IN THE INCOME TAX APPELLATE TRIBUNAL
BENGALURU BENCH 'C', BENGALURU

BEFORE SHRI. A. K. GARODIA, ACCOUNTANT MEMBER

AND

SHRI. LALIT KUMAR, JUDICIAL MEMBER

I.T.A No.998/Bang/2017
(Assessment Year : 2011-12)

Esplanade Developers P. Ltd,
(formerly known as Millennia Properties P. Ltd,
2 Frontline Grandeur, 14 Walton Road,
Bengaluru – 560 001 .. Appellant
PAN : AAFCM0561L

v.

Asst. Commissioner of Income-tax,
Circle -2 (1), Bengaluru .. Respondent

Assessee by : Shri. Ajit Kumar Jain, CA
Revenue by : Shri. Sanjay Kumar, CIT-III

Heard on : 27.06.2017
Pronounced on : 13.09.2017

O R D E R

PER LALIET KUMAR, JUDICIAL MEMBER :

This is an appeal by the assessee against the order of the CIT (A), Bengaluru -2, Bengaluru, dt.22.03.2017, for the assessment year 2011-12.

02. The assessee has raised the following grounds before this Tribunal :

Ground No. 1: Summary of the effects of grounds of appeal

1.1. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) ['CIT(A)'] erred in law and on facts in upholding the action of Income-tax Officer Range– 12(1), Bangalore ('ITO') of determining the total income of Esplanade Developers Private Limited ('the Appellant') at INR 163,426,850 under the provisions of the Income-tax Act, 1961 ('the Act') as against INR 2,926,847 returned by the Appellant.

Ground No. 2: Addition of write back of loan amounting to INR 160,500,000

2.1. On the facts and circumstances of the case and in law, the learned CIT(A) erred in holding that the write back of the loan constitutes 'income' chargeable to tax under section 28(iv) of the Act and section 41(1) of the Act.

2.2. On the facts and circumstances of the case and in law, the learned CIT(A) erred in disregarding the principals laid down by the jurisdictional High Court of Karnataka in the case of Comfund Financial Services (I) Ltd (2000) (I.T.R.C. No 49 of 2000) and its binding applicability in the case of Appellant.

2.3. The Appellant prays that the addition of write back of the loan amounting to INR 160,500,000 made by the learned ITO and further confirmed by the learned CIT(A) is erroneous, unwarranted and should be deleted.

Ground No. 3: No credit for taxes paid of INR 1,099,437

3.1. On the facts and circumstances of the case and in law, the learned CIT(A) erred in not adjudicating the action of the learned ITO in not granting credit of taxes (including Self Assessment tax and Tax on Regular Assessment) paid by the Appellant totaling to INR 1,099,437.

3.2. The Appellant prays that the learned ITO be directed to grant credit of taxes paid of INR 1,099,437.

Ground No. 4: Interest under section 234B of the Act

4.1. On the facts and in the circumstances of the case, and in law, the learned CIT(A) erred in not adjudicating the action of the learned ITO in computing consequential interest under section 234B of the Act at INR 19,567,626

4.2. The Appellant prays that the learned AO be directed to re-compute the interest under section 234B of the Act.

03. Facts apropos are the assessee filed its original return of income for the assessment year 2011-12 declaring nil income. Subsequently the assessee filed a revised return and offered an income of Rs.29,26,847/- to tax without claiming any business expenditure. The case was selected for scrutiny. Notice was issued u/s.143(2) of the Act, was issued by the DCIT, Circle 12(1), Bengaluru, seeking certain information which was duly supplied by the assessee. Thereafter the case was transferred to ITO, Range -12(1) (TPO).

04. The TPO issued notice u/s.142(1) requesting for submission of additional information which were also duly filed by the assessee. The TPO was not satisfied with the reply submitted by the assessee and had completed the assessment by computing the total income at Rs.16,34,26,850/-, after adding back the write back of loan amounting to Rs.16,05,00,000/-, as against the returned income of Rs.29,26,847/-. The AO in the assessment order has given the reasoning for writing back of the loan, as follows :

> 6. The submissions made by the assessee are summarised below:
>
> The Assessee stated that it is a settled principle that a loan by itself is an item of capital nature. Accordingly, its waiver is also treated as capital in nature, not chargeable to income-tax.
>
> Further, under section 4 of the Act, 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 which *inter-alia* includes the following:

- the value of any benefit or perquisite taxable under section 28(iv) of the Act;
- Any sum chargeable to income-tax under section 41 of the Act.

The Assessee submitted that the write back of loan of INR 160,500,000/- is not covered and hence not taxable under section 28(iv) and section 41(1) of the Act for the reasons mentioned below:

Section 28(iv) of the Act reads as follows:

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

The Assessee submitted that various Courts have held that section 28(iv) applies only under the following two circumstances:

The benefit or perquisite should arise from business or profession. Hence, where the assessee is not carrying on the business of obtaining loans, the waiver/remission of loans cannot be construed as a benefit arising from such business; and

The term 'whether convertible into money or not' would mean something other than money and hence section 28(iv) of the Act would not apply when the amount received is cash or considered in terms of money

In the instant case, the loan obtained by the Assessee is clearly in money terms. Further, the Assessee is engaged in the business of property development and not in the business of obtaining loan. Hence, the Assessee submitted that the waiver of loan is not chargeable to tax under section 28(iv) of the Act

The Assessee placed reliance on the following judicial precedents while placing the above arguments:

CIT v Alchemic Pvt Ltd (1981) 130 ITR 168 (High Court of Gujarat)Mahindra & Mahindra Ltd. v CIT (2003) 261 ITR 501 (High Court of Bombay); and

CIT v Chetan Chemicals (P) Ltd (2004) 267 ITR 770 (High Court of Gujarat)

Further, the Assessee emphasized on the jurisdictional Tribunal in the case of **Comfund Financial Services (I) Ltd v DCIT (1998) 67 ITD 304** wherein it was held that the remission of the liability towards the principal loan amount cannot constitute income in the hands of the Assessee under the provisions of section 28(iv) of the Act. It was stated that the for the purpose of the applicability of section 28(iv) of the Act, the benefit or perquisite must relate to the revenue account of the Assessee.

In light of the above principles laid down the judicial precedents (including the jurisdictional Bangalore bench of the Tribunal), the Assessee submitted that the subject write back of loan is not taxable under section 28(iv) of the Act.

The Assessee further submitted that the subject write back of loan is also not taxable under section 41(1) of the Act which reads as under:

> *"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; ....."*

In the instant case, the Assessee stated that it has not claimed deduction, expenditure or loss in respect of the loan obtained from RPPL in any year. Hence, the write back of loan amounting to INR 160,500,000/- is not chargeable to tax under section 41(1) of the Act.

Feeling aggrieved by the order of the AO, whereby the AO has added back the loan amount of Rs.16,05,00,000/-, the assessee filed appeal before the CIT (A).

05. It was submitted by the assessee before the first appellate authority that :

i) in order to carry out the commercial project, the assessee intended to avail finance from the financial institutions / banks. It availed an interim loan of Rs.16,05,00,000- as a temporary arrangement from RMZ Properties P. Ltd, which is a group company.

ii) the assessee executed corporate loan agreement on 18.03.2009 with RPPL and received interest from unsecured loan for Rs.16,05,00,000/- from RPPL during the financial year 2008-09 in three instalments.

iii) it is the contention of the assessee that it agreed to return back the loan amount on receipt of construction loan from financial institution / bank. It is also the case that the assessee utilised the above funds for development of projects and capitalised the expenditure under work-in-progress. The assessee submitted that on account of downward trend in the real-estate, there was an interruption in the construction of the project.

As the assessee was not in a position to repay the loan received from RPPL, the Board of Directors of RPPL approved the write-off of the loan. After writing off the loan by RPPL, the assessee wrote-back the same to its profit and loss account for the FY 2010-11. It was the case of the assessee before the authorities that in profit and loss account the loan was a capital receipt, hence not chargeable to IT in view of Section 56 of the Act.

06. However, the CIT (A) was not convinced with the submission made by the assessee and therefore had confirmed the order passed by the AO. However, the reasoning given by the CIT (A) was different than the reasoning given by the AO. For the purposes of clarity, we are hereinbelow reproducing paras 4.1, 7 and 8 of the CIT (A)'s order:

> 4.1 As is apparent from the facts above, the appellant company has received a benefit of Rs.16,05,00,000 during the year. This benefit is by virtue of write off of a loan due to RMZ Properties Pvt. Ltd. which had been taken in the course of business.

> 7. This clearly shows that said amount was initially claimed as expenditure and withdrawn only for a specific purpose i.e,, to claim inapplicability of section 41(1) in respect of waiver of loan of Rs. 16,05,00,000. Under such facts, the said claim is an opportunistic one and is seen as one merely to seek the benefit of claiming exemption of Rs. 16,05,00,000 from taxation under section 41(1). This cannot be allowed. Also, the other decisions relied upon by the appellant on the issue of chargeability u/s 41(1) will not help the appellant as the appellant had claimed deductions in earlier years in respect of the amounts written off (though may be not in entirety). As such, the appellant is also not excluded from taxation of the said amount u/s 41(1).

