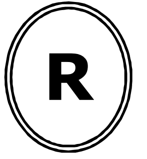
VERDICTUM.IN



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 23RD DAY OF SEPTEMBER 2023

BEFORE

THE HON'BLE MR.JUSTICE S. SUNIL DUTT YADAV

WRIT PETITION No.20579 OF 2022 (T-IT)

Between:-

M/s. I.G. Petrochemicals Ltd.,
(a Public Limited Company incorporated
under the Companies Act No.1 of 1956)
manufacturer of Phthalic Anhydride
D-4, Jyothi Complex,
134/1, Infantry Road,
Bengaluru - 560 001.
(PAN: AAACI4115R)
Represented by its
Executive Director
Sri Jitendra Kumar Saboo
Aged about 71 years
Son of late Vishwanath Saboo

... Petitioner

(By Sri S. Ganesh, Senior Advocate a/w
Ms. Jinita Chatterjee, Advocate for
Sri S.Parthasarathi, Advocate)

And:

1. The Income-tax Appellate Tribunal,
"C" Bench,
No.51, 1st Cross,

VERDICTUM.IN

4th 'T' Block East,
Tilak Nagar
Jayanagar
Bengaluru - 560 041.

2. The Deputy Commissioner of
Income-tax, Circle-3(1)(1),
Office of the Pr. Commissioner of
Income-tax-3, 5th Floor,
BMTC Building, 80 Feet Road,
6th Block, Koramangala,
Bengaluru - 560 095.

... Respondents

(By Sri E.I. Sanmathi, Advocate)

***

This Writ Petition is filed under Articles 226 and 227 of Constitution of India, praying to issue a writ of certiorari or a direction in the nature of writ of certiorari, quashing the order of the Income-tax Appellate Tribunal, "C" Bench, Bangalore dated 05.09.2022 in M.P. No.47/Bang/2018 (in ITA No.1317/Bang/2018) for the Assessment Year 2006-07 (Annexure-'F') and etc.

This Writ Petition having been heard and reserved on 31.07.2023 and coming on for pronouncement of orders, this day, the Court made the following:

VERDICTUM.IN

ORDER

The petitioner has sought for setting aside of the order dated 05.09.2022 at Annexure-'F' passed by the Income Tax Appellate Tribunal "C" Bench, Bangalore in M.P.No.47/Bang/2022 in ITA No.1317/BANG/2018 for the Assessment Year 2006-07. In terms of the said order, the Miscellaneous Petition filed by the Assessee under Section 254(2) of the Income Tax Act, 1961 ('I.T. Act' for brevity) seeking rectification of the mistake in the order of Tribunal[1] dated 21.01.2022 came to be partly allowed by deleting the paragraph Nos.6, 7 and 8 and substituting the same with fresh paragraphs.

(I) BRIEF FACTS:

2. The petitioner is stated to have taken term loans and working capital loans from Banks and had entered into an One Time Settlement (OTS) with the

[1] ITA No.1317/Bang/2018 for the A.Y.No.2006-07

VERDICTUM.IN

Banks, whereby portion of the interest charged by the Bank and also part of the principal amount stood waived.

3. While petitioner had offered the waiver of interest to assessment, however, the waiver of the principal amount of term loans and working capital loans was treated to be a capital receipt and was not subjected to tax.

4. The subject matter of dispute relates to the Assessment Year 2006-2007.

5. The history of litigation is as follows:-

23.03.2011	The appellant/petitioner herein, preferred an appeal ITA No.185/CIT(A)-3/BNG/2014-15 before the Commissioner of Income Tax (Appeals) challenging the order dated 12.11.2010 passed by the Assistant Commissioner of Income Tax, Circle-11(4), Bangalore, for A.Y. 2006-2007.
28.02.2018	The Commissioner of Income Tax (Appeals) dismissed the above said appeal (Annexure-B).

VERDICTUM.IN

27.12.2021	The ITAT "B" Bench, Bangalore, disposed off the appeal filed by the Revenue against the order dated 31.10.2019 of the Commissioner of Income Tax (Appeals) for AY 2005-06, by holding that the principal portion of the loan which was received by the assessee is not in the course of trading activity and hence not taxable and remitted the matter to the assessing officer to verify if there was any deduction with respect to waiver of interest in any earlier assessment year and then only the such waiver of interest could be taxable. (Annexure-C).
21.01.2022	The ITAT "C" Bench, Bangalore partly allowed the appeal preferred by the Petitioner against the order of Commissioner of Income Tax (Appeals), Bengaluru dated 28.02.2018 for AY 2006-07. The ITAT concluded that the loan received by the assessee was in the course of carrying on business of the assessee and the waiver of the loan amount will result in revenue receipt and shall be liable to tax. (Annexure-D).
25.05.2022	The petitioner flied Miscellaneous Application u/s 254(2) for AY 2006-07 before the ITAT "C" Bench, Bengaluru in ITA.No.1317/Bang/2018 (Annexure-F).
05.09.2022	The ITAT "C" Bench, Bengaluru partly allowed the miscellaneous application. The ITAT reiterated its finding that waiver of principal amount of working capital loan is liable to be assessed u/s 41(1) for A.Y. 2006-07 (Annexure-F).

VERDICTUM.IN

6. The order of the Assessing Officer for the Assessment Year 2006-2007 came to be challenged before the Commissioner of Income Tax (Appeals) which confirmed the order of the Assessing Officer at Annexure-'B' which was taken up in appeal before the Income Tax Appellate Tribunal which allowed the appeal in part, while holding that waiver of term loan taken for the purpose of capital assets would not result in any benefit or perquisite flowing to the assessee which could be described to be a revenue receipt and accordingly would not constitute income of the assessee. However, as regards loans taken in the course of carrying on the business and where such loans were waived, it would result in flow back of funds to the assessee which was in the nature of revenue receipt and hence liable to tax. Accordingly, the Appellate Tribunal has treated the amount flowing back to the assessee consequent to waiver of loan relating to day-to-day operation as income

VERDICTUM.IN

of the assessee under Section 28(iv) of the I.T. Act. For determination of the nature of loan taken which would have a bearing on the amount that benefits the assessee upon waiver, the matter was remitted to the Assessing Officer for reconsideration, while observing that upon waiver of loans taken in the course of carrying on day-to-day affairs, the amount of loan that was waived would be treated as income under Section 28(iv) of the I.T. Act.

7. Miscellaneous Application came to be filed under Section 254(2) of the I.T. Act contending that ITA No.1317/2018 ought to have been allowed in its entirety, that waiver of principal amount of term loans and working capital loan constituted a capital receipt which was not taxable income, that the order of the Commissioner of Income Tax (Appeals) for the Assessment Year 2005-2006 had affirmed to the stand that waiver of loans was a capital receipt which was not

VERDICTUM.IN

taken note of, that the judgment of Apex Court in **Commissioner of Income Tax** v. **Mahindra and Mahindra**[2] [***Mahindra and Mahindra***] was not taken note of.

8. The said Miscellaneous Petition came to be partly allowed while holding that waiver of term loan was taxable.

9. It is this order that is challenged in the present Writ Petition not being satisfied with the partial allowing of Miscellaneous Petition.

10. Sri E.I.Sanmathi, learned counsel appearing for the Revenue has objected to the maintainability of the Writ Petition contending that the effect of rectification of the order would result in a fresh original order as against which there is a remedy available under Section 260A of the I.T. Act to the High Court against the

[2] (2018) 16 SCC 79 : (2018) 404 ITR 0001 SC

VERDICTUM.IN

order passed by the Appellate Tribunal. It is also submitted that the order passed under Section 254(2) of the I.T. Act as well would be an appealable order in terms of Section 260A of the I.T. Act

11. After hearing both sides, the following points would arise for consideration:-

(A) Whether as against the order passed in Miscellaneous Petition under Section 254(2) of I.T. Act in light of the remedy of appeal being available under Section 260A of I.T. Act, the Writ Petition could be entertained?

(B) Whether the law laid down in ***Mahindra and Mahindra (supra)*** if taken note of, would result in benefit in the form of waiver of loan being construed as monetary benefit and not covered by Section 28(iv) of the I.T. Act?

(C) What order?

VERDICTUM.IN

(II) ANALYSIS:-

(A) Whether as against the order passed in Miscellaneous Petition under Section 254(2) of I.T. Act in light of the remedy of appeal being available under Section 260A of I.T. Act, the Writ Petition could be entertained?

