

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES: 'F', NEW DELHI**

**BEFORE SMT. BEENA A PILLAI, JUDICIAL MEMBER  
AND SHRI MAHARISHI PRASHANT, ACCOUNTANT MEMBER**

**ITA No. 3881/Del/2015  
AY: 2009-10**

Sh. Vijay Arora C/o Sh.Vijay Kumar Gupta, Adv. Opp. Jain Mandir Main Bazar Ballabgarh Faridabad 121 004  PAN: AFMPA3846F	<b>vs.</b>	ACIT, Circle 1(1) HSIIDC Building Vanijya Nikunj Udyog Vihar Gurgaon
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**(Appellant)**

**(Respondent)**

**Assessee by :** Sh. Vijay Kumar Gupta, Adv.

**Department by :** Sh. Surender Pal, Sr. D.R.

**Date of Hearing :** 01/11/2018

**Date of Pronouncement:** 27/11/2018

**ORDER**

**PER BEENA A PILLAI, JUDICIAL MEMBER**

Present appeal has been filed by assessee against order of Ld.CIT(Appeals)-1, Gurgaon dated 04.03.2015 for A.Y 2009-10 on the following grounds of appeal:

- i) THAT in the Balance Sheet for the year ending 31/03/2009 [AY 2009-10] there is an outstanding liability at Rs.71,68,305.00 as discount payable to the customers accumulated for the last four years. Out of that amount the appellant has claimed expenses on account of discounts to customers at Rs.12,06,800.00 in the present period [AY*

2009-10]. The Ld. AO in the present case has added that amount Rs.71,68,305.00 in the total income of the appellant. Such an addition was against the facts on record as well as law on the subject.

ii) THAT on the facts and in the circumstances of the present case the Ld.CIT[A] has grossly erred to hold that the amount of Rs.59,61,505.00 represents profit chargeable to tax u/s 41(1) of the I.T. Act, 1961 since this liability ceased to exist during the present year and the amount of Rs.12,06,800=00 pertaining to discount payable during the present year is added back u/s 68 of the I.T. Act, 1961.

iii) THAT in the present case it is incorrect to say that the appellant has failed to prove the identity of customers to whom discount in question was given. The appellant submitted confirmation letters procured from customers. The Ld. AO without making any enquiry from such customers added the said amount in the total income of the appellant.

iv) THAT the Ld. AO in his remand report has said that he wrote letters to 15 customers to whom the said discount of Rs.12,06,800.00 was allowed / payable in the present period, but he received only one reply, which reads "the booking of the flat was made at Rs.2300.00 less Rs.50.00 i. e. Rs.250.00 per Sq:ft. We were not given any discount other than what has been stated above". This reply by the customer clearly confirms that the said customer was allowed discount @ Rs.50.00 per Sq. ft. by the appellant

*herein. On such confirmation it can be well concluded that the stand of the appellant was / is correct. But the Ld. Lower Authorities have misread that reply against the appellant.*

*v) THAT when the appellant filed full details of customers to whom discount was payable, the Ld.AO was required to make enquiry from such customers including summoning of such customers. The Ld. AO even at appeal stage made enquiry part heartedly, so truth could not be brought on record.*

*vi) THAT the appellant craves leave to add, amend, revise, modify, substitute or delete any or all grounds of appeal or/and prayer made.*

PRAYER

*IN VIEW OF THE ABOVE, it is, therefore, prayed that the impugned order being illegal, arbitrary, beyond jurisdiction and in utter disregards of the true facts and in the circumstances of the case may kindly be quashed in the interest of justice and fair play.”*

2. Brief facts of the case are as under:

Assessee filed its return of income on 30/09/09 declaring total income of Rs.22,14,360/-. The case was selected for scrutiny and statutory notice under section 143(2) of the Act was issued, along with notice under section 142(1) and questionnaire. In response to statutory notices, representative of assessee appeared before Ld.AO and filed requisite details as called for.

3. Ld.AO observed that assessee was on the basis of property dealer during financial year relevant to assessment year under consideration.

4. Ld.AO recorded that several opportunities was given to assessee to prove genuineness of discount paid/payable to customers. However, assessee filed only copy of ledger account of discount to customers, which was not sufficient to prove genuineness of discount paid/payable and identity of such customers. Ld.AO, thus, was of opinion that assessee has not proved three ingredients, which is required to be established by assessee under section 68 of the Act, being, identity, creditworthiness and most importantly, genuineness of transaction. He, accordingly, disallowed sum of Rs.71,68,305/-.

5. Aggrieved by assessment order passed, assessee preferred appeal before Ld.CIT (A). Before Ld. CIT(A), assessee filed additional evidence, which was remanded to Ld.AO. Ld.AO after considering additional evidence issued remand report dated 09/02/15 stating that circumstances which precluded assessee from filing evidence before assessment order does not stand satisfied as per Rule 46A. He, thus, rejected additional evidence filed by assessee.

