आयकर अपीलीय अधीकरण, न्यायपीठ – "वि" कोलकाता,

IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH: KOLKATA

(समक्ष)Before **श्री महावीर सिंह,** न्यायीक सदस्य **एवं/and श्री,** लेखा सी.डी.राव सदस्य)

[Before Sri Mahavir Singh, JM & Shri C. D. Rao, AM]

आयकर अपील संख्या / I.T.A No. 1135/Kol/2010

निर्धारण वर्ष/Assessment Year : 2007-08

Deputy Commissioner of Income-tax, Circle-33, Kolkata.	Vs.	M/s. S. K. Tekriwal (PAN-AARFS 0465 J)
(अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

For the Appellant: Shri Niraj Kumar
For the Respondent: Shri Sanjay Bajoria

Date of hearing: 23.09.2011
Date of pronouncement: 21.10.2011

आदेश/ORDER

Per Mahavir Singh, JM (महावीर सिंह, न्यायीक सदस्य)

This appeal by revenue is arising out of order of CIT(A)-XX, Kolkata in Appeal No.194/CIT(A)-XX/DC Cir-33/09-10/Kol dated 12.03.2010. Assessment was framed by DCIT, Circle-33, Kolkata u/s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for Assessment Year 2007-08 vide his order dated 30.12.2009.

2. The only issue in this appeal of revenue is against the order of CIT(A) deleting the addition made by Assessing Officer by invoking the provisions of section 40a(ia) of the Act for lower rate of deduction of tax. The revenue's contention in the grounds is that in the instant case the provisions of section 194-I for deduction of tax will apply instead of tax deducted by assessee u/s. 194C(2) of the Act. For this, revenue has raised following ground:

> *"Factual circumstances of the case reveals that in the instant case section 194I is applicable instead of section 194(2) of the I. T. Act. Hence the A.O has rightly made addition as section 40a(ia) of the I. T. Act. Therefore 2nd appeal is suggested."*

3. We have heard rival submissions and gone through facts and circumstances of the case. The brief facts are that assessee is engaged in the business of construction of bridges, roads, dams and canals, and heavy earth moving activities in contract with government and semi-government bodies, such as, BRO, PWD, NTPC etc. Return of Income was filed on 27.10.2007 showing total income at Rs.45,49,360/-. During the course of assessment proceedings, A.O noticed that the assessee has debited total payments of Rs.3,37,37,464/- in the P&L a/c under the head 'machine hire charges'. The Assessing Officer also found that the assessee has deducted tax @ 1% on such payments, therefore, he required the assessee as to

why tax u/s. 194I of the Act was not deducted. It was explained before the Assessing Officer that payments were made to sub-contractors for completion of specific work; and therefore, tax was deducted @ 1% as per the provisions of section 194C(2) of the Act. The payments were not made for hiring of machines, but, the same have been wrongly grouped under the head 'machine hire charges'. Copies of agreements with the concerned parties were filed at the assessment stage to show that they were sub-contractors, who were assigned specific work; and that the payments do not actually relate to hiring of machines. The Assessing Officer did not accept the explanation. The Assessing Officer observed that it was clearly mentioned in the agreements that the rate are exclusively for machine and maintenance, all material will be supplied by us. The Assessing Officer concluded that the payments were made for hiring of machines, and that the provisions of section 194I of the Act are applicable in the case of the assessee and so, tax should have been deducted @ 10%. The Assessing Officer then made proportionate disallowance under the provisions of section 40a(ia) of the Act in respect to 'machinery hire charges'. Aggrieved, assessee preferred appeal before CIT(A).

4. The CIT(A) deleted the disallowance by holding the 'machinery hire charges' expenses falling u/s. 194C(2) of the Act, by holding as under:

> *"7. I have considered the assessment order and the submission of the appellant. I have also perused the assessment record. The AO has relied solely on the accounting entries made in the books of account in as much as the subcontract expenses are clubbed under the head 'machine hire charges'. The AO has confined himself only to a particular line mentioned in the agreement; but, has failed to properly analyze the agreement in its totality. The nature and particulars of work that has been assigned to each sub-contractor is clearly specified in the agreement, which includes back filling, gravel filling, morum/ sand filling and rubber soiling; excavation with transportation; PCC, RCC and Dewatering; Pile & Open foundation work; Earthworks in filling from earth-quarry to works-site with all lift in layers as approved by the Railways, including all machineries & equipments and manpower regarding earth transportation, loading & unloading; and, providing RCC M-30 grade in well curb using concrete mixture and manual means and machinery and completing the job as per specification and direction of E/I.*
>
> *In each of the agreements, the quantity of work is fixed, and, the rate is also fixed on the basis of such quantity of work. I find substance in the argument that hire charges depend on the time period for which the machines are used. But, in the present case, the time consumed by the sub-contractors, or the period for which the machines are used, is not at all a factor in deciding the payments made to the sub-contractors; it is only on the basis of the quantity of work that the payments have been made. The sub-contractors are required to complete the assigned job by utilizing their machines and equipments, and also, by employing local labour. But then, the time period for which the machines and equipments are used has no role in deciding the payments made to the sub-contractors; moreover, labour charges are paid by the sub-contractors, and, the sub-contract expenses debited in the books of account of the appellant do not include labour charges. It was contended before me that the nature of work assigned to the subcontractors is such that there was actually no requirement of any material in completion of the work, except for providing RCC M-30, where the principal employer itself has supplied the required material (iron and cement) for quality reasons. It was also argued that the payments made to the sub-contractors have been shown by them as receipts from sub-contract work. The P & L a/c, Computation of Income, etc., in respect of some sub-contractors is available in*

the assessment record, e.g., Archana Shah, Julie Agrawal and Sweta Agrawal. I find that they have shown the payments made by the appellant to them as receipts from sub-contract work, and, offered profit © 8% on such receipts.

The decision of the AO is not based on proper findings. The AO has confined himself only to the accounting entries made in the books of account, and failed to properly analyze the material on record. The explanations, and also the evidences, submitted by the appellant seem to have been summarily rejected more on ground of presumption and assumption than on factual ground. This has led the AO to a state of affairs where salient evidences have been overlooked. In view of the above, I am of the opinion that the payments of Rs.3,37,37,464 were made to the sub-contractors, and, that the provisions of section 194C(2) are applicable in the case of the appellant. Since the appellant has deducted tax © 1 % on such payments, which is in conformity with the provisions of section 194C(2), the provisions of section 40(a)(ia) are not attracted. The addition is directed to be deleted. The grounds raised by the appellant are liable to he allowed."

Aggrieved, revenue is in appeal before us.

5. From the order of CIT(A), we find that CIT(A) has gone into the controversy of assessee falling under the head 'sub contractor' or falling under the head 'rent', the expenses made under the head 'machinery hire charges'. It is also a fact that the assessee has deducted TDS u/s. 194C(2) of the Act and covered itself under the head 'sub contractor'. We find that CIT(A) after verifying records and explanation submitted by assessee reached to a conclusion that payments are in the nature of contract payments made to sub contractors. On merits, we are in agreement with the findings of CIT(A) and even revenue before us could not controvert the same. Another facet of this issue is that once the assessee has deducted TDS u/s. 194C(2) of the Act, whether disallowance can be made by invoking the provisions of section 40a(ia) of the Act. The relevant provision reads as under:

"40a(ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under chapter XVII-B and such tax has not been deducted or after deduction has not been paid on or before the due date specified in sub-section (1) of section 139:"

In this provision it is provided that where in respect of any sum, as referred in this section, tax has not been deducted or after deduction has not been paid on or before the due date specified in sub-section (1) of section 139 of the Act, such sum shall be disallowed as a deduction while computing the income of the assessee for the previous year relevant to AY under consideration. But in the present case before us, the assessee has deducted tax, although u/s. 194C(2) of the Act and it is not a case of non-deduction of tax or no deduction of tax as is the import of section 40a(ia) of the Act. Even otherwise if it is considered that this particular sum falls under section 194I of the Act, it may be considered as tax deducted at a lower rate and it cannot be considered a case of non-deduction or no deduction. Similar view is taken by 'C' Bench of

Mumbai ITAT in ITA No. 20/Mum/2010 in the case of DCIT v M/s Chandabhoy & Jassobhoy dated 08.07.2011, wherein it is held that there is no dispute with reference to the deduction of tax u/s 192 of the Act with the fact that the alleged consultants, in their individual assessments declared these payments as salary payments and accepted by revenue as it is. Further, it is held that the assessee had deducted tax u/s. 192 of the Act as against the allegation of revenue that the provisions of section 194J of the Act would be attracted as these consultants are in the capacity of professionals. The Bench held that the provisions of section 40(a)(ia) of the Act will not apply as the said provision can be invoked only in the event of non-deduction of tax but not for lesser deduction of tax. In that case the assessee has deducted tax u/s. 192 of the Act as against section 194J of the Act as against the claim of revenue.

6. In the present case before us the assessee has deducted tax u/s. 194C(2) of the Act being payments made to sub-contractors and it is not a case of non-deduction of tax or no deduction of tax as is the import of section 40a(ia) of the Act. But the revenue's contention is that the payments are in the nature of machinery hire charges falling under the head 'rent' and the previous provisions of section 194I of the Act are applicable. According to revenue, the assessee has deducted tax @ 1% u/s. 194C(2) of the Act as against the actual deduction to be made at 10% u/s. 194I of the Act, thereby lesser deduction of tax. The revenue has made out a case of lesser deduction of tax and that also under different head and accordingly disallowed the payments proportionately by invoking the provisions of section 40(a)(ia) of the Act. The Ld. CIT, DR also argued that there is no word like failure used in section 40(a)(ia) of the Act and it referred to only non-deduction of tax and disallowance of such payments. According to him, it does not refer to genuineness of the payment or otherwise but addition u/s. 40(a)(ia) can be made even though payments are genuine but tax is not deducted as required u/s. 40(a)(ia) of the Act. We are of the view that the conditions laid down u/s. 40(a)(ia) of the Act for making addition is that tax is deductible at source and such tax has not been deducted. If both the conditions are satisfied then such payment can be disallowed u/s. 40(a)(ia) of the Act but where tax is deducted by the assessee, even under bonafide wrong impression, under wrong provisions of TDS, the provisions of section 40(a)(ia) of the Act cannot be invoked. Here in the present case before us, the assessee has deducted tax u/s. 194C(2) of the Act and not u/s. 194I of the Act and there is no allegation that this TDS is not deposited with the Government account. We are of the view that the provisions of section 40(a)(ia) of the Act has two limbs, one is where, inter alia, assessee has to deduct tax and the second where after deducting tax, inter alia, the assessee has to pay into Government Account. There is nothing in the said section to treat, inter alia, the assessee as defaulter where there is a shortfall in deduction. With regard to the shortfall, it cannot be assumed that there is a default as the deduction is not as

required by or under the Act, but the facts is that this expression, 'on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction has not been paid on or before the due date specified in sub-section (1) of section 139'. This section 40(a)(ia) of the Act refers only to the duty to deduct tax and pay to government account. If there is any shortfall due to any difference of opinion as to the taxability of any item or the nature of payments falling under various TDS provisions, the assessee can be declared to be an assessee in default u/s. 201 of the Act and no disallowance can be made by invoking the provisions of section 40(a)(ia) of the Act.

Accordingly, we confirm the order of CIT(A) allowing the claim of assessee and this issue of revenue's appeal is dismissed.

7. In the result, appeal of the revenue is dismissed.

8. Order pronounced in open court on 21.10.2011

Sd/- Sd/-

सी.डी.राव लेखा सदस्य **महावीर सिंह**, न्यायीक सदस्य

(C. D. Rao) (Mahavir Singh)

Accountant Member Judicial Member

(तारीख) Dated : 21st October, 2011

वरिष्ठ निजि सचिव Jd.(Sr.P.S.)

आदेश की प्रतिलिपि अग्रेषितः- Copy of the order forwarded to:

1. अपीलार्थी/APPELLANT – DCIT, Circle-33, Kolkata.
2. प्रत्यर्थी/ Respondent, M/s. S. K. Tekriwal, 4, Ballav Das Street, 3rd floor, Room No.33, Kolkata-700 071
3. आयकर कमिशनर (अपील)/ The CIT(A), Kolkata
4. आयकर कमिशनर/CIT, Kolkata
5. वभागिय प्रतिनीधी / DR, Kolkata Benches, Kolkata

सत्यापित प्रति/True Copy, आदेशानुसार/ By order,

सहायक पंजीकार/Asstt. Registrar.

IN THE INCOME TAX APPELLATE TRIBUNAL
"C" Bench, Mumbai

Before Shri R.V. Easwar, President
and Shri B. Ramakotaiah, Accountant Member

ITA No. 20/Mum/2010
(Assessment Year: 2006-07)

DCIT - 11(2) Room No. 479, 4th Floor M.K. Road, Aayakar Bhavan Mumbai 400020	Vs.	M/s. Chandabhoy & Jassobhoy 208, Phonex House, 'A' Wing 2nd Floor, 462 Senapati Bapat Marg, Lower Parel, Mumbai 400013 PAN - AAAFC 5274 C
Appellant		**Respondent**

Appellant by: Shri Jitendra Yadav
Respondent by: Shri Percy J. Pardiwalla

O R D E R

Per B. Ramakotaiah, A.M.

This appeal by the Revenue is against the order of the CIT(A)-III, Mumbai dated 20.10.2009.

2. Assessee is a partnership firm of Chartered Accountants and in the scrutiny assessment, the A.O. considered that payment made to certain consultants engaged by the Chartered Accountants' firm are in the nature of fees for professional services and accordingly provisions of section 194J would attract. It was the contention of the assessee that the consultants functioned as employees of the firm and were engaged on full time basis. They could not undertake any other job or assignments privately and they were provided with annual leave and other benefits except bonus, gratuity and P.F. It was further submitted that they were employees of the firm and tax was deducted under section 192 of the I.T Act and these persons filed their returns based on Form 16 issued by the assessee firm and so their salary can not be under the provisions of section 194J. The A.O. analyzing the agreements entered by the assessee firm with the said consultants came to a conclusion that there is no employee-employer relationship and assessee should have deducted tax under section 194J and since assessee

has not deducted the tax, the amounts claimed of ₹26,75,535/- was to be disallowed under section 40(a)(ia). The matter was carried to the CIT(A) who, after examining the issue and submissions of the assessee, deleted the addition by stating as under: -

> *"3.7.1. There is merit in this submission of appellant. The deduction of tax made by appellant though made u/s. 192 has not been disputed by AO, neither has the TDS deposit in Government account been challenged, nor has the genuineness of payment of monies to IHC been doubted by AO. As such, the payments become allowable expense under the Act. These have been disallowed due to an interpretation of the section under which the payment made is to be considered i.e. whether section 192 or section 194J. Without prejudice to the decision in para 3.6 and 3.6.1 supra, in the background of appellant's submission and precedence of many years in his own case, it is felt that even if payments were considered to be u/s. 194J by A.O., the tax already deducted by appellant could have been considered against that due u/s 194J and shortage of TDS, if any, could have been arrived at. The consequent shortage of TDS with interest, if any, could have been considered as liability under the I.T. Act and as due from the appellant. Disallowance of the entire expenditure of Rs.26,75,535/- whose genuineness has not been doubted by the AO is not justifiable."*

3. We have heard the rival arguments and examined the record. Assessee has employed about 18 consultants with whom it entered into agreements for a period of two years renewable further at the option of either parties and they were paid fixed amounts without any share in the profit. These consultants are prohibited from taking any private assignments and worked full time with the assessee firm. There is no dispute with reference to the deduction of tax under section 192 and also the fact that in their individual assessments these payments were accepted as salary payments. It is also not disputed that the entire amount paid for 18 consultants is only an amount of ₹26,75,535/-, which indicates that they are in employment and not professional consultants. It is also not the case that assessee has not deducted any amount. Assessee has indeed deducted tax under section 192 and so we are of the opinion that provisions of section 40(a)(ia) also do not apply as the said provision can be invoked only in the event of non deduction of tax but not for lesser deduction of tax. In view of this, we are of the opinion that there is no merit in Revenue's contention that the amount

paid to the employees should be disallowed as provisions of section 194J would attract. On the facts of the case, there is no merit in Revenue's appeal. Accordingly the order of the CIT(A) is confirmed.

4. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on 8th July 2011.

Sd/-	Sd/-
(R.V. Easwar)	**(B. Ramakotaiah)**
President	**Accountant Member**

Mumbai, Dated: 8th July 2011

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) – III, Mumbai*
4. *The CIT– II, Mumbai City*
5. *The DR, "C" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.