

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "D", MUMBAI**

BEFORE SHRI SHAMIM YAHYA (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 7442/MUM/2018
Assessment Year: 2013-14**

The Asstt. Commissioner of Income Tax – 24 (2), Room No. 613, Piramal Chambers, Lalbaug, Parel, Mumbai - 400012	Vs.	M/s M Ramjan & CO, ½ , Majid Ali Mansion, Bharawadi Lane, S.V. Road, Andheri (E), Mumbai - 400058 PAN: AAAFM6187C
(Appellant)		(Respondent)

Revenue by : Shri Rakesh Ranjan (DR)

Assessee by : Ms. Dinkle Hariya

Date of Hearing: 28/10/2020
Date of Pronouncement: 07/12/2020

ORDER

PER RAM LAL NEGI, JM

This appeal has been filed by the revenue against the order dated 27.09.2018 passed by the Commissioner of Income Tax (Appeals)-36 (for short 'the CIT(A), Mumbai, for the assessment year 2013-14, whereby the Ld. CIT(A) has partly allowed the appeal filed by the assessee, against the assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short the 'Act').

2. Brief facts of the case are that the assessee a partnership firm working as civil contractors and engineers, filed its return of income for the assessment year under consideration declaring total income of Rs. 1,71,48,704/-. The AO passed assessment order u/s 143 (3) of the Act and determined the total income of the assessee at Rs. 3,81,92,220/- , *inter alia* making addition of Rs. 1,88,96,549/-, treating the sundry creditors as bogus and Rs. 17,94,574/- u/s 40A (3) of the Act. The assessee challenged the assessment order before the CIT(A). The Ld. CIT(A) after hearing the assessee, deleted the aforesaid

additions made by the AO. Against the said order, the revenue has filed the present appeal.

3. The revenue has challenged the impugned order passed by the Ld. CIT (A) on the following effective grounds:-

- “1. *On the facts and circumstances of the case and in law, the Ld.CIT (A) has failed to appreciate the fact that the AO has disallowed Rs. 18,96,549/- u/s 41 (1) of the Act in view of the fact that there were several sundry creditors of large amounts to whom no payments have been made for nearly three years and the assessee has not brought anything on record to show that these creditors have been following up for payments due to them.*
2. *On the facts and circumstances of the case and in law, the Ld. CIT (A) has erred in deleting the addition of Rs. 1,88,96,549/- made by the AO u/s 41 (1) relying, inter alia, on the assessee’s submission that some of the creditors had filed cases against the assessee in Civil Courts, but completely overlooking the fact that such details were filled before the Ld. CIT (A) for the first time & that, therefore it was incumbent on the part of Ld. CIT (A) to forward the same to the Assessing Officer for verification in terms of Rule 46A of the Income-Tax Rules.*
3. *On the facts and circumstances of the case and in law, the Ld. CIT (A) has failed to appreciate the fact that the AO has disallowed Rs. 17,94,574/- as non-genuine/bogus purchases, with the observation that even some of the payments may be covered u/s 40(A)(3), details of which cannot be ascertained from available records.”*

4. Vide Ground No. 1 and 2, the revenue has challenged the action of the Ld. CIT (A) in deleting the addition of Rs. 1,88,96,549/- made by the AO u/s 41 (1) of the Act. The Ld. Departmental Representative (DR) submitted before us that the Ld. CIT (A) has erred in deleting the addition in question without appreciating the fact that the assessee has not brought anything on record to show that the creditors have been following up for payments due to them. The Ld. DR further submitted that the Ld. CIT (A) has failed to refer the additional

evidence produced by the assessee under Rule 46A of the Income Tax Rules, to AO for verification. The Ld. DR further pointed out that in some of the cases, the creditors have filed civil suits for recovery against the assessee, however, the assessee failed to produce documentary evidence before the AO. Since, the documents were produced before the CIT (A) under rule 46A of the Income Tax Rules, the Ld. CIT (A) ought to have forwarded the same to the AO for verification of the additional evidence placed on record. The Ld. DR accordingly submitted that the order passed by the Ld. CIT(A) may be set aside and the findings of the AO may be restored.

