IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH:'F': NEW DELHI

BEFORE SH. G.C. GUPTA, VICE PRESIDENT
AND
SH. INTURI RAMA RAO, ACCOUNTANT MEMBER

ITA No. 159/Del/2011
Assessment Year: 2007-08

M/s Perfect Paradise Emporium Pvt. Ltd., 32, 1st Floor, Central Market, Ashok Vihar, Delhi (PAN:AAACP5808Q)	Vs.	Income Tax Officer, Ward 14(2), New Delhi
(Appellant)		(Respondent)

Appellant by : Sh. S.M. Mathur, CA
Respondent by: Sh. Vikram Sahay, Sr. DR

Date of hearing: 06.04.2015
Date of pronouncement: 22.04.2015

ORDER

PER INTURI RAMA RAO :

This is an appeal filed by the assessee company against the order dated 11.11.2010 passed by learned CIT(A) on the following grounds:

1. That the Hon'ble Commissioner of Income Tax (Appeals)-XVII, New Delhi has erred in law as much as on the facts of the case by sustaining the unwarranted additions of Rs. 19,61,036/- made by the learned Income Tax Officer u/sec. 68 of the Income Tax Act, 1961 for the alleged unsupported/unproved Sundry Creditors.
2. That on the facts and circumstances of the case, the Hon'ble Commissioner of Income Tax (Appeals) before confirming the aforesaid additions has not appreciated that :-
   a) The addition of so called unsupported/unconfirmed Sundry Creditors are pertaining to previous years i.e. prior to assessment year under appeal and these are the brought forward opening balance pertaining to previous years, which cannot form part the income-of the year under appeal.

(b) The statements recorded by the learned Assessing Officer during the course of remand proceedings u/sec. 131 of the Income Tax Act, 1961 of Sh. Rajesh Kumar Raheja and Sh. Anubhav Raheja ï Copies thereof were of course provided to the appellant remained unconfronted to the appellant so as to cross examine these two parties with reference to the documents and papers already filed by the appellant before the learned Assessing Officer as well with the Hon'ble CIT (A) before the statements of the above two parties were recorded. These statements were recorded behind the back of the appellant and these remained unrebutted by the appellant, therefore, the appellant is deprived of an opportunity to cross examine the witnesses.

3. That the appellate order passed by the Hon'ble CIT(A) in the instant appeal are vague because from it, it is not clear as to whether he is upholding the findings of additions made by the learned Assessing Officer u/sec. 68 of the Income Tax Act, 1961 or he is upholding the additions u/sec. 41 (1) of the Act considering the same as the case of remission of /cessation of liability. He has not passed speaking order in this reference, therefore, the non-speaking orders passed by the Hon'ble CIT(A) itself is not only bad in law by ab-initio void.
4. That the appellate orders passed by the Hon'ble CIT(A) are also in violation of the principles of natural justice as he had at first not dispose off the objections raised by the appellant during the course of appellate proceedings on the remand report with reference to the documents already on record and were available both with the learned Assessing Officer and also before him. The objection of the appellant that the statements recorded to the appellant u/sec. 131 of the Act were not taken in a right because it is prospective ignoring the documents already available with him but this objection of the appellant was at first not decided by the Hon'ble CIT (A) before deciding the appeal of the appellant, therefore, the appellate order of the Hon'ble CIT(A) are bad in law.
5. Without prejudice to the above, the Hon'ble CIT (A) while upholding the aforesaid unwarranted addition of Rs.19,61,036/- has failed to appreciate that these liabilities were since the opening balances being brought forward from previous years and assessee company did not obtain any benefit in respect of such trading liability by way of so called remission during the year under appeal, and the appellant company also did not written off these liabilities in the books of accounts maintained by them during the year under appeal, therefore, the provisions of section 41 (1) are also not applicable in the case of the appellant.

6. That on the facts and circumstances of the case, the learned Assessing Officer has erred in law by initiating the penalty proceedings u/sec. 271(1)(c) of the Act.
7. That the appellant assail their right to alter, submit additional Grounds of Appeal, if required, at the time of hearing of the appeal.

It is, therefore, kindly prayed that the aforesaid unwarranted addition of Rs.19,61,036/- made by the learned Assessing Office and erroneously upheld by the Hon'ble CIT(A) may kindly be cancelled after affording an opportunity of being heard to the appellant.

2. The factual matrix leading to the present appeal is as follows:

2.1 The assessee has filed the return of income on 31.10.2007 declaring total income of Rs. 46,924/-. The return of income was processed under Section 143(1) of the Income-tax Act, 1961 (for short ñthe Actò) and subsequently the case was selected for scrutiny and assessment was completed vide order dated 31.12.2009 under Section 143(3) of the Act at a total income of Rs. 21,94,630/-, inter alia, making the addition of Rs. 19,61,036/- on alleged fictitious creditors. During the assessment proceedings, the assessee was called upon to file the confirmation from all creditors. Since the appellant failed to file the confirmation letters from the creditors, a sum of Rs. 19,61,036/- was added to the returned income. Aggrieved, the assessee filed an appeal before the learned CIT(A) who vide order dated 11.11.2010 dismissed the appeal after considering the confirmation letters filed before him. He further concluded that the confirmation letters filed before him were bogus and therefore, upheld the addition. Hence, the present appeal.

3. It was argued before us that the learned CIT(A) while disposing of appeal had not complied with the principles of natural justice by not confronting with the statements obtained on oath from the creditors. He further argued that in any event it does not call for any addition in the appeal for the reason that even in case the creditors are found to be unproved the addition was to be made only in the year in which subject credit was made in the books of account and the addition cannot be made under Section 143(3) of the Act because there was no cessation of any trading liability.

4. On the other hand, the learned DR heavily relied on the order of learned CIT(A) and brought to our notice para 2 of the order wherein learned CIT(A) had considered the statements of the creditors at length.

5. After hearing the rival submissions and perusing the relevant material available on record, we are of the considered opinion that the learned CIT(A) had dealt with the issue threadbare. The appellant has chosen not to file the confirmation letters in respect of all the creditors before the Assessing Officer. It was only during the course of proceedings before the learned CIT(A), the appellant has filed two confirmation letters in respect of M/s R&A Techniques and M/s Millennium Marketing for credit balance of Rs. 6,76,000/- and Rs. 7,79,101/- respectively and had not filed any confirmation in respect of M/s Ganesh Enterprises and M/s Goyal Fasterners for credit balance of Rs. 3,70,588/- and Rs. 1,35,347/- respectively. The appellant filed these two confirmation letters before CIT(A) as additional evidence along with the

application under Rule 46A of the Income Tax Rules, 1962. Apparently, after admitting this additional evidence, the learned CIT(A) has called for remand report from the Assessing Officer, who in turn, examined Mr. Rajesh Raheja Prop. of R&A Techniques and Mr. Anubhav Raheja Prop. of Millennium Marketing on oath. They stated on oath that there were no money payable to M/s Perfect Paradise Emporium Ltd. i.e. the appellant and they further stated that they never signed any confirmation letters. The remand report of the Assessing Officer was furnished to the Authorized Representative of the appellant by the learned CIT(A). This amounts to affording an opportunity to rebut the remand report. While responding to the remand report, it is noticed that the appellant had not asked for the opportunity to cross examine those two parties except stating that the amounts were written off unilaterally by those two concerns. This, in our considered opinion, is not acceptable, inasmuch as, it is for those concerns to explain that the outstanding amounts have been written off in the earlier year itself. Pleading at this stage that the CIT(A) has not given opportunity to cross examine those parties is not tenable in the eyes of law since no party can take the advantage of its own mistakes. Therefore, the depositions made by those two creditors have become final and the depositions remain uncontroverted. This clinches the issue that sundry creditors can be held to be fictitious and no longer payable by the appellant. Therefore, in our considered opinion, the CIT(A) is justified in holding that the sundry creditors are factious.

6. Having held that the sundry creditors are not payable and fictitious, the next question that comes up for our consideration is the year in which the amount is taxable under what provisions of law either under Section 41(1) or 68 of the Act. We are required to examine whether this amount should be brought to tax in the year in which credit was made first time in the books of account or in the year in which these are found not payable. An identical issue had come up for consideration before the Hon'ble Gujarat High Court in the case of *CIT Vs Bhogilal Ramjibhai Atara in Tax Appeal No. 588 of 2013, dated 04.02.2013*, in which it was held as under:

> *"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."*

7. The Hon'ble Jurisdictional High Court in the case of *CIT Vs. Shri Vardhman Overseas Ltd., (2012) 343 ITR 408 (Del.)*, has dealt with the issues of taxability under section 41(1) of the Act in a case where long outstanding sundry creditors were treated as taxable. The Hon'ble High Court after referring to the decisions of Hon'ble Supreme Court in the cases of *CIT(Chief) Vs. Kesaria Tea Co. Ltd., (2002) 254 ITR 434(SC)* and *CIT Vs. Sugauli Sugar Works P. Ltd., (1999) 236 ITR 518 (SC,* has held that such amounts cannot be brought to tax under Section 41(1) of the Act. The Hon'ble Suprme Court in the case of *CIT Vs. Sugauli Sugar Works P. Ltd.* (supra) held 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.

8. Applying the ratio in the cases mentioned supra, we hold that the amount in question cannot be brought to tax in the year under appeal under the provisions of Section 41(1) of the Act. It is trite law that an addition under Section 68 can be made only in the year in which credit was made to the account of the creditors in the books of account maintained. Kindly refer to the Hon'ble Supreme Court in the case of *Damodar Hansraj Vs. CIT, (1969) 71 ITR 427 (SC)*. Admittedly, in this case the credit to the account of creditors was made in the earlier years and therefore, the amount even cannot be brought to tax under

Section 68 in the year under appeal. However, it is open to the Department to levy tax on such amount by resorting to the remedies available under the provisions of Act by duly following the procedure known to the law. This disposes of ground nos. 1 to 5.

9. The ground no. 6 relating to the initiation of penalty proceedings under Section 271(1)(c) of the Act. This issues does not emanate from the order of learned CIT(A) and therefore dismissed.

10. In the result, the appeal is partly allowed.

The decision is pronounced in the open court on 22nd April, 2015.

Sd/-
(G.C. GUPTA)
VICE PRESIDENT

Sd/-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER

Dated: 22nd April, 2015.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi