

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'SMC' BENCH, KOLKATA**

[Before Sri J. Sudhakar Reddy, Accountant Member]

**I.T.A. No. 709/Kol/2017
Assessment Year: 2009-10**

Bhim Charan Das.....Appellant
C/o New Bargabhima Transport
Basudevpur (Hazra More)
P.O. KhanjanChak
Purba-Mednipur - 721 602
[PAN : AJDPD 4999 B]

Income Tax Office, Ward-27(1), Haldia.....Respondent
Dubey House
Basudevpur
KhanjanChak
Purba Mednipur - 721 602

Appearances by:

Shri S.M. Surana, Advocate, appeared on behalf of the assessee.
Shri SailenSamaddar, Adl. CIT, Sr. DR, appearing on behalf of the Revenue

Date of concluding the hearing : May 24th, 2018

Date of pronouncing the order : June 27th, 2018

ORDER

Per J. SudhakarReddy :-

This is an appeal filed by the assessee directed against the order of the Commissioner of Income Tax (Appeals)-7, (hereinafter the 'Ld. CIT(A)'), dt. 03/02/2017, passed u/s 250 of the Income Tax Act, 1961 (hereinafter the 'Act'), relating to Assessment Year 2009-10.

2. Brief facts:-

This is the second round of appellate proceedings. The Tribunal in ITA No. 1887/Kol/2012, in the assessee's own case for the very same Assessment Year vide order dt. 27/02/2015, in the revenue appeal at para 5 held as follows:-

"4. We have heard Ld. DR and gone through facts and circumstances of the case. We find that the entire premise of the CIT(A) for deleting the disallowance is that there is no contract and individual OR (which is meant for hiring of truck) is to be taken for the purpose of deduction of TDS u/ s. 194C of the Act. Accordingly, he held that there is no contract exists. But we have gone through the provisions of section 194C of the Act, which has specifically provided in sub-section (5) the limits and the relevant sub-section (5) of section 194C of the Act reads as under:

"(5)No deduction shall be made from the amount of any sum credited or paid or likely to be credited or paid to the account of or to, the contractor, if such sum does not exceed seventy five thousand rupees.

In term of the clear provision as reproduced above, the aggregate payment is to be seen and not the individual GR in respect to the same lorry for hiring of the lorry. As the CIT(A) has not examined the issue in proper perspective and to do justice with the assessee, we feel that this issue needs re-verification at the level of CIT(A).The CIT(A) has not gone into sub-section (5) of section 194C of the Act while deleting the disallowance. Hence, we feel that let this issue be re-examined by the CIT(A) in the light of this provision. This issue of revenue's appeal is allowed for statistical purposes."

3. The Id. CIT(A) at para 7 held as follows:-

"7. I have perused the assessment order, the appellate order passed by LdCIT(A) and the Tribunal order. From the assessment order (para 3 above) it can be seen that many transporters are getting repeat orders for supply of lorry as total amount per lorry is more than Rs.50,000. Therefore it is, likely that there is some form of verbal contract between these transporters for supply of lorry. The assessee has not brought on record any evidence to prove its contention that there is no contract and each transaction of transporting is independent and not result of a contract. The assessee has not even supplied its books of accounts or bills and vouchers which could throw some light on this issue. Further s pointed out by Hon'ble Tribunal under sub section of Section 194C, the amount of payments exceeds Rs. 50,000/- in aggregate for a party during the financial year, then the assessee is required to deduct tax. The Assessing Officer has disallowed only such kind of payments exceeding Rs. 50,000/-. In view of the above discussion the disallowance made by the Assessing Officer amounting to Rs. 2693978/- is being upheld and the grounds of appeal 1·n this issue [ground no. 1] is being dismissed"

He dismissed the ground the of the assessee.

4. Facts of the case are brought out by the Assessing Officer at page 2 & 3 of his assessment order. It was stated that the Tribunal while setting aside the matter to the file of the Id. CIT(A), has observed that aggregate payment has to be seen and not the individual GR in respect to the same lorry for hiring a lorry.

The Id. Counsel for the assessee relied on the following decisions for the propositions that individual GRs have to be considered and not the aggregate payment, when there is no written contract that the assessee had entered into.

4.1. We find that in the case of *Income Tax Officer, Wd-36(3), Kolkata vs. M/s. Saha Agency in ITA No. 2453/Kol/2013, Assessment Year 2010-11, Assessment Year 2010-11, order dt. 20/05/2016*, it has been held as follows:-

"3.7. We have heard rival submissions and perused the material available on record and case laws cited above. We find in respect of payments made to Air Transport Corporation (Assam) Ltd., the Ld. CIT(A) had recorded a categorical finding that there was no oral or written contract the assessee had with lorry operators as vehicles were hired whenever the need arose. This finding has not been

controverted by the revenue before us. In this regard, the reliance placed by the Ld. AR on the decision of jurisdictional High Court in the case of M/s. Stumm India, supra, wherein it has been held as under:

"It is urged before us that the learned Tribunal ought not to have accepted the judgment and order of the CIT (Appeal) who has quashed the disallowance of deduction of Rs.41,33,710/- and on account of tax deduction at source. The learned Tribunal has recorded the fact that the department has not been able to bring any material on record to show that the assessee has made the payment to the transporters in pursuance of contract for carriage of goods of the assessee and the question of deduction at source under section 194C does not and cannot arise. In the absence of evidence of payment made by the assessee to the transporters, the assessee cannot be saddled with the liability of deducting tax at source. Before us no other point has been urged nor it is said that the aforesaid fact finding is truthful without any basis whatsoever."

4.2. The Id. Counsel for the assessee pointed out that this decision was also followed by the Kolkata Bench of the Tribunal in the case of *I.T.A. No. 962/Kol/2015; Assessment Year: 2010-11 M/s. Mini Dairy Vs. Income-tax Officer, Wd-50(2), Kol*, order dt. 06/10/2017. He relied on the judgement of the Jurisdictional High Court in the case of *CIT vs. M/s. Stumm India in ITA No. 127 of 2009, dt. 16th August, 2010*. He further submitted that the fact that there is no contract entered by the assessee and it is wrong on behalf of the revenue to direct the assessee to prove the negative. He pointed out that the Id. CIT(A) in his order, on the basis of conjectures and surmises, held that there is some form of verbal contract between transporters for supply of lorries.

4.3. The Id. D/R, on the other hand strongly controverted the arguments of the Id. A/R and submitted that at page 4 of the assessment order, the list of lorries and the payment made against each lorry is given and this demonstrates that all the payments were in excess of Rs.50,000/- in aggregate. He submitted that the assessee did not produce any details or books and under these circumstances, the Id. CIT(A) confirmed the addition by following specific directions of the Tribunal. He argued that the order of the Tribunal be upheld.

5. After hearing rival contentions, perusing the papers on record, orders of the authorities below as well as the case-law cited, I hold as follows:-

5.1. At page 2 of the assessment order, the Assessing Officer observes as follows:-

“The assessee is an individual and during the financial year 2008-09 he was engaged in subcontracting of transfer of goods from one place to another, as per direction of the contractor. He was also engaged in the business of supplying soil to brickfield, filling up factory sites and other sites and cutting of pond etc. and hiring for transportation of soil as per direction of the brick-field owners.”

From the above it is clear that the assessee is a sub-contractor and he undertakes contract works as per the directions of the of the sub-contractor. I also find that during the first round of appellate proceedings, the Id. CIT(A) had categorically held that there is no contract between the assessee and the transporter. He held that individual GR is to be taken for the purpose of deduction of TDS u/s 194C of the Act. The Tribunal remanded the matter and did not agree with the Id. CIT(A) that individual GR s have to be taken.

6. We find that the assessee had submitted details from pages 16 to 29 of the paper book giving lorry wise, date wise payments and has also furnished copy of the tax audit reports and other papers. The judgement of the Hon'ble Jurisdictional High Court in the case of *M/s. Stumm India (supra)* is in favour of the assessee. It is clear that there is no contract between the assessee and if the contracts of individual GRs are considered then there is no legal requirement of deduction of tax at source u/s 194 of the Act. Hence the disallowance u/s 40(a)(ia) of the Act, is bad in law. Accordingly, I delete the same.

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

Kolkata, the 27th day of June, 2018.

Sd/-
[J. Sudhakar Reddy]
Accountant Member

Dated: 27.06.2018
{SC SPS}

Copy of the order forwarded to:

1. BhimCharan Das
C/o New Bargabhima Transport
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P.O. Khanjanchak
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2. Income Tax Office, Ward-27(1), Haldia
Dubey House
Basudevpur
Khanjan Chak
Purba Mednipur - 721 602

3. CIT(A)-
4. CIT- ,
5. CIT(DR), Kolkata Benches, Kolkata.

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