

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B", MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER**

ITA NO. 885/MUM/2018

A.Y : 2012-13

Jt. Commissioner of Income Tax vs. M/s. Barry Callebaut India Pvt. Ltd.,
(OSD)-9(2)(1), 4th floor, Times Square,
Mumbai (Appellant) Andheri (E), Mumbai 400 050.
PAN : AADCB2472R (Respondent)

Appellant by : Ms. Samatha Mullahudi
**Respondent by : Shri Aliasger Rampurawala &
Shri Pratik Shah**

Date of Hearing : 18/10/2019
Date of Pronouncement : 30/10/2019

ORDER

PER SAKTIJIT DEY, JUDICIAL MEMBER

This appeal by the Revenue is against the order dated 22.11.2017 passed by learned Commission of Income Tax (Appeals)-16, Mumbai for the assessment year 2012-13.

2. The grounds raised by the Revenue read as under :-

"1. Whether in the facts and circumstances of the case and law, the Ld. CIT(A) has erred in not remitting or sending back this issue to the assessing officer for verification under rule 46A of the I.T. Rules instead of accepting the said contention of the AR.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance u/s 41(1) of the IT Act amounting to Rs.4,53,85,796/- without appreciating the facts of the case."

3. As could be seen from the grounds raised, the basic issue relates to deletion of disallowance made under Section 41(1) of the Income Tax Act, 1961 (in short 'the Act'). Briefly, the facts are the assessee, a resident company, is engaged in the business of trading in cocoa products. For the asst year under consideration, assessee filed its return of income on 24.11.2012 declaring loss of Rs.1,52,10,337/-. During the assessment proceedings, the Assessing Officer, after calling for and examining the details of trade payables, noticed the following amounts which remained outstanding for more than 3 years.

<i>Sr. No.</i>	<i>Name of the Party</i>	<i>Amount in Rs.</i>
1	<i>Barry Callebaut Singapore</i>	<i>1,35,31,066</i>
2	<i>Barry Callebaut Asia Pacific (S) Pte. Ltd.</i>	<i>3,18,54,730</i>
	<i>Total</i>	<i>4,53,85,796</i>

Noticing the above, he called upon the assessee to explain why the said amount should not be considered as cessation of liability under Section 41(1) of the Act and added to the income of the assessee. In response to the show cause notice issued, as alleged by the Assessing Officer, the assessee neither furnished any detail nor offered any explanation against consideration of outstanding liability as cessation of liability for addition under Section 41(1) of the Act. Accordingly, the Assessing Officer proceeded to complete the assessment by treating the amount of Rs.4,53,85,796/- as income of assessee on account of remission/cessation of liability as per Section 41(1) of the Act. The assessee challenged the aforesaid addition before learned Commission (Appeals). In the course of hearing of appeal, in response to the query raised by the learned First Appellate Authority, assessee furnished details of the outstanding liabilities and also submitted that the addition under Section 41(1) of the Act is without any justifiable reason as there is no remission/cessation of

liability under Section 41(1) of the Act, since, the liability continued in the accounts of the assessee and ultimately, the liability was discharged by making payment to the concerned parties after obtaining approval from Reserve Bank of India (RBI). Learned Commission (Appeals), on verifying the facts on record, found that the outstanding liability in dispute continued to be shown as liability in the books of account of the assessee and ultimately, the accounts were squared off after the assessee discharged the liability after obtaining approval from the RBI. Therefore, following the ratio laid down in certain judicial precedents, learned Commission (Appeals) deleted the addition made under Section 41(1) of the Act.

4. The learned Departmental representative submitted, the liability remained outstanding in the books of the assessee for more than 3 years. Therefore, the Assessing Officer treated it as cessation of liability under Section 41(1) of the Act. He submitted, no details or explanation was furnished by the assessee in the course of assessment proceedings which compelled the Assessing Officer to make the addition under Section 41(1) of the Act. He submitted, in the course of appellate proceedings before learned Commission (Appeals), the assessee had furnished fresh evidences which were never furnished before the Assessing Officer. He submitted, by considering the additional evidences furnished by the assessee without confronting them to the Assessing Officer, learned Commission (Appeals) has deleted the addition, which is in complete violation of Rule 46A of the Income Tax Rules. Thus, he submitted, the order of learned Commission (Appeals) should be set-aside and the matter be restored to the Assessing Officer for fresh adjudication.

5. The learned AR submitted, only because the liability in dispute was continuing for more than 3 years, the Assessing Officer treated it as cessation

of liability under Section 41(1) of the Act. The learned AR submitted, the amount in question was to be paid to overseas Associated Enterprises of the assessee. He submitted, the liability continued to exist and was neither written off by the Associated Enterprises in their books nor was written back in the books of the assessee. Therefore, the liability continued to exist. He submitted, it is also not the case that the recipients have given up their right of recovery of the amount and, in reality, were pressing hard for recovery of the outstanding liability. He submitted, to repay the amount to the recipients, assessee had to seek approval of the RBI through its bank and ultimately, after obtaining approval of the RBI, the amounts were repaid. Thus, he submitted, when the liability has already been discharged, there cannot be any addition under Section 41(1) of the Act. The learned AR further submitted, there is no violation of Rule 46A of the Income Tax Rules as learned Commission (Appeals), in exercise of powers conferred on him under Section 251 of the Act, had made inquiry to find out the correct facts. He submitted, even in course of assessment proceedings also the assessee had furnished its explanation before the Assessing Officer vide letter dated 15.03.2016 bringing all relevant facts on record. However, the submissions of the assessee were totally ignored by the Assessing Officer. Thus, he submitted, there is no need to interfere with the decision of learned Commission (Appeals).

6. We have considered the rival submissions and perused the material on record. We have also applied our mind to the decisions relied upon by the parties at the time of hearing of appeal. It is evident, the Assessing Officer has treated the outstanding liability of Rs.4,53,85,796/- as remission/ cessation of liability under Section 41(1) of the Act basically for the reason that the aforesaid amount has remained outstanding in the books of the assessee for

more than three years. On a reading of Section 41(1) of the Act, it becomes clear that there are three conditions to be satisfied for invoking the said provision. Firstly, the liability in question must be a trading liability; secondly, the assessee must have derived a benefit either in cash or in kind in respect of such liability; and, thirdly, such benefit must have been derived by the assessee during the year under consideration. As per Assessing Officer's own admission, the liability is continuing from past several years. Therefore, it is for the Assessing Officer to establish on record through proper evidences that the liability has not only ceased to exist, but, the assessee has derived benefit either in cash or in kind during the year under consideration. *Prima facie*, we are of the view that the Assessing Officer has not brought any material on record to demonstrate that the aforesaid conditions of Section 41(1) of the Act were satisfied. Merely because the liability remained outstanding for more than three years, it cannot cease to exist unless the recipient writes off such liability in its books of account and simultaneously, the assessee also writes back the amount in its books. The onus is entirely on the Assessing Officer to demonstrate that the liability has ceased to exist during the year under consideration. In our view, the Assessing Officer has failed to prove that the outstanding liability has ceased to exist in the impugned assessment year so as to invoke the provisions of Section 41(1) of the Act. On the contrary, it is seen from the evidences filed by the assessee in the paper book that not only the recipients were pressing hard for recovery of the outstanding liability, but the assessee has also written to the RBI through its banker seeking approval for remittance to be made to the overseas recipients. It is also evident, after obtaining the necessary approval from the RBI, the amount in dispute was ultimately remitted to the concerned parties and the entire liability stood discharged. Thus, from the aforesaid facts, it becomes clear that there is

neither remission nor cessation of liability as envisaged under Section 41(1) of the Act. Insofar as the allegation of the Revenue that learned Commission (Appeals) had deleted the addition by admitting fresh evidences in violation of Rule 46A of the Income Tax Rules, we are not convinced with the same. It is noticed that in the course of assessment proceedings also, the assessee vide letter dated 15.03.2016 had furnished all the evidences including approval from RBI to demonstrate that the liability has not ceased to exist. It appears that the Assessing Officer has completely ignored the submissions of the assessee and the materials brought on record, whereas, learned Commission (Appeals) after appropriately appreciating the relevant facts and material on record as well as the submissions of the assessee had taken a correct view by deleting the addition under Section 41(1) of the Act, since, factually there was neither remission or cessation of liability under Section 41(1) of the Act. In view of the aforesaid, we do not find any infirmity in the decision of learned Commission (Appeals) on the issue. The grounds raised by the Revenue are dismissed.

7. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on 30th October, 2019.

Sd/-
(MANOJ KUMAR AGGARWAL)
ACCOUNTANT MEMBER

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Mumbai, Date : 30th October, 2019

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Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "B" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai