

IN THE INCOME TAX APPELLATE TRIBUNAL
'(SMC)' BENCH, KOLKATA

Before Sri J. Sudhakar Reddy, Hon'ble Accountant Member

I.T.A. No. 719/Kol/2017
Assessment Year: 2008-09

P.B. Enterprise.....Appellant
42, Mahendra Goswami Lane
Kolkata - 700 006
[PAN : AAKFP 1758 N]

ACIT, Circle-37, Kolkata.....Respondent
3, Govt. Place (W)
Kolkata- 700 001

Appearances by:

Sri S.N. Burman & Shri M.K. Mundra, C.A. appeared on behalf of the assessee.
Shri Biswasnath Das, JCIT, Addl. CIT, Sr. DR, appearing on behalf of the Revenue.

Date of concluding the hearing : September 14, 2017

Date of pronouncing the order : October 31, 2017

O R D E R

Per J. Sudhakar Reddy, AM :-

This is an appeal filed by the assessee directed against the order of the Id. Commissioner of Income Tax (Appeals)-11, Kolkata (hereinafter the 'Ld. CIT(A)'), dt. 30/01/2017, passed u/S. 250 of the Income Tax Act, 1961 (hereinafter the 'Act'), relating to Assessment Year 2008-09.

2. The assessee is a partnership firm and is in the business of contracts and chain order suppliers. It has undertaken the work of garbage removal and for this purpose it hires lorries. He claimed the payment of higher charges for these lorries. The AO in his assessment order passed u/S 143(3) of the Act, on 15/12/2010, disallowed the claim of deduction on

account of lorry hiring charges u/s 40(a) (ia) of the Act, on the ground that the assessee has not deducted tax at source as required u/s 194C of the Act.

3. This appeal has a chequered history, the dates and events are brought out by the assessee at page number 56 of the paper book, which is extracted for ready reference:-

<u>FACT-SHEET SHOWING ORDER-WISE POSITION OF THE CASE</u>		
<u>Date</u>	<u>Event</u>	<u>Relevant pages of this Paper-Book</u>
15-12-2010	Order u/s.143(3) passed disallowing lorry hire charges of Rs.41,90,994/- u/s.40(a)(ia)	12 - 13
15-02-2012	Copies of Forms No.15-I and 15J were submitted alongwith submission-letter dated 15-02-2012 with CIT(A)-XXIV, Kol. These were sent by Ld.CIT(A)-XXIV, Kol to Ld. A.O. for Remand Report.	15 - 30
06-03-2012	Remand-Report issued by Ld. A.O.	31 - 32
29-06-2012	Order passed by Ld. CIT(A)-XXIV, Kolkata, where:- (i) Ld. CIT(A) duly considered Remand Report (refer first sentence in Para-2.3 of this Order) (ii) Ld. CIT(A) gave relief to assessee, as no expenditure was payable as on 31 st March (relying on Special Bench decision of Hon'ble ITAT, Visakhapatnam in case of Marilyn Shipping Transport Vs. ITO) (iii) Ld. CIT(A) remained silent on the issue of non-liability of assessee to deduct TDS on lorry hire charges, as payees submitted Forms No.15I to assessee.	33 - 39
13-05-2013	Hon'ble ITAT, "B" Bench passed Order, where:- (i) Revenue's appeal in ITA No.1236/Kol/2012 (for deletion of addition u/s.40(a)(ia) by CIT(A) relying on Marilyn Shipping case) was allowed. (ii) Assessee's Cross Objection in C.O. No.90/Kol/2012 (on not deciding by Ld. CIT(A) about non-liability of assessee to deduct TDS on lorry hire charges, as payees submitted Forms No.15I to assessee, and disallowance u/s.40(a)(ia) is wrong due to this reason also) set aside to file of A.O.	41 - 45
14-07-2015	Order u/s.254 / 143(3) passed by Ld. A.O. giving effect to portion of Hon'ble ITAT's Order dated 13-05-2013 dealing with Revenue's appeal in ITA No.1236/Kol/2012 (and ignoring the portion of that Order dealing with Cross Objection of assessee)	46
11-08-2015	Appeal against Order u/s.254 / 143(3) dated 14-07-2015 filed by assessee with CIT(A)-11, Kolkata	
03-06-2016	Hon'ble ITAT, "B" Bench passed Order in M.A. No.104/Kol/2015 where Assessee's Cross Objection in C.O. No.90/Kol/2012 (on not deciding by Ld. CIT(A) about non-liability of assessee to deduct TDS on lorry hire charges, as payees submitted Forms No.15I to assessee, and disallowance u/s.40(a)(ia) is wrong due to this reason also) set aside to file of CIT(A).	48 - 49
30-01-2017	Ld. CIT(A)-11, Kolkata passed the Order herein appealed against.	

4. The sole issue before us, is the correctness of the disallowance made u/s 40(a)(ia) of the Act, which arises from the original order passed by the Assessing Officer u/s 143(3) of the Act.

4.1. The Id. Counsel for the assessee, submitted that the assessee has furnished Form number 15 I and 15 J, obtained from various transporters and subcontractors, during the first round of appellate proceedings and the Id. CIT(A) was kind enough to admit this evidence and the had called for a remand report from the AO and the AO had given a remand report and after considering the same the Id. CIT(A) had adjudicated the issue. He drew the attention of the bench to the remand report given by the assessing officer, on 6th March, 2012, to the then Id. CIT(A)-24, Kolkata. In this background he strongly disputed the findings in the impugned order of the Id. CIT(A), wherein, it was held that non-filing of Forms 15I & 15J, before the AO can lead to fabrication of these forms. He vehemently contended that these forms were filed way back in 2012, before the then Id. CIT(A) and the same was sent to the AO or a remand report. He submitted that the Id. CIT(A) in the impugned order was wrong in holding that these are new evidences which are brought before him and this should not be admitted. He referred to the cross objection filed by him vide C.O. No.

90/Kol/2012, and drew the attention of the bench to the order of the ITAT in ITA No. 1236/Kol/2012, order dt. 13th May, 2013, where the cross objection was restored to the file of the Id. CIT(A). He argued that having failed to consider these evidences despite number of grounds of appellate proceedings in the interest of justice, the matter should not be once again restored to the file of the Id. CIT(A) or the Assessing Officer, and the disallowance deleted. For this proposition, he relied on the following case laws:-

- *Tropical Clothing Co. Pvt. Ltd. vs. Asst. CIT (Mumbai ITAT) in ITA No. 3143 & 3144/Mum/2017, relating to Assessment Year 2001-02 & 2002-03.*

4.1.1. He further submitted that the Id. CIT(A) has rejected the claim of the assessee only on suspicion and relied on the following case laws for the propositions that suspicion, however, strong cannot take the place of proof.

- *ITA No. 270 of 1999, CIT vs. Lakshmanarh Estate & Trading Co. Ltd.*
- *CIT vs. Daulat Ram Rawat Mull, (1973) 87 ITR 349 (SC)*

4.1.2. He prayed that the disallowance be deleted and in the alternative, the issue be restored to the file of the assessing officer for fresh adjudication, in accordance with law. He pleaded that this being a very old matter and the assessee being a small businessman and the fact that numerous rounds of

proceedings have already taken place, the tribunal should delete the addition.

5. The ld. DR, on the other hand, opposed the contentions of the assessee and submitted that the ld. CIT(A) has clearly stated that there is no reason whatsoever, for the assessee in not filing the Form Nos. 15I & 15J, before the Assessing Officer. He submitted that the ld. CIT(A), in the order dt. 29/06/2012, did not pronounce any decision on the admissibility of the fresh evidence which was in the form of Form Nos. 15I & 15J. He argued that the production of Form Nos. 15I & 15J, was an afterthought. He relied on the order of the ld. CIT(A).

6. Rival contentions heard. On a careful consideration of the papers on record, case laws cited and orders of the authorities below, I hold as follows:-

6.1. The assessee is engaged in the business of contracts and chain order suppliers. It had paid an amount of Rs. 41,98,227/-, as lorry hire charges. The disallowance of this expenditure was made u/s 40(a)(ia) of the Act, on the ground that tax was not deducted at source u/s 194C of the Act. The assessee's case is that it has obtained declaration in the form of Form Nos. 15I & 15J, and under these circumstances, no tax need to be deducted at

source from these lorries. The reliance was place on the following decisions:-

- *ITO vs. Rajesh Kr. Garg, ITA No. 522/Kol/2011*
- *Capital Transport vs. ITO, ITA No.1573/Kol/2009*
- *ITO vs. Gautam Roadways Pvt. Ltd., ITA No. 1290/Kol/2011.*

6.2. The sole ground on which the ld. CIT(A), rejected the claim of the assessee is that, these Forms, were not produced during the course of assessment. In my view, the assessee had submitted these documents before the ld. CIT(A), during the course of first round of assessment proceedings on 15/12/2010. The ld. CIT(A), called for remand report from the assessing officer and thereafter gave relief to the assessee by relying on the decision of the special bench of the Tribunal in the case of *Merilyn Shipping Transport vs. Addl. CIT*. In other words, the ld. CIT(A), had granted relief based on an interpretation of law rather than the facts of the case. The revenue carried the matter in appeal before the ITAT on a legal issue and the assessee filed cross objection on the ground that the ld. CIT(A) should have granted relief by taking into consideration the Forms, submitted by the assessee before him. The Tribunal restored this issue to the file of the ld. CIT(A), for adjudicating this issue.

7. At this stage, I am of the considered opinion that it is wrong on the part of the Id. CIT(A) to hold that these are additional evidences which were filed at a very belated stage and hence cannot be admitted. Though the Id. CIT(A), has not commented on these additional evidences in the first round of appellate proceedings, the fact that he had taken them on record and called for a remand report and thereafter has not adversely commented on the same, points to the fact that he has not rejected these evidences. Thus, non-consideration of these evidences is bad in law.

7.2. The assessee has filed Form Nos. 15I & 15J, from all the transporters from whom the assessee has not deducted tax at source. The AO in the remand proceedings, on a reference from the Id. CIT(A), during the first round of appellate proceedings, has not drawn any adverse inference on these evidence. I am of the opinion that these evidences have to be accepted and there is no case for remanding the matter once again to the file of the Assessing Officer, for fresh adjudication on this issue. This is a very old case and has gone through multiple litigations.

8. The Tribunal in the case of *ITO vs. Rajesh Kr. Garg, ITA No. 522/Kol/2011, Capital Transport vs. ITO, ITA No.1573/Kol/2009, ITO vs. Gautam Roadways Pvt. Ltd., ITA No. 1290/Kol/2011*, has laid down that if the assessee has obtained Form Nos. 15I & 15J, from the transporter, there is no obligation on the part of the assessee to deduct tax at source.

8.1. Respectfully following the order of the Coordinate Bench of the Tribunal, I delete the disallowance of Rs. 40,90,994/-, and allow this appeal of the assessee.

9. In the result, appeal of the assessee is allowed.

Kolkata, the 31st day of October, 2017.

Sd/-

[J. Sudhakar Reddy]
Accountant Member

Dated : 31.10.2017
{SC SPS}

Copy of the order forwarded to:

**1. P.B. Enterprise
42, Mahendra Goswami Lane
Kolkata – 700 006**

**2. ACIT, Circle-37, Kolkata
3, Govt. Place (W)
Kolkata- 700 001**

3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

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