> 8. As regards the finding of the AO that the claim is made u/s 57 of the Act, this has been clarified at para 4 above, wherein it is held that the amount is taxable u/s 28(iv) and also u/s.41(1). Thus, the addition made by the AO is upheld with the finding and qualification as above.

Feeling aggrieved by the order of the CIT(A), the assessee is in appeal before this Tribunal.

07. Before us, it is urged before us by the assessee that the order passed by the CIT (A) is contrary to the judgment passed by the jurisdictional High Court in the case of CIT v. M/s. Comfund Financial Services [67 ITD 304]. It is submitted that the AO relied upon Sections 56 and 57 to knock out the assessee, whereas the CIT (A) relied upon Section 28(4) r.w.s.41(1) of the IT Act, to hold the write-back as valid. It was submitted by the assessee before us that the assessee before the AO had submitted that the loan by itself is of capital in nature and its waiver is to be treated as capital in nature and is not chargeable to Income-tax under the Act. It was submitted that Section 28(iv) defines charge of Income-tax upon the total income of the previous year. It was submitted that the write-back of loan is not covered and hence not taxable u/s.28(iv) and Section 41(1) of the Act. It was submitted that the word used in Section 28(iv), is "convertible into money or not, arising from business or the exercise of profession", therefore for the purposes of Section 28(iv), the benefit of perquisite should arise from business or profession. As the assessee was not in the profession of giving loans, the waiver of loans cannot

be construed as the benefit arising from such business. Further it was submitted that the write-back of loan is also not taxable u/s.41(1).

08. The Ld. AR has drawn our attention to page 37 of the paper book where it is mentioned that pursuant to the Board Resolution of RMZ Properties P. Ltd, dt. August, 19, 2010, interest free unsecured loan has been written off as it is no longer payable and transferred to other income. The Ld. AR has also drawn our attention to the copy of the letter issued by RMZ Properties P. Ltd, dt.19.08.2010 where the entire interest-free unsecured loan amounting to Rs.16,05,00,000/- which was availed by the assessee was approved to be written off. In the light of the above, it was submitted that the assessee had treated the loan as capital receipt and as the same was approved to be written-off, the same was wrongly written back by the lower authorities. The assessee relied upon the judgment of the Hon'ble jurisdictional High Court in the Comfund Financial Services (supra).

09. On the other hand, the Ld. DR has submitted that the issue has been examined in detail by the Hon'ble Madras High Court in CIT v.

Ramaniyam Homes P. Ltd [(2016) 384 ITR 530]. He drew our attention to paras 39 to 44 of the judgment, which reads as under :

39. Therefore, it is not the actual receipt of money, but the receipt of a benefit or perquisite, which has a monetary value, whether such benefit or perquisite is convertible into money or not, which is what is covered by Section 28(iv). Say for instance, a gift voucher is issued, enabling the holder of the voucher to have dinner in a restaurant, it is a benefit of perquisite, which has a monetary value. If the holder of the voucher is entitled to transfer it to someone else for a monetary consideration, it becomes a perquisite convertible into money. But, irrespective of whether it is convertible into money or not, it should have a monetary value so as to attract Section 28(iv). A monetary transaction, in the true sense of the term, can also have a value. Any number of instances where a monetary transaction confers a benefit or perquisite that would have a value, can be conceived of. There may be cases where an incentive is granted by the supplier, waiving a portion of the sale price or granting a rebate or discount of a portion of the price to be paid, when the payments scheduled over a period of time, are made promptly. It is needless to point out that in such cases, the prompt payment of money itself brings forth a benefit in the form of an incentive or a rebate or a discount in the price of the product. We do not know why it should not happen in the case of waiver of a part of the loan. Therefore, the finding recorded in paragraph 27.1 of the decision in Iskraemeco Regent Ltd. (supra) that Section 28(iv) has no application to any transaction, which involves money, is a sweeping statement and may not stand in the light of the express language of Section 28(iv). In our considered view, the waiver of a portion of the loan would certainly tantamount to the value of a benefit. This benefit may not arise from "the business" of the assessee. But, it certainly arises from "business". The absence of the prefix "the" to the word "business" makes a world of difference.

40. We shall now turn our attention to the distinction sought to be made between the waiver of a portion of the loan taken for the purpose of acquiring capital assets on the one hand and the waiver of a portion of the loan taken for the purpose of trading activities on the other hand.

41. It appears that in so far as accounting practices are concerned, no such distinction exists. Irrespective of the purpose for which, a loan is availed by an assessee, the amount of loan is always treated as a liability and it gets reflected in the balance sheet as such. When a repayment is made in monthly, quarterly, half yearly or yearly instalments, the instalment is divided into two components, one relating to interest and another relating to a portion of the principal. To the extent of the principal repaid, the liability as reflected in the balance sheet gets reduced. The interest paid on the principal amount of loan, will be allowed as deduction, in computing the income under the head "profits and gains of business or profession", as per the provisions of the Act.

42. But, Section 36(1)(iii) makes a distinction. The amount of interest paid in respect of capital borrowed for the purpose of business or profession is allowed as deduction under

Section 36(1)(iii), in computing the income referred to in Section 28. But, the proviso thereunder states that any amount of interest paid in respect of capital borrowed for acquisition of an asset for extension of existing business or profession, whether capitalised in the books of account or not for any period beginning from the date on which the capital was borrowed for the acquisition of the asset, till the date on which such asset was put to use, shall not be allowed as deduction.

43. Therefore, it is clear that the moment the asset is put to use, then the interest paid in respect of the capital borrowed for acquiring the asset, could be allowed as deduction. When the loan amount borrowed for acquiring an asset gets wiped off by repayment, two entries are made in the books of account, one in the profit and loss account where payments are entered and another in the balance sheet where the amount of unrepaid loan is reflected on the side of the liability. But, when a portion of the loan is reduced, not by repayment, but by the lender writing it off (either under a one time settlement scheme or otherwise), only one entry gets into the books, as a natural entry. A double entry system of accounting will not permit of one entry. Therefore, when a portion of the loan is waived, the total amount of loan shown on the liabilities side of the balance sheet is reduced and the amount shown as Capital Reserves, is increased to the extent of waiver. Alternatively, the amount representing the waived portion of the loan is shown as a capital receipt in the profit and loss account itself. These aspects have not been taken note of in Iskraemeco Regent Ltd.(supra)

44. In view of the above, the questions of law are liable to be answered in favour of the Revenue/appellant. Accordingly, they are answered in favour of the appellant/Revenue and the appeal filed by the Revenue is allowed. No costs.

The Ld. DR argued that the CIT (A) was right in coming to the conclusion, as he had examined the judgment of the Madras High Court in detail and hence, this issue of the assessee had to be dismissed.

10. We have heard the rival contentions and perused the record. The issue before us is hinges on the aspect whether the loan taken by the assessee was in the nature of capital or revenue. We find that this aspect was not examined by the authorities below. The nature of loan taken by the assessee could be determined on the basis of the purpose

for which the loan was taken is to be examined. If the loan is taken for a purpose which gives enduring benefit, then it may be termed as a capital receipt. If it does not give any enduring benefit to the assessee, then it is to be treated as revenue in nature. Besides, the examination of this aspect by the lower authorities, it is also required that the aspect of the assessee's statement before the AO that this loan was taken as a stop-gap arrangement, till the loan is disbursed by the financial institution / bank, has also to be examined. In this regard, necessary assistance is to be provided by the assessee to the AO during verification for what purposes the loan was taken from sister concerned. We would like to refer to the extracts of the assessment order at para 04 above, which goes to show that the loan was only taken by the assessee to carry out the development of commercial project as an interim arrangement, till the assessee availed a loan from the financial institution. Thus the loan taken by the assessee was only as a temporary arrangement and not as a regular borrowing for the purpose of building capital assets. In our view, the AO is also required to verify the actual use of the loan amount after borrowing it from RMZ Properties. Assuming that the loan was used for acquiring

or constructing some capital asset, then after write off of the loan liability by the lender, the cost of such asset should go down as per the provisions of Section 43(1) of the Act. These aspects are required to be examined by the AO which have not been done, as the assessee has not provided the date and amount of loan taken from the financial institution / bank for the development of the commercial project.

11. Further in our view the assessee had also relied upon page 119 of the paper book which is a letter written by RMZ Properties P. Ltd to the assessee. The said letter in our view cannot substitute the Board Resolution passed by the company RMZ Properties, but is merely a letter issued by it. Further the said RMZ Properties is also required to confirm for what purpose the loan was initially given and whether there was a board resolution passed by the Board of directors at the time of grant of loan about the purpose of the loan. All these aspects have not been examined by the authorities below. We are of the opinion that the examination of all these aspects are required to answer the moot question whether the loan given was towards capital or otherwise. Further in the matter Rollatainers Ltd. Vs Commissioner of Income-tax*[2011] 15 taxmann.com 111 (Delhi) it was held as under

