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Does section 28 amendment overrule Landmark Mahindra and Mahindra case ruling of Supreme Court – the obscure fact**GOPAL NATHANI**

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Budget amendment

Finance bill 2023 propose an amendment in section [28 \(iv\)](#) of the Income Tax Act with the intent to provide a clarity on taxation of benefits and perquisites in cash in the context of income chargeable under the head business or profession. The explanatory memorandum further explains such amendment in the following manner:

1. Section 28 of the Act provides for income that shall be chargeable to income-tax under the head "Profits and gains of business or profession". Clause (iv) of this section brings to chargeability the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession. This provision was inserted through the Finance Act 1964 and the Circular no 20D dated 7th July 1964 issued to explain the provisions of this Act stated clearly that the benefit could be in cash or in kind. Therefore, the intention of the legislation while introducing this provision was also to include benefit or perquisite whether in cash or in kind. However, Courts have interpreted that if the benefit or perquisite are in cash, it is not covered within the scope of this clause of section 28 of the Act.
2. In order to align the provision with the intention of legislature, it is proposed to amend clause (iv) of section 28 of the Act to clarify that provisions of said clause also applies to cases where benefit or perquisite provided is in cash or in kind or partly in cash and partly in kind.
3. This amendment will take effect from 1st April, 2024 and will accordingly apply to the assessment year 2024-2025 and subsequent assessment years.

According the new section 28 clause (iv) read as under:

"(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;".

Landmark ruling of the Supreme Court in Mahindra and Mahindra case

The short point for consideration before the Supreme Court in *Commissioner v. Mahindra and Mahindra Ltd.* [\[2018\] 93 taxmann.com 32/255 Taxman 305/404 ITR 1](#) was whether a sum of Rs. 57,74,064/- due by the respondent company to capital assets creditor which later on got waived off by their successor constitute taxable income of the respondent company or not?

The brief facts of this case were that the respondent company imported capital assets such the dies, welding equipment and die models after the requisite approvals from the concerned Government Departments. In the way forward the holding company of the supplier agreed to provide a loan to the respondent at the rate of 6 per cent. interest repayable after 10 years in instalments. In other words the original liability got converted into a loan agreement which also had desired approval of the Reserve Bank of India. As a result, the liability was shown as a loan in the balance sheet of the respondent company.

In the later time lender company/supplier were taken over by American Motor Corporation (AMC) who further agreed to waive the remaining principal amount of loan to compensate for losses etc. In the consequence the respondent company treated such waiver as capital receipt in its books.

The ITO however concluded that with the waiver of the loan amount, the credit represented income and not a liability. Accordingly, the ITO charged the same to tax under section 28 (iv) of the Income-tax Act, 1961. Later the revenue also invoked section [41](#) in this case.

Ipsa Facto, the Supreme Court while dealing with section 28(iv) relevance held as under (on para 13):

"13. On a plain reading of section 28(iv) of the Income-tax 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 provisions of section 28(iv) of the Income-tax 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 Income-tax 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 Income-tax Act."

Crux- Unilateral transactions of waiver of loan do not come within section 28(iv) ambit

From the reading of the above the words "**in no circumstance**" it is almost certain that a waiver of loan does not fall within the purview of section 28 primarily because the right of waiver is unilateral with the creditor/grantor of loan and therefore the benefit resulting from exercise of such right cannot be considered as received in the course of business by the debtor from the creditor. It is a *sine qua non* in any business transaction that it involves at least two parties of which one party shall be receiver and another will be giver. Since the waiver of loan transaction is a unilateral act therefore section 28 may not have application in its natural and plain course leaving as sacrosanct the effect of Supreme Court judgement in Mahindra and Mahindra case despite amendment in section 28 to bring to tax benefits and perquisites arising in the business or profession in the form of money. In other words, the landmark ruling of Supreme Court

remains untouched. In the absence of any clause or explanation similar to Explanation 1 to sub-section (1) of section 41 subjecting to tax remission or cessation of any liability by a unilateral act within its ambit the language employed in the amended section 28 does no harm to the taxpayers viz a viz be reason of cessation of any liability or loan in their books.

Conclusion

The landmark SC ruling in Mahindra and Mahindra case is bereft of proposed amendment in section 28(iv) Finance bill 2023 and the decision is still "**stare decisis**" means to abide by precedents where the same points come again in litigation.

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