IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION.

INCOME TAX APPEAL (IT) NO.735 OF 2018

APPELLANT : Pr. Commissioner of Income Tax-7, Mumbai Room No.315, Aaykar Bhavan, Maharshi Karve Road, Mumbai 400 020

..**VERSUS**..

RESPONDENT : M/s. Orient Press Ltd., 20, Pragati Industrial Estate, Lower Parel, Mumbai 400 011.

Ms. Swapna Gokhale, Advocate for the Appellant.
Mr. Kumar U. Kale, Advocate for the Respondent.

CORAM : **DHIRAJ SINGH THAKUR AND VALMIKI SA MENEZES, JJ.**

DATE : **10th NOVEMBER, 2022.**

ORDER : (PER : VALMIKI SA MENEZES, J.)

. This is a Tax Appeal under Section 260A of the Income Tax Act, 1961 ("the Act"), against the order dated 20.12.2016, passed by the Income Tax Appellate Tribunal ("ITAT"), Mumbai, in ITA No.3681/Mum/2014, which relates to Assessment Year 2008-09.

Relevant to the Assessment Year 2008-09, the Respondent – assessee had filed its Return of Income on 16.10.2008, declaring nil income. The return was processed under Section 143(1) of the Act, and was selected for scrutiny, pursuant to which Notice under Sections 143(2) and 142(1) of the Act, was issued to the assessee by the Assessing Officer. After response was filed by the assessee, and after the assessee was heard, an Assessment Order came to be passed on 29.12.2010; in the assessment order, the assessee was held liable to pay additional taxes and interest due to disallowance made under Section 14A of the Act, and under Section 41(1) of the Act, in the amount of Rs.15,22,32,432/- on the ground that this was the principal amount on a loan taken by the assessee, which was waived by financial institutions i.e. IND Bank, Indian Oversees Bank, ICICI Limited, IDBI Limited and UTI Mutual Fund, in terms of a One Time Settlement (OTS). Whilst disallowing the amount of Rs.15,22,32,432/-, the Assessing Officer has opined that even though the same was a receipt of capital nature, the amount had become the assessee's own money and applying the ratio of the judgment in ***M/s Solid Containers Ltd. ..V/s.. DCIT, Spl. Range – 1, Mumbai***

(2008-TIOL-459-HC-Mumbai-IT), passed by this Court, due to subsequent event of waiver by the banking institutions, the principal amount has attained a totally different quality and is treated as the assessee's income for the year. Consequently, the Assessing Officer made disallowances of the said amount under Section 41(1) of the Act, adding the amount of Rs.15,22,32,432/- as income of the assessee charging tax, penalty and interest on the same.

2. The Respondent challenged the Assessment Order dated 29.12.2010, before the Commissioner of Income Tax (Appeals)-13, ("the Commissioner (Appeals)), Mumbai, in an appeal, who on considering the reply, reversed the order of the Assessing Officer dated 29.12.2010 only with respect to the disallowance of the amount of Rs.15,22,32,432/-, holding that the same was waived under the OTS Scheme of the financial institutions, and that since the said amount was towards purchase of land and other capital assets in the nature of machinery, that amount was not chargeable to tax under Section 41(1) of the Act, nor was it a profit and gain of business under Section 28(iv) of the Act. Accordingly, the Appellate

Authority set aside the order of the Assessing Officer to the limited extent of the disallowance of Rs.15,22,32,432/-. For want of challenge to the remaining part of the appellate order, by the Respondent, the same has become final.

The Appellant challenged the order of the Commissioner (Appeals) dated 12.03.2014, before the ITAT, which has dismissed the appeal by the impugned order dated 20.12.2016, upholding the findings arrived at by the Appellate Authority. The impugned order dated 20.12.2016 of the ITAT, is sought to be challenged before us in an appeal filed under Section 260A of the Act, on the following proposed substantial questions of law :