16. Thus, the entire judgment rested on the premise that the liability in question was not a trading liability. Coming to the case of *Tosha International Ltd.* (*supra*) the facts are that the assessee was engaged in manufacturing of black and white picture tubes. It ran into huge losses and ultimately became a sick company and was so registered with the BIFR. Under one time settlement Scheme, the banks and financial institutions required the assessee to pay 60% of the amount towards the principal and waived the entire interest amount. The question before the Court was whether waiver of the principal amount of amount Rs. 10.48 crore, credited to the capital reserve account, constituted income? The Court came to the conclusion that the amount is not covered by the provision contained in Section 41(1). It was also mentioned that the principles enunciated in the case of *Mahindra & Mahindra Ltd.* v. *CIT* [2003] 261 ITR 501 / 128 Taxman 394(Bom.) are fully applicable. Again, it was a case where the loan was on capital account and not for trading purposes. Even in the instant case, as far as term loans are concerned, waiver thereof by the financial institutions has not been treated as income at the hands of the assessee. It is only the writing off loans on cash credit account which was received for carrying out the day to day operations of the assessee which is treated as "income" in the hands of the assessee. The judgment of the Bombay High Court in *Solid Containers Ltd.'s*case (*supra*) and that of Madras High Court in *Aries Advertising (P.) Ltd.'s* case (*supra*) are directly on this issue. The Tribunal has rightly applied the said judgments wherein the view taken is the same as taken by this Court in *Logitronics (P.) Ltd.'s* case (*supra*).

17. Insofar as the decision in *Jindal Equipment Leasing & Consultancy Services Ltd.* is concerned, that was a case where the assessee was an investment company registered with the Reserve Bank of India as a Non Banking Financial Company (NBFC). In the return for the assessment year 2003-04, it had shown a loan of Rs. 6,80,31,189 payable to M/s Jindal Steel & Power Ltd. (JSPL). It is the JSPL which had return of a sum of Rs. 1,46,53,065 in its books of account. On that premise, the Assessing Officer had treated the same as income of the assessee on the ground that the creditor had written of the said amount and, therefore, it was no more the liability of the assessee and to this extent it was the assessee's gain and added the same under Section 41(1) of the Act. The plea of the assessee in that case was that JSPL had done it unilaterally and without the knowledge of the assessee. The CIT(A) confirmed the addition made by the Assessing Officer in term of Section 41(1) read with Section 28(*i*) of the Act. The ITAT deleted the addition holding that Section 41(1) of the Act had no application. In the appeal preferred by the Revenue, it did not press the applicability of Section 41(1) Act or Section 28(*i*) of the of the Act but took a totally different stand namely the said waiver was to be treated as income under Section 28(*iv*) of the Act. No doubt, this Court held that the amount written of in the books of account by JSPL was in the nature of value of any benefit or perquisites, whether convertible into money or not and, therefore, could not be treated 'profits and gains from business'. However, no other aspects were looked into or discussed. The nature of loan taken by the said assessee, which was waived by the JSPL, namely whether it was on capital account or in the trading field was not the aspect looked into. In fact, neither there was any material on this aspect nor it was argued. This Court had relied upon the judgment of Bombay High Court in *Mahindra & Mahindra Ltd.'s* case (*supra*). When we go through the said judgment of the Bombay High Court, it becomes clear that in that case, the loan arrangement in its entirety was not obliterated and more importantly the purchase consideration related to capital asset.

In view thereof the issues referred in above paragraphs 10-11 are required to be decided by the AO after giving the opportunity to the parties.

12. In our view reliance placed by both the parties on the judgments (supra), cannot be blindly applied to the facts of the present case unless the facts are clear. In any case if the facts of the case before us

and the facts of the case decided by the jurisdictional High Court in the matter of Comfund Financial Services (supra) are similar, then the same is binding on us. However, at this stage it is too early to decide whether the judgment of Comfund Financial Services (supra) is applicable or not. Therefore, we are left with no other option but to remand the matter to the file of the AO to analyse the matter afresh, after giving opportunity of hearing to the assessee.

13. In the result, appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on 13th day of September, 2017.

Sd/- Sd/-

(A. K. GARODIA) (LALIET KUMAR)
ACCOUNTANT MEMBER JUDICIAL MEMBER

Bengaluru
Dated : 13.09.2017
MCN*

Copy to:

1. The assessee
2. The Assessing Officer
3. The Commissioner of Income-tax
4. Commissioner of Income-tax(A)
5. DR
6. GF, ITAT, Bangalore

By Order

SENIOR PRIVATE SECRETARY