
(2012) 04 GUJ CK 0030

In the Gujarat High Court

Case No : Tax Appeal No's. 2428 and 2431 of 2010

Commissioner of Income Tax-II

APPELLANT

Vs

Nitin S. Garg

RESPONDENT

Date of Decision : 11-04-2012

Acts Referred:

Income Tax Act, 1961 — Section 122, 132, 143(3), 153, 260(A)

Citation : (2012) 208 TAXMAN 16

Hon'ble Judges : Bhaskar Bhattacharya, Acting C.J.; J.B. Pardiwala, J

Bench : Division Bench

Advocate : Mauna M. Bhatt, for the Appellant; S.N.L. Agarwala, for the Respondent

Final Decision : Dismissed

Judgement

J.B. Pardiwala, J.—As common questions of fact and law arise in the above captioned batch of four appeals and the appeals are also preferred against a common order passed by Income Tax Tribunal, B Bench, Ahmedabad, the same were taken up for hearing together and are being disposed of by this common judgment and order. These appeals under Section- 260(A) of the Income Tax Act, 1961 are at the instance of the Revenue and are directed against an order dated 04/06/2010 passed by the Income Tax Tribunal, B Bench, Ahmedabad in Income Tax Appeals bearing ITA No. 169, 170, 171 and 172-AHD-2009 for the Assessment Year 2001-02, 2002-03, 2003-04 and 2006-07 respectively.

2. The facts giving rise to present Appeals can be summed up thus:

(1) The assessee, respondent herein is one of the key persons of the group comprising of the Agarwal (also known as Garg) family of Surat and Vadodara, engaged mainly in the business of transportation of petro-product and trading of sarees, bitumen etc. A search operation was conducted u/s 132 of the Act at the residential premise of the assessee on 31/05/2006. During the course of assessment proceedings u/s 143(3) read with Section- 153 of the Act, the

Assessing Officer noticed from the balance sheet that various creditors (other than family concerns) are very old and no interest has been paid on these loans. Despite the fact, the Assessing Officer gave various opportunities to the assessee to furnish details of such creditors viz. confirmation as well as creditworthiness, the assessee failed to produce the necessary information and details in this regard. The assessee also failed to furnish the postal addresses, PAN, confirmations of outstanding balance etc. Accordingly the Assessing Officer held that the liability incurred in regard to the purchase from the parties as claimed (i.e. Rs. 38,17,601/-, Rs. 1,65,090/-, Rs. 40,032/- and Rs. 1,32,118/- for the Assessment Year 2001-02, 2002-03, 2003-04 and 2006-07 respectively) have seized to exist.

3. On being aggrieved, the assessee preferred appeal before the CIT (A)-II, Ahmedabad. Vide his order in Appeal CIT(A)-II-CC.4-305 to 309-2008-09 dated 01/10/2009 confirmed the addition made by the Assessing Officer under Section-41(1) of the Act holding that when the liability itself is not to be paid as the party is not traceable, and the assessee has claimed the expenses in the earlier years, the same has to be taxed u/s 41 of the Act irrespective of the fact as to whether the liability has been written off or not.

4. The assessee preferred appeal before the Appellate Tribunal, B Bench, Ahmedabad against the common order of the CIT(A)-II, Ahmedabad. The Appellate Tribunal came to the conclusion that as assessee had continued to show the admitted amounts as liability in its balance sheet such liabilities reflected in the balance sheet cannot be treated as cessation of liabilities. The Appellate Tribunal took the view that merely because the liabilities are outstanding it cannot be inferred that such liabilities have ceased to exist. Accordingly the Appellate Tribunal allowed the appeals of the assessee.

5. Feeling aggrieved and dissatisfied, the revenue has come up before this Court by way of present Appeals under Section- 260(A) of the Act.

6. The Revenue has proposed the following common substantial question of law for its determination.

(A) Whether Tribunal below has committed substantial error of law in deleting the addition made on account of cessation of liability under Section- 41(1) of the Act on the basis of material subsequently produced before Appellate Tribunal subjecting such material to verification for proving genuineness of the payments and thereby totally ignoring the findings of the Assessing Officer/CIT(A) in this regard?

Contentions of Revenue:-

7. Learned Senior Counsel Mr. M.R. Bhatt appearing with learned advocate Ms. Mauna Bhatt submitted on behalf of the Revenue that Appellate Tribunal was not justified in setting aside the addition made by the Assessing Officer in respect of assessment of liabilities for the Assessment Years 2001-02, 2002-03, 2003-04

and 2006-07. He further submitted that during the search conducted u/s 122 of the Act, it was found that the assessee was not having proper address or contact numbers, phone numbers, mobile numbers, web site addresses or any other details or whereabouts of alleged sellers. Learned Senior Counsel Mr. Bhatt further contended that the Tribunal below has committed a substantial error of law in holding that Section 41(1) of the Act was not applicable from the material on record.

8. In order to appreciate the aforesaid question, it will be profitable to refer to the provisions contained in Section- 41(1) of the Act which is quoted below:

41. Profits chargeable to tax.--(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 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.

9. The Supreme Court had, in the case of CIT v. Sugauli Sugar Works (P.) Ltd. [1999] 102 Taxman 713, the occasion to consider the effect of Section 41 of the Act. In that context, it was held that the mere fact that the assessee has made an entry of transfer in his accounts unilaterally will not enable the Department to say that S. 41 would apply and the amount should be included in the total income of the assessee. It was further held therein that it could not be said that the liability had come to an end as period of more than 20 years had elapsed and creditor had not taken any steps to recover amount. Expiry of period of limitation, the Supreme Court pointed out, did not extinguish the debt but only prevented the creditor from enforcing the debt.

10. The following observations of the Supreme Court, approving an earlier Full Bench decision of the Gujarat High Court in that case, are relevant and quoted below:

As pointed out already, the crucial words in the Section require that the assessee has to obtain in cash or in any other manner some benefit. That part of the Section has been omitted to be considered by the Division Bench of the Bombay High Court. The said words have been considered by a Full Bench of Gujarat High Court in detail in the Commissioner of income tax, Gujarat-II, Ahmedabad v. M/s. Bharat Iron and Steel Industries, Bhavnagar, 1993 Tax LR 188. The following passages in the judgment brings out of the reasoning of the Full Bench succinctly (At Pp. 195 and 196 of Tax LR): "11. In our opinion, for considering the taxability of amount coming within the mischief of S. 41(1) of the Act, the system of accounting followed by the assessee is of no relevance or consequence. We have to go by the language used in S. 41(1) to find out whether or not the amount was obtained by the assessee or whether or not some benefit in respect of trading liability by way of remission or cessation thereof was obtained by the assessee and it is in the previous year in which the amount or benefit, as the case may be, has been obtained that the amount or the value of the benefit would become chargeable to income tax as income of that previous year.

12. We fully agree with the view taken by the Division Bench in CIT v. Rashmi Trading, 1977 Tax LR 520 (Gujarat) (supra) that the only meaning that can be attached to the words "obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure" incurred in any previous year clearly refer to the actual receiving of the cash of that amount. The amount may be actually received or it may be adjusted by way of an adjustment entry or a credit note or in any other form when the cash or the equivalent of the cash can be said to have been received by the assessee. But it must be the obtaining of the actual amount which is contemplated by the Legislature when it used the words "has obtained; whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure in the past". As rightly observed by the Division Bench in the context in which these words occur, no other meaning is possible.

We are in agreement with the said reasoning.

[Emphasis supplied]

11. The aforesaid provisions of the Income Tax Act came up for further consideration before a larger Bench of the Apex Court in the case of the Chief CIT v. Kesaria Tea Co. Ltd. [2002] 122 Taxman 91 where the Supreme Court reiterated the views taken in the case of Sugauli Sugar Works (P.) Ltd. (supra). The following observations of the Court are relevant and quoted below:

It may be noted that the provision was made in the books of account towards purchase tax which was under dispute and the benefit of deduction from business income was availed of in the past years in relation thereto. The same was sought to be reversed by the assessee during the year ending on 31-3-1985 for whatever reason it be. The question is whether the circumstances contemplated by Section 41(1) exists so as to enable the Revenue to take back

what has been allowed earlier as business expenditure and to include such amount in the income of the relevant assessment year i.e. 1985-86. In order to apply Section 41(1) in the context of the facts obtaining in the present case, the following points are to be kept in view: (1) In the course of assessment for an earlier year, allowance or deduction has been made in respect of trading liability incurred by the assessee; (2) Subsequently, a benefit is obtained in respect of such trading liability by way of remission or cessation thereof during the year in which such event occurred; (3) in that situation the value of benefit accruing to the assessee is deemed to be the profit and gains of business which otherwise would not be his income; and (4) such value of benefit is made chargeable to income tax as the income of the previous year wherein such benefit was obtained. The High Court, agreeing with the Tribunal, rightly held that the resort to Section 41(1) could arise only if the liability of the assessee can be said to have ceased finally without the possibility of reviving it. On the facts found by the Tribunal, the Tribunal as well as the High Court were well justified in coming to the conclusion that the purchase tax liability of the assessee had not ceased finally during the year in question. Despite the finality attained by the judgment in *Neroth Oil Mills*" case, the other issues having bearing on the exigibility of purchase tax still remained and the dispute between the assessee and the sales-tax department was still going on. There is no material on record to rebut these factual observations made by the Tribunal. Nor can it be said that the reasons given by the Tribunal are irrelevant.

The learned senior counsel appearing for the income tax Department has contended that the assessee itself took steps to write-off the liability on account of purchase tax by making necessary adjustments in the books, which itself is indicative of the fact that the liability ceased for all practical purposes and therefore, the addition of amount of Rs. 3,20,758/- deeming the same as income of the year 1985-86 u/s 41(1) is well justified of the Act. But, what the assessee has done is not conclusive. As observed by the Tribunal, an unilateral action on the part of the assessee by way of writing-off the liability in its accounts does not necessarily mean that the liability ceased in the eye of law. In fact, this is the view taken by this Court in *Commissioner of Income Tax, Calcutta Vs. Sugauli Sugar Works P. Ltd.*, . We, therefore, find no substance in the contention advanced on behalf of the appellant. Incidentally, we may mention that the controversy relates to the period anterior to the introduction of Explanation 1 to Section 41(1).

12. The case before us also relates to the period anterior to the introduction of the Explanation 1 to Section 41(1) of the Act.

13. We, therefore, find that the learned Tribunal below totally misconstrued the provisions contained in Section 41(1) of the Act in adding the disputed amount as the income of the assessee for the relevant year."

14. In the case before us, it is not been established that the assessee has written off the outstanding liabilities in the books of account. The Appellate Tribunal is

justified in taking the view that as assessee had continued to show the admitted amounts as liabilities in its balance sheet the same cannot be treated as assessment of liabilities. Merely because the liabilities are outstanding for last many years, it cannot be inferred that the said liabilities have ceased to exist. The Appellate Tribunal has rightly observed that the Assessing Officer shall have to prove that the assessee has obtained the benefits in respect of such trading liabilities by way of remission or cessation thereof which is not the case before us. Merely because the assessee obtained benefit of reduction in the earlier years and balance is carried forward in the subsequent year, it would not prove that the trading liabilities of the assessee have become non-existent.

15. Moreover, as pointed out in the case of Sugauli Sugar Works (P.) Ltd. (supra), vide the last five lines of the paragraph-6 of the judgment, the question whether the liability is actually barred by limitation is not a matter which can be decided by considering the assessee's case alone but has to be decided only if the creditor is before the concerned authority. In the absence of the creditor, it is not possible for the authority to come to a conclusion that the debt is barred and has become unenforceable. There may be circumstances which may enable the creditor to come with a proceeding for enforcement of the debt even after expiry of the normal period of limitation as provided in the Limitation Act.

16. We, thus, find that the views taken by the Tribunal are absolutely consistent with the ones taken by the Supreme Court in the case of Sugauli Sugar Works (P.) Ltd. (supra) and other decisions which have been referred to in the judgment. We do not find any error much less an error of law in the judgment and order of the Tribunal. In absence of any substantial question of law arising in these Appeals, all Appeals deserve to be dismissed and accordingly they are all dismissed. However, there shall be no order as to costs.