<u>आयकर अपीलीय अधिकरण, कटक न्यायपीठ,</u>कटक

IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK

BEFORE SHRI N.S.SAINI, AM & SHRI PAVAN KUMAR GADALE, JM

आयकर अपील सं./**ITA No.25/CTK/2015**

(**निर्धारण वर्ष /** Assessment Year :2010-2011)

Smt. Ranjita Nayak, At-Plot No.270A, Sahid Nagar, Bhubaneswar-751007, District-Khurda, Odisha	Vs.	The DCIT, Circle-2(2), Bhubaneswar
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **ADOPN 2618 Q**		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

निर्धारिती **की ओर से** /Assessee by : Shri P.K.Mishra, AR

राजस्व **की ओर से** /Revenue by : Shri D.K.Pradhan, DR

सुनवाई की तारीख **/ Date of Hearing : 24/10/2017**

घोषणा की तारीख**/Date of Pronouncement 09/11/2017**

<u>आदेश / O R D E R</u>

<u>Per Shri N.S.Saini, AM</u>:

This is an appeal filed by the assessee against the order of the CIT(A),Berhampur (Camp: Bhubaneswar), dated 07.10.2014 for the assessment year 2010-2011.

2. Ground No.1 reads as under :-

> *(1) For that the disallowance/addition of hiring charges of machinery & tippers amounting to Rs.66,62,255/- under invocation of section 40(a)(ia) as tax is liable to be deducted u/s.194C of the Act by the Ld. AO and upheld by the Ld. CIT(A) is contrary to the Act and settled possession of law, particularly when only Rs.72875/- was payable by the appellant as on the due date u/s.139(1) of the Act., therefore the addition on this account is liable to be deleted.*

3. The AO observed that the assessee has claimed expenses of Rs.66,62,225/- in the profit and loss account towards hiring of machines & tippers. He observed that the assessee has not deducted TDS from the

payment on hiring charges. On being show-caused, the assessee submitted as under :

> *"I was doing sub-contract work of excavation, removing overburden work at the site of M/s. Dillip Kumar Nayak. During the course of my business I had hired machineries such as JCB, excavator, loaders and tippers for the above work. I had treated all these earth moving vehicles as machineries and not deducted TDS since the payment against hiring to each party was not above rupees 1,80,000/- and I was not liable to deduct tax at source within the meaning of Section 194-I of the Income Tax Act."*

3.1 The AO did not find the explanation of the assessee is convincing. According to him the machineries used by the assessee is earthmoving vehicles, which are booked on contract basis and are paid on hours of work performed or tonnage of goods moved, each credit in the account was more than Rs.20,000/- and total credit/payment to each party under this head was in excess of rupees 50,000/-. According to him as per provisions of Income Tax, 1961, the assessee is liable to deduct tax u/s.194C of the Act from the payments made to such parties. As the assessee has not deducted TDS, the AO invoked the provisions of Section 40(a)(ia) of the Act and disallowed deduction of Rs.55,72,255/- of the assessee.

3.2 On appeal, the CIT(A) confirmed the action of AO for the very same reason.

3.3 Before us, ld. AR of the assessee reiterated the submissions made before the AO and CIT(A). On the other hand, ld. DR supported the orders of the lower authorities.

3.4 We have heard rival submissions and perused the material available on record. In the instant case, the undisputed facts of the case

are that the assessee is a mining contractor. During the year under consideration the assessee hired machines and tippers and paid hire charges of Rs.66,72,255/-. According to the AO the assessee should have deducted TDS u/s.194C of the Act. On being show-caused, the assessee explained before the AO that the assessee was under bonafide belief that it has hired the machineries such as JCB, excavators, loaders and tippers, he was liable to deduct TDS from the same u/s.194-I of the Act, if the payment exceeds Rs.1,80,000/-. Since the payments made to none of the parties exceeded the said limit, no tax was deducted by him at source from the payments made. Thus, the AO not being convinced with the said explanation, disallowed deduction of Rs.66,72,255/- by invoking provisions of Section 40(a)(ia) of the Act, which was confirmed in the appeal by the CIT(A). We find that the contention of the assessee before the AO was that it has taken on rent JCB, excavators, loaders and tippers and as the payment to one person in the year has not exceeded the amount of Rs.1,80,000/-, the assessee was not liable to deduct any tax at source therefrom as per the provisions of Section 194-I of the Act. However, the above contention of the assessee was negated by the AO on the ground that normally the machineries used by the assessee are booked on contract basis and are paid on hours of work performed or tonnage of goods moved, and therefore provisions of Section 194C of the Act are applicable in the instant case.

On the other hand, when the assessee takes such machineries and tippers on rent basis and the machines are used under the control and

supervision of the assessee then the provision of Section 194-I of the Act is applicable. In our view, how the amount of rent is quantified is not determinative of the nature of the contract or agreement. We find that in the instant case both the parties have failed to produce copy of agreement or any other documents to prove the actual nature of the agreement between the assessee and owner of the tippers and machines. In the above circumstances, in our considered view, it shall be in the interest of justice to restore this issue back to the file of AO for re-adudication afresh after verification in the light of the discussion made hereinabove. The assessee is also directed to provide evidence before the AO as and when called upon to do so. Thus, this ground of appeal is allowed for statistical purposes.

4. Ground No.2 reads as under :-

> *(2) For that the disallowance/addition of wages payable amounting to Rs.20, 00,000/- by the Ld. AO and 50% of it sustained by the Ld. CIT(A) is absolutely based on presumption, without proper examination of books of accounts and devoid of any valid/cogent reason, therefore the same is arbitrary and illogical.*

4.1 Brief facts of the case are that the AO observed that the assessee has claimed towards wages of Rs.2,40,90,560/- on receipt of Rs.3,84,26,230/- as against 34,55,630/- on a receipt of Rs.1,02,41,760/- claimed in the immediately preceding year. He further observed that out of the total claim of Rs.2,40,90,560/-, Rs.38,59,750/- remained unpaid at the end of the year. He also noticed that an amount of Rs.19,40,500/- debited on 10.02.2010 and Rs.19,24,130/- on 31.03.2010 was not paid by the end

of the year. The AO disbelieved that labour payment can be kept pending. Hence, he disallowed Rs.20,00,000/- as bogus claim on estimate basis.

4.2 Before the CIT(A), the ld. AR of the assessee submitted that payments for labour could not be made because of huge receivable from the contractors. The CIT(A) considering the submission of the assessee observed that while labour charges for the month of the March will admittedly remain payable, there was force in the observation of the AO that it was difficult to believe that labour charges for February was not paid, even partly. The assessee could not furnish any evidence before him to substantiate the arguments that the charges were paid in the subsequent year. The CIT(A) also observed that even accepting the assessee's contention that huge receivables posed a liquidity problem to her at its face value, it is difficult to accept that the assessee would not make any payment to the labourers at all relating to bill raised in February. The AO observed that there was substantial cash withdrawal by the assessee in the month of March. The CIT(A), therefore, held that in the interest of justice, he was inclined to hold that assessee at best could have postponed payment of 50% of the labour charges would be around Rs.10,00,000/- and must have been paid by the assessee out of undisclosed income. Therefore, the CIT(A) sustained disallowance of Rs.10,00,000/- out of the disallowance of Rs.20,00,000/- made by the AO.

4.3 Being still aggrieved by the order of CIT(A), the assessee is in appeal before us.

4.4 Ld. AR of the assessee reiterated the submissions made before the lower authorities that the labour payments could not be made because of huge receivables from the contractors. On the other hand, ld. DR supported the findings of the CIT(A).

