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

BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI N.K. PRADHAN, HON'BLE ACCOUNTANT MEMBER

ITA NO.983/MUM/2016 (A.Y: 2011-12)

M/s. Flo Dyne Controls (India) Pvt. Ltd., C/o. Jayesh Sangharjka & Co LLP Charted Accountants Unit No. 405, Hind Rajasthan Centre, D.S. Phalke Road, Dadar (E) Mumbai – 400 014	*v.*	Income Tax Officer – 10(3)(1) {Now known as Income Tax Officer 15(1)(2)} Aayakar Bhavan, M.K. Road, Mumbai-400 020

PAN NO: AABCF 2339 M

(Appellant) **(Respondent)**

Assessee by	**:**	**Shri Ritika Agarwal**
Department by	**:**	**Ms. Pooja Swaroop**
Date of Hearing	**:**	**04.04.2018**
Date of Pronouncement	**:**	**15.06.2018**

O R D E R

PER C.N. PRASAD

1. This appeal is filed by the assessee against the order of the Learned Commissioner of Income Tax (Appeals)-24 Mumbai dated 31.12.2015 for the Assessment Year 2011-12.

2. Assessee though initially filed grounds along with Form No.36 elaborately, subsequently by letter dated 16.12.2017 filed concise grounds of appeal which reads as under: -

> *"1.1. Because, the Id. CIT(A) has erred in law and on facts in upholding the addition of ₹.75,82,302/- u/s 41(1) of the Act although the same remained payable to M/s. Camy Plant in the appellant's books.*
>
> *1.2. Because, the CIT(A) has erred in placing reliance upon a judicial authority which is completely distinct in facts.*
>
> *2. Because, the Id. CIT(A) has erred in law and on facts in upholding the disallowance of expenses of ₹.1,00,640/- although complete explanation in that regard was placed on record.*
>
> *3. Because, the Id. CIT(A) has erred in law and on facts in disallowing the expenses of ₹.25,38,533/- allowed as discount to one of its debtors which was in the nature of write off of debt since the debtor had gone into liquidation.*
>
> *4. Because, the Id. CIT(A) has erred in law and on facts in granting only partial relief in respect of the addition of ₹.21,56,984/- u/s 40(a)(i) of the Act by referring to AO for verification although all relevant material was already on record".*

3. In so far as Ground No. 1 &.2 i.e. the addition made u/s. 41(1) of the Act is concerned the Assessing Officer after going through the balance sheet of the assessee noticed that assessee has shown liability of ₹.75,82,362/- as payable to M/s. Camy Plant, the assessee was required to furnish the confirmations from the creditors and also required to explain as to why the same should not be treated as cessation of liability u/s. 41(1) of the Act. Assessee vide letter dated 01.03.2014 submitted that in its case the conditions u/s. 41(1) are not satisfied as there is no remission or cessation of liability during the year under consideration. Assessee relied on the decisions in the cases of CIT v. Miraa Processors (P.) Ltd., [208 Taxman 93 (Guj.)] and CIT *v. Nitin S. Garg* [208 Taxman 16 (Guj).].

However, the Assessing Officer treated the said amount of ₹.75,83,302/- shown as sundry credit in the balance sheet as cessation of liability u/s. 41(1) of the Act and taxed in the hands of the assessee observing that assessee has not submitted the confirmation from the creditor, genuineness of the transactions is not proved and the case law relied upon are distinguishable. Assessing Officer relied on the decision of the Hon'ble Supreme Court in the case of T.V. Sundaram Iyengar and Sons Ltd. [222 ITR 344] and concluded that there is a cessation of liability and accordingly he made the addition.

4. On appeal, the Ld.CIT(A) placing reliance on the decision of the Mumbai Bench of the Tribunal in the case of Natural Gas Company Pvt. Ltd. *v.* DCIT [61 taxmann.com 297] rejected the claim of the assessee.

5. Learned Counsel for the assessee submitted that assessee is engaged in the business of designing, manufacturing, reselling and installing engineering Equipments used for noise and pollution control. One job order received from Flo-Dyne Limited, U.K. was given to M/s. Camy Plant for Rs. 1,01,06,500/- out of which an amount of Rs. 75,82,302/ was payable on 31-03-2011. Neither M/s. Camy Plant has waived the said amount nor has the assessee unilaterally written back the liability. The amount payable to M/s. Camy Plant ₹.75,82,302/- is acknowledged as

payable in the audited balance sheet. It is submitted that the details of the transaction are as follows: -

i) One order worth Rs 1,26,83,6007- was received from Flo-Dyne Limited, UK.

II) The original order was initiated by M/S Rasgas, Qatar to M/S Sidem, Paris to M/s Flo-Dyne Limited, UK to Flo-Dyne Controls, India (the assessee).

iii) The assessee got this job executed through M/s Camy Plant, India. The actual job to be delivered was in Oct '09 but delivered in Dec'09.

iv) Job was directly delivered to Qatar in hopes that the money will come.

v) M/s Rasgas, Qatar has given payment to M/s Sidem, Paris but M/s Sidem has not given payment to next in loop i.e. M/s Flo-Dyne Limited, UK.

vi) In these circumstances, a rebate of 20% of the order amount i.e. ₹.25,36,720/- was granted to M/s. Flo-Dyne Limited, UK.

6. Learned Counsel for the assessee further submitted that in view of the delay, the payment to M/s Camy Plant was halted to renegotiate the amount payable in view of the loss suffered by the assessee because of delay by M/s Camy Plant. M/s Camy Plant has issued legal notice to the assessee in this regard. It is submitted that the relevant documentary evidences showing job done by M/s Camy Plant are attached in the paper book. Learned Counsel for the assessee submitted that confirmation could not be obtained because of the ongoing dispute because of which the creditor is not co-operating. A Liability acknowledged by the assessee

as payable in Balance Sheet cannot be considered as cessation where the creditor has not waived off the amount.

7. Ld. Counsel for the assessee in support of the above contentions placed reliance on the following decisions: -

(i) CIT v. Smt Sita Devi Juneja in ITA.No. 619/2009 Punjab and Haryana High Court.

(ii) Nitin S. Garg v. ACIT [40 SOT 253 (Ahmedabad)]

(iii) Hareshbhai Jagmiohandas Mehta (HUF) v. ACIT [50 taxman.com 112 (Ahmedabad)]

(iv) DSA Engineers (Bombay) v. ITO [30 SOT 51 (Mum)]

8. Ld. DR vehemently supported the orders of the authorities below.

9. We have heard the rival submissions, perused the orders of the authorities below and the case laws relied on. It is not in dispute that the assessee is having dispute with the other party the creditor who executed the work beyond the stipulated time and the dispute is going on. It is an admitted fact that neither the assessee nor the creditor have written off the liability from their Books of Accounts. In such circumstances simply because the liability is outstanding for quite some years the liability does not seize to exist. In the case of CIT v. Smt Sita Devi Juneja (supra) the Hon'ble Gujarat High Court considering the judgment of the Hon'ble Supreme Court in the case of CIT *v.* Sugauli Sugar Works (P.) Ltd [236 ITR 518] held as under: -

"In the present case, the Assessing Officer made an addition of Rs.1,47,71,696/- on account of outstanding sundry credit balances as on 31.3.2004, while holding that liability in respect of these creditors had ceased to exist and as such, it had become liable to be treated as deemed income under Section 41 (1), Explanation-I of the Act. On appeal filed by the assessee, the CIT (A) partly allowed the appeal and the aforesaid addition was deleted, while coming to the conclusion that in the facts and circumstances of the case, the Assessing Officer has wrongly invoked the provision of Section 41 (1), Explanation-I of the Act. It has been observed that in the instant case, there was no unilateral cessation or remission of liabilities of Rs. 1,47,71,696/-, therefore, the provision of Explanation-I to Section 41 (1) of the Act is not attracted. It was further observed that if the income is to be assessed under Section 41 (1) of the Act, the burden is on the revenue to prove this income, whereas the Assessing Officer has failed to give any finding in his assessment order regarding the mandatory requirement of Section 41 (1) of the Act. The Assessing Officer has also not given any finding regarding obtaining of any benefit of these trading liabilities in the earlier year.

Against the order of the CIT (A), the revenue filed appeal, which has been dismissed by the ITAT, while observing as under: -

"It was for the AO to show that the liabilities in question had ceased to exist. In fact, these liabilities were payable to the assessee and unless demonstrated, they were to be shown as outstanding. These liabilities were appearing in the assessee's balance-sheet, indication acknowledgment of the debts payable by the assessee, as has been held in "CIT v. Tamil Nadu Warehousing Corpn." 292 ITR 310 (Mad), and "Ambika Mills Ltd. v. CIT" 54 ITR 167 (Guj.). As such, these liabilities could not have been treated to have ceased and so, invocation of the provisions of Section 41 (1) was not at all called for. Moreover, as held by the Hon'ble Supreme Court in "Sugauli Sugar Works v. CIT" 236 ITR 518 (SC), the cessation of the liability can come about only by a bilateral act and not unilateral act. In the present case, the assessee treated the liability as existing. Further, section 41 (1) of the Act provides for a deeming fiction, as per which an amount not having the nature of income is treated as income. That being so, the burden of proving the fiction is in the department. Sans the discharging of this burden, the addition cannot be made. Here, the AO has not made out any case of applicability of section 41 (1). To attract section 41 (1), there must exist a trading liability, regard, which the deduction had been claimed and allowed. No such trading liability had been proved herein. The addition was clearly made on the basis of mere presumptions, conjectures and surmises. The AO failed to show that in any earlier year, allowance of deduction had been made in respect of any trading liability incurred by the assessee, nor was it proved that any benefit was obtained by the assessee concerning such trading liability by way of remission or cessation thereof during the concerned year. There thus, did not accrue any benefit to the assessee which could be deemed to be the profits or gains of the assessee's business which would otherwise not be the assessee's income. The assessment order, as such, is directly against the decision of the Hon'ble Supreme Court in the case of "Chief Commissioner of Income Tax v. Kesaria Tea Co. Ltd." (2002) 254 ITR 434 (SC)."

After hearing learned counsel for the appellant and going through the impugned order, we do not find any merit in the instant appeal. It is the conceded position that in the assessee's balance sheet, the aforesaid liabilities have been shown,

which are payable to the sundry creditors. Such liabilities, shown in the balance sheet, indicate the acknowledgment of the debts payable by the assessee. Merely because such liability is outstanding for the last six years, it cannot be presumed that the said liabilities have ceased to exist. It is also conceded position that there is no bilateral act of the assessee and the creditors, which indicates that the said liabilities have ceased to exist. In absence of any bilateral act, the said liabilities could not have been treated to have ceased. In view of these facts, the CIT (A) as well as the ITAT have rightly come to the conclusion that the Assessing Officer has wrongly invoked the Explanation-I of Section 41 (1) of the Act and made the aforesaid addition on the basis of presumption, conjectures and surmises. It has been further found that the Assessing Officer failed to show that in any earlier year, allowance of deduction had been in respect of any trading liability incurred by the assessee. It was also not proved that any benefit was obtained by the assessee concerning such trading liability by way of remission or cessation thereof during the concerned year. Thus, there did not accrue any benefit to the assessee which could be deemed to be the profit or gain of the assessee's business, which would otherwise not be the assessee's income. It has been further found as fact that the assessee had filed the copies of accounts of sundry creditors signed by the concerned creditors. In view of this fact, in our opinion, the ITAT has rightly come to the conclusion that confirmation from the creditors were produced."

10. The Hon'ble Supreme Court in the case of *CIT v.* Sugauli Sugar Works (P.) Ltd. (supra) while dismissing he appeal of the Revenue held as under: -

"7. One aspect of the matter has been completely ignored by the judgment of the Division Bench of the Bombay High Court. As pointed out already, the crucial words in the Section require that the assessee has to obtain in cash or in any other manner some benefit. That part of the Section has been omitted to be considered by the Division Bench of the Bombay High Court. The said words have been considered by a Full Bench of Gujarat High Court in detail in The Commissioner of Income-tax, Gujarat-II, Ahmedabad v. M/s. Bharat Iron & Steel Industries, Bhavnagar, (1993) Tax L R 188. The following passages in the judgment brings out of the reasoning of the Full Bench succinctly:

"11. In our opinion, for considering the taxability of amount coming within the mischief of S. 41(1) of the Act, the system of accounting followed by the assessee is of no relevance or consequence. We have to go by the language used in s. 41(1) to find out whether or not the amount was obtained by the assessee or whether or not some benefit in respect of trading liability by way of remission or cessation thereof was obtained by the assessee and it is in the previous year in which the amount or benefit, as the case may be, has been obtained that the amount or the value of the benefit would become chargeable to income tax as income of that previous year.

12. We fully agree with the view taken by the Division Bench in C.I.T. v. Rashmi Trading (1976) 103 ITR 312 Gujarat (Supra) that the only meaning that can be attached to the words "obtained, whether in cash or in any other manner

whatsoever, any amount in respect of such loss or expenditure" incurred in any previous year clearly refer to the actual receiving of the cash of that amount. The amount may be actually received or it may be adjusted by way of an adjustment entry or a credit note or in any other form when the cash or the equivalent of the cash can be said to have been received by the assessee. But it must be the obtaining of the actual amount which is contemplated by the Legislature when it used the words "has obtained; whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure in the past". As rightly observed by the Division Bench in the context in which these words occur, no other meaning is possible."

we are in agreement with the said reasoning.

8. There is another judgment of the Bombay High Court which was rendered much earlier in J.K. Chemicals Ltd. v. Commissioner of Income-Tax, Bombay City II, (1966) 62 ITR 34. The Bench observed:

".....The transfer of an entry is a unilateral act of the assessee, who is a debtor to its employees. We fail to see how a debtor, by his own unilateral act, can bring about the cessation or remission of his liability. Remission has to be granted by the creditor. It is not in dispute, and it indeed cannot be disputed, that it is not a case or remission of liability. Similarly, a unilateral act on the part of the debtor cannot bring about a cessation of his liability. The cessation of the liability may occur either by reason of the operation of law, i.e., on the liability becoming unenforceable at law by the creditor and the debtor declaring unequivocally his intention not to honour his liability when payment is demanded by the creditor, or a contract between the parties or by discharge of the debt - the debtor making payment thereof to his creditor. Transfer of an entry is neither an agreement between the parties nor payment of the liability....."(at page 41)

9. This judgment has been quoted by the High Court in the present case and followed. We have no hesitation to say that the reasoning is correct and we agree with the same.

10. The principle that expiry of period of limitation prescribed under the Limitation Act could not extinguish the debt but it would only prevent the creditor from enforcing the debt, has been well settled. It is enough to refer to the decision of Court in Bombay Dyeing & Manufacturing Co. Ltd. v. The State of Bombay and Others, [1958] SCR 1122, If that principle is applied, it is clear that mere entry in the books of accounts of the debtor made unilaterally without any act on the part of the creditor will not enable the debtor to say that the liability has come to an end. Apart from that, that will not by itself confer any benefit on the debtor as contemplated by the Section.

11. In the circumstances, we find no merit in this appeal and it is dismissed. There will be no order as to costs."

11. Respectfully following the said decision, we hold that there is no cessation of liability in the case of the assessee. Hence this ground of appeal is allowed.

12. Coming to Ground No.2 i.e upholding the disallowance of expenses of ₹.1.00.640/- and Ground No.3 i.e. in respect of disallowance of discount allowed by the assessee, Learned Counsel for the assessee submitted that, additional evidences were filed along with a petition for admission of the same and in view of the additional evidences the matter may be examined afresh. We have gone through the petition and the reasons provided therein for submission of additional evidences and we are of the considered view that since these additional evidences go to the root of the matter and assessee is prevented with reasonable cause in not submitting the same while completion of the assessment, we admit the additional evidences and restore both the issues in Ground No.2 & 3 to the file Assessing Officer for examining afresh in accordance with law considering the additional evidences. This ground of appeal is allowed for statistical purpose.

13. Coming to last grounds of appeal i.e. disallowance u/s. 40(a)(i) of the Act, the Learned Counsel for the assessee submitted that, assessee has deducted TDS in respect of the expenditure and remitted before the due date for furnishing of return of income u/s. 139(1) of the Act and

therefore no disallowance is required to be made in the light of the present legal position. Therefore, the Learned Counsel for the assessee submitted that this issue also may be restored to the file of the Assessing Officer with a direction to decide in accordance with law, taking into consideration the latest legal position, after providing adequate opportunity of being heard to the assessee.

14. Ld. DR vehemently supported the orders of the authorities below.

15. On hearing both the sides, we are of the considered view that the contentions of the assessee have to be examined in the light of the latest legal position. Hence, this issue is restored to the file of the Assessing Officer who shall examined afresh in the light of the latest legal positon and decide in accordance with law, after providing adequate opportunity of being heard to the assessee. This ground of appeal is allowed for statistical purpose.

16. In the result, appeal of the assessee is partly allowed as indicated above.

Order pronounced in the open court on the 15th June, 2018.

Sd/-	Sd/-
(N.K. PRADHAN)	**(C.N. PRASAD)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai / Dated 15/06/2018
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mum