

आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम

**IN THE INCOME TAX APPELLATE TRIBUNAL,
VISA KHAPATNAM BENCH, VISA KHAPATNAM**

श्री वी. दुर्गाराव, न्यायिक सदस्य एवं
श्री डी.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष

**BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A.No.488/Vizag/2013
(निर्धारण वर्ष / **Assessment Year: 2005-06**)

The ITO, Ward-2(1)
Central Revenue Buildings
M.G.Road
Vijayawada-2
Krishna District(AP)

Sri K.V.S.Prakasa Rao
L/R of Late Smt.K.Suseela
D.No.29-14-53,
Suryaraopet
Vijayawada

[PAN : AFWPK8823N]

(अपीलार्थी / Appellant)

प्रत्यार्थी / Respondent)

अपीलार्थी की ओर से / Appellant by
प्रत्यार्थी की ओर से / Respondent by

: Shri V. Appala Raju, DR
: Shri C. Subrahmanyam, AR

सुनवाई की तारीख / Date of Hearing

: 03.08.2017

घोषणा की तारीख/Date of Pronouncement

: 18.08.2017

आदेश / ORDER

PER D.S. SUNDER SINGH, Accountant Member:

This appeal is filed by the revenue against the order of the
Commissioner of Income Tax (Appeals), [CIT(A)], Vijayawada
vide ITA No.430/CIT(A)/VJA/10-11 dated 29.04.2013.

2. The revenue has raised the following grounds of appeal :

1. The Ld. CIT(A) erred both in law and on facts of the case.
2. Whether on facts and in circumstances of the case the Ld. CIT(A) is justified in holding that it is not taxable u/s.41(1) of the Act as there was no transfer to the Profit and Loss account?
3. The Ld. CIT(A) erred in deleting the addition of Rs.2,85,79,116/- made as per the provisions of section 41(1) r.w.s. 68 of the Act as the provisions clearly state that in respect of loss, expenditure, trading / liability incurred by the assessee for *any* year and subsequently, the assessee obtained any amount in respect of such loss, expenditure or trading liability , the amount obtained or the value of benefit accruing to the assessee shall be deemed to be profits and gains of business.
4. The Ld. CIT(A) failed to consider that the same falls under section 41(1) of the Act as the creditor viz Gujarat Insecticides Limited has confirmed that they have written off the debt of Rs.2,66,41,803/- as bad in their books which shows that the assessee has obtained the trading liability.
5. The Ld.CIT(A) erred in striking down the reassessment proceedings as the AO has formed a belief that taxable income has escaped assessment with regard to short assessment of property income and excess claim of deprecation.
6. The Ld.CIT(A) ought to have considered that the AO has jurisdiction to re-open the assessment when an Income liable to tax has escaped assessment in the original assessment proceedings due to oversight and inadvertence or mistake committed by AO and information need not be from external sources.
7. Reliance is placed on the following judicial pronouncements:
 - a. CIT & Anr Vs Rinku Chakraborty (Kar) 56)DTR 227
 - b. Kalyanji Mavji & Co. Vs CIT (SC) 102 lit 287
8. The Ld. CIT(A) ought not have considered the assessment as bad in law for non furnishing of reasons for re-opening the

assessment, without formal request from the assessee for the same.

9. Any other ground that may be urged at the time of hearing.”

3. Ground No. 1 and 9 are general in nature and do not require specific adjudication.

4. Ground No.8 is against the order of Ld.CIT(A) for holding the reopening of assessment as bad in law for non furnishing the reasons. In this case, the Ld.CIT(A) called for the remand report on the issue of reopening and the AO submitted the remand report stating that the assessee has never requested for reasons, hence, the reasons were not communicated to the assessee during the course of assessment proceedings. Though Ld.AR supported the orders of the Ld.CIT(A), no evidence is placed before us regarding request for reasons during the assessment proceedings or on receipt of notice u/s 148. Ld.CIT(A) relied upon the Hon'ble Supreme Court's decision in the case of GKN Driveshafts (India) Ltd. v.Income-tax Officer [2002] 125 Taxman 963 (SC). In the cited decision, Hon'ble Apex Court held that the assessing officer should submit the reasons recorded for reopening the assessment on the request of the assessee. For ready reference we

reproduce the relevant paragraph of the Hon'ble apex court's judgement which reads as under :

"We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The Assessing Officer is bound to furnish reasons within a reasonable time."

4.1. In this case, the assessee has never asked for the reasons, hence, the assessing officer did not submit the reasons and there is no error in issue of notice u/s 148. Accordingly, we hold that the notice issued u/s 148 is valid and the appeal of the revenue on this ground is allowed and we set aside the orders of the Ld.CIT(A).

5. Ground no. 5 and 6 are related to jurisdiction of the assessing officer for issue of notice u/s 148 of I.T.Act. The Ld.CIT(A) struck down the notice issued u/s 148 holding that completed assessment can be reopened only when there is tangible material available with the assessing officer to form a belief that taxable income had escaped assessment. The belief entertained by the assessing officer should not be irrational and arbitrary. For the sake of convenience and clarity, we extract the relevant paragraphs of Ld.CIT(A)'s order.

"With regard to change of opinion the contention of appellant is that there is a mere change of opinion without any reference to new material that has come to the notice of the assessing officer subsequent to the completion of original assessment u/s.143(3) The issue of sundry creditors was there right from the time of the original assessment made u/s.143 (3) on 17-12-2007. As seen from the assessment records no new facts have come the notice of the assessing officer so as to form an opinion for assuming jurisdiction u/s 148. In this context it may be noted here that the apex court's decision in the case CIT vs. Kelvinator India Ltd reported in (2010) 320 ITR 561 (SC), wherein it was held that even under new provisions of Section 147 reassessment proceedings cannot be initiated on a mere "change of opinion. One of the major reasons for taking such a view appears to be the fact that if assessing officer is permitted to reopen the assessment on a mere change of opinion", section 147 would give arbitrary powers to the assessing officer to reopen the completed assessments. Therefore, the concept of change of opinion" is treated as a inbuilt test check to the abuse of power by the assessing officer. However, it may be noted here that In the case of CIT Vs. Kelvinator of India Ltd. reported in (2002) 256 ITR 1 (Delhi) (FB) completed assessments can be reopened only when there is a tangible material available with assessing officer to form a belief that taxable income has escaped assessment. The belief entertained by assessing officer should not be irrational and arbitrary. It must be reasonable and based on reasons which are material. Thus the reassessment proceedings initiated by the assessing officer are also struck down."

6. Appearing for the revenue, the Ld.DR argued that while verifying the TDS certificate the assessing officer found the difference in property income admitted by the assessee. As per the TDS certificates under the head property income the rent receipts were Rs.3,20,000/- against which the rental income admitted by the assessee was Rs.3,00,000/-. Even during the course of original assessment proceedings, the assessee did not bring this fact to the notice of the assessing officer. On

detection of the difference the assessing officer reopened the assessment u/s 148 of the I.T.Act, thus, this is a clear case of escapement of income and argued that the assessing officer has rightly reopened the assessment and Ld.CIT(A) arrived at the wrong conclusion though there is a clear case of escapement of income which came to the notice of the AO on verification of Form 16A.

7. On the other hand, the Ld.AR supported the orders of the Ld.CIT(A).

8. We have heard both the parties and perused the material placed on record. We have also gone through the reasons recorded by the assessing officer for reopening the assessment. As per the reasons recorded by the assessing officer, the assessing officer formed the belief for escapement of income as there was difference in the income admitted by the assessee as per the Form 16A TDS certificate. As per Form 16A, the rent received was Rs.3,20,000/-, whereas the assessee has admitted the income from property for an amount of Rs.3,00,000/- and there was understatement of the income to the extent of

Rs.20,000/-. Though the assessment was completed u/s 143(3), the Ld.AR did not furnish any evidence to controvert the above finding. Therefore, we hold that the assessing officer has formed the belief basing on the tangible material for escapement of income and accordingly we set aside the order of the Ld.CIT(A) and hold that the assessing officer has rightly issued notice u/s 148 and the same is valid in law and revenue's appeal on this ground is allowed.

9. Ground No. 2 to 4 are related to the addition made by the assessing officer u/s 41(1) of I.T.Act. In this case, the assessee filed return of income declaring total loss of Rs.97,420/- on 29.10.2005. The assessment was completed u/s 143(3) vide order dated 17.12.2007 and the assessing officer reopened the assessment u/s 147 of I.T.Act and completed the reassessment proceedings u/s 147 r.w.s. 143(3) of I.T.Act. on total income of Rs.2,89,47,550/-. In the reassessment proceedings, the assessing officer made the additions of Rs.2,89,47,550/-. In the reassessment proceedings, the assessing officer made the additions u/s 41(1) relating to the outstanding credit balances of Gujarat Insecticides Limited amounting to Rs.2,47,11,822/-

and Rs.38,67,294/- relating to Gharda Chemicals Limited. In the reassessment proceedings, the assessing officer called for the details by issue of notices to the creditors calling for confirmation and in reply, M/s Gujarat Insecticides Ltd. reported vide letter 30.12.2010 that it has written off the outstanding balance appearing in the name of the assessee in the financial year 2001-02 since the assessee was not making any payment. In the case of Gharda Chemicals Limited, it was replied that the balance outstanding as on 31.03.2005 was Nil. In the facts and circumstances, the assessing officer held that there is no liability in existence and accordingly brought the amounts to tax u/s 41(1) of I.T.Act.

10. Aggrieved by the order of the assessing officer, the assessee went on appeal before the Ld. CIT (Appeals) and the Ld.CIT (Appeals) deleted the addition holding that it is for the assessee to transfer balances to P&L a/c voluntarily and admit the same as income. The Ld.CIT(A) viewed that where there is no voluntary transfer the outstanding sundry creditors cannot be taxed. The Ld.CIT(A) relied on the order of the Hon'ble Delhi High Court in the case of CIT Vs. Vardhaman Overseas

Ltd. [343 ITR 408] and the decision of Hon'ble Apex court in the case of CIT Vs. Sugauli Sugar Works Pvt.Ltd. reported in [236 ITR 518]. Aggrieved by the order of the Ld.CIT(A), the revenue is in appeal before us.

11. During the appeal hearing, the Ld.DR argued that in this case, the assessing officer has issued notices calling for the information from the creditors and the creditor M/s Gujarat Insecticides Ltd replied that the balance was written off and M/s Gharda Chemicals stated that the balance was said to be Nil. There is no enforceable liability which is existing in the books of creditors and the debt is time barred by limitation. Though the assessee is showing credit balance in her books it is not supported by the balance sheet of the creditors and any other valid documents. The assessee also did not submit any evidence regarding the demand made by the creditors for payment of the debt and also no proceedings were initiated by the creditor through court for recovery of the debt. Therefore, Ld.DR supported the order of the assessing officer and argued that the assessing officer has rightly brought to tax the outstanding balances in the names of Gujarat

Insecticides as well as Gharda Chemicals. The Ld.CIT(A) has not applied the provisions of law properly and landed in a wrong conclusion that unless the assessee transfer the credit balance to the P&L a/c, the same cannot be brought to tax. Further, the assessee also did not bring any evidence to show that the outstanding balances are payable to the creditors. According to the Ld.DR the AO rightly made the addition and the assessment order be restored.

12. Per contra, Ld. AR argued that the assessing officer has completed the original assessment u/s 143(3) and the assessee has submitted all the details including the addresses during the course of assessment proceedings, hence, reexamination of the creditors which was already examined earlier in the original assessment proceedings is mere change of opinion which is not permissible in law. Further, the Ld.AR argued that as per the provisions of Section 41(1), the assessee has to offer the expenditure or trade liability claimed as deduction in the earlier years as income, if the liability is ceased to exist or by way of remission or cessation. In the case of the assessee the liability neither ceased to exist nor the assessee got the benefit by way of remission. The

assessee is having moral duty to repay the debt and the assessee is bound to pay it. Because of some financial problems, the assessee could not repay the debt and merely because the assessee could not repay it should not be construed that the liability has been ceased and should not count the assessee as wilful defaulter. Further referring to page No.11 of paper book, Ld.AR submitted that M/s Gharda Chemicals Limited requested the assessee for confirmation of balance as on 31.03.2007 which was acknowledged by the assessee. Similarly referring to page No.25 of the paper book, Ld. AR submitted that Gujarat Insecticides Ltd., has also requested the assessee to confirm the balance as on 31.03.2007 which the assessee has acknowledged the debt. The above two documents show that though the debts are stated to be written off in the books of creditors they were continuously pursuing with the assessee for the payment and the assessee was also acknowledging the debt every year. It is settled law that once the assessee acknowledges the debt, the limitation period extends and debt becomes enforceable liability as per Limitation Act. Therefore, Ld.AR contended that the debt is neither ceased to exist nor got remission hence the same is payable as on 31.03.2005 and the assessing officer

has wrongly taxed u/s 41(1) of I.T.Act. The assessee also relied on the decision of Ambica Mills Ltd. Vs. Commissioner of Income Tax [54 ITR 0167] and Section 13 of The Limitation Act,1963.

13. We have heard both the parties and perused the material placed on record. The assessing officer brought the outstanding amounts in the names of Gujarat Insecticides and Gharda Chemicals Ltd as on 31.03.2005 u/s 41(1) of I.T.Act. In this connection, it is relevant to go through the section 41(1) of I.T. Act which reads as under.

"41. ³[⁴(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 obtained⁵⁻⁶, whether in cash or in any other manner whatsoever, any amount in respect of such ⁵⁻⁶loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, 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;"

13.1. Plain reading of Section 41(1) of I.T.Act shows that it is taxable only when there is cessation / remission of trading liability and the assessee has to transfer the outstanding liability to the income account. The coordinate bench of Jaipur Tribunal on the similar facts in the case

of Brothers Pharma (P.) Ltd.v.Income Tax Officer, Ward 4(2), Jaipur,

[2017]82taxmann.com234(Jaipur-Trib.,held asunder:

"22.1. It is a trite law that there has to be a bilateral waiver meaning thereby, there has to be a specific and admitted position of fact from the side of the debtors and the creditors that they have reached a common consensus of waiving off/forgiving the liabilities between them. The law does not permit to draw any inference or presumption based upon the lapse of time or on some other factors that the creditors did not exist or they were not pressing/waived the liability. It does not mean that liability not existed or waived by the creditor. The number of Hon'ble High Courts held that mere unilateral reversal of entries by one party will not amount to cessation of liability and that 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".

13.2. Hon'ble Karnataka High court in the case of Commissioner of Income-tax, Bangalore.v.Alvares & Thomas*[2016] 69 taxmann.com 257 (Karnataka) held that

"Even if one accepts 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 because cessation of the liability has to be cessation in law, of the debt to be paid by the assessee to the creditor."

13.3. From the above judicial pronouncements it is clear that the assessee has to get the benefit by way of remission or cessation of liability and the assessing officer cannot bring the outstanding creditors to tax u/s 41(1) of I.T.Act merely because the creditor has not pressed

for the payment or it was written off in the books of the creditor. It is for the assessee to decide whether the assessee got benefit by way of remission or cessation of liability on the facts. Unless there is cessation or remission of liability, it cannot be held to be not payable. In the assessee's case, both the creditors have called for the confirmation of balance from the assessee. In the case of Gharda Chemicals Ltd. they sought for confirmation of balance as on 31.03.2007 and the account reveals the outstanding balance was inclusive of balance as on 31.03.2005. In the case of Gujarat Insecticides Ltd., they sought for confirmation as on 31.03.2007 vide their letter dated 22.06.2007 requesting the assessee to confirm the balance of Rs.2,47,11,822/- as on 31.03.2007 which the assessee has confirmed the balance. Both the creditors as evident from the said documents sought for the confirmation of balances and the assessee has acknowledged the debt. It is settled law that once, the assessee confirms the balance and shown the outstanding amount in the balance sheet, the said liability is enforceable as per Limitation Act. Section 25(3) of Contract Act validates the promise to pay a debt by limitation. This view is upheld by the Hon'ble Supreme Court in the case of Hiralal Vs. Badkulal, AIR 1953

SC 225 quoted with the approval the decision of Privy Council in Maniram Vs. Seth Rupchand, [33 Indian Appeals 165(PC)] that an unconditional acknowledgement was sufficient to furnish a cause of action for it implied promise to pay. In the case of Ambica Mills Ltd. Vs. CIT (supra) relied upon by the assessee, it was held that unpaid and unclaimed wages, remaining due and payable to workers and acknowledged as a liability by the company in its balance sheet does not become time barred and cannot be added to income as profits chargeable to tax. In the instant case, the assessee has shown the liability in the balance sheet and there is an evidence produced by the assessee seeking confirmation by the creditors and the assessee has acknowledged the debt. Therefore, the credit is enforceable by the creditor and the assessee has not transferred the credit balances to the P&L a/c. The Ld. CIT(Appeals) also relied on the decision of Vardhaman Overseas Ltd. of Hon'ble High Court of Delhi and Sugauli Sugar Works Ltd. of Hon'ble Apex Court. Since the assessee has not transferred credit balance to the P&L a/c and furnished evidence to support that the liability is acknowledged by him in the confirmation letter and shown in her Balance Sheet, we do not find any error in the

order of the Ld.CIT(Appeals) in deleting the addition. On this ground the appeal of the revenue is dismissed.

14. In the result, the appeal of the revenue is partly allowed.

The above order was pronounced in the open court on 18th Aug 2017.

Sd/- (वी. दुर्गराव) (V. DURGA RAO) न्यायिक सदस्य/JUDICIAL MEMBER
विशाखापटणम /Visakhapatnam
दिनांक /Dated : .08.2017

Sd/- (डि.एस. सुन्दर सिंह) (D.S. SUNDER SINGH) लेखा सदस्य/ACCOUNTANT MEMBER

L. Rama, SPS

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:-

1. अपीलार्थी / The Appellant – The Income Tax Officer, Ward-2(1), Central Revenue Buildings, M.G.Road, Vijayawada-2, Krishna Distyriect (AP)
2. प्रत्यार्थी / The Respondent – Sri K.V.S.Prakasa Rao, L/R of Late Smt. K Suseela, D.No.29-14-53, Suryaraopet, Vijayawada
3. आयकर आयुक्त / The CIT, Vijayawada
4. आयकर आयुक्त (अपील) / The CIT(Appeals), Vijayawada
5. विभागीय प्रतिनिधि, आय कर अपीलीय अधिकरण, विशाखापटणम /DR, ITAT, Visakhapatnam
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Sr. Private Secretary
ITAT, VISAKHAPATNAM

