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Loan given by foreign company to Indian subsidiary company is capital asset as per section 2(14) of the Act

Loss arising on assignment/sale of debt is capital loss

The Bombay High Court in Siemens Nixdorf Information Systemse GmbH¹ held that, loss arising on assignment of loan given to its subsidiary in India, was capital loss, as loan constitutes capital asset within the meaning of section 2(14) of the Income Tax Act.

Facts of the Case:

- Siemens Nixdorf Information Systems GmbH (SNISG) a foreign company had provided loan in September 2000 to its Indian subsidiary company named Siemens Nixdorf Information Systems Limited (SNISL).
- Due to serious financial troubles, the subsidiary company SNISL, was likely to be wound up.
- SNISG sold/assigned the debt to Siemens AG at a lower value as compared to the original debt obligation on the basis of valuation carried out. The difference between the amount of loan and consideration received was claimed as short-term capital loss.
- The Assessing Officer disallowed short-term capital loss by contending that loan given is not covered under the definition of capital asset as per section 2(14) of the Act and also on the basis that no transfer in terms of section 2(47) of the Act took place on assignment of a loss.
- CIT(A) upheld the order of the Assessing Officer, but not in its entirety. The CIT(A) held that such assignment of loss is a transfer as per section 2(47) of the Act. But since loan given is not a capital asset, the contention of SNISG was not accepted.

Decision of ITAT:

- The Tribunal allowed the appeal of SNISG by order dated 31 March 2016.
- ITAT held that the term 'capital asset' is defined as 'property of any kind held by an assessee, whether or not connected with his business or profession', except those which are specifically excluded in the said section.
- It placed reliance on decision of this Court in the case of CWT v. Vidur V. Patel [1995] [\[1995\] 79 Taxman 288/215 ITR 30](#) rendered in the context of Wealth Tax Act, 1957, which construed the meaning of the word 'property' includes interest of every kind.
- The Tribunal held that in the absence of loan being specifically excluded from the definition of capital assets under the Act, loan would stand covered by the meaning of the word 'capital asset' as defined under section 2(14) of the Act. It was also held that transfer of loan would be covered by section 2(47) of the Act.

¹ [2020] 114 taxmann.com 531 (Bombay)

Decision of Bombay High Court:

- The High Court noted that word 'capital asset' as per section 2(14) of the Act has been defined very widely to mean property of any kind, subject to certain exclusions. It also noted that advancement of loan in the case is not a trading activity.
- Tax Revenue did not prove that advancement of loan should be covered under any of the exclusions.
- The Tax Revenue was also not able to point out any reasons mentioned in the case of Vidur Patel to understand meaning of the word 'property' as per section 2(14) of the Act, differently from the meaning assigned under section 2(e) of the Wealth Tax Act, 1957.
- The objection of the Revenue that the decision in case of Vidur Patel is rendered under a different Act, is not valid since both the Income-tax Act, 1961 and Wealth Tax Act, 1957 are cognate.
- The High Court relied the case law of *Bafna Charitable Trust v. CIT* [\[1998\] 101 Taxman 244/230 ITR 864 \(Bom.\)](#) wherein it was mentioned that '*property is a word of widest import and signifies every possible interest which a person can hold or enjoy except those specifically excluded*'. The Revenue was not able to point why this decision should not be applicable.
- Hence, the appeal of Revenue was dismissed by the High Court.

Observations:

The definition of capital asset under section 2(14) of the Act is wide in nature. Any property held by the assessee except specific exclusions mentioned in the section should be considered as capital asset, thereby triggering capital gains on its transfer.

In *Mahindra and Mahindra Ltd*² the Supreme Court had upheld the decision of the Bombay High Court on the facts of that case, that waiver / cessation of loan liability, is neither taxable under section 28(iv) nor under section 41(1) of the Act. In view of the Bombay High Court decision in *SNISG*, can the gains on waiver of loan liability be considered as capital gains?

² 93 taxmann.com 32 (SC)



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