

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'D' NEW DELHI**

**BEFORE SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

ITA No. 6708/DEL/2014 (A.Y 2009-10)

Lok Nath Narang, Prop. C/o. M/s. RRA Tax India, D-28, South Extension, Part-I New Delhi PAN : ADRPN8014H (APPELLANT)	Vs	ITO Ward-2(1) Gurgaon (RESPONDENT)
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Appellant by	Sh. Rakesh Gupta, Adv., Sh. Rohit Gupta, Adv.
Respondent by	Smt. Naina Soin Kapil, Sr. DR

Date of Hearing	02.01.2019
Date of Pronouncement	03.01.2018

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed against the order dated 03.11.2014 passed by CIT(A)-II, Faridabad by the assessee for the assessment year 2009-10.

2. The grounds of appeal are as under:-

“1. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not deleting the addition of Rs. 37,95,928/- fully as made by Ld. AO on account of sundry creditors and has further erred in sustaining the addition to the extent of Rs. 22,73,232/- by applying the provisions of section 41(1) whereas Ld. AO made the impugned addition u/s 68 of the Act and the impugned addition has been made by recording incorrect facts and findings and without giving adequate opportunity of hearing and without considering

the submissions/evidences of the assessee.

2. *That in any case and in any view of the matter, action of Ld. CIT(A) in not deleting the addition of Rs. 37,95,928/- fully as made by Ld. AO on account of sundry creditors and sustaining the same to the extent of Rs. 22,73,232/- and passing the impugned assessment order is illegal, bad in law, void ab initio, unjustified, contrary to facts & law and based upon recording of incorrect facts and finding, without giving adequate opportunity of hearing, in violation of principles of natural justice and the same deserves to be quashed.*

3. *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not reversing the action of Ld. AO in charging interest u/s 234A, 234B and 234C of Income Tax Act, 1961.*

4. *That the appellant craves the leave to add, modify, amend or delete any of the grounds of appeal at the time of hearing and all the above grounds are without prejudice to each other.”*

3. The assessee is having income from trading business. Returned declaring an income of Rs. 1,35,750/- was filed on 30.09.2009 which was processed u/s 143(1) of the Income Tax Act, 1961. The case was selected for scrutiny and statutory notice u/s 143(2) of the Income Tax Act, 1961 was issued on 28.09.2010 which was duly served upon the assessee. Notice u/s 142(1) along with the detailed questionnaire was issued on 24.06.2011. Requisite information was furnished by the assessee and assessment proceeding was attended by the advocate of the assessee from time to time. During the proceedings, the Assessing Officer observed that the assessee had reflected sundry creditors at Rs. 73,07,477/-. The assessee was asked to submit copy of account of all the sundry creditors along with the complete addresses and individual confirmations of creditors having balances exceeding Rs. 1,00,000/-. The Assessing Officer further observed that all the notices u/s 133(6) was returned back due to non availability and non-existence of concern creditors at the given addresses. The Inspector of the revenue personally visited and made due inquiries at the given

addresses and returned that no such concerns were available at the given addresses not their whereabouts could be located. Therefore, the Assessing Officer held that credit balances totaling to Rs. 37,95,928/- should be treated as the assessee's income from undisclosed sources and added back the same to the income of the assessee for continuous & willing failure of assessee to get the same verified.

4. Being aggrieved by the assessment order the assessee filed appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee by making an observation that the four sundry creditors i.e. M/s. Delite Trading Company, M/s. Ganesh Enterprises, M/s. Krishna Trading Company and M/s. Nanak Enterprises has not filed any confirmation and hence due to non-availability of any evidences and amount received from these creditors in the preceding years the Assessing Officer instead of applying Section 68 of the Act should have applied the provisions of Section 41(1) of the Income Tax Act to make the addition. Therefore the CIT(A) made additions u/s 41(1) of the Income Tax Act.

5. The Ld. AR submitted that the only effective issue in the present appeal is sustaining the addition of Rs. 22,73,232/- out of total addition of Rs. 37,95,928/- out of sundry creditors made by the Assessing Officer u/s 68 but sustained by CIT(A) u/s 41(1) the Assessing Officer made addition u/s 68 in response of the parties mentioned in the Assessing Officer. The CIT(A) deleted some of the additions but sustained the balance 6 creditors. The Ld. AR submitted that the impugned liabilities are very much payable by the assessee as to when demanded and unless it is demanded, these are bound to be shown as outstanding. The very fact that these liabilities are appearing in the balance sheet is strong acknowledgement of the dates payable by the assessee as held in the case of CIT vs. Tamil Nadu warehousing Corporation, 292 ITR 310 (Mad.). In case of Ambica Mills vs. CIT 54 ITR 167 (Guj.) it is held that liability shown in the balance sheet is a clear case of acknowledging the liability of such liability cannot be treated to have ceased so as to attract Section 41(1) of the Act. The Ld. AR further

submitted that being so, where is the question of holding the said liabilities as ceased to exist, more so when assessee herself is acknowledging the liabilities to be paid? How can a third party that too a quasi-judicial authority hold in the absence of any material that the liability is not payable by the assessee? Therefore, the Ld. AR submitted that the addition made on the basis of the presumption does not have either factual or legs to stand. The Ld. AR submitted that the Hon'ble Apex court in case of Sugauli Sugar Works vs. CIT 236 ITR 518 (SC) held that the cessation of the liability can be done not by the unilateral Act, but it can certainly be so by the bilateral act. The Ld. AR submitted that so long as the assessee is recognizing his/her liability to pay to these creditors, whereas the question of quasi judicial authority to intervene and to say on behalf of sundry creditors or on behalf of the assessee that amount is not payable by the assessee?

6. The Ld. AR further submitted that Section 41(1) Section 41(1) creates a deeming fiction in which burden to prove that the three ingredients of section 41(1) are there in this case rests on the shoulders of the Assessing Officer. These ingredients are that the credit is in respect of as an expense which has been allowed as deduction in any year. The second component is that the liability has ceased to exist and the last one is that the liability has ceased to exist in the year in which the addition is made. The Ld. AR submitted that even in law, the addition is not sustainable for more than one reason. Section 41(1) is a deeming fiction according to which an amount which does not have any trace of income is treated as income liable to suffer the brunt of tax. Therefore, as per the established canons of law, the burden to prove that a particular amount falls within the four corners of section 41(1) is on the shoulder of the Assessing Officer without which the addition cannot be made and if made is liable to be deleted. The Ld. AR further submitted that the first pre-requisite for the applicability of section 41(1) is that there must be a trading liability in respect of which the deduction has been claimed and allowed and burden to prove the twin conditions to the effect of the above facts, it goes without saying, is on revenue. The Ld. AR submitted that there is not even an iota of whisper as to whether the

impugned creditors were in respect of trading liability for which any deduction was ever claimed and allowed and if allowed, in which year was it allowed so on so forth. This is evident from a plain reading of the assessment order. Therefore, the Assessing Officer miserably failed to discharge the said burden in view of the following decisions and therefore this addition is liable to be deleted on this short ground alone. The Ld. AR submitted that the Assessing Officer has not established with evidence that the liability in respect of the above outstanding balances has ceased to exist. The Assessing Officer has gone on presumption and that too by placing the burden wrongly on the shoulders of the assessee. Section 41(1) does not envisage any such presumption of cessation and fix the incidence of tax thereon. In the absence of any material having been brought on record to establish that the deduction was claimed or credit balance has been remitted, addition cannot be made u/s 41(1) in view of the following decisions :

- i. Steel and General Mills Co. Ltd. vs. CIT 96 ITR 438 (Del)
- ii. CIT vs. Nathubhai Desha Bhai 130 ITR 238 (MP)
- iii. Liquidator, Mysore Agencies P. Ltd. vs. CIT 114 ITR 853 (Karn)
- iv. K.V.Moosa Koya & Co vs. CIT 175 ITR 120, 124 (Ker)
- v. CIT vs. Pranal P Doshi 201 ITR 756 (Guj)

7. The Ld. AR submitted that the Assessing Officer failed to establish that cessation if at all has happened, has happened in the year under appeal as held by Delhi Bench of Tribunal in the case of Madan Lal Brothers. After all, liability to tax can be fixed in the year to which it pertains and to no other year. Liability to tax any ceased liability in a particular year does not depend on the action of the Assessing Officer in selecting a case in scrutiny of that year. Merely because the Assessing Officer chose to enquire about the creditors in this year and if assessee fails to establish the existence of the liability in this year (even if it is so assumed) then also it cannot be said that the liability ceased to exist only in this year and not before. Nobody can be permitted to fix the year of taxability by a conscious design or omission, be he an assessee or an

Assessing Officer. Therefore, viewed from any angle, the addition made by the Assessing Officer is liable to be deleted. The Ld. AR also relied upon the following direct decisions :-

- i. Uttant Air Products P Ltd vs DCIT 99 TTJ 718 (Del)
- ii. New Commercial Mills Co. Ltd vs DCIT 73 TTJ 893 (Ahd)
- iii. ABC India Ltd vs DCIT 57 TTJ 349(Gau)
- iv. CIT vs Sadul Textiles Ltd 167 ITR 634(Raj)
- v. CIT vs Pre Stressed Concrete P Ltd 162 ITR 314(Mad)

The Ld. AR submitted that a plain reading of the assessment order would show that none of these three ingredients is available in the case of the assessee nor has it been proved by the Assessing Officer with the help of any evidence. Therefore, the addition u/s 41(1) could not be made as held by Hon'ble Punjab & Haryana High Court in the case of CIT vs. Sita Devi Juneja 325 ITR 593.

8. The Ld. AR further submitted that the assessee was having opening balances and the same is confirmation by the parties directly to the Assessing Officer, therefore, the addition cannot be made. The Ld. AR relied upon the decision of the Hon'ble Delhi High Court in case of Pr. CIT vs. New World Synthetics Limited (ITA no. 806/2018 order dated 27.08.2018)

9. The Ld. DR submitted that commencing with a brief background that the Assessing Officer made addition u/s 68 on account of sundry creditors of Rs. 37,95,928/- the CIT(A) sustained addition of Rs. 22,73,232/- which the assessee is agitating. The Ld. DR submitted that as regards M/s. Delite Trading Co.-Rs. 7,16,903, M/s. Ganesh Enterprises-Rs. 4,75,883, M/s. Krishna Trading Co.-Rs. 2,33,844 and M/s. Nanak Enterprises-Rs. 1,14,966 are concerned there was wrong PAN, no confirmations filed, and notices issued u/s. 133(6) twice remain uncompiled with, Inspector's spot inquiry by personally visiting and making inquiries at given address and from the occupants / neighbors reported that no such concerns are available at the given addresses nor their whereabouts could be located. During the remand proceedings details of confirmations filed were examined and PAN was again

found to be wrong by the AO, so identity of the creditor remains profusely doubtful, creditworthiness and genuineness of transaction also not proved in absence of any evidence. As regards to M/s. S.B.Industries – Rs. 4,00,351, the Ld. DR submitted that notice was issued u/s 133(6) but not complied with both the times, even during remand proceedings confirmation could not be furnished by the assessee, other corroborative evidences also not produced. As regards to M/s. Vee Kay Enterprises – Rs. 3,31,285, the copy of A/c of the assessee in their books reflected Nil balance. This sundry creditor denied of having any transaction between him and the assessee since 2005. It is corroborated by the inquiry conducted by the Inspector wherein it was informed by Sh. Vinod Bansal that M/s. Vee Kay Enterprises did not have any debtor named M/s. Loknath Narang. The Ld. DR relied upon the following case laws :

1. Konark Structural Engineering (P) Ltd. vs. DCIT [2018]96 taxmann.com255 (SC)
Konark Structural Engineering (P) Ltd. vs. DCIT [2018] 90 taxmann.com 56 (Bombay)
2. DRB Exports (P) Ltd. vs. CIT [2018] 93 taxmann.com 490 (Calcutta)
3. CIT vs. Ultra Modern Exports (P) Ltd. (40 taxmann.com 458, 220 Taxman 165)
4. CIT vs. Frostair (P.) Ltd. (26 taxmann.com 11, 210 Taxman 221)
5. CIT vs. Empire Builtech (P.) Ltd. (336 ITR 110)

10. We have heard both the parties and perused all the relevant material available on the record. From the perusal of the records it can be seen that all the relevant records were produced by the assessee before the Assessing Officer as well as before the CIT(A). The submissions made by the Ld. DR about the evidences are contrary to what is on record. The assessee is in trading business and the figures appearing in the assessment order are that of opening balances therefore, Section 68 as well as Section 41(1) will not be applicable in the present case. Since the assessee is challenging the order of

the CIT(A) wherein the addition has been done u/s 41(1) the same does not sustain in light of the decision of the Hon'ble Delhi High Court in case of New World Synthetics Ltd. wherein it is held as under :-

“3. It is an undisputed and admitted fact that the respondent-assessee had an outstanding liability of Rs.2,61,72,160/- due and payable to M/s. P.T. Polysindo, Jakarta, Indonesia since 31st March, 2003. This liability was shown and acknowledged in the balance-sheet and the accounts prepared by the respondent-assessee for the year ending 31st March, 2006, and filed with the Registrar of Companies and the Income Tax department. M/s. P.T. Polysindo, was shown and recorded as a sundry creditor, to whom the respondent-assessee was liable to pay Rs.2,61,72,160/-.

4. While liability to pay was not disputed and doubted by the respondent- assessee, albeit, the Revenue insists and claims that there was cessation of liability as Rs.2,61,72,160/- had remained outstanding and unpaid since 31st March, 2003 till 31^s March, 2006. The debt due to M/s. P.T. Polysindo, it is stated, had become barred by limitation. Further there was no likelihood of the respondent-assessee making the said payment as the respondent-assessed had incurred huge losses and stopped business operations during the period relevant to the Assessment Year 2000-01.

5. Section 41(1) of the Act, for the sake of convenience is reproduced below:

“Profits chargeable to tax.

41. (1) 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 (hereinafter referred to as the first-mentioned person) and subsequently during any previous year,—

(a) 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, the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits and gains of business or profession and accordingly chargeable to income-tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not; or

- (b) *the successor in business has obtained, whether in cash or in any other manner whatsoever, any amount in respect of which loss or expenditure was incurred by the first- mentioned person or some benefit in respect of the trading liability referred to in clause (a) by way of remission or cessation thereof, the amount obtained by the successor in business or the value of benefit accruing to the successor in business shall be deemed to be profits and gains of the business or profession, and accordingly chargeable to income-tax as the income of that previous year.*

Explanation 1.—For the purposes of this sub-section, the expression "loss or expenditure or some benefit in respect of any such trading liability by way of remission or cessation thereof shall include the remission or cessation of any liability by a unilateral act by the first-mentioned person under clause (a) or the successor in business under clause (b) of that sub-section by way of writing off such liability in his accounts.

Explanation 2.—For the purposes of this sub-section, "successor in business" means,—

(i) where there has been an amalgamation of a company with another company, the amalgamated company;

(ii) where the first-mentioned person is succeeded by any other person in that business or profession, the other person;

- (iii) where a firm carrying on a business or profession is succeeded by another firm, the other firm;
- (iv) where there has been a demerger, the resulting company.”

The provision states that when an assessee makes an allowance or deduction in respect of loss, expenditure or trading liability incurred, any amount obtained in cash or in any other manner; or when there is remission or cessation, the amount obtained or the value of benefit accruing by way of remission and cessation shall be deemed to be profit and gain of the business or profession. The word "cessation" in common parlance and in context in which it is used in Section 41(1) of the Act connotes that the debt has become extinct, has come to an end or it has been forfeited. "Remission" implies cancellation or extinguishment of all or part of the financial obligation on part of the creditor.

6. Explanation to the Section states that the loss or expenditure or some benefit in respect of any such trading liability by way of remission or cessation thereof, shall include remission and cessation of any liability by unilateral act of the first mentioned person i.e. the assessee. The explanation therefore refers to the conduct of the assessee. We need not refer to Clause (b) to Section 41(1) for the said clause is not applicable.
7. In the present case there was no unilateral act by way of remission or cessation by the assessee, for the respondent-assessee had not written off the outstanding amount of Rs.2,61,72,160/- payable to M/s. P.T. Polysindo. This is also not a case where benefit in any form or in cash was received by the respondent-assessee. Hence the first part of Clause (a) to Section 41(1) of the Act, would not apply.
8. Whether the debt had ceased to exist, was forfeited, or was extinct or whether there was remission in whole or part, would normally be a question of fact, unless there was cessation or remission by operation of law. When it comes to facts, the conduct and understanding of the

parties is relevant and important. For the conduct would reveal existence or extinction and forfeiture of the liability.

