IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR (SMC)

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER

I.T.A. No. 597/Asr/2015
Assessment Year: 2010-11

Gurjeet Singh, H. No. 7, Street No. 2, Pawan Nagar, Amritsar. [PAN: AQHPS 8775M]	vs.	Income Tax Officer, Ward 4(2), Amritsar
(Appellant)		**(Respondent)**

Appellant by : Sh. Satish Bansal (C.A.)
Respondent by: Sh. Charan Dass (D.R.)

Date of Hearing: 21.02.2019
Date of Pronouncement: 30.04.2019

ORDER

Per Sanjay Arora, AM:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-2, Amritsar ('CIT(A)' for short) dated 02.8.2015, partly allowing the assessee's appeal contesting his assessment u/s. 143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) dated 13.3.2013 for the Assessment Year (AY) 2010-11.

2. The short question arising in the instant case is if section 41(1) is applicable in the facts and circumstances of the case. The assessee claims to have paid the impugned sum, discharging his trade liability to the supplier, M/s. Cosmo Diagnostics, Chennai through it's representative, liquidating, thus, the trade

liability of Rs.5.19 lacs outstanding thereto as at the beginning of the year. The ld. CIT(A) has confirmed the addition by holding as under:

'(iii) The ground of appeal no. 3 is against the disallowance of opening balance of Rs. 5,19,320/- u/s. 41(1) by treating the same as cessation of liability. As per the assessment order it was noticed by the AO that a sum of Rs 394,320/- was shown as payable to M/s. Cosmo Diagnostic, 14/31, Trichi Road, Amritsar as on 31-03-2010. Accordingly, the AO issued letter u/s. 133(6) of the Act by speed post to M/s Cosmo Diagnostic but the letter was received back from postal authorities as "undelivered".

The AO asked the assessee to furnish the latest correspondence address of M/s Cosmo Diagnostic as the letter sent by speed post had returned unserved, in response to which the assessee's counsel vide letter dated 27-01-2013 stated that the assessee had made purchases from M/s. Cosmo Diagnostic through its dealer in New Delhi and all the payments had been made against receipts. That it has come to their notice that the party has absconded. However, the correspondence address had already been submitted vide letter dated 10.10.2012.

The AO asked the assessee to furnish the copies of purchase bills received by him from M/s. Cosmo Diagnostic in respect of which the amount has been shown as payable in the balance sheet and the copies of year wise receipts which have been issued by the said Company or on its behalf against the payments made by him including the payments of Rs. 1,25,000/- made by the assessee in cash during the year under consideration.

Despite repeated requests made by the AO, the assessee did not submit the complete address of M/s. Cosmo Diagnostic and the name and complete address of the person who received the payment from the assessee on behalf of M/s. Cosmo Diagnostic. The AO had also asked the assessee to submit the documentary evidence that the person to whom the payments of Rs 1,25,000/- have been made in cash during the year was duly authorized by M/s. Cosmo Diagnostic, which was however not furnished.

The assessee had shown a sum of Rs 3,94,320/- as payable in the balance sheet as on 31-03-2010 to M/s. Cosmo Diagnostic 14/31, 1st floor, Shiva Complex, Trichy Road, CHENNAI. The AO observed that despite several requests made by the AO, the assessee had neither produced the person who received the payments of Rs 1,25,000/- nor furnished any evidence that the person to whom the payments were made in cash during the year was duly authorized by M/s. Cosmo Diagnostic. *The assessee also did not furnish the name and address of the person at Delhi who received payment from the assessee on behalf of M/s. Cosmo Diagnostic nor the latest complete postal address of M/s. Cosmo Diagnostic*. Accordingly the AO held that the cash payments of Rs 1,25,000/- made to M/s Cosmo Diagnostic was not verifiable. Secondly the assessee had himself admitted that M/s Cosmo Diagnostic is absconding and, therefore, there was clearly a cessation of liability of Rs 5,19,320/- and the same was assessed u/s 41(1) of the act and added to the taxable income.

In the written submissions filed during the appeal proceedings, the assessee had purchased "Blood Test Kit" from M/s Cosmo Diagnostic during the year ending 31-03-2008 for Rs 7,39,320/-. Since the kits were not successful the assessee delayed the payment. That earlier assessment years for AY 2008-09 and 2009-10 were framed u/s 143(3) and the relevant expenses claimed were allowed. The appellant submitted that the payments were being made in part from year to year as under:-

A Y	Amount
2009-10	Rs.2,20,000/-
2010-11	Rs.1,25,000/-
2011-12	Rs.3,94,320/-
	Rs.7,39,320/-

The appellant submitted that the total payment has already been made to the party through its representative. That there cannot be any cessation of liability for which payment has already been made and the receipts issued by the representative were filed during the assessment proceedings. The appellant submitted it had admitted before the AO that M/s Cosmo Diagnostic is absconding whereas all the payments to the third party have already been made and the last payment was made on 22-02-2011 to its representative. That the books of accounts were duly audited.

The assessment order and the written submissions of the appellant were considered. It is observed that even in the present appeal proceedings, the appellant has **not furnished the name and** complete **address of the persons** who received cash payments of Rs 1,25,000/- from the appellant on behalf of M/s Cosmo Diagnostic nor furnished any evidence that the person to whom such payments were made in cash during the year was duly authorized by the M/s. Cosmo Diagnostic to receive the payment.

Further it is observed that despite several requests made by the AO in the assessment proceedings, the assessee had **neither** produced the **person who received the payments of Rs1,25,000/-** from him on behalf of M/s Cosmo Diagnostic. Moreover the latest complete postal address of M/s Cosmo Diagnostic was not provided by the appellant to the AO or in the present appeal proceedings and the appellant had himself admitted that M/s Cosmo Diagnostic is absconding.

Accordingly, I am in agreement with the AO that the cash payments of Rs 1,25,000/- made to M/s Cosmo Diagnostic was not verifiable. *Since the genuineness of payments amounting to Rs 125,000/- claimed to have been made to M/s Cosmo Diagnostic during the year under consideration was not established in view of the above facts and the appellant had himself admitted that M/s Cosmo Diagnostic is absconding*, therefore in my opinion the AO was justified holding that there was clearly a cessation of liability of Rs 5,19,320/- and the same was rightly assessed u/s 41(1) of the Act. The addition of Rs 5,19,320/- (is) therefore confirmed.

The ground of appeal no. 4 is against the disallowance of Rs 2,16,831/- on account of difference in opening capital.'

3. The assessee's case before me is that 'the availability of cash' with him (the assessee) for making the payment/s, evidenced by cash receipts (not forming part of the record, though, to be fair, on being asked to during hearing, were produced by the ld. counsel for the assessee, Sh. Bansal), is not in doubt. Where is the question of any benefit on account of remission of the liability arising to the assessee when he has made the payment/s, i.e., the cash going out of his books? It is the case of the debit entry and not credit entry. The Revenue's case, on the other hand, is of it being a clear case of cessation of liability in view of the assessee failing, despite abundant opportunity to him, to prove the genuineness of the cash payments and, thus, claim of discharge of liability, with the trade creditor being admittedly absconding.

4. I have heard the parties, and perused the material on record.

4.1 Section 41|(1) in its relevant part reads as under:

'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 the 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, ……

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, …

The resolution of the dispute, as apparent, rests on the proving or otherwise of the genuineness of the assessee's claim of payment/s to the creditor, stated to be in part during the current year (Rs.1.25 lacs). The reason is simple. If the payments/s is proved, the liability stands discharged upon consideration, so that there is no question of any benefit in its respect on account of remission or cessation. If not, the liability, outstanding at Rs. 5.19 lacs at the beginning of the year and, admittedly, not as on 31/3/2011, a benefit to that extent has accrued to the assessee.

4.2 The matter, therefore, is clearly and principally factual, and toward which it may be relevant to recount briefly, the facts of the case. Goods (blood test kits) worth Rs.7,39,320 were purchased by the assessee, a Jalandhar based pathological lab, from M/s. Cosmo Diagnostics, Chennai ('CD' for short) during the previous year relevant to AY 2008-09, which amount was accordingly claimed as deduction in computing the business income for that year. The goods were stated to be not of acceptable quality. No payment was accordingly made during that year, even as a part of payment of Rs.2.20 lacs was made in the following year, which explains the credit of Rs.5,19,320 as at the beginning of the current year. It is the payments – for Rs. 5.19 lacs, claimed to be made during the current and the following year, being the third and the fourth year of the purchase, that have been doubted for their genuineness by the Revenue. What, therefore, is relevant is whether there are valid grounds for doubting the same, i.e., the genuineness of the stated cash payments. Per contra, whether the assessee has established the said payments in-as-much as the burden to prove his return and the claims preferred thereby is only on him (*CIT*

v. Calcutta Agency Ltd. [1951] 19 ITR 191 (SC); *CIT v. R. Venkata Swamy Naidu* [1956] 29 ITR 529 (SC)).

4.3 The assessee has not rebutted any of the observations by the ld. CIT(A) per the impugned order, reproduced supra, or otherwise shown them to be not relevant. The primary facts of the case are, it needs to be appreciated, only in the knowledge of the assessee, so that where he is unable to lead evidence toward the same, justifying or substantiating his case, an adverse inference would, in law, follow (ref: *Union of India v. Rai Deb Singh Bist* [1973] 88 ITR 200 (SC); *Kalayani Medical Store v. CIT* [2016] 386 ITR 387 (Cal)). Further, examining the assessee's claims and the material on record, the same, i.e., the said payments, are completely unproved, which examination shall form the ensuing part of this order.

4.4 There is, to begin with, no confirmation of account which, i.e., the confirmation of payment/s, is the primary document required for claiming the same. It is only when this basic document stands furnished, that the Revenue, where in doubt, i.e., in view of the attending or surrounding facts and circumstances of the case, may subject the same to further verification, or require the assessee – where there are sufficient or valid reasons to doubt the authenticity of the confirmation, to furnish further corroborative evidence/s.

Even *de hors* the confirmation, *the basis of the claim of discharge of the trade liability is payment/s*. The cash receipts are stated to be issued by the company's (CD's) representative/agent, whose name, though, is not clear from the receipt/s. The person/s to whom the 'payment/s' is made is even otherwise not stated, much less his identity/s proved. *To whom, then, the payments have been made*? Could a payment possibly be made without knowing the person, nay establishing the identity of the payee? Its absence, wholly quizzical, unexplained at

any stage, makes the assessee's claim of payments to CD, the trade creditor, ludicrous. *The assessee's case rests on the edifice of payments to CD, which, therefore is rendered as without basis*. Clearly, it is only where payments are made to CD or its' authorized representative, i.e., shown to be so, that it could be said to be in discharge of liability thereto, precluding section 41(1).

Further still, I may next examine the evidence adduced as to, as well as the manner of, payment/s. There is nothing to show that the payment was made to a person – itself undefined, authorized for the purpose. As afore-noted, the receipts do not bear the name (identity) of the person receiving the same. How does, further, the assessee ensure that the payment was indeed made to the supplier inasmuch as only that would operate to discharge his liability? Why, rather, one wonders, was the payment not made direct, i.e., through a bank transfer/s, which would by itself confirm the receipt. This is particularly so considering that the payments were being made not in the normal course of business, but only in pursuance to the resolution of a dispute, outstanding since long, with a view to settle a trade liability and, besides, over a long distance (from Jalandhar to Chennai), entailing problems *qua* transmission of cash. All these aspects get mitigated in case of a bank transfer, which is even otherwise superior by far, i.e., in terms of risk, speed and business prudence, besides being legally mandated per s.40A(3) r/w s. 40A(4). Rather, companies, to avoid risk of misappropriation, insist that payments are made direct. The cash receipts in such a case, strongly advised against, bear a statement to the effect of being only a provisional receipt, made at the cost and risk of the payer. Further, the cash payments have been made over a period of nearly three years – the last, after the first on 10/6/2008, being on 22.02.2011. Rather, the liability being disputed by the assessee, the payments would be made only on arriving at a settlement or agreement and, two, duly accepted/acknowledged. This is also inferable from the fact of the first payment,

for goods purchased in f.y. 2007-08, being made only on 10/6/2008 and, further, stopped after 20/10/2008, only to 'commence' in October, 2009. There is nothing on record to evidence the said settlement; rather, even of the goods being defective. In fact, the payment being already delayed and, presumably, only upon arriving at an agreement in its respect – inasmuch as there is no reason to make the payment, withheld for supply of OK goods, in its absence, would be made at the amount settled, and the transaction closed, obtaining a receipt, also confirming the discharge of the debt in full. In fact, the payment for the entire amount contradicts the assessee's claim of the goods being defective and the liability, resultantly, disputed. If the payment was to be, even if belatedly, made in full, what purpose did deferring the same serve? There is nothing to evidence the dispute, much less its resolution, or its basis, as where the defective goods were replaced with 'OK' goods. Any person settling a liability, not to speak of a disputed one, would do so on the basis of an agreement so as not to risk any legal action (for short payment and/or compensation for delay) from the creditor. The conduct of the account (placed at PB pgs. 1 - 3) would suggest that the agreement – for full payment, was reached much earlier, though the assessee 'sought time' to 'pay', making the payment over nearly three years, i.e., after it started on 10.6.2008, up to 22.02.2011. Were the payments to different representatives or only one? Further, the payments were made on several occasions on successive days, at Rs.20,000 each, as if to beat the provision of section 40A(3)/(3A) which would otherwise stand attracted. The assessee, despite availability of funds, yet, chooses to pay in cash, risking misappropriation and, in any case, non-confirmation of receipt, which continues to obtain. In fact, payment on a daily basis is inconsistent with his seeking time for making payment, which is in full, and itself inconsistent with the claim of the goods being defective, so that the same would stand to be replaced, of which there is though no mention or whisper.

4.5 The next question is if the liability under reference, outstanding at Rs. 3,94,320/- as on 31/3/2010, the year-end, in the assessee's books of account, actually exists, to any extent, as on that date. The burden to prove the truth of his accounts and, thus, the existence of the liability as at the year-end, is on the assessee, and which he could by, among others, establishing the payment/s, claimed to be made subsequently. The facts in relation to the impugned payment/s, discussed in detail in the fore-going part of this order, and found completely unproved, applies equally to the payments made during the following year, i.e., as it does to the payment/s claimed to be made during the current year. No part of the payment/s made during the current or the following year, stated to be at Rs. 5.19 lacs, and, accordingly, liability to that extent, is proved. It therefore only follows that no part of the trade liability under reference exists as at the year-end, i.e., 31/3/2010. The inference drawn by the Revenue to this effect is accordingly in order and valid. Here it may be relevant to state that the copy of account of CD in the assessee's books (from 1/4/2006 to 31/3/2014/ PB pgs. 1 – 3), reflects the last date of payment (at Rs. 14,320/-) on 08/9/2010, i.e., as against 22/2/2011 (at pg. 9 of the impugned order). The latter date, toward which no objection has been taken by the assessee, would presumably only be on the basis of the material/s furnished by the assessee before the ld. CIT(A). Adopting the former date reduces the time span over which 'payment' stands made to the said creditor to 26 months. The payment for the goods, which would normally be made inside few weeks of their purchase, is made only in pursuance of an unevidenced resolution and, further, in cash and in sums in which it is, again unevidenced, makes it highly suspect. The said reduction, assuming so, accordingly does not materially impact the observations and the consequent findings per the fore-going part of this order.

In sum

5. Both the creditor and its representative/s, in touch with the assessee for four years, inasmuch as only that, coupled with, rather, their constant persuasion, would have led to the resolution of the dispute, surprisingly disappear when required for confirmation of the transaction/s. There is, however, strangely, nothing on record to show either the said persuasion; the manner and basis of resolution, nor indeed the resolution itself. The creditor's representative/s, including the Delhi based dealer (through whom the goods are stated to have been purchased), is not specified, and which cannot be, much less their roles clarified. It is not even clear if it was not the same agent (i.e., through whom the goods were supplied) or a different one/s, who collected the money, again, surprisingly, in the sums of Rs.20,000 each, i.e., in a sum just sufficient not to breach the limit that would attract disallowance u/s. 40A(3)/(3A). The dispute, and more importantly, its resolution, is undocumented/unevidenced. That, though, there was some dispute is borne out of conduct. This is as in the normal course the payment would have been made in full within a few months, if not a few weeks of the purchase of goods, on which there is though no doubt. Was the representative/s Chennai based or local, is, again, not known. How did the assessee identify the representative, particularly considering that it did not undertake any further business with the said firm. Did he come from Chennai each time, or was on a regular tour to the area.

The assessee's claim of payment/s (i.e., after 20/10/2008, the last date of payment during fy 2008-09), and the concomitant fact of existence of liability, inasmuch as the two cannot co-exist, which is the fact-in-issue, is, in view of the fore-going, wholly unproved, if not disproved. The outgo of cash in the assessee's books, as contended, is, in view thereof, of no consequence. This would also meet the argument of it being a case of debit entry and not credit entry, advanced by Sh. Bansal during hearing. In fact, it did not therefore require, i.e., in the absence of

even the primary evidences, a detailed analysis of the facts, as made, to underscore the same, and which has been only to highlight the several aspects to the matter, that stand to arise, though remain completely unaddressed. The claim is both unevidenced and untenable. None of the various findings by the assessing and the first appellate authority are rebutted, or otherwise shown to be either infirm or not relevant. The absence of confirmation; absence of an agreement or the basis of the resolution of the dispute; 'payments' in cash, made over a period of over two (or nearly three) years, to unknown/unauthorized persons; conduct of the account, etc., make the entire claim completely suspect. No evidence in rebuttal to any of these observed facts has been adduced at any stage, including before the tribunal, to some of which though reference was even made during hearing. The trade liability, admittedly outstanding as at the beginning of the year, is found, despite being not shown to be discharged – while being admittedly paid, so that it exists no more, as not existing as at the year-end. There has thus been cessation of liability during the year, of which there is therefore no basis, except the truth of the assessee's accounts which are completely unproved in that respect. The assessee, thus, despite having not accounted for the same in his books of account, has definitely derived a benefit in its respect, validating the application of s. 41(1).

I decide accordingly.

6. In the result, the assessee's appeal is dismissed.

Order pronounced in the open court on April 30, 2019

Sd/-
(Sanjay Arora)
Accountant Member

Date: 30.04.2019
/GP/Sr. Ps.
Copy of the order forwarded to:
(1) The Appellant: Gurjeet Singh, H. No. 7, Street No. 2, Pawan Nagar,

Amritsar
(2) The Respondent: Income Tax Officer, Ward-4(2), Amritsar
(3) The CIT(Appeals)-2, Amritsar
(4) The CIT concerned
(5) The Sr. DR, I.T.A.T

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By Order