Dcit Cen Cir 8(3), Mumbai vs Tranquil Homes & Holding P.Ltd, ... on 8 March, 2017

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H", MUMBAI

BEFORE SHRI D.T. GARASIA (JUDICIAL MEMBER)
AND
SHRI ASHWANI TANEJA (ACCOUNTANT MEMBER)

I.T.A. No.238/Mum/2015
(Assessment Year 2011-12)

Dy.CIT, Cent.Cir.8(3), Mumbai	vs	M/s Nalwa Chrome Pvt Ltd 54A, Jindal Mansion Dr G Deshmukh Marg Mumbai-26 PAN No. AABCN3768Q
(Appellant)		(Respondent)

I.T.A. No.299/Mum/2015
(Assessment Year 2011-12)

Dy.CIT, Cent.Cir.8(3), Mumbai	vs	Tranquil Homes & Holding Pvt Ltd, 26/27, 6th Floor, Raheja Towers, M.G. Road, Bangalore-560 001. PAN No. AABCN3768Q
(Appellant)		(Respondent)

Revenue by		Shri Rahul Raman, CIT-DR
Respondent by		Shri Rakesh Joshi

Date of hearing : 25-01-2017
Date of order : 08-03-2017

ORDER

Per Ashwani Taneja, AM :-

These appeals pertain to two different assessees. Though these appeals were heard on different dates but involve identical issue, therefore, these are being disposed of by this common order for the sake of convenience.

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2. First, we shall take up appeal filed by the Revenue in the case of Nalwa Chrome Pvt Ltd in ITA No.238/Mum/2015 filed against the order of Ld. Commissioner of Income-tax (Appeals)-36,

Mumbai [hereinafter called CIT(A)] dated 16-10-2014 passed against the assessment order u/s 143(3) dated 18-03-2013 on the following grounds:-

> "Whether in the facts and circumstances of the case and in law, the ld. CIT(A) is justified in deleting the addition of Rs. 4,50,00,000/- on account of advance against share capital received in FY 2003-04"

3. The solitary issue raised by the Revenue before us is about the addition made by the AO on account of advance received by the assessee in financial year 2003-04 on account of the share capital which was written back during the year and transferred to the capital reserve by the assessee, but treated as income of the assessee of the impugned year by the AO.

4. The brief background and facts of the issue before us is that the assessee company is an investment company and during the year under consideration it sold investments and earned long term capital gain / loss. During the course of assessment proceedings, it was noted by the AO from the notes given in the financial statements (i.e. balance-sheet) filed by the assessee along with return of income that 'capital reserve represents advance against equity of Rs.4,50,00,000 written back during the year, as the purported allotment of shares has not materialized and the amount is no longer repayable'. In view of the same, the AO asked the assessee to justify as to why the amount transferred to the said reserve should not be included in the total income of the current period. In response, the assessee submitted detailed reply to the AO which has been reproduced by the AO in his assessment order and also reproduced here under:

> "M/s Anand Transport advanced a sum of Rs.4,50,00,000/- on 18.06.2003 to M/s Nalwa Chrome Private Limited as advance ITA 238 & 299/Mum/2015 subscription to share capital. Nalwa had completed the ROC compliances to increase the authorized share capital of the company for allotting shares to M/s Anand Transport. However, the shares could not be issued due to certain differences regarding terms of issuance of share.
>
> The said advance of Rs 4.50 Crores was outstanding in the books of Nalwa Chrome as "Advance against Equity" as on 16.03.2011 (DOS) and the company was actively considering to reach upon an amicable settlement with the share applicant in this regard. Subsequent to the search action, to buy peace and avoid litigation, the assessee has unilaterally treated the said advance against equity as no more refundable in FY 2010-11 (AY 2011-12). The said amount being Capital Receipt, since it was in the nature of Subscription to Equity share capital, has been transferred to Capital Reserve in the balance sheet as on 31-3-2011.
>
> We would like to submit here that the amount in question of Rs.4,50,00,000/- has been received by the Assessee Company during the F.Y. 2003-04 which is the period beyond the period under consideration in the present proceedings.

> Without prejudice to the above fact, we would like to submit that remission of liability on account of share capital advance is a capital receipt not liable to tax under provisions of Income Tax Act. Further, the said amount received from M/s. Anand Transport would not qualify for addition u/s 41(1) of the Income Tax Act' 1961 since it has never been claimed as a deduction in any of the years nor would it qualify for addition u/s.28 since the loan had not been received in the course of a trading transaction but being a Capital Receipt, received for the purpose of allotment of Equity Shares."

5. In support of its claim, the assessee placed reliance upon various judgements for the proposition that the aforesaid amount was capital receipt and, therefore, correctly transferred to capital reserve and, therefore, could not have been treated as income of the assessee. However, AO did not agree with the submissions of the assessee. It was observed by the AO that the aforesaid amount was offered to tax by Shri M.V.S. Sesagiri Rao, director of JSW Steel Ltd during the course of recording of his statement by the search officials. During the course of search proceedings on JSW Steel Ltd, the said ITA 238 & 299/Mum/2015 director had admitted an aggregate amount of Rs.262 crores as additional income and in the break up submitted on 01-06-2011, aforesaid amount of Rs.4.50 crores was offered as part of income. Thus, under these circumstances, the AO relied upon the judgment of Hon'ble Bombay High Court in the case of Solid Containers Ltd vs DCIT (2002) 255 ITR 510 (Bom) and held that the impugned amount received as advance on account of share capital from M/s Anand Transport, which was subsequently forfeited and credited to capital reserve account was income of the assessee arising out of business activity of the assessee u/s 28(iv) of the Act.

6. Being aggrieved, assessee filed first appeal before Ld. CIT(A) wherein detailed submissions were filed to contest the addition made by the AO. Relevant part of the submissions made by the assessee is reproduced below:-

> "The facts of the case is that M/s Anand Transport advanced a sum of Rs.4,50,00,000/- on 18.06.2003 to M/s Nalwa Chrome Private Limited as advance subscription to share capital. The Appellant Company had completed the ROC compliances to increase the authorized share capital of the company for allotting shares to Anand. However, the shares could not be issued due to certain differences regarding terms of issuance of share and way forward between the two parties in terms of the sharing of the profits and responsibilities of the proposed business model.
>
> The said advance was outstanding in the books of Nalwa Chrome as "Advance against Equity" from the date of receipt in 2003 till 16.03.2011 (DOS) and the company was actively considering to reach an amicable settlement with the share applicant in this regard. Subsequently, owing to the search action, to buy peace and avoid litigation the said amount has been reversed in the books of accounts of Nalwa Chrome Pvt. Ltd, in the F.Y. 2010-11 (A.Y. 2011-12). The said amount being Capital Receipt, since it was in the nature of Subscription to Equity share capital, the Appellant Company transferred the same to capital Reserve.

We would like to submit here that the amount in question of ITA 238 & 299/Mum/2015 Rs.4,50,00,000/- has been received by the Appellant Company during the F. Y. 2003-04 which is the period beyond the period tinder consideration in the present proceedings.

Without prejudice to above fact, we would like to submit that remission of liability on account of share capital advance is a capital receipt not liable to tax under provisions of Income Tax Act.

It may he pertinent to mention here that the aforesaid amount was received as advance against equity to be issued by the appellant and is shown in the balance sheet as such for so many years from 2003 to 2011. The Assessing Officer has not brought out any other facts on record to make an addition 2(24). Mere fact that, share application money was pending for allotment for a decade cannot be a ground to suggest that, such share-application money represents income of the appellant company on allotment of shares While the said sum has been offered for taxation, the same is merely to buy peace of mind and avoid protracted litigation. It does not tantamount to admission of any wrong doing by the Appellant. No such finding of the Learned Assessing Officer also comes out from the Assessment Order passed. Further, it would also be pertinent to note here that the treatment of the same would be as prescribed by law in the books of accounts as well as for Income Tax purposes. The said treatment has been duly meted in the present case.

Further, time Learned Assessing Officer has stated that there has been no change in the Authorised Share Capital of the Company since 01.04.2004 and that as on 31.03.2011 also it stood at Rs.46,00,000/- as against Rs.4,50,00,0001- received under the Share Application Money. In this regard, it would be pertinent to note that the Authorised Share Capital had been increased during the F.Y. 2003-04 i.e. prior to 01.04.2004 when time amount was to be received and business prospects and understanding being finalized. Since then there has been no change in the Authorised Share Capital. Further, the shares as originally decided were to be issued @ Rs. 100/- including Rs.90/- per share premium. Hence, 11w Authorised Share Capital was not increased by the amount of the actual amount of Share ITA 238 & 299/Mum/2015 Application Money received."

7. The assessee also placed reliance on the following judgments before the Ld. CIT(A) in support of its claim that the impugned amount could not have been treated as income of the assessee, as per law:-

(1) ACIT vs Morarji Textiles Ltd (ITA No.2077/Mum/2009) dated 10-05-2013(Mum) (2) Fortune Oceanic Products Ltd vs DIT (ITA No.2414/Del/2011) dated 09-03-2011 (Del) (3) Sunita Gupta Share Brokers Ltd vs ACIT (ITA No.4188/Del/2020 (Del) (4) DCIT vs Brij Laxmi Leasing & Finance Ltd 309 ITR 2011 (All) The assessee also argued that every deposit or advance is not income, and

therefore, 'write-back' of such amount cannot be treated as business income u/s 28(iv) or 41(1) of the Act, in view of the following judgements:-

CIT vs AVM Ltd (146 ITR 35) (Mad) CIT vs Phool Chand Jiwan Ram (131 ITR 37) (Del) APR Ltd vs Dy.CIT [2003] 87 ITD 618 (Hyd) Dy.CIT vs Tosha International Ltd [2008] 116 TTJ (Delhi) 941 Impast (P) Ltd vs Income Tax Officer [2004] 91 ITD 354 (Del) Helios Food Improvers (P) Ltd vs Dy.CIT [2007] 14 SOT 546 (Mum) Prism Cement Ltd vs Jt CIT [2006] 285 ITR(AT) 43 / 101 ITD 103(Mum) ITO vs Ahuja Graphic Machinery (P) Ltd [2007] 109 ITD 71 (Mum)(TM) Accelerated Freeze and Drying Co. Ltd. vs Dy.CIT (IT Appeal No.971 (Coch) of 2008.

The assessee also distinguished the judgements relied upon by the AO on the ground that in those judgements, the amounts were received in course of trading transactions whereas in the case of the assessee, the amount was received towards allotment of equity shares, and therefore it was apparently capital receipt. Ld. CIT(A) considered the submissions made by the assessee as well as the order of the AO and deleted the addition made by the AO with the following observations:-

"7. The oral and written arguments made by the appellant's AR have been duly considered. There is no dispute to the fact that impugned amount of Rs 4.50 Crores was received by appellant ITA 238 & 299/Mum/2015 company in FY 2003-04 as advance against equity. The advance against share capital was a capital receipt at the initial stage. The stand of AO is that the amount has been received for the purpose of assessee's business and therefore should be chargeable to tax in the year of write back as business income u/s 28(iv) of the Act. I find the stand of AO to be misplaced as the advance was received against issue of equity shares of appellant company which cannot be termed as deposit or advance received in the normal course of business of the appellant. The share application money being received against contribution to equity capital, even after forfeiture, continues to be capital in nature. The decision of Hon'ble Supreme Court in CIT vs T V Sundaram lyenger (supra) relied upon by the I 'S on different set of facts wherein the assessee transferred time barred unclaimed deposits received from customers during normal course of business to profit and loss account and claimed the same as capital receipt. The Hon'ble Court deciding in favour of the revenue held that If the amount is received in the course of trading transactions, even though it is not taxable in the year of receipt as being of capital character, the amount changes its character when the amount becomes the assessees own money because of limitation or by any other statutory or contractual right.

In the case of Solid Containers Ltd (supra) the issue before Honourable Bombay High Court was taxability of waiver of loan taken for trading activity in its business. The court held that assessee became richer in its trading activity by crediting such amount to profit and loss account and therefore the sum was chargeable to tax as business income.

> 8. In the impugned case, advance against equity was not received in the normal course of business activity of the appellant but towards contribution to equity capital of the appellant company. The financial statements of the appellant since year ending 31 s ' March, 2004, increase in authorised capital and entries in seized documents also indicate the sum was indeed received as advance towards issuance of special equity shares.
>
> ITA 238 & 299/Mum/2015 Hence, forfeiture thereof and crediting the same to capital reserves amount to capital receipt which cannot be charged to tax as business income without any specific provision in the Act.
>
> 9. The issue is also squarely covered by decisions of Hon'ble Mumbai Tribunal in the case of Morarjee Textiles Limited (supra), Delhi Tribunal in the case of Fortune Oceanic Products Ltd and Sunita Gupta Share Brokers Ltd. (supra) and Ahmedabad bench of 1TAT in the case of Brijlaxmi Leasing and Finance Ltd.(supra). Respectfully, following the decisions of Honourable Tribunal, it is held that the sum of Rs. 4,50,00,000/- received by appellant as advance against equity in FY 2003-04 and credited to capital reserves during the current assessment years is capital receipt not chargeable to tax. The AO is directed to delete the addition."

8. Being aggrieved, Revenue filed appeal before the Tribunal. During the course of hearing before us, Ld. CIT-DR relied upon the order of the AO and submitted that since the assessee has written-back the amount, it should be treated as income of the assessee.

9. Per contra, the Ld. Counsel of the assessee vehemently supported the order of the Ld. CIT(A). It was submitted by him that share application money is of the nature of capital receipt. Therefore, reversal of the same cannot change its character. He distinguished the judgment relied upon by the AO in the case of Solid Containers Ltd (supra) and judgment of Hon'ble Supreme Court in the case of CIT vs T.V. Sundaram Iyengar 222 ITR 344 (SC) on the ground that in these cases, loan amount was received by the said assessees for trading / revenue purposes. Therefore, under in view of these facts, Hon'ble Court held that the amount written back should be treated as income of the year, whereas in the case of the assessee, the amount has undoubtedly been received on account of share capital. No dispute has been raised on that aspect. Therefore, this amount could not have been treated as income of the ITA 238 & 299/Mum/2015 assessee for the year under consideration. He reiterated the arguments made before the Ld. CIT(A) and also relied upon the judgments considered by the Ld. CIT(A). In addition to that, he placed reliance on the following judgements:-

> CIT vs Xylon Holdings Pvt Ltd (Income Tax Appeal No.3704 of 2001) dated 13-09-2012 CIT vs Softworks Computers Pvt Ltd 354 ITR 16 (Bom) Skraemeco Regent Ltd vs CIT 331 ITR 317 (Mad)

10. In addition to the above, the Ld. Counsel drew our attention on the statement of Shri M.V.S. Sesagiri Rao in the capacity of Director of JSW Steel Ltd recorded on oath at time of search upon the aforesaid company as well as break-up of the surrender made by Shri M.V.S. Sesagiri Rao at the

time of search which have been also made the basis by Ld. AO for making the impugned addition. Our attention was drawn upon the break- up submitted by Shri M.V.S. Sesagiri Rao and it was argued that the surrender was not made on facts. It was merely mentioned that writing- back of the advance towards subscription to share capital was included in the income surrendered. Thus, no surrender has been made on facts showing any suppression of income, factually. If the said amount is not part of taxable income of the year, then, same cannot be brought to tax merely because, the same was wrongly included as part of income surrendered by the director of another company, viz. JSW Steel Ltd. It was further submitted that in any case, whatever statement is given by Shri M.V.S. Sesagiri Rao on behalf of another company, viz. JSW Steel Ltd shall not be binding upon the assessee company, because this statement was recorded in his capacity of being director of JSW Steel Ltd. No consent was obtained by said Shri M.V.S. Sesagiri Rao from the assessee before making any such statement which was adversely used against the ITA 238 & 299/Mum/2015 assessee by the AO. Therefore, viewed from any angle, the said statement could not have been made the basis to make addition in the hands of the assessee of the impugned amount which is otherwise not in the nature of income. Reliance was placed in this regard on the judgment of Hon'ble Allahabad High Court in the case of CIT vs Malti Mishra 262 CTR 564 (All) for the proposition that if the income as per law was exempted, then, the offer of the assessee surrendering income was meaningless and law would prevail and would supersede the 'offer' made by the assessee.

11. At the rejoinder stage, we put up a query to the Ld. DR to show how the statement of Shri M.V.S. Sesagiri Rao would have bearing upon the assessment of the company before us. In response, the Ld. CIT-DR was not able to show any authority given by the assessee company under which such statement was given by Mr. Rao on behalf of the assessee company.

12. We have gone through the orders passed by the lower authorities as well as submissions made and judgements placed before us by both the sides. We are required to decide the issue whether the amount received on account of share application money could be treated as income of the assessee, if the same is written-back in the books of account, either u/s 41(1) or 28(iv) of the Income-tax Act, 1961. But before that we came across another facet viz. the AO had relied upon the statement made by Shri M.V.S. Sesagiri Rao for making impugned addition, wherein aforesaid amount has been allegedly offered to tax on behalf of the assessee before us. Therefore, we need to first decide the bearing of the same on the addition made by the AO.

13. It is noted from the information brought before us that search had taken place on JSW group of companies wherein statement of Shri ITA 238 & 299/Mum/2015 M.V.S. Sesagiri Rao was recorded wherein he had allegedly made a surrender of an aggregate amount of Rs.262 crores which comprises of the amount of Rs.4.50 crores on account of write-back of the share application money. We have gone through the statement recorded of Shri Rao as well as the break-up of the aforesaid sum, subsequently provided by Mr Rao. It is noted that statement of Shri Rao was recorded u/s 132(4) on 17-03-20121 by the DDIT(Inv), Unity-IX(3), Mumbai on the occasion of search carried out at the premises of JSW group. In response to the question with regard to connection with the JSW group, it was replied that Shri Rao was managing director and group CEO of JSW group of companies and was incharge of steel business of JSW Steel Ltd. It appears that said statement was given by Mr Rao in the capacity of director of JSW Steel Ltd. In the entire statement, at no place,

name of the assessee company has been mentioned. There is no mention in the entire statement whether the statement was being given by Shri Rao on behalf of the assessee company also. Further, we have also gone through the question and answers with regard to so called offer / surrender of aggregate amount of Rs.262 crores made by Shri Rao and the same is reproduced hereunder for the sake of ready reference:-

> " Do you want to say anything else?
>
> Answer: No. I have briefly gone through the seized materials and various statements recorded at this premises during the course of U the search and seizure proceedings. On perusal of the same, it appears that there are certain discrepancies 'with regard to expenses, cash payments etc. On the basis of these discrepancies and to cover any other discrepancies that may arise during the course of analysis of the seized material and the books of account of the group companies and to buy peace of mind and avoid litigation, I offer a sum of Rs.262 crores as additional income of the group. Detailed assessee-wise and year-wise break-up of the additional income i.e., ITA 238 & 299/Mum/2015 Rs. 262 crores will be given within a week's time. I request you not to initiate penalty and prosecution proceedings on account of the fact that the disclosure has been made voluntarily."

14. It is seen that in the aforesaid statement, name of the assessee company has nowhere specifically mentioned while offering the additional income of Rs.262 crores. Our attention was also drawn upon the break-up of the aforesaid amount which was claimed to be provided by Shri Rao. Relevant part of the same reads as under:-

> .....
>
Nalwa Chrome Pvt Ltd.	2011-12	4,50,00,00/-	Writing back of the advance towards subscription to share capital. (Relevant entry passed in the books of accounts)

> ..... In addition to the above, our attention was also drawn upon the following journal voucher which was passed by the assessee company dated 31-03- 2011:-
>
Particulars	Dr.	Cr.
Advance against Equity	4,50,00,000	
Capital Reserve		4,50,00,000

> (On account of : Entry to transfer advance against equity received from Anand Transport to Capital Reserve on account of basis of discussion with Income-tax Authorities)

15. We have carefully gone through the entire exercise of making this statement and furnishing of this break-up of offer of additional income. It is noted that nowhere it has been mentioned that the impugned amount was bogus or non-genuine. It has nowhere been admitted that the aforesaid amount represents undisclosed income of the ITA 238 & 299/Mum/2015 assessee. Thus, there is no admission on facts by anyone to the effect that impugned amount could be treated as undisclosed income of the assessee. What has been offered is that '...writing back of the advance received towards subscription to share capital may be treated as income of the assessee...'

16. Thus, it is a case of purely a legal issue. It is settled law that on legal issue, the assessee cannot be always made bound by its 'admissions'. If a particular item or receipt or transaction is taxable as per the provisions of the Act, then it is, and if it is not, then it is not. The position of law remains unchanged and the legal position is not altered even on the basis of consent of an assessee especially when the consent is subsequently withdrawn. It is because of the fact that as per the constitutional framework of our country, no tax can be collected except as per authority of law, as has been clearly laid down under Article 265 of Constitution of India. Various courts have time to time clarified this position. Therefore, assessment of income must be done only within the four corners of provisions of the Income-tax Act, 1961. Ld. Counsel of the assessee placed reliance in this regard upon the judgment of Hon'ble Allahabad High Court in the case of CIT vs Malti Mishra (supra) wherein legal position in this regard has been clarified. Relevant part of the judgment is reproduced hereunder, for the sake of ready reference:-

> "13. In the i nsta nt case, there is no concealment on the part of t he assessee regarding the transactions. All the transactions were duly disclosed. If the income as per law is exempted, then the offer of the assessee is meaningless as the law will prevail and will supersede the "offer" made by the assessee. In the instant case, surrender was to buy the peace as the assessee is not an expert in income tax matter. The Department cannot take the advantage of the ITA 238 & 299/Mum/2015 ignorance of the assessee as per CBDT Circular No.14(XL-
>
> 35)/1955 dated 01.04.1955 mentioned in 150 ITR 105 (Kar).

1 4 . In t he ins t ant c ase , t h e st a teme n t was re co r de d of t h e b r ok er , w ho h a d confirmed the sale and purchase. No concealment was made by the assessee even then she has made an offer to treat the said income as income from "other sources". The only reason for making the addition is that it was not entered in the register of the company, for which, the assessee is not responsible specially when she has discharged the burden of proof by disclosing all the transactions in the return, as per the ratio laid down by the Punjab & Haryana High Court in the case of CIT vs. Sudarshan Gupta, 2008 (10) DTR 134 (P&H). Hence, we are of the view that the surrender letter will have to be ignored. Thus, we find no reason to interfere with the impugned order passed by the Tribunal. The same is hereby sustained along with reasons mentioned therein."

17. Thus, from the above, it may be noted that Hon'ble High Court has relied upon the circular of the Board wherein it has been clearly guided by the Board to its revenue officers that they should not take undue advantage of ignorance of assessee. Thus, from the evidences brought before us and the

legal position as discussed above, we find that the AO could not have adopted the aforesaid offer as the sole basis to make addition in the hands of assessee. Therefore, in our considered view, the taxability of this amount as income in the hands of the assessee should be decided purely on its merits and strictly in accordance with the provisions of Income-tax Act, 1961.

18. As far as merits of this issue are concerned, it is noted that the facts are undisputed that the assessee had received the impugned amount on account of share application money which has been written-back as the shares were not allotted. Now question arises, whether this amount could be treated as part of income of the assessee and that too, of the year under consideration. It is brought to our notice that this issue is no more res-integra as Hon'ble ITA 238 & 299/Mum/2015 Bombay High Court has already decided this issue in many judgments. Ld. Counsel of the assessee has placed reliance upon the judgment of Hon'ble Bombay High Court in the cases of Softworks Computers Pvt Ltd (supra) and Xylon Holdings Pvt Ltd (supra) wherein it is held that the amount received on account of share capital can neither be treated as taxable either u/s 41(1) or u/s 28(iv) if the same is written-back in the books of account. We shall discuss hereunder the judgment in the case of Xylon Holdings Pvt Ltd (supra) wherein one of the questions raised by the Revenue before the Hon'ble High Court was "whether the amount received on account of share application money and written-back in the books of account can be brought to tax u/s 41(1) of the Act or u/s 28(iv) of the Act as business income". Hon'ble High Court discussed the entire law in this regard and held the same in the negative by observing as under:-

> "8. We have considered the submissions. The issue arising in this case stands 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 for 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 an d So ns Ltd. 2 22 ITR 3 44 held that t he l oan wa s received b y the assessee for car rying on i ts business a nd 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 ITA 238 & 299/Mum/2015 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.

9) In view of the issue arising in this appeal being covered by the decision of this Court in the matter of Mahindra & Mahindra Ltd.(supra), no substantial question of law arises and both the questions are dismissed."

19. From the above, it may be noted that Hon'ble High Court has considered its earlier judgment in the case of Solid Containers (supra) as well as the judgment of Hon'ble Supreme Court in the case of T.V. Sundaram Iyengar & Sons Ltd (supra) and held that the amount received on account of share application money cannot be brought to tax as income u/s 41(1) or u/s 28(iv).

20. It is further noted that similar view has been taken by Hon'ble Madras High Court in the case of Skraemeco Regent Ltd (312 ITR 317) wherein detailed discussion was made on section 28(iv) as well as section 41(1) and it was held that amount received for the purpose of acquiring capital asset did not constitute trading liability, and therefore, the same was not taxable u/s 41(1) or section 28(iv) of the Act. It is further noted that Hon'ble Delhi High Court in the case of CIT vs Tosha International Ltd 331 ITR 440 adopted the same view after considering the judgment of Hon'ble Bombay High Court in the case of Mahindra & Mahindra Ltd (supra). Thus, from the aforesaid legal discussion and facts of the case before us, we find that the order passed by the Ld. CIT(A) is well reasoned and based on correct legal position and, therefore, no interference is called for in his order. Thus, the same is upheld. Ground raised by the Revenue is ITA 238 & 299/Mum/2015 dismissed.

21. As a result, appeal filed by the Revenue is dismissed.

22. Now we shall tke up appeal filed by the Revenue in the case of Tranquil Homes & Holdings Pvt Ltd in ITA No.299/Mum/2015 on the following grounds:-

1. "Whether in the facts and circumstances of the case and in law, the Ld. CIT(A) is justified in deleting the addition of Rs. 13,50,00,000/- on account of cessation of loan liability as business income u/s. 28(iv) of the Act."

2. "Whether in the facts and circumstances of the case and in law, the Ld. CIT(A) is justified in accepting the assessee company's claim that business was never set up."

It was jointly stated by Ld. DR that facts and the issue involved in this case are identical to the appeal in the case of Nalwa Chrome Pvt Ltd (supra). Therefore, order passed in the said case should be followed here also.

23. However, during the course of hearing, the Ld. Counsel of the assessee fairly stated that in the break-up submitted by Shri M.V.S. Sesagiri Rao while making mention of the aforesaid amount in the particulars, it has been written as unsecured loan instead of share capital. However, it was merely a typographical error. In reality, this amount was also share capital as per the evidence shown to the lower authorities and there is no dispute on the same.

24. It is noted that lower authorities have treated this amount as share capital only. Therefore, our order passed in the case of Nalwa Chrome Pvt Ltd (supra) squarely applies on this case also. It is further noticed by us that the orders passed by the lower authorities in this case are identical to the orders passed in the case of Nalwa Chrome Pvt Ltd (supra). Therefore, following our order in the case of Nalwa Chrome Pvt Ltd (supra), the appeal filed by the Revenue is dismissed.

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25. As a result, both the appeals filed by the Revenue are dismissed. Order pronounced in the court on this 03rd day of March, 2017.

Sd/-	sd/-
(D.T. GARASIA)	(ASHWANI TANEJA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt: 08th March, 2017
Pk/-

Copy to:
1. The appellant
2. The respondent
3. The CIT(A)
4. The CIT

5. The Ld. Departmental Representative for the Revenue, H-Bench (True copy) By order ASSTT.REGISTRAR, ITAT, MUMBAI BENCHES