IN THE HIGH COURT OF KARNATAKA
DHARWAD BENCH

ON THE 29TH DAY OF JULY, 2015

BEFORE

THE HON'BLE MR.JUSTICE RAVI MALIMATH

AND

THE HON'BLE MR.JUSTICE G. NARENDAR

I.T.A. No 5027/2010

BETWEEN

1. THE COMMISSIONER OF INCOME TAX
BELGAUM

2. THE ACIT
CIRCLE-2, BELGAUM

... APPELLANTS

(BY SRI.Y.V.RAVIRAJ, ADVOCATE)

AND

M/S. MARUTI SUBRAY PATIL
JADHAV COMPLEX, P.B.ROAD
BELGAUM.

... RESPONDENT

(BY SRI.V.CHANDRASHEKAR, SRI.S.ANNAMALI
& SRI.SHASHANK HEGDE, ADVOCATES
FOR SRI.A.SHANKAR, ADVOCATE)

THIS ITA IS FILED U/S.260 A OF THE INCOME-TAX ACT, 1961 AGAINST ORDER DTD:25/11/2009 PASSED IN I.T.A.NO.86/PNJ/2009 ON THE FILE OF THE INCOME TAX APPELLATE TRIBUNAL, PANAJI BENCH, PANAJI,PARTLY ALLOWING THE APPEAL AND CONFIRM THE

ORDER PASSED BY THE DEPUTY COMMISSIONER OF INCOME TAX, BELGAUM FOR THE ASSESSMENT YEAR 2005-06.

RESERVED ON 13.07.2015

PRONOUNCED ON 29.07.2015

THIS APPEAL COMING ON THIS DAY, G.NARENDAR J., DELIVERED THE FOLLOWING:

JUDGMENT

This appeal is preferred under the provisions of Section 260A of ITA Act, 1961, arising out of the order dated 25.11.2009 passed by the Income Tax Appellate Tribunal, Panaji Bench, Panaji in ITA No.86/PNJ/2009, praying that the Hon'ble Court may be pleased to:

I) Formulate the substantial questions of law and further has stated hereinafter;

II) Allow the appeal and set aside the orders passed by the ITAT, Panaji Bench in ITA No.86/PNJ/2009, dated 25.11.2009, whereby the order of the appellate Commissioner dated 30.03.2009 confirming the order of the assessing officer was set aside and confirm the assessment of the assessing authority for the assessment year 2005-06.

2. The above appeal is filed by the Revenue impugning the order passed by the Tribunal.

3. The substantial questions of law that arise for consideration in the above appeal are as follows:

1. *Whether in the facts and circumstances of the case, the ITAT is right in law in deleting the addition made under Section 40(a)(ia) ignoring the facts that there was oral contract with transporters which was evident from the fact that, payments made to each lorry owner exceeded* Rs.*50,000?*

2. *Whether the ITAT is right in deleting the addition made ignoring Explanation-III to Sectiion 194C defining "Work" as only carriage of goods and not sub-contract of entire work as held by ITAT and also ovelooking Uttaranchal High Court decision in 290 ITR 530 wherein, it is held that once agents are appointed by contractor liability to TDS arises under Sectiion 194C?*

3. *Whether the ITAT is right in deleting the addition made on the ground that entire work undertaken by contractor was not sub-contracted to transporters ignoring provisions of Section 194C(2) which clearly provides that, even sub-contracting part of work by contractor also attracts T.D.S.?*

4. The brief facts of the case are as follows:

The assessee, who is the respondent herein claims to be in the business of transportation. It is the further claim by the assessee that he had entered into a contract with one M/s.Infrastructures Logistics Pvt.

Ltd., Goa for transportation of iron ore from Sandur Mines to a place called Redi. It is further asserted that under the contract, the assessee has claimed to have paid a sum of Rs.5,10,16,407/-. In the books of account of the said assessee, the amount mentioned supra was described as "Freight Paid".

It is the case of the Revenue that the Assessing Authority at the time of scrutinizing the returns for the assessment year 2005-06 noticed that the assessee had made aggregate of payment in excess of Rs.50,000/- in a single assessment year and towards freight charges to various truck owners/operators, without deducting tax at source, on such payments, as mandated under the provisions of Section 194C of the IT Act. Upon noticing the discrepancy, the assessee was called upon to explain. Whereupon it was claimed by the assessee that there is no sub-contract and that he has loaded the vehicle whichever had come to the site and that the heading "freight paid" is a misnomer and a factual error and that the amount paid in fact represent the hire charges and not freight charges. Rejecting the specious contentions the Assessing Authority disallowed certain amounts. The Assessing Authority noticing

the discrepancy was constrained to invoke the provisions of Section 40(a)(ia) of I.T. Act and disallowed the amount of Rs.4,07,73,435/-.

5. The assessee aggrieved by the assessment order preferred an appeal before the Commissioner Appeals, contending that there was neither an oral or written contract, by which the contract work of transportation was sub-contracted to the truck owners and it was contended that the amounts paid represent the hire charges and are not freight charges. It was also contended that in the absence of the sub-contract the amount though described as freight charges ought to be read as "hire charges only". The Commissioner (Appeals) is said to have thoroughly scrutinized the records and is said to have found that the payments made to the various vehicle owners depended on the quantity transported and in this regard, he has relied upon certain vouchers dated between 13th March to 31st March for the year 2005, wherein it is seen that for the same distance, different rates have been paid to different vehicles under different voucher numbers and thus arrived at the conclusion that the amounts expended was indeed freight charges and not hire charges. Though, it was the specific case of the assessee that the amounts paid reflect only the hire charges. No material has been placed

to demonstrate the same either before the Assessing Officer or before the Commissioner (Appeals). Hence, the Commissioner (Appeals) by a detailed and reasoned order was pleased to conclude that the amounts allegedly paid are indeed freight charges and not hire charges and rejected the contention of the assessee that the entry "freight paid" is on account of the mistake committed by the accountant and in fact such amount represent the hire charges only. It is the admitted case of the assessee that there are no written contract nor bills issued by the transporters and the entire case is sought to be demonstrated and supported only by the vouchers maintained by the assessee.

6. The other undisputed fact is that the asseessee has described the payments in the vouchers as "freight charges" (though it is alleged to be the result of error by the assesseee's accountant) in its books of accounts.

7. In the above background of facts the assessee aggrieved by the order of the Commissioner (Appeals) preferred the appeal before the Income Tax Appellate Tribunal impugning the conclusion of the assessing officer and its confirmation by the Commissioner (Appeals) concluding that the provisions of Section 194C(2) of the Act was

attracted and the assessing authority invoked consequential provisions of Section 40(a)(ia) of the Act.

8. The learned counsel for the appellant would take the Court through the order rendered by the appellate Tribunal. He would state that the Tribunal after merely recanting the respective submissions of the parties before the authorities below, thereafter, simply proceeded to rely upon the judgments and citations, to dispose off the appeals. He would submit that the Tribunal misdirected itself by relying upon the broad principles to dispose off the appeal, which has resulted in grave miscarriage of justice.

9. The appellant's counsel dilating at the bar, would point out that the facts pleaded herein and the facts in the case laws relied upon are at variance and the facts are not identical. He would submit that the Tribunal erred in observing the fact that the decisions of the Visakahpattanam Bench involved almost similar facts. He would further submit that the Tribunal erred in accepting the contention of the assessee at the face value. The contention is that there are no written sub-contract and hence, in the absence of written sub-contracts the payments have to be construed as hire charges is not only materially

irregular, but contrary to the law resulting in travesty of justice and rendition of an illegal order which resulted in unjustified avoidance of tax.

10. The appellant would further submit that the Tribunal materially erred in not appreciating the various contentions on behalf of the revenue. He would contend that the Tribunal erred in holding the assessing authority responsible for not placing on record, any material to demonstrate that the obligation of the assessee are taken over by the truck owners engaged by the assessee.

11. The appellant counsel would further submit that the Tribunal erred in holding that the element of risk remained with the assessee only and was not transferred to the truck owners. He would submit that it is not the case of the assessee nor the assesseee placed any material to demonstrate or buttress the case made out by the Tribunal.

12. The appellant counsel would submit that the reasoning of the Tribunal that the Revenue failed to place any material to controvert "oral statement" of the assessee is not only perverse but also contrary to all known canons of evidence. He would submit that the reasoning of the

Tribunal calling upon the revenue to disprove or controvert, unsubstantiated and uncorroborated self serving statement of the assessee is not only whimsical but highly illegal. He would state that no burden is caste upon a person to disprove anything that has not been proved.

13. The learned counsel for the appellant would submit that the vouchers and entries in the books of accounts are the evidence of contract entered into and executed on behalf of the assessee. He would submit that it is the case of the assessee that he owned only five trucks and that the trucks of third party has been used to transport the materials, that is to execute the contract entered into between the assessee and his principal. He would submit that the same are evidence of an implied agreement and agreements include oral agreement also. He would state that it is an undisputed fact that no material has been placed by the assessee to either (a) demonstrate that no written contract has been executed between the truck owners and the assessee; (b) no material is placed by the assessee to demonstrate that the element of risk remained with the assessee only and was not transferred to the transporter; (c) no material was placed before the original authority or

the Tribunal to demonstrate that the payments are hire charges only and not freight charges; and (d) no material is placed either before the Tribunal or the authorities to corroborate and demonstrate the statement / alibi of the assessee that the entry in the books of accounts described as "freight charges" is as a result of factual mistake. He would submit that in the light of the above, the question of disproving a unsubstantiated or non existing facts does not arise. He would state that shifting of the burden of proof on the revenue to disprove the non-existing fact is contrary to law under the Indian Evidence Act and on the above contentions the appellants counsel would submit that the impugned order warrant interference at the hands of the Court and requires to be set aside.

14. Per contra, the learned counsel for the respondent/assessee would reiterate his contentions that the payments are indeed hire charges and the entry in the books of accounts and vouchers describing the payments as "freight charges" is a factual mistake committed by the assessee's accountant. That apart he would submit that in the absence of the written sub-contract, it is erroneous on the part of the revenue to presume or assume the violation of the mandate of Section 194C(2). He

would also strongly condemn consequential invocation of the provisions of Section 40(a)(ia) of the Act. He would submit that the invocation is bad in respect of the payments that have already been made and that the provision could be invoked and would be applicable only in respect of pending payments that are yet to be made. He would submit that if the interpretation placed by the Assessing Authority is allowed, it would result in grave in justice as the consequence are very grave and have the capacity to financially ruin the assessee put him out from the business permanently.

15. The respondent counsel would relay on the various judicial pronouncements by the Tribunals and of the Panjab and Harayana High Courts.

16. The above appeal came to be admitted on 03.02.2011 on the substantial questions of law as framed by the revenue. Apart from the same, this Court would also deem it necessary to frame an additional issue, which has arisen incidentally as a result of the approach adopted by the Tribunal, the same is as follows:

Whether in the facts and circumstances of the case, the income tax appellate Tribunal was right in allowing the appeal by merely

relying on broad principles without reference to the critical facts of the case?

17. For the sake of brevity and convenience the provisions of Section 194C of IT Act, are culled out for reference purpose only.

"194C. [(1) Any person responsible for paying any sum to any resident (hereinafter 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—

(a) XXXXX
(b) XXXXX
(c) XXXXX
(d) any company; or
(e) XXXXX
(f) XXXXX
(g) XXXXX
(h) XXXXX
(i) XXXXX
(j) XXXXX
(k) XXXXX

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:

Provided that no individual or a Hindu undivided family shall be liable to deduct income-tax on the sum credited or paid to the account of the contractor where such sum is credited or paid exclusively for personal purposes of such individual or any member of Hindu undivided family.]

(2) Any person (being a contractor and not being an individual or a Hindu undivided family) responsible for paying any sum to any resident (hereafter in this section referred to as the sub-contractor) in pursuance of a contract with the sub-contractor for carrying out, or for the supply of labour for carrying out, the whole or any part of the work undertaken by the contractor or for supplying whether wholly or partly any labour which the contractor has undertaken to supply shall, at the time of credit of such sum to the account of the sub-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 one per cent of such sum as income-tax on income comprised therein:

[Provided XXXXX

Explanation I. — XXXXX

Explanation II. — XXXXX

Explanation III. —For the purposes of this section, the expression "work" shall also include—

(a) XXXXX

(b) XXXXX

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

(3) No deduction shall be made under sub-section (1) or sub-section (2) from—

(i) the amount of any sum credited or paid or likely to be credited or paid to the account of, or to, the contractor or sub-contractor, if such sum does not exceed twenty thousand rupees:

Provided that where the aggregate of the amounts of such sums credited or paid or likely to be credited or paid during the financial year exceeds fifty thousand rupees, the person responsible for paying such sums referred to in sub-section (1) or, as the case may be, sub-section (2) shall be liable to deduct income-tax [under this section:]"

18. The provisions of Section 40(a)(ia) are culled out for the sake of convenience:

40. Notwithstanding anything to the contrary in sections 30 to [38], the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",—

(a) in the case of any assessee—

[(i) any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or other sum chargeable under this Act, which is payable,—

(A) outside India; or

(B) in India to a non-resident, not being a company or to a foreign company,

Provided XXXXX

> *(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 during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of section 200:"*

19. A perfunctory reading of the provisions of Section 194C of the Act obviates the necessity for any interpretational exercise as the provisions are unambiguous. A reading of the provisions of Section 194C mandates that any person who is involved in executing any contract or carrying out any work under a contract between any individual and company etc., and where the aggregate of payments to such person/s or agency engaged by a contractor exceeds Rs.20,000/-, a mandate is cast on such persons making payments to deduct a sum of one percent or two percent at the time of making payments to the person, who carries out the work or such portion of the work under the Contract. Thus in a sense, the provisions of Section 194C enjoins a positive duty on the persons making the payment to deduct a sum at the specified rate and as mandated under the Act and that too at the time of making of payments and the deducted amounts are to be deposited with the authorities. One such activity which has been brought within the

sweep of the above section is transportation of goods or carriage of goods by any mode of transport other than the railways.

20. The provisions of Section 40(a) provides an exemption from the rigors of Chapter XVII-B, and the said Chapter includes the provisions of Section 194C, provided aggregate of payments made to a person/entity does not exceed Rs.20,000/-.

21. In the background of the law it is necessary to revisit the facts of this case and address the poser as to whether the said provisions are applicable and the revenue was justified in invoking the same.

22. The undisputed facts are that the assessee declared a total income of Rs.25,14,811/- for the assessment year 2005-06. On an inspection of the accounts by the A.O., it was revealed that the assessee had received a sum of Rs.5,74,48,399/- as freight charges from M/s.Infrastructures Logistics Pvt. Ltd., Goa and out of that he declared that he had paid a sum of Rs.5,10,16,407/-. The said information was furnished vide questioner dated 06.09.2007, wherein the assessee was asked to furnish the details of freight paid and also called upon to explain the reason as to why a tax was not deducted on the freight charges paid. In response to

the same, the assessee vide his letter dated 19.11.2007 stated that it is not a freight charges but it is lorry hire charges and that by mistake the accountant has used the word freight paid. Thus it was asserted for the first time by the assessee that he had hired the vehicles belonging to others for transportation of materials under contract with principle. It was also asserted that there are no written contracts with the lorry owners and who ever was available had been employed by them and paid hire charges and that as the lorry owners are not fleet owners and possess one or two trucks, the question of making TDS from hire charges did not arise. With reference to the explanation offered under the letter dated 19.11.2007, a further query was addressed by the Assessing Officer on 12.12.2007. It was pointed out to the assessee that his explanation vide letter dated 19.11.2007 was self contradictory. It was pointed out that in one breath he has stated that the amounts paid to the lorry owners is not freight charges but hire charges and in next breath, he admits that there are no contracts. It was further pointed out that there is no hire agreement presented before the Assessing Officer. It was further pointed out that except for a few cases, the aggregate of amounts paid to each lorry owners was in excess of Rs.50,000/- and as noted

supra only those payments of aggregate which do not exceed Rs.50,000/- are exempted under sub-section 3 of Section 194 of the Act and where no single payment of Rs.20,000/-, the same are exempted from the purview of sub-section 3 of Section 194C and failure attracts the consequences under Section 40(a)(ia) of the Act.

23. In reply, the assessee has reiterated that the word freight paid has been mistakenly used by his accountant and that there are no contracts with the lorry transporters and that even if it is assumed that there is implied contract, then the contract is for one trip and that the second trip will be an independent and that no amount in excess of Rs.20,000/- has been paid. That is, in sum and substance, the defence of the assessee is that as he has not paid any transporter in excess of Rs.20,000/- for any single trip, that is there is no single transactions where payment has exceeded Rs.20,000/-. But it is to be noted that it has not been denied by the assessee, that in most of the cases, the aggregate of sums paid in the assessment year is in excess of Rs.50,000/-. It is seen that the assessee has conversely argued before the assessing authority stating that he has not made any single payment either in excess of Rs.20,000/- or Rs.50,000/- and hence, he has sought exemption from the purview of

the Act mandating deduction of tax at sources. But yet again it is to be noted that there is no denial of the fact that the aggregate of the payment in the assessment year in respect of the most of the transporters exceeds Rs.50,000/- and the provisions of Section 194C(i) read with Section 194C(iii) mandates that, if the sum credited/paid to any person exceeds Rs.50,000/- in a financial year, then the said sums are liable for deduction of tax at source, in other words, tax is to be deducted at source (TDS). The assessee has also relied upon a circular dated 01.10.2004 and the same has also been rejected in view of the fact that the provisions of Section 194C(i) had been amended with effect from 01.10.2004. Thus, in effect all the contentions raised by the assessee were negated and the assessing authority invoking the provisions of section 40(a)(ia) of the Act disallowed a sum of Rs.4,07,73,435/- out of the declared sum of Rs.5,10,16,407/- as this represented the total sum of amounts, where the aggregate of payments made to the transporters exceeded Rs.50,000/- in the assessment year. It is seen that the Assessing Authority has also brought out specific instance which go to demolish the contention of the assessee. The

assessee and his Chartered Accountant attended hearing before the Assessing Authority.

24. The dispute in a nutshell is as to whether the provisions of Section 194C of the Act can be invoked only if any single payment exceeds Rs.50,000/- or can be invoked if the aggregate of payment in an assessment year exceeds Rs.50,000/-. As stated supra there is no controversy regarding the said contention, the provision is clear and unambiguous and the word aggregate has been specifically used. In that view of the matter, the assertion on behalf of the assessee, that only in respect of payment which exceeds Rs.50,000/- is liable to be deducted at source is liable to be rejected and is accordingly rejected. Accordingly, the substantial questions of law as framed by the appellant/revenue is answered in favour of the revenue.

25. The simple issue has been approached by the Tribunal in an erroneous manner. The Tribunal under the guise of broad principles has misdirected itself resulting in adjudication of the dispute on the basis of inferences and assumption, contrary to law. The Tribunal has rendered a finding without reference to the basic and critical facts which were necessary for adjudication. The Tribunal has gravely erred in trying to

adjudicate the appeal merely on the basis of broad principles. The Tribunal gravely erred in inferring that, there ought to be a sub-contract in writing and only in a such an event the provisions of the Act can be invoked. It further seriously erred in holding the factual issue in favour of the assessee, when not even a shred as evidence was placed before it. A pointer in this direction, is the finding that no risk was undertaken by the lorry owners. It was not the case of the assessee before the Assessing Authority or Commissioner (Appeals). The said contention being question of fact, the appellate Tribunal erred in accepting the same and on the contrary ought to have outright rejected the same. It ought to have seen that it is an improvement to the case put forth by the assessee before the original authority. It is not the finding of the Tribunal that any independent material either in the form of say of lorry owners, etc., were placed before it compelling it to take a different view than the one adopted by the original authority. The Tribunal has also gravely erred in holding that the assessee/appellant had made out a case because the revenue failed to place any material before it, contraverting the vague and mere oral assertion of the assessee. The said reasoning is contrary to all known cannons of the law of evidence, logic and law mandates that

the burden and onus is on the person, who alleges a fact, to prove the said fact. The assessee has pleaded that the entries "freight paid" is on account of a mistake committed by their accountant and they have come up with the excuse very belatedly. This being the factual issue, the Tribunal did not deem it necessary to call upon the assessee to demonstrate the said fact, but proceeded to accept the statement as a proven fact. It appears that the Tribunal has diverted itself from addressing the core issue, that is whether the assessee has paid any sums, the aggregate of which exceeds Rs.50,000/- in the assessment year to any single entity. The Tribunal has not addressed itself to any of the findings of fact rendered by the Assessing Authority. In particular, several instances of the aggregate of payments have exceeded Rs.50,000/- in the assessment year have been placed on record. It does not render any reasoning to unsettle the finding of the original authority, that even the agreement can also be an oral and that the transactions with the lorry owners/transporters is within the purview of the provisions of the Act as it amounts to carriage of goods other than the railways.

26. The finding that the appeal requires to be allowed in view of the decision by the Co-ordinate Bench and that of the Punjab and Haryana

High Court in the case of Commissioner of Income Tax Vs. United Rice Land Limited reported in (2010) 322 ITR 594 (P&H) is erroneous. Therein the finding of fact, that the amounts paid to the transporter is by way of hire charges, was rendered on the basis of evidence furnished by the alleged transporters. The assessee therein was in the manufacturer and export of rice and there was an identified route, quantity etc., in view of which certain facts could be easily identifiable. The transportation of goods was from its premises to the port and in the course of its export. In the present case, the facts and details are not only hazy but are obfuscated due to lack of clarity. Apart from stating that the ore was required to be transported from point (a) to point (b), no details are provided as to whether the point (b) was a licenced or registered place, where minerals could be stored there, etc., It is seen that a huge sum amounting to Rs.5=00 crorers is spent merely for transportation of iron ore from point (a) to point (b), no details are forth coming whether the transportation is in the course of business or is being transported to the hands of end user. In such situation, this Court finds it hard to believe the version put out by the assessee.

27. The counsel for the respondent is unable to answer the queries in this direction. As stated earlier, the Tribunal gravely erred in adversely inferring against the revenue for having failed to disprove the oral assertion of the assessee.

28. On the other hand, the Tribunal ought to have adversely inferred against the assessee for having failed to place material to substantiate its oral assertion. Consequently, the order of the Tribunal is vitiated and requires to be interfered with. Accordingly, the impugned order under appeal is set aside and the order of the original authority dated 26.12.2007 stands resurrected. The case of the assessee is rejected and the question of law formulated by the appellant stands answered in favour of the revenue.

29. The appeal stands disposed of in the above terms.

Sd/-
JUDGE

Sd/-
JUDGE

Vnp*