

आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'C' BENCH : CHENNAI

श्री चंद्र पूजारी, लेखा सदस्य एवं

श्री धुव्वुरु आर.एल रेड्डी न्यायिक सदस्य के समक्ष

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND Shri Duvvuru RL Reddy, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A.No.1626/Mds./2012

निर्धारण वर्ष /Assessment year : 2006-07

The Assistant Commissioner of
Income Tax,
Company Circle II(3),
Chennai.

**Vs. M/s.India Cements Capital &
Finance Limited,**
827-Anna Salai,
Chennai 600 002.

(अपीलार्थी/Appellant)

**[PAN AAACA 3071 C]
(प्रत्यर्थी/Respondent)**

अपीलार्थी की ओर से/ Appellant by
प्रत्यर्थी की ओर से /Respondent by

: Mr.Arun C.Bharat,CIT DR
: Mr.R.Vijayaraghavan,Advocate

सुनवाई की तारीख/Date of Hearing

: 24-05-2016

घोषणा की तारीख /Date of Pronouncement

: 11-08-2016

आदेश / O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER

This appeal of the Revenue is directed against the order of the Commissioner of Income-tax (Appeals)-III, Chennai dated 25.05.2012 pertaining to assessment year 2006-07.

2. The main grievance of the Revenue in this appeal is that the Ld.CIT(A) erred in deleting the addition made on account of cessation of bank liability to the extent of ₹46.05 crores.

3. The facts of the issue are that in the previous year, relevant to the assessment year under appeal, the assessee had assigned all its receivables to M/s.Unique Receivable Management Private Limited (URMPL) on the basis of a tripartite agreement executed on 28-6-2006 between the assessee, URMPL and the consortium of banks, who had advanced finance to the assessee company. The total receivables as per accounts were ₹93.45 crores and the bank loan liabilities were ₹89.86 crores. The Commissioner of Income-tax found that the differential amount of ₹3.59 crores has been shown as recoverable in the accounts of the assessee. But, in the light of the assignment of receivables to the Special Purpose Vehicle URMPL, the Assessing Officer has not considered whether the said differential amount of ₹3.59 crores would be in the nature of income or not. The Commissioner of Income-tax also observed that the total receivable assigned to URMPL is ₹89.86 crores, against which the said URMPL has to make a payment of ₹43 crores alone to the consortium of banks, resulting in remission of liability. The Assessing Officer has not considered the taxability of the above remission of liability. Based

on the above findings, the Commissioner of Income-tax issued notice under section 263, proposing to revise the order of assessment passed under section 143(3). After examining the detailed reply filed by the assessee company, the Commissioner of Income-tax confirmed the proposals and passed the revision order, setting aside the order of assessment passed by the assessing authority. He set aside the assessment with a direction to the Assessing Officer to enquire about all the above issues pointed out by him and pass a fresh assessment order in accordance with law.

3.1 Consequent to the order of the CIT, the assessee went in appeal before the Tribunal. The Tribunal with regard to issue observed that:-

" 11. The question of the differential amount between ₹89.86 crores and ₹43 crores is a very predominant issue that should have been meticulously examined in the assessment order. The tripartite agreement entered into between the assessee, the Special Purpose Vehicle URMPL and the State Bank of Mysore, as the representative of the consortium of lending banks, entered into on 28-6-2006, lists out the terms and conditions of the assignment of receivables to the Special Purpose Vehicle and the repayment of loans by the Special Purpose Vehicle to the consortium of lending banks. The consortium of banks is having a first and prior charge on all receivables of the assessee company as security for the loans and credit facilities

extended to the assessee. As on the date of the tripartite agreement, the total of the receivables of the assessee was ₹93.45 crores. As against the above amount, the tripartite agreement limited its assignment to ₹89.86 crores. The differential amount of ₹3.59 crores is shown as receivables in the accounts of the assessee company. The exact nature of this amount, whether it subsists as recoverable or already included in the bad debts written off or is in the nature of income, etc. have not been examined by the Assessing Officer, if not discussed in the assessment order. The amount of receivables assigned to the Special Purpose Vehicle URMPL was ₹89.86 crores. It is stated in the tripartite agreement that the agreement was executed to crystallise the liabilities of the assessee company to the consortium of banks. In paragraph 3 of the tripartite agreement it is stated as below:-

"3. The dues of the FIRST PART amounting to ₹89.05 crs to the THIRD to FOURTEENTH PARTS is hereby crystallized and fixed at ₹43 crores (with the application of interest to cease from 1st July 2005)."

Thereafter, the agreement speaks about the modalities of the payment of the sum of ₹43 crores by the Special Purpose Vehicle URMPL to the consortium of banks.

12. Clause 7 of the tripartite agreement reads as below:-

"7. The Parties agree that on the SECOND PART paying the THIRD PART the aforesaid sum of ` 43 crores in terms of Clause 5 above and interest in terms of Clause 6 above, all dues, claims,

demands and liabilities of the THIRD to FOURTEENTH PARTS against the SECOND PART shall cease and the same shall constitute a full and final settlement and absolute release of the SECOND PART from any obligation whatsoever to the THIRD to FOURTEENTH PARTS and the THIRD to FOURTEENTH PARTS shall not be entitled to commence any legal proceedings against the SECOND PART either in the Debt recovery Tribunal or elsewhere."

13. The above clauses in the tripartite agreement clearly shows that the liability to the consortium of banks has been crystallised at ₹43 crores and once the said amount of ₹43 crores was paid over to the banks, the liabilities of the assessee company towards the banks stand fully discharged and settled. Thereafter, the banks do not have any option for legal proceedings against the assessee or the Special Purpose Vehicle. Therefore, it is clear that prima facie there is a remission of liability in favour of the assessee company. This paramount issue ought to have been examined by the assessing authority in the assessment order.

14. The learned counsel appearing for the assessee has invited our attention to clause 5(d) of the Tripartite agreement which states that any amount collected over and above the crystallized amount will also be paid to the banks after extinguishing the outside loan of ₹15 crores raised for the initial three instalments. We agree with the argument of the learned counsel appearing for the assessee that there is distant possibility that the Special Purpose Vehicle may realize more

than ₹43 crores and in such a situation some more amount would have to be paid to the banks. But, that is only a possibility. That liability of the assessee is only contingent.

15. For the purpose of section 263, it is not necessary for the Commissioner of Income-tax to make a final adjudication of the issues. If he finds prima facie that certain relevant aspects of the assessment have not been examined by the assessing authority, which has made the assessment order erroneous and prejudicial to the interests of the Revenue, the Commissioner of Income-tax is within his competence to invoke section 263.

16. As far as the present case is concerned, the assessment order passed by the assessing authority is a very cryptic order where there is no discussion regarding certain vital issues arising from the assessment.

17. Therefore, in the facts and circumstances of the case, we uphold the revision order passed by the Commissioner of Income-tax."

3.2. Consequent to the order u/s.263 of the Act, the Id. Assessing Officer passed the assessment order dated 13.12.2011 u/s.143(3) r.w.s.263 of the Act observing that in clause-3 of page-5, the Tripartite agreement, there is a remission of liability to the tune of `46.05 crores and accordingly, AO brought into tax. Against this, the assessee carried the appeal before the Ld.CIT(A).

4. On appeal, the Ld.CIT(A) observed that the tripartite agreement dated 28.06.2006 among the assessee (FIRST PART), Unique Receivable Management Pvt.Ltd, the SPV (SECOND PART) and the consortium of banks (THIRD to FOURTEENTH PART), Lead Bank being State Bank of Mysore (THIRD PART), as per clause (2) of the agreement, the hire purchase and lease receivables of the assessee shall be transferred to the SPV on 01.10.2005. The bank liabilities shall also be treated as the liabilities of the SPV to the banks. Upon such transfer in favour of the SPV, the appellant shall be relieved , of the liabilities to the banks. As per clause(3) the dues of the assessee amounting to Rs.89.05 crores to the bank was crystalised and fixed at Rs.43 crores. It is clear from the agreement that both the fund based activities of the appellant together with all the receivables and bank liabilities were transferred to the SPV. Accordingly, the appellant did not have any assets or bank liabilities relating to the fund based activities in its book. Therefore, there was no reduction on the liability in the hands of the assessee. The liability was on the transferee SPV which is clear from clause (5) of the aateent which states that "The SECOND PART agrees to pay the aforesaid sum of Rs.43 crores to the THIRD PART in the following manner —. .. ." The SECOND PART is the SPV and not the appellant (FIRST PART).

Clause (5)(d) stipulates that any amount collected over and above the crystallised amount will also be paid to the banks. It is thus clear that there was no waiver of loan or remission of bank liability in the hands of the appellant. The remission was in the hands of the SPV to which the total bank liability had been transferred at book value of Rs.89.86 crores. Further, as agreed to vide clause (5)(d) of the agreement, any amount collected from the related receivables transferred together with the liability to SPV which is in excess of the net accepted liability should also be passed on to the bank. Therefore, there is no reduction of liability in the true sense because whatever is collected from the client receivable has to be passed on to the banks to the extent of Rs.89.86 crores. It is thus clear from the terms and conditions stipulated in the tripartite agreement that there was no liability in the hands of the appellant because the liability had been transferred to the SPV. Since there was no liability at the first instance, there is no question of remission or cessation of liability. The AO has also not brought on record any material to prove that the agreement was not genuine. Hence, Ld.CIT(A) was of the opinion that the impugned sum cannot be added u/s.41(1).

4.1 Further the contention of the assessee was that the waiver was in the capital field since the loan from the banks were used for acquisition of capital assets which were given on hire or on lease to

customers. This is confirmed by the fact that the hire purchase and leasing transactions were hypothecated against bank liability and both were transferred together to the SPV. In this regard, the Id.AR has relied on the decisions in the cases of Iskraemeco Regent Ltd, Jindal Equipment and Leasing Services Ltd, Mahindra & Mahindra, Chetan Chemicals Ltd, MindTek India P Ltd, Elscope and Nectar Beverages P Ltd (supra). He has gone through the above decision and found that the ratio of the decision in the case of Iskraemeco Regent Ltd (supra) is applicable to the facts of the present case. The Hon'ble jurisdictional High Court in the above case found that the amount received and used for the purchase of capital asset could hardly constitute a trading receipt, so that the application of T.V.Sundaram Iyengar & Sons Ltd's case (222 ITR 344) lack merit. Though taken for business and not a trading receipt, the amount related to capital account. In Mahindra & Mahindra Ltd (supra), it was held to be not taxable for the same reason that the decision in T.V.Sundram Iyengar's case has no application. The argument that it would be taxable u/s 28(iv) was also dismissed as it is not coming within the purview of sec 2(24). The Hon'ble Delhi High Court in the case of CIT v. Tosha International Ltd, 331 ITR 440 has also dismissed the appeal of revenue by holding that the amount of Rs.1048 crores waived by the financial institutions under scheme approved by BIFR cannot be taxed in the hands of the assessee. Under these circumstances, Ld.CIT(A) came to a conclusion that the impugned amount cannot also be taxed in the hands of the appellant either u/s 41(1)

or u/s 28(iv) of the Act. Against this, the Revenue is in appeal before us.

5. Before us, the Id.D.R submitted that the question of the differential amount between ₹89.86 crores and ₹43 crores is a very predominant issue. The tripartite agreement entered into between the assessee, the Special Purpose Vehicle URMPL and the State Bank of Mysore, as the representative of the consortium of lending banks, entered into on 28.06.2006, lists out of the terms and conditions of the assignment of receivables to the Special Purpose Vehicle and the repayment of loans by the Special Purpose Vehicles to the consortium of lending banks. The consortium of banks is having a first and prior charge on all receivables of the assessee company as security for the loans and credit facilities extended to the assessee. According to Id.D.R, as on the date of the tripartite agreement, the total of the receivables of the assessee was ₹93.45 crores. As against the above amount, the tripartite agreement limited its assignment to ₹89.86 crores. The differential amount of ₹3.59 crores is shown as receivables in the accounts of the assessee company. The exact nature of this amount, whether it subsists as recoverable or already included in the bad debts written off or is in the nature of income. The amount of receivables assigned to the Special Purpose Vehicle

URMPL was ₹89.86 crores. It is stated in the tripartite agreement that the agreement was executed to crystallise the liabilities of the assessee company to the consortium of banks. In paragraph 3 of the tripartite agreement it is stated as below:-

“3. The dues of the FIRST PART amounting to Rs. 89.05 crs to the THIRD to FOURTEENTH PARTS is hereby crystallized and fixed at Rs. 43 crores (with the application of interest to cease from 1st July 2005).

