



**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK**

**BEFORE S/SHRI N.S SAINI, ACCOUNTANT MEMBER
AND PAVAN KUMAR GADALE, JUDICIAL MEMBER**

ITA No. 86 /CTK / 2017
Assessment Year : 2010-2011

Sri Dillip Kumar Nayak, Plot No.270/A, Saheed Nagar, Bhubaneswar.	Vs.	JCIT, Range-2, Bhubaneswar
PAN/GIR No.BAUPS 1084 H		
(Appellant)	..	(Respondent)

Assessee by : Sri P.K.Mishra, AR
Revenue by : Shri A.K.Mohapatra, CIT DR

Date of Hearing : 28/08/ 2018
Date of Pronouncement : 06/09/ 2018

ORDER

Per N.S.Saini, AM

This is an appeal filed by the assessee against the order of the CIT(A)-2, Bhubaneswar dated 7.11.2016 for the assessment year 2010-2011.

2. Ground Nos.1,2, 8 & 9 of appeal are general in nature and hence, requires no separate adjudication by us.

3. In Ground No.3 of appeal, the grievance of the assessee is that the CIT(A) erred in confirming the addition of Rs.2,60,440/- out of total addition of Rs.9,01,844/- made by the Assessing Officer.

4. Before the CIT(A), the assessee has assailed the addition of Rs.9,01,844/- being deposits in account number 511210100004605 in Bank of India, Kharvel Nagar, Bhubaneswar. The assessee in its written submission before the CIT(A) submitted as under:

"The assessee had maintained his personal savings account with Bank of India vide account number 511210100004605. The assessee had drawn Rs. 3,00,000.00 during the year as reflected in the audited Balance Sheet for the year. The total credit in the account during 01.04.2009 to 31.03.2010 was Rs. 2,60,438.00. As the total drawings exceed the total credit in the account there was no unexplained credit. The learned JCIT had erred in making the addition of Rs. 9,01,844.00 as there is no such credit in the bank. Copy of bank statement, Drawing account and the audited balance sheet are enclosed herewith."

5. Since the assessee furnished new evidence, the CIT(A) referred the matter to the assessing officer for verification and submission of the remand report. The assessing officer has filed remand report vide order dated 01.09.2016. The relevant portion is as below: -

"A. Addition of Rs. 9,01,844/- on account of undisclosed deposits in SB a/c. Bearing A/c. No. 511210100004605.

The assessing officer made an addition of Rs. 9,01,844/- being the credit entries made in the SB account bearing No. 511210100004605 maintained with Bank of India, Kharvel Nagar Branch since the same were not reflected in the books of accounts of the assessee.

During the course of remand proceedings the A/R of the assessee appeared and furnished the following submissions:

- "1. During the financial year 2009-10, relating to Assessment year 2010-11 Assessee has not deposited Rs. 9,01,844.00 in that Account.*
- 2. Total amount deposited during the year under consideration comes to 1 2,60,436.00. Therefore, the findings made in the Assessment order are not correct.*
- 3. It, being a Savings Account has no relationship with the business of the Assessee and no business transaction was ever deposited in this Account.*
- 4. The Bank Accounts relating to the business of the Assessee are truly and correctly disclosed. Therefore, there is no necessity to disclose this Account in the Business Balance sheet, as such your Assessee has not committed any error in not disclosing it in the Business Balance Sheet.*
- 5. It, being a Savings Account, only the drawings made of Rs. 3,00,000.00 on different dates out of the disclosed profit from the Capital Account were deposited. Therefore, the deposits made in this Account cannot be treated as unexplained income of the Assessee.*

The bank accounts statements of the assessee is duly verified and found that during the financial year 2009-10 relevant to the assessment year 2010-11 the amount credited in the account is Rs. 2,60,440/-. It is also found that during the financial year 2009-10 the assessee has made drawings of Rs. 3,00,000/-from his capital accounts. However, the assessee failed to furnish reconciliation statement regarding amounts withdrawn from the capital account and consequent deposits made in the SB account of the assessee claimed to be maintained by the assessee in his personal capacity. Therefore, the contention of the assessee is not acceptable. "

6. After considering the submissions of the assessee and the remand report of the Assessing Officer, the CIT(A) observed that the Assessing officer has accepted that the quantum of cash credits of the bank account of the assessee are of Rs. 2,60,440/-. The assessing officer has not accepted that the source of these

cash deposits which are from the drawings of Rs. 3,00,000/-. Therefore, the CIT(A) was in agreement with the assessing officer that drawing of Rs. 3,00,000/- will be utilized by the assessee for his household expenditure. Considering the fact that the assessee will not manage the household expenses for Rs.40,000/- for one year and that the assessee has not furnished reconciliation statement showing deposits are from the drawings, the CIT(A) restricted the addition to Rs.2,60,440/- and partly allowed the appeal of the assessee.

7. We find that during the course of hearing, Id A.R. reiterated the submission made before the CIT(A). He could not bring any cogent and relevant material on record to show that the deposits in the bank account were out of earlier drawings made by the assessee before depositing the same in the bank account. We, therefore, confirm the order of the CIT(A) and dismiss this ground of appeal of the assessee.

