IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "F", MUMBAI

BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI SANJAY GARG, JUDICIAL MEMBER

ITA No.1691/M/2011
Assessment Year: 2007-08

M/s. Family Plastics & Thermoware, 4 Radha Apartments, Telli Galli, Andheri (E), Mumbai – 400 069 **PAN: AAAFF4968L**	Vs.	Dy. Commissioner of Income Tax – 20(3), Mumbai
(Appellant)		(Respondent)

Present for:
Assessee by : Shri K. Gopal, A.R.
Revenue by : Shri Senthil Kumaran, D.R.

Date of Hearing : 06.06.2016
Date of Pronouncement : 15.06.2016

O R D E R

Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 03.11.2010 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2007-08.

2. The assessee through its grounds of appeal has raised three effective issues. The first issue is relating to the disallowance under section 40(a)(ia) on account of freight and forwarding charges paid to foreign shipping companies.

3. The brief facts relating to the issue under consideration are that the assessee a partnership firm, is engaged in the business of manufacturing of household plastic goods and markets the same in the domestic market as well as in the export market. During the assessment proceedings, the Assessing Officer (hereinafter referred to as the AO) observed that the assessee had made

certain payments of freight and forwarding expenses to the foreign shipping companies. The AO observed that the assessee had not deducted tax at source on such payments. He, therefore, disallowed the freight, forwarding and carriage outward charges under section 40(a)(ia) of the Act. He rejected the plea of the assessee that the provisions of section 40(a)(ia) of the Act were not applicable to the payments made to foreign shipping companies. He, while relying upon the decision of the Hon'ble Jurisdictional Bombay High Court in the case of "CIT vs. Orient (Goa) Pvt. Ltd." in ITA No.7/2010 reported at 325 ITR 554 (Bom.) held that CBDT circular No.723 dated 19.09.2005 was not applicable to the provisions of section 40(a)(ia) of the Act.

4. In appeal, the Ld. CIT(A) upheld the above disallowance made by the AO. The assessee, thus, has come in appeal before us on the same issue.

5. At the outset, the Ld. A.R. of the assessee has brought our attention to the Full Bench decision of the Hon'ble Jurisdictional Bombay High Court in the cases of "CIT vs. V.S. Dempo and Co. P. Ltd." and Sesa Goa Ltd. vs. CIT" reported in (2016) 381 ITR 303 (Bom) (FB) vide which the Hon'ble Bombay High Court has overruled the proposition of law laid down in the case of "CIT vs. Orient (Goa) Pvt. Ltd." (supra). The Full Bench of the Hon'ble Bombay High Court in the case of "CIT vs. V.S. Dempo and Co. P. Ltd." (supra) has held that there are special provisions for computing profits and gains for shipping business in the case of a non resident enacted by section 44B which stipulates that a sum equal to 7 1/2 % of the aggregate amount specified in sub section (2) of section 44B is deemed to be profit and gains of such business chargeable to tax under the head 'profit and gains of business or profession'. The tax is to be levied and recovered in terms of sub sections of section 172 of the Act. The Hon'ble Bombay High Court has observed that section 172 is referable to section 44B of the Act and that both the provisions open with a non obstante clause. While section 44B enacts special provision for computing profits and gains of shipping business in case of non residents, section 172

deals with shipping business of non residents which is enacted for the purpose of levy and recovery of tax in the case of any ship belonging to or chartered by a non resident operated from India. The Full Bench of the Hon'ble Bombay High Court has observed that when sub sections of section 172 read altogether and harmoniously with the provisions of section 44B, they reveal as to how the tax should be levied, computed, assessed and recovered. The Full Bench of Hon'ble Bombay High Court (supra) held that there is no warrant in applying the provisions of chapter VII for collection and recovery of the tax and its deduction at source vide section 195 in case of income of non resident shipping companies. The Hon'ble Bombay High Court has further observed that as per the provisions of section 172, the ship cannot leave the port without paying or to make arrangement to pay the tax, hence, the prevention of avoidance or evasion both are taken care of by the legislature while enacting the said provisions. The Full Bench of the Hon'ble Bombay High Court, thus, held that there being the special provisions having non obstante clause in relation to the levy and recovery of tax in case of shipping business of non residents, the assistance can be derived by the assessee in this respect for non deduction of TDS in case of foreign shipping companies. The relevant part of the observations made by the Full Bench of the Hon'ble Bombay High Court in the case of "CIT vs. V.S. Dempo and Co. P. Ltd." (supra) for the purpose of ready reference is reproduced as under:

> "46. A bare perusal thereof would indicate as to how this provision covers the case of an assessee who is a non-resident and engaged in the business of operation of ships. That stipulates a sum equal to 7½% of the aggregate of the amount specified in sub-section (2) of section 44B as deemed to be profits and gains of such business chargeable to tax under the head "Profits and Gains of Business or Profession". It is the explanation which refers to the demurrage and for the purpose of sub-section (2) of SRP 62/79 ITXA989.15.doc section 44B. It clarifies that the amount paid or payable or received or deemed to be received, as the case may be, by way of demurrage charges or handling charges or any other amount of similar nature shall for the purposes of sub-section (1) deemed to be the profits and gains of the business, namely, shipping business chargeable to tax under that head. The amounts which are paid or payable whether in or out of India to the assessee or to any person on his behalf on account of carriage of passengers, livestock, mail or goods shipped at a port in India and the amount received was deemed to be

received in India by or on behalf of the assessee on account of the carriage of passengers, livestock, mail or goods shipped at any port outside India shall be deemed to be the profits and gains. On that the tax is payable by virtue of sub-section (1) of section 172. That has to be levied and recovered in terms of the sub-sections ofsection 172 of the Income Tax Act. Once section 172 falls in Chapter XV titled as Liability in Special Cases - Profits of Non-residents, then section 172 is referable to section 44B. Both provisions open with a non-obstante clause and whereas section 44B enacts special provisions for computing profits and gains of shipping business in case of non-residents section 172 dealing with shipping business of non-residents is SRP 63/79 ITXA989.15.doc enacted for the purpose of levy and recovery of tax in the case of any ship belonging to or chartered by a non-resident operated from India. These sections and particularly section 172 devise a scheme for levy and recovery of tax. The sub-sections of section 44B denote as to how the amounts paid to or payable would include demurrage charges or handling charges or any other amount of similar nature. The sub-sections of section 172 read together and harmoniously would reveal as to how the tax should be levied, computed, assessed and recovered. Therefore, there is no warrant in applying the provisions in chapter XVII for collection and recovery of the tax and its deduction at source vide section 195.

47. To our mind, the Division Bench judgment in Commissioner of Income-tax vs. Orient (Goa) Pvt. Ltd. seen in this light does not, with greatest respect, take into account the scheme and setting as understood above. There need not be apprehension because there is no escape from the levy and recovery of tax. The tax has to be levied and collected. The ship cannot leave the port or if allowed to leave any port in India, it must either pay or make arrangement to pay the tax. Hence, the apprehension of SRP 64/79 ITXA989.15.doc avoidance or evasion both are taken care of by the legislature. That is how advisedly the legislature cast the obligation to deduct tax at source on the person responsible to make payment to a non-resident in shipping business.

48. The respondent-assessee contended before the Division Bench in Orient (Goa) (supra) as well as the Division Bench which made the referring order that section 172 of the Income Tax Act has a bearing and an important one on the obligation to deduct tax at source. Therefore, it is the recipient's position and the perspective in which the recipient's income would be taxed will have to be borne in mind. The non-resident shipping company in respect of it's income would be in a position to rely upon section 44B and consequently section 172. However, we do not see how there is an obligation to deduct tax at source on the resident assessee/Indian company before us. While computing the income of the non-resident Indian / foreign company, assistance can be derived by such non-residents from section 44B if they are in shipping business. It would also be in a position to rely upon section 172 but the responsibility of the person making payment to a non-resident in sub-section (1) of section 195 cannot be SRP 65/79 ITXA989.15.doc avoided in the manner set out in other cases. The scheme as above operates only to cases covered by section 172 of the IT Act and none else."

6. Since the decision of the Hon'ble Bombay High Court in the case of "CIT vs. Orient (Goa) Pvt. Ltd." (supra) has been overruled by the Full Bench

decision in the case of "CIT vs. V.S. Dempo and Co. P. Ltd." (supra), hence respectfully following the above decision of the Hon'ble Bombay High Court, we delete the disallowance made by the lower authorities for non deduction of TDS on the amounts paid by the assessee to foreign shipping company.

7. The second issue raised by the assessee is relating to disallowance of commission payment made to M/s. S.G. Trading Company – a foreign agent. During the assessment proceedings the AO observed that the assessee had paid a sum of Rs.5,31,979/- to M/s. S.G. Trading Company, but the assessee has not been able to prove the services rendered by M/s. S.G. Trading Company and further nexus of such services with the business of the assessee. He, therefore, held that the assessee had failed to prove that the above expenditure had been incurred by the assessee wholly and exclusively for the business purpose of the assessee. He, therefore, disallowed the said expenditure and added the same into the income of the assessee.

8. Before the Ld. CIT(A), the assessee submitted that the said company was a foreign agent who had procured the sales order in foreign countries and that no TDS was liable to be deducted on payments to the said foreign agent. That, though, the AO had accepted that no TDS was applicable, yet, had disallowed the claim stating that the assessee was unable to prove the nexus of the services and commission paid with the business of the assessee. The assessee before the Ld. CIT(A) produced appointment letter of the foreign commission agent, acceptance letter from assessee's commission agent, debit notes, e-mail and correspondence about the purchase order, sales invoices and export documents showing the items exported and the details of payments etc. made in foreign currency.

However, the learned CIT(A) did not consider the documents and details supplied by the assessee at appellate stage citing Rule 46A of the I.T. Rules and observing that the evidence under Rule 46A can only be accepted,

if, the AO had refused to accept the said evidence or the assessee was prevented by sufficient cause from producing the evidence before the AO.

10. We have heard the rival submissions put forth by the learned representatives of both the parties and gone through the relevant material available on record.

In our view, while refusing to take into consideration the relevant documents which were very much necessary for the just decision of the case, learned CIT(A) failed to exercise his appellate jurisdiction u/s 250 of the Act. The duty was also cast upon the learned CIT(A) to admit and consider the evidence produced before him by the assessee if, the same go to the root of the case. The Hon'ble Bombay High Court in the case of "Smt. Prabhavati S.Shah v. CIT" [(1998) 231 ITR 1 (Bom.)] has held that the powers conferred on the first appellate authority under sub-section (4) of section 250 of the Act, being a quasi-judicial power, it is incumbent on him to exercise the same, if the facts and circumstances justify.

Even otherwise under rule 46A(4) of the Income tax Rules, the CIT(A) has been given power to call for production of any document or the examination of any witnesses to enable him to dispose of the appeal. There is no doubt about the legal position that if any document furnished by the assessee before the Commissioner (Appeals) is in the nature of clinching evidence which goes to the root of the case, then in the interest of justice such types of evidence should not be rejected. The documents relied upon by the assessee are very much relevant and necessary for the just and proper decision of the case as the assessee from the above documents has claimed that he had deducted the tax while making payments to certain parties and further that the remaining parties had been granted exemption from deduction of tax under section 197(1) of the Act. Hence, we set aside the findings of the CIT(A) on this issue and remand back the matter to the file of AO with a direction to decide the issue afresh as per law after allowing the assessee to submit the relevant evidences, consider

the same and after giving the assessee a reasonable opportunity of being heard. This ground of appeal is accordingly allowed for statistical purposes.

11. The next issue is regarding the levy of interest under section 234B and 234C, which is consequential in nature and does not require any adjudication at this stage.

12. In view of our above observations, the appeal of the assessee is treated as allowed for statistical purposes.

Order pronounced in the open court on 15.06.2016.

Sd/-	**Sd/-**
(G.S. Pannu)	**(Sanjay Garg)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 15.06.2016.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.