

IN THE INCOME TAX APPELLATE TRIBUNAL "D", BENCH KOLKATA
BEFORE SHRI K. NARASIMHA CHARY, JM & DR. A.L.SAINI, AM

आयकर अपील सं./ITA No.259/KoI/2014

(निर्धारण वर्ष / Assessment Year :2010-2011)

M/s Pappu Garments, 62/1, Tollygunge Circular, Kolkata-700053	Vs.	ITO Ward-28(4), Kolkata, 2 Gariahat Road, (South), Kolkata-700068
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAGFP 9974 L		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : Shri Malay Dhar
& Sankha Sadhu, Advocate
राजस्व की ओर से /Revenue by : Shri Banibrata Dutta, ADCIT
सुनवाई की तारीख / **Date of Hearing** : **19/10/2016**
घोषणा की तारीख/**Date of Pronouncement** **26/10/2016**

आदेश / O R D E R

Per Dr. Arjun Lal Saini, AM:

The captioned appeal filed by the assessee, pertaining to the assessment year 2010-2011, is directed against an order passed by Id. Commissioner of Income Tax (Appeals)-XIV, Kolkata in Appeal No.180/CIT(A)-XIV/2012-13, dated 31.10.2013, which in turn arises out of an order passed by the Assessing Officer (AO) Under Section143(3) of the Income Tax Act 1961, (in short the 'Act'), dated 06.12.2012.

2. The facts of the case qua the assessee are that the assessee filed its return of income on 19.08.2010 showing total income of Rs.2,75,880/-. The assessee's case was selected for scrutiny U/s.143(3) of the Act and the AO completed the assessment by making addition of Rs.28,73,299/- on account of stitching charges. The AO observed that the assessee did

not deduct the TDS u/s.194C(1) of the Act while making payment to the contractors/sub-contractors, therefore, the addition was made.

3. Aggrieved from the order of the AO, the assessee filed an appeal before the CIT(A), who has confirmed the addition made by the AO observing the following :-

"6.2. I have heard the verbal argument and examined written submission and bills vouchers submitted by the A.R. of the appellant, gone through the records, perused the assessment order carefully. The disallowance of expenditure amounting to Rs.28,73,299/- u/s. 40(a)(ia) on account of non-deduction of Tax. The A.O. has asked to explain as to why the expenses claimed would not be disallowed in contravention of provision u/s. 194C(1) followed by the provision u/s. 40(a)(ia) of the I. T. Act, 1961. In reply A.R. stated with the citation of various references that provision u/s. 40(a)(ia) is applicable only when the amounts remain payable to a contractor or sub-contractor and if amount is actually paid and tax is not deducted as per any section applicable under chapter XVII of the I. T. Act., 1961, payments cannot be liable for disallowance. As far as the TDS in question is concerned provision u/s. 194C(1) of the I. T. Act., 1961, construed that "any person responsible for paying any sum to any resident for carrying out any work in pursuance of a contract between the contractor and a specified person shall, at any time of credit of such sum to the account of the contractor at the time of payment thereof in cash or by issue of cheque/draft or any other mode whichever is earlier, deduct an amount equal to the specified percentage of such sum as income tax comprised therein". So, the question of paid or payable arises as soon as it becomes due. Hence, whenever any amount is credited to any account of party, tax is required to be deducted. Considering the above discussion, submission made by the A.R. of the appellant firm is hereby refuted and entire expenses of Rs.28,73,299/- claimed under the head stitching charges added back to the total income.

4.2.1. In view of my above findings and a careful perusal of impugned assessment order I find no infirmity in the action of A.O. in disallowing expense of Rs. 28,73,299/- U/s. 40(a)(ia) of the I. T. Act., 1961. and I dismissed ground no. 4 of the instant appeal."

4. Not being satisfied with the order of Id. CIT(A) the assessee is in further appeal before us and has taken the following grounds of appeal :-

1. *For that the order passed by the learned Commissioner of Income-tax (Appeals) was not justified in confirming the*

disallowance of the expenditure claimed under head, "stitching charges" amounting to Rs.28,73,299 without taking into consideration of the facts, evidences and arguments adduced to him by the appellant that the provisions of section 40(a)(ia) of the Income-tax Act, 1961 was not applicable in this case.

2. *For that having regard to the facts that the condition precedent for invoking jurisdiction u/s. 40(a)(ia) of the said Act did not exist in this case and in view of this, reliance made on the citations which was wholly applicable in the instant case, the learned Commissioner of Income-tax (Appeals) should not have acted arbitrarily and capriciously in dismissing the ground raised by the appellant as regard disallowance of the expenditure of Rs.28,73,299.*

5. Although the assessee has raised two grounds of appeal, but at the time of hearing, grievance of the assessee has been confined to ground No.1. Ground No.2, cited above, is just repetition to ground No.1.

6. Brief facts qua the ground No.1 is that, the assessee firm claimed to have expended of Rs.31,99,803/- against 32 (thirty two) parties under the head stitching charges. Some of the parties were issued notice u/s-133(6) of the I.T. Act,1961, seeking information and the payments were confirmed by the compliances kept in the assessment folder. List of outside stitching charges reveals that assessee firm paid to the following parties corresponding to the amount mentioned side by side.

Name of the party	Address of the party	Amount paid
Mona Garments	Vill+PO.-Alambabi, Falta, South 24 Parganas, Pin-743503	Rs.10,43,747/-
M.D.Enterprise	Vill+PO.-Alambabi, Falta, South 24 Parganas, Pin-743503	Rs.12,74,520/-
Balaji Garments	10B, Indra Kr. Karnani Street, Kolkata-700001	Rs.2,19,462/-
Md. Saiful Mondal	Vill-Chourasi, BSP Road, Berachapa, North 24 Parganas.	Rs.3,35,570/-
	Total	Rs.28,73,299

The issue was brought to the notice of the A/R by the AO and asked to explain as to why the expenses claimed would not be disallowed in contravention of provision u/s-194C(1) followed by the provision u/s-40(a)(ia) of the I.T.Act, 1961. In reply, A/R stated with the citation of various references that provision u/s.40(a)(ia) is applicable only when the amounts remain payable to a contractor or sub-contractor and if amount is actually paid and tax is not deducted as per any section applicable under chapter-XVII of the I.T. Act.1961, payments cannot be liable for disallowance. As far as the TDS in question is concerned, provision u/s-194C(1) of the I.T. Act, construed that "any person responsible for paying any sum to any resident for carrying out any work in pursuance of a contract between the contractor and a specified person shall, at any time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of cheque/draft or any other mode whichever is earlier, deduct an amount equal to the specified percentage of such sum as income tax comprised therein". So, the question of paid or payable arises as soon as it becomes due. Hence, whenever any amount is credited to any account of party, tax is required to be deducted. Considering the above discussion, submission made by the A/R of the assessee firm is hereby refuted and entire expenses of Rs.28,73,299/- claimed under the head "stitching charges" added back to the total income.

7. Ld. AR for the assessee has submitted that the assessee under consideration is engaged in manufacturing of garments. The assessee

gets stitching work from other parties/labourers. Therefore, the provisions of Section 40(a)(ia) is not applicable to the case under consideration. Ld. AR also pointed out that the parties to whom the payment has been made, (which have been shown in the assessment order), are not directly connected with the assessee. These parties were working on behalf of the other agent. Therefore, an agent/mediator is working. It means the parties, which have been shown in the assessment order are not directly linked with the assessee. Therefore, the assessee does not deduct TDS while making payment to these parties, who have worked in the manufacturing organizations of the assessee on behalf of the other agents. The assessee may be liable to deduct TDS, if any, while making payment to the agent/mediator. He pointed out that these parties used to work on the basis of verbal/written contract between the agent and the assessee. Ld. AR also relied on the judgment of the Hon'ble High Court in the case of Jiauddin Mollah Vs. CIT-XVI, ITA No.145 of 2010, dated 13-06-2016, which is on similar facts under consideration. The important para of the judgment is quoted below:

“ Mr. Dhar contended with some justification that before his client can be roped in under section 194C (2), the revenue has to establish that the assessee has entered into a contract with the aforesaid four persons for carrying out the whole or part of the work undertaken by the assessee. He submitted that there is nothing on the record to show that the assessee has assigned the work undertaken by him to the aforesaid four persons or to anyone of them. He added that there has to be an offer and acceptance before a contract can come into existence. In the case before us, there is nothing to show that there was any offer and acceptance between the assessee and the aforesaid four persons.”

8. On the other hand, Id. DR for the revenue has pointed out that parties from whom the assessee gets stitching work done are enterprises and firms, therefore, the statement of the assessee that he gets work done through labourers is wrong. Except to one individual Md. Saiful Mondal, others are firms and enterprises. The Firms and Enterprises cannot be labourers. In addition to this, Id. DR for the revenue has also primarily reiterated the stand taken by the AO, which we have already noted in our earlier para and is not being repeated for the sake of brevity.

9. Having heard the rival contentions and perused the material available on record, we noticed that this case requires a fresh examination at the end of the Assessing Officer. As Ld. AR for the assessee has submitted before us that there was an agreement (written/oral) between the assessee and agent. The agent was responsible for all the labourers and workers and the said agent used to monitor the labourers and workers. The said verbal/written agreement was not produced by the assessee before the Assessing Officer; during the assessment proceedings U/s 143(3) of the Act. Therefore, this primary document (written/verbal agreement) needs to be examined by the Assessing Officer.

Accordingly, we are of the view that this issue requires fresh examination at the end of the Assessing Officer. Accordingly, we set aside the order of the Ld. CIT(A) and restore this issue, to the file of the Assessing Officer with the direction to ascertain the issue after examination of the agreement between assessee and agent, as explained above.

10. In the result, appeal filed by assessee is allowed for statistical purposes.

Order pronounced in the open court on this 26/10/2016.

Sd/-
(NARASIMHA CHARY)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(DR. A.L.SAINI)

लेखा सदस्य / ACCOUNTANT MEMBER

कोलकाता /Kolkata; दिनांक Dated 26/10/2016

प्रकाश मिश्रा/Prakash Mishra,नि.स/ PS

आदेश की प्रतिलिपि अग्रोषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A), Kolkata.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार

(Asstt. Registrar)

आयकर अपीलीय अधिकरण, कोलकाता / ITAT, कोलकाता