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IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI "I" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, HON'BLE JUDICIAL MEMBER &
SHRI Dr. A.L. SAINI, HON'BLE ACCOUNTANT MEMBER

ITA No. 786/MUM/2016
(Asst. Year: 2010-11)

ITO-12(2)(4),
Room No. 146A, 1st Floor,
Aayakar Bhavan,
M.K. Road, Mumbai.

vs.

M/s. Anu Exports Pvt. Ltd.,
Office No. 33, Shrinaman
Plaza, Behind Shopper's Stop,
Kandivali (W), Mumbai

PAN No. AAAC 6806 M
(Assessee)

(Respondent)

Assessee by : ShriAjay R. Singh -Adv.
Department By : Shri Virendar Singh - DR

Date of hearing : 19/06/2018.
Date of pronouncement : 29/06/2018.



ORDER

PER Dr. A.L. SAINI, ACCOUNTANT MEMBER

The captioned appeal filed by the Revenue, pertaining to Assessment Year 2010-11, is directed against the order passed by the Id. CIT(A)-, Mumbai in Appeal No.CIT(A)-8/IT-174/14-15, dated 30/11/2015, which in turn arises out of the assessment order passed by the Assessing Officer under section 143(3) of the Income Tax Act, 1961 (for short, "Act"), dated 26/03/2013.

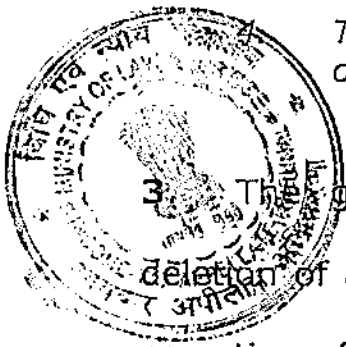
2. The grievances raised by the Revenue are as follows:-

1. *Whether on the facts and circumstances of the case and in law, the Id. CIT(A) erred in deleting the addition of Rs. 55,93,627/- without considering the fact that parties could not be cross-examined by the Assessing Officer because the non-cooperation from the assessee.*
2. *Whether on the facts and circumstances of the case and in law, the Id. CIT(A) -8, Mumbai erred in allowing the trading loss of Rs. 4,93,44,267/- without considering the fact that because of non-cooperation from the assessee, cross examination of party could not be carried out by the Assessing Officer.*
3. *The assessee prays that the order of the Id. CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored.*

The assessee craves leave to add, amend or alter all or any of the grounds to appeal."

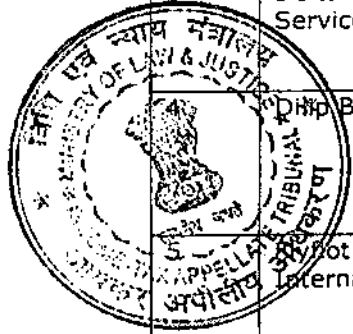
3. The ground No.1 raised by the Revenue relates to the deletion of addition of Rs. 55,93,627/- on account of remission or cessation of liability.

4. The facts of the case which can be stated quite shortly are as follows: The assessee is closely held company-mainly engaged in the business of trading in edible oil. During the course of assessment proceedings, the Assessing Officer, in order to find genuineness of the creditors, issued notices under section 133(6) of the Act. In certain cases, notices issued were returned back by the postal authorities and could not be served. In certain cases, reply is not received. The Assessing Officer asked the assessee,



vide letter dated 01/03/2013, to furnish the correct addresses of the creditors. In response to the same, neither any reply nor satisfactory explanation was given by the assessee. The Assessing Officer identified the following parties, which could not be verified:-

| S.No. | Name of the assessee | Amount | Remarks | Status | Amount. |
|-------|--------------------------------------|-----------|--------------------|--|-----------|
| 1 | Calcutta Trading Co. | 1,44,453 | Reply not received | No reply has been received from the party, therefore party is not being considered as genuine. | 1,44,453 |
| 2 | Contract India Commodities Pvt. Ltd. | 5,65,646 | unserved | Notice remain unserved on the party, therefore party is not being considered as genuine. | 5,65,646 |
| 3 | Delta Marine Services | 2,767.96 | unserved | Notice remain unserved on the party, therefore party is not being considered as genuine. | 2,767 |
| | Dhip Broker | 19,830 | Reply not received | No reply has been received from the party, therefore party is not being considered as genuine. | 19,830 |
| | Not International | 8,486 | Reply not received | No reply has been received from the party, therefore party is not being considered as genuine. | 8,486 |
| 6 | Ketki Exports P. Ltd. | 23,276 | Reply received | Company not found on physical verification | 23,276 |
| 7 | Kundan Rolling Floor P. Ltd. | 9,605 | Reply not received | No reply has been received from the party, therefore party is not being considered as genuine. | 9,605 |
| 8 | Mid India Commodities P. Ltd. | 12,24,528 | Reply not received | No reply has been received from the party, therefore party is not being considered as genuine. | 12,24,528 |
| 9 | Mirage Impex P. Ltd. | 12,00,000 | Reply not received | No reply has been received from the party, therefore party is not being considered as genuine. | 12,00,000 |



| | | | | | |
|----|-----------------------------|-----------|--------------------|--|------------------|
| 10 | Sunline Trading Co. P. Ltd. | 23,54,300 | unserved | Notice remain unserved on the party, therefore party is not being considered as genuine. | 23,54,300 |
| 11 | Swastik Oil Industires | 30,271 | unserved | Notice remain unserved on the party, therefore party is not being considered as genuine. | 30,271 |
| 12 | Vinodkumar & Co. | 10,465 | Reply not received | No reply has been received from the party, therefore party is not being considered as genuine. | 10,465 |
| | | | | | 55,93,627 |

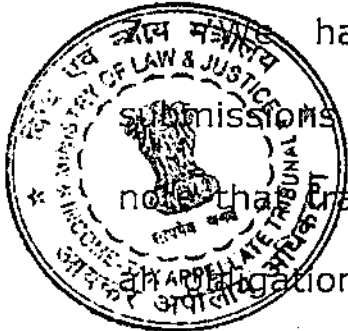
Therefore, the Assessing Officer observed that the creditors mentioned in the above table are not genuine because of the reasons as stated in the table. The Assessing Officer noted that the assessee did not file any satisfactory reply regarding the genuineness of these parties and also noted that these creditors continued to be outstanding even at the time of assessment. Therefore, the Assessing Officer treated them bogus because the liabilities shown against them did not exist anymore. Hence, he made the addition to the tune of Rs. 55,93,627/- to the total income of the assessee under section 41(1) of the Act.

5. Aggrieved by the stand so taken by the Assessing Officer, the assessee carried the matter in appeal before the Id.CIT(A) with success. The Id. CIT(A) observed that the Id A.O. has not been able to controvert any of the evidences produced by the assessee and



has not been able to establish either remission or cessation of liabilities. The Id CIT(A) did not find base for application of section 41(1) of the Act, therefore he deleted the addition of Rs. 55,93,627/-.

6. Aggrieved by the order passed by the Id. CIT(A), the Revenue is in appeal before us. The Id. Departmental Representative for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity. On the other hand, Id. Counsel for the assessee has defended the order passed by the Id. CIT(A).



have given a careful consideration to the rival submissions and perused the material available on record. We note that trading liability in general terms can be understood as an obligation of the assessee to pay any person (creditor) for goods purchased or value received from that person (creditor). A genuine trading liability in the course of business or profession would be a permissible expenditure in the relevant financial year under the applicable provisions the Income Tax Act, 1961. However, when some benefit is derived by the debtor (assessee under consideration) in the form of remission or cessation of such trading liability, then such benefit received by the debtor is to be considered as a taxable income under sec. 41(1) of the Act.

Section 41(1) of the Act, deals with considering ceased trading liability as deemed profits of business or profession. We note that the liability may be barred by limitation, but there are cases where a liability is being carried forward for years in the books of assessee, in such cases, the income tax authorities have considered the liability as ceased /non-existent, because of the fact that the liability is being shown outstanding for many years and the assessee has not provided confirmations from the creditors or has failed to provide necessary details like PAN/



Address of the creditors or there is no possibility of the creditors claiming their debts in future and then apply section 41(1) of the Act by adding the liability to the taxable income of the assessee

We note that assessing officer, vide para 6 and page no.3 of assessment order held as follows:

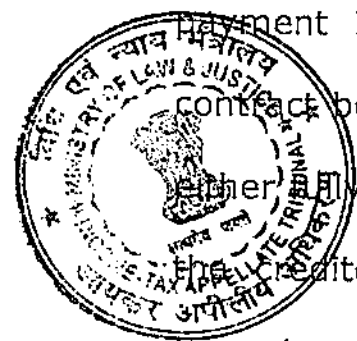
".....It is also observed that these creditors continues to be outstanding even at the time of assessment. Accordingly, I hold that these creditors are bogus and the liability shown against them does not exist anymore..."

From the above statement of the assessing officer, it is abundantly clear that these liabilities under consideration have not aroused in the assessment year under consideration but these liabilities have been coming from previous years as an outstanding liability. We

note that a liability cannot be treated as ceased merely because of the fact that the liability is being carried forward for years and the assessee is not completely able to prove the genuineness of the trading liability and also at the time of application of section 41(1) by the income tax authorities. In case of remission, there has to be a waiver by the creditor in favour of the assessee either unilaterally or through contractual agreement, and to the extent, such remission or waiver of the liability is granted, assessee would get benefit and accordingly, to that extent same would be taxable under section 41(1) subject to the basic conditions that such liability remitted has been taken into account in the trading account or in the profit and loss account in the current year or in an earlier year. Thus, there has to be a positive act on the part of the creditor in the current year which would provide the benefit to the assessee by way of remission. However, we note that in the assessee's case under consideration there has been no waiver from the creditors of the liability in favour of the assessee-company as evidenced from the list of creditors.

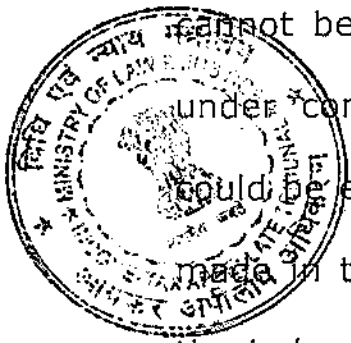
8. We note that the concept of cessation in section 41(1) of the Act, implies that liability of the assessee has ceased to exist in the year under consideration, either by operation of law, or by mutual contract between the parties. Operation of law would indicate that

liability has become unenforceable at law i.e., the limitation prescribed for recovery of the dues by the creditor has expired or there is a court decree or order finally against the creditor thereby, he loses his right to recover the money from the debtor i.e., the assessee. Therefore, it is either expiry of limitation or a decree of a court that would make the liability ceased to exist. However, a further condition is imposed where limitation is expired. It is that the debtor i.e., the assessee should unequivocally declare his intention not to honour his liability when payment is demanded by the creditor. Further, if there is a contract between the parties and the creditor discharges the debt either fully or partly then, to the extent the debt is discharged by the creditor without payment by the assessee, liability would cease to exist. Therefore, there has to be an event for cessation of liability to take place. We note that in assessee's case under consideration, nothing happens during the relevant assessment year and as such liability in respect of such creditors cannot be considered as ceased to exist. The fact that these creditors were not found at the given address or have not responded to the notices issued u/s 133(6), does not imply that the liability towards these creditors against the assessee ceases to exist because these creditors are still admittedly subsisting in the books and they have

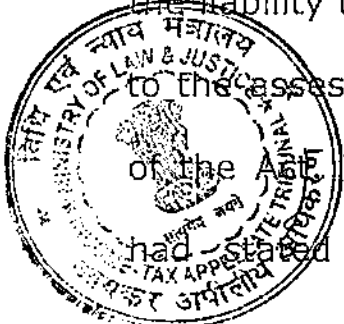


full right to demand the same at any time. We note that the credit amount outstanding for several years cannot be held as cessation of trading liability on the ground that assessee could not prove genuineness of the transactions, where assessee had acknowledged its liability successively over several years. For this, we rely on the judgment of Delhi High Court in the case of *CIT, Delhi-11 vs. Gen Exports Pvt. Ltd.* [2013] 35 Taxmann.com 540, wherein similar facts have been upheld.

9. We note that whether the liabilities were genuine or not, cannot be examined in the assessment proceedings for the year under consideration (i.e. subsequent years) and such question could be examined only in the year, in which the entries were first made in the account of the sundry creditors, for that we rely on the judgment of the Hon'ble Delhi High Court in the case of *CIT-III vs. Shri Vardhaman Overseas Limited* (343 ITR 408). We note that according to the Assessing Officer, these creditors do not exist at the address provided by the assessee, is incorrect and self-contradictory, because a bare perusal of the table at para 5 of the Assessment Order in status column would indicate that the AO herself has observed that in case of seven creditors, reply to the notice u/s.133 (6) has not been received. This establishes the fact that notice u/s. 133 (6) has been served to these creditors at the



given address and as such the allegation of non-existence of the creditors at the given address by the AO is unfounded. We note that these creditors continue to be outstanding even at the time of assessment, therefore, these unpaid liabilities cannot be added to the assessee's income by the assessing authorities, under section 41(1) merely because they remained unpaid for a long time. The legal position is that unless there is evidence to show that the creditor has remitted the debt or otherwise by operation of law, the liability to pay him has ceased, there can be no benefit arising to the assessee within the meaning of clause (a) of section 41(1) of the Act. Unless notices were issued to the creditors and they had stated that they had given up the claims against the assessee, no decision could be taken by the income tax authorities, merely on the ground that the debts remained unpaid in the assessee's books for a number of years.



We note that Hon'ble Supreme Court in the case of CIT v/s Sugauli Sugar Works Ltd. 236 ITR 518, held that section 41(1) of the Act can be applied only where the Department establishes that the trading liability has ceased or has been remitted and such remission or cessation has taken place in the year in which section 41(1) of the Act is sought to be invoked. We note that in assessee case under consideration, the assessing officer has failed to

same were not provided on the ground that a search action has been carried out in M/s. Ruchi Soya Industries Ltd.

The AO noted that on analysis of the transactions mentioned in the table above, indicates that whenever the assessee-company makes a transaction with M/s. Ruchi Soya Industries Ltd. the sale price is lower than the purchase price. Thus, the assessee incurs artificial losses & creates artificial profit to M/s. Ruchi Soya Industries Ltd. On analysis of the transaction, it was noticed that the assessee has purchased Sunflower oil from M/s. Ruchi Soya

Industries Ltd., a quantity of 1500 MT on 1.4.2009 @40870 and sold the same on 2.4.2009, a quantity of 500 MT @ 35686.25. On

this transaction, the assessee incurred the loss @5183.75 per MT.

The gross comes to Rs. 25,91,875/- which was the benefit transferred to M/s. Ruchi Soya Industries Ltd. which cannot be

allowed and the same was added to the total income of the

assessee which came to Rs. 25,91,875/-. The assessing officer

also analysed other loss transactions by following the same

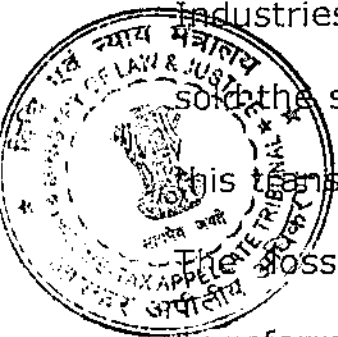
method. The Assessing Officer was of the opinion that the

assessee has transferred the benefit to other parties mentioned in

the table above, by selling Sunflower Oil & Palmolien Oil in lower

cost and booked the loss in its account. The details of total losses

are as follows:



| | |
|------------------------------------|------------------------|
| 1) Ruchi Soya Industries Ltd. | Rs. 25,91,875 |
| 2) Ruchi Soya Industries Ltd. | Rs. 95,346 |
| 3) Nova Trading Pvt Ltd | Rs. 1,53,72,335 |
| 4) Ruchi Soya Industries Pvt Ltd | Rs. 3,04,50,000 |
| 5) Imperial Marktrade (I) Pvt Ltd. | <u>Rs. 8,34,720</u> |
| | <u>Rs. 4,93,44,276</u> |

Therefore, the assessing officer held that total losses to the tune of Rs.4,93,44,276/- should not be allowed to the assessee and the same was added to the total income of the assessee.

12. Aggrieved by the stand so taken by the Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A), with success. The Id CIT(A) noted that even the transactions resulting in losses should be taken as genuine unless proved otherwise. There is no sustainable logic for presuming that the forward trading losses were resulted to transfer benefit to certain trading partners and therefore, Id CIT(A) deleted the addition made by the Assessing Officer.

13. We have given a careful consideration to the rival submissions and perused the material available on record. We note that all these transactions of purchases and sales were not affected with M/s.Ruchi Soya Industries Ltd, as alleged by the Assessing Officer. All these transactions of purchases and sales of edible oil were duly recorded in the books of account which are subject to audit under the Companies Act as well as under Income



Tax Act. We note that complete details of purchase and sales were furnished and copies of High Seas purchase and High Seas sale bill along with High Seas agreements were filed during the course of assessment proceedings. All transactions of purchase and sales were settled through banking channel. High Seas transactions of trading in edible oil resulting in losses were not only legitimate & genuine but were carried out in the normal course of the assessee's business activity without any *malafide* intention of avoiding taxes by transferring profits or booking losses. We note


that the assessee company, in some High Seas transactions has earned the profit and in some other High Seas transactions has incurred the loss and the Assessing Officer taxed the profit earned by the assessee in such transaction and disallowed the losses.

This approach of the Assessing Officer is not acceptable and it is arbitrary and unfair. The Assessing Officer has not established adverse factors in such transactions, where the assessee incurred losses, the same should be accepted at par with that of the transactions resulting in profit. We note that assessee has filed the details of forward contract at page 87 to 89 of the paper book.

None of the companies with whom the assessee-company has entered into transactions for purchase and sale of edible oil were group companies and as such the Assessing Officer has proceeded



with a wrong presumption. The Audited Financial statement requires the auditor to furnish the details of transactions with group concern. A perusal to said financial statement shows that the Auditor has reported NIL transactions of purchase and sales with group companies. Therefore, it seems to us that purchase and sale transactions were at arm's length, and no any extra commercial consideration is flowing from one party to another party and it is not a planning to shift the profit from one party to another party, as the transactions are on principal to principal basis and not tented by any extra commercial consideration.



We note that the Revenue cannot justifiably claim to put itself in the armchair of the businessman or in the position of the Board of directors and assume the role to decide whether a particular margin or profit should be earned or not. No businessman can be compelled to maximize its profit. The IT authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own viewpoint but that of a prudent businessman. It is a prerogative of the assessee to decide whether a particular business transaction is to be done with a particular party or not. While doing business it is not necessary that assessee should always earn profits.

15. We note that during the assessment proceedings the assessee had produced all sales and purchase bills for verification by Id AO. The books of accounts of the assessee are duly audited. The ledger accounts as well as bank statements have also been verified by Id AO. The Id AO has not found any discrepancies therein. It is also a fact that overall the assessee has made profit on forward trading. The Id AO has not disputed or doubted those transactions where it resulted in profits. The Id AO disputed or doubted those transactions where it resulted in losses. Therefore, the Id AO has adopted only one-sided approach, that is, he picked only those transactions which has resulted into losses. We note that profit making transactions and loss making transactions, both have settled through banking channels and no difference at all so contractual terms are concerned, hence by the same logic, even the transactions resulting in losses should be taken as genuine unless proved otherwise. M/s Ruchi Soya Industries Ltd has submitted confirmation before the Id CIT(A). This confirmation was not available when the assessment proceedings were going on, therefore assessee could not submit before Id AO. The Id CIT(A) has co-terminous powers, (that is, all the powers as the assessing officer have) and examined the said confirmation and he found the same in order. Hence, there is no sustainable logic for



presuming that the forward trading losses were effected to transfer benefit to certain trading partners. The AO has not disproved any of the contentions or explanations of the assessee and the addition is solely on suspicion. That being so, we decline to interfere with the order of Id. C.I T.(A) deleting the aforesaid addition. His order on this issue is, therefore, upheld and the grounds of appeal of the Revenue are dismissed.

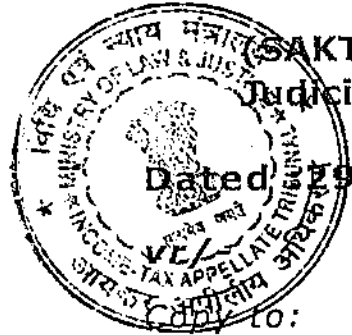
16. In the result, appeal filed by the Revenue is dismissed.

Order Pronounced in open Court on this 29th day of June,2018.

Sd/-
(SAKTIJIT DEY)
Judicial Member

sd/-
(A.L. SAINI)
Accountant Member

Dated, 29th June, 2018.



Copy to:

1. The Assessee - M/s. Anu Exports Pvt. Ltd., Office No. 33, Shrinaman Plaza, Behind Shopper's Stop, Kandivali (W), Mumbai.
2. The Revenue - ITO-12(2)(4), Room No. 146A, 1st Floor, Aayakar Bhavan, M.K. Road, Mumbai.
3. The Pr.CIT-3, Mumbai. XII
4. The CIT(A)-8, Mumbai. 8
5. The D.R., Mumbai.
6. Guard file.

By order

(Signature) 24/7/18

Dy./Asst. Registrar,
ITAT, Mumbai.

Senior Private Secretary
आयकर अपील अदालत
Income Tax Appellate Tribunal
मुंबई / Mumbai