8. In Ground Nos.4,5 & 6 of the appeal, the grievance of the assessee is that the CIT(A) is not justified in confirming the addition of Rs.3,05,26,985/- made by the Assessing Officer on account of payment made to M/s. Sumasankar Sponge Iron Pvt Ltd., by applying section 40(a)(ia) of the Act.

9. The brief facts of the case are that the Assessing Officer found that the assessee has claimed payment of wages of Rs.3,05,26,985/- to M/s. Sumasankar Sponge Iron Pvt Ltd. On being required from the assessee to produce contract agreement, number of labours employed, bills raised by other parties, the assessee submitted that M/s. Sumasankar Sponge Iron Pvt Ltd was promoted by his father Shri Bidyadhar Nayak. The unit was sick and that his father alongwith others negotiated with Bank of Baroda and taken over assets and liabilities through the bank. The unit could not turn around due to shortage of raw materials and electricity. As a result, it became idle. Since the assessee was in requirement of labour for his operations, he had accommodated the labour force of M/s. Sumasankar Sponge Iron Pvt Ltd in his unit as it being a tribal and forest area, getting labour was very difficult. That the assessee made payment to labourers of Rs.3,05,26,865/- through bank account of M/s. Sumasankar Sponge Iron Pvt Ltd and booked the expenditure in his account. M/s. Sumasankar Sponge Iron Pvt Ltd has neither shown any income towards labour charges nor any corresponding expenditure and no cash payment of Rs.20,000/- to any single person in a day was made.

10. The Assessing Officer was not satisfied with the above explanation of the assessee and, therefore, held that the payment of expenditure was shown in order to reduce profit in order to avoid of payment legitimate tax. The assessee was required to produce primary evidence such as provident fund and ESI subscription made for labours by M/s. Sumasankar Sponge Iron Pvt Ltd. The assessee could not furnish any details. Further, neither any wage register nor any supporting bills and payment vouchers in respect of such claim was produced for verification. Therefore, he inferred that the payment was bogus and disallowed the same.

11. On appeal, the CIT(A) called for a remand report from the Assessing Officer on the submissions and evidences filed before him. In the remand report dated 1.9.2016, the Assessing Officer stated as under:

“C. Disallowance of payment of Rs. 3,05,26,985/- to Sumasankar Sponge Iron (P) Ltd. on account of wages payment.

During the course of assessment proceeding the A/R of the assessee claimed that out of total wages of Rs. 5,63,25,435/- incurred by him during the financial year 2009-10, he has paid an amount of Rs. 3,05,26,985/- to M/s. Sumasankar Sponge Iron (P) Ltd. On account of Labour forces of he said company being used by the assessee. But the assessee failed to produce any material evidences in support of engagement of labour force of M/s. Sumasankar

Sponge Iron (P) Ltd. Therefore, the Assessing Officer disallowed wages payment of Rs. 3,05,26,985/- and treated the payment as bogus as the payments made by the assessee were not supported by account of other party.

During the course of remand proceedings, the A/R of the assessee appeared and furnished following documents/explanations:

That, in query No. 3 your Honour required the Assessee to justify as to why the labour charges paid to M/s. Sumasankar Sponge Iron (P) Ltd. of Rs. 3,05,26,985/- disallowed in Assessment is not justified, further to explain why section 40(a) (ia) of the Act. On this issue, it may be submitted here that, during the year under consideration, M/s. Sumasankar Sponge (P) Ltd., had stopped its business and its labours were lying idle, for which it requested the assessee to use its labour, so that, they will not have any complain against the Company. Since, the labours of the Company were staying nearby the site of the Assessee, he simply used them for his work and paid them through the Company. The Company neither worked as for his work and paid them through the Company. The Company neither worked as a Labour contractor nor also supplied Labours and earned its income out of it. Therefore, the question of application of section 194C does not arise at all.

3.1 That, since the said company is not a labour contractor and simply acts as a supervision on behalf other Assessee. The question of deduction of Tax on payment of labour charges does not arise at all. Further, since there is no infraction of section 194C of the Act, section 40(a)(ia) of the Act **cannot be applied to** disallow the labour expenses paid through the Company.

3.2 That, on this issue, your Assessee wants to draw your Honour's kind attention to the **TDS** provisions contemplated under the Act. On perusal of the said **on**, it will be revealed that, Tax is not required to be deducted in **all** expenses claimed by the Assessee. Only those expenses, which forms income in the hand of the recipient needs to be subjected to TDS. Since the payment made through Mis. Sumasankar does not form any income and, therefore question of deduction of Tax at source does not arise at **all**.

3.3 **That,** in response to your Honour's query regarding none disclosure of the receipt of labour charges by the said company in its return of income, it may be respectfully submitted here that, since it is not an income in the hand of the said company, it has not reflected the same in its Audit Report. Therefore, in not including the labour charges received from the Assessee and paid on behalf of the Assessee, in its income, it had not committed anything wrong.

With his written submission the AIR of the assessee furnished `ledger Account copy of Labour charges paid through the said Company, copy of Agreement executed with the Company in respect of use of Labour of the Company and confirmation letter of the company issued to the assessee regarding receipt of Rs. 3,05,23,985/- on the account of labour payment. The above documents were verified and found that during the financial year 2009-10 relevant to the assessment year 2010-11 the assessee has paid an amount of Rs. 4,50,90,439/- to M/s. Sumasankar Sponge Iron (P) Ltd. which includes an amount of Rs. 3,05,26,985/- claimed to have been paid on account of wages. The above said amount has been paid through banking channels except Rs. 1,33,875/- which has been incurred in cash. Perusal of the agreement revealed that the agreement has been made with the company only for accommodation of labours and company is not a labour contractor/supplier. The assessee also claimed the above expenses of Rs. 3,05,26,985/- under the head wages. The copies of the agreement and confirmation letter of the company M/s. Sumasankar Sponge Iron (P) Ltd. with regard to receipt of Rs. 3,05,26,985/- against use of labours is placed in the file for ready reference.

In view of the above facts and circumstances, though the claim of the assessee regarding payment of Rs. 3,05,26,985/- has been explained, the additions on the above ground may be decided on merit. "

12. The assessee filed rejoinder to the remand report vide submission dated 18.10.2016, which reads as follows:

*"5.1. That, the learned A.O. while completing the Assessment has disallowed **Rs.3,05,26,985.00** paid to M/s. Sumasankar Sponge Iron (P) Ltd. which was paid on account of use of the labour of the Company by the Assessee. During the course of Remand proceeding, the Assessee furnished the Ledger Account of labour charges paid through the said Company, copy of Agreement executed with the Company in respect of use of labour of the company and confirmation of letter issued by the Company in that respect. The learned A. O. verified the above documents and found that, the said amount were paid through banking channels except of Rs. 1,33,875.00. Further, it was also found that, the said payments were made only for accommodation of labour and the said company is neither a labour contractor nor supplier of labour. Further it is also held by the learned A. O in the remand report that the claim of the of the Assessee regarding the payments of Rs. 3,05,26,985.00 has been satisfactorily explained. Therefore, the impugned additions made by the learned A.O. on the ground of want of evidences in support of engagement of labour is now explained with evidences, as such the impugned addition needs to be deleted in the interest of justice. "*

13. Thereafter, the CIT(A) held as under:

" 6.5 As it can be seen from page number-5 of the assessment order, the assessing officer made the addition of Rs. 3,05,26,985/- on the ground that the appellant did not submit the contract by which labour was supplied to him by SSEPL and no deduction u/s. 194C has been made by the appellant on payment made to SSIPL. In addition, the assessing officer noticed that SSIPL has not shown receipt of this payment from the appellant and primary evidences such as PF/ESI subscription were not furnished. The assessing officer has also noted that the appellant did not produce documentary evidence such as wage register and supporting bills/vouchers.

6.6 During the course of remand proceedings, the appellant submitted ledger account, copy of labour charges paid to

SSEPL, copy of agreement executed by appellant with SIPL for use of labour of SSIPL, confirmation letter regarding receipt of Rs.3,05,26,985/- on account of labour payment etc. On the basis of these documents, the assessing officer has accepted that the payment of Rs. 3,05,26,985/- was genuine.

6.7 However, it is seen that the appellant has not deducted tax at source on the payment of Rs. 3,05,26,985/-. No explanation was submitted during the course of assessment proceedings. During the course of remand proceedings, the appellant submitted that the SSEPL is not a labour contractor, SSIPL neither credited this amount to its books of account nor has claimed expenditure and therefore provisions of section 194C are not applicable. I have gone through the agreement dated 01.04.2009 between SSEPL and the appellant which was filed during the course of remand proceedings. The relevant portion is as below:-

"The First party is the Managing Director of M/s Sumakar Sponge Iron (P) Ltd running a induction furnace plant situated at Khuntakata, Suakathi, Keonjhar district in the state of Orissa, India. The First Party has idle labour force as the plant is not in operation. The Second Party has approached the First Party for using the Labour force at his work site execution of overburden of iron ore at Gandhamardhan mines, Suakati Keonjhar. As the First Party is unable to make payment to the idle labour he has agreed to the proposal by the Second Party under following terms and conditions.

- 1. That, this is not a labour contract agreement as the First Party is not a labour contractor and will not raise any such labour bills. This arrangement will be only temporary deputation of labour to the Second Party and the Second Party shall not deduct any TDS from the wages payments.*
- 2. That the second party will pay the monthly wages bill to the labour through the bank account of the First Party as the labour force are under the pay roll of the First party.*
- 3. That, the Second party will make the payment to labour on receipt of payments through account.*

4. *That, this arrangement is only a temporary arrangement to engage the labour force of the First Party and either party can give two months' notice to terminate this agreement.*

5. *That the Second Party will not pay any labour benefits such as ESI and EPF which shall be responsibility of the First Party.*

6.8 I have also gone through the confirmation letter dated 30.9.2010 written by SSIPL to the appellant whose relevant portion is as below: -

