

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

Before Shri Joginder Singh (JUDICIAL MEMBER)

AND

Shri G Manjunatha (ACCOUNTANT MEMBER)

I.T.A No.5558/Mum/2017
(Assessment year: 2014-15)

Riteplaza Trading Co Pvt Ltd 2 nd Floor, JK Somani Bldg British Hotel Lane, Fort Mumbai 400 001 PAN : AADCR0300A	vs	ITO- 4(3)(3), Mumbai
---	----	----------------------

Appellant by	Shri Rajeev Khandelwal
Revenue by	Shri Ram Tiwari

Date of hearing	28-02-2018
Date of pronouncement	26-04-2018

ORDER

Per G Manjunatha, AM :

This appeal filed by the assessee is directed against the order of the CIT(A)-3, Mumbai dated 28-07-2017 and it pertains to AY 2014-15.

The assessee has raised the following grounds of appeal:

The following grounds of appeal are independent of, and without prejudice to, one another:

1. The Commissioner of Income-tax (Appeals) - 3, Mumbai (hereinafter referred to as the CIT(A)) erred in upholding the action of the Income-tax Officer- 1(3)(1), Mumbai (hereinafter referred to as the Assessing Officer) in making an addition of a sum of Rs 2,25,00,000 under section 41(1) of the Act on the basis that Om Metals Infraprojects Pvt. Ltd., the lender, has written-off the loan/ advance in their books of account.

The appellants contend that on the facts and in the circumstances of the case and in law, the CIT(A) ought not to have upheld the action of the Assessing Officer in making the impugned addition as the provisions of section 41(1) are not applicable inasmuch as the appellants have shown the impugned liability in their books of account and, the Assessing Officer has not been able to show

that some benefit has accrued in respect of such liability by way of remission or cessation thereof.

The appellants further, contend that the CIT(A) has erred in not accepting additional evidence filed under cover of letter dated 25th July, 2017 even though the appellants were prevented by reasonable cause in furnishing the said additional evidences with the Assessing Officer during the course of assessment proceedings.

The appellants further, contend that the CIT(A) has grossly erred in bringing the impugned amount to tax under section 41(1) of the Act inspite of the fact that the Assessing Officer has taxed the said amount under section 68 of the Act without following the principles of natural justice of allowing an opportunity of being heard to the appellants for such change.

2. The CIT(A) erred in upholding the action of the Assessing Officer in charging interest of Rs.1,46,002 and Rs.24,09,033 under sections 234A and 234B of the Act, respectively.”

2. The brief facts of the case are that the assessee filed its return of income for AY 2014-15 on 28-11-2014 declaring total income at Nil. The case was selected for scrutiny under CASS and accordingly notices u/s 143(2) and 142(1) of the Act were issued. In response to notices, authorized representative of the assessee appeared from time to time and filed details, as called for. During the course of assessment proceedings, the AO noticed that the assessee has borrowed loan from M/s Om Metals Infraprojects Ltd amounting to Rs. 2.25 crores in the financial year, 2007. In order to verify the genuineness of loan, the AO issued notice u/s 133(6) to M/s Om Metals Infraprojects Ltd . The creditor, vide letter dated 19-09-2016 furnished copy of ledger account of assessee in their books of account for the year ending 31-03-2014 as per which, the party has written off loan advanced to the assessee with a narration that it was lying outstanding and the company did not pay;

hence, written off as bad debts. Thereafter, the AO vide letter dated 25-10-2016 requested assessee to show cause as to why the loan amount of Rs.2.25 crores shall not be treated as unexplained cash credit u/s 68 of the Act. In response, the assessee, vide letter dated 7-12-2016 submitted that it has received loan from the party by account payee cheque and due to fiscal constraints, the same was not repaid. However, the same is very much a liability and assessee company intent to repay the same and arrangements are being made for the same. The AO, after considering explanations of the assessee observed that the assessee knew the creditor, M/s Om Metals Infraprojects Ltd had already written off the entire loan amount. From the above, it was clear that the assessee had reduced an amount of Rs.2.25 crores from profit instead of making addition u/s 41(1). In view of the above, the entire loan amount of Rs.2.25 crores was added to total income u/s 68 of the Act.

3. Aggrieved by the assessment order, assessee preferred appeal before the CIT(A). Before the CIT(A), assessee has filed certain additional evidences u/r 46A alongwith copies of letters dated 04-01-2017 and 09-01-2017 addressed by the creditor in response to a letter issued by the assessee. As regards addition made by the AO towards loan u/s 68, the assessee submitted that the addition made by the AO towards loan received from M/s Om Metals Infraprojects Ltd can neither

be sustained u/s 68 nor u/s 41(1) of the Act as the assessee is still admitting the liability towards repayment of loan. The assessee further submitted that to make addition u/s 68, the amount of loan should be received during the year whereas in this case it has received loan in the financial year 2007, therefore, there is no reason for the AO to invoke provisions of section 68 of the Act. The assessee further contended that to invoke provisions of section 41(1) to treat remission or cessation of liability, the assessee should either get cash or kind benefit during the year under consideration by way of write off of liability. The liability written off in the books of account of the creditor is no longer relevant to decide whether the assessee has got some benefit in the form of remission or cessation of liability.

4. The CIT(A), after considering relevant submissions of the assessee and also relying upon certain judicial precedents observed that it is a clear case of cessation of liability to which the assessee has no obligation to discharge towards loan received from M/s Om Metals Infraprojects Ltd. The CIT(A) further observed that the creditor categorically stated in its letter addressed to the AO that it has already written off the liability as bad debt in its books of account and hence, the provisions of section 41(1) comes into operation the moment, the assessee derives certain benefit out of remission or cessation of liability either on its own or on account of unilateral write back of liability in the

books of account of the creditor. The AO has brought out clear facts to the effect that the liability is no longer payable and the assessee derives benefit out of write off of liability by the creditor for which the assessee had not produced any evidence to counter the findings of the AO. Therefore, he opined that the addition made by the AO towards loan received from M/s Om Metals Infraprojects Ltd is required to be added u/s 41(1) but not u/s 68 as held by the AO. With these observations, he confirmed addition made by the AO and dismiss the appeal filed by the assessee. Aggrieved by the order of CIT(A), assessee is in appeal before us.

5. The Ld.AR for the assessee submitted that the Ld.CIT(A) erred in upholding addition made by the AO towards loan received from M/s Om Metals Infraprojects Ltd by holding that the addition made by the AO is sustained u/s 41(1) as the assessee has derived certain benefit out of unilateral remission or cessation of liability by the creditor. The Ld.AR further submitted that the Ld.CIT(A) failed to appreciate the fact that the addition made by the AO can neither be sustained u/s 68 nor u/s 41(1) as the amount of loan received on account of capital account which cannot be added u/s 41(1) as the provisions of section 41(1) applies in a case where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee and subsequently during any previous

year the first mentioned person has obtained whether in cash or in any other manner, whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof. In this case, the assessee has received loan from the creditor which has been continued in the account of the assessee. It is irrelevant whether the creditor has written off the liability in its books of account or not. What is to be seen is whether the assessee has derived any benefit out of remission or cessation of liability and such liability is on account of trading liability or not. The liability towards loan is on account of capital account for which no benefit has been derived by the assessee in the earlier year. Therefore, there is no reason for the AO to treat such liability as a trading liability for which the assessee has got certain benefit by way of remission or cessation. The Ld.AR further submitted that even the addition made by the AO cannot be sustained u/s 68 of the Act as the provisions of section 68 is applicable to a case where the loan or any other credit arising during the year under consideration. In this case, the assessee has raised loan in the year 2007. Therefore, there is no reason for the AO to invoke the provisions of section 68 to make addition. In this regard, the Ld.AR relied on the following decisions:-

1. Ambica Mills 54 ITR 167 (Guj)
2. Chase Bright Steel Ltd 177 ITR 128 (Guj)

3. Sugauli Sugar Works (P) Ltd 236 ITR 518 (SC)
4. Liquidator, Mysore Agencies (P) Ltd 114 ITR 852 (Kar)
5. Cipla Investments Ltd 33 SOT 317 (OM)
6. Airline Allied Services Ltd 2017) 167 ITD 717 (Del-Trib)
7. Bombay Gas Co Ltd (2012) 54 SOT 13 (Mum)
8. Samrat Rice Mills (P) Ltd 54 SOT 1 (Del)
9. Tosha International Ltd 331 ITR 440 (Del)
10. Suretech Hospital & Research Centre Ltd 293 ITR 53 (Bom)
11. Prabhavati S Shah 231 ITR 1 (Bom)

6. On the other hand, the Ld.DR supporting the order of CIT(A) submitted that the assessee derived benefit out of remission or cessation of liability towards loan received from M/s Om Metal Infraprojects Ltd which is evident from the fact that the creditor has accepted before the AO that it has unilaterally written off the liability as bad debt. The Ld.DR further submitted that the moment the assessee derived certain benefit whether in cash or in any other manner, by way of remission or cessation thereof, whether such remission or cessation is on account of unilateral write off of liability by the creditor or by the assessee in its books of account, as long as there is a remission or cessation of liability, the assessee certainly derived certain benefit and accordingly, the CIT(A) was right in confirming the addition made by the AO u/s 41(1) of the Act.

7. We have heard both the parties and perused the materials available on record. The AO made addition towards loan received from M/s Om Metal Infraprojects Ltd on the basis of confirmation received from the creditor wherein the creditor confirmed that it has written off the liability in its books of account as bad debt. According to the AO, even though the creditor wrote off the liability, the assessee continue to claim the liability in its books of account, therefore, he opined that the credit appeared in the books of account of the assessee is unexplained as the assessee failed to explain with necessary evidences the genuineness of transactions. The Ld.CIT(A) confirmed addition made by the AO has applied the provisions of section 68; the addition made by the AO is sustainable u/s 41(1) as the assessee has derived certain benefit out of remission or cessation of liability. It is the contention of the assessee that the addition made by the AO neither can be sustained u/s 41(1) nor could it be sustained u/s 68 of the Act as the AO has made addition of loan on the basis of confirmation received from the creditor without appreciating the legal position with regard to such credit. The assessee further contended that the additions made by the AO u/s 68 cannot be sustained because the provisions of section 68 applies to any credits found in the books of account of the assessee for which the assessee offers no explanation. The addition made by the AO cannot be sustained even u/s 41(1) as the provisions of section 41(1) applies to a

trading liability for which an allowance or deduction has been made in the assessment for any year and subsequently during any previous year the person has obtained whether in cash or in any other manner, whatsoever some benefit in respect of such liability by way of remission or cessation thereof. According to the assessee, the liability towards loan from the creditor is continued in its books of account and it is bound to repay the loan. Merely the creditor wrote off the loan in its books of account, it cannot be said that the assessee's obligation towards repayment of loan ceased to exist. The assessee further contended that though the creditor has written off the loan in its books of account as bad debt but it has addressed a letter to the assessee. The outstanding balance of Rs.2.25 crores is still payable which is evident from the fact that the creditor has addressed two letter on 04-01-2017 and 09-01-2017.

8. Having heard both parties, we find that although, technically the addition towards loan cannot be sustained either under section 68 or 41(1) of the Act, yet the nature of transaction clearly indicates that the transaction is not genuine which is evident from the fact that creditor has unilaterally written of such a huge loan amount to given to a third party. Once truncation is proved to be non genuine and appears to be suspicious, then, the moment the assessee derives certain benefit whether in cash or in kind

or in any other manner, whatsoever, towards a liability by way of remission or cessation thereof, such liability is liable to be taxed under the Act and to that extent there is no controversy. In the present case, the AO obtained the confirmation from the creditor to find true status of the liability shown by the assessee. The correct facts emerged from confirmation filed by the creditor shows that the creditor has written off the outstanding loan in its books of account as the assessee has not paid the amount over a long period. We further observe that even though the assessee knew of the write off of liability by the creditor, it has continued to claim the liability in its books of account without making payment towards loan. Therefore, we are of the considered view that loan transaction appears to be non genuine or sham transaction. But, fact remains that assessee has filed two letters dated 04-01-2017 and 09-01-2017 issued by creditor as per which the creditor states that liability towards loan is still payable by the assessee and which has been reiterated by the assessee. Therefore, we are of the considered view that the issue needs to be re-examined by the AO in the light of additional evidences in form of letters of creditor to ascertain genuineness of loan transaction. The AO is directed to cause all possible enquiries to ascertain true nature of transactions. Hence, we set aside the issue to the file of the AO and direct him to pass de novo assessment in accordance with law in light of our observation above.

9. In the result, appeal filed by the assessee is allowed for statistical purpose.

Order pronounced in the open court on 26th April, 2018.

Sd/-

sd/-

(Joginder Singh)	(G Manjunatha)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 26th April, 2018

Pk/-

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

/True copy/

By order
Sr.PS, ITAT, Mumbai