

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND

DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER

ITA No. 309/SRT/2023 (AY: 2015-16)

(Physical Hearing)

Sudhir Kapoorchand Gandhi, C/o-Ateet Gandhi, 3, Shepway Bungalow, Off Juhu Tara Road, Azad Lane, Juhu Koliwada, Near Italian Bakery, Behind 35A, Aashit, Mumbai-400049. PAN No. ABGPG 4775 P	Vs.	A.C.I.T., Circle-2(3), Surat,
Appellant/ Respondent		Respondent/ Assessee

Assessee represented by	Shri Hiren Vepari, C.A.
Department represented by	Shri Airiju Jaikaran, CIT-DR
Date of Institution of Appeal	01/05/2023
Date of hearing	27/09/2023
Date of pronouncement	06/10/2023

Order under Section 254(1) of Income Tax Act

PER: PAWAN SINGH, JUDICIAL MEMBER:

1.This appeal by the Assessee is directed against the order of learned National Faceless Appeal Centre, Delhi (in short, the NFAC)/ Commissioner of Income Tax (Appeals) (in short, the Id. CIT(A)) dated 02/03/2023 for the Assessment Year (AY) 2015-16. The assessee has raised following grounds of appeal:

- "1. The learned CIT(A), NFAC having passed an ex parte order, the matter may be remitted back to the file of the learned CIT(A).*
- 2. The learned CIT(A), NFAC was not justified in confirming the addition made u/s 41 particularly when there was no cessation or remission of liability in respect of the overseas suppliers.*
- 3. Nothing happened in this year that called for the remission of liability that would justify an addition.*

4. *The department cannot unilaterally decide on the cessation of liability and that too in the year under appeal.*
 5. *All the above grounds are without prejudice to each other.*
 6. *The appellant craves leave to add, alter or vary any of the grounds of appeal.”*
2. Brief facts of the case are that the assessee is individual, engaged in the business of processing, trading and export of diamonds in the name and style of Nidhi Exports, Mumbai. The assessee filed his return of income for A.Y. 2015-16 on 30/09/2015 declaring NIL income. The case was selected for scrutiny. During the assessment, the Assessing Officer noted that the assessee has shown sundry creditors amounting to Rs. 26.59 crores from various creditors. The assessee was issued show cause notice dated 01/06/2017 to furnish details of all sundry creditors. The assessee files his reply on 04/09/2017. The Assessing Officer recorded that the required details were not furnished by the assessee. Vide notice dated - 07/09/2017, the assessee was again asked to submit details of sundry creditors and ultimately, a final show cause notice dated 20/11/2017 was issued to the assessee for furnishing the details. The Assessing Officer recorded that in response to final show cause notice, the assessee filed details of sundry creditors for import, local trading and labour charges vide reply dated 29/11/2017. The Assessing Officer recorded that vide first show cause notice dated 01/06/2017, the assessee was asked to furnish the details of sundry creditors in the format given alongwith notice. The assessee ultimately vide reply dated 06/12/2017 given details of 14

creditors aggregating of Rs. 29.59 crores which was outstanding for more than three years for import of goods and local trading.

3. On the basis of such discrepancies, the Assessing Officer issued final show cause notice dated 11/12/2017. The contents of such show cause notice is recorded in para 4.1 on page No. 3 of assessment order. In the show cause notice, the Assessing Officer asked the assessee why the whole amount should not be treated as cessation of liability under Section 41 and added to the income of assessee. The Assessing Officer in the show cause notice mentioned that the reply of assessee should reach within three days of said notice, failing which it will be presumed that the assessee has nothing to say. The assessee filed his reply dated 15/12/2017. Relevant part of reply is reproduced by Assessing Officer in para 4.2 of assessment order. In the reply, the assessee stated that the outstanding credit of import is Rs. 2.72 crore and local outstanding is Rs. 26.86 crores. The assessee further submitted that he suffered heavy loss in past and as a result thereof he was unable to recover dues from his debtors. Similarly for huge outstanding receivables, he faced financial and working capital crunches and was unable to make payment to the creditors. There are outstanding receivables and payables. Such trend is normal in the diamond industries and on mutual understanding of the vendors and assessee, the payments outstanding was prolonged. The assessee submitted that unpaid liability in respect of trading liability

incurred by the assessee cannot be added to the income of assessee under Section 41(1) merely because it remained unpaid for sufficient long time. The assessee has not got any benefit. The assessee further vide reply dated 18/12/2017 submitted that out of sundry creditors for local purchases of Rs. 1.50 crore was paid to Kushal Exports, Mumbai against their outstanding dues in F.Y. 2015-16. Similarly to discharge the liability, the stock of rough diamond of Rs. 1.00 crore were sold to Yogi Diam against their outstanding in F.Y. 2016-17. The extract of ledger account of both the parties were furnished. The assessee also submitted that the application of provisions of Section 41 will create hardship to the assessee which is against the natural justice.

4. Reply of assessee was not accepted by the Assessing Officer. The Assessing Officer noted that outstanding of 14 creditors in the books of assessee since 2008 to 2012 are more than three years. No subsequent payment or transaction with these creditors. The assessee in his reply dated 15/12/2017 stated that when his financial position will improve he will make payment accordingly and the credit period was mutually agreed for extension. The Assessing Officer rejected such explanation in absence of any agreement with creditors. The Assessing officer also noted that some confirmation of creditors were filed, accordingly, the Assessing Officer treated the liability as fictitious and added amount of Rs. 29.59 cores on account of cessation of liability under Section 41 of the Act and

added to the income of assessee. The Assessing Officer also made addition of income from other sources of Rs. 23,336/- without discussing anything in the assessment order and after granting deduction of Rs. 1,60,000/- under Chapter VIA and allowing set off of brought forward losses and unabsorbed depreciation for A.Y. 2012-13 and 2013-14 of Rs. 6.93 crores and assessed total income at Rs. 22.64 crores in the assessment order dated 26/12/2017 passed under Section 143(3) of the Act.

5. Aggrieved by the additions in the assessment order, the assessee filed appeal before the Id. CIT(A) on 08/01/2018. Before the Id. CIT(A), the assessee challenged the addition of Rs. 29.59 crores made under Section 41 of the Act only. The appeal of assessee was dismissed by taking a view that the assessee was served notice for making compliance or submission on four occasions, the assessee sought adjournment on three occasions and ultimately vide notice dated 13/02/2023 for making compliance by 28/02/2023, no response was made. The Id. CIT(A) thus adjudicated the appeal on the basis of material on record and concluded that the Assessing officer in para 4.4 of his order has drawn a logical conclusion and the assessee has not produced any evidence or argument for taking different conclusion as of Assessing Officer and thereby dismissed the appeal. Further aggrieved, the assessee has filed present appeal before this Tribunal.

6. We have heard the submissions of learned authorised representative (Id AR) for the assessee and the learned departmental representative (Id DR) for the revenue. At the outset of hearing, the Id. AR of the assessee submits that he is not pressing ground No. 1 of his appeal and would straightway make his submission on the merit of the case. The Id. AR of the assessee also filed his written submission without seeking permission of the Bench running into seven pages and relied on 23 decisions on the merit of the case. Copy of all such decisions was furnished.

On the merit of addition, the Id. AR of the assessee made his submission exactly on the line of written submission filed before the Tribunal. The Id. AR of the assessee submits that none of the liability outstanding against 14 creditors in the books of assessee as on 31/03/2015 cease to exist. All the liabilities continued. To substantiate such claim, the assessee furnished confirmation before the Assessing Officer vide letter dated 22/12/2017, copy of such letter is enclosed. Once the parties made confirmation about the receivables even in the subsequent years, no addition was attracted. All confirmations bear the address and PAN number. The only reason of Assessing Officer for making addition, was that the payments to creditor were outstanding since long. The assessee explained the reasons and the confirmation was furnished. To support such submission, the Id. AR of the assessee relied on the decision of Hon'ble Supreme Court in CIT Vs Sugauli Sugar Works

(P.) Ltd. (1999) 102 Taxman 713 (SC) wherein it was held that if he 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 absence of creditor, it is not possible for authority to come to a conclusion that debt was barred and had become enforceable. The Hon'ble Gujarat High Court in the case of CIT Vs G.K. Patel & Co. (2013) 29 taxmann.com 248 (Guj) wherein it was held that where there is no declaration by assessee that it does not intend to honor its liabilities nor is there any discharge of debt, provisions of Section 41(1) cannot be invoked. Hon'ble Delhi High Court in the case of CIT Vs. Hotline Electronics Ltd. (2012) 18 taxmann.com 363 (Delhi) wherein it was held that unpaid liability cannot be added to the assessed income under Section 41(1) merely because they remained unpaid for a sufficiently long time. The Revenue authorities to show that the liability to pay creditors has seized or has been remitted by creditors. The Bangalore Tribunal in the case of Smt. Victoria Roberts Vs ACIT (2012) 28 taxmann.com 220 (Bang.) held that when no confirmation was filed from creditor it could not lead to conclusion that there was cessation or remission of liability to the assessee. The Id. AR of the assessee submits that most of the cases he has relied, similar view was taken. The Id. AR of the assessee prayed for deleting the entire addition.

7. On the other hand, the learned Commissioner of Income Tax-Departmental Representative (Id. CIT-DR) for the revenue supported the orders of lower authorities. The Id. CIT-DR for the revenue submits that the Assessing Officer has given full opportunity to the assessee to file confirmation of the creditors in the format given alongwith show cause notice dated 01/06/2017. The assessee despite repeated direction and request has not furnished the complete details. At the fag-end of limitation period, the assessee filed confirmation of some of the creditors. Such confirmation was not supported with any other material if they agreed for extension of time or not. The assessee intentionally and deliberately delayed the proceedings till the end of time period of completion of assessment order. Before the Id. CIT(A), the assessee again not furnished any submission despite giving four opportunities as recorded in para 4 of order of Id. CIT(A). The assessee intentionally and deliberately delayed the proceedings. The assessee again in response to notice dated 13/02/2023 not furnished any submission till 28/02/2023, the Id. CIT(A) has no option except to decide the appeal on the basis of material available before him. No material or evidence was furnished by assessee for verification of facts or investigation of fact either by Assessing Officer or from the office of Id. CIT(A). The Id. CIT-DR for the revenue submits that the Id. CIT(A) has no option except to confirm the order of Assessing Officer.

8. In his without prejudice submissions, the Id CIT-DR for the revenue submits neither the facts nor evidence if any was examined by Assessing Officer or by the Id. CIT(A), therefore, the matter may be restored back to the file of Id. CIT(A) with direction to adjudicate the issue on merit. On reliance of various decisions by the Id. AR of the assessee, the Id. CIT-DR for the revenue submits that there are various decisions favouring the revenue that when liability is not discharged for more than 6-7 years, it is nothing but a fictitious liability.
9. We have considered the rival submissions of both the parties and have gone through the orders of the lower authorities carefully. We find that the Assessing Officer during the assessment issued first show cause notice on 01/06/2017 for seeking the details of sundry creditors exceeding Rs. 1.00 lacs in the format supplied alongwith show cause notice. The assessee on repeated directions, furnished the details for the first time vide reply dated 15/12/2017 and confirmation of some of the creditors only on 22/12/2017. The Assessing Officer not accepted such confirmation on the ground that such confirmation is not supported with other material evidence. The Assessing Officer made addition of entire liability. We find that the Id. CIT(A) confirmed the order of Assessing Officer in absence of compliance or submission. Though, order of Id. CIT(A) is not as per mandate of Section 250(6) of the Act. Perusal of grounds of appeal shows that initially, the assessee raised grounds of

appeal raising objection that the Id. CIT(A) passed ex parte order and matter may be remitted back to the file of Id. CIT(A), though such ground of appeal was not pressed at the time of making submission by Id. AR of the assessee.

10. We find that neither the Assessing Officer got sufficient opportunity to examine the veracity of creditors and the details were furnished at the fag-end of limitation period of passing the assessment order. The time period for passing the assessment order was only upto 31.12.2017 and the required details or confirmations was filed for the first time only on 22.12.2017. Similarly, before the Id. CIT(A), no details, confirmation, submission or any explanation was filed by the assessee. The Id. CIT(A) confirmed the action of Assessing Officer in a single sentence that the assessee has not either produced any evidence nor has submitted any argument on the basis of which a conclusion different from the decision of the Assessing Officer can be formed and dismissed the appeal. Considering the overall facts and circumstances of the case, neither the assessee furnished complete details in time nor Id. CIT(A) gave sufficient and reasonable time despite seeking adjournment by the assessee. Therefore, keeping in view the principles of natural justice and the quantum of addition, the matter is restored back to the file of Id. CIT(A) to adjudicate the issue afresh. The assessee is also directed to be more vigilant and to make compliance timely to the notices issued by the Id.

CIT(A). The Id. CIT(A) would be at liberty to seek remand report from Assessing Officer, on the submissions or the evidences if any, if so desired. With this direction, the grounds of appeal raised by the assessee are allowed for statistical purposes only. In the result, the grounds of appeal raised by the assessee are allowed for statistical purpose.

11. In the result, this appeal of assessee is allowed for statistical purposes.

Order announced in open court on 06th October, 2023.

Sd/-
(Dr. ARJUN LAL SAINI)
ACCOUNTANT MEMBER

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Surat, Dated: 06/10/2023

**Ranjan*

Copy to:

1. Assessee
2. Revenue
3. CIT
4. DR
5. Guard File

By order

Sr. Private Secretary, ITAT, Surat