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

+ **ITA 222/2023**

PR. COMMISSIONER OF INCOME TAX -7Appellant

Through: **Mr. Puneet Rai, SSC with Mr.
Ashvini Kumar & Mr. Rishabh
Nangia, Advs.**

versus

PARAMOUNT COMMUNICATION LTD.Respondent

Through: **Mr. Satyen Sethi & Mr. Arta
Trana Panda, Advs.**

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

**HON'BLE MR. JUSTICE HARISH VAIDYANATHAN
SHANKAR**

ORDER

29.01.2025

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1. The Principal Commissioner impugns the order dated 15 June 2021 handed down by the **Income Tax Appellate Tribunal**¹. We had in terms of our order dated 11 March 2024 admitted this appeal on the following question of law:

“A. Whether in the facts and circumstances of the case and in law the ITAT has failed to appreciate that the discount received by the assessee to the extent of INR 45,64,91,290/- at the time of premature redemption of FCCBs constituted revenue receipt and hence the same is chargeable to tax?”

2. The question itself is posed in the context of a premature redemption of **Foreign Currency Convertible Bonds**² which had been issued by the respondent-assessee and whether the receipts were liable to be treated as being revenue in character and which was the stand taken by the Revenue.

¹ Tribunal

² FCCB



3. On facts, the Tribunal has found that the FCCBs' had been redeemed on 23 November 2011. It was further noted that during the period from 22 November 2006 to 13 November 2011, holders of the FCCBs' had the option to convert the same into equity shares at the rate of INR 265/- per share and at a fixed exchange rate of INR 44.99 = USD 1. The respondent-assessee, in terms of the automatic route that was available to be tread, repurchased the FCCBs' valued at USD 19.50 million.

4. The Tribunal further found that 3900 FCCBs' were repurchased at INR 47,26,18,710/- out of the original 5400 FCCBs' of USD 5,000 each. It is this fact which led the Tribunal to hold and observe that the assessee thus reduced their very obligation to repay the principal amount of the FCCBs' by INR 45,64,91,290/-. The **Assessing Officer**³ had treated that profit of INR 45,64,91,290/- through buyback as a revenue receipt.

5. The Tribunal has while debunking that stand pertinently observed as under:

“43. We have considered the rival arguments made by both sides, perused the orders of the learned AO and learned CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us, we find the assessee, in the instant case, had issued 5400 FCCBs aggregating to US\$ 27 million on 22.11.2006. The bonds were to be redeemed on 23.11.2011 at a price of US\$ 7277 per bond. During the period 22.11.2006 to 13.11.2011, bondholders had the option to convert the bonds into equity shares @Rs.265/- per share at a fixed rate of exchange of Rs.44.99 = US\$ 1. The assessee in terms of automatic route repurchased FCCB of the value of US\$ 19.50 million (Rs.92,91,10,000/- rupee equivalent at prevailing exchange rate). Out of 5400 FCCBs of US\$ 5000 each, 3900 bonds were repurchased (3900 x 5000 = US\$ 19.50 million) at Rs.47,26,18,710/-. As such the assessee reduced its obligation to repay the principal amount of FCCB by Rs.45,64,91,290/- We find

³ AO



the Assessing Officer treated the profit of Rs.45.65 Crore through buy back of FCCB at a discounted price as revenue receipt and accordingly made addition of the same to the total income of the assessee amounting to Rs.45.65 Crores. We find the learned CIT(A) upheld the action of the Assessing Officer, the reasons of which have already been reproduced in the preceding paragraphs. It is the submission of the learned counsel for the assessee that discount received by the assessee on buyback of FCCBs could not be taxed u/s 28(iv) of the Act as such receipt in the hands of the assessee was in form of cash/money and further, such proceeds were utilized for ongoing capitalization programs and thus, same was capital receipt. We find force in the above arguments advanced by the learned counsel for the assessee on this count. It is an admitted fact that the FCCB proceeds were utilized for setting up of new manufacturing facility or expansion of manufacturing facility. The utilization of such proceeds for capital purposes has not been doubted by the Assessing Officer or learned CIT(A). We find an identical issue had come up before the Mumbai Bench of the Tribunal in the case of DCIT vs Pidilite Industries Ltd. (Supra), wherein, the Tribunal following the various decisions has upheld the action of the learned CIT(A) in deleting the addition made by the Assessing Officer and dismissed the appeal filed by the Revenue by observing as under:-

“5.4 Upon careful consideration, it emerges that the assessee has repurchased certain FCCB during impugned AY at a discount of 25%. The fact that the proceeds of these bonds was utilized partly for investment in foreign subsidiaries and partly for ongoing capitalization programs remain unrebutted before us. In fact, the RBI’s terms of issue of bonds prohibits utilization of proceeds for trading purposes. The said facts lead us to form an opinion that the gains were on capital account. The Ld. AO, while making additions has invoked the provisions of Section 28(iv). These provisions consider value of any benefit or perquisite, whether convertible in money or not, arising from the business as business income. However, the benefit has to be in some form other than in the shape of money, as held by higher judicial authorities.

5.5 The Hon’ble Supreme Court in recent decision of CIT V/s Mahindra and Mahindra Ltd. [93 Taxmann.com 32] has observed as under: -

10. The term "loan" generally refers to borrowing something, especially a sum of cash that is to be paid back along with the interest decided mutually by the parties. In other terms, the debtor is under a liability to pay back the principal amount along with



the agreed rate of interest within a stipulated time.

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 or profession",— ** ** **

*(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.

We agree with the submissions of Ld. AR that the propositions laid down in the above decision squarely apply to factual matrix before us. Therefore, the benefit to be received by the assessee has to be in some form other than in the shape of money so as to bring the same within the ambit of Section 28(iv).

5.6 Similar view has been taken by Hon'ble Bombay High Court in CIT V/s Xylon Holdings Pvt. Ltd [supra] wherein the case law of Solid Containers Ltd. [supra] as relied upon by Ld. AO, has been distinguished. Similar view has been expressed in CIT V/s Santogen Silk Mills Ltd. [supra].

5.7 Respectfully following the aforesaid binding judicial precedents, we confirm the view taken by Ld. first appellate authority. This ground stands dismissed."

6. As was noted by the Tribunal, and which fact is not disputed before us, the FCCB proceeds were utilized for setting up a new manufacturing facility. The Tribunal has noted that the utilization of those proceeds for capital purposes had not been doubted either by the AO or the **Commissioner of Income Tax (Appeals)**⁴. The Tribunal has in this regard also rested its ultimate conclusions on the judgments handed down by the Mumbai Bench of the Tribunal in **DCIT v. Pidilite Industries Ltd.**⁵ and the view taken by a Bench of the Delhi Tribunal in **M/s Ok Play India Ltd. v. JCIT**⁶ as well as in **ACIT v. M/s KEI Industries Limited**⁷.

⁴ CIT(A)

⁵ (2019) 177 ITD 472 (Mum.)(Trib)

⁶ ITA No.3402/Del/2016 dated 13 January 2020

⁷ ITA.No.1433/D/2014, CO.No.200/D/2017, CO.No.34/D/2019 in ITA.No.3564/D/2015 & I.TA.No.528/D/2016 dated 03 December 2020



7. In *KEI Industries*, the Tribunal upheld the assessee's claim for depreciation on exchange rate fluctuations related to machinery acquired using FCCB funds. Bearing in mind the principle of consistency and the fact that similar claims had been allowed by the CIT(A) in prior years, and since the utilization of FCCB proceeds for capital purposes was undisputed, the Tribunal dismissed the Revenue's appeal in the following terms:

"8. We have considered the rival submissions and perused the material on record. The stand of the assessee since the beginning had been that FCCBs proceeds were for setting-up new project for manufacture of wire has not been disputed by the A.O. In fact one of the reason to make the addition is that FCCBs were utilised in increasing the depreciable asset of the assessee company. The Ld. CIT(A) has verified this fact from the balance-sheet of the assessee company and found the utilization of FCCBs proceeds towards capital account were found to be correct. This fact is also not disputed by the A.O. The assessee has also satisfied the conditions of RBI to buy-back FCCBs. The assessee also proved on record that all the conditions of RBI in this regard have been made by assessee company. Section 41(1) of the I.T. Act would not apply because the amount of FCCBs was not allowed as expenditure or trading liability in earlier year. Further, no addition could be made under section 28(iv) of the I.T. Act. The assessee is in manufacturing business and has admittedly utilised the FCCBs by increasing the asset of the assessee company and most of them being depreciable asset which fact is also mentioned by the A.O. in the assessment order. Since the FCCBs were raised to use the proceeds for setting-up of new project and this fact is admitted by the A.O. in the assessment order, therefore, assessee used the loan to purchase the capital asset for the company. The ITAT, Delhi E-Bench, Delhi in the case of M/s. OK Play India Ltd., RozKa-Meo Industrial Estate, Tehsil Nuh, District Mewat, Haryana vs., JCIT, Range-II, Gurgaon (supra), considering the Judgment of the jurisdictional Delhi High Court in the case of Logitronics P. Ltd., vs., CIT (supra) and Judgment of Hon'ble Supreme Court in the case of CIT vs., Mahindra & Mahindra Ltd., (supra), decided the identical issue in favour of the assessee and appeal of assessee has been allowed. The findings of the Tribunal in paras 3.7 to 3.12 are reproduced as under:

"3.7. We have heard rival submissions and perused the relevant material on record. The assessee raised FCCB in the earlier year and during the year repaid with discount of



Rs.9,46,73,015/- received. According to the assessee, the discount received is in the nature of capital receipt but according to the Revenue the discount is in the nature of trading receipt. The Assessing Officer has alleged the activity of raising FCCB as an adventure in the nature of trade. This finding of the Assessing officer is without any basis. The assessee is not engaged in raising the FCCB with motive of any trading and discounting and thereby earning profit on the same. The allegation by the Assessing Officer of motive and intent of earning profit by the assessee are unsubstantiated with any evidences. On the contrary, the assessee has substantiated that it raised the FCCB for funding its acquisition of assets. Further, the Ld. CIT(A) has relied on the decision of the Hon'ble Delhi High Court in the case of Logitrinics (P) Ltd (supra), wherein it is held as under:

"27..... We, therefore, restore this issue back to the file of the Assessing Officer for his fresh adjudication with a direction to the assessee to furnish all the details and particulars of loan, and the purpose for which the loan taken from Bank was utilised. 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 assets in case the assessee wants to have the benefit of decision of Hon'ble Delhi High Court in the case of Tosha International Ltd. (supra) as well as the decision of Hon'ble Bombay High Court in the case of Mahindra & Mahindra Ltd. (supra) If on an enquiry and verification, it transpires that the assessee has utilized the loan for the purpose of its business activity or trading activity, the amount of loan to the extent it has been waived by the bank shall be deemed to be the assessee's income chargeable to tax as per the decision of Hon'ble Bombay High Court in the case of Solid Containers Ltd. (supra), where the principle laid down by the Hon'ble Supreme Court in the case of TV. Sundaramlyengar & Sons Ltd. (supra) has been applied and followed..."

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3.8 The Hon'ble High Court has laid down test for holding the amount of waiver of loan as capital or trading receipt. If the amount of the loan has been utilized for capital expenditure, then the waiver amount is in the nature of the



capital receipt and if the amount of the loan has been utilized for trading purposes then the waiver amount received would be in the nature of trading receipt.

3.9 Before us, the assessee has demonstrated how the FCCB amount has been utilized towards capital expenditure. The assessee submitted entire list of capital asset acquired through the funds of FCCB, which is available on page 235 to 241 of the paper book. The assessee has shown capital expenditure of more than Rs.21 Crores upto March, 2008. The Ld. DR could not controvert this factual aspect of utilization of the FCCB toward capital expenditure. In instant case, once it is undisputed that FCCB amount has been utilized toward capital expenditure, in view of the decision of the Hon'ble Delhi High Court in the case of Logotronics (P) Ltd (supra), the discount on FCCB falls in the nature of capital receipt not exigible to tax. The Ld. CIT(A) has given his finding on wrong assumption of the fact that FCCB funds were utilized for trading or revenue expenditure, without verifying the books of account of the assessee...”

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8.1. Thus the issue is covered by the aforesaid decision of the Tribunal as well as by Judgment of Hon'ble Delhi High Court in the case of Logitronics P. Ltd., vs., CIT (supra). No material is produced before us to contradict the findings of fact recorded by the Ld. CIT(A) in favour of the assessee. Therefore, we are of the view that no interference is required in the matter. We confirm the finding of fact recorded by the Ld. CIT(A) and dismiss Ground No.1 of the appeal of the Revenue.

8.2. In the result, Ground No.1 of the appeal of the Revenue dismissed.”

8. More pertinent for our purposes are the following succinct observations which appear in the decision of the Division Bench of this Court in **Logitronics P. Ltd. v. CIT**⁸ and where we had held as follows:

“23. In the context of waiver of loan amount, what follows from the reading of the aforesaid judgment is that the answer would depend upon the purpose for which the said loan was taken. If the

⁸ 2011 SCC OnLine Del 896



loan was taken for acquiring the capital asset, waiver thereof would not amount to any income exigible to tax. On the other hand, if this loan was for trading purpose and was treated as such from the very beginning in the books of account, as per T.V. Sundaram Iyengar and Sons Ltd. (1996) 222 ITR 344 (SC), the waiver thereof may result in the income more so when it was transferred to the profit and loss account.

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

"21. In the light of the above decision of the hon'ble Bombay High Court in the case of Mahindra and Mahindra Ltd. v. CIT [2003] 261 ITR 501, it is clear that in the case where capital assets are acquired by obtaining a loan, and subsequently, the loan amount is waived by the other party, the principal amount of loan waived by the other party cannot be brought to tax under section 28(iv) of the Act or under section 41(1) of the Act."

25. However, in the present case, the Tribunal finds that nothing was brought on record to show that the loan taken by the assessee from the bank in cash credit account, CTL and WCTL account was utilized for the purpose of acquiring capital assets. On the contrary, material available on record including the notes to the accounts indicated that the assessee had obtained the loan or credit facility by way of hypothecation of finished goods, semi-finished goods, raw material, book debts, receivable claims, securities and rights by way of first charge, which indicated that the assessee had obtained the loan facility for its business activity or trading operations. However, noted the Tribunal, this aspect of the matter whether the whole amount of the loan had been utilized either for the purpose of acquiring capital asset or for the purpose of business activity or trading activity had not been looked into or examined by the authorities below. For this reason, the Tribunal has restored the case to the file of the Assessing Officer for fresh adjudication giving details in the behalf, in the following manner:

"27. .. We, therefore, restore this issue back to the file of the Assessing Officer for his fresh adjudication with a direction to the assessee to furnish all the details and particulars of loan, and the purpose for which the loan taken from the bank was utilized. All these informations are within the control and specific knowledge of the assessee and, therefore, it would be the duty of the assessee to prove and establish that the amount of loan taken from the bank was utilized for the purpose of acquiring capital assets in case the assessee wants to have



the benefit of the decision of the hon'ble Delhi High Court in the case of Tosha International Ltd. (2011) 331 ITR 440 as well as the decision of the hon'ble Bombay High Court in the case of Mahindra and Mahindra Ltd. v. CIT (2003) 261 ITR 501. 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 the hon'ble Bombay High Court in the case of Solid Containers Ltd. (2009) 308 ITR 417 where the principle laid down by the hon'ble Supreme Court in the case of T. V. Sundaram Iyengar and Sons Ltd. (1996) 222 ITR 344 has been applied and followed. In the present case, the total amount of loan payable by the assessee was Rs.4,76,42,213, which was settled at Rs. 1.85 crores giving benefit of Rs. 2,91,42,213 to the assessee by way of waiver. Therefore, the proportionate amount of loan waived by the bank shall be worked out by the Assessing Officer with reference to the purpose for which the loan amount was utilized. The Assessing Officer shall provide reasonable opportunity of being heard to the assessee. Be it mentioned here that in case the assessee fails to produce or furnish details or particulars about the purpose for which the loan amount was utilized, the Assessing Officer shall draw adverse inference against the assessee, and shall decide the issue in the light of the fact that the loan amount was obtained by the assessee in cash credit account, CTL and WCTL account by way of hypothecation of finished, semi-finished goods, book debts, receivable claims, securities, rights by way of first charge implying thereby that the amount was utilized for the purpose of business or trading activity of the assessee. We order accordingly."

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

9. In view of the aforesaid, we find no merit in the challenge which stands raised to the order of the Tribunal. The question thus framed is answered in the negative and against the appellants.



10. The appeal consequently fails and shall stand dismissed.

YASHWANT VARMA, J.

HARISH VAIDYANATHAN SHANKAR, J.
JANUARY 29, 2025/neha