

**IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, MUMBAI**

**BEFORE SHRI ABY T VARKEY, JM &
MS PADMAVATHY S, AM**

**I.T.A. No. 2064/Mum/2015
(Assessment Year: 2005-06)**

B.V. Jewels “C/o, Mr. Suken S. Mehta, Sterling Apartment, 14 th Floor, Room No. 28, Peddar Road, Mumbai- 400026 PAN : AAAFC2291C	Vs.	Deputy Commissioner of Income Tax, CC-21, Koimbatore.
Appellant)	:	Respondent)

Appellant/Assessee by : Shri Vijay Mehta, Shri Govind
Javeri, CA

Revenue/Respondent by : Shri Ashok Kumar Ambastha,
Sr. DR

Date of Hearing : 21.02.2024

Date of Pronouncement : 01.03.2024

ORDER

Per Padmavathy S, AM:

This appeal of the Assessee is against the order of the Commissioner of Income Tax (Appeals) – 51, Mumbai dated 23.1.2015 for AY 2005-06.

2. The assessee raised the following concise grounds of appeals. The ld AR presented arguments with regard to these concise grounds during the course

hearing and therefore only these grounds are considered for the purpose of adjudication –

“(1) The learned CIT(A) inspite of the finding of the Hon'ble ITAT. Mumbai in its order in ITA No. 1433/Mum/2009 dated 13.05.2011 that the consent terms do not indicate the allocation of the properties to the firm at paragraph 7 of its order, has erred in confirming the addition of capital gains of Rs.5,63,07,760/ made by the AO, without disputing that the appellant did not have and could not have transferred, any occupancy right, and holding that arbitration award did not concern the appellant (Para 8.3) elsewhere, in her order, in the facts and the circumstances of the case and in law.

(2) The learned CIT(A) has erred in holding that there was a waiver of loan by the ING Vysya Bank, when the loan amount was allotted only to the partners, who between them settled the loan amount, and the firm would be liable to tax u/s 45(4), and in confirming the addition of Rs.5,96,67,306/-, as extinguishment of liability taxable/s 41(1) of the I.T.Act, without due application of mind to the facts and the circumstances of the case and the law.

(3) The learned CIT(A) has erred in confirming the disallowance of expenditure in respect of custom case of Rs.6,64,410/-, in the facts and the circumstances of the case and in law.

(4) The learned CIT(A) has erred in confirming the disallowance of Rs.8,50,290/- on foreign travel, as personal in nature, in the facts and the circumstances of the case and in law.

(5) The learned CIT(A) has erred in confirming the disallowance of Rs. 1,85,133/-, as prior period expenses, being wages paid to the employees, in the facts and the circumstances of the case and in law.”

3. The Assessee is a partnership firm carrying on business of trading in diamonds. The Assessee filed a return of income for AY 2005-06 declaring a total loss of Rs.18,19,087/- on 26.10.2005. The case was selected for scrutiny and the statutory notices were duly served on the Assessee. The AO completed the assessment by making the following additions.

Sr.No.	Particulars	Amount/Rs.
1.	Addition towards factory building as capital gains	5,63,07,760

2.	Waver of Vaishya Bank Loan added u/s 41(1)	5,96,67,306
3.	Legal and professional expenses disallowed	10,80,349
4.	Foreign travel expenses disallowed	8,50,210
5.	Salaries disallowed	17,50,000

4. Aggrieved, the Assessee filed further appeal before the CIT(A) who gave partial relief to the Assessee by reducing the disallowance made towards legal and professional fees, foreign travel expenses and salaries. The Assessee and the revenue filed appeal before the Tribunal against the order of the CIT(A). The coordinate bench of the Tribunal vide order dated 13.5.2011 (ITA No.1433 and 2038/MUM/2009) restored the issues contended by the Assessee back to the AO and dismissed the appeal filed by the Department. The AO in the remand proceedings retained the additions made during the first round of assessment proceedings as listed above and the CIT(A) confirmed the said additions. The Assessee is in appeal before the Tribunal once again contending the additions made by the AO in the remand proceedings.

Addition towards factory building – Ground No.1

5. Brief facts pertaining to the issue contended - The assessee and M/s B.V. Star are two partnership firms having common partners being individuals from Mehta family (Mehta Group) and Shah family (Shah Group). There were disputes and differences arose between the partners carrying on business in the said partnership firms and the same was referred to arbitration. As per the consent terms agreed before the Arbitration Tribunal the individual partners of Shah Group would retire from the assessee-firm and the individual partners from Mehta Group would retire from M/s. B.V. Star. The Mehta Group took over the firm and the business of the assessee as a going concern together with all its assets including stock, recoveries, bank balances, etc. and liabilities and obligations including

obligation to SEEPEZ and customs authority. The Shah Group took over M/s B.V. Star on similar terms. As per the consent terms it was agreed that upon the retirement of Mehta Group from M/s B.V. Star the immovable property of the firm M/s B.V. Star in Plot No. 55 at SEEPEZ, Andheri (E), Mumbai together with building constructed thereon belonging to the firm M/s B.V. Star was allocated to the individuals of Shah Group and Mehta Group the same proportion in which they as partners shared the assets of the erstwhile partnership i.e. the property was to be held jointly by the individual partners as co-owners. It is relevant to note that the assessee was permitted to occupy and conducted business from the above property since the assessee firm and M/s B.V. Star had common partners. Subsequent to the allocation, the individual partners of Mehta Group introduced the portion of the property allotted to them as part of the terms of consent and arbitration award into the assessee firm. The assessee firm passed a journal entry bringing the property into the books of the assessee firm by crediting the partner's capital account and debiting the building account to the tune of Rs. 2,35,03,628/- being the written down value of the building. Subsequently the said building was revalued and a revaluation reserve was created to the tune of Rs. 3,28,04,132/- and accordingly the factory building in the books of account of the assessee firm stood at Rs. 5,63,07,760/-.

6. During the first round of assessment proceedings the AO was of the view that Building brought into the books of accounts is arising out of the transfer of tenancy rights since the assessee firm has been occupying the building as a tenant for a long time and proposed to tax the entire amount of Rs.5.63 crores as capital gains. The assessee submitted before the AO that the Building was allotted to Mehta Group in their individual capacity and it is the individual partners who have introduced the said property into the firm as capital contribution. In this regard the

assessee during the first round of assessment proceedings submitted the various documentary evidences such as the award of Arbitration Tribunal the consent terms the retirement deed in respect of the assessee firm as well as M/s B.V. Star etc. before the AO. However, the AO did not accept the submissions of the assessee and held that assessee is allotted the ownership towards building in lieu of transfer of tenancy rights as per the consent terms. Accordingly, the AO held that the entire amount of Rs. 5.63 crores is a capital gain towards transfer of tenancy rights and brought the same as addition in the hands of the assessee firm. Aggrieved the assessee filed appeal before the CIT(A). The CIT(A) in the first round of appellate proceeding upheld the addition. The Co-ordinate Bench of the Tribunal after considering various submissions of the assessee remitted the issue back to the AO by holding that

“7. We have considered the issue and examined the record and perused arguments. We are of the opinion that the consent terms does not indicate allocation of property to the firm. As submitted the claimants were individual partners and the assets and liabilities were allotted to the claimants of each group and accordingly the adjustment entries were made and retirement deeds were executed. On what basis the AO considered the property as allotted to the firm could not be understood as the award was very clear in its terms. We are of the opinion that the AO did not examine the terms of the award, the distribution of assets and liabilities and consequential action taken by the respective group, in its accounts.

7.2 It is a fact that both the firms are operating from the same premises. But the AO did not examine whether there was any rental agreement or even any rent payment by examining the earlier years returns. Even the clear terms of the award were misconstrued to state that the firm was allotted the property i.e. factory Building whereas the Mehta Group was allotted 3rd, 4th floor of the building. Even the terms of award indicate the floor space allotted to each group, the provision to be made for lift etc. These indicate that the floors were allotted to the claimants (the Mehta group) who introduced the property in the books of the firm as their capital

7.3 Another aspect missed by the AO is that the value adopted for capital gain was the revaluation value but not the original value as per the books. The

corresponding adjustment entries were made at book value and the necessary entries in parties accounts were made w.e.f. 31/3/2004 by virtue of deed executed on 22/6/2005. Subsequently, the property was revalued on the basis of valuation report obtained in Aug. 03 for the purpose of consent terms during the pendency of Arbitration proceedings.

7.4 Reliance by the AO on the valuation report for ownership is not correct as the other documents clearly indicate that the property was owned by the M/s. B.V. Star, and M/s. B.V. Jewels was also functioning from there. Consequent to the consent terms 3rd and 4th floors were allotted to Mehta Group. However not only this asset but stock-in-trade, balances in creditors and debtors account and other liabilities including liability to Vysya Bank was distributed amount the groups by way of consent terms. Therefore, we are of the opinion that the AO and CIT wrongly considered only the factory building for the purpose of capital gains which did not arise in the hands of firm but may be in the hands of claimants. The respective capital accounts of partners placed on record do indicate that the property allotted to partners of Mehta Group was introduced by the group in the books of account at the book value initially and revealed subsequently.

7.5 One reason which can be attributed to the action of AO is the reply dt07-12-2007 by assessee during the course of assessment proceedings which is as under:

5. Capital gains on transfer of factory premises

Our client was never owner of building premises situated at SKKPZ and it was owned by M/s BV Stars. As per consent terms, our client had become part owner the property and therefore had capitalized the same as factory building in their books w.e.f. 1 April 2004. Since our client was not legal owner of factory premises occupied by them as wrongly mentioned in the valuation report they are not liable to pay any capital gain

Even the schedule forming part of the balance sheet and P&L Account (placed at page 27 of the paper book) indicate that the revaluation was done for the year ending 31/3/2004. Whether it was done for the year ending 31/3/2004 could not be examined by us as the 3CD report dated 25/10/2005 was also indicating year ending 31/3/2004 for the accounts of year ending on 31/3/2005. These could have led to the mis-understanding by the AO that the firm got the allotment and at a revalued price.

7.6. Since the facts are not examined properly with reference to the terms of arbitration award and adjustment entries passed in the firm accounts, we are of the opinion that the issue can be restored to the file of AO for his

examination. The assessee also claimed legal charges as part of business expenditure which however AO disallowed and contested in another ground. Therefore we are of the opinion that this issue require fresh examination as some of the partnership deeds and the adjustment entries were also not examined. With these observations the issue is restored to the file of the AO to examine the consent terms and books of accounts including the retirement deeds placed on record as additional documents. The ground is considered allowed for statistical purposes.”

7. In the remand proceedings the assessee produced the copies of various documents including the journal entries before the AO. However, the AO after considering the submissions of the assessee once again retained the addition for the reason that

(i) The assessee firm has been occupying the two floors of the building for several years which is now brought into books as part of settlement which would mean that the assessee firm has obtained the ownership in lieu of the occupancy rights.

(ii) There is an amount mismatch in the journal entries between the individual capital accounts of the partners and the Building account and therefore the accounting entries are not reliable in support of the claim of the assessee.

(iii) The correction made in the clause 12 of the consent terms to the effect the third and the fourth floor of the building is allotted to Mehta Group "as partners of" the assessee firm is an afterthought and that the allotment was intended to be made to the assessee firm directly.

8. Aggrieved the assessee filed further appeal before the CIT(A). The CIT(A) upheld the addition made by the AO in the remand proceeding by holding that

“5.5 I have perused the Consent terms/the Arbitration Award, the Retirement Deed and examined the entries made in the books of accounts. Clause 12 of the Consent terms dated 8.04.2004, deal with the division of property at SEEPZ owned by the firm, M/s. B.V. Star. It is stated in clause 12(i) that the "ground floor shall be shared equally by the claimants and respondents". As per Clause 12 (iii), the "third and fourth floors shall be the asset of claimants, now as partners of M/s. B.V. Jewels and the same shall stand allotted to the claimants". Interestingly, as per the copy of the Consent terms placed on

record by the appellant, clause 12 (iii) was initially "Third and Fourth floors shall be the asset of M/s. B.V. Jewels and the same shall stand allotted to the claimants". The words "claimants now as partners of appears as an interpolation, an overwriting. The appellant has not explained as to at what point of time this over-writing or interpolation has been made. The original of the Consent Terms has not been produced. Hence, from an overall appreciation of clause 12 (iii) it has to be interpreted to mean that the Third and Fourth floors were intended to be the asset of the firm, M/s. B.V. Jewels especially when juxtaposed against the language used in clause 12(i) when the consent terms simply said that the ground floor would be shared by "Claimants and Respondents". This is not the language used in clause (iii); there is a departure in the terminology. The language in clause (iii) is stretched by using terms such as "asset of claimants, now as partners". Even otherwise, interpreting clause 12 (iii) as it exists, even then the said part of building is clearly not that of "claimants", simpliciter but that of "claimants now as partners". Thus leads to the irresistible conclusion that the third and fourth floors are now allotted to the firm and not to the claimants individually. If it were intended to be that of claimants in their individual capacity, the words "claimants now as partners" would not be required. The foregone conclusion is that the said part of the factory building was intended to be the asset of the firm M/s. B.V. Jewels and the clause 12(iii) of the Consent terms has to be interpreted accordingly The said aspects are not seen to have been considered earlier. It is also to be mentioned that though the Hon'ble ITAT had given a prima facie finding that the Consent terms do not indicate allocation of property to the firm, the Hon'ble Bench had left it to the subordinate authorities to factually examine the Award and Distribution of assets. It, therefore, follows that the observations made by the Bench are subject to the factual examination of the Consent terms and cannot be seen as an observation completely favouring the appellant herein. Now it makes sense that as early as on 07.12.2007, the appellant had written to the AO that "as per consent terms, our client had become part owner of the property and therefore, had capitalised the same as factory building in their books we 1st April, 2004". I have also examined the copy of ledger account of the Factory Building for 01.04.2004 to 31.03.2005. As per journal entry, the factory building is debited by Rs. 5,63,07,760/- and credit was given of Rs. 2,35,03,628/- to Suresh K. Mehta HUF and also revaluation reserve of Rs. 3,28,04,132/- However, in respect of ledger account of Suresh K. Mehta HUF, the factory building a/c. is credited with Rs. 94,01,452/- Thus, the books do not reflect the actual state of affairs and being not reliable cannot be depended upon to give a solution or answer to the issue at hand. It is the Consent terms alone that have to be relied upon to consider the issue in question. In this view of the matter and considering the words used in the