6. Ld.CIT(A) after considering submissions advanced by assessee, dismissed appeal filed by assessee.

7. Aggrieved by order of Ld. CIT (A) assessee is in appeal before us now.

8. At the outset, Ld.AR submitted that **Ground Nos. (i), (iv)** are not pressed. Accordingly, we dismiss these grounds as not pressed.

9. As regards **Ground Nos. (iii), (v) to (vi)** are concerned is general in nature and, therefore, do not require any adjudication.

10. **Ground No. (ii)** has been raised in respect of sum of Rs.59,61,505/- which has been considered by authorities below as ceased under section 41(1) of the Act and holding alleged discount paid during year amounting to Rs.12,06,800/- under section 68 of the Act.

11. Ld.AR submitted that Assessing Officer made addition of Rs.71,68,605/- on account of discount payable to customers. He submitted that a sum of Rs.12,06,800/-, out of total discount payable, pertained to year under consideration. He submitted that, Assessing Officer, without giving proper opportunity, made addition of entire amount. Ld. AR submitted that balance amount of Rs.59,61,505/-, related to preceding years. He submitted that during remand proceedings, assessee submitted confirmation filed by customers towards discount allowed by assessee during year under consideration, and also list of customers pertaining to earlier years. But Ld.AO held amount to be non-genuine.

12. On the contrary, Ld. Sr. DR submitted that Assessing Officer was right in holding discount payment of Rs.12,06,800/- to be non-genuine, as assessee could not establish genuineness of transaction, by presenting customers, along with their PAN card, to whom discount was given. He submitted that, as transaction could not be verified by Ld. AO, he has rightly made addition of section 68 of the Act.

13. As regarding balance Rs.59,61,505/-, Ld. Sr. DR submitted that assessee failed to give substantial evidence of pending liability to that extent.

14. We have perused submissions advanced by both sides in light of records placed before us.

15. The case of assessee is that, it had shown a sum of Rs.71,68,305/-, on account of discount payable in his balance sheet as on 31/03/09. Ld.AO during assessment proceedings called for details of parties to whom discounts were payable for purposes of verifying genuineness of transaction. Assessee filed some details as additional evidence at the time of hearing before Ld.CIT (A), which was sent for remand to Ld.AO. Ld.AO observed that assessee had filed confirmation of persons to whom discounts were paid during the year under consideration amounting to Rs.12,06,800/-. In respect of balance amount of Rs.59,61,505/-, it has been submitted that the amount pertains to preceding years, assessee filed list of names to whom discounts were alleged to be payable.

16. Ld. AO, thereafter, getting complete address of persons to whom discount was payable during year under consideration sent letters to 15 persons asking them to confirm discount payable by assessee. It is observed that out of 15 letters two letters came back unserved, whereas in balance 13 cases reply was received on one case. Person who submitted reply to Ld.AO, stated that no discount was given by appellant in connection with booking of flat. Thus, on any independent enquiry conducted by Ld.AO on the basis of details submitted by assessee not a single customer acknowledged to discount having received from assessee. Assessee also could not produce these persons who were claimed to have received discount from assessee.

17. We have carefully considered argument advanced by Ld.AR and are not impressed with that. In our opinion Assessee has failed to discharge initial onus cast upon assessee to identify creditors and also prove creditworthiness and genuineness of transaction in facts of present case. Assessee in paper book has only filed balance sheet Ledger accounts and intimation issued under section 143 (1) of the Act, pertaining to assessee. None of these documents show any details of customers, in order to shift onus upon Revenue. Further Ld. AO has investigated upon whatever details were submitted by assessee, by issuing notice under section 131 of the Act, and has found to be contrary to what has been submitted by assessee is.

18. We draw our support from the strict analysis of section 68 by *Hon'ble Delhi High Court in case of CIT vs. Lovely Exports reported in [2008] 216 CTR 195 (supra)*. *Hon'ble Court* has held as under:

*“18. In this analysis, a distillation of the proceedings yield the following prepositions of law in the context of section 68 of the income tax act. The assessee has to prima facie prove (1) the identity of the creditor/subscriber; (2) the genuineness of the transaction, namely whether it has been transmitted through banking channel or other indisputable channels; (3) the creditworthiness or financial strength of the creditor/subscriber; (4) if relevant details of the address or pan identity of the creditor/subscriber are furnished to the Department along with copies of the shareholders registered, share application forms should, share transfer register, etc., It would constitute acceptable*

*proof or acceptable explanation by the assessee. (5) the department would not be justified in drawing an adverse inference only because the creditor/subscriber failed to neglect to respond to blitz notices; (6) the onus would not stand discharge if the creditor/subscriber denies to repudiate the transaction set up by the assessee nor should the assessing officer take such repudiation at face value to construe it, without more against the assessee; and (7) assessing officer is duty bound to investigate the creditworthiness of the creditor/subscriber to the genuineness of the transaction and the veracity of the repudiation.”*

19. It is also observed that assessee in the case of *CIT vs. Lovely Exports (supra)* had established by way of confirmation and affidavits of share applicants, containing details including PAN/IT Ward number, ration card of share applicants, and further payments were made through proper banking channels. In that particular case all the necessary details, particulars of the creditors were furnished thereby discharging the onus.

20. The decisions relied upon by Ld.AR being decision of *Hon’ble Delhi High Court* in case of *CIT vs Gangeshwari Metal Pvt. Ltd.*, reported in (2014) 361 ITR 10, *Hon’ble Punjab and Haryana High Court* in case of *CIT vs. Varinder Rawlly* reported in (2014) 366 ITR 232, decision of *Hon’ble Rajasthan High Court-Jaipur Bench*, reported in (2014) 366 ITR 217 are distinguishable on facts, as in all these cases, assessee therein provided most of the details regarding parties like PAN numbers, confirmation letters, complete address proof, copies of bank statement of the parties,

copies of bank account of assessee therein, which was sufficient in order to discharge initial onus cast upon assessee therein under section 68 of the Act.

21. Further, it is hard to believe that when assessee is dealing in purchase and sale of properties, most of the documents like PAN card ration card and address proof of parties/customers who are purchasers/customers of flats through assessee. Accordingly, we confirm the disallowance of expenses on account of alleged discounts amounting to Rs. 12,06,800/-.

22. In our considered opinion assessee failed to establish identity, creditworthiness and most importantly genuineness of discounts claimed to have been paid/payable by assessee to satisfaction of Ld.AO, as laid down by *Hon'ble Delhi High Court* in the case of *CIT vs Lovely Exports (supra)*.

23. As regards balance amount of Rs.59,61,505/-, that has been alleged to be pertaining to preceding years, assessee only filed list of person and Ledger account without giving their PAN details and/or confirmations. It has been observed by authorities below that even during first appellate proceedings, assessee could not file these details in order to establish that liability existed. Further, it has been alleged that liability has not been proved to be existing.

24. On the contrary, Ld.AR submitted that no addition can be made under section 41(1) of the Act unless there are materials available on record to show that liability ceased to exist. He placed reliance upon decision of *Hon'ble Supreme Court* in the case of *CIT vs. Sugauli Sugar Works Pvt. Ltd.*, reported in (1999) 236 ITR 518.

25. Assessee in paper book from page 98-155 placed balance sheet, income and expenditure account and intimation processed under section 143(1) of the Act from assessment year 2010-11 onwards. On perusal of the same, it appears that every year in balance sheet expenses payable in respect of discount to customers have been shown having an increasing trend. During year ending 31/03/12 expenses payable has been shown at Rs.71,11,275/-, *vis-a-vis* Rs.87,77,312/- which was shown as payable as on 31/03/11. It has further reduced to Rs.69,12,405/- as on year ending 31/03/13 and Rs.64,62,575/- as on 31/03/14. Thus it cannot be ignored that assessee has been making payments, as and when claim is raised by creditors. Thus in our considered opinion conditions of section 41(1) does not stand satisfied. *Hon'ble Supreme Court in CIT vs. Sugauli Sugar Works Pvt. Ltd., (supra)* held that unilateral action cannot bring out cessation of liability. If and when there is any evidence in later years to show that liability has ceased, then only it can be brought to tax under provisions of section 41(1) of the Act. Insofar as present year is concerned revenue has not been able to establish cessation of liability. Respectfully following a well analysed ratio laid down by *Hon'ble Supreme Court in case of CIT vs. Sugauli Sugar Works Pvt. Ltd., (supra)*, we delete addition made by Ld. AO amounting to Rs.59,61,505/- under section 41 (1) of the Act.

**Accordingly this ground raised by assessee stands partly allowed.**

**In the result appeal filed by assessee stands partly allowed**

Order pronounced in the Open Court on 27<sup>th</sup> November, 2018.

Sd/-  
**(PRASHANT MAHARISHI)**  
**ACCOUNTANT MEMBER**

Sd/-  
**(BEENA A PILLAI)**  
**JUDICIAL MEMBER**

Dt. 27<sup>th</sup> November, 2018

\*GMV/\*Kavita

Copy forwarded to: -

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

- TRUE COPY -

By Order,

**ASSISTANT REGISTRAR**  
ITAT Delhi Benches