

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

Before **Shri Waseem Ahmed, Accountant Member** and
Shri K.Narsimha Chary, Judicial Member

ITA No.355-356/Kol/2014
Assessment Years: 2006-07 & 2007-08

ACIT, Circle-33, 10B, Middleton Row, 3 rd Floor, Kolkaata-71	<u>बनाम</u> / V/s.	Shri Biswajit Guha 128/4A, Hazra Road, Calcutta-26 [PAN No.ADTPG 5944 K]
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

आवेदक की ओर से/By Assessee	Shri Rajeeva Kumar, Advocate
राजस्व की ओर से/By Respondent	Shri Satyendra Mohan Das, Addl. CIT-SR-DR
सुनवाई की तारीख/Date of Hearing	14-09-2016
घोषणा की तारीख/Date of Pronouncement	05-10-2016

आदेश / O R D E R

PER Waseem Ahmed, Accountant Member:-

Both appeals by the Revenue are against the separate orders of Commissioner of Income Tax (Appeals)-XIX, Kolkata dated 12.08.2013. Assessments were framed by DCIT, Circle-33, Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his orders dated 24.12.2008 & 22.12.2009 for assessment years 2006-07 & 2007-08 respectively.

Shri Satyendra Mohan Das, Ld. Senior Departmental Representative appeared on behalf of Revenue and Shri Rajeeva Kumar, Ld. Advocate appeared on behalf of assessee.

2. Both the appeals are heard together and are being disposed of by way of this common order for the sake of convenience.

First we take up ITA No.355/Kol/2014 for A.Y 06-07.

3. The grounds raised by the assessee per its appeal are as under:-

“1. “whether on the facts and in the circumstances of the case and in law, the Ld. CIT(Appeals) has erred in deleting the addition made on account of Rs.2,35,500/- unexplained purchase from M/s Konked International as the same could not be verified.”

2. “Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(Appeals) has erred in deleting the addition made on account of outstanding liability in relation to M/s Bharat Somani as the same could not be verified.”

3. “Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(Appeals) has erred in deleting the addition made on account of non-deduction of TDS on transport charges u/s/s 40(a)(ia) of the Income-tax Act, 1961.”

4. First issue raised by Revenue is that Ld. CIT(A) erred in deleting the addition made by Assessing Officer for Rs.2,35,500/- from M/s Konked International (for short KI) which was not verified u/s. 133(6) of the Act.

5. Facts of the case are that assessee- an individual is engaged in the business of civil construction as a Govt. contractor and running its proprietorship business under the name of M/s Vida Engineering Co. The assessee during the year has shown purchases for Rs. 2,35,500/- from M/s KI. During the year, notice u/s. 133(6) of the Act was issued for confirmation but returned as un-served with the remarks “that there was no such party in the given address”. On question by AO the assessee failed to offer any explanation about the genuineness of the party, therefore same was disallowed and added to the total income of assessee.

6. Aggrieved, assessee preferred an appeal before Ld. CIT(A) who deleted the addition made by AO by observing that M/s KI, a registered dealer with Sales Tax Department with Govt. of West Bengal vide R.C. SBST No.BG/9471A & CST No.5489A(BG)C. The assessee has made the payment to the party M/s Konked International through account payee cheque. The Ld. CIT(A) observed that the existence / identity of the party cannot be doubted. The assessee is not an Investigating Authority and therefore it is not possible for him to be informed about the change of address of the party. The entries were reflecting in his audited books of account. Therefore, AO cannot make the addition on the ground of non-service of notice and inspector report.

Being aggrieved by this order of Ld. CIT(A) Revenue is in appeal before us.

7. Before us both the parties relied on the order of Authorities Below as favourable to them. We have heard rival contentions and perused the materials available on record. We find that AO has made the addition on the ground that inspector could not trace the address of the party M/s KI and notice issued u/s. 133(6) of the Act was returned un-served. However, Ld. CIT(A) granted relief to assessee by observing that party M/s KI was registered with the Govt. of West Bengal and payment was made through account payee cheque. In this connection, we find that the payment was made by assessee through account payee cheque and that party was duly registered with Sales Tax Departments of Govt. of West Bengal. There was also no defect in the books of account of assessee. Therefore, we do not find any reason to interfere in the order of Ld. CIT(A) and we also rely in the judgment of Hon'ble jurisdictional High Court in the case of *Diagnostics vs. CIT & ANR* (2011) 334 ITR 111 (Cal). The relevant portion of the judgment is reproduced below :

“So far as the purchases from SE and INT were concerned, the alleged payments being made in cash and the amount involved being Rs. 50,675 and Rs. 1,00,737 respectively during the relevant assessment year and at the same time, the appellant having failed to produce any of the parties except

the bills alleged to be raised by those concerns, the Tribunal was justified in disbelieving those transactions and there is no reason to interfere with such finding which is basically a finding of fact based on appreciation of material evidence. However, as regards the payments made to SP are concerned amounting to Rs. 3,12,302, those have been made by account payee cheques and those have been encashed through the bankers of SP. It appears that according to the appellant, at the time of assessment, the appellant had no business transaction with SP and consequently, the said party did not co-operate with the AO. However, the transaction having taken place through account payee cheques, the contention of the advocate appearing for the Revenue that the transaction was a non-existent one cannot be accepted. If an assessee took care to purchase materials for his business by way of account payee cheques from a third party and subsequently, three years after the purchase, the said third party does not appear before the AO pursuant to the notice or even has stopped business, the claim of the assessee on that account cannot be discarded as non-existent. The Revenue has not put forward any other ground, such as, it was not a genuine transaction for other reasons but has simply rejected the claim on the ground as if there was no such transaction. The transaction having taken place through payment by account payee cheques, such plea is not tenable and in such circumstances, the Tribunal below erred in law in reversing the finding arrived at by the CIT(A) accepting the said transaction as a genuine transaction.

Since the payment was made by account payee cheques and was encashed through the bankers, disallowance was not called for; however, disallowance was sustainable in respect of payment made in cash to other two parties in respect of which the assessee had not been able to produce the parties to prove the genuineness.”

Respectfully, following the above precedents of the above case, we do not find any reason to interfere in the order of the Id. CIT(A). We hold accordingly. This ground of Revenue is dismissed.

8. Coming to next issue raised by Revenue in this appeal is that Ld. CIT(A) erred in deleting the addition made by AO for ₹ 4 lacs on account of outstanding liability in respect of M/s Bhart Somani.

9. The assessee has shown sundry creditors in the name of M/s Bharat Somani for ₹ 4 lakhs but the same was not verified u/s 133(6) of the Act as the notice returned as un-served. On question by the AO about non-service of

notice assessee could not reply, accordingly, AO disallowed the same as unexplained claim and added to the total income of assessee.

10. Aggrieved, assessee preferred an appeal before Ld. CIT(A) who deleted the addition by observing as under:-

*“6.1 The facts on this issue are exactly similar to those of Konked International dealt with above. The appellant made purchases of raw materials (Ballast) for sum of ₹8.31,748/-, which was inclusive of transport and loading & unloading charges. During the assessment year under appeal, part payment to the extent of ₹4,31,748/- was made to the supplier, Bhrat Somani, which was comprised of by cheque of ₹4,00,000/- and cash on two dates of ₹16,748/- and ₹15,000/-, and the balance outstanding of ₹4,00,000/- [₹8,31,748 - ₹4,31,748/-] was shown as sundry creditor in the balance sheet as at 31/3/2006. Copies of relevant bills, R.C of Central and State and bank statement were filed before the AO in response to his letter dated 16.12.200, a copy of which is also filed during appellate proceedings. As in the case of Konked International, the AO alleged that the notice u/s. 133(6) of the Act could not be served by postal authorities and even by the Inspector deputed by the department, which promoted him to treat the transaction ingenuine, resulting in addition to the total income as unexplained credit. For the reasons discussed hereinabove while dealing with the addition of ₹2,35,500/- in respect of Konked International, I find no plausible ground to concur with such arbitrary action of the AO an addition made thereunder. That apart, the AR has pointed out that the AO made conflicting observation in respect of Bharat Somani, inasmuch as on one hand addition of ₹4,00,000/- was allegedly made as unexplained credit and on the other hand the transportation charge of ₹5,51,995-, which was shown by Bharat Somani in his supply bills were disallowed u/s. 40(a)(ia) of the Act. If total effect of these two is taken together, the total addition would be more than the total transaction of the appellant entered with Bharat Somani. I have verified this fact and found the same true. Therefore, by the said action of the AO it emerges that the impugned addition of ₹4,00,000/- was made by the AO purely on assumption and addition on such hypothesis cannot be entertained on the facts and circumstances of the case and in the eye of law. That being so, the addition made by the AO in the sum of ₹4,00,000/- in the case of Bharat Somani is also directed to be **deleted**.”*

Being aggrieved by this order of Ld. CIT(A) Revenue is in appeal before us.

11. Before us Ld. DR submitted that the Ld. CIT(A) has coterminous power which has not been exercised for the verification of genuineness of the party. He further submitted that Ld. CIT(A) has misunderstood the facts of the case in connection with the provision of Sec. 40(a)(ia) of the Act and relied on the

order of AO. He lastly, left the issue to the discretionary of the Bench. On the other hand, Ld. AR relied on the order of Ld. CIT(A).

12. We have heard the rival contentions and perused the materials available on record. At the outset, we find that AO has made the addition on account of non-existence of the party however payment was made through account payee cheque, so the identity of the party cannot be doubted. Therefore, we do not find any reason to interfere in the order of Ld. CIT(A) and we also rely in the judgment of Hon'ble jurisdictional High Court in the case of *Diagnostics vs. CIT & ANR* (2011) 334 ITR 111 (Cal)(*Supra*). Respectfully, following the above precedents of the above case, we do not any reason to interfere in the order of the Id. CIT(A). We hold accordingly. This ground of Revenue's appeal is dismissed.

13. The last issue raised by Revenue in this appeal is that Ld. CIT(A) erred in deleting the addition made by AO on account of non-deduction of transport charges. The assessee for the year under consideration has claimed transport charges for ₹25,32,484/- on which no TDS was deducted by assessee. On question by AO about the non-deduction of TDS assessee submitted that transport charges are the part and parcel of raw material purchased by assessee. Therefore, the question of TDS deduction does not arise. However, AO disregarded the claim of assessee by observing that the transport charges have been shown in the books of account of assessee separately. Had it been the cost of purchase then it should have been added in the cost of material. Accordingly, AO disallowed the same of ₹25,32,484/- and added to the total income of assessee.

14. Aggrieved, assessee preferred an appeal before Ld. CIT(A) who deleted the addition made by AO by observing as under:-

"7.4. I have considered the submissions made on behalf of the appellant, gone through the various documents filed and the impugned assessment order. It is apparent from the table (supra) that except in the case of Suresh

Gupta, in all other cases of three suppliers, the cost of transportation was higher than the cost of materials supplied by those parties. The AR tried to explain that the suppliers were charging the price of raw materials for their convenience under different headings seemingly for the reasons that the price of such raw materials were either of negligible value or of no value and the suppliers may add their expenses with the cost of goods and collected the price of raw materials in the garb of transportation cost and loading cost. Whatever it may be, it was submitted the total bill raised by the respective suppliers represented the cost of materials supplied by them to the appellant and the appellant treated the same as the cost of the raw materials purchased. However, in the books of account the transport charges were shown separately under the nomenclature transport charges, although it partake the character of cost of raw material. It was also submitted that no addition should be made if any claim is made under a wrong notion and nomenclature, I find substance in this submission. On going through the payment details, it is found that although the suppliers had bifurcated the total payments into different heads of expenditure according to their method of billing and on which the appellant had no control, but the appellant, in fact, made payments towards purchase on the basis of total amount raised in the respective bills. It is also fact that the appellant booked the transport charges separately in his books of account, which was claimed to be a mistake attributable to nomenclature. It is a settled position in law that even if assessee omits to claim justifiable and allowable expenses, that should be looked into by the assessing authority and appropriate relief should be granted to the assessee irrespective of fact of claiming under any nomenclature. The value of the raw materials purchased should be the actual cost of material and incidental expenses incurred on such purchases. In the instant case, the suppliers of raw materials of their own transported the goods to the appellant and naturally, therefore, the total bill raised by them would fetch the purchase price to the appellant. The expenses incurred on account of transportation were intrinsically linked with the purchase cost to the appellant. With these facts, it was found that as the appellant had not paid any amount to the suppliers on account of transportation, accordingly, there was no liability for deduction of tax source. If expenses incurred by a person on account of transportation etc. are added to the cost of the goods, it cannot be inferred that the person who is billed had paid certain amount on account of those services separately as the same becomes part of the commodity so sold [CIT (TDS) vs. Assistant Manager (Accounts), Food Corpn. of India (2010) 326 ITR 106 (P&H)]. In view of the above factual matrix and numerous judicial pronouncements on the issue, it is amply clear that as the suppliers were not the transport contractors and the AO could not bring on record evidence establishing existence of any oral or written agreement, provisions of section 194C of the Act do not come into play warranting any disallowance u/s 40(a)(ia) of the Act. That being so, the observation of the AO in respect of default in deducting tax at source on transport charges u/s 194C of the Act is misconceived and not sustainable in the eye of law.

7.5. Without prejudice to what has been stated above the case of the appellant impliedly falls under the category of '**contract for sale**' and not contract for carrying out any work. Although there was no oral or written

*agreement between the appellant and the suppliers, but on the facts of the case it emerges that there was impliedly a contract for sale on the part of the supplier. The appellant used to purchase raw materials from the suppliers. Therefore, there was a relationship of purchaser and seller between them. The appellant purchased raw materials for the purpose of use of the same in his construction job and it was, therefore, a contract for sale and not a contract for any work. In the case of Kishak Bharati Co-op. Ltd. (2011) 10 ITR (Trib) 527, the Hon'ble I.T.A.T., Delhi has held that **"The contract for supply of gas from the producers for the purpose of use of this gas for burning in the assessee's factory was a contract for sale of goods and not a work contract."** It was, therefore, held that tax was not deductible at source from the payments made by the assessee in that regard. There are also series of decisions of several Hon'ble Courts that-where there is a contract for sale and not contract for carrying, out any, provisions of section 40(a)(ia) r.w.s. 194C of the fact do not apply. Therefore, on the above factual matrix, the appellant was not liable to deduct tax at source on the transport charges separately included in the sale price of raw materials supplied by the parties, because, to reiterate, the total billed amount raised by the parties was the purchase cost to the appellant. In this view of the matter, the AO went wrong in not appreciating the facts of the instant case in proper perspective and making uncalled for disallowance in that regard. The addition of ₹25,32,484/- made u/s 40(a)(ia) r.w.s. 194C of the Act is, therefore, directed to be **deleted.**"*

Being aggrieved by this order of Ld. CIT(A) Revenue is in appeal before us.

15. Before us Ld. DR submitted that transport charges were shown separately in the books of account of assessee. He further submitted that in case transport charges are shown separately then how the closing stock is valued at the end of the year under consideration. In rejoinder, Ld. AR before us submitted that assessee was not liable to deduct TDS under the provision of Sec. 194C of the Act and the provision came into effect of u/s. 194C with effect from 01.06.2007 and the instant case pertains to AY 2006-07.

16. We have heard rival contentions and perused the materials available on record. At the outset we find that the provisions of section 194C of the Act were made applicable to the individual assessee w.e.f. 1.6.2007 and it is admitted position that the matter relates to the assessment year 2006-07. Therefore in our considered view the assessee in the instant case was not liable to deduct TDS and accordingly there is no default for non-deduction of

TDS. In this connection we rely in the judgment of Hon'ble Court of Calcutta in the case of *CIT Vs. Shri Rinku Mallick* ITAT no. 96 of 2012, **GA No. 1368 of 2012** where it was held as under:-

"We have heard the learned Counsel Smt. Sinha [Das de], appearing for the appellant, and we have gone through the impugned judgment and order. We are of the view that this appeal does not require admission for hearing as the applicability of law involved herein is admittedly settled. It is admitted position that the matter relates to the assessment year 2006-07, whereas Section 194C(1) has been made applicable to the individual assessee with effect from 1.6.2007. There is no dispute that the respondent is an individual assessee.

Considering the position of the law, the learned Tribunal has consistently held that Section 194C(1) cannot be made applicable for the assessment year 2006-07. On identical fact the learned Tribunal has held so in the case of Ajay Rawla vs. DCIT, Circle-28, Kolkata [ITA No.353/Kol/2010 dated 22.6.2011].

It has not been submitted that the aforesaid judgment has been upset by this Court. In fact, on narration of undisputed fact, we do not think that the learned Tribunal has decided wrongly in this case or in the previous year.

Accordingly, this appeal is dismissed."

Respectfully, following the above precedents of the above case, we do not any reason to interfere in the order of the Id. CIT(A). We hold accordingly. This ground of Revenue's appeal is dismissed.

Coming to ITA No.356/Kol/2014 for A.Y. 07-08.

17. The grounds raised by the Revenue per its appeal are as under:-

"1. "Whether on the facts and in law, the Ld. CIT(Appeals) has erred in deleting the addition made on account of bogus purchases from M/s Sunidhi Enterprises amounting to Rs.14,89,888/-"

2. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(Appeals) has erred in deleting the addition made on account of excess liability sown in respect of ESS Refilling Station amounting to Rs.90,752/-"

3. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(Appeals) has erred in deleting the addition made on account of disallowance u/s. 40(a)(ia) of the Income-tax Act, 1961 for short deduction of tax u/s 194I of the Income-tax At, 1961 amounting to Rs.17,30,671/-"

4. "Any other ground of appellant craves leave to submit on or before the hearing of the appeal."

18. First issue raised by the Revenue in this appeal is that the Id CIT(A) erred in deleting the addition made by the AO for Rs. 14,89,888/- on account of bogus purchases from M/s Sunidhi Enterprises (for short SE).

19. The assessee during the year has shown the following transactions of purchases and corresponding payment to M/s SE.

Date	Particulars	Debit	Credit
01.12.06	Bridge – material		3,15,274/-
10.12.06	Bridge-material		2,08,562/-
30.12.06	C UBI Hazra	3,58,500/-	
30.12.06	Bridge-material		3,61,716.-
19.01.07	CC UBI Hazra	3,61,716/-	
20.01.07	CC UBI Hazra	1,65,346/-	
19.03.07	Bridge Material		2,53,400/-
21.03.07	Bridge – material		5,16,282/-
		8,85,562/-	16,55,234/-
	Closing balance	7,69,672/-	
		16,55,234/-	16,55,234/-

The AO, during the assessment proceedings observed that the payment of Rs.3,58,500/- and Rs.3,61,716/- has been made to 'P.Beriwal' and 'Sun Enterprises' respectively. The AO further deputed the Inspector to conduct the enquiry from the party M/s SE to confirm the transaction who confirmed the purchases for Rs.1,65,346/- only. Accordingly the AO has held the difference of the purchases of Rs.14,89,888/- as bogus and added to the total income of the assessee

20. Aggrieved, assessee preferred an appeal to Id. CIT(A) whereas assessee submitted that the payment of Rs.3,61,716/- was made to the party (M/s SE) only but the bank has entered the short name in its statement as 'Sun Enterprises'. Similarly, the payment of Rs.3,58,500/- was made 'P. Beriwala' as authorised by the party (M/s SE). The closing balances as appearing in the books of accounts in the name of SE for Rs. 7,69,672/- was cleared through account payee cheque in the subsequent year. The Id. CIT(A) accordingly deleted the addition made by the AO by observing as under:-

*"5.9 Fourthly, as is found from the impugned assessment order, the Inspector deputed by the AO restricted his query/inspection to the purchase transaction i.e. sale transactions of Sunidhi Enterprise without verifying the payments received by that party from the appellant. Therefore, the enquiry was not directed to the proper direction, yielding no fruitful purpose. Further, the AO before relying on such report of the Inspector ought to have given an opportunity to counter that report and/or establish his case with evidence. From the above factual matrix of the case and several documents placed on record. I have no hesitation to hold that the appellant, in fact, made purchases to the total tune of ₹16,55,234/- from Susnidhi Enterprise during the assessment year under appeal, out of which payments to the extent of ₹8,85,562/- were effected by account payee cheques during the relevant year and the balance outstanding carried forward to the next AY 2008-09 in the sum of ₹7,69,672/- was also paid by account payee cheques to the said party. That being so, as the app's purchases in this year is totally explained and payments thereof are also found recorded in the bank details, there was no scope left to the AO to doubt the purchases and add the sum of ₹14,89,888/- as bogus purchases. The addition of the said amount made by the AO in the impugned assessment order is, therefore, directed to be **deleted**."*

Being aggrieved by this order of Ld. CIT(A) Revenue is in appeal before us.

21. Before us both the parties relied on the order of Authorities Below as favourable to them. We have heard rival contentions and perused the materials available on record. We find that AO has made the addition on the ground that there was bogus purchase in the books of the assessee. However the Id. CIT(A) deleted the same by observing that the all the transactions are genuine. From the facts we find that the lower authorities have not brought anything on record about the payment claimed by the assessee to the party. The payment was made through account payee

cheque. The lower authorities have not confronted the reply received from the party under section 133(6) of the Act to the assessee. There was no defect in the bills of the purchases of the party. The Id. CIT(A) has given clear finding that the payment to the P. Beriwal has been made as authorized by the party M/s SE. The Id. DR has not brought anything on record contrary to the findings of Id. CIT(A). Hence we do not find any reasons to interfere in the order of Id. CIT(A). Hence this ground of revenue's appeal is dismissed.

22. The next issue raised by the Revenue in this appeal is that the learned CIT(A) erred in deleting the addition made by the AO for Rs. 90,752/- on account of excess liability shown in the respect of ESS Refilling Station (for short ERS).

23. The AO during the assessment proceedings issued notice u/s 133(6) of the Act to ERS to confirm the transaction. In response to the notice of section 133(6) of the Act the AO found the excess balance of Rs. 90,750/- shown by the assessee. On question by the AO assessee failed to provide any supporting evidence to explain the difference. Accordingly the AO has treated the excess liability shown by the assessee as income and added to the total income of the assessee.

24. Aggrieved, assessee preferred an appeal to learned CIT(A). The assessee before the Id CIT(A) submitted that the party ERS in the response to the notice u/s 133(6) of the Act has furnished the details of the purchase transactions took place during the year but failed to incorporate the opening balance of Rs.90,752/-. The difference of Rs. 90,752/- is arising only on account of the opening balance as shown by the assessee and the party in the response to the notice u/s 133(6) of the Act. The Id CIT(A) accordingly deleted the addition made by the AO by observing as under:-

"6.5 Coming to the addition of ₹90,752/- on account of sundry credits, on perusal of the Bill issued by ESS Refilling Station for the period 05/03/2006 to 31/03/2006, it is observed that the AO considered the information supplied by

*ESS Refilling Station as true without considering the app's explanation thereof. The appellant furnished a reconciliation statement in this regard before the AO which shows opening balance against that party of ₹90,752/- as on 01/04/2006. ESS Refilling Station only gave the details of sales made to the ape during the assessment year under appeal. Naturally, therefore, both the statements, one by the appellant and the other by the said supplier could not be said to be incorrect. The ape furnished ledger copy and statement of account of the said supplier from which it is evident that the closing balance in those two statements was in agreement, with each other. Thus, it is evident that ESS Refilling Station either omitted to give the opening balance carried forward from earlier year or in compliance to the query regarding sales made during the year, it gave details only to that extent. Whatever it may be the AO to meet the ends of justice should have further enquired from the said party about the appellant's claim, which he did not do so before coming to such an unwarranted conclusion. In such circumstances, in effect, there was no short or excess sales or purchase in this case. That being so, the addition of ₹90,752/0- is **deleted**."*

Being aggrieved by this order of Ld. CIT(A) Revenue is in appeal before us.

25. Before us both the parties relied on the order of Authorities Below as favourable to them. We have heard rival contentions and perused the materials available on record. We find that AO has made the addition on account of the difference in the balance shown by the assessee and the party. At the outset we find that the excess balance shown by the assessee in its books of accounts is balance sheet item and it has corresponding effect in the form of purchases which was shown in the profit & loss account of the assessee. In the instant case the AO has not brought any defect in the amount of purchases shown by the assessee in relation to the excess balance of the party. Therefore in our considered view the AO should have disallowed the amount of the purchases corresponding to the excess balance shown by the assessee. In the instant case before us the AO has admitted all the purchases as genuine in relation to the excess balance shown by the assessee for Rs. 90752.00. The AO has not taken into account the opening balance as shown by the assessee. All the transactions took place during the year are matching with the confirmation of the party as received in response to the notice issued under section 133(6) of the Act. The learned DR has not

brought anything on record contrary to the finding of Id. CIT(A). We also find that the confirmation received by the AO in response to notice under section 133(6) of the Act have not been confronted to the assessee. In view of above we find no reason to interfere in the order of learned CIT(A). Hence this ground of appeal of the Revenue is dismissed.

26. Next issued raised by the Revenue in this appeal is that Id CIT(A) erred in deleting the addition made by the AO for Rs. 17,30,671/- on account of short deduction of TDS under section 194-I viz a viz 40(a)(ia) of the Act.

27. The assessee for the year under consideration has incurred expenses for Rs. 21,63,339/- towards machine hire charges and deducted TDS @ 2% on such expenses whereas the liability to deduct TDS was at the rate of 10% u/s 194-I of the Act. Accordingly the AO has disallowed proportionate expenses of Rs. 17,30,671/- and added to the total income of the assessee u/s 40(a)(ia) of the Act.

28. Aggrieved, assessee preferred an appeal to Id. CIT(A) who has deleted the addition made by the AO by observing as under:-

“7.4 Provisions of section 40(a)(ia) has two limbs, one is where, inter alia, assessee has to deduct tax and the second where after deducting tax, inter alia, the assessee has to pay into Government account. The appellant in the instant case has deducted tax u/s 194C and not u/s. 194-I of the Act and there is no allegation that this TDS is not deposited with the Government account. Where tax is deducted by the assessee, even under bona fide wrong impression, under wrong provisions of TDS, the provisions of section 40(a)(ia) of the Act cannot be invoked and further, nor the appellant can be declared to be an assessee in default u/s 201 of the Act [DCIT vs. S.K. Tekriwal,(2011) 48 SOT 515 (Kol)]. In view of the facts of the case and decision of Hon'ble Tribunal (supra), the addition made by the AO u/s 40(a)(ia) of the Act for application of wrong rate of TDS under wrong section does not stand good, which is thus directed to be deleted.”

Being aggrieved by this order of Ld. CIT(A) Revenue is in appeal before us.

29. Before us both the parties relied on the order of Authorities Below as favourable to them. We have heard rival contentions and perused the materials available on record. We find that AO has made the addition on the ground that TDS was deducted at a rate lower than the rate prescribed under section 194-I of the Act. However the Id. CIT(A) deleted the same by observing that the assessee deducted TDS at a lower rate under *bona fide* belief. Now the question before us arises so as to whether the expenses claimed by the assessee are allowable deduction though the TDS on such expenses has been deducted at the lower rate. From the provisions of section 40(a)(ia) of the Act we find that it requires deduction of tax and deposit of tax in Government account. The provisions of section are silent to treat the assessee as defaulted in case of short deduction of TDS. Therefore, in our considered view of the action of AO for making the disallowance deserves to be deleted. In this connection we rely in the judgment of Hon'ble jurisdictional High Court in the case of *CIT versus S.K. Tekriwal* in **ITAT No. 183 of 2012**, GA No. 2069 of 2012. The relevant operative portion of the said judgment is reproduced below:-

*"..... We are of the view that the provisions of section 40(a)(ia) of the Act has two limbs one is where, inter alia, assessee has to deduct tax and the second where after deducting tax, inter alia, the assessee has to pay into Government Account. There is nothing in the said section to treat, inter alia, the assessee as defaulter where there is a shortfall in deduction. With regard to the shortfall, it cannot be assumed that there is a default as the deduction is not as required by or under the Act, but the facts is that this expression, **'on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction has not been paid on or before the due date specified in sub-section (1) of section 139'**. This section 40(a)(ia) of the Act refers only to the duty to deduct tax and pay to government account. If there is any shortfall due to any difference of opinion as to the taxability of any item or the nature of payments falling under various TDs provisions, the assessee can be declared to be an assessee in default us/s 201 of the Act and no disallowance can be made by invoking the provisions of section 40(a)(ia) of the Act.*

Accordingly, we confirm the order of CIT(A) allowing the claim of assessee and this issue of Revenue's appeal is dismissed." ..

In view of the aforesaid facts and respectfully following the judicial precedents relied upon hereinabove, we find no infirmity in the order passed by the Ld. CIT(A) in this regard and accordingly, the ground raised by Revenue is dismissed.

30. In the result, Revenue's appeal dismissed.

31. **In combined result, both appeal of Revenue stand dismissed.**

Order pronounced in open court on 05/10/2016

Sd/-
(K.Narsimha Chary)
Judicial Member

Sd/-
(Waseem Ahmed)
Accountant Member

*Dkp, SrPS

दिनांक:- 05/10/2016 कोलकाता / Kolkata

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

1. आवेदक/Assessee-Shri Biswajit Guha, 128/4A, Hazra Road, Kolkata-26
2. राजस्व/Revenue-ACIT, Circle-33, 10B, Middleton Row, 3rd Floor, Kolkata-71
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
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