Share application money written back in books of account cannot be treated as income, ITAT followed HC ruling

Summary – The Mumbai ITAT in a recent case of Nalwa Chrome (P.) Ltd., (the Assessee) held that Amount received by assessee on account of share application money which was subsequently written back in books of account, could not be treated as income of assessee either under section 41(1) or section 28(iv)

Facts

- The assessee company was an investment company. 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 Assessing Officer from the notes given in the financial statements (*i.e.*, balance-sheet) filed by the assessee along with return of income that 'capital reserve represented advance against equity of Rs. 4.50 crores written back during the year, as the purported allotment of shares had not materialized and the amount was no longer repayable.
- In response to notice, the assessee submitted that amount in question would not qualify for addition under section 41(1) since it had never been claimed as a deduction in any of the years nor would it qualify for addition under section 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.
- The assessing Officer did not agree with the submissions of the assessee. The Assessing Officer found that the aforesaid amount was offered to tax by 'M', director of JSW Steel Ltd. during the course of search proceedings on JSW Steel Ltd. The said director had admitted an aggregate amount of Rs. 262 crores as additional income and in the break up submitted later on, aforesaid amount of Rs. 4.50 crores was offered as part of income.
- Thus, the Assessing Officer held that the impugned amount received as advance on account of share capital which was subsequently forfeited and credited to capital reserve account was income of the assessee arising out of business activity of the assessee under section 28(*iv*).
- The Commissioner (Appeals), however, held that amount in question was capital receipt not chargeable to tax.
- On revenue's appeal:

Held

- The issue to be decided is 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 under section 41(1) or 28(iv). But before that there was another facet *viz*. the Assessing

Officer had relied upon the statement made by 'M' for making impugned addition, wherein aforesaid amount has been allegedly offered to tax on behalf of the assessee. Therefore, one needs to first decide the bearing of the same on the addition made by the Assessing Officer.

- It is noted from the information brought on record that search had taken place on JSW group of companies wherein statement of 'M' 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. It is noted that statement of 'M' was recorded under section 132(4) by the DDIT(Inv), 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 'M' 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 'M' 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 'M' on behalf of the assessee company also.
- It is seen that in statement, of 'M', name of the assessee company has nowhere specifically mentioned while offering the additional income of Rs.262 crores.
- 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 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…'
- 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 the 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 Act.
- From the evidence brought on record and the legal position as discussed above, it is found that the Assessing Officer could not have adopted the aforesaid offer as the sole basis to make addition in the hands of assessee. Therefore, 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 Act.
- 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. This issue is no more *res integra* as Bombay High Court has already decided this issue in many judgments.

- In the case of *CIT* v. *Xylon Holdings (P.) Ltd.* [2012] 211 Taxman 108 (Mag.)/26 taxmann.com 333 (Bom.) the High Court has considered the judgment of Supreme Court in the case of *CIT* v. *T.V. Sundaram Iyengar & Sons Ltd.* [1996] 222 ITR 344/88 taxman 429 and held that the amount received on account of share application money cannot be brought to tax as income under section 41(1) or under section 28(*iv*).
- Thus, from the aforesaid legal discussion and facts, it is held that the order passed by the Commissioner (Appeals) 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 dismissed.