

आयकर अपीलिय अधीकरण, न्यायपीठ –“A” कोलकाता,  
IN THE INCOME TAX APPELLATE TRIBUNAL “A “ BENCH: KOLKATA  
[Before Hon’ble Shri J. Sudhakar Reddy, AM and Hon’ble Shri A. T. Varkey, JM

ITA No.2463/Kol/2017  
Assessment Year: 2011-12

M/s. Green Star Corporation PAN: AAGFG 4948M	Vs.	A.C.I.T, Circle-5(2). Kolkata
Cross Objector-Assessee		Respondent-Department

Date of Hearing	02-03-2021
Date of Pronouncement	9.04.2021
For the Appellant/Assessee	Shri Ankit Jalan, Advocate, Ld. AR
For the Respondent/Department	Shri Dhruvajyoti Ray, JCIT, Ld.DR

ORDER

Shri J.Sudhakar Reddy, AM

This is an appeal filed by the assessee directed against the order of the Learned Commissioner of Income-tax (Appeals), 13, Kolkata dated 02-08-2017 for the assessment year 2011-12 passed u/s. 250 of the Income-tax Act, 1961 ( hereinafter, referred to as the ‘Act’)

2. The assessee is a partnership firm and is in the business of manufacturing of electrical goods. It filed its return of income for the A.Y 2011-12 relating to F.Y 2010-11 on 29-09-2011 declaring income of Rs. 29,99,051/-. The Learned Assessing Officer ( in short, Ld. AO) selected the case for scrutiny assessment and passed an order u/s. 143(3) of the Act on 25-03-2014 determining the total income of the assessee at Rs. 2,13,84,774/- inter-alia making additions (i) Rs. 29,94,747/- as ungenuine, Sundry creditors / outstanding liabilities on various expenses (ii) Rs. 23,94,000/- as ungenuine, liabilities outstanding expenses and iii) Rs. 13,83,100/-, which are long outstanding liability for wages and (iv) Rs. 1,16,13,876/- being outstanding commission expenses of Rs.40,49,876/- and Rs. 75,64,000/- commission expenses. Aggrieved, the assessee carried the matter in appeal to the First Appellate Authority. The assessee contended that in most

of the cases, except current year's commission payments, expenditure incurred for the earlier years and which were allowed in particular AY (2009-10) and when they remained unpaid during the year, no addition can be made during the current assessment year.

3. The First appellate authority dismissed the case of the assessee and confirmed the order of the Ld. AO by observing that the assessee has not furnished any details to conclude that the outstanding liability / sundry creditors could not be treated to be ceased even though they have not been written off from the books of account. He observed that the profit disclosed by the assessee was meager and that the nature of expenses claimed by the assessee cannot be outstanding for a long time as there were generally paid. Further, aggrieved the assessee is in appeal before us on various grounds.

4. Shri Ankit Jalan, Advocate, Ld. Counsel for the assessee submitted that ground nos. 1 to 7 as raised by the assessee before us are against the additions made by the Ld. AO towards outstanding expenses and liabilities belonging to earlier assessment years. He further contended that no particular section has been invoked by the Ld. AO or the Ld. CIT(A) for making this addition. He submitted that the only section under which the addition can be made is only u/s. 41(1) of the Act. As there is no cessation or remission of any liability, he argued that the addition can be made u/s. 41(1) of the Act. He argued that the expenditure relating to the outstanding liabilities / sundry creditors have been incurred by the assessee in the earlier assessment years and have been claimed and allowed in earlier assessment years. He submitted that the Ld. CIT(A)'s order was factually incorrect, when it stated that the expenditure relating to certain liabilities was not claimed and allowed in the earlier assessment years. On a query from the Bench, he submitted that these outstanding liabilities/ sundry creditors were paid/ discharged by the assessee in subsequent financial years. He emphasized that even otherwise, the addition is being made of outstanding liabilities, as appearing in the balance sheet of the assessee cannot be justified, specifically when liability is still outstanding and which has neither ceased to exist nor written off in the books of account.

5. Regarding ground no. 8, he submitted that outstanding commission payable of Rs. 40,49,876/- was wrongly added during the year though the liabilities were outstanding

from the beginning of the year and the expenses were claimed in the earlier years and were duly discharged/paid by the assessee in subsequent assessment years. On the balance of commission expenses disallowed, the Ld. Counsel for the assessee submitted that the expenditure is genuine and was incurred for services received by the assessee and the assessee had made payments through account payee cheques against bills raised and tax deducted at source was deducted as per law. That agents/recipients of commission had filed their respective I.T returns declaring their respective commission receipt as per law. That nature of services rendered by the agents was clear from the bills raised by the agents. He disputed the finding of the Ld. AO that, the supply of goods to various districts in the state of West Bengal was on the basis of lowest tendering and there was direct nexus between the buyer and seller and hence no middleman was required. He submitted that the assessee's supply of goods was throughout the state of W.B. and that either an agent or an employee was required for delivery of goods as well as in liaison follow-up and in realising the bills. He submitted that similar commission expenses was incurred in the earlier assessment year and was allowed by the Ld. AO in the order dt. 29-11-2011 passed u/s. 143(3) of the Act. He pointed out that the assessee does not have any employees in every part of the state for service and for smooth supply of goods and that it has to rely on these agents for supply, service, billing liaison and receiving of payments.

6. The Ld. DR, on the other hand, opposed the contention of the assessee and submitted that a perusal of any outstanding expenses/liabilities demonstrate that the expenses cannot be kept outstanding, without payment for a long period of time. He pointed out that the assessee has not paid any expenses on account of staff welfare etc for more than 5 years, which shows that these are not genuine expenses. He submitted that even wages and salaries are kept outstanding for a number of years. He submitted that it is clear that liabilities are bogus. On a query from the Bench, the Ld. DR submitted that additions can be made u/s. 41(1) of the Act. He argued that neither the Ld. AO nor the Ld. CIT(A) had invoked this section of the Act. The Ld. DR submitted that it is implied that this section was invoked by the assessing authority. On the issue of commission payment, the Ld. DR relied on the orders of the Ld. AO and the Ld. CIT(A) and submitted that 90% materials were supplied to the Govt. Department on the basis of tenders and quotations,

services cannot be a necessity. He prayed before us that the order of the AO, as confirmed by the Ld. CIT(A), be confirmed.

7. Heard rival contentions. On a careful consideration the facts and circumstances of the case and a perusal of papers on record are as follows:

7.1 Admittedly the expenditure relating to outstanding liabilities/outstanding expenses claimed to have been incurred by the assessee, are in the earlier A.Y. The assessee claimed that the expenditure were allowed by the Ld.AO in those A.Ys. As some of the expenditure remains outstanding for a number of years the Ld. AO came to a conclusion that these are not genuine expenditure and consequently not genuine outstanding and that the assessee is not required to discharge the same. The AO made the addition of all outstanding liabilities except in the case of commission expenses, where both outstanding as well as current year expenses were added as income. Such additions of outstanding liabilities can be made only u/s. 41(1) of the Act. This section can be invoked only when there is either cessation or remission of the liabilities. It is not the case of the Ld. AO or the Ld. CIT(A) that there is cessation of liability in question. It is true that on a perusal of the nature of the expenses, our conclusion is that there cannot be outstanding for these many number of years. This indicates that these expenditure is not genuine. Such expenses should not have been allowed in the year in which they were claimed. The AO is correct in doubting the genuine of these expenses. But the problem is that they do not pertain to this asst. year. The disallowance, if any, has to be made in the year in which they were claimed. It cannot be taxed as income of this year unless it falls under the provisions of section 41(1) of the Act. Let us now examine the scope of Sec. 41(1) of the Act.

8. Hyderabad Bench of Tribunal, Hyderabad 'A' Bench, in the case of M/s. Nama Properties Ltd Vs. DCIT, Cir-2(1), Hyderabad, ITA No. 1831/Hyd/2017 for the A.Y 2012-13 on the scope of Sec. 41(1) of the Act considered a number of judgments of the Hon'ble Supreme Court and Hon'ble High Court 's and held as follows:-

*"8. Having regard to the rival contentions and the material on record, we find that the details of the trade payables/liabilities were produced before the AO and the AO has not doubted that they are the liabilities of the earlier A.Ys i.e. A.Y 2006-07 and 2008-09 respectively. The trading payables are continued as payables since then, and the relevant A.Y before us.*

*13. if there is cessation of liability, it is for the assessee to write off the*

*payables and offer it to tax u/s 41(1) of the Act. Since the payables are pending for many years, the AO during the relevant A.Y, wanted to examine the veracity of payables and since the assessee failed to produce necessary details of the trade payables, he decided that there is cessation of the liability during the relevant A.Y and to brought it to tax u/s 41(1) of the Act. U/s 41(1) of the Act, where an allowance or deduction has been made any year in respect of loss, expenditure or trading liability incurred by the assessee, and in the subsequent year, the liability ceased or there is a remission of such liability, then the same is to be brought to tax u/s 41(1) of the Act. In the case of the assessee before us, the assessee has been claiming it as trade payables. Thus, the assessee must have been allowed expenditure in the year in which it had accrued to the assessee and can be brought to tax in the year in which it ceases to exist. It is pointed out by the learned Counsel for the assessee that the liability is still existing in the books of account of the assessee. It is the case of the assessee that subsequently, its sister concern Madhucon Projects Ltd has taken over the liability of the assessee company and to this effect, the confirmation of M/s. Madhucon Projects Ltd is filed, wherein it is confirmed that a sum of Rs.14,49,60,055/- is receivable from the assessee. In his report, AO has expressed that there is nothing available on record to prove that M/s. Madhucon Projects Ltd is the parent company of the assessee, nor that they have owned up the trade liabilities of the assessee company. In reply to this report of the AO, the learned Counsel for the assessee has filed the Annual Report of Madhucon Projects Ltd for financial year 2012-13 wherein, in the list of related party transactions, the name of the assessee is mentioned under the head "Enterprises where significant Influence Exists". The AO can examine the genuineness of the expenditure in the year in which it is claimed to have accrued to it and can only bring it to tax in the year there is cessation of liability. The genuineness or otherwise of the expenditure should have been questioned by the AO in the year in which it is claimed by the assessee. As far as the A.Y 2012-13 is concerned, we find that the AO has invoked only the provisions of section 41(1) of the Act and the same can be invoked only if there is a cessation of liability and the AO cannot unilaterally treat it as cessation of liability without there being any evidence that such liabilities cannot be enforced on the assessee or that the assessee has written it off. Therefore, assessee's appeal is treated as allowed.*

*9. The assessee has relied upon the following decisions in support of its contention that the genuineness or otherwise of the trade liability should have been considered in the year in which they are claimed as liability and unless and until there is a remission of liability of cessation of liability, it cannot be brought to tax u/s 41(1) of the Act:*

*i) Das D.Y in ITA No.365/Hyd/2013, the SMC Bench of ITAT Hyderabad in this case, has held as under:*

*"8. Having heard the learned DR and having considered the material on record, I find that the only basis for making addition u/s 41(1) of the Act by the AO is the presumption by him that the liability of the assessee under*

*'sundry creditors' has ceased to be liability due to long duration of time after the credit became a liability and also because the assessee was not having any further transactions with the said parties. It is observed that there can be cessation of liability only when the creditor gives up his claim or the assessee recognizes the cessation of liability. Further, I find that the assessee has submitted receipts from the sundry creditors as proof of having received the amounts outstanding from him, before the CIT(A) and that there is no cessation of liability as presumed by the AO. Further, the CIT(A) has followed the order of his predecessor in assessee's own case for AY 2008- 09 wherein similar addition u/s 41(1) has been deleted. The learned DR has not been able to produce any evidence on record to rebut the finding of the CIT(A). In view of the above discussion, I do not find any reason to interfere with the order of the CIT(A) and, accordingly, the order of the CIT(A) is hereby upheld dismissing the ground raised by the revenue on this count".*

*ii) Hon'ble Gujarat High Court in the case of Bhogilal Ramjibhai Atara 43 Taxmann.com 55 (Guj.).*

*Section 41(1) of the Income-tax Act, 1961 - Remission or cessation of trading liability (Cessation of liability) - Assessment year 2007-08 - In return of income for assessment year 2007-08, assessee had shown a certain amount by way of his debts - He supplied details of 27 different creditors -Assessing Officer undertook exercise to verify records of so called creditors and found that creditors had no dealing with assessee - Assessing Officer further having found that debts were outstanding since several years applied section 41(1) and added above amount in income of assessee as deemed income - There was nothing on record to suggest that there was remission or cessation of liability that too during previous year relevant to assessment year 2007-08 - Whether in peculiar facts of case amount in question could not be added back in income of assessee as deemed income under section 41(1) - Held, yes [Para 8] [In favour of assessee]*

*iii) ITAT Mumbai in the case of Maharashtra State Coop. Consumers Federation Ltd, 13 Taxmann.com 163 (Mum).*

*I. Section 41(1) of the Income-tax Act, 1961 - Remission or cessation of trading liability – Assessment year 2005-06 - During assessment proceedings, Assessing Officer observed that there was a liability of Rs. 10,85,531 pending for more than 5 years on assessee and same had not been claimed by creditors; therefore, he added this amount to total income of assessee presuming that assessee's liability had seized - Whether in absence of any contrary materials placed on record by revenue to show that no such liability existed in books of account or assessee had obtained any benefit by cash or in any manner, merely because said liability was more than 5 years old it could not be said that there was cessation of liability - Held, yes [In favour of assessee]*

*iv) ITAT Delhi in the case of Sri Vardhman Overseas Ltd 24 SOT 393 (Del.) held as under:*

*Section 68 of the Income-tax Act, 1961 - Cash credits - Assessment year 2002-*

03 - During relevant assessment year, Assessing Officer asked assessee-company to prove genuineness of certain sundry creditors - Assessee could not file confirmations from said creditors; therefore, Assessing Officer treated credit balance appearing in assessee's books of account as unexplained credits under section 68 - On appeal, Commissioner (Appeals) confirmed additions under section 41(1) - Whether since no new amount had been credited in accounts of creditors during year under consideration, addition could not be made under section 68 - Held, yes Section 41(1) of the Income-tax Act, 1961 - Remission or cessation of trading liability - Assessment year 2002-03 - Whether in view of facts stated under heading 'cash credits', since amounts-in-question were brought forward balances, they could not be added to income of assessee for year under consideration, as question of genuineness thereof could be examined only in year in which they were credited to account of assessee - Held, yes

- Whether, even otherwise since revenue had failed to show that liabilities which were appearing in balance-sheet had ceased finally and there was no possibility of their revival, impugned addition could not be made under section 41(1) - Held, yes

v) Hon'ble Delhi High Court in the case of Jain Exports (P) Ltd 35 Taxmann.com 540 held as under:

Section 41(1) of the Income-tax Act, 1961 - Remission or cessation of trading liability [Cessation of liability] - Assessment year 2008-09 - During scrutiny, Assessing Officer added amounts shown as credit balances of creditors, outstanding for several years under section 41(1) - Commissioner (Appeals) confirmed addition only in respect of creditor 'E' as assessee could not prove genuineness of transaction, but deleted addition in respect of other creditors - Whether, as per section 41(1), cessation of liability may occur either by reason of it becoming unenforceable in law by creditor coupled with debtor's intention not to honour his liability, or by a contract between parties or by discharge of debt - Held, yes - Whether, establishment of genuineness of transaction was required in year when liability had arisen and addition could not be made on such ground, treating it as cessation of trading liability, when assessee had acknowledged its liability successively over several years - Held, yes [Para 22] [In favour of assessee] vi) Hon'ble Gujarat High Court in the case of Matruprasad C Pandey, 59 Taxmann.com 428 held as under:

Section 41(1) of the Income-tax Act, 1961 - Remission or cessation of trading liability (Cessation of trading liability) - Assessment year 2007 08 - Assessing Officer observed certain liabilities (sundry creditors) in balance sheet of assessee, which were very old - As assessee failed to furnish complete identity, creditworthiness of creditors, etc., as sought by Assessing Officer, he treated said creditors as no longer payable and made addition under section 41(1) - Whether addition under section 41(1) cannot be made unless and until it is found that there was remission and/or cessation of liability that too during relevant assessment year - Held, yes - Whether since there was no remission and/or cessation of liability during year under consideration, addition made

*under section 41(1) was liable to be deleted - Held, yes [Para 6.2] [In favour of assessee]*

*vii) ITAT Kolkata in the case of Jashojit Mukherjee 93 Taxmann.com 366 held as under:*

*I. Section 41(1) of the Income-tax Act, 1961 - Remission and cessation of trading liability (Cessation of liability) - Assessment year 2012-13 - Assessee had shown provision for sundry creditors -Assessing Officer held that since present whereabouts of creditors were not known to assessee, sum claimed towards sundry creditors were to be treated as deemed income of assessee under section 41(1) on account of cessation of liability - It was noted that assessee had shown balances outstanding towards sundry creditors even in next assessment year - Assessee had not written back these creditors in his profit and loss account as liabilities no longer payable - Hence, there was no unilateral write back of creditors to his profit and loss account by assessee and from same it could be safely concluded that assessee had proved that liabilities had not ceased to exist - Whether since assessee had duly acknowledged his debt by accepting creditors liability to be discharged in future, there could not be any cessation of liability under section 41(1), thus impugned, additions to income of assessee was unjustified - Held, yes [Para 5] [In favour of assessee]*

*10. The learned DR has relied upon the following decisions in support of his contention where the assessee is not able to prove the genuineness of the liability, they can be brought to tax u/s 41(1) of the Act.*

*a) In the case of ACIT vs. Dattatray Poultry Breeding Farm (P) Ltd, 95 Taxmann.com 130, ITAT Ahmedabad Bench held as under:*

*"Section 41(1) of the Income-tax Act, 1961 - Remission and cessation of trading liability (Creditor's confirmation) - Assessment year 2010-11 - Whether liability cease to exist in terms of section 41(1) where it is outstanding for a long period without any payment, despite it being reflected in books of account - Held, yes - Assessee company, had shown sundry creditors outstanding for six to twenty years - Assessing Officer made inquiries under section 133(6) about said creditors in which it was found that certain creditors had categorically denied that they had not made any transaction with assessee - Notices in some cases had returned unserved - Assessee had failed to produce said creditors as directed - Assessee had not even furnished correct address of all creditors, their PAN numbers and confirmation - Whether, on facts, Assessing Officer was justified in holding that there was cessation of liability and making additions to income of assessee under section 41(1)*

*- Held, yes - Whether merely because liabilities were shown in books of account by assessee as outstanding and not written back, would not, tie down revenue to hold such liabilities to be subsisting liability - Held, yes [Paras 9 and 10] [In favour of revenue"].*

*b) In the case of Palki Investments & Trading Co. (P) Ltd vs. ITO Mumbai 71 Taxmann.com 322, Hon'ble Bombay High Court held as under:*

*Section 271(1)(c), read with section 41(1), of the Income-tax Act, 1961 - Penalty - For concealment of income (False claims) - Assessment year 2005-06 - During assessment proceedings Assessing Officer made certain additions under section 41(1) in respect of trade liabilities which had ceased to exist - Penalty under section 271(1)(c) was also levied for furnishing inaccurate particulars of income - Facts revealed that in quantum proceedings Tribunal recorded that one of creditors had denied any amount to be due to it from assessee and some of creditors named by assessee were not found available at addresses given - Further, in penalty proceedings all three authorities had concurrently arrived at a finding of fact that claim made by assessee with regard to its outstanding liabilities for subject assessment year was false - Whether showing a non-existent liability as an existing liability and not offering same to tax amounted to furnishing inaccurate particulars of income and, therefore, penalty was justified - Held, yes [Para 8] [In favour of revenue]*

*c) Hon'ble' Supreme Court in the case of CIT vs. T.V.Sundaram Iyengar & Sons Ltd (1996) 88 Taxmann 429 (S.C) held as under:*

*Section 28(i) of the Income-tax Act, 1961 - Business income - Chargeable as - Assessment years 1982-83 and 1983-84 - Assessee received certain deposits from customers in course of its business which were originally treated as capital receipt - Unclaimed credit balances which were time barred were written back by assessee to its profit and loss account - Assessing Officer treated such amount as its trading receipt and made addition - Whether if an amount is received in course of trading transaction, even though it is not taxable in year of receipt as being of capital character, amount changes its character when amount becomes assessee's own money because of limitation or by any other statutory or contractual right and such amount should be treated as income of assessee - Held, yes - Whether therefore amount representing unclaimed credit balances written back to profit and loss account by assessee during assessment year under consideration, could be treated as assessee's income and liable to be taxed - Held, yes*

*d) Hon'ble Rajasthan High Court in the case of Rama Steel Rolling Mills & General Engg. Works(2013) 35 Taxmann.com 262 has held as under:*

*Section 41(1), read with section 260A, of the Income-tax Act, 1961 - Remission or cessation of trading liability [Unproved credits] - Assessment year 2007-08 - During financial years 2001-02 and 2002-03, assessee had purchased goods from one 'T' - There was dispute between assessee and 'T' and assessee failed to make payment of Rs. 34 lakhs to 'T' - In balance-sheet of assessee for year ending on 31-3-2007 aforesaid amount of Rs. 34 lakhs stood in name of 'T' - Assessing Officer added said amount to income of assessee for assessment year 2007-08 in view of provisions of section 41(1) - Tribunal held that liability of Rs. 34 lakhs in respect of 'T' at end of year as on 31-3-2007 if not proved could be added to income of assessee under section 41(1) - While remitting matter to Assessing Officer, it was left open for Assessing Officer to verify discharge of liability till date of fresh assessment and if liability had*

*been discharged till date then there would be remission or cessation of liability and if assessee failed to produce creditor or unable to give exact address then such liability would stand ceased during year and Assessing Officer would be free to add back same as per law - Whether liability of Rs. 34 lakhs in respect of 'T' at end of year if not proved could certainly be added to income of assessee under section 41(1) - Held, yes - Whether in facts and circumstances of case no substantial question of law arose for consideration regarding effect of section 41(1) resulting into remission or cessation of trade liability standing in books of account - Held, yes [Paras 3 & 4] [In favour of revenue]*

*e) Hon'ble Gujarat High Court in the case of Gujtron Electronics (P) Ltd vs. ITO, 83 Taxmann.com 389 held as under:*

*Section 41(1) of the Income-tax Act, 1961 - Remission or cessation of trading liability (Customer advances) - Assessment year 2012-2013 - Under a sales promotion scheme launched during financial year 1986- 87, assessee company collected a sum of Rs 500 from each of its customer by sale of coupons - Assessee collected a huge sum under said scheme - Since then, assessee had been showing such sum as outstanding trade liability under head customer advances - During relevant assessment year, Assessing Officer held that there was cessation of liability and, therefore, added such sum to income of assessee - It was found that scheme was valid only for period of twelve months - There was no activity at hands of assessee in connection with scheme for past several years - Not a single customer had demanded money back nor assessee had made any attempt to repay same - In all invoices, signatures of member customers were missing - Their addresses were not sufficient - Over years, company had also invested such amount and earned interest and used such interest for its purpose*

*- Whether on facts, there was cessation of trading liability, thus, Assessing Officer was justified in adding impugned amount to income of assessee - Held, yes [Paras 10 & 12] [In favour of revenue]*

*f) Hon'ble Delhi High Court in the case of CIT vs. Chipsoft Technology (P) Ltd 26 Taxmann.com 109 held as under:*

*Section 41(1) of the Income-tax Act, 1961 - Remission or cessation of trading liability - Assessment year 2006-07 - Unpaid dues of employees had been outstanding for 6-7 years and recovery of such dues was time barred - Whether assessee could not claim benefit of showing said amount as a liability - Held, yes - Whether there was cessation of such liability and, hence, said amount had to be added to income of assessee - Held, yes [Paras 9 & 10] [In favour of revenue] Words & Phrases :*

*Word 'Include' occurring in Explanation to section 41(1) of the Income-tax Act, 1961 Interpretation of statute : Rule of pragmatic construction.*

*g) ITAT Mumbai Bench in the case of Bharat Dana Bera vs. ITO, 56 Taxmann.com 388 I. Section 41(1) of the Income-tax Act, 1961 - Remission or cessation of trading liability (Cessation of liability) -Assessment year 2007-08 - Assessee was engaged in business of manufacturing and trading in*

*readymade garments - In return of income, assessee declared certain amount payable to creditors on account of purchases made from them - Assessing Officer issued notices to various creditors which were returned unserved with remarks not known - He thus taking a view that creditors in question were not genuine, made addition to assessee's income under section 41(1) - Whether since liability towards creditors remained in existence for a long time and, moreover, assessee failed to establish genuineness of those liabilities by producing supporting evidence, impugned addition was to be confirmed - Held, yes [Para 7] [In favour of revenue]*

*h) ITAT Mumbai Bench in the case of ITO vs. Sajjan Kumar Didwani, 47 Taxmann.com 381 held as under:*

*I. Section 41(1) of the Income-tax Act, 1961 - Remission or cessation of trading liability (Cessation of trading liability) - Assessment year 2009-10 - Assessee's books showed trading liabilities which worked out to approx. 40 per cent of purchase and were outstanding for a period of almost six years - Entertaining doubts with regard to genuineness of outstanding liabilities, notices were issued to four parties - One party gave its confirmation and other notices were received as unserved -Assessing officer observed that said liabilities ceased to exist and invoked section 41(1) - Whether since, confirmation was furnished by one party, application of section 41(1) was unjustified and matter needed re- adjudication - Held, yes - Whether as regards other liability, since no confirmation or any other material furnished and no claims were made same would be said to be clearly unproved and section 41(1) was rightly invoked - Held, yes [Para 4.3] [Partly in favour of revenue]*

*i) The Hon'ble Andhra Pradesh High Court in the case of A.K. Babu Khan vs. CWT 102 ITR 757 held as under:*

*Section 24 of the Wealth-tax Act, 1957, read with rule 29 of the Income-tax (Appellate Tribunal) Rules, 1963 - Appellate Tribunal - Orders of - Assessment years 1959-60 to 1963-64 - WTO made ex-parte assessments for relevant assessment years on ground that assessee did not submit returns in any one of assessment years despite several notices issued in that regard - AAC upheld said assessment - Even before AAC though assessee took time to adduce evidence but no evidence was produced by him in support of his case - After death of assessee his legal representatives filed appeal before Tribunal and filed an application to adduce further evidence - Tribunal, however, rejected application for adducing further evidence - Whether there was any infirmity in order of Tribunal - Held, no*

*11. Having considered the above case law relied upon by the learned DR, in the case of Dattatray Poultry Breeding Farm (P) Ltd, we find that the sundry creditors were outstanding for 6 to 20 years and during the enquiry made by the AO u/s 133(6) of the Act, some of the creditors categorically denied that they had made any transaction with the assessee while in some cases, the notices were returned unserved. It was in these circumstances that the AO had*

*held that there was a cessation of liability and the addition was made u/s 41(1) of the Act.*

*12. In the case of Palky Investments & Trading Co. (P) Ltd, the Hon'ble Bombay High Court was dealing with the case of levy of penalty u/s 271(1)(c) of the Act for alleged concealment of income with respect to addition made u/s 41(1) of the Act on account of cessation of liabilities. The Hon'ble High Court has considered that in the case in the penalty proceedings, all the three authorities had concurrently arrived at a fact that claim made by assessee with regard to its outstanding liabilities for subject A.Y was false. Therefore, the facts of this case are different and distinguishable from the facts before us and therefore, cannot be applied to the case on hand.*

*13. In the case of CIT vs. TV Sundaram Iyengar & Sons Ltd, the Hon'ble Supreme Court was considering the case where certain deposits from customers in course of its business were originally treated as capital receipts by the assessee and unclaimed credit balances, which were time barred, were written back by the assessee to its P&L A/c and were treated as assessee's income and were held to be liable to tax. Thus, in the said case, the assessee therein had recognized the cessation of its liability and the issue was whether capital receipts can thereafter be treated as revenue receipt. In the case before us, the assessee has not recognized the cessation of liability as in the case of TV Sundaram Iyengar & Sons and hence the case is distinguishable on facts. Therefore, the said judgment cannot be applied to the facts of the case before us.*

*14. In the case of Rama Steel Rolling Mills & General Engg. Works, the Hon'ble Rajasthan High Court has held that the liability at the end of the year, if not proved could certainly be added u/s 41(1) of the Act but still it is open for the AO to verify the discharge of liability and if liability had been discharged till the date of assessment, then there would be no remission or cessation of liability, but if assessee failed to produce the creditor or was unable to give exact address of the creditors, then such liability would stand ceased during the year and AO would be free to add back same as per law.*

*15. In the case of Gujtron Electronics (P) Ltd, the Hon'ble Gujarat High Court held that where there is limitation period in claiming the amount back and if there is absolutely no movement or correspondence between the assessee and its members with respect to the claim or with respect to deposit amount, the same can be brought back to tax u/s 41(1) of the Act.*

*16. Thus, it can be seen that the facts of the case relied upon by the learned DR are distinguishable from the facts of the case before us. In the decisions relied upon by the learned Counsel for the assessee it was held that the genuineness of the trade payables or creditors has to be examined in the year in which they originate and that unless the liability becomes unenforceable or is written off by the assessee or is given up by the other party or something is brought on record that there is cessation of liability, the same cannot be brought to tax u/s 41(1) of the Act. Therefore, they are very much applicable to the facts of the case before us and respectfully following the same, since*

*there is no evidence that there is a cessation of liability during the relevant A.Y, we hold that it cannot be brought to tax u/s 41(1) of the Act during the relevant A.Y. The addition is accordingly deleted.*

*17. In the result, assessee's appeal is allowed.”*

Similar are the proposition of law laid down by the ITAT Kolkata Bench in the case of I.T.O. Vs. M/s. C D Steel (P) Ltd ITA No. 1360/Kol/2017 dt. 29/8/18.

9. Applying the proposition of law laid down in the above case to the facts of this case, we hold that no addition can be made to the income of the assessee in this asst. years, as in the view of the AO the outstanding liability in question is bogus and non-existent. The question of cessation of such non-existent as bogus liability does not arise. Hence, Sec. 41(1) cannot be applied. Only when there is a genuine liability and there is cessation of such liability or it is written off in the books of account, then Sec. 41(1) of the Act can be applied. Law permits the Ld. AO to re-open the assessment for the earlier year and consider whether the expenditure incurred are to be allowable or not and in such cases additions can be made of bogus expenditure. Thus, in view of the above discussion, we delete all these additions of outstanding liabilities/expenses as appearing in the balance sheet as made by the Ld.AO and confirmed by the Ld. CIT(A) and allow the grounds of the assessee.

10. Coming to payment of commission, the matter came up for consideration and examination by the Ld.AO during the A.Ys 2006-07 and 2008-09. The order was passed u/s. 143(3) of the Act on 30-12-2020. The AO considered these claims of expenditure in commission and held as follows:-

*(B) Commission of Rs. 63,15,457/- Debited under head Selling, General & Administrative exp. Section Schedule 19 of P/L A/c. The A/R during the stage of hearing was asked to produce the details of parties to whom the commission was given and for what purposes. How it helped to promote the sale of assessee firm and whether TDS was made thereon. The Ld. A/R vide his written submission explained that the commission is required in his nature of business and to promote the sale.*

The AO allowed the claim of the assessee in that year.

11. The assessee specifically submits that he does not have any employee throughout the state of W.B., where supplies of goods have taken place and instead the assessee

appointed sales agent to liaison the supply of goods and follow up of the bills and collection in various districts of State of W.B. He also submitted that commission expenses were paid through a/c payee cheques after deducting tax at source against the bills raised by the Commission Agents. The sales agents have filed their I.T returns declaring such commission as their income. We also find that similar commission had been paid by the assessee in the earlier years also. The Ld. DR could not controvert these facts as stated by the assessee. The only basis for such disallowance is that supply of goods was to State Govt. by way of open tender and that no commission need to be paid for sales. Commission expenditure in this case was paid for liaison work at various locations in the state where goods were supplied. Thus, expenditure incurred was in lieu of salary which was required to be paid to employees; agents were not employed. In view of the above discussion, we find no justification in the disallowance of commission expenditure. Hence, ground no. 8 of assessee's appeal is allowed.

12. In the result, the appeal of assessee is allowed in part.

Order is pronounced in the open court on 9<sup>th</sup> April, 2021

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

Sd/-  
( J. Sudhakar Reddy)  
Accountant Member

Dated : 9<sup>th</sup> April, 2021

\*\*PP(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant/Assessee: M/s. Green Star Corporation 45A Khudiram Bose Sarani, Kolkata-37.
2. Respondent /Revenue–The ACIT, Cir-45, 3 Govt Place, West, Gr. Fl., Kolkata-1.
3. CIT(A)-, Kolkata (sent through e-mail)
4. CIT- , Kolkata.
5. DR, ITAT, Kolkata. (sent through e-mail)

By order,

/True Copy,

Assistant Registrar