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, 1st 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

O R D E R

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 ld. 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 ld. 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 ld. representatives of both the parties and have also gone through the records.

6. The ld. 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 ld. 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 ld. A.R. that as to whether the

alleged labour charges have been paid now, to that the ld. A.R. showed his ignorance. However, subsequently a paper book was filed by the ld. A.R. which has been taken on record and the opportunity of hearing on the said documents has also been given to the ld. 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/-	**Sd/-**
(D. Karunakara Rao)	**(Sanjay Garg)**
ACCOUNTANT MEMBER	**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

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By Order

Dy/Asstt. Registrar, ITAT, Mumbai.

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "F", MUMBAI

BEFORE SHRI P M JAGTAP, ACCOUNTANT MEMBER
& SHRI SANJAY GARG, JUDICIAL MEMBER

ITA No.: 8408/Mum/2010
Assessment Year: 2007-08

Mr. Yusuf R Tanwar, Row House No.68, Sector 15, Koparkhairne, Navi Mumbai PAN. ABMPT7433R	Vs.	ITO 22(3)(4), Navi Mumbai
(Appellant)		(Respondent)

Appellant By : Shri Prakash Pandit
Respondent By : Shri O.P.Meena

Date of hearing : 22.01.2013
Date of pronouncement : 28.02.2013

<u>O R D E R</u>

<u>Per Sanjay Garg, JM :</u>

The present appeal has been preferred by the assessee against the order of the CIT(A) dated 14.10.2010, vide which he confirmed the additions of Rs.48,89,025 to the income of the assessee made by the Assessing Officer vide assessment order dated 27.11.2009 u/s. 143(3) of the Income Tax Act relevant to A.Y. 2007-08 holding the cessation of liability of sundry creditors, invoking provisions of section 41(1) of the Income Tax Act.

2. The brief facts of the case are that the assessee, an individual, was engaged in the business of civil contract, filed his return of income declaring the income at Rs.2,10,060. The Assessing Officer during the assessment proceedings found that the assessee had shown an amount of Rs.48,89,025.96 as current liabilities towards

sundry creditors. The Assessing Officer asked the assessee to give details of the said sundry creditors along with their name address and also confirmation of the same. The assessee failed to supply the requisite information and, hence, the Assessing Officer treated the said liabilities as income of the assessee and added this amount to the total income of the assessee. Aggrieved by the order of the Assessing Officer, the assessee filed appeal before the learned CIT(A). The learned CIT(A) also did not find any infirmity in the order of the Assessing Officer and, hence, confirmed the additions made by him. The assessee is thus in appeal before this Tribunal.

3. We have heard the learned representative of the parties and have also gone through the material on record. The Assessing Officer when called for the details such as the name, addresses and confirmations of the sundry creditors from the assessee, the assessee vide his letter dated 08.05.2009 claimed that all the credits pertain to the assessment year prior to A.Y. 2002-03 and that it would not be proper and prudent on the part of the assessee to give confirmation letters from the sundry creditors as by doing so, the period of limitation would start. The assessee also failed to provide the addresses and other details of the creditors. However, at the same time, the assessee claimed before the Assessing Officer that though the limitation period for claiming the amount by the creditor had expired, he had not extinguished the debt so as to prevent the creditors from enforcing the debts against the assessee. He further stressed that only the right to recovery had ceased but not the liability. Hence, he has rightly shown the amount of Rs.48,89,025 as current liability on account of sundry creditors. The Assessing Officer after considering the submissions of the assessee in para 5.4 i of the assessment order has observed as under:

> *"i. After repetitive opportunities during the course of assessment proceedings, the representative for the assessee vide order sheet noting dated 3.11.2009 submitted that the assessee is not able to provide addresses of sundry creditors. The assessee is claiming that these liabilities pertain to period prior to A Y 2002-03 and are due to expenses claimed by her at that time. The statute does not permit to assessee to claim certain business liabilities in its balance sheet ad, at the same, does not disclose details of these business liabilities in the*

name of limitation act or any other reason. The primary details were privileged knowledge of the assessee and therefore, the assessee had to prove that these trade liabilities were genuine and in existence and not settled in some other manner or by some other arrangement. In the decision of Kesoram Industries & Cotton Mills Ltd (1992) (196 ITR 845 (Cal) the hon'ble High court held that whether the liability of the assessee has been fully discharged is within special knowledge of the assessee. He has to prove that in fact the liability subsists. Where the conduct and surrounding circumstances demonstrate that the amount has been remitted or foregone or the sum has ceased to be claimable against the assessee it would be a clear case of remission or cessation of the liability of the assessee."

4. The authorized representative citing various authorities has submitted before us that the assessee has not written back the accounts of the sundry creditors into profit and loss account. The liability has regularly been shown in the balance sheet. The assessee's liability to the creditors thus subsists and has not ceased, whatever is ceased is the right of the creditors under law to recover the same being barred by limitation in view of the provisions of the Limitation Act 1963. 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 he has relied upon the following decisions:

"CIT vs. T V Sundaram Iyengar & Sons Ltd." 222 ITR 344 (SC)
"DCIT vs. Hotel Excelsior Ltd." 141 TTJ 248 (Del)
"ACIT Circle -1 vs. Samrat Rice Mills (P) Ltd." 54 SOT 1 (Del)
"ITO vs. Bhavesh Prints (P.) Ltd." 46 SOT 268 (Ahd)
"Kaps Advertising vs. ITO" 48 SOT 63 (Del)
"CCIT vs. Kesari Tea Co. Ltd." 254 ITR 434 (SC)
"CIT vs. Sugauli Sugar Works (P.) Ltd." 236 ITR 518 (SC)

5. On the other hand, the learned DR 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 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."

6. We may observe that one of the Hon'ble Judges of the High Court of Delhi was part of the Division Bench as in both the authorities i.e. " Shri Vardhaman Overseas Ltd." (supra), and "Chipsoft Technology (P.) Ltd." (supra). Under such circumstances, it cannot be said that both the authorities are contradictory to each other, rather the law laid down by the authority in the case of "Chipsoft Technology (P.) Ltd." (supra), supplements but not supplants the law laid down by the Hon'ble Delhi High Court in the case of "Shri Vardhaman Overseas Ltd." (supra). In the case of "Chipsoft Technology (P.) Ltd.", the Hon'ble High Court has categorically held that it 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 facts of the present case are also squarely covered by the law laid down by the Hon'ble Delhi High Court in the case of "Chipsoft Technology (P.) Ltd.",

(supra). In the case in hand also the assessee on one had is continuously for the last so many years showing the amount in question as his liability towards sundry creditors and at the same time when the Assessing Officer asked for the details of the creditors he refused to provide the same saying that it would amount to acknowledgement of the debt and the creditors may sue him for recovery of the amount. He even failed to provide the addresses of the creditors, prove the genuineness or the creditworthiness of the creditors. Under law, the assessee cannot be allowed to approbate and reprobate at the same time. On one hand he wants to avoid the liability to pay the tax saying that the amount is legally payable by him as a liability but on the other hand he does not want to pay the said amount to the creditors but enjoy the same without being added to his income. The assessee is blowing hot and cold in the same breath, which in our view is not permissible under law. So far as the authorities relied upon by the assessee are concerned, with due respect it is submitted that in those authorities, it was not established that the assessee had no intention to pay back the debts but in the case in hand, the assessee has refused to divulge the details of creditors because of his intention not to pay back the loan amount as was claimed by him in his reply to the Assessing Officer. Hence, the authorities relied upon by the assessee, as detailed above, are quite distinguishable on their own facts.

7. The case was heard on merits on 22nd Jan 2013 and the judgment was reserved. Now, the assessee vide letter dated 28th Jan 2013 has submitted a statement showing the details of sundry credits from the year 2000 to 2012. It has been further claimed that the amount which was outstanding at Rs.69,32,307 in the year 2000 has been reduced to Rs.19,32,372 at the end of the A.Y. 2012-13. Through this letter the assessee wants to bring into the knowledge of this Tribunal that the liability has not ceased, rather he has been repaying the amount to his creditors. The outstanding amount is now a sum of Rs.19,32,372 only against the amount of 48,89,025 relating to A.Y. 2007-08, which has been added by the Assessing Officer to his total income.

8. In view of the newly developed facts, it would be in the interest of justice to remand the issue back to the Assessing Officer for verifying the genuineness of repayment of loans as claimed by the assessee. We may observe that in the list submitted by the assessee, he has shown to have made certain payments during the A.Ys. 2009-10 and 2010-11. However, neither this fact was brought into the knowledge of the Assessing Officer before completion of the assessment on 27.11.2009 nor this plea or this fact of repayment was brought into the notice of the learned CIT(A) during the pendency of the appeal or till date of order on 14.10.2010. No such plea was taken by the assessee in the grounds of appeal before the Tribunal. It is only after the completion of the arguments that the assessee has come with a new fact that he has been regularly repaying the loan amount to the creditors as detailed in the list. This type of explanation given by the assessee at this stage seems to be suspicious. However, the interest of justice demands that this explanation, though suspicious, is required to be verified. If the assessee has really repaid the amount to the creditors then it will be injustice to him, if the amount is added to his income. Under such circumstances, we remand this case back to the file of the Assessing Officer for fresh assessment in accordance with law and with direction to scrutinize, verify and make necessary investigations regarding the genuineness of the assessee's claim of repayment to the sundry creditors

9. In the result, the appeal is partly allowed.

Order pronounced in the open court on this 28th day of February 2013.

Sd/-	Sd/-
(P. M. JAGTAP)	**(SANJAY GARG)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, Dt : 28th February, 2013

Copy forwarded to :

1. The Appellant
2. The Respondent
3. The C.I.T. concerned Mumbai
4. CIT (A) concerned Mumbai
5. The DR, "F" - Bench, ITAT, Mumbai

//True Copy//

BY ORDER

ASSISTANT REGISTRAR
ITAT, Mumbai Benches, Mumbai

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON: 16.07.2012
PRONOUNCED ON: 20.7.2012

\+ ITA 598/2011

CIT ..... Appellant
Through: Mr. Sanjeev Rajpal, Advocate.

versus

CHIPSOFT TECHNOLOGY PVT LTD. ..... Respondent
Through: Mr. Parag Chawla, Advocate.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT

% 1. The present appeal by the revenue is directed against a judgment of the Income Tax Appellate Tribunal (ITAT) dated 17-10-2101, in ITA 2108/Del/2010.

2. Admit. The following question of law arises for consideration:

"Did the Tribunal fall into error of law, in its impugned judgment in setting aside the disallowance of Rs. 32,28,724/- towards unpaid liability claimed in respect of salaries of the assesse for the assessment year 2006-07?"

With consent of counsel for parties the appeal was heard finally.

3. The brief facts of the case are that the assesse filed its return declaring nil income, on 31-11-2006. The Assessing Officer (AO) noticed that the assesse had shown unpaid liability to an extent of Rs. 38,51,893/- on account of its employees' dues. Of this, an amount of Rs. 6,23,000/- pertained to salary for the year 2005-06 and the balance pertained to the previous years; some extending to as far back in period as 2000-01. The AO called upon the assesse to furnish details and confirmation from the employees. The assesse furnished particulars and confirmation only in respect of 3 employees, out of 170 whose dues it claimed were outstanding. The assesse provided correspondence through e-mail with employees, without giving particulars such as address, etc of such employees. According to the assesse, it was struggling to survive due to a downturn in business. The AO was unconvinced with the explanation, and held that there was a cessation of the assesse's liability and that it had obtained benefit in respect of the said amounts; he invoked Section 41(1) of the Income Tax Act, and added the same to its assessable income. The assesse appealed to the CIT (A), who directed deletion of the amounts, holding that the liability was outstanding in its books and therefore, did not amount to cessation of liability. The revenue appealed to the ITAT, which endorsed the reasoning of the CIT (Appeals).

4. It is argued by Mr. Rajpal, that the ITAT fell into error in overlooking the fact that the amount due to 170 employees remained unchanged and static for about 6-7 years and no payment was made during the intervening period. Furthermore, the assesse did not reveal

that its employees were actively pursuing their claims, and had taken any steps at all to recover their dues. The assesse did not file any correspondence with its employees, to substantiate its argument; even in the assessment proceedings it was unable to furnish particulars about its employees. The liability therefore, had ceased. It was urged that even if it were assumed that at some point the liability existed, the lapse of time, and the resultant defences available to the assesse under the Limitation Act, justified the AO's inclusion of the said amounts, on the ground of cessation of liability. It was underlined that the ITAT erred in not holding that benefit had accrued to the assesse by virtue of the wage liability becoming time barred. The revenue relied on *Kesoram Industries and Cotton Mills Ltd. v. Commissioner of Income-tax* 196 ITR 845 (Cal).

5. It was argued by Mr. Parag Chawla, on behalf of the assesse that in the absence of any action altering the treatment of wage liability in the books, or any other such act, the revenue cannot arbitrarily treat what is a liability as a profit. It was submitted that in order to attract Section 41(1) there should be some overt objective act, or act of the creditor leading to the inference that the liability ceases in law. It was submitted that the employees or workmen can always approach the court, or authorities under the Industrial Dispute Act, and claim the unpaid wages. In such event, the assesse would be remediless.

6. Section 41 (1) of the Income Tax Act reads as follows:

"Profits chargeable to tax.

__41.__ (1) Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee (hereinafter referred to as the first-mentioned person) and subsequently during any previous year,—

(a) the first-mentioned person has obtained[38], whether in cash or in any other manner whatsoever, any amount in respect of such[38] loss or expenditure[38] or some benefit in respect of such trading liability by way of remission or cessation thereof[38], the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits and gains of business or profession and accordingly chargeable to income-tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not; or

(b) the successor in business has obtained[38], whether in cash or in any other manner whatsoever, any amount in respect of which loss or expenditure was incurred by the first-mentioned person or some benefit in respect of the trading liability referred to in clause (a) by way of remission or cessation thereof, the amount obtained by the successor in business or the value of benefit accruing to the successor in business shall be deemed to be profits and gains of the business or profession, and accordingly chargeable to income-tax as the income of that previous year.

[Explanation 1.—For the purposes of this sub-section, the expression "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 a unilateral act by the first mentioned person under clause (a) or the successor in business under clause (b) of that sub-section by way of writing off such liability in his accounts."

In *Kesoram* (supra), the Calcutta High Court held that the liability in such cases had to be added back:

> *"Whether the liability of the assessee has been fully discharged is within the special knowledge of the assessee. He has to prove that in fact the liability subsists. When the assessee itself comes to the conclusion that the amount in question would not be claimed by the concerned persons and, thereafter, it proceeds to forfeit such amount and does not take such amount to a reserve account but writes it back in the profit and loss account, the reasonable inference that will follow from these facts and circumstances and the conduct of the assessee is that the amount which was provided for was in fact not necessary and it was an excess provision. No longer was there any liability. It is always possible that a creditor, if he so chooses, may agree to accept a smaller amount in full discharge of the whole amount due to him. An employee, casual or regular, who is entitled to wages or salary, will not allow his claim to remain unsatisfied. If the employer does not pay, he can move the authorities under the Payment of Wages Act. In his own interest, he will not permit the employer to withhold the wages, if it is due to him. When an assessee has obtained a benefit of deduction of a trading liability, it is for the assessee to establish whether such trading liability has been fully discharged or not. This court has laid down in CIT v. Agarpara Co. Ltd. [1986] 158 ITR 78, that if there be any excess over the requirement of the assessee in respect of liability claimed and allowed, such liability must be deemed to have ceased. It has also been laid down that it may be inferred from the surrounding circumstances that there has been a cessation or remission of the liability of the assessee. It has also been laid down that if unclaimed bonus being a portion of the bonus allowed as deduction in computing the income of the assessee is carried forward from year to year and thereafter written back in the account and no tax is levied thereon, the assessee would be getting a benefit to which it was not entitled."*

The court in the above decision was concerned with a fact situation where the assesse had unilaterally altered the liability in its books. This aspect was sought to be highlighted as a point of distinction, by the assesse in this case, to say that here, no such change in situation had occurred and that the liability continued to be reflected in the books.

7. There is some authority in favour the assesse's position that there is neither remission nor cessation of its trading liability in such cases, since there is neither any unilateral act of the creditor amounting to remission nor any bilateral act of the parties resulting in the liability ceasing to exist in law, merely because the recovery of the same has become time-barred. (*J.K. Chemicals Ltd. v. CIT* [1966] 62 ITR 34 (Bom), *CIT v. Sadabhakti Prakashan Printing Press (P.) Ltd.* [1980] 125 ITR 326 (Bom), *CIT v. V.T. Kuttappu & Sons* [1974] 96 ITR 327 (Ker), *Liquidator, Mysore Agencies Pvt. Ltd. v. CIT* [1978] 114 ITR 853 (Kar), and *Bhagwat Prasad & Co. v. CIT* [1975] 99 ITR 111 (All). It was also held in those judgments that the mere fact that the assessee did not show the amount as his trading liability in his account books did not affect the consequence since such unilateral act of the assessee was neither remission nor cessation of his trading liability.

8. On the other hand, this Court has considered *Kesoram* (supra) which upholds a view that favours the revenue. A similar view was spelt out in *Commissioner of Income Tax v Agarpara Co. Ltd* 1986 158 ITR 78:

> *"26. Whether a trading liability that was once incurred ceases to exist for the purpose of Section 41(1) has to be decided in the light of the provisions of the Income-tax Act, 1961, and the statute, if any, governing such liability. The assessee who maintains his accounts on the mercantile basis would be*

entitled to a deduction in respect of bonus in the year in which a liability arises under the statute, or the employees' claim for bonus is admitted by the assessee or is settled by an agreement between the parties or is adjudicated upon by an award. Under Section 36(1)(ii) of the Income-tax Act, 1961, payment of bonus to the employees is an allowable deduction. Under the Payment of Bonus Act, 1965, liability to pay bonus has become a statutory obligation imposed upon the employer covered by the said Act. Under the Bonus Act bonus is payable within a period of eight months from the close of the accounting year unless there is a dispute regarding such payment, in which case it is payable within a month from the date of the award becoming enforceable. Contravention of any of the provisions of the Bonus Act or the Rules made thereunder is punishable with imprisonment for a term which may extend to six months or with fine which may extend to Rs. 1,000 or with both. As the liability for bonus became a statutory one, a provision made therefor or even where no provision is made, in the mercantile accounting, the amount payable is allowable if the same is in accordance with the law about the payment of bonus. Any provision over and above that payable under the Bonus Act shall not be allowable to the extent of such excess. It is not the case of the assessee before us that time to pay bonus was extended or any dispute as regards payment of bonus has been raised. The assessee has provided for bonus for its employees but a part of the bonus so provided for three several years remained unclaimed. Once bonus has been offered by the employer, but remains undrawn, it cannot be said that the liability subsists even after the expiry of the time prescribed by the statute, particularly when there is no dispute pending regarding the payment of bonus. In the context of such facts and circumstances, it may be inferred that unclaimed or unpaid bonus is an excess of the requirement of the assessee and, therefore, to that extent, in any event, the liability has ceased."

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 the 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 assesse'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 a 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/assesse would therefore qualify as a cessation of liability, albeit by operation of law.

10. The submission of the assesse that no period of limitation is provided for under the Industrial Disputes Act, as a result of which it is exposed to liability at any time, is insubstantial and unpersuasive.

This is because in *The Nedungadi Bank Ltd. vs K.P. Madhavankutty* AIR 2000 SC 839 the Supreme Court held that even though under the Act no period of limitation has been prescribed, a stale dispute one where the employee approaches the forum under the Act after an inordinate delay cannot be entertained and adjudicated.

11. In view of the foregoing reasons, the question of law is answered in the affirmative, in favour of the revenue, and against the assesse; consequently the orders of the Commissioner (Appeals) and the impugned order of the ITAT are hereby set aside. The order of the Assessing Officer is hereby restored. The appeal is allowed in the above terms without any order on costs.

S. RAVINDRA BHAT
(JUDGE)

R.V.EASWAR
(JUDGE)

JULY 20, 2012
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