

आयकर अपीलीय अधिकरण, ' सी ' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, CHENNAI

श्री धुव्वुरु आर.एल रेड्डी, न्यायिक सदस्य एवं श्री, एस जयरामन लेखा सदस्य समक्ष
BEFORE SHRI DUVVURU RL REDDY, JUDICIAL MEMBER AND
SHRI S. JAYARAMAN, ACCOUNTANT MEMBER

आयकर अपील सं./ I.T.A. No. 2672/Mds/2016

निर्धारण वर्ष/Assessment Year : 2009-10

M/s. Fairmacs Shipping & Transport
Services Pvt. Ltd.,
31, Moores Street,
Chennai – 600 001.

Dy. Commissioner of Income Tax,
Vs. Company Circle II(1),
Chennai.

[PAN: AAACE 2126J]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by

: Shri. S. Seetharaman, CA
Shri. B. Gowthaman, CA

प्रत्यर्थी की ओर से/Respondent by

: Shri. Sailendra Mamidi, CIT

सुनवाई की तारीख/Date of Hearing

: 26.10.2017

घोषणा की तारीख/Date of Pronouncement

: 27.12.2017

आदेश / O R D E R

PER S. JAYARAMAN, ACCOUNTANT MEMBER:

The assessee filed this appeal against the order of Commissioner of Income Tax (Appeals)-6, Chennai in ITA No. 196/CIT(A)-6/2015-16 dated 12.07.2016 for assessment year 2009-10.

2. M/s. Fairmacs Shipping & Transport Services Pvt. Ltd., the assessee, is engaged in the business of Coastal Cargo, Air Cargo, Transport & Clearing & Forwarding Container and Freight Forwarding. In the assessment made u/s. 143(3) r.w.s. 147 for the assessment year 2009-10, the AO found that for the payments made at Rs. 15,78,00,945/- TDS was not made, the assessee could not produce any documents till the time of passing the assessment order and hence the AO added Rs. 15,78,00,945/- u/s. 40(a)(ia) for non-deduction of TDS. Aggrieved, the assessee filed an appeal before the CIT(A). In the return submissions filed before the CIT(A), the assessee included the following documents:

- i. Exemption Certificate for freight charges paid Rs. 6,58,84,521/-
- ii. Payments which are exempted from TDS Rs. 3,95,49,095/-
- iii. Payments made to parties less than threshold limits Rs 17,05,967/-
- iv. Form 26A Rs. 1,21,23,290/-

After considering such claim, the CIT(A) directed the AO to undertake necessary verifications with regard to the documents furnished at (i), (ii) & (iii) supra, i.e., the exemption certificates for freight charges, the payments which are exempted from TDS and payments to parties less than threshold limits. The CIT(A) also held that after necessary due diligence and verification, the AO may allow relief to the appellant as per law. The appellant is directed to produce all the necessary evidences before the AO for verification. However, with regard to Form No. 26A submitted by the

assessee, the CIT(A) held that the assessee's case is for assessment year 2009-10, prior to insertion of second proviso to section 40(a)(ia) w.e.f. 01.04.2013. Hence, the relief sought at Rs. 1,21,23,290/-, for which the assessee has submitted and Form 26A, was not allowable and accordingly confirmed the disallowance made by the AO. While doing so, the CIT(A) relied on the decision of the Hon'ble Kerala High Court in Thomas George Muthoot vs CIT in ITA No. 278, 279, 282, 283, 288, 289 290 & 292/2014. Further, he confirmed the disallowance made at Rs 3,85,38,072/- for which no details has been furnished by the assessee.

3. Aggrieved, the assessee filed this appeal with the following grounds:

"1. The learned Commissioner of Income Tax (Appeals)-6 has disallowed a sum of Rs. 5,06,61,632/- being expenses incurred during the relevant previous year towards Freight and other related expenses under section 40(a)(ia) of the Act.

