

IN THE INCOME TAX APPELLATE TRIBUNAL, RANCHI BENCH, RANCHI

Before: **Shri J. Sudhakar Reddy, Accountant Member** and
Shri S.S. Viswanethra Ravi, Judicial Member

I.T.A No. 57/Ran/16 A.Y 2010-11

M/s. Gulf Steel & Minerals

PAN: AAHEG8248

Appellant

Vs.

I.T.O., Ward 1(4), Jamshedpur

Respondent

For the Appellant : S/Shri S.M. Surana &
Rajesh Agarwal, Advocates, Id.ARs
For the Respondent : Shri P.K. Mondal, JCIT
Shri T. Vasanthan, CIT, Id.DR

Date of hearing : 27-02-2018

Date of pronouncement : 04-05-2018

ORDER

Per Bench:

This appeal by Assessee is against the order dt. 18-12-2015 of CIT(A), Jamshedpur for the assessment year 2010-11, wherein he confirmed the order of the AO on account of additions made by the AO being sundry creditors made u/s. 68 of the Act, while accepting all the credit purchases as genuine expenditure. The issue before us is whether the credit purchases can be added u/s. 68 of the Act, when all the purchases have been accepted as genuine

2. After hearing the rival submissions and perusing the material available on record and paper book filed before us, we find that the issue in hand is relating to addition made on account of sundry creditor. During the course of arguments before us the Id.AR referred to page-5 of the paper book and argued that the details of purchases were verified by the AO and found satisfied with the same and accepted the expenditure incurred to that effect. The AO is wrong in making the impugned addition on account of sundry creditor, which

are related to purchases and the same also accepted by the AO as genuine. Without rejecting the purchases, the sundry creditors cannot be treated as income of assessee and in support of the contention, the assessee relied on the order dt. 07-09-2016 of the Co-ordinate Bench, ITAT, Kolkata in the case of Ms/ Standard Leather Pvt. Ltd in ITA No. 2620/Kol/2013 for A.Y 2010-11, copy of the same is on record and referred to paras 10-13 of the said order. We find that the facts of the case in M/s. Standard Leather Pvt. Ltd *supra* as relied on by the assessee are similar and identical to the facts of the present case. The Id.DR has relied on the orders of the AO and CIT-A.

3. We find that the issue in hand is covered in favour of assessee by the above said order of the Co-ordinate Bench, ITAT, Kolkata. Relevant portion of said order are reproduced herein below:-

" 10. The assessee has shown sundry creditors in its books of account for Rs.6,24,70,343/- as on 31.03.2010. The AO during the course of assessment proceeding sent the notice at the addresses given by assessee u/s. 133(6) of the Act but all of them returned unserved. On question by the AO the assessee submitted that the sundry creditors relates to the purchases which is genuine, therefore, the creditors without rejecting the purchases cannot be treated as income of the assessee. However, the AO disregarded the claim of assessee by observing that the onus lies upon the assessee to prove identity, genuineness and creditworthiness. Accordingly, AO disallowed the creditor for Rs.4,29,02,130/- on account of non-existent and added to the total income of assessee.

11. Aggrieved assessee preferred an appeal before Ld. CIT(A) who deleted the addition made by AO by observing as under:-

"5.3.5 I have gone through the assessment order, submission of the AR, peruse the fact of the case and other materials brought on record and I am of the view that for the following reasons Rs.4,29,02,130/- cannot be added to the income of the appellant either by applying the provisions of [section 41\(1\)](#) or 68 of the Act.:-

(i) That the purchase of the hides from the sundry creditors is evident from the purchase bills and books of accounts maintained by the appellant. As regards the treatment of the same as bogus creditors by the AO, I find that the AO has treated the creditors for purchase made during the year as bogus and not existing. The AO was of the view that the notices u/s 133(6) issued to the creditors came back unserved and therefore the creditors were bogus. It is however found that the AO has treated the purchase made during the year from the same very persons as genuine. The payment made to them was also treated as genuine and disallowance was made only by applying the provisions of [section 40A\(3\)](#). I also find that such sundry creditors for supply of raw hides and skins remained outstanding at the end of every year and were duly accepted in earlier years. Even while completing the assessment for the assessment year in question, sundry creditors of the earlier years have been accepted by the AO. I also find that there were sundry debtors of equal amount in the Balance sheet which shows that in this trade there remain outstanding sundry creditors and debtors. When purchase was accepted as genuine then the sundry creditors cannot be treated as bogus.

vii) Regarding applicability of provisions of [section 68](#), I find that the appellant has brought substantial material on record to show that these are sundry creditor for purchases paid in subsequent years and that part of the purchases from the very parties were already accepted by the Assessing Officer. Evidently, the creditors were held to be bogus on the ground that enquiry letters under sec. 133(6) of the Act were received back unserved with the remarks 'not known' leaving the Assessing Officer to conclude

that the appellant has failed to discharge his onus of proving the capacity of the creditors and genuineness of the transactions. Apparently, in my opinion, the Assessing Officer has not appreciated the facts of the case in its entirety. This is a case, where the books are not outrightly rejected, there is no adverse inference drawn regarding quantum of purchases or sales and even the purchase accounts of the sundry creditors have not been disturbed. The act that the assessee maintained regular books of account including stock register is also not negated. The Assessing Officer had not disallowed the purchases from those creditors nor the trading results were disturbed. In CIT vs. Ritu Anurag Aggarwal -IT Appeal No. 325 of 2008 dated 22/7/2009, dealing with [section 68](#) of the IT Act in a similar case, the Hon'ble Delhi High Court observed '

....Proceeding on this basis, the ITAT observed that the sales, purchases as well as gross profits as disclosed by the assessee have been accepted by the Assessing Officer.

4. Once this is accepted, we are of the opinion that the approach of the ITAT was correct inasmuch as the Assessing Officer did not consider this aspect while making additions of the sundry creditors under [section 68](#) of the Income Tax Act. As there was no case for disallowance for responding purchases, no addition could be made under [section 68](#) inasmuch as it is not in dispute that the creditors' outstanding related to purchases and the trading results were accepted by the Assessing Officer.'

viii) As regards applicability of provisions of [section 41\(1\)](#), the facts clearly show that the appellant did not write back the sundry creditors to its profit and loss account. In [CIT v. Vardhman Overseas Ltd.](#) in ITA No. 774//2009 decided on 23.12.2011, (2012) 343 ITR 408 (Del), the Delhi High Court, referring to its judgment in the case of [Jay Engineering Works Ltd. v. CIT](#) (22009) 311 ITR 299 (Del) and applying the ratio laid down in the case of [CIT v. T.V. Sundaram Iyengar & Sons Ltd.](#) (1996) 222 ITR 344 (SC) under sec. 28 of the [IT Act](#), considered the applicability of clause (a) of sub-section (1) of [section 41](#) as to what would constitute remissions or cessation of trading liability. The Hon'ble Court noted that in the reported case, the assessee has not unilaterally written back the accounts of the sundry creditors in its profit and loss account. Therefore, the High Court answered the substantial question of law in the negative and in favour of the assessee. The facts of the present case are similar those of the case of [Vardhman Overseas Ltd.](#) (supra). Therefore, it is abundantly clear that the provision of sec. 41(21) (a) are not applicable. No addition could be made for remission or cessation of trading liability as envisaged under [section 41\(1\)](#) of the Act for the assessment year under consideration.

ix) In view of above discussed legal and factual position, I am of the considered view that the sundry creditors of Rs.4,29,02,130/- cannot be treated as bogus sundry creditors and cannot be added to the income of the appellant. Accordingly, the impugned addition made by the AO is hereby directed to be deleted and thus, these grounds of the appeal of the appellant are allowed."

Being aggrieved by this order of Ld. CIT(A) Revenue is in appeal before us.

12. Before us Ld. DR vehemently relied on the order of AO whereas Ld. AR submitted that the AO has made further addition of Rs. 4,29,02,130/- from Sundry Creditors. It is submitted that these creditors stood in the books of the company and the amount was never written off. The purchases of goods from these parties have been accepted to be genuine. There was no evidence to suggest that no liability to sundry creditors was payable. The details of these Sundry creditors were filed. The AO has also accepted that the payments to these parties were made by bearer cheques. However, as per the AO that payment by bearer cheques causes a serious doubt that sundry creditors did not exist. Simply because the AO doubted the said sundry creditors even though accepting that the payments were made by cheque, the doubt will not entitle the AO to treat the said sundry creditors as bogus creditors. It may be submitted that some of the purchases from these sundry creditors were made during the year itself and purchases from all of them have been accepted to be genuine, found recorded in the books of accounts such purchase of raw materials was also found to be consumed, the disallowance for purchase was made only by applying [section 40A\(3\)](#) wherever the payment were in excess of Rs. 20,000/-. Therefore sundry creditors cannot be said to be bogus and no addition can be made as bogus creditors. It is further submitted that even if it is presumed that there were unconfirmed creditors, then whether the provision of [section 68](#) or [section 41\(1\)](#) can be invoked and whether such creditors can be treated as bogus warranting addition in the income of the assessee. It is again submitted that there is no dispute that the goods have been purchased and the genuinity of the purchase have not been disputed and it was because that the provisions of [section 40A\(3\)](#) have been applied. Moreover, the assessee maintained day-to-day stock register wherein the raw material purchased were entered into and the finished goods produced have been accepted. Therefore, in so far as the purchase during the year and the corresponding outstanding balance as creditors which relates the assessment year in question, addition

u/s 68 cannot be made. In so far as the balances brought forward from earlier years are concerned addition cannot be made u/s 68 since as per [section 68](#) credits in the books should appear during the assessment year relevant previous year for invoking provision of [section 68](#) of the Act.

" 13. We have heard the rival parties and perused the materials available on record. From the aforesaid discussion we find that the addition was confirmed by the AO on account of non-service of notice issued under [section 133\(6\)](#) of the Act for the purpose of the confirmation of sundry creditors. However we find that the AO has confirmed the addition of the sundry creditors without disallowing the corresponding purchases. From the above it is clear that the purchases in the instant case have been admitted but the corresponding sundry creditors have been added as total income of the assessee. In our considered view the action of the AO for making the addition of the sundry creditors without disallowing the purchases is based on wrong interpretation of Income Tax Laws. The sundry creditors can be added as income under [section 41\(1\)](#) of the Act once it is written off in the books of accounts. In the instant case the same has not been written off and very much reflecting in the books of the assessee. Therefore in our considered view the sundry creditors reflecting in the books of accounts cannot be disallowed and added to the total income of the assessee. In the instant case, the balances of many of the sundry creditors were outstanding coming from earlier years. Payments were made to some or the creditors during the year. The said payments have been accepted by the AO which means genuinity of the payments to these creditors as well as the genuinity thereof till last year have not disputed by the AO. In the instant case the firstly the AO has not specifically invoked the provisions of [section 41](#) (1). Further in any case no such addition can be made u/s 41. In this connection we are putting our reliance in the judgment in the case of DSA Engineers. In the case of DSA Engineers v. ITO 30 SOT 31 (Mum-Trib), the AO found that there were creditor balances which in many cases were 3 years or more than 3 years old. As per the assessee the balances represented amounts due to various parties and the liability was subsisting. The Tribunal held that in the absence of cessation of liabilities and on the mere fact that the amounts were outstanding for more than 3 years, the provisions of [section 41](#) (1) could not be applied. In the case of Dhawan (M.R.) v. CIT 149 ITR 160 (Del), it was observed that the remission of the liability arises when the creditor voluntarily gives up the claim. The cessation of such liability arises only when it ceases to exist in the eyes of law for all intents and purposes. In the case of [UOI v. J. K. Synthetics Ltd.](#) (1993) 199 ITR 14 (SC), the Hon'ble Court held that ITA No.2620/Kol/2013 A.Y. 2010-11 ITO Wd-12(1), Kol. vs. M/s Standard Leather Pvt. Ltd. Page 15 cessation of liability for the purpose of [section 41\(1\)](#) means irrevocable cessation so that there is no possibility of the liability being revived in future. If there is such a possibility, then the cessation is not complete and [section 41](#) (1) is not attracted. In the case of [Shri Vardhman Overseas Ltd. vs. Asstt. CIT 24 SOT 393](#) (Del 'H'-Trib), the facts of the case were that the AO asked the assessee to prove the genuineness of some sundry creditors. The assessee did not file confirmations of said sundry creditors, except one. Therefore, AO after giving various opportunities treated the balance amount as income of assessee on account of unexplained cash credits and added the same balance amount to the income of assessee. It was held that all the parties with regard to which the addition has been made, no new amount was found credited in its account during the year under consideration hence [section 68](#) cannot be applied. It was also held that the balances were brought forward balances and if the same were added on account of their non-genuineness, then also these amounts could not be added to the income of the assessee for the year under consideration as the question of genuineness thereof can be examined only in the year in which they were credited in the account of the assessee. It was also held that the department could not prove that the debt cannot be said to be unenforceable. It was held that the onus had wrongly been shifted by the revenue on the assessee. It was held that the liability existed since tile assessee had shown the liabilities outstanding in its balance sheet. Therefore, there was no occasion to treat the said amount as taxable under [section 41](#) (1) and if department intends to assess the same by applying the provisions of [section 41](#) (1), then the onus will be on the revenue to show that the liability which is appearing in the balance sheet has ceased finally and there is no possibility of the revival of the liability. Hence, addition could not be sustained under [section 41\(1\)](#). The said judgment of the Tribunal was confirmed by Delhi High Court on 23-12-2011 In the case of National Insulated Cable Co. v. ITO ITA No. 421/Del/2011 dt. 8-7-2011 (Del 'E'-Trib) it was held that the fact that the creditors were old creditors brought forward from earlier years has not been disputed by the department. These creditors have not been introduced during the year under consideration. There is no evidence or material on record to establish that the assessee liability to pay the amount to the creditors have been ceased during the year under consideration. Further, the amount payable to these creditors can be added to the assessee's total income in the year in which the assessee's liability to pay the amount ceased or extinguished and not in the year under consideration where assessee has admittedly shown the liability in the balance sheet. It has been held in the case of G P International Ltd. (P & H) reported in 325 ITR page 25 that provisions of [section 41](#) cannot be applied if the assessee is still showing the liability. It has been held in the

case of Bhavesh Prints reported in 142 TTJ page 128 that simply because some of the creditors were not traceable it cannot be held that the liability is not payable. In the case of Taminadu Ware Housing Corporation reported in 292 ITR 310, it was held that so long the assessee had shown the liability in the balance sheet it cannot be said that the liability has ceased to exist. In the case of Willson and Co. Ltd reported in 121 TTJ 258 (Chennai Tribunal), it was held that unless it was shown by the Department that the liability ceased to exist during the assessment year in question it cannot partake the character of income during the assessment year in question.

Similarly in the case of Dy. CIT v. Amod Petrochem (P) Ltd. (2008) 23 (I) ITCL 145 (Guj-HC) : (2008) 217 CTR (Guj) 401, it was held that as per [section 68](#), there should be cash credits of previous year. The section provides for a deeming fiction of treating the sum found credited in the books of an assessee maintained for any previous year, being charged to income-tax as the income of the assessee of that previous year, provided (i) the assessee offers no explanation as to the nature and source of the credits, or (ii) the explanation offered by the assessee is not, in the opinion of the assessing officer, satisfactory. The crux of the issue, therefore is, there have to be credits of any sum in the books of an assessee maintained for any previous year, only then the sum so credited can be brought to tax as the income of the assessee of that previous year; in other words, first of all, there have to be credits in a previous year and only in the assessment relatable to that previous year, namely, year of credit, the sum can be brought to tax. In [CIT v. Usha Stud Agricultural Farms Ltd.](#) (2008) 301 ITR 384 (Del) : (2009) 183 Taxman 277 (Del), it was held that since it is a finding of fact recorded by the Commissioner (Appeals) that the credit balance appearing in the accounts of assessee, did not pertain to the year under consideration, under these circumstances, the assessing officer was not justified in making the impugned addition u/s 68 and as such no fault could be found with the order of the Tribunal which had endorsed the decision of Commissioner (Appeals). In [Mahabir Prasad Prem Chand Jain v. ITO](#) (1988) 40 Taxman 35 (Del- Trib)(Tax Mag), it was held that amounts found in the books of assessee were in existence much prior to the beginning of the accounting period corresponding to the relevant assessment year and the same could not, therefore, be treated as the income of assessee earned during the relevant previous year. In [Nuchem Ltd. v. Dy. CIT](#) (2004) 87 TTJ (Del-Trib) 166, it was held that revenue had failed to prove that the amounts were credited to the books of account of the assessee in the year under consideration. These amounts were brought forward from earlier years and it is settled law that the addition under [section 68](#) could be made only if the amount was credited in the accounts of the assessee in the relevant financial year. In [Shri Vardhman Overseas Ltd. v. Asstt. CIT](#) (Del-Trib): 24 SOT 393, it was held that no new amount had been credited by assessee in its account during the year under consideration. Therefore, applicability of [section 68](#) of the Act is also ruled out and addition could not be made under [section 68](#) of the Act. In view of above we find no reason to interfere in the order of Id. CIT(A). Hence this ground of Revenue is dismissed. "

4. The AO in our view was confused. He at para (3) of his order states that the addition u/s 68 of the Act and at para 3.6 states that he is disallowing Sundry Creditors. The Id. CIT-A also did not dispute the facts that the purchase is genuine. While so Sec 68 of the Act cannot be invoked.

5. In view of above, we are of the view, the Tribunal has analyzed the issue with various case laws. The case laws are also relevant to the present facts of the case. Thus, the CIT-A was not justified in confirming the impugned additions challenged in ground nos. 2 to 7 of the appeal. Thus, the order of the CIT-A is set aside and direct the AO to delete the additions involved in ground nos. 2 to 7 of the appeal raised by the assessee before us.

6. In the result, the appeal of the assessee in ITA No. 57/Ran/2016 for the A.Y 2010-11 is allowed.

Order Pronounced on 04-05-2018

Sd/-
J. Sudhakar Reddy
Accountant Member

Sd/-
S.S. Viswanethra Ravi
Judicial Member

Dated : 04-05-2018

PP(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – M/s. Gulf Steel & Minerals C/o Prem Nath Poddar, Station Road, Nawamundi-833218.
2. Respondent –Income Tax Officer, Ward 1(4), 47 C.H Area, Jamshedpur-831001.
3. The CIT(A), Ranchi
4. CIT , Ranchi
5. DR, ITAT Ranchi Benches, Ranchi.

/True Copy,

By order,

Sr.PS
ITAT, Ranchi