12. Under section 260A of the I.T. Act, an appeal lies to the High Court from "every order passed in appeal by the Appellate Tribunal", if the High Court is satisfied that the case involves a substantial question of law. The Revenue has taken the stand that the order passed in the Miscellaneous Petition filed seeking rectification, would be an order subject to appeal under Section 260A of the I.T. Act. This position is not seriously disputed by the petitioner, however, it is the contention that mere existence of an alternative remedy would not *ipso facto* amount to a bar on entertaining a Writ Petition.

VERDICTUM.IN

13. In the present factual matrix, it needs to be noticed that the petitioner contends that the rectification application filed under Section 254(2) of the I.T. Act ought to have been allowed in its entirety in light of the law laid down by the Apex Court in ***Mahindra and Mahindra (supra),*** wherein the Apex Court has held that waiver of loan constituted a benefit in the shape of money which was outside the purview of Section 28(iv) of I.T. Act. Accordingly, it is contended that the Tribunal and subordinate Authorities being bound by such law laid down, its application did not require any detailed discussion on facts. It is contended that the order in challenge before the Tribunal ought to have been rectified after taking note of the legal position.

14. Though learned counsel Sri E.I. Sanmathi has relied on the Division Bench's judgment of this Court in **L. Sohanraj and others** v. **Deputy Commissioner of**

VERDICTUM.IN

Income Tax and Another[3] ***[L. Sohanjraj]***, affirming the order of learned Single Judge[4] and the judgment of this Court passed in **Deputy Commissioner of Income Tax v. H.V. Shantaram**[5] **[*H.V. Shantaram]***, however, a close reading of the said judgments and orders do not support the proposition of the Revenue. Before the learned Single Judge in ***L. Sohanraj and others v. Deputy Commissioner of Income Tax and another***[6]**,** though the conclusion was that Writ ought not to be entertained as the petitioners had an alternative, effective and efficacious remedy provided under the statue, however, such conclusion cannot be elevated to a rule prescribing non-entertaining of Writ Petitions where alternative remedy is available. In the order rendered by the learned Single Judge it is observed as follows:-

---

[3] W.A.No.3852-55/2000 dated 03.08.2000
[4] 2003 (260) ITR 147 (KARL)
[5] ITR (260) 2003 156
[6] 2003 (260) ITR 147 (KARL)

VERDICTUM.IN

"10. The bar relating to alternative remedy has been a rule of self-imposed limitation rather than a rule of law. The existence of alternative remedy had always been regarded as one of the factors which this court is required to bear in mind while exercising its discretionary jurisdiction. Ordinarily, the court will not entertain a petition for a writ under article 226 of the Constitution, where the petitioner has an alternative remedy, which without being unduly onerous provides an equally efficacious remedy. The law on this point is now well settled…"

The learned Single Judge further refers to the observation made by the Apex Court in **Thansingh Nathmal** v. **Superintendent of Taxes**[7], ***[Thansingh Nathmal]*** at para-7 which reads as follows:-

"7. Against the order of the Commissioner an order for reference could have been claimed if the appellants satisfied the Commissioner or the High Court that a question of law arose out of the order. But the procedure provided by the Act to invoke the jurisdiction of the High Court

---

[7] [1964] 15 STC 468, 474 : AIR 1964 SC 1419

VERDICTUM.IN

was by-passed; the appellants moved the High Court challenging the competence of the Provincial Legislature to extend the concept of sale, and invoked the extraordinary jurisdiction of the High Court under article 226 and sought to reopen the decision of the taxing authorities on question of fact. The jurisdiction of the High Court under article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the articles. But the exercise of the jurisdiction is discretionary; it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily, the court will not entertain a petition for a writ under article 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally, enter upon a

VERDICTUM.IN

determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or Tribunal, to correct errors of fact, and does not by assuming jurisdiction under article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another Tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under article 226 of the Constitution the machinery created under the statute to be by-passed, and will leave the party applying to it to seek resort to the machinery so set up."

15. The conclusion of learned Single Judge[8] declining the Writ Petition cannot be read out of context including reference to the order of the Apex Court in ***Thansingh Nathmal (supra)*** which speaks for itself

[8] L. Sohanraj & Ors. v. Deputy Commissioner of Income Tax and Another *(supra)*

VERDICTUM.IN

and lays down the proposition that the exercise of jurisdiction of the High Court under Article 226 of the Constitution of India is couched in wide terms and that exercise of jurisdiction is discretionary and subject to self imposed limitations and that where there is redress provided for under a statute, *"the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution,"* accordingly, the order of the learned Single Judge cannot be construed as laying down an inflexible rule of non-entertaining of Writ Petition when alternative remedy is available by relying on the conclusion of that case. The appeal against the order of learned Single Judge[9] came to be rejected by the Division Bench in ***L. Sohanraj (supra),*** which merely affirmed the order of learned Single Judge without adding anything further than what was laid down by the learned Single Judge.

---

[9] L. Sohanraj & Ors. v. Deputy Commissioner of Income Tax and Another *(supra)*

VERDICTUM.IN

16. In ***H.V. Shantaram (supra),*** the Court had framed a question - *"(ii) Whether this is a fit case for this Court to examine the correctness of the impugned order in exercise of the power conferred on it under Articles 226 and 227 of the Constitution of India, even if the right of appeal is available?*

While answering the said question, the observations made by the learned Single Judge are as under:-

> *"… Now the next question is, if the petitioner has a right of appeal provided against the impugned order before this Court, whether this Court in the light of the contentions advanced by the learned Counsel appearing for the petitioner that the impugned order is one without jurisdiction, should proceed to examine the correctness of the impugned order and if it is held that the impugned order is one made without jurisdiction, whether this Court should interfere against the impugned order? It is no doubt true that when an order is made in disregard of principles of natural justice or the order made is one without jurisdiction, this*

VERDICTUM.IN

Court could interfere against the said orders in exercise of its powers under Articles 226 and 227 of the Constitution of India, even if a right of appeal is provided against such orders. But the question is, when a right of appeal is provided before Division Bench of this Court on a substantial question of law where the scope of interference is wider in appeal than the one by this Court in exercise of its writ jurisdiction, whether it is appropriate for this Court to proceed to examine the correctness of such orders? As noticed by me earlier, in my view, when alternative remedy of right of appeal provided is to this Court and that too before a Division Bench of this Court, it will be totally inappropriate for this Court to exercise its extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India. The power of this Court under Articles 226 and 227 of the Constitution of India is exercised to set right the injustice done to a party and when generally no remedy is provided to the party under a statute. The scope of examination by this Court with regard to the grievance made by the parties against the order passed by the subordinate authorities, the Tribunals and

VERDICTUM.IN

Courts in exercise of the power under Articles 226 and 227 of the Constitution of India is much narrower and circumscribed by in-built limitations imposed on it than the right of appeal conferred in a Statute. Therefore, question number 2 is also required to be answered against the petitioner. However, the submission of Sri Acharya that the respondent also would not raise any objection with regard to the maintainability of the appeal under 260A of the Act is placed on record."

Finally, the Court has concluded by rejecting the petition filed under Article 226 and 227 of the Constitution of India while reserving liberty to challenge the impugned order by way of an appeal under Section 260A of the I.T. Act.

The conclusion also cannot be relied upon as laying down the rule of non-maintainability of Writ Petition where an alternative remedy of appeal is provided under a statute. The observations reproduced above would

VERDICTUM.IN

clearly indicate that the entertaining of Writ Petition is a matter of discretion and appropriateness.

17. Accordingly, the judgments of this Court relied upon and referred to above would reiterate that entertaining of a Writ Petition in the presence of a statutory alternative remedy is a matter of appropriateness indicating existence of discretion in the Court while recognizing the exceptions for entertaining such Writ Petitions even where an alternative remedy exists. The conclusions in the above judgments do not lay down any principle of law and are mere decisions in the facts of the case and cannot be read *de hors* the other observations made in the said order and references to the judgments of Apex Court which would affirm the conclusion arrived at as hereinabove.

18. It is to be noticed that the subsequent judgment of the Apex Court in **Magadh Sugar and**

VERDICTUM.IN

Energy Ltd v. **State of Bihar and Others**[10](*Bench of three Judges)*, wherein the Apex Court was dealing with the appeal challenging the order of the High Court declining to entertain a Writ Petition on the ground that the dispute was suitable for adjudication under a statutory remedy was disposed off by remitting the matter back to the High Court to entertain the Writ Petition. The relevant observations made are as follows:

> *"25. While a High Court would normally not exercise its writ jurisdiction under Article 226 of the Constitution if an effective and efficacious alternate remedy is available, the existence of an alternate remedy does not by itself bar the High Court from exercising its jurisdiction in certain contingencies. This principle has been crystallized by this Court in Whirlpool Corporation v. Registrar of Trademarks, Mumbai and Harbanslal Sahni v. Indian Oil Corporation Ltd. Recently, in Radha Krishan Industries v. State of Himachal Pradesh a two judge Bench of this Court of which one of us was a part of (Justice DY Chandrachud) has summarized the principles governing the exercise*

[10] 2021 SCC Online SC 801

VERDICTUM.IN

of writ jurisdiction by the High Court in the presence of an alternate remedy. This Court has observed:

"28. The principles of law which emerge are that:

(i) The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;

(ii) The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;

(iii) Exceptions to the rule of alternate remedy arise where (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) ***the order or proceedings are wholly without jurisdiction****; or (d) the vires of a legislation is challenged;*

(iv) An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be

VERDICTUM.IN

entertained when an efficacious alternate remedy is provided by law;

(v) When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and

(vi) In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.

(emphasis supplied)"

27. The above principle was reiterated by a three-judge Bench of this Court in Executive Engineer v. Seetaram Rice Mill. In that case, a show cause notice/provisional assessment order was issued to the assessee on the ground of an unauthorized use of electricity under Section 126(1) of the Electricity Act 2003 and a demand for

VERDICTUM.IN

payment of electricity charges was raised. The assessee contended that Section 126 was not applicable to it and challenged the jurisdiction of the taxing authorities to issue such a notice, before the High Court in its writ jurisdiction. The High Court entertained the writ petition. When the judgment of the High Court was appealed before this Court, it held that the High Court did not commit any error in exercising its jurisdiction in respect of the challenge raised on the jurisdiction of the revenue authorities. This Court made the following observations:

"81. Should the courts determine on merits of the case or should they preferably answer the preliminary issue or jurisdictional issue arising in the facts of the case and remit the matter for consideration on merits by the competent authority? Again, it is somewhat difficult to state with absolute clarity any principle governing such exercise of jurisdiction. It always will depend upon the facts of a given case. ***We are of the considered view that interest of administration of justice shall be better subserved if the cases of the present kind are heard by the courts only where they involve***

VERDICTUM.IN

primary questions of jurisdiction or the matters which go to the very root of jurisdiction and where the authorities have acted beyond the provisions of the Act.

82. It is argued and to some extent correctly that the High Court should not decline to exercise its jurisdiction merely for the reason that there is a statutory alternative remedy available even when the case falls in the above stated class of cases. It is a settled principle that the courts/tribunal will not exercise jurisdiction in futility. The law will not itself attempt to do an act which would be vain, lex nil frustra facit, nor to enforce one which would be frivolous-lex neminem cogit ad vana seu inutilia-the law will not force anyone to do a thing vain and fruitless. ***In other words, if exercise of jurisdiction by the tribunal ex facie appears to be an exercise of jurisdiction in futility for any of the stated reasons, then it will be permissible for the High Court to interfere in exercise of its jurisdiction****. This issue is no longer res integra and has been settled by a catena of judgments of this Court, which we find entirely unnecessary to refer to in detail…”*

(emphasis supplied)”

VERDICTUM.IN

19. Finally, the judgment of Apex Court in **M/s Godrej Sara Lee Ltd.** v. **The Excise and Taxation officer**[11], apart from reiterating the exceptions for entertaining Writ Petitions despite availability of alterative remedy, has observed as follows:-

> "4. …*In a long line of decisions, this Court has made it clear that availability of an alternative remedy does not operate as an absolute bar to the "maintainability" of a writ petition and that the rule, which requires a party to pursue the alternative remedy provided by a statute, is a rule of policy, convenience and discretion rather than a rule of law. Though elementary, it needs to be restated that "entertainability" and "maintainability" of a writ petition are distinct concepts. The fine but real distinction between the two ought not to be lost sight of. The objection as to "maintainability" goes to the root of the matter and if such objection were found to be of substance, the courts would be rendered incapable of even receiving the lis for adjudication. On the other hand, the question of*

[11]Civil Appeal No.5393/2010 dated 01.02.2023

VERDICTUM.IN

"entertainability" is entirely within the realm of discretion of the high courts, writ remedy being discretionary. A writ petition despite being maintainable may not be entertained by a high court for very many reasons or relief could even be refused to the petitioner, despite setting up a sound legal point, if grant of the claimed relief would not further public interest..."

"8. …In the latter decision, this Court found the issue raised by the appellant to be pristinely legal requiring determination by the high court without putting the appellant through the mill of statutory appeals in the hierarchy. What follows from the said decisions is that where the controversy is a purely legal one and it does not involve disputed questions of fact but only questions of law, then it should be decided by the high court instead of dismissing the writ petition on the ground of an alternative remedy being available."

20. A perusal of the above observations would indicate the following:-

VERDICTUM.IN

(a) Rule of exhaustion of statutory remedy is a rule of policy, convenience and discretion[12].

(b) Maintainability relates to an objection which if upheld would operate as a bar for taking up the writ petition and result in rendering incapable adjudication of the *lis* while the question of entertainability is entirely within the realm of discretion of the High Court Writ remedy being discretionary[13].

(c) "In other words, if exercise of jurisdiction by the Tribunal ex-facie appears to be an exercise of jurisdiction in futility for any of the stated reasons, then it will be permissible for the High Court to interfere in exercise of its jurisdiction[14]"

---

[12]Radha Krishan Industries v. State of Himachal Pradesh - (2021) SCC OnLine SC 334 - "28*(v) When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion;*"

[13] M/s Godrej Sara Lee (supra) - para - 4

[14] Executive Engineer v. Seetaram Rice Mill - para - 82

VERDICTUM.IN

21. Accordingly, where the petitioner contends that the legal question raised is covered by the judgment of Apex Court in ***Mahindra and Mahindra (supra)*** which lays down a pure principle in law and does not require detailed investigation into the facts, such assertion if accepted, would lead to the allowing of Miscellaneous Application for rectification in its entirety and taking note of the principle noticed at point (c) above, no purpose would be served in relegating the parties to avail the statutory remedy. That apart, as noticed in the principle at points (a) and (b) above, the entertaining of Writ Petition involves discretion of the Court and there being no inflexible rule acting as a bar to entertaining of Writ Petition even where alternative remedy is available.

22. Accordingly, the contention regarding maintainability of the Writ Petition is rejected while clarifying that the judgments of this Court in

VERDICTUM.IN

L. Sohanraj (supra) and ***H.V. Shantaram (supra)*** do not create a bar on maintainability of Writ Petition as contended and the later judgments of the Apex Court in ***Magadh Sugar and Energy Ltd (supra)*** and ***M/s.Godrej Sara Lee (supra)*** further explain and reiterate that existence of an alternative remedy does not raise a bar on maintainability and only call upon the Court to decide on entertainability which involves exercise of judicial discretion.

(B) Whether the law laid down in ***Mahindra and Mahindra (supra)*** if taken note of, would result in benefit in the form of waiver of loan being construed as monetary benefit and not covered by Section 28(iv) of the I.T. Act?

VERDICTUM.IN

23. At the outset, it must be noted that the Revenue is not placing reliance on Section 41(1) of the I.T. Act.

24. Accordingly, what needs to be determined is as to whether the wavier of loan leading to a 'benefit' would fall within the ambit of income in terms of Section 28(iv) of the I.T. Act and hence, chargeable to Income Tax?

The relevant extract of Section 28(iv) reads as follows:-

> *"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."*

VERDICTUM.IN

25. The admitted facts being that the petitioner Company has received a 'benefit' by waiver of loans, the interest on such waived loans though has been offered to tax, the waived principal amount of loan is not offered to tax. The only contention of the Revenue is that the purpose of loan which has been waived, i.e., whether loan was a term loan or working capital loan would determine, if it would be taxable under Section 28(iv) of the I.T. Act.

26. It is contended that, if the loan was taken for working capital, trading purpose and was waived, the benefit being in the nature of a revenue character would fall within the definition of 'benefit' under Section 28(iv) of the I.T. Act and would be income which was taxable. However, if the loan was taken for a capital purpose and upon waiver of it, the benefit would not constitute 'benefit' for the purposes of Section 28(iv) of the I.T. Act

VERDICTUM.IN

being capital in nature and hence would not constitute income chargeable to tax.

27. Reliance is placed on the judgment of High Court of Mumbai in **Solid Containers Ltd.,** v. **Deputy Commissioner of Income Tax and Another**[15]**.**

Extending the aforesaid logic, reliance is also placed on the judgment of Apex Court in **Commissioner of Income Tax** v. **T.V. Sundaram Iyengar & Sons Ltd.**[16] to contend that there could be 'changing character of receipt by efflux of time'. It is submitted that a receipt which is capital in nature in earlier year can change its character as revenue receipt with efflux in time which needs to be kept in mind.

