IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Sanjay Arora, Accountant Member and
Shri Manomohan Das, Judicial Member

ITA No. 211/Coch/2023 : Assessment Year: 2014-2015

Garuda Marketing Associates V/490, Oasis Shopping Complex Peringavu, Trichur – 680 018. [PAN:AACFG2340R]	vs.	The Income Tax Officer Ward 2(2) Thrissur.
(Appellant)		(Respondent)

Assessee by:	Sri. Narayanan P Potty, Advocate
Revenue by:	Smt. J M Jamuna Devi, Sr. DR

Date of Hearing:	16.11.2023
Date of Pronouncement:	13.02.2024

O R D E R

Per Sanjay Arora, AM

The instant appeal by the Assessee is directed against the order dated 23.01.2023 by the Commissioner of Income-tax, NFAC [CIT(A)], partly allowing the assessee's appeal contesting it's assessment under section 143(3) of the Income Tax Act, 1961 (the Act) dated 23.11.2016 for Assessment Year (AY) 2014-15.

2. The brief facts of the case are that the assessee-firm's, a wholesale dealer in food products, etc., balance sheet as at the end of the relevant year reflected sundry credits at Rs.34.73 lakhs comprising 14 creditors, which the assessee was in assessment proceedings required to confirm. The assessee, despite sufficient opportunity do so, could not, communicating (vide letter dated 21.11.2016) that the creditors were not responding to it's request for confirmation. The Assessing Officer (AO), accordingly, added the same to the assessee's returned income. In appeal, the assessee relying on the decision in *CIT v. Shri Vardhaman Overseas Limited* [2012] 343 ITR 408 (Del), claimed that there had been no remission or cessation of liability

for the AO to have invoked sec.41(1) of the Act. The ld. CIT(A), in appeal, was of the view that the liability had not been proved, which was the assessee's responsibility and, accordingly, confirmed the addition. Aggrieved, the assessee is in second appeal.

3. Before us, Sri Narayanan Potty, the learned counsel for the assessee, would, with reference to the list of the creditors at para 3 of the assessment order, submit that all the creditors, save one, at Sr.No.9 (i.e., Nambisans Diary Pvt. Ltd., Palakkad, at Rs.1.68 lakh), had been paid by the assessee in the immediately succeeding year, i.e., f.y. 2014-2015. The reason for the sole case of non-payment was the continuing litigation inasmuch as the creditor demanded a higher sum. He, however, could not answer as to why, then, the admitted amount of Rs.1,67,989 was not paid? Further, he continued, all the payments, save one, i.e., to CIG & Co., Kunnamkulam (at Rs. 19,265), who was paid in cash, were made through the banking channel. Again, he could not answer as to why the payment was not made through bank, or otherwise explain the absence of the receipt from the said creditor. He also could not answer, much less satisfactorily, the query by the Bench as to why, in that case, did the assessee not state so upfront, i.e., during the assessment proceedings, or even the appellate proceedings; the impugned orders being *sans* any reference to the stated payments. He would though close by making a prayer for the matter being remitted to the file of the AO to enable the assessee to demonstrate the fact of the stated payments through bank during the succeeding year, proving thus the existence of the liability as on 31.03.2014, the end of the relevant year. Smt. Devi, the ld. Sr. DR, would plead non-interference inasmuch as the assessee's case before both the Revenue authorities, and despite sufficient opportunity being extended, has been wholly unsubstantiated, and whose orders therefore are in accordance with law based on the facts and the material on record and the assessee's explanation.

4. We have heard the parties, and perused the material on record.

4.1 Our first observation in the matter is that, much less substantiated, the assessee had no case whatsoever before the Revenue authorities. In the absence of confirmation, on what basis, one may ask, does the assessee contend existence of liability as at the relevant year-end? There has been, it is to be noted, and which the ld. CIT(A) is also at pains to emphasize, *no explanation whatsoever* for the non-furnishing of the confirmations by the assessee and, indeed, furnishing of even a single confirmation. This is intriguing as, as now stated before us, the payment had already been made during fy 2014-15, while the hearing in the assessment proceeding took place from 05/10/2015 to 21/11/2016. This fact, with necessary material, evidencing thus the existence of the liability, would surely be advanced by an assessee not acting inimical to himself – a perversity. Continuing further, why should not the same, therefore, be regarded as unclaimed credit and, thus, the benefit arising to the assessee in the course of business, assessed as income u/s.28(i)/(iv)? Rather, the same is, in the absence of being proved, where and to the extent it arises during the relevant year, equally liable to be deemed as income u/s.68, which does not distinguish between cash and non-cash credit. That the credit/s arose ostensibly on the purchase of goods or services is in fact an explanation toward the nature of the credit/s, which an assessee is under and in terms of sec.68 obliged to explain, along with source thereof. Then, again, it may well be that the credit, representing a trade credit, had been paid since, though not accounted for in books of account. Even as there has therefore been no remission or cessation of liability as such, the liability/s reflecting in the assessee's books obtains no longer, and would warrant being assessed as income u/s.69A as unexplained money, i.e., toward discharge of the liability/s, which draws no distinction w.r.t. the time the credit arose. The AO, it may be noted, has not applied sec.41(1) – which may though apply in the facts & circumstances of the case, nor assessed the impugned sum as business income.

We say so, i.e., the fore-going, as the inference of a credit/s no longer representing an existing liability/s surely arises *qua* an unconfirmed credit,

presumably a carry-over from an earlier year. Yes, it could be argued that there is nothing to show that the remission of liability or, as the case may be, payment thereof out of books, was during the relevant year, for s. 41(1) or s. 69A to apply, the latter *qua* credits arising during an earlier year. The accounts for the immediately preceding year, reflecting it as a trading liability, since closed, stand accepted as such. It is therefore now not open now for the assessee to claim the same as a bogus liability for an earlier year and, therefore, not liable to be brought to tax for the current year. That is, an assessee is estopped from going against his own accounts, usually audited, and on the basis of which he returns income. That is, the principle of esstopple, of which 'approbate and reprobate' is a specie, applicable to the conduct of the parties, shall prevent the assessee to do so (*CIT v. V. MR.P.Firm* [1966] 56 ITR 67 (SC)). This in fact is also the purport of the amendment by way of *Explanation* to s. 41(1) by the Finance (No.2) Act, 1996, with effect from 01.04.1997. Even otherwise one cannot take advantage of his own wrong to the prejudice of another (*B.M. Malani v. CIT* [2008] 306 ITR 196, 207 (SC)). As such, notwithstanding that an assessee has not recorded, for instance, the payment (discharge) or remission of a credit appearing in it's accounts, where the same is found as not representing an actual liability as at the relevant year-end, as being claimed by him, there is a presumption as to remission or cessation of liability, or otherwise a change in its character, during the relevant year. An adverse inference, it is well-settled, would follow non-furnishing the requisite evidence (*Union of India v. Rai Deb Singh Bist* [1973] 88 ITR 200 (SC)). Also, non-passing of the entries in the books of account would not be determinative of the matter (*Kedarnath Jute Mfg. Co. Ltd. v. CIT* [1971] 82 ITR 363 (SC); *Sutlej Cotton Mills Ltd. v. CIT* [1979] 116 ITR 1 (SC)). Entries in accounts, it is to be appreciated, recognize income, and do not create income. There are, thus, in the instant case, strong grounds for, in the absence of any evidence toward proving the genuineness of the liability and/or of it existing as at 31/3/2014, the relevant year-end, as reflected in

accounts, being liable to be assessed as income, i.e., either source-based or evidence-based, the two bases on which is income is brought to tax under the Act.

4.2 As regards admission of additional evidence, sure, no case is made out; the assessee not even contending, much less showing, of being constrained to produce the evidences it now seeks to adduce, at the earlier stages. That, no doubt relevant, may not oust the assessee's case inasmuch as the admission of additional evidence at the second appellate stage is not referable to any right of the parties to produce the same but is dependent solely on the requirement of the court, which has to decide if it requires the same for pronouncing its judgement or for any other substantial cause, for which reference be made to r. 29 of the Income Tax (Appellate Tribunal) Rules, 1963, mandatory in character (*Roshan Di Hatti v. CIT* [1977] 107 ITR 938 (SC)). We consider the additional evidence as to payment through banking channel during fy 2014-15 as satisfying this test. Payment during the immediately succeeding year, as now contended before us, is a piece of evidence toward the same, i.e., existence of liability as the end of the relevant year, and which further renders both, the non-furnishing of the confirmations by the creditors, as indeed the non-statement of the fact of payment, as the assessee now contends, in assessment proceedings, both quizzical and intriguing. The matter is evidence based, with the assessee failing completely. And is to be, if an adverse inference is not to follow, properly scrutinized.

4.3 The evidence sought to be admitted is toward exhibiting payment to creditors in respect of 12 creditors, i.e., other than the two referred to at para 3 above, requesting for its admission, and remittance to the AO for verification. We, conscious of the completely uncooperative and inexplicable behaviour of the assessee even up to the first appellate stage, yet consider it proper to do so in the interest of justice, moved by the 'fact' that the payment is, as stated, made through the banking channel and, further, during fy 2014-15, so that it cannot be an after-thought. Subject, therefore, to the payment of INR 25,000 (twenty thousand) by the assessee to the

Prime Minister's Relief Fund within one month of the receipt of this order, we remit the matter back to the file of the AO, who shall cause such verification as he may deem proper for arriving at his satisfaction as to the existence of the impugned liabilities as at 31/3/2014, the year-end. And decide in accordance with law, per a speaking order, issuing definite findings of fact. We may though qualify that 'payment' by itself may not necessarily amount to a discharge of the outstanding liability inasmuch as it could be *qua* a subsequent liability. That is, the same may require being confirmed by/from the accounts of the creditor/s. The matter being factual, is left entirely to the discretion of the AO, to be exercised judicially, in arriving at his said satisfaction, including obtaining copy of accounts from the creditors for the relevant and the subsequent years. The imposition of cost is due to the assessee being uncooperative in the extreme, not producing an iota of evidence toward the existence of the stated liabilities, which he now contends as borne out of his regular books of account. This would exclude the two creditors listed at Sr. Nos.1 and 9 of the Table appearing at pg. 2 of the assessment order, which sums are to be regarded as assessee's income for want of any evidence on record, i.e., the payment *qua* Sr.No.1, and the liability being disputed *qua* Sr.No.9. Any payment to the latter subsequently, on the order of a Court, made in respect of the amount outstanding, would though qualify for being considered for exclusion by the AO, i.e., shall get included, to the extent of payment/discharge, in the category of the other 12.

4.4 We decide accordingly.

5. In the result, the assessee's appeal is partly allowed for statistical purposes.

Order pronounced in the open court on February 13, 2024 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963.

Sd/-	Sd/-
(Manomohan Das)	(Sanjay Arora)
Judicial Member	Accountant Member

Cochin, Dated: February 13, 2024
n.p.

Copy to:

1. The Appellant
2. The Respondent
3. The Pr. CIT concerned
4. The Sr. DR, ITAT, Cochin
5. Guard File

By Order

Assistant Registrar
ITAT, Cochin