

IN THE INCOME TAX APPELLATE TRIBUNAL  
“SMC - A” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT

ITA No.2059/Bang/2019
Assessment year: 2013-14

Shri K.Y. Ningoji Rao, Partner, M/s. Rao & Venkatesulu, Chartered Accountants, No.200, 3 <sup>rd</sup> D Cross, II Block, III Stage, Basveshwaranagar, Bangalore – 560 079. <b>PAN: AAHPN 0794P</b>	Vs.	The Income Tax Officer, Ward 2(3)(2), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri K.Y. Ningoji Rao, CA
Respondent by	:	Shri Ganesh R. Ghale, Standing Counsel for Dept.

Date of hearing	:	10.12.2019
Date of Pronouncement	:	13.12.2019

**ORDER**

This appeal by the assessee is against the order dated 26.8.2019 of the CIT(Appeals)-2, Bengaluru relating to assessment year 2013-14.

2. The first issue that requires consideration by me in this appeal is with regard to addition of Rs.8,14,763 made by the AO. This addition comprises of an addition of Rs.3,85,000 being liability of the assessee to one late Mr. Kunsang Lama and another sum of Rs.4,29,763 being liability of Assessee to one late Mr. Aga Yedullah Shirazi.

3. The assessee is a CA by profession. For the AY 2013-14, he filed a return of income declaring total income of Rs.37,66,940. In the course of

assessment proceedings, the AO noticed that there was a liability shown in the balance sheet of a sum of Rs.3,85,000 due to late Mr. Kunsang Lama and another sum of Rs.4,29,763 to late Mr. Aga Yedullah Shirazi. The assessee explained the outstanding shown in the balance sheet as follows:-

**(1) Regarding Rs.3,85,000/- due to Late Mr. Kunsang Lama:**

(a) Regarding the sum of Rs.3,85,000/- shown as outstanding to Mr.Kunsang Lama, the Assessee explained that the Assessee borrowed the aforesaid sum from his friend Late Mr. Kunsang Lama prior to 1.4.2002. Since Mr. Kunsang Lama breathed his last in 28th day of August, 2003, the same remained unpaid for the reason that his sons who went away to USA and residing there were not available for communication after the unfortunate death of their mother and father. However through some known people the Assessee was informed that the said amount be paid to Penor Rinpoche Charity Foundation of Bylakuppe as Corpus Donation in his memory. However for want of direct information the said liability was retained in books of account as liability, which remained as the liability of the Assessee until it is repaid;

(b) The Assessee paid the said sum of Rs.3,85,000/- unto the Penor Rinpoche Charity Foundation of Bylakuppe on 13.5.2016 by Cheque No.182446 vide their Receipt No.13167.

(c) The copies of the Ledger Account of Late Kunsang Lama as appearing in the Assessee's Books for the period from 1.4.2002 to 31.3.2018 and the Receipt received from M/s Penor Rinpoche Charity Foundation were furnished.

**(2) Regarding Rs.4,29,763/- due to Late Mr. Aga Yedulla Shirazi:**

(a) The Assessee explained that as on 31.3.2013 a sum of Rs.4,29,763/- was due to Late Aga Yedulla Shirazi. The Assessee submitted that he received amounts from Mr.Aga Yedulla Shirazi for purchase of shares and debentures in various companies from the open market at his request. The said shares were purchased in the Assessee's name as per contract notes. The

transfer of those shares to him could not be completed owing to his non-availability and the delays caused by him and the same situation continued till his death. His wife is German National and she refused to receive the money as she would forfeit social security benefits in Germany. Hence the said money continued in the Assessee's books of account as unsecured loan and the shares purchased are included in the Assessee's investment in shares in companies.

(e) The amount actually due to late Aga Yedulla Shirazi after some transfers effected on 2.4.2015 was only Rs.3,34,763/-.

(f) All his nephews viz., Aga Ali Reza Shirazi, Aga Murtuza Shirazi, Aga Mustapha Shirazi are residents in USA and Canada. The only other person available is his niece Mrs. Sama Shafiyeh Abdulla nee Sama Shirazi who is residing at Hyderabad. In fact Mrs. Sama has agreed to take the amount.

(g) The Assessee paid the said sum of Rs.3,34,763/- unto Mrs. Sama Shafiyeh Abdulla by Cheque No.980377 drawn on Canara Bank on 24.8.2016 as per the Email dated 27.3.2016 received from her.

(h) The copies of the Ledger Account of Late Aga Yedulla Shirazi as appearing in the Assessee's Books for the period from 1.4.2002 to 31.3.2018 and the copy of her Email were furnished.

4. The AO, however, did not accept the explanation provided by the assessee for the following reasons:-

“The explanation submitted by the assessee is not acceptable for the following reasons:

- As admitted by the assessee himself vide his letter dated 27.01.2016, the outstanding loan taken from Late Shri Aga Yedulla Shirazi had no claimant till that date.
- The assessee has not produced any documentary evidence to show that the creditor's wife refused to receive the outstanding amount due to her late husband.

- As regards assessee's submissions dated 28.03.2016 regarding the option exercised by the creditor's niece to receive the money due to the creditor, it is not known whether she is a legal heir to the deceased creditor in the absence of documentary evidence.
- As regards amounts due to late Shri Kunsang lama, the assessee himself has admitted that there are no claimants for the amounts due to the said creditor. That the amount would be paid to some Charity Foundation on a future date is merely an afterthought.
- Both the outstanding loans under question have not been paid as on date.

Under the circumstances, the amounts of Rs.4,29,763/- and Rs.3,85,000/- shown in the assessee's balance sheet as outstanding unsecured loans due to Late Shri Aga Yedulla Shirazi and Late Shri Kunsang Lama respectively are treated as non-existing liability and are added to the total income of the assessee.”

5. Before the CIT(Appeals), the assessee specifically made a submission that the AO did not specify the provision of law under which the impugned additions were made. Assessee pointed out that going by the stand taken by the AO in the order of assessment, the AO had relied upon the provisions of section 41(1) of the Act for making the impugned addition. The assessee pointed out that those provisions cannot be applied to the facts of assessee's case for the following reasons:-

“Section 41(1) will come into play only when:

- (a) the assessee has obtained remission of any trading liability;
- (b) As a result of remission the said trading liability ceases to exist by cessation; and
- (c) The assessee must have obtained some benefit by such remission and cessation for which he had enjoyed deduction in computation of his business income in the earlier years.

Unless all the aforesaid conditions are satisfied, section 41(1) has no application.”

6. The assessee pointed out that there was neither a deduction on the aforesaid sums claimed by the assessee in the past in computing its income nor did the assessee derive any benefit of remission or cessation of the said liability and therefore the provisions of section 41(1) are not applicable. The assessee submitted that if the addition is being made u/s. 68 of the Act, then the sums in question were not received during the previous year and cannot be considered for addition in the present assessment year.

7. The CIT(Appeals) however upheld the order of AO for the following reasons:-

“6. I have considered the above grounds of appeal, statement of facts and written submissions filed by the appellant. The AO has treated the amounts of Rs. 4,29,763/- and 3,85,000/- appearing in his Balance Sheet as payable to late Shri Aga Yedullah Shirazi and Late Shri Kunsang Lama respectively as non existing liability and added to the total income for the following reasons:

As admitted by the assessee himself vide his letter dated 27.01.2016, the outstanding loan taken from Late Shri Aga Yedulla Shirazi had no claimant till that date.

The assessee has not produced any documentary evidence to show that the creditor's wife refused to receive the outstanding amount due to her late husband.

As regards assessee's submissions dated 28.03.2016 regarding the option exercised by the creditor's niece to receive the money due to the creditor, it is not known whether she is a legal heir to the deceased creditor in the absence of documentary evidence.

As regards amounts due to late Shri Kunsang Lama, the assessee himself has admitted that there are no claimants for the amounts due to the said creditors. That the amount

would be paid to some Charity Foundation on a future date is merely an afterthought.

Both the outstanding loans under question have not been paid as on date.

I have further noticed that the above existing liabilities are prayer to 2003 and no interest has been paid till date and both the creditors are deceased. I do not find any infirmity in the findings given by the assessing officer and therefore the grounds on this issue are dismissed.”

8. Aggrieved by the order of the CIT(Appeals), the assessee has preferred the present appeal before the Tribunal.

9. I have heard the rival submissions. The Id. Counsel for the assessee reiterated the submissions made before the lower authorities. The Id. DR relied on the order of AO and CIT(Appeals).

10. After considering the rival submissions, I am of the view that the addition sustained by the CIT(A) deserves to be deleted. As rightly contended by the assessee, the addition in question could not have been made u/s. 41(1) of the Act because the assessee should have got the benefit of a deduction or allowance in an assessment in respect of loss, expenditure or trading liability. Admittedly, this condition is not satisfied in the case of assessee. The second condition is that subsequently the assessee should have obtained remission of liability or cessation of liability during the previous year. There is no material on record to show that the assessee derived the benefit of any remission or cessation of liability. The fact that the assessee has shown the liability in the balance sheet only means that he acknowledges the liability as existing. None of the conditions for invoking the provisions of section 41(1) are present in the instant case and therefore the addition cannot be sustained u/s. 41(1) of the Act.

11. Even if the said addition is tested on the parameters of section 68 of the Act, the same cannot be sustained because the credit in question is not in relation to previous year relevant to assessment year 2013-14. Therefore, the very basis of the addition made by the AO and sustained by the CIT(Appeals) is erroneous and cannot be sustained. In view of the above conclusion, I am of the view that the subsequent discharge of the liability in future by the assessee and the facts relating to the same are not discussed, though those facts would support the plea of the assessee that there was no cessation of liability in AY 2013-14. For the reasons given above, the addition made by the AO is hereby deleted.

12. The other grounds of appeal are with regard to levy of interest u/s. 234B of the Act. I am of the view that a direction to the AO to verify the claim of assessee that proper credit has not been given to pre-paid taxes and TDS would be just and appropriate. I direct the AO accordingly.

13. In the result, the appeal by the assessee is partly allowed.

Pronounced in the open court on this 13<sup>th</sup> day of December, 2019.

Sd/-

( N V VASUDEVAN )  
VICE PRESIDENT

Bangalore,  
Dated, the 13<sup>th</sup> December, 2019.

*/Desai S Murthy /*

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar  
ITAT, Bangalore.