5. On the other hand, the Ld. counsel for the assessee supporting on the order passed by the Ld. CIT (A), submitted that since the AO had passed the assessment order without appreciating the evidence on record and contrary to the settled principles of law, the Ld. CIT (A) has rightly deleted the addition made u/s 41 (1) of the Act. The AO had not even issue notices u/s 133 (6) and called the details of the outstanding balances and disallowed 63.49% of the total sundry creditors without assigning any cogent reason. The Ld. counsel pointed out that during the assessment proceedings, the ledger accounts of most of the parties, whose outstanding amounts were paid in the subsequent years, were produced before the AO. The assessee also placed on record the other relevant documents to prove the payments made by the assessee in subsequent years. The Ld. counsel further pointed out that the assessee has placed on record the documents pertaining to seven creditors who have moved the courts for recovery of their due. Under these circumstances, the AO had no reason to make disallowance u/s 41(1) of the Act. Hence, there is no infirmity in the order passed by the Ld. CIT (A) to interfere with.

6. We have heard the rival submissions and perused the material on record in the light of the rival contentions. The Ld. CIT (A) has deleted the addition made by the AO holding as under:-

“4.2.2 I have gone through the submissions of the appellant along with the views enumerated by the AO in his Order and have come to the understanding that there is weight in the argument and reasoning given by the Ld. AR. It is incorrect on the part of the AO to assume that the liabilities of sundry creditors stand cancelled or that

the liabilities of the creditors are not genuine. If a debt becomes time barred, it does not become extinguished but only unenforceable in the court of law. However, the debt will remain a debt which is payable and the contractual liability will not be extinguished. The said observations are made in the case of CIT vs Sugauli Sugar Works Pvt Ltd.(1999), 236 ITR as under:

"Just because an assessee made an entry in his books of account unilaterally, he cannot get rid of his liability. The question whether the liability is actually barred by limitation, is not a matter which could be decided by considering the assessee 's case alone but it is a matter which has to be decided only if the creditor is before the concerned authority. In the absence of the creditor, it is not possible for the authority to come to a conclusion that the debt was barred and had become unenforceable. There may be circumstances which may enable the creditor to come with a proceeding for enforcement of the debt even after expiry of the normal period of limitation as provided in the Limitation Act. The principle that expiry of period of limitation prescribed under the Limitation Act cannot extinguish the debt but it will only prevent the creditor from enforcing the debt is well-settled.

Mere entry in the books of account of the debtor made unilaterally without any act on the part of the creditor would not enable the debtor to say that the liability had come to an end. Apart from that that would not by itself confer any benefit on the debtor as contemplated by the section. Therefore, the High Court was right in holding that the assessee 's unilateral entry in the accounts transferring the amount to the capital reserve account would not bring the, matter within the scope of section 41."

4.2.3 The Ld. AR stated that in spite of submitting the details of the payments made to the sundry creditors as appearing in the books as on 31st March 2013 along with details of payments being made to the sundry creditors in the subsequent years, the AO disallowed a sum of Rs. 1,88,96,549/- u/s. 41(l). If the A.O. had any doubt about the credit balances of the creditors he should have issued notices u/s. 133(6) and called the details of the outstanding balances which has not been done. It shows that the A.O. has not followed the due procedure for verification of Sundry creditors and merely disallowed 58% of total sundry creditors at his own notion.

4.2.4 The Ld. A.R. has placed on record 7 creditors whose credit balances are quite substantial and who have moved the Courts for recovery of their dues. It shows that the creditors are

genuine, but the payments are much delayed by the assessee in the ordinary course of business. The parties which have filed their cases in the city civil court or served the legal notices are:

<i>SR. No.</i>	<i>Name of the party</i>	<i>Amount (Rs.)</i>
1	<i>Lafarge Aggregates & Concrete India Pvt. Ltd.</i>	<i>38,49,973/-</i>
2	<i>M/s Bashist Transport</i>	<i>4,61,326/-</i>
3	<i>SNB Infrastructure Pvt. Ltd.</i>	<i>17,63,239/-</i>
4	<i>Sany Heavy Industries Pvt. Ltd.</i>	<i>9,24,000/-</i>
5	<i>M/s Progressive Timbers Pvt. Ltd M/s Deepak Traders</i>	<i>50,000/- 94,000/-</i>
	<i>Mahendrakumar Ramnikial Kathawala</i>	<i>81,500/-</i>
	<i>TOTAL</i>	<i>56,24,038/-</i>

4.2.5 In view of the observation and discussions above, I am of the considered opinion that the view taken by the AO is not correct and fair, looking into the facts and circumstances of this case. A liability will cease as per the provisions of section 41(1) only when the liability is extinguished/written off by the creditors in their books. In this case the liability not only exists but is being aggressively pursued by the creditors in the courts of law. In the case of the other creditors who were not in courts for recovery, the appellant has shown documentary evidence towards their settlement in the subsequent years both to the AO as well as at the appellate stage. The sundry creditors cannot be said to be bogus or that the liability payable by the appellant to the sundry creditors has been extinguish. Hence, the disallowance made of Rs.1,88,96,549/- u/s. 41(1) is against the provisions of law and is therefore deleted. The ground of appeal no.2 is Allowed.”

7. The Ld. CIT (A) has considered the plea of the assessee that since it had furnished the details of payments made to the sundry creditors appearing in the books as on 31st March, 2013, the AO should have issued notices u/s 133 (6) and called the details of the outstanding balances. Further, the Ld. CIT (A) has pointed out that seven creditors have filed suits for recovery against the assessee. Further, the Ld. CIT (A) has relied on the judgment of the Hon'ble Supreme Court in the case of *CIT vs. Sugauli Sugar Works Pvt. Ltd.* 236 ITR (SC), Hence, in our considered view, the findings of the Ld. CIT (A) are based on the evidence on record and in accordance with the settled principles of law. We therefore do not find any infirmity in said order to interfere with. Accordingly, we dismiss this ground of appeal of the revenue.

8. Vide Ground No. 3, the revenue has challenged the action of the Ld CIT (A) in deleting the disallowance of Rs. 17,94,574/- made by the AO on account of bogus purchases. The Ld. DR submitted that since the assessee failed to furnish full details to prove genuineness of the transaction despite several opportunities given by the AO, the Ld. CIT (A) has wrongly made addition. The Ld. DR further pointed out that in some of the cases the assessee had made payment in cash exceeding Rs. 10,000/- therefore, covered u/s 40 (A) (3) of the Act. The Ld DR further submitted that since, the findings of the Ld. CIT (A) are erroneous, the same is liable to be set aside. On the other hand, the Ld. counsel for the assessee supporting the order of the Ld. CIT (A) submitted that there is no infirmity in the order of the Ld. CIT (A). Since, the AO had no basis for making the addition in question, the Ld. CIT (A) has rightly deleted the same.

9. We have perused the material on record in the light of the rival contentions of the parties. The Ld. CIT (A) has deleted the addition holding that the opening and closing balance of the sundry creditors remain intact through of the years. Observations of the Ld. CIT (A) are as under:

“4.3 The ground of appeal No. 3 relates to disallowance of cash payment above Rs. 20,000/- in the financial year 2012-2013 amounting to Rs. 17,94,574/- u/s 40A(3). The Ld. A.R. has submitted that the A.O. has disallowed the credit balances of 24

parties to whom it is alleged that payments are made in cash. The Ld. A.R. has placed a tabulation sheet incorporating the opening balances of sundry creditors as on 01.04.2012 and as on 31.03.2013. The balances of most of the parties remained unchanged which shows that no cash payments are made, hence the provisions of this section are not applicable.

4.3.1 Section 40A(3) comes into operation only when payments above Rs. 20,000/- are made otherwise than by an account payee cheque or an account payee bank draft to the same person in 1 day. In such cases the entire payment made in cash will be disallowed subject to the Rule 6DD which covers the cases and circumstances in which payment in excess of Rs. 20,000/- may be made otherwise than by payees account cheque or payees account bank draft. In the case of the appellant, as the opening and closing balances of the sundry creditors remained intact through the years, the A.O. has wrongly made additions under this section. In view of the above observations, the addition of Rs. 17,94,574/- is hereby deleted. The Ground of Appeal No. 3 is hereby Allowed.”

10. We notice that the AO made the disallowance in question holding that the assessee had made payments in cash to 24 parties. However, the Ld. CIT (A) noted that the opening balance of most of the parties remained unchanged as on 01.04.2012 and 31.03.2013, which shows that no payments were made by the assessee. Hence, we do not find any infirmity in the order of the Ld. CIT(A). We accordingly uphold the findings of the Ld. CIT (A) and dismiss this ground of appeal of the revenue.

In the result, appeal filed by the revenue for assessment year 2013-2014 is dismissed.

Order pronounced on 7th December, 2020 under rule 34 (4) of the Income Tax Appellate Tribunal Rules, 1963.

Sd/-

(SHAMIM YAHYA)

ACCOUNTANT MEMBER

Sd/-

(RAM LAL NEGI)

JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 07/12/2020

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/ Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**