IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 27.02.2019
DELIVERED ON: 11.3.2019

CORAM

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

Tax Case Appeal No.302 of 2008

M/s. West Asia Exports & Imports (P) Ltd.
No.5, Moores Road
Chennai 600 006. .. Appellant

Vs.

Assistant Commissioner of Income Tax
Company Circle III(3)
121, Nungambakkam High Road
Chennai 600 034. .. Respondent

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Chennai "C" Bench, dated 19.12.2007 in ITA No.2486/Mds/2006, for the Assessment Year 2003-04.

For Appellant : Mr.M.P.Senthil Kumar

For Respondent : Mr.M.Swaminathan
Senior Standing Counsel

J U D G M E N T

Dr.Vineet Kothari,J

The Assessee has filed this appeal under Section 260A of the Act

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raising the following substantial questions of law arising from the order of the Income Tax Appellate Tribunal dated 19th December 2007. The appeal was admitted by a Coordinate Bench of this Court on the following substantial questions of law on 17.6.2008:

> *"1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in confirming the assessment of Rs.58,60,105/- as income of the appellant, invoking Section 41(1) of the Income Tax Act? and*
>
> *2. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in holding that in the absence of confirmation of balances and in the absence of evidence of claim for repayment during the previous year, the liability balances should be deemed to have ceased warranting the invocation of Section 41(1) of the Income Tax Act?"*

2. The facts of the present case in a nut shell are as under:

The Assessment Year involved in the present case is 2003-04. The Assessing Authority added back a sum of Rs.58,60,105/- on account of the cessation of liability of Sundry Creditors in the hands of the Assessee. The Assessee was earlier engaged in the business of Timber, but about 10 years back from Assessment Year in the present case before us, it closed that Timber business and switched over to the business of Recruitment of

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Employees for sending to Gulf countries on behalf of certain foreign companies. The sundry creditors, about 16 in number, totalling to Rs.58,60,105/- represented the suppliers in the timber business of the Assessee and shown as Sundry Creditors in the Balance Sheet of the Assessee for the said Assessment Year 2003-04 also. The Assessing Authority asked the Assessee to produce the confirmations from those Sundry Creditors about the current existence of its liability in respect of the above parties. But, the Assessee company submitted that these are old balances outstanding for last several years and therefore, it was unable to produce such written confirmations. The Assessing Authority, therefore, held that the liability of the Assessee towards such Sundry Creditors had ceased to exist and therefore, the same was liable to be added back as income of Assessee as per Section 41(1) of the Act, in the present Assessment Year 2003-04. The appeals filed by the Assessee against such addition in the income under Section 41(1) of the Act also came to be dismissed by both the Appellate Authorities, namely, Commissioner of Income Tax (Appeals) as well as the Income Tax Appellate Tribunal. The findings of both the Appellate Authorities in this regard are quoted below for ready reference.

3. The findings of the Commissioner of Income Tax (Appeals) are as under:

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"2.6. I am of the view that the facts of the appellant are entirely different from the above case and hence, the said ratio of the said decision of Hon'ble SC cannot be applied in the present case. In the case of the appellant, the sundry creditors were existing in the books for more than 7 years. ***None of those parties had admittedly approached the appellant for the recovery of their amounts.*** *The said amounts were being utilised by the appellant for all these years without paying any interest. During the course of assessment as well as the appellate proceedings,* ***the appellant has not been able to file confirmations from any of the above parties. I had given the option to the AR to file confirmation even at this stage but the same has not been availed by the appellant.*** *These facts clearly indicate that the said liability has ceased to exist.*

2.7. One of the main condition in Section 41(1) is that there should either be remission or cessation of a liability. In the present case, ***there is clearly a cessation*** *of the above mentioned liability because there is no claim from any party for the recovery of the said amounts for many years and there is no obligation on the part of the appellant for returning such money to any of the abov mentioned parties. The above money of* ***Rs.58.60 lacs is practically lying with the appellant and being used in the business****. Such amounts have not been separately kept in any suspense A/c. or client's A/c. The*

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utilisation of these funds without any intention or legal obligation to return them to anybody itself ***is a big monetary benefit and it satisfies the other condition of S.41(1)*** *that the assessee must be benefited from such remission or cessation. I am of the view that the above facts clearly establish that the said liabilities have ceased to exist* ***(there is cessation) though the entries have not been reversed in the accounts****, and all the requirements / conditions prescribed in S.41(1) are fully met in the present case.*

2.8. In view of the above mentioned facts and circumstances, I am of the considered view that it is a clear case cessation of liability as a result of which the appellant has been benefited to the extent of Rs.58,60,105/- on account of non-existing liabilities shown in the balance sheet. Furthermore, all the said liabilities are pertaining to the trading transaction for which the equivalent amount has already been debited by the appellant in the relevant accounting year against the taxable profits. In view of these facts, the entire addition made by the AO is confirmed.

In the result, the appeal is dismissed." (emphasis supplied)

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4. Similarly, the Income Tax Appellate Tribunal also dismissed the appeal of the Assessee with the following observations:

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"2. The first issue raised is that Commissioner of Income Tax (Appeals) erred in holding that the sum of Rs.58,60,105/- representing credit balances of sixteen parties are to be treated as profit u/s 41(1).

2.1. On this issue the Assessing Officer noted that ***credit balances from sixteen parties were lying unconfirmed****. Since these were balances* ***outstanding for over seven years****, the Assessing Officer invoked the provision of section 41(1). Upon assessee's appeal, the learned Commissioner of Income Tax (Appeals) confirmed the action of the Assessing Officer. Against this order, assessee is in appeal before us.* ***The main contention of the assessee is that these creditors have not been written off in the books.*** *Hence, Section 41(1) cannot be invoked. It is the further plea of the assessee that these amounts are also not so taxable on the anvil of Hon'ble Jurisdictional High Court decision in the case of* ***CIT v. Southern Roadways Ltd.*** *and Hon'ble Apex Court decision in* ***CIT v. Sugauli Sugar Works P Ltd. 236 ITR 518.***

2.2. We have heard both the counsels and perused the relevant records. We find that ***assessee's plea*** *that unless the assessee writes off the same in the books of accounts Section 41(1) cannot be invoked,* ***is totally erroneous****. Section 41(1) is clearly attracted when there is a remission or cessation of liability. Remission and cessation is a matter which has been*

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perceived on the facts of the case. *Explanation 1(a) to Section 41(1) is aimed to bring into the ambit of remission and cessation the writing off of such liability in the accounts. This cannot be interpolated to mean that when the circumstances clearly indicate the remission and cessation of liability, the same would not come under the realm of Section 41(1) until and unless the assessee writes off the same in the books of accounts. We find that the decisions relied upon by the assessee are not applicable on the facts of the case. The implications of those decisions was that, unilateral act of assessee by writing off the amount cannot be a basis of invoking Section 41(1) and also that expiry of the period of limitation prescribed under the Limitation Act would not extinguish the debt.*

2.3. In the present case, the circumstances are different. As observed by the learned Commissioner of Income Tax (Appeals), ***assessee is engaged in the recruitment of manpower for foreign countries. About ten years back the assessee company was doing business of purchase and sale of timber***. *The above mentioned sundry creditors were admittedly standing in the books for more than seven years. There was no evidence of confirmation nor the fact that any of those parties have appraoched the assessee for recovery of the amount. In such circumstances, in our opinion, authorities below were quite correct in invoking the*

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provisions of Section 41(1). Hence, we affirm the order of the learned Commissioner of Income Tax (Appeals) in this regard and decide the issue in favour of the Revenue." (emphasis supplied).

5. The learned counsel for the Assessee, Mr.M.P.Senthil Kumar, urged before us the following contentions and relied upon certain case laws which are discussed herein below.

6. The learned counsel for the Assessee submitted that unless the Assessee writes off such liability in its books of accounts, the liability to pay such debts of the Assessee continues in law and merely because the Sundry Creditors had not made a claim against the Assessee in this regard and the Assessee failed to produce the confirmations in writing from such Sundry Creditors as they were very old dues, it did not amount to cessation of liability under Section 41(1) of the Act. Therefore, the additions made by the Authorities below, up to the Tribunal, were not sustainable. He relied upon the decision of the Delhi High Court in the case of ***Commissioner of Income Tax v. Jain Exports Pvt. Ltd. [(2013) 89 DTR 265 (Delhi)]***, wherein it was held that in order to attract the provisions of Section 41(1) of the Act, there should have been an irrevocable cessation of liability without any possibility of the same being revived. Since the Assessee continued to

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reflect the said outstanding in the balance sheet of its company and no credit entry had been made in the Profit and Loss Account or in the books of the Assessee in the previous year relevant to Assessment Year 2008-09, it amounted to the 'acknowledgment' of the debt for the purpose of Section 18 of the Limitation Act, 1963, by the Assessee company. Therefore, the outstanding balances reflected as payable to one M/s. Aravind Oil and Vanaspathi Limited could not be brought to tax under Section 41(1) of the Act.

7. In another decision from Delhi High Court in the case of ***Commissioner of Income Tax v. Hotline Electronics Ltd. [(2012) 80 CCH 156 Del. HC]***, it was held that since the Assessing Officer has not brought on record any evidence or material, including any statement from the creditors that the debts had been extinguished and the liability to pay them had ceased despite the extension of the period of limitation by 'acknowledgment' made in the Assessee's Balance Sheet, Section 41(1) could not be attracted.

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8. The learned counsel for the Assessee also relied upon Karnataka High Court decision in the case of ***Principal Commissioner of Income Tax v. Ramgopal Minerals [(2017) 394 ITR 696 (Kar.)]***, to which one of us

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(Dr.Vineet Kothari,J) was a party. In the said decision, it was held that the burden lies upon the Revenue to establish that the liability of the respondent Assessee towards creditors had ceased in law or has been remitted by creditors finally. It was further held that the burden of the Revenue to summon such creditors or Transporters for establishing that the liability had ceased could not be shifted upon the respondent Assessee and since no such material was brought on record by the Assessing Authority, to establish such creditors (Transporters) were fake, but on the contrary, the documentary evidence on record on the basis of which the Tribunal returned the finding of facts in favour of the respondent Assessee that the creditors were genuine and existing, the additions under Section 41(1) were rightly set aside by the Tribunal and no substantial question of law arises under Section 260A of the Act and thus, the Revenue's appeal was dismissed.

9. In yet another decision of Karnataka High Court in ***Commissioner of Income Tax v. Alvares & Thomas [(2017) 394 ITR 0647 (Kar.)]***, another Division Bench of Karnataka High Court held that the *sine qua non* for invoking the provision of Section 41(1) of the Act is that there should be a remission or cessation of a trading liability and the additional requirement is that some benefit in respect of such trade liability is taken by the Assessee. In the facts of that case, the Revenue contended that since the burden was

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not discharged of existence of the liability, it would be treated as cessation of liability attracting Section 41(1) of the Act and it was further stated that when in respect of debt in question, confirmation was called for, a letter was produced of the creditor with its address, but when the same was verified, the report came that party could not be traced and therefore, it was not verifiable. The Court, therefore, held that cessation of liability has to be cessation in law, of the debt to be paid by the Assessee to the creditor and such debt is recoverable even if the creditor has expired, by the legal heirs of the deceased creditor.

10. The learned counsel for the Assessee also relied upon Punjab and Haryana High Court decision in the case of ***Commissioner of Income Tax v. Sita Devi Juneja [(2010) 325 ITR 0593]***, in which the Court held that if in the Assessee's Balance Sheet, the liability was shown as payable to the Sundry Creditors, such entries in the Balance Sheet indicated the acknowledgement of the debts payable by the Assessee and merely because the liability was outstanding for the last six years, it cannot be presumed that the said liability has ceased to exist.

11. On the other hand, the learned Senior Standing Counsel for the Revenue, Mr.M.Swaminathan, contended that the significant difference in

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facts, in the present case, is that the entire business of the Assessee, namely the timber business, for which the said trade liabilities were incurred by the Assessee, had been closed by the Assessee about ten years back prior to the present Assessment Year 2003-04 in hand and not only none of the creditors had made any claim from the Assessee with regard to the said dues, but the Assessee also failed to produce the confirmations from these creditors and that the Assessee had changed its business of sending of persons to Gulf countries, which was entirely a different business altogether and in the absence of any continuity of the debt or continued business relationship with those creditors, there was no question of treating the said trade liabilities as perennial and indefinitely continuing forever and for all practical purposes, the liability of the Assessee to pay off those Sundry Creditors, who were suppliers to his timber business, had ceased and therefore, the authorities were justified in bringing the said amount of liability to tax under Section 41(1) of the Act. He submitted that mere book entries in the Balance Sheet or keeping such credit entries alive in the Balance Sheet of the Assessee, even for a different business, could not indefinitely postpone the applicability of Section 41(1) of the Act.

12. The learned counsel for the Revenue relied upon the following decisions in support of his submissions.

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13. In ***Commissioner of Income Tax v. T.V.Sundaram Iyengar & Sons Ltd. [(1996) 222 ITR 344 (SC)]***, the case before the Supreme Court was just contra and interesting. The Assessee had received certain deposits from customers in the course of carrying on its business, which 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 Assesseee, 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.

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*"22. The principle laid down by **Atkinson, J**. applies in full force to the facts if 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**.*

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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)

14. The Delhi High Court, in the case of ***Commissioner of Income Tax v. Rajasthan Golden Transport Company [(2001) 249 ITR 723 (Del.)]***, the 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

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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.

15. 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 ommission 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,*

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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 assesse'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/assesse would therefore qualify as a cessation of liability, albeit by operation of law.*

10. The submission of the assesse that no period of limitation is provided for under the Industrial Disputes Act,

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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."

16. 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

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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*

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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

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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)

17. Having heard the learned counsel for the parties and upon perusal of the aforesaid case laws, we are of the opinion that the present appeal of the Assessee has no merit and is liable to be dismissed and the questions of law deserves to be answered in favour of the Revenue and against the Assessee. The reasons are as follows:

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18. Section 41 of the Act brings to tax certain 'Profits chargeable to tax' and though it is a long provision having six Sub-sections, 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

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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.*

19. The crucial words in the said provisions are the '**remission or cessation**' of such trading liability which has been claimed as an allowance or deduction taken by the Assessee in a previous year and if such liability is remitted by the creditor or had ceased to exist, then in the year of remission or cessation, the said trading liability can be brought to tax as profit chargeable to tax under the said provision. Obviously, the word "cessation" in the said provision means cessation ***de facto*** and ***de jure***. The cessation of

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liability should cease to exist in the eye of law. While the remission of liability can be by way of conscious act on the part of the creditor, the cessation of such liability can be inferred on the basis of facts and circumstances surrounding such trading liability. After Explanation was added on Section 41(1), it can be even by the unilateral act on the part of Assessee viz., by writing back or writing off such liability amounting to cessation of liability in his hands attracting Section 41(1) of the Act and attracting tax thereon.

20. In the present case, where the trading liability incurred by the Assessee in the course of its erstwhile timber business, which was discontinued ten years ago and nobody claimed a single penny from the Assessee in the last ten years and the Assessee even failed to produce the written confirmations from such trade creditors, it could very well be inferred by the Assessing Authority that such trading liability of the Assessee ceased to exist in law and not only the claims become barred by limitation, but in fact, no creditor came forward to make any claim from the Assessee. The fact that the Assessee had changed its business from timber business to that of sending of manpower to Gulf countries, altogether a different kind of business, but still continued to show its erstwhile Sundry Creditors of its erstwhile timber business in the Balance Sheet of current business also, it did not entitle the Assessee to claim that the liability of such creditors of its

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timber business still continues in the eye of law, since such creditors are shown in the Balance Sheet. The inference of cessation of liability will not solely depend upon the accounting entries made, by the Assessee nor the omission of the Assessee to make such accounting entries. The accounting entries are not the sole determinative factor, but they may still be relevant.

21. Though the burden lies upon the Revenue to establish that such liability had ceased in law to apply Section 41(1) of the Act, but the initial burden of Revenue in this case was discharged by calling upon the Assessee to produce the written confirmations from such trade creditors and thus, the onus, thereupon shifted on the Assessee to either produce the written confirmations or to produce the creditors themselves as witnesses to establish that the trade credit or liability to pay continues to exist ***de facto*** and ***de jure***.

22. The entries in the books of accounts or more particularly balances drawn year after year in the Balance Sheets cannot perennially or indefinitely postpone the applicability of Section 41(1) of the Act on the ground of cessation of trading liability. Such an interpretation would defeat the very object of enacting such a provision. The object of the provision is very clear that what deduction and allowance was claimed against the profits of the

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previous year(s), if such liability ceased in law in the later year(s) then in such later year(s), to such extent, the liability should be treated as profit of such later year(s) and brought to tax, in such later year(s).

23. Therefore, while entry in the books of accounts is only one piece of evidence to establish that the liability is current and subsisting in the eye of law, even in the current assessment year, if the assessee fails to discharge the onus cast upon him, the Assessing Authority will be free to draw an adverse inference, as has been done in the present case. One cannot shut eyes to the fact like change of business by the Assessee to an entirely different nature and then creditors of old timber business not speaking up anything for ten years and the absence of the Assessee to produce the written confirmation from such creditors. In such circumstances, certainly an inference that the business link of the creditors with the Assessee and the survival of the claim has totally vanished. Thereafter, after ten years, if such an inference is drawn and Section 41(1) is applied, no valid exception can be taken by the Assessee.

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24. On the issue of burden of proof and shifting onus on the Assessee,a reference to the following cases may be useful. In ***Metal Box Company of India Ltd. v. Workmen [AIR 1969 SC 612]***, the Supreme

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Court held in a case relating to payment of bonus to the workmen and the claim of depreciation in the Balance Sheet of the company, held that mere production of Auditor's certificate especially when it is not admitted by labour, the proper proof of the correctness of statements made in the Balance Sheet was necessary. The Supreme Court followed its earlier view in *Petlad Turkey Red Dye Works Ltd. v. Dyes & Chemical Workers Union [(1960)2 SCR 906]*. The relevant paragraph from the said judgment is quoted below for ready reference:

> *"8. Since the company claimed the deduction of depreciation, it stands to reason that the burden of proof that the depreciation claimed by it was the correct amount in accordance with the Income Tax Act was on the Company and* ***that burden the company must discharge once its figures were challenged. But it was contended that once the company produced its auditors' certificate. that should be sufficient and must be accepted*** *and that the Tribunal should not insist either on the auditors proving their certificate or on the company proving depreciation on each and every item of depreciable asset. Such an enquiry before the Tribunal, it was argued, would be a* ***harassing and prolonged enquiry****, not contemplated in industrial adjudication and, therefore, the Tribunal ought to have accepted as correct Rs. 28.82 lacs certified by the auditors. Under sec. 23 of the Act the*

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presumption of accuracy is allowed only to the balance sheet and the P & L Account of companies. ***No such presumption is provided for by the Act to auditors' certificates****. Speaking of rehabilitation amount deductible as a prior charge under the Full Bench formula while working out the available surplus this Court in* ***Khandesh Spg. Ana Wvg. Mills Co. Ltd. v. Rashtriya Girni Kamgar Sangh(1)*** *observed at page 847 as follows:*

> *"The importance of this question (the procedure to be followed for ascertaining facts) in the context of fixing the amount required for rehabilitation cannot be over-estimated. The item of rehabilitation is generally a major item that enters. into the calculations for the purpose of ascertaining the surplus and, therefore, the amount of bonus. So, there would be a tendency on the part of the employer to inflate this figure and the (1) [1960] 2 S.C.R. 841,847. ap. C. 1./69-2employees to deflate it. The accounts of a company are prepared by the management. The balance-sheet and the profit and loss account are also prepared by the company's officers. The labour have no concern in it.* ***When so much depends on this item, the principles of equity and justice demand that an Industrial Court should insist upon a clear proof of the same and also give a real and adequate opportunity to the labour to canvass the***

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correctness of the particulars furnished by the employer."

The necessity of proper proof of the correctness of statements in the balance-sheet was repeated in ***Petlad Turkey Red Dye Works Ltd. v. Dyes & Chemical Workers' Union(1)****. These observations made with regard to balance- sheets and P & L accounts would equally apply to statements made in ,the auditors' certificates 'prepared on the instructions and information supplied to them by employers.* ***Mere production of auditors' certificate****, especially when it is not admitted by labour, not by the auditors but by the employees of the company who admitted not to have been concerned with its preparation or the calculations on which it was based* ***would not be conclusive****. We do not say that in such a case the Tribunal should insist upon proof of depreciation on each and every item of the assets.* ***It should, however, insist on some reasonable proof of the correctness of the figure of depreciation*** *claimed by the employer either by examining the auditors who calculated and certified it or by some other proper proof. Depreciation in some cases would be of a large amount affecting materially the available surplus. Fairness, therefore, requires that an opportunity must be given 'to the employees to verify such figures by cross-examination of the employer or his witnesses who have calculated depreciation amount. Notwithstanding the Unions' challenge to the figure*

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of depreciation claimed by the company, the only thing that the company did was to examine Verma, who admittedly had nothing to do with its calculation, and to produce through him the said certificate. In our view, that was neither proper nor sufficient. The ***proper course*** *for the Tribunal in such a case was to* ***insist upon the company adducing legal evidence in support of its claim instead of taking the figure of depreciation from the P & L account which was not worked out in accordance with the Income Tax Act*** *but under sec. 205 of the Companies Act, and saying that the Company had failed to prove that it was a mistaken figure. In our view, the question as to the correct amount of depreciation must go back to the Tribunal for a fresh decision. The Tribunal should give opportunity to the Company to prove its claim for depreciation by reasonable proof and to the Unions to test such evidence by cross-examination or otherwise. (1) [1960] 2 S.C.R. 906, 909."* (emphasis supplied)

25. In ***Controller of Estate Duty, Kerala v. V Venugopal Varma Rajah [(1976) 4 SCC 3]***, the Supreme Court dealt with the case of exemption from Estate duty in respect of a forest land, which was claimed to have been converted by the Assessee into agricultural land and while dealing with the issue of burden of proof in this regard, the Court held as under:-

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"The burden of establishing the exemption lay upon the assessee respondent. ***The High Court was not correct in placing the burden upon the Department, after it was admitted that it was "forest land"****. Even if there could be such an onus, it was sufficiently discharged by the admission that the land was "forest land" covered with natural or wild growths.* ***After that, at any rate, the assessee had to prove change of its character****. Here the* ***assessee's admission*** *that the land under consideration was "forest land", covered by wild and natural growth of forests,* ***constituted evidence to the contrary****.*

After the assessee's admission that it was "forest land", which presumably prevented cultivation, no evidence was led to indicate any change of character of this land or its conversion into agricultural land. The assessee not having led any evidence of any intention to prepare or appropriate or earmark the land for any agricultural use or purpose, but, on the other hand, ***having contended that mere possibility of using such land for agricultural purposes in future was enough could not be said to have discharged his onus of proof.*** *Hence such land cannot claim exception."* (emphasis supplied)

26. In ***Sodhi Transport Company v. State of U.P. [(1986) 2 SCC 486]***, the Apex Court dealing with the question of rebuttable presumption

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under Section 4 of the Evidence Act, 1872, in a sales tax matter, where on the failure of Driver of Truck to produce the Transit Pass at the Check-post at the time of checking vehicles, the presumption raised under Section 28 of the U.P. Sales Tax Act that the goods will be deemed to have been sold within the State, attracting local sales tax liability, the Supreme Court held that the said rebuttable presumption of sale made within the State has the effect of shifting the burden of proof on the Assessee. The relevant extract from paragraphs 14 to 17 from the Head Note is quoted below for ready reference.

> *"The words "it shall be presumed" in Section 28-B only require the authorities concerned to raise a rebuttable presumption,* ***that the goods must have been sold in the State if the transit pass is not handed over*** *to the officer at the check-post or the barrier near the place of exit from the State. A statutory provision which creates a rebuttable presumption as regards the proof of a set of circumstances which would make a transaction liable to tax with the object of preventing evasion of the tax cannot be considered as conferring on the authority concerned the power to levy a tax which the liegislature cannnot otherwise levy.* ***A rebuttable presumption has the effect of shifting the burden of proof****. The authority concerned before levying sales tax arrives at the conclusion by a judicial process that the goods have been sold inside the State and in doing so relies upon the statutory*

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rule of presumption contained in Section 28-B of the Act which may be rebutted by the person against whom action is taken under Section 28-B. ***The person concerned having opportunity to displace the presumption by leading evidence, there is no unconstitutionallity in it****. When once a finding is recorded that a person has sold the goods which he had brought inside the State, he would be a dealer even according to the definition of the word 'dealer' as it stood from the very commencement of the Act subject to the other conditions prescribed in this behlaf being fulfilled. There is, therefore, no substance in the contention that a transporter was being made liable for the first time after 1979 with retrospective effect to pay sales tax on a transaction which is not a sale.*

A presumption is not in itself evidence but only makes a prima facie case for the party in whose favour it exists. It is a rule concerning evidence*. It indicates the person on whom the burden of proof lies. When presumption is conclusive, it obviates the production of any other evidence to disodge the conclusion to be drawn on proof of certain facts. Having regard to the definition of 'may presume' in Section 4 of the Evidence Act, it is open to a court, in its discretion, either to draw a presumption referred to in a law or not.* ***The words "shall presume" require the court to draw a presumption accordingly, unless the fact is disproved.***

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They contain a rule of rebuttable presumption. When presumption is rebuttable it only points out the party on whom lies the duty of going forward with evidence on the fact presumed, and ***when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed the purpose of presumption is over. Then the evidence will determine the true nature of the fact to be established.*** *The rules of presumption are deduced from* ***enlightened human knowledge and experience*** *and are drawn from the connection, relation and coincidence of facts, and circumstances."* (emphasis supplied)

27. Similarly in the present case before us, we are of the opinion that once the Assessee was called upon to prove the credit entries with regard to the Sundry Creditors of its erstwhile business, the burden shifted upon him to establish the current existence of those creditors and their debts due from Assessee and that there was a live link between the creditors and the outstanding debts and therefore, in the absence of Assessee discharging that burden shifted upon him, the case of cessation of liability made out by the Revenue against him so as to bring back those dead debts of the Assessee to tax under Section 41(1) of the Act, was justified.

28. The Assessment Year 2003-04 in question has passed by for last

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15-16 years by now. When we took up the cases for hearing, we asked the learned counsel for the Assessee that even in past 15-16 years, if any creditor has raised any claim against the Assessee with regard to these credit entries, he may produce the evidence of the same. But we drew a blank from the learned counsel for the Assessee, despite the grant of an opportunity in this regard. Thus, it is also more fortified now that the liability to pay for these Sundry Creditors had ceased long back and the authorities under the Act, up to the Tribunal, were justified in applying Section 41(1) of the Act and bring to tax the liability to pay back their old debts, as having ceased in law and in fact.

29. A reasonable time line of period has to be drawn while considering the words "cessation of trading liability" as employed in Section 41(1) of the Act. The lapse of ten years of time, coupled with the fact that there was a change of business altogether by the Assessee, in our opinion, absolutely justified the Assessing Authority to draw an adverse inference against the Assessee about the cessation of liability, especially when the Assessee failed to produce the written confirmation from such trade creditors of its erstwhile timber business, despite grant of opportunity to the Assessee. The debts had not only become time barred long ago, but, in fact also, no creditor made any claim for recovery from the Assessee during any of these years even up to

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now.

30. We find considerable support in the judgments relied upon by the learned counsel for the Revenue, especially the 'common sense principles' propounded by Lord Atkinsons, as applied by the Supreme Court in the case of ***T.V.Sundaram Iyengar*** supra and also Gujarat High Court in the case of ***Gujtron Electronics***, whereas we are unable to draw any contra support on the basis of ratio of the judgments relied upon by the learned counsel for the Assessee, albeit without any quarrel on the principles laid down therein, especially when it remains a mixed finding of fact and law as to when a trading liability ceases ***de facto*** and ***de jure*** and therefore, finally it should depend upon the facts and circumstances of each case as to whether such trading liability could be said to have ceased in law or not so as to apply Section 41(1) of the Act.

31. In the present case, we are fully satisfied that the authorities under the Act, all the three authorities, were perfectly justified in drawing such an inference against the Assessee and holding that the trading credits of erstwhile timber business of the Assessee were liable to be taxed as profits of the business under Section 41(1) of the Act in the Assessment Year 2003-04 in question. Accordingly, the appeal of the Assessee is dismissed and the

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substantial questions of law are answered in favour of the Revenue. No order as to costs.

Index : Yes
Order : Speaking

(V.K.J.) (C.V.K.J.)
11.3.2019

kpl

To

1. Assistant Commissioner of Income Tax
   Company Circle III(3)
   121, Nungambakkam High Road
   Chennai 600 034.

2. Income Tax Appellate Tribunal
   Chennai "C" Bench,

3. Commissioner of Income Tax (Appeals)
   Chennai.

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

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Judgment in
TCA No.302 of 2008.

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11.3.2019.

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