IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "D", MUMBAI

BEFORE SHRI SHAMIM YAHYA (AM) AND SHRI RAM LAL NEGI (JM)

ITA No. 3461/MUM/2016
Assessment Year: 2011-12

The DCIT -14(2)(1), 432, Aayakar Bhavan, 4th Floor, M.K. Marg, Mumbai - 400020	**Vs.**	M/s Mahanagar Gas Ltd., Block G-33, MGL House, Bandra Kurla Complex, Bandra (East), Mumbai - 400051 PAN: AABCM4640G
(Appellant)		**(Respondent)**

Revenue by : Shri Ram Tiwari (Sr. DR)
Assessee by : Shri P.P. Jayaraman (AR)

Date of Hearing: 04/01/2018
Date of Pronouncement: 28/02/2018

O R D E R

PER RAM LAL NEGI, JM

This appeal has been filed by the revenue against the order dated 11.02.2016 passed by the Ld. Commissioner of Income Tax (Appeals)-22, Mumbai, for the assessment year 2011-12, whereby the Ld. CIT (A) has partly allowed the appeal filed by the assessee against assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short 'the Act').

2. The facts of the case in brief are that the assessee company engaged in the business of supply and distribution of natural gas filed its return of income declaring total income of Rs. 315,33,56,690/-. The assessment was processed u/s 143(3) of the Act. Since the case was selected foe scrutiny, notice u/s 143(2) and 142(1) of the Act was served on the assessee. In response thereof, the authorized representative appeared before the AO and submitted the

information and details sought from the assessee. On perusal of P&L account it was noticed that the assessee had debited an amount of Rs.223.53 lakhs on account of secondment charges under the head professional cost. Accordingly, the assessee was asked to justify the claim. The assessee submitted that the said charges were incurred for secondment of seconded by GAIL and British Gas work in Mahanagar Gas Ltd. employees and there is no mark up in the payments made to them. However, the AO rejecting the contention of the assessee added back the said amount to the income of the assessee holding that the claim is disallowable u/s 40(a)(ia) of the Act. It was further noticed that the assessee company had been following mercantile system of accounting and the assessee had mentioned in the accounts which reads as under:

> *"Compensation receivable from customers with respect to shortfall in minimum guaranteed off-take of gas and delayed payment charges are recognized on receipt basis in view of uncertainty of collection."*

3. Accordingly, the AO asked the assessee to submit quantum implication for the assessment year under consideration. In response thereof the assessee submitted that there is no question of any disallowance as in the immediate preceding previous year the AO had chosen not to disagree on this issue. However, the AO estimated the disallowance at Rs. 30,00,000/- on the basis of decision taken in the earlier years and added back to the income of the assessee. The AO also disallowed the claim of Rs. 1,73,187/- as sundry deposit written off for the reason that the assessee has failed to prove that the expenses in question have been incurred wholly and exclusively for business purposes and are revenue in nature. The AO also made an addition of Rs. 67,574/-to the income of the assessee on the ground that the assessee had obtained bogus bills from M/s Viraj Enterprises without purchasing any raw material during the assessment year under consideration. The assessee challenged the assessment order before the Ld. CIT(A). The Ld. CIT(A) after hearing the assessee in the light of the evidence on record, allowed the

secondment expenses, deleted the addition of Rs. 30 lacs made by AO on estimated basis on account of compensation from customers and allowed the claim of the assessee as sundry deposit written off by following the decisions of his predecessor and restricted the addition made on account of bogus purchases to 12.5% of the total amount of bogus purchases in question by following the decision of the Hon'ble Gujarat High Court.

4. Aggrieved by the order of Ld. CIT (Appeals), the revenue has preferred this appeal before the Tribunal on the following effective grounds:-

> 1. *"On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in allowing the secondment expenses on which tax was not deducted at source and deleting the addition made on this account by the AO u/s 40(a)(ia) to the tune of Rs. 22352923/- and in not appreciating the fact that Certificate for non-deduction of TDS was not obtained by the assessee company from the appropriate TDS authority for the year under consideration.*
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> *1.1 On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in ignoring that factually the assessee company was well aware of the TDS provisions of the Act that the non-deduction of TDS certificate should have been obtained u/s 197 for the current year as well; and instead wrongly relying on the decision Bombay High Court in the case of CIT Vs. Kotak Securities Ltd. (appeal no. 3111 of 2009).*
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> 2. *On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in deleting the addition of Rs. 30 lacs made by AO on estimated basis on account of compensation from customers without appreciating the facts that the assessee is following mercantile system of accounting, and hence, the compensation receivable from the customers is required to be accounted on accrual basis.*

3. *On the facts and the circumstances of the case and in law, the CIT (A) has erred in partly holding the addition made by the AO by stating only the profit element embedded in the bogus purchases is to be taxed instead of whole transaction.”*

5. Before us, the Ld. departmental representative relying on assessment order passed by the AO submitted that since the assessee had not obtained the certificate for non deduction of TDS from the competent authority, the Ld. CIT(A) has wrongly allowed the secondment expenditure by relying on the decision of Bombay High Court in the case of CIT Vs. Kotak Securities Ltd. rendered in appeal no. 3111 of 2009. The Ld. DR further submitted that since the assessee has failed to provide the quantum of disallowance, the Ld. CIT(A) has wrongly deleted the addition made by the AO on estimation basis. The Ld. DR further contended that since the assessee has failed to establish the genuineness of the transaction, the Ld. CIT(A) has wrongly restricted the addition made by the AO on account of bogus purchases to 12.5% of the total amount of bogus purchases.

6. On the other hand, Ld. counsel for the assessee submitted that ground No 1 and 2 of the appeal are covered in favour of the assessee by the order of the ITAT rendered in the assessee’s own case and ground No 3 is covered by the ratio laid down by the Hon’ble Gujarat High Court in the case of *CIT vs. Simit P. Seth (2013) 356 ITR 451 Guj*. The Ld. counsel further submitted that since all the grounds of the appeal are covered in favour of the assessee, there is no merit in the appeal of the revenue and the same is liable to be dismissed.

7. We have heard the rival submissions and perused the documents on record in the light of the rival contentions. We find that the ground No 1 of the assessee's appeal is covered by the decision of the coordinate Bench of the Tribunal rendered in assessee's own case ITA No. 658/Mum/2015 for the assessment year 2010-11. The relevant portion of the order of the coordinate Bench of the Tribunal reads as under:-

> *"7. We have carefully considered the rival submissions and perused the material placed before us including the orders of the authorities below and the case law relied upon by the assessee. We find from the material placed before us and the decision of Tribunal relied upon by the AR that the issue raised by the revenue covered is in favour of the assessee in assessee's own case in ITA No. 1945/Mum/2013 (supra). The operative part is as under:-*
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> *"6 Now we go through the case law cited by the Ld. counsel for the assessee in the case of CIT Vs. Kotak Securities Ltd. (2012) 340 ITR 333 (Bom), wherein it has been held as under:*
> *"31. The object of introducing section 40(a)(ia), as explained in the Central Board of Direct Taxes Circular No. 5, dated July 15, 2005- See [2005] 276 ITR (St.) 151), is to augment and curb bogus payments. Moreover, though section 194J was inserted with effect from July 1, 1995, till the assessment year in question that is the assessment year 2005-06 both the Revenue and the assessee proceeded on the footing that section 194J was not applicable to the payment of transaction charges and accordingly during the period from 1995 to 2005 neither the assessee has deducted tax at source while crediting the transaction charges to the account of the stock exchange nor the Revenue has raised any objection or initiated any proceedings for not deducting the tax at source. In these circumstances, if both the parties for nearly a decade proceeded on the footing that section 194J is not attracted, then in the assessment year in question, no fault can be found with the assessee in not deducting the tax at source under section 194J of the Act and consequently, no action could be taken under section 40(a)(ia) of the Act. It is relevant to note that from the assessment year 2006-07 the*

assessee has been deducting tax at source while crediting the transaction charges to the account of the stock exchange though not as fees for technical services but as royalty. It is further relevant to note that it is not the case of the Revenue that on account of the failure on the part of the assessee to deduct tax at source, the Revenue has suffered presumably because, the stock exchange has discharged its tax liability for the assessment year in question. In any event, in the facts of the present case, in view of the undisputed decade old practice, the assessee had bona fide reason to believe that the tax was not deductible at source under section 194J of the Act and, therefore, the Assessing Officer was not justified in invoking section 40(a)(ia) of the Act and disallowing the business expenditure by way of transaction charges incurred by the assessee.

32. Accordingly, we hold that the transaction charges paid by the assessee to the stock exchange constitute 'fees for technical services' covered under section 194J of the Act and, therefore, the assessee was liable to deduct tax at source while crediting the transaction charges to the account of the stock exchange. However, since both the Revenue and the assessee were under the bona fide belief for nearly a decade that tax was not deductible we at source on payment of transaction charges, no fault can be found with the assessee in not deducting the tax at source in the assessment year in question and consequently disallowance made by the Assessing Officer under section 40(a)(ia) of the Act in respect of the transaction charges cannot be sustained. We make it clear that we have arrived at the above conclusion in the peculiar facts of the present case, where both the Revenue and the assessee right from the insertion of section 194J in the year 1995 till 2005 proceeded on the footing that the assessee is not liable to deduct tax at source and in fact immediately after the assessment year in question, i.e. from the assessment year 2006-07 the assessee has been deducting tax at source while crediting the transaction charges to the account of the stock exchange."

7. We also find that the issue is covered by the decision of ITAT, Bangalore bench in the case of IDS Software Solutions (India) (P) Ltd. vs. ITO (International Taxation) (2009) 122 TTJ 410 (Bang), wherein the facts discussed as regards to where the assessee entered into a

> *secondment agreement with US Company and obtained the services of an employee and the question arose whether the reimbursement bys the assessee to the US Company of the salary paid by the US company was chargeable to tax as "fess for technical services". It was held that though the US Co was the employer in a legal sense but since the services of the employee had been seconded to the assessee and since the assessee was to reimburse the emoluments and it controlled the services of the employee, it was the assessee which for all practical purposes was not chargeable to tax. Though the person deputed by the US Co was a technical person, the consideration paid under the secondment agreement was not "fees for technical services" because the fact that the seconded employee was responsible and subservient to the payer (assessee) and was required to be also act as officer or authorized signatory or nominee of the assessee made it consistent with an agreement for providing technical services.*
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> *In view of the above facts and circumstances, we dismiss this issue of revenues' appeal. Respectfully following the order of coordinate bench, we dismiss the ground no. 1 raised by the revenue."*

8. We further notice that the coordinate Bench has decided this issue in favour of the assessee by following the order of the coordinate Bench passed in the assessee's own case for the A.Y. 2009-10. Since, the coordinate Bench has decided the identical issue in favour of the assessee in assessee's own case referred above, we respectfully following the decision of the coordinate Bench decide this issue in favour of the assessee and dismiss ground No. 1 of the revenue's appeal.

9. Ground No. 2 pertains to addition of Rs. 30 lacs made by AO on estimated basis on account of compensation from customers. As pointed out by the Ld. counsel for the assessee the coordinate Bench has send the matter back to the file of AO in the assessee's own case for the assessment year 2009-10. The operative part of the order reads as under:

> *"10. We find that the identical issue had come up before the Tribunal and the Tribunal has sent back the issue to the file of the AO for re-adjudication in term of the principles laid down in the order passed in ITA No. 6832/Mum/2011 for Asst. Year 2008-09 vide order dated 27.02.2013. The relevant operative para of the said order is reproduced below:*
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> > *"9. At the outset, ld. counsel for the assessee stated that this issue has already been remitted back to the file of AO in the immediate preceding year exactly on identical facts by the Tribunal in assessee's own case in ITA No. 6832/Mum/2011 for Asst. Year 2008-09 vide order dated 27.02.2013 and on similar line if the issue is remitted back to the file of the AO that will suffice the matter. On query from the bench, ld. Sr. DR has not objected to the stand of the assessee. Hence, we direct the AO to decide the issue in terms of the principles laid down in the order passed in ITA No. 6832/Mum/2011 for Asst. Year 2008-09 vide order dated 27.02.2013. This issue of revenue's appeal is allowed for statistical purposes."*
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> *11. In view of the above, we are inclined to send the issue back to the file of the AO to decide the matter afresh in terms of ratio laid down in ITA No. 6832/Mum/2011 (supra). Accordingly, the ground is allowed for statistical purposes."*

10. In view of the fact that the coordinate Bench has send the identical issue back to the file of AO for fresh adjudication in accordance with the principles of law laid down in the order passed in ITA No 6832/Mum/2011 for the assessment year 2008-09, we respectfully following the decision of the coordinate Bench rendered in the assessee's case for the assessment year 2010-11, send the issue back to the AO to decide the issue afresh in accordance with the ratio laid down in ITA No 6832/Mum/2011 referred above. Hence, this ground of the revenue is allowed for statistical purposes.

11. Third Ground pertains to addition made by the AO on account of bogus purchases made by the assessee during the assessment year under consideration. We notice that the Ld. CIT(A) has restricted the addition to 12.5% by following the principles of law laid down by the Hon'ble Gujarat High Court in the case of CIT vs. Simit P. Seth (supra). The Hon'ble Gujrat High Court in *CIT vs. Simit P. Seth (supra)* has upheld the decision of the Tribunal and sustained the addition 12.5% of the total bogus purchases holding that only profit element embedded in such purchases can be added to income of the assessee. We further notice that the AO has not rejected the sale shown by the assessee during the year relevant to the assessment year under consideration. Under these circumstances, there is no justification in making 100% addition of the bogus purchases made by the assessee. Therefore in our considered view, the Ld. CIT(A) has rightly restricted the addition keeping in view the element of profit embedded in the transaction in question. Accordingly, the finding of the Ld. CIT(A) on this issue is based on the law laid down by the Hon'ble Gujarat High Court rendered in the case referred above. Hence, we do not find any infirmity in the findings of the Ld. CIT(A) to interfere with the same. We, therefore, uphold the findings of the Ld. CIT(A) and dismiss this ground of appeal of the revenue.

In the result, appeal filed by the revenue for assessment year 2011-2012 is partly allowed for statistical purposes.

Order pronounced in the open court on 28th February, 2018.

Sd/-	*Sd/-*
(SHAMIM YAHYA)	(RAM LAL NEGI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 28/02/2018

Alindra, PS

<u>आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**