

**NEW DELHI, AUG 02, 2010: THE** issue before the tribunal is - Whether the assessee is entitled to exclude the loan amount waived off by the bank as income in its hand u/s 41(1) as the same has not been in the nature of cessation of any trading liability and also the failure to prove that the loan was utilised for acquiring any capital asset. And the answer is NO.

### **Facts of the case**

The assessee filed its return of income on 21.1.2006 declaring total income at Rs.1,52,99,616/-. The case was selected for scrutiny, and, accordingly, notices u/s 143(2) and 142(1) of the Act were issued, which were complied with by the assessee. Various details required by the AO were furnished during the course of assessment proceedings. In the course of assessment proceedings, it was noticed by the AO that assessee has appended a note to the accounts in Schedule XV, Part B, that *the company has sold/agreed to sell during the year its entire fixed assets comprising, leasehold land, building and electric installation therein and has realized a sum of Rs.1.85 crores from sale and advance and has paid the said sum to State bank of India to settle the entire outstanding principal amount of Rs.4,76,42,213/- under the one time settlement with the said bank.* During the course of assessment proceedings, the assessee's representative explained before the AO that one time settlement with State Bank of India by paying Rs.1.85 crores against the entire outstanding principal amount of Rs.4,76,92,213/- was made, and the company has written back the outstanding provision for bank interest amounting to Rs.1,90,42,295/- to the Profit and loss account and offered the same as income. However, the principal amount of loan waived by the Bank to the extent of Rs 2,91,42,213/- was not taken to the Profit & Loss Account but was taken directly to the balance sheet by creating a capital reserve. The principal outstanding loan amount of Rs.4,76,42,213/- was settled for Rs.1.85 crores, and the balance outstanding principal amount of Rs.2,91,42,212/- has been written off by the bank after accepting the payment of Rs.1.85 crores against total outstanding principal amount of Rs.4,76,42,213/-. It was claimed by the assessee that this principal amount written off by the bank does not fall within the ambit of "cessation of liabilities" as contemplated u/s 41 of the Act and, therefore, it was not chargeable to tax in the hands of the assessee. It was stated by the AO that the basic line of argument put forward by the assessee was that Section 41(1) of the Act covers only such liabilities, which have been allowed or deducted in earlier years as expenditure or trading liability, and when such a liability is written off, it is chargeable to tax as income u/s 41(1) of the Act. The assessee's argument was that since no allowance or deduction was made in the assessment for any year in respect of principal amount of loan obtained by the assessee from Bank, the principal amount of loan written off by the bank is not covered by Section 41(1) of the Act, the same is thus not liable to be included as income in the hands of the assessee u/s 41(1) of the Act. This line of the argument advanced by the learned counsel for the assessee before the AO has been accepted by the AO. However, the AO proceeded further to state that the matter does not end there but the next question to be decided is as to whether the above principal amount written off by the Bank is otherwise assessable as income in the hands of the assessee under the provisions of the Act. In this respect, the AO examined the definition of "income" given in Section 2(24) of the Act and hold that in case any benefit arises to the assessee by way of waiver of loan taken by the assessee, the same shall be treated to be the income chargeable to tax under the Act notwithstanding the fact that the item may not be covered by the provisions of Section 41(1) of the Act. The AO further hold that since this loan amount was related to the business of the assessee, the same would be assessable under the head "business". He, therefore, brought the said amount of Rs.2,91,42,213/- to tax as income includible in the assessee's total income.

After considering the AO's order and the assessee's submissions, the CIT(A) decided this

issue in favour of the assessee by holding that the provisions of Section 2(24) or Section 28(i) or 28(iv) and Section 41(1) are not applicable to the present case.

The revenue appealed before the Tribunal.

It was contended by the revenue that whether the principal amount of bank loan waived by the bank is includible as income under the provisions of Section 41(1) of the Act, the AO has accepted the assessee's contention that this item is not covered by the provisions of Section 41(1) of the Act inasmuch as it was neither allowed or deducted as expenses or trading liability in earlier years. Therefore, the dispute in this case is not with regard to the applicability of Section 41 of the Act. He further submitted that in this case, the assessee has obtained bank loan to be utilized in its business, and subsequently, the bank loan to the extent of Rs.2,91,42,212/- has been waived by the bank implying thereby that the assessee has become richer by this amount in the course of carrying on its business.

It was submitted by the assessee by supporting the order of the CIT(A) to contend that in the light of the decisions of jurisdictional High Court of Delhi in the case of CIT vs Tosha International Ltd and Bombay High Court in the case of Mahindra & Mahindra Ltd. vs CIT the principal amount of loan waived by the bank cannot be treated to be income of the assessee either within the meaning of Section 41(1) of the Act or otherwise within the meaning of Section 28(iv) or Section 28(i) or Section 2(24) of the Act. He further submitted that the principal amount of loan waived by the bank is also not liable to be taxed in the light of the decision of Hon'ble Madras High Court in the case of CIT vs. P. Ganesa Chettiar.

**Having heard both the parties the Tribunal held that:**

*++ in the light of the decision of Bombay High Court in the case of Solid Containers Ltd. vs DCIT where the principle enunciated by the Supreme Court in the case of CIT vs T.V. Sundaram Iyengar & Sons Ltd. has been applied, the principal amount of loan, which is taken for the purpose of business or trading activity, on its waiver by the creditor, would constitute income chargeable to tax under the Act. However, if the loan is utilized for the purpose of acquiring any capital asset, the same, on its waiver, would not constitute income chargeable to tax as held by Bombay High Court in the case of Mahindra & Mahindra Ltd. vs CIT and Delhi High Court in the case of CIT vs. Tosha International Ltd. either under section 41(1) or 28(iv) or 2(24) of the Act.*

*++ in the instant case, the assessee has not brought any material or evidences on record to show that the loan taken by the assessee from bank in Cash Credit account, CTL account and WCTL account was utilized for the purpose of acquiring any capital asset. On the other hand, the material available on record including the Notes to the Accounts indicates that the assessee has 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 indicates that the assessee have obtained the loan facility for its business activity or trading operations. However, this aspect of the matter, whether the whole of the loan amount has been utilized either for the purpose of acquiring capital asset or for the purpose of business activity or trading activity, has not been looked into or examined by the authorities below nor the assessee has established that the loan amount was utilized only for the purpose of acquiring capital asset. The assessee has merely relied upon the decision of Hon'ble Delhi High Court in the case of CIT vs. Tosha International Ltd. and the decision of Hon'ble Bombay High Court in the case of Mahindra & Mahindra Ltd. vs CIT without giving details about the purpose for which the loan amount was utilized.*

*++ issue is restored to the file of the AO 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 information 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. 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. vs DCIT, where the principle laid down by the Hon'ble Supreme Court in the case of CIT vs T.V. Sundaram Iyengar & Sons Ltd 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 AO with reference to the purpose for which the loan amount was utilized. The AO shall provide reasonable opportunity of being heard to the assessee.*