

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
**IN THE INCOME TAX APPELLATE TRIBUNAL,
RAJKOT BENCH, RAJKOT**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER,
And
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER**

आयकर अपील सं./ITA No. 554/Rjt/2015

निर्धारण वर्ष/Asstt. Years: 2012-2013

D.C.I.T., Circle-2, Jamnagar	Vs.	Aditya Coke Private Limited, Survey No.14, Village Chopadva, Tal. Bhachai, Dist. Kutch, (Gujarat) PAN: AAECA3029Q
------------------------------------	-----	--

Revenue by	:	Shri Aarsi Prasad, CIT. D.R
Assessee by	:	Shri P.V. Shivraman, A.R

सुनवाई की तारीख / **Date of Hearing** : **07/07/2022**
घोषणा की तारीख / **Date of Pronouncement**: **16/09/2022**

आदेश/ORDER

PER BENCH:

The captioned appeal has been filed at the instance of the Revenue against the order of the Learned Commissioner of Income tax(Appeals), Jamnagar, dated 26/08/2016 arising in the matter of assessment order passed under s.143 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2012-13.

2. The Revenue has raised following grounds of appeal:

1. *Whether, on facts and the circumstances of the case, the Id.CIT(A) was justified in deleting the addition of rs.10,17,84,750/- made by AO u/s.41(1) of the I.T. Act, 1961.*
2. *Whether on facts and the circumstances of the case, the Id.CIT(A) was justified in deleting the addition of Rs.42,98,84,771/- made by AO u/s.41(1) of the I.T. Act, 1961.*
3. *On the basis of the facts and circumstances of the case, the learned CIT(A) ought to have upheld the order of the Assessing Officer.*
4. *That the revenue craves leaves to add, amend, alter or withdraw any ground of appeal.*
5. *It is therefore prayed that the order of the CIT(A), Jamnagar may kindly be set aside and that of Assessing Officer be restored.*

3. The only issue raised by the Revenue is that the learned CIT(A) erred in deleting the addition of Rs. 10,17,84,750/- and Rs 42,98,84,771/- made under section 41(1) of the Act being cessation or remission of liability.

4. The assessee is a private company and engaged in the business of manufacturing of coke. The assessee during the year has shown following parties as sundry creditors:

- i. Khodiyar Enterprise
- ii. Krishna Enterprise
- iii. Karan Enterprise
- iv. SK Corporation

5. The AO during the assessment proceeding issue notices under section 133(6) of the Act to the above parties but no response was received. Thereafter, the AO required the assessee to produce the parties in person but failed, however, the assessee provided alternate addresses of the parties. Accordingly, the AO again issued the summon to these parties. Shri Kirit Kumar Jani attended the office of the AO and submitted the address on which summon was issued belong to him but he never heard about "M/s Khodiyar Enterprise". As such, Shri Kirit Kumar Jani denied to have any connection with "M/s Khodiyar Enterprise"

5.1 The AO on perusal of VAT/TIN number details on commercial tax portal found that the Shri Kirit Kumar Jani is applicant for Khodiyar Enterprise but he categorically denied, having any connection "M/s Khodiyar Enterprise" and any transaction with the assessee. Similarly, on verification of TIN/VAT number mentioned on invoice of parties issued by M/s Krishna Enterprise, M/s Karan Enterprise and M/s SK Corporation, the same were belonging to some other parties and cancelled subsequently. Thus, the AO of the view that the assessee forged the document and intentionally mentioned wrong detail on the invoices.

5.2 Likewise the assessee has shown credit balance of Rs. 71,29,78,695/- from M/s Kabra Brothers. However, as per the books of M/s Kabra Brothers which were received in response the notice u/s 133(6) of the Act, the outstanding balance was of Rs. 28,30,93,924/- only.

5.3 Thus the AO in view of the above show caused the assessee why the amount outstanding from the above 4 parties and difference amount with Kabra Brotehr should not be added back to the total income.

5.4 The assessee in response submitted that the creditors namely M/s Khodiyar Enerprise, Krishna Enterprise, Karan Enterprise and SK Corporation were outstanding from A.Y. 2011-12 and the purchases were made by previous management. To avoid the payment of outstanding dues of the previous management, it was not approaching to the parties. However on the advice of the auditor, the same were written back in profit and loss account in F.Y. 2014-15. With regard to difference with M/s Kabra brother, the assessee submitted that purchases were made against letter of credit which were due in next year but M/s Kabra Brother discounted the LC in the year under consideration itself which is not recorded in our book hence difference arises.

5.5 However, the AO disagreed with the submission of the assessee and held that the genuineness of sundry creditor namely M/s Khodiyar Enerprise, Krishna

Enterprise, Karan Enterprise and SK Corporation were not established by the assessee. Also the basis of writing off the same in the profit loss account was not explained. Hence the AO treated the outstanding balance of Rs. 10,17,84,750/- from these parties as income of the assessee under section 41(1) of the Act.

5.6 Likewise, the AO further held that if the purchases were made against letter of credit then in such a situation, the liability should have been reduced by the amount of LC. Further, from the perusal of bank statement of the assessee it was not established that M/s Kabra Brother is not the creditor for Rs. 71,29,78,695/- in the books of the assessee. The assessee also failed to reconcile the difference as per the confirmation received from M/s Kabra Brother. Thus the AO treated the difference amount of Rs. 42,98,84,771/- as income of the assessee under section 41(1) of the Act.

6. On appeal by the assessee, the learned CIT(A) deleted the addition made by the AO by observing as under:

I have duly considered the submission of the appellant, remand report of the AO, rejoinder of the appellant and assessment order. There are basically three grounds of appeal which are dealt as under.

7.1 Addition of Rs.10,17,84,7507- u/s.41(3)

The fact is that in the appellant's case there is no remission or cessation of trade liability u/s.41(1) during the year in question. From the account copy of the parties, it is also seen that the appellant had issued cheques to the parties during the financial years 2010-11 and in the case of M/s.Karan Enterprises in the financial year 2011-12 also.

This indicates that the parties are genuine. Further unless the creditors decide to forgo the debt by crediting the appellant's account in their books of account, question or cessation of liabilities u/s.41(1) on appellants part does not arise. And if the parties are not genuine then question of invoking the provisions of section 41(1) does not arise at all, because the provision are applicable only in case genuine liabilities. On this issue Hon'ble Gujarat High Court decision in the case of Bhogilal Ramjibhai Atara is very relevant.

The Hon'ble Gujarat High Court in the case of Bhogilal ramjibhai Atara (relied upon by the appellant) has observed as under:

"Section 41(1) would apply in a case where there has been remission or cessation of liability during the year under consideration subject to the conditions contained in the statute being fulfilled. Additionally such cessation or remission has to be during the previous year relevant to the assessment year under consideration. This is one of the strange cases where even if the debt itself is found to be non genuine from the very inception, at least in terms of section 41(1) there is no cure for it. Therefore, the appeal filed by the revenue was liable to be dismissed.

The appellant's case is squarely covered by the above decision of jurisdictional High Court. Hence respectfully following the above decision it is held that provisions of sec. 41(1) are not applicable in this case. Therefore, the addition of Rs.10,17,84,750/- made u/s.41(1) is hereby deleted this ground of appeal is allowed.

7.2 Addition/disallowance u/s. 41(1) of Rs.42,98,84,771/-/ being difference in the books of account of appellant and creditor M/s. Kabra Bros.

The Assessing Officer added Rs.42,98,84,771/ being difference in the books of accounts of the assessee and books of account of the creditor M/s Kabra Brothers. As per the appellant's books there was a credit balance of Rs.71,29,78,695/- as on 31.03.2012 and as per account copy furnished by M/s Kabra Brothers to the A.O. the closing balance was Rs.28,30,93,924/-. Therefore the difference between the closing balance of Rs.42,98,84,771/- (Rs.71,29,78,695/- - Rs.28,30,93,924/-) was added by the Assessing Officer on the ground that the appellant has not satisfactorily explained the difference.

In the course of appeal proceedings the appellant filed written submission and original certificate issued by SBI, Overseas Bank, Koikata which shows dates of LCs opening in favour of M/s Kabra Brothers dated 04.08.2015, which shows details of bills discounted with SBI, DN road branch, Mumbai.

A remand report was called for from the A.O. on appellant's submission.

In the remand report furnished a very vague comment has been given by the A.O. on reconciliation submitted by the appellant.

The appellant submitted that the difference was because of discounting of LCs by M/s Kabra Brothers with SBI, DN Road Branch, Mumbai in the financial year 2011-12 before the due dates for payment of LCs. As per the certificate of M/s.kabra Brothers the LCs were discounted in the financial year 2011-12. From the certificates it could be seen that instead of waiting for receiving the amounts in accordance with the LC schedule M/s. Kabra Brothers discounted them and got the payments immediately. The appellant made payments on the due dates due to the bank as per LCs which is borne out by the records of the appellant and letter from the State Bank of India. In the light of the above facts I am of the considered opinion that the alleged difference which forms the basis for addition, stands, satisfactorily reconciled/explained. Therefore the addition of Rs.42,98,84,771/- is hereby deleted and this ground of appeal is allowed.

7. Being aggrieved by the order of the learned CIT(A) the Revenue is in appeal before us.

8. The learned DR before us contended that the liability has ceased to exist and therefore the same is subject to tax under the provisions of section 41 (1) of the Act.

9. On the other hand, the learned AR before us filed a paper book running from pages 1 to 109 and contended that the impugned sundry creditors are arising against the purchases which were made in the earlier years and no doubt of whatsoever was raised about such purchases. Furthermore, the creditors have not been written back in the books of accounts. Therefore, the provisions of section 41 (1) of the Act cannot be applied in the given facts and circumstances.

10. Both the learned DR and the AR before us vehemently supported the order of the authorities below as favourable to them.

10.1 We have heard the rival contentions of both the parties and perused the materials available on record. The provisions of section 41(1) of the Act gives authority to the revenue to treat certain benefits enjoyed by the assessee in respect of loss, expenditures and trading obligation which were already allowed as deduction by deeming them as profit if the liability ceases to exist. On plain reading of the provisions of section 41(1) of the Act, the following conditions emerge:

1. In the course of assessment for an earlier year, allowance or deduction has been made in respect of trading liability incurred by the assessee;
2. Subsequently, a benefit is obtained in respect of such trading liability by way of remission or cessation thereof during the year in which such event occurred;
3. In that situation the value of benefit accruing to the assessee is deemed to be the profit and gains of business which otherwise would not be his income; and
4. Such value of benefit is made chargeable to income tax as the income of the previous year wherein such benefit was obtained.

10.2 From the above, it is revealed that to apply the provisions of section 41(1) of the Act, the condition precedent is that there should be an allowance or deduction in the assessment for any year in respect of allowance, expenses or trading liability incurred by the assessee and thereafter in any previous year if the creditor waives any such liability, then assessee is liable to tax under section 41(1) of the Act.

10.3 The provisions of Section 41(1)(a) of the Act casts a burden on the assessee to establish remission and cessation of liability in relevant assessment year where benefit has been obtained earlier by the assessee.

10.4 In *West Asia Exports & Imports (P.) Ltd. v. Asstt. CIT*, reported in 104 taxmann.com 170 the Hon'ble High Court of Madras while construing the provisions of Section 41(1) of the Act held that once the assessee was called upon to prove the credit entries with regard to the sundry creditors of its erstwhile business, it was for the assessee to establish the current existence of the creditors and their debts due from assessee and that there was a live link between the creditors and the outstanding debts. The assessee on being asked to produce evidence with regard to any creditor, who may have raised the claim against assessee even in past 15-16 years, was unable to produce any evidence, despite the grant of an opportunity in this regard. The assessee could not discharge the burden and the case of cessation of liability was made out by the Department/Revenue against him. The Hon'ble Court concluded that the liability to pay the sundry creditors has ceased in law and drawing such an inference against the assessee by all the three authorities under the Act and holding that the trading credits of erstwhile business of the assessee was liable to be taxed as profits of the business under section 41(1) of the Act was justified in law.

10.5 Coming to the facts of the present case, we note that the assessee itself has admitted during the assessment proceedings that it is not approaching to the creditors namely M/s Khodiyar Enerprise, Krishna Enterprise, Karan Enterprise and

SK Corporation as it is reluctant to make the payment. The relevant submission of the assessee reads as under:

We have the creditors namely Khodiyar enterprise, Krishan enterprise, S.K. Corporation and Karan enterprise outstanding in our books since FY 2010-11 to till date as we have purchased coking coal from these parties during FY 2010-11 by our erstwhile management. We are not approaching them because if we approach them, we will have to pay the outstanding amount to them. Till the time we do not approach them, we are safe, as we do not have to pay any amount to them. These purchase were made by our erstwhile management and it is payable till today. We are not approaching to the party. But in the current year with the consultation of our auditor these amount are being written back in the P/L account.

10.6 Further, from the ledger copies of these parties namely M/s Khodiyar Enterprise, Krishna Enterprise, and SK Corporation available at page 90 to 95 of paper book, we find that in each case 3 purchase invoice all dated 19-08-2010 aggregating to Rs. 3,70,03,200/-, Rs. 3,53,60,000/- and Rs. 3,44,86,400/- were booked in their respective ledger. In all these 3 parties cases part payment were made dated 6-12-2010 and 18-01-2011 for Rs. 14,23,200/-, Rs. 28,60,000 and Rs. 13,26,400/- respectively leaving outstanding balances of Rs. 3,55,80,000/- in case of Khodiyar Enterprise, Rs. 3.25 crore in case of Krishna Enterprise and Rs. 3,31,60,000/- in case of SK Corporation which is still outstanding.

10.7 However, on perusal of ledger copy of M/s Karan Enterprises available at pages 86 to 89 we note that the purchases aggregating to Rs. 9,84,30,904/- were made during September 2010 at different dates. Against the purchases payments were made at regular interval till 10-01-2012 through banking channel leaving outstanding balance of Rs. 5,44,750/- only which seems to be genuine liability. The assessee also claimed that outstanding amount of Rs. 5,44,750/- also paid in subsequent year i.e. in F.Y. 2012-13.

10.8 From the above, there remains no ambiguity that the liabilities appearing in the books of accounts of the assessee against 3 parties namely M/s Khodiyar Enterprise, Krishna Enterprise, and SK Corporation are not actually payable if we see

the facts in aggregation. Shri Kirit Kumar Jani, the alleged proprietor of Khodiyar Enterprise has appeared and admitted that he is not the proprietor of the concern namely Khodiyar Enterprise. Likewise, he also admitted that is not into any kind of business dealing of whatsoever with the assessee.

10.9 Moving ahead, the parties namely M/s Krishna Enterprise and SK Corporation are also not genuine. It is for the reason that TIN/ VAT reflected on so called invoices raised were not belonging to them and were immediately cancelled after registration. Thus, it can be inferred that the liabilities shown by the assessee with respect to these parties were bogus. However, the assessee was allowed deduction on account of purchases from these bogus parties in earlier year.

10.10 Even at the time of hearing, the learned AR has not controvert the findings of the authorities below based on tangible materials. As such the learned AR vehemently relied on the judgment of Hon'ble jurisdiction High Court of Gujarat in case of Dattaray Poultry Breeding Farm (P.) Ltd. vs. ACIT reported in 104 taxmann.com 366. Accordingly, the learned AR argued that even the liabilities treated as bogus, the same cannot be treated as profit of the assessee under the provisions of section 41(1) of the Act. However, we are not convinced with the argument of the learned AR for the assessee for the reason that the facts of the case relied by him i.e. Dattaray Poultry Breeding Farm (P.) Ltd. vs. ACIT (supra) are distinguishable from the facts of the case on hand insofar that the assessee in the present case admitted itself that it does not intend to make the payment of the outstanding creditors.

10.11 Be that as it may be, we find the assessee before the lower authorities has claimed that, on the advice of auditor, the outstanding balance from the parties namely M/s Khodiyar Enerprise, Krishna Enterprise, and SK Corporation has been written back in the books in the F.Y. 2014-15 as liability no longer required. The assessee to this effect also furnished a working sheet of liability written back as no longer required in F.Y. 2014-15 which is placed on page 97 of the paper book. In

these facts and circumstances and in our considered view no addition under section 41(1) of the Act on account of cessation of liability is required to be made in the year consideration, otherwise same will lead to double addition as the assessee has already offered the same in the F.Y. 2014-15 i.e. A.Y. 2015-16. However, before parting, we would like to give direction to the AO to delete the addition paid by him after necessary verification whether the impugned amount of sundry creditors has suffered to tax in the financial year 2014-15 corresponding to assessment year 2015-16.

10.12 Coming to the addition made by the authorities below for Rs. 42,98,84,771/- under section 41(1) of the Act in respect of the party namely M/s Kabra Brothers, we note that the difference in the amount shown by the assessee as liability viz of viz the amount shown by the party M/s Kabra Brother is arising mainly on account of the entries recorded in the books of accounts. The assessee has issued letter of credit to the party which can be verified from the letter of the bank placed on pages 99 to 100 of the paper book. The assessee was liable to make the payment after the period of 90 days which was falling in the subsequent financial year. However, the other party got these letter of credit discounted and received the payment which was adjusted against the account of the assessee. This fact can also be verified from the certificate issued by the party placed on page 98 of the paper book. Thus, the difference was arising only on account of book entries. The assessee actually made the payment in the later year whereas the party has accounted the receipt in the same financial year which has resulted the difference in the balance as discussed above. Thus to our understanding no addition is warranted under the provisions of section 41(1) of the Act. At the time of hearing the learned DR has also not brought anything on record contrary to the finding of the learned CIT-A. Thus, we do not find any infirmity in the order of the learned CIT-A and accordingly we uphold the

same. Thus the AO is directed to delete the addition made by him.

11. In the result, the appeal of the revenue is partly allowed for the statistical purposes.

Order pronounced in the Court on 16/09/2022 at Ahmedabad.

Sd/-
(SIDDHARTHA NAUTIYAL)
JUDICIAL MEMBER
(True Copy)

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

Ahmedabad; Dated 16/09/2022
Manish