> "A. Whether on the facts and in the circumstances of the case and in law, the Hon'be ITAT has erred in deleting the addition of Rs.15,22,32,432/- made u/s.41(1) of the I.T. Act, 1961 without properly appreciating the fact that the decision of the Jurisdictional High Court in the case of M/s. Solid Containers Ltd vs DCIT, Spl.Rg.1, Mumbai (2008-TIOL-459-HC-Mumbai-IT) is squarely applicable to the case of assessee ?
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> B. Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT

has erred in deleting the addition of Rs.15,22,32,432/- made u/s.41(1) of the I.T.Act, 1961 by relying on the decision of the Hon'ble Bombay High Court in the case of M/s. Mahindra & Mahindra Ltd vs CIT 261 ITR 501 (Bom) without properly appreciating that the facts of the case relied upon are different from the facts of the case relied upon are difference from the facts of the instant case. In the case of M/s. Mahindra & Mahindra Ltd (supra), it has been held that the entire loan agreement was not obliterated by such waiver. However, in this case, the entire loan agreement with the various institutions has been obliterated by one time settlement of dues entered by the assessee ?

C. Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT has erred in deleting the addition of Rs.15,22,32,432/- made u/s.41(1) of the I.T.Act, 1961 without properly appreciating the fact that because of the waiver of loan amount, it has assumed the character of a trade surplus and therefore has to be treated as deemed income of the assessee u/s.41(1) of the Act, for the year under consideration ?"

3. Though, the proposed substantial questions of law are three in number, in substance the challenge to the order passed by the Appellate Authority and the ITAT was primarily on the ground that the deletion of the addition of

Rs.15,22,32,432/- allowed by those Authorities under Section 41(1) of the Act, was contrary to the judgment of this Court in ***Solid Containers Ltd. ..V/s.. Deputy Commissioner of Income-Tax and Another***, reported in ***(2009) 308 ITR 417***, and further on the ground that the ratio laid down in the judgment of this Court in ***Mahindra and Mahindra Ltd. ..V/s.. Commissioner of Income-Tax***, reported in ***(2003) 261 ITR 501 (Bom)***, was not applicable to the facts of the case.

4. We have heard Ms Swapna Gokhale, learned Counsel for the Appellant and perused the record of the proceedings before the Assessing Officer, the Appellate Forum and ITAT. Mr Kumar Kale, learned Counsel appearing for the Respondent has not filed any reply in the matter, but supports the impugned orders.

5. Ms Swapna Gokhale, learned Counsel for the Appellant submits that Solid Containers Ltd. (supra), refers to the judgment of the Hon'ble Supreme Court in ***Commissioner of Income Tax, Madurai ..V/s.. M/s T. V. Sundaram Iyengar and Sons Ltd.,*** reported in ***(1996) 222 ITR 344***, and has considered the question of claim of deduction from taxable

income of waiver of loan, which was a capital receipt, put down as an expense, and therefore, was not an income under Section 41(1) of the Act. It was further submitted that Solid Containers Ltd. (supra), has also considered the judgment of this Court in Mahindra and Mahindra Ltd. (supra), which was also a case of waiver of the principal amount by way of an OTS deciding a question whether it was covered under Section 41(1) of the Act, and could be treated as business income under Section 28(iv) of the Act.

It is the submission of the learned Counsel for the Appellant that though the judgment of this Court in Mahindra and Mahindra Ltd. (supra), was upheld by the Hon'ble Supreme Court in ***Commissioner ..V/s.. Mahindra and Mahindra Ltd.***, reported in ***(2018) 93 taxmann.com page 32 (SC)***, the ratio of the said two judgments would be inapplicable to the facts of the present case. Learned Counsel therefore contends that a wrong application of the judgments of the Hon'ble Supreme Court and of this Court in Mahindra and Mahindra Ltd. (supra), to the facts of the present case would give rise to the substantial questions of law proposed by the revenue in this appeal.

6. This Court, in Mahindra and Mahindra Ltd. (supra), was concerned with the case of a waiver of a loan amount on a contract for supply of tools and dies, which the assessee claimed benefit of depreciation over a period of time. In that case, after considering the loan arrangement between the parties in its entirety, the Appellate Authority has held that there was no benefit to the assessee on waiver of the contract and as such there was no value of any benefit or perquisite arising in favour of assessee under Section 28(iv) of the Act. In that judgment, this Court has also addressed the alternate submission on behalf of the revenue that, the waiver on the contract constituted remission of trading liability, and therefore, Section 41(1) of the Act stood attracted. That argument was also rejected on two grounds, the first being that in order to apply Section 41(1) of the Act to a case, an assessee should have obtained deduction in the assessment for any year in respect of loss, expenditure or trading liability incurred by it and in that case, the assessee had not obtained such allowance or deduction in respect of the expenditure or trading liability. The second ground for

rejecting the contention based on Section 41(1) of the Act was, that there was no deduction given to the assessee in earlier years, and therefore, the amount claimed towards waiver could not be included as income under Section 41(1) of the Act; it further held that the toolings constituted capital assets and were not a stock-in-trade and hence waiver of the principal amount, which had been used for acquiring a capital asset, would be a case not covered by Section 41(1) of the Act. For easy reference, the relevant paragraphs of Mahindra and Mahindra Ltd. (supra), are quoted as under :

> *"8. At the very outset, we wish to point out three facts which are undisputed : (a) that a loan was advanced by KJC to the assessee, (b) that the assessee had paid interest at 6 per cent, per annum for ten years being the period of contract, (c) that the assessee never got deduction for payment of interest under Section 36(1)(iii) or under Section 37 of the Act. These three facts are not disputed by the Department. Therefore, we are required to consider the applicability of the provisions of Sections 28(iv) and 41(1) of the Act in the light of the abovementioned three undisputed facts.*
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> *9. 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 (Guj)). Applying Section 28(iv) to the facts of this case, one finds that on June 18, 1964, the assessee entered into an agreement to purchase toolings from KJC. In 1964-65, India was 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 per cent, 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.*

10. 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 on 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 asses-see-firm had purchased goods. They had also obtained loans from a party, accounts were settled and the balance was credited to the partners' account. It was held by the Delhi High Court that the amount referable to loans was not a trading liability. 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."

7. The judgment of this Court in Mahindra and Mahindra Ltd. (supra), was challenged before the Hon'ble Supreme Court, which dismissed the revenue's appeal. In Commissioner ..V/s.. Mahindra and Mahindra Ltd. (supra), the Hon'ble Supreme Court, whilst upholding the judgment of this Court, has held as under :

"11) It is a well-settled principle that creditor or his successor may exercise their "Right of Waiver" unilaterally to absolve the debtor from his liability to repay. After such exercise, the

debtor is deemed to be absolved from the liability of repayment of loan subject to the conditions of waiver. The waiver may be a partly waiver i.e., waiver of part of the principal or interest repayable, or a complete waiver of both the loan as well as interest amounts. Hence, waiver of loan by the creditor results in the debtor having extra cash in his hand. It is receipt in the hands of the debtor/assessee. The short but cogent issue in the instant case arises whether waiver of loan by the creditor is taxable as a perquisite under Section 28 (iv) of the IT Act or taxable as a remission of liability under Section 41 (1) of the IT Act.

12) The first issue is the applicability of Section 28 (iv) of the IT Act in the present case. Before moving further, we deem it apposite to reproduce the relevant provision herein below:-

> *'28. Profits and gains of business or profession.—The following income shall be chargeable to income-tax under the head "Profits and gains of business profession",-*
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> ** ** **
>
> *(iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession;*
>
> ** ** **'

13) On a plain reading of Section 28 (iv) of the IT Act, prima facie, it appears that for the applicability of the said provision, the income which can be taxed shall arise from the business or profession. Also, in order to invoke the provision of Section 28 (iv) of the IT Act, the benefit which is received has to be in some other form rather than in the shape of money. In the present case, it is a matter of record that the amount of Rs.57,74,064/- is having received as cash receipt due to the waiver of loan. Therefore, the very first condition of Section 28 (iv) of the IT Act which says any benefit or perquisite arising from the business shall be in the form of benefit or perquisite other than in the shape of money, is not satisfied in the present case. Hence, in our view, in no circumstances, it *can be said that the amount of Rs.57,74,064/- can be taxed under the provisions of Section 28 (iv) of the IT Act.*

14) Another important issue which arises is the applicability of the Section 41 (1) of the IT Act. The said provision is re-produced as under:

> *"41. Profits chargeable to tax.- (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*
>
> ** ** **"

15) On a perusal of the said provision, it is evident that it is a sine qua non that there should be an allowance or deduction claimed by the assessee in any assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee. Then, subsequently, during any previous year, if the creditor remits or waives any such liability, then the assessee is liable to pay tax under Section 41 of the IT Act. The objective behind this Section is simple. It is made to ensure that the assessee does not get away with a double benefit once by way of deduction and another by not being taxed on the benefit received by him in the later year with reference to deduction allowed earlier in case of remission of such liability. It is undisputed fact that the Respondent had *been paying interest at 6 % per annum to the KJC as per the contract but the assessee never claimed deduction for payment of interest under Section 36 (1) (iii) of the IT Act. In the case at hand, learned CIT (A) relied upon Section 41 (1) of the IT Act and held that the Respondent had received amortization benefit. Amortization is an accounting term that refers to the process of allocating the cost of an asset over a period of time, hence, it is nothing else than depreciation. Depreciation is a reduction in the value of an asset over time, in particular, to wear and tear. Therefore, the deduction claimed by the Respondent in previous assessment years was due to the deprecation of the machine and not on the interest paid by it.*

16) Moreover, the purchase effected from the Kaiser Jeep Corporation is in respect of plant, machinery and tooling equipments which are capital assets of the Respondent. It is important to note that the said purchase amount had not been debited to the trading account or to the profit or loss account in any of the assessment years. Here, we deem it proper to mention that there is difference between 'trading liability' and 'other liability'. Section 41 (1) of the IT Act particularly deals with the remission of trading liability. Whereas in the instant case, waiver of loan amounts to cessation of liability other than trading liability. Hence, we find no force in the argument of the Revenue that the case of the Respondent would fall under Section 41 (1) of the IT Act.

17) To sum up, we are not inclined to interfere with the judgment and order passed by the High court in view of the following reasons:

> *(a) Section 28(iv) of the IT Act does not apply on the present case since the receipts of Rs.57,74,064/- are in the nature of cash or money.*
>
> *(b) Section 41(1) of the IT Act does not apply since waiver of loan does not amount to cessation of trading liability. It is a matter of record that the Respondent*

> *has not claimed any deduction under Section 36 (1) (iii) of the IT Act qua the payment of interest in any previous year."*

8. This Court, in ***<u>Commissioner of Income-tax-8 ..V/s.. Santogen Silk Mills Ltd</u>***., reported in ***<u>(2015) 57 taxmann.com 208 (Bombay)</u>***, after referring to <u>Mahindra and Mahindra Ltd</u>. (supra), considering a similar case of a loan availed of for acquiring capital assets like machinery, waived by a bank, has held as under :

> *"8. We have heard both sides and with their assistance perused the paper book. It is not the argument of Mr. Pinto that the ground as noted in paragraph 1 of the tribunal's order and particularly at Page 40 ground no.5 was not the one which was forming part of the memo of appeal before the tribunal. There, the revenue specifically argued that the amount of loan retained by the assessee on account of one time settlement with the banks constituted its income as per the Section 28(iv) of the Income Tax Act though not under Section 41 (1) of the said Act. In such circumstances we do not see any justification for raising the question of law and particularly formulated as question no.3 above. We do not think that the said question arises for determination and consideration in the background facts.*
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> *10. Thereafter, it was noted by the tribunal that during the course of assessment proceedings, the assessee filed revised return of income on 20th October, 2009. In the original return of income it had disclosed income from other sources at Rs.20.19 crores. Before the Assessing Officer, it was urged that this income arose on account of one time settlement with two banks from which it had taken loans. The said amount was shown in the Profit and Loss Account as an extra*

ordinary income. In the revised return of income, it was claimed that amount waived by the banks consisted of interest component of Rs.20.79 crores and principal amount of Rs.4.40 crores. The argument is that throughout the waived principal amount did not result in income. The Assessing Officer did not accept this argument and therefore the assessee carried the matter before the First Appellate Authority. He directed the Assessing Officer to verify the principal/interest portions of loan and if the principal portion of loan had not been claimed as deduction, then the same should be excluded from the taxable income.

