

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "D" KOLKATA**

Before **Shri S.S.Viswanethra Ravi, Judicial Member** and
Shri Dr.A.L.Saini, Accountant Member

ITA No.1520-1521/Kol/2016 Assessment Years :2004-05 & 2010-11

Banarasi Holding Pvt. Ltd., P-3, New CIT Road, Kolkata-700 073 [PAN No.AABCB 4048 H]	V/s.	ITO, Ward-13(1), Aaykar Bhawan, Poorva, 110, Shanti Pally, Kolkata-107
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

आवेदक/ की ओर से /By Assessee	Shri Manish Tiwari, FCA
राजस्व की ओर से/By Respondent	Md. Ghayas Uddin, JCIT-DR
सुनवाई की तारीख/Date of Hearing	04-01-2017
घोषणा की तारीख/Date of Pronouncement	13-01-2017

आदेश /O R D E R

Shri S.S.Viswanethra Ravi, Judicial Member:-

Both appeals by the assessee are against the different orders dated 14.03.2016 & 16.03.2016 passed by Commissioner of Income Tax (Appeals)-5, Kolkata for assessment years 2004-05 & 2010-11 respectively.

2. Since the Assessee, facts and relief sought in both the appeals are similar and identical, therefore, said appeals heard together and are being disposed of by way of consolidate order for the sake of convenience.

First we shall take up ITA No.1520/Kol/2016 for A.Y. 2004-05.

3. Assessee has raised as many as five grounds amongst which Ground No.1 and 2 raised challenging the *ex parte* order by CIT(A) and Ground No. 3 and 4 are challenging the order of CIT(A) on merits.

4. At the time of hearing Ld. AR for assessee submits initially assessee filed its return of income on 30.10.2004 and said return was processed u/s 143(1) of the Income Tax Act, 1961 (hereinafter referred to 'of the Act') on 24.10.2005. Thereafter assessment was reopened duly following the procedure as set out u/s. 148 of the Act, wherein in response, assessee could not produce the relevant details before Assessing Officer. Accordingly, AO determined the income of assessee at ₹23,46,664/- and passed an order to the effect u/s. 144 of the Act. It was further submitted by Ld. AR that assessee has engaged an Authorized Representative to prosecute its case before CIT(A) but unfortunately, none appeared representing the assessee and referred to in para-1.1 of the impugned order and urged to remit the issue to the file of AO.

5. On contrary, Ld. DR submits many opportunities were afforded to assessee by AO in reopening proceedings but assessee could not submit confirmation statement or evidence in support of claims before AO and referred to order of AO. Ld. DR also submits that Ld. CIT(A) granted several adjournments to assessee but assessee could not avail the same and relied on the order of Authorities Below.

6. Heard rival submissions and perused the materials available on record. We find that assessee filed its return of income in 2004 and AO reopened said assessment on a reason that income of ₹20,56,14,814/- escaped assessment duly following procedure as contemplated u/s. 148 of

the Act. However, assessee could not avail the opportunity and that notice u/s 148 of the Act was served on 13.08.2007 for non compliance of the same and AO completed the assessment for best of his judgment. Before CIT(A) also authorized representative representing assessee appeared on 23.08.2011 and 17.12.2012 and other occasions none could represent the case of assessee. Ld. AR submitted that the assessment was reopened in the year 2007, after a period of three years from date of filing original return and the assessment was completed in 2008 u/section 144 of the Act and the assessee could not gather information to file the same before the AO. Likewise, before CIT(A), it is noticed the AR appeared before CIT(A) on two occasions and remained absent on other four occasions. It clearly shows before the Authorities Below, the assessee could not avail the opportunity as afforded by the Authorities Below. In view of the submissions of the both parties and taking into consideration the facts of the case, we are of the view that the issues involved in ground No's 3 & 4 require fresh adjudication. Accordingly, we deem it appropriate to restore the said issues to the file of AO. We are conscious of the fact that Assessment is of 2004-05, therefore, we direct the assessee to co-operate with the AO in the proceedings without seeking adjournment and assessee is liberty to file any evidence in support of its claim. Accordingly, ground No's. 1 and 2 are allowed for statistical purpose.

7. In the result, assessee's appeal stands allowed for statistical purpose.

Now, we shall deal with ITA No.1521/Kol/2016 for A.Y.2010-11.

8. In this appeal various grounds have been raised out of which grounds No. 2 to 5 were not pressed, and therefore, same are dismissed as not pressed. Ground No.6 is of general nature and does not require separate adjudication.

9. The only effective ground is as together CIT(A) is justified in holding the addition made by AO u/s 41(1) of the Act. The AO on perusal of the schedule-8 of the balance-sheet as stood on 31.03.2010 found ₹ 1 and 5 lakh respectively to M/s EK Estate & Developers Pvt. Ltd. and M/s Probal Traders Pvt. Ltd. respectively as liability. According to AO, assessee furnished wrong addresses of M/s EK Estate & Developers Pvt. Ltd. and M/s Probal Traders Pvt. Ltd. and letters could not served on such entities. The AO show-caused assessee to furnish complete addresses of such concerns and for non-submission and he treated the same as demat profit and added same to the income of assessee u/section 41(1) of the Act.

10. In First appellate proceedings, CIT(A) having obtained remand report from the Assessing Officer and dismissed the issue on hand for non-submission of relevant documents in rebutting the addition.

11. Before us Ld. AR submits that assessee did not written off the liability and said liability nor ceized till now and argued there was no cessation or remission of liability and said addition needs to be deleted and placed reliance the order of this Tribunal in ITA No.734/Kol/2015 in the case of *Pabitra Biswas vs. ITO* dated 06.01.2016. On the other hand, Ld. DR relied on the order of Authorities Below.

12. Heard rival submissions and perused the materials available on record. We find the facts of instant case and the case law cited by Ld. AR are similar to the issue on hand, wherein the Tribunal held the addition made by Assessing Officer u/s. 41(1) of the Act is not sustainable and relevant portion is reproduced herein below:-

"6. I have heard the arguments of both the sides and also perused the relevant material available on record. Although the Id. DR has strongly relied on the impugned order of the Id. CIT(Appeals) in support of the revenue's case on this issue and referred to the case laws relied upon by the Id. CIT(Appeals) are different from the facts involved in the present case. On the other hand, the facts involved in the case of Shri Sahadeb Kundu decided by the Coordinate Bench of this Tribunal vide its order dated 07.05.2015 passed in ITA Nos. 1345 & 1446/Kol/2011 as cited by the Id. Counsel for the assessee are similar to the facts of the present case, wherein the similar addition made by the Assessing Officer under section 41(1) was held to be unsustainable by the Tribunal for the following reasons given in paragraph no. 5 of its order:-

'5. We find from the above facts that these are trade creditors admittedly coming from earlier years being opening balance. We also find from the record that the assessee has not written-off the liability or liability has not ceased or remitted. In such circumstances, now we have to go to the provisions of section 41(1) of the Act and see the legal possession. Section 41(1) 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 2007-08 relevant to the assessment year 2008-09 which was the year under consideration. It is undoubtedly a curious case. Even the liability itself seems under serious doubt. The AO 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 biparte 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 deemed income under section 421(1) of 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. Hence, we have no alternative except to confirm the findings of CIT(A) in respect of deletion but reverse qua the confirmation of addition.'

13. In the present case the assessee furnished the addresses of M/s. E.K Estates & Developers Pvt. Ltd and M/s. Probal Traders Pvt. Ltd. But, however, according to the AO, the addresses of such concerns proved to be wrong on verification. But in the aforementioned case law as relied on by the Id.AR that in order to attract the provisions of section 41(1) shall be requirement of remission or cessation of such liability during the year under consideration. We find that neither such remission or cessation by the assessee nor the AO could bring on record anything to show that the said liability ceased or remitted. Therefore, in view of the same by relying on the decision/order of this Co-ordinate Bench in the case of Pabitra Biswas in ITA No. 734/Kol/2015 for the AY 2010-11 and Sahadeb Kundu in ITA Nos.1345/Kol/2011 and ITA No.1446/Kol/2011 for the A.Y 2008-09 the addition made u/s. 41(1) of the Act is liable to be deleted.

14. In this regard, we may refer to the decision in the case of Nitin S.Garg of Hon'ble High Court of Gujarat reported in (2012) 22 taxmann.com 59(Guj). The relevant paras are reproduced herein below for better understanding:

15. In the case before us. it is not been established mat the assessee has written off the outstanding 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."

15. In the aforesaid decision the Hon'ble High Court of Gujarat was pleased to hold that if the assessee continues to show the admitted amounts as liabilities in its balance sheet and the same cannot be treated as seized to exist. In the present case also the assessee has shown the liabilities to be paid. Therefore, we are of the view the facts of the Hon'ble High Court of Gujarat in the case of supra is also applicable to the present facts of the case.

16. In another decision in the case of CIT Vs. Alvares & Thomas Jayant Patel & Mrs. B.V Nagarithna reported in [2016] 69 Taxmann. Com 257 (Kar) held that if the parties could not be traced and the debts could not be verified in such circumstances also no addition on account of cessation of liability is attracted. The relevant portion is reproduced herein below:-

9. In our view, even if we accept the contention of the Revenue that the party could not be traced and therefore debt could not be verified then also, by no stretch of imagination can it be held that it would satisfy the requirement of cessation of liability. In legal parlance, merely because the creditor could not be traced on the date when the verification was made, same is not a ground to conclude that there was cessation of the liability. Cessation of the liability has to be cessation in law, of the debt to be paid by the assessee to the creditor. The debt is recoverable even if the creditor has expired, by the legal heirs of the deceased creditor. Under the circumstances, in the present case, it can hardly be said that the liability had ceased. If the liability had not ceased or the benefit was not taken by the assessee in respect of such trade liability, in our view, the conditions

precedent were not satisfied for invoking Section 41(1) of the Act in the instant case.

17. In the present case according to the AO the assessee produced full details of sundry creditors and the said addresses could not be verified during the course of assessment proceedings as the addresses proved to be wrong and as such he added the said amount u/s. 41(1) of the Act. Therefore, in our view that the facts and circumstances of the above cases are applicable to the present case and thereby the addition requires to be deleted.

18. Respectfully following the law laid down by the Hon'ble High Courts of Gujarat and Karnataka and the order of the Co-ordinate Bench of Kolkata Tribunal in the cases of supra, we delete the impugned addition as made by the AO u/s. 41(1) of the Act and confirmed by the CIT-A. This ground of assessee's appeal is allowed.

19. In the result, assessee's appeal in ITA No.1520/Kol/2016 for the AY 2004-05 is allowed for statistical purpose and that of ITA No. 1521/Kol/2016 for the AY 2010-11 is partly allowed.

Order pronounced in the open court 13/01/2017

Sd/-
(Dr.A.L. Saini)
(Accountant Member)

Sd/-
(S.S.Viswanethra Ravi)
(Judicial Member)

Date/ दिनांक:- 13/01/2017

*Dkp

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-Banarasi Holding Pvt. Ltd. P-3, New CIT Road, Kolkata-700 073
2. राजस्व/Revenue-ITO Ward-13(1), Aaykar Bhawan Poorva 110, Shanti Pally, Kol-107
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4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,
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आयकर अपीलीय अधिकरण,
कोलकाता ।