PIN THE INCOME TAX APPELLATE TRIBUNAL "H", BENCH MUMBAI

BEFORE SHRI G. MANJUNATHA, ACCOUNTANT MEMBER
&
SHRI RAVISH SOOD, JUDICIAL MEMBER

ITA No.2261/Mum/2019
(**Assessment Year: 2010-11**)

Krishnaping Alloys Ltd 1001, 10th Floor Pinnacle Corporate Park Bandra Kurla Complex Bandra(E) Mumbai-400 051	Vs.	ACIT-10(1)(2) Aaykar Bhawan M.K.Road Mumbai-400 020
PAN/GIR No.AACCK0121F		
(Appellant)	..	**(Respondent)**

Assessee by	Shri Rajiv Khandelwal, AR
Revenue by	Shri B. Srinivas, CIT-DR
Date of Hearing	**02/03/2020**
Date of Pronouncement	**24/07/2020**

आदेश / O R D E R

PER G.MANJUNATHA (A.M):

This appeal filed by the assessee is directed against order of the Ld. Commissioner of Income Tax (Appeals)–17, Mumbai, dated 25/03/2019 and it pertains to Assessment Year 2010-11.

2. The assessee has raised the following grounds of appeal:

1. On the facts and circumstances of the case and in-law, the learned AO erred in reopening the case u/s 148 of the Act 1961 without considering the facts of the case.

2. On the facts and circumstances of the case and in law, the learned CIT (A) erred in confirming the addition made by the learned Assessing officer of Rs.15,15,00,000/-lying as Share application money since 31.03.2009, treated as cessation of trading liabilities u/s 41(1) of the income tax Act 1961, without considering the facts of the case.

3. On the facts and circumstances of the case and in law, the learned CIT (A) and learned Assessing officer has erred in not providing cross examination, without considering the facts of the case.

4. The Appellant craves, leaves to add, alters, amends or deletes any grounds of Appeal at the time of hearing.

3. The brief facts of the case are that the assessee company is engaged in the business of trading of Minerals, filed its return of income for AY 2010-11 on 26/09/2010, declaring total income of Rs.2,81,842/- and said return was processed u/s 143(1) of the I.T.Act, 1961. Subsequently, a survey u/s 133A of the I.T.Act 1961 was conducted on 29/09/2016 on the business premises of the assessee. During the course of survey and post survey enquiry, it was gathered that the assessee company had claimed to have converted outstanding trading liability into share application money and later on was claimed to have alloted equity shares of Rs.10/- with premium of Rs.90/- per share to 174 persons. During the course of survey, a statement was recorded from M/s Sanjeev Khandelwal, Managing Director of the company on 29/09/2016 and in response to question No.31, the Director of the company stated that the company has converted unpaid trading liability of 174 persons into share application money in the financial year 2008-09 and he, further stated that necessary list of creditors as on 31/03/2009, 31/03/2010 and 31/03/2011 shall be furnished.

4. The case has been subsequently, reopened u/s 147 of the Act, on the basis of information gathered during the course of survey and reasons recorded thereon and accordingly, notice u/s 148, dated 30/03/2017 was issued. In response to the said notice, the assessee filed letter dated 19/04/2017 and stated that the return of income filed on 26/09/2010 u/s 139(1) shall be treated as return filed in

response to the notice issued u/s 148 of the I.T.Act, 1961. The case has been selected for scrutiny and during the course of assessment proceedings, the Ld. AO called upon the assessee to furnish necessary details, in respect of unpaid trading liability and subsequent conversion of said liability into share application money. In response, the assessee has filed details of unpaid liability of 174 persons and conversion of said liability into share application money and further allotment of equity shares on 14/06/2010. The assessee has also, filed a detailed reply on 19/12/2017, in response to show cause notice issued by the ld. AO, dated 05/12/2017 and contended that the liability had ceased to exist in AY 2009-10 itself, when the same was converted into share application money and thus, there cannot be addition u/s 41(1) of the I.T.Act, 1961 for the impugned Asst. year.

5. The ld. AO was not convinced with the explanation of the assessee and according to him, the liability is ceased to exist during AY 2010-11, when the assessee has allotted equity shares to creditors on 14/06/2010. Therefore, there is no merit in the arguments of the assesee that liability had ceased to exist for AY 2009-10. The Ld. AO, further noted that the enquiry conducted during the course of assessment proceedings, including u/s 133(6) notices issued to subscribers to share application money clearly indicates that out of 174 persons, 23 persons did not acknowledge of making any share application money and remaining creditors either not responded or notices are returned un-served. The Ld. AO, further noted that even otherwise, as per list of creditors submitted as on 31/03/2009, 31/03/2010 & 31/03/2011, it was very clear that the trading liability was exist as on 31/03/2009, consequently, the

same become opening balance for AY 2010-11. Further, the assessee has failed to furnish any evidences to prove that trading liability has been converted in the FY 2008-09 relevant AY 2009-10, but on the other hand the evidences collected during the course of survey, including statement recorded from the Director clearly indicates that the creditors are very much existed in the books of accounts of the assessee in the FY 2009-10 relevant AY 2010-11 and only on 14/06/2010, the same has been treated share application money for allotment of equity shares. The ld. AO, further noted that one more important aspect of the case is that all these shareholders have gifted their shares to the Directors and their relatives in subsequent financial year and from the above, it is very clear that the liability shown in the books of accounts of the assessee is non-genuine and which became non-existence or ceased to exist. Accordingly, he opined that an amount of Rs.15.15 crores become cessation of trading liability u/s 41(1) of the I.T.Act, 1961 and hence, made addition of Rs.15.15 crores to the total income of the assessee. The relevant findings of the Ld. AO are as under:-

> *10. The submission of the assessee is considered but not found to be acceptable on the following grounds:*
>
> *i) The assessee claims that the company had hired many parties to carry out the work of handling the process of mining. These parties were asked to consider taking the shares of the company instead of amounts payable to them. To test the claim of the assessee notices u/s 133(6) were issued twice as discussed earlier in the assessment order but they returned un-served or no replies were received, 23 parties even did not acknowledge of making any share application.*
>
> *ii) In annexure -4 of the statement of the director Mr Sanjeev Khandelwal recorded on 29.09.2016 had submitted a list of creditors as on 31.03.2009, 31,03.2010 and 31.03.2011. On perusal of the list the names of the creditors it was observed that no names of share allot tees were present in the creditors. The director had replied that the same may be*

grouped in other heads. The first page of Annexure 4 being part of the statement is reproduced.

iii) The subhead of creditors-(creditors-sub contractors) shows the names of the persons to whom the shares were allotted. The ledger account of the same is reproduced:-

It can be observed that the ledger shows entries from 1.04.2008 to 31.03.2009. Thus the above creditors are present in the closing balance for the year ended F.Y. 2008-09 i.e. A.Y. 2009-10. Consequently the same creditors should be outstanding as opening balance in FY 2009-10 i.e. A.Y. 2010-11. Thus, the contention of the assessee in point no 9 of the above reply is not correct. The liability existed during the year and cessation happened during the year. The above ledger is certified by the director of the company. Ledgers being primary books of accounts has to be infallible and thus are relied upon.

iv) The assessee claims that these were trading liabilities in its books of accounts. During the year under consideration i.e. AY 2010-11 the same were converted into share application money. The assessee was not liable to pay any sum to the so called creditors. Thus the trading liability has ceased to exist during the year as discussed in point iii) Above, as the creditors have denied making any application for shares.

v) On perusal of the above ledger it can be observed that the persons to whom the shares are allotted are not having any opening balance and they were allotted shares of the company for the work carried out during the year. The shares of the company signifies the ownership of the company. The assessee transferred the shares to these creditors who just entered as one time contract that too at a premium of Rs 90/- These shareholders then subsequently gifted these shares to the 6 persons without any cost. In effect these so called creditors did the job for the assessee without any consideration is an undisputed fact.

vi) As has been discussed above in various points of the order that the genuineness of the creditors/ share applicants is not established. The same are produced at the cost of repetition:
-Notice u/s 133(6) returned un-served twice.

- 23 persons had categorically denied that they had applied for the shares of the company which are appearing in the share applicant list produced by the assessee.

Thus
- These shares issued at premium were gifted to the 6 persons who are all existing share holders of the company.

On the basis of the above points it can be established that the creditors are not genuine. On verification during the reopening assessment it is discerned that the same are not existing and thus being a trading liability

which does not exist the amount should be taken as income of the assessee.

The same principles are relied upon as reiterated in various judicial pronouncements:

[2014] 47 taxmann.com 268 (Punjab AHaryana)
HIGH COURT OF PUNJAB AND HARYANA Mrs. Adarsh Sood
v. Commissioner of Income-tax, Faridabad

Section 41(1) of the Income-tax Act, 1961 - Remission or cessation of trading liability (Trading liability) - Assessment year 1993-94 - Balance in name of three parties were appearing since 1984-87 - Two parties denied to have any amount payable to them while third was found to be non-genuine ~ Whether in respect of amount found credited in books of account of assessee, liability to pay back ceased to exist and, hence, Tribunal had rightly treated it to be assessee's taxable income - Held, yes [Para 8] [In favour of revenue]

[2016] 71 taxmann.com 322 (Bombay)
HIGH COURT OF BOMBA Y
Palkhi Investments & Trading Co. (P.) Ltd,
v.
*Income Tax Officer, Mumbai**

Section 271(1)(c), read with section 41(1), of the Income-tax Act, 1961 - Penalty - For concealment of income (False claims) - Assessment year 2005-06 - During assessment proceedings Assessing Officer made certain additions under section 41(1) in respect of trade liabilities which is had ceased to exist - Penalty under sect/on 271(1)(c) was also levied for furnishing inaccurate particulars of income - Facts revealed that in quantum proceedings Tribunal recorded that one of creditors had denied any amount to be due to it from assesses and some of creditors named by assessee were not found available at addresses given - Further, in penalty proceedings all three authorities had concurrently arrived at a finding of fact that claim made by assessee with regard to its outstanding liabilities for subject assessment year was false - Whether showing a nonexistent liability as an existing liability and not offering same to tax amounted to furnishing inaccurate particulars of income and, therefore, penalty was justified Held, yes [Para 8] [In favour of revenue].

8. On the basis of above discussion thus it is held that an amount of Rs.15,15,00,000/- is added back as income of the assessee on account of cessation of trading liability u/s 41(1) of Income tax act, 1961.

6. Being aggrieved by the assessment order, the assessee preferred an appeal before the Ld.CIT(A). Before the Ld.CIT(A), the assessee had reiterated its submissions made before the Ld. AO to

argue that additions made by the Ld. AO towards cessation of trading liability u/s 41(1) of the Act, for the impugned assessment year is incorrect, because the liability had been ceased to exist for AY 2009-10, when the assessee has converted trading liability into share application money on 31/03/2009. The Ld.CIT(A) after considering relevant submissions of the assessee and also, by relied upon certain judicial precedents, including the decision of Hon'ble Supreme Court in the case of Sumati Dayal vs. CIT [1995] 214 ITR 801, came to the conclusion that claim of the assessee company that it has converted trading liability into share application money was part of a surreptitious design transactions, in order to create fictitious liability, which is converted into share application money, finally gifted back to the existing shareholders. He, further noted that claim of the assessee that the so called share applicants have gifted their shares to the director of the assessee company in succeeding year, nothing less than an attempt made to convert non-existed liability into shareholders funds. He, further noted that it cannot be logical and practical to hold that a small time creditors have gifted there hard earned money, converted into so called shares capital of Rs.15.15 crores to the existing shareholders. In other words, ownership in the form of share capital and share premium total into Rs.15.15 crores has come back to the existing shareholders without any consideration and such claim is a bizarre, which is factually and legally not tenable. Therefore, he opined that there is no error in the findings of the Ld. AO to invoke provisions of section 41(1) of the Act, and accordingly, confirmed additions made by the Ld.AO towards cessation of liability amounting to Rs.15.15 crores and dismissed appeal filed by the assessee. Aggrieved by the Ld.CIT(A)

order, the assessee is in appeal before us. The relevant findings of the Ld.CIT(A) are as under:-

5.1 This is a classic case where out of a huge turnover, Rs.15.15 cores, is shown as a liability. The huge list of outstanding creditors totaling to Rs.15.15 crores is neither explained nor confirmed by the parties as well as by the documents pertaining to actual work done. The survey u/s.133A, the statement of Shri Sanjeev Khandelwal, the books of accounts found during the course of survey, all these documents indicate the surreptitious planning of the appellant company to create fictitious liability in order to reduce the incidence of tax.

5.2 During the course of survey and subsequent return of income and another smoke screen is created when it is claimed that these outstanding liabilities have been converted into share application money that too in the preceding year i.e. Assessment Year 2009-10. First of all, there is no iota of any evidence either gathered during the survey or submitted during any of the proceedings that so called outstanding creditors have applied for shares against their outstanding payables. The documents particularly the different ledger accounts quoted by the AO makes the claim of the appellant that the conversion of outstanding liability to their share application money started during Assessment Year 2009-10, untenable.

5.3 It has been further claimed that shares have been allotted to creditors in subsequent year i.e. precisely ***14.6.2010 and again all these share allottees have gifted their share to the six*** *original shareholders of the company. First of all, such claim is devoid of any documentary support.* ***Can it be logical and palatable that a small time creditors have gifted their hard earned money, converted into so called*** *shares totaling to****o Rs.15.15 crores to the existing shareholders.*** *In other words, ownership in the form of share capital arid share premium totaling to 15.15 cores has come back to the existing shareholders without any consideration. Such claim is a bizarre claim, which is factually and legally not tenable. Such surreptitious arrangements and claims should be examined on the basis of human behavior and conduct. Hon'ble Supreme Court's observation, in the case of* ***CIT v. Durga Prasad More f1971] 82 ITR 540,*** *to the effect that "Science has not yet invented any instrument to test the reliability of the evidence placed before a court or tribunal. Therefore, the courts and Tribunals have to judge the evidence before them by applying the test of human probabilities". Similarly, in a later decision in the case of* ***SumatiDayal v. CIT 1995l 214 ITR 801/80 Taxman 89*** *(SC),Hon'ble Supreme Court rejected the theory that it is for alleger to prove that the apparent and not real, and observed that, "This, in our opinion, is a superficial approach to the problem. The matter has to be considered in the light of human probabilities". ....Similarly the observation ....that if it is alleged that these tickets*

were obtained through fraudulent means, it is upon the alleger to prove that it is so, ignores the reality. The transaction about purchase of winning ticket takes place in secret and direct evidence about such purchase would be rarely available ....,...,........In our opinion, the majority opinion after considering surrounding circumstances and applying the test of human probabilities has rightly concluded that the appellant's claim about the amount being her winning from races is not genuine. It cannot be said that the explanation offered by the appellant in respect of the said amounts has been rejected unreasonably. "I will be superficial in my approach in case I do not examine the claim of the assesses on the basis of documents and affidavits filed by the assesses and overlook clear the unusual pattern in the documents filed by the assessee and pretend to be oblivious of the ground realities. As Hon'ble Supreme Court has observed, in the case of Durga Prasad More(supra), ...,.."it is true that an apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real party who relies on a recital in a deed has to establish the truth of those recitals, otherwise it will be very easy to make self-serving statements in documents either executed or taken by a party and rely on those recitals. If all that an assessee who wants to evade tax is to have some recitals made in a document either executed by him or executed in his favour then the door will be left wide open to evade tax. A little probing was sufficient in the present case to show that the apparent was not the real. The taxing authorities were not required to put on blinkers while looking at the documents produced before them. They were entitled to look into the surrounding circumstances to find out the reality of the recitals made in those documents". Genuineness is a matter of perception but essentially a call on genuineness of a transaction is to be taken in the light of well settled legal principles. There may be difference in subjective perception on such issues, on the same set of facts, but that cannot be a reason enough for the fact finding authorities to avoid taking subjective calls on these aspects, and remain confined to the findings on the basis of irrefutable evidences. The Hon'ble Supreme Court has, in the case of Durga Prasad More (supra), observed that "human minds may differ as to the reliability of a piece of evidence but in that sphere the decision of the final fact finding authority is made conclusive by law".

5.4 Thus, from the aforesaid discussion it is absolutely clear that the claim of the appellant company were part of a surreptitious design transaction in order to create fictitious liability which is converted into a share application money finally gifted back to the existing shareholders. The AO has justifiably invoked the provision of section 41(1) of the Act. The reliance of appellant company on certain judgments are absolutely distinguishable on facts and law. The AO's detailed enquiry where the outstanding liability has not been explained /confirmed, conversion of outstanding payables into share application money has not been established. Thus, the cessation of liability u/s. 41(1) of the Act i.e. outstanding liability of Rs.15.15 crores is ***upheld*** *and the ground of appeal filed on this issue is* ***dismissed.***

7. The Ld. AR for the assessee, at the time of hearing submitted that the Ld. AO has erred in reopening the assessment u/s 147 of the I.T.Act, 1961, without considering fact that there is no escapement of income within the meaning of section 147 of the I.T.Act, 1961. The Ld. AR, further submitted that if, you go through the reasons recorded by the Ld. AO, the reasons clearly indicates escapement of income for AY 2010-11 for allotment of equity shares by conversion of trading liability into share application money on 14/06/2010, whereas the conversion of trading liability had been taken place for AY 2009-10. Therefore, there is no nexus between reasons recorded and escapement of income.

8. The Ld. AR, further submitted that insofar as, additions made by the Ld. AO towards cessation of liability u/s 41(1) of the I.T.Act, 1961, the facts gathered during the course of survey and consequent statement recorded from a director of the company clearly indicates that trading liability had been converted into share application money on 31/03/2009 and this fact has been stated in the statement recorded during the course of survey. When, the liability had ceased to exist during AY 2009-10 itself, making additions towards said liability in the impugned assessment year is incorrect. He, further submitted that the Ld. AO has erred in invoking provisions of section 41(1) of the I.T.Act, 1961, without appreciating the fact that in order to invoke said section, there should be remission or cessation of liability in the year under consideration, because the assessee has paid the trading liability during the FY 2008-09 relevant to AY 2009-10 itself. In this regard, he has relied upon the following judicial precedents:-

a) CIT vs Sugajuli Sugar Works (P) Ltd.[1999] 102 Taxman in (SC)
b) CIT vs Bhogilal Ramjibhai Atant [20I4J 43 taxmann.com 55 (Gujarat High Court)
c) CIT vs. Hotline Electronics Ltd.[2012] 18 taxmann.com 363 (Delhi)
d) CIT vs SHRI VARDHMAN OVERSEAS LTD ITA NO. 774/2009 (Delhi High Court)
e) CIT vs Enam Securities Private Limited on 27 April. 2012 INCOME TAX APPEAL NO.5372 OF2010 (Bombay High Court)
f) CIT vs Jain Exports Pvt. Ltd. on 24 May. 20 f 3 ITA No.235/2013 (Delhi High Court)
g) CIT vs Alvares & Thomas [2016] 69 iaxmann.com 257 (Karnataka HC) dated 24 march 2016.
h) CIT v.v *Sither India Ltd [2014] 369 ITR 717 (Bombay HC)*
i) CIT vs Kesaria Tea Co. Ltd[2002] 122 TAXMAN 91 (SC)
j) CIT vs *Smt. Sita Devi Juneja I. T.A. No. 619 of 2009(PUNJAB AND HARYANA HC)*

9. The Ld. DR, on the other had strongly supporting order of the Ld.CIT(A) submitted that there is no merit in grounds taken by the assessee challenging reopening of assessment, because the reopening was not challenged before the Ld.CIT(A) and consequently, if at all the assesee wants to challenge reopening of assessment, the same should be by way of additional grounds of appeal. The Ld. DR, further submitted that even otherwise, the arguments of the assessee fails on reopening of assessment, because, the Ld. AO has reopened the assessment on sound footing, which is supported by fresh tangible material gathered during survey proceedings conducted u/s 133A of the Act, where escapement of income has been detected. In this regard, he relied upon the decision of Hon'ble Supreme Court, in the case of ACIT vs Rajesh Jhaveri Stock Brokers Pvt.Ltd. (2007) 291 ITR 500 and Raymond woolen Mills Ltd. vs ITO [236 ITR 34].

10. The Ld. DR, further, submitted that as regards, additions made towards cessation of liability u/s 41(1) of the Act, the Ld. AO, as well

as, the Ld.CIT(A) have brought out clear facts to come to the conclusion that the liability had ceased to exist in the FY 2009-10 relevant to AY 2010-11 and hence, there is no merit in the arguments taken by the assessee.

11. We have heard both the parties, perused the material available on record and gone through orders of the authorities below. We have carefully considered case laws relied upon by both the parties. As regards, reopening of assessment, we find no merits in the arguments advanced by the ld. AR for the assesee, because the Ld. AO has reopened the assessment on sound footing, based on fresh tangible material come to his possession after completion of assessment u/s 143(1) of the I.T.Act, 1961, which clearly suggest escapement of income within the meaning of section 147 of the I.T.Act, 1961. We, further, noted that there is a nexus between the reasons recorded for reopening of assessment and escapement of income and hence, we are of the considered view that reopening is on sound footing. Further, the assessment in this case has been reopened beyond four years, but within six years from the end of the relevant assessment years. The original assessment has been completed u/s 143(1) of the I.T.Act, 1961. Further, when the original assessment has been completed u/s 143(1) of the I.T.Act, 1961, then the assessment can be reopened within period of six years from the end of relevant assessment years, if the escapement of income is within specified limit. In this case, there is no doubt with regard to escapement of income as per the reasons recorded by the Ld. AO, which is beyond the prescribed limit provided under the Act. Further, The Hon'ble Supreme court, in the case of ACIT vs Rajesh Jhaveri Stock Brokers Pvt. Ltd. (supra) had clearly held that reasons

to believe does not mean that the reasons for reopening should have been factually ascertained by legal evidence or conclusion before the reopening of an assessment. We, further noted that the Hon'ble Supreme Court, in the case of Raymond woolen Mills Ltd.vs ITO had held that for determining, whether initiation of reopening proceedings was valid, it has only to be seen, whether there was prima-facie some material on the basis of which, the department would reopen the case. It further held that the sufficiency or correctness of the material is not a thing to be considered at the stage of issue of notice. Therefore, we are of the considered view that there is no merit in arguments taken by the Ld. Counsel for the assesee challenging reopening of assessment and hence, we are of the considered view that the Ld. AO has reopened the assessment on valid grounds. Accordingly, the grounds taken by the assessee is dismissed.

12. As regards, additions made towards cessation of trading liability u/s 41(1) of the Act, for Rs.15.15 crores, we find that the Ld. AO has invoked provisions of section 41(1) of the Act, on the ground that the liability had ceased to exist during FY 2009-10 relevant to AY 2010-11. In order to come to above conclusion, the Ld. AO has taken support from information gathered during the course of survey conducted u/s 133A of the Act and consequent statement recorded from the Director of the company. The Ld. AO had also taken support from investigation carried out during the course of assessment proceedings, including information collected u/s 133(6) of the I.T.Act, 1961. According to the Ld. AO, out of 174 creditors 23 have claimed that they do not aware of investments in share application money of assessee company by conversion of trading

liability into share application money. Further, some of the creditors are either not responded to 133(6) notices or notices are returned un-served. Further, some of the creditors have accepted that they have invested in share application money of Assessee Company by conversion of trading liability into equity shares. The Ld AO had also taken support from the fact that the so called shareholders have gifted their shares in subsequent financial year to directors and their relatives. Therefore, he opined that liability shown in books of accounts in the name of so called creditors is either non-existence or the same has been ceased to exist during FY 2009-10 relevant to AY 2010-11.

13. It was the claim of the assessee before the Ld. AO, as well as the Ld.CIT(A) that provisions of section 41(1) of the Act, cannot be invoked for the impugned assessment year, because the liability had ceased to exist in the books of accounts of the assessee during the FY 2008-09 relevant to AY 2009-10, when the assessee has converted trading liability into share application money on 31/03/2009. The assessee, further claims that in order to invoke the provisions of section 41(1) of the Act, there should be remission or cessation of trading liability. Unless, there is a cessation or remission of liability, the said provisions cannot be invoked. In this case, the assessee has paid total liability during FY 2008-09 by converting said liability into share application money and subsequently, allotted equity shares to the shareholders. The assesee, further claims that the subsequent event of allotment of equity shares and gifting of said shares to certain persons has no bearing on the additions made by the Ld. AO u/s 41(1) of the I.T.Act, 1961.

14. We have heard both the parties and given our thoughtful consideration to the facts of the present case, in light of provisions of section 41(1) of the I.T.Act, 1961. The provisions of section 41(1) of the Act, deals with a cases, where an allowance or deductions have been made in the assessment for any year, in respect of loss, expenditure or trading liability incurred by the assessee and subsequently, during any previous year, the assessee 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 thereon, the amount obtained 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 income of that previous year. Further, as per Explanation (1) to section 41(1) of the Act, the explanation 'loss or expenditure' or some benefit in respect of any trading liability by way of remission or cessation thereon shall include, the remission or cessation of any liability by way of unilateral act by the first mentioned person. A plain reading of section 41(1) of the Act, makes it very clear that in order to invoke said provisions, three conditions must be fulfilled i.e (i) there should be trading liability and deductions or allowances should be allowed towards said liability in the previous assessment years (ii) the assessee should derived benefit in cash or in any other form by remission or cessation of liability (iii) the said liability should be ceased to exist during relevant assessment year. In the background of above factual and legal background, if you examine the case of the assessee, one needs to understand, whether the ld. AO was right in invoking provisions of section 41(1) of the Act to trading liability for the year under consideration.

15. The facts borne out from records clearly indicate that the assessee has converted trading liability into share application money in the FY 2008-09 relevant to AY 2009-10. This fact has been supported by financial statement of the assessee for the relevant financial years produced before us, as per which the assessee has transferred trading liability into share application money on 31/03/2009. Subsequently, the share application money has been converted into equity share capital by allotment of equity shares to above subscribers on 14/06/2010. These are undisputed facts. From the above, it is clear that the liability does not seize to exist in the books of accounts of the assesee, even for AY 2009-10 or for AY 2010-11, because, the assesee has paid back total trading liability in the FY 2008-09 by converting said liability into share application money. Further, once the liability has been converted into share application money with the consent of the creditors, then the same cannot be treated as cessation or remission of liability, either unilateral or bilateral. Further, once the liability has been paid back during AY 2009-10, then the same cannot be considered as continued in the books of accounts as on 31/03/2010, in order to invoke provisions of section 41(1) of the Act, on the basis of subsequent enquiries conducted during the course of assessment proceedings. In fact, the evidences filed before the authorities have clearly established the fact that the assesee has paid said liability in AY 2009-10. Therefore, we are of the considered view that liability, if at all is ceased to exist, then said liability had been ceased to exist in the FY 2008-09 relevant to AY 2009-10, but not for the AY 2010-11. Hence, we are of the considered view that the Ld. AO, as well as the Ld.CIT(A) were erred in, coming to the conclusion that the liability is ceased to exist during AY 2010-11.

16. Coming back to the other allegations of the Ld. AO, as well as the Ld. CIT(A). The Ld.AO had alleged that the so called trading liability existed in the books of accounts of the assessee is non-genuine, because none of the creditors have confirmed the liability, when enquiries was conducted by issue of notice u/s 133(6) of the I.T.Act, 1961. The Ld. AO had also taken support from the fact that the so called shareholders have gifted their shares to the directors and relatives in subsequent financial years. No doubt, there may be no response from certain creditors in response to 133(6) notices, but non appearance or non response of the creditors cannot be a sole grounds to draw an adverse inference against the assesee, when the assessee has filed necessary evidence to prove that the liability is genuine in nature, which was subsequently paid back by converting said liability into share application money. As regards, the other allegations of the ld. AO that so called shareholders have gifted their shares to directors and relatives in subsequent financial year, said findings is not relevant in the context of additions made by the Ld. AO u/s 41(1) of the Act, because in order to invoke provisions of section 41(1) of the Act, three conditions enumerated therein should be fulfilled. Unless, the conditions prescribed therein are not fulfilled, the Ld. AO cannot make additions u/s 41(1) of the Act. In this case, on perusal of facts available on record, we find that none of the conditions prescribed therein u/s 41(1) of the I.T.Act, 1961 were fulfilled, in order to bring said liability within the ambit of provisions of section 41(1) of the Act, because neither, the liability is ceased to exist during the impugned assessment year, nor the Ld. AO proved that it is a non-genuine trading liability. On the other hand, the assessee has filed necessary evidences to prove that the

liability was existed in the books of accounts up to 31/03/2009 and on 31/03/2009 said liability has been fully paid back by converting, the same into share application money with the consent of creditors. We, therefore, are of the considered opinion that the Ld. AO, as well as the Ld.CIT (A) was completely erred in making additions towards cessation or remission of liability u/s 41(1) of the Act, towards share application money of Rs.15.15 crores. Hence, we direct the Ld. AO to delete additions made towards cessation of liability u/s 41(1) of the I.T.Act, 1961.

17. In the result, appeal filed by the assessee is partly allowed.

18. Before parting, we shall deal with procedural aspect of prouncement of order as prescribed under rule 34(4) of Income Tax (Appellate Tribunal) Rules 1963. As per rule 34(4), no order shall be pronounced after expiry of 90 days from the date of hearing. This appeal was heard on 02/03/2020 and ordinarily, the order shall be pronounced on or before 31/05/2020. But, this order could not be pronounced on or before 31/05/2020, due to the fact that the Govt. of India has imposed nationwide lockdown from 25/03/2020 and the same has been extended timt to time up to 31/05/2020 and because of this the office was closed up to 22/05/2020. Further, if the above lockdown period is exclued for the purpose of limitation, then this order can be pronounced on or before 27/07/2020. Further, whether lockdown period can be excluded or not has been exhastively dealt by the co-ordinate bench of ITAT, Mumbai, in the case of DCIT vs JSW Limited, in ITA No. 6264/Mum/2018, dated 14/05/2020, where it was held that due to corona virus pandamic, the period of limitation automatically gets extends till such period the lockdown is in force.

We, therefore, are of the opinion that considering the prevailing situation and also, by respectfully following the decision of co-ordinate bench in the case of DCIT vs. JSW Limited (Supra), the order pronounced in the month of July 2020, is well within the time allowed under rule 34(4) of Income Tax (Appellate Tribunal) Rules 1963.

This order is pronounced as per Rule 34(4) of Income Tax (Appellate) Tribunal Rules, 1963, by notice to parties on this: 24/07/2020

Sd/-	Sd/-
(RAVISH SOOD)	**(G. MANJUNATHA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 24/07 /2020
Thirumalesh Sr.PS

Copy of the Order forwarded to :

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

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai