IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, JUDICIAL MEMBER AND
SHRI JASON P. BOAZ , ACCOUNTANT MEMBER

ITA No.1078/Bang/2014
Assessment year : 2009-10

Glen Williams, No.8, Sona Palace, Richmond Town, Bangalore – 560 032. **PAN: AABPW 4733B**	Vs.	The Assistant Commissioner of Income Tax, Circle 1(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri T.V. Subramanya Bhat, CA
Respondent by	:	Shri P. Dhivahar, Jt. CIT(DR)

Date of hearing	:	10.07.2015
Date of Pronouncement	:	07.08.2015

O R D E R

Per N.V. Vasudevan, Judicial Member

This is an appeal by the assessee against the order dated 12.3.2013 of the CIT(Appeals)-I, Bangalore relating to assessment year 2009-10.

2. In this appeal, the assessee has challenged the order of CIT(Appeals), whereby he confirmed the order of the Assessing Officer making an addition of Rs.65,66,925. The sum of Rs.65,66,925/-

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represents a list of sundry creditors of Rs.68,59,477, out of which the AO treated the sundry creditors to the tune of Rs.65,66,925 as non-existent and therefore added to the same total income of the assessee. Neither the orders of AO nor the CIT(A), is clear as to whether the addition is being made u/s. 68 or 41(1) of the Act.

3. Before we go to the merits of the appeal, there is a delay of about 456 days in filing the appeal before the Tribunal. The assessee has filed an affidavit explaining the reasons for the delay. In his affidavit, the assessee has stated that the order of CIT(Appeals) was passed on 12.3.2013 and was received by the CA of the assessee on 22.3.2013. The same was given by the CA to his assistant to be given to the assessee. The assistant of the CA however not deliver the order of CIT(A) to the assessee. It appears that the revenue proceeded to recover the arrears of tax due consequent to the order of CIT(A) and thereupon the assessee could get the order of CIT(A) from his CA, after making enquiries from the CA. The facts as stated in the application for condonation of delay are affirmed by the assessee in an affidavit of the CA, Shri T.V. Subramanya Bhat, which confirms the fact of non-delivery of the order of CIT(A) to the assessee.

4. The ld. DR, however, pointed out before us that the assessee claims to have got the knowledge of the order of CIT(A) when recovery proceedings were initiated. He brought to our notice that the appeal was

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filed before the Tribunal on 25.8.2014. According to him, even as early as 21.7.2014, a notice u/s. 271(1)(c) of the Act was issued to the assessee for AY 2009-10 and atleast when such notice was received by the assessee, he ought to have enquired about the fate of the appeal filed before the CIT(Appeals) with his CA. According to him, therefore, the delay in filing the appeal has not been properly explained.

5. We have considered the rival submissions. As we have already seen, the fact that the CA received the impugned order of CIT(A) on 22.3.13 and instructed his Assistant to deliver the same to the assessee is borne out from the affifdavit of the CA. It is also borne out from the affidavit of the assessee and CA that the Assistant of the CA did not deliver the order to the assessee. The assessee came to know about the impugned order when recovery proceedings were initiated against the assessee. The ld. DR has produced a letter dated 21.7.2014 sent to the assessee by the AO and the same is with reference to the penalty proceedings u/s. 271(1)(c) of the Act. There is no doubt, there is a reference in this letter about factum of dismissal of the assessee's appeal by the CIT(A) by order dated 12.3.2013. It is the plea of assessee that since this letter was with reference to penalty proceedings, he did not notice the contents of this letter. We are of the view that this explanation offered by the assessee is acceptable. Law is well settled that in income-tax proceedings, the assessee does not gain by delaying the proceedings, nor is there any prejudice to the revenue by correct and proper

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determination of tax liability. In fact, the Hon'ble High Court of Karnataka in *ISRO Satellite Centre, ITA No.532/2008,* expressed the view that in income-tax matters, delay in filing the appeal on the part of the assessee should be condoned, irrespective of the length of delay. The Hon'ble Supreme Court in the case of *Collector, Land Acquisition v. Mst. Katiji & Ors, 167 ITR 471 (SC)* has also taken the view that there should be a liberal and practical approach in exercising discretionary powers in condonation of delay. Keeping in mind the judicial pronouncements referred to above and considering the facts and circumstances of the present case, we are of the view that the delay in filing the appeal has occasioned due to a reasonable and sufficient cause. Accordingly, the delay in filing the appeal is condoned.

6. As far as merits of the appeal is concerned, the facts are that the assessee who is a dealer in sale of bakery and confectionary products, filed his return of income for AY 2009-10 on 30.9.09 declaring an income of Rs.29,07,340. In the course of assessment proceedings, the AO called for confirmations and complete names and addresses of sundry creditors totaling to Rs.68,59,477. These creditors were 22 in number and their names have been listed in para 2 of Assessing Officer's order. It is not dispute that none of the transactions with the creditors listed in para 2 of the AO's took place during the previous year. In other words, the balances were opening balances of the earlier financial years and no balance arose out of the transactions during the previous year.

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7. The assessee gave confirmations from the creditors which did not have complete details. The AO therefore called for the names and address of the creditors. The assessee furnished the names & addresses of 12 creditors out of 22 creditors. The AO sent a letter u/s. 133(6) to these creditors, but those letters were returned with the endorsement "no such person", except in the case of one creditor. When this fact was confronted to the assessee, the assessee submitted that the creditors were old creditors and the addresses given was the address available in the records of the assessee and therefore the assessee is not in a position to confirm whether those creditors were residing in that address.

8. The AO was not satisfied with this reply and made an addition of Rs.65,66,925 observing as follows:-

> "In view of the above points, it is to be concluded that the credit claims made in the books of the assessee as on 1.4.2008 by the above 21 parties are non-existent and therefore added to the income of the assessee. The total credit balance claims in respect of 21 cases referred in para 2 (except M/s. Perfect Industries) works out to Rs.65,55,925."

9. On appeal by the assessee, the CIT(A) confirmed the order of the AO observing as follows:-

> "3.3 I have carefully considered the appellant's submissions and also the reasons given by the AO in the assessment order. The AO made enquiries as per the information submitted by the appellant and gave him sufficient opportunities. Bu the appellant was unable to explain the amounts standing in the names of

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> various sundry creditors. The A.O followed the due process. At the time of appeal hearing, the appellant's authorised representative pleaded that the appellant was unable to obtain confirmation from the 21 creditors regarding the balances shown against them inspite of several opportunities. In the circumstances, I have no option but to confirm the addition of Rs.65,66,925/- made by the AO in this regard."

10. Aggrieved by the order of the CIT(Appeals), the assessee has preferred the present appeal before the Tribunal.

11. We have heard the submissions of the ld. counsel for the assessee and the ld. DR. The submission of the ld. counsel for the assessee was that addition u/s. 68 of the Act could not be made because, admittedly, the credits in question did not relate to the previous year relevant to AY 2009-10. In this regard, the fact that the creditors did not have any transactions during the relevant previous year is admitted by the AO in para 2 of the assessment order. According to him, therefore the provisions of section 68 will not be attracted. The ld. counsel thereafter drew our attention to the decision of the Hon'ble Delhi High Court in *CIT v. Sri Vardhaman Overseas Ltd., ITA No.774/2009 dated 23.12.2011 343 ITR 408 (Del)*, wherein on identical facts, the Hon'ble High Court held that neither section 68 nor section 41(1) of the Act would be attracted. In this regard, we have already observed that neither the order of the AO nor the order of CIT(A) is clear as to whether the impugned addition is being made u/s. 68 or 41(1) of the Act. U/s. 41(1) of the Act, if there is a cessation of liability of the assessee, then the same should be brought to tax, subject to other requirements to be

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satisfied u/s. 41(1). On the question of cessation of liability, ld. counsel for the assessee submitted that there is no evidence brought on record to show that liability of the assessee vis-à-vis creditors has ceased to exist. It was therefore submitted by the ld. counsel for the assessee that the impugned additions cannot be sustained in law and the same will have to be deleted.

12. The ld. DR, on the order, placed reliance on the orders of the Revenue authorities.

13. We have given a careful consideration to the rival submissions. On almost identical facts, the Hon'ble Delhi High Court in the case of *Shri Vardhaman Overseas Ltd. (supra)*, has clearly laid down that neither section 41(1) nor section 68 of the Act can be applied. On the applicability of section 68, we are of the view that those provisions will not apply as the balances shown in the creditors account do not arise out of any transaction during the previous year relevant to AY 2009-10. The provisions of sec. 68 are clear inasmuch as they refer to "sum found credited in the books of account of an assessee maintained for any previous year". Since the credit entries in question do not relate to previous year relevant to AY 2009-10, the same cannot be brought to tax u/s. 68 of the Act. The proper course in such cases for the Revenue would be to find out the year in which the credits in question were credited in the books of account and thereafter

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make an enquiry in that year and make an addition in that year, if other conditions for applicability of section 68 are satisfied.

14. As far as applicability of section 41(1) of the Act is concerned, the question before us is limited to the applicability of Section 41(1) of the Act. The section in so far as it is relevant for our purpose is as below:

> "Profits chargeable to tax.
>
> 41. (1) Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee (hereinafter referred to as the first-mentioned person) and subsequently during any previous year, -
>
> (a) the first-mentioned person has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or <u>some benefit in respect of such trading liability by way of remission or cessation thereof</u>, the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits and gains of business or profession and accordingly chargeable to income-tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not; or
>
> xx xx xx xx xxxx xx xx xxxx xx xx
>
> [Explanation 1 — For the purposes of this sub-section, the expression —loss or expenditure or some benefit in respect of any such trading liability by way of remission or cessation thereof shall include the remission or cessation of any liability by a unilateral act by the first mentioned person under clause (a) or the successor in business under clause (b) of that sub-section by way of writing off such liability in his accounts.]
>
> (underlining ours)

15. Explanation 1 which was inserted w.e.f. 1.4.1997 is not attracted to the present case since there was no writing off of the liability to pay the sundry creditors in the assessee's accounts. The question has to be considered de hors Explanation 1 to Section 41(1). In order to invoke clause (a) of Sec.41(1) of the Act, it must be first established that the assessee had obtained some benefit in respect of the trading liability which was earlier allowed as a deduction. There is no dispute in the present case that the amounts due to the sundry creditors had been allowed in the earlier assessment years as purchase price in computing the business income of the assessee. The second question is whether by not paying them for a period of four years and above the assessee had obtained some benefit in respect of the trading liability allowed in the earlier years. The words "remission" and "cessation" are legal terms and have to be interpreted accordingly. In the present case, there is nothing on record to show that there was either remission or cessation of liability of the assessee. In fact, there is no reference either in the order of the AO or CIT(A) to the expression "remission or cessation of liability". In such circumstances, we are of the view that the provisions of section 41(1) of the Act could not be invoked by the Revenue. In fact the decision of the Hon'ble Delhi High Court in the case of *Vardhaman overseas Ltd. (supra)* clearly supports the plea of the Assessee in this regard. On identical facts, the Hon'ble Delhi High Court on the applicability of Sec.41(1) of the Act, held:

"12. That takes us to the next question as to what constitutes remission or cessation of the liability. It cannot be disputed that the words "remission" and "cessation" are legal terms and have to be interpreted accordingly. In State of Madras vs. Gannon Dunkerley & Co. AIR 1958 SC 560 Venkatarama Aiyyar J. explained the general rule of construction that words used in statutes must be taken in their legal sense and observed :

> *"The ratio of the rule of interpretation that words of legal import occurring in a statute should be construed in their legal sense is that those words have, in law, acquired a definite and precise sense and that, accordingly, the legislation must be taken to have intended that they should be understood in that sense. In interpreting an expression used in a legal sense, therefore, we have only to ascertain the precise connotation which it possesses in law".*

In our opinion, this rule should be applied to the interpretation and understanding of the words "remission" and "cessation" used in the section.

13. In Bombay Dyeing & Mfg. Co. Ltd. vs. State of Bombay AIR 1958 SC 328 the legal position was summarized by T.L. Venkatarama Aiyar, J., in the following manner :

> *"It has been already mentioned that when a debt becomes time-barred, it does not become extinguished but only unenforceable in a Court of law. Indeed, it is on that footing that there can be statutory transfer of the debts due to the employees, and that is how the board gets title to them. If then a debt subsists even after it is barred by limitation, the employer does not get, in law, a discharge therefrom. The modes in which an obligation under a contract becomes discharged are well-defined, and the bar of limitation is not one of them. The following passages in Anson's Law of Contract, 19th Edition, p. 383, are directly in point :*
>
> > *"At Common Law lapse of time does not affect contractual rights. Such a right is of a permanent and indestructible character, unless either from the nature of the contract, or from its terms, it be limited in point of duration."*

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> *But though the right possesses this permanent character, the remedies arising from its violation are withdrawn after a certain lapse of time; interest reipublicaeut si finis litium. The remedies are barred, though the right is not extinguished.'*
>
> *And if the law requires that a debtor should get a discharge before he can be compelled to pay, that requirement is not satisfied if he is merely told that requirement is the normal course he is not likely to be exposed to action by the creditor."*

(underlining, italicised in print, ours)

This was also the view taken by the Supreme Court in CIT vs. Sugauli Sugar Works (P) Ltd. (supra).

14. Since the Tribunal has relied on the judgment of the Supreme Court in the case of CIT vs. Sugauli Sugar Works (P) Ltd. (supra) we may usefully refer to the decision in order to appreciate the controversy therein and the ratio laid down. That was a case of a private limited company. In respect of the asst. yr. 1965-66, it transferred a sum of 3,45,000 from the suspense account running from 1946-47 to 1948-49 to the capital reserve account. The ITO found that a sum of 1,29,000 out of the above amount repaymented deposits and advances which were paid back by the assessee. He, therefore, deducted this amount from the amount of 3,45,000 and the balance of 2,56,529 was brought to assessment under s. 41(1) of the Act. The assessee appealed unsuccessfully to the AAC and thereafter carried the matter in further appeal to the Tribunal. Its contention before the Tribunal was that the unilateral entry of transferring the amount from the suspense account to the capital reserve account would not bring the said amount within s. 41(1). The contention was accepted by the Tribunal whose decision was affirmed by the Calcutta High Court CIT vs. Sugauli Sugar Works (P) Ltd. (1981) 23 CTR (Cal) 226 : (1983) 140 ITR 286 (Cal). The Revenue carried the matter in the appeal to the Supreme Court. The contention of the Revenue (as noted at p. 520 of 236 ITR) was that on the facts of the case, the liability came to an end as a period of more than 20 years had elapsed and the creditors had not taken any steps to recover the amount and consequently there was a cessation of the debt which would bring the matter within the scope of s. 41(1). It may be noted that the contention of the Revenue in the case

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before us is precisely the same. To recapitulate, the learned standing counsel contended before us that since a period of more than 4 years has admittedly elapsed from the debt on which the debts were incurred and since the creditors had not taken any steps to recover the amount, there was a cessation of the debts which brought the matter under s. 41(1). Turning back to the judgment of the Supreme Court, we find that the judgment of the Calcutta High Court under appeal was affirmed for two reasons. The first reason was based on a judgment of the Full Bench of the Gujarat High Court in CIT vs. Bharat Iron & Steel Industries (1992) 105 CTR (Guj)(FB) 331 : (1993) 199 ITR 67 (Guj)(FB). It was held by the Supreme Court that the Gujarat High Court was right in saying that in order to attract taxability under s. 41(1) the assessee should have obtained, whether in cash or in any other manner whatsoever, any amount in respect of the loss or expenditure earlier allowed as a deduction. This part of the reasoning, in the light of the amended cl. (a) of sub-s. (1) of s. 41 may not be relevant after substitution of the said clause by the Finance Act, 1992 w.e.f. 1st April, 1993, by which the words "some benefit in respect of such trading liability by way of remission or cessation thereof" were inserted. After the amendment, therefore, it is not necessary that in respect of a trading liability earlier allowed as a deduction, the assessee should have received any amount, in cash or otherwise, but it is necessary that the assessee should have received "some benefit" in respect of such trading liability. However, we have already seen that this benefit in respect of trading liability should be "by way of remission or cessation of the liability", after the amendment made to the clause w.e.f. 1st April, 1993. The second part of the reasoning of the Supreme Court in CIT vs. Sugauli Sugar Works (P) Ltd. (supra) is based on the interpretation of the words "cessation or remission" of the trading liability. The Supreme Court noticed a judgment of the Bombay High Court in J.K. Chemicals Ltd. vs. CIT (1996) 62 ITR 34 (Bom) in which it was explained as to what could bring out a cessation or remission of the assessee’s liability. The observations of the Bombay High Court in the judgment cited above are as under :

"The question to be considered is whether the transfer of these entries brings about a remission or cessation of its liability. The transfer of an entry is a unilateral act of the assessee, who is a debtor to its employees. We fail to see how a debtor, by his own unilateral act, can bring about the cessation or remission of his

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liability. Remission has to be granted by the creditor. It is not in dispute, and it indeed cannot be disputed, that it is not a case of remission of liability. Similarly, a unilateral act on the part of the debtor cannot bring about a cessation of his liability. The cessation of the liability may occur either by reason of the 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. Transfer of an entry is neither an agreement between the parties nor payment of the liability. We have already held in Kohinoor Mills Co. Ltd. vs. CIT (1963) 49 ITR 578 (Bom) that the mere fact of the expiry of the period of limitation to enforce it, does not by itself constitute cessation of the liability. In the instant case, the liability being one relating to wages, salaries and bonus due by an employer to his employees in an industry, the provisions of the Industrial Disputes Act also are attracted and for the recovery of the dues from the employer, under s. 33C(2) of the Industrial Disputes Act, no bar of limitation comes in the way of the employees."

15. The Supreme Court noticed that the above observations of the Bombay High Court were quoted by the Calcutta High Court in the judgment under appeal before them, and observed as under while upholding the judgment of the Calcutta High Court :

"This judgment has been quoted by the High Court in the present case and followed. We have no hesitation to say that the reasoning is correct and we agree with the same.

To reinforce the conclusion, the Supreme Court also noticed its earlier judgment in Bombay Dyeing & Mfg. Co. Ltd. vs. State of Bombay AIR 1958 SC 328 wherein it was held that the expiry of the period of limitation prescribed under the Limitation Act could not extinguish the debt but it would only prevent the creditor from enforcing the debt.

16. In our opinion, the judgment of the Supreme Court in CIT vs. Sugauli Sugar Works (P) Ltd. (supra) is a complete answer to the contention of the learned standing counsel. In the case before the Supreme Court for a period of almost 20 years the liability remained unpaid and this fact formed the basis of the contention

> of the Revenue before the Supreme Court to the effect that having regard to the long lapse of time and in the absence of any steps taken by the creditors to recover the amount, it must be held that there was a cessation of the debts bringing the case within the scope of s. 41(1). In the case before us, the identical contention has been taken on behalf of the Revenue, though the period for which the amount remained unpaid to the creditors is much less. It was held by the Supreme Court that a unilateral action cannot bring about a cessation or remission of the liability because a remission can be granted only by the creditor and a cessation of the liability can only occur either by reason of operation of law or the debtor unequivocally declaring his intention not to honour his liability when payment is demanded by the creditor, or by a contract between the parties, or by discharge of the debt."

16. From the ratio laid down in the aforesaid decision, we are of the view that there is nothing on record to show any cessation or remission of liability by the creditor or even an unilateral act by the Assessee in this regard. In view of the above, we are of the view that the impugned addition cannot be sustained and the same is directed to be deleted.

17. The appeal of the assessee is accordingly allowed.

Pronounced in the open court on this 7th day of August, 2015.

Sd/-	Sd/-
(JASON P. BOAZ) Accountant Member	(N.V. VASUDEVAN) Judicial Member

Bangalore,
Dated, the 7th August, 2015.
/D S/

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2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar/
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