11. It is this order of the First Appellate Authority which was challenged by the revenue in appeal before the tribunal. The argument of both sides have been referred in details in paragraph 6 of the tribunal's order and it has held that on perusal of the loan agreement insofar as loan from ICICI Bank is concerned (subject matter and part of this appeal) that was for purchasing machinery and availed by the assessee. As far as loan from ADCB is concerned, it was conceded that the same was against hypothecation of stock and not a term loan. We are not concerned with that part of the order of the tribunal, however, it is material to note that the tribunal disallowed the claim made by the assessee and held that as far as ADCB is concerned, the waiver of the principal amount would have to be construed as taxable income. However, as far as ICICI bank is concerned, it waived the principal amount of Rs.3.06 crores that was not for carrying on any business activity but to acquire the capital assets. This Court has consistently taken a view that the loan amount written off would not come within the purview of Section 28(iv) of the Income Tax Act. The view taken by this Court in the case of Mahindra & Mahindra Ltd. v. CIT [2003] 261 ITR 501/128 Taxman 394 and Solid Containers Ltd. v. Dy. CIT [2009] 308 ITR 417/178 Taxman 192 (Bom.) would enable the tribunal and equally us to conclude that the loan written off would not be taxable under Section 28(iv) of the Act. That issue specifically came up for consideration in the matter of Mahindra and Mahindra and

> *it was held that the said provision would apply only when a benefit or perquisite is received in kind and has no application where benefit is received in cash or money. Following this decision in the case of CIT v. Xylon Holdings (P.) Ltd. [2012] 211 Taxman 108/26 taxmann.com 333 (Bom.) this Court held that the waiver would not come within the purview of Section 28(iv) of the Income Tax Act. Having perused this decision and in the peculiar facts and circumstances of the present case we are of the view that the tribunal has rightly upheld the order of the Commissioner. It has concluded that the factual and legal position enables it to hold that the direction of the First Appellate Authority cannot be said to be perverse. The view taken by him as termed by the tribunal is rational and judicious. More so, when the assessee company is a BIFR unit and it is in the process of revival, therefore, the banks waived loan as well as interest component due from the assessee. Equally, the loan sanctioned by ADCB and subsequently waived off has also been offered to tax. It is only in the ICICI bank's case that the tribunal took the above view and which we do not find as perverse or vitiated by a error of law apparent on the face of record. As a result of the above discussion, the appeal fails and is dismissed. There will be no order as to costs."*

9. This Court, in Solid Containers Ltd. (supra), considered a case where the assessee had taken a loan for trading activity, whose repayment had become time barred and the question before this Court was whether the amount of loan in the hands of the assessee, which was not a capital asset, should be treated as liable to tax in the hands of an assessee, as his income, being part of the trading of the assessee. On those facts, this Court in Solid Containers Ltd. (supra), was of the

opinion that the ratio of Mahindra and Mahindra Ltd. (supra) was not applicable, since the facts in Mahindra and Mahindra Ltd. (supra), were different in that loan amount, which had been waived, was applied to create a capital asset.

10. This Court, in ***The Commissioner of Income Tax-3 ..V/s.. M/s. Xylon Holdings Pvt. Ltd***., **(Income Tax Appeal No.3704 of 2010 dated 13.10.2012)**, has distinguished this Court's judgment rendered in Solid Containers Ltd. (supra), on facts, holding that Solid Containers Ltd. (supra), was a case where the assessee had taken a loan for business purpose and waiver of the loan, in those circumstances was not a loan taken for purchase of capital assets, and therefore, chargeable the tax in terms of the provisions of Section 41(1) of the Act.

It then applied the ratio in Mahindra and Mahindra Ltd. (supra), since the liability to repay the loan in that case had been waived, the loan amount having been applied to creation of a capital asset of purchase of a car, and held that in that case, Section 41(1) of the Act would not be applicable. The relevant paragraphs of the judgment in The Commissioner of Income Tax-3 ..V/s.. M/s. Xylon Holdings Pvt. Ltd. (supra), are quoted for ready reference as under :

> *"4. The Commissioner of Income Tax (Appeals) by an order dated 31/10/2008 allowed the respondent-assessee's appeal. The Commissioner of Income Tax (Appeals) held that the liability to repay a loan taken towards the purchase of a motor car which had ceased cannot be subjected to tax. This is for the reason that the extinguishment of the loan which was taken for the purchase of a capital asset like a motor car is not a revenue receipt. Hence the same is not taxable.*
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> *8. We have considered the submissions. The issue arising in this case stand covered by the decision of this Court in the matter of Mahindra & Mahindra (supra). The decision of this court in the matter of Solid Containers (supra) is on completely different facts and inapplicable to this case. In the matter of Solid Containers (supra) the assessee therein had taken a loan business purpose. In view of the consent terms arrived at, the amount of loan taken was waived by the lender. The case of the assessee therein was that the loan was a capital receipt and has not been claimed as deduction from the taxable income in the earlier years and would not come within the purview of Section 41(1) of the Act. However, this Court by placing reliance upon the decision of the Apex Court in the matter of CIT v. T.V. Sundaram Iyengar and Sons Ltd. 222 ITR 344 held that the loan was received by the assessee for carrying on its business and therefore, not a loan taken for the purchase of capital assets. Consequently, the decision of this Court in the matter of Mahindra and Mahindra Limited (supra) was distinguished as in the said case the loan was taken for the purchase of capital assets and not for trading activities as in the case of Solid Containers Limited (supra). In view of the above, the decision of this Court in the matter of Solid containers Limited (supra) will have no application to the facts of the present case and the matter stands covered by the decision of this Court in the matter of Mahindra & Mahindra Limited (supra). The alternative submission that the amount of loan written off would be taxable under Section 28(iv) of the Act also came*

up for consideration before this Court in the matter of Mahindra & Mahindra Limited (supra) and it was held therein that Section 28(iv) of the Act would apply only when a benefit or perquisite is received in kind and has no application where benefit is received in cash or money."

11. In the present case, the Commissioner (Appeals) has considered the nature of the transaction on the principal amount of Rs.15,22,32,432/- and after examining in great detail, the transaction which consisted waiver of the loan, has come to the following conclusion :

(a) That the assessee was a Sick Industrial undertaking under BIFR.

(b) That the principal amount of Rs.15,22,32,432/- was taken as a loan and applied to its capital reserv; that amount was by way of a term loan given for purchasing capital asset or for financing the business and was used towards project cost, which included purchase of land and other capital assets in the nature of machinery. The term loan was sanctioned by these banks towards project cost and the waiver of the principal amount by way of a settlement was correctly accounted for as capital reserve, and was therefore, not in the nature of an income, which would be covered under Section 41(1) of the Act.

(c) That in the above facts, since loan amount was applied towards creation of capital, the judgment of this Court in Mahindra and Mahindra Ltd. (supra), and Commissioner of Income Tax-3 (supra), would apply in all force to the facts of the case.

Consequently, the Commissioner (Appeals), on coming to a specific finding of fact that the waiver was of a loan applied towards creation of capital, has proceeded to allow the appeal to the extent that the additions made by the Assessing Officer of Rs.15,22,32,432/- were deleted from the Income of the assessee.

12. The ITAT, in the appeal filed by the revenue, whilst adverting to the very same facts in issue referred to by the Commissioner (Appeals), has concurrently held, after applying the ratio of the judgments in Mahindra and Mahindra Ltd. (supra) and Commissioner of Income Tax-3 (supra), that the cessation of liability to repay the bank loan taken for purchase of capital asset did not result in a revenue receipt and it was not taxable under Section 28(iv) of the Act, or under Section 41(1) of the Act.

13. In our view, there are concurrent findings of fact of the Authorities below that the amount of Rs.15,22,32,432/-, which falls subject matter of the waiver of the loan, was applied by the assessee for creation of capital assets, as found on examining the record. There being a concurrent findings of fact on this issue, a substantial questions of law proposed by the revenue, would not arise.

We also find that the loans, which were waived were applied to creation of capital assets, the three substantial questions of law proposed by the revenue would be squarely covered by the judgment of the Hon'ble Supreme Court in Commissioner ..V/s.. Mahindra and Mahindra (supra), and of this Court in Mahindra and Mahindra Ltd. ..V/s.. Commissioner of Income-Tax (supra), and The Commissioner of Income Tax-3 ..V/s.. M/s. Xylon Holdings Pvt. Ltd. (supra). This being a case covered by the settled law, no substantial questions of law as proposed would arise.

14. The income tax appeal is dismissed. No costs.

(VALMIKI SA MENEZES, J.) **(DHIRAJ SINGH THAKUR, J.)**

TAMBE.