

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH “E”, MUMBAI**

**BEFORE SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER AND
SHRI SANJAY GARG, JUDICIAL MEMBER**

**ITA No.7012/M/10
Assessment Year:2007-08**

Income Tax Department, O/o the ACIT 25(2), C-11, 1 st Floor, Pratyakshkar Bhavan, Bandra (E) Mumbai – 400 051	Vs.	Shri Shailesh D. Shah, B-11, 1101, Serinity Complex, Behind Oshiwara Police Station, Andheri (W), Mumbai – 400 052 PAN: AAHPS4059C
(Appellant)		(Respondent)

Assessee by : Shri Yogesh A. Thar
Revenue by : Shri Pitambar Das

Date of Hearing : 22.11.13
Date of Pronouncement : 11.12.13

ORDER

Per Sanjay Garg, Judicial Member:

The present appeal has been filed by the Revenue against the order of the CIT(A) dated 16.07.10 relevant to assessment year 2007-08. The Revenue has taken following grounds of appeal:

- “(i) *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the addition u/s. 41(1) of Rs.86,25,651/- without appreciating the fact that the assessee failed to prove the genuineness of the liability.*
- (ii) *On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition u/s. 41(1) of Rs.86,25,651/- without giving an opportunity to the A.O. for further verification.*

(iii) The appellant prays that the order of the ld. CIT(A) on the above grounds to be set aside and that of the A.O. be restored.”

2. Brief facts of the case are that the assessee is an individual engaged in the business of civil construction and labour contractor under the name & style of M/s. Engarc Construction. The assessee filed his return of income for the relevant year admitting total income of Rs.16,76,266/-. However, the Assessing Officer (herein further referred to as AO) observed that the assessee's balance sheet as on 31.03.2007 showed an amount of Rs.1,89,03,822/- as sundry creditors and creditors for expenses. On being called for the grouping of the sundry creditors, the assessee filed the details wherein AO found that out of the total creditors of Rs.1,89,03,822/- an amount of Rs.86,25,651/- was shown as outstanding labour charges that had remained unpaid by the assessee for more than three years. Before the AO, the assessee submitted that earlier the assessee was a partner in the M/s. Engarc Construction till 31.3.2006. During the relevant year, the firm was dissolved and the assessee took over the said firm as its proprietor. There was an outstanding liability of labour charges payable in the balance sheet of the firm amounting to Rs.91,25,901/-. There was a dispute between the partners of the firm regarding payment of outstanding liability and as the dispute was not settled, hence the labour charges were not paid. However, the AO did not accept the contention of the assessee and observed that liability of labour charges outstanding for more than three years was something abnormal as generally the labour charges do not remain outstanding for such a long period. He further observed that despite being asked for, the assessee had not filed the addresses and labour bills of such labourers. The assessee had failed to prove the genuineness of such liability and the same had ceased to exist. He therefore

added the same into the income of the assessee under section 41(1) of the Income Tax Act.

3. Before the Id. CIT(A) the assessee submitted that as per the dissolution deed, the assessee was to take over only the assets of the firm and not its liabilities, hence, the assessee had disowned himself of the labour liability of Rs.86,25,651/- and there was no question of remission of the same under section 41(1). However, the Id. CIT(A) observed that as per the dissolution deed not only the assets of the firm but also its liabilities were intended to be taken over by the assessee. Even the assessee after the take-over had shown the liability in its books of account; hence, the stand of disowning of the same could not be accepted as per records.

4. However, he further observed that unless the AO would have proved that there was a remission or cessation of liability during the assessment year under consideration, the same could not have been taxed under section 41(1) merely because the liability was outstanding for more than three years or that the assessee was not able to furnish confirmation. There was neither remission nor cessation of liability during the assessment year under consideration. He therefore deleted the addition made by the AO under this head.

5. We have considered the submissions of the Id. representatives of both the parties and have also gone through the records.

6. The Id. D.R. before us has relied upon a recent authority of the Hon'ble Delhi High Court styled as "CIT vs. Chipsoft Technology (P) Ltd." 210 Taxman 173 (Del), wherein it has been held that in the case of an employer, omission to pay the dues/liability to employee over a period of time and the resultant benefit derived by the employer/assessee would qualify as a cessation of liability,

albeit by operation of law and that a debtor or an employer, holding on to unpaid dues, should not be given the benefit of his showing the amount as a liability, even though he would be entitled in law to say that a claim for its recovery is time barred, and continue to enjoy the same. The relevant para of the above said judgment of the Hon'ble Delhi High court is reproduced as under:

“9. Two aspects are to be noticed in this context. The first is that the view that liability does not cease as long as it is reflected in the books, and that mere lapse of time given to the creditor or the workman, to recover the amounts due, does not efface the liability, though it bars the remedy. This view, with respect is an abstract and theoretical one, and does not ground itself in reality. Interpretation of laws, particularly fiscal and commercial legislation is increasingly based on pragmatic realities, which means that even though the law, permits the debtor to take all defences, and successfully avoid liability, for abstract juristic purposes, he would be shown as a debtor. In other words, would be illogical to say that a debtor or an employer, holding on to unpaid dues, should be given the benefit of his showing the amount as a liability, even though he would be entitled in law to say that a claim for its recovery is time barred, and continue to enjoy the amount. The second reason why the assessee's contention is unacceptable is because with effect from 1-4-1997 by virtue of Finance Act, 1996 (No.2), an Explanation was added to Section 41 which spells out that “loss or expenditure or some benefit in respect of any such trading liability by way of remission or cessation thereof” shall include the remission or cessation of any liability by an unilateral act by the first mentioned person under clause”. The expression “include” is significant; Parliament did not use the expression “means”. Necessarily, even omission to pay, over a period of time, and the resultant benefit derived by the employer/assessee would therefore qualify as a cessation of liability, albeit by operation of law.”

7. On the other hand the Id. A.R. of the assessee has submitted before us that the assessee had not written off the accounts of the sundry creditors into profit and loss account. The liability had regularly been shown in the balance sheet. The assessee's liability to the creditors thus subsisted and had not ceased even. The limitation act bars the remedy to recover through legal course of action but does not extinguish the debt. He has pressed that the amount is not thus assessable u/s. 41(1) of the Income Tax Act. He has strongly relied upon

the authority of the Hon'ble Delhi High Court styled as "CIT vs. Shri Vardhaman Overseas Ltd." (2012) 343 ITR 408 (Del). Apart from the said authority, to stress this point, he has also relied upon the following decisions:

1. "*CIT v. Bharat Iron & Steel Industries*" [(1993) 70 *Taxman* 353 (Guj.)]/[(1993) 199 ITR 67 (Guj.)]/ [(1992) 105 CTR 331 (Guj.)]
2. "*DSA Engineers (Bombay) v. ITO*" [2009] 30 SOT 31 (Mum.)(ITAT)
3. "*CIT v. Indian Rayon & Industries Ltd.*" 2010-(IT2)-GJX-0688-BOM
4. "*CIT v. J.K. Chemicals Ltd.*" [1996] 62 ITR 34 (Bom.)
5. "*CIT v. Sugauli Sugar Works (P.) Ltd.*" [1999] 102 *Taxman* 713 (SC)/[1999] 236 ITR 518 (SC)/[1999] 152 CTR 46 (SC)
6. "*Cit vs. Silver Cotton Mills Co. Ltd.*" 170CTR 377 (Guj)
7. "*CIT v. Miraa Processors (P) Ltd.*" (2012)22taxmann.com 120(Guj)

8. The facts of the case in hand reveal that the outstanding liability has been shown towards pending labour charges. It is a commonly known factor that labourer class, which is generally consists of economically weak/ poor persons, generally demands the payment for their labour work done immediately. It is very improbable that a labourer would not claim his remuneration for the labour work done by him for more than three years. When called for by the AO to produce the records relating to name, addresses and bills of the labour etc; the assessee failed to provide the same. The assessee just provided the names of alleged labourers which did not prove any identity of such persons. Even, as per the case of the assessee, the liability had been taken over by the assessee from the previous partnership firm. When no identity of alleged labourers is available with the assessee, then the possibility of subsequent payment of such amount to the alleged labourers does not arise at all. Even we have specifically asked the Id. A.R. that as to whether the

alleged labour charges have been paid now, to that the Id. A.R. showed his ignorance. However, subsequently a paper book was filed by the Id. A.R. which has been taken on record and the opportunity of hearing on the said documents has also been given to the Id. DR also. After going through the newly filed documents, it reveals that the assessee had no evidence of the payment of such labour charges even till date. The assessee vide affidavit letter dated 28.10.13 has deposed that in fact he had given a comprehensive power of attorney to his earlier partner Mr. Abdul Qadir to look into the affairs of his proprietary concern M/s. Engarc Contractors. The said Mr. Abdul Qadir has not provided him any accounts in connection with the assessee concern despite several reminders. However, during the financial year 2007-08 and financial year 2008-09, he had received an amount of Rs.80,70,000/- and Rs.7,00,000/- respectively from the proprietary concern of Mr. Abdul Qadir namely M/s. Engarc Contractors. After deducting the credit balance of Rs.77,80,629/- from Mr. Abdul Qadir, the remaining amount of Rs.2,89,371/- has been offered for tax by the assessee for the assessment year 2008-09 and full amount of Rs.7,00,000/- as taxable income for the assessment year 2009-10. Thereafter the assessee has not received any money from Mr. Abdul qadir and the assessee has reasons to believe that Mr. Abdul Qadir has paid of all the concerned creditors. This statement of the Mr. Shailesh D. Shah proprietor of the assessee concern in our view is not sufficient to hold that the assessee has paid of all the labour charges. Rather it supports the contention of the Revenue that the said amount has not been paid till date to any labourer and thus it is a case of cessation of liability. The explanation of the assessee that he had given a comprehensive power of attorney to his earlier partner and the said partner has not provided any accounts to him is of no help to the assessee. It is a matter between the assessee and his power of attorney and the assessee can

not escape from the burden to prove that the said liability has not ceased to exist. Even the nature of the liability i.e. labour charges outstanding for so many years themselves prove that neither there is any identity of any labourer nor there seems any probability of the assessee to pay any such amount to any such person at this stage. The assessee has just continued the entry of the same in his books of account without any intention to pay back the same. Even as observed above when the identity of any such labourer is not known the question of payment of such amount to such person does not arise.

9. As observed by the co-ordinate bench of the Tribunal in the case of “Yusuf R. Tanwar, vs. ITO” (ITA No.8408/Mum/2010) decided on 28.02.13 that the proposition of law laid down by the Hon’ble Delhi High Court in “Chipsoft Technology (P) Ltd.” (supra) is not contrary to that of laid down by the Hon’ble Delhi High Court in the case of “Shri Vardhaman Overseas Ltd.” (supra). The proposition of law laid down in “Chipsoft Technology (P) Ltd.” (supra) supplements but not supplants the proposition of law laid down by the Hon’ble Delhi High Court in “Shri Vardhaman Overseas Ltd.” (supra). When we read both the authorities in harmony with each other, then it can be observed that the assessee cannot be allowed to show an amount as a liability even though he has no intention to pay it back but to enjoy the same for unlimited period without being added to his income only on the excuse that he has not written off the same in his books of accounts. However, if the facts of the case establish that the liability has been genuinely shown by the assessee and his subsequent conduct shows that he has paid back the said credits and his intention was not to enjoy the amount for unlimited period without any intention to pay back the same, then it cannot be said to be a case of cessation of liability.

10. However, from the facts of the case it reveals that not only the existence of outstanding liability of labour charges for so many years is improbable in the normal course of business but the assessee has also failed to give any evidence regarding the genuineness of the creditors, identity of the creditors or any payment of the liability subsequently till date, despite specific query by us on this point. Under such circumstances it is held to be a case of cessation of liability. Accordingly, the appeal of the Revenue is hereby allowed and the action of the AO in adding the said labour charges into the income of the assessee is upheld.

11. In the result the appeal of the Revenue is allowed.

Order pronounced in the open court on 11.12.2013.

Sd/-
(D. Karunakara Rao)
ACCOUNTANT MEMBER

Sd/-
(Sanjay Garg)
JUDICIAL MEMBER

Mumbai, Dated: 11.12.2013.

* Kishore

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR "C" Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.