Thereafter, the agreement speaks about the modalities of the payment of the sum of Rs 43 crores by the Special Purpose Vehicle URMPL to the consortium of banks.

Clause 7 of the tripartite agreement reads as below:

‘7. The Parties agree that on the SECOND PART paying the THIRD PART the aforesaid sum of Rs. 43 crores in terms of Clause 5 above and interest in terms of Clause 6 above, all dues, claims, demands and liabilities of the THIRD to FOURTEENTH PARTS against the SECOND PART shall cease and the same shall constitute a full and final settlement and absolute release of the SECOND PART from any obligation whatsoever to the THIRD TO FOURTEENTH PARTS and the THIRD to FOURTEENTH PARTS shall not be entitled to commence any legal proceedings against the SECOND PART either in the Debt recovery Tribunal or elsewhere”.

Further, Id.D.R submitted that from the above clause in the tripartite agreement, it is very clear that the liability to the consortium of banks

has been crystallized at ₹43 crores and once the said amount of ` 43 crores was paid over to the banks, the liabilities of the assessee company towards the banks stand full discharged and settled. Thereafter, the banks do not have any option for legal proceedings against the assessee or the Special Purpose Vehicle. Therefore, it is clear that prime facie there is a remission of liability in favour of the assessee company. Further, Id.D.R submitted that the case law relied on by the assessee company i.e. in the case of M/s.Iskraemeco Regent Ltd., reported in 331 ITR 317 (Mad.) cannot be applied to the facts of the case. In that case, assessee engaged in the business of development, manufacturing and marketing of electro-Mechanical and State Energy Meters. It had taken a loan from the bank for purchase of capital assets. A one-time settlement with the Bank is reduced the loan liability. In that case, reduction in loan was credited to the 'capital reserve account' as it was in the capital field. However, in the present case, it is herein current liability which is in revenue field. He relied on the order of Tribunal in the assessee's own case in ITA No.871/Mds./2011 vide order dated 3rd April, 2012 wherein the Tribunal had already given the findings against the assessee while confirming the order of CIT passed u/s.263 of the Act.

6. Before us, Id.A.R submitted the following points for our consideration.

a) India Cements Capital Ltd (ICCL) transferred its fund based business with the corresponding liabilities to M/s Unique receivables (URL) with the approval of consortium of Banks.

b) ICCL transferred Receivables worth Rs. 93.45 Crores and Bank Liabilities worth Rs.89.85 Crores. Balance Rs. 3.60 Crores was shown as receivable from the transferee URL.

c) The transfers were reflected in the Books of ICCL and URL (Notes on accounts Sch 14(2) at page 18 of PB)

ICCL offered Rs.7 Crores as short term capital gains, being the difference between the Book value and IT WDV of the Leased assets. The same was assessed in the hands of ICCL for AY2006-07 (Page 9 of PB)

d) For Assignment of liabilities, the banks insisted that ICCL guarantee the payment of Rs. 43 Crores. As per the Tripartite Agreement with SBM representing the consortium of Banks:

Clause 2: Liabilities and receivables will be treated as Liabilities and receivables of URL from 1.10.2005.

Clause 3: ICCL liability, in spite of transfer would be Rs. 43 Crores.

Clause 4: Once transfer is complete ICCL does not have any liability.

Clause 5: URL shall pay Rs. 43 Crores to the Banks.

Clause 6: URL to pass on further collections, after settling outside liabilities, realised from receivables to the banks.

Clause 7: On payment of Rs. 43 Crores, Banks will not proceed to realize further amounts. But whatever is realized from the receivables shall be passed on to the Banks. Hence the liability has not been waived or ceased.

