IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND
Ms. PADMAVATHY S, ACCOUNTANT MEMBER

ITA No.507/Bang/2022
Assessment year : 2015-16

The Deputy Commissioner of Income Tax, Circle 2(2)(1), Bangalore.	Vs.	M/s. Spoorthi Constructions, # 250, 1st Floor, Sampige Road, Malleshwaram, Bangalore – 560 003. **PAN: ACMFS 3000J**
APPELLANT		RESPONDENT

CO No.3/Bang/2022 [in ITA No.507/Bang/2022]
Assessment year : 2015-16

M/s. Spoorthi Constructions, Bangalore – 560 003. **PAN: ACMFS 3000J**	Vs.	The Deputy Commissioner of Income Tax, Circle 2(2)(1), Bangalore.
APPELLANT		RESPONDENT

Revenue by	:	Shri Gudimella V P Pavan Kumar, Jt.CIT(DR)(ITAT), Bengaluru.
Assessee by	:	Shri Sagar, CA

Date of hearing	:	27.10.2022
Date of Pronouncement	:	28.10.2022

O R D E R

Per Padmavathy S., Accountant Member

This appeal of the revenue and cross objections by the assessee is against the order of CIT(Appeals), National Faceless Assessment

Centre, Delhi [NFAC] dated 4.4.2022 for the assessment year 2015-16. The revenue raised the following grounds:-

> "1. Whether the ld.CIT(Appeals) was right in facts and law to hold that bogus expenses claimed by the assessee during survey amounting to Rs.20,15,600/- were as per law even in background that assessee had admitted the same during the course of survey proceeding?
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> 2. Whether the ld. CIT(Appeals) was right in facts and law to delete addition made u/s 41(1) of the Act even though the assessee did not produce any evidence before the AO?
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> 3. Whether the ld. CIT(Appeals) was right in facts and law to hold that addition u/s 41(1) of the Act was not correct and violate rule 46A of the Income Tax Act wherein he admitted additional evidence which was hitherto not submitted before AO?"

2. The assessee is a partnership firm. The assessee filed return of income for the AY 2015-16 on 30.9.2015 declaring a total income of Rs.1,28,92,150. The case was selected for scrutiny by CASS for the reasons "large other expenses claimed in the Profit & Loss account, tax credit claimed in ITR is less than tax credit available in 26AS" and a notice u/s. 143(2) was duly served on the assessee on 1.8.2016. During the scrutiny proceedings, a survey was conducted on assessee's premises on 19.9.2017. During the survey proceedings, the assessee was asked to produce original bills/vouchers to substantiate the expenses claimed in the P&L account and also to produce details and confirmations regarding the current liabilities shown in the balance sheet. The AO concluded the assessment by making the following disallowances/additions on the basis that the assessee has voluntarily accepted the disallowance of expenses vide letter dated 10.10.2017 and

that the assessee has not produced any details with regard to sundry creditors :-

1. Disallowance of various expenses – Rs.20,15,000.
2. Addition towards cessation of trading liability u/s. 41(1) – Rs.3,24,67,217.

3. Aggrieved, the assessee filed appeal before the CIT(Appeals). Before the CIT(Appeals), the assessee filed evidence substantiating the expenditure and also furnished confirmations from the sundry creditors. The CIT(Appeals) deleted the disallowances / additions based on the evidences submitted and allowed the appeal in favour of the assessee. Aggrieved, the revenue is in appeal before the Tribunal.

4. The ld. DR submitted that the CIT(Appeals) has allowed the appeal in favour of the assessee by admitting the additional evidence without giving an opportunity to the AO to cross-examine the evidences. It is therefore submitted that the CIT(Appeals) has not complied with the mandatory conditions of Rule 46A. The ld. DR further submitted that the confirmations received from various parties should be examined and the CIT(Appeals) ought to have given an opportunity to the AO in this regard. With regard to addition of expenses, the ld. DR submitted that it was voluntarily admitted by the assessee during the survey proceedings basis which the AO made the disallowance. The CIT(Appeals) allowed the expenses based on the bills & invoices supporting these expenses submitted by the assessee but the AO was not given the opportunity to examine these evidences.

The ld. DR therefore submitted that the order of the CIT(Appeals) is not sustainable.

5. The ld. AR submitted that the assessee was not given sufficient time to collate the details towards expenses and in order to buy peace during the course of survey, the expenses were admitted for disallowance by the assessee. However, the assessee could collate the supporting in terms of invoices and bills to substantiate the claim of expenditure during appellate proceedings which were produced before the CIT(Appeals), who allowed the same after examination.

6. We heard both the parties. On perusal of the CIT(Appeals) order it is noticed that the assessee has submitted all the relevant details pertaining to the expenses voluntarily admitted for disallowance during survey proceedings. The CIT(Appeals), has observed based on the evidences submitted that the expenses are incurred in the regular course of business and deleted the disallowance made by the AO without affording an opportunity to the AO to cross-examine. We therefore see merit in the submissions of the ld. DR that admission of evidence by the CIT(Appeals) is done without fulfilling the categorical conditions laid down in Rule 46A. Considering the issue on merits and the facts and circumstances in its entirety, in the interest of justice we restore the issue back to the file of AO to examine the evidences afresh and decide the allowability in accordance with law after affording the assessee sufficient opportunity of being heard.

7. With regard to addition made u/s. 41(1), the ld. AR submitted that the said liability is reflected in the balance sheet of the assessee and the revenue has not brought anything on record to show that the liability ceased to exist. It is further submitted that the confirmations from creditors have been submitted before the CIT(Appeals), who has clearly examined the confirmation by giving a clear finding in his order and allowed the issue in favour of the assessee. The ld. AR therefore prayed for upholding the order of the CIT(Appeals).

8. We have heard the rival submissions and perused the material on record. We notice that the Hon'ble High Court of Karnataka in the case of *B.T. Nagaraja Reddy (supra)* has considered a similar issue and held as follows:-

> "**5.** Having heard the learned counsel for the appellants and on perusal of the appeal papers, we are of the view that no substantial question of law would arises for consideration in this appeal. Under Section 260A of the Act, the appeal from the order of the ITAT could be entertained by the High Court if it is satisfied that the appeal involves a substantial question of law. In the case on hand, the assessee filed returns for the assessment year 2011-12. The case of the assessee was selected for scrutiny and notice was issued under Section 143(2) of the Act on 06.08.2013. Subsequently, notice dated 24.02.2014 was issued asking the assessee to explain sundry creditors which have been continued in the books of accounts without any change. He was also asked to explain why the unclaimed credit balances should not be brought to tax invoking Section 41(1) of the Act. The assessee submitted his explanation with regard to sundry creditors. The Assessing Authority on the ground that the assessee has not furnished PAN numbers or address of the creditors brought to tax an amount of Rs.2,52,71,577/-. The assessee filed appeal against the assessment order. The Appellate Authority allowed the appeal and deleted addition of Rs.2,52,71,577/- for the purpose of taxation holding that the Assessing Officer has failed to make any cross-

verification as to remission or cessation of liability before invoking the provision of Section 41(1) of the Act. The revenue filed appeal against the appellate order before the ITAT. The ITAT also rejected the appeal of the revenue holding that the Appellate Authority has rightly deleted the addition noting that there is no evidence to show remission of liability or cessation of liability.

6. Section 41(1) of the Act reads as follows:

'(1) Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee (hereinafter referred to as the first-mentioned person) and subsequently during any previous year;-

(*a*)	the first-mentioned person 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 thereof, the amount obtained by such person 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 the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not; or
(*b*)	the successor in business has obtained, whether in cash or in any other manner whatsoever, any amount in respect of which loss or expenditure was incurred by the first-mentioned person or some benefit in respect of the trading liability referred to in clause (a) by way of remission or cessation thereof, the amount obtained by the successor in business or the value of benefit accruing to the successor in business shall be deemed to be profits and gains of the business or profession, and accordingly chargeable to income-tax as the income of that previous year.

Explanation 1:- For the purposes of this sub-section, the expression "loss or expenditure or some benefit in respect of any such trading liability by way of remission or cessation thereof" shall include the remission or

cessation of any liability by a unilateral act by the first-mentioned person under clause (a) or the successor in business under clause (b) of that sub-section by way of writing off such liability in his accounts.

Explanation 2:- For the purposes of this sub-section, "successor in business" means, -

(*i*)	where there has been an amalgamation of a company with another company, the amalgamated company;
(*ii*)	where the first-mentioned person is succeeded by any other person in that business or profession, the other person;
(*iii*)	where a firm carrying on a business or profession is succeeded by another firm, the other firm;
(*iv*)	where there has been a demerger, the resulting company.'

To attract the above provision, the Assessing Officer, based on available material ought to have verified as to whether there is any remission or cessation of liability. In the absence of any such verification, the Assessing Officer could not have added such amount of credit for taxation. Therefore, the Tribunal has rightly held that in the absence of any material evidence, the assessing authority could not have invoked Section 41(1) of the Act. We see no error or illegality in the order passed by the ITAT.

7. As stated above, no substantial question of law would arise for consideration in the appeal. Accordingly, the appeal is dismissed."

9. In the present case, the assessee has submitted the confirmations from the sundry creditors and the CIT(Appeals) has given a clear finding in page 18 in this regard the extract of which is reproduced below –

On the basis of the evidences submitted as above, the assessee has successfully proved the existence of the sundry creditors and confirmation letters from various parties including NPCC (A Govt. of India Enterprises) proves the sundry creditors. The addition is against the law

as the section 41(1) of the Income Tax Act is not applicable in the present case. Therefore the addition of Rs.3,24,67,217 on the ground of sundry creditors u/s.41(1) is hereby deleted. This ground of appeal is allowed

10. Therefore it is an admitted fact that the assessee has managed to obtain confirmation from the sundry creditors. It is to be noted here that the Hon'ble High Court in the above case has clearly laid down the principle that without proper verification of the amount standing to the credit of the provision account, it cannot be concluded as a remission or cessation of liability. However, we also see merit in the argument of the ld. DR that the AO was not given an opportunity to examine various details submitted by the assessee before the CIT(Appeals) with regard to confirmations received from the various creditors which is not compliance with Rule 46A. In the light of this discussion we remit the issue back to the AO to cross-examine the confirmations submitted by the assessee with regard to sundry creditors after giving reasonable opportunity of being heard to the assessee. The AO is directed to keep in mind the order of the jurisdictional High Court in the case of *B.T. Nagaraja Reddy (supra)* while examining the issue of addition u/s. 41(1).

11. In the CO, the assessee has raised grounds with regard to the case being taken up for limited scrutiny and that the AO proceeded to examine other issues with regard to sundry creditors which is beyond the scope of limited scrutiny. During the course of hearing, the ld.AR though presented arguments with regard to this ground conceded that the issues can be adjudicated only on merits based on the grounds

raised by the revenue in the appeal. Accordingly, we are not adjudicating the grounds raised in CO leaving them open.

12. In the result, the appeal of the revenue is allowed for statistical purposes and the CO is partly allowed.

Pronounced in the open court on this 28th day of October, 2022.

Sd/-	Sd/-
(N V VASUDEVAN)	(PADMAVATHY S)
VICE PRESIDENT	ACCOUNTANT MEMBER

Bangalore,
Dated, the 28th October, 2022.
/*Desai S Murthy* /

Copy to:
1. Appellant 2. Respondent 3. CIT 4. CIT(Appeals)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.