

GA 2502 of 2010
ITA 8 of 2011
ITAT 186 of 2010
IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

HIGHTENSION SWITCHGEARS PRIVATE LIMITED
VERSUS
COMMISSIONER OF INCOME TAX, KOLKATA-II

BEFORE:

The Hon'ble JUSTICE GIRISH CHANDRA GUPTA
AND

The Hon'ble JUSTICE TAPASH MOOKHERJEE

Date: 24th June, 2016.

For the appellant :
Mr. J.P.Khaitan, Sr. Advocate
Mr. Siddharth Das, Advocate
Mr. C.S.Das, Advocate

For the revenue :
Mr. S.N.Dutta, Advocate
Mr. P.Dudhuria, Advocate

The Court : - The appeal is directed against a judgment and order dated 19th March, 2010 passed by the Income Tax Appellate Tribunal 'C' Bench, Kolkata in ITA No. 2053/Kol/2009 pertaining to the assessment year 2006-07. The assessee has come up in appeal. The assessee is aggrieved by the following finding of the learned Tribunal :

"We are of the considered view that the assessee was liable to deduct TDS as per Section 194C of the Act in respect of freight charges paid; and since the assessee had failed to deduct TDS in respect thereof, there is no infirmity in the order of the learned CIT(A) in confirming the action of the

Assessing Officer to make the disallowance of the said amount Rs. 69,57,975 as per Section 40(a)(ia) r.w.s. 194C of the Income Tax Act, 1961.”

The reasons which weighed with the learned Tribunal in arriving at the aforesaid conclusion are as follows :

“On perusal of invoices/bills placed at pages 20 to 30 of the PB, there is no dispute to the fact that freight charges payable by the assessee are separately shown in the said bills/invoices. The assessee has also paid the said freight charges as per invoices to the suppliers namely, M/s. Reliance Industries Ltd., and M/s. Gulshan Sugars & Chemicals Ltd. We also observe on perusal of the said bills/invoices that the name of the transporters are also stated through which the goods have been transported to the assessee. As per Section 194C of the Act, any person responsible for paying any sum to any resident for carrying out any work i.e., inter alia carrying of goods by any mode of transport other than by railways, is required to deduct TDS at the time of payment in cash or by issue of cheques or draft or by any other mode @ 2 % of such amount as income tax on income comprising therein. We are of the considered view that the said suppliers have supplied the goods to the assessee and as far as the transport of the said goods, the goods were transported to the assessee by acting as an agent on behalf of the assessee and the assessee has reimbursed the freight charges to the suppliers, who in turn have paid to the concerned transporters. The assessee has admittedly not deducted TDS in respect of freight charges reimbursed to the suppliers of goods. During the course of hearing, the learned AR of the assessee submitted that the said suppliers have deducted TDS and referred to pages 9 to 13 of the PB to substantiate his submission. However, in this regard we consider it relevant to mention the finding of the learned CIT(A) given at pages 5 and 6 of the impugned order.

“The appellant submitted that M/s. Reliance Industries Ltd. (IPCL) had reimbursed total freight charges of Rs. 66,15,675/- in their invoices from him and paid to the transporter M/s. Reliance Logistics Ltd. during the F.Yr. 2005-06, after making necessary TDS deduction which have been deposited under TAN No. BRDIOO275C. I have gone through the documents furnished before me. As seen from the invoice produced before me for the months of April, 2005 and May, 2005, the transporter's name is mentioned as Delhi, Assam Roadways Corporation Ltd. and not M/s. Reliance Logistics Ltd. This was pointed out to the Ld. Authorized Representative. However, no explanation in this regard was given by him. The objective of TDS provisions is to ensure that there is proper tax compliance by the assessees. Similarly, in the case of M/s. Gulshan Sugars and Chemicals Ltd. the freight charges have been reimbursed through sale invoices to M/s. Limra Roadways. As seen from Form No. 16A filed by the appellant PAN/GIR no. of the payee Limra Roadways is not available. The details of

payment made by M/s. Guishan Sugars & Chemicals Ltd. to Limra Roadways cannot be correlated to the reimbursement from the appellant. The Ld. AR also could not relate the payments. In this situation it is very difficult to accept the contention of the appellant that freight charges were paid by him to the suppliers and they deducted TDS from the payments made to Transport Contractors. The appellant cannot take a plea that he does not have the scope of deduction of tax at source. The appellant could not also provide sufficient proof, that legitimate taxes due to the State have been paid.....”

Although a number of questions were formulated on 24th December, 2010, there is consensus between the learned Advocates appearing before us that the substantial question is question no. 1 which is as follows :

“Whether on a true and proper interpretation of sections 40(a)(ia) and 194C of the Income Tax Act, 1961, the Tribunal was justified in law in holding that the appellant was liable to deduct tax at source in respect of the freight component included in the suppliers’ invoices for the goods and in upholding the disallowance of Rs. 69,57,975/- under section 40(a)(ia) of the Act ?”

Mr. Khaitan has produced before us a price list issued by Indian Petro Chemicals Corporation Limited dated 30th December, 2006 which contains the following stipulations as regards freight :

i) Freight :

I) For Ex-factory sales : Freight to customers’ destination will be paid to the GTA on their behalf and collected in the supply invoices.

II) The freight rates are Exclusive of Unloading charges at Customers’ end. Unloading charges at Customers’ end will be extra and will have to borne by the Customers.

III) For Ex-stock point sales, freight from Depot to the customers’ location will be arranged and paid by the customers themselves.

IV) Octroi charges or any other local levy will be borne by customers.

The stipulations appearing from the price list dated 30th December, 2006 appear to have actually been pressed into service from the following facts :

There are seven invoices disclosed by the assessee-appellant appearing at pages 44 to 50 of the paper book. The invoices were issued by Indian Petrochemical Corporation Limited. Each of the aforesaid seven invoices contained the following information:

*Mode of Transport : Road Despatch on A/C RLL
Transporter's Name : DELHI ASSAM ROADWAYS CORN. LTD.*

In order to elucidate the aforesaid information available from the invoices, Mr. Khaitan has drawn our attention to a letter dated 18th March, 2010 which could not be brought to the notice of the Learned Tribunal because the letter was received after the hearing was concluded. The letter dated 18th March, 2010 addressed by Reliance Industries Limited to the assessee reads as follows:

"Sub: Furnishing of Information u/s 133(6) of the IT Act 1961 in respect of M/s. Hightension Switchgears Pvt. Ltd. for the A.Y. 2006-07

Sir,

This has reference to your aforesaid letter dated 10.03. 2010 and subsequent discussions over the phone.

We would like to inform you that M/s. Reliance Logistics Limited (RLL) is our main contractor for transportation of material by road from Plat. This company in turn deputed various transporters for dispatch of materials to various locations across the country from the plants located at Hazira, Jamnagar, Baroda, Gandhar & Nagothane.

Hence in your case the material was transported through M/s. Delhi Assam Roadways Corporation Limited who is a sub contractor for transportation of material by road from plant of M/s. Reliance logistics limited."

We understand that Indian Petrochemical Corporation Limited merged with Reliance Industries Limited. Therefore, Reliance Industries Limited is a transferee company or in other words, the amalgamated company and the Indian Petrochemical Corporation Limited is the amalgamating company.

Therefore, the fact, which emerges, is that the amalgamating company, Indian Petrochemical Corporation Limited sold the goods to the assessee. Reliance Logistics Limited (RLL) was the main contractor of the seller for transportation of materials by road from the plant. RLL in its turn deputed various transporters for despatch of materials to various locations. Delhi Assam Roadways Corporation Limited, whose name appears in all the seven invoices, was thus deputed by RLL. According to the letter dated 18th March, 2010, the said Delhi Assam Roadways Corporation Limited was a sub-contractor of RLL. The invoices go to show that the seller has realised from the assessee freight for the goods. The Learned Tribunal has also recorded the following findings:

“The assessee has also paid the said freight charges as per invoices to the suppliers namely, M/s. Reliance Industries Ltd. and M/s. Gulshan Sugars & Chemicals Ltd.”

We already have quoted the relevant part of the price list concerning freight from which it appears that freight was payable by the seller of the goods to the goods transport agency. The seller under the contract of sale was bound to send the goods to the buyer. It was, therefore, for the seller to arrange for the necessary transport. The assessee has merely reimbursed the cost of transportation incurred by the seller. The Learned Tribunal, therefore, was wrong in holding that *“the said suppliers have supplied the goods to the assessee and as far as the transport of the said goods, the goods were transported to the assessee by acting as an agent on behalf of the assessee and the assessee has reimbursed the freight charges to the suppliers, who in turn have paid to the concerned transporters.”*

The aforesaid view formed by the Learned Tribunal is patently wrong. Under the contract of sale, the seller was bound to send the goods to the buyer. The price list goes to show that the seller was bound to pay the transportation charges to the goods transport agency. The seller was, however, entitled to recover the same from the buyer. The question naturally in the facts of the case is as to who was liable to deduct the tax at source. Section 194C in so far as the same is material for our purpose at the relevant point of time provided as follows:

“Any person responsible for paying any sum to any resident (hereafter in this section referred to as the contractor) for carrying out any work (including supply of labour for carrying out any work) in pursuance of a contract between the contractor and shall, at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, [deduct an amount equal to –

(i) one per cent in case of advertising,

(ii) in any other case two per cent,

of such sum as income-tax on income comprised therein”

Explanation III to Section 194C as it stood at the relevant point is also relevant for our purpose, which reads as follows:

“Explanation III – For the purpose of this section, the expression “work” shall also include –

(a) advertising;

(b) broadcasting and telecasting including production of programmes for such broadcasting or telecasting;

(c) carriage of goods and passengers by any mode of transport other than by railways;

(d) catering.”

From a combined reading of the provisions set out above, it would appear that any person responsible for paying any sum to any resident on

account of carriage of goods “ *shall, at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, [deduct an amount equal to –*

(iii) one per cent in case of advertising,

(iv) in any other case two per cent,

of such sum as income-tax on income comprised therein.]”

Therefore, the relevant question to be asked is, who was responsible for paying any sum to any resident for carriage of goods? The answer obviously is that it was the seller who was responsible for paying and the seller admits to have done that. Therefore, the liability to deduct tax was that of the seller. In case seller is unable to show that he had made the deduction, Section 40(a)(ia) may be applied to his case but not to the case of the buyer/assessee.

Even assuming that the supplier in transporting the goods to the assessee acted “as an agent of the assessee and the assessee has reimbursed the freight charges to the suppliers, who in turn have paid to the concerned transporters” as held by the learned Tribunal is conceptually correct, no other conclusion is possible. The agent being the supplier in this case has admittedly paid to the transporters and has also deducted tax at source. When the agent has complied with the provision, the principal cannot be visited with penal consequences. For one payment there could not have been two deductions. Moreover, when a person acts through another, in law, he acts himself.

In that view of the matter, the question, quoted above, is answered by holding that the Tribunal was wrong in holding that the appellant was liable to

deduct tax at source in respect of the freight component. When the assessee was not liable to make any deduction under Section 194C, the rigours of Section 40(a)(ia) could not have been applied to him. The question is thus answered. The appeal is thus allowed.

(GIRISH CHANDRA GUPTA, J.)

(TAPASH MOOKHERJEE, J.)