आयकर अपीलीय अधिकरण, कटक न्यायपीठ,कटक

IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK

BEFORE SHRI C.M. GARG, JM & SHRI L.P. SAHU, AM

आयकर अपील सं./ITA Nos.01 & 02/CTK/2017

(**निर्धारण वर्ष /** Assessment Years :2008-2009 & 2009-2010)

Srabani Construction (P) Ltd., Plot No.A/16, Nilakantha Nagar, Nayapalli, Bhubaneswar	Vs	DCIT, Circle-2(1), Bhubaneswar
PAN No. : **AAGCS 8902 A**		

(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

निर्धारिती **की ओर से** /Assessee by	:	Shri Mohit Sheth, AR
राजस्व **की ओर से** /Revenue by	:	Shri S.C.Mohanty, DR

सुनवाई की तारीख **/ Date of Hearing**	:	02/03/2021
घोषणा की तारीख**/Date of Pronouncement**	:	04/03/2021

आदेश / O R D E R

Per Bench:

These two appeals have been filed by the assessee against the separate order of CIT(A)-3, Bhubaneswar, both dated 26.08.2016 for the A.Y.2008-2009 & 2009-2010.

2. The grounds raised by the assessee in its appeal for A.Y.2008-2009 are as under :-

1. *That, the learned Commissioner of Income-tax (Appeals) [Hereinafter referred as "the learned CIT (A)"] has committed serious error in not quashing the assessment order passed by the learned Assessing Officer which is per se illegal, unjust, without jurisdiction, arbitrary and contrary to the provisions of the Income-tax Act, 1961 (hereinafter referred as "the Act") and has been passed in gross violation to the principles of natural justice.*
2. *That, the learned CIT (A) has committed serious error in not quashing the assessment order which has been passed on the basis of issuance of notice u/s 148 of the Act after the earlier proceedings u/s 147 of the Act has been dropped.*

3. *That, the learned CIT (A) has committed serious error in not quashing the assessment order which has been passed in contravention to the section 129 of the Act.*

4. *That, the learned CIT (A) has committed serious error in not quashing the assessment order which has been passed on the basis of issuance of notice u/s 148 of the Act without having any reasons to do so.*

5. *That, the learned CIT (A) has committed serious error in not quashing the assessment order which has been passed on the basis of notice u/s 142(1) of the Act dated 09.09.2013 calling for the return of income which is nullity in the eyes of law as the appellant has already submitted the return of income.*

6. *That, the learned CIT (A) has committed serious error in not quashing the assessment order passed on issuance of notice u/s 148 of the Act dated 19.08.2013 without having any reasons that the income of the appellant has escaped assessment.*

7. *That, the learned CIT (A) has committed serious error in not quashing the assessment order passed u/s 144 of the Act after issuing notice u/s 142(1) of the Act calling for the return of income for which the entire assessment order based on wrong assumption of law u/s 144 of the Act is illegal and is liable to be quashed.*

8. *That, the learned CIT (A) has committed serious error in not deleting the addition made by the learned Assessing Officer u/s 68 of the Act of Rs. 12,00,000/-.*

9. *That, the learned CIT (A) has committed serious error in not deleting the addition made by the learned Assessing Officer of Rs. 51,84,803/- of sundry creditors u/s 68 of the Act.*

10. *That, the appellant may add, alter, delete, withdraw or modify any of the grounds at the time of hearing of the matter with the leave of the Hon'ble ITAT.*

3. The grounds raised by the assessee in its appeal for A.Y.2009-2010 are as under :-

1. *That, the learned Commissioner of Income-tax (Appeals) [Hereinafter referred as "the learned CIT (A)"] has committed serious error in not quashing the assessment order passed by the learned Assessing Officer which is per se illegal, unjust, without jurisdiction, arbitrary and contrary to the provisions of the Income-tax Act, 1961 (hereinafter referred as "the Act") and has been passed in gross violation to the principles of natural justice.*
2. *That, the learned CIT (A) has committed serious error in not quashing the assessment order which has been passed on the basis of issuance of notice u/s 148 of the Act after the earlier proceedings u/s 147 of the Act has been dropped.*

3. *That, the learned CIT (A) has committed serious error in not quashing the assessment order which has been passed in contravention to the section 129 of the Act.*

4. *That, the learned CIT (A) has committed serious error in not quashing the assessment order which has been passed on the basis of issuance of notice u/s 148 of the Act without having any reasons to do so.*

5. *That, the learned CIT (A) has committed serious error in not quashing the assessment order which has been passed on the basis of notice u/s 142(1) of the Act dated 09.09.2013 calling for the return of income which is nullity in the eyes of law as the appellant has already submitted the return of income.*

6. *That, the learned CIT (A) has committed serious error in not quashing the assessment order passed on issuance of notice u/s 148 of the Act dated 19.08.2013 without having any reasons that the income of the appellant has escaped assessment.*

7. *That, the learned CIT (A) has committed serious error in not quashing the assessment order passed u/s 144 of the Act after issuing notice u/s 142(1) of the Act calling for the return of income for which the entire assessment order based on wrong assumption of law u/s 144 of the Act is illegal and is liable to be quashed.*

8. *That, the learned CIT (A) has committed serious error in not deleting the addition made by the learned Assessing Officer u/s 68 of the Act of Rs. 67,99,000/-.*

9. *That, the learned CIT (A) has committed serious error in not deleting the addition made by the learned Assessing Officer of Rs. 56,57,462/-of sundry creditors u/s 68 of the Act.*

10. *That, the appellant may add, alter, delete, withdraw or modify any of the grounds at the time of hearing of the matter with the leave of the Hon'ble ITAT.*

4. On perusal of the above grounds of appeal raised by the assessee in both the appeals, we found that the issue involved in ground Nos.1 to 7 in both the appeals is with regard to reopening of the assessment u/s.147/148 of the Act. At the outset, ld. AR of the assessee did not press the legal issue being ground No.1 to 7. Accordingly, we dismiss the above legal ground raised in ground No.1 to 7 by the assessee in both the appeals, as not pressed. Ground Nos.10 in both the appeals is

general, which does not require any adjudication. However, ld. AR of the assessee argued the case on merits for both the years under consideration.

ITA No.01/CTK/2017 (AY : 2008-2009)

5. Brief facts of the case are that the assessee company is engaged in the business of construction work and filed its return of income for the assessment year 2008-2009 electronically on 24.02.2008 declaring total income at Rs.4,41,370/-. A survey was conducted on the company on 06.11.2012. Thereafter the case was reopened after recording reasons as per the provisions of the Income Tax Act. Notice u/s.148 of the Act was issued and served on the assessee on 27.12.2012. No return was filed by the assessee as per the notice u/s.148 of the Act. Thereafter another notice was issued to the assessee on 09.09.2013 for fixing the case for hearing on 30.09.2013 but no one was present. There was no compliance on the part of the assessee. Thereafter the AO proceeded the case ex-parte u/s.144 of the Income Tax Act, 1961. The AO noticed from the financial statement for the financial year 2007-2008 that the assessee company has shown Rs.12 lakhs under the head share application money in the return of income and he did not file any documentary evidence in support of the allocation of the shares or share application money. Accordingly, the AO notice that the identity, creditworthiness and genuineness of the transaction could not be

established by the assessee, therefore, the AO added the entire amount of Rs.12 lakhs into the total income of the assessee u/s.68 of the Act. On further scrutiny of return of income, it was noticed by the AO that the assessee had shown under the head sundry creditors to the tune of Rs.51,84,803/-. During the course of assessment proceedings the assessee failed to produce the details and PAN of the sundry creditors along with their confirmations. Accordingly, the AO observed that the identity, creditworthiness and genuineness of the transaction could not be established by the assessee. Accordingly, the AO added the whole amount of Rs.51,84,803/- to the total income of the assessee and completed the assessment determining the total income of the assessee at Rs.68,26,173/-.

6. Feeling aggrieved from the order of AO, the assessee filed appeal before the CIT(A). The CIT(A) after considering the submissions of the assessee and statements recorded during the course of survey proceedings u/s.133A of the Act and considering the facts of the case, dismissed the appeal of the assessee.

7. Aggrieved from the order of the CIT(A), the assessee is in appeal before the Income Tax Appellate Tribunal.

8. Ld. AR has filed two paper books for assessment year 2008-2009 containing 97 pages and for assessment year 2009-2010 containing 53 pages. The assessee submitted in his written submission are as under :-

During survey in the Assessee Company the AO must have found the books of accounts and the books of accounts found were duly signed by the Managing Director of the company . The books of accounts and other documents were impounded from the survey premises. The period of Retention of books of accounts and documents were duly approved by the Commissioner of Income Tax, Bhubaneswar .

The AO in the assessment order has taken view to pass the order ex-party by applying Sec. 144 as the books of accounts by the assessee were not produced, maintained properly or correctly and are not ascertainable and verifiable. The books of accounts were impounded during the survey and no copy of the documents were given to the assessee- company. Keeping the books of accounts and other related documents in one hand and asking the assessee-company to produce the books of accounts during the assessment proceedings is not justifiable and acceptable. The books of accounts itself reveals the purchases and sales. The purchase and sales as stated earlier are accepted and not doubted as such trade creditors cannot be added back.

Prayer :
The addition under the head share application money and sundry creditors by applying Section 68 is arbitrary and unjustified. And the said addition should be deleted .
***Citations** :*
The appellant relay on :

1. *Standard Leather Pvt. Ltd. vs. ITO*
   ITA No.2620/KOL/2013
2. *Gulf Steels & Mineral vs. ITO, Jamshedpur*
   ITA No.57/Ranchi/2016
3. *Lycos India Ltd. vs. ITO , Ward-1(1), Bhubaneswar*
   ITA No.02/CTK/2018
4. *M/s.Ashok Transport Co. vs. ITO,Ward-l(l),Jodhpur (Raj.)*
   ITA No.336/Jodh/2018

In addition to the above, he also submitted that the share application money was received in earlier assessment year, therefore, it should not be added in the impugned assessment year and in regard to the sundry creditors, he submitted that the purchase and sales and closing stocks were accepted by the AO, hence, the sundry creditors were automatically deemed to be accepted and in support of his arguments, he has cited some judgments in his written submissions as above.

9. On the other hand, ld. DR supported the orders of authorities below and submitted that the assessee could not properly explain the share application money shown in the financial statements before the authorities below and the statement recorded during the course of survey proceedings, the assessee had admitted the payment of tax but he did not pay the tax on the admitted amount as well as the assessee could not substantiate its claim either before the AO or before the CIT(A) in regard to the share application money and sundry creditors. Therefore, the CIT(A) is justified to confirm the addition made by the Assessing Officer.

10. After hearing the submissions of both the parties and perusing the entire material available on the record along with the orders of authorities below, we noticed from the financial statements submitted by the assessee before us at page No.23 in which balance sheet for the financial year 31.03.2007 and 31.03.2008 is appearing, in the said balance sheet the share application money is remained as it is. There is no change in the share application money in the said financial year and there is no doubt that the share application money was received prior to this financial years, therefore, it cannot be added in the impugned assessment year. In support of our above view, reliance can be placed on the decision of coordinate bench of the Tribunal in the case of M/s

Auroglobal Comtrade Pvt. Ltd., ITA NO.426/CTK/2018, order dated 14.12.2020, wherein the Tribunal has observed as under :-

> *9. After considering the submissions of the both the sides and perusing the entire material available on record as well as the orders of authorities below, we find that the AO made addition u/s.68 of the Act on account of unexplained share premium as the assessee could not prove the genuineness and creditworthiness of the shareholders. During the course of appellate proceedings, on production of all the required documentary evidences by the assessee which are necessary to prove the genuineness of the impugned transaction, the CIT(A) called for the remand report to which the assessee has also submitted his reply. After considering the submissions of the assessee, remand report of the AO and the reply of the assessee to the remand report, the CIT(A) found that the consideration of the AO is entirely based on suspicion and not on evidence. Even no evidence whatsoever has been brought on record by the AO either at the time of assessment or at the time of remand proceeding to show that M/s Sakambari Financial consultancy (P) Ltd. is a shell company not having the creditworthiness to make investment in the shares of the assessee company. Further the CIT(A) has also accepted the returned income of that company without any adverse comments to show that M/s Sakambari Financial Consultancy (P) Ltd. is a shell company. After considering the voluminous documents produced by the assessee and the material available on record, the CIT(A) held that the share premium receipts from M/s Sakambari Financial Consultancy (P) Ltd. cannot be taxed as income of the assessee u/s.68 of the Act and deleted the addition made by the AO in this regard after observing as under :-*
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> > *"4.7 I have considered the matter with reference to the facts and materials brought on record. I have also gone through the assessment order, the written submissions of the assessee, remand report of the AO and the response of the assessee to the remand report. The assessee company has received during the FYs 2012-13 (Rs.3,49,00,000/-) and 2013-14 (Rs.15,00,000/-) share premium totaling Rs.3,18,50,000/- from M/s. Sakambari Financial Consultancy (P) Ltd. The company M/s. Sakambari Financial Consultancy (P) Ltd. is assessed to tax and has been filing returns regularly since its incorporation as is evident from the copies of its income tax returns filed by the assessee. The amount towards share premium has been given by M/s. Sakambari Financial Consultancy (P) Ltd. through banking channels (RTGS) and from the copies of the audited accounts of the company filed by the assessee and also copies of the bank statements for the relevant period, it is quite evident that it had sufficient funds to invest in the shares of the assessee company. The details of the investments which have been encashed by M/s. Sakambari Financial Consultancy (P) Ltd. have also been filed in the course of remand proceeding and there is no reason*

to doubt the genuineness of those transactions. Though the AQ has mentioned in the remand report that he is not a position to give any opinion on the creditworthiness of M/s. Sakambari Financial Consultancy (P) Ltd., from the details filed it is evident that M/s. Sakambari Financial Consultancy (P) Ltd. had adequate funds to pay the share premium of Rs.3,18,50,000/- during the FYs 2012-13 and 2013-14. From the voluminous documents filed by the assessee before the AO at the time of remand proceeding, the identity M/s. Sakambari Financial Consultancy (P) Ltd. its creditworthiness and the genuineness of the transaction, being the three ingredients to be proved in the case of cash credits appears to be well established.

4.8 In the remand report, the AO mentioned about certain facts at para 3 which are found not to be very relevant so far as the identity and creditworthiness of M/s. Sakambari Financial Consultancy (P) Ltd. are concerned. The AO has mentioned that one of the investors of M/s. Sakambari Financial Consultancy (P) Ltd. namely M/s. Merfin Consultants (P) Ltd. holding 38,900 of shares is a shell company engaged in providing accommodation entries as per the statement of its director Sri Akash Agarwal. The AO has also mentioned in the above para of his report that Dhuper family which controls the affairs of the assessee company are also controlling the affairs of M/s. Samboodhan Projects (P) Ltd. which owns 99.9% of the shares of M/s. Sakambari Financial Consultancy (P) Ltd. However, these facts by themselves cannot be a ground to hold that the investment made by M/s. Sakambari Financial Consultancy (P) Ltd. in the shares of the assessee company is not genuine. These facts may be adequate to raise a reasonable suspicion about the genuineness of the impugned investment but suspicion alone without evidences cannot be acted upon.

4.9 From the remand report of the AO, it is clear that out of the total share- receipt of Rs.3,64,00,000/- (inclusive of share premium of Rs.3,18,50,000), the major part of Rs.3,49,00,000/- was received during FY 2012-13 relevant to the AY 2013-14. An amount of Rs.15,00,000/-only was received in the FY 2013-14 relevant to the AY 2014-15. Accordingly, the addition that can be made u/s.68 for the AY 2014-15 cannot exceed Rs.15,00,000/-.

4.10 It is quite relevant to mention here that the AO has not treated the entire share capital investment by M/s. Sakambari Financial Consultancy (P) Ltd. as bogus. The total investment made by this company amounts to Rs.3,64,00,000/-. The AO has accepted the investment to the extent of Rs.54,50,000/- which represents the face value of 4,55,000 number of shares @ Rs.10/- per share as genuine since no addition has been made in respect of the same. What the AO has done is that he has treated the share premium receipt of Rs.3/,18,50,000/- @ Rs.70/- per share as unexplained and made addition for the same. Once a part of

the share capital investment is accepted as genuine, there is no reason not to accept the share premium receipt of Rs.3,18,50,000/-. The AO has not brought on record any materials, either at the time of assessment or at the time of remand proceeding, to indicate that the share premium receipt is not genuine. The voluminous documents submitted by the assessee before the AO at the time oT remand proceeding clearly establish the genuineness of the share investment made by M/s. Sakambari Financial Consultancy (P) Ltd. including the share premium of Rs.3,18,50,000/-. The assessee is also found to have satisfied the requirement of the first proviso to section .68 by filing a confirmation from M/s. Sakambari Financial Consultancy (P) Ltd. about the investment made by them and also explaining the nature and source of the amount given to the assessee company. Hence, the addition made u/s.68 appears to be unjustified.*

4.11 The AO has doubted the genuineness of the share premium receipt in the remand report, but has not brought any evidence on record to show that the share premium was not actually paid by the investor company and the assessee has channelized its own unaccounted money in the garb of share premium. In the case of M/s. Gagandeep Infrastructure (P) Ltd. (2017)'80 Taxmann.com 272 (Bom.), the Hon'ble Bombay High Court while dealing with a similar case has held that relying on the decision of the Hon'ble Apex Court in the case of Lovely Export (P) Ltd. (2008) 216 CTR 195 that if the receipt of large amount of share premium gives rise to suspicion on the genuineness of the shareholders whose identities have been established, the Revenue should proceed by reopening the assessment of such shareholders and assessing them to tax in accordance with law. It is further held in this case that the Revenue is not entitled to add the same in the hands of the assessee as income from unexplained cash credit.

4.12 It appears that the AO considers M/s. Sakambari Financial Consultancy (P) Ltd. as a shell company existing only on paper and, therefore, the investment made by it in the form of share premium of the assessee company cannot be accepted as genuine. It appears that the consideration of the AO is entirely based on suspicion and not on evidence. No evidence whatsoever has been brought on record by the AO eitherM the time of assessment or at the time of remand proceeding to show that M/s. Sakambari Financial Consultancy (P) Ltd. is a shell company not having the creditworthiness to make investment of Rs.3,64,00,000/- in the shares of the assessee company..It is found that scrutiny assessment in the case of M/s. Sakambari Financial Consultancy (P) Ltd. was made for the AY 2010-11 by the ACIT(OSD), Ward-1(3)^ Kolkata on 19.12.2017 u/s.!43(3)/147. A copy of the order has been filed by the assessee in the course of the remand proceeding which is lying on record.

From this order, it is apparent that the AO has accepted the returned income of that company without any adverse comments to show that M/s. Sakambari Financial Consultancy (P) Ltd. is a shell company.

4.13 It is relevant to mention here the decision of the Hon'ble Bombay High Court in the case of Paradise Inland Shipping (P) Ltd. dt.28.11.2017 400 ITR 439 (Bom.). The Hon'ble High Court has held in this case that companies which invest in share capital of another company cannot be treated as bogus if they are registered and have been assessed to tax. It has been further held in this case that once the assessee has produced documentary evidence to establish the existence of such companies, the burden shifts to the Revenue to establish their case and that reliance on statements of 3rd parties who have not been subjected to cross examination is not permissible. Voluminous documents produced by the assessee cannot be discarded merely on the basis of statements of individuals contrary to such public documents.

4.14 In view of the discussions made above, it is held that the share premium receipts from M/s. Sakambari Financial Consultancy (P) Ltd. cannot be taxed as income of the assessee u/s.68. Hence, the addition of Rs.3,18,50,000/- is deleted."

10. On perusal of the above observations of the CIT(A), we find that the CIT(A) has decided the issue in detail relying some authorities of law. We are also in agreement with the view taken by the CIT(A) that once the assessee has produced the documentary evidence to establish the existence of such companies, the burden shifts to the Revenue to establish their case and that reliance on statements of 3rd parties, who have not been subjected to cross examination is not permissible. Thus, the case laws relied on by the ld. CITDR are not applicable to the present case, whereas the reliance placed by the ld. AR of the assessee on the decision of coordinate bench of the Tribunal in the case of M/s Savera Towers Pvt. Ltd. (supra) is accepted because once the receipt of share capital has been accepted as genuine within the purview of Section 68 of the Act, there is no reason for the AO to doubt the share premium component received from the very same shareholders as bogus. The relevant observations of the Tribunal in the said order are as under :-

6. We have heard the rival submissions. The facts stated hereinabove remain undisputed before us by either of the parties and hence the same are not reiterated for the sake of brevity. At the outset, we find that the assessee had received share capital of Rs. 54,200/- from 4 corporate entities and Rs. 2,70,45,800/- from the very same shareholders towards share premium. The share capital received by the assessee has been duly accepted by the ld. AO within the ken of section 68 of the Act. However, share premium component has been doubted by the ld. AO. We find that the assessee in the instant case had duly complied with by furnishing the complete details of share subscribers to prove

their identity, genuineness of the transaction and creditworthiness of share subscribers beyond doubt. These are duly supported by the documentary evidences which are enclosed in the paper book. The ld. AO had not found any falsity or any adverse inference of the said documents. We find that the Ld. CIT(A) had placed heavy reliance on these documents and had granted relief to the assessee. All the share subscribers are duly assessed to income tax and the transaction with the assessee company are duly routed through banking channels and are duly reflected in their respective audited balance sheets which are also placed on record before us. In any case, once the receipt of share capital has been accepted as genuine within the ken of section 68 of the Act, there is no reason for the ld. AO to doubt the share premium component received from the very same shareholders as bogus. We held that all the three necessary ingredients of section 68 had been duly complied with by the assessee with proper documentary evidences. We find that notices issued u/s 133(6) have been duly complied with. The only grievance of the ld. AO was that the assessee could not produce the directors of the share subscribing companies. In our considered opinion, for this reason alone, there cannot be any addition u/s 68 of the Act as held by the Hon'ble Supreme Court in the case of CIT vs. Orissa Corporation Pvt. Ltd. reported in 159 ITR 78 (SC). We find that the decision of Hon'ble Delhi High Court in the case of Novo Promoters and Finelease Pvt. Ltd. reported in 342 ITR 169 (Del) vehemently relied upon by the ld. DR before us, is not applicable in the instant case, as in the facts before the Hon'ble Delhi High Court, the notices u/s 133(6) have not been duly complied with. Hence the decision rendered by the Hon'ble Delhi High Court in the case referred to supra is not applicable to the facts of the instant case and is factually distinguishable..

Respectfully following the above decision of the coordinate bench of the Tribunal as well as factual aspects of the matter, we do not see any good reason to interfere with the just and proper findings recorded by the CIT(A) in this regard. Accordingly, we upheld the same and dismiss the grounds raised by the Revenue.

11. Respectfully following the above decision of the coordinate bench of the Tribunal, we delete the addition made by the AO and allow the ground No.8 raised by the assessee in the appeal for A.Y.2008-2009.

12. Further in respect of addition of Rs.51,84,803/- made by the AO u/s.68 of the Act with regard to sundry creditors, on observing the financial statement it is found that the assessee could not produce the creditors as well as could not satisfy the three ingredients i.e. identity, creditworthiness and genuineness of the transaction as per the Section 68 of the Act and accordingly, the same was added to the total income of the assessee. The assessee has filed return of income declaring at Rs.4,41,370/- which has been accepted by the AO while determining the total income of the assessee in the reassessment proceedings. The assessee has prepared trading profit and loss account which is duly certified by the Chartered Accountant u/s.44AB of the Act. The assessee is engaged in the business of construction work. The profit shown in the income has been arrived after deducting expenditure from the total gross turnover of the assessee. The gross turnover for the impugned financial year is Rs.8,33,46,703/- and the net profit has been shown as per Annexure/1 Part-B of the tax audit report which is placed at page 19 of the paper book in which the net profit has been shown before tax is Rs.4,41,371/- which has been accepted by the AO. Once the purchase and sales and net profit declared in the return of income has been accepted by the AO then the sundry creditors should also be accepted. Our this view is supported by the decision of coordinate bench of the Tribunal in the case of Lycos India Limited, ITA

No.02/CTK/2018, order dated 01.09.2020, wherein the Tribunal has observed as under :-

> *12. On merits of the case, with regard to addition of Rs.1,42,04,290/- relating to sundry creditors, there was an opening balance of Rs.1,25,24,747/- (approx) as on first date of the financial year in the books of the assessee and the closing balance is Rs.1,42,05,241/- (approx) On further perusal of the assessment order, the AO has doubted the genuineness of the sundry creditors which could not be proved by the assessee at the time of assessment as well as at the appellate stage and we further notice that the assessee has shown cost of raw material consumed of Rs.2,50,70,322.18 and he has shown also revenue from operations of Rs.4,09,10,036.44 and there is also closing stock of raw materials as well as of the work-in-progress and finished goods. From the order of AO, we find that the AO has accepted the cost of raw material consumed, work-in-progress and finished goods as well as revenue from operations but the AO has not accepted the current liabilities appeared in the books of the assessee. Without the purchases, how the manufacturing process can be done and sales can be made. If there was not genuine or bogus creditors credited by the assessee the effect must be given on the financial statements prepared by the assessee. But the AO has one-sided taken view that the purchase is bogus. This view of the AO is not correct and our view is supported by the decision of the coordinate bench of the Tribunal in the case of Smt. Sudha Loyalka ITA No.399/Del/2017, order dated 18.07.2018, wherein the Tribunal has observed as under :-*
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> > *"6. After hearing both the parties and perusing the entire material on record, we find that the only effective issue in the present appeal is against the addition of Rs.3,50,94,758/- made by A.O. and confirmed by Ld. CIT(A) on the ground that closing credit balances of 26 parties could not verified. The above addition included a sum of Rs. 5,50,000/- made by AO vide page 16 of the assessment order in the name of Erica Enterprises P Ltd. This difference is due to the cheque issued but not presented for payment. The A.O. has given the list of 26 parties under two heads i.e. one list of 20 suppliers aggregating to Rs. 2,78,20,495/- i.e. where notices were issued u/s 133(6) but were received back undelivered with the remarks that no such firm/left/ koi jankari nahin / not related / wrong address etc. given at page 3-4 of the assessment order and six suppliers aggregating to Rs. 67,24,263/- in respect of which though notices were served but confirmations were not received given at page 13-14 of the assessment order. We further find that Ld. CIT (A) has confirmed the addition vide discussion made at page 25-30 of the appeal order. These amounts added are the closing credit balances of the suppliers as on 31.3.2012 which is evident from PB 42-66. In our considered opinion, the sustaining of impugned addition is not justified due to the following reasons:-*

i). It has not been mentioned either by A.O or by Ld. CIT(A) as to under which section of the Income Tax Act, these closing credit balances appearing as on 31.03.2012 could be added. Therefore, non-mentioning the precise provision of law makes the impugned addition bad in law.
ii) If addition has been made u/s 68, such could not be added and that too of this much of amount as there was no sum received from these parties & that too during the year under appeal which is evident from the copies of account of these parties enclosed in the paper book at PB 42-66 which would show that either there were opening credit balances or were purchases.
iii). After perusing the PB Pg. 42-66 and PB Pg. 144, we find that purchases from these parties were aggregating to Rs 1,90,88,538/- and it has been held in the following judicial decisions that credit on account of purchases cannot be added u/s 68.

Addition under section 69 - Unexplained investment in purchases - Purchases made by assessee having been properly recorded in books of account and supported by authenticated purchase bills / vouchers for which payments were made through banking channels, and sales against these purchases are not doubted, addition under section 69 was not justified merely because suppliers could not be located and were not produced for examination - RAJESH P. SONI VS. ACIT 100 TTJ 892 (AHD 'D').

Section 68 cannot be applied for taxing unconfirmed sundry creditors - CIT vs. Vardhman Overseas Ltd (2012) 343 ITR 0408 (Del).

Income-Cash credit-Credit purchases-Provisions of s. 68 are not attracted to amounts representing purchases made on - credit-Tribunal- has recorded a categorical finding of fact based on appreciation of materials and evidence on record that the AO has accepted the purchases, sales as also the trading result disclosed by the assessee-It has also recorded a finding that the two amounts in question represented the purchases made by the assessee on credit-Therefore, addition of said amounts could not be made under s. 68 (COMMISSIONER OF INCOME TAX vs. PANCHAM DASS JAIN 74 CCH 0623 (All HC) Income-Cash credit-Credit purchases-Provisions of s. 68 are not attracted to amounts representing purchases made on credit -Astt. CIT vs. Har Singar Gutkha (P) Ltd. 9 DTR 604(Lucknow) Construction business-Trade purchases-Assessing Officer rejecting books while deciding purchase transactions not genuine but relying on return accepting profit-Assessing Officer ought to have proceeded under section 144-Addition under section 68 not justified-Income-tax Act, 1961, ss. 68, 144, 14S(3)-Amitabh Construction P. Ltd. vs. Addl. CIT 335 ITR 523 Glharkltand) (PARA 11-15 OF THE DECISION) Income from undisclosed sources-Addition under s. 69C-Purchases not verifiable-Alleged suppliers did not

appear before the AO in response to summons issued under s. 131 despite repeated opportunities-AO treated the purchases from the said parties as non-genuine and made addition of that amount under s. 69C and also applied proviso to s. 69C-Not justified- Once sales were made by the assessee obviously purchases were made- Therefore, purchases could not be treated as unexplained expenditure and addition thereof could not be made under s. 69C or by invoking proviso to s. 69C - Nisraj Real Estate & Exports (P)) Ltd. vs. Asstt. CIT 31 DTR 456(JP 'A') CASH CREDIT-Failure by creditors to participate in inquiry and furnish accounts-Does not mean that creditors lacked identity-No material to show that amounts advanced by creditors in reality represented money belonging to assessee-Sums cannot be treated as cash credits-Income-tax Act, 1961-CIT v. CHANDELA TRADING CO. P. LTD. 372 ITR 68 (Cal) Income from undisclosed sources-Addition-Alleged bogus purchases-AO was not justified in making the disallowance of purchases made by the assessee merely due to non-filing of confirmation from suppliers especially when assessee has filed certificate from the bank indicating the facts that cheques issued by it were cleared and no defect in the books of account was pointed out by AO-YFC Projects (P) Ltd. vs. Dy. CIT 46 DTR 496 (Del. 'I')

iv). We note that Opening balances amounting to Rs. 1,60,19,598/- (PB

144) (PB 42-66) which is evident from copies of account of these parties enclosed in the paper book at PB 42-66 is not justified on the ground that when assessee has not claimed any expense to that extent during the year under appeal, where is the question of making disallowance of such amount?

v). If addition has been mentioned u/s 41(1), ingredients of section 41(1), the burden of proof which is resting on revenue in view of the following judicial decisions has not been discharged. 6.1 There is no evidence that the liability has ceased to exist and that too in the year under appeal. The very fact these amounts are being shown as payable in the balance sheet of the assessee go to establish that there was no cessation of the liability as held in the following judicial decisions: - 6.2 Impugned liabilities are very much payable by the assessee as and when demanded and unless it is demanded, these are bound to be shown as outstanding. The very fact that these liabilities are appearing in the balance sheet is a strong acknowledgement of the debts payable by the assessee as has recently been held in the case of CIT vs Tamilnadu Warehousing Corporation 292 ITR 310(Mad). It has also been held in the case of Ambica Mills Ltd vs CIT 54 ITR 167 (Guj) that liability shown in the balance sheet is a clear case of acknowledging the liability and such liability cannot be treated to have ceased so as to attract section 41(1). That being so, where is the question of holding the said liabilities as ceased to exist, more so when assessee herself is acknowledging the liabilities to be paid? How can a third party that too a quasi - judicial authority hold in the absence of any

material that the liability is not payable by the assessee? Therefore, the addition made on the basis of the presumption does not have either factual or legal lags to stand. Reliance is also placed on the decision of Sita Devi Juneja 325 ITR 593(P&H). 6.3 It is settled law by umpteen number of decisions including the decision of the apex court in the case of Sugauli Sugar Works vs CIT 236 ITR 518(SC) that the cessation of the liability can be done not by the unilateral act but it can certainly be so by the bilateral act. So long as the appellant is recognizing her liability to pay to these creditors, where is the question of a quasi judicial authority to intervene & to say on behalf of sundry creditors or on behalf of the appellant that amount is not payable by the assessee? Here there is not even unilateral act, let alone the bilateral act, Therefore also, action of AO in holding the liabilities ceased to exist may please be reversed.

6.4 Even in law, the addition is not sustainable for more than one reason. Section 41(1) of the Act is a deeming fiction according to which an amount which does not have any trace of income is treated as income liable to suffer the brunt of tax. Therefore, as per the established canons of law, the burden to prove that a particular amount falls within the four corners of section 41(1) is on the shoulder of the Assessing Officer without which the addition cannot be made and if made is liable to be deleted. 6.5 The first pre-requisite for the applicability of section 41(1) is there must be a trading liability in respect of which the deduction has been claimed and allowed and burden to prove the twin conditions to the effect of the above facts, it goes without saying, is on revenue. There is not even an iota of whisper as to whether the impugned creditors were in respect of trading liability for which any deduction was ever claimed and allowed and if allowed, in which year was it allowed so on so forth. This is evident from a plain reading of the assessment order. Therefore, Ld. A.O. miserably failed to discharge the said burden in view of the following decisions and therefore this addition is liable to be deleted on this Short ground alone. There could very well be the possibility of the loan creditors or advances from the business constituents under the head of sundry creditors for which there could never be any claim of deduction having been allowed. 6.6 The A.O. has not established with evidence that the liability in respect of the above outstanding balances has ceased to exist. AO has gone on presumption and that too by placing the burden wrongly on the shoulders of the assessee. Section 41(1) does not envisage any such presumption of cessation and fix the incidence of tax thereon. 6.7 In the absence of any material having been brought on record to establish that the deduction was claimed or credit balance has been remitted, addition cannot be made u/s 41 (1) in view of the following decisions:

• Steel and General Mills Co. Ltd vs CIT 96 ITR 438(Del) • CIT vs Nathubhai Desha Bhai 130 ITR 238 (MP) • Liquidator, Mysore Agencies P Ltd vs CIT 114 ITR 853(Karn) • K.V. Moosa Koya & Co vs CIT 175 ITR 120,124(Ker) • CIT vs Pranlal P Doshi 201 ITR

756(Guj) 6.8 The third burden which was on A.O. was to establish that cessation if at all has happened, has happened in the year under appeal. After all, liability to tax can be fixed in the year to which it pertains and to no other year. Liability to tax any ceased liability in a particular year does not depend on the action of A.O. in selecting a case in scrutiny of that year. Merely because A.O. chose to enquire about the creditors in this year and if assessee fails to establish the existence of the liability in this year (even if it is so assumed) then also it cannot be said that the liability ceased to exist only in this year and not before. Nobody can be permitted to fix the year of taxability by a conscious design or omission, be he an assessee or an Assessing Officer. Therefore, viewed from any angle, the addition made by A.O. is liable to be deleted.

6.9 Moreover, sales made by the assessee have been accepted and also the purchase have been accepted by the sales tax authorities and so much so purchase input tax credit has been given as is evident from sales tax returns at PB 18-41 and sales tax assessment order at PB 135. 6.10 Even assuming that purchase could not be got verified, the fact that the sales have been accepted such sales obviously could not have been made without purchases. Therefore, in such situation G.P. Rate of the earlier years can act as a guide as held in judicial decisions including 355 ITR 290 (Guj) PB 17 is the copy of G.P. chart of various years. 6.11 We note that PB 136-143 is the copy of profit and loss account and trading account of earlier years together with assessment orders u/s 143(3) in which G.P. at the rate of 3.52%,4.13%, 2.99%, 2.~9%, 2.60%,2:21 %, 1.88% for Financial years 2007-08, 2008-09, 2009-10, 2010-11, 2012- 13, 2013-14, 2014-15 respectively has been accepted (PB 17). 6.12. Without prejudice to above, the assessee's sale was Rs. 6.21 Crores as is evident form profit and loss account enclosed at PB 13 and assessed income is at Rs. 3.54 Crores as is evident from the last page of the assessment order which would constitute 56% of the sale which is impossible and against all norms.

7. In view of above discussions, it is clear that the transactions were not bogus and therefore, the case laws relied upon by the Ld. DR are not applicable in this case. As far as case law relied upon by the Ld. CIT(A) as well as relied by the Ld. DR during the hearing i.e. La Medica 250 ITR 575(Del), we note that Hon'ble High Court has specifically noted in this decision that this was not the case of the assessee at any stage prior to the Hon'ble High Court whereas in this case, this was the plea taken by assessee before Ld. CIT(A) that if sale has been accepted, purchases must have been made. How can there be sale without purchases? Hence this decision does not apply.

8. In the background of the aforesaid discussions and respectfully following the aforesaid decisions, we are of the opinion that the Authorities below are not justified in making / sustaining the addition in dispute. Accordingly, the total addition of

> *Rs.3,50,94,758/- made by the AO and confirmed by the Ld. CIT(A) is hereby deleted.*
>
> *On careful perusal of the above observations of the Tribunal, we find that the issue involved in the present case of the assessee is squarely applicable to it. Respectfully following the same, we delete the addition made by the AO and confirmed by the CIT(A) on account of unexplained sundry creditors. Thus, ground No.2 of appeal of the assessee is allowed.*

13. Respectfully following the above decision of the coordinate bench of the Tribunal, we delete the addition made by the AO and allow the ground No.9 raised by the assessee in the appeal for A.Y.2008-2009.

14. Thus, the appeal of the assessee for A.Y.2008-2009 in ITA No.01/CTK/2017 is partly allowed.

ITA No.02/CTK/2017 (AY : 2009-2010)

15. In this appeal, the facts are remained unchanged as stated above in the preceding assessment year i.e. A.Y.2008-2009, except different in figures.

16. Ground Nos.1 to 7 have been dismissed as not pressed. Ground No.10 is general in nature. Now, the grounds remained in ground No.8 & 9 to be decided in the following paragraphs.

17. With regard to ground No.8, at the outset of hearing, ld. AR submitted that the books of accounts have been impounded by the survey team but till date they have not released the books of accounts, therefore, the assessee could not represent properly the case before the AO. Accordingly, he requested before the Bench for sending back to

the file of AO for re-adjudication of the case and he also drew attention at page No.3 of the CIT(A) order in which the CIT(A) has clearly mentioned as under :-

> *"Managing Director of the company has duly signed in each page of inventories of account books, loose papers, computers, laptops etc. found and impounded from the survey premises."*

18. On the other hand, ld. DR relied on the order of authorities below and submitted that the assessee never made any request for release of books and accounts, therefore, he objected for sending back to the file of AO for re-adjudication.

19. Considering the prayer of the assessee and in the interest of justice, we restore this issue to the file of AO for fresh adjudication considering the submissions of the assessee, after providing reasonable opportunity of hearing to the assessee. The assessee is also directed to appear before the AO on or before 23rd March, 2021, positively for early disposal of the case. Accordingly, ground No.8 is allowed for statistical purposes.

20. With regard to ground No.9, we find that this issue has already been decided by us while considering the appeal of the assessee for A.Y.2008-2009 in ITA No.01/CTK/2017 in para 12 above, wherein we have followed the decision of coordinate bench of the Tribunal in the case of Lycos India Limited, ITA No.02/CTK/2018, order dated 01.09.2020 and deleted the addition made by the AO. Accordingly, this

ground raised by the assessee in the appeal for A.Y.2009-2010 being similar to the ground raised by the assessee in the appeal for A.Y.2008-2009 in ground No.9, therefore, our observations made in the said appeal shall apply *mutatis mutandis* to this ground also. Thus, ground No.9 in the appeal of the assessee for A.Y.2009-2010 is allowed. Consequently, the appeal of the assessee for A.Y.2009-2010 is partly allowed for statistical purposes.

21. In the result, the appeal of the assessee i.e. ITA No.01/CTK/2017 is partly allowed and ITA No.02/CTK/2017 is partly allowed for statistical purposes.

Order pronounced in the open court on 04/03/ 2021.

Sd/-	**Sd/-**
(C.M.GARG)	**(L.P.SAHU)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

कटक Cuttack; दिनांक Dated 04/03/2021

Prakash Kumar Mishra, Sr.P.S.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant-
   Srabani Construction (P) Ltd.,
   Plot No.A/16, Nilakantha Nagar,
   Nayapalli, Bhubaneswar
2. प्रत्यर्थी / The Respondent-
   DCIT, Circle-2(1), Bhubaneswar
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कटक** / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

(Senior Private Secretary)
आयकर अपीलीय अधिकरण, कटक/ITAT, Cuttack