**IN THE INCOME TAX APPELLATE TRIBUNAL**
**BENCHES 'F' MUMBAI**

**ITA No.6455/Mum/2010**
**Assessment Year 2007-08**

**VARDHAMAN AND HIRANANDANI DEVELOPERS**
**514, DALAMAN TOWERS, 214, FPJ MARG**
**NARIMAN POINT MUMBAI-400021**
**PAN NO:AAAFV2059E**

**Vs**

**INCOME TAX OFFICER**
**WARD 12(3)(4), MUMBAI**

**S V Mehrotra, AM and Vijay Pal Rao, JM**

**Dated: February 28, 2011**

**Appellant Rep by:** Shri Chetan A Karia
**Respondent Rep by:** Smt Ashima Gupta

**ORDER**

**Per: Vijay Pal Rao:**

This appeal by the assessee is directed against the order dated 23.07.2010 of the CIT(A) for the assessment year 2007-08.

2. The assessee has raised the following effective grounds in this appeal :

*"1. the ld. CIT(A) erred in confirming addition of Rs.1,78,74,364/ - u/s 41/ (1)/28(iv)*

*2. without prejudice, the learned CIT(A) erred in confirming the assessment of he said amount I AY 2007-08."*

3. During the course of assessment proceedings, the AO found that the assessee has shown to have issued cheques by way of book entries from 11th March 1998 till 31st March, 2007 of Rs.1.61 crores which has not been encashed. The assessing officer also found that the same relates to payments for various creditors which has been wiped off from its books and has been shown as overdraft from Oriental Bank of Commerce. He has also found that in many cases even the names of parties were not mentioned. Therefore, the AO was of the view that the correct nature is of discharged liabilities and the assessee has merely passed book entries to substantiate that the discharge was by way of repayment of the credit balances. The AO found that the said treatment is clearly in the nature of treatment specified in Explanation 1 to Section 41(1) regarding entries which can be treated as discharges of liability by unilateral Act of writing off such liabilities in its books.

4. The AO also observed that there was substantial credits outstanding in the books of assessee for the last 8-10 years, which are reproduced below:

| Sr.No. | Name of the party | Amount |
|---|---|---|
| 1 | Kanchan M Bhora | Rs.77,302 |
| 2 | Meena D Pahalajani | Rs.21,937 |
| 3 | Metal craft | Rs.71,400 |
| 4 | Om transport co. | Rs.1,166 |
| 5 | Pranav const. equipment p ltd | Rs.1,98,485 |
| 6 | Prima ply and laminatesc[ | Rs.3,88,529 |
| 7 | R S stone supply com. | Rs.1,869 |
| 8 | Rajashree cement | Rs.500 |
| 9 | Rupal Transport | Rs.1,193 |
| 10 | Shree ram enterprises | Rs.4,980 |
| 11 | Shree ramdev enterprises | Rs.10,319 |
| 12 | Soils and foundation engineers | Rs.11,889 |
| 13 | Stresscrete India ltd | Rs.47,500 |
| 14 | Suraj traders | Rs.3,594 |
| 15 | Yadav electric stores | Rs.1,273 |
| 16 | Rajendrakumar H Jain | Rs.77,302 |
| 17 | Subashchand Jain | Rs.77,302 |
| 18 | Gujarat bldg matgerials p ltd | Rs.13,326 |
| 19 | J K Plumbing and sanitation | Rs.5,71,026 |
| 20 | Hemand J Zaveri | Rs.2,31,095 |
| 21 | J B Decora | Rs.7,342 |
| 22 | Other expenses | Rs.92,83,817 |
|  | Total | Rs.1,10,03,146 |

5. The AO called upon the assessee to produce the addresses of the following parties:

1. Pranav const. equipment p ltd

2. Meena D Pahalajani

3. Kanchan M Bhora

4. Rajendrakumar H Jain

5. Subashchand Jain

6. Hemand J Zaveri

6. Again the notice u/s 133(6) was issued and the notice Stresscrete India ltd J K Plumbing and sanitation could not be served due to incorrect address. In reply to the notice, some parties stated that there is no balance outstanding as per their records.

7. In reply to the show cause notice the assessee submitted before the AO that it had made certain purchase from Prima Ply and Laminates and J K Plumbing and Sanitation. The assessee also submitted that the project under taken by the firm is under construction and all the expenses incurred till date are debited to work-in-progress (WIP) account and till date no deduction has been claimed in respect of any of the expenses. The assessee submitted that as per the provisions of section 41(1) the addition to income has to be made only if any deduction or allowance has been claimed in any previous year and therefore if any credit balances are outstanding for more than 8 to 10 years the same can be reduced from work in progress and in no way be considered as income u/s 41(1) of the IT Act .

8. The AO was of the view that the method of accounting followed by the assessee is merely for recognition of profit and is an allowable method for project lasting over many years due to unpredictability of the extent of profit especially at the stage of commencement of the project.

9. The AO did not accept the explanation of the assessee and held that the discharged liability of Rs.1,78,74,364/ - consisting of discharge of liability unilaterally effected by the assessee by book entries for issue of cheques to the extent of Rs.1,60,55,035/ - and the creditors outstanding for more than 8 to 10 years of Rs.18,19,329/- (after excluding Rs.92.84 lakhs being interest on loan to HDFC) is taxable under 41(1)/28(iv) on account of discharge of liability or alternatively constituting benefit accrued on account of conducting of the business

10. On appeal, the CIT(A) confirmed the addition made by the AO vide impugned order

11. Before us, the learned AR submitted that all expenses incurred till date are debited to WIP and accountant no deduction has been claimed, thus, no addition can be made u/s 41(1. The learned AR submitted that the AO has observed that the method of accounting followed in the project completion method is only for reorganization of revenue at the end of the project. He submitted that the WIP is prepaid for each year and filed with the return and such work in progress indicates all the expenses born in that year. The learned AR submitted that the income is not recognizable as on the date of the end of the relevant financial years and the expenses have not been given effect to determining profit. The learned AR submitted that for the purpose of section 41(1); the criteria that the allowance or deduction has been made is not fulfilled. Alternatively the learned AR submitted that the addition cannot be taxed in the assessment year under consideration because the payments shown by the assessee through cheques were during the period from 1998-99 to 2006-07.

12. On the other hand, the learned DR has submitted that the assessee has shown in the books of accounts the payment to the creditors whereas no such payments was made by the assessee, therefore, the assessee has written off credits from the books of account and the same represents income being part of the trading account of the

assessee. It is a benefit to the assessee to the extent of the amount which was shown as liability to the sundry creditors against the supply of raw material consumed in the construction of the project on the building which has shown WIP. Thus, the learned DR submitted that even if the assessee has not recognized any income from the project, the liability which is no more exists certainly a gain in the trading account of the assessee and liable to the tax under section 41(1)/28(iv). He has relied upon the orders of the lower authorities. He has relied upon the decision of the hon. Jurisdictional High Court in the case of *Solid Containers ltd V/s Dy CIT (308 ITR 417)***..**

13. We have considered the rival contentions as well as the decision of the Hon. Jurisdictional High Court in the case of *Solid Containers ltd V/s Dy CIT (308 ITR 417.* It is undisputed fact that the assessee has shown the payment by issuing cheques towards the discharge of liability representing the trade creditors. These payments were for purchase of raw material consumed by the assessee in the construction of project which is not completed and therefore the assessee has not recognized any income from the said projects. The assessee has been showing the entire cost of the project as WIP. The main contention of the assessee is that even if there is remission of liability the same cannot be taxed as income but at the most may be reduced from the cost of the WIP. We do not agree with the contention of the learned AR that the income due to remission of liability can be recognized only when the project is completed. The assessee has not disputed the remission of liabilities towards the credit balances for material consumed in the construction of the project. The assessee has not straight way written off the liability but has indirectly wiped out by way of entries in the books of account by issuing the cheques which were not encashed. Thus, the real effect of exercise carried out by the aseseee for making the entries in the books of account of discharging of the liability without actual payment would be the remission of the liability. Undispsutedly, the liability was for the construction of the project which has shown as stockin- trade/WIP, therefore, the remission of the same has become the income of the assessee being part of the trading activity. The Hon'ble Jurisdictional High Court in the case of Solid Containers ltd V/s Dy CIT (supra) relied upon by the DR has observed as under :

*"3. It is worthwhile to refer to the observation of the apex court in T V Sundaram Iyangar and Sons ltd (1996) 222 ITR 344.*

*22. The principle laid down by Atkinson J applies in full force to the facts of this case, if a common sense view of the matter is taken the assessee, because of the trading operation, had become richer by the amount which it transferred to its profit and loss account. The moneys had arisen out of ordinary trading transactions. Al though the amounts received originally were not of income nature, the amounts remained with the assessee for a long period unclaimed by the trade parties. By lapse of time, the claim of the deposit became time barred and the amount attained a totally different quality. It became a definite trade surplus Atkinson. J Pointed out that in Tattersall's case (1939) 7 ITR 316 (CA) no trading asset was created. Mere change of method of bookkeeping had taken place. But where a new asset came into being automatically by operation of law, common sense demanded that the amount should be entered in the profit and loss account for the year and be treated as taxable income. In other words, the principle appears to be that if an amount is received in course of a trading transaction, even though it is not taxable in the year of receipt as being of revenue character, the amount changes its character when the amount becomes the assessee's own money because of limitation or by any other statutory or contractual*

*right. When such a thing happens, common sense demands that the amount should be treated as income.*

*23. In the present case, the money was received by the assessee in the course of carrying on his business. Al though it was treated as deposit and was of capital nature at the point of time it was received, by efflux of time the money has become the assessee's own money. What remains after adjustment of the deposits has not been claimed by the customers. The claims of the customers have become barred by limitation. The assessee itself has treated the money as its own money and taken the amount to its profit and loss account. There is no explanation from the assessee why the surplus money was taken to its profit and loss account even if it was somebody else's money. In fact, as Atkkinson. J Pointed out that what the assessee did was the commonsense way of dealing with the amounts. "*

*4. The present appellant can hardly derive any advantage from the case of Mahindra and Mahindra Ltd V/s CIT (2003) 261 ITR 501 (Bom). As in that case a clear finding was recorded that the assessee continued to pay interest at the rate of 6% for a period of 10 years and the agreement for purchase of tooling was entered into much prior to the approval of loan arrangement given by the RBI. Therefore, the loan agreement, in is entirely, was not obliterated by such waiver. Secondly, the purchase consideration related to capital assets. The tooling were in the nature of dies and the assessee was a manufacturer of heavy vehicles. The import was that of plant and machinery and the waiver could not constitute business. The fact of the present case are entirely different inasmuch as it was a loan taken for trading activity and ultimately, upon waiver the amount was retained in business by the assessee. Thus, the principle stated by the Supreme Court in the case of T V Sundaram Iyengar and Sons ltd (1996) 222 ITR 344 would be squarely applicable to the facts of the present case. The amount which initially did not fall within the scope of the provisions rendering it liable to tax subsequently had become the assessee's income being part of the trading of the assessee. Similar view was also taken by a Bench of the Madras High Court in the case of CIT V. Aries advertising P Ltd (2002) 255 ITR 510. The court took the view that the assessee because of trading operation became richer by the amount which had been transferred and/or retained in the profit and loss account of the assessee.*

*5. In view of the above settled position of law and the facts of the present case, we are of the considered view that no question of law much less substantial question of law arises for consideration in the present appeal. Appeal dismissed in limine"*

14. In view of the decision of the Hon. Jurisdictional high Court (supra), we are of the view that once the liability in the trading account undisputedly ceases to exist would be the income of the assessee and has no nexus with the recognition of the income from the project in question for the purpose of the time of taxing the same.

15 As regards the contention of the learned AR of the assessee that the remission of the liability has not accrued entirely during the year under consideration but during the long span of time, therefore, the same cannot be taxed in the assessment year under consideration, we find that the remission has been admitted by the assessee only in the year under consideration and not in the earlier years. The assessee was making the entries in the books of account right from the beginning but only in the year under consideration in which the issue arises and it was considered as cessation of liability due to afflux of time as well as the assessee has already accepted the

non-existence of the trading liability. When the assessee by way of artificial entries showing the payments to creditor and corresponding entry for overdraft without coming out with clean hands then the stand taken by the assessee has no substance. Therefore, we do not find any merit in the alternative contention of the learned AR. In view of the above discussion as well as facts and the circumstances of the case we find no error or illegality in the order of the learned CIT(A).

16. In the result, appeal of the assessee stands dismissed.

(Order pronounced in the open court on 28.2.2011)