

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "C" KOLKATA**

Before **Shri Waseem Ahmed, Accountant Member** and
Shri S.S.Viswanethra Ravi, Judicial Member

ITA No.2489/Kol/2013
Assessment Year :2007-08

M/s Chunder Khatore & Associates, 10A, British Indiafn Street, Esplanade, Kolkata-700069 [PAN No.AACFC 2397 N]	V/s.	Income Tax Officer, Ward-54(1), Kolkata, 3, Government Place, Kolkat-700 001
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri S.M.Surana, Advocate
प्रत्यर्थी की ओर से/By Respondent	Shri A.K.Pande, JCIT-DR
सुनवाई की तारीख/Date of Hearing	23-05-2016
घोषणा की तारीख/Date of Pronouncement	17-06-2016

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee is against the order of Commissioner of Income Tax (Appeals)-XXXVI, Kolkata dated 12.08.2013. Assessment was framed by ITO Ward-54(1), Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 31.12.2009 for assessment year 2007-08. The grounds raised by the assessee per its appeal are as under:-

- "1. For that the order of the Ld. CIT(A) is arbitrary, illegal and bad in law.*
- 2. For that the Ld. CIT(A) erred in confirming the addition of Rs.1257,040/- being the payment made for hiring charges in connection with the completion of specified work where services for physical*

verification of assets along with location thereof, the closing stock, different statutory registers and books and various other related jobs was to be carried out for a number of clients for which there were receipts of over Rs.46 lakhs.

3. For that the Ld. CIT(A) erred in confirming the disallowance of Rs.12,57,040/- when the payment made for the services taken was quit4 reasonable considering the nature of work.

4. For that the Ld. CIT(A) erred in confirming the disallowance of Rs.9,71,000/- paid to 20 persons when the details of parties including their assessment particulars were field, all of them disclosed the receipts in their returns and therefore genuinity of the claim and identity of the parties cannot be disputed and further the services rendered were proved with reference to the nature of work done by them.

5. For that the Ld. CIT(A) erred in disallowing the remaining sum of Rs.2,86,040/- (**Rs.12,57,040 – 9,71,000/-**) without any finding that the said payment was not genuine.

6. For that the Ld. CIT(A) erred in disallowing the payment of hiring charges to 7 parties amounting to Rs.2,33,652/- without any adverse finding when 7 parties appeared before the Ld. CIT(A) and accepted having receive the hiring charges.

7. For that the Ld. CIT(A) erred in confirming the disallowance of 10% of the pocket expenses when there was no claim as such but only for the purpose of accounting the reimbursement of the expenses of Rs.8,39,858/- was shown in both the sides of the Income and Expenditure account.

8. For that on the facts and circumstances of the case the order of the CIT(A) be modified and the assessee be given the relief prayed for.”

Shri S.M.Surana, Ld. Authorized Representative appeared on behalf of assessee and Shri A.K.Pande, Ld. Departmental Representative appeared on behalf of Revenue.

2. Ground No.1 to 6 in this appeal of assessee are common and inter-connected, we clubbed together and pass consolidated order for the sake of convenience. The issue raised is that Ld. CIT(A) erred in confirming the order of Assessing Officer by disallowing a sum of ₹ 12,57,040/- on account of two

reasons i.e. Non deduction of Tax at Source (TDS for short) u/s 194J of the Act and genuineness of expenses. Facts in brief are that assessee a partnership firm of Chartered Accountants and rendering professional services. During the year under consideration, assessee claimed an expense of ₹15,12,750/- under the head "Consultancy & Accounting charges". During the course of assessment proceedings, AO observed that expenses "consultancy & accountancy charges" were subject to the provision of TDS. Accordingly, he sought clarification regarding the TDS provision and requested to produce the bills, vouchers in support of its expenditure. However, assessee failed to furnish the same and claimed that the expense shown under the head "consultancy & accountancy charges" are factually shown under the wrong head but it should be under the head "hiring charges". It was submitted that certain persons were hired for physical verification stock and fixed assets of the clients. As such no professional/ technical services were involved in the activity of physical verification. Therefore, the provision of Sec. 194C is attracted in place of Sec. 194J of the Act. However, AO observed that for the physical verification of the client's business, person having requisites expert knowledge are required. Therefore the assessee has defaulted in not deducting TDS 194J of the Act. Accordingly, AO has disallowed a sum of ₹12,51,040/- on account of non deduction of TDS and non production of documentary evidence and accordingly added the same to the total income of assessee.

3. Aggrieved, assessee preferred an appeal before Ld. CIT(A) whereas assessee submitted that the provision of Sec. 194J of the Act applies for the expense of professional services and technical services. Therefore the provisions to Sec. 194J are attracted only in case where the services are rendered by a person of professionally educated in a particular discipline. In the instant case, payments are made to ladies and gentlemen who are not much educated and have been hired to conduct clerical workings like counting, recording etc. of stock, counting of fixed assets, labelling etc. Such

clerical work requires no specific professional skill. Besides above, assessee submitted that the people were outsourced only for limited purpose of physical verification activity of the client's business and these people do not work for a long time. They were hired for a span of 2/3 months. Some people were hired assignment-wise and they leave the firm once the assignment is complete. Therefore, it is not possible to collect the required information about the people to whom the charges were paid. It is also to note that hired people were non-technical but all of them were working under the supervision of a technical person. Accordingly, the contention of assessee is that work cannot be rendered by the non-technical person is not valid. In proving the genuineness of the expences, assessee had submitted written submission and relevant extract is reproduced below:-

"3.4 The A/R of the appellant filed his written submission, the relevant portion of which is reproduced herein below:-

'1. It is humbly submitted that the appellant firm is a Chartered Accountants firm rendering professional services. The appellant firm had rendered service in the nature of taking physical verification of stock, of clients fixed assets etc., during the year and had engaged the services of various personnel to whom hiring personnel charges of Rs.12,57,040/- have been paid. The amount has been paid for contracting / hiring people for effectively carrying out the professional services.

The Ld. Assessing Officer had disallowed the expenses U/s 40(a)(ia) of the Income Tax Act, 1961 on the ground that TDS u/s. 194J of Income tax Act, 1961 has not been deducted. It is humbly submitted in this regard that the consultancy charges are in the nature of hiring charges paid for hiring non qualified personnel.

Section 194J reads as follows:

194J.(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) Fees for professional services, or

(b) Fees for technical services

.....

Shall, at the time of credit of such sum deduct an amount equal to ten per cent of such sum as income-tax on income comprised therein:

.....
Explanation. – For the purposes of this section,-

(a) “professional services” means services rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the Board for the purposes of section 44AA or of this section.

Thus, section 194J is attracted only in cases where the services are rendered by a professional educated in a particular discipline. In the present case, as rightly pointed out by the AO, the payments are made to ladies and gentlemen who are not much educated and have been hired to conduct clerical workings like counting, recording etc of stock, counting of fixed assets, labeling etc. Such, clerical work requires no specific professional skill.”

However, Ld. CIT(A) disregarded the plea taken by assessee that payments were made to clerical assistance and many of them worked as student of CA / CS / ICWA which is clearly of the nature of fees of professional services and therefore attracts the provision of Sec.194J of the Act.

3.1 Ld. CIT(A) also doubted the genuineness of the expenditure claimed by assessee on the ground that the alleged persons to whom payments were made did not appear in response to summon issued to them. In many occasion, summons issued came back as un-served. Ld. CIT(A) also rejected the documents submitted by the assessee at the time of hearing on the ground that documents submitted are not reliable and he confirmed the action of AO.

Being aggrieved by this order of Ld. CIT(A) assessee came in second appeal before us.

4. Before us Ld. AR submitted that payments were not made to people who are technically qualified as required u/s 44AA of the Act. The payments to the persons are covered u/s. 194C of the Act and in each case the payment is below ₹ 50,000/- per person for the entire year. So assessee is out of the

purview of TDS provision as specified u/s. 194C of the Act. Further, Ld AR stated that assessee has submitted the copies of IT returns along with PAN of various persons, the details of the clients for which physical verification of the stock / fixed assets were carried out which is placed on record. He requested the Bench to decide the issue on merit.

On the other hand, Ld. DR relied on the orders of Authorities Below.

5. We have heard the rival contentions and perused the materials available on record. From the aforesaid discussion, we find that assessee has incurred the expenses by hiring the 30 people for the activity of physical verification of fixed assets and stock of the client. The AO treated the payment to the said persons as professional charges and disallowed the same on account of non-compliance of the provisions of section 194J of the Act. The AO also disallowed the same due to non production of the supporting documents. However we find from the order of Ld. CIT(A) payments were made to 30 persons and out of 30 persons 17 persons had submitted documents; 4 persons had appeared before Assessing Officer and 7 persons had appeared before Ld. CIT(A). So the total 28 persons out of 30 persons have made representation before Income Tax Authorities. Therefore, the genuineness of the parties for having the transactions cannot be doubted. The possibility of non-submission of supporting documents in two/ three cases cannot be ruled out and that cannot be the basis for making the disallowance. Besides the above we find that the observation of the Id. CIT(A) that the payment was made inter-alia to the students pursuing CA/CS/ICWA professional courses therefore provisions of section 194J is applicable, in our view is not tenable. It is because that those are the students pursuing the professional course and they have not actually attained the professional degree by getting themselves admitted in the professional course. The Explanation to section 194J defines "**professional services**". "**Professional services**" means **services** rendered by a person in the course of carrying on

legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the Board for the purposes of section 44AA or of this section. *Notified professions under section 44AA are in terms* Notification No. S.O. 17(E), dated 12th January, 1977 issued under section 44AA prescribed the following professions :

(a) *The profession of authorised representative*

"Authorised representative" means a person, who represents any other person, on payment of any fee or remuneration, before any tribunal or authority constituted or appointed by or under any law for the time being in force, but does not include an employee of the person so represented or a person carrying on legal profession or a person carrying on the profession of accountancy.

(b) *The profession of film artist:*

"Film artist" means any person engaged in his **professional** capacity in the production of a cinematograph film, whether produced by him or by any other persons as (i) an actor; (ii) a cameraman; (iii) a director, including an assistant director; (iv) a music director, including an assistant music director; (v) an art director, including an assistant art director; (vi) a dance director, including an assistant dance director; (vii) an editor; (viii) a singer; (ix) a lyricist; (x) a story writer; (xi) a screen play writer; (xii) a dialogue writer; and (xiii) a dress designer.

The Notification number S.O. 2675 dated 25th September, 1992 under section 44AA prescribed profession of Company Secretary.

Profession defined under section 2(36)

Section 2(36) defines "**profession**" includes vocation. But this definition cannot be used for section 194J because the Explanation to section 194J specifically defined "**professional services**" for purpose of section 194J.

Technical services

"Fees for technical **services**" is defined in Explanation (b) to section 194J. It states that "fees for technical **services**" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9.

The Explanation 2 to clause (vi) of sub-section (1) of section 9 states that "Fees for technical **services**" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy **services** (including the provision of **services** of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "salaries".

In view of above, we find that the aforesaid expenditure claimed by the assessee under the head consultancy & accounting charges does not represent the professional services as explained under section 194J of the Act. Merely the assessee has claimed the nomenclature under the head consultancy will not amount to professional services. No doubt the services given by the CA firm to its clients in the instant case amounts to professional services but the services availed by the firm from outside for the physical verification of stock do not amount to professional services. Hence the payments made are covered under the provisions of section 194C of the Act. We also further find that in none of the case, the payment has exceeded Rs.50,000/-, We also find that 28 persons had made representation before Income Tax Authority and the Id. AR has submitted the copies of income tax returns along with PAN of various persons. We accordingly, considering the totality of the facts of the present case, we are inclined to reverse the orders of Authorities Below. This issue of assessee's appeal is allowed. Assessing Officer is directed accordingly.

6. Coming to next issue raised by assessee in this appeal is that Ld. CIT(A) erred in restricting the disallowance out of office expense incurred by assessee to the extent of 10% of ₹8,39,858/-.

During the year assessee has claimed reimbursement expense for an amount of ₹8,39,858/- by crediting in its profit and loss account. This reimbursement expense was claimed by assessee from its clients on actual basis of the expenditure incurred. Against the receipt of such reimbursement expenses and assessee has claimed expenses of ₹ 8,39,858/- exactly same amount by debiting the profit and loss a/c. On verification of expense claimed by assessee, the AO found that in some cases self-made vouchers were available and in some cases there was no voucher in support of expenses claimed by assessee. Accordingly, AO opined that the possibility of personal expense cannot be ruled out therefore 20% of Rs.8,39,858/- which comes to Rs.1,67,972/- was disallowed and added back to the total income of assessee.

7. Aggrieved, assessee preferred an appeal before Ld. CIT(A) who has reduced the disallowance made by AO from 20% to 10%.

Being aggrieved by this order of Ld. CIT(A) assessee came in second appeal before us.

8. We have heard rival contentions and perused the materials available on record. At the outset, we find that assessee has shown reimbursement of expense for an amount of ₹8,39,858/- exactly as against the receipt of Rs. 8,39,858.00. The AO during the assessment proceeding observed that in support of the expenditure self-made vouchers were available and in some cases there was no voucher available. The AO accordingly opined that personal expense cannot be ruled out and he made the addition @ 20% at ₹8,39,858/- which was reduced by Ld. CIT(A) at 10%. From the facts of the

case, we find that AO has not brought out any specific ground so as to disallowing the expense as claimed in assessee's profit and loss a/c. He has disallowed the expenses on *ad hoc* basis without appreciating the fact that income shown by assessee in the form of reimbursement of expense and expenditure claimed in the form of reimbursement expenses are equal. Therefore, in our considered view, the question of having any income out of reimbursement of expense does not arise. Therefore, we are inclined to reverse the orders of Authorities Below and issue raised by assessee is allowed. AO is directed accordingly.

9. Last issue of assessee's appeal in ground No.8 is general in nature and does not require any adjudication.

10. **In the result, assessee's appeal stands allowed.**

Order pronounced in the open court 17/06/2016

Sd/-
(S.S.Viswanethra Ravi)
(Judicial Member)
Kolkata,

Sd/-
(Waseem Ahmed)
(Accountant Member)

*Dkp

दिनांक:- 17/06/2016 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-M/s Chunder Khatore & Associates, 10A, British Indiafn Street, Esplanade, Kolkata-700 069
2. प्रत्यर्थी/Respondent-ITO, Ward-54(1), 3, Govt. Place, Kolkata-700001
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,
उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।