

आयकर अपीलीय अधिकरण “सी” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH, MUMBAI
BEFORE SHRI MAHAVIR SINGH, JM AND SHRI SANJAY ARORA, AM

आयकर अपील सं./I.T.A. No. 4676/Mum/2014
(निर्धारण वर्ष / Assessment Year: 2008-09)

ITO-13(2)-3, R. No. 425, 4 th Floor, Aayakar Bhavan, M. K. Road, Mumbai-20	बनाम/ Vs.	Paresh Chemicals, Plot No. 236, 1 st Floor, Samuel Street, Mumbai-400 003
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AA EFP 2676 H		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Vijay Kumar Sani
प्रत्यर्थी की ओर से/Respondent by	:	None

सुनवाई की तारीख / Date of Hearing	:	05.7.2016
घोषणा की तारीख / Date of Pronouncement	:	15.7.2016

आदेश / ORDER

Per Sanjay Arora, A. M.:

This is an Appeal by the Revenue directed against the Order by the Commissioner of Income Tax (Appeals)-24, Mumbai ('CIT(A)' for short) dated 19.3.2014, allowing the assessee's appeal contesting its assessment u/s.143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2008-09 vide order dated 28.12.2010.

2. None appeared for and on behalf of the assessee respondent when the appeal was called out for hearing. There being similarly no representation by the assessee on the earlier dates (of hearing) as well, the Bench had directed service of notice of hearing through the Id. Departmental Representative (DR). Even this has not, however, yielded any positive result in-as-much as there is no proof of service on record, with the Id. DR also being unable to state if the said service could be effected, which the non service being, as it appears, on account of change of address. Under the circumstances, we only consider it proper to dispose the Revenue's appeal *ex parte* the assessee, i.e., on merits, on the basis of the material on record and after hearing the party before us.

3. The facts of the case are as follows. The assessee-firm, in the business of trading in chemicals, was found during the assessment proceedings for the relevant year by the Assessing Officer (A.O.) as being liable to trade creditors, M/s. Kochi Refineries Ltd. (KRL) and M/s. Triox Chemicals P. Ltd. (as per the balance-sheet as at the year-end). Notices u/s. 133(6), sent thereto, being uncomplied with by KRL, supplying an organic chemical, toluene, the A.O. inferred that the assessee's liability to the said trade creditor, reflected at Rs.92,35,837/- as on 31/3/2008, carried over from the past, had since ceased to exist. A Government company, as KRL, supplying a licensed item, would not extend credit, and that too for so long. The said amount was accordingly added by him in assessment as deemed income u/s. 41 (1) of the Act. In appeal, whereat the matter was remanded to the AO for consideration of the assessee's case, including the materials furnished in the assessment proceedings, the assessee reiterated its' stand. The assessee bought toluene, a licenced item, from KRL, as it was listed therewith. As, however, it did not have a consignee user certificate, the sales (to third parties) were routed through its' sister concern, M/s. Jay Pee Trading Company, which held a consignee user certificate, enabling it to issue excise gate passes to the customers, who (or some of whom) paid directly to KRL. This led to the

accumulation of credit (in the account of KRL). Before the Id. CIT(A), it was further explained that as assessee had defaulted on its' payments to KRL (now Bharat Petroleum Corporation Ltd. – BPCL), it had been charged Rs.4,01,871/- as 'delayed payment charges' during f.y. 2006-2007 – which though remained to be accounted for by the assessee, besides invoking bank guarantee (at Rs. 53.33 lacs), so that the balance payable to the said company (as on 31/3/2008), as per accounts thereof, since confirmed by it (in January, 2011) was Rs.11,65,203/-. As per the Id. CIT(A), the recovery through bank guarantee stood evidenced by bank advices, and payment of Rs. 31,42,505/- had been made by M/s. Ash Chemicals, a customer and ultimate user. Though the assessee ought to have recorded entries to this effect in its accounts, its' failure to do so would not imply an unexplained cessation of liability, i.e., in the face of abundant evidence as to the encashment of the bank guarantee by the bank and the payment by M/s. Ash Chemicals, which was collecting goods directly from KRL. The balance amount of Rs.7,63,332/- – the assessee having not accounted for the delayed payment charges of Rs.4.02 lacs, is still outstanding. The addition for the entire sum of Rs.92.36 lacs was, accordingly, deleted. Aggrieved, the Revenue is in appeal.

5. We have heard the parties, and perused the material on record.

The case of both the parties – the assessee being though unrepresented before us, so that its case is taken as that before the Revenue authorities, remains the same. The primary facts, by now clear, are not disputed. The assessee's liability to KRL as on 31.3.2008, detailed as under, is Rs.11.65 lacs, since confirmed by the said company, so that there is no unexplained difference in account: (Amt. in Rs.)

Credit Balance of Kochi Refineries Ltd. in the books of the assessee as at 31/3/2008		92,35,837/-
Add:	Delayed payment charges debited by M/s. Kochi Refineries Ltd. but not accounted by the assessee during f.y. 2006-07	4,01,871/-
		96,37,708/-

Less:	1. Bank guarantee en-cashed & credited by Kochi Refineries Ltd. but not considered by the assessee (evidenced by copy of bank advices)	53,33,000
	2. Pay orders directly deposited by third parties with Kochi Refineries Ltd. & which were credited by M/s. Kochi Refineries Ltd. to the account of the assessee, however, no corresponding entry was passed by the assessee (evidenced by copy of ledger accounts)	31,42,505
	[(1) + (2)]	84,72,505
	Debit Balance as per Kochi Refineries Ltd. confirmation (96,37,708 – 84,72,505)	11,65,203

The issue, however, is not of any unexplained difference in account, which the Id. CIT(A) has confused it as. Section 41(1) gets attracted on the cumulative satisfaction of two events, i.e.:

- (a) cessation of trading liability (in respect of which the assessee had at any time in the past claimed and been allowed deduction); and
- (b) any benefit (in cash or in kind) stands obtained by the assessee on account of the said cessation.

In the instant case, the credit of KRL in the assessee's accounts is a trade liability *qua* which it has, by way of purchase cost of goods (toluene), secured deduction in the computation of its' business income. The actual liability thereto as at 31.3.2008 is Rs.7,63,332/- (i.e., Rs.11,65,203 – as per the accounts of KRL (–) Rs.4,01,871, not accounted for by the assessee). There is, thus, an admitted cessation of trading liability to the extent of Rs.84,72,505/- (Rs. 92,35,837 - Rs.7,63,332). The first limb of section 41(1) is thus satisfied. Where the discharge of liability is recorded in the assessee's books of account, the source thereof, recorded therein, can be ascertained with reference thereto, and explanation *qua* the same, where and to the extent deemed necessary, sought. In the instant case, however, the discharge having not been

recorded in the assessee's accounts, it was incumbent to inquire about the source of the said discharge, so as to ascertain if any benefit has inured to the assessee, and if there is thus a case for application for section 41(1) to any extent. This, latter, aspect has not been enquired into by the Id. CIT(A); he resting content with an explanation with regard to and on being satisfied of there being no unexplained difference (between the two parties) in the amount standing per their respective accounts as on 31.3.2008, i.e., out of the total credit of Rs.92.36 lacs reflected in the assessee's books of account as on that date. That, rather, confirms of their being a cessation of liability (for Rs.84.73 lacs), one of the ingredients for the invocation of section 41(1), so that the same ought to have been followed by an enquiry *qua* the second aspect thereof. This is more so as the non-passing of the entries by the assessee is itself quizzical, with the Id. CIT(A) himself recording (at para 3.4.4 of his order) of it being inexplicable as to why the assessee, supplying goods through M/s. Jay Pee Trading Co., with which it shared common business premises, had not passed the necessary entries in its books of account. What would be, or could be, those entries, we need not speculate at this stage, depend as it would on the facts and circumstances of the case – the sources where-from the liability – to that extent, stands discharged. The fallacy in the approach of the Id. CIT(A) gets reflected in his stating that either the assessee or someone else on his behalf had paid the balance amount (Rs.84.73 lacs). If the assessee has paid the amount, he should state so, along with the sources wherefrom the payment stands made, and as regards someone else, why, we wonder, would someone pay on the assessee's behalf. Then, again, who is this 'someone else'? The Revenue's case, rather, could not be limited to the application or otherwise of section 41(1), and may well extend to any of the other provision/s, as where it finds, as a result of its' enquiries, any undisclosed assets with the assessee; its' purview being the assessment of total income.

Coming to the facts of the case, Rs.31.42 lacs has been explained as paid directly by a trade debtor, M/s. Ash Chemicals, to whom goods were sold. The debit

balance of the said firm in the assessee's books of account, arising out of the sales thereto, would therefore stand to be reduced to that extent. What are those sale bills/invoices? Do they stand accounted for in the assessee's accounts? If so, is the amount sufficient to absorb the said reduction, and does the reduced balance agree with that as per the books of the said party? Where so, the source of payment, ascribed to the said party, gets fully explained with reference to the assessee's accounts, so that all that was required is a passing of a journal entry adjusting the account of the debtor and the creditor to that extent (Rs.31,42,505), non-passing of which can by no means be regarded as fatal. As regards the payment by bank on the invocation of bank guarantee issued by the assessee in its' favour by KRL, surely the bank would not pay without securing itself, paying presumably only out of funds made available by the assessee thereto, or the like. Bank-guarantee is an off-balance sheet item, with the assessee's accounts not reflecting its' invocation, or payment thus, only whereupon could the source thereof be known. Is it that the bank has released a line of credit in the assessee's favour? Or is it that the assessee has placed funds at the disposal of the bank, to be so applied in case of such a contingency (i.e., of non-payment). The source of payment of Rs.53.33 lacs is completely unexplained, and which would therefore also require being examined, necessitating a remission to the A.O.

Finally, we may consider the last component of the impugned sum of Rs. 92.36 lacs, i.e., the 'balance' outstanding as at the year-end, or Rs.7.63 lacs, reflected, again, as a liability in the assessee's accounts, which corresponds with the accounts of the creditor. Though, therefore, *prima facie* suggestive or indicative of a liability, that by itself could not be conclusive of the matter, particularly considering that we have found the assessee's books of account as not reflecting the actual state of affairs. Similarly, the non write off of the debt by KRL, which may be hopeful of recovery, would also not conclude or be determinative of the matter. The principal question, despite legal obligation, i.e., assuming so, is: Does the assessee intend of pay the same? *Going by the assessee's conduct, it does not.* Or else it would not have stopped

paying KRL, which appears to be for long, compelling it to charge delayed payment charges and, finally, invoke the bank guarantee in its' favour. A good part of the amount outstanding stands paid directly by a customer. Why? The supplier (KRL), it needs to be borne in mind, is selling a licensed item (through registered dealers), and recovers, as a matter of policy, payment of goods in advance (refer Ground # 2 before the Id. CIT(A), reproduced at pg. 1 of the impugned order), i.e., *does not extend any credit to its' customers*. It is for these reasons that we regard the establishment of intent by the assessee as relevant; the creditor having already, as it appears, exhausted the bank guarantee issued in its' favour. How would the assessee establish its intent to pay the said amount, as implied by its' holding out the same as a subsisting liability, we cannot predicate, being in fact a matter of evidence. Does the company have any means to recover except, of course, by initiating a legal process? Has it done so at any time? When does the same get barred by time? Has any part of liability been discharged subsequent to 31.3.2008? These and other related questions arise, on the basis of answers to all of which only would it be possible to say if there has occurred, or not so, a cessation of liability *qua* the said balance amount of Rs.7.63 lacs, i.e., as on 31.3.2008.

6. The matter is, in view of the foregoing, restored to the file of the AO for proper determination, to be decided after allowing a reasonable opportunity to the assessee to present its' case before him, issuing definite findings of fact, in accordance with law. We may clarify that we may not be construed as having issued any finding in the matter, but as having only analyzed the facts and circumstances with reference to the assessment of the (whole or any part of the) said credit balance appearing in the assessee's books of account as income under the Act. Further, lest one considers us as having travelled outside the scope of the appeal, we may advert to the decisions in the case of *Kapurchand Shrimal v. CIT* [1981] 131 ITR 451 (SC) and *Ahmedabad Electricity Co. Ltd. v. CIT* [1993] 199 ITR 351 (Bom)(FB). We decide accordingly.

7. In the result, the Revenue's appeal is allowed for statistical purposes.

परिणामतः राजस्व की अपील सांख्यिकीय उद्देश्य के लिए स्वीकृत की जाती है ।
Order pronounced in the open court on July 15, 2016

Sd/-
(Mahavir Singh)

न्यायिक सदस्य / Judicial Member

मुंबई Mumbai; दिनांक Dated :15.07.2016

व.नि.स./Roshani, Sr. PS

Sd/-

(Sanjay Arora)

लेखा सदस्य / Accountant Member

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai