

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: **18.03.2019**

DATED: **26.03.2019**

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

Tax Case Appeal No. 1788 of 2008

Commissioner of Income Tax
Chennai

Appellant/Appellant

Vs.

M/s. Chakiat Agencies Pvt. Limited.,
40 Rajaj Salai, 2nd Floor,
PB No. 1880
Chennai – 600 001.
PAN AABCC6281F

Respondent/Respondent

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'A' Bench, Chennai, dated 10.04.2008 made in ITA No.595/Mds/2007.

For Appellant : Mr.T.Ravikumar
Senior Standing Counsel

For Respondent : Mr. V.S.Jayakumar
for Mr.K.Vasudevan

J U D G M E N T

(Delivered by **C.V.KARTHIKEYAN, J.**)

The Revenue has filed this Appeal, calling in question the order of the Income Tax Appellate Tribunal dated 10.04.2008 with respect to the Assessment Year 2003-2004 whereby in respect of credits in the books of the Assessee in the nature of rents collected by the Assessee in the years 1994-1999 from its customers and payable to the Chennai Port Trust were held to be subject to dispute in pending judicial proceedings with the Chennai Port Trust and consequently cannot be brought to tax under Section 41(1) of the Act.

2. The Appeal had been admitted on 01.12.2008 on the following substantial questions of law:-

“(i) Whether on the facts and circumstances of the case, the Tribunal was right in holding that the amounts of Rs.21,06,840/- being credits of Cochin Branch cannot be taxed under Section 4(1) for the reasons that these represented the subject of disputed rent payable to

Chennai Port Trust while on facts, these balances do not relate to the Court case and the assessee itself was written the same back to profit and loss account in Assessment Year 2004-05?;

(ii) Whether in the facts and circumstances of the case, the Tribunal was right in holding that the amounts of Rs.16,69,991/- being credits of Chennai branch cannot be taxed under Section 4(1) for the reason that these represented the subject of disputed rent payable to Chennai Port Trust though on facts, these balances do not relate to the Court case and the assessee having collected the amounts from the clients but not paid them for number of years?;

(iii) Whether in the facts and circumstances of the case, the Tribunal was right in holding that the interest on inter corporate deposit cannot be treated as income as it was neither received nor recoverable during the relevant accounting year?;

(iv) Whether in the facts and circumstances of the case, the Tribunal

was right in holding that the interest on inter corporate deposit cannot be treated as income on the basis of a unilateral act of the assessee not to bring into its accounts?"

3. It is to be mentioned that the Tribunal had passed common order in two Tax Appeals preferred by the Revenue against the same Assessee with respect to the Assessment Years 2001-2002 and 2003-2004. The issues involved were the same. The Revenue had filed T.C.A.No. 1787 of 2008 also and the same had been dismissed owing to low tax effect by Judgement dated 14.11.2018 by a Co-ordinate Bench of this Court in pursuance of Circular No. 3 of 2018 dated 11.07.2018 issued by the Central Board of Direct Taxes. However, the substantial questions of law framed for consideration were left open for discussion and determination. It had been stated by the learned counsel for the Assessee that only the second question quoted above remains to be adjudicated. It was also mentioned that the amount mentioned, Rs.16,69,991/- was not correct, and that the correct amount was Rs.2,90,400,115/-. We are not examining that aspect, as it is an issue of fact and of computation. The legal issue alone is taken up for consideration.

4. The Assessee is a shipping agent. The Assessee had shown an amount of Rs.2,89,85,226/- in its books of account as receipts against the names of over 900 customers for the past six to seven years. These amounts have been collected by the Assessee from its customers during the period 1994-1999 towards ground rent payable to the Chennai Port Trust as storage charges for the containers of the customers of the Assessee. Even though the amounts were collected from the customers, they were not paid by the Assessee to the Chennai Port Trust. The explanation given by the Assessee was that the Chennai Port Trust had arbitrarily raised the ground rent charges, and challenging such increase, the Steamer Agents Association of which the Assessee is a member, had filed a Writ Petition before the Madras High Court. It was stated that the amount was therefore shown as a liability by the Assessee in its books and that since the liability was in dispute, it cannot be qualified as an amount received as income of Assessee. It was also stated that the Assessee had not claimed the said ground rent as an expenditure. The Assessing Officer by order dated 20.03.2006 rejected the contentions of the Assessee and held that the Assessee had collected the amounts from its customers and consequently, they are to be taxed as income during the relevant Assessment Year. It was also stated that as a fact, an enquiry was conducted by the Assessing Officer and it was

revealed that atleast five parties have confirmed that they have shown as "Nil" balance as receivable against the Assessee's name in their books of accounts as on 31.03.2003.

5. This order of the Assessing Officer was taken up on appeal before the Commissioner of Income Tax (Appeals) by the Assessee. The CIT (Appeals) in their order dated 05.12.2006 agreed with the contentions of the Assessee that once a claim is pending determination before judicial authorities, the same cannot be added to the income of the Assessee till the dispute is finally settled. The extract of the relevant portion of the CIT (Appeals) is given below:-

"2.3. I have examined the facts and various submissions of the appellant on this issue. Perusal of the facts reveal that the appellant has neither written back the said amounts of the creditors in its books of accounts nor there is cessation of the said liability till the end of the current accounting period. It is an admitted fact that the earlier order of Single Bench of Madras High Court has been stayed by the Division Bench and the final verdict over this dispute is yet awaited. In such circumstances the legal obligation on the appellant to return back the

said money to various clients if it wins the case has not ceased to exist. Once an amount is disputed before the judicial authorities the same cannot be added to the income of an assessee till the dispute is finally settled. In the context of compensation receivable Hon'ble Supreme Court has held in the case of CIT v. Hindustan Housing and Land Development Trust Limited., 161 ITR 524 (SC) that an amount cannot be taxed as income till the legal dispute about the quantum is finally settled. In the present case, the retrospective enhancement of ground rent as well as the quantum of ground rent has been disputed and the matter is still pending before the High Court. On these facts, I am of the considered view, that the AO was not justified in making the impugned addition in the hands of the appellant company for the current year. I also agree with the contentions of the learned AR that the nature of entries made by the clients in their books of accounts does not remit the liability existing in the books of accounts of the appellant company. On these facts, the decision of Hon'ble Madras High Court in the case of Southern Roadways Ltd (supra) relied by the AR is applicable in favour of the appellant company because the appellant had neither made the entries of remission of

liability in the books of accounts nor it has obtained and the benefit from cessation of any liability. In view of these facts and circumstances, the issue is decided in favour of the appellant. The AO is directed to delete the addition of Rs.289,85,226/-."

6. The Revenue then filed a further Appeal before the Income Tax Appellate Tribunal. The Tribunal concurred with the findings of the CIT (Appeals). The reasoning of the Tribunal is given below:-

"3. We have heard the rival submissions in the light of the material placed before us and the precedents relied upon. The Assessing Officer has made the additions treating the amounts as income of the Assessee on cessation of liability. It was contended before us that it is not a case of cessation of liability because these amounts do not represent expenses which were allowed in the earlier years. In fact these amounts represented recoveries from expenses towards crantage and port congestion charges. We have noted that the Madras Port Trust increased the ground rent payable which was challenged by the Steamer Agents Association before the Hon'ble Madras

High Court. The learned counsel for the Assessee placed before us a letter dated 18.10.2006 from Natraj, Rao, Raghu & sundaram, Advocates and Notary, wherein it is mentioned that the W.A.Nos. 1746 and 1747 of 2000 filed by the Board of Trustees, Port of Madras against the order dated 28.08.2000 passed by Hon'ble Mr. Justice P. Shanmugam in W.P.Nos. 11747 of 1994 and 5806 of 1997 is pending before the Division Bench of the Hon'ble Madars high Court. From the said letter, it is clear that the liability is not yet settled. In these circumstances the prescription of Section 41(1) of the Act cannot be invoked. We, therefore uphold the order of the Commissioner (Appeals) on this point."

7. Revenue is therefore on appeal before us. Heard arguments advanced by Mr.T.Ravikumar, learned Senior Standing Counsel for the Revenue and Mr.V.S.Jayakumar, learned counsel for the Assessee.

8. Mr.T.Ravikumar assailed the order of the Tribunal stating that the additions on the ground that the liabilities related to a Court case pending in respect to container charges of the Port Trust was erroneous and that the balance outstanding since 1999

have been written back by the Assessee itself in the accounting year 2003-2004. It was also pointed out that the Assessee had collected the amounts payable to the Port Trust from its customers in the period 1994-1999 but had not paid the same to the Port Trust and therefore, ought to have offered the same for taxation as a trading receipt.

9. Mr.V.S.Jayakumar, learned counsel for the Assessee strongly disputed the said contentions. He placed reliance on the Judgment in the case of **CIT vs. Keasria Tea Company Limited.**, reported in **(2002) 254 ITR 434 (SC)**. In the said Judgement , the Hon'ble Supreme Court had distinguished on facts an earlier Judgement of the Hon'ble Supreme Court in the case of **CIT vs. T.V.Sundaram Iyengar & sons Ltd.**, reported in **(1996) 222 ITR 334 (SC)** and had held that a liability would not cease in law if disputes were pending judicial determination.

10. Section 41 of the Act brings to tax certain 'Profits chargeable to tax'. The relevant extract of the said provision is quoted below for ready reference.

"Section 41(1)"

(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 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; or*

(b) the successor in business has obtained, whether in cash or in any other manner whatsoever, any amount in respect of which loss or expenditure was incurred by the first-mentioned person or some benefit in respect of the trading liability referred to in clause (a) by way of remission or cessation thereof, the amount obtained by

the successor in business or the value of benefit accruing to the successor in business shall be deemed to be profits and gains of the business or profession, and accordingly chargeable to income-tax as the income of that previous year.

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.*

11. The significant phrase in the said provision is '**remission or cessation**' of trading liability which has been claimed as an allowance or deduction taken by the Assessee, if such liability is paid back by the creditor or had ceased to exist, then in that year of payment or cessation, the said trading liability can be brought to tax as profit chargeable to tax. The cessation of liability should cease to exist in the eye of law. While the payment of the amount of liability can be by the creditor, cessation of liability can only be determined on the basis of facts of such trading liability. The Explanation provided that an unilateral act on the part of Assessee

to write back or write off such liability also amounted to cessation of liability attracting Section 41(1) of the Act and attracting tax thereon.

12. In *Keasria Tea Company* referred supra and relied on by Mr.V.S.Jayakumar, the Hon'ble Supreme Court dealt with the case of an Assessee who claimed that resort to Section 41(1) of the Act would arise only if the liability of the Assessee can be said to have been ceased finally without the possibility of receiving it. The facts as stated are as follows:-

*"2. Assessee who was engaged in the business of tea, spices etc. During the assessment year 1985-86 (previous year ending on 31.3.1985) the assessee 'wrote-back' in its accounts a sum of Rs.14,65,997/- representing the provision made during earlier years (1978-1981) towards its **purchase tax liability**. It appears that **the liability to pay purchase tax on certain goods was in dispute and, therefore, the provision was made.** Further, it appears that the assessee, in support of its claim for purchase tax relief, inter alia, relied on the decision of the Kerala High Court in *Neroth Oil**

Mills' case . The SLP filed by the Kerala State against the decision of the High Court in the said case was rejected by this Court in November, 1984. Apparently, for that reason, the assessee thought it fit to reverse the provision made earlier towards purchase tax and therefore made the entries in the books of account during the year ending on 31.3.1985. The assessing officer added the sum of Rs.14,65,997/- which represents the provision made towards purchase tax during the assessment years 1978-79, 1979-80 and 1980-81, treating the same as the income of the previous year ending on 31.3.1985. In the first appeal, the CIT (Appeals) held that there was no justification to include the sums which were already included in the course of reassessments made for the years 1979-80 and 1980-81. However, he upheld the addition of Rs.3,02,758 pertaining to the assessment year 1978-79. The Appellate Commissioner held that the liability of the assessee finally ceased during the year 1985-86 in view of the rejection of SLP in Neroth Oil Mills' case in November 1984. Certain observations were also made as regards the includibility of the sums pertaining to assessment years 1980- 81 and 1981-82 in respect of which reassessments were made. However, in this

appeal, we need not go into the details thereof.

*3. On further appeal by the assessee, the Tribunal set aside the addition of Rs.3,02,758/- which was upheld by the Appellate Commissioner. The Tribunal did not agree with the view taken by the first Appellate Authority that there was no cessation of liability within the meaning of Section 41(1) of the Income-tax Act during the relevant year on account of dismissal of SLP in another case. The Tribunal observed that **for claiming exemption from purchase tax on the ground that transaction was in the course of export, two conditions were required to be fulfilled: (1) things purchased and exported are one and the same and (2) the purchases were against firm orders for export.** Neroth Oil Mills' case was concerned only with the first aspect and not the second aspect. Therefore, the Tribunal observed that the judgment in Neroth Oil Mills' case, even if it had attained finality does not put an end to the disputed issue involved in the respondent-assessee's case. The Tribunal further noticed that as late as 1993, the sales tax department was pursuing the issue relating to purchase tax liability of the assessee from the assessment*

year 1974-75 onwards and **the cases were still pending decision before the Sales Tax Authorities.** The Tribunal pointed out that the **unilateral action on the part of the assessee in writing-back the amounts could not have the effect of extinguishing the statutory liability.** On reference, the High Court approved the view taken by the Tribunal and held that Section 41(1) cannot be invoked in the instant case. Hence, this appeal by revenue by Special leave.

13. In the light of the above facts, the Hon'ble Supreme Court held as follows:-

"4. It may be noted that the provision was made in the books of account towards purchase tax which was under dispute and the benefit of deduction from business income was availed of in the past years in relation thereto. The same was sought to be reversed by the assessee during the year ending on 31.3.1985 for whatever reason it be. The question is whether the circumstances contemplated by Section 41(1) exists so as to enable the Revenue to take back what has been allowed earlier as business expenditure and to include such amount in the income of

the relevant assessment year i.e. 1985-86. In order to apply Section 41(1) in the context of the facts obtaining in the present case, the following points are to be kept in view :

(1) In the course of assessment for an earlier year, allowance or deduction has been made in respect of trading liability incurred by the assessee; (2) Subsequently, a benefit is obtained in respect of such trading liability by way of remission or cessation thereof during the year in which such event occurred; (3) in that situation the value of benefit accruing to the assessee is deemed to be the profit and gains of business which otherwise would not be his income; and (4) such value of benefit is made chargeable to income tax as the income of the previous year wherein such benefit was obtained. The High Court, agreeing with the Tribunal, rightly held that the resort to Section 41(1) could arise only if the liability of the assessee can be said to have ceased finally without the possibility of reviving it. On the facts found by the Tribunal, the Tribunal as well as the High Court were well justified in coming to the conclusion that the purchase tax liability of the assessee had not ceased finally during the year in question. Despite the finality attained

by the judgment in *Neroth Oil Mills'* case, the other issues having bearing on the exigibility of purchase tax still remained and the dispute between the assessee and the sales-tax department was still going on. **There is no material on record to rebut these factual observations** made by the Tribunal. Nor can it be said that the reasons given by the Tribunal are irrelevant.

5. The learned senior counsel appearing for the Income Tax Department has contended that the assessee itself took steps to write-off the liability on account of purchase tax by making necessary adjustments in the books, which itself is indicative of the fact that the liability ceased for all practical purposes and therefore, the addition of amount of Rs.3,20,758/- deeming the same as income of the year 1985-86 under Section 41 (1) is well justified of the Act. But, what the assessee has done is not conclusive. As observed by the Tribunal, an **unilateral action on the part of the assessee by way of writing-off the liability in its accounts does not necessarily mean that the liability ceased** in the eye of law. In fact, this is the view taken by this Court in *CIT vs. Suguli Sugar Works (P) Ltd.* [236 ITR 518]. We, therefore, find no substance in the

contention advanced on behalf of the appellant. Incidentally, we may mention that the controversy relates to the period anterior to the introduction of Explanation 1 to Section 41(1).

6. The decision of this Court in Commissioner of Income Tax Vs. T.V. Sundaram Iyengar and Sons Ltd. [222 ITR 344] has been cited by the learned counsel for the appellant. We find no relevance of this decision to the determination of the question involved in the present case. **The factual matrix and the provision of law considered therein is entirely different."**

14. It is seen from the facts of the case in **Kesaria Tea Company** that the issue of payment of 'purchase tax' itself, was in dispute and not the rate or quantum of 'purchase tax' payable. The Assessee in the said case had questioned the very liability to pay 'purchase tax' and the dispute in that regard with the Sales Tax department was still going on and had not been finally concluded.

15. In **Commissioner of Income Tax v. T.V.Sundaram Iyengar & Sons Ltd. [(1996) 222 ITR 344 (SC)]**, the facts are that the Assessee had received certain deposits from customers in

the course of carrying on its business. These were originally treated as capital receipts. Since those credit balances were not claimed by the customers or creditors, the Assessee transferred it to its profit and loss accounts. However, it did not offer the same for taxation as its total income. The Assessing Officer held that the Assessee got the said surplus as a result of trade transaction and the said amounts credited to profit and loss account had a character of income and therefore, held that such amount were taxable in the hands of the Assessee. The Supreme Court finally upheld such taxability in the hands of the Assessee, applying the principles laid down by Lord Atkinson, J and held that even though the money were received by the Assessee as deposit was of capital nature at that point of time, but by the efflux of time, the money has become the Assessee's own money and the claims of the customers had become time barred and the Assessee itself had treated the money as its own money and credited the same to its profit and loss account and therefore, it was liable to be taxed in the hands of the Assessee. The following observations in paragraphs 22 and 23 of the Supreme Court are quoted below for ready reference.

“22. The principle laid down by Atkinson, J. applies in full force to the facts of this case. If a common sense view of the matter is taken, the

assessee, because of the trading operation, **had become richer by the amount which it transferred to its profit and loss account.** The moneys had arisen out of ordinary trading transactions. Although the amounts received originally was not of income nature, **the amounts remained with the assessee for a long period unclaimed by the trade parties.** By lapse of time, the claim of the **deposit became time barred** and the **amount attained a totally different quality.** It became a definite trade surplus. **Atkinson, J.** pointed out that in **Morley's case (supra)** no trading asset was created. Mere change of method of book-keeping had taken place. But, where a new asset came into being **automatically by operation of law, common sense demanded** that the amount should be entered in the profit and loss account for the year and be treated as taxable income. In other words, the principle appears to be that **if an amount is received in course of trading transaction,** even though it is not taxable in the year of receipt as being of revenue character, the amount changes its character when the amount becomes the assessee's own money because of limitation or by any other statutory or contractual right. When such a thing happens, **common sense demands that the amount should be treated as income of the assessee.**

23. *In the present case, the money was received by the assessee in course of carrying on his business. Although it was treated as deposit and was of capital nature at the point of time it was received, by influx of time the money has become the assessee's own money. What remains after adjustment of the deposits has not been claimed by the customers. The claims of the customers have become barred by limitation. The assessee itself has treated the money as its **own money and taken the amount to its profit and loss account**. There is no explanation from the assessee why the surplus money was taken to its profit and loss account even if it was somebody else's money. In fact, as Atkinson, J. pointed out that what the assessee did was the common sense way of dealing with the amounts."* (emphasis supplied)

16. In the case of ***Commissioner of Income Tax v. Rajasthan Golden Transport Company [(2001) 249 ITR 723 (Del.)]***, a Division Bench of Delhi High Court held that mere fact that some party had unilaterally written back the said amount to profit and loss account did not amount to remission or cessation of liability and therefore, such income could not be treated as assessable under Section 41(1) of the Act, but where an amount is received in the course of trading transaction, even though it was

not taxable in the year of receipt, the amount changes its character when it becomes Assessee's own money because of its limitation or by any such statutory or contractual right and thus, such amount in question has to be treated as Assessee's income under Section 41(1) of the Act. The Delhi High court relied upon the decision of Supreme Court in ***T.V.Sundaram Iyengar*** supra.

17. In another decision in ***Commissioner of Income Tax v. Chipsoft Technology (P) Limited [(2012) 210 Taxman 173 (Del.)]***, a Division Bench of the Delhi High Court held that the word "include" in the Explanation to Section 41(1) was important and where the unpaid dues of the employees had been outstanding for six to seven years and the recovery of such dues was time barred, even the omission to pay over a period of time and the resultant benefit derived by the employee/assessee would qualify as a cessation of liability, albeit by operation of law and therefore, was liable to be taxed under Section 41(1) of the Act. Paragraph 9 of the judgment is also quoted below for ready reference:

“9. Two aspects are to be noticed in this context. The first is that the view that liability does not cease as long as it is reflected in the books, and that mere lapse of the time given to the creditor or the workman, to recover the amounts due, **does not efface the liability, though it bars the remedy. This view, with**

respect is an abstract and theoretical one, and does not ground itself in reality. Interpretation of laws, particularly fiscal and commercial legislation is **increasingly based on pragmatic realities**, which means that even though the law permits the debtor to take all defences, and successfully avoid liability, for abstract juristic purposes, he would be shown as a debtor. In other words, would be illogical to say that a debtor or an employer, holding on to unpaid dues, should be given the benefit of his showing the amount as a liability, even though he would be entitled in law to say that a claim for its recovery is time barred, and continue to enjoy the amount. The second reason why the assessee's contention is unacceptable is because with effect from 1-4-1997 by virtue of Finance Act, 1996 (No.2), an **Explanation was added to Section 41** which spells out that "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**". The expression "include" is significant; Parliament did not use the expression "means". Necessarily, even omission to pay, over a period of time, and the resultant benefit derived by the employer/assessee would therefore qualify as a cessation of liability, albeit by operation of law.

10. *The submission of the assessee that no period of limitation is provided for under the Industrial Disputes Act, as a result of which it is exposed to liability at any time, is insubstantial and unpersuasive.*

This is because in The Nedungadi Bank Ltd. v. K.P. Madhavankutty AIR 2000 SC 839 the Supreme Court held that even though under the Act no period of limitation has been prescribed, a stale dispute one where the employee approaches the forum under the Act after an inordinate delay cannot be entertained and adjudicated.

11. *In view of the foregoing reasons, the question of law is answered in the affirmative, in favour of the revenue, and against the assessee; consequently the orders of the Commissioner (Appeals) and the impugned order of the ITAT are hereby set aside. The order of the Assessing Officer is hereby restored. The appeal is allowed in the above terms without any order on costs."*

18. A Division Bench of Gujarat High Court, in ***Gujtron Electronics (P) Ltd. v. Income Tax Officer [(2017) 397 ITR 462 (Guj.)]***, held that under a Scheme, the Assessee took deposit of Rs.500/- each from the person who was enrolled as a Member in the sales promotion Scheme, with the stipulation that if he enrolls

further four persons, he would get one Black and White Television manufactured by the Assessee Company free of cost, which Scheme was operative only for a period of 12 months and in the process of such deposits, the Assessee collected huge sum of Rs.7.87 Crores and after several years, when the said deposit was treated as income of the Assessee under Section 41(1) of the Act, it was challenged by the Assessee, but the Court held that the said amount of deposit of Rs.7.87 Crores represents the money deposited by the Members and the same would be liable to be taxed in the hands of the Assessee, because for the past several years not a single customer had demanded the money back nor the Assessee had made any attempt to repay the same and it was only when the Assessing Officer raised the said issue, the Assessee made correspondence with the customers, which the Commissioner of Income Tax had rightly held to be an afterthought and that over the years, the company had also invested such amount earning interest, which was offered for taxation and therefore, Section 41(1) stood attracted in the facts of the said case. The relevant portion of the said judgment are also quoted below for ready reference.

“9. Facts of the present case, as concurrently held by the two Revenue authorities and the Tribunal are somewhat peculiar. The

assessee had launched a scheme of sales promotion. Under such scheme, the assessee would enroll a member, who would deposit a sum of Rs.500/- with the assessee company. If such a member in turn enrolled four members, he would get one black and white TV set manufactured by the assessee company free of cost. Same benefit would be available to the enrolled members if they fulfilled this condition. The scheme was operative for a period of 12 months. In other words, a member would have to enroll four members within such period of 12 months in order to get the benefit of earning a free TV set. Over a span of couple of years, the assessee collected a huge sum of Rs.7.87 crores by enrollment membership fee of Rs.500/- each.

10. As is bound to happen, in such a scheme requiring continuous chain reactions, the chain would break at some stage. The amount of Rs.7.87 crores represents the money deposited by those members. **This amount remained with the company over the years without any change whatsoever.** The Revenue authorities have found that **there was no activity at the hands of the assessee company in connection with the scheme for past several years. Not a single customer had demanded the money back nor the assessee had made any attempt to repay the same.** It was only

when the Assessing Officer in the present assessment proceedings raised the issue, the assessee made correspondence with the customers. This, the Commissioner (Appeals) correctly categorised as an afterthought. More importantly in all invoices, the signatures of the member customers were missing. Their addresses were not sufficient. Over the years, **the company had also invested such amount earning interest and used such interest for its purpose, of course, offering interest income to tax.**

11. In view of the concurrent findings of the Revenue authorities and the Tribunal through which the above established facts emerged, we have no reason to interfere. The decision of the Supreme Court in case of Sundaram Iyengar (Supra) would apply. In the said case, the Court had held and observed as under:

(already quoted above, hence, not repeated)

12. It is true that unlike in case of Sundaram Iyengar (supra), **the assessee has not taken such amount in its profit and loss account. Nevertheless, by all accounts, the assessee has treated such amount as its own. The scheme itself terminated many years back. Limitation of claiming amount back has also seized** (sic ceased). There is absolutely no movement or correspondence between the assessee and its members with

respect to the claim or with respect to the deposited amounts.

13. *under the circumstances, we do not see any reason to interfere. Tax Appeal is therefore dismissed."* (emphasis supplied)

19. The Assessee herein had primarily relied on the fact that since the writ appeal had been pending before the Division Bench of this Court and consequently, the liability had not been determined. A closer examination of the facts reveal otherwise. Final orders were passed in W.A.Nos. 1746 & 1747 of 2000 etc., on 08.10.2014. It had been ordered as follows:-

"Learned counsel for parties have obtained instructions and state that they would follow the course of action as suggested in our last order dated 17.09.2014. Thus the issue of extent of revision of charges, if any, is referred to the statutory committee under Chapter V-A of the Major Port Trusts Act, 1963, by consent, though of course, this provision was introduced subsequently. Thus it is for the committee as an authority agreed to by the learned counsel for parties to decide the issue of revision of charges.

2. The authority will endeavour to complete the task within a period of Six months from today after putting parties to notice. This is qua the period from 06.07.1994 to August, 2001.

3. The writ appeals accordingly stand disposed of. No costs.

4. We appreciate the reasonable stand taken by the parties."

20. Subsequently, the authority, namely, the Tarriff Authority for Major Ports (TAMP) had passed final orders on 15.01.2016 revising the container storage charges at Chennai Port Trust for the period from 06.07.1994 to August 2001. The Authority had passed detailed and elaborate orders finally fixing the storage charges receivable. Consequently, as on date the reason given by the Assessee relating to pendency of the Writ Appeal or that TAMP had not finally determined the storage charges no longer survive. The obligation by the Assessee to pay back the amounts to Chennai Port Trust had arisen immediately when TAMP had passed final orders fixing the storage charges on 15.1.2016 and since they have not paid the same, the amount in their hands has to be treated as 'income' taxable under Section 41(1) of the Act.

21. In ***Kesaria Tea Company*** referred above, the Hon'ble Supreme Court as is evident from the passage quoted, dealt with a case wherein, the liability of the Assessee could not be said to have ceased finally. However, even in the said Judgement, the Hon'ble Supreme Court had held that ***“resort to Section 41(1) could arise only if the liability of the Assessee can be said to have ceased finally without the possibility of reviving it”***. In this case, as stated above, TAMP had finally fixed the storage charges and consequently, the claim of the Assessee that the tax liability had not ceased finally cannot be accepted. Further the amounts have been collected in the years 1994-1999, as held in T.V.Sundaram Iyengar Sons Ltd., referred supra, ***“that if an amount is received in course of trading transaction, even though it is not taxable in the year of receipt as being of revenue character, the amount changes its character when the amount becomes the assessee's own money because of limitation or by any other statutory or contractual right. When such a thing happens, common sense demands that the amount should be treated as income of the assessee.”***

22. In the present case, the amounts have been received by the Assessee in the course of carrying on their business. By efflux

of time, it had become the Assessee's own money. There has been no claim laid against the said money. Consequently, we hold that the amount in question could be treated as Assessee's income under Section 41(1) of the Act, for Assessment Year 2003-2004 by the Assessing Authority. In **Kesaria Tea Company** referred above, the Hon'ble Supreme Court determined that the dispute between the Assessee and the Sales Tax Department was still going on. The dispute was whether the sales tax was at all payable. The facts of the present case are distinguishable. The TAMP which is the Tarrieff Authority for Major Ports had finally fixed the storage charges payable. The Assessee had taken shelter on the ground that the storage charges had not been finally quantified, but the liability to pay the same to Chennai Port Trust was not disputed and therefore the liability of Assessee to pay back to customers had ceased and had infact become the income in the hands of the Assessee and consequently, the reasoning given by the Tribunal that the Assessee is not liable since there was a dispute pending, no longer survived. The disputes have concluded. The Assessee had enjoyed the said amounts as its income collected but without paying it to the Chennai Port Trust. They were under obligation to be taxed on the said amount, as per Section 41(1) of the Act.

23. In view of the above reasoning, we hold that the questions of law have to be answered in favour of the Revenue and against the Assessee and the Appeal of Revenue deserves to be allowed.

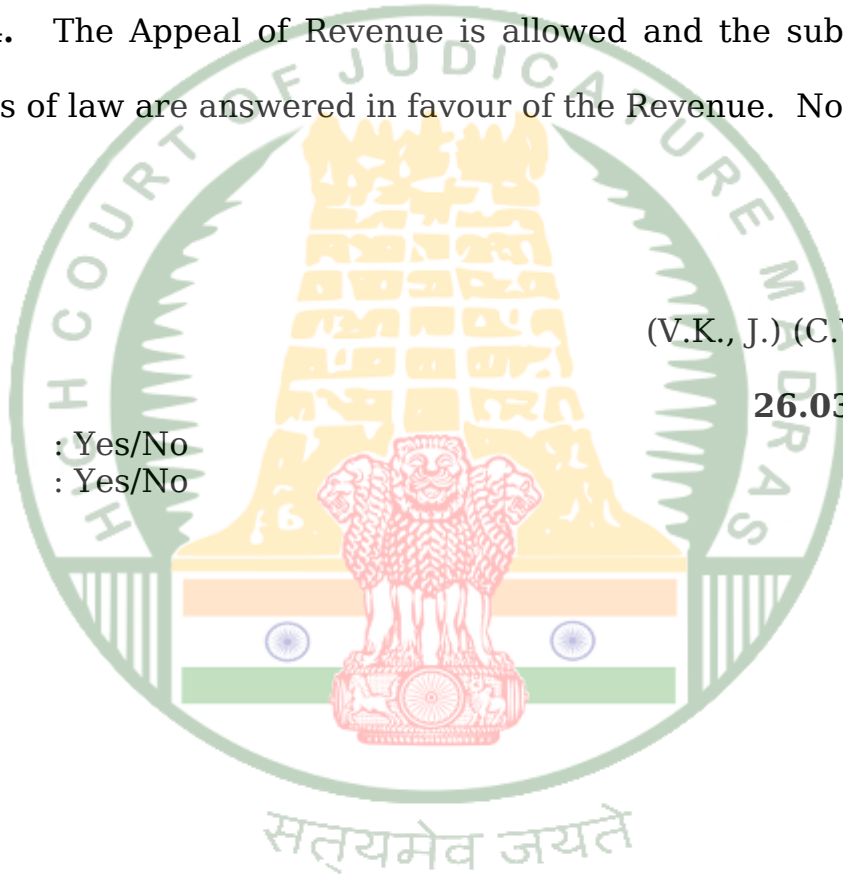
24. The Appeal of Revenue is allowed and the substantial questions of law are answered in favour of the Revenue. No costs.

(V.K., J.) (C.V.K., J.)

26.03.2019

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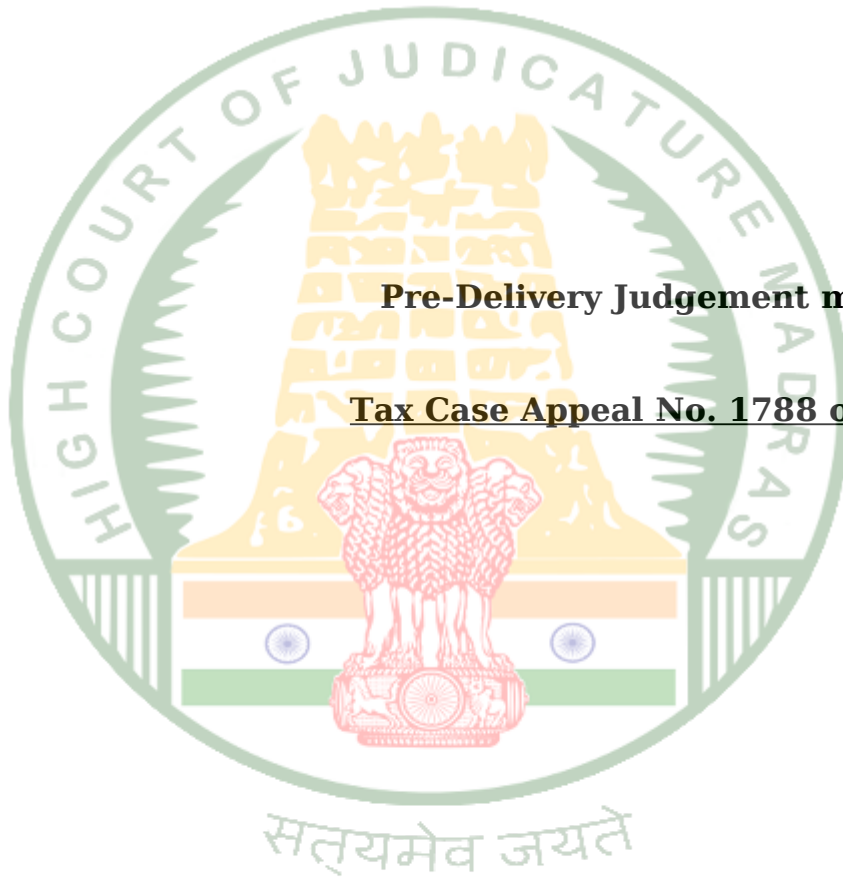
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DR.VINEET KOTHARI, J.
and
C.V.KARTHIKEYAN, J.

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Pre-Delivery Judgement made in

Tax Case Appeal No. 1788 of 2008

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