

आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री जी. मंजुनाथ, लेखा सदस्य के समक्ष

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.: 1701/Chny/2018

निर्धारण वर्ष / Assessment Year: 2013-14

Prahari Agency Private Limited,
24 Landons Road,
Kilpauk,
Chennai -600 010.

Income Tax Officer,
v. Corporate Ward 5(2),
Chennai – 600 034.

[PAN: AABCP 7862K]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by

: Shri. Arjunraj, CA
For S. Sridhar, Advocate

प्रत्यर्थी की ओर से/Respondent by

: Shri. G. Johnson, Addl. CIT

सुनवाई की तारीख/Date of Hearing

: 22.09.2021

घोषणा की तारीख/Date of Pronouncement

: 20.10.2021

आदेश /O R D E R

PER G. MANJUNATHA, ACCOUNTANT MEMBER:

This appeal filed by the assessee is directed against the order passed by the learned CIT(A)-3, Chennai, dated 28.12.2017 and pertains to assessment year 2013-14.

2. The assessee has raised the following grounds of appeal:-

“A. The impugned order is contrary to facts, law, decisions of the Hon'ble Tribunal High Court and Supreme Court and, therefore, the impugned order deserves to be set aside.

B. DISALLOWANCE u/s 40(a)(ia) - The appellant is a Clearing Agent and has been raising Bills on his Clients in two parts viz.,

(i) A Bill for Service charges towards the services rendered by them along with other payments which are charges in which the appellant does not receive specific Invoices and there could be an element of profit.

(ii) A Debit Note for reimbursement of all other Charges paid by the Appellant on behalf of their clients as an intermediary for the Clients and which are backed by specific Invoices raised on the Client by the Shipping Companies and CFS Agents.

C. The Appellant acts only as an Custom House Agent for the Clients while making the payments and the charges being in the nature of reimbursements and therefore TDS liability cannot be pinned on the Appellant.

D. The Appellant is of the view that TDS is not applicable on Reimbursable Expenses. It was applicable only on Income or Trading Receipts® The actual reimbursements do not come under the ambit of TDS.

E. Notwithstanding the above, the appellant pleads that wherever they had obtained Form 26A, the appellant should not have been treated as assessee in default' as provided in Section 40(a)(ia) and on such amounts Section 40(a)(ia) should not have been applied.

F. The appellant for the purpose of claiming non deduction of TDS relies on the decision of Supreme Court in the case of Transmission Corporation of AP Ltd. v CIT [1999] 239 ITR 587.

G. The appellant for the purpose of not being treated as assessee in default⁹ relies on decision of the Supreme Court in the case of Hindustan Cola Beverages Pvt Ltd. v CIT 293 ITR 226.

H. DISALLOWANCE u/s 36 (1) (ib) -The Assessing Officer failed to examine the Bank Statements of the appellant for the Month of April 2013 to confirm that the payment of Keyman Insurance of Rs.70,682/- had indeed been paid in Mare 2013 an Bank Account in the month of April 2013.

I. The appellant craves leave to adduce additional grounds of appeal at the time of hearing”

3. The brief facts of the case are that the assessee company is a Clearing Agent, filed its return of income for assessment year 2013-14 on 28.01.2014 declaring nil total income. The assessee acts as an intermediary and book container storage space on behalf of its clients. The assessee has been rising bills to its clients in two parts viz., (i) A bill for service charges towards the service rendered by them along with other payments which are charges in which the assessee does not receive specific invoices and there could be a element of profit (ii) a Debit note for reimbursement of other charges paid by the assessee on behalf of their clients as an intermediary for the clients and which are backed by specific invoices raised on the client by the shipping companies and CFS Agents directly. The assessee makes payments to shipping company and CFS Agent on behalf of its

clients. In return, the assessee receives payments including service charges and reimbursement of payments made to shipping companies from its clients. The assessee did not deduct TDS u/s. 194C while making payments to shipping companies and CFS Agents. The assessee claims that payments made to shipping companies and CFS Agents on behalf of its clients is in the nature of reimbursement of expenses without any element of profit and thus, is outside the scope of provisions of section 194C of the IT Act, 1961 (hereinafter "the Act").

4. The AO, however, did not get convinced with the explanation furnished by the assessee and according to him, the assessee has made payments on behalf of its clients on principal to principal basis on bills raised by the freight stations or shipping companies. Further, payments are in the nature of income of shipping companies/CFS Agents for service rendered by them and thus, there may be an element of profit and hence, assessee ought to have deducted TDS u/s. 194C of the Act. Since, the assessee has failed to deduct TDS, the AO has disallowed sum of Rs. 60,02,756/- u/s 40(a)(ia) of the Act for failure to deduct TDS u/s. 194C of the Act. The AO has also rejected an alternative plea of the assessee that as per second proviso to section 40(a)(ia)

inserted w.e.f. assessment year 2013-14 r.w.s. 201(1), assessee cannot be treated as an assessee in default when the recipient have offered the payments to tax in the return filed for relevant assessment years and further, wherever the assessee furnishes certificate in prescribed Form 26A along with Annexure to the effect that the deductee has included the same amount in his return of income, for the reason that the assessee could not furnish necessary Form 26A for verification. The AO had also made additions towards disallowance on premium paid for Key man Insurance Policy u/s. 36(1)(ib) of the Act.

5. Being aggrieved by the assessment order, the assessee preferred an appeal before the CIT(A). Before the CIT(A), the assessee has reiterated its arguments made before the AO to justify non-deduction of tax at source on payment made to shipping companies/CFS Agents on behalf of their clients on the ground that it is mere reimbursement of expenses without any element of profit and thus, is outside the scope of provisions of section 194C of the Act. The assessee has also challenged additions made by the AO towards disallowance of Key man Insurance Premium u/s. 36(1)(ib) of the Act. The Ld. CIT(A) for

the reason stated in his appellant order has rejected arguments taken by the assessee and confirmed additions made towards disallowance of payment made to shipping companies/CFS Agents u/s. 40(a)(ia) of the Act for failure to deduct TDS on the ground that when the assessee claims that transactions are not pertain to its own business, then why such transactions booked in its books of accounts. The CIT(A) further noted that the assessee has routed all payments and receipts as an items of income and expenditure in P&L a/c and thus, it cannot say that this transactions are not belonging to the assessee. Therefore, he has sustained additions made by the AO towards disallowance of expenses u/s. 40(a)(ia) of the Act. As regards disallowance of Key man Insurance Premium u/s. 36(1)(ib) of the Act, confirmed additions made by the AO since, the assessee has not submitted any evidence. Aggrieved by the CIT(A) order, the assessee is in appeal before us.

6. The first issue that came up for consideration from ground no. B to G of assessee appeal is disallowance of payment made to shipping companies/CFS Agents u/s. 40(a)(ia) of the Act. The Ld. AR for the assessee submitted that the Ld. CIT(A) has erred in

sustaining the additions made by the AO towards disallowance of payments made to shipping companies/CFS Agents u/s. 40(a)(ia) of the Act, without appreciating fact that payments made by the assessee is nothing but a reimbursement of expenses for which TDS liability cannot be pinned on the assessee. The Ld. AR for the assessee referring to invoices and debit note raised to its customers submitted that the assessee raised bills on its clients in two parts as per which one bill for service charges towards service rendered which could be included as an element of profit, and a debit note for reimbursement of all other charges paid by the assessee on behalf of their clients as an intermediary which are backed by specific invoices raised on the clients without an element of profit. Therefore, payments made on behalf of their clients cannot be considered as an expenditure incurred by the assessee to bring within the ambit of section 194C of the Act and consequently, no disallowance could be made u/s. 40(a)(ia) of the Act for non-deduction of tax at source. The Ld. AR further submitted that though the assessee has routed receipts from its customers and payments to shipping companies/CFS Agents as income and expenditure, but the nature of expenses is such that it is only reimbursement of expenses incurred by their clients and thus, is outside the scope of TDS provisions. The Ld. AR has also

made an alternate argument to the effect that wherever assessee has obtained Form 26A, in such cases the assessee should not have been treated as assessee in default as provided in section 40(a)(ia) of the Act and consequently, no disallowance can be made for failure to deduct TDS u/s. 194C of the Act.

7. The Ld. DR, on the other hand strongly supporting the order of the CIT(A) submitted that there is no merit in arguments taken by the Ld. AR of the assessee that payments made to shipping companies/CFS Agents is in the nature of reimbursement of expenses incurred by the assessee on behalf of their clients, because the payment made by the assessee vis-à-vis the expenditure disallowed is not any reimbursement, but first hand payment between principal to principal on the bills raised by the freight stations. The concept of reimbursement of expenses will come into operation only when someone made payments on behalf of the assessee and assessee reimburse such expenditure. In those cases, obviously the TDS liability cannot be bestowed on the assessee because the assessee has not made any direct payments to the service providers. In this case, the assessee has made payment on behalf of their clients for services rendered by shipping companies/CFS Agents for their clients and thus, either

the assessee should deduct TDS at the time of making payment or the recipient should deduct TDS on the payments made to service provider because the concept of TDS provisions is inserted to withhold tax on the income of service providers. Since, the assessee has made payments on behalf of their clients it ought to have deducted TDS as applicable under law. Since, the assessee has not deducted TDS, the AO rightly disallowed payments u/s. 40(a)(ia) of the Act and hence, there is no reason to take a different view to give benefit to the assessee.

8. As regards an alternative arguments of the assessee in light of second proviso to section 40(a)(ia) of the Act inserted w.e.f. assessment year 2013-14, the Ld. DR submitted that the assessee did not complied with the conditions laid down in the second proviso to section 201 and not furnished a certificate from an Accountant in the prescribed form and Income Tax Rules stating that the recipient has furnished his return u/s. 139 of the Act and also has taken into account such sums for computing the income in such return of income. The assessee has failed to file any certificate in prescribed Form 26A and thus, the AO has rightly rejected alternative plea of the assessee.

9. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. The assessee is in the business of clearing agent, has rendered services to their clients and made direct payment to shipping companies/CFS Agents for services rendered to their clients. The assessee has raised bills to his clients in two parts, (i) a bill for service charges towards services rendered by them along with other payments (ii) a debit note for reimbursement of other charges paid by the assessee on behalf of their clients as an intermediary for the clients and which are backed by specific invoices raised by service providers to their clients. The assessee has not deducted TDS on payments made to shipping companies/CFS Agents on behalf of their clients. The assessee contended that payments made to shipping companies/CFS Agents is in the nature of reimbursement of expenses without any element of profit and thus same cannot be brought within the TDS provisions and consequently, no disallowance can be made u/s. 40(a)(ia) of the Act.

10. We have gone through reasons given by the AO to disallow payments made to shipping companies/CFS Agents u/s. 40(a)(ia) of the Act, in light of the arguments advanced by the Id. AR for the

assessee and we ourselves do not in agreement with arguments advanced by the Ld. AR of the assessee for the simple reason that payment made by the assessee to shipping companies/CFS Agents is not a reimbursement of expenses, but first hand payment between principal to principal on the bill raised by the shipping companies and CFS. No doubt, the assessee has made payment on behalf of their clients for bills raised by shipping companies/CFS Agents and further, the services rendered by the shipping companies/CFS Agents is for their clients. But, what is important is who made payments to service providers and what law say about TDS provisions. The concept of TDS provisions was introduced to withhold tax on income of service providers. As per provisions of section 194C of the Act, it is abundantly clear that any person responsible for paying any sum to any resident for any work. That means while making payment, the person responsible for making payment shall deduct TDS as per law. Generally, the service receiver shall deduct TDS on payments made to service providers. In this case, the assessee acts an intermediary between service provider and service receiver. The assessee has availed services from shipping companies/CFS Agents for their clients and made payments directly to shipping companies/CFS Agents. The assessee has taken responsibility of making payment on behalf of

their clients. Therefore, as per law while making payments the person who makes the payments should deduct TDS on such payments. In this case, since, the assessee has availed services for their clients and also payments have been made by the assessee directly to the shipping companies/CFS Agents. Therefore, in our considered view, the assessee ought to have deducted TDS on such payments. The arguments of the assessee that if at all tax has to be deducted, it shall be deducted by its client but not the assessee is also not correct, because, service provider does not have had an occasion to deduct TDS. In fact payment made by the assessee to shipping companies is reimbursement in the hands of the clients and thus, there may be no occasion for the recipient of services to withhold tax on such payments. The concept of reimbursement of expenses will come into operation only when someone made payments on behalf of the assessee and assessee reimburse such expenditure. In this case, it is not so. In fact, the assessee has made payments on behalf of their clients and thus it is reimbursement for their client. In our view, the assessee being a payer directly to the shipping companies/CFS Agents ought to have deducted TDS while making the payment although such payments was made on behalf of their clients. Therefore, we are of the considered view that there is no merit in

the arguments of the assessee that payments made to shipping companies/CFS Agents is in the nature of reimbursement for which TDS liability cannot be pinned on the assessee. In the present case, since, the assessee has made payments on behalf of their clients, it should have deducted TDS on such payments, while making payments. The assessee being payer fails to deduct tax on the pretext that the payment is only a reimbursement and the tax has to be deducted by the end user which is practically not possible, because the payment is directly made by the assessee. If you accept the arguments of the assessee, then the purpose of legislature is defeated and the intend to subject the contract payment to deduction of tax at the point of payment is defeated by arranging transaction in such a manner that the purpose is defeated. It is also important to note that it is the assessee who has booked the expenditure towards container storage charges on payment to shipping companies/CFS Agents and debited in their books of accounts. Similarly, the assessee has received charges from its clients including amount paid to shipping companies/CFS Agents and the same has been credited to its P&L a/c when it had received payments from its clients. Therefore, we are of the considered view that payments made by the assessee to shipping companies/CFS Agents is not a reimbursement of expenses, but

first hand payment between principal to principal on the bill raised by the service providers. Since, the assessee has made payment on behalf of their customers; the assessee ought to have deducted TDS on such payments while making payments. Since, the assessee has failed to deduct TDS, on such payments the AO is right in disallowing such payments u/s. 40(a)(ia) of the Act. Hence, we confirm additions made by the AO.

11. As regards alternative plea of the assessee that it has made payment to reputed shipping companies and all service providers has filed their return of income u/s. 139 of the Act and included payments made by the assessee in the return of income and thus, the assessee cannot be held as an assessee in default in terms of second proviso to section 40(a)(ia) of the Act inserted by the Finance Act, 2012 w.e.f. assessment year 2013-2014. No doubt, the second proviso to section 40(a)(ia) of the Act inserted by the Finance Act, 2012 w.e.f. assessment year 2013-2014 held to be retrospective effect from the date of insertion of provisions of section 40(a)(ia) of the Act. But, to apply such provisions, the assessee shall comply with certain conditions as per which it has to obtain a certificate from an Accountant in prescribed Form No. 26A stating that the recipient of such sum have filed return of

income u/s. 139 of the Act and also has taken in to account such sums for computing income in such return of income. In this case, the assessee has failed to obtain Form No. 26A and file before the AO and CIT(A) to give the benefit of proviso to section 40(a)(ia) of the Act, and said lapse is continued even before us. Before us, the assessee could not file any Form no 26A obtained from its clients nor filed their ITR copies to prove that the recipients have included sum paid by the assessee in their income tax returns. Therefore, we are of the considered view that there is no merit in alternate ground taken by the assessee and hence, the same is rejected.

12. The next issue that came up for consideration from ground H of assessee appeal is disallowance u/s. 36(1)(ib) of the Act towards Key man Insurance Premium paid at Rs. 70,682/-. The AO has made disallowance since, the assessee could not furnish necessary supporting evidence. Even before the CIT(A), the assessee did not file any evidence to justify payment of insurance premium on Key man Insurance Policy taken in the name of the directors. Even before us neither any evidence was filed nor justified payment. Therefore, we are of the considered view that there is no error in the reasons given by the Ld. CIT(A) to sustain additions made by the AO for disallowance of insurance premium

paid on Key man Insurance Policy. Hence, we reject the arguments of the assessee and confirm additions made by the AO.

13. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the court on 20th October, 2021 at Chennai.

Sd/-

(महावीर सिंह)

(MAHAVIR SINGH)

उपाध्यक्ष /Vice President

Sd/-

(जी. मंजुनाथ)

(G. MANJUNATHA)

लेखा सदस्य /Accountant Member

चेन्नई/Chennai,

दिनांक/Dated, the 20th October, 2021

JPV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त/CIT | 5. विभागीय प्रतिनिधि/DR | 6. गार्ड फाईल/GF |