IN THE HIGH COURT OF JUDICATURE AT CALCUTTA

SPECIAL JURISDICTION (INCOME TAX)

ORIGINAL SIDE

RESERVED ON: 14.11.2022
DELIVERED ON: 23.11.2022

CORAM:

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

ITAT/46/2020

(IA NO: GA/01/2020)

(IA NO: GA/02/2020)

PRINCIPAL COMMISSIONER OF INCOME TAX – 12, KOLKATA

VERSUS

M/S SOORAJMUL NAGARMULL

Appearance:-
Mr. Vipul Kundalia, Senior Standing Counsel.
Mr. Amit Sharma, Adocate.
Mr. Anurag Ray, Advocate.

.....For the Appellant.

Mr. Pratyush Jhunjhunwala, Advocate.
Mr. Dipankar Chowdhury, Advocate.
Mr. S. Bhattacharya, Advocate.

.....For the Respondent.

JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)

1. There is a delay of 627 days in filing this appeal and the revenue has filed GA 01 of 2020 to condone the delay. The respondent assessees have filed their affidavit-in-opposition objecting to the prayer for condonation. Reply affidavit has been filed by appellant revenue to the averments set out in the affidavit-in-opposition. After elaborately hearing the learned Advocates for the parties and carefully perusing the averments set out in the affidavits, we find that the explanation offered by the appellant revenue for not preferring the appeal within the period of limitation is not satisfactory. It would have been well open to us to dismiss the appeal as time barred. However being conscious of the fact that the appeal has been filed under Section 260A of the Income Tax, Act, 1961 (Act), wherein the Court has to consider as to whether any substantial question of law arises for consideration, we are of the view that in the facts and circumstances of the case, it may not augur well to reject the appeal on a technical ground especially when the statute stipulates that the requirement is to consider whether any substantial question of law arises for consideration in this appeal.

2. Hence for such reasons, we exercise discretion and accordingly condoned the delay in filing the appeal. GA No. 01 of 2020 is allowed.

3. This appeal filed by the revenue under Section 260A of the Act is directed against the order passed by the Income Tax Appellate Tribunal "B" Bench Kolkata (Tribunal), dated 20.07.2018 in ITA No. 1907/Kol/2016 for the assessment year 2001-2002.

4. The revenue has raised the following substantial questions of law for consideration:

a) *Whether on the facts and in the circumstances of the case and in law, the Learned Income Tax Appellate Tribunal was correct in law in deleting the addition of Rs. 12,97,47,322/- made by the Assessing Officer on account of cessation of liability?*
b) *Whether on the facts and in the circumstances of the case and in law, the order of the Learned Income Tax Appellate Tribunal has failed to appreciate that necessary conditions u/s 41(1) of the Income Tax Act 1961?*
c) *Whether on the facts and circumstances of the case and in law and on proper interpretation of Section 41 (1) of the Income Tax Act, 1961, the Tribunal was right in law in holding that the assessees liability to pay the creditors had not cease and therefore, the Assessing Officer was not justified in making an addition of Rs. 12,97,47,322/- ?*
d) *Whether on the facts and circumstances of the case and in law, the Learned Income Tax Appellate Tribunal is perverse as it holds that liability of the assessee on account of trading liability exists without considering the provisions of the Limitation Act, 1963?*

5. We have heard Mr. Vipul Kundalia, leaned Senior Standing Counsel and Mr. Amit Sharma, learned standing counsel for the appellant department and Mr. Pratyush Jhunjhunwla, learned advocate assisted by Mr. Dipankar Choudhury and Mr. S. Bhattacharya, advocates for the respondent assessee.

6. The assessee filed its return of income for the assessment year under consideration A.Y. 2001-02 reporting a loss of Rs. 18,740/-. The case was reopened by issuance of the notice under Section 148 of the Act wherein among other things, it was observed by the Assessing Officer that the assessee while preparing their return of income could not include profit and

the loss of *Shri Hanuman Jute Mills* and *Siliguri Godown* as the figures thereon have not been received and of the input division and Vardhal Lubricant as the figures thereof have not been received. In response to the notice under Section 148, the assessee filed revised return reporting loss of Rs. 83,923/-. There after notices under Section 143(2) and 142(1) of the Act were issued and the case was discussed with the authorised representative of the assessee. The assessee was called upon to furnish the balance sheets and profit and loss accounts with supporting evidence of expenses of each branch for the assessment years 2000-2001, 2001-2002, 2002-2003, 2003-2004, 2005-2006. The details of the business activities done by each unit were also called for. The assessing officer while completing the assessment by order dated 31.12.2007 pointed out that the assessee has failed to submit any of the details of the branches as well as the head office and has submitted only a list of unsecured loan creditors with amount thereof. Further the assessing officer records that there is no confirmation of account of the said loan creditors as on 15.11.2007. Further in the balance sheet as the assessee had shown current liability amounting to Rs. 12,97,47,322/-, the assessee was directed to provide names and addresses of all persons to whom this interest is payable. Other connected details were also called for. The assessing officer records that the assessee submitted a list of loan creditors and also mentioned about the interest which is due and payable to them. There after show cause notice dated 27.12.2007 was issued calling upon the assessee to explain as to why the interest payable on loan for the assessment year 2001-2002 should not be treated as cessation of liability and be included in the taxable income. The assessee submitted

their response by letter dated 31.12.2007. The assessing officer concluded that there is no evidence or confirmation regarding the trading liability and hence as per Section 41(1) (a) of the Act, it is a cessation of trading liability and hence is deemed to be profit and gain of business or profession for the assessment year under consideration. Aggrieved by the same, the assessee preferred appeal before the Commissioner of Income Tax (Appeals) – XX, Kolkata [CIT(A)]. The CIT(A) by order dated 31.03.2008 deleted the addition. Challenging the said order, the revenue preferred appeal before the tribunal in ITA No. 1326/Kol/2008. The learned tribunal by order dated 04.03.2014 set aside the orders passed by the CIT(A) and remanded the matter back to the assessing officer for fresh decision. The assessing officer by order dated 30.03.2015 sustained the addition as was done earlier. Aggrieved by the same, the assessee preferred appeal before the Commissioner of Income Tax (Appeals) – 10, Kolkata (CIT(A). The said appeal was allowed by order dated 18.07.2016. Challenging the same, the revenue preferred appeal before the tribunal which was dismissed by the impugned order.

7. The issue which falls for consideration is whether the assessing officer was right in applying Section 41(1) after treating the assessee's liability to the tune of Rs. 12,97,47,322/- to be a case of cessation of liability. The assessee among other things contended that the assessing officer fell in error in not appreciating that there was evidence on record to show that the assessee firm made payments to its loan creditors towards its outstanding liabilities for interest and the liability continues to reflect as outstanding liability in the subsequent balance sheets year after year and no portion thereof can be alleged to have ceased to exist for the assessment year under

consideration within the meaning of Section 41(1)(a) of the Act. It was further contended that the burden of proof as to the satisfaction of condition set out in Section 41(1)(a) was on the revenue and not on the assessee and such burden has not been discharged by the revenue and in the absence of any material on record to the effect that conditions referred to in the said provision had been satisfied, it cannot be held that the trading liability had cessated. Further the assessees case was that the liability on account of interest payable to various persons whose names were furnished was continuing for a very long time; there has been no change in relation thereto atleast since 1988-1989 corresponding to the assessment year 1989-1990; most of the creditors were family members, relations and associates of the partners of the assessing firm; the names and addresses of all the creditors is available in the old tax records of the assessee firm; on account of various disputes which had been continuing amongst the partners for more than three decades, the liability on account of loans borrowed from their family members, close relations and their associates and/or interest payable there on, had not been discharged by the assessee; the fact that disputes continue amongst the partners is on record of the Income Tax Department and the assessee was not able even to file its complete tax return year after year, since its various partners including their family members who are controlling different business activities of the assessee did not provide details to its head office; none of the creditors named in the list furnished by the assessee have ever granted remission and/or either of the amounts due and payable to them; out of the aggregate outstanding liability of Rs. 12,97,47,322/-, the sum of Rs. 8,08,554.44ps was paid to Mrs. Indira Jalan