9. *Non-payment of outstanding liability which is admitted and acknowledged as due and payable by an assessee does not indicate remission or cession of liability. When an assessee suffers losses, payments and debts due including those due to financial institutions are not paid. Delay or nonpayment, even when the Assessing Officer is of the opinion that likelihood of payment was remote as business has stopped, would by itself not denote and mean cessation or remission of liability. In the winding up or bankruptcy proceedings, payments are made, mostly partly, on sale of assets.*

10. *In Bombay Dyeing & Manufacturing Company Limited Vs. State of Bombay & Ors., AIR 1958 SG 328, it was held and observed that the debt or liability may subsist notwithstanding its recovery was barred by limitation for the law of limitation merely bars the creditor from invoking legal remedy. In Commissioner of Income Tax Vs. Sugauli Sugar Works (P) Ltd. ,(1999) 2 SCC 355, it was elucidated that expiry of period of limitation as prescribed in the Limitation Act does not extinguish the debt but only prevents the creditor from enforcing the debt. This is the right and correct position in law as held by the Bombay High Court in Kohinoor Mills Co. Ltd. Vs. Commissioner of Income-tax [1963] 49 ITR 578 (Bom.) and Bhagwat Prasad and Co. Vs. Commissioner of Income-tax (1975) 99 ITR 111 (All). In this context the admission and acknowledgement of the debt and liability by the respondent- assessee is significant and important.*

11. *The patent flaw in the argument raised by the Revenue is to ignore and overlook admission of liability to pay as the respondent-assessee had acknowledged that Rs.2,61,72,160/- was due and payable to M/s.P.T. Polysindo. This liability was accepted and acknowledged in the books of accounts and the returns filed with the Registrar of*

Companies and with the Income-tax department. Debt acknowledged and admitted in the balance-sheet and accounts filed with the Registrar of Companies is an acknowledgement within the meaning of Section 18 of the Limitation Act, so as to give a fresh period of the limitation as has been held in Ambica Mills Ltd. Ahmedabad Vs. Commissioner of Income-tax, Gujarat, Ahmedabad AIR 1964 Guj. 208. The Supreme Court in Uttam Singh Duggal & Co. Ltd. Vs. United Bank of India & Ors. (2000) (7) SCC 120 has reflected and pronounced curadmission in the balance sheet and accounts for the purpose of Order XII, Rule 6 of the Code of Civil Procedure.

12. Decision in the case of Polyflex (India) Pvt. Ltd. Bangalore Vs. Commissioner of Income Tax Karnataka (2002) 7 SCC 188, is distinguishable, as in the said case assessee had received and obtained an amount in cash, which amount received was earlier recorded and treated as expenditure in the profit and loss account. In the said case excise duty paid had been refunded, though the Revenue had preferred an appeal and the decision on refund had not attained finality. The Supreme Court therefore drew distinction between receipt of cash or amount; and remission or cessation of liability in respect of loss or expenditure under the second part of clause (a) of Section 41(1) of the Act. In the present case the respondent-assessee has not obtained any money or benefit under the first part or the deeming part of Clause (a) to Sub-section 1 to Section 41 of the Act.

13. There was no remission or cessation of liability.”

This decision of the Jurisdictional High Court is applicable in the present case therefore, the order of the CIT(A) does not sustain. From the perusal of the records it can be seen that the Assessing Officer has not established with evidence that the liability in respect of the above outstanding balances has ceased to exist. The case laws referred by the Ld. DR are factual distinguished by the Ld. AR and will not be applicable in the present case. The appeal of the assessee is allowed.

11. In the result appeal of the assessee is allowed.

Order pronounced in the Open Court on 3rd January, 2019.

Sd/-

(N.K.BILLAIYA)
ACCOUNTANT MEMBER

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Dated: 03/01/2019

Binita

Copy forwarded to:

- 1.Appellant
2. Respondent
3. CIT
- 4.CIT(Appeals)
- 5.DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	02.01.2019
Date on which the typed draft is placed before the dictating Member	02.01.2019
Date on which the typed draft is placed before the Other Member	02.01.2019
Date on which the approved draft comes to the Sr. PS/PS	03.01.2019
Date on which the fair order is placed before the Dictating Member for pronouncement	03.01.2019
Date on which the fair order comes back to the Sr. PS/PS	03.01.2019
Date on which the final order is uploaded on the website of ITAT	03.01.2019
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	