"On your request, We here by conform you that, We have received Rs. 3,05,26,985/- (Three Crore Five Lakhs Twenty-Six Thousand Nine Hundred Eighty-Five) only towards labour payment for providing engagement to our labour. We further clarify that for safety, security & to avoid disputes of our labours who were working under you at different times. We have requested you to hand over the payment to us. So that we can distribute it among out labours. We further clarify that, we are neither a labour contractor nor we are engaged in supply of labour. We simply provided our labour for facilitate your work and to save that our labour are getting their income. "

6.9 From the agreement as well as conformation letter, it is clear that there was a contract of supply of labour between SSIPL and the appellant. SSIPL provided its labour to the appellant for which a payment of Rs. 3,05,26,985/- has been made by the appellant to SSIPL. Since the payment was for supply of labour, provisions of section 194C are attracted. The appellant has not deducted tax at source on this payment and therefore, the payment of Rs. 3,05,26.985/- has to be disallowed u/s. 40(a)(ia) of I.T. Act, 1961. The AO is directed to disallow the payment of Rs.3,05,26,985/- u/s.40(a)(ia) of the I.T.Act, 1961. Accordingly, this ground of appeal is dismissed."

14. We have heard the rival submissions, perused the orders of lower authorities and materials available on record. The assessee is a mining contractor. The assessee has claimed to have incurred expenditure of Rs.5,63,25,435/- under the head "wages". Out of

the said expenditure, Rs.3,05,26,985/- was disallowed by the Assessing Officer by invoking the provisions of section 40(a)(ia) of the Act.

15. According to the CIT(A), the assessee has paid wages of Rs.3,05,26,985/- to *M/s. Sumasankar Sponge Iron (P) Ltd.* . The assessee was liable to deduct tax u/s.194C of the Act, which he failed to do. The assessee explained that *M/s. Sumasankar Sponge Iron (P) Ltd.* was not a labour contractor and payment was made to labours through to *M/s. Sumasankar Sponge Iron (P) Ltd.* because they were under the pay roll of the said company. The assessee pointed out from the agreement dated 1.4.2009 placed at pages 61 to 62 of paper book that the said company was running an induction furnace plant. As at the material time, the said plant was not in operation, the said company has idle labour force with it. In the circumstances, the labour of *M/s. Sumasankar Sponge Iron (P) Ltd.* was engaged for the work of the assessee and the assessee paid wages to labours through the said party. No income element of *M/s. Sumasankar Sponge Iron (P) Ltd* was involved in this transaction. At best, it can be held that the labour wages alone were reimbursed to the said company by the assessee. It is a settled position of law that when an amount paid is merely reimbursement and no income is

embedded in the payment made to payee, there is no obligation to deduct ITDS out of such payment. For the above submission, reliance was placed on the decision of Visakhapatnam Bench of the Tribunal in the case of ACIT vs. M/s. Veera Associates in ITA No.332/Vizag/2016 for A.Y. 2007-08 order dated 21.2.2018 and Delhi Bench of the Tribunal in the case of ITO vs. M/s. Deepak Bhargawa in ITA No.343/Del/2012 for A.Y. 2007-2008 order dated 13.11.2014.

16. We find that Visakhapatnam Bench of the Tribunal in the case of M/s. Veera Associates (supra) has held as under:

“ “ 7. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. During the previous year relevant to the assessment year 2007-08, the assessee has paid a sum of ` 4,83,71,049/- to M/s Aditya Spinners. As per the profit & loss account enclosed along with the return of income, the assessee submitted that ` 43,71,049/- was conversion charges, which is a contract amount and the TDS was deducted. The remaining amount of ` 4,36,13,708/- was conversion expenses which was reimbursed to the contractor on actual basis hence TDS is not applicable. In fact, this was the actual expenses incurred by the contractor for executing the contract, which was reimbursed by the assessee. The fact regarding the payment of conversion charges and reimbursement of expenses was evidenced by the agreement entered by the assessee with M/s. Aditya Spinners Pvt. Ltd., which was also relied upon by the Ld. CIT(A). As per the job conversion agreement, the assessee required to reimburse the production cost, power, wages, consumables, packing, etc. Therefore, the Ld. A.R. argued that job conversion charges would not attract TDS. The assessee relied on the decision of Hon'ble ITAT, Hyderabad 'B' Bench in the case of ACIT, Circle-2(2), Hyderabad Vs. Louis Berger International Inc. in ITA Nos.1073/Hyd/2004, 1074/Hyd/2004, 720/Hyd/2005 and 721/Hyd/2005 dated 30.6.2010. The Hon'ble ITAT in the cited decision held that there is no profit element in the reimbursement of expenses, hence the reimbursement of expenditure received by the recipient does not

form part of total income. Since the reimbursement of expenditure does not form part of total income, the TDS does not attract in respect of the reimbursement of expenditure. For ready reference, we extract para Nos.21 to 24 of the order relied upon by the Ld. A.R as follows:

“21. We have also carefully gone through the judgement of the Delhi High Court in CIT Vs. Industrial Engineering Projects Pvt. Ltd. (1993) 202 ITR 1014. In the case before the Delhi High Court the assessee had agreement with M/s. ETAG, a Swiss Company, for rendering services. The assessee would receive a minimum sum of ` 1,20,000/- per month for the services rendered besides reimbursement of certain costs and expenditure incurred by the assessee while rendering the services as per the agreement. The Income-tax Officer disallowed the expenses incurred. On appeal by the assessee before the Delhi Bench of this Tribunal, it was held that the reimbursement of the expenditure did not constitute income as the expenses were incurred on behalf of the Swiss company. On a reference to the Delhi High Court at the instance of the Revenue, the Delhi High Court after considering the judgement of the Apex Court in the case of CIT Vs. Tejaji Farasram Kharawalla Ltd. (1968) 67 ITR 95 held that the reimbursable expenditure cannot form part of the taxable income. Accordingly it was held that the reimbursable expenditures are to be excluded from the total income In view of this judgement of the Delhi High Court, in our opinion, the reimbursable expenditure received by the assessee for the purpose of rendering services cannot form part of the total income. Therefore, it has to be excluded.

22. We have also carefully gone through the judgement of the Calcutta High Court in CIT Vs. Sanderson & Morgaon (1970) 75 ITR 433. In the case before the Calcutta High Court a firm of solicitors received money from their clients. The question arose before the Calcutta High Court was whether the money received by the solicitors in the course of their professional activities would form part of the total income or not. The Calcutta High Court held that the money received by the solicitors was not revenue receipt. It was further held that when a solicitor received money from his clients he does not do so as a trading receipt but he receives the money from the principal in capacity as an agent. Therefore, the money received does not have any profit making quality. In this case also the money was received by the assessee on behalf of their clients for incurring the expenditure. Therefore, the money received did not have the profit making quality as held

by the Calcutta High Court. In our opinion, this judgement of the Calcutta High Court also supports the case of the assessee.

23. We have also carefully gone through the judgement of the Apex Court in the case of CIT Vs. Tejaji Farasram Kharawalla Ltd. (1968) 67 ITR 95. The assessee before the Apex Court acted as a selling agent of Ciba (India) Ltd. The assessee was entitled to commission of 12.5% on sales. Out of the 12.5%, 7.5% was treated as selling commission and 5% as compensation in lieu of contingency expenses which it had to meet. The question arise before the Apex Court was whether the 5% selling commission in lieu of the contingency expenditure would form part of the total income or not. The Apex Court held that 5% of the expenses in lieu of the contingency expenses was for the expenditure incurred in the performance of the duties of the respondent as selling agent. Therefore, it will not form part of the taxable income Accordingly, the same was exempt. In view of this judgement of the Apex Court, the reimbursable expenditure received by the assessee in pursuance to the agreement cannot form part of the taxable income Accordingly, the same has to be excluded.

24. We have also carefully gone through the judgement of the Bombay High Court in CIT Vs. Tanubai D. Desai (1972) 84 ITR 713. In the case before the Bombay High Court, the assessee was a practicing solicitor. In the course of carrying on his profession the assessee used to receive money from or on behalf of his clients. The money received was deposited by him in separate current account with Imperial Bank of India. Subsequently, the assessee withdrew a sum of ` 3.25 lakhs and placed the same in fixed deposit with Chartered Bank. The assessee renewed the account from time to time together with interest earned thereon. The assessee earned interest on the fixed deposit. The interest earned on the fixed deposit was not adjusted by apportioning it to different clients whose moneys were deposited in the bank account. The assessee did not show the interest in the return of income. The question arose before the Bombay High Court was whether the interest accrued in the fixed deposit with Chartered Bank was the income of the assessee or not. The Bombay High Court after elaborately examining the issue found that the moneys received by the solicitor from his clients are held by him in fiduciary capacity. Even the income received from such money must equally be held by the solicitor in a fiduciary capacity. What the solicitor actually does

with the income, i.e., whether he appropriates it to himself or not is a matter of no consequence. If the solicitor appropriates the interest accrued on such deposit to himself that would amount to a breach of his fiduciary relationship and whatever may be the consequences in law would follow. But his unauthorized act of converting any part of the corpus or even the income derived therefrom would not convert those moneys held by him for his benefit. Accordingly, it was held that the interest income which was neither disclosed in the return of income nor adjusted to the clients was held to be not taxable. In the case before us the facts are almost similar. The assessee received the money as a reimbursement after incurring the expenditure. In the case before the Bombay High Court, the money was received by the solicitor in advance. In the case before us the money was received after incurring the expenditure by way of reimbursement. Therefore, the reimbursable expenditure received by the assessee cannot form part of the total income. In view of the above discussion, in our opinion, the reimbursable expenditure received by the assessee cannot form part of the total income. Therefore, we do not find any infirmity in the order of the lower authority. Accordingly, the same is confirmed.”

8. The CIT(A) also observed that reimbursement of expenditure does not attract TDS, hence no addition required to be made u/s 40(a)(ia) of the Act. This view is supported by ITAT, Delhi Bench in the case of ACIT Vs. Modicon Network Pvt. Ltd. reported in (2007) 14 SOT 204 (2007) (Del). For ready reference, we extract the relevant portion of the order as under:

“Obligation to deduct tax under s. 195(1) is only with reference to the income element imbedded in the remittance. The obligation of the assessee to deduct tax under s. 195 is limited only to the appropriate proportion of income chargeable under the Act. It is therefore clear that any remittance which does not have an income element which is chargeable to tax need not suffer tax deduction at source.—Transmission Corporation of A.P. Ltd. &Anr. vs. CIT (1999) 155 CTR (SC) 489: (1999) 239 ITR 587 (SC) relied on.

9. The Hon'ble ITAT Delhi relied on the decision of Transmission Corporation of India of AP Limited Vs. CIT 155 CTR (SC) 489. In the instant case, the expenditure debited to P&L account towards the conversion expenses is reimbursement of expenditure, which is supported by the agreement entered into by the assessee. The A.O. made addition u/s 40(a)(ia) of the Act but not given any reasoning. The Ld. CIT(A) held that the same is reimbursement of expenses. M/s. Aditya Spinners Limited has admitted the entire

amount of reimbursement of expenses as well as conversion charges as income in their hands and filed the return of income for the relevant assessment year. As held by the coordinate bench of Hyderabad in the case of M/s. Louis Berger International Inc. (supra) since no element of profit is involved, the reimbursement of expenditure does not form part of total income. Therefore we are of the considered view that the conversion expenses of Rs.4,36,13,708 was the reimbursement of expenditure and does not attract the TDS and consequent disallowance u/s 40a(ia). The Special bench decision in the case of Merylin Shipping has no application in view of Hon'ble Apex court's decision in the case of Palam gas.

In the assessee's case the recipient has admitted the entire receipt as income and filed the return of Income. Following the decision of coordinate bench in the case of B. Dwarakanatha Reddy Vs. DCIT in ITA Nos.703 & 704/Hyd/2015, dated 11/09/2015 we hold that provisions of section 40(a)(ia) of the Act are not applicable provided the payer has offered the amount for tax purpose and have paid or deemed to have paid the taxes on such income. Since the recipient has already has admitted the income and paid the taxes and the amount in question was reimbursement of expenses, we hold that the addition made by the A.O. u/s 40(a)(ia) of the Act is unsustainable and accordingly, we uphold the order of the Ld. CIT(A) and dismiss the revenue's appeal.

10. In the result, the appeal filed by the revenue is dismissed.”

17. We find that the Delhi Bench of the Tribunal in the case of M/s. Deepak Bhargawa (supra) has held as under:

“6. We have heard rival submission and perused the material on record. As regards the disallowance of Rs.18,16,637/- made by the AO, these were payments made to M/s Sai Dutta Clearing Agency and Sh. Kamal Sehgal. The aforesaid clearing and forwarding agencies had been raising two separate bills on the assessee namely:

i) First bill in respect of the service charges of the agency provided to the assessee and on the said bill the assessee deducted tax and paid the same to government account on time.

ii) The second bill was raised by above said clearing agencies pertains to reimbursement of expenses incurred by the agency on behalf of the assessee. These reimbursement of expenses the assessee has non deducted TDS. Hence, these payments were made subject matter of disallowance u/s 40(a)(ia) of the Act.

6.1. The CIT(A) has categorically held that the amount of Rs.18,16,637/- is nothing but reimbursement of expenses incurred by the payee on behalf of the assessee. Copies of the few bills raised by the two agencies were placed on record at Pages 40 to 66 of the assessee's paper book. On perusal of the same, it is clearly evident that these are nothing, but reimbursement of expenses incurred by the clearing agencies on behalf of the assessee. Therefore, these amounts did not constitute income of the clearing agent and no TDS was required to made thereon. Therefore, the provision of Section 194C will not be applicable in respect of reimbursement of expenses.

6.2 Circular No.715 dated 08.08.1995 was issued by CBDT on "Clarifications on various provisions relating to tax deduction at source regarding changes introduced through Finance Act, 1995". The said circular in reply to question no.30, provided as under:

"Sections 194C and 194J refer to any sum paid. Obviously, reimbursements cannot be deducted out of the bill amount for the purpose of tax deduction at source."

6.3 The aforesaid circular was applicable only where the consolidated bills are raised for the gross amount inclusive of contractual payments as well as reimbursement of actual expenses. The same would therefore, not be applicable to the facts of the present case where bills are raised separately for the reimbursement of expenses incurred by payee.

6.4 The following judicial pronouncements support the view that circular No.715 (supra) will not have application, when bills are raised separately for reimbursement of expenses.

- a. Hon. Jurisdictional (Delhi) Bench of ITAT in the case of "ITO Vs. Dr. Willmar Schwabe India (P.) Ltd. [2005] 3 SOT 71 (Delhi).
- b. Hon. Rajkot Bench of ITAT in the case of DCIT Vs. Choice Sanitary Industries [2011] 9 taxmann.com 120 (Rajkot).

6.5. The Tribunal Bench of the Rajkot in the case of DCIT Vs. Choice Sanitary Industries (supra) held that:

"We have considered the rival submissions and gone through the material placed before us. The Id. DR relied upon the order of the Assessing Officer whereas the Id. AR relied upon the order of the CIT(A). We find that the main objections of the Assessing Officer in making the disallowance are that as per CBDT circular 715 dated 08.08.1995, the reimbursement of actual expenses cannot be deducted from the commission charges paid by the assessee. The Id. CIT(A) drawing support from the co-ordinate bench decision in the case of ITO v. Dr. Willmar Schwabe India (P) Ltd. [2005] 95 TTJ (Delhi) 53 wherein it has been held that the circular is applicable only in cases where the bills are raised for the gross amount inclusive of professional fees as well as reimbursement of actual expenses held that the circular was not applicable in the case of the assessee as C&F agent raised two separate bills, one for the commission and the other for the reimbursement of expenditure."

6.6 Similarly the jurisdictional Bench of the Tribunal in the case of ITO Vs. Dr. Willmar Schwabe India (P.) Ltd. (Supra) held as under:

"After considering the rival submissions and perusing the relevant material on record, we find no infirmity in the impugned order of learned CIT(A) on this issue. It is observed that as agreed by and between the assessee company and M/s. Indochem Techno, Consultants Ltd., a vehicle was to be provided by the assessee company to the said consultant for attending to its work and thus, the assessee company was to bear the vehicle expenses actually incurred by the said party. Bills for such expenses incurred by the said consultant were separately raised by them on

the assessee company in addition to bills for fees payable on account of technical services and since the amount of bills so raised was towards the actual expenses incurred by them, there was no element of any profit involved in the said bills. It was thus a clear use of reimbursement of actual expenses incurred by the assessee and the same, therefore, was not be the nature of payment covered by section 194J requiring the assessee to deduct tax at source therefrom. The CBDT Circular No. 715, dated 08.08.1995 relied upon by the Assessing Officer in support of his case on this issue was applicable only in the cases where bills are raised for the gross amount inclusive of professional fees as well as reimbursement of actual expenses and the same, therefore, was not applicable to the facts of the present case where bills were raised separately by the consultants for reimbursement of actual expenses incurred by them. As such, considering all the facts of the case, we are of the view that the provisions of section 194J were not applicable to the reimbursement of actual expenses and the assessee company was not liable to deduct tax at source from such reimbursement. In that view of the matter, we uphold the impugned order of learned CIT(A) on this issue and dismiss the relevant grounds of the Revenue's appeal "

6.7. In view of the aforesaid orders of the Tribunal, we hold that CIT(A) is justified in deleting the disallowance of Rs.18,16,637/- and we dismiss this ground of the Revenue."

18. Further, the Hon'ble Karnataka High Court in the case of **Commissioner of Income Tax vs Kalyani Steels Ltd.**, [2018] 91 taxmann.com 359 (Karnataka) held as under:

“ 7. Heard the learned counsel appearing for the parties and perused the material on record.

8. In order to answer the substantial questions of law raised by the revenue, it is apt to refer to Section 194J of the Act, the relevant provision reads thus:

194J- Fees for professional or technical services.

(1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any sum by way of -

- | | | |
|------|----------------------------------|----|
| (a) | ** | ** |
| | (b) fees for technical services, | |
| (ba) | ** | ** |
| (c) | ** | ** |
| (d) | ** | ** |

shall, at the time of credit of such sum to the account of the payee 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 (ten) per cent of such sum as income-tax on income comprised therein:

9. A reading of this provision discloses that, an amount equal to ten percent of such sum as income-tax has to be deducted on income comprised therein, by a person not being an individual or a HUF, who is responsible for paying a resident any sum towards fees for technical services as per Clause (b) of Section 194J(1) of the Act, the relevant factor is "income comprised". To attract this provision, there must be an income comprised therein. Section 2(24) of the Act defines the income. The reimbursement of expenses incurred by HSL cannot be categorized as income under Section 2(24) of the Act.

10. Section 190 of the Act provides for deduction at source and advance payment. The said provision reads thus:

"190. (1) Notwithstanding that the regular assessment in respect of any income is to be made in a later assessment year, the tax on such income shall be payable by deduction (or collection) at source or by advance payment (or by payment under sub- section (1A) of Section 192), as the case may be, in accordance with the provisions of this Chapter.

(2) Nothing in this section shall prejudice the charge of tax on such income under the provisions of sub-section (1) of section 4."

11. This provision makes it clear that deduction at source shall be on such income not otherwise. The primary factor to

attract Section 194J is the ingredient of "income comprised therein". If no income is reflected in the balance sheet and P & L account of HSL towards the reimbursement charges paid on cost to cost basis by KSL and ML, it ceases to have the character of income. As such, the assessee cannot be treated as the assessee in default in not deducting tax at source under Section 194J of the Act. The arguments of the revenue that the fees paid by the assessee is towards technical services is imaginary one not established with substantial material.

12. The Assessing Officer proceeded to pass the orders under Sections 201 and 201(1A) of the Act on the footing that the assessee was required to deduct tax from the payments made to the HSL irrespective of the fact that the said payments include element of income or not. This approach of the Assessing Officer is contrary to Section 194J of the Act, which in unequivocal terms describes deduction of income tax on income comprised therein.

13. It is trite that, if there is no income embedded in a payment, then TDS provisions would not apply as TDS is only an alternative method of collection of taxes. It is beneficial to refer to the judgment of this Court in the case of *Hyderabad Industries Ltd. v. ITO* [1991] 59 Taxman 202/188 ITR 749 (Kar.), wherein it is held that, "an amount which will not be included in the total income of a person cannot be considered as "income" for the purpose of deduction of tax at source at all. The purpose of deduction of tax at source is not to collect a sum which is not a tax levied under the Act, it is to facilitate the collection of tax lawfully leviable under the Act." In view of the factual finding of the appellate authorities that the payment made by KSL and ML to HSL for various expenses incurred would be a reimbursement and not a fee for technical services, Section 194J of the Act is not attracted.

14. The CBDT in the circular number 715 dated 03.08.1995 has clarified that the reimbursement cannot be deducted out of the bill amount for the purpose of TDS. The Assessing Officer's view is against the intent of the said circular.

15. This Court in *Karnataka Power Transmission Corporation Ltd. v. Dy. CIT* [2016] 67 taxmann.com 259/238 Taxman 287/383 ITR 59 (Kar) while considering the applicability of

Section 194A of the Act has observed that, Section 194A of the Act mandates the tax deductor to deduct 'income tax' on any income by way of interest other than income by way of interest on securities. The phrase 'any income' and 'income tax thereon' if read harmoniously, it would indicate that the interest which finally partakes the character of income, alone is liable for deduction of the income tax on that income by way of interest. If the said interest is not finally considered to be an income of the deductee, as per reversal entries of the provision, Section 194A(1) of the Act would not be made applicable. In other words, if no income is attributable to the payee, there is no liability to deduct tax at source in the hands of the tax deductor.

16. Under the circumstances, the assessee falls outside the scope of Section 194J r/w Section 200 of the Act during the relevant assessment years. Consequently, the provisions of Sections 201 and 201(1A) of the Act are not attracted. We do not find any material irregularity or infirmity in the orders passed by the appellate authorities. For the aforesaid reasons, we answer substantial questions of law against the revenue and in favour of the assessee.”

19. The assessee filed before us a copy of audited financial statement of M/s. Sumasanka Sponge Iron (P) Ltd., to show that no income accrued to that company out of payment of wages by the assessee through the said company. The assessee also filed before us a copy of the wage register of M/s. Sumasanka Sponge Iron (P) Ltd and and copy of ledger account of M/s. Sumasanka Sponge Iron (P) Ltd to show that the wages of labours were actually paid to the said company and no income of M/s. Sumasanka Sponge Iron (P) Ltd was involved in this transaction. In view of above decisions discussed above, we are of the view that the assessee is not liable to deduct ITDS on the amounts

which are purely in the nature of reimbursement to the payee u/s.194C of the Act when the payment to the payee does not involve any taxable income of the payee. We, therefore, set aside the orders of lower authorities and restore the matter back to the file of the Assessing Officer for proper verification of the nature of payment made by the assessee to M/s. Sumasanka Sponge Iron (P) Ltd and re-adjudicate the issue afresh in accordance with law keeping in view the discussion made hereinabove. Needless to mention that the Assessing officer shall allow reasonable opportunity of hearing to the assessee before adjudicating the issue afresh. Hence, these grounds of appeal of the assessee are allowed for statistical purposes.

20. In Ground No.7 of the appeal, the grievance of the assessee is that the CIT(A) erred in confirming adhoc disallowance of Rs.4,72,810/- made by the Assessing Officer.

21. The Assessing Officer observed that the assessee has claimed Rs.9,45,620/- on account of business promotion expenses. On being asked by the Assessing Officer to furnish details of such claim with supporting bills and payment vouchers, the assessee submitted that the expenditure was incurred for travel & food for OMC officials and other officials for inspection, license and permit renewals, liasoning with labour office, mining



office, check gates, forest offices, related expenses, gifts, presents made to different parties etc. As no supporting bills with payment vouchers were produced, the Assessing officer made adhoc disallowance of 50% of Rs.9,45,620/-, which works out to Rs.4,72,810/-. This was confirmed in first appeal.

22. Before us also, no supporting bills and vouchers were furnished by the assessee. Therefore, we confirm the orders of the lower authorities and dismiss this ground of appeal of the assessee.

23. In the result, appeal of the assessee is partly allowed for statistical purposes.

Order pronounced on 6 /09/2018.

Sd/-

sd/-

(Pavan Kumar Gadale)
JUDICIALMEMBER

(N.S Saini)
ACCOUNTANT MEMBER

Cuttack; Dated 6/09/2018
B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : Sri Dillip Kumar Nayak, Plot No.270/A, Saheed Nagar, Bhubaneswar
2. The Respondent. JCIT, Range-2, Bhubaneswar
3. The CIT(A)-2, Bhubaneswar
4. Pr.CIT-2, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

By order

**Sr. Pvt. Secretary,
ITAT, Cuttack**