

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES 'B' JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 1164/JP/2019
निर्धारण वर्ष / Assessment Year : 2012-13

The DCIT, Circle-02, Jaipur	बनाम Vs.	M/s H. K. Impex, 2260, Takia Yakeen Shah, Choukdi Topkhana, Hajuri, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAAPH5802K		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Sh. P.C. Parwal (CA)
राजस्व की ओर से / Revenue by : Smt. Runi Pal (JCIT)

सुनवाई की तारीख / Date of Hearing : 19/03/2020
उद्घोषणा की तारीख / Date of Pronouncement: 28/04/2020

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the Revenue against the order of Id. CIT(A)-I, Jaipur, dated 30.07.2019 wherein following grounds of appeal have been taken:-

"1. Whether on the facts and circumstances of the case and in law, the Id. CIT(A) was justified in deleting the addition made by the AO u/s 41(1) of the Income Tax Act, 1961 without taking cognizance of the fact that the assessee without specifying any reason has not made payment to two parties namely M/s Sky Gems and M/s AR Gems amounting to Rs. 92,19,355/- and Rs. 21,61,250 respectively despite having obtained the approval from RBI for its remittance on 04.08.2015. Further there is no pursuance for the application again

filed on 19.08.2016 thereby establishing that these liabilities had ceased to exist during F.Y 2011-12?

2. Whether on the facts and circumstances of the case and in law, the Id. CIT(A) was justified in deleting the addition of Rs. 1,20,54,761/- made by the AO u/s 41(1) of the Income Tax Act, 1961 holding that the assessee has himself written off such liabilities in a subsequent year that is F.Y 2016-17 whereas these had ceased to exist during F.Y 2011-12 relevant to A.Y 2012-13 itself as rightly observed by AO?"

2. Briefly stated, the facts of the case are that the assessee firm is engaged in business of import, export, trading and manufacturing of precious, semi precious finished and rough stones. It filed its return of income on 20.09.2012 declaring income of Rs. 1,62,930/-. During the year under consideration, the assessee has shown sundry creditors of Rs. 5,97,08,992/- as on 31.03.2012. The AO observed that out of the total outstanding creditors of Rs. 5,97,08,992/-, assessee has made payment/written back the creditor in the subsequent years to the extent of Rs. 1,62,89,178/-. Accordingly, he treated the balance amount of Rs. 4,34,19,814/- as cessation of the liability u/s 41(1) of the Act and corresponding addition was made in the hands of the assessee.

3. Being aggrieved, the assessee carried the matter in appeal before the Id CIT(A) and submitted that creditors of Rs. 4,34,19,814/- can be divided into following three categories.

(a) Parties in respect of which assessee has subsequently obtained approval from RBI and made payment Rs. 1,87,24,339/-.

(b) Parties in respect of which outstanding relates to the period less than 3 years including 2 parties in respect of which permission for payment has also been obtained from RBI - Rs. 1,26,40,714/-.

(c) Parties for which payment are outstanding due to dispute and the same is written back in accounts in April 2016- Rs. 1,20,51,761/-

4. The Id. CIT(A) after considering the submission of assessee and the remand report of the AO deleted the addition made by the AO by giving following findings:-

(a) Addition u/s 41(1) of the Act cannot be made when the evidence brought on record indicate that the assessee has continued payment to the concerned parties subsequently to discharge the liability.

(b) The assessee has himself written back the creditors in A.Y 2017-18 which indicate that the assessee was recognizing such liability till year 2017-2018. The addition of the same amount in the current year will amount to double addition.

(c) The liability is still bring recognized in the books of accounts and in the absence of specific finding by the AO that the said amount has been specifically written off in books of accounts, it does not amount to remission/cessation of liability. The reason that creditors are outstanding for long period cannot be basis for addition u/s 41(1) of the Act.

5. Against the order of Id. CIT(A), the Revenue is in appeal before us on the ground that assessee without specifying any reason has not made payment to two parties namely M/s Sky Gems Ltd. and M/s A.R Gems

amounting to Rs. 92,19,355/- and Rs. 21,61,250/- respectively despite having obtained the approval from RBI for its remittance on 04.08.2015/19.08.2016 and secondly, the liability of Rs. 1,20,46,936/- which has been written off by the assessee in subsequent year i.e. F.Y 2016-17 had ceased to exist during F.Y 2011-12 itself.

6. During the course of hearing, the Id DR submitted that these are long outstanding creditors and the assessee has not made any payment to M/s Sky Gems and M/s AR Gems inspite of getting the approval of the RBI for remitting the money to these parties which clearly show that the liability towards these parties have ceased to exist and the AO was right in invoking the provisions of section 41(1) of the Act and which has wrongly been deleted by the Id CIT(A). Further, it was submitted that the Id CIT(A) has wrongly deleted the addition of Rs 1,20,46,936/- merely for the reason that the assessee has subsequently written off such liabilities in financial year 2016-17 when the fact of the case is that the liabilities in respect of these creditors have ceased to exist during the financial year 2011-12 itself. He accordingly supported the order of the Assessing officer.

7. Per contra, the Id. AR supported the findings of the Id CIT(A) and drawn our reference to the provisions of Section 41(1)(a) which read as under:-

- (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 and chargeable to income-tax as the income of that previous year, whether the business of profession in respect of the allowance or deduction has been is in existence in that year or not; or.

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 cession thereof shall include the remission or cession of any liability by a unilateral act by the first mentioned person under clause (a) or the successor in business under clause (b) of the sub-section by way of writing off such liability in his accounts."

8. It was submitted that from the plain reading of the section, it can be noted that section 41(1) would be attracted only when there is a remission or cessation of a trading liability. Explanation 1 to this section further clarifies that any unilateral act of writing off a liability in the accounts would also be considered as remission or cessation of the liability. It was submitted that assessee firm is engaged in the business of precious and semi precious stones. The assessee has not written back any of these creditors nor AO has brought on record any material to prove that the liability has ceased to exist. Section 41(1) cannot be invoked where liability to pay to the creditor is continued to be shown in the books of accounts and the creditor has not written off the same. In the trade of gems and jewellery it is a normal phenomenon that the amount remains outstanding for more than three to five years. To bring an amount to tax u/s 41(1), the AO has to prove the same by positive evidence that liability has ceased to exist. This has not been

done. The AO has picked up all the creditors who are outstanding as on 31st March, 2012 and not paid/written back till the date of assessment. This is not as per law as the assessee has not written back any of these creditors nor AO has brought on record any material to prove that the liability has ceased to exist. Therefore, addition made u/s 41(1) is not as per law.

9. It was further submitted that in assessment proceedings, the assessee has filed copy of account of all parties. All the creditors are against purchases. Section 41(1) cannot be invoked on the ground that assessee has not furnished evidence to prove that it will make payment to the creditors or the evidence about the dispute with the creditors particularly when liability to pay the creditors is continued to be reflected in the books of accounts and the creditors has not been written back. The Id. CIT(A) in these facts has called a remand report where addition of Rs. 1,87,24,329/- where payment is subsequently made is deleted against which department is not in appeal. The Id. CIT(A) also deleted the addition of Rs. 1,20,54,761/- which has been subsequently written back by the assessee but department has challenged the same in ground No. 2 of the appeal. The Id. CIT(A) has also deleted the addition of the creditors of Rs. 1,26,40,714/- in respect of five creditors which was outstanding for the period less than 3 years out of which department has challenged the deletion in respect of two creditors, i.e., M/s Sky Gems Ltd. and M/s AR Gems aggregating to Rs. 1,13,80,605/- in Ground No. 1 of the appeal.

10. It was further submitted that in respect of these creditors which are under challenge by the Department, following facts are relevant:-

A. M/s Sky Gems Ltd. – Rs. 92,19,355/-

From the copy of account from F.Y 2008-09 to 2011-12 which is placed on record, it can be noted that assessee made regular purchases from this party and also regularly made the payment. However, some of the bills which relate to the period 2009 to 2011 remained outstanding. Before Id. CIT(A) assessee filed certificate of import and also the correspondence with party dated 14.03.2016 regarding payment of outstanding. The assessee also got the permission from RBI on 4.08.2015 for making the payment. However, due to unavoidable circumstances, payment could not be made. The assessee again filed an application to its banker on 19.08.2016 for revalidation of the bills so that remittance can be made but the same is still pending and therefore, remittance could not be made. This proves that the liability to pay the creditors still exists. In the remand proceedings, AO has not made any adverse comments and therefore, Id. CIT(A) has rightly deleted the addition by referring to various decisions at para (xviii) to (xx) at pages 36 to 38 of his order.

B M/s A.R Gems- Rs. 21,61,520/-

From the copy of account which is placed on record, it can be noted that this amount is outstanding in respect of purchases made for the year 2011- 2012 itself. Before Id. CIT(A), the assessee filed letter dated 21.03.2016 of the party regarding payment of outstanding along with the copy invoice and certificate of import. The assessee also got the permission for RBI on 4.08.2015 for making the payment. However, due to unavoidable circumstances payment could not be made. The assessee again filed an application to its banker on 29.08.2016 for revalidation of the bills so that remittance can be made but the same is still pending and therefore, remittance could not be made. This proves that the liability to pay the creditors still exists. In the remand proceedings, AO has not made any

adverse comments and therefore, Id. CIT(A) has rightly deleted the addition by referring to various decisions at para (xviii) to (xx) at Pg 36 to 38 of his order.

(c) Parties for which payment are outstanding due to dispute and the same is written back in account in April 2016 - Rs. 1,20,54,761/-.

It was submitted that it relates to the amount payable to the following parties:-

S.No.	Name of the Party	Amount (in Rs.)
1	Southstream Enterprises	21,86,502/-
2	Bits Trading Co. Ltd	2,98,717/-
3	Gems House (K) Ltd.	8,34,528/-
4	RVP Ltd.	14,20,934/-
5	Glitz (Kenya) Ltd.	8,03,343/-
6	Jagoda Gems Ltd.	3,51,889/-
7	Kariba Amethyst Mktg. Ltd.	6,12,410/-
8	Prominent Gems & Rough Inc.	4,87,082/-
9	Mbele Investment Ltd.	8,09,866/-
10	Gems Marketing Services	22,31,124/-
11	Wildlife Ranch & Trading Co. Ltd.	20,18,366/-
	Total	1,20,54,761/-

It was submitted that in assessment proceeding, the assessee filed the complete details of these parties and confirmation in some of the cases. These amounts are still payable but the same were written back by the assessee in the books of accounts for F.Y 2016-17 and accordingly, offered for tax in A.Y 2017-18. Thus, when these creditors have been written back and offered for tax in A.Y 2017-18, in view of Explanation 1 to section 41(1),

the Id. CIT(A) has rightly deleted the addition as per Para (xiii) & (xiv) of his order.

11. Further, reliance was placed on the following cases, apart from the decisions already referred in the order of Id. CIT(A):-

- PCIT vs. Pukhraj S. Jain ITA No. 1288 of 2016 order dt. 04.01.2019 (Bom)

It is well settled through series of judgments that merely because a debt has not been repaid for over three years, would not automatically imply cessation of liability. Exhaustion of period of limitation may prevent filing of recovery proceedings in a Court of law, nevertheless it cannot be stated by itself that the liability to repay the amount had ceased. Such liability cannot be termed as bogus.

- PCIT vs. New World Synthetics Ltd. (2018) 258 Taxman 189 (Del)

Non-payment of outstanding liability which is admitted and acknowledged as due and payable by an assessee does not indicate remission or cession of liability. Delay or non-payment, even when AO is of the opinion that likelihood of payment was remote as business has stopped, would by itself not denote and mean cessation or remission of liability.

- Babulal Products (P.) Ltd. vs. ACIT (2017) 167 ITD 402 (Ahd.) (Trib.)

In return of income, assessee has shown liabilities under head sundry creditors for goods, sundry creditors for expenses, advances from customers and other liabilities. AO formed an opinion that there was no manufacturing

activity in business since 13.03.2005, therefore, this liability was to be assumed as ceased. Accordingly, he made an addition. It was held that AO had not brought any evidence on record to show that liability had ceased. Assessee had not written off liability in accounts. Addition u/s 41(1) could not be made unless liability in accounts had been written off.

12. We have heard the rival contentions and perused the material available on record. In respect of transaction with M/s Sky Gems, the Id CIT(A) has returned a finding that the assessee had made the purchase in preceding three years and has also obtained the permission from RBI for remitting the money. In respect of M/s AR Gems, the Id CIT(A) has returned a finding that the purchases were made during the financial year 2011-12 itself and application was filed seeking permission of RBI to remit the money and confirmation of the party was also filed during the assessment proceedings. It was held by the Id CIT(A) that as the liabilities are still being recognized in the books of accounts, it doesn't amount to remission/cessation of liability and reliance was placed on the decision of Hon'ble Rajasthan High Court in case of CIT vs Narender Mohan Mathur 97 DTR 428 (Raj). The said findings of the Id CIT(A) remain uncontroverted before us. We find that the liability continue to exist as on the close of the financial year 2011-12 as evidence by the fact that the permission to remit the money has been sought and granted by the RBI on 4/8/2015 and thereafter, the assessee had again applied for permission to remit on 19/8/2016. The fact that the payment has still not been made cannot be sole reason as reflective of remission or cessation of the said liability as there could be other financial constraints for not making the payment in time. The fact remains that the liability continue to exist and remain payable and the assessee continue to reflect the same as payable in its books of accounts as on close of the financial year 2011-12 and in view of the same, there is no

basis for making the addition u/s 41(1) and the findings of the Id CIT(A) are hereby confirmed.

13. Regarding amount of Rs 1,20,54,761/-, the Id CIT(A) has returned a finding based on perusal of profit and loss account and return of income for A.Y 2017-18, that the assessee has written back the creditors amounting to Rs 1,20,46,936/- in A.Y 2017-18 which indicates that the assessee was recognizing such liabilities till A.Y 2017-18. The Revenue has not brought any evidence on record which suggests that liability in respect of these creditors have ceased to exist during the financial year relevant to impugned assessment year 2012-13. Therefore, where liabilities continue to exist and reflected in the assessee's books of accounts, there is no basis to bring the same to tax u/s 41(1) of the Act. Further, in the A.Y 2017-18, where such liabilities have been written back in the books of accounts, the same have already been offered to tax by the assessee in his return of income. Therefore, we affirm the following findings of the Id CIT(A) which reads as under:

"(xiii) Next, the disallowance of credit entries from the parties appearing in table-2 is examined. Where the appellant has himself written off the outstanding liabilities in its books of accounts in April, 2016 amounting to Rs. 1,20,54,761/- in the remand proceeding on this issue, the AO commented that writing off the trading liability in the year 2016 after lapse of 10 years is not satisfactory. The AO also conducted enquiries through FT & TR division of the department and forwarded the report received to this office. The transaction related to M/s RVP Ltd. and M/s Prominent Gems & Rough inc. could not be verified by the concerned authorities.

(xiv) The details filed by the appellant is examined. The appellant has submitted the tax audit report for AY 2017-18, wherein in the profit and loss account, other income amounting to Rs. 1,20,46,936/- has been shown. The return of income was filed on 30.10.2017 declaring total income at Rs. 1,39,40,980/-. Thus, the appellant has himself written back the creditors amounting to Rs. 1,20,46,936/- in A.Y 2017-18 which indicates that the appellant was recognizing such liabilities till A.Y 2017-18. The addition of the same amount in the current year will amount to double addition. It is also seen that the writing back of such liabilities in AY 2017-18 has been separately shown by the appellant in profit and loss account and offered for taxation. Considering the above facts, there is no justification of making addition on account of outstanding trading liabilities appearing in table-2 amounting to Rs. 1,20,54,761/-. As per submission, the writing off has been claimed at Rs. 1,20,54,761/-, however, in the return of income for A.Y 2017-18 only amount of Rs. 1,20,46,936/- is added. The AO is directed to examine the above difference and grant the relief accordingly."

In the result, appeal of the assessee is allowed.

Order pronounced on 28/04/2020.

Sd/-
(विजय पाल राव)
(Vijay Pal Rao)
न्यायिक सदस्य / Judicial Member

Sd/-
(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 28/04/2020

*Ganesh Kr.

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

1. अपीलार्थी / The Appellant- DCIT, Circle-02, Jaipur

2. प्रत्यर्थी / The Respondent- M/s H. K. Impex, Jaipur
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 1164/JP/2019}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar