

आयकर अपीलीय अधीकरण, न्यायपीठ –“C(SMC)” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “C(SMC)” BENCH: KOLKATA
[Before Shri A. T. Varkey, JM]

I.T.A. No. 2625/Kol/2019
Assessment Year: 2005-06

Shri Tum Nath Shaw (PAN: AJGPS 2913 P)	Vs.	ITO, Ward-2(3), Burdwan
Appellant		Respondent

Date of Hearing (Virtual)	04.02.2021
Date of Pronouncement	08.02.2021
For the Appellant	Shri Soumitra Choudhury, Advocate
For the Respondent	Shri Jayanta Khanra, Sr. D.R

ORDER

This is an appeal preferred by the assessee is against the order of Ld. CIT(A)-Asansol dated 31.03.2008 for Assessment year 2005-06.

2. However, it was brought to my notice that the assessee received certified copy of the impugned order only on 30.09.2019 and there is a delay of 24 days to file the appeal. An Affidavit has been filed by the assessee which has been perused explaining the cause of delay and the Ld. D.R does not oppose and it is noted that there is reasonable cause for the delay therefore, the delay condoned.

3. At the outset itself, the Ld. A.R Shri Soumitra Choudhury submitted that the appeal of the assessee is covered by the decision of this Tribunal in assessee's own case for the previous assessment years 2000-01 to 2004-05 in ITA Nos. 2043 to 2047/Kol/2017 dated 31.12.2018. According to the Ld. A.R since the entire additions have been made pursuant to survey conducted at the assessee's premises and the additions are identical for AY 2000-01 to 2004-05; and the AO in this assessment order (AY 2005-06) has specifically stated that since in the earlier years these additions has been made, he is continuing making the same addition for AY 2005-

06 also. The Ld. A.R thereafter drew my attention to grounds of appeal from where we note that the assessee has preferred eleven (11) grounds of appeal. According to Ld. A.R ground no. 1 and 11 are general in nature, so not pressed. And Ground no. 7 which is in respect of confirmation of addition of Rs. 36,025/- is not pressed and ground no. 9 against the action of Ld. CIT(A) in confirming the AO's action to resort to estimation without rejecting the books of account are not being pressed. Ground no. 10 is consequential and not pressed. So these grounds are dismissed being not pressed.

4. Coming to ground nos. 2 and 3 which is against the action of Ld. CIT(A) in confirming the disallowance of amount of Rs. 4,40,000/- u/s 40A(3) of the Income Tax Act, 1961 (hereinafter referred to as the Act).

5. The Ld. A.R submitted that this issue is covered in assessee's own case for AY 2000-01 to 2004-05 which is evident from a perusal of page 9 [page 10 of PB] Para 15-18 wherein the Tribunal (DB) has decided this issue as under:

"15. Now we shall take Ground No.3. I.T.A. No. 2046/Kol/2017 for A.Y. 2003-04, which relates to disallowance of Rs. 5,95,107/- under section 40A(3) of the Act.

16. Brief facts qua the issue are that the assessee being a commission agent, is also a trader in Jaggery. This is clearly reflected in the trading account of the audited accounts of the assessee and the assessee made purchases of Gur of Rs.29,75,538/-.The assessee submitted before the Assessing Officer that Gur trading was done with those customers who did not have bank account in village and as such the assessee will get the benefit under Rule 6DD(J) of the IT Rules. However, the Assessing officer noted that gur/ jaggery is a by-product of sugar cane and as such it is not an agricultural product but rather it is a product of the sugar cane and hence the benefit under Rule 6DD cannot be extended to the assessee in the instant case. The Assessing Officer noted that almost all the payments in both the businesses were in cash, exceeding Rs.20,000/- therefore the Assessing Officer made a disallowance of 20% of the entire purchases amounting to Rs. 5,95,107/-(that is, 20% of Rs.29,75,538), u/s 40A(3) of the Act.

17. Aggrieved by the addition made by the Assessing Officer, the assessee carried the matter in appeal before the Ld. CIT(A) who has confirmed the addition made by the Assessing officer. Aggrieved by the order of the Ld. CIT(A) the assessee is in appeal before us.

18. We have given a careful consideration to the rival submissions and perused the material available on record. We note that considering the size and nature of the business and the product in which the assessee deals, we are of the view that in the

village and remote area and kind of the peoples involved in this business (that is, most of the peoples are farmers), the gur and jaggery trading were being done mostly on cash basis. Most of the farmers have factory to produce gur and jaggery in the farm house itself where the sugarcane is produced therefore it cannot be said that farmers are not involved in manufacturing gur and jaggery. When it comes to the farmers, the general phenomenon and perception is that the Indian farmers are mostly uneducated and do not know how to operate the bank account. We know that the gur and jaggery production is not an agricultural activity but farmers are involved in producing gur and jaggery, as explained above, therefore, there are more chances to do the transactions in cash. We also note that the books of accounts of the assessee were audited and books of accounts were not rejected by the Assessing Officer. The Assessing Officer has not taken any adverse view on the assessee's books of accounts, so far this addition is concerned. Apart from this, the Assessing Officer has not doubted the purchase and sales made by the Assessing Officer. We note that the assessee's claim falls under Rule 6DD(J) of the Income Tax Rules (vide old Rules). It will be pertinent to go into the intention behind introduction of provisions of section 40A(3) of the Act at this juncture. We find that the said provisions was inserted by Finance Act 1968 with the object to curbing expenditure in cash and to counter tax evasion. In the assessee's case, there is no tax evasion, as the books of accounts were duly audited by the Chartered Accountant and AO has not rejected the books of the assessee and the payee has offered the tax. Therefore, the addition made by the Assessing Officer and confirmed by the Ld. CIT(A) needs to be deleted. Accordingly, we delete the addition to the tune of Rs. 5,95,107/-."

6. According to Ld. A.R, since there is no change in facts or law and addition was out of the same survey, the Tribunal's decision may be followed. Per contra, the Ld. D.R could not controvert the fact that there is any change in facts or law. Therefore the division bench order of Tribunal which is binding on this SMC Bench and is respectfully followed and it is directed that the addition of Rs. 4,40,000/- be deleted.

7. Coming to the ground nos. 4,5 and 6 which relates to addition made by the AO is against the action of Ld. CIT(A) in confirming the addition of Rs. 24,28,080/- as bogus sundry creditors.

8. The Ld. A.R drew my attention to page no.2 [page 3 of PB] para 4 wherein the Tribunal has dealt with the identical issue and has given relief to the assessee which is discernible from a perusal of para13 , page 9 (page 10 of PB) which reads as under:

4. Now we shall take summarized ground nos.1 and 2.At the cost of repetition the summarized ground no.1 and 2 is given below for ready reference:

Ground No.1 Addition on account of bogus creditors.

For assessment year 2000-01

Rs. 10,03,082/-

For assessment year 2001-02	Rs. 8,25,545/-
For assessment year 2002-03	Rs. 7,26,621/-
For assessment year 2003-04	Rs.13,13,668/-
For assessment year 2004-05	Rs.10,04,556/-

Ground No.2. I.T.A. No. 2043/Kol/2017 for A.Y. 2000-01- Addition Rs. 2,66,000/- on account of not disclosing unsecured loan.

5. The facts of the case which can be stated quite shortly are as follows. The assessee filed his return of income declaring total income of Rs.1,50,010/- on 30.10.2000. Subsequently, the Assessing Officer issued notice u/s 148 of the Act on 01.04.2005 and assessment u/s 143(3) read with section 147 was completed on 29.12.2006. In the said order u/s 143(3) read with section 147 of the Act, the Assessing Officer made total addition to the tune of Rs. 12,69,082/-, consisting bogus creditors of Rs. 10,03,082/- and unsecured loan of Rs. 2,66,000/-.

6 On appeal by the assessee, the said order u/s 143(3) r.w.s. 147 of the Act was, upheld by the ld. CIT(A) on 12.10.2007. On further appeal by the assessee against the order of ld CIT(A), dated 12.10.2007, the Hon'ble Income Tax Appellate Tribunal in its order no. 2425 to 2429/Kol/2017, dated 18.07.2008 set aside the orders of the lower authorities for assessment years 2000-01 to 2003-04, directing that the Assessing Officer shall furnish the copy of the reasons recorded u/s 148 of the Act to the assessee and if the assessee files any objection, the Assessing officer should dispose of the same by passing a speaking order and thereafter complete the assessment as per law.

7. As per the direction of the Hon'ble ITAT in I.T.A.Nos.2425to 2429/Kol/2017, order dated 18.07.2008 (supra) the reasons recorded were provided by the Assessing Officer to the assessee. The Assessing Officer also provided the opportunity of being heard to the assessee on several occasions, and then after completed the assessment u/s 144/147 of the Income Tax Act, 1961, on the basis of material available on record.

8. During the assessment proceedings,u/s 144/147 of the Act, the Assessing Officer noted that the assessee had disclosed Rs. 19,40,677/- as sundry creditors and Rs. 77,90,185/- as sundry debtors in his books of accounts. The assessee was asked to file the details of the sundry debtors and creditors and their postal addresses. Accordingly, the assessee submitted the postal addresses of the sundry debtors and creditors. After getting postal address from the assessee, the Assessing Officer issued letters to various creditors u/s 133(6) of the Act, on test check basis. Many letters u/s 133(6) of the Act, returned unserved with postal remark "Not Known".

The Assessing officer based on the report of the commission U/s 131(d) of the Act, noted that assessee had overstated the credit payable and claimed bogus credits in many cases, which are given below:

Name of the party	A.Y.	Credit as per assessee	Credit as per party	Difference
Agarwal Cane Crusher	2000-01	60922/-	Nil	60922/-
Agarwal Industries	2000-01	158982/-	1038/-	157944/-
Baldev Singh Bhim Singh	2000-01	124181/-	73328/-	50853/-
Hari Shankar Khandsari Udyog	2000-01	149471/-	266000 (Unsecured loan)	149471/-
Ganga Sugar Works	2000-01	104943/-	Nil	104943/-
KishanKhandasari Udyog	2000-01	225794/-	16170/-	209624/-
Shri Hanuman Rab Udyog	2000-01	271539/-	118789/-	152750/-
Sree Ganapati PashuAher	2000-01	158481/-	41906/-	116575/-
Total				1003082/-

Based on the above analysis, the Assessing officer, asked the assessee to submit the reasons of the discrepancy, as noted in the table above. In response the assessee filed written submission stating that the above noted discrepancy in the table above was due to goods in transit or payments in transit. The Assessing Officer noted that the reply of the assessee was without basis and without any evidence therefore he rejected the contentions of the assessee and made the addition to the tune of Rs. 10,03,082/-.

9. The Assessing Officer also noted that the assessee had given an unsecured loan to the tune of Rs. 2,66,000/- to Hari Shankar Khandsari Udyog but the assessee has not shown the loan in his books of accounts. The AO presumed that the assessee had extended this loan out of his unaccounted cash and therefore the Assessing Officer made an addition to the tune of Rs. 2,66,000/-

10. Aggrieved the addition made by the Assessing Officer the assessee carried the matter in appeal before the ld. CIT(A) who has confirmed the addition made by the Assessing Officer. Aggrieved by the order of the ld. CIT(A) the assessee is in further appeal before us.

11. We have heard both the parties and perused the material available on record. We note that the ld. Counsel for the assessee submitted before us that assessee's books of accounts were audited. The books of accounts were not rejected by the assessing officer. The ld Counsel also pointed out that some of the creditors were paid by assessee in subsequent years therefore it cannot be said that creditors are bogus. On the other hand, ld DR for the Revenue submitted before us that the assessee has not explained the difference in creditors therefore, the difference worked out by the assessing officer should be sustained. We note that assessee has participated in the assessment proceedings and submitted the details and documents required by assessing officer. The assessee also explained the difference between creditors recorded in his books vis-à-vis balance in the books of creditors, stating that said difference was due to goods in transit or payment in transit. The assessing officer rejected the explanation of the assessee without providing any valid reasons. Besides, the assessing officer failed to adduce any evidence on record to prove that the difference in creditors is a bogus and out of unaccounted money. Just to work out the difference in sundry creditors is not sufficient, the AO ought to adduce any tangible material on record to prove that the said difference belongs to unaccounted money of the assessee. We note that assessee's purchases had not been doubted by the Assessing Officer. The Assessing officer also did not doubt the sales made by the assessee therefore, so far the accounting principles are concerned, if the total sales and total purchases are not doubted then balance of creditors are going to be genuine, if it is not otherwise proved by the assessing officer.

12. We note that the difference between creditors recorded in his books vis-à-vis balance in the books of creditors, should not be treated as cessation of liability. At this juncture it is appropriate to go through the relevant provisions of section 41(1) of the Act, the relevant extracts of which is reproduced below:

"Section 41(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

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.

On perusal of the aforesaid provision it could be seen that the following two conditions need to be fulfilled in order to treat cessation of liability as income under section 41(1) of the Act in the year of cessation of liability:

- a) Assessee has to avail an allowance or deduction in any earlier year in respect of loss, expenditure or trading liability and*
- b) In subsequent year the assessee has obtained cash or any other benefit in respect of such loss, expenditure and trading liability by way of remission or cessation of liability.*

In other words, if an assessee incurred any loss, expenditure or trading liability in respect of any year and subsequently has obtained cash or any other benefit in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, then, the amount of cash /benefit so received shall be treated as income in the year of receipt or cessation of liability.

We note that in the assessee's case under consideration, the assessee had shown the closing balance of sundry creditors as on 31-03-2000 in its balance sheet and the said closing balance has been continued and carried forward as opening balance in the subsequent year i.e. as on 01-04-2000. Hence, it is clear that the assessee had not written back the same to its Profit & Loss account during the relevant year. As such, it cannot be said that the assessee had availed any benefit, as specified in (b) above, during the relevant year. Hence, the condition prescribed in section 41(1) of the Act has not been fulfilled in instant case. Besides, the Explanation 1 to section 41(1) of the Act is also not applicable in instant case since the assessee has not credited the same to its Profit & Loss account for the relevant year. In such a situation, it cannot be contended that the liability of different assessment years, as mentioned in the grounds of appeal had ceased to exist. Furthermore, the above liabilities has been continued from earlier years. Hence, the addition on account of bogus creditors is wholly unjustified.

13. In this regard it is also pertinent to note that the AO has not brought on record any evidence to justify that the aforesaid liabilities had actually ceased to exist during the relevant year. In such a situation the question of addition does not arise. Reliance in this regard is placed on the decision in the case of CIT -vs.- Sugauli Sugar Works (P). Ltd. (1999) 236 ITR 518 (SC) wherein, affirming the decision of the Hon'ble Calcutta High Court, the Hon'ble Apex Court held as follows:

"It will be seen that the following words in the section are important; the assessee had 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 him'. Thus, the section contemplates the obtaining by the assessee of an amount manner, whatsoever, or a benefit by way of remission or cessation and it should be of a particular amount obtained by him. Thus, the obtaining by the assessee of a benefit by virtue of remission or cessation is sine qua non for the application of this section".

In the instant case, the assessee has shown sundry creditors in the books of accounts and as such, applying the ratio of the above decision, it cannot be said that the assessee has received cash or other benefit in respect of such creditors or there has been cessation/remission of liabilities during the relevant respect year so as to justify addition under section 41(1) of the Act.

Further, in the case of CCIT -vs.- Kesaria Tea Co. Ltd. (2002) 254 ITR 434 (SC) the Hon'ble Apex Court held as follows:

"In order to apply section 41(1) in the context of the facts of the present case, the following points are to be kept in view (1) in the course of the 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"

In the assessee's case under consideration, the assessee has not received any benefit by way of remission or cessation of liabilities during the relevant year towards balance of sundry creditors and as such, it can be stated that it has not fulfilled the conditions as specified by the Hon'ble Apex Court in the above referred decision. Thus, applying the ratio of the Hon'ble Apex Court, it can be stated that the aforesaid liabilities cannot be added back under section 41(1) of the Act for the relevant respective assessment year. Our views are also fortified by the judgment of Co-ordinate Bench in the case of Puspall Kumar Das in I.T.A. No. 1442/Kol/2012 for assessment year 2007-08 wherein it was held as follows:

"10. We have given a very careful consideration to the rival submissions. In our view the addition was rightly deleted by the CIT(A) for the following reasons:

i. There was no evidence to show cessation of liability.

ii. Assessee still shows the liability in its books of accounts which itself is prima facie evidence that the liability exists.

iii. The transaction of purchase, if regarded as bogus then there is no liability in law and hence the question of applying section 41(1) will not arise for consideration.

iv. The sums in question has been repaid in the subsequent assessment years, thereby rendering the theory of cessation of liability not sustainable.

We therefore concur with the view of the CIT(A) and dismiss Gr. No. 2 raised by the revenue also."

Considering the factual position explained above and the position in law we are of the view that the addition made by the Assessing Officer should be deleted accordingly we delete the following additions made by the Assessing Officer:

<i>For assessment year 2000-01</i>	<i>Rs. 10,03,082/-</i>
<i>For assessment year 2001-02</i>	<i>Rs. 8,25,545/-</i>
<i>For assessment year 2002-03</i>	<i>Rs. 7,26,621/-</i>
<i>For assessment year 2003-04</i>	<i>Rs.13,13,668/-</i>
<i>For assessment year 2004-05</i>	<i>Rs.10,04,556/-</i>

9. According to Ld. A.R, since there is no change in facts or law and addition was out of the same survey, so the Tribunal's decision may be followed. Per contra, the Ld. D.R could not controvert the fact that there is any change in facts or law. Therefore respectfully following the division bench order of tribunal which is binding on this SMC Bench, I direct the deletion of addition of Rs. 24,28,080/-.

10. Coming to Ground no. 8 is against the action of Ld. CIT(A) in confirming the estimation of commission income of Rs. 3,83,879/-.

11. The Ld. A.R drew my attention to page 11 [page 12 of PB] para 19 wherein the similar addition has been made by the AO and has been dealt with by the tribunal at para 19 onwards reads as under:

“19.Ground No.4. I.T.A. No. 2046/Kol/2017, for A.Y. 2003-04, relates to addition of Rs. 44,120/-, on account of undisclosed profit.

20. Brief facts qua the issue are that the assessee in his statement given by him, during the survey, had mentioned that the commission was 4 per tin of ‘gur’ sold. Based on the analysis of the trading account of the assessee, it was noted by the Assessing Officer that the assessee had sold 20,966 tins in the year and disclosed a gross profit of Rs. 37,744/- which is at the rate of Rs. 1.8 per tin. The Assessing Officer also noted that the profit earned from trading activity was much less than the income earned from commission, therefore the income disclosed in the trading activity was grossly understated. Therefore, the Assessing Officer noted that even if the income earned per tin from the commission is considered @ Rs.4 per tin, the income from the said 20,966 tins should be Rs. 83,864/-. Therefore, the Assessing Officer made an addition for the differential amount to the tune of Rs. 44,120/- (Rs.83,864 - Rs. 39,744).”

12. According to Ld. A.R, since there is no change in facts or law and addition was out of the same survey, the Tribunal’s decision may be followed. Per contra, the Ld. D.R could not controvert the fact that there is any change in facts or law. Therefore respectfully following the division bench order of Tribunal which is binding on this SMC Bench, I direct the deletion of addition of Rs. 3,83,879/-.

13. In the result, the appeal of the assessee is partly allowed.

Order is pronounced in the open court on 8th February, 2021.

Sd/-
(A. T. Varkey)
Judicial Member

Dated: 08.02.2021

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- Shri Tum Nath Shaw, Kamala Kaminitala Lane, Nutanganj, Burdwan-713102
2. Respondent – ITO, Ward-2(3), Burdwan
3. The CIT(A)- Asansol (sent through e-mail)
4. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

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By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata