

आयकर अपीलीय अधिकरण, मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES 'B' MUMBAI
श्री डी. मन्मोहन, उपाध्यक्ष एवं श्री चंद्र पुजारी, लेखा सदस्य के समक्ष ।
BEFORE SHRI D. MANMOHAN, VICE PRESIDENT (M.Z.) AND
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

ITA NO.7537/Mum/2011 (A.Y.2007-08)

Bharat Dana Bera C/o., Jayesh Sanghrajka & Co. Chartered Accountants Unit No.405, Hind Rajasthan Centre D.S. Phalke Road, Dadar (E) Mumbai-400 014. GIR No./PAN : AKVPB 8714 H (Appellant)	Vs.	The Income tax Officer Ward 19 (1)(3), Piramal Chambers Mumbai. (Respondent)
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Appellant by :	Shri Harshavardhan Datar
Respondent by :	Shri Vivek Batra

Date of hearing :	03 /03/2015
Date of pronouncement :	05 /03/2015

ORDER

PER CHANDRA POOJARI, A.M:

This appeal is filed by the assessee. It is directed against the order passed by Id. CIT(A) dated 05/08/2011 for the assessment year 2007-08. The first ground in this appeal is with regard to sustained addition of Rs.23,34,721/- by CIT(A) out of addition made by AO at Rs.35,13,739/-.

2. Facts of the issue are that the assessee is a proprietor of M/s. Naughty Girls which is in the business of manufacturing and trading in ready-made garments. The AO found from the return of income and details thereof that there are outstanding sundry creditors. In order to verify the genuineness of the creditors generated over the years on

account of purchases notices u/s. 133(6) of the Act were issued to 14 parties. Out of which 8 notices were returned unserved with the remarks not known. Outstanding sundry creditors are shown at Rs.35.49 lacs in the name of 31 parties as per the balance sheet. The AO noted that even, after providing sufficient opportunities and time the assessee failed to provide the necessary details for proving their genuineness in respect of the remaining 25 parties. The AO further noted that the non furnishing of the requisite details gives an indication that the assessee has either not paid creditors or the creditors are non existing. After having made thorough enquiry in respect of sundry creditors the AO reached to the conclusion that out of total outstanding sundry creditors of Rs.35,49,294/- an amount of Rs. 35,555/- is only genuine sundry creditors. The remaining amount of Rs.35,13,739/- are non-genuine creditors and are no more payable. Therefore, the AO made addition of Rs. 35,13,739/- u/s.41(1) of the I.T. Act, 1961. The assessee is in appeal against this addition made by the AO.

3. On appeal CIT(A) called for the remand report from AO and observed that out of Rs.35,13,739/- assessee failed to furnish proof of creditors in respect of Rs.23,34,721/- and proved the creditors only in respect of Rs.11,79,018/- and as such he has sustained addition of Rs.23,34,721/- .Against this assessee is in appeal before us.

4. The Id. AR for the assessee submitted that the amount of Rs.23,34,721/- has ceased to exist and also there is no remission of liability in respect of this amount. It is further submitted that since assessee has shown these amounts as payable and not credited them as cessation of liabilities and there is nothing on record to suggest the

remission granted by the respective parties, addition made by the AO is to be deleted. It is further submitted that these creditors irrespective of anything cannot be added by invoking the provisions of section 68 as the said provisions are neither invoked during the assessment proceeding nor during the first appellate proceeding. It is further submitted that these creditors irrespective of anything could be added by invoking the provisions of section 68 as the said provisions are applicable only for the year in which credit is made. Since, all these balances are opening balances hence, provisions of section 68 could be invoked. Reliance in this regard was placed on decision of ITAT in matter of *ACIT vs. M/s Expo Gas Containers Limited* in ITA No.6271/Mum/2011, order dated 10.7.2013 in which it had been held that remission of liability arises when creditor voluntarily gives up the claim. The cessation of liability arises only when it ceases to exist in the eyes of law for all intents and purposes. Further the Id. AR relied on decision of Hon. Bombay High Court in matter of *CIT vs Surindra Engineering Co. Pvt. Ltd.* ITA No 2812 of 2010 order dated 12.09.2012 in which it had been held that alleged bogus purchases could be taxed only in year of transaction. Reliance was placed on decision of Hon. Bombay High Court in matter of *CIT vs Sugauli Sugar Works Pvt. Ltd.* (102 Taxman 713) in which it had been held that obtaining the benefit by assessee is sine qua non for the application of the section 41(1). Reliance was also placed on decision of ITAT in matter of *ITO v. M/s. V. Kumar & Sons* in ITA No 4649/Mum/2012 order dated 21.8.2012 in which it had been held that closing balances cannot be considered as remission or cessation by the party, even after three years of balance. Reliance was placed on decision of ITAT in the matter of *Mrs.*

Shailikarani Goel v. ITO in ITA No.911/Mum/2009 order dated 13/08/2010 in which it is found that liability in respect of all three parties is appearing in the books of assessee and there were no purchases during the year. All the balances were out of opening balances only. Therefore, section 68 cannot be invoked as genuineness of the transaction can be examined only in year to which it pertained. Reliance was also placed on decision of ITAT in the case of *Bamboot & Co vs. ACIT in ITA No. 1438/Mum/2010* order dated 20.04.2011 in which it has been held that the burden for proving, that the liability had ceased to exist during the year, is on revenue. This view is also supported by decision of the tribunal in case of *DCIT vs. Bhagwandas Shoberlal Jain 60 ITD 118*, and also by the decision of Hon'ble Supreme Court in matter of *Sugauli Sugar Works 236 ITR 518*. Reliance was placed on decision of ITAT in matter of *International Clothing Inds Ltd v. DCIT ITA No. 5923/Mum/2009* order dated 28/01/2011 in which it has been found that liability has been shown as outstanding and not written off by assessee. It had been held that department could assess the under section 41(1) only when assessee writes it off actually. Reliance was also placed on decision of *Hon'ble Delhi High Court* in case of *CIT v. Shri Vardhaman Overseas Limited ITA No 774 of 2009, 16 TAXMANN.COM 350* in which it had been held that addition for cessation of liabilities cannot be made under section 28(iv). Further, reliance in this regard was placed on the decision of *ITAT in matter of DCIT vs. Allied Leather Finishers Pvt. Ltd 32 SOT 549*, in which it had been held that closing balances of creditors could not be added by invoking provisions of section 41(1). It had also been held that Section 41(1) is invoked for inflow of credit in earlier year while section 68 is invoked for

inflow of credit in the current year. In the light of above facts, circumstances and judicial proposition, it is contended by the Id. AR for the assessee to allow the ground and delete the addition.

4.1 The Id. AR further submitted that Ground No. 2 is against the rejection of books of accounts of the assessee under section 145(3) and estimation of the net profits. During the assessment proceedings, due to failure of assessee to furnish the books of accounts by assessee, AO rejected the books of accounts of assessee. However, during the appellate proceeding, the assessee furnished the relevant details as an additional evidences which were admitted by CIT (A) and forwarded to AO for the remand report. In his remand report the AO had not reported any defect or absence of any document. He had only reported the existence of cash expenses. On these facts, confirmed the rejection, but however, reduced the percentage of net profit ratio at 7% as against the 10% estimated by AO. The assessee submitted that merely because cash expenses are found book results of the assessee should not be rejected, especially when they are audited. Apart from that no defect has been found by AO. It is submitted by the Id. AR that book results of the assessee are to be accepted and addition confirmed by CIT (A) is to be deleted especially when no defect is subsisting for books of account. It is further submitted that no adhoc addition at this stage for existence of cash expenses is to be made because it would amount to enhancement and revenue is not in the appeal against the order of CIT(A). It is contended by the Id AR to confirm the ground and delete the addition.

4.2 It is the plea of the Id AR that ground No.3 will come into play only if Ground No. 1 is rejected. Ground No.3 is against making separate addition despite rejection of books of accounts. It is submitted that since books of accounts of assessee were rejected and net profit is estimated addition of cessation of liabilities under section 41(1) is not justified and liable to be deleted. Reliance in this regard was placed on decision of ITAT in matter of *M/s Exim Kargo Kare v. ITO in ITA No. 5134/Mum/2011 order dated 7.08.2013* in which it is found that Ld. AO made additions under section 41(1) despite the estimation of net profit, it had been held that no further addition could be made when AO estimated the net profits after relying on the decision of *Hon'ble Allahabad High Court in case of CIT vs. Banwarilal Banshidhar (229 ITR 229)*.

4.3 He further relied on the following judgment in the case of *MCorp Global (P.) Ltd. (2009) 178 taxmann 347(SC)*.

5. On the other hand the Id. DR submitted that inspite of giving enough opportunity to the assessee, the assessee failed to establish the existence of sundry creditors to the tune of Rs.23,34,702/- . Being so, it was considered that these creditors were not in existence and same was considered as cessation of liability under section 41(1) of the Act.

6. We have heard both the parties and perused the material available on record. In this case the AO requested the assessee to furnish the details of purchases and outstanding sundry creditors, the payment details of creditors and year from which the creditors were shown as outstanding. The assessee has furnished the party-wise details of

purchases and outstanding sundry creditors. However, it is seen from the details furnished by the assessee that some of the creditors are very old and still shown as payable. As the creditors appearing in the balance sheet are very old and still shown as payable, it clearly indicates doubts and hence in order to verify the genuineness of the creditors generated over a year on account of purchases, notice u/s 13(6) of the Act were issued to the following parties and sent by speed post.

6.2 It was quite strange to note that most of notices issued and sent by speed post by AO have been returned unserved by the postal authorities. The reason for non-service of notice has been stated as 'Not known' .

Name of the party	Dt. of issue of notice	Reason given by the postal authorities for non-service	Amount of credit outstanding(Rs.)
M/S. MARBEL TAX	14/09/2009	NOT KNOWN	312431/-
M/S. FASHION INDIA	14/09/2009	NOT KNOWN	106562/-
M/S. SAI BABA TEXTILES	23/09/2009	NOT KNOWN	93010/-
M/S/ BABA TEXTILE	23/09/2009	NOT KNOWN	583368/-
M/S. BHAVANI TEXTILE	23/09/2009	NOT KNOWN	472642/-
M/S. AMBAVI	23/09/2009	NOT KNOWN	25940/-
M/S. MARBEL FEB	14/09/2009	NOT KNOWN	69998/-
SHREENATH TEXTILES	14/09/2009	NOT KNOWN	300115/-
SHREENATH TEXTILES	23/09/2009	REPLY RECEIVED	117809/-
SHREENATH TEXTILES	23/09/2009	REPLY NOT RECEIVED	
SHREENATH TEXTILES	23/09/2009	REPLY NOT RECEIVED	96501/-
SHREENATH TEXTILES	23/09/2009	REPLY RECEIVED	63715/-
SHREENATH TEXTILES	23/09/2009	REPLY RECEIVED	
SHREENATH TEXTILES	23/09/2009	REPLY NOT RECEIVED	126200/-

6.3 From the above, it can be seen that out of 14 cases notices were returned unserved in 8 cases on the ground that party is not known.

6.4 Since the notices issued by AO to the parties were returned unserved, assessee vide order sheet noting dated 01.10.2009 was asked to furnish the details of subsequent payment of outstanding sundry creditors by giving cheque number through which creditors are paid and date of cheques issued. The aforesaid details were furnished on 29th October 2009 in respect of few parties.

6.5 The details were submitted by the assessee before AO in respect of *M/s* Baba Textiles, *M/s* Bhavani Textiles, *M/s* Hari Enterprises, *M/s* Jyoti Traders, *M/s* Sai Baba Textiles and *M/s* Shreenath Textiles. However, the outstanding sundry creditors are shown at Rs. 35.49 lacs in the name of 31 parties as per the balance sheet. Even after providing sufficient opportunities by AO, assessee failed to provide the above details in respect of the remaining 25 parties. Non furnishing of these details gives an indication that assessee has either not paid the creditors or creditors are non-existent.

6.6 It is seen from the details of subsequent payment of sundry creditors furnished in respect of certain parties that some of these creditors are outstanding from 2001 and some of them are being paid partly in the year 2009. The details furnished by the assessee in respect of only 5 parties are as under :

Name of the creditors	Cheque No.	Date of issue	Amount(Rs.)	Final closing Balance
Baba Textiles	276729	19.4.2007	26650/-	
Baba Textiles	277073	23.10.2008	50000/-	
Baba Textiles	277094	8.12.2008	30000/-	

Baba Textiles	277019	21.2.2009	30000/-	4,46,718/-
Bhavani Textile	277078	2.12.2008	31350/-	
Bhavani Textile	277079	2.12.2008	31040/-	
Bhavani Textile	277003	09.05.2008	19870/-	
Bhavani Textile	277080	04.12.2008	32040/-	
Bhavani Textile	277093	8.12.2008	25245/-	3,95,487/-
Hari Enterprise	277106	22.12.2008	25000/-	84,700/-
Hari Enterprise	Paid in cash	-	42700/-	
Shreenath Textiles	755923	04.06.2006	9822/-	
Shreenath Textiles	755944	12.09.2006	12461/-	
Shreenath Textiles	755982	14.11.2006	13272/-	
Shreenath Textiles	277059	11.10.2006	25000/-	2,75,115/-
Jyoti Traders	Paid in cash	-	55300/-	93,010/-

6.7 The creditors which are outstanding from 2001 if paid in the year 2009 clearly indicates doubts and hence in order to examine the correctness of the statement furnished by the assessee, notice u/s 133(6); was issued to the banker of the assessee by AO, requiring it to furnish the copy of bank statement and payment detail in respect of outstanding creditors as stated by the assessee to settle the creditors.

7. The assessee was not able to furnish the bank statement copy, however, the AO procured the bank statement from the bank and found certain discrepancies in the statement regarding payment to sundry creditors. Finally he made an addition of Rs.35,13,739/- in respect of outstanding creditors treating as cessation liability. However, CIT(A) called for remand report from the AO in the course of first appellate proceedings and once again the AO called for details of sundry creditors

and payment to them. The assessee failed to furnish the details in respect of sundry creditors amounting to Rs.23,34,721/-. Admittedly, these credits continued to be carried forward year after year. In the normal course everybody would ordinarily claim the dues and usually they take steps to recover the dues if it is a genuine liability. In this case, the liability remains to be recovered year after year. For invoking provisions of section 68 of the Act, if any sum is to be found credited in the books of the assessee maintained during the previous year, only then it would be possible to make addition under section 68 of the Income tax Act. In the case of carried forward credit, which is from earlier year, provisions of section 68 cannot be applied. In the present case, the liabilities outstanding in the books of account of the assessee for the assessment year under consideration and only the provisions of the section 41(1) of the Act could be applied. In the present case the assessee failed to establish the actual existence of the impugned disputed amount in the books of account of the assessee. The assessee has drawn its balance sheet based on its books of account, in which the above amount, were being claimed as liabilities due, to various parties, as at the end of the accounting year under dispute. However, the assessee failed to establish the genuineness of these liabilities by producing supporting evidence. Simply the liabilities being reflected against certain names in the books of account would not establish the genuineness of liabilities.

8. On the other hand the AO required the assessee to file supporting evidence from the alleged creditors and the assessee was only able to prove the existence of the liability in respect of Rs.11,79,018/- and balance was not established as genuine. This shows, that the assessee

has no explanation to prove that the creditors in the books of account are genuine. The assessee failed to discharge its onus cast on it, to substantiate its claim. Being so, CIT(A) is justified in holding that such liabilities did not exist at the end of the accounting year and rightly sustained the said liabilities which has ceased to exist.

9. The Id. AR had also taken a plea before us, that this issue was covered in favour of the assessee by the judgment of Hon'ble Jurisdictional High Court in the case of *CIT vs. Surindra Engineering Co. Pvt. Ltd. in IT Appeal No.2812 of 2010 dated 12/09/2012*. We have carefully gone through this judgment wherein it was decided in favour of the assessee on the reason that the liability in respect of alleged bogus purchases having been made in the assessment year 1993 i.e. outside the block period, it cannot be brought to tax in the block assessment covering the period from 1/4/1995 to 21/3/2002. Being so, this judgment is of no assistance to the assessee . We find that there are following judgments which are decided by the co-ordinate Bench against the assessee .

- i) ITO vs. Shailesh B. ... dated 11/12/2013 in ITA No.7012/2010;
- ii) Yusuf Kanwar vs. ITO . dated 28/2/2013 in ITA No.8408/M/2010;
- iii) ITO vs. Sajjan Kumar Didwani 65 SOT 179;

9.1 Being so, in our opinion the above judgments are squarely applicable to the facts of the case. Accordingly, this ground of the assessee is dismissed.

10. The next ground i.e. ground No.3 in this appeal is with regard to the estimation of net profit of Rs. 6,95,770/- by the AO. The facts in this regard are that in the P&L A/c, the assessee has shown total sales of Rs. 69,57,69,21/- and total purchase at Rs. 52,87,543/-. The assessee was asked to furnish the purchases made by him which was furnished by the assessee vide letter dated 18.09.2009. The AO verified the purchases of the assessee by issuing notices u/s.133(6) of the I.T. Act in respect of 7 parties. Replies were received in respect of two parties and all other notices were unserved with the remarks not known. The AO asked the assessee to produce the books of accounts and bills and vouchers for verification. The AO observed that these were not furnished before him. Since the books of accounts etc. were not produced before him the AO proceeded to complete the assessment u/s.144 of the I.T. Act being best and estimated the income of the assessee at 10% of the turnover.

10.1 On appeal, CIT(A) observed that the AO had estimated the net profit of the assessee primarily on the ground that the books of accounts and bills etc. were not produced before him. During the remand proceedings the assessee had produced the books of accounts with bills and vouchers. The AO has not commented adversely anything about the purchase of the assessee. However, with regard to the four-expenses as stated above he has stated that there are no bills and vouchers for these expenses and the same are incurred in cash. In view of this he estimated profit at 7% of the turnover which works out to Rs.4,87,038/-. Therefore, out of total addition made Rs.6,95,770/- addition to the extent of Rs.4,87,038/- was confirmed and balance addition of Rs.2,08,732/- was direct to be deleted. Against this the assessee is in appeal before us.

11. We have heard both the parties and perused the material available on record. The pattern of assessment is given by Section 29 of the Income tax Act, which states that the income from profit and gains of business shall be computed in accordance with the provisions contained in sections 30 to 43D. Section 43 provides for certain disallowances in certain cases notwithstanding that those amounts are allowed jointly under other sections.

11.1 The computation under Section 29 is to be made under section 145 on the basis of the books regularly maintained by the assessee. If those books are not correct or complete, the Income-tax Officer may reject those books and estimate the income to the best of his judgment. When such an estimate is made it is in substitution of the income that is to be computed under Section 29. In other words, all the deductions which are referred to under Section 29 are deemed to have been taken into account while making such an estimate. This will also mean that the embargo placed in Section 40 is also taken into account.

12. This will mean that the embargo placed in section 41 (1) is also taken into account. In the present case during the course of remand proceedings before AO the assessee produced the books of account. The AO also confirmed the examination of books of account and observed that the assessee has not produced the bills in respect of conveyance expenses Rs.75,710/-; general expense Rs.69,361/-, motor car expenses Rs.48,000/-, telephone expenses Rs.20,052/-. Once the books of account of the assessee was produced before the lower authorities and if there is certain discrepancy the authorities were free to make

addition to that extent of discrepancies noticed by the authorities and, authorities were precluded in rejecting the books of account of the assessee. In such circumstances in our opinion, in this case rejection of books of account of the assessee is not justified. However, there is certain discrepancy noticed by the authorities in the course of first appellate proceedings. Accordingly, in our opinion instead of adhoc estimation, we are inclined to sustain the disallowance in respect of expenses incurred in cash and no bills or vouchers were produced by the assessee for verification namely conveyance expenses, Rs.75,710/-, general expenses Rs.69,361/-, motor car expenses Rs.48,000/-, telephone expenses Rs.20,052/-. Accordingly we sustain these additions and the ground of the assessee is partly allowed.

13. In the result, ITA No.7537/11 is partly allowed.

Order pronounced in the open court on 05/03/2015
आदेश की घोषणा खुले न्यायालय में दिनांक: 05/03/2015 को की गई ।

Sd/-

Sd/-

(डी. मन्मोहन / **D. MANMOHAN**) चंद्र पुजारी / **CHANDRA POOJARI**)
उपाध्यक्ष / **VICE PRESIDENT** लेखा सदस्य / **ACCOUNTANT**

MEMBER

मुंबई Mumbai; दिनांक Dated 05/03/2015

व.नि.स./Jv, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Assessee
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai