IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 588 of 2013

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COMMISSIONER OF INCOME TAX III....Appellant(s)

Versus

BHOGILAL RAMJIBHAI ATARA....Opponent(s)

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Appearance:

MR PRANAV G DESAI, ADVOCATE for the Appellant(s)

MR SN SOPARKAR, SR. ADV. MR B S SOPARKAR, ADVOCATE for the Opponent(s)

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MS JUSTICE SONIA GOKANI

Date : 04/02/2014

ORAL ORDER

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

Revenue is in appeal against the judgment of the Income Tax Appellate Tribunal dated 28.2.2013 raising following questions for our consideration:

> "A. Whether in the facts and circumstances of the case and in law, the Appellate Tribunal is right in coming to the conclusion that the ingredients of section 41(1) of the Act are not satisfied in the instant case?
>
> B. Whether in the facts and circumstances of the case and in law, the Appellate Tribunal is justified in deleting the addition of Rs.37,52,752/- made by the A.O. under section 41(1) of the IT Act?"

Briefly stated, the facts are that for the assessment year 2007-08, the assessee filed return of income which showed, besides others, a sum of Rs.37.52 lacs by way of his debt. The Assessing Officer inquired into such outstanding dues of the assessee. The assessee supplied details of 27 different creditors. The Assessing Officer issued summons to all these so called creditors and questioned them about the alleged credit to the assessee. In detail, the Assessing Officer in his order of assessment recorded that number of parties were not found at the given address. Many of them stated that they had no concern with the assessee. Some of them conveyed that they did not even know the assessee.

On the basis of such findings and considering that the debts were outstanding since several years, the Assessing Officer applied section 41(1) of the Income Tax Act, 1961 and added the entire sum as income of the assessee. The Assessing Officer held that liabilities have ceased to exist within the meaning of section 41(1) of the Act and therefore, the same should be deemed to be the income of the assessee.

The assessee carried the matter in appeal. CIT (Appeals) rejected the appeal. The assessee thereupon approached the Tribunal. The Tribunal by the impugned judgment, allowed the assessee's appeal making following brief observations:

> "7. We have heard both the parties. There is no finding that the impugned liabilities were trading liabilities in respect of which the assessee had obtained any benefit or advantage either by way of their remission or cessation in the year under appeal. The assessee has not written off the impugned liabilities shown in the accounts. The A.O. has not brought sufficient material on records to establish as to how the ingredients of section 41(1) are satisfied so as to bring the impugned addition within its ambit. ?The judgment of Hon'ble Jurisdictional High Court in C.I.T. V. Nitin Garg, cited

supra is squarely applicable. In this view of the matter ground No.1 taken by the assessee is allowed.

8. On the facts of the case, we do not consider it appropriate to restore the matter to the file of the CIT (A)/AO so as to give them second inning in order to establish the applicability or non-applicability of section 41(1). It is a settled principle of law that a statutory provision can be invoked only when the conditions stipulated by it are established. In the present case, conditions of section 41(1) are not satisfied. It is the policy of law to ensure that the litigations are brought to an end expeditiously. In this view of the mater, matters under appeal cannot be restored at the request of the parties so as to give second inning to the parties to establish their cases."

Learned counsel for the Revenue vehemently contended that the creditors whose details were given by the assessee were not even found. In many cases, those who were found stated that they have not given credit to the assessee. He, therefore, submitted that the Tribunal committed serious error in deleting the addition.

On the other hand, learned counsel Shri Soparkar for the assessee supported the order of the Tribunal contending that there had been no cessation of liability. Section 41(1) of the Act would not apply. In any case, it was not established that such liability ceased during the year under consideration.

The counsel relied on following decisions:

(I) In the case of **CIT v. Miraa Processors (P) Ltd.** (2012) 208 Taxman 93 (Guj.) in which Division Bench of this Court observed as under:

"14. As pointed out in the case of Sugauli Sugar Works (P) Ltd. (supra), vide the last five lines of the paragraph-6 of the judgment, the question whether the liability is

actually barred by limitation is not a matter which can be decided by considering the assessee's case alone but has to be decided only if the creditor is before the concerned authority. In the absence of the creditor, it is not possible for the authority to come to a conclusion that the debt is barred and has become unenforceable. There may be circumstances which may enable the creditor to come with a proceeding for enforcement of the debt even after expiry of the normal period of limitation as provided in the Limitation Act."

(ii) In the case of **CIT v. Nitin S. Garg**, (2012) 208 Taxman 16 (Guj.), it was observed as under:

15. In the case before us, it is not been established that the assessee has written off the outstanding liabilities in the books of account. The Appellate Tribunal is justified in taking the view that as assessee had continued to show the admitted amounts as liabilities in its balance sheet the same cannot be treated as assessment of liabilities. Merely because the liabilities are outstanding for last many years, it cannot be inferred that the said liabilities have seized to exist. The Appellate Tribunal has rightly observed that the Assessing Officer shall have to prove that the assessee has obtained the benefits in respect of such trading liabilities by way of remission or cessation thereof which is not the case before us. Merely because the assessee obtained benefit of reduction in the earlier years and balance is carried forward in the subsequent year, it would not prove that the trading liabilities of the assessee have become non existent.

16. Moreover, as pointed out in the case of Sugauli Sugar Works (P) Ltd. (supra), vide the last five lines of the paragraph-6 of the judgement, the question whether the liability is actually barred by limitation is not a matter which can be decided by considering the assessee's case alone but has to be decided only if the creditor is before the concerned authority. In the absence of the creditor, it is not possible for the authority to come to a conclusion that the debt is barred and has become unenforceable. There may be circumstances which may enable the creditor to come with a proceeding for enforcement of the debt even after expiry of the normal period of

limitation as provided in the Limitation Act."

(iii) In the case of **CIT v. G.K. Patel & Co.** (2013) 212 Taxman 384 (Guj)., in which a Division Bench of this court held and observed as under:

> "To the extent the said decision holds that a unilateral act on the part of the debtor cannot bring about a cessation of his liability, the same would not be applicable to the facts of the present case, in view of the insertion of Explanation 1. However, at the cost of repetition it may be stated that in this case there is no unilateral act on the part of the debtor so as to bring about a cessation of its liability. Therefore, the other part of the decision would still apply to the facts of the present case, namely that the cessation of liability has to be either by reason of operation of law, i.e., on the liability becoming unenforceable at law by the creditor and the debtor declaring unequivocally his intention not to honour his liability when payment is demanded by the creditor, or a contract between the parties, or by discharge of the debt – the debtor making payment thereof to his creditor. In the present case, admittedly there in no declaration by the assessee that it does not intend to honour its liabilities nor is there any discharge of the debt. In the aforesaid premises, as no event had taken place in the year under consideration to indicate remission or cessation of the liabilities in question, the provisions of section 41(1) of the Act could not have been invoked. The reasoning adopted by the Tribunal while holding that section 41(1) would not be applicable to the facts of the present case is in line with the principles enunciated in the above decision. The Tribunal, therefore, committed no legal error so as to give rise to any question of law warranting interference by this court."

We are in agreement with the view of the Tribunal. Section 41(1) of the Act as discussed in the above three decisions would apply in a case where there has been remission or cessation of liability during the year under consideration subject to the conditions contained in the

statute being fulfilled. Additionally, such cessation or remission has to be during the previous year relevant to the assessment year under consideration. In the present case, both elements are missing. There was nothing on record to suggest there was remission or cessation of liability that too during the previous year relevant to the assessment year 2007-08 which was the year under consideration. It is undoubtedly a curious case. Even the liability itself seems under serious doubt. The Assessing Officer undertook the exercise to verify the records of the so called creditors. Many of them were not found at all in the given address. Some of them stated that they had no dealing with the assessee. In one or two cases, the response was that they had no dealing with the assessee nor did they know him. Of course, these inquiries were made ex parte and in that view of the matter, the assessee would be allowed to contest such findings. Nevertheless, even if such facts were established through bi-parte inquiries, the liability as it stands perhaps holds that there was no cessation or remission of liability and that therefore, the amount in question cannot be added back as a deemed income under section 41(c) f the Act. This is one of the strange cases where even if the debt itself is found to be non-genuine from the very inception, at least in terms of section 41(1) of the Act there is no cure for it. Be that as it may, insofar as the orders of the Revenue authorities are concerned, the Tribunal not having made any error, this Tax Appeal is dismissed.

(AKIL KURESHI, J.)

(MS SONIA GOKANI, J.)

(vjn)