approve the finding of the Tribunal that nature of deposits received from the customers was capital. In ***Punjab Distilling Industries Ltd. (supra)*** the assessee a distiller, used to charge from wholesalers a price for the bottles and as well as certain security deposit as a condition for sale of its liquor. Price of the bottles and the security deposits were returned as and when the bottles were returned. The assessee was left with a surplus in the security deposits, after the bottles were returned. The question was whether the amount left with the assessee was business income. Considering the question, the Supreme Court held that "that the additional amounts taken as deposits were integral parts of the commercial transactions of the sale of liquor in bottles. When they were paid, they were the money of the assessee and remained thereafter the money of the assessee. They were the assessee's trading receipts". In the process, the Court exhaustively discussed and examined the principles laid down by the House of Lords in the case of ***Morley (Inspector of Taxes) Vs. Tattersall*** **[1939] 7 ITR 316 (CA)** that the taxability of a receipt was fixed with reference to its character at the moment, it

subsequently in his income account as his own did not alter th character. The Court noted that ***Tattersall (supra)*** was explained and distinguished in ***Jay's The Jewellers Ltd. Vs. IRC (1947) 29 TC 247 (KB)***. In this case, the assessee was carrying on business of pawn brokers. Depending upon the amount involved, on the expiry specified period, the article pledged became the property of the assessee. The question was whether the amount received in excess of debt due on sale of articles pledged was assessable profit. Considering the issue, the Court held:-

> "The true accountancy view would, I think, demand that these sums should be treated as paid into a suspense account, and should so appear in the balance sheet. The surpluses should not be brought into the annual trading account as a receipt at the time they are received. Only time will show what their ultimate fate and character will be. After three years that fate is such, as to one class of surplus, that insofar as the suspense account has not been reduced by payments to clients, that part of it which is remaining becomes by operation of law a receipt of the Company, and ought to be transferred from the suspense account and appear in the profit and loss account for that year as a receipt and profit. That is what it in fact is. In that year Jays become the richer by the amount which automatically becomes theirs and that asset arises out of an ordinary trade transaction. It seems to me to be the commonsense way of dealing with these matters……. "

Applying the aforesaid principle, it was held that the assessee because of the trading operations had become richer by the amount transferred to its profit and loss account. The Court observed as under:

> "In other words, the principle appears to be that if an amount is received in course of trading transaction, even though it is not taxable in the year of receipt as being of revenue character, the amount changes its character when the amount becomes the assessee's own money because of limitation or by any other statutory or contractual right. When such a thing happens, commonsense demands that the amount should be treated as income of the assessee. "

14. Applying this principle to the facts from which the Court held th

> "In the present case, the money was received by the assessee in course of carrying on his business. Although it was treated as deposit and was of capital nature at the point of time it was received, by efflux of time the money has become the assessee's own money. What remains after adjustment of the deposits has not been claimed by the customers. The claims of the customers have become barred by limitation. The assessee itself has treated the money as its own money and taken the amount to its profit and loss account. There is no explanation from the assessee why the surplus money was taken to its profit and loss account even if it was somebody else's money. In fact, as Atkinson, J. pointed out that what the assessee did was the common-sense way of dealing with the amounts."

15. The ratio of the decision of ***T.V. Sundaram Iyengar and Sons Ltd. (supra)*** is that the proposition enunciated in ***Tattersall (supra)*** that the quality and nature of a receipt for income tax purposes is fixed once and for all, when the receipt is received and that subsequent operation can change its nature, is not absolute and that in given cases by reason of subsequent events, the amounts which initially were not received as trading receipts may be regarded as business income.

16. ***T.V. Sundaram Iyengar and Sons Ltd. (supra)*** case was decided by Three Member Bench. It would be of interest to point out that barely a month ago, the Supreme Court had delivered another judgment on identical issue in the case of ***Commissioner of Income Tax Vs. Karam Chand Thapar and Others [222 ITR 112]***. Two Hon'ble Judges who constituted the said Bench were the Members of the Bench which had rendered the decision in ***T.V. Sundaram Iyengar and Sons Ltd. (supra)***.

17. This issue cropped up again in the Supreme Court in the case of ***The Travencore Rubber & Tea Co. Ltd. v. C.I.T., Trivandrum [243 ITR 158]***. Analyzing these judgments, the Court reiterated

nature of a receipt for income tax purposes were fixed once a for all when receipt was received and that no subsequent operation could change the nature of the receipt. However, in ***CIT Vs. Karam Chand Thapar*** **[1996] 222 ITR 112,** the Supreme Court held that the proposition enunciated in ***Tattersall (supra)*** was not absolute and that in given cases, amounts which were not received initially as trading receipts could eventually be regarded as business income by reason of subsequent events.

18. The Court, at the same time, stated emphatically that "the subsequent event must be such that a different quality is imprinted on the receipt". In that case the assessee was a plantation company engaged in the business of growing rubber and tea. In 1975, it entered into three agreements with three purchasers for sale of old rubber trees. Each of the purchasers paid a certain amount by way of earnest money and another amount by way of advance under their respective agreements. The total amount of earnest money received by the assessee under the three agreements was ₹75,000/- and the total amount by way of advance was ₹3,56,300/-. All the three purchasers defaulted in payment of the balance amounts. The agreements were accordingly terminated and the amounts of earnest money and advance were forfeited by the assessee. The assessee's right to retain the amounts of earnest money and advance was confirmed by the Court. The assessee was eventually successful in selling the old rubber trees to a third party but at a loss. In the assessee's return for the Assessment Year 1977-78, the assessee claimed that the amounts forfeited were not taxable as revenue

were negotiations for transfer of the rubber trees in questic which did not fructify in sale. The amounts forfeited referred only to the capital asset of the assessee and were directly related to the sale of such capital asset. In the opinion of the Court, if the agreed sums of money under the agreements had been received by the assessee, they would have been credited in its account as capital receipts. That being so, the forfeited amounts must also be treated as capital receipts.

19. Coming to the decision of this Court in ***Tosha International Ltd. (supra)***, in that case, the assessee company had incurred huge loss as a result, it became sick company and got itself registered by BIFR. Under one time settlement scheme, the banks and financial institutions agreed for payment of 60% of amount due towards principal and waived entire interest amount. The A.O. opined that since the loans ceased to exist, it amounted to cessation of liability, and therefore, it had to be treated as income. The CIT (A), however, deleted the addition by observing that remission of principal amount of loan did neither amount to income under Section 41(1) nor under Section 28(iv) of the Act and nor under Section 2(24) of the said Act. The appeal of the Revenue was dismissed by the Tribunal holding that the remission would become income under Section 40(1) only if the assessee claimed deduction in respect of expenditure or trading liability. Since in that case remission of principal amount of loan so obtained from bank and financial institutions had not been claimed as expenditure or trading liability in any of earlier previous years, waiver thereof would not result in income and

Revenue *in limine* accepting the aforesaid approach of t Tribunal of Bombay High Court in ***Mahindra & Mahindra (supra)***.

20. We find that similar issue is discussed at length, from all angles, by the High Court of Madras in the case of ***Iskraemeco Regent Limited (Originally Seahorse Industries Ltd. and Subsequently Iskraemeco Seahorse Ltd.) Vs. The Commissioner of Income Tax*** **[196 Taxman 103]**. In that case, the assessee was engaged in business of development, manufacturing and marketing of electro-Mechanical and Static Energy Meters. It had taken loans from bank for the purpose of capital assets both by way of imports as well as in the local markets. In view of the loss suffered, the assessee went before Board of Industrial and Financial Reconstruction (BIFR) where one time settlement was arrived at by the banker, State Bank of India whereby the Bank waived the outstanding due of principal amount of ₹5 Crores and a sum of ₹2 Crores as the outstanding interest amount. The Court held that the waiver of principal amount would not be income, the High Court went into the gamut of entire case law. After discussing the ***Sundaram Iyengar (T.V.) and Songs Ltd. (supra)***, it was held not applicable in view of the following reasons:

> "22. In the present case on hand, admittedly the Assessee was not trading in money transactions. A grant of loan by a Bank cannot be termed as a trading transaction and it cannot also be construed in the course of business. Indisputably, the Assessee obtained the loan for the purpose of investing in its capital assets. A part of this loan amount along with this interest was waived by way of an agreement between the parties. Therefore, the facts involved In the present case are totally different in the facts involved in Commissioner of Income Tax v. Sundaram Iyengar (T.V.) and Sons Ltd. (1996) 222 ITR 344. In the said case, admittedly there was a trading transaction whereas, In the

of character with regard to the original receipt which was capital in nature into that of a trading transaction. It is further seen that there is a marked difference between a loan and a security deposit.

23. In Commissioner of Income tax v. Ganesa Chettiar (P.) (1982) 133 ITR 103, this Court has held that a debt forgiven cannot be treated as income. The relevant portion is extracted herein:

It is settled law that a debt forgiven cannot be treated as income. The question as to whether a remission of debt would constitute income was considered in British Mexican Petroleum Co. Ltd. v. Jackson [1932] 16TC 570 (HL). The Assessee in that case entered into a contract with an oil producing company for the purchase of petroleum over a period of years. The unpaid price of the oil supplied was debited in the accounts. In view of the adverse effect of a business slump on the Assessee-company, the petroleum producing company accepted payment of a part of the debt and released the Assessee-company from its liability to pay the balance which was due. The House of Lords held that the amount remitted could not be included as a revenue receipt. Lord Macmillan observed (p.593):

I cannot see how the extent to which the debt is forgiven can become a credit item in the trading account for the period within which the concession is made.

24. It is a well established principle of law that, every deposit of money would not constitute a trading receipt. Broadly speaking even though a receipt may be in connection with the business, it cannot be said that every such receipt is a trading receipt. Therefore, the amount referable to the loans obtained by the Assessee towards the purchase of its capital asset would not constitute a trading receipt. The said issue has been fortified by the judgment of this Court in Commissioner of Income Tax v. A.V.M. Ltd. (1984) 146 ITR 355."

21. The Court was also of the view that Section 28(iv) of the Act would not be attracted, as it would not be treated income under the said provision in the following terms:

"xxx xxx xxx

27.2. The Division Bench of the Bombay High Court presided over by His Lordship Justice S.H. Kapadia (as he then was) in Mahindra and Mahindra Ltd. v. Commissioner of Income Tax (2003) 261 ITR 501, while approving the ratio laid down by the Division Bench of the Gujarat High Court in Commissioner of Income Tax v. Alchemic Pvt. Ltd. (1981) 130 ITR 168, has held as follows:

> "At the outset, we wish to clarify that this judgment is confined to the facts of this case. This is because the value of any benefit or perquisite arising from business, as contemplated by Section 28(iv), could accrue in numerous ways. 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 CIT v. Alchemic Pvt. Ltd. [1981] 130 ITR 168 (Gui). Applying Section 28(iv)

> facing foreign exchange crunch. In the circumstances, around June 7, 1965, the Government of India and the Reserve Bank of India, in this case, approved the arrangement under which KJC (supplier of toolings) was permitted to advance a loan of $ 6,50,000 to the Assessee for ten years bearing interest at the rate of 6 per cent., free from income-tax. KJC was later on taken over by AMC and as a part of take-over, AMC agreed to waive the principal amount of the loan and not the interest. In the circumstances, as stated in the above three undisputed facts, the Assessee paid interest at 6 percent, per annum, for ten years, being the contractual period. According to the Assessing Officer, the loan arose from business dealings. According to the Assessing Officer when AMC waived the loan, the credits became part of business income; that prior to such waiver, the credits represented liability. In the circumstances, the Assessing Officer has taxed such credits as business income. However, in this connection, there are two important facts which are overlooked by the Assessing Officer. Firstly, the Assessee has continued to pay interest at 6 per cent, for a period of ten years on the loan amount. In this case, the Assessing Officer has not gone behind the loan agreement. In this case, the approval by the Government of India and the Reserve Bank of India are on record. In this case, the agreement for purchase of toolings was entered into, much prior to the approval of the loan arrangement given by the Reserve Bank of India. Therefore, the loan arrangement, in its entirety, was not obliterated by such waiver. Secondly, in this case we are concerned with the purchase consideration relating to capital asset. The toolings were in the nature of dies. The Assessee was a manufacturer of heavy vehicles and jeeps. It required these dies for expansion. Therefore, the import was that of plant and machinery. The consideration paid was for such import. In the circumstances, Section 28(iv) is not attracted. Lastly, we may mention that, in this case, AMC agreed to forego the principal amount of loan as a part of take-over arrangement with KJC to which the Assessee was not a party. The waiver of the principal amount was unexpected. In the circumstances, one fails to understand how such waiver would constitute business income."

28. The facts involved in the present case are more or less identical to the case dealt with by the Bombay High Court as discussed earlier. The Division Bench has held in the said judgment that the loan agreement in its entirety, as in the present case is not obliterated by the waiver in as much as the Assessee has partly complied with, the Assessing Officer has not gone behind the loan agreement, the loan amount was towards the purchase of capital asset and the waiver of the amount was accepted and hence such an activity is not an income assessable to tax. The Division Bench was also pleased to hold that Section 28(iv) does not apply to the benefits in cash or money and it applies only to a transaction arising from business. The said view was also taken by the High Court of Delhi in Ravinder Singh v. Commissioner of Income-Tax (1994) 205 ITR 353 wherein, the earlier decision in Commissioner of Income Tax v. Alchemic pvt. Ltd. (1981) 130 ITR 168 was quoted with approval, the relevant paragraphs are extracted herein:

> "So far as the question of s.28(iv) of the Act is concerned, s.28(iv) provides that income falling under

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

22. Section 41(1(1)(a) of the Act was also held inapplicable and following reasons were given in support of it:

> "30. Similarly, in so far as the applicability of Section 41(1)(a) of the Income Tax Act is concerned, the same also cannot have any application in as much as the said provision would be applicable only to a trading liability. Accordingly, it was held that a loan received for the purpose of capital asset would not constitute a trading liability and hence Section 41(1) has no application. The said issue has also been considered in Mahindra and Mahindra LTD. v. Commissioner of Income Tax (2003) 261 ITR 501, wherein it has been held as follows:
>
> > "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 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) of the Act was not applicable. Secondly, even assuming for the sake of argument that the Assessee had got deduction on allowance even then 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 Rehman 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 CIT v. 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

> That, only amounts allowed as deduction in earlier years could be treated as a trading liability. In other words, unless the amounts have been allowed as deduction in earlier years they cannot be 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 assets would not constitute a trading liability and accordingly Section 41(1) was not attracted."

23. In the context of waiver of loan amount, what follows from the reading of the aforesaid judgment is that the answer would depend upon the purpose for which the said loan was taken. If the loan was taken for acquiring the capital asset, waiver thereof would not amount to any income exigible to tax. On the other hand, if this loan was for trading purpose and was treated as such from the very beginning in the books of account, as per ***Sundaram Iyengar (T.V.) and Songs Ltd. (supra)***, the waiver thereof may result in the income moreso when it was transferred to Profit and Loss account.

24. The Tribunal in the impugned judgment has rightly appreciated this ratio/principle of law from the aforesaid judgments, as is clear from the reading of Para 21 of the impugned order:

> "21. In the light of the above decision of Hon'ble Bombay High Court in the case of Mahindra & Mahindra Ltd. (supra), it is clear that in the case where capital assets are acquired by obtaining a loan, and subsequently, the loan amount is waived by the other party, the principal amount of loan waived by the other party cannot be brought to tax under Section 28(iv) of the Act or under Section 41(1) of the Act."

25. However, in the present case, the Tribunal finds that nothing was

from the bank in Cash Credit Account, CTL and WCTL Account w utilized for the purpose of acquiring capital assets. On the contrary, material available on record including the Notes to the Accounts indicated that the assessee had obtained the loan or credit facility by way of hypothecation of finished goods, semi-finished goods, raw material, book debts, receivable claims, securities and rights by way of first charge, which indicated that the assessee had obtained the loan facility for its business activity or trading operations. However, noted the Tribunal, this aspect of the matter whether the whole amount of the loan had been utilized either for the purpose of acquiring capital asset or for the purpose of business activity or trading activity had not been looked into or examined by the Authorities below. For this reason, the Tribunal has restored the case to the file of the AO for fresh adjudication giving details in the behalf, in the following manner:

> "27.....We, therefore, restore this issue back to the file of the Assessing Officer for his fresh adjudication with a direction to the Assessee to furnish all the details and particulars of loan, and the purpose for which the loan taken from Bank was utilized. All these informations are within the control and specific knowledge of the Assessee and, therefore, it would be the duty of the Assessee to prove and establish that the amount of loan taken from the Bank was utilized for the purpose of acquiring capital assets in case the Assessee wants to have the benefit of decision of Hon'ble Delhi High Court in the case of Tosha International Ltd. (supra) as well as the decision of Hon'ble Bombay High Court in the case of Mahindra & Mahindra Ltd. (supra). If on an enquiry and verification, it transpires that the Assessee has utilized the loan for the purpose of its business activity or trading activity, the amount of loan to the extent it has been waived by the bank shall be deemed to be the Assessee's income chargeable to tax as per the decision of Hon'ble Bombay High Court in the case of Solid Containers Ltd. (supra), where the principle laid down by the Hon'ble Supreme Court in the case of T.V. Sundaram Iyengar & Sons Ltd. (supra) has been applied and followed. In the present case, the total amount of loan payable by the Assessee was Rs. 4,76,42,213, which was settled at Rs. 1.85 crores giving benefit of Rs. 2,91,42,213 to the Assessee by way of waiver. Therefore, the proportionate amount of loan waived by the bank shall be worked out by the Assessing Officer with reference to the purpose for which the loan amount was utilized. The Assessing Officer shall provide reasonable opportunity of being heard to the Assessee. Be it mentioned here that in case the Assessee fails to produce or furnish details or particulars about the purpose for which the loan amount was utilized, the Assessing Officer shall draw adverse

> receivable claims, securities, rights by way of first charge implying thereby that the amount was utilized for the purpose of business or trading activity of the Assessee. We order accordingly."

26. It is clear from the above that the Tribunal has rightly culled out the principle laid down from the various judgments and has rather given an opportunity to the assessee to prove its case before the AO. In these circumstances, there is no reason or occasion for the assessee to feel aggrieved by the order and prefer this appeal.

27. We, accordingly, dismiss this appeal holding that no substantial question of law arises and impose cost of ₹25,000/- upon the assessee.

ITA No.503 of 2010

28. In this case, which pertains to the Assessment Year 2004-05, the respondent assessee M/s. Jubilant Securities Pvt. Ltd. (hereinafter referred to as 'the assessee') had filed the income of ₹5,95,148/- in its return. The assessee is an investment company engaged in the business of sale/purchase of shares and business of taking loans and further providing it to the parties.

29. The AO found that the assessee had credited a sum of ₹25,00,000/- in Profit and Loss Account on account of remission of liability with respect of certain unsecured loans appearing in its financial results. This amount represented loan taken from one M/s. Sail Holdings Pvt. Ltd. more than ten years ago. Since there was no communication from the party and no claim was made for so many years the loan was written back. It was treated as capital receipt and was reduced from taxable income in the computation

AO was of the view that the assessee had treated such write (Loan Written Back) as receipt of a capital nature without explaining as to how and in what manner such cash credited were transferred to the Profit and Loss Account.

30. For this and other reasons stated in detail in the assessment order, the AO held that the amount of ₹25,00,000/- as written off liability was the income of the assessee and added in the taxable income.

31. The CIT (A) confirmed this order of the AO.

32. The Tribunal has, however, following the judgment of the Court in the case of ***Tosha International Ltd. (supra)*** deleted the addition holding on the ground that since the assessee had not claimed any deduction in respect of this loan, therefore, Section 41(1) would not be attracted.

33. Challenging the order of the Tribunal, the instant appeal was filed and this appeal was admitted on the following substantial question of law:

> "Whether learned ITAT erred in deleting the addition of ₹25 lacs made by the Assessing Officer on account of Unsecured Loan Written Back?"

34. In view of our legal discussion above, what is to be seen is as to whether the aforesaid loan was taken for trading purpose or it was to generate some capital assets. As mentioned above, the assessee is an investment company mainly into the business of purchase and sale of shares. It is also engaged into taking

holding that the amount of loan was utilized for its financi business, following discussion of the CIT (A) in this behalf is apt to take note of:

> "4.3.....Further in Schedule H of the Return Form giving General Information about the assessee, the nature of business shown at S No 15 is – *loans & investment* The specific fact that loan was taken by the company for its financing business is admitted by the appellant in no uncertain terms by giving following note below the statement of income:
>
> > The investment made for long term with a policy of investment being made out of funds available from share capital/profit. Borrowings have been made for other business activities viz. lending, share trading etc. Hence interest cost is incurred to earn interest/profit. The company therefore, claimed as allowable cost against profit.
>
> 4.4 Therefore, it is proved beyond doubt (or rather admitted by the appellant itself) that it is a finance company which is doing the business of investment, trading or shares and giving & taking of loans. It is clearly admitted that the borrowed funds were not used for long term investment contrary to contention made in : submissions filed before me. All along it has been admitted by the appellant that borrowing was made for financing business. However, after the assessment order was passed & the AO added this amount treating it as part of circulating capital, the appellant has come up with the plea that the funds were borrowed for long term investment. This is nothing but change of stand. It is therefore established that the loan was obtained by the appellant for financing business. The table which the appellant has made to contend that loan was part of fixed capital, shows position as on 31/3/03 whereas loan was taken in FY 92-93, i.e. ten years back. Therefore the balance sheets as on 31/3/03 or 31/3/04 do not in any way prove the actual use of loan. Having established that the funds were borrowed for the purpose of lending business by the appellant, it is to be examined as to whether remission or write back to such loan wot.~ld (sic.) give rise to taxable income?
>
> 4.5 So far as the decision in Sugauli Sugar Pvt Ltd. 236 ITR 518 relied upon by the appellant are concerned, it is noted that the fact are quite different. In that case the relevant amount was directly carried to capital reserve a/c and the issue related was taxability u/s 41(1). Moreover it was held that merely because the claim was barred by limitation did not result in extinguishment of debt. However in this case the amount was treated as income by the appellant company as per the resolution of the Board of Director who observed that there was no claim by the concerned party for long. The facts and circumstances as discussed in earlier paragraphs also made this case different on facts."

35. The Tribunal while allowing the appeal simply relied upon t judgment of this Court in the case of ***Tosha International Ltd. (supra)*** and accepted the plea of the assessee that loan was not used in the financing business, but was used in long term investment made in shares. This discussion is in the following term:

> "8. On perusal of the Ld. CIT (A)'s order we find that addition has not been made with the aid of Section 41(1) of the Act rather it is confirmed on the ground that assessee was in business of money lending, the moment it took loan in the normal trade transaction then this amount would become working capital or circulating capital in the business of the assessee. If assessee was not required to repay this loan as trading receipt then it would be treated as an income of the assessee. From the balance sheet as on 31.3.1993, we find that this amount was not used in the financing business. It was used in the long term investment made in share. As far as doubting genuineness of the loan is concerned, the AO himself accepted it in 1997-98 while passing the assessment u/s 143 ( ) (sic.). This year also he did not raise such doubt. Thus there was no sufficient material with Ld. CIT (A) to express his apprehension on the genuineness of this loan transaction. Since the amount was not used in servicing alleged money lending business, it cannot be treated as part of circulating capital and to be treated as trading receipt. In view of the above discussion, we allow the ground raised by Assessee and direct the AO not to treat this sum of Rs.25 lacs as income of the Assessee."

36. It was also explained by the learned counsel for the assessee, during the arguments, that not only waiver of loans would not constitute income applying the judgment of the Bombay High Court in ***Mahindra & Mahindra Ltd.(supra)***, the benefit or perquisite must be one arising in the course of business, in order that the same is taxable under Section 28(iv) of the Act. The assessee is a company engaged, *inter alia*, in the business of finance and making investments in shares. The loan obtained by the respondent-assessee from SHPL was part of the source of funds employed by the assessee in its business. In pursuance of

with the assessee in the form of share capital and reserves or c of borrowed funds in the form of loans, etc. The loans borrowed are to augment the funds available with the assessee, to be advanced on interest. Such loans borrowed are a source of funds. It cannot be said that the assessee is in the business of borrowing and advancing loans – it can never be the business of an assessee to borrow money by way of loans. Thus, the money borrowed, it is reiterated, are only a source of funds.

37. Furthermore, as pointed out above, the Tribunal has reached a finding of fact that the amount of loan was not used in financing business. Having regard to these findings of facts constituting the nature of loan, we answer the question in affirmative and accordingly dismiss this appeal.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

FEBRUARY 18, 2011
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