28. The assessee on the other hand has relied on the judgment in ***Mahindra and Mahindra (supra)***

---

[15](2009) 308 ITR 0417 - High Court of Bombay has held that any amount received as loan by the assessee for trading activity and retained in business upon waiver is taxable under Section 28(iv) of the IT Act.
[16](1996) 222 ITR 0344

VERDICTUM.IN

where the Apex Court had declared that the benefit to be taxable for the purpose of Section 28(iv) of the I.T. Act, should be a benefit/ perquisite other than in the shape of money. The Apex Court held that the benefit upon waiver of loan was in the nature of cash receipt and accordingly, the benefit not being "other than in the shape of money" would fall outside the ambit of Section 28(iv) of I.T. Act and hence, would not constitute income that could be taxable.

29. It must be noted that the Apex Court in ***Mahindra and Mahindra (supra)*** was dealing with the waiver of loan and the relevant reasoning as regards Section 28(iv) of the I.T. Act is found in para Nos.13 to 16, which are as follows:-

> *"13. 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*

VERDICTUM.IN

back the principal amount along with the agreed rate of interest within a stipulated time.

14. 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.

15. 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 hereinbelow:

VERDICTUM.IN

> *"**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;"*

16. 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

VERDICTUM.IN

> *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."*

30. The clinching factor as per the Apex Court in ***Mahindra and Mahindra (supra)*** to bring the benefit/perquisite within the term 'income' under Section 28(iv) of the I.T. Act was that the 'benefit/perquisite' should be ‘other than in the shape of money’, while holding that the benefit upon loan waiver was in the form of a cash receipt and did not satisfy the test to make it taxable within the terms of section 28(iv). Clearly, the purpose of loan was neither dealt with nor would be a relevant determinative factor. The only test is that the 'benefit' or 'perquisite' should be other than ‘in the shape of money’.

VERDICTUM.IN

31. Thus, in the present case, the nature of loan would be of no relevance and accordingly, the exercise of ascertaining the purpose of loan as contended by the Revenue does not arise.

32. The judgment of Apex Court in ***Mahindra and Mahindra (supra)*** holds the field. The benefit of waiver of loan in the present case is also not other than 'in the shape of money'. Accordingly, the 'benefit' would fall outside the ambit of Section 28(iv) of I.T. Act.

33. The recent amendment to Section 28 of I.T. Act vide Finance Bill 2023[17], wherein the legislature has included 'benefit' even in form of 'cash' arising from business or profession as being chargeable to income tax. Such amendment substantiates the interpretation of

---

[17] Finance Bill 2023 - *"11. In section 28 of the Income-tax Act, for clause (iv), the following clause shall be substituted with effect from the 1st day of April, 2024, namely:— "(iv) the value of any benefit or perquisite arising from business or the exercise of a profession, whether— (a) convertible into money or not; or (b) in cash or in kind or partly in cash and partly in kind;".*

VERDICTUM.IN

the Apex Court in ***Mahindra and Mahindra (supra),*** wherein it was concluded that the 'benefit' not being "other than in the shape of money" i.e., 'benefit' in form of 'cash' would fall outside the ambit of Section 28(iv) of the I.T. Act by proposing the present amendment.

(C) What order?

34. In light of the above reasoning, no purpose would be served by referring to the judgments relied upon by the Revenue. Even otherwise, as referred to in para-6 of the written submissions filed by the petitioner dated 04.08.2023, the judgments of High Courts[18] relied upon by the Revenue have been dismissed by the Apex Court in ***Mahindra and Mahindra (supra).***

35. Accordingly, the order dated 05.09.2022 at Annexure-'F' passed by the Income Tax Appellate

---

[18] Logitronics (P) Ltd. v. Commissioner of Income Tax and Anr - (2011) 333 ITR 0386; Commissioner of Income Tax v. Ramaniyam Homes P. Ltd - (2016) 95 CCH 0147 ChenHC

VERDICTUM.IN

Tribunal "C" Bench, Bangalore in M.P. No.47/Bang/2022 in ITA No.1317/BANG/2018 for the Assessment Year 2006-2007 is set aside. The Tribunal is directed to reconsider M.P.No.47/Bang/2022 in light of the discussion made hereinabove without re-opening any fresh question for consideration.

Accordingly, the petition is ***disposed off***.

Sd/-
JUDGE

NP/VGR