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

+ **ITA 69/2020**

PR. COMMISSIONER OF INCOME TAX- 7 Appellant

Through: Mr. Sanjeev Menon, Jr.
Standing Counsel for Mr.
Zoheb Hossain, Sr. Standing
Counsel.

versus

OPERA HOUSE EXPORTS LTD Respondent

Through: Mr. Ved Jain, Mr. Nischay
Kantoor and Ms. Soniya
Dodeja, Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

**HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR
KAURAV**

ORDER
18.03.2024

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1. The appellant seeks to impugn the order of the Income Tax Appellate Tribunal ['ITAT'] dated 27 February 2019 and has proposed the following questions for our consideration:-

“A. Whether the ITAT erred in deleting the addition of Rs.3,44,26,263/- u/s 68 of the Act without considering the fact that in the list of sundry creditors of the assessee, there was increase of Rs. 3,44,26,263/- in the credit balance of M/s. Opera Global Pvt. Ltd. in the relevant period whereas Opera Global Pvt. Ltd. had not shown the assessee company as a debtor in its balance sheet?

B. Whether the ITAT erred in deleting the addition of Rs.4,84,53,923/- U/S 41(1) of the Act without considering the fact that the said amount had remained outstanding and unpaid since 31.03.2008 to 31.03.2010. The liability to pay was not disputed and the debt had become barred by limitation for addition in that year in which it was created?



C. Whether the ITAT erred in not considering that in the present case liability to pay was not disputed and the debt due had become barred by limitation and hence liable to be added to the income of the assessee?

D. Whether the ITAT erred in not considering the fact that in the present case the assessee had incurred losses and had stopped/nominal business operations which denotes cessation or remission of liability?”

2. We note that insofar as unexplained cash credit and the additions under Section 68 of the Income Tax Act, 1961 [**‘Act’**] are concerned, the assessee is stated to have been unable to place all the relevant material before the Assessing Officer [**‘AO’**]. However, the material in respect of the aforesaid alleged unexplained cash credit was duly examined and verified at the level of the Commissioner of Income Tax (Appeals) [**‘CIT(A)’**] as would be evident from the following discussion which ensues in the impugned order:-

“7. Ground No.1 is regarding deletion of addition of Rs.3,44,26,263/- made by the AO on account of unexplained cash credit under section 68 of the Act. The Assessing Officer made this addition on the premise that this amount is not appearing as debit in the balance sheet of the sister company M/s Opera Global Pvt. Ltd. The CIT(A) has deleted the same holding that the assessee has led evidences to show that Opera Global Pvt. Ltd. has repaid the loans to SBI and SIDBI on behalf of the appellant. The CIT(A) has further stated that he has examined this with the help of documents which demonstrate that Opera Global Pvt. Ltd. has made payment to SBI and SIDBI on behalf of the appellant. After examination of the documents placed in the paper book, we are of the view that the Ld. CIT(A) has committed no error while deleting the impugned addition. The AO has ignored the reply submitted by the assessee vide letter dated 25.03.2013 along with the supporting evidences. In his letter dated 25.03.2013, the assessee has submitted copy of account with SBI and SIDBI along with the bank statement and photocopy of cheques issued by the Opera Global Pvt. Ltd on behalf of the assessee company (placed at paper book page 63 to 80). The assessee has also placed copy of account with details of payment received from Opera Global Pvt. Ltd. at paper book page 81 and 82. The assessee has also explained that in the balance sheet of Opera Global Pvt. Ltd, on the basis of which adverse inference has been drawn by the AO, this amount is appearing below the head current liabilities at paper book page 115 to 128 relevant page 128 of the



paper book. The figures stated at page 128 as on 31.03.2008, 31.03.2009 and as on 31.03.2010 of the net current liabilities match with the figures stated on the first page of the balance sheet at paper book page 115. The total current liabilities as on 31.03.2010 as per the list was Rs.12,24,92,114.64/- which after deduction of debit balance of Opera House Export Pvt. Ltd. i.e. assessee company of Rs.7,62,72,356.63/- comes to Rs.4,62,19,758.01/- which is the figure mentioned at first page of the balance sheet as current liabilities, Similarly, as on 31.03.2009 the total of the current liability at paper book page 128 comes to Rs.8,58,55,902.48/- which after deduction of balance against assessee company of Rs.4,18,46,093.65/- comes to Rs.4,40,09,808.83/- which matches with the figure at the front of balance sheet. In view of these facts we are of the view that Assessing Officer was not justified in drawing adverse inference against the assessee. The assessee has led sufficient evidences which are supported by bank statement of Opera Global Pvt. Ltd. and its balance sheet read with the schedules attached thereto. Hence, the CIT(A) was correct in deleting the addition. Accordingly, we uphold the order of the CIT(A) on this score and ground no.1 of the Revenue appeal deserves to be dismissed.”

3. We, consequently, and notwithstanding the reference to the amount being shown under the head of “net current liabilities” are of the opinion that the ultimate conclusion as rendered by the ITAT would not merit any interference.

4. Insofar as the additions referable to Section 41(1) of the Act are concerned, we note that the ITAT has found that the sundry creditors were continued to be shown under the category of payables and therefore there was no justification for making any additions. The aforesaid question has been examined and answered in the following terms:-

“9. Ground No.3 is regarding deletion of addition of Rs.4,84,53,923/- made by the Assessing Officer on account of sundry creditors by invoking the provisions of section 41(1) of the Act. The AO had called for the details of creditors for the last 3 years. On the basis of this list, the AO held that creditors are not being paid since long and as such the same has become income of the assessee under section 41(1) of the Act and added all the creditors as Income of the assessee. The CIT(A) has deleted the addition holding that these creditors have been continued to be payable in the books of the assessee and the same have not been



written off, hence there is no remission or cessation of the liability and accordingly, section 41(1) cannot be invoked. The main argument of the Ld. DR before us was that since the assessee has not paid for long, it should be assumed that these amounts are no more payable, and hence, it has become income of the assessee. It was contended by the Ld, DR that though section 41(1) may not be applicable in this case but section 28(iv) will be applicable as this is the benefit which the assessee has derived from its business. We are of the view that both section 41(1) and section 28(iv) will not be applicable in the facts of the present case. From the assessment order, it is evident that the assessee company has filed an application under section 15(1) of the Sick Industrial companies (special provision) Act, 1985. The assessee company on being questioned by the AO had given the reasoning as to why these creditors have not been paid so far. It was explained that the company has become sick and it has approached BIFR for restructuring of its liabilities. This, in our opinion, was plausible reason for delay in payment of the creditors. Section 41(1) is applicable when the trade creditors are written off as not payable. In the present case, it is not the case of the assessee that these trade creditors are not payable. It is also not the case of the AO that these creditors have been written off by the assessee. These creditors continue to be payable in the books of accounts of the assessee. The assessee has also explained the reason for the delay in making payment to these creditors. In these circumstances, the assumptions by the AO that these creditors had become income of the assessee cannot be sustained. On the contrary, the circumstances do explain the delay in payment of these creditors. In these facts, provisions of section 41(1) cannot be invoked. Similarly, the contention of the Ld. DR for invoking provision of section 28(iv) is misplaced as section 28(iv) is regarding value of any benefit or perquisite arising from business is chargeable to tax. These trade creditors are payable and by no stretch of imagination it can be said that assessee has received any benefit or perquisite. We have also gone through the various case laws relied upon by the Ld. DR and after going through the same we are of the view that the same are on different set of facts and are not applicable to the facts of this case. As against this, the judgment of jurisdictional High Court in the case of CIT vs. Shri Vardhman Overseas Ltd.³⁴³ ITR 408 (Del.) is direct on this Issue wherein Hon'ble Court has differentiated the scope of section 28(iv) and section 41(1) of the Act and held that section 28(Iv) would apply generally to all benefits or perquisites which arise to the assessee from the business carried out by him, The benefit which he obtains by way of remission or cessation of a trading liability in a later year, in respect of which he has obtained a deduction in an earlier year in computing the business income, should be governed by Section 41(1) which is the specific provision governing the factual situation and not the Section 28(iv) of the Act. In view of the above judgment it is clear that that



provisions of section 28(iv) are not applicable to the facts of the present case. Accordingly, ground no.3 of the Revenue's appeal is also dismissed sans merit.”

5. In view of the aforesaid, we are of the considered opinion that the appeal raises no substantial question of law. It consequently shall stand dismissed.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

MARCH 18, 2024
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