2. The learned CIT(A) has erred in applying the provisions of section 40(a)(ia) of the Act. The appellant in this case does not have any outstanding balance payable to the Sundry Creditors providing Freight and other related services. In such a case, where there is no outstanding balance as at the end of the close of the year relevant to the assessment outstanding balance as at the end of the close of the year relevant to the assessment year, the section shall not apply in the appellant's case.

3. The appellant craves leave to adduce additional grounds of appeal at the time of hearing."

3.1 Later on, the assessee filed additional grounds of appeal, the relevant portions are extracted as under:

"4. The Commissioner of Income Tax (Appeals) erred in concluding that second proviso to section 40(a)(ia) read with proviso to section 201(1) of the Act is not retrospective in operation i.e., applicable only with effect from 1st April 2013.

5. The Commissioner of Income Tax (Appeals) failed to appreciate the fact that the second proviso to section 40(a)(ia) read with proviso to section 201(1) of the Act being declaratory and curative in nature is applicable with effect from 1st April 2005 and not from 1st April 2013.

6. The Commissioner of Income Tax (Appeals) failed to appreciate that appellant being a freight forwarder other related charges paid by the appellant (on behalf of the exporters and importers) are deductible u/s. 28/29 of the Act and not u/s. 30 to 38 of the Act and section 40(a)(ia) of the Act is applicable to items of expenditure which are deductible u/s. 30 to 38 of the Act.

7.(i) the reassessment be annulled as the same is not in accordance with the provisions of the Act;

(ii) The disallowance of freight charges paid Rs. 5,06,61,362 u/s. 40(a)(ia) of the Act be deleted; and

(iii) The provisions of the second proviso to section 40(a)(ia) be held as applicable retrospectively."

At the time of hearing the AR did not press for the grounds relating to the validity of re-opening the assessment. In view of that the corresponding grounds are not extracted, supra, and hence those grounds are treated as dismissed. With regard to other grounds, we heard the rival contentions and admit them.

4. The AR submitted that the assessee submitted the required particulars in respect of payment of Rs. 1,21,23,290/-. The CIT(A) upheld the disallowance made by the AO on the ground that second proviso of section 40(a)(ia) does not have retrospective operations i.e., it is applicable only w.e.f. 01.04.2013 only. The AR further submitted that the second proviso of section 40(a)(ia) r.w. Provisio of section 201(1) is declarative and curative in nature and hence it is applicable w.e.f. 01.04.2005 and relied on the Delhi High Court decision in the case of CIT-1 vs Ansal Land Mark Township (P) Ltd., in ITA No. 160/2015 dated 26.08.2015. In view of that if the amount paid by the payer has been included by the payee in his return of income for relevant assessment year and the payee has filed the return of income u/s. 139 and has paid the taxes, no disallowance u/s. 40(a)(ia) could be made. Relying on the Delhi High Court decision, supra, the AR pleaded that the payments covered in Form No. 26A at Rs. 1,21,23,290/- mad kindly be allowed.

4.1 In respect of Rs. 3,85,38,072/-, the disallowance sustained by the CIT(A) for the reason that the assessee has not furnished details about them, the AR submitted that out of the above:

- Sums aggregating to Rs. 47,62,602 represents amounts paid to various parties which are individually less than Rs. 50,000;

- Sums aggregating to Rs. 13,93,151 represents amounts paid to various parties who have obtained non-deduction of TDS from the tax department;
- Sums aggregating to Rs. 6,18,771 represents amounts paid to various parties who have furnished Form 26A.

Further, the AR submitted that in the present case there is written or oral agreement between the assessee and the recipients of goods for transportation or carriage thereof, or that the payments of freight had been made in pursuance of a contract of transportation of goods for a specific period, quantity or price, that none of the individual payments exceeded Rs. 20,000. In this regard, he submitted that the CBDT Circular No 715 dated 8th August, 1995 is applicable only where consolidated bills were raised inclusive of contractual payments and reimbursement of actual expenditure. Similar view has been held by the Delhi High Court in the case of CIT vs Career Launcher India Limited (250 CTR 240). Notwithstanding the above, the AR submitted that the scope of section 40(a) of the Act is limited to expenditure u/s.s 30 to 38 in view of the non obstante preamble to the section and not in respect of payments covered by trading and manufacturing account i.e. direct expenditure. In other words, only if there is default in respect of tax deduction viz. Non-deduction or failure to deposit after deduction thereof in respect of sums referred in sections 30 to 38, the provisions of section 40(a)(ia) could be invoked to disallow such sums in that year where default

has occurred. Lastly, the AR submitted that the CIT(A) failed to appreciate that the assessee being a freight forwarder, the freight and other related charges paid by the assessee on behalf of the exporter and importer are deductible u/s.s 28 /29 of the Act and u/s.s 30 to 38 of the Act and hence the provisions of section 40(a)(ia) of the Act is not applicable to such items of expenditure which are deductible u/s.s 30 to 38 of the Act. Per contra, the DR supported the order of the CIT(A).

5. We heard the rival contentions and gone through the relevant material. In respect of the payments covered in Form 26A, the CIT(A) refused to allow the claim on the basis of the Hon'ble Kerala High Court's decision in Thomas George Muthoot vs CIT, supra. On the other hand, the assessee is seeking relief based on the ratio of the Delhi High Court, supra. We have gone through the judgements. Neither the assessee nor the Revenue brought to our notice any of the decision of the Jurisdictional High Court. The decision relied on by the assessee is the latest and is in favour of the assessee. The Delhi High Court after considering the reasoning of the Agra Bench of ITAT, held as under:

"14. The Court is of the view that the above reasoning of the Agra Bench of ITAT as regards as the rationale behind the insertion of the second proviso to section 40(a)(ia) of the Act and its conclusion that the said proviso is declaratory and curative and has retrospective effect from 1st April 2005- merits acceptance.

15. In that view of the matter, the Court is unable to find any legal infirmity in the impugned order of the ITAT in adopting the ratio of the decision of the Agra Bench, ITAT in (Rajiv Kumar Agarwal v ACIT)."

Following it, the issue is remitted back to the AO for re-examination and if the assessee makes out the case in accordance with Delhi High Court's decision the AO is directed to allow the deduction claimed to that extent. To this extent, the assessee's appeal is allowed.

6. With regard to the assessee's claims with regard to the disallowance at Rs. 3,85,38,072/- extracted, supra, and the assessee's claim that the assessee being a freight forwarder, freight and other charges paid by the assessee on behalf of the exporter and importer and are deductible under sections 28/29 of the Act and not under sections 30 to 38 of the Act etc., we are of the view that the relevant facts require re-examination and hence, this issue is remitted back to the AO for a fresh examination. After affording a due opportunity to the assessee, the AO shall pass a speaking order. Thus, corresponding grounds of the appeal filed by the assessee are treated as allowed for statistical purposes.

7. In the result, the assessee's appeal is allowed/treated as allowed for statistical purposes.

Order pronounced on Wednesday, the 27th day of December, 2017 at Chennai.

Sd/-

(धुव्वुरु आर.एल रेड्डी)

(DUVVURU RL REDDY)

न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-

(एस जयरामन)

(S. JAYARAMAN)

लेखा सदस्य/Accountant Member

चेन्नई/Chennai,

दिनांक/Dated: 27th December, 2017

JPV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|------------------------|--------------------------|------------------------------|
| 1. अपीलार्थी/Appellant | 2. प्रत्यर्थी/Respondent | 3. आयकर आयुक्त (अपील)/CIT(A) |
| 4. आयकर आयुक्त/CIT | 5. विभागीय प्रतिनिधि/DR | 6. गार्ड फाईल/GF |