

IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SHRI GEORGE GEORGE K., JUDICIAL MEMBER

ITA No.541/Bang/2019
Assessment year: 2011-12

M/s. Hothur Traders, Plot Nos. 5, 6, 7 & 8, “Hothur House”, Infantry Road, Cantonment, Bellary – 583 104. PAN: AAEFH 7705H	Vs.	The Assistant Commissioner of Income Tax, Circle 1, Fort Road, Bellary – 583 102.
APPELLANT		RESPONDENT

Appellant by	:	Shri Shiva Prasad Reddy, IRS
Respondent by	:	Shri Kannan Narayanan, Jt.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	15.03.2021
Date of Pronouncement	:	25.03.2021

ORDER

Per Chandra Poojari, Accountant Member

This appeal by the assessee is directed against the order of CIT(Appeals) dated 31.12.2018 for the assessment year 2011-12.

2. The assessee has raised the following grounds:-

“1. The impugned assessment order is opposed to the facts of the case and the law and therefore, it is liable to be set-aside.

NOTICE U/S 148.

2.1. The impugned assessment order u/s 143(3) r.w.s 147 is void-ab-initio since it is completed without supplying the reasons recorded u/s 148 in spite of the request of the Appellant vide letter dated, 16-04-2016.

2.2. The impugned assessment order is also void-ab-initio since the Notice u/s 148 dated, 17-03-2016 is issued after 4 years from the relevant assessment year when the condition precedent stipulated in the First Proviso u/s 147 is not satisfied.

ON MERITS.

3. The learned AO failed to appreciate that there was no cessation of liability of Rs.4,17,71,395/- as per section 41(1) since the credit balance in the account of M/s ILC Industries Ltd., was not written off in the books of account and there was no intimation of any such write off in the books of account of the said creditor.

4. The grounds are taken without prejudice to one another and the Appellant craves leave to add or delete or modify or revise any ground at the time of hearing before the Hon'ble ITAT.

For these and other grounds that may be urged at the time of hearing, it is prayed that the Hon'ble /TAT may be pleased to allow the appeal in the interest of the equity and justice.”

3. At the time of hearing, the Id. counsel for the assessee has not pressed grounds No.2.1 & 2.2. Accordingly, these grounds are dismissed as not pressed.

4. The facts of the issue are that assessment proceedings for AY 2011-12 was completed u/s. 143(3) of the Income-tax Act, 1961 [the Act]. Original return was processed u/s. 143(1) of the Act and later original assessment was completed u/s. 143(3) on 30.3.2014 and assessee filed appeal against the original assessment order before the CIT(Appeals). The

first appellate authority gave certain relief to the assessee and while giving effect to the first appellate order, the AO was in the process of conducting scrutiny proceedings in the case of this assessee for AY 2013-14. The AO; while going through the details of transaction pertaining to the assessee firm, M/s. Hothur Traders, in the books of the company by name, M/s. ILC Industries Ltd., who was sundry debtor to assessee company; noticed that M/s. ILC Industries Ltd. has written off the amount of Rs.4,17,71,395 due from the assessee company as bad debt during the FY 2010-11 relevant to AY 2011-12. However, the assessee has shown this amount as outstanding against M/s. ILC Industries Ltd. even as on 31.3.2014. Hence the AO reopened the assessment by issuing notice u/s. 148 of the Act and made addition in the reassessment framed u/s. 143(3) r.w.s. 147 towards this amount of Rs.4,17,71,395 u/s. 41(1) of the Act, though the assessee claimed the enhanced business profit to that extent to be considered u/s. 10B of the Act. Against this, the assessee went in appeal before the CIT(Appeals).

5. The CIT(Appeals) confirmed the addition u/s. 41(1) and also denied exemption u/s. 10B on the enhanced business profit of the assessee company. For denying exemption u/s. 10B on enhanced business profit, the CIT(A) observed that the assessee has not filed revised return for claiming deduction u/s. 10B of the Act, as held by the Hon'ble Supreme Court in the case of *Goetze (India) Ltd. v. CIT, 284 ITR 323 (SC)*. On this, the assessee is in appeal before us.

6. It is submitted that the facts found mentioned in para 4 & 4.1 of pages 3 & 4 of the impugned assessment order would reveal that the assessee had received a sum of Rs.10 crores from M/s. ILC Industries Limited as advance for supply of iron ore fines during the FY 2009-10. The assessee had also paid an advance amount of Rs.5.60 crores on 09.09.2010 to the said party for supply of 'C' ore. The said M/s. ILC

industries Limited did not take delivery of the goods contracted on account of fluctuation in the prices between the contract date and the date of delivery. There was considerable price drop and the said party insisted to take delivery only if the goods are sold at the lower prices. In view of this dispute, the transaction did not materialise and the assessee therefore adjusted the said amount of Rs.5.60 crores against the amount of Rs.10 crores received from M/s. ILC Industries Limited. The ledger account of the said party accordingly showed an amount of Rs.4,17,71,395 as credit balance. The copies of the lawyer Notice and a certified copy of the ledger of the said party as appearing in our books of account were filed before the AO.

7. Apart from the above, the assessee had supplied iron ore to the said party vide Invoice No.23, through Mehboob Transport Company on 22.3..2010 for a sum of Rs.22,28,605/-, which, obviously does not represent any purchase cost or expenditure to be charged to profits. It is submitted that only an expenditure representing purchase goods or providing of services would constitute an expenditure for the purpose of section 41(1), subject to the condition that the amount is charged to profits and the credit balance is written off by either party. On a plain reading of the ledger account of the assessee in the books of account of M/s. ILC Industries Ltd, (coming into the possession of the AO), it would be clear that there was no supply of goods or services and the credit balance outstanding (the subject matter of purported write off by the other party) did not represent any expenditure in the hands of the assessee.

8. As per the observations of the AO himself, the reassessment proceedings were initiated on the basis of the purported ledger account of the assessee in the books of account of M/s. ILC Industries Limited, alleging corresponding debit balance of Rs.4,17,71,395 in its books of

account was written off, whereas the said amount is reflected as credit balance in the books of account of the assessee.

9. It was submitted that from the above facts, it is clear that the credit balance did not represent the liability for the purpose of section 41(1) as the amount was never charged to profits — either in the subject assessment year or in the earlier years, and the alleged write off by the said party does not bring it within the scope of the said section.

10. The Id. DR relied on the order of CIT(Appeals) and submitted that there is a cessation of liability u/s. 41(1) of the Act as there is no outstanding amount due to M/s. ILC Industries Ltd. He supported the order of lower authorities relying on the following judgments:-

- (i) West Asia Exports & Imports (P) Ltd. v. ACIT, 104 taxmann.com 170 (Madras)
- (ii) Gujtron Electronics (P) Ltd. v ITO, 83 taxmann.com 389 (Gujarat)
- (iii) CIT v. GP International Ltd., 325 ITR 25 / 186 taxman 229 (P&H).

11. In the present case, the assessee presented the balance sheet which was prepared from the books of account in which the amount is shown as outstanding to the tune of Rs.417,17,395 to M/s. ILC Industries Ltd. This amount is carried forward from the earlier year. It was submitted by the assessee that the said company had given an advance of Rs.10 crores during December, 2009 and assessee had paid them an amount of Rs.5.6 crores on 9.2.2010 for supply of C-Ore from the said company. Though the assessee intimated to lift the stock of 40,000 m.t. of iron ore fines for which advance of Rs.10 crores was given to assessee,

but for reasons best known to that party, they failed to lift the material. Thus, there was outstanding of Rs.417,17,395.

12. The contention of the Id. AR is that this is a carried forward balance from earlier year and this liability is outstanding to M/s. ILC Industries Ltd. and it was not written off in the books of account of assessee company. Being so, it cannot be considered as cessation of liability u/s. 41(1) of the Act. More so, it was a trading liability ceased to exist.

13. We have heard both the parties. It is an admitted fact that the said amount of Rs.10 crore has been received by the assessee for business purpose i.e., for supply of iron ore fines by assessee and for purchase of iron ore (C-Ore) from them by the assessee. This is evident from the letter dated 12.2.2016 filed by the assessee before the CIT(Appeals). Contrary to this, the contention of Id. AR is that it is not a trading liability so as to bring it under the purview of section 41(1) of the Act. When the money/loan was received by the assessee in the course of carrying on of business, even if it was treated as a loan at the time of receipt, it was in the nature of revenue, on the waiver it had become the assessee's own money, though it was not taken into Profit & Loss account. The benefit was in the revenue field as the money had been received in the course of day to day affairs of assessee. There was no purchase of any capital asset. Thus, the loans received by the assessee from M/s. ILC Industries Ltd. were for circulating capital and not for fixed capital. We are only concerned with waiver of advance/loan in the course of carrying on of day to day affairs of assessee company and units on its waiver, which is to be treated as income in the revenue field. At this stage, it is appropriate to discuss certain case laws on this issue:-

(1) *Logitronics Pvt. Ltd. v. CIT [2011] 333 ITR 386 (Del)*: This was a case where certain amount of loan and interest was waived by the financial

institution as it had become Non Performing Asset (NPA) for the bank in view of the guidelines of the Reserve Bank of India. On waiver the principal amount written off was directly taken to balance sheet under the head capital reserve, was not offered for taxation. The Assessing Officer treated the said waiver of principal amount of loan as 'income' within the meaning of Section 2(24) of the Income-Tax Act, exigible to tax. The CIT(A) deleted the addition holding that it was not an income and provisions of Section 28(iv) as well as Section 41(1) of the Act were not applicable. The Tribunal, however, reversed the decision of the CIT(A) giving *inter alia* following reasons:-

- "(a) Since the Tribunal in the case of *Tosha International Ltd. (supra)* proceeded to decide the issue on the premise that loan was utilized to acquire capital assets, decision of the Tribunal as upheld by this Court would apply to the cases where the loan obtained is utilized for acquiring capital assets.
- (b) In the case of *Mahindra & Mahindra Ltd. v. CIT* [261 ITR 501 (Bom.)], loan was to purchase plant and machinery - dies, tools, etc., *i.e.*, capital assets. It was on these facts that waiver of principal amount of loan was held to be neither covered by Section 28(iv) nor Section 41(1) of the Act.
- (c) In the case of *Tosha International Ltd. (supra)*, neither the Tribunal nor this Court considered the issue from the stand point of principal laid down by the Supreme Court in the case of *CIT v. T.V. Sundaram Iyengar and Sons Ltd.* [1966] 222 ITR 344 .
- (d) In *Solid Containers Ltd. v. Dy. CIT* [2009] 308 ITR 417 , the Bombay High Court applying the decision in *T.V. Sundaram Iyengar and Sons Ltd. (supra)* distinguished its decision in *Mahindra & Mahindra Ltd. (supra)* and has held that on waiver of loan taken for business purposes, the amount is retained in the business and as such, the amount that initially did not have the character of income becomes income liable to tax.
- (e) Decisions rendered in *CIT v. P. Ganesh Chettiar* [1982] 133 ITR 103 (Mad.) and *CIT v. Phool Chand Jiwan Ram* [1981]

131 ITR 37 (Del.) were of no assistance to the appellant because the same were rendered prior to judgment of the Supreme Court in *T.V. Sundaram Iyengar and Sons Ltd. (supra)*."

Against the orders of the Tribunal, appeal was preferred by the said assessee and the Hon'ble Delhi High Court vide orders dated 18th February, 2011 affirmed the order of the Tribunal.

(2) *CIT v. Phool Chand Jiwan Ram, 131 ITR 37 (Del)* and *Tosha International Ltd., 331 ITR 440 (Del)* : It was held that they are not applicable in the instant case. In the case of *Phool Chand Jiwan Ram (supra)* the relevant facts are that the assessee had purchased goods in an earlier year from M/s Narsinghdass Banarsidass, the payment in respect of which was made by M/s Janaki Dass Banarasi Dass. The amount was subsequently waived. The case of the revenue was that the amount so paid should be taken towards purchase of cloth and, therefore, it represents a trading liability. The High Court came to the conclusion that this conclusion was rather far-fetched. The cloth was purchased from M/s Narsinghdass Banarsidass and the debt represented a trading debt. However, so far as M/s Janaki Dass Banarasi Dass is concerned, the payment made by it was not for the purpose of purchase of stock-in-trade. Therefore, it was held that the liability was not a trading liability and the amount waived could not be brought to tax in the hands of the assessee.

Thus, the entire judgment rested on the premise that the liability in question was not a trading liability. Coming to the case of *Tosha International Ltd. (supra)* the facts are that the assessee was engaged in manufacturing of black and white picture tubes. It ran into huge losses and ultimately became a sick company and was so registered with the BIFR. Under one time settlement Scheme, the banks and financial institutions

required the assessee to pay 60% of the amount towards the principal and waived the entire interest amount. The question before the Court was whether waiver of the principal amount of amount Rs. 10.48 crore, credited to the capital reserve account, constituted income? The Court came to the conclusion that the amount is not covered by the provision contained in Section 41(1). It was also mentioned that the principles enunciated in the case of *Mahindra & Mahindra Ltd. v. CIT* [2003] 261 ITR 501 are fully applicable. Again, it was a case where the loan was on capital account and not for trading purposes. As far as term loans are concerned, waiver thereof by the financial institutions has not been treated as income at the hands of the assessee. It is only the writing off loans on cash credit account which was received for carrying out the day to day operations of the assessee which is treated as "income" in the hands of the assessee. The judgment of the Bombay High Court in *Solid Containers Ltd.*, [2009] 308 ITR 417 (Bom) and that of Madras High Court in *Aries Advertising (P.) Ltd.*, [2002] 255 ITR 510 case (supra) are directly on this issue. The Tribunal has rightly applied the said judgments wherein the view taken is the same as taken by this Court in *Logitronics (P.) Ltd.* [2011] 333 ITR 386 (Delhi).

2.1 In so far as the decision in *Jindal Equipment Leasing & Consultancy Services Ltd.* [2010] 325 ITR 87 (Delhi) is concerned, that was a case where the assessee was an investment company registered with the Reserve Bank of India as a Non Banking Financial Company (NBFC). In the return for the assessment year 2003-04, it had shown a loan of Rs. 6,80,31,189 payable to M/s Jindal Steel & Power Ltd. (JSPL). It is the JSPL which had return of a sum of Rs. 1,46,53,065 in its books of account. On that premise, the Assessing Officer had treated the same as income of the assessee on the ground that the creditor had written of the said amount and, therefore, it was

no more the liability of the assessee and to this extent it was the assessee's gain and added the same under Section 41(1) of the Act. The plea of the assessee in that case was that JSPL had done it unilaterally and without the knowledge of the assessee. The CIT(A) confirmed the addition made by the Assessing Officer in term of Section 41(1) read with Section 28(i) of the Act. The ITAT deleted the addition holding that Section 41(1) of the Act had no application. In the appeal preferred by the Revenue, it did not press the applicability of Section 41(1) Act or Section 28(i) of the of the Act but took a totally different stand namely the said waiver was to be treated as income under Section 28(iv) of the Act. No doubt, the Court held that the amount written of in the books of account by JSPL was in the nature of value of any benefit or perquisites, whether convertible into money or not and, therefore, could not be treated 'profits and gains from business'. However, no other aspects were looked into or discussed. The nature of loan taken by the said assessee, which was waived by the JSPL, namely whether it was on capital account or in the trading field was not the aspect looked into. In fact, neither there was any material on this aspect nor it was argued. The Court had relied upon the judgment of Bombay High Court in *Mahindra & Mahindra Ltd.'s case (supra)*. When we go through the said judgment of the Bombay High Court, it becomes clear that in that case, the loan arrangement in its entirety was not obliterated and more importantly the purchase consideration related to capital asset.

14. Further, in the judgment relied on by the Id. DR in the case of *West Asia Exports & Imports (P) Ltd. v. ACIT, 104 taxmann.com 170 (Madras)*, it was held as under:-

“Section 41(1) of the Income-tax Act, 1961 - Remission or cessation of trading liability (Cessation of liability) - Assessment

year 2003-04 - Assessee was earlier engaged in timber business, but about 10 years back from assessment Year in instant case, it closed timber business and switched over to business of sending of manpower to Gulf countries, however, still continued to show its erstwhile sundry creditors of its erstwhile timber business in balance sheet of current business also - Assessing Authority held that there was cessation of liability as not only claims became barred by limitation, but no creditor came forward to make any claim from assessee and, therefore, it added such sum to income of assessee - Whether lapse of ten years of time, coupled with fact that there was a change of business altogether by assessee, and fact that debts had become time barred and no creditor made any claim for recovery from assessee during any of these years, even upto now, absolutely justified Assessing Authority to draw an adverse inference against assessee about cessation of liability - Held, yes [Paras 29 and 31] [In favour of revenue]”

15. Further, in *Gujtron Electronics (P) Ltd. v. ITO, 397 ITR 462 (Guj)* it was held as under:-

“Section 41(1) of the Income-tax Act, 1961 - Remission or cessation of trading liability (Customer advances) - Assessment year 2012-2013 - Under a sales promotion scheme launched during financial year 1986-87, assessee company collected a sum of Rs 500 from each of its customer by sale of coupons - Assessee collected a huge sum under said scheme - Since then, assessee had been showing such sum as outstanding trade liability under head customer advances - During relevant assessment year, Assessing Officer held that there was cessation of liability and, therefore, added such sum to income of assessee - It was found that scheme was valid only for period of twelve months - There was no activity at hands of assessee in connection with scheme for past several years - Not a single customer had demanded money back nor assessee had made any attempt to repay same - In all invoices, signatures of member customers were missing - Their addresses were not sufficient - Over years, company had also invested such amount and earned interest and used such interest for its purpose - Whether on facts, there was cessation of trading liability, thus, Assessing Officer was justified in adding impugned amount to income of assessee - Held, yes [Paras 10 & 12] [In favour of revenue]”

16. Further the Tribunal in *Suresh Kumar Jain v. ITO, [2011] 128 ITD 74 (Bang)* held as follows:-

“Section 68 , read with section 41(1) , of the Income-tax Act, 1961 - Cash credits - Assessment year 2005-06 - In course of assessment, Assessing Officer asked assessee to prove genuineness of sundry creditors shown in return of income - In reply, assessee merely filed confirmation letters issued by some of alleged creditors - Assessing Officer rejected those letters and made addition under two heads, i.e., 'brought forward creditors balances treated as cessation of trading liability under section 41(1)' and 'current creditors under section 68' - Commissioner (Appeals) confirmed addition - On instant appeal, it was seen that Assessing Officer went to root of issue; made inquiries and brought on record that brought forward alleged sundry creditors and current year's creditors were not genuine - Further, assessee never tried to reconcile difference of brought forward balances nor produced any bills of purchase, etc., for verification in spite of being provided with ample time to reconcile - Whether, on facts, assessee had failed to discharge onus cast on him to substantiate his claim and, therefore, impugned addition made by authorities below was to be upheld - Held, yes”

16.1 In the present case, the assessee had received the amount in the course of its business, which are originally treated as an advance. These deposits neither claimed nor returned to the party concerned. There is no dispute that this impugned amount was received in the course of carrying on the normal course of business of the assessee, the amount was written off by the other party, who was given this to the assessee and there was no necessity of fulfilment of contract which was originally entered by the assessee as ILC Industry Limited has written of it. Since the advance was taken in the course of normal business affairs of the assessee and it was unclaimed amount and not required to returned by the assessee will be its trade receipts. Because of the trading operation, the assessee had received it and it become richer by the amount on written of by the ILC Industry Limited in its books of account. Though the amount received

originally were not of income nature, the amount remained with the assessee for a long period unclaimed by the third parties, i.e., ILC Industries Limited and become definite trade surplus and to be treated as taxable income. In other words, if an amount received in the course of trading transaction, even though it is not taxable in the year of receipt as being the revenue character, the amount changes its character when the amount becomes assessee's own money because of written off by ILC Industry Limited in its books of account and there was no contractual obligation on the part of the assessee to perform its obligation and it should be treated as income of the assessee. Being so, we are of the opinion that the lower authorities are justified in treating the amount of Rs.4,17,71,395 as income of the assessee u/s 41 of the I.T.Act.

17. The alternative ground of the assessee is that where the assessee's business profit was enhanced on account of addition by invoking the provisions of section 41(1), the assessee is entitled to deduction u/s 10B on the enhanced profit. For this purpose, reliance was placed on the following judgments:-

- (i) Yahoo Software Development (P.) Ltd. v. DCIT, (2020) 116 taxmann.com 403 (Bang. Trib)
- (ii) Anthelio Business Technologies (P.) Ltd. v. ITO, 78 taxmann.com 203 (Mum Trib.)

18. We have carefully gone through the above judgments. In the case of *Yahoo Software Development (P.) Ltd. (supra)* disallowance u/s. 40(a)(ia) was made and business income was enhanced, on this count exemption u/s. 10A was granted on the enhanced income. In the case of *Anthelio Business Technologies (P.) Ltd. (supra)*, deduction u/s. 10B was granted on account of enhancement of income due non-deduction of tax at

source by invoking the provisions of section 40(a)(i). Similar was the position in the case of *Lionbridge Technologies (P.) Ltd. v. PCIT (2017) Anthelio Business Technologies (P.) Ltd. v. ITO (2017) 86 taxmann.com 101 (Mum Trib.)*.

19. In the above cases, the assessee received business income through convertible foreign exchange and as such reduced the same by claiming various expenditure without deduction of tax at source. Non-disallowance of expenditure increased business income of assessee in actual terms. In the present case, the assessee received amount from the local party, M/s. ILC Industries Ltd. and the assessee has not received the earnings in convertible foreign exchange. Being so, this cannot be equated with disallowance made u/s. 40(a)(i) or 40(a)(ia) of the Act. Therefore, we reject the alternative ground of the assessee also.

20. In the result, the appeal by the assessee is dismissed.

Pronounced in the open court on this 25th day of March, 2021.

Sd/-
(GEORGE GEORGE K.)
JUDICIAL MEMBER

Sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 25th March, 2021.

/Desai S Murthy /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.