

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
DR. ARJUN LAL SAINI, ACCOUNTANT MEMBER
ITA No. 257/SRT/2022 (AY: 2016-17)
(Hearing in Virtual Court)

A.C.I.T. Central Circle-4, Surat.	Vs.	M/s Valencia Corporation, S. No. 400, T.P. No. 29 (Vesu-Rundh Magdalla), F.P. No. 45/2, Nr. Siddhivinayak Temple, Vesu, Surat (Gujarat) PAN : AAKFV 2329 K
APPELLANT		RESPONDEDNT

C.O. No. 17/SRT/2023
(Arising out of ITA No. 257/SRT/2022)(AY: 2016-17)

M/s Valencia Corporation, S. No. 400, T.P. No. 29 (Vesu- Rundh Magdalla), F.P. No. 45/2, Nr. Siddhivinayak Temple, Vesu, Surat (Gujarat) PAN : AAKFV 2329 K	Vs.	A.C.I.T. Central Circle-4, Surat.
APPELLANT/OBJECTOR		RESPONDEDNT

Department by	Shri Ritesh Mishra, CIT-DR
Assessee by	Shri Brijesh Ariwala, C.A.
Date of hearing	06/11/2023
Date of pronouncement	09/11/2023

Order under section 254(1) of Income Tax Act

PER PAWAN SINGH, JUDICIAL MEMBER:

1. The appeal by the Revenue and Cross Objection (CO) by the assessee are directed against the order of learned Commissioner of Income tax (Appeals)-4, Surat [‘ld. CIT(A)’ for short] dated 14/06/2022 for the Assessment Year (AY) 2016-17. The Revenue in its appeal has raised the following grounds of appeal:-

“1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the addition of Rs.2,58,02,535/- made by the Assessing Officer on account of unpaid liabilities under Sec.41(l)

of the Act to Rs. 1,31,623/- and thereby giving a relief of Rs.2,56,70,912/-.

2. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in ignoring the fact that the assessee has failed to furnish the details called for by the AO during the course of assessment proceedings in respect of the unpaid liabilities Rs.2,58,02,535/- to prove that these liabilities were existing or have not ceased to exist despite providing sufficient opportunities by the AO and the Ld. CIT(A) has also erred in admitting the additional evidences furnished/submissions made by the assessee during the course of appellate proceedings without giving any cogent reason and ignoring the fact that the assessee's case was not falling under any of the criteria prescribed under Rule 46(1) of the I. T. Rules, 1962.*
3. *In addition and alternative to Ground No. 1 & 2, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the fact that instead of showing the correct liability against the work contractor where TDS is supposed to be deducted, the assessee created a fiction of sub-creditors in its books in the name of parties which had no commercial transactions with the assessee firm and, therefore, the Assessing Officer has rightly treated the liability pertaining to Konark Infratech as extinguished under Sec.41(1) of the Act.*
4. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the addition of Rs. 1,99,50,000/- made by the Assessing Officer on account unexplained capital introduced by the partners of the firm, without appreciating the fact that the partners of the assessee-firm who have introduced fresh capital during the year under consideration has shown very low or NIL income in the year under consideration in comparison to the capital introduced and the assessee has also failed to furnish necessary evidences or to explain the creditworthiness of those partners.*
5. *It is, therefore, prayed that the order the Ld. CIT(A)-4, Surat may be set aside and that of the AO may be restored to the above extent.*
6. *The appellant craves leave to add, alter, amend and/or withdraw any ground(s) of appeal either before or during the course of hearing of the appeal.”*

2. The assessee in its CO has raised following grounds of appeal:

- “1. *In view of the facts and circumstances of the case and in law, the Ld. CIT(A)-4, SURAT has rightly deleted the additions made by assessing officer of to the extent*

- of Rs. 2,56,70,912/- on account of unpaid liabilities u/s. 41(1) of the Income Tax Act, 1961.
2. *In view of the facts and circumstances of the case and in law, the Ld. CIT(A)-4, SURAT has rightly considered the facts of the case and evidences produce before it, in consideration of rule 46A and powers envisage in section 250(4) and section 250(5) of the I. T. Act, upon CIT(A), after providing sufficient opportunity to AO for perusal of additional evidences furnished by the assessee during the course of appellate proceedings, with clearly stating **"as per clause (ii) of Rule 46A of the IT Rules, the additional evidences stands admitted."***
 3. *In view of the facts and circumstances of the case and in law, interpretation of rule 46A of Income-tax Rules is that it only fetters rights of assessee to produce additional evidence but it does not restrain Commissioner (Appeals) power under section 250(4) or section 250(5).*
 4. *In addition and alternative to cross objection No. 1, 2, & 3, in view of the facts and circumstances of the case and in law, the Ld. CIT(A) has rightly appreciated the facts that entire amount of Rs. 2,56,70,912/- pertains to works contractor(i.e. Konark Infratech) and TDS was deducted in concern FYs in which bills were raised by the works contractor (i.e. Konark Infratech). Also, Ld. CIT(A) has rightly considered the requirements of section 41(1) of the Act, and onus cast upon the assessing officer to prove that conditions of section 41(1) of the Act have to be fulfilled to treat the liability as income on account of remission or cessation in the particular AY.*
 5. *In addition and alternative to cross objection No. 1, 2, 3, & 4, in view of the facts and circumstances of the case and in law, the Ld. CIT(A) has rightly deleted the additions of Rs. 1,99,50,000/- made by assessing officer on account of unexplained capital introduced by the partners of the firm, pointing that the Ld. AO did not take cognizance of details of partners capital introduction furnished by assessee on ITBA portal on 14/12/2018, as required by the assessing officer during the assessment proceedings.*
 6. *In addition and alternative to cross objection No. 1, 2, 3, 4 & 5, in view of the facts and circumstances of the case and in law, the remand report prepared by Ld. AO after availing time of over 4 months, has not gone through any aspects of the additional evidences produce by the assessee during the course of appellate proceedings, and contentions and submission made by the assessee is partly read and partly understood, without any comment on the merits of the additional evidences produced, or without any cogent reason as to why such additional evidences should not be accepted at appellate stage in the interest of natural justice.*
 7. *It is therefore prayed that order of the Ld. CIT(A) may be restored and appeal filed by the department may be dismissed.*
 8. *The respondent craves leave to add, alter, amend and/or withdraw any cross objections of appeal either before or during the course of hearing of the appeal."*
3. Brief facts of the case are that the assessee is a firm, engaged in development of property. The assessee while filing its return of

income for A.Y. 2016-17 declared NIL income. The case was selected for scrutiny. During the assessment, the Assessing Officer noted that the assessee has shown huge credit liability in its balance sheet. The assessee was asked to furnish the details of such liability. The assessee furnished the details of unpaid liability of five creditors, details of which are recorded in para-3 of assessment order recorded. The Assessing Officer issued show cause notice to the assessee as to why the unpaid liability should not be treated as no longer payable and cease to exist. The assessing Officer initially recorded that no reply was furnished by assessee nor any supporting evidence to justify such claim was furnished. The Assessing Officer in para 3.2 of assessment order, noted that the assessee furnished some self-serving document, no confirmation of creditor was filed. The Assessing Officer invoked the provisions of Section 41(1) of the Income Tax Act, 1961 (in short, the Act) and made addition of Rs. 2.58 crores.

4. The Assessing Officer further noted that the assessee has introduced partners' capital. The Assessing Officer prepaid the summary of such introduction of capital of Rs. 1.99 crore introduced by this partner. The Assessing Officer issued notice under Section 142(1) of the Act to furnish the genuineness and creditworthiness of partner who had introduced such capital. The Assessing Officer recorded that the assessee failed to furnish copy of balance sheet of such partners and supporting evidence to substantiate the creditworthiness of such

partner, the Assessing Officer treated the capital of partners as unexplained credit under Section 68 of the Act.

5. Aggrieved by the additions in the assessment order, the assessee filed appeal before the Id. CIT(A). Before the Id. CIT(A), the assessee filed its written submission as recorded in para 6.1 of his order. In the written submission, the assessee submitted that during the assessment, the assessee furnished confirmation of original creditors and the Assessing Officer failed to appreciate such facts and circumstances explained by the assessee. All entries of sub-creditors and confirmation by the authorised person of the original creditor was filed. The original creditor has three sub-creditors and have liability against them. Upon creation of such sub-creditors, the assessee made payment to original creditor in Financial Year (FY) 2014-15 and 2015-16 and liability was paid in due course, when funds were available. There is no cessation of liability rather it was diversion of liability from original creditor to sub-creditor to whom payments were made and expenses were claimed as deduction. The contention of Assessing Officer was that the credit was outstanding for more than 3-4 years and is not sustainable. The assessee relied on the decision of Hon'ble Apex Court in Sugauli Sugar Works Pvt Ltd. 236 ITR 518 (SC) and other decisions wherein it was held that there cannot be a remission or cessation of liability, merely because liability remained unpaid for three years, when the creditors have confirmed liability by giving confirmation. The assessee again

furnished the details of ledger account of all the creditors alongwith their names and other details. The assessee specifically raised plea that one of the original creditor Konark Infratech has raised invoices of Rs. 7.32 crores in F.Y. 2014-15 against which they have made payment of Rs. 9.09 crores. Similarly, one of the invoices of Rs. 2.21 crore was raised in F.Y. 2015-16 against which payment of Rs. 1.70 crore was made to them. Such instances clearly indicate that the creditors are regularly paid their dues and are no long overdue or ceased to exist for bringing such liability under the ambit of Section 41(1) of the Act. For Jay Steel, Parth Trade and Dee Pee Sales, the assessee submitted that they are sub-creditors created by original creditor to reduce its own liability, which was agreed by the assessee and liability of amount was paid I F.Y. 2014-15 and 2015-16 and only current year liabilities are outstanding. For Nilkanth Fabrication Works, the assessee submitted that Nilkanth Fabrication Works and MRS Enterprise are regular supplier and creditors and having no long dues and their dues are paid regularly against the invoices raised by them.

6. On the other addition of partners' capital contribution, the assessee stated that the Assessing officer erred in making such addition. The assessee introduced capital in assessee's firm whereas required details like ledger account, ITR copy, balance sheet and copy of extract of bank book of partners were furnished in the assessment proceedings under acknowledgement in e-proceedings on

14/12/2018. The Assessing Officer ignored such submission and framed the assessment order in a hurriedly manner to create and tax demand. The genuineness and creditworthiness of partners and source of partners' capital from bank could have been ascertained by making effort by Assessing Officer. The assessee furnished complete details of such partner and discharged their liability, if Assessing Officer was not convinced about the creditworthiness of partner, he could make required enquiry. To support their view, the assessee relied upon the decision of Hon'ble Gujarat High Court in CIT Vs Pankaj Dyestuff Industries in Income Tax Reference No. 241 of 1993 dated 06/07/2005.

7. The ld. CIT(A) after considering the contents of assessment order and the submission of assessee forwarded the submission to Assessing Officer for his remand report. The ld. CIT(A) recorded that the Assessing Officer has not given his specific comment on the merit of submission and merely objected against the admission of evidence under Rule 46A of the Income Tax Rules, 1962 (in short, the Rules). The ld. CIT(A) on considering the submission of assessee that all creditors were running creditors and outstanding dues for only one or two years and for the change of constitution of firm and bank accounts remained frozen, the assessee could not make regular payment. On considering such contention, the additional evidence was accepted by the ld. CIT(A). While considering the merit of case on the addition under Section 41(1), the ld. CIT(A) noted that out of

five creditors, three creditors are sub-contractors of Konark Infratech relating to construction contract. Konark Infratech is a partnership firm engaged in executing civil contract and in F.Y. 2014-15 requested the assessee to make direct payment to their three suppliers namely Jay Steel, Deep Pee Sales Corporation and Parth Trade. On the instruction of Konark Infratech, the assessee by way of journal entries transfer, the part payment payable to Konark Infratech to three sub-contractors firm and thereafter making regular payments to Konark Infratech. The outstanding shown in the assessee's book payable to Jay Steel, Deep Pee Sales Corporation and Parth Trade was on account of liability payable to Jay Steel, Deep Pee Sales Corporation and Parth Trade. The ledger account of Jay Steel, Deep Pee Sales Corporation and Parth Trade was produced which shown that there is regular payment against civil work except the period during which bank account remains fridge. Thus the liability against Jay Steel, Deep Pee Sales Corporation and Parth Trade has not ceased to exist for making addition under Section 41(1) of the Act. Against remaining two creditors, namely MRS Enterprise and Nilkanth Fabrication Works, the outstanding was merely for one year as on 31/03/2016. The ld. CIT(A) held that the assessee failed to substantiate about these two creditors, therefore, the addition against these two creditors were sustained. The ld. CIT(A) further held that for making addition under Section 41(1) of the Act, the liability should have been ceased to exist or cessation of particular

- liability which has not been proved by the Assessing Officer. It is not the case of Assessing Officer that creditors have written off the liability in their books of account. No valid reasons are given by the Assessing Officer for invoking provisions of Section 41(1) of the Act.
8. On the addition of capital contribution by partners, the ld. CIT(A) recorded that the contention of assessee is that the assessee furnished complete details of partners of ITBA Portal on 14/12/2018 consisting their ITR, computation of total income, bank passbook and balance sheet and no cognizance of such evidences were taken by the Assessing Officer. The ld. CIT(A) on considering such submission and the evidences recorded that the bank details, return of income and capital accounts of all the partners shows that all these persons have contributed their capital through banking channel. The source of their fund is proved in their individual returns and balance sheet. Therefore, source of capital is introduced by all these partners. Accordingly, the addition of Rs. 1,99,50,000/- was deleted. Aggrieved by the order of ld.CIT(A), the revenue has filed the present appeal before this Tribunal. On service of notice of memo of appeal, the assessee has filed its cross objection as recorded above raising the grounds of C.O. as noted above.
9. We have heard the submissions of learned Commissioner of Income Tax-Departmental Representative (CIT-DR) for the revenue and the learned Authorised Representative (AR) of the assessee and have gone through the orders of the lower authorities carefully. Ground

No. 1 of the appeal relates to addition under Section 41(1) of the Act of Rs. 2.58 crores. The ld. CIT-DR for the revenue submits that the assessee was showing liability of creditors for several years. No confirmation of such creditors were furnished nor any submission was given to the Assessing Officer to substantiate the outstanding liability despite giving ample opportunity to the assessee. The ld. CIT(A) accepted the additional evidence without showing any reasonable cause as per Sub-Rule (1) of Rule 46A of the Rules. The Assessing Officer objected and raised plea that despite giving sufficient opportunity, the assessee has not furnished any evidence. The ld. CIT(A) granted relief to the assessee in accepting the contention of assessee. Ground No. 2 of the appeal which relates to addition on account of capital contribution, the ld. CIT-DR for the revenue submits that despite giving numerous opportunity, the assessee failed to furnish the creditworthiness of all the partners about their contribution. Before the ld. CIT(A), the assessee took a plea that all details were furnished on ITBA Portal on 14/12/2018. Before 14/12/2018, the assessee was given more than 8-9 opportunities to furnish such details but the assessee has not furnished any evidence to substantiate the creditworthiness of all the partners. The ld. CIT(A) despite objection by Assessing Officer, admitted the evidence and accepted the submission of assessee. The ld. CIT-DR for the revenue prayed to reverse the finding of ld. CIT(A)

- on both the additions and to restore the addition made by Assessing Officer.
10. In alternative submission, the Id. CIT(A) for the revenue submits that the matter may be restored back to the file of Assessing Officer to consider all the evidences on both the issues/additions and to pass fresh order.
11. On the other hand, the Id. AR of the assessee has supported the order of Id. CIT(A). On the addition which relates addition under Section 41(1) of the Act, the Id. AR of the assessee submits that during the assessment, the Assessing Officer made addition against unpaid credit liability by treating the same as ceased to exist. The Assessing Officer failed to appreciate that the liability was not shown for a long period rather it was the current liability against construction contractor and the supplier. There was a dispute amongst the partner and the accounts of assessee firm was fridge in temporary in 2017 till June, 2018, so the assessee firm could not make certain regular payments to supplier or contractor. The assessee furnished complete details and bifurcation of outstanding liability and the payment made to the contractor or supplier from time to time. The Id. CIT(A) on appreciating the fact that the provisions of Section 41(1) of the Act is not applicable on the credit liability and deleted the substantial addition except against the liability of MRS Enterprise of Rs. 21,903/- and Nilkanth Fabrication Works of Rs. 1,09,720/-. The assessee furnished complete details before the Id. CIT(A). On the

submission of assessee, the remand report was called from Assessing Officer. The Assessing Officer has not made any adverse comment on the evidences furnished by assessee rather objected against the admission of additional evidence only. The ld. CIT(A) on appreciation of submission that the assessee has sufficient and plausible reason for not furnishing the details, admitted additional evidence and further appreciated that there were three sub-creditors of one main creditor namely Konark Infratech. Konark Infratech sub-let its work to Dee Pee Sales Corporation, Parth Trade and Jay Steel. The assessee was regularly making payment to Konark Infratech which was apparent from the ledger account furnished by the assessee. The liability has not ceased to exist. To support his submissions, the ld AR for the assessee relied on the decision of tribunal in ITO Vs Shri Thadaram Khaldas Tolani in ITA No. 3194/Mum/2016 dated 20.12.2017.

12. Against ground No. 2 which relates to deleting the addition of Rs. 1.99 crore on account of capital contribution, the ld. AR of the assessee submits that complete details of partners were furnished by the assessee, there was no dispute on the identity and genuineness of transaction. The creditors were in fact the partners, contributed their capital for capital infusion, thus, the genuineness was also not in dispute. The Assessing Officer disputed the creditworthiness of partners. The assessee furnished their ITR, balance sheet and returns of income. The entire capital was received through banking

channel. No adverse evidence was brought by Assessing Officer except doubting the creditworthiness of the partner. The ld. CIT(A) on appreciation of facts, deleted the addition. The ld. AR of the assessee submits that he fully supports the order of ld. CIT(A) on both the issues. The ld AR for the assessee also relied on the decision of Jurisdictional High Court in PCIT Vs Vaishnodevi Refoils and Solvex in Tax Appeal No. 846 of 2017 dated 28.11.2017.

13. We have considered the rival submissions of both the parties and have gone through the orders of the authorities below carefully. We find that the Assessing officer made addition under Section 41(1) of the Act of Rs. 2.58 crores by taking a view that the liability shown by the assessee is ceased to exist and that the assessee has not substantiated the liability despite giving opportunity by filing evidences or submission that the liability is not ceased to exist. Similarly, the Assessing Officer also made addition of Rs. 1.99 crore on account of capital contribution by partner by taking a view that the assessee failed to substantiate the creditworthiness of partners. We find that before the ld. CIT(A), the assessee furnished details of creditors, their ledger account, account confirmation and also raised plea that there were three main creditors. One of the creditor namely Konark Infratech was the construction contractor who has sub-let work to three sub-contractors namely Dee Pee Sales Corporation, Parth Trade and Jay Steel.

14. So far as credits of Nilkanth Fabrication works and MRS Sales Enterprise are concerned, we find that the credit liability of these creditors were confirmed. No cross appeal for grounds of appeal against confirmation of such addition is raised or argued by the Id. AR of the assessee, therefore, the addition qua Nilkanth Fabrication works and MRS Sales Enterprise attains finality.
15. Turning to the liability of Konark Infratech, the assessee claimed that Konark Infratech sublets its contract to three sub-contractors namely Dee Pee Sales Corporation, Parth Trade and Jay Steel. We find that the Id. CIT(A) on appreciation of evidence furnished by assessee, clearly held that the assessee is regularly making payment to Konark Infratech which is apparent in the ledger account. Dee Pee Sales Corporation, Parth Trade and Jay Steel were the sub-contractors of Konark Infratech and on the request of Konark Infratech, they were treated as creditors, however, on making payment to Konark Infratech, their entries were reversed by the journal entries. The assessee has regularly making payment to such creditors and credits are not more than one year and there is no evidence that liability ceased to exist.
16. We find that the Assessing Officer merely doubted the trade liability without bringing any adverse material on record. The Assessing Officer has not made any independent investigation of facts. No notice under Section 133(6) or 131 of the Act was issued to Konark Infratech. The Assessing Officer without having any evidence in his

possession, treated the liability as ceased to exist without appreciating the condition precedent for invoking Section 41(1) of the Act. We find that coordinate bench of Mumbai Tribunal in ITO Vs Shri Thadaram Khaldas Tolani (supra) held that when the assessee has furnished names and address of the sundry creditors and other relevant details the assessing officer could have conducted necessary enquiry with the concerned creditors for asserting the facts whether the liability still continuing or not. Without making any such enquiry, the assessing officer cannot presume cessation of liability.

17. Thus, in view of the aforesaid factual and legal discussion, we do not find any illegality or infirmity in the order passed by the Id. CIT(A) in deleting the addition under Section 41(1) of the Act which we affirm. In the result, ground No. 1 to 3 are dismissed.
18. So far as deleting addition under Section 68 of the Act of Rs. 1.99 crore on account of capital contribution by partners are concerned, we find that the assessee furnished all the evidences to discharge primary onus about the creditworthiness of partner. The Assessing Officer has not investigated the fact and without bringing any adverse material just treated the capital contribution as unexplained credit. At the cost of repetition, we may reiterate that the identity of partners cannot be disputed, identity and genuineness of transactions are also not in dispute. The dispute was only regarding creditworthiness. The assessee has furnished bank details, ITR and their balance sheets. Before us, the assessee has furnished the bank statement and

income tax return of all the partners who had contributed such capital.

19. We find that Jurisdictional High Court in PCIT Vs Vaishnodevi Refoils and Solvex (supra), while referring and relying on its earlier decision in CIT Vs Pankaj Dyestuff Industries dated 06th July 2005 in Income Tax Reference No. 241 of 1993, held that when the assessee has furnished the details with regards to source of the capital introduced in the firm and concerned partner had confirmed such contribution, the assessee has duly discharged its onus cast upon it. If the assessing officer was not convinced about the creditworthiness of the partner who had made the capital contribution, the enquiry had to be made at the end of the partner and not against the firm.
20. In view of the aforesaid factual and legal position, we find that the ld. CIT(A) on appreciating the facts and considering evidences of creditworthy of partners deleted the addition, therefore, we do not find any illegality or infirmity in the finding of ld. CIT(A) which we affirm.
21. In the result, this appeal of revenue is dismissed.
22. So far as cross objection of assessee is concerned, we find that the assessee has not raised any independent grounds of appeal challenging any addition or granting partial relief. The assessee has raised all the grounds of appeal supporting the finding of ld. CIT(A). Considering the fact that no new grounds of appeal has raised in

the cross objection excepting supporting the contention of ld. CIT(A) order, therefore, adjudication on the grounds of cross objection of assessee have become academic and accordingly dismissed as infructuous.

23. In the final result, the appeal of revenue is dismissed and the cross objection of the assessee is also dismissed as infructuous.

Order pronounced on 09/11/2023 in open court.

Sd/-
(Dr. ARJUN LAL SAINI)
ACCOUNTANT MEMBER
Surat, Dated: 09/11/2023

**Ranjan*

Copy to:

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

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

By Order

Sr. Private Secretary, ITAT Surat