through account payee cheques along with the principal amount in the financial years 2003-2004 and 2004-2005 and another sum of Rs. 2,14,490/- has been repaid through account payee cheque to Bhuri Devi Charity Trust in the financial year 2008-2009 and evidence supporting the same were placed before the assessing officer. The assessee placed reliance on the decision of the Hon'ble Supreme Court in ***Commissioner of Income Tax Versus Sugauli Sugar Works Private Limited*** [1] for the proposition that even the expiry of period of limitation would not extinguish the debt. For the same proposition, reliance was also placed on the decision of the Hon'ble Supreme Court in ***Chief Commissioner of Income Tax Versus Kesaria Tea Company Limited*** [2]. The assessee sought to distinguish the decision relied on by the assessing officer in the case of ***Commissioner of Income Tax Versus Chipsoft Technology Private Limited*** [3]**.** Before we go into the legal issues involved, certain facts which are undisputed need to be brought on record.

8. At the very first instance before the assessing officer, the assessee had furnished complete details of the outstanding creditors as on 31.03.2001. The details included the names, address and the amount due to each of the creditors. These details were once again filed when the matter was remanded by the tribunal to the assessing officer for a fresh decision. It is also not disputed that the assessee offered explanation as to why these sum were outstanding for 20 years, furnished copies of audited financial statements for the financial years 2003-2004 to 2009-2010 along with the

[1] (1999) 236 ITR 519
[2] (2002) 254 ITR 434 (SC)
[3] (2012) 210 Taxman 173 (Del)

list of creditors which were reflected as outstanding at the end of the year. Further the assessee acknowledged the liability in subsequent years till the financial year 2010-2011 having written back the same in the books of account. The assessee had placed the copies of the assessment order under Section 143(3) for the subsequent years to show that the assessing officers never drew any adverse inference with regard to the outstanding creditors reflected in the balance sheets. The enquiry made by the assessing officer under Section 142 (1) of the Act was placed on record. Therefore, revenue cannot take a stand that the assessee has not furnished details of the outstanding creditors. That apart, the assessee also furnished details of payments made to creditors subsequent to 31.03.2001 which was produced to show that the liabilities continue to exist at the end of 31.03.2001. It is not disputed that the assessing officer though was furnished the full list of creditors chose to issue notice only to 6 of them. Directors of the four creditor companies appeared before the assessing officer, however, those directors were appointed subsequent to 31.03.2001 and did not readily have the necessary information. This led to the assessing officer to conclude that the directors of the four companies were unaware of the transactions. The assessing officer ought to have taken note of the response filed by the assessee by way of further explanation which appears to have been brushed aside. More importantly, none of the persons who had appeared before the assessing officer had denied the transactions with the assessee nor stated that there are no dues or outstanding payable by assessee to them. In the given facts and circumstances, was the assessing officer justified in holding that there was cessation of liability and the amount should be added back

as the income of the assessee. The assessing officer chose to follow the decision in ***Chipsoft*** to substantiate his conclusion. The learned tribunal while granting relief to the assessee followed ***Sugali Sugar Works***.

9. Mr. Kundalia sought to distinguish the decision in ***Sugauli Sugar Works Private Limited*** by referring to paragraph 12 of the judgment and submitting that the decision in the case of ***Bombay Dyeing and Manufacturing Company Limited Versus State of Bombay and Others*** [4] which was referred to in the said decision pertain to statutory liabilities and the decision could not have been pressed into service by the tribunal to decide in favour of the assessee. The question which was decided was whether the debtor by his own unilateral act can bring about the cessation or remission of his liability. The said issue was answered by holding that remission has to be granted only by the creditors. In ***Sugauli Sugar***, the Hon'ble Supreme Court agreed to the view expressed by the High Court of Bombay in ***J.K. Chemicals Limited Versus Commissioner of Income Tax*** [5] wherein it was held as follows:

- *There is another judgment of the Bombay High Court which was rendered much earlier in J.K. Chemicals Limited Versus CIT. 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 of 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 wither by reason of the operation*

[4] AIR 1958 SC 328
[5] (1966) 62 ITR 34 (Bom)

> *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 not payment thereof to his creditor. Transfer of an entry is neither an agreement between the parties nor payment of the liability."*

- *This judgement 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. As noted above, revenue contended that the decision in ***Bombay Dyeing*** was dealing with the statutory liability and that could not have been taken into consideration to examine the theory of extinguishing of the debt. We are not persuaded by the said submission as the five judge bench of the Hon'ble Supreme Court which delivered the verdict had analysed the entire aspect as regards, cessation of liability and held that the limitation does not extinguish the debt or precludes its enforcement unless the debtor chooses to avail himself of the defence and specifically pleads its. Therefore, the decision in ***Bombay Dyeing*** was rightly referred to in ***Sugauli Sugar Works*** for the aforesaid legal proposition. Reliance was placed on the decision in ***West Asia Exports and Imports Private Limited Versus Assistant Commissioner of Income Tax, Company Circle III(3)*** [6] In the said case, the facts were wholly different from the case on hand as there was change of business of the assessee therein to entirely different nature and the creditors of the old business did not speak anything about the liability

[6] (2019) 412 ITR 208 (Mad)

for ten years and there was no written confirmation from such creditors. In such fact situation, the court held that there was cessation of liability. The said decision is distinguishable on facts. The decision in ***Commissioner of Income Tax, Madurai Versus T.V. Sundaram Iyengar and Sons Limited 1996*** [7] was referred to by the revenue for the proposition that the claims of the creditors of the assessee before us have become time barred and unenforceable and therefore there is cessation of liability. The facts of the said case was that the assessee had transferred certain sums of money to the profit and loss account of the company during the relevant accounting period but those amounts were not included in the total income of the assessee. The said amounts were stated to be credit balances standing in favour of the customers of the company and since these balances were not claimed by the customers, the amounts were transferred to the assessee to the profit and loss account. In such fact situation, the Hon'ble Supreme Court held that the amount changes its character when the amount becomes assessee's own money because of limitation or by any other statutory or contractual right.

11. In the preceding paragraphs, we have noted the facts situation in the case on hand to which the decision in ***T.V Sundaram Iyengar*** cannot be applied. Reliance was placed on the decision in ***Commissioner of Income Tax, Calcutta Versus Karam Chand and Others*** [8] wherein the Hon'ble Supreme Court pointed out that when no demand for payment was made,

[7] (1996) 6 SCC 294
[8] (1996) 10 SCC 575

common sense requires that such amount should be entered into profit and loss account for the year and to be treated as taxable.

12. In the said decision on facts, it was held that the conduct of the assessee goes to show that the assessee himself did not treat the amount as trust money and the amount was not shown as a liability nor was it kept in a suspense account. The fact in the case before us is entirely different and the said decision cannot applied. In ***Chief Commissioner of Income Tax, Cochin Versus Kesaria Tea Company Limited***[9]***,*** it was held that a unilateral action on the part of the assessee by way of the writing of the liability in its account does not necessarily mean that the liability ceased in the eye of law. In said decision, it was held that the decision in ***T.V. Sundaram Iyengar and Sons*** is of no relevance. This decision will wholly support the case of the assessee. Reliance was placed on the decision in ***Gujtron Electronics Private Limited Versus Income Tax Officer*** [10] and that special leave petition filed against the said decision was dismissed by the Hon'ble Supreme Court by order dated 30.10.2017. In said decision also on facts the court found that in all the accounts the assessee has treated such amount as its own and the scheme which the assessee has floated had been terminated many years back and the limitation for claiming the amount back had also ceased and there was absolutely no movement or the correspondence between the assessee and its members with regard to the claim or with response to the deposited amount. The said decision is also factually distinguishing. Reliance was also placed by the revenue on the

[9] (2002) 3 SCC 684
[10] (2017) 397 ITR 462 (Guj)

decision in the case of ***Jay Engineering Works Limited Versus Commissioner of Income Tax*** [11]. In our considered view, the decision in the case of ***Commissioner of Income Tax 3 Versus Indian Rayon and Industries Limited*** [12] will squarely apply to the facts and circumstances of the case and enure in favour of the assessee. The substantial questions of law which was decided was whether the tribunal was right in deleting the disallowance of deduction and adding back the sum being unclaimed credit balances unilaterally written back (credited to the profit and loss account). The said question was answered in the following terms:-

> *The tribunal has followed its order for assessment year 1990-1991. That apart, in Commissioner of Income Tax Versus Sugauli Sugar Works Private Limited, the Supreme Court affirmed the law laid down in a judgment of this court in J.K. Chemicals Limited Versus CIT where the Division Bench has held as follows:*
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> - *".....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 of 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....."*

[11] (2009) 311 ITR 299 (del)
[12] (2011) 336 ITR 479 (Bom)

- *The Supreme Court held that the principle that the expiry of the period of limitation prescribed under the Limitation Act would not extinguish the debt but, would only prevent the creditor from enforcing the debt, has been well settled. If that principle were to be applied, a mere entry in the books of account made unilaterally without any act on the part of the creditor was held not to entitle the debtor to say that the liability has been extinguished. In the circumstances, Section 41(1) was held not to be attracted.*
- *Counsel appearing on behalf of the Revenue has sought to place reliance on an earlier judgment of the Supreme Court in CIT Versus T.V. Sundaram Iyengar & Sons Limited. The decision in Sundaram Iyengar case is distinguishable. In that case, monies were received by the assessee in the course of carrying on its business. Although the receipt of these monies was treated as a deposit and was of a capital nature when it was received, the money had by efflux of time become the assessee's own money. What remained after making adjustments had not been claimed by the customers. The claims of the customers had become barred by limitation. In these circumstances, the assessee having treated the money as its own money and having transferred it to the profit and loss account, the Supreme Court held that the amount representing unclaimed credit balances would be treted as the assessee's income and was liable to be taxed. The decision in Sundaram Iyengar's case consequently rested on these specific facts. On the other hand the subsequent decision in* ***Sugauli Sugar Works*** *specifically deals with the issue in hand and would cover the case against the Revenue. Hence, no substantial question of law would arise.*

13. The decision in ***Commissioner of Income Tax - III Versus Shri Vardhman Overseas Limited*** [13] has considered all the decisions which we have referred above and explained the legal position in the following terms:

[13] (2011) 16 Taxmann.com 350 (Del)

- *It may at once be noticed that the decision cannot be understood as explaining the conditions of applicability of section 41(1) of the Act, for the simple reason that the section was not invoked by the revenue authorities in that case and there was a finding of the appellate authorities to the effect that neither section 41(1) nor section 28 was attracted to that case. That was a case of certain deposits being received by the assessee. At the time of the receipt they were admittedly treated as capital in nature, and the assessee credited them to separate accounts. In due course of time, they were depleted by adjustments made from time to time. The balance in the accounts remained unclaimed for a long time and in the accounts for the accounting periods relevant to the assessment years 1982-83 and 1983-84, the balance remaining in the accounts was taken to the credit of the profit and loss account. The assessee could not explain why the balance was taken to its profit and loss account even though the money belonged to somebody else. It was in these circumstances that the Supreme Court applied a common sense view of the matter and held that the assessee had become richer by the amount transferred to the profit and loss account. The matter was thus decided on general principles and on the footing that the assessee committed and overt act indicating that it had appropriated the balances in the deposit amounts belonging to its customers as its own monies and was not able to explain why it took the step. The general principles and the common sense point of view were applied to decide the case. Section 41(1) specifically deals with amounts that were allowed as deduction in the past assessments as trading liabilities, which in a later year cease or are remitted by the creditors. If and when there is evidence in a particular later year to show that the liability has ceased or has been remitted, the same can be brought to tax as provided in Section 41(1). In this manner the statute prescribes that a deduction for a trading liability allowed earlier can be brought to tax on the ground that the liability to pay the same has been remitted or ceased.*

- *Another distinguishing feature in the present case is that the sundry creditors continue to be shown in the assessee's balance sheet as on 31.3.2002. In the case before the Supreme Court in CIT v. T.V.Sundaram Iyengar (supra), the*

assessee took a positive step of transferring the unclaimed balances in the deposit accounts to its profit and loss account, an act, which was considered to be of considerable significance in demonstrating the intention of the assessee to appropriate the money belonging to the depositors as its own monies. That case was dealing with items of receipt received in the course of the business of the assessee, though of capital nature at the time when they were received. The present case is one of a trading liability being earlier allowed as a deduction and which is sought to be recalled under Section 41(1) of the Act. At the cost of repetition it may be added that in CIT Vs. Kesaria Tea Company Ltd. (supra) the revenue sought to raise the argument based on the judgment of the Supreme Court in CIT Vs. T.V.Sundaram Iyengar (supra), but it was rejected by the Supreme Court holding that the decision was of no relevance to the question involved in the case before them, which was about the applicability of Section 41(1), and because the factual matrix and the provision of law considered therein were entirely different. For these reasons we are unable to give effect to the argument of the ld. standing counsel based on the judgment of the Supreme Court in CIT Vs. T.V.Sundaram Iyengar (supra).

- *The other judgment which the ld. standing counsel for the income tax department relied upon before us is of this Court in Jay Engineering Works Ltd. v. CIT (supra). A perusal of the judgment shows that though Section 41(1) was invoked to tax amounts that were unilaterally written back to the profit and loss account of the assessee, this Court had applied the judgment of the Supreme Court in CIT Vs. T.V.Sundaram Iyengar (supra) to hold that the unclaimed liabilities written back were taxable under Section 41(1). A perusal of question No. 3 referred to this Court under Section 256(1) of the Act shows that there is a specific reference to Section 41(1) of the Act. However, this judgment cannot be invoked to the present case for the simple reason that in the present case, the assessee did not write back the sundry creditors to its profit and loss account, a finding which is not disputed by the Revenue. The judgment of this Court in Jay Engineering Works Ltd. v. CIT (supra) is therefore distinguishable.*

14. Lastly the decision of this court in the case of ***Goodricke Group Limited Versus Commissioner of Income Tax – II, Kolkata*** [14] has also elaborately discussed all the decisions on the points and it was held that in the absence of the creditors it is not possible for the authority to come to a conclusion that the debt is barred and has become unenforceable. Relevant paragraphs are quoted herein below:

> *The Supreme Court had, in the case of Sugauli Sugar Works (P.) Ltd.'s case (supra) the occasion to consider the effect of section 41 of the Act. In that context, it was held that the mere fact that the assessee has made an entry of transfer in his accounts unilaterally will not enable the Department to say that section 41 would apply and the amount should be included in the total income of the assessee. It was further held therein that it could not be said that the liability had come to an end as period of more than 20 years had elapsed and creditor had not taken any steps to recover amount. Expiry of period of limitation, the Supreme Court pointed out, did not extinguish the debt but only prevented the creditor from enforcing the debt.*
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> *The following observations of the Supreme Court, approving an earlier Full Bench decision of the Gujarat High Court in that case, are relevant and quoted below:*
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> > *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 CIT v. Bharat Iron & Steel Industries MANU/KA/0138/1992 : [1993] Tax LR 188. The following passages in the judgment brings out of the reasoning of the Full Bench succinctly (At Pp. 195 and 196 of Tax LR):*

[14] (2011) 11 Taxmann.com 210 (Cal)

In our opinion, for considering the taxability of amount coming within the mischief of section 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 section 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.

We fully agree with the view taken by the Division Bench in CIT v. Rashmi Trading [1977] Tax LR 520 (Guj.) (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.

The aforesaid provisions of the Income-tax Act came up for further consideration before a Larger Bench of the Apex Court in the case of the Kesaria Tea Co. Ltd.'s case (supra) where the Supreme Court reiterated the views taken in the case of Sugauli Sugar Works (P.) Ltd. (supra). The following observations of the Court are relevant and quoted below:

It may be noted that the provision was made in the books of account towards purchase tax which was under dispute and the benefit of deduction from business income was availed of in the

past years in relation thereto. The same was sought to be reversed by the assessee during the year ending on 31-3-1985 for whatever reason it be. The question is whether the circumstances contemplated by section 41(1) exists so as to enable the revenue to take back what has been allowed earlier as business expenditure and to include such amount in the income of the relevant assessment year i.e., 1985-86. In order to apply section 41(1) in the context of the facts obtaining in the present case, the following points are to be kept in view : (1) In the course of assessment for an earlier year, allowance or deduction has been made in respect of trading liability incurred by the assessee; (2) Subsequently, a benefit is obtained in respect of such trading liability by way of remission or cessation thereof during the year in which such event occurred; (3) in that situation the value of benefit accruing to the assessee is deemed to be the profit and gains of business which otherwise would not be his income; and (4) such value of benefit is made chargeable to Income-tax as the income of the previous year wherein such benefit was obtained. The High Court, agreeing with the Tribunal, rightly held that the resort to section 41(1) could arise only if the liability of the assessee can be said to have ceased finally without the possibility of reviving it. On the facts found by the Tribunal, the Tribunal as well as the High Court were well justified in coming to the conclusion that the purchase tax liability of the assessee had not ceased finally during the year in question. Despite the finality attained by the judgment in Neroth Oil Mills' case, the other issues having bearing on the exigibility of purchase tax still remained and the dispute between the assessee and the sales-tax department was still going on. There is no material on record to rebut these factual observations made by the Tribunal. Nor can it be said that the reasons given by the Tribunal are irrelevant.

The learned senior counsel appearing for the Income-tax Department has contended that the assessee itself took steps to write-off the liability on account of purchase tax by making necessary adjustments in the books, which itself is indicative of the fact that the liability ceased for all practical purposes and therefore, the addition of amount of Rs. 3,20,758 deeming the same as income of the year 1985-86 under section 41(1) is well justified of the Act. But, what the assessee has done is not conclusive. As observed by the Tribunal, an unilateral action on the part of the assessee by way of writing-off the liability in its

accounts does not necessarily mean that the liability ceased in the eye of law. In fact, this is the view taken by this Court in CIT v. Sugauli Sugar Works (P.) Ltd. (MANU/SC/0077/1999 : 236 ITR 518). We, therefore, find no substance in the contention advanced on behalf of the appellant. Incidentally, we may mention that the controversy relates to the period anterior to the introduction of Explanation 1 to section 41(1).

The case before us also relates to the period anterior to the introduction of the Explanation 1 to section 41(1) of the Act.

In the case of T.V. Sundaram Iyengar & Sons Ltd. (supra) relied upon by Mr. Bhowmick appearing for the revenue, the principle that was enunciated has been reflected from the following observations made therein:

In other words, the principle appears to be that it an amount is received in course of 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 of the assessee.

In the case before us, it has not been established that for non-encashment of the cheques in question, the money involved has become the money of the assessee because of limitation or by any other statutory or contractual right. Incidentally, it may be mentioned here that the aforesaid decision in the case of T.V. Sundaram Iyengar & Sons Ltd. (supra), was also relied upon by the learned counsel for the revenue in the case of Kesaria Tea Co. Ltd. (supra) and the Supreme Court in paragraph 6 of the judgment dealt with the decision by making the following observations:

The decision of this Court in CIT v. T.V. Sundaram Iyengar & Sons Ltd. (MANU/SC/1251/1996 : 222 ITR 344) has been cited by the learned counsel for the appellant. We find no relevance of this decision to the determination of the question involved in the

present case. The factual matrix and the provision of law considered therein is entirely different.

We also propose to adopt the same observations in the above decision. Moreover, as pointed out in the case of Sugauli Sugar Works (P.) Ltd. (supra), vide the last five lines of the paragraph 6 of the judgment, the question whether the liability is actually barred by limitation is not a matter which can be decided by considering the assessee's case alone but has to be decided only if the creditor is before the concerned authority. In the absence of the creditor, it is not possible for the authority to come to a conclusion that the debt is barred and has become unenforceable. There may be circumstances which may enable the creditor to come with a proceeding for enforcement of the debt even after expiry of the normal period of limitation as provided in the Limitation Act.

15. In the preceding paragraphs, we have noted the undisputed factual position which was rightly taken note of by the learned tribunal and in particular, noting that there is no dispute about the assessee to have been carrying forward the impugned liability in its books for a time span of almost three decades and the department did not raise any issue in all the intervening assessment years in question. The tribunal also noted that the assessing officer after the matter was remanded to him had issued summons to six directors of the concerned entities on test check basis, and four out of the six directors had appeared in response to the summons. The statements were recorded. The learned tribunal also notes that the creditors have given written reply in response to the summons reiterating their liability as also the fact that the assessee had settled some of the creditors even after 31.03.2001. Thus the assessee has fulfilled the duty cast upon them to provide evidence that the liability exist at the end of the year. The

duty on the assessing officer is to prove that the liability has ceased to exist which in our considered view has been miserably failed to be established.

16. Thus, for all the above reasons, we find that the learned tribunal rightly declined to interfere with the orders passed by the CIT(A) by dismissing the appeal filed by the revenue.

17. In the result, the appeal is dismissed and the substantial questions of law are answered against the revenue. No Costs.

(T.S. SIVAGNANAM, J.)

I Agree.

(HIRANMAY BHATTACHARYYA, J.)

(P.A- SACHIN)