

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH : KOLKATA

[Before Hon’ble Sri N.V.Vasudevan, JM & Shri M.Balagnesh, AM]

I.T.A No.1872/Kol/2016
Assessment Year : 2011-12

Smt. Mahua Palit
Kolkata
[PAN : ALGPP 7572 B]
(Appellant)

-vs.-

Pr..C.I.T., Circle-17,
Kolkata

(Respondent)

For the Appellant : Shri Miraj D.Shah, AR
For the Respondent : Shri Goulean Hangshing, CIT(DR)

Date of Hearing : 20.09.2017.

Date of Pronouncement : 04.10.2017.

ORDER

Per N.V.Vasudevan, JM

This is an appeal by the Assessee against the order dated 20.06.2016 of CIT-17, Kolkata passed u/s 263 of the Income Tax Act, 1961 (Act.)

2. The Assessee is an individual. She carries on the business under the name and style of M/s Mahua Enterprise. The assessee acts as service provider for organizing various events like booking venues for pre recruitment processing services like conducting examinations, interviews etc. The services are provided at Kolkata and other cities and locations. The AO while concluding the assessment noticed that as a service provider the assessee would get the work done through third parties and that would be a case of sub-contract. The assessee provided services to an entity by name Merit Trac services Pvt. Ltd (Merit Trac for short) of Bangalore. The assessee has two agreements with the aforesaid party dated 12.07.2012 and 30.04.2012. The main terms of the contract between the assessee and Merit Trac is that the assessee will provide man power for all the recruitment events and all pre and post events as directed by

Merit Track. The assessee has to locate the venues as specified by Merit Trac and also ensure that the facilities for conducting recruitment activities are proper. The consideration payable for the services rendered by the assessee is reimbursement of all charges incurred by the assessee on behalf of Merit Trac for arranging venues etc and 5% service charges to the assessee. Thus all the expenses are reimbursed by Merit Trac and the assessee's income is only 5% of the total expenses incurred by it for providing services to Merit Trac.

3. In the course of assessment proceedings, the AO found that the assessee had received venue booking charges of Rs.4,37,78,625/- from Merit Trac for the expenses incurred on hiring various venues etc., for conduct of manpower pre and post recruitment on which Merit Trac deducted TDS of Rs.1,23,53,685/- at the time of making payment to the assessee. The AO was of the view that when the assessee makes payments for venues and other services she had not deducted tax at source. The plea of the assessee before AO was that each of the payments made by the assessee for meeting the expenses like rent for the venues, fees for examiners, guards etc., were less than the limits for which the tax deduction at source (TDS) is mandatory as per section 194C of the Act. The assessee had given all these information in the form of CD. The contents of the CD have been given in the form of print out and it contains details of each of payment made and the purpose of making such payments etc. These details are placed at pages 24 to 78 of the assessee's paper book. The AO after analyzing all the details came to the conclusion that there is a TDS violation in so far as the payment of Rs.1,18,000/- in respect of payment made for a venue at Nepal and Rs.86,000/- paid to the principal of an institution at Nepal. Thereafter after getting the reply from the assessee, the AO disallowed the payments of Rs.1,18,000 for venue charges at Nepal and Rs.86,000/- paid to the principal of the institution at Nepal because there is violation of section 195 of the Act. In the order of assessment however

this has been referred to disallowance u/s 40(a)(ia) of the Act. The following are the conclusions of the AO in the order of assessment :-

“5.4. Conclusion & Reliance placed: On perusal of submission dated 12-03-2015 the following conclusions are arrived at considering all circumstantial evidence and factual position of the case:-

(i) Any Work" means any work and is not confined to or restricted to "works contract" only. Reliance is placed on Associated Cements Co Ltd.-vs- CIT 2011TR 435 (Se) (1993).

(ii) Venue charges paid to organizations/institutions fall under the purview of 194C instead of 194I because the authorities of the selected venue simply granted permission to conduct examination/event/interview/placement etc. They did not grant any exclusive right or interest in any specific portion of land or building of the venue of the institution. The HOD/Principal simply granted a license to use the premises for few hours/days only and also provided certain other facilities necessary for smooth conduct of the event. Reliance is placed on DCIT -vs-- Japan Airlines 93 ITD 163 (Delhi) and DCIT -vs-- Singapore Airlines 7 SOT 84 (Chennai) both cases uncontested in higher courts.

5.5. TDS on Foreign Remittance: Save what is contended at Para 5.4. above, the AR is completely silent in the case of payments made to following Principal and his college in Nepal where 194C is attracted.

NAME OF INST	ADDRESS	No.of Days	Venue	Principal
Shikhadeep Higher Secondary School	Biratnagar-14, Min Road	16	3100	3200
Balmiki Education Foundation	Charpane-1, Birtmod, Jhapa(Nepal)	15	2800	2900
Kalika Higher Secondary School	Kalikanagar Rupandehi District Lumbini Zone	19	4500	5730
Public Youth Campus	Ward No.4, Kadam Chowk, Janakpur	22	5500	5800
Manipal	Deep Heights,	25	10500	12000

College of Medical Sciences	Pokhara-16			
Campion Kathmandu College	Ghanapokhari, (Beside Naxal Police Hqrs) Naxal	26	31000	20000
Campion Academy	Lagankhel, (Beside Patan Hospital), Lalitpur	26	52000	86000
Campion College	Kupondole (Near Room to Read), Lalipur	27	35000	20000

All the case laws put forward by AR in his reply deal with domestic payments and in no means is self interpretation of 194C(1) "Any person responsible for paying any sum to any resident " and stretch the meaning for payments made to person(s) of Nepal. Hence, a total amount of Rs.1,18,,000/- on venue charges and Rs.86000/- paid to Principal of an institution situated at Nepal is disallowed in the hands of the assessee and added to the business income."

4. The CIT in exercise of his powers u/s 263 of the Act was of the view that the aforesaid of the AO was erroneous and prejudicial to the interest of the revenue because of the action of the AO in not making the disallowance of Rs.52,79,866/- which was payments made towards hire of various venues, Rs.32,64,500/- which was payments to principals to various colleges and another sum of Rs.28,07,393/- which was the payment made to examiners. According to the CIT the AO having consciously come to a conclusion that there was TDS obligation when the payments are made by the assessee to third parties who are non-residents for and on behalf of Merit Trac ought to have applied the same logic to other payments made to residents and made disallowances u/s 40(a)(ia) of the Act. A show cause notice u/s 263 dated 10.03.2016 was accordingly issued by CIT calling upon the assessee to explain why the order passed u/s 143(3) of the Act dated 23.03.2015, not making the disallowance u/s 40(a)(ia) of the Act should not be revised.

5. In reply to the aforesaid show cause notice, the Assessee explained that there was no TDS obligation in respect of the payments set forth in the show cause notice by CIT, as each of the payments made was well below the limits prescribed u/s 194C of the Act for deduction of tax at source. The CIT however did not agree with the contentions put forth on behalf of the assessee. In the reply to the show cause notice the assessee also took a plea that the provisions of section 194C of the Act are not attracted to the payments in question as what the Assessee paid was on behalf of Merit Trac which was reimbursed by them to the Assessee.

6. The CIT however was not satisfied with the reply and he set aside the order of AO in so far as it relates to the payment of Rs.52,79,366/- as venue charges, payment of Rs.32,64,500/- to principals of schools and colleges and payment of Rs.28,07,393/- to examiners. The CIT directed the AO to examine as to whether disallowance u/s 40(a)(ia) of the Act has to be made on the aforesaid payments for violation to deduct tax at source, after affording opportunity of being heard to the assessee.

7. Aggrieved by the order of CIT the assessee is in appeal before the Tribunal.

8. We have heard the rival submissions. It is clear from the order of the AO passed u./s 143(3) of the Act dated 23.03.2015 that the AO was fully conscious of the TDS obligation u/s 194C of the Act. It is seen that even in the impugned order, the Assessee has specifically contended that the details of payments made by the assessee were furnished to the AO in the form of CD at the time when the Assessment u/s.143(3) of the Act was made. Further, the AO in the course of assessment u/s.143(3) of the Act has specifically raised the following query :-

“5.2. TDS Violation: During examination of papers and soft copies of ledgers produced by AR it is seen that in the case of examiners, guards and Group"D" staff, several persons were involved and TDS was not attracted. However, in the case of venue charges and payments to Principal, TDS violation to the extent of

Rs.52,79,866/- and Rs.32,64,500/- respectively were detected in case of payments in the case of Domestic institutions. That apart, TDS violation to the extent of Rs.1,18,000/- on venue charges at Nepal and Rs.86000/- paid to Principal of an institution situated at Nepal were detected.

5.3. Show cause and Reply of AR: The assessee vide letter dated 08/03/2015 was requested to explain as to why she failed to deduct TDS u/s 194C of the Act on the above mentioned cases (stated at Para-5.2 above). In response, The AR instead of explaining the factual position, submitted an elaborative reply consisting of 9{nine} pages misplacing the interpretation of the statute, exemplifying a Barber's hair cutting with provisions of Section 194C and relying on various court cases his own contention about of the applicability of section 194C read with section 40(a)(ia) of the Act. The reply of AR dated 12-03-2015 is annexed herewith as Annexure-"A" to this order .”

9. The conclusion of the AO after extracting the reply of the Assessee to the show cause notice have already been set out in paragraph-3 of this order and hence not being repeated. It is clear that the details of each of the payments made by the assessee which are given in pages 24 to 78 of the assessee's paper book clearly demonstrates that each of the payments made did not attract deduction of tax at source in terms of section 194C of the Act as they were below the threshold limit prescribed by those provisions for deduction of tax at source. These details were available before the AO. The AO though he has not made any specific discussion in the order of assessment was conscious of the fact that the payments made by the assessee would attract the provision of section 194C of the Act. The AO has chosen to make addition of TDS on foreign remittance but has not chosen to make any addition in respect of the payments made to resident in India because he was satisfied that each of the payments were less than the limits for which TDS has to be made in terms of section 194C of the Act. The presumption of the CIT in the impugned order is that the AO was satisfied that even the payments referred to in the show cause notice required compliance of Sec.194C of the Act, but were omitted to be disallowed u/s.40(a)(ia) of the Act. There is no basis on which the CIT has drawn such inference. Therefore we agree with the submissions of the Id. Counsel for the assessee that it was a conscious decision of the AO not to make

any disallowance in respect of these payments by invoking the provisions of Section 40(a)(ia) of the Act. In fact in reply by the assessee to the show cause notice u/s 263 of the Act, the assessee has specifically highlighted the following aspects :-

“From the Order of Assessment it will be evident that the A.O. has made thorough enquiry on the issue of payment of 'Venue Charges', 'Payment of Principal' and 'payment to Examiners'. He had issued the Show Cause Notice on the points on 08.03.2015 and the assessee's reply dated 12.03.2015 was made part of the assessment order itself. In addition to filing reply to Show Cause Notice Your assessee had earlier filed detailed ledger of 'Venue Charges, Payment of Principal. Payment to Examiners and self copies thereof before the A. O. which the A.O noted in Para 5.1 in Page 3 and 4 of the Assessment Order. **After thorough examination of the ledger, the A.O. did not find any domestic payment for 'Venue Charges', 'Payment to Principal' and 'Payment to Examiners which could attract TDS provisions. In view of the fact that all such payments were below the threshold limit prescribed in the law for deduction of TDS.’**”

10. The CIT has not countered this plea of the assessee. He proceeded on the basis that the AO erroneously omitted to make addition in respect of three payments viz., payment of Rs.52,79,366/- as venue charges, payment of Rs.32,64,500/- to principals of schools and colleges and payment of Rs.28,07,393/- to examiners. At best it can be said that two views were possible on the question whether TDS provisions were attracted to the payment of Rs.52,79,366/- as venue charges, payment of Rs.32,64,500/- to principals of schools and colleges and payment of Rs.28,07,393/- to examiners by the Assessee. The AO has adopted one view which is permissible in law. The jurisdiction u/s 263 of the Act cannot be invoked in a case where two views are possible and the AO has taken one view with which the CIT does not agree. The decision of the Hon'ble Supreme Court in the case of Malabar Industries Ltd. 243 ITR 83 (SC) clearly supports the plea of the assessee in this regard. We are therefore of the view that in the facts and circumstances of the present case, the CIT ought not to have exercised his jurisdiction u/s 263 of the Act. His Order u/s 263 of the Act is accordingly quashed and the appeal of the assessee is allowed.

11. In the result the appeal of the assessee is allowed.

Order pronounced in the Court on 04.10.2017.

Sd/-
[M.Balaganesh]
Accountant Member

Sd/-
[N.V.Vasudevan]
Judicial Member

Dated : 04.10.2017.
[RG PS]

Copy of the order forwarded to:

1. Smt. Mahua Palit, CD-184, Sector-1, Salt Lake City, Kolkata-700064.
2. Pr.C.I.T.-17, Kolkata.
3. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head Of Office/ D.D.O., ITAT Kolkata Benches