2011-TIOL-548-ITAT-DEL

IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH 'C' DELHI

ITA No.1447(Del)/2011
Assessment Year: 2007-08

SHRI HARDARSHAN SINGH
AC-6, GANGA RAM VATIK
NEW DELHI

Vs

DEPUTY COMMISSIONER OF INCOME TAX
CIRCLE-26(1), NEW DELHI

I P Bansal, JM and K G Bansal, AM

Dated: August 26, 2011

Appellant Rep by: Shri K Sampath, Adv.
Respondent Rep by: None

Income tax – Section 40(a)(ia), 40A(3), 194C – Whether the assessee, a transportation company, which earns commission income for arranging trucks for its clients from other transport companies, is not required to deduct TDS on payments made by it to the other transport company for transporting the goods as no work of transportation of goods is carried on by the assessee itself.

Assessee is the proprietor of M/s Satguru Cargo Movers, in the business of transportation of cargo. Assessee entered into arrangements for transportation of goods through vehicles of other transport companies. Assessee contended that he was not carrying on the work of transportation of goods and, therefore, the provisions of section 194 C were not applicable. AO stated that the assessee had been carrying on this business on which he is liable to deduct TDS from the payments made to other transporters but not deducted the same. Therefore, disallowance was made u/s 40(a)(ia). It was directed to the assessee to file a revised profit and loss and accordingly the same was furnished showing income from lorry booking amount of Rs. 8.51 crores equal to the expenditure of lorry booking and a commission income on such lorry bookings of Rs. 26.02 lacs. AO included the income the lorry booking amount also and also invoked section 40A(3) disallowing 20% of the expenditure incurred in cash.

CIT (A) confirmed the additions stating that the bills on behalf of the truck owners were raised by the appellant and, therefore, the payments were also made by the clients to the appellant. However, the reconciliation between the bills submitted and the payments received by the appellant was not produced. According to the understanding of accounts, the client companies will either maintain a consolidated ledger account in the name of the appellant and all debits and credits will be routed through the same or, alternatively, the clients will maintain accounts in the names of the individual truck/lorry owners and settle their individual accounts after deduction of tax etc. The claim of the assessee is not in

agreement with the same because the manner in which the accounts have been maintained by him do not support the case of the appellant. The individual truck owners and the appellant that a broad agreement/understanding was reached as to the providing of trucks/trolleys for transportation/carries of goods/articles and, therefore, the relationship of contractual nature was developed at this stage only. Therefore, the assessee's claim that he was acting only as a facilitator is not acceptable and disallowance was correctly made. Assessee contended that the truck owners were regular income tax assessees and there was not revenue loss even if no deduction of tax by assessee. However, the assessee could not produce any evidence supporting the same. Therefore the said plea was also rejected.

Disallowance u/s 40A(3) was also confirmed stating that AO had recorded a categorical finding that the payment of Rs.14.14 lacs was made in violation of section 40A(3) and no explanation in regard to had been furnished.

After hearing both the parties, the ITAT held that,

++ the assessee owns and operate four trucks for transportation of goods. These trucks are not adequate in number to meet the market requirement. Therefore, he arranges trucks of other transport companies for carriage of goods for which he receives commission from them which is credited to profit and loss account. In respect of this income, the assessee does not undertake the business of carriage of goods and no work is performed by him. The bills are prepared in a manner that net commission income becomes payable by the actual transporter to the assessee. Thus, there was no liability on assessee for deduction of tax at source;

++ the assessee acted as intermediary between the client and the other transport company. The company carried the goods and the advance received from the customer was handed over to the driver of the company. In the bill, the advance and the commission of the assessee were deducted from the bill amount and the assessee had to receive commission from the company. Thus, it cannot be said that assessee really entered into the contract of transportation of goods. He merely acted as an intermediary. Hence, no addition could have been made u/s 40(ia);

++ payments more than Rs. 20000/- in cash have been quantified by the AO in the assessment order on the basis of evidence filed by the assessee. Such payments should also find place in the tax audit report, which is incomplete in this respect as column 17(b)(B) has not been filled up. Column 17(b)(A) only mentions that a certificate has been obtained. The assessee has not been able to show in any manner that there is any mistake in quantification made by the AO. Therefore, CIT(Appeals) rightly upheld the disallowance of Rs.2,82,913/-.

Assessee's appeal partly allowed

ORDER

Per: K G Bansal:

The assessee has taken up two grounds in the appeal to the effect that on the facts and in law, the ld. CIT(Appeals) erred in upholding the addition of –(i) Rs.8,51,43,744/- by invoking the provision contained in section 40(ia) of the Income-tax Act, 1961; and (ii) Rs.2,82,913/- u/s 40A(3) of the Act.

2. The facts of the case are that the assessee filed his return on 31.10.2007 declaring total income of Rs.8,57,684/-. The return was processed u/s 143(1) on 21.3.2009 at the income returned by the assessee. Subsequently, it was picked up for scrutiny by issuing notice u/s 143(2) on 15.09.2008. The assessee is the proprietor of M/s Satguru Cargo Movers, which is undertaking the business of transportation of cargo. He is also entering into arrangements for transportation of goods through vehicles of other transport companies. The dispute relates to the latter business. The case of the assessee had been that in this business, he is not carrying on the work of transportation of goods and, therefore, the provision contained in section 194 C is not applicable to him. However, the finding of the AO is that the assessee has been carrying on this business also in respect of which he is liable to deduct tax at source from the payments made to other transporters. He has not deducted the tax at source on payment made to such transporters. Therefore, the expenditure incurred in this behalf is liable to be disallowed under the provision contained in section 40(ia). In order to illustrate his point , he directed the assessee to file a revised profit and loss account including the receipts and expenditure from this business in the profit and loss account. Such an account was furnished, which shows that the income from lorry booking amounting to Rs.8,51,43,744/- and booking commission of Rs.26,02,032/-. The expenditure on lorry booking was the same as the income, i.e., Rs.8,51,43,744/-. This amount of Rs.8,51,43,744/- was included in the total income of the assessee. 20% of the expenditure incurred in cash, computed at Rs.2,82,913/-, was also disallowed by invoking the provision contained in section 40A(3). Thus, the total income was computed at Rs. 8,62,84,341/-.

3. The ld. CIT(A) confirmed this addition by recording the following findings:-

"However, on a careful consideration, I find that the claim of the appellant cannot be accepted in the absence of basic information as to how and in what manner the client companies are making payment against transportation/carries of goods/articles to the appellant. The appellant has also not furnished a reconciliation of the total number of lorries/trucks arranged by him during the FY under consideration and deduction of tax by the clients with reference to individual truck/lorry owners. The ld. counsel for the appellant submits that the bills on behalf of the truck owners are raised by the appellant and, therefore, the payments are also made by the clients to the appellant. However, when he was asked to submit the reconciliation between the bills submitted and the payments received by the appellant, he expressed his inability in doing so. According to my understanding of accounts, the client companies will either maintain a consolidated ledger account in the name of the appellant and all debits and credits will be routed through the same or, alternatively, the clients will maintain accounts in the names of the individual truck/lorry owners and settle their individual accounts after deduction of tax etc. As to the claim of the appellant that he has acted only as a facilitator, I do not find myself in agreement with the same because the manner in which the accounts have been maintained by him do not support the case of the appellant. Otherwise also, it is first between the individual truck owners and the appellant that a broad agreement/understanding is reached as to the providing of trucks/trolleys for transportation/carries of goods/articles and, therefore, the relationship of contractual nature is developed at this stage only. Therefore, in the absence of any evidence to the contrary, it is difficult to accept the assessee's claim that he was acting only as a facilitator and was not responsible for deduction of tax u/s 194C of the Act.

During the course of hearing, the ld. counsel for the appellant also attempted to explain that all the truck owners are regular income tax assessees and have paid taxes on the transportation receipts of Rs.8,51,43,744/- and, therefore, there is no loss to the revenue even in the absence of deduction of tax by the appellant. However, on being asked to

furnish necessary evidence so as to substantiate his claim, the ld. counsel again expressed his inability to do so. Therefore, this plea of the appellant is also not tenable in the absence of supporting evidence and is being rejected.

In view of the aforesaid, I do not find any infirmity in the action of the ld. AO and the addition of Rs. 8,51,43,744/- made in terms of section 40(ia) read with section 194C of the IT Act, 1961 is being sustained."

3.1 He also confirmed the addition of Rs. 2,82,913/- by recording the following findings:-

"5. As regards ground no. 2 relating to disallowance of Rs. 2,82,913/- made in terms of section 40A(3) of the Act, no argument/submission has been made on behalf of the appellant. The ld. AO has recorded a categorical finding that the payment of Rs.14,14,564/- was made in violation of section 40A(3) and no explanation in regard to compelling circumstances leading to payment in cash in excess of Rs.20,000/- has been furnished. In view of the aforesaid, the disallowance of Rs.2,82,913/- is also being accordingly sustained."

3.2 Aggrieved by this order, the assessee is in appeal before us.

4. The case was originally fixed for hearing on 23.03.2011 and adjourned to 02.08.2011. On this date, a written application was received signed by the ld. CIT, DR seeking adjournment on the ground that some more time is required. However, he was not present to explain the contents of the application. But, the case was adjourned to 04.08.2011. He again filed a written application without making personal appearance, seeking adjournment on the ground that some time is required for preparation of this case. The ld. counsel for the assessee opposed the adjournment application. It was submitted that the issue involved is simple and covered by two decisions of Hon'ble Delhi High Court and Punjab & Haryana High Court. Huge demand had been raised and the revenue is pressing for payment of demand. It was further submitted that in both the applications the ld. CIT, DR has mentioned the same reason. He has also not appeared in person to explain the exact reasons for seeking the time. After considering the submissions of the ld. counsel, the application is rejected, as the same reason has been advanced twice and the exact reasons have not been explained by way of personal appearance.

5. Coming to the merits of the case, it is submitted that the assessee owns and operate four trucks for transportation of goods. These trucks are not adequate in number to meet the market requirement. Therefore, he arranges trucks of other transport companies for carriage of goods for which he receives commission from them. This commission income is credited to profit and loss account. In respect of this income, the assessee does not undertake the business of carriage of goods and no work is performed by him. The bills are prepared in a manner that net commission income becomes payable by the actual transporter to the assessee. To support this contention, reliance has been placed on bills prepared and accounted for in the books. One set of bills in respect of transportation of goods from Hissar to Kurukshetra has been explained in details. It is found that the goods were carried through the truck belonging to Delhi Assam Roadways Corporation Ltd. and the consideration was fixed at Rs.70,000/-. Advance of Rs.50,000/- was received from the customer, leaving a balance of Rs.20,000/-payable by it. On the same date, i.e., 26.03.2007, the amount of Rs.50,000/- was handed over to the driver Ram Kishan of truck No. HR 47E 7121 of Delhi Assam Roadways Corporation Ltd. Again, on the same day, a final bill was drawn in which lorry freight was shown at Rs.70,000/-. Two amounts, i.e., Rs.50,000/- and Rs.2,100/- representing money paid to the driver and the commission of

the assessee, aggregating to Rs.52,100/-, were deducted showing the balance amount payable at Rs.17,900/-. According to the ld. counsel, the balance amount would be paid by the customer to Delhi Assam Roadways Corporation Ltd. on unloading of goods at Kurukshetra. It is also submitted that the only activity carried on by the assessee was to act as an intermediary between the customer and Delhi Assam Roadways Corporation Ltd., for which he received commission of Rs.2,100/-. No other work has been done by the assessee except bringing the two parties together. He did not make any payment to the aforesaid roadways corporation for transportation of goods. Such payment was made by the customer. Thus, there was no liability on assessee for deduction of tax at source.

5.1 To support the aforesaid contention, reliance has been placed on the decision of Hon'ble Delhi High Court in the case of *CIT Vs. Cargo Linkers, (2009) 179 Taxman 151*. The assessee had been carrying on the business of clearing and forwarding agent and booking cargo for transportation abroad for various airlines operating in India. The freight charges were collected from the exporters, who intended to export the goods through a particular airline and paid the amount to the airline or its general sales agent. In lieu of such service, the assessee charged commission from the airline. The AO was of the view that the assessee was liable to deduct tax at source from payments made to airlines. The plea of the assessee in appeal was that it only received commission from the airline on the cargo booked on behalf of the clients, who were exporters. Therefore, it was not the person responsible for making payment in terms of section 194C. The Tribunal recorded the finding that the assessee is nothing but an intermediary between exporter and airline. It books cargo for and on behalf of the exporter and, thus, facilitates the contract for carrying goods. The principal contract is between the exporter and the airline. The Hon'ble Court agreed with the finding of the Tribunal and mentioned that the question is one of fact about the nature of contract between the parties concerned. It has been found as a matter of fact that the contract is between the exporter and the airline and the assessee is merely an intermediary. Accordingly, it has been held that the assessee is not a person responsible for deduction of tax at source u/s 194C of the Act.

5.2 In the case of *CIT Vs. Grewal Brothers, (2011) 199 Taxman 201 (P&H) (Magazine 11)*, the facts stated in the head note are that the assessee-firm was engaged in the business of transportation of liquefied petroleum gas ("LPG" for short). It entered into contracts with petroleum companies for carriage of LPG. The companies deducted tax at source from the payments made to it. The assessee passed on the transportation work to its partners and the payments received from petroleum companies were passed on to them after deducting its commission @ 3% of the value of the contract. The AO held that the partners were sub-contractors and the firm was liable to deduct tax at source from the payments made to them. The Tribunal held that provision contained in section 194C was not applicable and, therefore, the provision contained in section 40(ia) was also not applicable. The Hon'ble Court mentioned that the firm and partners may be separate entities for income-tax and it may be permissible for a firm to give contract to its partners and deduct tax from the payments made as per provision contained in section 194C, but it was to be determined whether there was any separate sub-contract or the firm merely acted as an agent. The case of the assessee was that it was the partners who were executing transportation contract by using their trucks and payment from the company was routed through the firm as agent. The ld. CIT(A) and the Tribunal accepted this plea. Once this plea is upheld it could not be held that there was a separate contract between the firm and the partners.

5.3 We have considered the facts of the case and submissions made before us. We may explain the contents of the bill as mentioned above. The assessee raised a bill no. 3916 dated 26.03.2007 on the aforesaid Delhi Assam Roadways and asked it to arrange the

trucks of the capacity of 25 tons on his behalf. The bill amount was Rs.70,000/- and Rs.50,000/- were paid to Ram Kishan, driver. Second bill of same number and date shows the contract value at Rs.70,000/- and balance payable at Rs.20,000/-. The challan no. 3916 of the same date shows balance freight at Rs.17,900/- and commission of Rs. 2,100/-. This details show that a contract has been entered into between the two parties for a sum of Rs.70,000/- and advance payment of Rs.50,000/- has been made through the driver of the Delhi Assam Roadways. The assessee has not done the work of actual transportation of goods. He earned only the commission of Rs.2,100/-. Thus, it becomes clear that the assessee acted as intermediary between the client and Delhi Assam Roadways Corporation Ltd. The company carried the goods and the advance received from the customer was handed over to the driver of the company. In the final bill, the advance and the commission of the assessee were deducted from the bill amount of Rs.70,000/- and the assessee had to receive commission of Rs.2,100/- from the company. According to us, it cannot be said that assessee really entered into the contract of transportation of goods. He merely acted as an intermediary. Thus, the facts seem to be similar to the facts in the case of Grewal Brothers (supra) although the provisions of Partnership Act make the position of law some what messy. In the case of Cargo Linkers, the assessee acted as an intermediary between the exports and the airlines. It received the amount from the exporter and handed over the same to the airline, who paid commission. These facts are also nearer to the facts of the case at hand. Accordingly, following this decision, it is held that the assessee was not liable to deduct tax at source. In view thereof, no addition could have been made u/s 40(ia). Thus, ground no. 1 is allowed.

6. In respect of ground no. 2, the finding of the AO is that the expenses in respect of “own booking” were furnished and it was found that certain payments in cash exceeding Rs.20,000/- were made. Such payments aggregated to Rs.14,14,564/-. Therefore, 20% of this expenditure was disallowed. The assessee failed to furnish any further submission in this behalf. Accordingly, the action of the AO has been upheld.

6.1 Before us, the ld. counsel wanted the matter to be restored to the file of the AO for making further verification in the matter for which no proper evidence or ground was stated. We are unable to accede to such request for the simple reason that the case is being heard at the insistence of the ld. counsel, which means that he is fully prepared to argue all the grounds. At the same time, looking to the provision of section 40A(3), what is to be ascertained is whether the assessee has incurred any expenditure in respect of which a payment or aggregate of payments made in a day, otherwise than by an account payee cheque drawn on a bank or account payee bank draft, exceed(s) Rs.20,000/-. Such payments have been quantified by the AO in the assessment order on the basis of evidence filed by the assessee. Such payments should also find place in the tax audit report, which is incomplete in this respect as column 17(b)(B) has not been filled up. Column 17(b)(A) only mentions that a certificate has been obtained. The ld. counsel has not been able to show in any manner that there is any mistake in quantification made by the AO. Therefore, we are of the view that the ld. CIT(Appeals) rightly upheld the disallowance of Rs.2,82,913/-.

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

(The order was pronounced in the open court on 26.8.2011.)