4.5 We have heard rival submissions and perused the orders of lower authorities and materials available on record. The undisputed facts of the case are that the AO observed that the assessee has not made payment for labour charges of Rs.19,40,500/- debited on 10.02.2010 and Rs.19,24,130/- debited on 31.03.2010, which was shown as outstanding payable as at the year end. He also noted that in compare to the payment of labour charges of Rs.34,55,630/- in the immediately preceding year on a receipt of Rs.1,02,41,760/-, the assessee has shown payment of labour charges during the year of Rs.2,40,90,560/- against receipt of Rs.3,84,26,230/-, which was much higher. Therefore, he treated the labour charges outstanding payable as bogus to the extent of Rs.20,00,000/- and disallowed the same and accordingly made addition to the income of the assessee. On appeal, the CIT(A) reduced the same to Rs.10,00,000/- on the ground that at best 50% of the labour charges remained outstanding payable as at the end of the year. We find that the CIT(A) has observed that the assessee failed to produce evidence to substantiate the arguments that labour charges were paid in the subsequent period. Further, the assessee could not give any explanation for the fact found that it has made huge withdrawals in cash from the bank and still did not make payment for the labour charges. Even when

questioned by the bench to produce evidence with regard to payment of labour charges in the subsequent year, the ld. AR of the assessee expressed his inability to do so. In the above facts and circumstances, in our considered opinion, the order of CIT(A) does not call for any interference by us, the same is confirmed and the ground of appeal of the assessee is dismissed.

5. Ground No.3 reads as under :-

> *(3) For that the disallowance/addition of interest amounting to Rs.3,32,841/- under invocation of section 40(a)(ia), paid to L&T Finance on alleged contravention of sec.194A of the Act by the authorities below is arbitrary and illogical, particularly documents are available with the appellant, that the said financer has already offered the interest amount to tax on the same financial year, thus the such addition is also liable to be deleted.*

5.1 Brief facts of the case are that the AO observed that the assessee had paid interest of Rs.3,32,841/- without deducting the tax therefrom u/s.194-A of the Act and, therefore, by invoking provisions of Section 40(a)(ia) of the Act disallowed the same. On appeal, the CIT(A) observed that the case of the assessee was of simply financing from M/s L&T Finance, the amount paid by the assessee included principal and interest and the assessee has claimed interest of Rs.3,32,841/- in its profit and loss account. M/s L&T is neither a banking company nor a corporation established by the Government and, hence, there is no exemption from TDS from the payments made by the persons to this concern. He held that TDS admittedly having not been made and found no infirmity in the action of the AO in disallowing the deduction u/s.40(a)(ia) of the Act and, therefore, confirmed the action of the AO.

5.2 Before us, the contention of the ld. AR of the assessee was that no disallowance can be made u/s.40(a)(ia) of the Act for an expenditure claimed by the assessee on which no tax was deducted in view of the second proviso to Section 40(a)(ia) of the Act, which provides that “where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso. He submitted that according to the first proviso to Section 201 of the Act, “any person including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident—

(i) has furnished his return of income under section 139;
(ii) has taken into account such sum for computing income in such return of income; and
(iii) has paid the tax due on the income declared by him in such return of income,

and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed:";

Therefore, it was prayer of the assessee that M/s L&T Finance was a large cooperate company and must have included amount paid as interest by the assessee in the return of income filed by them and paid due tax thereon and, hence, in the interest of substantial justice, the matter may

be restored back to the file of AO for examining of the same and readjudicating the issue thereafter. He submitted that the assessee will file necessary evidence for consideration of the AO in this regard.

5.3 Ld. DR had no objection to the above submission of the ld. AR of the assessee.

5.4 In the above facts and circumstances of the case, we set aside the orders of lower authorities and remit the matter back to the file of AO to readjudicate the issued afresh in the light of the discussion made hereinabove after allowing a reasonable and appropriate opportunity of hearing to the assessee. Thus, this ground of appeal of the assessee is allowed for statistical purposes.

6. Ground No.4 reads as under :-

> *(4) For that the addition of alleged un-explained income amounting to Rs.10,00,000/- by the Ld. AO which has been sustained by the Ld. CIT(A) is also based on erroneous presumptions and findings, therefore liable to be deleted.*

6.1 Brief facts of the case are that the AO observed that the assessee has made an investment of Rs.10 lakhs with M/s Homebase Estates Pvt. Ltd. on 8.2.2010. He observed that the same is not appearing in the balance sheet and could not be explained by the withdrawals made by the assessee during the year. Therefore, the AO held the source of investment as unexplained and accordingly made addition of Rs.10 lakhs to the income of the assessee.

6.2 Before the CIT(A), the assessee submitted that the amount of Rs.10 lakhs was advanced on 8.2.2010 for purchase of flat was refunded by the party in cash before 31.03.2010. They have paid back the advance

in three instalments i.e. Rs.9 lakhs on 5.3.2010, Rs.50,000/- on 18.3.2010 and Rs.50,000/- on 25.3.2010. The assessee filed Xerox copy of the letter from M/s Homebase Estates Pvt. Ltd. and ledger account. It was submitted that Rs.9,50,000/- was deposited in the bank account, xerox copy of which was enclosed and Rs.50,000/- was drawn by the assessee herself. The CIT(A) observed that during the course of hearing on 24.9.2014, the ld. AR filed confirmation from M/s Homebase Estates Pvt. Ltd. to the effect that the amount of Rs.10 lakhs was returned to the assessee in three instalments of Rs.3,00,000/-, Rs.3,00,000/- and Rs.4,00,000/- on 13.03.2010, 18.03.2010 and 27.03.2010 respectively. The CIT(A) after considering the confirmation filed by the assessee of M/s Homebase Estates Pvt. Ltd. observed that the AO made reference to the deposits made by the assessee in its bank account maintained with Bank of India and asked for an explanation for a total deposits of Rs.1,74,35,000/-. In this account Rs.10,00,000/- has been paid to M/s Homebase Estates Pvt. Ltd. vide Cheque No.71501 on 8.02.2010. Therefore, it was not possible to accept the contention of AO that the source of this payment is unexplained because the same is out of a bank account where the source of deposits has been examined by the AO.

6.3 The CIT(A) observed that there is contradiction in the submission of the assessee before him. While claiming that this amount was not shown in the balance sheet on the ground that the same was received back from the company M/s Homebase Estates Pvt. Ltd. The assessee filed statement from the said company stating that this amount was refunded to

the assessee in three instalments of Rs.3,00,000/-, Rs.3,00,000/- and Rs.4,00,000/- on 13.03.2010, 18.03.2010 and 27.03.2010 respectively. When required to explain the discrepancy the ld.AR stated that the amount was received in cash only and other payments as per the ledger submitted earlier are not from Homebase. He observed that the assessee expressed his inability to produce the books of account or clarify the source of receipt of Rs.10 lakhs as per ledger in its books. He, therefore, held that he did not agree that the addition in the instant case can be made on account of unexplained investment because admittedly the same is out of cash credit account, he was of the view that the addition of Rs.10 lakhs was required to be made because as per the books of assessee this amount was received on 05.03.2010, 18.03.2010 and 25.03.2010 and admittedly the same was not from M/s Homebase Estates Pvt. Ltd as clearly admitted by the ld. AR before the CIT(A).Thus, there was no explanation of source of receipt of this amount which stood credited in the books of the assessee on the above dates. Therefore, the CIT(A) sustained the addition of Rs.10 lakhs u/s.68 of the Act.

6.4 The ld. AR of the assessee submitted that the AO has made addition on the ground that the investment with M/s Homebase Estates Pvt. Ltd of Rs.10 lakhs was not shown by the assessee in the balance sheet. He submitted that it is not in dispute that the said amount of Rs.10 lakhs was received back by the assessee before the end of the year on 31.03.2010 and the account of M/s Homebase Estates Pvt. Ltd was squared off and, hence, the same was not shown in the balance sheet of

the assessee. The CIT(A) was satisfied with the explanation of the assessee that the source of investment of Rs.10 lakhs with M/s Homebase Estates Pvt. Ltd was out of the cash credit account maintained with Bank of India. He submitted that just because there was mistake of the assessee in showing the date of amount received back from M/s Homebase Estates Pvt. Ltd, the addition cannot be sustained.

6.5 On the other hand, ld. DR relied on the order of lower authorities.

6.6 We have heard rival submissions and perused the orders of lower authorities and material available on record. In the instant case, the AO on verification of assessee's bank account found that the assessee has invested Rs.10 lakhs with M/s Homebase Estates Pvt. Ltd on 08.02.2010 and as this investment amount was not reflected in assessee's balance sheet, the AO added Rs.10 lakhs in the income of the assessee.

6.7 On appeal, the assessee explained before the CIT(A) that as the amount of Rs.10 lakhs was received back by the assessee before 31.03.2010 and, therefore, the same was not appearing in the balance sheet as on 31.03.2010. The assessee filed the details of refund of Rs.10 lakhs as Rs.9 lakhs on 5.3.2010, Rs.50,000/- on 18.03.2010 and Rs.50,000/- on 25.03.2010. All the amounts were received back. Further, the assessee also filed one statement obtained from said M/s Homebase Estates Pvt. Ltd, wherein the said M/s Homebase Estates Pvt. Ltd confirmed repayment of Rs.10 lakhs during the year itself but the date-wise details of refund was stated as Rs.3 lakhs on 13.03.2010, Rs.3 lakhs on 18.03.2010 and Rs.4 lakhs on 27.03.2010.

6.8 From the above fact the CIT(A) deleted the addition of Rs.10 lakhs which was made by the AO on account of undisclosed investment against which revenue has not preferred any appeal. However, the CIT(A) observed discrepancy in the date and amount of refund given by the assessee in details and in statement of account of M/s Homebase Estates Pvt. Ltd. In view of this discrepancy, the CIT(A) was of the opinion that source of Rs.10 lakhs which was claimed to have been received on 05.03.2010, 18.03.2010 and 25.03.2010 remained unexplained. He, therefore, added Rs.10 lakhs to the income of the assessee against which the assessee is in appeal before us.

6.9 The AR of the assessee submitted before us that the date and amount which have been mentioned by M/s Homebase Estates Pvt. Ltd in the account statement is correct and by mistake the date and amounts were wrongly stated in the details filed by the assessee. He claimed that the assessee has not credited Rs.9 lakhs on 05.03.2010, Rs.50,000/- on 18.03.2010 and Rs.50,000/- on 25.03.2010 and no benefit was claimed on those dates.

6.10 We find that even for the sake of argument that the assessee credited the amount on the date furnished in the details sheet and taken advantage of the same, then also addition of entire Rs.10 lakhs is not sustainable, the same is because credit of Rs.50,000/- on 18.03.2010 and Rs.50,000/- on 25.03.2010 is subsequent to payment of Rs.3 lakhs on 13.03.2010 admitted by the said M/s Homebase Estates Pvt. Ltd.

Therefore, in such an eventuality also the source of Rs.1 lakhs can be taken as receipt of Rs.3 lakhs on 13.03.2010.

Be that as it may.

In our opinion, to adjudicate the issue properly verification of assessee's books of account is necessary to ascertain whether the assessee has claimed advantage on any amount on a date earlier to the date of repayment made by M/s Homebase Estates Pvt. Ltd. Therefore, in our considered view, it shall be in the interest of justice to restore this issue back to the file of AO for fresh adjudication after proper verification in the light of the discussion made hereinabove. Needless to mention that the AO shall allow reasonable opportunity of hearing before adjudicating the issue afresh. Thus, this ground of appeal is allowed for statistical purposes.

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

Order pronounced in the open court on this 09/11/2017.

Sd/-	**Sd/-**
(PAVAN KUMAR GADALE)	**(N. S. SAINI)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

कटक Cuttack; दिनांक Dated 09/11/2017

प्र.कु.मि/PKM, Senior Private Secretary

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

1. अपीलार्थी / The Appellant-
   Smt. Ranjita Nayak,
   At-Plot No.270A, Sahid Nagar,
   Bhubaneswar-751007,
   District-Khurda, Odisha
2. प्रत्यर्थी / The Respondent-
   The DCIT, Circle-2(2), Bhubaneswar
3. आयकर आयुक्त(अपील) / The CIT(A),

4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कटक** / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(**Senior Private Secretary**)
आयकर अपीलीय अधिकरण, कटक / ITAT, Cuttack