Clause 11 &12. ICCL shall sell receivables to URL and the consideration is the transfer of Bank liabilities.

e. ICCL transferred all, its assets and liabilities to URL at Book Value.

The same was reflected in the Books of URL and has been accepted by the Department.

f. The order u/s 263 and the Assmnt order read with 263 dt 26.12.2011 has accepted the transfer of Liability of Rs. 89 crores.

g. URL has shown Rs. 89 Crores as Liability to Banks in its books.

h. Total amount of Rs. 43 Crores were paid by URL to Banks till Aug 2009.

i. This amount was reduced from the Bank liability in the books of URL.

j. At the time of transfer no Bank has indicated any waiver or reduction.

k. Anyway waiver if any will have to be considered in the hands of URL.

l. ICCL transferred the business of fund based financing. The entire assets and Liabilities were transferred to URL. There was no reduction of Liability in the hands of ICCL.

m. URL continued to show the liability in its books which has been accepted by the Bank.

The Id.A.R further submitted that the consideration for transfer of receivables was the value of liabilities transferred (Clause 12). According to Id.A.R, If Banks had waived liability over and above Rs. 43 Crores, then the value of liabilities transferred would only be Rs. 43 Crore. The contention of the Id.A.R is that the consideration for transfer of receivables of Rs. 93.45 Crores would be only Rs. 43 Crores resulting in loss of the differential amount of appx Rs. 50 Crores arising from transfer in the hands of ICCL. Finally, Id.A.R emphasised that the agreement is subject to payment of Rs.43 crores which was completed only in August, 2009. Further, Id.A.R placed reliance in the case of M/s.Iskraemeco Regent Ltd., reported in 331 ITR 317 (Mad.).

7. We have heard both the parties and perused the material on record. In this case, an earlier occasion the assessee came in appeal before this Tribunal challenging the order of CIT passed u/s.263 of the Act. The Tribunal decided the issue against the assessee vide its order dated 3rd April, 2012 and the relevant portion of the order was reproduced herein above at para No.3.1. Now, Id.A.R pleaded that there cannot be any remission of liability u/s.41(1) of the Act. In our opinion, since there is a categorical findings of the Tribunal that there was a cessation/remission of liability u/s.41(1) of the Act, on earlier occasion confirming the order of Id. CIT passed u/s.263 of the Act, wherein the Ld.CIT directed the AO to verify from the assessment records whether interest/depreciation/hire charges or any other expenditure related to bank liability has been claimed and allowed by the AO in the earlier years and if 'Yes', the taxability of the remission of bank liability should be examined by the AO under relevant provisions of the Act. The Id. Assessing Officer consequent to this examined the issue and observed that there is remission of bank liability accrued to the assessee at ₹ 46.05 crores. Contrary to this, Ld.CIT(A) observed that there was no cessation of liability in the hands of assessee and it was only in the hands of URMP(SPV) and if any cessation is to be considered in the hands of URMP. We are not in a position to uphold the argument of the Id.A.R as held by the

Tribunal on earlier occasion. There is a remission of liability in favour of assessee company and the liability payable to the bank has been reduced to ₹ 43 crores and it has to be brought to tax in the hands of assessee only u/s.41(1) of the Act. Accordingly, the ground raised by the Revenue is allowed.

8. In the result, the appeal of the Revenue is allowed.

Order pronounced on 11th August, 2016, at Chennai.

Sd/-

(धुव्वुरु आर.एल रेड्डी)

(DUVVURU RL REDDY)

न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-

(चंद्र पूजारी)

(CHANDRA POOJARI)

लेखा सदस्य /ACCOUNTANT MEMBER

चेन्नई/Chennai

दिनांक/Dated: 11th August, 2016

K S Sundaram

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|--------------------------|------------------------------|-------------------------|
| 1. अपीलार्थी/Appellant | 3. आयकर आयुक्त (अपील)/CIT(A) | 5. विभागीय प्रतिनिधि/DR |
| 2. प्रत्यर्थी/Respondent | 4. आयकर आयुक्त/CIT | 6. गार्ड फाईल/GF |