Consent terms, the finding of the AO that it is the appellant firm herein who became the full owner of the said portion of the factory building is to be upheld. It is an undisputed fact that the appellant firm was conducting business from the said premises; the mere fact that there was no rental agreement cannot whittle down the fact that the appellant was actually enjoying and occupying the said premises. The absence of a rental agreement is not material to address the question in issue. The appellant firm has been awarded ownership over the said portion of the factory building against occupancy right or rather, right of possession, which is of the status of tenancy right falling within the meaning of section 55(2) and hence is exigible to Capital Gain on the asset having been received by the firm as per the Consent Terms, specifically clause 12(iii) of Consent terms dated 8th April, 2004. The said asset has been revalued and the total value of the building in the books of the assessee firm is Rs. 5,63,07,760/- (on which value depreciation is seen to have been claimed). As held by the AO, the gains arisen on account of transfer of said property to the firm against the right of possession, which has the status tenancy right, is Rs. 5,63,07,760/-. The action of the AO is confirmed.”

9. Aggrieved the assessee is in appeal before the Tribunal for second time. The ld. AR briefed the facts of the case as extracted in the earlier part of this order and also took the bench through the various clauses in the retirement deed, Arbitration award, consent terms, etc. The ld. AR also drew the attention of the bench to the agreement specifically entered into the regarding the ownership of the building (page 120 to 133 of PB) and the journal entries passed in the books of accounts of the assessee firm (page 134 to 144 of PB). The ld. AR submitted that the main reason for the AO/CIT(A) for making the addition is that the assessee firm was having the tenancy/occupancy rights in the two floors of the building which was transferred against the ownership of the two floors in the building that is accounted in the books of the firm. The ld. AR further submitted that the contention that individual partners have introduced their share in the building obtained through arbitration award into the partnership firm was not accepted for the reason that the journal entries submitted by the assessee firm in this regard is not reflecting the

correct position and therefore not reliable. The ld AR also submitted that the AO/CIT(A) also did not accept the submission that the assessee is not having the tenancy rights and did not pay any rent to M/s B.V. Star since both the assessee and M/s B.V. Star were having same set of individuals as partners. The ld. AR argued that if the tenancy/occupancy rights as alleged by the Revenue was transferred then there should have been mentioned about the same in the various documents entered into between the assessee firm and M/s B.V. Star. The ld. AR further drew our attention to the assessment order of M/s B.V. Star (page 215 to 221 of PB) to submit that the AO in the said case had made the addition of the entire amount of Rs. 5.63 crores for the reason that M/s B.V. Star had transferred the building to the partners and therefore, should be taxed as capital gains. The ld. AR therefore submitted that the Revenue on one hand has admitted the fact that the building was transferred to individual partners on retirement while making assessment in the case of M/s B.V. Star but at the same time is not accepting the fact that the individual partners have introduced their share in the building as capital in the hands of assessee's firm. The ld. AR also drew our attention to the financial statements of the assessee firm to substantiate that the building before being introduced by partners was never part of the fixed assets schedule of the assessee firm. The ld AR with regard to the allegation that the correction made in clause 12(iii) of the consent terms to include the words "claimants no as partners of" the assessee is inserted as an afterthought, pointed out that there have been many corrections made manually to the consent terms and in every place where there is correction, the representatives from Mehta and Shah group have put additional signature which would prove the authenticity. The ld AR also brought on record the original copy of the consent term for verification to substantiate that the said correction is not an afterthought and that it is the corrected version which

is agreed before the Arbitration Tribunal. The Id AR drew our attention to the disallowance made by the AO towards arbitration expenses on the ground that the said expenditure is that of individual partners and not of the assessee firm. Therefore the Id AR argued that on one hand the revenue is making disallowance of the arbitration expenses stating that it belongs to the individual partners and on the other hand when it comes to the issue of transfer of building holds that it belongs to the assessee firm. The Id AR accordingly submitted that the revenue is not consistent in its view and the addition made should be deleted.

10. The Id. DR on the other hand vehemently supported the order of the lower authorities.

11. We have heard the parties and perused the material on record. To recapitulate the facts the assessee firm and M/s. B.V. Star had common partners namely individuals from Mehta Group and Shah Group. Since both the firms had common partners the assessee firm was permitted to occupy and conduct business from the premises constructed by M/s B.V. Star on the land that was allotted by SEEPEZ authorities to M/s B.V. Star. As per the submissions of the Id. AR there was no rental agreement or contract between the assessee firm and M/s B.V. Star and that the assessee was not paying any rent. There was a dispute that arose between the Mehta Group and Shah Group and accordingly the individual partners of Shah Group retired from the assessee firm. The impugned building was allotted to the individuals from both Mehta Group and Shah Group in the same ratio in which the profit was shared in the erstwhile partnership firm of M/s B.V. Star. Accordingly, the individuals from Mehta Group received a portion of the building upon retirement from M/s B.V. Star. The individuals of Mehta Group who are continuing partners in the assessee firm introduced the building into the assessee

firm as part of their capital contribution at the written down value of the said building. The building was subsequently revalued and the enhanced value was credited to revaluation reserve. In the assessee firm's books of accounts necessary journal entries were passed to give effect to the above described transactions.

12. The main contention of the revenue that the assessee firm directly obtained the ownership of the Building and not through the partners and the said ownership is received against the transfer tenancy/occupancy rights obtained by the assessee firm from the long term occupancy of the said building. The revenue's reason for said contention is two fold. One the amounts in the journal entries passed to record the impugned transactions into the books of account of the assessee firm are not matching and hence cannot be the reliable basis for accepting that the asset was brought in by the partners only and not directly. The second reason is that clause-12 of the consent terms contains the correction which if interpreted (without the correction) would mean that the building is transferred by M/s B.V. Star to the assessee firm and not to the individual partners of the assessee firm. It is also relevant to note here that the revenue did not record any adverse finding with regard to the other documentary evidences such as retirement deed, Agreement recording the understanding regarding the ownership of the building.

13. We therefore will first take up the contentions of the revenue with regard to the journal entries and in this regard the journal entries as appearing in the Accounting Software used by the assessee firm i.e. Tally accounting software is extracted below –

Journal Voucher		
No. : 8	Dated : 1-Apr-2004	
Particulars	Debit	Credit
Factory Building	Dr 2,35,03,628.00	
To Suresh K. Mehta HUF		94,01,452.00 ✓
To Saroj S Mehta		11,75,181.50 ✓
To Suken S. Mehta		1,05,76,633.50 ✓
To Sapna S. Mehta		11,75,181.50
To Shivani S. Mehta		11,75,179.50
	2,35,03,628.00	2,35,03,628.00

Factory Building Ledger Account 1-Apr-2004 to 31-Mar-2005					
Date	Particulars	Vch Type	Vch No.	Debit	Page 1 Credit
1-4-2004	To Suresh K. Mehta HUF	Journal	8	2,35,03,628.00	
	To Revaluation Reserves	Journal	9	3,28,04,132.00	
31-3-2005	By DEPRECIATION 10%	Journal	260		56,30,776.00
				5,63,07,760.00	56,30,776.00
	By Closing Balance				5,06,76,984.00
				5,63,07,760.00	5,63,07,760.00

14. A careful perusal of the above two extracts would make it clear that Voucher No.8 which is the journal passed for accounting the contribution from individual partners is what is reflected in the Factory Building Account. However the total amount of Rs.2,35,03,628 is reflected against the first name appearing in the above Voucher No.8 i.e. Suresh K Mehta HUF. On perusal of the capital account of Suresh K Mehta HUF we notice that only the correct amount of Rs. 94,01,452/-is reflecting (page 135 of paper book). Therefore there is merit in the submission of

the ld AR that it is the manner in which it is displayed on Tally Software which picks up the first line of the voucher to reflect the journal total. Further in our considered view, this cannot be one of the reasons doubting the entire transaction without conducting further enquiries more so when there are many other documentary evidenced produced by the assessee in support of the claim.

15. The Second ground for revenue to claim that the property is directly transferred to the assessee firm is that the corrections manually made to clause 12 is an after thought to make it appear as if the transfer is done to the individuals and not to assessee firm. Therefore before proceeding further we will look at the relevant clause-12 from the consent terms as per the arbitration award.

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12. The division of the property at Seepz held in the name of M/s. B. V. Stars is subject to the following irrevocable arrangement:-

- (i) The ground floor shall be shared equally by the Claimants and Respondents,
- (ii) First and Second floors shall be the asset of M/s. B. V. Stars and the same shall stand allotted to the Respondents absolutely,
- (iii) Third and Fourth floors shall be the asset of ^{Claimants; not as partners of} M/s. B. V. Jewels and the same shall stand allotted to the Claimants.
- (iv) The Claimants shall be entitled to and shall have right to equalize the area of the 3rd and 4th floors with the area of the 1st and 2nd floors, the difference being 5173 sq. ft. and the Claimants shall be entitled to construct the said difference in area on the 4th floor and/or the 5th floor at their own costs. The Respondents shall not be liable to pay ~~any amount~~ towards the cost of construction of the said ~~area of 5173 sq. ft.~~ ft. for such equalization.
- (v) The benefit of the Floor Space Index ~~of 1.5~~ available on the said property after equalization ~~of the area~~ mentioned in sub-clause (iv) above, shall be shared by the Claimants and the Respondents in equal share.
- (vi) Both parties shall ensure compliance of lease terms, pay their proportionate shares, in taxes and outstandings and enter into a co-owners agreement embodying fair and reasonable terms of such co-ownership and user.

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Seal of the Sub-Registrar, Mumbai, No. 3, 1st Floor, 1st Cross, 1st Lane, 1st Street, 1st Block, 1st Ward, 1st District, 1st City, 1st State, 1st Country.

Stamp: 2008

16. From the perusal of the above terms it is clear that 1st and the 2nd floor of the building belonging to M/s B.V. Star is allotted to the individuals of the Shah Group

absolutely. Similarly the 3rd and 4th floor shall be allotted to individuals of Mehta Group. From the findings of the CIT(A) as extracted in the earlier part of the order, we notice that the CIT(A) has alleged that the foregone conclusion is that the said part of the factory building was intended to be the asset of the assessee and the clause 12(iii) of the Consent terms has to be interpreted accordingly. However we are unable to appreciate the said contention since the same is made merely for the reason that the word to indicate that the asset is transferred to individual partners is inserted manually. Further the coordinate bench in the first round has given a clear finding to hold that *"Even the clear terms of the award were misconstrued to state that the firm was allotted the property i.e. factory Building whereas the Mehta Group was allotted 3rd, 4th floor of the building. Even the terms of award indicate the floor space allotted to each group, the provision to be made for lift etc. These indicate that the floors were allotted to the claimants (the Mehta group) who introduced the property in the books of the firm as their capital"*. During the course of hearing the ld AR drew our attention to the fact that there are many corrections made manually in the consent terms (page 70, 71, 72 & 75 of PB) and that wherever there is such a correction it is being additionally signed by the representatives of both Mehta and Shah Group. Further the original copy of the said document was produced during the course of hearing to factually prove the said claim and to rebut the CIT(A)'s finding that the original copy was not submitted for verification.

17. Having given our considered view on the findings of the AO/CIT(A) in the remand proceedings, we will now examine the documentary evidences submitted in support of the claim of that the Building was allotted to the partners and it is the partner's who have brought the same into the books of accounts of the assessee firm. We noticed that the Tribunal in the first round of proceedings has given a

clear finding that portion of the building was transferred to individuals of the Mehta Group as part of the arbitration settlement and that the same was introduced by them into the assessee firm (refer para 7.4 of the ITAT order). The case was remitted back in order to verify the fact that the assessee was not the owner of the impugned building and that the basis of revaluation was not examined by the AO which could have led to misunderstanding that the firm got the allotment and at revalued price. In this regard we have extracted below the relevant part of the Arbitration Award, Consent Terms, Retirement Deed and Agreement Recording the Understanding Regarding the Ownership of Factory Building

Arbitration Award – Consent Terms

“2. Agreed, declared and confirmed that the Claimants have retired and shall be deemed to from the firm of M/s. B. V. Stars w.e.f. from close of business on 31st March, 2004. Recorded that subject to what is stated hereinafter the Respondents have taken over the firm and business of M/s. B. V. Stars as a going concern and all its export obligations save and otherwise provided herein and that the Claimants shall not be in any manner liable with respect to M/s. B. V. Stars and the Claimants shall be kept indemnified by the Respondents against any costs, claims and expenses with respect to the firm M/s. B. V. Stars of and for the period from and after 12th March, 2004. As a term of retirement the Claimants have taken over all the liabilities of M/s. B. V. Stars up to the date of Retirement as shown in the balance sheet and shall indemnify the Respondents against and claim costs, demands or expenses with respect thereof. Upon such retirement, the immovable property of the firm of M/s. B. V. Star leasehold rights in Plot No. 55 at Seepz, Andheri (East), Mumbai together with the building constructed thereon and belonging to the firm of M/s. B. V. Star shall be held jointly as co- owners by the parties, in the same proportion in which they shared the assets of the earstwhile partnership i.e.

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|----------------------------------|-----|
| 1. Shri Suresh Kirtilal Mehta | 15% |
| <i>Karta of and representing</i> | |
| <i>Suresh Kirtilal Mehta HUF</i> | |
| 2. Smt. Saroj Suresh Mehta | 05% |
| 3. Shri Suken Suresh Mehta | 20% |
| 4. Smt. Sapna Suken Mehta | 05% |
| 5. Smt. Shivani Suhrud Jhaveri | 05% |
| 6. Smt. Bina Bharat Shah | 40% |
| 7. Shri Rashesh Bharat Shah | 05% |
| 8. Shri Bharat Shantilal Shah | 05% |

The user of the said property and other matters pertaining thereto shall be as provided hereinafter. Stocks of the said firm and its recoveries, bank balance etc. stands allotted to the Claimants. Machaneries and other movables of the said firm shall be divided between the Claimants and the Respondents equally in such manner as may be mutually agreed upon."

Deed of Retirement

THIS DEED OF RETIREMENT MADE AND ENTERED INTO AT Mumbai this 22nd day of June, 2005 between (1) Shri Suresh Kirtilal Mehta of Mumbai Indian Inhabitant as Karta and Manager of Shri Suresh Kirtilal Mehta H.U.F. (2) SMT. SAROJ SURESH MEHTA of Mumbai, India inhabitant (3) SHRI SUREN SURESH MEHTA of Mumbai, Indian Inhabitant, (4) SMT. SAPNA SUREN MEHTA of Mumbai, India Inhabitant and (5) MS. SHIVANI SURESH MEHTA of Mumbai, Indian Inhabitant hereinafter called "The CONTINUING PARTNERS" (which expression shall unless it be repugnant to the context or meaning thereof be deemed to mean and include in the case of Shri Suresh Kirtilal Mehta H.U.F and their representative heirs, executors and administrators and in the case of the said Sat. Saroj Suresh Mehta, Shri Suken Suresh Mehta. Smt. Sapna Suken Mehta and Ms. Shivani Suresh Mehta their respective heirs, executors and administrators) of the One Part AND (1) SMT. BINA BHARAT SHAH, (2) SHRI RASHESH BHARAT SHAH AND (3) SHRI BHARAT SHANTILAL SHAH all of Mumbai Indian Inhabitants hereinafter called "THE RETIRING PARTNERS" expression shall unless it be repugnant (which to the context of meaning thereof be deemed to mean and include their respective heirs executors and administrators) of the Other Part: -

9. It is agreed, declared, confirmed and recorded that the said leasehold plot of land bearing 55, at SEEPZ, Marol, Andheri (East), Mumbai 400 096 shall be held jointly by the parties hereto as co- owners and the building constructed thereon shall be used, occupied, possessed, enjoyed, utilised and shared in the manner and in the proportion as set out in the said Common Consent Award.

Agreement recording the understanding regarding the ownership of factory building

(xi) By the said Consent Terms and consequent thereupon under the said Common Consent Award, it is agreed, declared, confirmed and recorded that the said plot No.55 at SEEPZ, Marol, Andheri (East), Mumbai 400 096 shall be held jointly by the said Smt. Bina Bharat Shah, Shri Rashesh Bharat Shah and Shri Bharat Shantilal Shah and the said Shri Suresh Kirtilal Mehta as Karta of and representing Suresh Kirtilal Mehta HUF, Smt. Saroj Suresh Mehta, Shri Suken Suresh Mehta,

Smt. Sapna Suken Mehta and Smt. Shivani Suresh Mehta as co-owners and the building constructed thereon shall be used, occupied, possessed, enjoyed, utilised and shared in the manner and in the proportion as out in the said Common Consent Award.

2(c) The Third and Fourth floors of the said building including pocket terrace on 4th floor level shall be the asset of and held, used, possessed and enjoyed by Mehta Group and shall absolutely belong to them at the execution of Shah Group and the said Shri Vijay Shantilal Shah

18. From the perusal of the above clauses extracted from the documents submitted, it is clear that the building is owned by the partners of the assessee firm and that the same is brought into the books of the assessee firm as capital contribution. In order to further substantiate that the Building was never part of the fixed assets schedule of the assessee firm, our attention was drawn to the below given Fixed Asset Schedule of 31.03.1998 in which year the land was allotted to M/s.B.V.Star and the Fixed Asset Schedule for the year under consideration.

SCHEDULE "D" FIXED ASSETS		M/S. B.V. JEWELS ASSESSMENT YEAR 1998-99 31.03.98		
PARTICULAR	GROSS BLOCK VALUE AS ON 1.04.97	ADDITION DURING THE YEAR	DELETION DURING THE YEAR	GROSS BLOCK AS ON 31.03.98
PLANT & MACHINERY	5184605.00	155544.00		5340149.00
WATER COOLER & FRIDGE	14300.00			14300.00
AIR COMPRESSOR	32800.00			32800.00
METTLER BALANCES	72066.00			72066.00
DESK LAMPS	44113.00			44113.00
CAMERA	48779.00			48779.00
COMPUTERS	140150.00			140150.00
ELECTRONIC TYPEWRITER	15400.00			15400.00
CALCULATORS	13925.00			13925.00
PHOTOCOPIER MACHINE	104400.00			104400.00
BINDING MACHINE	46500.00			46500.00
CARD PUNCHING MACHINE	24450.00			24450.00
TYPEWRITER	8131.00			8131.00
OPEL ASTRA CAR	679072.00			679072.00
FLAT AT SHANTINAGAR	429000.00			429000.00
SCOOTER*	19889.00			19889.00
MARUTI CAR (1000)	440553.81		440553.81	0.00
FORD ESCORT CAR	739565.00			739565.00
TATA SIERA	369015.00			369015.00
METAL DETACTORS	78899.00			78899.00
LASER PRINTERS	50354.00			50354.00
UPS SYSTEM	25476.00			25476.00
TELEVISION	54500.00	12800.00		67300.00
FAX MACHINE	40050.00			40050.00
BOOKS	157408.00	74694.00		232102.00
CEILO CARS		1143024.00		1143024.00
BORWELL		63305.00		63305.00
TOTAL RS.	8833400.81	1449367.00	440553.81	9842214.00

ELD IN THE NAME OF PARTNER

FOR B.V. JEWELS

M/s. B.V.Jewels
Schedules forming part of the balance sheet and profit & loss account for the year ended 31st March, 2004.
Schedule - "D" Fixed Assets

DESCRIPTION	RATE	Written Down Value as on 01/04/2004	Additions	Deductions	Total as on 31/03/2005	Depreciation For the year	Written Down Value as on 31/03/2005	Written Down Value as on 31/03/2004
Land & Building								
Flat at Shantinagar*	0%	429,000.00						429,000.00
Factory Building*	10%		56,307,763.00	429,000.00	56,307,760.00	5,630,776.00	50,676,984.00	
Borwell	25%	41,205.27			41,205.27	10,301.00	30,904.27	41,205.27
Furniture & Fixtures								
Furniture & Fixtures	10%	134,423.20	4,443.00		138,863.20	20,829.00	118,034.20	134,423.20
Water Cooler & Fridge	25%	4,524.61			4,524.61	1,131.00	3,393.61	4,524.61
Books								
Designing Books	25%	161,059.96			161,059.96	40,265.00	120,794.96	161,059.96
Office Equipments								
Computers	60%	53,063.84	70,953.00		124,013.84	60,323.00	63,690.84	53,063.84
Laptop (Dell)	60%	66,228.40			66,228.40	39,737.00	26,491.40	66,228.40
Electronic Typewriters	25%	4,872.66			4,872.66	1,218.00	3,654.66	4,872.66
Calculators	25%	4,405.96			4,405.96	1,101.00	3,304.96	4,405.96
Photocopier Machine	25%	90,145.09			90,145.09	22,536.00	67,609.09	90,145.09
Binding Machine	25%	14,712.88			14,712.88	3,678.00	11,034.88	14,712.88
Typewriter	25%	2,572.70			2,572.70	643.00	1,929.70	2,572.70
Laser Printer	60%	5,004.26			5,004.26	3,003.00	2,001.26	5,004.26
UPS Systems	25%	4,891.40			4,891.40	1,223.00	3,668.40	4,891.40
Television	25%	21,294.14			21,294.14	5,324.00	15,970.14	21,294.14
Fax Machine	25%	12,672.07			12,672.07	3,168.00	9,504.07	12,672.07
Desk Jet Printer	60%	231.63			231.63	139.00	92.63	231.63
Vacuum Cleaner	25%	18,750.00			18,750.00	4,688.00	14,062.00	18,750.00
Scanner	60%	1,680.00			1,680.00	1,008.00	672.00	1,680.00
Filing Cabinet	25%	2,823.92			2,823.92	706.00	2,117.92	2,823.92
Plant & Machinery								
Plant & Machinery	25%	2,138,443.04			2,138,443.04	534,611.00	1,603,832.04	2,138,443.04
Oven	25%		162,415.00		162,416.00	40,604.00	121,812.00	
Air Compressors	25%	10,378.13			10,378.13	2,595.00	7,783.13	10,378.13
Mettler Balances	25%	22,802.13			22,802.13	5,701.00	17,101.13	22,802.13
Desk Lamps	25%	40,290.86			40,290.86	10,073.00	30,217.86	40,290.86
Camera	25%	15,433.98			15,433.98	3,858.00	11,575.98	15,433.98
Card Punching Machine	25%	19,975.85			19,975.85	4,994.00	14,981.85	19,975.85
Metal Detectors	25%	28,086.12			28,086.12	7,022.00	21,064.12	28,086.12
Euro Air Purifier	25%	3,986.72			3,986.72	997.00	2,989.72	3,986.72
Vehicles								
Opel Astra	20%	278,147.89			278,147.89	55,630.00	222,517.89	278,147.89
Scooter	20%	8,146.54			8,146.54	1,629.00	6,517.54	8,146.54
Ford Escort	20%	302,925.82			302,925.82	60,585.00	242,340.82	302,925.82
Tata Sierra	20%	151,148.54			151,148.54	30,230.00	120,918.54	151,148.54
Cello	20%	468,182.63			468,182.63	125,637.00	342,545.63	468,182.63
Kinetic Honda	20%	15,441.10			15,441.10	3,088.00	12,353.10	15,441.10
Maruti Van	20%	81,363.76			81,363.76	16,273.00	65,090.76	81,363.76
Mercedes	20%	614,400.00			614,400.00	122,880.00	491,520.00	614,400.00
Total		5,272,715.10	56,545,566.00	429,000.00	61,389,281.10	6,878,204.00	54,511,077.04	5,272,715.10

* As per arbitration award.

19. From the perusal of the above Fixed Asset Schedule it is evident that the Building was not owned by the assessee until 31.03.2004 and that the same is reflected as an addition during the year under consideration by crediting the capital account of the partners. Considering all the facts as elaborated above and evidences submitted it is clear that the building was allotted to the individual partners belonging to Mehta Group as part arbitration award which they have brought into the books of the assessee firm as part of their contribution. It is also clear that the assessee firm did not hold any right in any form in the said building until such time the same is brought into the books through capital contribution of the partners. Accordingly we direct that the addition made towards capital gain on transfer of tenancy / occupancy rights for Rs. 5,63,07,760/- be deleted. The grounds raised by the assessee in this regard are allowed.

Addition under section 41(1) – Ground No.2

20. In the first round of assessment proceedings the AO noticed that "significant accounting policy" in Note-8 states that since the assessee firm has gone for one time settlement with their banker no interest has been charged to P& L A/c. The AO further noticed that the amount outstanding as payable to Vysya Bank Ltd. which stood at Rs. 6,58,34,613 as on 31.03.2004 was reduced to Rs. 1,50,00,000/- as at 31.03.2005. The AO accordingly held that there is reduction in the liability to the extent of Rs. 5,08,34,613/- which should be brought to tax under section 41(1) of the Act.

21. The assessee submitted before the AO that as part of consent terms liability was taken over by the partners who had to settle the dues to Vysya bank Ltd., and therefore, the loan was adjusted in the capital account of the partners. The assessee further submitted that the adjustment thus made would not amount to write back of a liability and hence provisions of section 41(1) is not applicable. The AO however did not accept the submissions of the assessee and accordingly made addition under section 41(1). The CIT(A) in the first round of appellate proceedings confirmed the said addition. The co-ordinate bench of the Tribunal remitted the issue back to the AO by holding that

“10. We have considered the detailed arguments of the Ld. Counsel and Ld. DR and examined the record. Here also the AO and CIT(A) have wrongly considered the issue. The liability with the bank was an existing liability and as a process of settlement the liability was also taken over by Mehta group. This is part of adjustment of assets and liabilities of the Firms between two groups. AO has only took in to consideration only part entries ignoring past payments to the bank' and adjustments made thereon. Consent term 3 is specific about the liability of Vysya bank. The CIT(A) also did not consider the letter filed before him stating as self serving document ignoring the stated facts. The supporting document of letter from the Vysya Bank was filed as additional document before us which supports the assessee's contentions.

Since the issue was not examined by the AO we are of the opinion that the same has to be examined afresh with reference to the record, consent terms and adjustment entries passed in this regard including the documents placed on record by assessee supporting the claims. The issue in this is therefore restored to the file of AO who should give proper opportunity to the assessee and decide the issue accordingly. Ground is accordingly considered allowed.”

22. The second round of assessment proceedings the assessee furnished a letter from Vysya Bank Ltd. which has confirmed the receipt of credits aggregating to Rs. 4,25,07,343/- in the subsequent period to submit that there was not cessation of liability during the year under consideration. The assessee also submitted that as per the arbitration award terms the outstanding liability of Vysya Bank Ltd. was to be settled by the continuing partners of the assessee firm and therefore there is no cessation of liability on that count also. The AO however after examining the various documents on record held that there is cessation of liability to the extent of Rs. 5,96,67,306/- by holding that -

“From the above Arbitration Award (Consent Terms), it is clear that the liability of settling the bank loan and interest thereon is that of the Claimants to the extent of Rs. 4 crores; and any amount due in excess over Rs. 4 crores has to be shared by the Claimant and Respondents in equal ratio. If one has to consider the Consent Terms for implementation in this respect, the total amount waived would work out as under:-

<i>Total amount due to Vysya Bank</i>	<i>Rs. 6,58,34,613/-</i>
<i>Less: Amt waived by Vysya Bank</i>	<i>Rs. 1,35,00,000/-</i>
<i>Balance payable</i>	<i>Rs. 5,23,34,613/-</i>
<i>Less :Amt. To be paid by Claimants</i>	<i>Rs. 4,00,00,000/-</i>
<i>Balance amounts to be shared equally by</i>	
<i>Claimants (50% of 1,23,34,613/-)</i>	<i>Rs. 61,67,306.50</i>
<i>Respondents (50% of 1,23,34,613/-)</i>	<i>Rs. 61,67,306.50</i>

From the above, it is very clear that the extinguishment of assessee's liability towards Vysya Bank as per the Consent Terms works out to Rs. 1,35,00,000/- + 4,00,00,000/- + 61,67,306 Rs. 5,95,67,306/-. The assessee, has nowhere explained the quantum of waiver in his letter, even though sufficient opportunity was given. Therefore, strictly following the clauses in the Consent Terms and other details submitted by the assessee, I arrive at the liability

figure including interest which is not borne by the assessee at Rs. 5,96,67,306/-, the same being in the nature of extinguishment of liability. Therefore, the amount of Rs. 5,96,67,306/- is added back to the assessee's income. Penalty proceedings are initiated under 271(1)(c) of the Income Tax Act for concealing particulars of income and for filing inaccurate particulars of income.

23. The CIT(A) confirmed the addition by holding that there has been a waiver of loan that needs to be brought to tax. Before us the ld. AR submitted that there is no cessation of liability since the amount is fully repaid either by the assessee firm or by the partners which is evident from the letter from Vysya Bank Ltd. The ld. AR also made an alternate submission that assuming without admitting that there has been a reduction in the liability, the cessation of liability did not happen during the year under consideration. In this regard the ld. AR drew our attention to letter dated 29.06.2005 from the assessee firm to Vysya Bank Ltd., (page 309 of paper book) wherein the details of payment orders towards the loan repayment is mentioned which is acknowledged by the Bank vide letter dated 30.06.2005 (page 310 of PB). The ld. AR further drew our attention to the letter from the assessee firm to Vysya Bank Ltd. dated 14.11.2006 wherein various payments/adjustments against the loan are communicated (page 312 of PB). The ld. AR also drew our attention to the letter written by Vysya Bank Ltd. dated 24.11.2006 (page 314 of PB). where the bank has acknowledged the receipt of Rs. 425,07,343.90 against the loan and issued a No Dues Certificate. The ld. AR argued that from the perusal of these various correspondences between the assessee and Vysya Bank Ltd. it is clear that during the year under consideration there is no cessation of liability since subsequent payments happened against the said loan which is acknowledged by the bank. The ld. AR with regard to entries passed in the books of accounts for the year ended 31.03.2005 wherein the liability was reduced to Rs. 1.50 Crores cannot be the basis for treating the difference as addition under section 41(1) since the

assessee firm has paid more than Rs. 1.50 Crores in the subsequent years which is evidenced by the above referred letters. The ld. AR submitted that in the letter dated 07.02.2005 (page 306 of PB) the bank has specifically stated that if the assessee fails to pay the amount of Rs. 1.50 Crores on or before 20.03.2005 the cessation terms granted by the bank towards settlement would stand automatically withdrawn and that bank would be entitled to recover the full liability. The ld. AR therefore argued that even as on 31.03.2005 the assessee has not made any payment which is evidenced from the subsequent payment details and therefore as per the terms of the bank the assessee is liable to settle the full amount. Accordingly, the ld. AR argued that as on 31.03.2005 there is no cessation of liability and therefore no addition can be made during the year under consideration. The ld. AR placed an alternate argument that addition under section 41(1) can be made only towards any expenditure which is claimed as deduction in the earlier years and the cessation of liability towards a loan settlement cannot be added under section 41(1)

24. The ld. DR on the other hand argued that the assessee by accounting the reversal of loan liability has acknowledged that there has been a reduction/cessation of liability. The ld. DR further argued the assessee has taken the new argument that there is no cessation during the year under consideration based on subsequent payments to Vysya Bank Ltd. for the first time before the Tribunal. The ld. DR therefore, prayed that the issue should be remitted back to the AO to examine this new contention of the assessee.

25. We have heard the parties and perused the material available on record. The assessee had an outstanding loan of Rs. 6,58,34,613 as on 31.03.2004 payable Vysya Bank Ltd., and the same amount was reflected at Rs.1.50 crores as of

31.03.2005. The AO on verification of the consent terms and the entries passed in the books of accounts held that to the extent of loan taken over by the partners and the amount waived off by the Bank, there is a cessation of liability and accordingly made an addition of Rs. 5,95,67,306/- under section 41(1) of the Act. Though the ld AR presented various alternate contentions to submit that the addition under section 41(1) is not tenable, for the purpose of adjudication, we will restrict our finding as to whether there has been a cessation of liability towards the loan during the year under consideration.

26. From the perusal of the various communications between the assessee and Vysya Bank Ltd., it is clear that the assessee has made subsequent payments or allowed the bank to adjust against deposits etc. Further it is noticed that the last of the correspondence in which the Vysya Bank issued vide letter date 24.11.2005 (page 314 of paper book) acknowledges that a sum of Rs.425,07,343.90 is received and that the account is closed as no further dues are receivable. We also notice that when the settlement was agreed between the assessee firm and Vysya Bank Ltd., (refer clause (d) in the letter dated 07.02.2005 in page 306 of PB), it was agreed that if the assessee does not pay the amount of Rs.1.50 crores on or before 20.03.2005, the concession granted would be automatically withdrawn. Our attention in this regard was drawn to the letter date 22.06.2005 in which the assessee firm sought further time from the Bank and the letter dated 05.07.2005 in which the Bank has acknowledged the receipt of Rs.1.50 crores. A combined reading of these correspondence between the assessee and the Bank, leads us to the conclusion that even if there has been a reduction in the liability to the Bank, the same is not materialized during the year under consideration. The subsequent payments made for an amount higher than Rs.1.50 crore also support this view. Accordingly in our considered view, based on facts and circumstances of the case

and the materials on record there is no cessation of liability to the assessee for the year under consideration. It is a settled position that the entries in the books cannot be basis for deciding whether there is a cessation on not towards liability. We in this regard notice that a similar issue has been considered by the coordinate bench in the case of Surekha International vs ITO (ITA No.2702/M/2009 dated 03.03.2010) where it is held that

12. No reasons were given for arriving at the above view that the disputed customs duty ceased to exist during the year. We are unable to find any reason to hold that the liability ceased to exist during the year. First of all the event of settlement under KVSS happened in December 1998 relevant for A.Y. 1999-2000, If at all one considers that KVSS settled the issue. Similar finding was also given by the A.O. vide para 5 in page 4 of the order. If payment of customs duty under KVSS is considered as cessation of balance liability then the issue should have been considered in A.Y. 1999-2000. Since the customs authorities have not issued any certificate in Form No. 4 as the assessee has not enclosed the withdrawal of writ petition, certainly the cessation has not occurred in A.Y. 1999-2000. The Hon'ble Delhi High Court has permitted the withdrawal of writ petition vide order dated 20.02.2004 Therefore, the liability has crystallised for payment as the writ petition was withdrawn and consequently the original liability gets restored. As the assessee has discharged only 50% of the demand raised the balance of demand automatically got crystallised once the writ petition was withdrawn. So on the happening of withdrawal of writ petition, there is no cessation of liability. In fact there is a crystallisation of liability which the assessee may have to discharge if demanded. Subsequent to intimation of the withdrawal to the designated authority, so far the designated authority has not issued any certificate granting amnesty to the assessee. The amount would not have been demanded by the customs authorities but that does not make that the liability has ceased to exist for ever and there is every possibility of non-granting of certificate to the assessee since the assessee has not complied with the provisions of section 90 and in such an event the assessee may be asked to pay the full outstanding liability in addition to the amount paid under KVSS.

13. In view of these facts, it cannot be stated that there is cessation of liability for the purpose of section 41(1) which irrevocably ceased so that there is no possibility of liability being revived in future. As rightly held by the ITAT Calcutta "C" Bench in the case of Sreepati Hosiery Mills (P) Ltd. 64 ITD.170 provisions of section 41(1) are not attracted if there is such possibility of reviving the same. Cessation is not complete and the provisions of section

41(1) are not attracted. Since there is no cessation of liability as contemplated by the A.O. and by the CIT(A) in the year under consideration the addition under section 41(1) in A.Y. 2001-02 cannot be upheld on the facts of the case. Assessee has not even written off the amount in the books of account pending the certificate by the designated authority. In view of this we are of the opinion that the amount cannot be considered under the provisions of section 41(1) in the year under consideration. On these preliminary reasons the addition made by the AO cannot be sustained.”

27. The facts in assessee's case are similar and therefore the ratio laid down in the above decision is applicable to the assessee's case also. We therefore hold that the addition made by the assessing officer under section 41(1) to the tune of Rs. 5,95,67,306/- is hereby deleted only for reason that during the year under consideration there is no cessation of liability. This ground of the assessee is allowed.

Disallowance of Legal and Professional expenses – Ground No.3

28. The assessee had spent an amount of Rs.4,15,939 as expenses towards arbitration proceedings and an amount of Rs.6,64,410 as expenses for custom cases. The Tribunal in the first round of proceedings with a direction examine the issue afresh based on facts and allow as per law. The AO in the remand proceedings disallowed the sum of Rs.4,15,939 on the ground that the arbitration is between the individual partners of the Shah and the Mehta Group and therefore the assessee firm cannot claim the said expenditure as a deduction. The expenditure towards custom case amounting to Rs.6,64,410 was disallowed since the full facts pertaining to the case pending with customs was not submitted before the AO. The CIT(A) upheld the disallowance on similar ground.

29. We heard the parties and perused the material on record. The assessee in the concise grounds is not contesting the disallowance of Rs.4,15,939. Therefore, disallowance of Rs. 4,15,939/- is confirmed. With regard to the disallowance of legal expenditure towards customs case the ld AR drew our attention to the ledger copy of the Legal and Professional fees, sample vouchers/bills V.M. Doiphode & Co, order of CEGAT and judgments of the Hon'ble Supreme Court to support that Shri. V.M. Doiphode represented assessee's case (page 316 to 372 of PB). From the perusal of ledger accounts we notice that there are payments made to V.M. Doiphode & Co and that tax has also been deducted at source from the same. Since it is discerned that payments has been made to legal professionals who appeared on behalf of assessee in Courts, the same needs to be allowed. However, from the ledger account we are not able to verify the payments made for legal expenses. Therefore, this issue is restored to AO for the limited purpose to verify the payments made to legal Firm/Counsels (after deduction of tax) and therefore the AO to allow the expenses in accordance to law after hearing the assessee. We direct the AO accordingly. The ground raised by the assessee in this regard is partly allowed for statistical purpose.

Disallowance of Foreign Travel expenses – Ground No.4

30. The assessee had claimed a sum of Rs.8,50,210 on account of Foreign Travel. In the remand proceedings the assessee submitted that the expenditure was incurred for the business trip of two of its partners to USA for market study and exploring possibility of new clients. However the assessee could not provide any further evidences before the AO and CIT(A) in support of the claim. Before us also

no new material is brought on record in support of the claim the foreign travel expenses are incurred wholly and exclusively for the purpose of business. Considering the facts and circumstances, we are inclined to sustain the disallowance made by the AO/CIT(A) in the absence any documentary evidences. Accordingly this ground of the assessee is dismissed.

Disallowance of salary expenses – Ground No.5

31. The assessee had claimed 17,50,000 which was disallowed by the AO in the first round of proceedings. In the remand proceedings as per the directions of the ITAT, the AO called for further details and the assessee produced evidence to the tune of Rs.1,75,000 and accordingly the AO disallowed the balance amount of Rs.15,75,000. Before the CIT(A), in the second round of appellate proceedings the assessee submitted necessary documents such as salary slip, ledger account etc, which could not be produced before the AO since the customs authorities had sealed the premises where these documents were kept. The CIT(A) after perusing the documents allowed the expenses to the tune of Rs.13,89,867 and disallowed Rs.1,85,133 for the reason that the same is a prior period expenditure for which no clarification is provided.

32. We heard the parties. We notice that the assessee has not submitted any new material to substantiate the claim of Rs.1,85,133 before us. Therefore we see no reason to interfere with the decision of the CIT(A) is disallowing the said amount. Accordingly this ground of the assessee is dismissed.

33. Ground No.6 of the concise grounds is general not warranting any separate adjudication.

34. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 01-03-2024.

Sd/-
(ABY T VARKEY)
Judicial Member

**SK, Sr. PS*

Sd/-
(MS. PADMAVATHY S)
Accountant Member

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File
5. CIT

BY ORDER,
(Dy./Asstt. Registrar)
ITAT, Mumbai