IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH: KOLKATA
[Before Shri Mahavir Singh, JM & Shri Waseem Ahmed, AM]

I.T.A No. 202/Kol/2013
Assessment Year: 2007-08

Deputy Commissioner of Income-tax, Circle-52, Kolkata.	Vs.	M/s. Savourites (PAN: AASFS6258G)
(Appellant)		(Respondent)

Date of hearing: 29.10.2015
Date of pronouncement: 05.11.2015

For the Appellant: Shri S. S. Alam, JCIT, Sr. DR
For the Respondent: N o n e

ORDER

Per Shri Mahavir Singh, JM:

This appeal by revenue is arising out of order of CIT(A)-XXXIII, Kolkata in Appeal No.299/CIT(A)-XXXIII/AC.Circle-52/09-10 dated 23.11.2012. Assessment was framed by ACIT, Circle-52, Kolkata u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") for Assessment Year 2007-08 vide his order dated 29.12.2009.

2. The only issue in this appeal of revenue is against the order of CIT(A) deleting the disallowance made by AO on account of claim of expenses of carriage outward expenses and transportation and service charges for non-deduction of TDS u/s. 194C of the Act thereby invoking the provisions of section 40(a)(ia) of the Act. Revenue has raised the issue of admission of additional evidence in violation of Rule 46A of the I. T. Rules, 1962 without giving opportunity to the AO. For this, revenue has raised following three grounds:

> *"1) That on the facts and in circumstances of the case the CIT(A) erred in deleting the disallowances made u/s 40(a)(ia) of Rs.7,32,679/- in respect of Carriage Outwards and Rs.17, 16,256/- in respect of Transportation and service charges.*
>
> *2) That on the facts and in circumstances of the case, the Ld. CIT(A) erred in relying upon the decision of the Special Bench, ITAT, Visakhapatnam in the case of Merilyn Shipping & Transports vs. ACIT, 136 ITO 23(Viz) without appreciating that the Andhra Pradesh High Court had suspended the operation of the said decision as the same defeated the very purpose of introducing section 40(a)(ia) in the Income tax Act, 1961.*
>
> *3) That on the facts and in circumstances of the case, the Ld. CIT(A) grossly erred in admitting fresh evidence in violation of Rule 46A without giving an opportunity to the A.O. to rebut the claims of the assessee that it had no contract with the transport operators and that the payments made by it were below the monetary limit for making TDS."*

3. Briefly stated facts are that the assessee has claimed expenses of carriage outward charges of Rs.7,32,679/- and transportation and service charges of Rs.17,16,256/-. The AO observed from the P&L account that the assessee has claimed these expenses but not deducted any TDS u/s. 194C of the Act, accordingly, invoking the provisions of section 40(a)(ia) of the Act, he made disallowance. Aggrieved, assessee preferred appeal before CIT(A) who firstly, the carriage outward charges were allowed for the reason that these are not hiring charges but purchase of diesel, engine oil etc. for hiring vehicle for an amount of Rs.7,32,679/-. Secondly, in respect to transportation and service charges of Rs.17,16,256/- he observed that there is no contractual relationship existed in respect of carriage outward charges and transportation and service charges. The CIT(A) also relied on the Special bench of ITAT, Visakhapatna Bench in the case of Merilyn Shipping & Transport Ltd. Vs. ACIT, ITA No. 477/VIZAG/2008 and held that only the remaining outstanding expenses at the end of the year can be brought under the purview of section 40(a)(ia) of the Act and accordingly, he also deleted the disallowance in respect to transportation and service charges of Rs.17,16,256/-. Aggrieved, now revenue is in appeal before us.

4. We have heard Ld. Sr. DR and gone through facts and circumstances of the case. We find that the claim of carriage outward charges is as regards to expenses made for purchase of diesel, engine oil etc. for the hired vehicles and not hire charges. We find that the CIT(A) has gone through the vouchers which were produced before the AO also and in term of the fact that these are purchase of diesel and engine oil etc. and other repairs this does not come within the purview of section 194C of the Act and accordingly, he deleted the addition. We find no infirmity in the order of CIT(A) and the same is hereby confirmed. This issue of revenue's appeal is dismissed.

5. In respect to transportation and service charges of Rs.17,16,256/-, we find that the finding of CIT(A) that there is no contract and hence, assessee is not covered by the provision of section 194C of the Act. We are not in agreement with the finding of CIT(A) because the issue stands covered in favour of revenue and against assessee by the decision of Coordinate Bench of this Tribunal in the case of DCIT Vs. Kamal Mukjerjee & Co. (shipping) P. Ltd., ITA No. 199/Kol/2010 wherein it has been held as under:

> ***(From Head notes)***
>
> *…….Undoubtedly, these decisions do indicate that there is a workman employer relationship between the dock workers and the stevedores like assessee when they employ those workers, but be that*

as it may, the fact remains that the assessee has made payments to the CDLB for supply of labour, even when this labour may be treated as employed by the assessee for all practical purposes, the provisions of section 194C are clearly attracted. In such a situation, i.e. when labour hired by the assessee through CDLB is considered to be in assessee's employment, the payments made to CDLB cannot be treated as payments for any work, but nevertheless these payments could still be covered by the provisions of section 194C because these are payments made for supply of labour which are specifically covered by section 194C(1). CDLB is an agent of the stevedores like the assessee in the sense that the labour is recruited by the assessee through CDLB, but when this fact does not affect the nature of payment by the assessee to the CDLB which is admittedly in the nature of payment for supply of labour. The reasoning adopted by the Commissioner (Appeals), though somewhat impressive at first glance, is fallacious. There is no cause and effect relationship between workers assigned by the CDLB having employer workman relationship with the assessee, and the payments being made by the assessee to CDLB being not in the nature of 'payment for supply of labour'".

6. Further, the CIT(A) has relied on the decision of Special bench of this Tribunal in the case of Merilyn Shipping & Transport Ltd., supra. We find that this Special bench decision of Tribunal is reversed by jurisdictional High Court in the case of CIT v. Crescent Exports Syndicate (2013) 216 taxman 258 (Cal) and held the same to be applicable to all the payments whether paid or payable. Once this is the position, this issue is against the assessee and in favour of revenue. Hence, we reverse the order of CIT(A) on this aspect of transportation and service charges amounting to Rs.17,16,256/-. This issue of revenue's appeal is allowed.

7. However, at the time of hearing it has been pointed out to ld. Sr. DR that the assessee should be given an opportunity to explain whether the payments fall under the second proviso to section 40(a)(ia) of the Act as brought out by finance Act, 2012 which is held to be retrospective by Hon'ble Delhi High court in the case of CIT Vs. Ansal Land Mark Township (P) Ltd., ITA Nos. 160 & 161/Kol/2015. In view of the above, the appeal of revenue is partly allowed for statistical purposes.

8. In the result, the appeal of revenue is partly allowed for statistical purposes.

9. Order is pronounced in the open court on 05.11.2015

Sd/-	Sd/-
(Waseem Ahmed)	(Mahavir Singh)
Accountant Member	Judicial Member

Dated : 05th November, 2015

Jd. Sr. P.S

Copy of the order forwarded to:

1. APPELLANT – DCIT, Circle-52, Kolkata.
2. Respondent – M/s. Savourites, 249A, Jodhpur Park, Kolkata-700068
3. The CIT(A), Kolkata
4. CIT Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy, By order,

Asstt. Registrar.