

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**TAX APPEAL NO. 828 of 2017**

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PR. COMMISSIONER OF INCOME TAX-3,....Appellant(s)

Versus

SWASTIK CONSTRUCTION,....Opponent(s)

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Appearance:

MRS KALPANA K RAVAL, ADVOCATE for the Appellant(s) No. 1

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CORAM: **HONOURABLE MS.JUSTICE HARSHA DEVANI**
and
HONOURABLE MR.JUSTICE A.S. SUPEHIA

Date : 20/12/2017

ORAL ORDER

(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. The appellant revenue, by this appeal under section 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), has challenged the order dated 20.3.2017 made by the Income Tax Appellate Tribunal, 'D' Bench, Ahmedabad (hereinafter referred to as the "Tribunal") in ITA No.1601/ Ahd/ 2011 by proposing the following two questions, stated to be the substantial questions of law:

"(A) Whether on the facts and circumstances of the case and in law, the Appellate Tribunal is justified in holding that direct labour charges are not covered by the provisions of section 40(a)(ia) of the Income Tax Act, 1961 despite the fact that there is no employer-employee

relation between the labourers and the assessee?

(B) Whether on the facts and circumstances of the case and in law, the Appellate Tribunal is justified in holding that the addition made u/s 68 of the Income Tax Act, 1961 cannot be held bogus despite of the fact that identity of M/s Himali Enterprise, in whose name the bills were raised, was not proved and who is a non-filer of Income Tax Return since 2002?"

2. The assessment year is 2007-08 and the corresponding accounting period is the previous year from 1.4.2006 to 31.3.2007.

3. The assessee firm was engaged in the business of civil construction during the year under consideration. The assessee filed its return of income on 31.10.2007 declaring total income of Rs.23,940/-. The case of the assessee was selected for scrutiny assessment. On scrutiny of the accounts, the Assessing Officer found that the assessee had shown gross profit of Rs.15,17,818/-, which in terms of percentage comes to 4.81% of the total turnover of Rs.3,15,20,695/-. The Assessing Officer noted that there was fall in gross profit from the preceding year, where percentage of gross profit shown by the assessee was 22.87%.

4. The assessee was confronted with regard to the decline in the gross profit. The assessee submitted that it had sub-contracted two contracts having value of Rs.2,30,15,103/- and had received commission of 1.75% on the value of the sub-contract. Thus, there was fall in the gross profit.

5. The Assessing Officer, thereafter, verified the accounts of the assessee and arrived at the conclusion that the assessee had paid labour charges to the headman of the labourers, which is to be construed as a sub-contractorship between the assessee and the alleged headman for supply of labour. Hence the assessee should have paid labour charges after deducting tax at source. Accordingly, he made disallowance of Rs.42,17,418/- under section 40(a)(ia) of the Act on the ground that the assessee had failed to deduct tax at source on the payment of labour charges to the alleged headman/contractors of labour supplier.

6. During the year, the assessee had sub-contracted two of the work contracts awarded to it by the Canal Division of the Roads & Buildings Department to one M/s Hemani Enterprises. The sub-contract for the entire work was to be completed in its entirety as per the terms of the tender and the assessee firm was to retain 1.75% of the billed amount under the tender as its profit. M/s Hemani Enterprises had billed for Rs.2,17,02,016/- and the total payment of Rs.1,44,13,137/- (including TDS made to it) and balance amount of Rs.72,88,879/- was shown payable to it by the assessee in its accounts as on 31.3.2007. The Assessing Officer added this amount of Rs.72.88,879/-, being outstanding sundry creditors in the books of the assessee, as unexplained cash credit under section 68 of the Act. The assessee carried the matter in appeal before the Commissioner (Appeals), who deleted the deductions. The revenue carried the matter in appeal before the Tribunal, but failed.

7. Mrs. Kalpana Raval, learned senior standing counsel, assailed the impugned order on the reasoning adopted by the Assessing Officer.

8. As regards proposed question (A), as can be seen from the order passed by the Commissioner (Appeals), before him the assessee had submitted that in the construction industry, work was carried out by casual workers, who are floating and move from one place to another. These persons are directly employed by the main contractor, namely, the assessee in this case, and are paid on weekly or fortnightly intervals, through their leader who controls the group and is normally in contact with the main contractor. It was further submitted that payments were made in cash slightly below Rs.20,000/-, because such payments are to be made to casual workers, who cannot be expected to have bank accounts. Therefore, it was out of business compulsion and not for any other reason that payment was made in cash. It was further stated that as per the practice in vogue in the industry, attendance of workers and labourers was maintained on small cards and not on registers and it was not possible practically to preserve all the cards for lack of storage facility. It was further stated that though vouchers were self-made, the same were bearing the signature of the persons to whom payment was made along with the details of work site and the work done by the group. It was contended that the vouchers are always self-made as one cannot expect a labourer to provide a bill for the same.

9. The Commissioner (Appeals) observed that in connection with the submissions advanced by the assessee, remand

report was called for from the Assessing Officer, who, however, stated that he requires more time to make a detailed investigation. The Commissioner (Appeals), however, took note of the fact that the assessee had produced two persons before the Assessing Officer. However, the Assessing Officer asked them to come on some other occasion. Ultimately, therefore, the labourers did not turn up and instead affidavits of such labourers were sent to the Assessing Officer. In this backdrop, the Commissioner (Appeals) held that labour charges, being direct expenses, are covered under section 28(i) of the Act and do not fall within the ambit of section 40(a)(ia) of the Act and deleted the allowance.

10. In the impugned order, the Tribunal has observed that for the purpose of invoking section 194C of the Act, there has to be a relation of contractor and contractee between the assessee and the head of the labourers. In the present case, the assessee had merely handed over the labour payments to one or two persons on the site for being disbursed among the labourers and had not availed the services of a labour contractor and was, therefore, not required to deduct any tax at source on such payments and confirmed the deletion made by the Commissioner (Appeals).

11. Section 194C of the Act is attracted when any payment is made for carrying out any work (including supply of labour for carrying out any work) in pursuance of a contract between the contractor and a specified person. In the facts of the present case there is no contract between the assessee and any specified person for carrying out any work as contemplated in the section. The assessee had got the work done directly

through labourers and had merely paid them through the head labourer. In the absence of any contract to carry out any work with a specified person, the provisions of section 194C of the Act would not be attracted and hence there would be no liability to deduct tax at source so as to attract the provisions section 40(a)(ia) of the Act. The Tribunal, therefore, did not commit any error in confirming the order passed by the Commissioner (Appeals). No question of law can be said to arise in relation to this ground of appeal.

12. Insofar as proposed question (B) is concerned, the Commissioner (Appeals) had noted the submissions advanced by the assessee and had observed that the assessee was a Government contractor and hence the receipt was not doubtful. The assessee had sub-contracted major part of its work and had deducted tax at source as applicable on the payments made to the sub-contractor. Further, this outstanding payment had been fully paid in the next year by account payee cheque. The Commissioner (Appeals) observed that the Assessing Officer, on the one hand had come to the conclusion that the entire payments to the sub-contractor were non-genuine transactions, and on the other hand, he had disallowed only the amount which remained unpaid as on 31.3.2017. The Commissioner (Appeals) noted that the Assessing Officer had not made any effort to investigate further and had not brought any cogent evidence on record, which even indicates that the transactions were not genuine. According to the Commissioner (Appeals) simply because notices could not be served upon the sub-contractor, the transactions could not be held to be non-genuine. He, accordingly, held that by no stretch of imagination could the

outstanding credits be added under section 68 of the Act treating the same as unexplained cash credit and deleted the addition and allowed the ground of appeal.

13. The Tribunal, in the impugned order, has concurred with the findings recorded by the Commissioner (Appeals) and has held that if the transaction with M/s Hemani Enterprises had been disbelieved, the total contract payment made to it ought to have been disbelieved. The Tribunal noted that the assessee had been awarded the contract by Canal Division of the Roads & Buildings Department and it had executed the contract through M/s Hemani Enterprises. If the course of action adopted by the Assessing Officer was to be upheld, then the profit in the contract would be very abnormal because if for a contract valued at Rs.2,17,02,016/- a sum of Rs.72.88,879/- was to be treated as profit, then the ratio of profit would be too high for a civil work.

14. In the opinion of this court, the course of action adopted by the Assessing Officer defies logic. If the Assessing Officer had disbelieved that M/s Hemani Enterprises had executed the contract as a sub-contractor, he, at best, could have disbelieved the payment made to it and held that it was the assessee, who had executed the contract and worked out the profit accordingly. But when the entire amount received by the assessee was towards payment for the contract, there was no question of considering any part thereof as unexplained cash credit. In the opinion of this court, the view adopted by the Commissioner (Appeals) as concurred by the Tribunal is just and proper. Consequently, this ground of appeal also does not merit acceptance.

15. In the light of the above discussion, it is not possible to state that the impugned order passed by the Tribunal suffers from any legal infirmity so as to give rise to any question of law, much less, any substantial question of law. The appeal, therefore, fails and is accordingly, summarily dismissed.

(HARSHA DEVANI, J.)

(A. S. SUPEHIA, J.)

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